APPEALLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.09.2007

BEFORE
THE HON'BLE PANKAJ MITHAL, J.

Second Appeal No. 20 of 1996

Indal Kumar Kushwaha and another
...Defendants/Appellants
Versus.
Rajesh Kumar Gupta and others
...Plaintiffs/Respondents

Counsel for the Appelants:
Sri. Sankata Rai
Sri. Arvind Srivastava
Sri. A.K. Singh
Sri R.P. Dubey
Sri. H.N. Singh
Sri. Manish Kumar Nigam
Sri. P.K. Srivastava
Sri. B.N. Singh

Counsel for the Respondents:
Sri T.P. Singh
Sri S.P. Shukla
Sri Siddarth Singh

Code of Civil Procedure section 100- second appeal- scope for interference- concurrent findings of fact- wrong appreciation of evidence- even mandatory provisions of section 20 overlooked by both the Courts below- finding regarding compliance of section 16(c) perverse- sufficient ground for interference with concurrent finding of facts.

Held: Para 27

The instances are innumerable where despite such need and necessity warranting such interference, second appellate court mechanically declined to interfere, the matter has been relegated by this Court to the second appellate court to objectively deal with the claims of the parties keeping in view the parameters of consideration for interference under Section 100 C.P.C. In the instant appeal the courts below have overlooked the mandatory provision of Section 20 of the Act and at the same time misapplied the statutory provisions of the Ceiling Act. The findings on the issue of compliance of the Section 16(c) of the Act are also perverse. Therefore, the second appellate court is competent to interfere especially when the appeal raises substantial questions of law.

Case law discussed:
JT 1995(5) 553
AIR 1987 SC 2328
JT 2002(5) SC 357
JT 1995(3) SC 614
2003 AWC2587
1982 AWC 709
AIR 1978 SC 537
AIR 1997 SC 1751

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

1. This second appeal has been preferred by the defendants of Original No. 210 of 1984 (Achchey Lal Gupta and others Vs. Indra Kumar Kushwaha and others) after the suit for specific performance of the agreement to sell had been decreed against them by the two Courts below.

2. The defendants Indra Kumar Kushwaha and Raja Ram Kushwaha were undisputedly the Bhoomidhars with transferable rights in possession of the following plots of land situate in Tafsil Jail Waka Mauja Banakteechak, Tappa Kasba, Pargana Haweli, Tehsil Sadar, District Gorakhpur :

Arazi No.	Rakba
15	-0-9-1/2
16	-12-1/2
17	-9-9-
18	-32-3-
19	-2-7-

20	-25-2-	
25	-6-6-	
	Total 90 Desimal	

3. In the suit instituted by plaintiffs it is said that the aforesaid two defendants were in need of money and, therefore, they executed an agreement to sell the aforesaid land on 7.7.1973 in favour of the Shiv Poojan and Achche Lal Gupta for a total sale consideration of Rs.70,000/-, out of which Rs.10,000/- was paid in advance and the balance of Rs.60,000/- was payable at the time of the execution of the sale deed. The sale deed could not be executed as there was a ban on the registration of the sale deeds in U.P. at the relevant time and, therefore, it was stipulated that the sale deed would be executed within three months of the lifting of the ban. The aforesaid Shiv Poojan Gupta died sometime in July 1976. Thereafter, his successors and Achche Lal Gupta by a registered notice dated 13/14/2/1984 called upon the defendants to execute the sale deed in pursuance of the agreement. The said notice was served upon the two defendants on 15.2.1984 and 17.2.1984 respectively. The plaintiffs-respondents after the aforesaid notice approached the defendants-appellants in the first week of March 1984 along with the balance sale consideration for the execution of the sale deed but the defendants-appellants paid no heed. The plaintiffs-respondents as well as their predecessor in the interest were always ready and willing to perform their part of the contract but the defendants-appellants failed to execute the sale deed. Therefore, the suit for specific performance.

4. The defendants-appellants contested the suit by filing a joint written statement accepting the execution of the agreement to sell dated 7.7.1973 and having received a sum of Rs.10,000/- as earnest money but rest of the plaint allegations were denied. In the additional pleas it was stated as the Government was contemplating to bring out a legislation providing for the ceiling and regulation of urban land, a ban on the registration of the sale deeds was imposed. Therefore, on account of the said ban it was agreed that the sale deed would be got executed within three months of the lifting of the ban. The ban was only up to 31.12.1975 and it ceased to operate thereafter. However, the plaintiffs-respondents or their predecessor in interest never came forward to perform their part of the contract and to get the sale deed executed as per the agreement. Accordingly, after three months of the lifting of the ban from 31.12.1975 the agreement lapsed and the defendants-appellants were set at liberty to transfer the land in favour of third party. There was no stipulation under the agreement that the defendants-appellants would have to take permission for the sale from any Government department. The suit for specific performance after expiry of more than 11 years of the agreement is not only barred by time but also inequitable and as such no decree of specific performance of the agreement is liable to be passed.

5. The parties adduced evidence. The suit was decreed vide judgment and order dated 12.12.1989 and the appeal was dismissed on 16.11.1995. Aggrieved by the decree of the specific performance so passed by the courts below, the defendants-appellants have preferred this second appeal.

6. At the admission stage, the following substantial questions of law were formulated:

1. Whether the suit was barred by time?;
2. Whether the suit was barred by Section 16 (c) of the Specific Relief Act ?;
3. Whether the courts below erred in granting the relief of specific performance ignoring the provisions of Section 20 of the Specific Relief Act ?

7. During the pendency of this appeal the defendant-appellant No. 1 Indra Kumar Kushwaha died and his heirs and legal representatives were substituted vide courts' order dated 18.6.2006.

8. I have heard Sri H.N. Singh, assisted by Sri M.K. Nigam and Sri A.K. Singh, learned counsel appearing on behalf of the appellants and Sri T.P. Singh, Senior Advocate, assisted by Sri Siddharth Singh for the respondents.

9. A perusal of the agreement to sell on record as paper No. 90-Ka makes it clear that the defendants-appellants had agreed to transfer the land on a total sale consideration of Rs.70,000/-. On account of the ban on the registration of the sale deeds a sum of Rs. 10,000/- only was paid in advance and the balance was agreed to be payable at the time of the execution/registration of the sale deed. It was specifically stipulated in the agreement that Shiv Poojan Gupta and Achchey Lal Gupta would get the sale deed executed within three months of the lifting of the ban on the registration of the sale deed otherwise the defendants-appellants would be at liberty to sell the land to any other person and the earnest money would stand forfeited. The relevant part of the agreement containing the above conditions is reproduced below:

"रजिस्ट्री खुलने के तीन माह के अन्दर श्री शिव पूजन गुप्ता व श्री अच्छे लाल गुप्ता रजिस्ट्री करा लेगें। अन्यथा हम अपनी जमीन किसी अन्य व्यक्ति के हाथ बेचने में स्वतन्त्र होगें। ऐसी हालत में रूपया बयाना वापसी के जिम्मेदारी हम मुकिरान पर नहीं होगी।"

The agreement as such stipulated to get the sale deed executed within three months of the lifting of the ban. There was no condition for taking any permission from any department before the execution of the sale deed. Under the agreement no responsibility was fixed upon the defendants-appellants to take initiative to get the sale executed, once the ban was over. The intention was otherwise. The responsibility to act was upon the plaintiffs-respondents who wanted the sale deed.

10. Learned counsel for the appellant argued that the ban on the registration of the sale deed expired on 31.12.1975. The plaintiffs-respondents or their predecessor in interest took no steps and showed no initiative to perform their part of the contract so as to get the sale deed executed after that. Accordingly, as per the terms of the agreement the time stipulated for getting the sale expired on 31.3.1976 whereupon no right survived in favour of the plaintiff-respondents to get the sale deed executed. The silence on the part of the plaintiff respondents between 1.4.1976 till the date of notice i.e. 14.2.1984 itself establishes beyond any doubt that they were never ready and willing to perform their obligation under the contract and to get the sale deed executed. The courts below thus

committed manifest error of law in decreeing the suit for specific performance and at the same time failed to exercise its discretion under Section 20 of the Specific Relief Act, 1963. He also canvassed that the suit was patently barred by time and could not have been decreed.

11. In reply to the above argument Sri T.P. Singh, Senior Advocate submitted that the matter stands concluded by findings of fact, which have been concurrently recorded by the Courts below and therefore, neither the High Court has power to interfere in the second appeal nor the appeal has any substance.

12. All the substantial questions of law formulated at the time of admission of the appeal are interlinked and are dependent upon one another. Therefore, all of them are being dealt together.

13. The provisions of Section 16 and 20 of the Specific Relief Act, 1963 (hereinafter referred to as an Act) are very relevant and material for adjudicating the above controversy. Section 16 of the Act in sub clause (c) provides that specific performance of the contract cannot be enforced in favour of the person who fails to "aver and prove" that he has performed or has 'always' been "ready and willing" to perform the essential terms of the contract which are to be performed by him according to the true construction of the agreement. At the same time Section 20 of the Act makes its discretionary upon the Court to grant or not to grant a decree for specific performance but the said discretion is exercisable on sound and reasonable judicial principles. Article 54 of the Limitation Act, 1963 which governs the filing of the suit for specific performance lays down the limitation for instituting such a suit to be three years from the date fixed for the performance or if no such date is fixed three years from the date when the performance of the agreement is refused.

14. The legal position that emerges from the above provisions is well settled. First, there has to be an averment and proof of continuous readiness and willingness on part of the plaintiff to perform his agreement. Secondly, the Court is not bound to decree every suit for specific performance even if there is an agreement and it is lawful to do so and the Court is vested with the power to exercise its discretion on equitable consideration for which conduct of the parties play an important role. Thirdly, the limitation for initiating a suit for specific performance is three years from the date fixed for the performance or where no such date is fixed from the date the performance was refused.

15. The Supreme Court in **JT 1995 (5) SC 553 N.P. Thirugnanam (D) by Lrs. Vs. Dr. R. Jagan Mohan Rao & Ors.** laid down that relief of specific performance is discretionary in nature and continuous readiness and willingness is a condition precedent to grant such a relief. In other words, continuous readiness and willingness on the part of the plaintiff must be proved from the date of the agreement till the institution of the suit. In **AIR 1987 SC 2328 Parakunnan Veetill Joseph's Son Mathew Vs. Nedumbara Kuruvila's Son and others,** the Supreme Court has held that the Court is not bound to grant the relief of specific performance merely because it considers it lawful to do so but has to meticulously consider all the facts and circumstances and has to

exercise discretion while granting or refusing the same. It is also the duty of the Court to see that the litigation should not be used as an instrument of oppression to have an unfair advantage. The same view has been expressed by the Supreme Court in **JT 2002 (5) SC 357 Veluyudhan Sathyadas Vs. Govindan Dakshyani.** It has been laid down that mere establishment of the agreement to sell is not sufficient to grant the relief for specific performance and the Court always has a discretion in this regard. In another case **JT 1995 (3) SC 614 S.V.R. Mudaliar (dead) by Lrs. & Ors. Vs. Mrs. Rajabu F. Buhari (Dead) by Lrs. & Ors.**, the Supreme Court ruled that in exercising the discretionary power under Section 20 of the Act, the conduct of the parties is relevant and of utmost important.

16. It is an admitted position that that land in dispute involved in the present case is a Bhumidhari land. It has been described by the plaintiff himself in the plaint as Bhumidhari land. It has also been recorded as Bhumidhari land which means agricultural land. There are no pleadings or material on record to show that the said land or any part thereof has been declared to be non agricultural in nature under Section 143 of the U.P.Z.A. & L.R. Act. It is settled position that an agricultural land would continue to an agricultural in nature unless officially notified to be non agricultural in nature under Section 143 of the U.P.Z.A. & L.R. Act. Therefore, even though part of it may have been put to Abadi use, it shall remain to be an agricultural land in the absence of a notification under Section 143 of the U.P.Z.A. & L.R. Act.

17. My aforesaid view finds support from a decision of this Court reported in **2000(3) AWC 2587 Anirudha Kumar and another Vs. Chief Controlling Revenue Authority, U.P., Allahabad and another** wherein the Court held that an agricultural land cannot be treated to be a residential plot until there is a declaration under Section 143 of the UPZA & LR Act.

18. Section 26 of the Urban Land (Ceiling and Regulation) Act, 1976 (hereinafter referred to as Ceiling Act) stipulates for giving notice to the competent authority before transferring any 'vacant land' within the ceiling limit whereupon the competent authority would have the first option to purchase the same on behalf of the State Government. In other words, this is the provision which has been relied upon for obtaining permission of the competent authority before making any transfer of the 'vacant land' on the enforcement of the Ceiling Act. 'Vacant land' has been defined in Section 2 (q) of the Ceiling Act, which says 'vacant land' means land, not being land mainly used for the purpose of agriculture. Therefore, land used for agricultural purpose cannot be a 'vacant land'. In **1982 AWC 709 State of U.P. Vs. Satyabir Singh and another,** the High Court has held that the land used for the purpose of agriculture as per the revenue entries cannot be said to be an urban or vacant land and, therefore, no application is required to be moved under Section 26 before transferring the same.

19. In view of the above facts and circumstances, the land in dispute being Bhoomidhari land recorded as such would remain to be an agricultural land on which the provisions of Section 26 of the Ceiling

Act would not be applicable, even though a small part of it may have been in use as an Abadi land. Accordingly, the conclusion is safe that after the expiry of the ban on registration of the sale deeds w.e.f. 31.12.1975 there remained no rider or any clog upon the plaintiffs to get sale deed executed in accordance with the agreement to sell.

20. Undisputedly the ban on registration of the sale deeds was only upto 31.12.1975. Thereafter Urban Land (Ceiling and Regulation) Act was enforced w.e.f. 17.2.1976. The said Act vide Section 26 provided for obtaining permission from the competent authority before executing any sale deed in respect of 'vacant land' within the ceiling limit. Thus, between 1.1.1976 to 16.2.1976, there has neither any ban on the execution and registration of the sale deeds nor there was any statutory requirement for taking the permission from any competent authority for executing the sale deeds. It is also evident from the oral evidence on record that the plaintiff-respondents never took initiative during the above period to get the sale deed executed.

21. The evidence on record further establishes that even on the cessation of ban and on the enforcement of the Ceiling Act w.e.f. 17.2.1976, the plaintiffs-respondents took no steps to get the sale deed executed at least till 13/14.2.1984 when for the first time a notice in writing was given calling upon the defendants-appellants to execute the sale deed. No request was ever made by them during this period for obtaining permission for sale if necessary in view of Section 26 of the Ceiling Act. Thus, they were totally oblivious of the agreement to sell in their favour and impliedly waived and gave up their rights under the agreement by their inaction and conduct.

22. Thus, the plaintiffs-respondents neither come forwarded between 1.1.1976 to 16.2.1976 nor thereafter to get the sale deed executed. It was for the first time on 13/14.2.1984 that a notice was given to the defendants-appellants to execute the sale deed. Accordingly, there was complete inaction or silence on part of the plaintiffs- respondents to perform their part of the contract so as to get the sale deed executed. Therefore, they cannot be regarded as persons who were continuously ready and willing to perform their part of the obligation. Moreover, inordinate delay in the institution of the suit i.e. after 11 years of the agreement is also sufficient in itself to disentitle them to the discretionary relief of specific performance.

23. The Supreme Court in **AIR 1978 SC 537 Mrs. Sandhya Rani Sarkar Vs. Smt. Sudha Rani Debi,** observed that in a suit for specific performance of contract for sale of immovable property it is incumbent upon the plaintiff to affirmatively establish that all throughout he/she was willing to perform his/her part of the contract and where there is in ordinate delay on part of the plaintiff to perform his/her part of the contract, the Courts would be perfectly justified in refusing the decree for specific performance. It means that even if the suit is within time, the relief of specific performance can be denied, if there is unexplained delay on part of the plaintiff in performing his part of the contract. In **1997 SC 1751 K. S. Vidyanadam and others Vs. Vairavan,** the Supreme Court held that total inaction on part of the purchaser for two and half years

amounted to delay which was sufficient enough to deny him the relief for specific performance. In this case the purchaser i.e. the plaintiff remained quiet from the date of the agreement till the date of issuing notice before instituting the suit and had not taken any steps to perform his part of the agreement. In the said situation, the Supreme Court held that even though time may not be the essence of the contract it would be inequitable to grant the relief of specific performance as delay has brought about a situation where it becomes inequitable to do so. In a similar situation, the Supreme Court in another case reported in **AIR 1997 SC 2702 Tajram Vs. Patirambhan**, refused to grant specific performance of an assessment in a suit instituted after a gap of 3 years of the agreement though the suit was brought within time on the last day of the limitation. In this case the plaintiff had remained passive for three years and did nothing for the completion of the contract.

24. The aforesaid authorities fully supports the case of the defendant-appellants. In the case at hand, the plaintiffs-respondents have remained dormant not only for two or three years but for more than 10 years. They have only advanced a merge sum of Rs.10,000/- as part of the sale consideration in the year 1973 and at least till March 1984 never cared to tender the balance amount of Rs.60,000/-. The plaintiffs- respondents can not peg the value of land in this way and hold the defendants- respondents at ransom for the whole of the life from dealing with their land. Therefore, ex facie in the era of rising demand for land and increase in prices of immovable property it is highly inequitable to grant a decree of specific performance of the agreement of the year 1973 in a suit instituted in 1984.

25. Thus, in the light of the above discussions, I find that in the present case the plaintiffs-respondents have first of all failed to prove their continuous readiness and willingness to perform their part of the contract. They admittedly never come forward to get the sale deed executed immediately after lifting of the ban on 1.1.1976 till 16.2.1976 when the Urban Land (Ceiling & Regulation) Act, 1976 was enforced. Subsequently, there was a complete silence on their part to perform as per the agreement even thereafter i.e. from 17.2.1976 to 13/14.2.1984 as admittedly notice to execute the sale deed was given for the first time in 13/14.2.1984. During this period there was no positive step on their part. The plea that they waited for the defendants to obtain permission under section 26 of the Act and for the provision of permission being deleted is also not tenable. They had waited from February 1976 till February 1984 for the defendants-appellants to take permission i.e. for 8 years. There is no reason or explanation for such a long wait. The complete inaction on part of the plaintiffs-respondents to perform their part of the agreement during the above period of about 11 years alone is more than enough for refusing the relief of specific performance.

26. In view of the above discussion, the findings of the courts below on compliance of Section 16 (c) of the Act are not only perverse and one sided but have been returned by applying incorrect principles of law. They are accordingly reversed. Both the Courts below while granting decree of specific performance

have not adhered to the provisions of Section 20 of the Act. No reasons have been assigned for granting such a decree in such a belated instituted suit.

27. The submission that concurrent finding of fact cannot be disturbed in second appeal is not tenable under the facts and circumstances of the instant case. In **JT 2001 (6) SC 591 Shri Hafazat Hussain Vs. Abdul Majeed**, the Apex Court observed that it has been repeatedly pointed out by this Court that concurrent findings recorded by the trial court as well as the first appellate court on proper appreciation of the materials on record should not be disturbed by the High Court while exercising jurisdiction in second appeal, but at the same time, it is not an absolute rule to be applied universally and invariably since the exceptions to the same also were often indicated with equal importance by this Court. The instances are innumerable where despite such need and necessity warranting such interference, second appellate court mechanically declined to interfere, the matter has been relegated by this Court to the second appellate court to objectively deal with the claims of the parties keeping in view the parameters of consideration for interference under Section 100 C.P.C. In the instant appeal the courts below have overlooked the mandatory provision of Section 20 of the Act and at the same time misapplied the statutory provisions of the Ceiling Act. The findings on the issue of compliance of the Section 16(c) of the Act are also perverse. Therefore, the second appellate court is competent to interfere especially when the appeal raises substantial questions of law.

28. Since the substantial questions of law No. 2 and 3 as formulated at the admission of the appeal are sufficient to decide the appeal, I do not consider it necessary to dwell on the first substantial question of law with regard to suit being barred by time.

29. Accordingly the appeal is allowed. The judgment and orders passed by the Courts below dated 16.11.1995 passed in Civil Appeal No. 52 of 1992 (Indal Kumar and another Vs. Achchey Lal and others) and judgment and order dated 12.12.1989 passed in Original Suit No. 210 of 1984 (Achchey Lal Gupta and others Vs. Indal Kumar Kushwaha and others) and the consequential decree of specific performance of the agreement are set aside. The suit for specific performance is dismissed. No order as to costs. Appeal Allowed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.08.2007

BEFORE
THE HON'BLE AMITAVA LALA, J.
THE HON'BLE SHISHIR KUMAR, J.

F.A.F.O. No. 47 of 2006

The New India Insurance Co. Ltd.
...Claimants
Versus
Smt. Sheela Devi and others
...Opposite Parties

Counsel for the Appellant:
Sri K.S. Amist
Sri V.C. Dixit

Counsel for the Respondents:
Sri K.B. Dixit
Sri R.K. Porwal

Motor Vehicle Act 1988-Section 147 readwith 170-claim for limited liability-no objection raised before the a claim Tribunal-can not be allowed at appellate stage.

Held: Para 4

We are of view that the submission of the claimant-respondents is appropriate. Since no application is made for the purpose of determination of any independent right of the Insurance Company being agent of the owner, now such defence cannot be taken, otherwise the entire process of determination will become futile.

Case law discussed:
J.T. 2005 (4) SC-399

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

1. The appeal was placed for disposal in the final list. Learned counsel appearing for the appellant Insurance Company contended before this Court that its liability is limited as per section 147 of the Motor Vehicles Act, 1988. He relied upon the judgement reported in JT 2005 (4) SC 399 **(National Insurance Company Limited Vs. Prambai Patel and others).** By relying upon this judgement he contended that when the liability of the Insurance Company is limited as per Section 147 of the Act having an effect of Workmen Compensation Act, it is not liable to pay the entire amount of compensation.

2. We have carefully gone through the judgement and find that the same point was agitated in the appropriate court on the basis of the insurance policy when the Court found that liability is limited on the basis of the insurance policy and order was passed in favour of the Insurance Company. In the present case, no application under Section 170 of the Act was made by the petitioner to proceed with the case independently apart from the existence of the owner.

3. The learned counsel appearing for the claimant-respondents contended before this Court that as per Section 147 of the Motor Vehicles Act, 1988, either they can proceed before the Motor Accident Claims Tribunal or the Commissioner under the Workmen Compensation Act, 1923. When they have proceeded before the Motor Accident Claims Tribunal and the award has been passed without any objection, now at this appellate stage, the appellant Insurance Company cannot turn around and say that liability of the Insurance Company is limited as per the Workmen Compensation Act.

4. We are of view that the submission of the claimant-respondents is appropriate. Since no application is made for the purpose of determination of any independent right of the Insurance Company being agent of the owner, now such defence cannot be taken, otherwise the entire process of determination will become futile.

5. Hence the appeal stands dismissed. Interim order in connection with any application connected with appeal stands vacated.

6. No order is passed as to costs.

7. Incidentally the appellant Insurance Company prayed that the statutory deposit of Rs.25,000/- made before this Court for preferring this appeal shall be remitted back to the concerned Motor Accidents Claims Tribunal as expeditiously as possible in order to

adjust with the amount of compensation to be paid to the claimant, however, such prayer is allowed. Appeal Dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.04.2007

BEFORE
THE HON'BLE RAKESH SHARMA, J.

First Appeal from order No. 158 of 1997

Km. Pusp Lata and others
...Claimants-Appellants
Versus
Nirlep Singh and others ...Respondents

Counsel for the Appellants:
Sri Anant Kumar
Sri Anand Kumar
Sri C.P. Gupta
Sri G.L. Bind

Counsel for the Respondents:
Sri N.C. Gupta
Smt. Sarita Singh
Sri K.S. Amist
Sri A.K. Saxena

Motor Vehicle Act 1988-Section-173-Enhancement of compensation-diseased a housewife aged about 35 years-critically injured by tanker in question-initially awarded Rs.2 Lacs-on recall application after re-hearing reduced to Rs.60,000/-held-ridiculous- amount of compensation enhanced to Rs.1,50,000/-.

Held: Para 11

In view of the facts and circumstances of the case I am of the view that the compensation of Rs.60.000/- is too meager. Once the same Court had come to the conclusion that Rs.2 lacs should have been adequate compensation for the loss of human life, then how subsequently the same court has reduced the compensation to Rs.60,000/- is ridiculous. No such conclusion could be drawn on the same material, which existed on the date of earlier judgment and on the date of subsequent order passed by the Court. The findings are wholly erroneous, unjust and improper.

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

1. This case was listed on the daily cause list of 9 April 2007. The list is being rotated for the last two weeks. The case has come up for hearing today. Considering the facts and circumstances of this case, this Court is of the view that the litigation, which was initiated in the year 1989, claiming enhancement of compensation under the Motor Vehicles Act, must come to a logical end today after 18 years. The appeal was filed in the year 1997 and remained, pending for disposal in this Court for the last 10 years.

2. Heard learned counsel for the appellants and perused the record.

3. Under challenge is an order passed by Motor Accident Claim Tribunal, Mizapur dated 22.11.1996 in Motor Accident Claim Petition No. 39 of 1989 Km. Puspa and others vs. Nirlep Singh and others.

4. The facts of the case emerging from the record is that deceased Shrimati Shanti Devi wife of Prabhakar Pandey, appellant no. 6, was going on foot on 17.3.1989 on Mirzapur-Pipari road when the Tanker bearing registration No. URZ 2060, which was being driven rashly and negligently, hit the woman as a result of which she was critically injured and when she was being taken to Railway hospital, Chopan, she succumbed to her injuries in

the way. A first Information Report was lodged and the family members of the deceased took required legal action.

5. A claim petition was filed seeking compensation under the Motor Vehicles Act. Earlier the Tribunal had allowed the claim petition on 1.2.1991 awarding the compensation amounting to Rs.2 lacs with interest. Since this order was exparte, a recall of the same was sought and thereafter the Tribunal re-heard the matter, four issues were framed. Finally the learned Tribunal awarded only a sum of Rs.60,000/- as compensation.

6. As per the learned counsel for the appellant, the learned Tribunal had illegally and arbitrarily held that the deceased was simply a housewife and no one was dependent on her. The husband of the deceased was in railway service hence the compensation was reduced from Rs.2 lacs to a paltry sum of Rs.60,000/- in the latter judgment. According to the appellants, the deceased Shanti Devi was aged about 35 years, a young energetic women, who was engaged in rearing cattle, helping in agricultural activities, and earning about Rs.1500/- per month by selling milk and other by-products.

7. Once the finding was recorded that the Tanker No. URZ 2060, which was duly ensured, was involved in the accident and the death had occurred immediately after the accident and the deceased was an earning member of the family making substantial contribution to the income of the family, the learned Tribunal ought not to have drawn the conclusion which it has recorded while deciding the claim petition.

8. Respondents have not come forward to pursue the case nor any counter affidavit/objections etc. have been filed. Notices were duly issued and served upon the concerned parties and the matter is pending disposal for the last 10 years.

9. I have heard the learned counsel for the appellant and also perused the record. Here is a case where a young lady aged about 35 years has died as a result of an accident which occurred at 3.10 P.M. on 17.3.1989 at Mirzapur-Pipari Road near Chopan town due to rash and negligent driving of the tanker. The appellants have brought it on record as evidence that she was rearing cattle, helping in agricultural activities, selling milk and by-products and was earning Rs.1500/- per month and thus was augmenting the family income substantially. The findings of the learned Tribunal that generally a woman is not expected to sell milk are improper and erroneous. The learned Tribunal lost sight of the fact that these days women have become much enterprising. The Amul Milk Products, which are being used by most of the people and is one of the biggest Cooperative Society of the country is being run with the help of lower and middle class rural women in India. The women of Kheda district in Gujrat and other adjoining districts of Gujrat are running this Organization of repute. It is an example of the hard work and labour of the women folk of the villages of western Gujrat, whose endeavor and hard work has laid the foundation stone of an Apex Cooperative Organization like Amul. Thus the role of the women in Indian society as homemaker and assisting the man folk in today work cannot be ignored. Keeping in view the huge contribution of women in

the welfare of the family that they have been designated as "GRIH LAXMI". It is uncontroversial fact that the deceased was rearing cattle, taking care of five minor children, managing the family, as her husband was in employment and her contribution in augmenting the income of the family ought not to have been ignored. The learned Tribunal ignored the fact that the husband of the deceased Prabhakar Pandey was employed in railway and it was but natural for the deceased to look after the agricultural and other affairs of the family also.

10. In view of the above the finding that the deceased was a housewife and her contribution in the augmentation of the family income was negligible appears to be erroneous. Deceased could have earned Rs.1500/- per month by selling milk and its by-products. It appears that the finding is based on conjectures and surmises.

11. In view of the facts and circumstances of the case I am of the view that the compensation of Rs.60.000/- is too meager. Once the same Court had come to the conclusion that Rs.2 lacs should have been adequate compensation for the loss of human life, then how subsequently the same court has reduced the compensation to Rs.60,000/- is ridiculous. No such conclusion could be drawn on the same material, which existed on the date of earlier judgment and on the date of subsequent order passed by the Court. The findings are wholly erroneous, unjust and improper.

12. Keeping a mid way, this Court is of the view that Rs.1,50,000/- should be adequate compensation in this case. Accordingly the appeal is allowed and the judgment and award of the court below is modified to the extent that the Claimants shall be entitled to Rs1,50,000/- as compensation along with Interest at the rate of 10 per cent per annum. All the necessary consequences shall follow.

Appeal Allowed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.10.2007

BEFORE
THE HON'BLE PANKAJ MITHAL, J.

First Appeal No. 207 of 1990

Collector, Varanasi
...Defendant/Appellant
Versus.
Dariyao Singh ...Claimant/Respondent

Counsel for the Appellant:
Sri Shrish Chandra (SC)

Counsel for the Respondent:
Sri R.C. Sinha

Land Acquisition Act 1894- Section-54- Enhancement of compensation-reference Court while enhancing the amount-duty bound to show the reason for taking different view-than the view taken by S.L.O.-even no error in the view taken by S.L.O. Noticed in the order-held-reference Court's order cannot sustain.

Held: Para 11

Thus, in the totality of the circumstances, I am of the considered opinion that the reference court has erred in law in enhancing the compensation awarded by the SLAO to the claimant-respondent.

Case law discussed:
2005(6) SCC 454
JT 1992(5) SC 414
JT 1997(4)SC 112
JT 1992(5) SC 402

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

1. This appeal under Section 54 of the Land Acquisition Act, 1894 (hereinafter referred to as the Act) is directed against the judgment, order and award dated 3.11.1989 and the consequential decree of the reference court passed in LAR No. 77 of 1988 (Dariyao Singh Vs. Collector, Varanasi) by which the reference court has enhanced the compensation of the acquired land awarded by the Special Land Acquisition Officer (SLAO).

2. At the behest of the Executive Engineer, Chandraprabha Khand, Varanasi the State of U.P. notified to acquire 10.42 acres of land of various villages for increasing the capacity of Narainpur Pump Canal having a length of about 20 Kms. The notification under Section 4 of the Land Acquisition Act was issued on 31.5.1986 and was followed by a declaration under Section 6 of the Act dated 19.7.1986. By the aforesaid notifications agriculture land having an area of 0.28 acres of the claimant-respondent situate in Village Dhurikot, Pargana Majhwar, Tehsil Chandauli, District Varanasi was also acquired. The Special Land Acquisition Officer vide award No. 80 of 143 dated 30.7.1987 offered market value of Rs.2,16,875.34 paise per acre along with statutory benefits. The claimant-respondent was awarded a sum of Rs.8,384.81 paise as compensation. He was not satisfied by the compensation so offered. Therefore, he preferred a reference under Section 18 of the Act claiming market value @ Rs.1,60,000/- per acre. The reference court on the basis of the judgment and order dated 18.9.1989 passed in LAR No. 352 of 1988 (Kailash Bhushan Vs. Collector, Varanasi) determined the market value @ Rs.67,200/- per acre of the acquired land.

Aggrieved by the aforesaid enhancement the Collector, Varanasi has preferred this appeal.

3. Heard Sri Shrish Chandra, learned Standing counsel for the appellant and Sri R.C. Sinha, learned counsel appearing for the claimant/respondent.

4. It is settled legal position that the amount awarded by the SLAO is like an offer and the reference is equivalent to a plaint of a suit. It is upon the claimant-respondent to show or establish that the compensation offered by the SLAO is in-adequate and at the same time to prove the appropriate market value by adducing cogent evidence. In this regard the exemplar sale deeds of the same village relating to genuine and bona fide sale transactions are considered to be the best exemplars. Admittedly, in the present case the claimant-respondent has not filed any exemplar sale deed to prove the market value of the acquired land prevailing at the time of the acquisition. The claimant-respondent though claimed market value @ of Rs.1,60,000/- as per acre but no documentary evidence in support was adduced except for the copy of the judgment and order dated 18.9.1989 passed in LAR No. 352 of 1988 wherein compensation @ 67,200/- per acre was awarded in respect of the land of village Katshila, Pargana Majhwar.

5. I have perused the original record of the reference Court. The award of the SLAO indicates that he had considered 5 sale deeds which were executed within 3 years preceding the acquisition in the

village as per the office of the sub-registrar registration. The SLAO discarded the two sale deeds as one of them was regarding the Abadi Land and the other was in respect of a grove. Thus he placed reliance upon the remaining 3 sale deeds which involved the land similarly and identically located as the acquired land in making the award. In **ONGC Ltd. Vs. Sendhabhai Vastram Patel and others (2005) 6 SCC 454,** the Apex court ruled that where the reference court intends to take a different view from the one taken by the SLAO, it is duty bound to record reasons. In reference the claimant-respondent has not adduced any evidence to show that the reasoning adopted by the SLAO in making the award is in any way wrong and is not tenable. The reference court has also not recorded any finding that the SLAO had committed an error in choosing the exemplar sale deed or that he has otherwise ignored material evidence or a better exemplar while determining the market value. Therefore, in nut shell no fault was found with the award of the SLAO and no reasons for deferring with the view expressed by the SLAO were assigned. Thus, when no fault appeared in the award of the SLAO, the reference court was not justified in enhancing the compensation awarded.

6. Now it has to examined whether there was sufficient material/evidence before the reference court to increase the compensation. It is admitted on record that no exemplar sale deed was brought on record to prove the market value. The only documentary evidence thus is the judgment and order passed in the LAR No. 352 of 1988 (Kailash Bhushan Vs. Collector, Varanasi).

7. A perusal of the aforesaid judgment and order dated 18.9.1989 passed in LAR No. 352 of 1988 indicates that it is in respect of land of village Katshila which is a different village. There is no evidence of any kind to indicate the location of village Katshila vis. a vis. village Dhurikot in which the land of the claimant-respondent is situate. There is neither any pleading or evidence oral or documentary to prove the similarity in the lands of both the villages. In **Ranjit Singh and others Vs. Union Territory of Chandigarh JT 1992 (5) SC 414** the Apex Court observed where the claimants have not adduced evidence to show that the acquired land was similar to the land for which higher market value was awarded, the prayer for demand of higher compensation is liable to be dismissed. Moreover, the land of village Katshila involved in LAR No. 352 of 1988 was acquired by a notification dated 26.4.1984 issued under Section 4 of the Act dated i.e. two years prior to the acquisition of the land of the claimant-respondent. The award in respect of the said acquisition was also made by the SLAO on 14.8.1986. Therefore, the aforesaid judgment and order dated 18.9.1989 passed in LAR No. 352 of 1988 was passed in a totally different situation and in the absence of any evidence establishing the similarly or comparably of the two lands the said judgment and order could not have been applied and made the basis for determining the market value of the land involved in the present reference/appeal. Thus, the reference court fell in patent error in enhancing the compensation on its basis.

8. Sri Sinha, learned counsel for the claimant-respondent then placed reliance upon a judgment and order of this Court

dated 25.11.2003 passed in First Appeal No. 307 of 1990 (State of U.P. Vs. Jai Govind Singh) and submitted that in the said appeal the award of Rs.67,200/- per acre as market value has been upheld by the High Court . Therefore, on parity alone this appeal is liable to be dismissed.

9. Learned Standing counsel on the other hand submitted that the above judgment and order of the High Court cannot be applied as it has only upheld the decision of the reference court which has been passed on the basis of the judgment and order impugned in the present appeal.

10. From the perusal of the judgment and order dated 25.11.2003 passed in above First Appeal No. 307 of 1990, it transpires that the said appeal had arisen from the LAR No. 78 of 1980. In the said reference also the dispute was about the determination of compensation of the land situate in village Dhurikot which was acquired by the same notifications. The High Court upheld the judgment and order of the reference court treating the judgment and order in the case of Dariyao singh i.e. the present reference to be final and conclusive. It appears that the fact of pendency of this appeal was not brought to the notice of the Court. The Dariyao Singh's case was decided on the basis of judgment and order dated 18.9.1989 passed in LAR No. 352 of 1988 and @ Rs. 67,200/- per acre was awarded. It has already been held by me above that the judgment and order passed in LAR No. 352 of 1988 had no application for awarding compensation for the land situate in village Dhurikot for the simple reason that the land involved in the said reference was of a different village and was acquired two years prior to the acquisition of the land involved herein coupled with the fact that there was no evidence to establish the comparability of the lands of the two villages. In ONGC (Supra) the Supreme court has also laid down that the judgments and awards in respect of neighbouring lands would be of no value of the comparability of the lands are not established by evidence and particularly when they have not attained finality. Similarly, in **Jai Prakash and others Vs. Union of India JT 1997 (4) SC 112** the Apex Court had ruled that merely because higher compensation was given for lands in neighbouring villages does not entitle the claimants the same compensation. Thus, to conclude the judgment and order passed by the reference Court in LAR No. 352 of 1988 was wrongly made the basis of awarding compensation in the present case. Moreover, the High Court had decided the First Appeal No. 307 of 1990 in view of the judgment and order of the reference court passed in the present reference which had not become final. Therefore, even though the First Appeal No. 307 of 1990 has been dismissed and the award of compensation @ Rs.67,200/- per acre has been upheld in one of the references, it would not effect the jurisdiction of the court to decide this appeal independently and to determine the true and fair market value of the acquired land for the purposes of payment of compensation. In **Bhag Singh and others Vs. Union Territory of Chandigarh JT 1992 (5) SC 402** the supreme Court has laid down that the award of compensation at a particular rate in one stray case would not mean that the court is not competent to determine the market value and is bound to award the same compensation as in other case even when there is no evidence on record to establish the comparability of the lands.

11. Thus, in the totality of the circumstances, I am of the considered opinion that the reference court has erred in law in enhancing the compensation awarded by the SLAO to the claimant-respondent.

12. Accordingly, the appeal succeeds and is allowed. The judgment and order of the reference court dated 3.11.1989 passed in LAR 77 of 1988 (Dariyao Singh Vs. Collector, Varanasi) is set aside. No orders as to costs.

Appeal Allowed.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 31.5.2007

BEFORE
THE HON'BLE VINOD PRASAD, J

Criminal Revision No. [210] Of 2007

Munish Chandra Srivastava ...Revisionist
Versus
State of U.P. and others ...Respondents

Counsel for the Revisionist:
Sri Gopal Srivastava

Counsel for the Respondents:
A.G.A.

Code of Criminal Procedure–Section–397-Criminal Revision–Maintainability–order passed by Magistrate under section 156 (3)–directing the police to register the case- an administrative order–though passed judicially–in nature of reminder to police to perform its duty–held- revision not maintainable.

Held-para 7

Since I am of the view that the revision by the accused persons against whom the FIR has not yet been registered was not maintainable at all therefore, the impugned order passed by the Sessions Judge, Basti is de hors the law. Sessions Judge, Basti wrongly usurped the power of the revisional court and entertained the revision before the FIR was registered against the accused persons. How an accused can install the order for registration of FIR is not understandable? Under Section 156(3) Cr.P.C., the accused persons have got no right to be heard. It is an administrative power of the Magistrate, though passed judicially, directing the police to register the FIR and the said order is in the nature primary reminder to the police to perform its legal duty as has been held by the Apex Court in State of Haryana Vs. Bhajan Lal 1992 SCC (Criminal) 426 and Deverappalli Lakshaminarayana Reddy & Others versus V. Narayana Reddy 1976 SCC (3) 252. Lower revisional court can not set aside the primary reminder by exercising the power under Section 397 Cr.P.C.

Case law discussed:
2007(1) ALJ.169.
1992 SCC(Crl.) 426
1993 SCC- (Crl.) 1171

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

1. The application under Section 156(3) Cr.P.C. was filed by the revisionist Munish Chandra Srivastava in the Court of J.M.- I, Basti on 5.12.2006 with the allegations that he is a practicing advocate in District Basti and he is owner of plot No. 378 on which he and his brother are in opposition. The accused persons Sarjan Lal Srivastava along with other accused person Surendra Mohan Mishra came on the said plot on 21.11.2006 at 4 p.m. along with five or six unknown persons who were armed with firearms and forcibly put four electric pole on the said plot. When the applicant objected to the said installation of electric poles on his plot he was threatened in the witnessing of many other co-villagers. The applicant

made a report to the police but no action was taken by it against the accused persons.

2. With such allegations, the applicant filed an application under Section 156(3) Cr.P.C., which was allowed by J.M.-I, Basti vide his order dated 14.12.2006. Against the said order, the accused persons filed the revision before the Sessions Judge, Basti which was allowed by the Sessions Judge, Basti by passing his impugned order dated 14.5.2007. Session's Judge Basti set aside the order for registration of FIR passed by the Magistrate concerned.

3. I have heard learned counsel for the revisionist and the learned AGA.

4. Learned counsel for the revisionist argued that the Sessions Judge, Basti illegally entertained the revision at the behest of those person against whom the FIR was not yet been registered and therefore, the revision before the lower revisional court was not maintainable and the impugned order dated 14.5.2007 is wholly illegal.

5. Learned AGA also could not support the fact that how the revision was maintainable before the learned Sessions Judge, Basti at the behest of those persons who were alleged to be an accused against whom the FIR was not yet registered. The matter has been exhaustively dealt with by this Bench in the case of **Rakesh Puri and another Vs. State of U.P. and another 2007 (1) ALJ 169.**

6. It has been held in the said case that order under section 156(3) Cr.P .C. is in the nature of an administrative direction directing the police to exercise their plenary power of investigation of cognizable offence under Chapter XII Cr.P.C. relating to the power of police to investigate the cognizable offence. It has also been held that order under section 156 (3) Cr.P.C. is a pre - cognizance order therefore revisional power under section 397/401 Cr.P.C. is not available to an accused person to thwart the registration of FIR of cognizable offences.

7. Since I am of the view that the revision by the accused persons against whom the FIR has not yet been registered was not maintainable at all therefore, the impugned order passed by the Sessions Judge, Basti is de hors the law. Sessions Judge, Basti wrongly usurped the power of the revisional court and entertained the revision before the FIR was registered against the accused persons. How an accused can install the order for registration of FIR is not understandable? Under Section 156(3) Cr.P.C., the accused persons have got no right to be heard. It is an administrative power of the Magistrate, though passed judicially, directing the police to register the FIR and the said order is in the nature primary reminder to the police to perform its legal duty as has been held by the Apex Court in **State of Haryana Vs. Bhajan Lal 1992 SCC (Criminal) 426 and Deverappalli Lakshaminarayana Reddy & Others versus V. Narayana Reddy 1976 SCC (3) 252**. Lower revisional court can not set aside the primary reminder by exercising the power under Section 397 Cr.P.C.

8. I have not issued notices to the accused persons as in my view that would have perpetuated an illegality of hearing the accused even before FIR is registered against them against the law laid down by

the Apex Court in **Union Of India versus W.N. Chadha: 1993 SCC (Cr.) 117l.**

9. The impugned order dated 14.5.2007 passed by Session's Judge, Basti in Criminal Revision No. 1229 of 2006 is hereby set aside and the order dated 14.12.2006 passed by J.M.-I, Basti in Case No. 556/12/06 on the application under section 156 (3) filed by the revisionist is hereby restored. Police is directed to register the FIR. However, this order will not prejudice the rights of the accused persons which they have got under the law against the said registration of FIR.

10. In view of the aforesaid discussion, this revision is allowed at the admission stage itself.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.03.2007

BEFORE
THE HON'BLE H.L. GOKHALE, C.J.
THE HON'BLE ASHOK BHUSHAN, J.

Special Appeal No. 292 of 2007

Km. Rita Yadav ...Appellant
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Anil Kumar Dubey

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

Constitution of India-Art. 226- Interpretation of statutes-circular issued on 4.12.06 governing mode of giving weightage to disable persons-no where mention about retrospective applicable-held-prospective applicable-selection made earlier can not be questioned.

Held: Para 10

But if it is capable of two interpretations, it ought to be considered as prospective. In the present case, we have gone through this circular issued on 24th April, 2006. It undoubtedly states to begin with that the Government order dated 10th October, 2005 has led to some confusion with respect to the addition of the weightage that was provided there under. However, the Government clarificatory order does not say anything to provide that it will govern the selection made earlier or made from any particular date in the past. There is no indication in this subsequent circular that it is to act retrospectively. Inasmuch as there is no specific indication therein, as stated by the Apex Court, assuming that two interpretations are possible, the circular will have to be operated as prospectively.

Case law discussed:
2005 (2) ESC (SC) 247

(Delivered by Hon'ble H.L. Gokhale, C.J.)

1. Heard Mr. Anil Kumar Dubey for the appellant, learned Standing Counsel for the State and Sri V.P. Mishra appears for respondent No.6.

2. The appeal raises question with respect to the interpretation of the clarification issued by the State Government on 24th April, 2006 to clarify the earlier Government circular dated 10th October, 2005. The matter requires consideration.

3. The appeal is admitted.

4. Considering the facts and urgency of the case, the appeal is heard forthwith. The short facts leading to this appeal are as follows:-

5. The appellant was selected to the post of a Shiksha Mitra. She has secured 64.46 marks as per the method provided for selection under the Government orders. The respondent No.6, who was second in the list, had obtained 64.40 marks and that is why the appellant came to be selected.

6. Now it so transpires that respondent No.6 represented to the authorities concerned on the basis of the Government clarification dated 24th April, 2006. His case is that he is a handicapped person and under the particular clarification, if it is, applied he would be getting 68.55 marks. Therefore, he should have been selected.

7. The authorities of the Government accepted this submission of the respondent No.6 and that is why the appointment of the petitioner came to be cancelled. Aggrieved by this decision, she filed a writ petition and the same has been dismissed by a learned Single Judge by the impugned order dated 31st January, 2007. Being aggrieved by that judgment and order, this appeal has been filed.

8. The learned counsel for the appellant points out that under the earlier Government circular dated 10th October, 2005, as far as the disabled persons, widows or divorced women are concerned, 10% marks were to be added to the marks that they have secured. At the time when the petitioner was selected this circular dated 10th October, 2005 was in force. The circular dated 24th April, 2006 has come to be issued subsequently whereunder a certain method has been provided for calculating this 10% marks. As per this clarification average of the marks of 10th standard and 12th standard are first to be calculated and then 10 marks is to be added. As per this calculation, respondent No.6 will be getting 68.55% marks. The submission of the appellant is that this circular, which is issued subsequent to the selection of the appellant cannot be applied retrospectively and that being the position, the observation of the learned Single Judge that the clarificatory orders always relate back is not correct.

9. The counsel for respondent No.6 submitted that circular was clarifying the position under the earlier circular. This being so, the learned Single Judge was right in taking the view that it will apply retrospectively.

10. In this connection, we must note that there is a recent judgment of the Apex Court in the case of ***Secretary, A.P. Public Service Commission vs. B. Swapna and others*** reported in 2005(2) E.S.C. (SC) 247 wherein the Apex Court has laid down that statutory rule is normally prospective unless it is expressly, or by necessary implication, made to have retrospective effect. There must be words in the Statute showing intention to affect existing right. If the rule is clear in its language then there is no difficulty. But if it is capable of two interpretations, it ought to be considered as prospective. In the present case, we have gone through this circular issued on 24th April, 2006. It undoubtedly states to begin with that the Government order dated 10th October, 2005 has led to some confusion with respect to the addition of

the weightage that was provided thereunder. However, the Government clarificatory order does not say anything to provide that it will govern the selection made earlier or made from any particular date in the past. There is no indication in this subsequent circular that it is to act retrospectively. Inasmuch as there is no specific indication therein, as stated by the Apex Court, assuming that two interpretations are possible, the circular will have to be operated as prospectively.

11. In the circumstances, the view taken by the learned Single Judge, namely, that the circular will apply retrospectively is not correct.

12. We have, therefore, no option but to allow this appeal and set-aside the order passed by learned Single Judge. The appellant has undoubtedly received marks higher than the respondent No.6 even after considering the weightage that was given to him under the earlier circular. That being so, the petition filed by the appellant will have to be allowed. Consequently the order passed by the District Magistrate on 4th December, 2006 canceling her selection will have to be set-aside. We allow this appeal and we allow the writ petition as well. The appellant will be permitted to join back at the place where she was expected to join.

13. The appeal is allowed. No order as to costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.08.2007

BEFORE
THE HON'BLE PRAKASH KRISHNA, J.

First Appeal From Order No. 336 of 1988
Connected with
First Appeal From Order No. 337 of 1988
AND
First Appeal From Order No. 428 of 1988

Oriental Fire & General Insurance Company ...Defendant-Appellant
Versus
Smt. Savitri Devi and others ...Opposite Parties

Counsel for the Appellant:
Sri Kuldeep Shaanker Amist

Counsel for the Opposite Parties:
Sri Rakesh Pathak
Sri Dinesh Pathak
Sri S.D. Pathak
Sri S.K. Sharma
Sri Sameer Sharma
Sri Vinay Singh

Motor Vehicle Act 1939-Section 95 (1) (b)-Liability of Insurance Company-owner of vehicle allowed the vehicle in question to play by the U.P.S.R.T.C.-accident took place-whether the insurance is liable to pay whole amount of compensation or with limited liability-held-Insurance Company responsible to pay whole amount of compensation-the insurer can not be absolved from liability to pay compensation.

Held: Para 13

Having considered the respective submissions of the learned counsel for the parties as also the decisions relied upon by them, I am of the opinion that on the facts of the present case, the insurer cannot be absolved from its

liability to pay the compensation amount to the claimants on the ground that ill-fated Bus at the relevant point of time was under the control of U.P. State Road Transport Corporation. The bus in question was being plied, under a contract by the U.P. State Road Transport Corporation and a presumption would necessarily arise that it was being plied with the permission of its registered owner and for his benefit. Neither the scheme of the Motor Vehicles Act nor the terms and conditions of the insurance policy do lend support to the appellants' contention. It is not a case of breach of any condition of the insurance policy.

Case law discussed:

1997 ACJ-1148
1999 (3) SCC-754
AIR 1996 A.P. 62 (F.B.)
2003 (3) SCC-97
2006 (4) SCC-404
1978 ACJ 169
2007 ACJ-37

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

1. All the three appeals were heard together and are being disposed of by a common judgement as common questions of law and facts are involved. These appeals are under section 110-D of Motor Vehicles Act 1939.

2. On 15th of March, 1984 in a collision in between Bus No. USI 9813 and Bus No. DLP 1231, one Ajay Sharma and his sister Smt. Madhu Shukla lost their lives and husband of Madhu Shukla i.e. brother in law of Ajay Sharma received injuries. Parents of Ajay Sharma filed claim petition No.23 of 1984 giving rise to the First Appeal From Order No.336 of 1998. These persons were travelling in Bus No. USI 9813. The claim petition was filed by the paretns of Ajay Sharma on the pleas inter alia that the driver of the Bus No. USI 9813 in which Ajay Sharma was travelling from Moradabad to Rampur side was driving it rashly and negligently. When the Bus reached near village Kunda about 6 Kilometres away from Rampur towards Moradabad, the Bus No. DLP 1231 came from Rampur side and there took place headed on collusion between the aforesaid two Buses. The driver of Bus No. USI 9813 lost control over the speed and it fell into a ditch (Khad). Ajay Sharma and his sister Madhu received fatal injuries. The Bus No. USI 9813 was insured with the appellant, Oriental Fire and General Insurance Company, was being plied under the control of U.P. State Road Transport Corporation. The Claims Tribunal decreed the claim petition No.23 of 1984 for recovery of Rs.34,000/- against the defendant No.3 therein namely Oriental Fire and General Insurance Company. The Oriental Fire and general Insurance Company has approached this Court by way of above First Appeal From Order No. 336 of 1988. On similar allegations the Claim Petition No. 12 of 1984 was filed by Shri Shreekant Shukla, husband of Smt. Madhu Shukla claiming compensation of the death of his wife, before the Claims Tribunal and he has been awarded a sum of Rs.28,600/- against the Insurance Company, the appellant herein by the award dated 30th of January, 1988. Shri Shreekant Shukla who was also a co-passenger had received injuries, filed the Claim Petition No. 11 of 1984 for compensation of injuries received by in the aforestated accident before the Claims Tribunal and it has awarded a sum of Rs.24,000/- by the award dated 3rd of January, 1988 against which the First Appeal From Order No. 428 of 1988 has been filed.

3. It was jointly agreed by the learned counsel for the parties that in all these three appeals, a common question whether award can be passed on the facts of the present case against the Insurance Company, is involved. These appeals were heard together and are being disposed off by a common judgement. Issue No.5 was framed in Claim Petition No.23 of 1984 to the following effect:-

"Who is liable to pay compensation", is the point involved in these appeals.

4. It is not in dispute that the ill fated Bus No. USI 9813 was insured with the present appellant at the relevant point of time when the accident took place. It is also not in dispute that the said Bus was being plied under the control of U.P. State Road Transport Corporation. Shri K.S. Amist, the learned counsel for the appellant in all these appeals submits that in view of the fact as the Bus in question was under the control of U.P. State Road Transport Corporation, the registered owner ceases to be owner of the vehicle and as such the insurer is not liable to indemnify the insured person. Shri Sameer Sharma, the learned counsel for U.P. State Road Transport Corporation, on the other hand, submits that in view of Section 95 and various other provisions of Motor Vehicles Act, 1939, the insurer is liable to pay the compensation amount to the claimant. It has come on the record that the Bus in question was being driven by the driver of the insured person. But the tickets to the passengers were issued by the U.P. State Road Transport Corporation. It has also been admitted that in the fare, passenger's tax and insurance charges were included therein. The Tribunal under Issue No.4 reached to the conclusion that in view of Section 95 (1) (b) of the Motor Vehicles Act, the insurer is liable to indemnify the insured person. The Bus being driven by the driver of the insured person, the master (owner) is vicariously liable for the act of his servant.

5. Strong reliance was placed by the learned counsel for the appellant on a decision of the Apex Court in ***Rajasthan State Road Transport Corporation Vs. Kailash Nath Kothari and others .1997 ACJ 1148***. This decision is the anchor-sheet of the appellant. In the case cited above, the ill-fated Bus was under the control of Rajasthan State Road Transport Corporation and was being driven by its driver on the ill- fated day. The said Bus met with an accident and a question arose as to who will bear the liability to compensate the claimants and victims. The Insurance Company was held liable to pay the compensation amount to the extent of its limited statutory liability, a total amount of Rs.75,000/- only. The Rajasthan State Road Transport Corporation was also held liable for the remaining balance amount, a compensation over and above the statutory liability of the insurer. The contention of the Rajasthan State Road Transport Corporation that since it was only hirer and not owner of the Bus, it could not be fastened with any liability of payment of compensation, was examined and rejected by the Apex Court. Therefore, the learned counsel for the appellant submits that it is for the State Road Transport Corporation to bear the burden of compensation in its entirety. However, it is difficult to agree with his submission.

6. At a first flash, the argument is attractive but on a deeper probing it has

got no merit. In the decision cited above the controversy involved therein was totally different. Issue was with regard to the liability of Rajasthan State Road Transport Corporation with regard to the payment of compensation over and above the liability of the insurer. A close reading of the aforesaid citation shows that in no uncertain terms the insurer therein accepted its liability up to the statutory limit. The Rajasthan State Road Transport Corporation was disowning its liability to pay compensation over and above the statutory liability of the insurer. The ratio laid down in the said decision should be read keeping in mind these essential facts. It was not a case of total denial of liability by the insurer. In the case on hand, the insurer is completely disowning its liability which is otherwise on it under the insurance policy to pay the compensation amount to the claimants.

7. At this juncture Shri Sameer Sharma, the learned counsel for the U.P. State Road Transport Corporation has rightly placed reliance on sections 94,95, 97 and 103 - A and Motor Vehicles Act, 1939 as also on ***G. Govindan Vs. New India Assurance Co. Limited (1999) 3 SCC 754***. In this case the controversy was whether the insurance policy lapses and consequently the liability of insurer ceases when the insured vehicle was transferred and no application/intimation as prescribed under section 103-A of the Act was given. The Apex Court after noticing the conflicting views of different High Courts has affirmed the judgement of Andhra Pradesh High Court in ***Madineni Kondaiah Vs. Yaseen Fatima AIR 1996 Andhra Pradesh 62 (F.B.).***

It was held that section 95 requires insurance of vehicle. When the vehicle is covered by insurance not only the owner but any person can use the vehicle with his permission. It has been held that ".....S. 94 does not require that every person that uses the vehicle shall insure in respect of their separate use. The decided cases now held that on transfer the policy will lapse and a third party cannot enforce the policy against the insurance company. We must make it clear that there are two third parties when such transfer took place. One is a transferee who is a third party to the contract and the other for whose risk the vehicle is insured. We have no hesitation to hold that the transferee who is a third party to the contract cannot secure any personal benefit under the policy unless there is a novation i.e. the insurance company, the transferor of the vehicle, and the transferee must agree that the policy must be assigned to the transferee so that the benefit derivable, or derived under the policy by the original owner of the vehicle, the policy holder can be secured by the transferee. Thus, it is clear under a composite policy, covering the risk of property, person, third party risks, the transferee cannot enforce the policy without the assignment in his favour so far the policy covers the risk of the person and property. He has no remedy against the Insurance Company.

.....

.....

It is incorrect to assume that the moment the title of the vehicle passes to the transfree the statutory obligation under S. 94 ceases and the original owner is no longer guilty of causing or allowing the purchaser to use the vehicle. The question is when does the statutory liability cease? The mere passing of title in the vehicle to the transferee will not but an end to this liability."

It has been further held that *".....It is clearly an impracticable view to take that on passing of property in the vehicle, the policy lapses and the obligation under S. 94 of the Act ceases. In fact as observed by Supreme Court the policy is to the vehicle and hence normally it should run with the vehicle. It is just to expect a reasonable time for the transferor to make the necessary arrangement to notify the transfer under S. 31 and secure the certificate under S. 29-A within the time mentioned in those provisions. If this is not allowed, the moment the vendor the money and puts the vehicle in possession of the transferee, the latter is not in a position to use the vehicle in view of S. 94 till a fresh policy is obtained. He cannot take the vehicle to his house passing through any public place. When the transferor is liable to pay penalty under S. 31 and also liable to be prosecuted under S. 112 for not notifying the transfer. We are clearly of the opinion such statutory liability makes him to retain the insurable interest as the liability subsists till he discharges the statutory obligations. We disagree with the view expressed in* ***N. Kanakalakshimi v. R.V. Subba Rao (1972) 1 APLJ 249****."*

8. The aforesaid decision has been followed in ***Rikhi Ram and another Vs. Sukhirania (Smt) and others (2003) 3 SCC 97*** and has held that compulsory insurance is for the benefit of third party. Section 95 (5) shows that it was intended to cover local objectives. The relevant portion from the said judgement is reproduced below:-

"5. The aforesaid provision shows that it was intended to cover two legal objectives. Firstly, that no one who was not a party to a contract would bring an action on a contract; and secondly, that a person who has no interest in the subject-matter of an insurance can claim the benefit of an insurance. Thus, once the vehicle is insured, the owner as well ***as any other person can use the vehicle with the consent of the owner.*** *Section 94 does not provide that any person who will use the vehicle shall insure the vehicle in respect of his separate use. (Emphasis supplied)*

6. On an analysis of Ss. 94 and 95, we further find that there are two third parties when a vehicle is transferred by the owner to a purchaser. The purchaser is one of the third parties to the contract and other third party is for whose benefit the vehicle was insured. So far, the transferee who is the third party in the contract, cannot get any personal benefit under the policy unless there is a compliance of the provisions of the Act. However, so far as third party injured or victim is concerned, he can enforce liability undertaken by the insurer."

9. Very recently the same view has been reaffirmed by the Apex Court in ***United India Insurance Company Limited Vs. Tilak Singh and others (2006) 4 SCC 404***. The relevant passage is reproduced below:-

"13. Thus, in our view, the situation in law which arises from the failure of the transferor to notify the insurer of the fact of transfer of ownership of the insured vehicle is no different, whether under Section 103-A of the 1939 Act or under Section 157 of the 1988 Act in so far as the liability towards a third party is concerned. Thus, whether the old Act applies to the facts before us, or the new Act applies, as far as the deceased third

party was concerned, the result would not be different. Hence, the contention of the appellant on the second issue must fail, either way, making a decision on the first contention unnecessary, for deciding the second issue. However, it may be necessary to decide which Act applies for deciding the third contention. In our view, it is not the transfer of the vehicle but the accident which furnishes the cause of action for the application before the tribunal. Undoubtedly, the accident took place after the 1988 Act had come into force. Hence it is the 1988 Act which would govern the situation."

10. No doubt in these decisions question of transfer of insured vehicle to a purchaser by registered owner vis -a -vis the liability of insurer to the purchaser was involved. But I see no reason not to apply the above principle of law in the case of an insured vehicle where the registered owner permits another person to use it. It will make no difference as to whether the insured vehicle has been sold or is permitted to be used by a third person.

11. Use of vehicle by a third person other than the registered owner with the permission of the registered owner will not absolve the liability of the insurer as the insurance is of the vehicle and not of the owner. A vehicle which is insured continues to be insured so long it is being driven by an authorized person competent to drive the vehicle with the permission of the registered owner. The word "owner" is defined under section 2(19) of the Motor Vehicles Act of 1939 and it is corresponding to section 2(3) of the Motor Vehicles Act, 1988. It has been held above by the Apex Court that there is no substantial difference in the definition of word "owner" as contained in the Old Act and the New Act.

12. ***Deoki Devi Tiwari and others Vs. Raghunath Sahai Chatrath and others 1978 ACJ 169 (DB)***, a decision of this Court was heavily relied upon by the appellant. In this case the owner of the Jeep gave the vehicle to U.P. Congress Committee for election purposes. The said Jeep collided with a Petrol Tanker resulting in death of a passenger on the Jeep. In the said case it was found that the owner had given the Jeep but the said Jeep was not under the control of the owner and the driver was not agent of the owner. In this fact situation it was held that the Jeep was not being driven for the purposes of the owner and was not under the control of the owner, consequently the insurer of the Jeep was not liable to pay compensation amount. On facts, the said decision is distinguishable as the Jeep in question was not being driven for the purposes of the owner and the driver was not agent of the owner. In that fact situation this Court absolved the insurer from its liability. Apart from the fact that the said judgement was rendered in a different factual setting, there is hardly any discussion on the relevant sections of the Motor Vehicles Act. Only a brief reference in one sentence in para 24 of the report has been made that a reading of sections 94 to 96 also leads to the same conclusion. There is no threadbare analysis of the scheme of the Motor Vehicles Act or of Sections 94 to 96. The ratio laid down therein should be read and understood in the light of subsequent judgements of the Apex Court referred to herein above.

13. Having considered the respective submissions of the learned counsel for the

parties as also the decisions relied upon by them, I am of the opinion that on the facts of the present case, the insurer cannot be absolved from its liability to pay the compensation amount to the claimants on the ground that ill-fated Bus at the relevant point of time was under the control of U.P. State Road Transport Corporation. The bus in question was being plied, under a contract by the U.P. State Road Transport Corporation and a presumption would necessarily arise that it was being plied with the permission of its registered owner and for his benefit. Neither the scheme of the Motor Vehicles Act nor the terms and conditions of the insurance policy do lend support to the appellants' contention. It is not a case of breach of any condition of the insurance policy.

14. Viewed as above, I find no merit in the argument of the appellants and it is held that the Tribunal has rightly fixed the liability to pay the compensation on the insurer - appellants. There is no infirmity in the award under the appeal, on this score.

15. So far as the question of limited liability of the insurer is concerned, suffice it to say that the said plea is no longer open as the insurance policy is not on the record of the case.

The Apex Court in the case of **National Insurance Vs. Jugal Kishore (supra)** has held that,

"In all cases where the Insurance Company concerned wishes to take a defence in a claim petition that its liability is not in excess of statutory liability, it should file a copy of the Insurance Policy along with its defence."

Further it has been observed that filing of the policy, therefore, not only cuts short avoidable litigation but also helps the court in doing justice between the parties. Obligation on the part of the State or its instrumentalities to act fairly can never be over emphasized.

16. Very recently, the Apex Court in ***Tejinder Singh Gujral Vs. Inderjit Singh and another 2007 ACJ 37*** has approved the decision of High Court where a presumption was drawn in absence of insurance policy that liability of insurer was unlimited. The relevant paragraph is reproduced below:-

"13. The learned Tribunal, however, committed an error in opining that the insurance policy was not required to be proved. Learned Single Judge of the High Court, in our opinion, rightly held that the insurance policy having not brought on record, a presumption would arise that the liability of the insurer was unlimited. The learned single Judge adopted a rather liberal approach. He took into consideration the entire evidence on record including the extent of disability allegedly suffered by appellant."

17. Thus, it follows that in absence of insurance policy the plea of limited liability cannot be pressed into service by the appellant.

18. Lastly, a feeble attempt was made that the accident was the result of contributory negligence of both the vehicles, the compensation amount should be appropriated between the appellant and the U.P. State Road Transport Corporation. Indisputably, no permission was granted by the tribunal or by Court as required under section 110 C (2-A) of the

Motor Vehicles Act, 1939 to take such defences as were available to insured person. The said plea, therefore, also fails.

19. In the result, there is no merit in the appeal. All the appeals are hereby dismissed with no order as to costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 31.08.2007

BEFORE
THE HON'BLE PANKAJ MITHAL, J.

First Appeal From Order No. 426 of 2001

Employees State Insurance Corporation ...Appellant

Versus

Kamal Ahamad ...Respondent

Counsel for the Appellant:
Sri Saral Srivastava

Counsel for the Respondent:
Sri I.M. Tripathi

Employees State Insurance (Central) Rules 1950-Section 20-B-Limitation for Appeal-three months-runs from the date of communication and not from the date of order by medical Board-this question nor raised before Employees Insurance Court-can not be allowed in Appeal.

Held: Para 5

The limitation for filing the appeal before the Employees Insurance Court runs from the date of communication of the decision of the Medical Board and not from the actual date of the order of the Medical Board. Therefore, the submission that the appeal before the Employees Insurance Court was beyond the limitation is without substance. Moreover, it appears that no such issue of limitation was raised by the appellant before the Employees Insurance Court. The Employees Insurance Court has considered the appeal on merits. Once the appeal was considered and decided on merits without going into the question of limitation, the presumption is that no such point was raised by the appellant and had been abandoned and given up by the appellant.

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

1. Heard Shri Saral Srivastava, learned counsel for the appellant and Shri I.M. Tripathi, learned counsel for the respondent and perused the record.

2. Employees State Insurance Corporation has challenged the order dated 27.1.2001 passed by the Employees Insurance Court, Kanpur Nagar in appeal no. 244 of 1993 (Kamal Ahamad Vs. Employees State Insurance Corporation) whereby the Employee Insurance Court has determined the permanent partial disability of the respondent to the extent of 10%.

3. The respondent was an employee of the Elgin Mill and was insured with the Employees State Insurance Corporation. He suffered injury in his left eye while on duty on 6.1.1990. The Medical Board rejected the claim of the respondent on 25.7.1991 whereupon the respondent preferred an appeal before the Employees Insurance Court, which has been partly allowed by the impugned order.

4. The first submission of the learned counsel for the appellant is that the appeal of the respondent before the Employees Insurance Court was barred by time. The order of the Medical Board was passed on 25.7.1991 whereas the appeal was preferred on 25.5.1993. The limitation for filing the appeal is only

three months under Rule 20 B of the Employees State Insurance (Central) Rules, 1950.

5. I have considered the above submission and have perused the above rules. Rule 20 B of the Rules provides for filing the appeal to the Employees Insurance Court within three months from the date of communication of the decision of the Medical Board. Therefore, for the purposes of calculating the limitation for filing the appeal the date of communication of the decision of the Medical Board is most relevant and important. The appellant has not given the said date of the communication of the decision of the Medical Board. There is nothing on record to established as to when the decision of the Medical Board dated 25.7.1991 was communicated to the respondent. The limitation for filing the appeal before the Employees Insurance Court runs from the date of communication of the decision of the Medical Board and not from the actual date of the order of the Medical Board. Therefore, the submission that the appeal before the Employees Insurance Court was beyond the limitation is without substance. Moreover, it appears that no such issue of limitation was raised by the appellant before the Employees Insurance Court. The Employees Insurance Court has considered the appeal on merits. Once the appeal was considered and decided on merits without going into the question of limitation, the presumption is that no such point was raised by the appellant and had been abandoned and given up by the appellant.

6. The next submission of learned counsel for the appellant is that the loss in vision suffered by the respondent in one of the eyes is not on account of the injuries sustained by him during the course of employment but is due to age factor. Undisputedly, the respondent has suffered injury in his left eye while on duty. It is also not in dispute that he is unable to see from the said eye beyond a distance of one metre and as such his vision has been permanently reduced. The loss of vision of one eye has been listed as in injury deemed to result in permanent partial disablement under the 2nd Schedule of the Act. The respondent was treated at the Employees State Insurance Hospital in Pandu Nagar, Kanpur and was referred by it for further treatment in Lala Lajpat Rai Hospital, Kanpur. One of the reports of the eyes specialists of Lala Lajpat Rai Hospital, Kanpur certifies that the vision of the respondent in the right eye is only to the extent of 6/18 and in the injured left eye to the extent of 6/60. Another specialists of the same hospital has similarly certified the reduction of vision of the respondent and has further certified that the reduction of the vision of the injured left eye is due to the injuries only. On the basis of the aforesaid material on record the Employees Insurance Court has determined the permanent partial disability of the respondent extent 10%. I do not find any error in recording the above finding. Therefore, the submission that the loss of vision is due to age is also not tenable.

7. No other point has been raised before me and no substantial question of law is involved.

8. Therefore, the appeal lacks merits and is dismissed. Parties to bear their own costs.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.04.2007

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

Criminal Appeal No. 476 of 1979

Bhajan Lal & others ...Appellants(In Jail)
Versus
State of U.P. ...Respondents

Counsel for the Appellants:
Sri P.N. Misra

Counsel for the Respondents:
A.G.A.

Code of Criminal Procedure-Section 386-Criminal Proceedings–Practice & Procedure–Re-trial or reconstruction of Record–In case Original record–lost or destroyed due to fire-general direction issued to the S.S.P/S.P. to preserve the police paper and not to weed out or otherwise destroy–Where the original record of Trial reported missing–Distt. Judge directed to complete re-trial within 4 month.

Held- Para-8 & 9

In this view of the matter we direct this case to be remitted back to the trial Court for re-trial which may then dispose of the matter on accordance with the directions of the apex Court in the case of *State of U.P. Vs. Abhai Raj Singh and another (supra).*

Before parting, we would like to observe that a disturbing fact has been brought to our notice, that this is not an isolated case where the record of the case has gone missing or it has been destroyed and where efforts are being made by this Court to order reconstruction of records or re-trial in light of the directions in *Abhai Raj singh's* case, and that there are in fact a large number of such cases where the records have become untraceable. As often this exercise is undertaken long after the record was reported lost, often even the police papers such as FIR, inquest, 161 Cr. P.C. statements, postmortem report etc. in the case diary which may have facilitated reconstruction or re-trial have also been lost or destroyed or weeded out, and invariably there is no co-operation from the Counsel for the accused and even from the prosecution Counsel or the State, it has enabled guilty person to escape unpunished, who may even have been instrumental in the disappearance of the records in their cases. We therefore think that the Registry to issue a circular to all the district judges to immediately communicate to the police stations concerned where the crime was registered through S.S.P./S.P.s in charge of the districts to preserve the police paper and records in such cases, and ensure that they are not weeded out or lost or otherwise destroyed in cases where the trial court records, especially where foul play may be suspected. A communication should also be immediately sent to the High Court and the Registry for obtaining immediate orders from the bench concerned directing the concerned District Judges to initiate proceedings for reconstruction of the lost record, or re-trial so that timely action may be taken for ensuring compliance of the Apex Court's orders in *Abhai Raj Singh's* case in letter and spirit, and for ensuring that the guilty do not escape punishment and the process of justice is not derailed by the machinations of wily and unscrupulous accused.

Case law discussed:
AIR 2004 SC–3235

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

1. Heard Sri P.N. Misra for the appellant and learned AGA.

This appeal has been filed for challenging the conviction and sentence of the appellants to imprisonment for life under sections 302 read with 34 IPC by an order dated 30.1.1979 passed by the IV Addl. District and Sessions Judge, Bareilly, in ST No. 105 of 1978. After summoning the record by this Court a report was received from the Officer in charge, Record Room, Bareilly judgeship, dated 20.1.1984 that the record was not available after the fire incident which occurred in the civil courts building at Bareilly in the night of 18/19.11.1979.

2. An order was passed thereafter by a Division Bench of this Court dated 22.11.1993 for reconstruction of the record within 6 weeks. However, in spite of the said order and the reminder dated 31.3.2004 passed by another Division Bench, no report of the Sessions Judge was received, until an order dated 21.9.1995 was passed by the Bench of Hon. G.P. Mathur and Hon. Kundan Singh, JJ. directing the office to send a reminder to the district judge within 3 days who was to submit a report within 2 weeks and also to explain why the orders passed by the Court on 22.11.1993 and 31.3.1994 had not been complied with. Learned Sessions Judge was also directed to make an enquiry from the police office as to whether any paper of the case were available in that office or not. Thereafter, it appears, a report dated 4.11.1995 of the District Judge, Bareilly, has been received stating that it was not possible to reconstruct the record and the report of the concerned police station also shows that no record relevant to the case was available with the police office.

3. However, our attention has been drawn to the decision of the apex Court in *State of U.P. Vs. Abhai Raj Singh and another: [AIR 2004 SC 3235]* which was another case of burnt record as a result of the same fire which had broken out in the Bareilly civil Court on 18/19.22.1979 wherein the record of present appeal was also destroyed. In *Abhai Raj Singh's* case this Court had passed an order on 1.11.1993 for reconstruction of the record at the Session Judge level. However, when no response was received from the Session Judge within three months, the High Court after noting that no communication had been received from the Session judge, had drawn an inference that reconstruction of the record was not possible, and had passed an order dated 25.2.1994 that the appellants shall not be arrested, and were not required to surrender to their bail bonds, which were cancelled.

4. The Apex Court in *Abhay Raj Singh's* case (supra) declared the order to be illegal and observed as follows in paragraph 6:

"*The powers of the appellate Court when dealing with an appeal from a conviction are delineated in sub-clauses (i), (ii) and (iii) of clause (b) of section 386 of the Code. The Appellate Court is empowered by Section 386 to reverse the finding and sentence and acquit. Therefore, the acquittal is possible when there is reversal of the finding and sentence. The Appellate Court is also empowered to discharge the accused. The third category which seems to be applicable to the present case is a direction for re-trial by a Court of competent jurisdiction subordinate to the Appellate Court or committed for a trial. For exercise of the powers in case of first two categories, obviously a finding on*

merits after consideration of the materials on record is imperative. Where that is not possible because of circumstances like the case at hand i.e. Destruction of the records, the proper course for the Appellate Court would be to direct re-trial after reconstruction of the records if in spite of positive and construction efforts to reconstruct the records the same was impossible."

5. The apex Court had thereafter remitted the matter to the High Court for fresh consideration and directed that the High Court to direct the reconstruction of the record within a period of 6 months from all available or possible sources. In case it found that the reconstruction was not practicable, then it might order re-trial and from that stage the law was to take its normal course. However, it was pointed out that if re-trial and fresh adjudication by the sessions court was also rendered impossible due to loss of vital important basic records, only in that event the earlier judgement of the High Court would apply and the matter would stand closed. The relevant part of paragraph 10 of the order of the apex court read as follows:

"If it finds that reconstruction is not practicable but by order retrial interest of justice could be better served – adopt that course and direct retrial- and from that stage law shall take its normal course. If only reconstruction is not possible to facilitate High Court to hear and dispose of the appeals and the further course of retrial and fresh adjudication by sessions Court is also rendered impossible due to loss of vitally important basics records, in that case and situation only, the direction given in the impugned judgement shall operate and the matter shall stand closed."

6. However Sri P.N. Mishra vehemently contended that this Court should itself call for a fresh report and decide whether the basic documents which would facilitate are-trial are available or not and in case the same are not available it should itself pass the order closing the case in the light of Abhai *Raj Singh's* case.

7. We find that already this matter has become extremely old and the appeal is pending since 1979. We have also seen the great difficulties and the number of orders needed before the communication was received from the District Judge Bareilly on 4.11.1995 that reconstruction of the record was not possible. If we again initiate the exercise again for enquiring whether basic documents can be procured from any place or not for facilitating re-trial further time will be lost before we can obtain an appropriate response from the District Judge concerned. Furthermore we think the district Court would be in the best position to decide whether re-trial was possible in the context of the basic documents being available or unavailable.

8. In this view of the matter we direct this case to be remitted back to the trial Court for re-trial which may then dispose of the matter on accordance with the directions of the apex Court in the case of *State of U.P. Vs. Abhai Raj Singh and another (supra).*

9. Before parting, we would like to observe that a disturbing fact has been brought to our notice, that this is not an isolated case where the record of the case has gone missing or it has been destroyed and where efforts are being made by this Court to order reconstruction of records or re-trial in light of the directions in *Abhai*

Raj singh's case, and that there are in fact a large number of such cases where the records have become untraceable. As often this exercise is undertaken long after the record was reported lost, often even the police papers such as FIR, inquest, 161 Cr. P.C. statements, postmortem report etc. in the case diary which may have facilitated reconstruction or re-trial have also been lost or destroyed or weeded out, and invariably there is no co-operation from the Counsel for the accused and even from the prosecution Counsel or the State, it has enabled guilty person to escape unpunished, who may even have been instrumental in the disappearance of the records in their cases. We therefore think that the Registry to issue a circular to all the district judges to immediately communicate to the police stations concerned where the crime was registered through S.S.P./S.P.s in charge of the districts to preserve the police paper and records in such cases, and ensure that they are not weeded out or lost or otherwise destroyed in cases where the trial court records, especially where foul play may be suspected. A communication should also be immediately sent to the High Court and the Registry for obtaining immediate orders from the bench concerned directing the concerned District Judges to initiate proceedings for reconstruction of the lost record, or re-trial so that timely action may be taken for ensuring compliance of the Apex Court's orders in *Abhai Raj Singh's* case in letter and spirit, and for ensuring that the guilty do not escape punishment and the process of justice is not derailed by the machinations of wily and unscrupulous accused.

10. We therefore order the Registrar General to take steps for issuing a circular to all the District Judges for communication to all subordinate Courts for compliance on the lines suggested herein above, and to take the other steps suggested.

11. Office is also directed to communicate this order and papers in the case for re-trial as directed herein above in the present case to the District Judge Bareilly within a week who shall try to get the re-trial completed, if it is possible within 4 months and report compliance to this Court.

12. With these observation this appeal is disposed of.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.09.2007

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

Special Appeal No. 529 of 2006

Mohd. Tabib Khan ...Petitioner-Appellant
Versus
State of U.P. and others ...Respondents

Counsel for the Appellant:
Sri Ashok Khare
Smt. Anita Tripathi

Counsel for the Respondents:
Sri S.K. Yadav
Sri P.K. Singh
Sri S.S. Sisodiya
Sri R.K. Ojha
S.C.

High Court Rules-Chapter VIII Rule-5-Special Appeal- against the Order/

judgment by Single Judge-arises out from the Order passed by the prescribed Authority order 25 (1) of Society Registration Act-held-not maintainable.

Held: Para 24

We are in full agreement with the judgment and order of the Division Bench of this Court in the case of Jai Prakash Agarwal (supra) and that the Full Bench of this Court has not laid down any law to the controversy in the case of Sri Kashi Raj Mahavidyalay, Aurai (supra) and therefore, hold that the present special appeal which has been filed under Chapter VIII Rule 5 of the Allahabad High Court Rules, 1952 against the judgment and order of the learned Single Judge arising out of an order of the Prescribed Authority under Section 25(1) of the Societies Registration Act is legally not maintainable.

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

1. This special appeal is directed against the judgment and order passed by the learned Single Judge in Writ Petition No. 18566 of 2006 dated 04/4/2006.

2. Facts giving rise to the present appeal are Madarsa Jamya Ahley Sunnat Emdadul Ulum, Matehna, Post Khadsari Bazar District Siddhartha Nagar is a society duly registered under the Societies Registration Act, 1860 (hereinafter called the "Act 1860"). Elections of the office bearers of the society are stated to have taken place in the year 2000. Proceedings under Section 25(1) of the Act, 1860 were initiated by respondents 4 to 58 questioning the elections so held before the Prescribed Authority. The dispute was registered as Misc. Case No. 17 of 2001. During the pendency of the dispute, the term of the office bearers expired on 09/10/2005. Prior to the expiry of the term of the office bearers of the society, fresh elections are said to have taken place on 25/9/2005. On the strength of the elections so held the appellant-petitioner submitted an application dated 06/10/2005 before the Assistant Registrar Firms Societies and Chits Gorakhpur Region Gorakhpur seeking renewal of the registration of the society. In the meantime the Prescribed Authority by means of his order dated 17/3/2006 answered the reference under Section 25(1) of the Act 1860 and directed that a copy of the order along with the relevant file be transmitted to the Assistant Registrar Firms Societies and Chits Gorakhpur for appropriate action. Against this order of the Prescribed Authority the appellant who claims to be the Manager of the Committee of Management of the Madarsa filed Writ Petition No. 18566 of 2006. The learned Single Judge by means of his judgment and order dated 04/4/2006 dismissed the writ petition after recording that it raises disputed questions of fact and it is not feasible under Article 226 of the Constitution of India to decide such disputed issues of fact. Accordingly the writ petition has been dismissed with the liberty to the petitioner-appellant to approach the Civil Court. It is against this order that the present special has been filed.

3. A preliminary objection has been raised on behalf of respondents by Shri R.K. Ojha, Advocate to the effect that the present special appeal under Chapter VIII Rule 5 of the Allahabad High Court Rules, 1952 is not maintainable inasmuch as the Prescribed Authority, who has decided the dispute under Section 25(1) of the Act 1860, acts as a Tribunal, having trappings of the Court and therefore, this

Special Appeal against the judgment and order of the learned Single Judge arising out of the proceedings from an order of the Tribunal is legally maintainable in view of the language of Chapter VIII Rule 5 of the Allahabad High Court Rules 1952. In support of the said submission reliance has been placed upon the Division Bench judgement of this Court in the case of Jai Prakash Agarwal Vs. Prescribed Authority (Sub-Divisional Magistrate), Sadar, District Deoria & Ors., (1999) 1 UPLBEC 697.

4. The preliminary objection raised on behalf of the appellant is answered by Shri Ashok Khare, learned Senior Advocate assisted by Smt. Anita Tripathi contending that the Division Bench judgment relied upon by Shri R.K. Ojha in the case of Jai Prakash Agarwal (supra) does not lay down the correct law. With reference to the Full Bench judgement of this Court in the case of Committee of Management, Shri Kashi Raj Mahavidyalaya, Aurai & Anr Vs. Deputy Director of Education, Vth Region, Varanasi & Ors., 1997 (29) ALR 417, Shri Khare submits that the Prescribed Authority under Section 25(1) of the Act 1860 cannot be treated to be a Tribunal for the following reasons:

(a) The proceedings before the Prescribed Authority are summary in nature, the order passed therein is not final in as much as it has specifically been held by the Hon'ble Supreme Court that the order of the Prescribed Authority can always be questioned by way of civil suit.
(b) The Prescribed Authority is not entrusted with inherent judicial powers of the State, inasmuch as it has no authority to;

(i) summon production of witnesses or for ensuring their attendance;
(ii) to direct recovery/production of documents.

5. In support of his aforesaid contentions, Shri Khare has placed reliance upon the judgments of the Apex Court in The Bharat Bank, Ltd., Delhi Vs. The Employees of the Bharat Bank Ltd, Delhi, AIR 1950 SC 188; Mrs. Sarojini Ramaswami Vs. Union of India & Ors., AIR 1992 SC 2219; Jaswant Sugar Mills Ltd., Meerut Vs. Lakshmi Chand & Ors., AIR 1963 SC 677.

6. Shri R.K. Ojha in the rejoinder affidavit submits that merely because the proceedings before the Prescribed Authority are summary in nature or that the order of the Prescribed Authority can be questioned by way of Civil Suit, will not mean that finality has not been attached to the order of the Prescribed Authority so far as the Societies Registration Act is concerned. With regard to the second contention raised by Shri Ashok Khare, he submits that the power to summon the witnesses as well as to ensure discovery/production of documents are only few of the factors relevant for adjudicating upon the issue as to whether the authority deciding the dispute answers the description of Tribunal or not. He clarifies that even if the aforesaid two factors are absent while other relevant factors to be taken into consideration are present, the authority deciding the dispute answers the description of Tribunal and the aforesaid two factors are to be ignored.

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

8. The issue as what is a Court and a Tribunal having trapping of the Court and which authority cannot be held to be Court, has been considered by the Courts time and again. A Constitution Bench of the Hon'ble Supreme Court in The Bharat Bank Ltd. (supra), examined the issue at length. The question arose therein as to whether the Industrial Tribunal constituted under the Industrial Disputes Act, 1947 functions as a Court. The Hon'ble Supreme Court examined the scheme of the Act 1947 and considered its earlier judgements and held that as the Industrial Tribunal has some of the same powers as are vested in the Civil Court under the provisions of the Code of Civil Procedure (hereinafter called the 'CPC') while trying a suit in respect of the matters, particularly - (a) enforcing the attendants of any person and examining him on oath; (b) compelling the production of documents and material objects; (c) issuing commissions for examination of witnesses; (d) in respect of such other matters as may be prescribed and every enquiry or investigation by a Tribunal shall be deemed to be a judicial proceeding. The Court further held as under:-

"It is difficult to conceive in view of these provisions that the Industrial Tribunal performs any functions other than that of a judicial nature. The Tribunal has certainly the first three requisites and characteristics of a Court as defined above. It has certainly a considerable element of the fourth also inasmuch as the Tribunal cannot take any administrative action, the character of which is determined by its own choice."

9. The Court further held that the fact that the Government has to make a declaration for enforcing the decision of the Tribunal final is not, in any way, inconsistent with the view that the Tribunal acts judicially and the Court came to the conclusion that it was a Court.

10. In Virindar Kumar Satyawadi Vs. The State of Punjab, AIR 1956 SC 153, the Hon'ble Supreme Court considered the issue as to whether the Returning Officer deciding the validity of nomination paper under the provisions of the Representation of People Act, 1951 is a Court for the purposes of Section 195 of the Code of Criminal Procedure or not. The Supreme Court examined the provisions of the Representation of People Act, 1951 and made a distinction between the quasi judicial Tribunal and administrative authority observing that a quasi judicial Tribunal is charged with a duty to decide disputes in a judicial manner and declare the rights of parties in a definitive judgment. Such decisions involve entitlement of the parties as a matter of right to be heard in support of their claim and adduce evidence in support thereof. The authorities are under legal obligation to decide the matter on consideration of the evidence adduced and in accordance with law. The Court held that the Returning Officer has to examine the nomination form and decide all objections which may be made thereto. The power was of a judicial nature but as in the said case parties have no right to insist on producing evidence which they desire and there was no machinery provided for summoning of witnesses or for compelling production of document in an enquiry and there was no lis in which persons with opposite claims were entitled to have their rights adjudicated in

a judicial manner. The Returning Officer was not functioning as a Court.

11. A Constitution Bench of Hon'ble Supreme Court in **Associated Cement Companies Ltd. Vs. P.N. Sharma & Anr., AIR 1965 SC 1595**, examined the issue as to whether the State Government while exercising the appellate jurisdiction under Rule 6(6) of the Punjab Welfare Officers Recruitment and Conditions of Service Rules, 1952, was a Tribunal. The Court examined the scheme of the said Rules and held that the requirement of a procedure which are followed in Courts and possession of subsidiary powers which are given to Courts to try the cases before them, are described as Trappings of the Courts, and so, it may be conceded that these trappings are not shown to exist in the case of the State Government while hearing the appeals under the said Rules. However, the Court observed as under:-

"The presence of some of the trappings may assist the determination of the question as to whether the power exercised by the authority which possesses the said trappings, is the judicial power of the State or not. The main and the basic test, however, is whether the adjudicating power which a particular authority is empowered to exercise, has been conferred on it by a Statute and can be described as a part of the State's inherent power exercise in discharging its judicial function."

12. Again a Constitution Bench of the Hon'ble Supreme Court in Engineering Mazdoor Sabha & Anr. Vs. Hind Cycles Ltd., AIR 1963 SC 874, considered the similar issue and observed that the Court can compel witnesses to appear, they can administer oath to them, they are required to follow certain rules of procedure; the proceedings before them are required to comply with rules of natural justice, they may not be bound by the strict and technical rules of evidence, but, nevertheless, they must decide on evidence adduced before them; they may not be bound by other technical rules of law, but their decisions must, nevertheless, be consistent with the general principles of law. In other wards, they have to act judicially and reach their decisions in an objective manner and they cannot proceed purely administratively or base their conclusions on subjective tests or inclinations. These are the characteristics if found in an authority, it can be described as a Court or Tribunal. However, the basic test is that the authority/Tribunal should be constituted by the State and should be invested with the State's inherent judicial power.

13. A Constitution Bench of the Hon'ble Supreme Court in Indo-China Steam Navigation Co. Ltd. Vs. Jasjit Singh, Additional Collector of Customs, Calcutta & Ors., AIR 1964 SC 1140, considered the issue as to whether the authority under Section 167 of the Sea Customs Act was a Court or Tribunal and came to the conclusion that while determining such an issue, the Court must examine briefly the procedure prescribed by the Act in relation to the adjudications made under its provisions, and as to whether such authorities are constituted by the Legislature and they are empowered to deal with the disputes brought before them by aggrieved persons. Thus, the scheme of the Act, the nature of proceedings brought before the appellate or revisional authorities, the extent of the claim involved, the nature of the penalties imposed and the kind of

enquiry which the Act contemplates, all indicate that both the appellate and the revisional authorities acting under the relevant provisions of the Act constitute Tribunal because they are invested with the judicial power of the State and are required to act judicially.

14. In Thakur Jugal Kishore Sinha Vs. The Sitamarhi Central Co-operative Bank Ltd. & Anr., AIR 1967 SC 1494, the question arose as to whether the Assistant Registrar discharging functions of the Registrar under Section 48 of the Bihar and Orissa Co-operative Societies Act, 1935 was a Court and any contempt there of could be dealt with under the provisions of the Contempt of Courts Act, 1952.The Court placed reliance upon the judgment of this Court in Raja Himanshu Dhar Singh Vs. Kunwar B.P. Sinha, 1962 ALJ 57 where the disputes arose with certain resolutions passed by the Hind Provincial Flying Club, which was referred to the Registrar of the Cooperative Societies under the provisions of the U.P. Cooperative Societies Act, 1965 and the Registrar delegated his power to the Assistant Registrar to arbitrate in the matter. The Assistant Registrar issued an injunction that no further meeting should be called and the said direction was disobeyed. This Court held that only those arbitrators can be deemed to be Courts who are appointed through a Court and not those arbitrators who function without the intervention of a Court. The Hon'ble Supreme Court came to the conclusion that the Assistant Registrar was functioning as a Court in deciding a dispute between the parties.

15. In Ramrao & Anr. Vs. Narayan & Anr., AIR 1969 SC 724, again a question arose regarding the provisions of the Maharastra Co-operative Societies Act and the Hon'ble Supreme Court referred to and relied upon the Halsebury's Law of England, wherein it has been observed as under:-

"Originally the term "Court" meant, among other meanings, the Sovereign's place; it has acquired the meaning of the place where justice is administered and, further, has come to mean the persons who exercise judicial functions under authority derived either immediately or mediately from the Sovereign. All tribunals, however are not courts, in the sense in which the term is here employed, namely, to denote such tribunals as exercise jurisdiction over persons by reason of the sanction of the law, and not merely by reason of voluntary submission to their jurisdiction. Thus, arbitrators, committees of clubs, and the like although they may be tribunals exercising judicial functions, are not "Courts" in this sense of that term. On the other hand, a tribunal may be a court "in the strict sense of the term although the chief part of its duties is not judicial. Parliament is a Court. Its duties are mainly deliberative and legislative: the judicial duties are only part of its functions."

In Article 810 it is stated:

"In determining whether a tribunals is a judicial body the facts that it has been appointed by a non-judicial authority, that it has no power to administer an oath that the chairman has a casting vote, and that third parties have power to intervene are immaterial, especially if the statute setting it up prescribes a penalty for making false statements; elements to be considered are (1) the requirement for a public hearing, subject to a power to exclude the public in a proper case, and (2) a provision that a

member of the tribunal shall not take part in any decision in which he is personally interested or unless he has been present throughout the proceedings.

A tribunal is not necessarily a Court in the strict sense of exercising judicial power because (1) it gives a final decision, (2) hears witnesses on oath; (3) two or more contending parties appear before it between whom it has to decide; (4) it gives decisions which affect the rights of subjects; (5) there is an appeal to a Court; and (6) it is a body to which a matter is referred by another body. Many bodies are not courts although they have to decide questions, and in so doing have to act judicially, in the sense that the proceedings must be conducted with fairness and impartiality."

16. The Court came to the conclusion that the Registrar was not entrusted with the judicial power of the State, therefore, he was not a Court.

17. In Keshab Narayan Banerjee Vs. State of Bihar & Ors., AIR 2000 SC 485, while determining a similar issue, the Hon'ble Supreme Court referred to and relied upon a large number of its earlier judgments including Harinagar Sugar Mills Ltd. Vs. Shyam Sunder Jhunijhunwala & Ors., AIR 1961 SC 1669; and Canara Bank Vs. Nuclear Power Corporation of India Ltd. & Ors., 1995 Supp. (3) SCC 81 and after examining the provisions of the Act involved herein, came to the conclusion that he lacked the essential attributes of evidence which a Civil Court possesses, thus, considering the nature of jurisdiction and extent of power conferred on him, undoubtedly it was not a Court, though certain powers of the Code of Civil Procedure had also been conferred upon him.

18. In K. Shamrao & Ors. Vs. Assistant Charity Commissioner, (2003) 3 SCC 563, the Hon'ble Supreme Court while examining the provisions of the Bombay Public Trusts Act, 1950 in respect of the duties assigned to Assistant Charity Commissioner under the said Act has held that Section 73 of the Act, he had been given the powers of the Code of Civil Procedure to take evidence by affidavits, summoning and enforcing the attendance of any person and examining him on oath; ordering discovery and inspection, and compelling production of documents, examining witnesses on oath, and issuing commission etc. and its judgments were held to be final unless set aside by the Court on application or by the High Court in appeal and the jurisdiction of the Civil Court had been barred in matters decided by the Deputy or Assistant Charity Commissioner or the Charity Commissioner. It was held that the Charity Commissioner was a Court for the purposes of the provisions of the Contempt of Courts Act, 1971.

19. In view of the above, the law can be summarised that if a Tribunal has been constituted by the State and it exercises the inherent judicial power of the State, it is a Court, even if some of the trappings of the Court are not found therein.

20. In the aforesaid legal background following three issues need determination by this Court:

(A) Whether the order passed by the Prescribed Authority under Section 25 (1) of the Act 1860 is final so far as the provisions of the Act are concerned or not;

(B) Whether the order of the Prescribed Authority having being held to be subject to the order of suit proceedings has the effect of declaring that the order is not final between the parties; and
(C) Whether in absence of powers to ensure the attendance of witnesses and to direct discovery and production of documents, Prescribed Authority can be said to be vested with judicial powers of the State so as to hold that it was a Tribunal, having trapping of the Court.

21. Since counsel for the parties have placed reliance upon the same Full Bench judgment of this Court in the case of Committee of Management, Shri Kashi Raj Mahavidyalaya (supra), it is appropriate to refer to law as explained under the judgment qua maintainability of Special Appeals under Chapter VIII Rule 5 of the Allahabad High Court Rules 1952. In paragraph 9 of the said judgment it has been held as follows:

"The rationale behind exclusion of special appeal in respect of a decree or order made by a court is that once a decision has been rendered by a competent court of jurisdiction, one challenge in the High Court against such decree or order should be enough, so far as the High Court is concerned and finality should attach to that decision even if the decision has been rendered by a learned Single Judge of the High Court. Since the tribunals also discharge similar functions of deciding disputes acting judicially, as is done by the courts and they enjoy the same status as the Courts do, as the tribunals have also been entrusted with inherent judicial powers of the State, there is no reason why the same reason should not apply for exclusion of special appeal in respect of order of a tribunal. **Therefore, a tribunal within the meaning of rule 5 must be an authority which is required to act judicially and which has been entrusted with the inherent judicial powers of the State."**

22. Reference may also be made to paragraph 17 of the aforesaid Full Bench judgment wherein after referring to the judgment of the Apex Court in the case of Jaswant Sugar Mills Ltd. (supra) and Mrs. Sarojini Ramaswami (supra) it has been laid down:

"It would appear that to determine the question whether an authority is a tribunal, **the nature of the order passed by the authority and also the characteristic of the body which is called upon to adjudicate upon the matter in dispute are material considerations.** Even a judicial authority may, in a given situation, act in administrative or executive capacity. In that situation the authority would not be a tribunal. Likewise an administrative authority, even if required to act judicially would not be a tribunal if it is not invested with the inherent judicial power of the State."

23. The Full Bench of this Court thereafter proceeded to hold that an order passed under Section 16-A (7) lacks finality or conclusiveness in nature which is associated with the decisions of Court and Tribunal, therefore, the special appeal against an order under Section 16-A (7) has been held to be maintainable.

The Division Bench of this Court in the case of Jai Prakash Agarwal (supra) after examining the said Full Bench judgment of this Court held as under:

"Now if the aforesaid test is applied to the prescribed authority under Section 25 of the Act, there remains no doubt that it is a tribunal. Under Section 25 Prescribed Authority **decides important dispute of election and continuance in office of an office-bearer, which is essentially a dispute of civil nature.** The order passed by the Prescribed Authority though has not been said to be final in specific words but sub-section (2) of Section 25 of the Act specifically provides that where by an order made under sub-section (1), an election is set aside or an office-bearer is held no longer entitled to continue in office or where the Registrar is satisfied that any election of office-bearers of a society has not been held within the time specified in the Rules of that society, he may call meeting of the general body of such society for electing such office bearer or office bearers, and such meeting shall be presided over and be conducted by the Registrar or by any officers authorised by him in this behalf, and the provisions in the Rules of the society relating to meetings and elections shall apply to such meeting and election with necessary modifications. **Thus the provisions contained in sub-section (2) of Section 25 of the Act provide that if the election is set aside by the Prescribed Authority a fresh election is required to be held by the Registrar. This is sufficient indication that the order is final. The Prescribed Authority is also required to hear and decide in summary manner any doubt or dispute in respect of the election. Thus the order has to be passed after hearing parties and giving them opportunity to adduce evidence. From the provisions contained in proviso, it is clear that he decides the dispute in exercise of inherent judicial powers of the State vested in him by the notification.**

Learned Counsel for the appellant submitted that the order of the Prescribed Authority is not final and suit can be filed challenging the same, hence he decides the dispute administratively and not judicially. We are not prepared to accept this submission. **Prescribed Authority under Section 25 of the Act decides the dispute judicially and in exercise of the inherent judicial powers of the State. This position is not in any way diluted because against the order of the Prescribed Authority a suit may be filed in the Civil Court. If this test is accepted then no Court can exercise inherent judicial power of the State because orders can be challenged in appeal or revision or before this Court under Article 226 of the Constitution.** Finality of the order has to be judged from the effect of it on the rights of parties, if the order is not challenged further. In such a situation, it should finally resolve the dispute between parties. In our considered opinion, the Prescribed Authority is a tribunal and possesses the trappings of the Court. A Division Bench of this Court in All India Council and another (supra), held in paragraphs No. 6 and 7 as under:-

"The petitioners are clearly right. Section 25 of the Societies Registration Act as amended by the State Legislature enacts a comprehensive code and creates a designated forum or tribunal for adjudication in a summary manner of all disputes or doubts in respect of the election or continuance in office of an office-bearer of such society. It also provides the grounds upon which the election of an office-bearer can be set aside. The procedure to be followed for filling up of the vacancies arising from the decisions rendered by the Prescribed

Authority under sub-section (1) of S. 25 has also been laid down [S. 25 (2)].

It will therefore, be seen that insofar as disputes or doubts in respect of the election or continuance in office of the office-bearers of a society registered in Uttar Pradesh are concerned the Legislature has created a specific forum and laid down an exhaustive procedure for determination of the same under S. 25. There is no other provisions, express or otherwise, providing for determination of such disputes specifically. **It is settled law that where, as here, the legislature creates a specific forum and lays an exhaustive procedure for determination of a particular class of disputes in respect of matters covered by the statute.** Such disputes can be determined only in that forum and in the manner prescribed thereunder and not otherwise. If, therefore, a dispute is raised with regard to the election or continuance in office of an office-bearer of a society registered in Uttar Pradesh, the same, has to be decided only by the Prescribed Authority under Section 25(1) and not by the Registrar, save, of course, to the decision of the Prescribed Authority being subject to the result of a civil suit."

In case of Prabhat Mishra and others (supra) relied on by the learned Counsel for appellant, the learned Single Judge was examining the question whether Section 25 has taken away the jurisdiction to adjudicate the dispute relating to election of office-bearers of the society and in that connection, the learned Single Judge held that the suit is maintainable. The question whether the Prescribed Authority is a tribunal or not was not involved before the learned Single Judge and the judgment does not help appellant in any manner. What we have held above, we also find support from the Division Bench judgment of this Court in case of Sudarsan Singh Bedi (supra). **In fact by substituting Sec. 25 in the Act in present form, legislature has constituted an election tribunal for resolving the election disputes of societies registered under the Act and disputes regarding continuance of the office-bearers of such societies, though nomenclature given is Prescribed Authority.** The jurisdiction of this tribunal can be invoked either under a reference made by Registrar of by ?? members of general body of society, as provided under Section 25 (1) of the Act. Individual members of the society have been, it appears, intentionally excluded and have not been given right to invoke the jurisdiction of tribunal, only to avoid multiplicity of proceedings and frivolous litigation. Considering the fact that generally societies consist of large number of members such a step was very necessary. Considered from all possible angles the conclusion, which appears just and proper, is that prescribed authority is a tribunal."

We may, add few of our reasons also for the conclusion that:

(A) The order passed by the Prescribed Authority passed under Section 25(1) of the Act 1860 is final so far as the Act of 1860 is concerned. It may be recorded that once an order under Section 25(1) is passed by the Prescribed Authority recognising a set of elections, it automatically follows that the list of office bearers so recognised has to be registered under Section 4 of the Act 1860 by the Assistant Registrar. Similarly, if the elections are disapproved any list of office bearers earlier registered under Section 4 of the Act, would lose its sanctity by operation of the order passed

under Section 25(1) of the Act 1860. The Act 1860 does not contemplate any appeal or revision against the order of the Prescribed Authority passed under Section 25(1). The right to seek renewal of the Registration of the Society to make amendments in the bye-laws etc., can be affected by the office bearers those elections are approved by the Prescribed Authority under Section 25(1) of the Act of 1860. Therefore, it cannot be disputed by any stretch of imagination that the order passed under Section 25(1) of the Act 1860 in respect of right to be the office bearers of the Society is final and conclusive so far as the Act of 1860 is concerned.

(B) Merely because the order of the Prescribed Authority being subject to the orders of the Civil Court would not mean that the order has not attained finality so far as the Statute under which order has been passed. Civil Suits under the provisions of Civil Procedure Code are maintainable in respect of civil wrongs, except when prohibited under Section 9 of the Civil Procedure Code or by the provisions of Specific Relief Act or by a statutory enactment express or implied in that regard. Therefore, merely because an order of the Prescribed Authority under Section 25(1) can be challenged by way of civil suit, will not mean that the order has not attained finality so far as the Act 1860 is concerned.

(C) The power of ensuring attendance of witnesses and to direct for discovery/production of documents, though not conferred upon the Prescribed Authority, suffice are only few of the indices relevant for deciding as to whether the authority has exercised judicial powers of the State or not. They are not conclusive in themselves. It is settled legal proposition that even if few of the indices qua trappings of the Court are present the authority statutory vested with a judicial power to decide a dispute between two persons as a part of states inherent power it exercises judicial functions so as to answer the description of a Tribunal having trappings of the Court.

24. We are in full agreement with the judgment and order of the Division Bench of this Court in the case of Jai Prakash Agarwal (supra) and that the Full Bench of this Court has not laid down any law to the controversy in the case of Sri Kashi Raj Mahavidyalay, Aurai (supra) and therefore, hold that the present special appeal which has been filed under Chapter VIII Rule 5 of the Allahabad High Court Rules, 1952 against the judgment and order of the learned Single Judge arising out of an order of the Prescribed Authority under Section 25(1) of the Societies Registration Act is legally not maintainable.

25. The Special Appeal is dismissed as not maintainable. Interim order, if any, stands vacated.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.10.2007

BEFORE
THE HON'BLE PANKAJ MITHAL, J.

First Appeal From Order No. 594 of 2003

The New India Assurance Company Ltd. ...Appellant
Versus
Jagdish Singh and others ...Respondents

Counsel for the Appellant:
Sri Satish Chaturvedi

Counsel for the Respondents:
Sri A.B.L. Verma
Sri S.K. Johari
Sri K. Shailendra
Sri Atul Kumar Tiwari

Motor Vehicle Act, 1988-166-Compensation-on the date of occurrence-the driver possess no valid licence-as his licence already expired-even for renewal not applied within 30 days from the date of expiry-held-insurance company not responsible-except the owner of vehicle.

Held: Para 10

In view of the above discussion it is apparent on record that the licence of the driver had expired and he was not possessed of any valid driving licence on the date of the accident. He had not even applied for its renewal either within the 30 days of the expiry of the licence or till the date of the accident. The owner of the vehicle who was under a legal obligation to ensure that the vehicle was not driven by any unlicensed person had also not taken care to ensure that the driver applies and get the licence renewed. The purpose for issuing driving licence for a fixed period and to provide for its renewal is to enable the licensing authority to verify the continued competence of the persons to drive a motor vehicle. A person may be rendered unfit physically or mentally with the passage of time or otherwise to drive even though he was competent to do so earlier. Thus, the non-renewal of his driving licence coupled with the fact that he had not even applied for its renewal gives rise to a legitimate presumption that he had become incompetent to drive and was not a person competent to drive the motor vehicle at the time of accident. Therefore, on the facts there was a breach of the conditions of the contract of the insurance and accordingly the insurance company i.e. the appellant Oriental Insurance Company was not liable for payment of any compensation.

Case law discussed:
J.T. 2003 (2) SC-595
J.T. 2007 (10) SC-122
J.T. 2004 (2) SC-109
J.T. 2004 (3)-343
2006 JT (4) SC-9
2007 (2) TAC-393

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

1. This First Appeal From Order under Section 173 of Motor Vehicles Act, 1988 (hereinafter referred to as an Act) by the insurance company arises out of the judgment order and award of the Tribunal dated 14.1.2003 passed in MACP No. 33/70/93 (Jagdish Singh & another Vs. Sushil Kumar Shukla & another).

2. A school going six and half year old boy of class II was crushed to death by the speeding tempo No. UP-76-9098. The tempo which was owned by Sushil Kumar Shukla was insured with New India Insurance Company Limited. It was being driven by the driver Raj Kumar @ Raju. On the claim petition being preferred under Section 166 of the Act by the parents of the deceased boy, the Tribunal awarded a sum of Rs.1,00,000/- with 9% interest from the date of presentation of the petition till its payment and the insurance company was held liable to pay the same.

3. The only point for determination which has been raised by the learned counsel for the appellant New India Insurance Company Limited is that at the time of the accident the driver of the tempo was not having a valid licence as his licence had expired on 24.1.1992 and as such since the vehicle was being driven

in violation of the terms and conditions of the insurance policy the insurance company is not liable for the payment of compensation.

4. It is not in dispute that the accident took place on 5.2.1993. The driver of the vehicle was having a licence to drive tempo but admittedly the validity of the said licence expired on 24.1.1992. The driver had not applied for the renewal of the licence. Therefore, the licence had lapsed and as such the driver was not possessed with any licence on the date of the accident. However, the Tribunal in spite of recording a finding that the driver was not having a valid licence on the date of accident held that as he had been issued the driving licence, he was a person competent to drive the vehicle and as such the insurance company alone is liable to pay the compensation.

5. The scheme of the Act is sufficiently clear. Section 3 of the Act provide that no person shall drive a motor vehicle in public place unless he holds an "effective driving licence" issued to him authorising him to drive the vehicle. Section 5 of the Act mandates that no owner or person in-charge of the motor vehicle shall cause or permit any person who does not satisfy the conditions of Section 3 of the Act to drive the vehicle. In short, it puts an obligation upon the owner of the motor vehicle to ensure that no person other than a person having a valid driving licence drives the vehicle. Section 15 of the Act provides for the renewal of the driving licence by the licensing authority on an application in this regard. A plain reading of the above provision demonstrates that on application of renewal of a driving licence should normally be made within a period of 30 days of the expiry of the licence. The licensing authority has no power to suo motu renew the driving licence except on an application for renewal. Therefore, application for renewal of driving licence is sine quo non for its renewal otherwise the licence shall lapse. However, where renewal is applied after 30 days of the expiry of licence and the application is granted, the renewal shall have effect from the date of renewal and not from any earlier date. Admittedly in the present case the licence granted to the driver was valid only up to 24.1.1992. No application for its renewal was made within a period of 30 days prescribed and not even till the date of accident i.e. 5.2.1993. Thus, the licence of the driver had expired and had lapsed. He was therefore, not having any licence to drive the motor vehicle on the date of the accident.

6. In the case of **United India Insurance Company Ltd. Vs. Lehru and Others JT 2003 (2) SC 595**, it was observed that where the owner has satisfied himself that the driver has a licence and is driving competently there would be no breach of Section 149(2)(a)(ii) of the Act. Once the owner has checked that the driver possesses a valid driving licence which on the face of it is genuine, the owner is not expect to explore and find out whether the licence produced by the driver had been issued by the competent authority or not. Since in that case the owner had not only examined the driving licence produced by the driver but also took driving test of the driver and has come to the conclusion that he was competent to drive the vehicle, it was held that there was no breach of Section 149(2) (a) (ii) of the Act and the insurance company would not be absolved of its liability to pay the

compensation. The above principle laid down had been followed and reiterated by the Supreme Court in **JT 2007(10) SC 122 Lal Chandra Vs. Oriental Insurance Company Limited.**

7. The legal position that emerges from the above case law is that it is the duty of the owner of the vehicle to prima facie satisfy himself that the driver to whom the vehicle has been entrusted is possessed of a valid licence and is a person competent to drive. If he has taken care of satisfying himself about the above then the insurer i.e. insurance company with whom the vehicle is insured, cannot avoid its liability to pay compensation on the ground of breach of the conditions of the policy.

In the instant case, the owner of the vehicle has not pleaded and adduced any evidence to the effect that he had examined the driving licence of the driver. However, even if it is assumed that the licence was examined and a driving licence had been validly issued and he was competent to drive the motor vehicle, it cannot be said that the owner of the vehicle has exercised reasonable care in entrusting the vehicle to a competent person who was legally authorised to drive the vehicle inasmuch had he examined the licence, it would have been clear to him that it was valid only up to 5.2.1993. Once this fact had come to the notice of the owner of the vehicle it was his incumbent duty to get the licence of the driver renewed in accordance with law within time provided. The absence on part of the driver in applying for the renewal of the licence and also on part of the owner of the vehicle to pursue the driver to apply and to get the licence renewed demonstrate that both of them were negligent in discharging their duties and taking reasonable expected of them under the Act. In the circumstances the owner was guilty of allowing the driver to drive the motor vehicle in contravention of Section 5 of the Act. This contravention on his part has undoubtedly resulted in the breach of the terms and conditions of the insurance policy.

8. Sri Shailendra Kshitij, learned counsel appearing for the respondent No.3, the owner of the vehicle contended on the basis of the decision of the Supreme Court reported in **JT 2004 (1) SC 109 National Insurance Company Ltd., Vs. Swaran Singh & Ors.** that the insurance company cannot be allowed to avoid its liability towards the insured unless the said breach is so fundamental as to have contributed to cause the accident. In the case of Swaran Singh (Supra) the supreme Court while considering the extent of liability of the insurance company and the defences available to it held that compulsory insurance against the third party risks is a social welfare legislation. Therefore, the insurance company is entitled to raise defence only in terms of Section 149 (2) (a) (ii) to avoid its liability. The insurance company is not only supposed to prove that there is breach of the policy but that the insured (owner of the vehicle) is also guilty of negligence and has failed to exercise reasonable care in the matter of fulfilling the conditions of policy regarding use of the vehicle by duly licensed driver or one who is not disqualified to drive at the relevant time. Thus, insurance company can only avoid its liability if it is able to prove breach of the conditions as well as negligence or failure on part of the owner to exercise reasonable care to verify the competence

of the person under law to drive the vehicle before entrusting the motor vehicle into his hands. In the instant cases, the owner had not taken reasonable care in this regard as pointed out earlier. The driver who was entrusted with the vehicle had ceased to be a person competent to drive under the Act.

9. Sri Satish Chaturvedi, learned counsel for the appellant Oriental Insurance Company has placed reliance upon **(2004) 3 SCC 343 Malla Prakasarao Vs. Malla Janaki and others** a three judges decision of the supreme Court wherein a similar controversy had come up before the supreme Court and it was held that as the licence of the driver of the vehicle had expired and driver had not applied for renewal of licence within 30 days of its expiry the driver of the vehicle had no driving licence on the date the accident took place. Therefore, according to the terms of the contract the insurance company had no liability to pay compensation. In another case reported in **JT 2006 (4) SC 9 National Insurance Co. Ltd. Vs. Smt. Kusum Rai and others** the driver was having a licence to drive a private light motor vehicle but he was driving a taxi without having an appropriate commercial licence. Therefore, the court held that as he was not possessed of the licence to drive a commercial vehicle, there was breach of conditions of the contract. Accordingly, the insurance company was held entitled to raise the said plea and was held not liable to pay the compensation particularly in absence of the pleadings and evidence of the owner that he had verified about the driver of the vehicle having a valid licence or not. In another division bench of the supreme Court in **2007 (2) TAC 393 (SC) Iswar Chandra and others Vs. Oriental Insurance Co. Ltd. and others** a similar controversy had come up before the supreme Court for consideration. In this case also the licence of the driver had expired and thereafter the accident had taken place. Till the accident no application for the renewal the licence was moved. It was held that the driver had no valid licence on the date of the accident and therefore, the Insurance Company would not be liable to pay the compensation even if driving licence had been renewed subsequently. The above three decisions of the Apex Court squarely covers the field.

10. In view of the above discussion it is apparent on record that the licence of the driver had expired and he was not possessed of any valid driving licence on the date of the accident. He had not even applied for its renewal either within the 30 days of the expiry of the licence or till the date of the accident. The owner of the vehicle who was under a legal obligation to ensure that the vehicle was not driven by any unlicensed person had also not taken care to ensure that the driver applies and get the licence renewed. The purpose for issuing driving licence for a fixed period and to provide for its renewal is to enable the licensing authority to verify the continued competence of the persons to drive a motor vehicle. A person may be rendered unfit physically or mentally with the passage of time or otherwise to drive even though he was competent to do so earlier. Thus, the non-renewal of his driving licence coupled with the fact that he had not even applied for its renewal gives rise to a legitimate presumption that he had become incompetent to drive and was not a person competent to drive the motor vehicle at the time of accident.

Therefore, on the facts there was a breach of the conditions of the contract of the insurance and accordingly the insurance company i.e. the appellant Oriental Insurance Company was not liable for payment of any compensation.

11. In view of the above, the appeal succeeds. The judgment order and award passed by the Motor Accident Claims Tribunal dated 14.1.2003 passed in MACP No. 33/70/93 (Jagdish Singh & another Vs. Sushil Kumar Shukla & another) is set aside to the extent it fixes the liability to pay the compensation awarded upon the appellant insurance company. The respondent No.3 the owner of the vehicle is held liable to satisfy the award.

12. The appeal is allowed as above with no orders as to costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.08.2007

BEFORE
THE HON'BLE PANKAJ MITHAL, J.

Second Appeal No. 1007 of 2005

M/s Kamil & Brothers
...Plaintiff/Appellant
Versus
Central Dairy Farm, U.P., Pashu Dhan Uddyog, Ltd. and another
...Defendants/Respondents

Counsel for the Appellant:

Sri Ramendra Asthana

Counsel for the Respondents:

Sri Ram Niwas Singh
Sri V.K. Chandel
Sri V.K.S. Chandel

Indian Contract Act-1872-Section 73, 74-Compension for loss caused by breach of contract-Contract for supply of 30,000 live sheep and goats-deposit of Rs.2,60,000/- towards security-breach of contract-without proof of actual loss-whether the amount of security can be for fitted?-held-'No'.

Held: Para 14

Therefore, on breach of the contract by the plaintiff-appellant, the defendant-respondent No.1 is entitled to a reasonable compensation not exceeding the amount of security but not without establishing that it had actually suffered damage or loss on account of the said breach. In other words, compensation cannot be awarded where no loss or damage has been suffered at all. There is nothing on record to establish that any loss/damage was actually suffered by the defendant respondent No.1 on account of the alleged breach of contract by the plaintiff-appellant. Thus, in view of the legal position as discussed above specially in the light of five judges decision of the Supreme Court in Fateh (Supra) the defendant-respondent No.1 cannot forfeit the security amount without proving any actual loss or damage suffered by it.

Case law discussed:

AIR 1963 SC-1405
AIR 1970 SC-1955
AIR 1973 SC-1098
AIR 1977 Alld. 28
AIR 2003 SC-2629

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

1. The plaintiff-appellant was awarded a contract for the supply of 30,000/- live sheep & goats to the defendant-respondent No.1 i.e. Central Dairy Farm, Uttar Pradesh Pashu Dhan Uddyog Nigam Limited at the rate of Rs.786/- per quintal. The contract was for a period of one year and the supply was to be made between 1.10.1985 to 30.9.1986.

The plaintiff-appellant deposited a sum of Rs.2,60,000/- as security for the good performance of the above contract. The said security amount was in the form of a fixed deposit with the Bank of India, Jhansi. The contract/agreement contained a forfeiture clause in respect of the security amount. According to the defendants-respondents since the plaintiff-appellant defaulted in the due performance of the contract, the security was directed to the forfeited.

2. It was in the above circumstances the plaintiff-respondent a registered partnership firm through one of its partner filed original suit for permanent injunction restraining the defendant-respondent No.1 from en-cashing the security amount of Rs.2,60,000/- kept in fixed deposit receipt No. 9 / 151 dated 21.9.1985 with the Bank of India, Jhansi. The suit was decreed by the Court of first instance but in appeal the judgment and order of the Trial Court was reversed and the suit was dismissed. Therefore, the plaintiff-appellant has preferred this second appeal.

3. Heard Sri Ramendra Asthana, learned counsel for the appellant and Sri. R.N. Singh for the respondent No. 1.

4. On the basis of the submission made by the learned counsel for the parties only one substantial question of law arises in this second appeal i.e. whether the amount of security deposited by the plaintiff-appellant for the due performance of the contract is liable to be forfeited on the mere allegation of breach of contract without sufferance of actual loss or damage and in the absence of determination and quantification of the actual loss/damage suffered by the defendants-respondents?

5. In order to appreciate the above substantial question of law, it is first necessary to consider the provisions of Section 73 and 74 of the Contract Act, 1872 (hereinafter referred to as an Act). Both the above sections provide for the consequence of breach of contract. Therefore, they are to be read together and not separately. Sections 73 and 74 of the Contract Act reads as under:-

"73. Compensation for loss or damage caused by breach of contract.- *When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.*

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

Compensation for failure to discharge obligation resembling those created by contract.- *When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract.*

Explanation.- .....

74. Compensation for breach of contract where penalty stipulated for.- When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be the penalty stipulated for.

Explanation.- .....
Exception.- .....
Explanation.- ....."

6. The general principle which is embodied in Section 73 of the Act is that whenever there is a breach of contract, the party who suffers by such a breach is entitle to recover the loss or damage caused to him from the other party. However, recovery of any such loss or damage cannot be made unless the party claiming has actually suffered the loss or damage and the same has been quantified.

7. The position is slightly different with regard to liquidated damages. In a claim for liquidated damages the party complaining of breach of contract must fulfil the following conditions:

(i) he must prove that he has sustained loss or damage due to breach of the contract ;
(ii) only reasonable sum can be awarded as compensation for the loss or damage so sustained :
(iii) whatever may be the actual quantum of loss or damage sustained, the compensation cannot exceed the sum named in the contract ;
(iv) The court has power to dispense with the proof of damage or loss so suffered; and
(v) it is always open to the other party to show that no loss was actually suffered.

8. Therefore, even in cases where the damages or penalty is named in the contract or is provided by a forfeiture clause though proof of actual amount of loss or damages may be dispensed with but nonetheless sufferance of loss or damage due to such breach of contract is a sine quo non for claiming damages or for forfeiting the security amount.

9. A five judges Bench of the Supreme Court while dealing with the similar controversy and in interpreting the provisions of Section 74 of the Act in **AIR 1963 SC 1405 Fateh Chand Vs. Balkishan Dass,** held that where a contract contains stipulation by way of penalty the Court has jurisdiction to award such sum only as it considers reasonable but not exceeding the amount specified in the contract by way of compensation. It further lays down that Section 74 of the Act provides that the aggrieved party is entitled to receive compensation from the party who has broken the contract whether or not actual damage or loss is proved. It merely dispenses with proof of "actual loss or damage" but it dose not justify the award of compensation when as a consequence of breach of contract no legal injury has been caused. This has been provided because compensation for breach of contract is awarded to make good only the loss or damage which arose in the natural course of things and not otherwise.

10. The legal position that emerges from the plain reading of Section 73 and 74 of the Act in the light of the above authority of the Supreme Court is that a party complaining of the breach of contract is entitled to receive compensation for loss or damage suffered by it from the party who has broken the contract ; where the amount of compensation has been named or provided in the contract by way of penalty or forfeiture of any amount, the Court shall assess and award reasonable compensation but not exceeding the amount so named; and for the assessment of such reasonable compensation the party need not prove the actual damage or loss suffered but it would not justify the award compensation when no such damage or loss has actually been suffered on account of breach of contract. Section 74 of the Act, merely dispenses with the proof of actual loss or damage only for assessment of damage or loss as the maximum limit has been named in the contract but it does not dispense with the burden of proving that in fact damage or loss has actually been suffered.

11. In **AIR 1970 SC 1955 Maula Bux Vs. Union of India,** a three judges Bench of the Supreme Court while making a distinction between the earnest money and the amount deposited in security for the due performance of the contract held that a person complaining of the breach of contract is not required to prove actual loss or damage suffered by him and the Court is competent to award reasonable compensation even if no actual damage is proved. The aforesaid authority has been followed by the Division Bench of the Supreme Court in **AIR 1973 SC 1098 Union of India Vs. Rampur Distillery and Chemical Co. Ltd.** The Division Bench of the Allahabad High Court in **AIR 1977 Alld. 28 State of U.P. Vs. Chandra Gupta & Co.** relying upon the above two decisions of the Hon'ble Supreme Court held that Section 73 and 74 of the Act entitles a person complaining of breach of contract to get reasonable compensation but not if no damage is suffered on account of its non performance.

12. Thus, in my considered opinion a person is entitled to receive compensation in terms of money only if he has actually suffered damage or loss on account of breach of contract by the other party and not otherwise. Therefore, sufferance of damage or loss is an essential pre condition for the award of compensation by way of damages. The determination or assessment of damage or loss caused is altogether another aspect of the matter. The assessment of damages can be made by actual proof of damage or loss suffered or it may be a reasonable sum which the Court thinks fit but not exceeding the amount named in the contract where it is not possible to assess the same on the basis of material on record. The party aggrieved may be absolved of the burden of proving the amount of actual damage or loss but nevertheless is responsible to prove that the breach of the contract had actually caused damage or loss to it.

13. Sri R.N. Singh, learned counsel for the respondent has placed reliance upon **AIR 2003 SC 2629 Oil and Natural Gas Corporation Ltd., Vs. SAW Pipes Ltd.** and has contended that there is no requirement of proving the actual loss or damage suffered when under the contract the amount of loss is pre-stipulated by way of forfeiture clause.

The Division Bench of the Supreme Court in the above case held that the jurisdiction of the Court to award compensation in case of breach of contract is unqualified except for the fact that it has to be reasonable and not above the amount specified under the contract. It also lays down that a party complaining of the breach of contract is entitled to receive reasonable compensation whether or not actually loss is proved to have been caused by such breach, as in some cases it is impossible for the court to assess the compensation arising from such breach. However, neither Section 74 of the Act nor any of the above authorities cited at the Bar dispenses with the pre-condition of actual damage or loss being suffered or awarding compensation. Only proof of amount of actual loss and damage has been dispensed with where the contract itself specifics the amount or provide for a penalty or forfeiture of the sum specified.

14. In the present case undisputedly there is a forfeiture clause of the security amount, which is other than the earnest money, in the event of breach of contract. Therefore, on breach of the contract by the plaintiff-appellant, the defendant-respondent No.1 is entitled to a reasonable compensation not exceeding the amount of security but not without establishing that it had actually suffered damage or loss on account of the said breach. In other words, compensation cannot be awarded where no loss or damage has been suffered at all. There is nothing on record to establish that any loss/damage was actually suffered by the defendant respondent No.1 on account of the alleged breach of contract by the plaintiff-appellant. Thus, in view of the legal position as discussed above specially in the light of five judges decision of the Supreme Court in Fateh (Supra) the defendant-respondent No.1 cannot forfeit the security amount without proving any actual loss or damage suffered by it.

15. In the end learned counsel for the respondents urged that the suit itself was not maintainable and was barred by section 41 (h) of the Specific Relief Act, 1963 as the agreement/contract contained an arbitration clause. However, a perusal of the judgment and order of the lower appellate Court reveals that the said issue was decided against the defendant-respondent No.1 though the appeal was allowed in its favour. The defendant-respondent No.1 has not preferred any cross objections against the finding on the above aspect. I have also perused the agreement. It does not contain any such arbitration clause. The respondent No.1 who complains of the breach of contract has itself not invoked the arbitration clause, if any, and has straight away proceeded to forfeit the security without waiting for a finding of any competent authority about the breach being committed and the party responsible for such a breach of contract. Therefore, the above submission is without substance.

16. In the result, the appeal succeeds and is allowed. The judgment and order dated 8.11.2005 of the lower appellate court dated passed in Civil Appeal No. 148 of 2003 (Central Dairy Farms, Uttar Pradesh, Pashudhan Uddyog Nigam Ltd. & another Vs. M/s Kamil and Brothers) is set aside and that of trial court dated 15.11.2003 passed in Original Suit No. 344 of 1987 (M/s Kamil and Brothers Vs. Central Dairy Farms, Uttar Pradesh, Pashudhan Uddyog Nigam Ltd. & another) is restored. No order as to costs. Appeal Allowed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.09.2007

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

First Appeal From Order No. 1030 of 2000

National Insurance Company ...Appellant
Versus
Bankey Bihari Lal & others ...Respondents

Counsel for the Appellant:
Sri V.K. Birla

Counsel for the Respondents:
Sri Shekhar Srivastava,
Sri Ramendra Ashthana,
Sri M.K. Chandel
Sri Rajeev Chaddha
Sri Anand Srivastava

(A) Motor Vehicle Act 1988-Section-166 (2)-Territorial jurisdiction of Court-accident took place at Nepal-Truck owner/Insurance company place of business at Gorakhpur-held-claim Tribunal at Gorakhpur has jurisdiction.

Held: Para 4

On the basis of said sub-section either of the places as aforesaid i.e. appropriate place of accident at Nepal, appropriate place of residence/carrying on business of the claimants at Agra, Uttar Pradesh or appropriate place of residence/carrying on business of the respondents i.e. owner of the truck and/or Insurance Company at Gorakhpur, Uttar Pradesh, the respondents under the claim petition, are the appropriate places for hearing of the claim petition. Since the claim petition has been filed in the jurisdiction of Gorakhpur, we hold that the Tribunal at Gorakhpur had the jurisdiction to entertain, try and determine the claim petition of the claimants.

(B) Motor Vehicle Act, 1988-Section 166 (3)-Limitation for claim petition admittedly when accident took place amended provision not in existence-period of 6 months or 12 months on sufficient cause shown- No retrospective application- held- even after 3 years can be filed

Held: Para 7

Therefore, between the date of the accident and the date of filing application, if the law repealed, the effect will be made applicable to the application as if the law was not existing on that date. Hence, we hold and say that the application is squarely covered by the amended Act.

(C) Motor Vehicle Act. 1988 Section 163-A- Multiplier- age of claimants as well as of the deceased are material factor- the age of deceased 22 years- and of the claimants 55- 60 years- held- 8 multiplier- proper and just- Second schedule applicable

Held: Para 8 & 9

Therefore, at the time of award in the year 2000, their ages may not cross 60 years. Against this background multiplier of 8 was applied taking into account the ages of the parents roughly about 60 years alongwith the age of the deceased as 22 years, having cumulative effect.

We find from the Second Schedule under Section 163-A of the Act, 1988 that multiplier of 8 will be applicable in the case of the ages between 55-60 years when multiplier of 5 will be applicable in case of ages between 60-65 years and above also. Therefore, we do not find any ambiguity in applying multiplier of 8. We also find that multiplier of 17 will be applicable in case of age between 20-25 years.

Case law discussed:
AIR 1966 SC 2155, 1966(4) SCC 652, 1996(2) TAC 324, 1994(2) SCC 176, 1996 ACJ 831, 2003(2) SCC 274

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

1. This appeal has been preferred by the appellant-Insurance Company against a judgement and award passed by the learned Judge, Motor Accidents Claims Tribunal, Gorakhpur on 20th April, 2000, under a claim petition filed under Section 166 of the Motor Vehicles Act, 1988 (hereinafter referred to as the 'Act', 1988). Against the same judgment and award cross objection no. 121257 of 2002 has also been filed. Therefore, both are being decided by this common judgment.

2. The deceased died in a road accident at Nepal on 13th August, 1992. He was unmarried at that time. He left behind his parents and brother. A claim petition was filed by his parents before the Tribunal at Gorakhpur in 1995. The claim petition became successful. A sum of Rs.7,70,000/- was awarded by the Tribunal in favour of the claimants. Liability of the owner and Insurance Company for payment of compensation was made joint and several. Award of interest was also allowed at the rate of 12% per annum from the date of presentation of the claim petition till the actual date of payment. The share of compensation in favour of the claimants i.e. father and mother was made equal. Five issues were framed thereunder which are as follows:

"1. Whether this court had jurisdiction to try this claim petition for the accident alleged to have taken place within territory of Nepal in view of para-9 of the claim petition?
2. Whether the accident in question had occurred on 13.8.92 near Narayn Ghat Nepal due to rash and negligent driving of Maruti Van No. DL-4CB-1679 by its driver stated to be dead resulting into the death of Ashish Bansal ? If so its effect?
3. Whether the claimants are entitled to get any amount of compensation? If so what is the reasonable amount of compensation and who amongst the O.Ps. are liable to pay ?
4. Whether there was valid and effective insurance of this Maruti Van No. DL-4CB-1679 on the date and time of accident? If so its effect ?
5. Whether the driver of Maruti Van No. DL-4CB- 1679 in question had valid and effective driving licence on the date and time of accident? If so its effect?"

3. Issue no.1 is related to the question of jurisdiction. We have gone through Section 166(2) of the Act, 1988 for considering such question which is as follows:

"Every application under sub-section (1) shall be made, at the option of the claimant, either to the Claims Tribunal having jurisdiction over the area in which the accident occurred or to the Claims Tribunal within the local limits of whose jurisdiction the claimant resides or carries on business or within the local limits of whose jurisdiction the defendant resides, and shall be in such form and contain such particulars as may be prescribed."

4. On the basis of said sub-section either of the places as aforesaid i.e. appropriate place of accident at Nepal, appropriate place of residence/carrying on business of the claimants at Agra, Uttar Pradesh or appropriate place of residence/carrying on business of the respondents i.e. owner of the truck and/or Insurance Company at Gorakhpur, Uttar Pradesh, the respondents under the claim petition, are the appropriate places for

hearing of the claim petition. Since the claim petition has been filed in the jurisdiction of Gorakhpur, we hold that the Tribunal at Gorakhpur had the jurisdiction to entertain, try and determine the claim petition of the claimants.

5. Secondly, in the memorandum of appeal a specific point is taken by the appellant that when the accident took place, Section 166 of the Act, 1988 was not amended, therefore, by virtue of unamended Section 166(3) of the Act, 1988, no application could lie unless it is made within a period of six months from the date of occurrence of the accident. However, the Tribunal may entertain the application after the expiry of such period but not later than twelve months, if it is satisfied that the applicant was prevented by sufficient cause from making the application in time. In the instant case the accident took place on 13th August, 1992. The claim petition was filed in the year 1995. But prior to the date of filing of such petition, sub-section (3) of Section 166 of the Act, 1988 was repealed with effect from 14th November, 1994. Therefore, the claimant can not get the benefit of repealed provision which reads as under:

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

6. According to us, ratio of the judgment reported in **AIR 1996 SC 2155 = 1996 (4) SCC 652 = 1996 (2) TAC 324 (SC) (Dhannalal Vs. Vijayvargiya and others)** is pat on the point. Relevant portion is quoted hereunder:

"7. In this background, now it has to be examined as to what is the effect of omission of sub-section (3) of Section 166 of the Act. From the Amending Act it does not appear that the said sub- section (3) has been deleted retrospectively. But at the same time, there is nothing in the Amending Act to show that benefit of deletion of sub-section (3) of Section 166 is not be extended to pending claim petitions where a plea of limitation has been raised. The effect of deletion of sub-section (3) from Section 166 of the Act can be tested by an illustration. Suppose an accident had taken place two years before 14-11-1994, when sub-section (3) was omitted from Section 166. For one reason or the other no claim petition had been filed by the victim or the heirs of the victim till 14-11-1994. Can a claim petition be not filed after 14-11-1994, in respect of such accident? Whether a claim petition filed after 14-11-1994 can be rejected by the Tribunal on the ground of limitation saying that the period of twelve months which had been prescribed when sub-section (3) of Section 166, was in force having expired the right to prefer the claim petition had been extinguished and shall not be revived after deletion of sub-section (3) of Section 166 w.e.f. 14-11-1994? According to us, the answer should be in negative. **When sub-section(3) of Section 166 has been omitted, then the Tribunal has to entertain a claim petition without taking note of the date on which such accident had taken place. The claim**

petitions cannot be thrown out on the ground that such claim petitions were barred by time when sub-section (3) of Section 166 was in force."

7. It is to be remembered that when an enactment would prejudicially affect vested rights, the Rule against retrospective operation applies. Filing of a claim petition by the claimant is the vested right under the Motor Vehicles Act i.e. a social piece of legislation. Intention of the legislature is to liberalise the Act to give more benefit to the claimants. Therefore, such liberalised Act should not be put as leaver to nullity vested right of the claimant. Precisely the Act relates to claim not relates to occurrence of accident. Therefore, right accrues not on the date of occurrence but on the date when the lis commences. Therefore, between the date of the accident and the date of filing application, if the law repealed, the effect will be made applicable to the application as if the law was not existing on that date. Hence, we hold and say that the application is squarely covered by the amended Act.

8. Now the third question, as raised by the appellant, is wrong application of multiplier in calculating the appropriate amount of compensation. We have gone through the judgment carefully. According to us, the applicability of multiplier has been thoroughly considered by the Tribunal to arrive at just compensation under Section 166 of the Act, 1988. Deceased was survived by the parents as he died unmarried at the age of 22 years. No denial or rebuttal on the part of the Insurance Company is available in respect of the age of the deceased. Deceased was carrying on business with his father and paying income tax. Parental ages are not backed by any age verification certificate. Brother of the deceased deposed that the age of the mother is 62-63 years or 64 years. However, in the claim petition filed by the father and mother of the deceased on 3rd July, 1995, describing their ages as 53 years and 50 years respectively. Therefore, at the time of award in the year 2000, their ages may not cross 60 years. Against this background multiplier of 8 was applied taking into account the ages of the parents roughly about 60 years alongwith the age of the deceased as 22 years, having cumulative effect.

9. We find from the Second Schedule under Section 163-A of the Act, 1988 that multiplier of 8 will be applicable in the case of the ages between 55-60 years when multiplier of 5 will be applicable in case of ages between 60-65 years and above also. Therefore, we do not find any ambiguity in applying multiplier of 8. We also find that multiplier of 17 will be applicable in case of age between 20-25 years. To justify the cause, the Tribunal relied upon two very important judgments reported in **(1994) 2 SCC 176 (General Manager, Kerala State Road Transport Corporation, Trivandrum Vs. Susamma Thomas (Mrs.) and others)** and in **1996 ACJ 831 (U.P.State Road Transport Corporation and others Vs. Trilok Chandra and others)**. We have gone through both the judgments. In both the judgments the deceased was married. However, the discussion is about the applicability of multiplier method. In paragraph 13 of the judgement in Re: Susamma Thomas (Supra) the Supreme Court held that the multiplier method involves the ascertainment of the loss of dependency or the multiplicand having

regard to the circumstances of the case and capitalizing the multiplicand by an appropriate multiplier. The choice of the multiplier is determined by the age of the deceased (or that of the claimants whichever is higher) and by the calculation as to what capital sum, if invested at a rate of interest appropriate to a stable economy, would yield the multiplicand by way of annual interest. In ascertaining this, regard should also be had to the fact that ultimately the capital sum should also be consumed-up over the period for which the dependency is expected to last. Making reference to the above judgment, three Judges' Bench of the Supreme Court in Re: **Trilok Chandra (Supra)** held that there should be maximum multiplier upto 18 and not 16. However, it was also held that since there are several mistakes in multiplication in the aforesaid Second Schedule, neither the Tribunals nor the Courts can go by it as ready reckoner. It can only be used as a guide. **Besides, the selection of multiplier can not in all cases be solely dependent on the age of the deceased. For example**, if the deceased **a bachelor**, dies at the age of 45 years and **his dependents are his parents, age of the parents** would **also** be relevant in the choice of multiplier.

10. Therefore, the argument as put forth by appellant-Insurance Company before this Court that in the case of death of bachelor, only the age of the parents will be considered is not a sound submission. The word "also" as in the aforesaid three Judges' judgment of the Supreme Court denotes that both the ages of the deceased and the parents even in the case of bachelor ought to be taken into account. Moreover, multiplier method as under the Second Schedule of the Statute which relates to the age of victim can not be ignored by interpretation. Hence, the calculation of the Tribunal to ascertain compensation by adopting multiplier method giving cumulative effect of both the ages of the deceased and parents is not at all wrongful application. Determination has to be rational with judicious approach. Therefore, the Court has weighed such rationality on the basis of the available materials to arrive at "just" compensation and found justiciable.

11. We also find from the record that the claimants have filed a cross objection to the appeal on 21st July, 2002 i.e. after a period of two years from the date of filing the appeal by the Insurance Company contending mainly that the application of multiplier in awarding compensation should have been between 20-25 because while working out annual dependency of the claimants, relevant factor to be taken into consideration is age of the dependants at the time of death in accident. Moreover, total income of the deceased at the time of accident and enhancement of income from time to time, future inflation and other factors in carrying out business with his father are to be taken into account by the Tribunal. Although a point is involved herein about recovery of certain amount by the claimants in a proceeding under Workmen's Compensation Act and such point was taken by both the parties in their respective statements but nobody insisted for hearing on such point. Therefore, we ignore the same only keeping in mind such admitted factum that the claimants have realised certain amount of compensation apart from the awarded amount hereunder.

12. The claimants, relying upon three Judges' Bench judgment of the Supreme Court reported in **(2003) 2 SCC 274 (Nagappa Vs. Gurudayal Singh and others)** contended before this Court that compensation to a victim of a motor vehicle accident or in case of a fatal accident to the legal representatives is awarded under two heads, namely, special damages--which are suffered by the victim or the legal representatives and general damages--which include compensation for pain and sufferings, loss of amenities, earning capacity and prospective expenses including expenses for medical treatment. With regard to the first part of the damages, that is, special damages suffered by the victim or the legal representative, it can be easily proved on the basis of the evidence which is in possession of the claimant. However, with regard to the second part--general damages/compensation, it would be a matter of conjectures depending on the number of imponderables. While calculating such damages, the Tribunal/court is required to have some guesswork taking into account the inflation factor. Even if it is found later that the damage suffered was much greater than was originally supposed, no further action could be brought. It is well settled Rule of law that damages resulting from one and the same cause of action must be assessed and recovered once and for all. Two actions, therefore, will lie against the same party for personal injury sustained in the same accident.

13. However, the appellant-Insurance Company objected to the cross-objection taking a plea that as per Order 41 Rule 22 of the Code of Civil Procedure cross-objection can not be filed after a period of two years of initiation of the proceeding and notice upon it.

14. According to us, Motor Accidents Claims Tribunal is not the "Court" under Section 3 of the Code of Civil Procedure but when a Judge of such Court sits as a Judge of Tribunal he follows the principles laid down under such Code. For the said reason under Section 195 of the Act, 1988 a provision has been made. Above all, it is an impractical approach to entertain a cross-objection only for enhancement of the claim amount of the claimants after a period of two years from the date of filing the appeal when the same is not backed by any cogent reason other than reiteration of facts. Even thereafter if we go by the factual background, we find that the claimants admittedly were compensated even before the compensation was granted by the Tribunal. Hence, even without going into the controversy of granting compensation twice we can construe that the claimants' intention is not encouragable.

15. Thus, in totality neither the appeal nor the cross-objection succeeds. Therefore, both are dismissed on contest without imposing any cost.

Interim order, if any, stands vacated.

16. However, prayer of the appellant- Insurance Company about remittance of the statutory deposit of Rs.25,000/- for the purpose of adjustment with the claim of the claimants stands allowed having incidental effect.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.08.2007

BEFORE
THE HON'BLE R.C. DEEPAK, J.
THE HON'BLE VIJAY KUMAR VERMA, J.

Government Appeal No. 1874 of 2003

State of U.P. ...Appellant
Versus
Suraj Pal & others...Respondents-accused.

Counsel for the Appellant:
Sri Jagdish Tewari
Sri P.S. Pundir
A.G.A.

Counsel for the Opposite Parties:
Sri Manish Tiwari
Sri Ashwini Awasthi

Criminal Appeal-scope of interference by the appellate Court-against acquittal-offence under Section 302 IPC-findings recorded by Trail Court based on proper appreciation of evidence-considering the opinion of Doctor the injury caused by Rifles, Pistol or revolver-prosecution story about commission of murder by firing from cartridge gun-held-doubtful-considering recient view of Apex Court. No Scope for interference made out.

Held: Para 18

Therefore, Keeping in view aforesaid observations made by Hon'ble Apex Court, there is no scope to make any interference in the impugned judgment, because as mentioned earlier also, the findings of acquittal recorded by the learned Trial Court which are based on proper appreciation of the evidence, are neither perverse nor against the evidence.

Case law discussed:
2002 (10) SCC-461
2007 (57) ACC-959

(Delivered by Hon'ble Vijay Kumar Verma, J.)

1. This government appeal after seeking leave of Court has been preferred against the judgment and order dated 11.01.2000, passed by Sri B.L. Pandey, the then Additional Sessions Judge/ Spl. Judge (E.C. Act) Banda, in S.T. No. 236 of 1991 and connected S.T. No. 59 of 1992, whereby the respondents-accused Suraj Pal, Nawal Kishore, Bakshraj and Ram Kishore have been acquitted of the offence punishable under section 302 read with section 34 IPC in Case Crime No. 93/91 of Police Station Baberu, District Banda.

2. The incident resulting in the death of Sukhram Singh, brother of the complainant Ghanshyam Singh Chauhan is said to have occurred on 22.04.1991 at about 5.45 p.m. in Kasba Baberu. First information report was lodged by the complainant Ghanshyam Singh Chauhan S/o Indrajeet Singh, r/o Kasba and P.S. Baberu, District Banda. The case of the prosecution as per FIR (Ext. Ka 13), in brief, is that on 22.04.1991 at about 5.45 p.m., when the complainant, his mother Sunder Devi and his uncle Lal Singh were sitting on the door of their house and his elder brother Sukhram Singh was standing near the shop adjacent to the door of the house, the accused Ram Kishore and Nawal Kishore both sons of Shiv Balak armed with double and single barrel guns respectively, Suraj Pal S/o Laxmi Narayan armed with single barrel gun (all residents of kasba Baberu) and Bukshraj son of unknown r/o village Banthari, P.S. Kamasin, District Banda, armed with single barrel gun came there and abusing and saying that you have got the case registered against them, began to fire from their weapons. Sukhram Singh

sustained serious injuries, who fell down there and died instantaneously. The complainant and other persons managed to enter in the house and saved themselves. While making fire, the accused Nawal Kishore was terrorising and threatening the people that if anybody will come near, he also will be killed. Due to this incident, terror was caused in kasba and nearby shops were closed and people began to run towards their houses. After committing murder of Sukhram, the accused-respondents fled away towards village Kachendu. Leaving the dead body of Sukhram at the place of incident, the complainant went to police station Baberu and handed over written report (Ext. Ka 1), which he himself had scribed. On the basis of this report, P.W. 7 Ram Manohar Singh prepared chik FIR (Ext. Ka 13) and registered a case under section 302 IPC at Crime No. 93/91 against the respondents-accused on 22.04.91 at 6.50 p.m. and made entry in G.D. No.41 (Ext. Ka 14).

3. The investigation was entrusted to S.I. Babu Singh Sachan P.W. 6, who went to the place of occurrence along with police and PAC personnel and made search of the accused. Since there was low voltage, inquest proceeding on the dead body could not be conducted in night and next day i.e. 23.04.1991 inquest proceeding was conducted by S.I. Babu Singh, during which inquest report (Ext. Ka 3) and connected papers (Ext. Ka 5 to Ext. Ka 8) were prepared and thereafter, the dead body was sent in sealed condition through constable Mahipat Singh (P.W. 5) for post mortem examination, which was conducted by Dr. Sharif Alam (P.W.3). According to the post mortem report (Ext. Ka 2), the following ante mortem injuries were found on the person of deceased:-

1. Fire arm wound of entrance 5 cm. x 4 cm. x chest cavity deep situated on sternal area 6 cm. below to sternal notch. No blackening & scorching present in area 1 cm. around the wound. Margins inverted & irregular. Wound is directed inward upward toward left axilla & continue as.
2. Fire arm wound of exit 5 cm. x 5 cm. x chest cavity deep (communicating with Injury No.1 margin everted) situated on left side of upper of lateral side of chest 2 cm. behind the anterior axillary fold.
   Direction:- Injury No. (1) direct towards left axilla, Inward & upward communicating with Injury No. (2).
3. Fire arm wound of enterance 1.5 cm. x 1.5 cm. x chest cavity deep, on left lateral side of chest in 6th intercostal space 8 cm. lateral to left nipple Margins inverted, directed towards right lateral side of chest & continue as.
4. Fire arm wound of exit 2.00 cm. x 1.5 cm. x chest cavity deep on right lateral side of chest in 11th intercostal space. Margins enverted.
   Direction:- Fire arm wound of enterance No.(3) direct from left to right slight backward & downward towards Injury NO. (4).
5. Fire arm wound of enterance 1 cm. x 1cm. On middle of anterior aspect of left arm 7 cm. above the left elbow joint, muscle deep passing through & through as.
6. Fire arm wound of exit 1.5 cm. x 1.5 cm. x muscle deep through & through communicating with injury no. 5, situated on middle of back of left arm 7 cm. above the elbow joint.
   Direction:- Injury No. 5 firearm wound is directed straight backward forward Injury No. (5).

In internal examination, fractures of body of sternum, left 2nd rib (laterally) and right 11th rib (laterally) were found. Pleura was ruptured. Larynx, Trachea & Bronchi were congested. Lower lobe of right lung as well as middle and upper lobe of left lung were lacerated. Pericardium was ruptured aortic arch was also ruptured. Semi digested rice and pieces of dal about 400 gm. were found in the stomach. Pasty food & gasses were found present in small intestine whereas faeces & faecal material was found in large intestine. Right lobe of liver was ruptured. Spleen and Kidneys were congested.

According to Dr. Alam, death was caused about one day ago due to internal hemorrhage and shock as a result of ante mortem fire arm injuries.

4. During investigation, S.I. Babu Singh Sachan recorded the statement of complainant and prepared site plan (Ext. Ka 9) after making spot inspection. Rest investigation was carried out by S.S.I. Satya Narayan Singh, who after completing the investigation, submitted charge sheet Ext. Ka 11 against the accused Suraj Pal, Naval Kishore and Bakshraj. S.I. Hari Shankar Singh conducted further investigation against the accused Ram Kishore and submitted charge sheet Ext. Ka 12 against him on 20.10.1991.

5. On the case being committed to the court of session for trial, charge under section 302 read with section 34 IPC was framed against all the four accused-respondents, to which they pleaded not guilty and claimed to be tried.

6. The prosecution in order to prove its case has examined seven witnesses in all. P.W. 1 Ghanshyam is the complainant and eye witness also. He has proved written report (Ext. Ka 1) in his statement recorded on 12.10.1992. P.W. 2 Lal Singh is also said to be the eye witness. P.W. 3 Dr. Sarif Alam had conducted autopsy on the dead body of deceased Sukhram Singh on 23.04.1991 at 4.05 p.m. P.W. 4 S.I. Nand Kishore had gone to the place of incident along with S.I. Babu Singh Sachan and other police personnel on getting information regarding murder of Sukhram. P.W. 5 Mahipat Singh is the dead body carrier. P.W. 6 S.I. Babu Singh Sachan is the first investigating officer. He has proved inquest report Ext. Ka 3 and other documents Ext. Ka 4 to 12, which have been mentioned above. P.W. 7 constable Ram Manohar Singh is the scribe of chik FIR Ext. Ka 13, which has been proved by him along with copy of GD No. 41 (Ext. Ka 14).

7. In their statements recorded under section 313 Cr.P.C., the accused-respondents have denied their participation in the alleged incident and they have stated that due to enmity, they have been falsely implicated in this case.

8. The respondents-accused have not examined any witness in defence, but they have filed some documentary evidence to show the enmity between the parties.

9. The learned Trial Court after taking entire evidence into consideration, acquitted the accused-respondents vide impugned judgment, which has been challenged in this appeal by the state of U.P.

10. We have heard Sri P.S. Pundhir learned AGA for the state-appellant, Sri A.K. Awasthi learned counsel for the respondents-accused and perused entire evidence including impugned judgment carefully.

11. Assailing the impugned judgment, it was vehemently contended by learned AGA that on the basis of the testimony of the eye witnesses Ghanshyam and Lal Singh, which is corroborated by medical evidence, it is fully proved that murder of Sukhram Singh was committed by the accused-respondents on the alleged date, time and place, but the learned Trial Court did not properly appreciate the evidence and on the basis of surmises and conjectures, acquitted the accused-respondents recording unjustified, perverse and unreasonable findings and hence after setting aside the impugned judgment, the accused-respondents should be convicted of the offence with which they have been charged.

12. On the other hand, it was submitted by the learned counsel for the accused-respondents that there is no scope to make any interference in the impugned judgment by this Court, because findings of acquittal recorded by the learned Trial Court are neither perverse nor against the evidence. It was further submitted that murder of Sukhram Singh was committed by some unknown persons in some other manner and at some other time and place and on getting information, the police carried his dead body to police station Baberu, where it was kept in the night and next day due to previous enmity between the parties false FIR was lodged against the accused-respondents showing it to be lodged on 22.04.91. Next submission made by learned counsel for the accused-respondents was that medical evidence is not supporting oral evidence in this case.

13. Having giving our thoughtful consideration to the rival contentions of the learned counsel for the parties, we are of the considered opinion that prosecution has failed to bring home the guilt to the accused-respondents and interference by this Court in the impugned judgment is not warranted.

14. Murder of deceased Sukhram is said to have been committed on 22.04.1991 at about 5.45 p.m. This time of murder is falsified by the post mortem report (Ext. Ka 2). According to this report, about 400 gm. Semi digested rice and pieces of dal were found in the stomach of the deceased at the time of post mortem examination. Dr. Sharif Alam, who conducted post mortem examination on dead body, has stated that the death of deceased might have been caused within two hours after taking meal. This opinion of Dr. Alam is based on availability of semi digested rice and dal in the stomach of deceased. P.W. 1 Ghanshyam has stated in his statement that on the day of occurrence, he and the deceased Sukhram had taken their meal before noon and thereafter, Sukhram had slept. It is also stated by this witness that prior to the incident neither Sukhram nor he or his mother and Lal Singh had taken tea. From this statement of P.W.1 Ghanshyam, this fact is born out that after taking lunch before noon on the day of occurrence, the deceased had not eaten any food till his death. If this statement of Ghanshyam is believed, then murder of Sukhram Singh might have been committed much earlier from the time of incident mentioned in the FIR, because

the food of any nature is almost completely digested within about six hours from taking meal. If the deceased had not eaten any food after taking his lunch before noon on the day of occurrence, then his stomach must have been found empty at about 5.45 p.m., but as mentioned above, semi digested rice and pieces of dal about 400 gm. were found in his stomach at the time of post mortem examination. It is not disputed that it is a case of instantaneous death. As such the time of incident as mentioned in the FIR and told by the witnesses Ghanshyam and Lal Singh becomes doubtful. The finding recorded by the learned Trial Court on this point is most reasonable. On the basis of aforesaid discussion, murder of Sukhram Singh appears to have been committed two or three hours after his taking dinner, in which rice and dal was taken. Therefore, the story of the prosecution regarding murder of deceased at about 5.45 p.m. is extremely doubtful.

15. It was submitted by learned counsel for the accused-respondents that on getting information about the murder of Sukhram Singh, the police of P.S. Baberu had carried his dead body to the police station, because by that time the name of assailants were not known and next day i.e. 23.04.1991 after lodging FIR, inquest proceeding was conducted at P.S. Baberu and from there the dead body was sent to mortuary Banda for post mortem examination and hence on this ground also, the story of the prosecution becomes doubtful. This submission also has got force. Although the witness Babu Singh Sachan (P.W.6) has stated that inquest proceeding on the dead body was conducted on 23.04.1991 in the morning at the place of incident, but this statement is falsified by the complainant Ghanshyam (P.W.1), who has stated that dead body of his brother Sukhram Singh was carried by the police at about 7-8 p.m. to the police station and they also had gone with the dead body to P.S. Baberu, but he had come back before mid night and on the next day in the morning, he again went to the police station, where his statement was recorded and at about 12.00 O'clock, he departed from police station to Banda with the dead body. There is no reason to disbelieve this statement of P.W.1 Ghanshyam and on the basis of his testimony, this fact is fully established beyond doubt that on getting information about the murder of Sukhram Singh, the police had carried his dead body to police station Baberu, where it was kept in the night and after holding inquest proceeding next day, the dead body was sent from police station direct to mortuary Banda at about 12.00 noon. On the basis of the statement of P.W.1 Ghanshyam, the place of holding inquest proceeding on the dead body as mentioned in the inquest report Ext. Ka 3 becomes false.

16. According to the witness Ghanshyam, the accused are said to have fired 25 shots, but even a single pellet or bullet or any incriminating article was not found on the place of occurrence, which makes the place of incident doubtful.

17. According to prosecution case, the accused Ram Kishore is said to be armed with double barrel cartridge gun, whereas other accused are said to be armed with single barrel cartridge guns. Dr. Sharif Alam, who had conducted post mortem examination has opined that keeping in view the size of ante mortem injuries no. 3 and 5, it can be said with

certainty that there is more possibility of causing injuries no. 3 and 5 by means of rifle, pistol or revolver. It is specifically stated by Dr. Alam that cartridges, which were used in causing ante mortem injuries no. 3 and 5, might not have contained pellets. On the basis of this statement of Dr. Alam, the story of prosecution about commission of murder by firing from cartridge guns becomes doubtful.

18. On the basis of aforesaid discussion, we come to the conclusion that the prosecution has not succeeded to prove its case beyond reasonable doubt. Hence, this Court will not be justified to make interference in the impugned judgment. The Hon'ble Apex Court in the case of ***Bhim Singh vs. State of Haryana 2002 (10) SCC 461*** has held that:-

"Before concluding, we would like to point out that this Court in a number of cases has held that an Appellate Court entertaining an appeal from the judgment of acquittal by the Trial Court though entitled to reappreciate the evidence and come to an independent conclusion, it should not do so as a matter of routine. In other words, if from the same set of evidence two views are possible and if the Trial Court has taken one view on the said evidence, unless the Appellate Court comes to the conclusion that the view taken by the Trial Court is either perverse or such that no reasonable person could come to that conclusion or that such a finding of the Trial Court is not based on any material on record, it should not merely because another conclusion is possible reverse the finding of the Trial Court."

In the case of **Kallu @ Masih and others vs. State of Madhya Pradesh 2007 (57) ACC 959** it is held by Hon'ble Apex Court that:-

"While deciding an appeal against acquittal, the power of the Appellate Court is no less than the power exercised while hearing appeals against conviction. In both types of appeals, the power exists to review the entire evidence. However, one significant difference is that an order of acquittal will not be interfered with, by an Appellate Court, where the judgment of the Trial Court is based on evidence and the view taken is reasonable and plausible. It will not reverse the decision of the Trial Court merely because a different view is possible. The Appellate Court will also bear in mind that there is a presumption of innocence in favour of the accused and the accused is entitled to get the benefit of any doubt. Further if it decides to interfere, it should assign reasons for differing with the decision of the Trial Court.

Therefore, Keeping in view aforesaid observations made by Hon'ble Apex Court, there is no scope to make any interference in the impugned judgment, because as mentioned earlier also, the findings of acquittal recorded by the learned Trial Court which are based on proper appreciation of the evidence, are neither perverse nor against the evidence.

19. In the result, this government appeal lacks merit and is hereby dismissed. The respondents-accused are on bail. Their personal bonds and surety bonds of the sureties are cancelled and the sureties are discharged.

The Office is directed to return Trial Court record expeditiously along with a

copy of this judgment. Govt. Appeal Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.07.2007

BEFORE
THE HON'BLE RAKESH TIWARI, J.

Civil Misc. Writ Petition No. 2174 of 1997

Sunil Kumar Srivastava and another ...Petitioners
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioners:
Sri Sharad Kumar Srivastava

Counsel for the Respondents:
Sri C.K. Parekh

U.P. Nagar Mahapalika Sewa Niymawali 1962 readwith U.P. Nagar Mahapalika Service (Designations Scale of Pay, Qualifications, Conveyance Allowance and Method of Recruitment) Order 1963-Section-106 (2), 109-Termination of Apprentice vaccinator-appointment made without following the procedure-being nor or relative of ex-employee of Mahapalika-by the authority not competent to appoint-continuation in service on the strength of interim order passed by Court-termination-held-proper.

Held: Para 24

It is apparent that the power of appointment at the relevant time vested in the State Government and the petitioners could not have been appointed by the Nagar Swasthaya Adhikari under Section 107 (5) of the Adhiniyam since the post of Vaccinator was carrying initial salary of Rs. 315/- in 1984 and Rs.325/- in 1988. Their appointment was therefore not only in contravention of the Adhiniyam but also of the G.O. dated 30.12.1981. The selection/appointment of the petitioners was also not in conformity with the statutory powers under the U.P. Nagar Mahapalika Sewa Niyamawali, 1962 read with Clause 5 of the U.P. Nagar Mahapalika Service (Designations, Scales of Pay, Qualifications, Conveyance Allowances and Method of Recruitment) Order, 1963, Section 106 (2) and Section 109 of the Adhiniyam. Options had been sought from the old employees of the Nagar Nigam for absorption in the new cadre of the scheme but the petitioners did not join under the scheme formulated by the State Government. The Nagar Nigam did not have any power to create the post and in the circumstances the petitioners had no legal right to be appointed on a post which did not exist.

Case law discussed:
1994 (2) ACJ-781 (DB)
1996 (2) AWC-927 (DB)
1995 (2) LBESR-752 (DB)
1996 (1) LBESR-677
2006 (4) SCC-1
2007 (1) SCC-577

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

1. Heard Sri Sharad Kumar Srivastava for the petitioners and Sri C. K. Parekh for the respondents.

2. By means of this writ petition the petitioners have prayed for a writ of certiorari quashing the order dated 6.1.1997 passed by the Up Nagar Adhikari, Nagar Nigam, Varanasi, respondent no. 4 besides a writ of mandamus commanding the respondents to allow them to work upon their respective posts and to pay their salary regularly month to month.

3. The facts of the case, in brief, are that petitioner no. 1 was appointed as Paid Apprentice Vaccinator on 18.12.1984 for

three months which was extended twice and thereafter he was appointed on ad-hoc basis w.e.f. 3.10.1985 with the approval of the Administrator. One of the conditions of his appointment was that his services may be terminated at any time without prior notice. Thereafter on the basis of recommendations of Selection Committee he was promoted on the post of Vaccinator on ad-hoc basis w.e.f. 24.3.1988.

4. Petitioner no. 2 was appointed as Paid Apprentice Vaccinator on 24.3.1988 by the District Health Officer, Nagar Nigam, Varanasi on ad-hoc basis on the basis of recommendations of selection committee constituted by the Administrator. He was promoted to the post of Vaccinator by order-dated 23.5.1988 and in his place one Shashi Kant Sharma was appointed as Paid Apprentice Vaccinator.

5. The petitioners were terminated from service vide order dated 6.1.1997 in pursuance of the order of Mukhya Nagar Adhikari dated 28.12.1996 allegedly without prior notice and opportunity of hearing.

6. The grievance of the petitioners, inter alia, is that despite being appointed against substantive post of Vaccinator they have been terminated without any notice or affording any opportunity and that the order has been passed by an authority below in rank of the appointing authority.

While granting time to file counter affidavit and rejoinder affidavit the Court granted interim order dated 3.2.1997 staying the operation of the impugned order dated 6.1.1997.

7. In para 3 and 4 of the counter affidavit filed by Nagar Nigam, Varanasi it is averred that Nagar Nigam/Nagar Mahapalika does not act independently in the matter of creation or abolition of posts and for payment of salary thereon under the U.P. Nagar Mahapalika Sewa Niyamawali, 1962 read with the U.P. Nagar Mahapalika Service (Designation, Scales of Pay, Qualifications, Conveyance Allowance and Method of Recruitment) Order, 1963. In para 6 of the aforesaid counter affidavit it is averred that Section 107 (3) gives power to the Mukhya Nagar Adhikari alone to make appointment after recommendation of Selection Committee constituted by the Mukhya Nagar Adhikari, Mukhya Nagar Lekhaparikshak and Head of the Department concerned as existed before 1994. The Head of the Department concerned has power to make appointments on only the posts carrying an initial salary of not more than Rs.180/- per mensem. In 1984 the petitioners carried initial salary of Rs.315/- and in 1988 Rs.325/- per mensem. Thus, Nagar Swasthya Adhikari as Head of the Department had no power to appoint the petitioners under Section 107 (5) of the U.P. Municipal Corporations Adhiniyam, 1959 (hereinafter referred to as the Adhiniyam) on the relevant date. It is further averred that till 1989 there were no election, hence Nagar Mahapalika was not elected and constituted, as such the Administrator exercised all the powers of appointment. By G.O. dated 10.3.1978 the State Government specifically directed that the selection committee for the posts carrying initial pay of Rs.200/- per month must consist Administrator along with two other officers and that under Section 108 of the Adhiniyam the maximum period provided of temporary appointments was one year only.

8. In paragraph 7 of the counter affidavit it is further averred that under the U.P. Nagar Mahapalika Sewa Niyamawali, 1962 the appointment can only be made by Mukhya Nagar Adhikari himself for which list of vacancies is to be prepared first. Rule 19 of the Rules gives power to Mukhya Nagar Adhikari alone to make appointment in accordance with the recommendation of the selection committee and Rules 17 to 21 give power to make regular selection.

9. In paragraph 8 of the counter affidavit it is averred that in accordance with Government Order dated 10.3.1978 the Administrator/Mukhya Nagar Adhikari is the appointing authority and not the Nagar Swasthya Adhikari and that the post of Vaccinator is dying cadre. For eradication of small pox the post of Vaccinators were created which came to an end in the year 1982; that these posts are now not continuing in Nagar Nigam, Varanasi and that under Government Order dated 11.3.1976 all medical service staff of the Nagar Nigam has been directed to work under Family Planning Scheme.

10. In paragraph 10 of the counter affidavit it is averred that Government Order dated 25.2.1983 appended as Annexure C.A. 6 to the counter affidavit clearly speaks about stopping of the work of vaccination from the year 1977 and the employees of Health Department were directed to be absorbed as Health Workers under the scheme known as Bahu Uddeshiyaa Karyakarta Yojana for rural area in the State service.

11. The contention of the learned counsel for the petitioners is that the impugned termination order dated 6.1.1997 has been passed in reference to Government Order dated 28.4.1984 which is not applicable to the petitioners, but to the Vaccinators of Health and Family Welfare Department of State of U.P. It is stated that the Vaccinators of State Health Department and Nagar Nigam, Varanasi were separate and the post of Vaccinators and Paid Apprentice Vaccinators of Nagar Nigam, Varanasi were not of dying cadre as has been stated by the respondents in the counter affidavit and that the fact is that the post of Vaccinators and Paid Apprentice Vaccinators in all the Mahapalikas (Now Nagar Nigams) were not only continuing upto the year 1990 but thereafter also as is also evident from Annexure R.A. 1 to the rejoinder affidavit.

12. It is urged that it has been wrongly stated in the counter affidavit that options were called from all the Vaccinators of Nagar Nigam, Varanasi to join as Swasthya Karyakarta as has been stated in the Government Order dated 28.4.1984 as no options were ever called from the Vaccinators working in Nagar Nigam to join as Swasthya Karyakarta. It is submitted in the counter affidavit that in pursuance of order dated 25.11.1989 passed by the Director, Medical Health and Family Welfare, Lucknow, the District Health Officer, Nagar Mahapalika, Varanasi passed an order dated 12.12.1989 designating all vaccinators as Ex-officio Deputy Registrars; that the respondents in the counter affidavit have not disclosed the fact that the Mukhya Nagar Adhikari by order dated 18.5.1996 had directed all the vaccinators including the petitioners to be posted in different wards for the work of registration of birth and death; that it is not denied in the counter affidavit that the

petitioners were appointed on substantive post and that their appointment was made by the selection committee and approved by the Administrator and that it is wrong to say that Swasthya Adhikari was not competent authority for appointing the petitioners as vaccinators. According to Section 107 (5) of U.P. Municipal Corporations Adhininiyam, 1959 the Nagar Swasthya Adhikari being head of the Health Department was entitled to make appointment of the petitioners on the pot of Vaccinators. It is further submitted that Nagar Swasthya Adhikaris are the officers of the Public Health Department of the State Government who are sent on deputation in the Nagar Nigams and that both the petitioners are aged about 50 years, hence and in case they are thrown out of job they and their family members will suffer a lot for no fault of theirs.

13. The learned counsel for the petitioners relied upon the decisions rendered in **Rajendra Prasad Srivastava Vs District Inspector of Schools, Gorakhpur**, 1994 (2) A.C.J. 781 (D.B.); **Kamal Kant Gautam & Others Vs District Registrar/Addl. District Magistrate (Finance & Revenue), Muzaffarnagar & Others**, 1996 (2) A.W.C. 927 (D.B.); **Sri Rakesh Chandra Mittal Vs State of U.P. & Others**, 1995 (2) LBESR 752 (D.B.); and **Rajendra Singh Yadav Vs Executive Officer, Nagar Palika, Firozabad & Others**, 1996 (1) LBESR 677.

14. In Rajendra Prasad Srivastava (supra) it has been held that even if initial appointment of an employee is bad due to some infirmity but if he has been allowed to work for some years and thereafter further under the stay order of the Court, it will be highly unfair to remove such employee.

15. In **Kamal Kant Gautam (supra)** it has been held that since the petitioner continued to work for about 11 years on the basis of interim order of the Court he must have become over-aged and may not be able to get service in other department particularly when there is nothing on record to show that the petitioner was also a party to the irregularities in the selection, it will not be fair to terminate the services of an employee who has put in more than 11 years and the employee is entitled to be regularised.

16. In **Rakesh Chandra Mittal (supra)** it is held that even if there is some irregularity in an appointment such irregularity may be ignored particularly when an employee has put in about 20 years of service.

17. In **Rajendra Singh Yadav (supra)** it has been held that even if an appointment is invalid being not made by competent authority specially when there is Government Order not to make appointment on the post, the employee should be given right to be heard before cancellation of the appointment.

18. Per contra, learned counsel for the respondents contends that Section 106 (2) and Section 109 of the Adhiniyam give power to the State Government alone and not to the Nagar Nigam in the matter of fixing qualifications, emoluments, conditions of services of the employees of Nagar Nigam. Since the petitioners claim to be appointed by Nagar Swasthya Adhikari on 18.12.1984 and 24.3.1988 respectively the provisions as existed on

the dates of their appointment and prior to amendment dated 30.5.1994 are relevant. The learned counsel firstly submits that Nagar Swasthya Adhikari had no power to appoint the petitioners for the following reasons: -

(a) Old Section 107 (3) (b) gave power to the Mukhya Nagar Adhikari (now Nagar Ayukta) alone to make appointments in respect of all servants on recommendation of Selection Committee consisting of the Mukhya Nagar Adhikari, Mukhya Nagar Lekha Parikshak and Head of the Department concerned.

(b) Prior to amendment dated 30.5.1994 the provision of Section 107 (5) (old) gave power of appointment to Head of the Department concerned in case the post carried an initial salary of not more than Rs.180/- per mensem. Thus, Nagar Swasthya Adhikari being Head of Department had no power to appoint the petitioners under Section 107(5) of the Adhiniyam as the post of Vaccinator on the date of appointments of the petitioners was carrying the initial salary of Rs.315/- in 1984 and Rs.325/- in the year 1988.

(c) The initial salary of the post of Paid Apprentice Vaccinator as on 13.6.1988 was Rs. 315/- per month as is evident from the Government Order dated 30.12.1981 appended as Annexure C.A. 3 to the counter affidavit. Admittedly the initial salary of petitioner no. 1 on 19.12.1984 was Rs.315/- per month. Similarly the initial salary of petitioner no. 2 on 24.3.1988 was Rs.315/- per month as Paid Apprentice and from 13.6.1988 it became Rs. 325/- per month which is the same as on date.

19. The second submission of the learned counsel for the respondents is that no selection was made as per the statutory provisions. The Nagar Nigam/Nagar Mahapalika cannot act at its own in the matter of creation or abolition of the posts and for the payment of salary thereon under the U.P. Nagar Mahapalika Sewa Niyamawali, 1962 read with U.P. Nagar Mahapalika Service (Designations, Scales of Pay, Qualifications, Conveyance Allowances and Method of Recruitment) Order, 1963. Clause 5 of the aforesaid order 1963 read with Section 106 does not give any power to Nagar Nigam to create posts, but the Nagar Nigam is to follow directions issued by the State Government. Clause 5 (1) is as under: -

"5 (1). No posts other than the posts mentioned in the Schedule shall be created by a Mahapalika under clause (vi) of Sub-Section (1) of Section 106 nor shall any existing post be combined with another post except with the prior sanction of the Government and on such terms and conditions as Government may specify in that behalf.

(2) Clause 5 (2) provides for taking of approval of State Government."

20. The next submission of the learned counsel for the respondents is that the post of Vaccinator is dying cadre. The pattern of the posts in Health Department is to be governed by the State Government under the direction issued from time to time by the Government of India. By order dated 28.4.1984 options were sought from old employees for absorption in new cadre of service and further direction was issued not to make any appointment on such posts and to cancel such appointments, if any. Another Government Order dated 6.7.1983 was

also issued and an option was given to 11 Vaccinators and one Paid Apprentice Vaccinator working in Nagar Nigam to join under the Scheme referred to above, but it appears that they did not join under the Scheme as a result of which Government Order dated 28.4.1984 was issued reiterating the ban imposed on making appointment on the posts covered under the Scheme including the post of Vaccinator. Under the Uttar Pradesh State Control over Public Corporation Act, 1975 read with the provisions of Sections 106, 107 , 108-A, 109, 112-A and 112 (3) of the U.P. Municipal Corporation Act the authorities of Corporation/Nagar Nigam shall be guided by directions issued on the questions of policies given by the State Government. The Government order of 1981, 1984 etc. in fact contained policy directions for the guidance of Nagar Mahapalika and its authorities.

21. The learned counsel for the respondents then submitted that the petitioners have available alternate remedy by filing appeal under Rules 35 and 36 of the U.P. Nagar Mahapalika Sewa Niyamawali, 1962.

In support of his contention the learned counsel for the respondents has relied upon the decisions rendered in State of Karnataka Vs Uma Devi, (2006) 4 S.C.C. 1; and State of M.P. Vs Lalit Kumar Verma; (2007) 1 S.C.C. 577.

In **State of Karnataka Vs Uma Devi (Supra)** it has been held: -

"The distinction between "irregular appointment" and "illegal appointment" is apparent. In the event the appointment is made in total disregard of the constitutional scheme as also the recruitment rules framed by the employer, which is a part of the "State" within the meaning of Article 12 of the Constitution, the recruitment would be an illegal one; whereas there may be cases where, although substantial compliance with the constitutional scheme as also the rules have been made, the appointment may be irregular in the sense that some provisions of some rules might not have been strictly adhered to."

In **State of M.P. Vs Lalit Kumar Verma (supra)**, it has been held that: -

"Adherence to the rule of equality in public employment is a basic feature of our Constitution and since the rule of law is the core of our Constitution, a court would certainly be disabled from passing an order upholding a violation of Article 14 or in ordering the overlooking of the need to comply with the acquirements of Article 14 read with Article 16 of the Constitution. Therefore, consistent with the scheme for public employment, this Court while laying down the law, has necessarily to hold that unless the appointment is in terms of the relevant rules and after a proper competition among qualified persons, the same would not confer any right on the appointee. If it is a contractual appointment, the appointment comes to an end at the end of the contract, if it were an engagement or appointment on daily wages or casual basis, the same would come to an end when it is discontinued. Similarly, a temporary employee could not claim to be made permanent on the expiry of his term of appointment. It has also to be clarified that merely because a temporary employee or a casual wage worker is continued for a time beyond the term of his appointment, he would not be entitled

to be absorbed in regular service or made permanent, merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant rules. It is not open to the court to prevent regular recruitment at the instance of temporary employees whose period of employment has come to an end or of ad hoc employees who by the very nature of their appointment do not acquire any right. High Courts acting under Article 226 of the Constitution of India, should not ordinarily issue directions for absorption, regularization, or permanent continuance unless the recruitment itself was made regularly and in terms of the constitutional scheme. Merely because, an employee had continued under cover of an order of court, which we have described as 'litigious employment' in the earlier part of the judgment, he would not be entitled to any right to be absorbed or made permanent in the service. In fact, in such cases, the High Court may not be justified in issuing interim directions, since, after all, if ultimately the employee approaching it is found entitled to relief, it may be possible for it to mould the relief in such a manner that ultimately no prejudice will be caused to him, whereas an interim direction to continue his employment would hold up the regular procedure for selection or impose on the State the burden of paying an employee who is really not required. The courts must be careful in ensuring that they do not interfere unduly with the economic arrangement of its affairs by the State or its instrumentalities or lend themselves the instruments to facilitate the bypassing of the constitutional and statutory mandates."

22. After giving my thoughtful consideration to the rival contentions, I am of the view that the decisions relied upon by the learned counsel for the petitioners are distinguishable and do not apply to the instant case.

23. In my opinion, the appointments of the petitioners are collusive and back door entry without following the procedure. As averred in paragraph 25 of the counter affidavit petitioner no. 1 is the son of Sri Vijay Bahadur Lal Srivastava, a retired vaccinator, and petitioner no. 2 is the nephew of Sri Kewal Prasad Dubey, Vaccinator Superintendent. It appears that the appointments of the petitioners were made to oblige the ex-employees for the reasons best known to the then District Health Officer, Nagar Nigam, Varanasi.

24. It is apparent that the power of appointment at the relevant time vested in the State Government and the petitioners could not have been appointed by the Nagar Swasthaya Adhikari under Section 107 (5) of the Adhiniyam since the post of Vaccinator was carrying initial salary of Rs.315/- in 1984 and Rs.325/- in 1988. Their appointment was therefore not only in contravention of the Adhiniyam but also of the G.O. dated 30.12.1981. The selection/appointment of the petitioners was also not in conformity with the statutory powers under the U.P. Nagar Mahapalika Sewa Niyamawali, 1962 read with Clause 5 of the U.P. Nagar Mahapalika Service (Designations, Scales of Pay, Qualifications, Conveyance Allowances and Method of Recruitment) Order, 1963, Section 106 (2) and Section 109 of the Adhiniyam. Options had been sought from the old employees of the Nagar Nigam for absorption in the new cadre of the scheme but the petitioners did

not join under the scheme formulated by the State Government. The Nagar Nigam did not have any power to create the post and in the circumstances the petitioners had no legal right to be appointed on a post which did not exist.

25. The appointment letters appended as Annexures 1 and 2 to the writ petition being issued by Nagar Swasthya Adhikari who is not appointing authority of the petitioners are illegal. Moreover, there is no document on record showing approval of the Administrator to the appointment of the petitioners on the post of vaccinator. In Annexure 3 to the writ petition it is only mentioned that there was approval of the Administrator but there is no document on record to establish the averment made in Annexure 3 aforesaid. Similarly the existence of any valid selection committee consisting of the Administrator has also not been proved on record. The alleged selection committee was not consisting of competent persons, i.e., Administrator/Mukhya Nagar Adhikari as per the G.O. dated 10.3.1978. The Nagar Swasthya Adhikari is a member of Public Health Department sent on deputation under proviso to Section 107 (1) of the U.P. Municipal Corporation Act and is directly under control of the Chief Medical Officer. The Nagar Swasthya Adhikari is not the appointing authority of the petitioners, hence the appointment letters appended as Annexures 1 and 2 to the writ petition cannot be read in aid of the petitioners. It also appears from para 14 of the counter affidavit that no record was available in the Nagar Mahapalika or on the file of the case showing constitution of selection committee and approval of the Administrator.

26. For the reasons stated above and in view of the law laid down by the apex court relied upon by the learned counsel for the respondents which aptly apply to the instant case in the facts stated above, the writ petition is dismissed. No order as to costs. Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.09.2007

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

Civil Misc. Writ petition No. 4177 of 2007

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

Counsel for Petitioner:
Sri. S.R. Verma
Sri A.K. Verma

Counsel for the Respondents:
Sri. Jai Singh
Sri. R.B. Sahai
S.C.

Constitution of India Art. 226– Agricultural loan-recovery through private agencies-wholly uncalled for, illegal-against the soul of Constitution-utter disregard to the procedure prescribed under the U.P. Agricultural Credit Act 1973.

Held: Para 17

If the law does not permit creation of such agencies for recovering any loan or seizure of vehicles by any Banks or Financial Institutions which are doing business of advancing loan to anybody, such agencies are wholly incompetent to take law in their own hands and seize any vehicles at any time or at any place or initiate recovery proceedings on their

own in utter disregard of procedures prescribed for such seizure or auction. Such act of the Bank which have alternative way of approaching the Prescribed Authority under the U.P. Agricultural Credit Act which alone can pass appropriate orders and proceeding in accordance with law is wholly uncalled for and unwarranted being not countenanced by any legislation. The procedure prescribed under the U.P. Z.A.& L.R. Act i.e. procedure for recovery as arrears of land revenue could only be taken recourse to in case any law permits to recovery any amount as arrears of land revenue. In the cases in hand the Banks who have advanced agricultural loan under the U.P. Agricultural Credit Act, 1973, can only proceed and initiate proceedings under the provisions of the said Act i.e. by approaching the Prescribed Authority under the Act who alone are competent to initiate proceedings in accordance with the procedure prescribed under the Agricultural Credit Act. Any other means of recovery i.e. by engagement of private agencies by the Bank is wholly uncalled for , illegal and unwarranted besides being one militating against rule of law which is the soul of the Constitution.

Case law discussed:

AIR 1998 SC 1200

Constitution of India Art. 226 Recovery of Agricultural loan- Principle of "Damdupat" applicable to agricultural loan also- Bank cannot recover the amount of interest excess to principal amount- any agreement contrary to the legislation- unenforceable.

Held: Para 25

As held above, since principles of Damdupat are applicable to agricultural loans as well, the Bank cannot recover the amount of interest in excess of principal amount. It is further held that any agreement militating against the provisions of Transfer of Property Act or Contract Act or in case there is violation of the principles of any legislation, the same shall be unenforceable and cannot give any right to the Banks to initiate such proceedings with the help of recovery agents or any extra constitutional authority. The recovery shall be made strictly in accordance with the provisions of the U.P. Agricultural Credit Act.

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

1. The common question mooted in the above batch of writ petitions relates to agricultural loan advanced by different Banks and therefore, all the petitions have been heard and are disposed of by a composite judgment.

2. Civil Misc. Writ Petition No. 4177 of 2007: A brief resume of necessary facts in this writ petition is that the State Bank of India Meja Branch District Allahabad sanctioned a sum of Rs.2,98000/- to the petitioner against purchase of Tractor on 30.7.2004 and in connection with the aforesaid loan, agricultural land admeasuring 1.232 hectares situated in village Banwari Khas Post Shukulpur P.S.Manda Tahsil Koraon District Allahabad and also land admeasuring .560 sitauted in village Unchdah was pledged to the Bank. The total land pledged to the Bank admeasures 1.792 hectares. It would appear from the record that the petitioner repaid certain amount details of which are enumerated in the writ petition. It would further appear that Bhola Singh Patel and Dharmendra Singh arrayed as Opp. parties 3 and 4 who claimed themselves to be Recovery Agent appointed by the Bank, forcibly took away the Tractor on 26.10.2005. Thereafter, a notice was served to the petitioner cautioning that in case, petitioner failed to repay the loan, the tractor seized by the Bank will be put

to auction on 24.12.2006 followed by publication of auction sale notice appearing in news paper on 15.12.2006 and 16.12.2006.

3. Civil Misc. Writ Petition No. 4052 of 2007: In this case, the petitioner was sanctioned loan to the tune of Rs. 3 lac against purchase of tractor on 13.3.2004. He paid certain amount and thereafter, there occurred default in payment on account of natural calamities. It would further appear that one R.B.S. Associates arrayed as Opp. party no.4 claiming himself to be recovery Agent appointed by the Bank forcibly took away tractor on 4.1.2007.

4. Civil Misc. Writ Petition No. 4758 of 2007: In this case, loan granted to the petitioner was to the tune of Rs.3,25000/- against purchase a tractor payable in 7 years. It would appear that the petitioner deposited the Ist installment, and thereafter, unforeseen calamity befell him and his entire house and crops were engulfed in the raging fire. In this case, M/S Gorakhpur Financial services Gorakhpur which was appointed as recovery agent by the Bank took forcible possession of the Tractor to force recovery of the loaned amount.

5. Civil Misc. Writ Petition No. 4584 of 2007: In this case, the petitioner was granted loan to the extent of Rs.1,65,000/- to purchase tractor by U.P. Sahkari Gram Vikas Bank Ltd Etawah in the month of Jan 1996 and as a security, the land admeasuring 1.109 hectare was mortgaged. It is urged that petitioner repaid a sum to the tune of Rs.2,70,536/- and still notice was issued for recovery of Rs.1,58,225/-.

6. Civil Misc. Writ Petition No. 3463 of 2007: In this Case it would appear that the petitioner was sanctioned loan of Rs.2,50,000/- on 31.12.2000 for purchase of a tractor and to secure the loaned amount, agricultural land belonging to the petitioner was pledged to the Bank. It would further appear that the amount was agreed to be payable in nine year and the first installment of Rs.80000/- was deposited in August 2003 while second installment of Rs.13, 490/- was paid on 18.12.2000. Again, it would appear, a third installment of Rs.95000/- was paid in June 2004. A total sum of Rs.1,88,000/- is indicated to have been paid and yet the Bank issued citation demanding Rs.2,50,000/- failing which it was postulated, the amount would be recovered as arrears of land revenue.

7. In writ petition no. 3463 of 2007 and also in writ petition no. 4585 of 2007, Reserve Bank of India was impleaded and notices were issued. Sri Yashwant Verma, learned counsel appearing for Reserve Bank of India, assisted the court by placing certain material facts relating to agricultural land. It has been submitted by Sri Yashwant Verma that so far as rate of interest is concerned, the same is covered by the guidelines in the matter of loan upto the extent of Rs. 2 lac in the priority sector issued by the Reserve Bank of India and the same cannot exceed Bench Mark Prime Lending Rate (B.P.L.R.) and for the loaned amount above Rs. 2 lacs, it is stated, the Banks are free to determine rate of interest. In the matter of short term production Credit to farmers upto Rs. 3 lac, it is stated that rate of interest was fixed at 7% with 2% interest subvention to be provided by the Government of India. He has also placed graphs by which it is sought to be indicated that so far as

State Bank and other Associates are concerned, the agricultural land is provided at the rate of Rs.11.7%, Regional Rural Bank at the rate of 50.4%, Foreign Bank at the rate of 0.7%, Nationalised Bank at the rate of 12%, and other Scheduled Commercial Banks at the rate of 4.5% and all scheduled commercial Banks 10.8%. So far as agricultural sector is concerned, it is submitted that so far as agricultural sector is concerned, except the Banks mentioned above, the Banks are free to fix their respective interest rate.

8. In the matter of recovery, the question involved is whether the Bank could get the recovery made of agricultural could vehicles seized and possession of vehicles taken through persons within the legitimate parameters or by engaging private individuals or agencies not recognized by any provision of law as the agency for recovery and further whether such persons could seize the property at any time and Bank could fixed for auction privately without taking recourse to the law as envisaged under the U.P. Agricultural Credit Act. The second question is whether any recovery of interest could be made beyond the principal amount and whether principle of Damdupat will be applicable to loans in which certain immovable properties are mortgaged. The third question that begs consideration is whether in case mortgage of agricultural property against loaned amount what would be the effect of such mortgage regard being had to prohibition contained in section 155 of the U.P.Z.A. & L.R. Act if any such mortgage is impermissible and if agreement is entered between the Bank and tenure holder after mortgaging land to secure loaned amount.

9. This Court in the light of the above questions had already issued notices to the Banks for being heard on the questions as to what will be the effect of such agreement mortgaging property in the light of provisions of section 155 of the Act prohibiting mortgage of land and further what will be the effect in case agreement relating to mortgage is not registered and also whether such agreement would be enforceable by virtue of U.P. Agricultural Credit Act as envisaged in section 4 of the Act.

10. In all cases, which are before the Court, it appears that a printed form is being used by the Banks on which signatures of Agriculturists have been obtained and further that the details in the form have not been filled in by the agriculturist but the same have been filled in English language by some other persons and still further, most of the columns have been left blank. It is wholly undeniable that in majority of cases, the agriculturists are unlettered and illiterate and their thumb impressions have been obtained and virtually speaking, they are often not aware of the contents of the agreement or terms and conditions enumerated in the agreement and in the circumstances, a question of pivotal importance arises whether such agreement or terms and conditions embodied therein can be considered to be valid agreement within the definition of Contract Act. This Court while issuing notice has already framed certain questions vide order dated 12.2.2007 passed in writ petition no. 4177 of 2007 which are excepted below.

1. Whether a loanee applying for agricultural loan is supplied copy of the proposed terms and conditions before granting agricultural loan by

the Nationalized Banks, private Banks and other financial bodies,

2. Whether in the agreement, loanee has any say in fixing terms and conditions of the agreement,
3. Whether copy of the agreement duly signed by both the parties is supplied to loanee after loan is sanctioned,
4. Whether there is any procedure prescribed under any relevant rules, or circulars to explain the terms and conditions to rustic village person who is illiterate and has approached the Bank for loan whose thumb impressions are any how obtained on the agreement the contents of which are in printed form describing terms and conditions either in English language or any vernacular language,
5. What is the basis of fixing terms and conditions in the agreement.
6. Whether loaned amount if sanctioned is paid to loanee or is directly transferred to Agent or dealer nominated by the Bank and is shown in the account of loanee or loanee has any choice to purchase any agricultural instrument which includes tractor, trolley etc from dealer or shop of his own choice.
7. What is the rationale of mortgaging agricultural property in so far as agricultural loan is concerned apart from pledging tractor or trolley purchased through loaned amount though in case of other loans like car loan etc purchased properly alone is pledged without any mortgage of other property."

11. In writ petition no. 3463 of 2007, petitioner was sanctioned loan of Rs.2,50,000/- for purchase of a tractor. A total sum of Rs.1,88,000/- was deposited by the petitioner and yet the Bank issued citation demanding Rs. 2,50,000/- failing which it was postulated in the citation that amount would be recovered as arrears of land revenue. From a further scrutiny of the record it would appear that the Bank has credited only a sum of Rs,17355/- against principal amount, Rs.28,882.10 p. was adjusted towards administrative fee, Rs.2,221 was charged as penal interest, Rs.47485/- as interest and Rs.9025/- as Misc. expenses. In view of the above, this Court by a detailed order dated 1.2.2007 issued notice to the Bank to satisfy the recovery proceeding and justification of deducting all such charges from the petitioners to the extent of Rs.95000/- and further to justify whether it was permissible in law. The detailed order dated 1.2.2007 passed by this Court is quoted below.

"This writ petition has been preferred against the citation/demand notice dated 18.12.2006 (Annexure 1 to the writ petition) issued by Bhumi Vikrey Adhikari, U.P. Sahkari Gram Vikas Bank Ltd. demanding deposit of Rs.2,50,000/-.

From a perusal of the record, it would appear that the petitioner was sanctioned a loan of Rs.2,50,000/- on 31.12.2000 for purchase of a tractor. To secure the loaned amount, the petitioner pledged his agricultural land to the Bank. It brooks no dispute that it was agreed at the time of sanction of loan that the entire amount would be payable within a period of nine years. It would further appear from the record that the first instalement of Rs.80000/- was deposited in August 2003 while the second instalement of Rs.13490/- was deposited on 18.12.2000. Again the third instalement of Rs.95000/- was deposited in June 2004. Thus a total sum deposited by the petitioner approximates to Rs.1,88000/- and yet the

Bank aforesaid issued citation demanding Rs.2,50,000/- failing which it was postulated in the said citation/demand notice, the amount would be recovered as arrears of land revenue.

I have heard learned counsel for the parties at a prolix length.

The learned counsel for the petitioner canvassed that the total amount deposited by the petitioner that aggregates to a sum of Rs.1,88,000/- has not been reckoned into consideration while issuing citation dated 18.12.2006 in which a sum of Rs. 2,50,000/- is displayed to be due against the petitioner. It is further submitted that it is postulated in the citation that in case the amount demanded is not deposited by the due date, the land mortgaged against the loaned amount would be put to auction attended with further postulate therein to recover the additional interest at the rate of 22% besides penal interest and recovery charges. The learned counsel also submitted that despite deposit of a sum of Rs.1,88,000/- uptil now, a meagre amount in the amount of Rs.7000/- has been debited vis-a-vis the principal amount which is not only iniquitous but runs counter to all canons of law and settled position in law. The learned also canvassed that the petitioner is a poor agriculturalist and due to vagaries of time and mercurial weather condition and also that the area has been repeatedly hit by drought, **the manner in which interest has been charged, is comparable to a practice employed by money lenders trapping poor fellow in the iron vice of interest payment converting his crisis into an opportunity to exploit him.** The learned counsel also canvassed that the entire recovery proceeding including rate of interest being charged vis-a-vis agricultural loan which is more than the rate of interest in other agricultural sector, is highly discriminatory and is unsustainable in law.

On being asked to produce agreement entered into between the Bank and the petitioner, the learned counsel submitted that copy of agreement has not been made available by the Bank though it is mandatory on the part of the Bank to make available copy of the agreement so that calculation in all fairness may be made on the basis of the terms of the said agreement and also to enable its challenge in the court of law in case it militates against the provisions of the relevant law.

Sri Jai Singh learned counsel appearing for the Opp. party no.3 and also learned Standing counsel appearing on behalf of respondents 1 and 2 pray for and are granted one month's time to file counter affidavit. Rejoinder affidavit, if any may be filed within two weeks next thereafter.

In view of the nature of controversy involved in this petition, learned counsel for the petitioner is permitted to implead Reserve Bank of India. Let a copy of this writ petition be also served on Sri Yashwant Verma representing the Reserve Bank of India.

In the facts and circumstances of the case it is directed that till further orders of the Court, recovery proceeding pursuant to citation/demand notice dated 18.12.2006 (Annexure 1 to the writ petition) shall remain stayed. In the meanwhile, it is directed that the petitioner shall move application within two weeks to the Bank concerned and in case any such application is received within the aforesaid period, it would be incumbent upon the Bank to calculate the entire amount afresh charging simple interest and furnish the statement within a month next thereafter. Upon receipt of statement of account, it is directed, the

petitioner shall pay 1/4th of the amount displayed in the statement of accounts within a period not exceeding three months.

List this matte for further hearing immediately after expiry of the aforesaid period."

12. Considering the matter in entirety relating to agricultural loan, and from a perusal of materials on record, it would appear that tractor in all the cases in hand were seized by the persons who were engaged privately by the Bank. All the matters relates to recovery of agricultural loan and recovery in the matter of such loans could only be made according to the provisions contained in U.P. Agricultural Credit Act 1973 which has the flavour of a Special Act so far as recovery of agricultural loan is concerned. A detailed procedure has been envisaged for recovery of loan under the Agricultural Credit Act. This Act, it brooks no dispute, is applicable to all the Banks including the State Bank, the Subsidiary Banks, and all the Banks defined under the Bank Regulations Act and Cooperative Land Development Bank. According to Section 11 of the U.P. Agricultural Credit Act, the State Government by notification in the Gazette made on the application of Bank by an order directed that any amount due to the Bank given to an agriculturalist be recovered by sale of the land or by other immovable property and for this purpose, the Bank will approach the Prescribed Authority and Prescribed Authority will issue notice and pass appropriate orders which shall be subject to appeal under section 12. By notification dated 7.1.94, the Sub Divisional Officer and Additional Sub Divisional Officer were declared Prescribed Authority. This procedure has been prescribed and enforced by Special Act.

13. In writ petition No. 4177 of 2007, after seizing the tractor, the recovery agent appointed by Bank R.G.B. Associates published notice for auction of the Tractor to be made on 24.12.2006 without there being any indicia of interference or involvement of Prescribed Authority or any authority competent to proceed with the recovery proceedings.

14. In writ Petition No. 4584 of 2007, notice was issued on Form no. 74 i.e. Z.A. form for auction fixing 18.12.2006 at Tahsil Etawah. The property in the said case is situated in village Pratapner. There is nothing on record to show that proceedings were initiated in strict compliance of the U.P. Agricultural Credit Act or the Prescribed Authority passed any such order under the U.P.Z.A.& L.R. Act. The Agricultural Credit Act 1973 is a Special Act for recovery and in the circumstances, U.P.Z.A. & L.R. Act will not have any application to the cases in hand and therefore, the provisions of U.P.Z.A. & L.R. Act cannot be called in aid for being applied to the proceedings directly without any order passed by the Prescribed Authority at the instance of the Bank.

15. So far as U.P. Sahkari Land Development Bank is concerned, it would appear, the Bank itself has issued notice for auction mentioning therein a sum of Rs.2,50,000/- for recovery together with expenses to the extent of 22%.

16. In writ petition no. 4758 of 2002, M/S Gorakhpur Financial Services were appointed by State Bank of India as

Agent for recovery who seized the tractor of the petitioner.

17. The question whether private agents can be engaged by the Bank, was considered by the Apex court in Crl. Appeal No. 267 of 2007 Manager, ICICI Bank Ltd. V. Prakash Kaur and others vide judgment dated 26.2.2007. Though I.C.I.C.I Bank is not covered by the U.P. Agricultural Credit Act, 1973, but considering the matter in its expanse, the Apex Court in last paragraph observed that " In conclusion, we say that we are governed by a rule of law in the country. The Recovery of loans or seizure of vehicles could be done only through legal means. The Banks cannot employ goondas to take possession by force." Thee is no indicia on the record to show whether these agencies have any legitimate trapping of authority under any legislation to make any recovery of loan. If the law does not permit creation of such agencies for recovering any loan or seizure of vehicles by any Banks or Financial Institutions which are doing business of advancing loan to anybody, such agencies are wholly incompetent to take law in their own hands and seize any vehicles at any time or at any place or initiate recovery proceedings on their own in utter disregard of procedures prescribed for such seizure or auction. Such act of the Bank which have alternative way of approaching the Prescribed Authority under the U.P. Agricultural Credit Act which alone can pass appropriate orders and proceeding in accordance with law is wholly uncalled for and unwarranted being not countenanced by any legislation. The procedure prescribed under the U.P. Z.A.& L.R. Act i.e. procedure for recovery as arrears of land revenue could only be taken recourse to in case any law permits to recovery any amount as arrears of land revenue. In the cases in hand the Banks who have advanced agricultural loan under the U.P. Agricultural Credit Act, 1973, can only proceed and initiate proceedings under the provisions of the said Act i.e. by approaching the Prescribed Authority under the Act who alone are competent to initiate proceedings in accordance with the procedure prescribed under the Agricultural Credit Act. Any other means of recovery i.e. by engagement of private agencies by the Bank is wholly uncalled for, illegal and unwarranted besides being one militating against rule of law which is the soul of the Constitution. In case any specific legislation is there, the Banks or such authority advancing loan are competent to approach and proceeding in accordance with law and but in no way, they are authorized to engage any private Agencies who may proceed like the musclemen of a feudal lord to harass, and bludgeon the gullible village people into their submissions by taking law in their own hands and seize any property as agent of the lending authority and auction at their own sweet will. My view finds reinforcement from a judgment of this Court in Ram Sajeevan Shukla v. The Collector District Faizabad and others (2002 (46) ALR 820).

"A conjoint reading of sections 11 and 12 of U.P. Agricultural Credit Act, 1973, reveals that the respondent-Bank instead of sending recovery certificate to Collector, Faizabad to recover the financial assistance granted to the petitioner and co-loanee for purchase of a Tractor as arrears of land revenue under U.P.Z.A. and L.R. Act read with Rules framed thereunder ought to have moved an application before Prescribed

Authority and an order passed by Prescribed Authority after hearing both the parties, subject to the result of appeal under section 12 of the said Act would have become final and binding between them. It is held that expression "notwithstanding anything contained in any law used under section 11 of the U.P. Agricultural Credit Act, 1973 has overriding effect upon any other law including U.P. Z.A. & L.R. Act and Rules framed thereunder. The entire proceedings initiated by respondent Bank by issuing recovery certificate to recover financial assistance granted for purchase of a Tractor to the petitioner and co-loanee, who are indisputably agriculturists, is without jurisdiction being in breach of Sections 11 and 12 of U.P. Agricultural Credit Act, 1973."

18. The second question which begs consideration is whether mortgage of agricultural land to secure loaned amount is permissible vis a vis section 155 of the U.P.Z.A. & L.R. Act which envisages that no Bhumidhar shall have the right to mortgage any land belonging to him as such where possession of the mortgaged land is transferred or is agreed to be transferred in future to the mortgagee as security for the money advanced or to be advanced. Under the U.P. Agricultural Credit Act, section 3 makes it clear that State Government may by notification in Gazette vest, subject to such restriction as may be specified in notification, all bhumidhars, asamis and Government lessees with rights of alienation in land held under their tenure or any interest in such land including the right to create a charge or mortgage on such land or interest in favour of banks generally or any specified class of banks for the purpose of obtaining financial assistance from such banks and upon issue of such notification,, such bhumidhar, asamis and Government lessees shall, notwithstanding anything contained in any law for the time being in force or in any contract, grant or other instrument to the contrary, or any custom or tradition, have a right or alienation in accordance with the terms of the notification. By notification dated 3rd May 1975, the State Government has vested all Bhumidhars, Sirdar, Asami Government lessee the right of alienation in the land or any interest in such land including to create charge or mortgage of such land in favour of Bank generally purposes of obtaining financial assistance. The right of alienation to a Bhumidhar or a tenure holder is governed by the U.P.Z.A. & L.R. Act and right to mortgage is prohibited under that Government and this right has been issued by a notification dated 3rd May 1975 (supra) issued under section 3 which is in the nature of subordinate legislation as the petitioners wants to take loan against these properties for creating charge or mortgage against that land in future no such mortgage could be entered into. The U.P.Z.A. & L.R. Act is very clear which envisages in section 167 of the Act that any transfer made in contravention of such chapter will be void and property shall vest in the State. But the same was permitted by the Special Act called U.P. Agricultural Credit Act 1973 according to which mortgage/charge could be made to secure the loaned amount.

19. The third question that arises for consideration is whether any recovery could be made more than the principal amount? In this connection, paragraph 16 of the decision in Mhadagonda Ramgonda Patil and others v. Shripal Balwant

Rainade and others AIR 1988 SC 1200, being relevant is quoted below.

"We may now consider the second question as to whether the rule of Damdupat is applicable to a mortgage transaction. Admittedly, it is an equitable rule debarring the creditor to recover at any given time the amount of interest, which is in excess of the principal amount due at that time. It is urged by the learned counsel appearing on behalf of the appellants that the rule is applicable only to a simple loan transaction and not to a transaction of mortgage. we are unable to appreciate this contention. In every mortgage there are two aspects, namely, (i) loan, and (ii) transfer of interest in immovable property. As mortgage is principally a loan transaction we do not find any reason why the rule of Damdupat which is an equitable rule should not apply also to mortgage."

20. The quintessence of what has been held is that Damdupat is an equitable rule debarring the creditor to recover at any given time the amount of interest which is in excess of the principal amount due at that time. What is further held by the Apex Court in the said decision is that by virtue of amendment by Act 20 of 1929 of Transfer of Property Act, the rule of Damdupat was made applicable to Transfer of property Act and to all the transaction relating to loan and mortgage of Hindu Law.

21. Learned counsel for the petitioner urged that there are cases in which a farmer has paid more than five times of actual amount and still he is trapped in debt. Any transaction by which any right is transferred whether by sale, gift or mortgage or otherwise is governed by Transfer of Property Act and any equitable principal of Transfer of Property Act so far as loan or mortgage are concerned, will also apply in case of loan advanced by Bank. Any contract made by the Bank with the farmer is always governed by the Transfer of Property act or Contract Act. From a perusal of the Contract filed by the Bank in some of the cases in seisine of the court it transpires that the agreement whatsoever is in the printed form which is not duly filled in by the loanee or the Bank but in the hand writing by some other persons and most of the columns are blank. It further appears that this cannot be a valid agreement in view of the fact that farmer who has taken loan has not seen the contents thereof. He has simply signed and therefore he cannot be said to have fully understood the terms and conditions on which contract is settled. In number of cases, there is nothing in the agreement that 22% shall be charged as recovery charges and more than 50% will be adjusted towards administrative charges and various other charges. All such charges are ex facie against the public policy. The financial assistance or loan is sanctioned to help the agriculturist to promote and facilitate agricultural farming.

22. The main vocation of majority of the people of India is farming. Most of the people engaged in farming are small farmers with small holding and are hardly able to arrange two square meals for their families. Their entire hopes and expectations are pinned on good yield of harvest and in case harvest fails them one year or two years, it brings them to the brink of starvation and one can well visualize their predicament. On one hand, they are unable to arrange a square meal

for their family and on the other hand, they suffer persecution at the hands of recovery staff or agents who add to their woes by seizing of whatever remains in their impoverished family. In most of the cases, it has been seen that when once, the poor fellow has borrowed, he is trapped in the iron vice of interest payment and ultimately he is trapped in penury inasmuch as his entire land the only source of livelihood is auctioned at throw away price besides suffering civil prison. The agricultural sector is considered to be the most fragile sector and good or bad yield depends upon good or bad weather. In case there is drought or any natural calamity the agriculturist is affected by the same and in some cases it is very difficult for him to arrange meal for his family members. In case crop is destroyed by the drought or flood or due to any natural calamities. In most of the cases as in the present case also, due to unforeseen reason either due to fire destroying the entire crop or due to drought or other natural calamities, if loanee is unable to pay any one of the installments, the default clause is often invoked and proceedings are initiated by employing private agents (often anti social elements) or by resorting to procedure of auctioning the property. In a welfare and democratic State ruled by rule of law, we decry money lending because it is immoral to convert crisis of another into an opportunity to exploit him. Such exploitation of poor people by our banking sectors in the welfare state was never visualized by Constitutional framers. The agricultural loan has to be taken to be one for assisting and helping the agricultural sector to improve their lot and not as a stranglehold to push them to penury. The Banking sector has to be liberal and not impatient so as to rigidly apply the rules meant of recovery. In the above conspectus, this court is of the view that in case of default, where the drop is hit by natural calamities like flood or drought or fire, beyond the control of farmer, the bank shall take accommodative attitude of employing coercive tactics and must explore measure like postponing recovery or re-scheduling recovery rather than preying upon farmers in the modernized version of Shylock's pound of flesh for failure to repay one or two installments.

23. In connection with the argument that in most of the cases, printed form is used and the loanee is often compelled to affix signatures or thumb impressions on every page of the printed form, which is subsequently filled in by person other than the petitioner. It is shocking to conscience that the poor agriculturists who are either illiterate or semi-literate are compelled to sign on dotted line without having any opportunity of understanding the terms of the agreement. In case of agricultural loan most of the agriculturist who get loan for the purpose of development of their agricultural land, copy of agreement was never given to any agriculturist. The copy of agreement filed alongwith counter and some of the writ petitions makes it clear that signatures has been affixed thereon at the bottom of every page. Most of the columns are also left blank and entries have been made by some person other than petitioner who according to learned counsel for the petitioner was made at a subsequent date. It has come on record that in the event of loan for more than 2 lacs, Banks are free to charge rate of interest. In such a situation in order to execute a valid agreement both the parties to the agreement must arrive at an agreement by

actual consent out of free will and without any coercion or undue influence. In case of agricultural loan as most of the parties are illiterate and are made to affix their signatures, in order to get a valid agreement, it is necessary that loanee must get copy of the agreement proposed by the Bank at least one week prior to entering into agreement and only after the loanee gets acquainted with the terms of agreement fully, the agreement may take place and every column must be filled and every page must be signed by all the parties to the agreement. It is clear from the U.P. Agricultural Credit Act 1973, that though under the U.P.Z.A. & L.R. Act thee is a bar on any mortgage but under the said Act, charge or mortgage has been permitted subject to registration under section 17 of the Registration Act. In case any agreement is unregistered, the same cannot be enforced in obedience and no recovery will be referred to the Prescribed authority or collector for being given effect to.

24. It has come from the letter (Annexure 1 to the writ petition No. 3463) that the loanee deposited Rs.95000/- and only Rs.17355/- was credited in the principal amount and rest of the amount was not credited against the remaining loan. This Court is of the view that any amount deposited by the loanee may be credited towards principal and interest if any due may be recovered subsequently. The Banks are however, wholly incompetent to charge administrative, Misc. and other charges. There is nothing on record to show that in cases where Opp. parties are charging 23% as recovery charges such charges as mentioned in the notices are wholly arbitrary and exorbitant. The recovery charges cannot be more than 10% by any reckoning particularly by a statutory body. In case of U.P. Land Development Bank, before the recovery is embarked upon as mentioned in the Act, the matter is required to be placed before the Registrar and only by the order of the Registrar, recovery proceedings can be embarked upon. The Registrar may after giving opportunity of hearing to the loanee and may pass order for recovery of the amount.

25. As held above, since principles of Damdupat are applicable to agricultural loans as well, the Bank cannot recover the amount of interest in excess of principal amount. It is further held that any agreement militating against the provisions of Transfer of Property Act or Contract Act or in case there is violation of the principles of any legislation, the same shall be unenforceable and cannot give any right to the Banks to initiate such proceedings with the help of recovery agents or any extra constitutional authority. The recovery shall be made strictly in accordance with the provisions of the U.P. Agricultural Credit Act.

26. In view of the above discussions, the writ petitions are allowed. The recovery proceedings initiated against the petitioners are quashed. The Banks are restrained from making recovery through any recovery agent except under the provisions of the U.P. Agricultural Credit Act in so far as agricultural loans are concerned by adopting procedure prescribed. The petitioners shall approach the Bank by way of representation bringing all facts to the notice of the Bank which result in failure to repay the loans on due dates and in case any such representation is preferred, the Bank shall consider and take appropriate decision on

petitioner's representation considering the directions embodied in the judgment and also taking into consideration the difficulties and aptitude of farmers and if it so requires, the Banks may also reschedule the installments accordingly. In view of the above a general mandamus is also issued that in case any private agency is found to be engaged in making recovery made under the U.P. Agricultural Credit Act, immediately action shall be initiated against him for launching criminal prosecution besides taking action against the Bank concerned which has employed such private agent.

27. Let a copy of this judgment be circulated to all District Magistrates/S.S.Ps/S.Ps in the State for compliance through Home Secretary. The Home Secretary shall also issue circulars to all concerned for strict implementation of direction contained in this judgment. Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.08.2007

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

Civil Misc. Writ Petition No.5435 of 1996

Ram Barai Prasad ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Ram Lal Singh
Sri R.C. Shukla
Sri R.P. Shukla
Sri R.K. Dubey

Counsel for the Respondents:
Sri Deo Prakash Singh
Sri Kaushal Kant
Sri S.K. Jaiswal
Sri K.S. Singh

U.P.Z.A. & L.R. Rules-Rule-285 (1)-Auction sale of agricultural property-petitioner already deposited entire out standing amount on 14.6.90-No occasion for auction on 22.8.90-auction sale held illegal-consequential direction issued.

Held: Para 4

As there were no arrear against the petitioner hence there was no occasion for auction sale of petitioner's agricultural property. The sale was therefore void ab initio. The learned commissioner while dismissing the objection under Rule 285 (I) has gone on technicalities like delay etc. The Supreme Court in Shanti Devi Vs. State of U.P AIR 1997 SC 3541 has held that if sale is void then it can be set-aside by the High Court in exercise of writ jurisdiction.

Case law discussed:
AIR 1997 SC-1547

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

1. List revised. No one is present on behalf of the auction purchaser, respondent No.5. Heard learned counsel for the petitioner as well as learned standing counsel for the respondents 1 to 3 and 6. Learned standing counsel for respondent No.4 Union Bank of India is also not present.

2. Petitioner took some loan for purchasing a tractor from respondent No.4, Union Bank of India, Jangipur Branch Ghazipur. Petitioner defaulted in payment of instalment of loan, hence, recovery certificate was issued by the bank to the Tehsil authorities who in turn issued citation. Thereafter, according to the petitioner, he cleared all the dues on 14.6.1990 by paying balance amount to

the Amin. It has further been stated that some excess amount had also been paid by the petitioner which was to the tune of Rs.354.92/-. The said amount of Rs.354.92/- remained over paid as rebate of Rs.10000/- was granted to the petitioner. The agricultural property of the petitioner was auctioned on 22.8.1990 for realisation of the dues even though there were no dues on that date. Hari Prasad respondent No.5 was auction purchaser. The land was sold for Rs.60000/- while according to learned counsel for the petitioner reserved price was fixed for Rs.2 Lakhs. Thereafter, when petitioner came to know about the auction sale he raised objection and ultimately filed application under Rule 285 (I) of the Rules framed under U.P.Z.A.L.R Act being sale case (objection) No. 4/17/38/4/13/21/1 of 1990. The said application was rejected on 30.12.1995 by Additional Commissioner, (Administration) Varanasi division, Varanasi. The said order has been challenged through this writ petition.

3. The State in its counter affidavit has admitted that there were no dues on 22.8.1990. It may be mentioned that sale was confirmed on 22.9.1990. Even in the counter affidavit of respondent No.5 there is no specific denial of the fact that dues had been cleared on 14.6.1990. In the counter affidavit filed on behalf of the State by the Tehsildar Saidpur district Ghazipur in para 15, it is clearly admitted that ***"it is stated that during the continuance of the recovery proceedings, the petitioner had obtained the receipt from the collection Amin of the tehsil after depositing arrear/loan amount"*** .

4. As there were no arrear against the petitioner hence there was no occasion for auction sale of petitioner's agricultural property. The sale was therefore void ab initio. The learned commissioner while dismissing the objection under Rule 285 (I) has gone on technicalities like delay etc. The Supreme Court in Shanti Devi Vs. State of U.P AIR 1997 SC 3541 has held that if sale is void then it can be set-aside by the High Court in exercise of writ jurisdiction.

5. Accordingly, writ petition is allowed. Order dated 30.12.1995 passed by learned Additional Commissioner (Administration), Varanasi division Varanasi is set-aside. Auction sale dated 22.8.1990 and Sale confirmation order dated 22.9.1990 are also set-aside. Let no interference be made in the possession of the petitioner and name of the petitioner be also re-entered in the revenue records by the Tehsil authorities.

6. The amount of Rs.65000/- directed to be deposited by the petitioner under interim order dated 13.2.1996 passed by this court in this writ petition shall at once be returned to the petitioner along with accrued interest, if any.

Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.09.2007

BEFORE
THE HON'BLE RAKESH TIWARI, J.

Civil Misc. Writ Petition No.5834 of 2007

Subedar Mishra ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Radha Kant Ojha

Counsel for the Respondents:
Sri Vivek Saran
S.C.

Constitution of India-Art. 226-Dismissal from Service-on allegation petitioner given notice for "Atmdah" for redressal of grievances-even after withdrawal within a week-No misconduct committed-punishment of dismissal-without application of mind-against all norms of natural justice-order quashed with all consequential benefits.

Held: Para 8

Since no misconduct was committed by the petitioner, the extreme punishment of dismissal from service of the petitioner for any misconduct which was not committed is not only highly disproportionate to the charge but also shocks the conscience of the Court.

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

1. Heard counsel for the parties.

2. The petitioner had given a notice dated 10.8.2005 for 'Atmdah' for not considering his grievances which have not been considered by the Officials which he had communicated to the Officials, including some persons grievances also. He thereafter, withdrew his aforesaid notice of 'Atmdah' within a week vide letter dated 18.8.2005.

3. Pursuant to the notice of "Atmdah" dated 10.8.2005 an enquiry was initiated against the petitioner and a charge sheet was given to him under covering letter dated 21.9.2005. Subsequently, enquiry report was also submitted by the Enquiry Officer. On the basis of the aforesaid enquiry report, a show cause dated 18.2.2006 was served on the petitioner without appending therewith copy of the enquiry report.

4. The petitioner submitted his reply to the show cause dated 18.2.2006, however by an order dated 28.4.2006 he was dismissed from service by the Service Manager Regional Workshop, U.P.S.R.T.C., Allahabad.

5. The petitioner preferred an appeal before the Regional Manager, respondent No.2 which was rejected vide order dated 18.5.2006. Aggrieved by the order, the petitioner preferred a Revision before the respondent No.2 affirming the dismissal order of the petitioner by his order dated 28th October 2006.

6. The petitioner has been dismissed from service only on the ground that he had given a notice of 'Atmdah' to draw the attention of the authorities towards certain problems he was facing in life and for mitigation of their grievances by the authorities as a friend philosopher and guide being on a higher post and status than the petitioner.

7. It is not in dispute that the petitioner never acted upon the notice of 'Atmdah' and had in fact withdraw the said within a week of its serving on the authority, hence it cannot be said that any misconduct or any criminal offence was committed by the petitioner.

8. Since no misconduct was committed by the petitioner, the extreme punishment of dismissal from service of the petitioner for any misconduct which was not committed is not only highly disproportionate to the charge but also shocks the conscience of the Court.

9. For the reasons aforesaid I am of he considered opinion that no misconduct has been committed by the petitioner by merely showing his intent to commit suicide by giving notice of 'Atmdah'. He cannot be removed from service by the respondents also for the reason that not only the impugned order is without any application of mind but also because his dismissal appears to be against all cannons of principles of natural justice as the petitioner was not given any copy of the enquiry report for effectively challenging it in appeal which amounts to denial of reasonable opportunity of hearing before awarding punishment. A intention to commit suicide by 'Atmdah' is not an offence unless it is put to an action. If put to action and had the petitioner succeeded in his intention, he would have been beyond reprieve or any punishment in the World. Had he not only than he even liable to punishment in this mortal world.

10. For the reasons stated above, the writ petition is allowed with the direction to the respondents to reinstate the petitioner forthwith in service with continuity of service within a period of one month from the date of production of certified copy of this order and pay his all legal dues and benefits, which the petitioner would have been entitled to had his services not been illegally terminated by the respondents. Petition Allowed.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 25.09.2007

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

Criminal Misc. Application No. 11905 of 2006

Amresh Kumar and another ....Applicants
Versus
State of U.P. ...Opposite Party

Counsel for the Applicants:
Sri B.N. Singh
Sri Kunwar Anand Singh

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

Juvenile Justice (Care & Protection of Children) Rule 2004-Section 22-claim of juvenile on the date of occurrence-education certificate disbelieved-application for medical examination of age-rejected on the ground of belated stage-held-illegal this plea can be raised even at appellate age-trail court committed apparent error.

Held: Para 4

It is to be seen that it has been laid down by Hon'ble Apex court in Bhola Bhagat and others Vs. State of Bihar: 1997(35) ACC 835(S.C.) that the plea that the accused was juvenile can not be rejected on the ground that this plea has been taken at a belated stage, and it was held that such a plea can be raised during pendency of the appeal also . As such in the present case the learned Addl. Sessions Judge has committed a legal error by not allowing the prayer for medical examination of the applicants on the ground that this prayer has been made at a belated stage.

Case law discussed:
1997 (35) ACC-835 (S.C.)

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

1. This is an application under section 482 Cr.P.C. to set aside the order dated 29.4.2006 and 16.9.06 passed by Addl. Sessions Judge, Court no. 6 Kanpur Dehat in Sessions Trial No. 286 of 2002, State Vs. Kuldeep and others under section 376 I.P.C., P.S. Rura District Kanpur Dehat.

2. The facts relevant for disposal of this application are that the applicants are accused in the aforesaid case under section 376 I.P.C. They moved an application before the trial court stating that they were juvenile on the date of the incident and they also filed some documentary evidence of their educational record for proving the allegation of juvenileship but that evidence was not found to be reliable by the court concerned. Thereafter they made a prayer that they should be got medically examined for ascertaining the fact whether they were juvenile on the date of the incident or not. This prayer was also rejected by the trial court on the ground that this prayer had been made at a belated stage only to delay the proceedings of the case and so the prayer for medical examination of the applicants was also rejected. Aggrieved with that order the applicants have filed this application under section 482 Cr.P.C.

3. I have heard the learned counsel for the applicants as well as the learned A.G.A. for the State.

4. It is to be seen that it has been laid down by Hon'ble Apex court in Bhola Bhagat and others Vs. State of Bihar: 1997(35) ACC 835(S.C.) that the plea that the accused was juvenile can not be rejected on the ground that this plea has been taken at a belated stage, and it was held that such a plea can be raised during pendency of the appeal also. As such in the present case the learned Addl. Sessions Judge has committed a legal error by not allowing the prayer for medical examination of the applicants on the ground that this prayer has been made at a belated stage.

5. It is also to be seen that under Rule 22 of U.P. Juvenile Justice (Care & Protection of Children) Rule, 2004, birth certificate of the child or School record regarding date of birth has first to be considered for ascertaining his age and if the above evidence is not available or is found to be not trustworthy, then the medical evidence regarding age is to be considered. Hence in the present case, where the educational records filed by the applicants were found to be unreliable, the proper course for the trial court was to get the applicants medically examined and refusal to get the applicants medically examined for ascertainment of their actual age is erroneous.

6. Now, I take up the impugned orders dated 29.4.06 and 16.9.06. The order-dated 29.4.06 which is on other documentary evidence regarding age of the applicants does not suffer from any illegality and so it is maintained. So far as order dated 16.9.06 is concerned, that part of it whereby co accused Mukesh has been disbelieved to be a juvenile is maintained, and that part of it whereby the other documentary evidence regarding age of the applicants has been declared is also maintained, but its that portion whereby their prayer for their medical examination for ascertainment of the age has been rejected is set aside and the

present application under section 482 Cr. P.C. deserves to be allowed to this extent only.

7. The application under section 482 Cr.P.C. is therefore partly allowed. The order 16.9.06 passed by Addl. Sessions Judge, Court no. 6 Kanpur Dehat in Sessions Trial No. 286 of 2002, State Vs. Kuldeep and others under section 376 I.P.C., P.S. Rura District Kanpur Dehat is partly set aside only to the extent pointed out above. Learned Addl. Sessions Judge shall now get the applicants medically examined and after receipt of the report of the C.M.O., shall provide an opportunity to both the parties to file objections, if any , against the report of the C.M.O. and thereafter he would pass suitable orders regarding so called juvenileship of the applicants on the date of the incident.

Application partly Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.08.2007

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

Criminal Misc. Writ Petition No. 12339 of 2007

Khan Saulat Hanif ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Satish Trivedi
Sri S.M.A. Kazmi
Sri D.S. Misra
Sri Sharique Ahmed

Counsel for the Respondents:
A.G.A.

Constitution of India-Art. 226-Quashing F.I.R.-offence under section 395,397,384,506 IPC-looted articles recovered by Police-name of petitioner found in the statement of witness-malafide allegations made as petitioner a practicing lawyer belongs to a particular party-held-no ground for interference.

Held: Para 16

In this case after the registration of the case the looted articles have been recovered by the police and also statements of the witnesses were recorded in which the name of the petitioner has been mentioned and it cannot be said that there is no allegation against the petitioner to attract the commission of cognizable offence. The Apex Court in the case of Union Of India Vs. B.R. Bajaj reported in (1994) 2 SCC 777 has held that at the stage of the FIR the courts should refrain from interfering when the FIR discloses the commission of a cognizable offence and statutory power of police to investigate can not be interfered with in exercise of the inherent power of the court.

Case law discussed:
1992 SCC(Crl.)-426
1999 (3) SCC-259
2002 (3) SCC-89
2007 SCC (Crl.)-193

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

1. This petition has been filed for quashing of the F.I.R. registered at case crime no.62 of 2007 under sections 395, 397, 384, 506 I.P.C. police station Bargarh District Chitrakoot lodged by respondent no. 4 Ramesh Chand Jain.

2. According to the allegations of the first information report the informant is proprietor of firm Vardhman Industrial and Trading Corporation BKD College Chauraha, Gwalior Road, Jhansi and deals in the business of purchasing scrap in

auction from railways. On 26.6.2007 he purchased iron scrap of PWI Shankargarh. After purchasing the said scrap he received a telephone call from the mobile no.9336840875 of Mohd. Shahjad who is an associate of Atiq Ahmad, Member of Parliament threatening him that he had committed big mistake by purchasing the goods and he should be ready for heavy financial losses and reminded him that earlier also an attack was made on him at the office of PW I, Shankergarh and at that time Jafar Bhai, Farooq Bhai and Shaulat Vakeel warned him that he should not purchase the goods at Shankergarh and Allahabad and also threatened him not to register the F.I.R. otherwise he will be killed. It was further mentioned in the report that he tried to lodge the report against them but on account of influence of Atiq Ahmad, he could not lodge the report. He did not succumb to the threats extended to him and between 1.8.2007 and 4.8.2007 he started lifting the iron of PW I Shankergarh and in the night at about 1.30 to 2.30 p.m. on 4.8.2007 when his loaded Truck was parked near Madhyamik Vidyalay Kataiya Dandi Road near Police Station Bargarh in a planned manner the persons named in the report through Aslam and 15-20 persons forcibly looted the goods and loaded the same in Truck No. UP 60- T 0687 and his three chaukidar Jai Prakas, Naim Khan and Sunil Raikwar were assaulted on the point of gun and money was also snatched from their pockets and after tying them with a rope they escaped alongwith the looted iron. His Chaukidar Jai Prakash informed him on telephone about the incident and told him that they had also demanded Rs. two lacs from him and also threatened him not to purchase the goods otherwise he will be killed. After receiving the information he came to Bargarh from Allahabad and lodged the report.

3. We have heard Shri Satish Trivedi, Shri S.M.A. Kazmi and Shri D.S. Misra, Senior Counsels, learned counsels for the petitioner and the learned A.G.A. for the State.

4. Shri Satish Trivedi submitted that the petitioner is a practicing lawyer having 21 years of experience and whenever Bahujan Samaj Party comes into power the members of Samajwadi Party are falsely roped in different criminal cases. The petitioner was representing Atiq Ahmad in several cases and has been falsely implicated only on account of his professional relationship with Atiq Ahmad. It is further submitted that the allegations of the F.I.R. are highly improbable and no prudent man will believe the allegations to be true and from bare perusal of the F.I.R. it cannot be said that any allegations in the report attracts the cognizable offence against the petitioner. The name of the petitioner has been mentioned alongwith other accused persons without mentioning his participation about the incident for which report has been lodged and further argued that the allegations made against the petitioner are vague and do not constitute cognizable offence. Shri S.M.A. Kazmi Sr. Advocate submitted that on account of political reasons several reports have been registered against the petitioner. In two F.I.Rs. which were registered against the petitioner his arrest had been stayed on the ground that the petitioner was an Advocate and he represented Atiq Ahmad, Member of Parliament as his counsel. It is further submitted that the impugned F.1.R. is *malafide* and also placed reliance on the decision of Apex

Court in the case of ***State of Haryana Vs. Bhajan Lal reported in 1992 SCC (Crl) 426*** wherein it has been held that "*the extra ordinary powers under Article 226 or the inherent power under section 482 Cr.P.C can be exercised by the High Court where the allegation made in the F.I.R. or the complaint, even if they are taken at their face value and accepted in their entirety do not prima-facie constitute any offence or make out a case against the accused and where the allegations made in the F.J.R. or the complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused and where a criminal proceeding is manifestly attended with malafide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."*

5. Sri Kazmi further submitted that no allegations have been made against the petitioner which could attract the penal provisions and the allegations made in the impugned report are highly improbable. It was pointed out that according to the averments made in the report the Truck in which the goods were looted had covered only two kms. in 12 hours before it was recovered by the police and no prudent man can-believe these allegations as true. Attentions of the Court was also drawn to paragraphs 13, 14, 15 and 16 of the petition where other instances were mentioned about registration of false reports against the lawyers of Atiq Ahmad.

6. Shri D.S. Misra, learned counsel for the petitioner submitted that perusal of the F.I.R. indicates that the first informant is not an eyewitness and he lodged the report on the basis of information given by his Chaukidar and this fact cannot be accepted that the petitioner was known to the Chaukidar of the informant from before.

7. On the other hand learned A.G.A. submits that the F.I.R. clearly discloses the commission of cognizable offence. There are allegations that Aslam and 15-20 persons have looted the iron in a planned manner at the instance of the person whose names were mentioned in the report and name of the petitioner finds place in the report.

8. The learned A.G.A. pointed out that in the report it is clearly mentioned that *"YOJNABADH TARIKE SE UPROKT LOGO KE DWARA ASLAM ADI 15-20 LOGO NE TRUCK NO. UP 62-T 0687 ME JABRAN BHAR LIYA"* and in view of the specific averments in the report it cannot be said that there is no allegation against the petitioner. It is further pointed out by the learned A.G.A. that after registration of the report the goods of the informant were recovered by the S.O. Pramod Kumar Pandey and case crime no. 63/07 under sections 194, 196, 177, 130(1)/207 M.V. Act was also registered and the Driver of the Truck, Suresh Giri was also arrested. Learned A.G.A. on the basis of instructions received from the investigating officer submitted that the statement of witnesses Jai Prakash, Naim Khan and Sunil Raikwar were recorded and they also mentioned the name of the petitioner.

9. We have considered the rival contentions of the learned counsels for the parties and also perused the first information report.

10. From the perusal of the F.I.R it cannot be said that no cognizable offence is made out. It is a settled position of law that where the allegations made in the F.I.R. if taken at their face value and accepted in its entirety do not make out a cognizable case, the proceedings can be interfered with. The impugned first information report prima facie discloses commission of cognizable offence.

11. The Apex Court in the case of ***Rajesh Bajaj Vs. State NCT of Delhi reported in (1999) 3 SCC 259*** has held that "If factual foundation for the offence has been laid in the complaint the court should not hasten to quash criminal proceedings during investigation stage merely on the premise that one or two ingredients have not been stated with details. For quashing an FIR (a step which is permitted only in extremely rare cases) the information in the complaint must be so bereft of even the basic facts which are absolutely necessary for making out the offence. In *State of Haryana v. Bhajan Lal* I this Court laid down the premise on which the FIR can be quashed in rare cases. The following observations made in the aforesaid decisions are a sound reminder: (See p. 379, para 103)

"103. We also give a note of caution to the effect that the power of quashing a criminal proceeding should be exercised very sparingly and with circumspection and that too in the rarest of rare cases; that the court will not be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR or the complaint and that the extraordinary or inherent powers do not confer an arbitrary jurisdiction on the court to act according to its whim or caprice."

12. We also do not find any substance in the submission of the counsel for the petitioner that the report should be quashed because it has been lodged in order to wreak vengeance due to political reasons and the report is *malafide*. The first information report cannot be quashed on the ground of *malafide* or it has been lodged on the ground of political enmity.

13. The Apex court in the case of ***State of Karnataka Vs. .M. Devendrappa 2002 (3) SCC 89*** has held that *"when information is lodged at the police station and an offence is registered, then the malafide of the informant would be of secondary importance, it is material collected during the investigation and the evidence led in court which decide the fate of the accused persons. The allegations of malafide against the informant are of no consequence and cannot by themselves be the basis for quashing the proceedings."*

14. Again in the case of **Prakash Singh Badal 2007 SCC (Crl.) 193** the Apex Court has held that an investigation should not be shut out at the thresh hold because a political opponent or a person with political background difference raises the allegation of commission of an offence.

15. We have also perused the orders staying the arrest of the petitioner in two earlier FIRs passed by this court in which one of us (I. Murtaza, J.) was also a member. In both the cases allegations

against the petitioner were only connected with his professional duties and it was observed that "*considering the fact that the petitioner is a practicing lawyer and he has been representing co-accused and the fact that there is no allegation that petitioner was in any manner involved in the abduction and torture of respondent no. 4 and that he has no other connection with co-accused except that of counsel and client, and his case is distinguishable from the case of other co-accused persons, this petition is disposed of finally with a direction that arrest of the petitioner in the aforesaid case shall remain stayed during investigation provided he cooperates with the investigation.*" But the facts of this case are altogether different and the allegations in the impugned first information report are not even remotely connected with his professional duties.

16. In this case after the registration of the case the looted articles have been recovered by the police and also statements of the witnesses were recorded in which the name of the petitioner has been mentioned and it cannot be said that there is no allegation against the petitioner to attract the commission of cognizable offence. The Apex Court in the case of Union Of India Vs. B.R. Bajaj reported in (1994) 2 SCC 777 has held that at the stage of the FIR the courts should refrain from interfering when the FIR discloses the commission of a cognizable offence and statutory power of police to investigate can not be interfered with in exercise of the inherent power of the court.

17. In view of the above no interference in required and the petition is dismissed.

18. However, it is provided that in case the petitioner surrenders within ten days from today, his application for bail shall be decided expeditiously in accordance with law. Petition Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.09.2007

BEFORE
THE HON'BLE KRISHNA MURARI, J.

Civil Misc. Writ Petition No. 12959 of 1993

Khacheru ...Petitioner
Versus
Board of Revenue, U. P. at Allahabad & others ...Respondents

Counsel for the Petitioner:
Sri. K.R. Sirohi
Sri. B.K. Pandey

Counsel for the Respondents:
Sri. K.B. Garg
Sri. M.K. Tripathi
Sri. A.D. Prabhakar
Sri. V.K. Singh

UPZA & LR Act-1955 Section 161 read with UP Consolidation of Holdings Act 1963- Section 29(c) 2-exchange of land reserved for public purpose by Gaon Sabha-is permissible- provided the exchanged land also utilized for the same purpose.

Held: Para 16
Giving strict interpretation to provisions of Section 29(c)(2) of the Consolidation of Holdings Act and holding that the land earmarked in the final consolidation scheme for a public purpose cannot be used for any other purpose even though the purpose may have been frustrated or failed, like in the case in hand, would be futile, because in that event public purpose for which the land was earmarked would not be served having

failed, and the land contributed by the tenure holder for that purpose would go to waste. In such a situation, if the exchange is permitted that would further the cause for which the land was contributed by the tenure holder and was earmarked in the final consolidation scheme and would be for the benefit of every body. Thus, it would be expedient and in the interest of justice to hold that; such land reserved for public purposes under section 29(c) can be given by the Gaon Sabha in exchange under Section 161 of the Act subject to the condition that the land so received in exchange shall be utilized for the same public purpose for which the land given in exchange was being used

Case law discussed:

1971 RD-466

1994 RD(Supp) 554

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

1. Heard Sri K. R. Sirohi, learned senior counsel assisted by Sri B. K. Pandey appearing for the petitioner and Sri M. K. Tripathi, appearing for the contesting respondent no. 5.

2. By means of this petition filed under Article 226 of the Constitution of India, the petitioner has prayed for issuance of a writ of certiorari to quash the order-dated 22.03.1993 passed by Board! of Revenue allowing the second appeal filed by respondent no. 5 arising out of the proceedings under Section 161 of U. P. Zamindari Abolition & Land Reforms Act (for short the ,'Act').

Facts giving rise to the dispute are as under;

3. Gaon Sabha proposed exchange of its Plot No. 610 area 6 biswas 16 biswansis with Plot No. 617 area 8 biswas 10 biswansis of the petitioner and accordingly passed a resolution dated 11.4.1991. Thereafter, petitioner moved an application under Section 161 of the Act before the Sub Divisional Officer. An objection was filed by respondent no. 5 assailing the exchange on the ground that plot no. 610 of Gaon Sabha had been reserved for manure pits during consolidation operation and the land being reserved for public purposes could not be given in exchange. Sub Divisional Officer vide order dated 30.12.1991 declined to grant permission for exchange and dismissed the application. Petitioner went up in appeal. Additional Commissioner, Meerut Division Meerut vide order dated 30.7.1992 allowed the appeal against which respondent no. 5 went up in Second Appeal. Board of Revenue vide order dated 22.3.1993 allowed the same and set aside the order of Additional Commissioner and maintained the order of Sub Divisional Officer. Aggrieved, petitioner has approached this Court.

4. Sub Divisional Officer though found that Gaon Sabha has passed a resolution for exchange and the difference in land revenue of the two land sought to be exchanged was less than 10 per cent and the exchange was duly recommended by the Supervisor Kanoongo vide report dated 16.8.1991, yet refused to grant permission to the exchange on the ground that the land reserved for public purpose, could not have been given in exchange. Lower appellate Court allowed the appeal on the ground that since 'abadi' has developed around the land which was reserved for manure pits and there is not much difference, in the land revenue of the two lands sought to be exchanged and the exchange is for the benefit of the tenure holders of the village at large.

Board of Revenue held that since the land is not vested in the Gaon Sabha or under the provisions of Section 117 of the Act but it was vested under Section 29(c) of the Consolidation Act as land reserved for public purpose and it can only be utilized for the purpose for which it has been earmarked in the consolidation operation as such the exchange is not permissible.

5. It has been urged by learned counsel for the petitioner that there is nothing in Section 29(c) which may go to show that land reserved for public purpose cannot be given in exchange rather section itself provides that where the purpose for which the land had been earmarked, is frustrated then it can be utilized for such other purpose as may be prescribed. It has further been urged that Plot no. 610, which had been earmarked for manure pits in the final consolidation scheme, came to lie in the densely populated area of the village with the extension of 'abadi'. Since continuation of manure pits at the site would cause more inconvenience to the public and would be hazardous to public health, Gaon Sabha rightly passed a resolution to exchange its plot with another plot which be used as manure pits.

6. My attention has been drawn to the provisions of Section 161(2) which provides that when exchange is made in accordance with sub-Section (l), they shall have the rights in the land so reserved in exchange as they had in the land given in exchange.

7. In reply, it has been: submitted that since land was reserved in final consolidation scheme for manure pits in accordance with provisions of Section 29(C) of the said Act, the land cannot be utilized for any other purpose as such it could not have been given in exchange. Reliance in support of the contention has placed on the decision of learned single Judge in the case of ***Lalji & another vs. Board of Revenue & others 1971 RD 466***

8. I have considered the arguments advanced on behalf of learned counsel for the parties and perused the record. I

Section 161 of the Act providing for exchange reads as under;

"161. Exchange-(1) A bhumidhar may exchange with
(a) any other bhumidhar land held by him, or
(b) any Gaon Sabha or local authority lands for the time being vested in it under Section 117:.
Provided that no exchange shall be made except with the permission of an Assistant Collector who shall refuse permission if the difference between the rental value of land given in exchange and of land received in exchange calculated at hereditary rates is more than 10 per cent of the lower rental value.

(l-A) where the Assistant Collector permits exchange he shall also order the relevant annual registers to be corrected accordingly.

(2) On exchange made in accordance with sub-section (1) they shall have the same rights·in the land so received in exchange as they had in the land given in exchange.

Section 29(c) of Consolidation Act providing for vesting of land for public purpose reads as under;

29-C Vesting of land contributed for public purposes.-(1) The land contributed for public purposes under this Act shall, with effect from the date on which the tenure-holders became entitled to enter into possession of the chaks allotted to them under the provisions of this Act as amended from time time, vest and be always deemed to have vested in the Gaon Sabha in an area in which Section 117 of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 applies and in the State Government in any other area, and shall be utilized for the purpose for which it was earmarked in the final Consolidation Scheme, or in case of failure of that purpose, for each other purposes as may be prescribed.

(2) The provisions of Section 117 of the Uttar Pradesh Zamindari Abolition and Land Reforms Act 1950 (U. P. Act No.1 of 1951) shall mutatis mutandis apply to such land vested in the Gaon Sabha as if the land had vested in the Gaon Sabha by virtue of a declaration made by the State Government under sub-Section (1) of that section and as if the declarations were made subject to the conditions respecting utilization specified in sub-section (1) of this section.

9. From a reading of the provisions of Section 161 of the Act it is clear that any land vested in Gaon Sabha or local authority under Section 117 of the said Act can be subject matter of exchange with the land of any bhumidhar.

10. However, a reading or Section 29(c) of U. P. C. H. Act prima facie goes to show that land contributed for public purpose during consolidation shall be deemed to be vested in Gaon Sabha under Section 117 of the Act but the same would be subject to the condition with regard to utilization only for the purpose for which it has been earmarked in the final consolidation scheme that is to say that though land stands vested in Gaon Sabha in accordance with the provisions of Section 117 of the Act but a restriction appears to have been placed on the powers of the Gaon Sabha with respect to such land and the same can only be utilized for the purpose for which it has been earmarked in the final consolidation scheme. However on a closer and deeper analysis of the aforesaid provision, a completely contradictory picture emerges out. Section 29(C)(1) of U. P. Consolidation of Holdings Act though provides that the land contributed for the public purpose and earmarked for the same in the final consolidation scheme shall be utilized only for the said purpose but it also provides that in case of failure of that purpose that land can be utilized by Gaon Sabha for such other purposes as may be prescribed.

11. 'Word prescribed' occurring in section would normally mean prescribed either under the Act or under the Rules. However, there is nothing either in the Act or in the in rules prescribing the otherwise user of the land earmarked for the public purpose in the in event of failure of the original purpose. The purpose of placing such restriction is that Gaon Sabha may not utilize the land for any other purposes other than the public purpose or purposes for which it has been earmarked. Thus, what is relevant is the purpose for which the land has been contributed by the tenure holder of the village and earmarked in the final

consolidation scheme and the same should not be allowed to be frustrated by the action of Gaon Sabha by diverting the user of said land for any purpose other than the one for which it was contributed and earmarked. Viewed from this angle it is the 'purpose' which is relevant and important and not the place or the site.

12. Legislature being conscious of the fact while enacting the provisions of the exchange under Section 161 also enacted section 161(2) which clearly provides that on exchange made in accordance with sub Section (1), the parties shall have the same rights in the land so received in exchange as they had in the land given in exchange.

13. In the case in hand, resolution of Gaon Sabha indicates that land received in exchange from the petitioner shall be used as manure pits. Apart from the resolution even under the provisions of Section 161(2) of the Act, the land received in exchange from the petitioner could not have been used by the Gaon Sabha for any other purpose except for manure pits.

14. From a perusal of the resolution passed by Gaon Sabha, it also becomes clear that there has been a complete failure of purpose i.e.. keeping manure pits inasmuch as on account of extensive extension of village 'abadi', the said land was surrounded by 'abadi' and thus was not fit to be utilized as manure pits as it would be hazardous to the public health and the land so reserved was also being encroached upon illegally.

15. Learned single Judge in the case of ***Lalji & another vs. Board of Revenue & others (supra)*** relied upon by the learned counsel for the respondent has not considered the matter from this aspect. It failed to consider the words in the case of failure of that purpose for such other purpose as may be prescribed as well as the provisions of Section 161(2) of the Act. The said judgment straight way considered the provisions of Section 29(c)(2) of U. P. Consolidation of Holdings Act as well as Section 161 of the Act and failed to take into account the words in the case of failure of that purpose used in Section 21(C) (2) of U. P. Consolidation of Holdings Act as well as in Section 161(2) of the Act and as such it cannot be said to be a good law. The same view has been taken by another learned single judge in the case of ***Jagannath vs U. P. Board of Revenue & Others 1994 (Suppl.) RD 554.***

16. Giving strict interpretation to provisions of Section 29(c)(2) of the Consolidation of Holdings Act and holding that the land earmarked in the final consolidation scheme for a public purpose cannot be used for any other purpose even though the purpose may have been frustrated or failed, like in the case in hand, would be futile, because in that event public purpose for which the land was earmarked would not be served having failed, and the land contributed by the tenure holder for that purpose would go to waste. In such a situation, if the exchange is permitted that would further the cause for which the land was contributed by the tenure holder and was earmarked in the final consolidation scheme and would be for the benefit of every body. Thus, it would be expedient and in the interest of justice to hold that; such land reserved for public purposes under section 29(c) can be given by the Gaon Sabha in exchange under Section

161 of the Act subject to the condition that the land so received in exchange shall be utilized for the same public purpose for which the land given in exchange was being used

17. In view of the aforesaid discussions, impugned order passed by the Board of Revenue dated 22.3.1993 refusing the exchange cannot be sustained and is hereby quashed and that of Additional Commissioner dated 30.7.1992 stands affirmed.

18. The writ petition stands allowed.

However, in the facts and circumstances, there shall be no order as to costs. Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.09.2007

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

Civil Misc. Writ Petition No. 19718 of 2000

Ram Chandra ...Petitioner
Versus
State of U.P and others. ...Respondents

Counsel for the Petitioner:
Sri A.N. Shukla
Sri R.A. Verma
Sri Yogesh Agrawal

Counsel for the Respondents:
S.C.

U.P. Recruitment to Services (Determination of Date of Birth) Rules 1974-Rule-2-Date of Birth-recorded in service book initially-can not be changed-school certificate below class 10-held-not authentic document.

Held: Para 8

Whatever may be basis of first entry of date of birth in the service book, Subsequently it cannot be changed unless there is some rule in that regard and representation is made promptly for, change of date of birth. Petitioner did not make any representation. The camp-clerk got the second entry of 10.10.1948 made in the service book after few months of the first entry, which was not permissible.

Case law discussed:
AIR 2006 SC-2157 relied on.

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

Heard learned counsel for the parties.

1. The question to be decided in this writ petition is as to whether one of the two dates of birth of petitioner as entered in his service book i.e. 10.10.1948 was rightly scored off? The age of retirement of Class of employees to which petitioner belongs is 60 years. According to the petitioner he should have been permitted to continue in service until 10.10.2008, however, he was wrongly retired on 1.8.1998. Original service book was summoned and perused by the court. Photostat copy of the first page of original service book was directed to be filed by learned standing counsel who has filed the said photostat copy. On the first page of the service book, certificate issued by C.M.O dated 1.8.1986 was annexed. Photocopy of the said certificate has also been filed. These two copies have also been filed along with other affidavits. The certificate was issued under Rule 10 of Fundamental Rules on the proforma given thereunder. The title of the certificate was **Certificate of Fitness for government servants.** In the certificate which was on the printed proforma as prescribed by

Rule 10 of Fundamental Rules, the last sentence is to the following effect. ***The candidates age according to his own statement is 48 years and by appearance about forty eight years.***

2. In the service book of the petitioner the entry which was scored off was to the effect that according to the School certificate date of birth is 10.10.1948. This entry was made against Item No.5 relating to date of birth. Against the said column first the following entry was made **"1.8.1986 Ko 48 Varsh" (48 years on 1.8.1986)**.

3. Thereafter the entry of 10.10.1948 was written. Apparently the first entry was made on the basis of certificate granted by C.M.O. which was also attached to page 1 of the service book. Learned standing counsel also stated that the said entry was made in pursuance of and on the basis of certificate issued by the C.M.O.

4. In this writ petition, I passed an order on 2.4.2003 (on separate sheet). Through the said order, I directed the Executive Engineer U.P.P.W.D Allahabad to decide the question as to what was the position of entry of date of birth in the service book when it was prepared and who scored off the figure 10.10.1948 and under what circumstances. Thereafter, enquiry was conducted and copy of enquiry report was filed along with supplementary affidavit sworn on 23.10.2003. The enquiry report runs into 18 pages, each page containing about 35 lines. Enquiry report bears the date 28.6.2003 and signatures of Executive Engineer Provincial Division PWD Allahabad.

5. The Executive Engineer, who has given the report dated 28.06.2003 has done an excellent job. The report is at par with the judgment of a Competent Judicial Officer. About 25 concerned Officers/ Officials, who could have any knowledge of the facts regarding preparation of the service books and scoring off one of the entries against date of birth of petitioner were examined by the Executive Engineer. The statements have meticulously been examined. The Executive Engineer asked precise, searching questions from the officers/officials, who were called by him. Sri Dileep Kumar, Assistant Engineer gave report that in 1994, he scored off the entry of 10.10.1948 from the service book of the petitioner. Sri Dileep Kumar further stated that the petitioner and the then camp-clerk (*shivir Iipik*) tried to persuade him to score off other entry, i.e. "*01.08.1986 ko 48 varsh*" Sri Dileep Kumar further stated that after scoring off the entry of 10.10.1948, he put his initials thereupon. Several concerned officers and officials stated that when service book was prepared, Sri Shitla Prasad was the concerned clerk and the service book was prepared by him and entries were in his handwriting. Accordingly, statement of Sri Shitla Prasad was also recorded on 24.06.2003, which is given on Page-14 of the report. Sri Shitla Prasad categorically stated that entries in the service book of the petitioner were made by him on the direction/dictation of camp clerk-Sri Krishan Chand. It was further stated by Shitla Prasad that in the service book of petitioner, entries against item No.1 to 7 were in his handwriting but the entries were made on the direction of Sri Krishan Chand and petitioner was also present and Sri Krishan Chand was dictating the entries after asking and seeking relevant

information from the petitioner. Sri Shitla Prasad categorically stated that he made the entry of "*01.08.1986 ko 48 varsh*" at the time of preparation of service book and thereafter the second entry of 10.10.1948 according to the school certificate was written by him after two to three months and the said entry was also made by him on the direction of camp-clerk.

6. From the above, it is quite clear that first entry of "*01.08.1986 ko 48 varsh*" was made in the service book and after few months, the other entry "*school certificate ke anusar 10. 10. 1948*" was made. The alleged school certificate was obtained on 02.08.1986, i.e. one day after the report of C.M.O. Copy of that certificate is Annexure-1 to the writ petition, which shows that petitioner passed Class-V and left the school on 19.05.1962. Firstly, no reason has been given for obtaining the certificate so late and secondly, Supreme Court in **AIR 2006 SC 2157 "Ravinder Singh Gorkhi v. State of U.P."** has held that school certificate below standard of Class-X in respect of date of birth is not an authentic document particularly when it has not been issued at the time when the person concerned left the school. Moreover, the fact that it was obtained on the next date on which C.M.O. gave the certificate makes it unbelievable and manufactured document.

7. It is correct that under Rule-10 of Fundamental Rules, C.M.O. is required to give certificate of fitness and not certificate in respect of age. Moreover, in the certificate, C.M.O. has not determined the age. He has only mentioned that petitioner stated that his age was 48 years and by appearance also he looked about 48 years of age.

8. Whatever may be basis of first entry of date of birth in the service book, Subsequently it cannot be changed unless there is some rule in that regard and representation is made promptly for, change of date of birth. Petitioner did not make any representation. The camp-clerk got the second entry of 10.10.1948 made in the service book after few months of the first entry, which was not permissible. The Executive Engineer in his report has also mentioned that even the school, which had allegedly issued the certificate to the petitioner, was contacted by him but the said school was found locked. The Executive Engineer has also referred to U.P. Recruitment to Services (Determination of Date of Birth) Rules, 1974, according to which in case an employee has not passed Class-X, the date of birth entered in the service book at the time of entry in the service book should be deemed to be final and no application or representation for change of the said date of birth would be entertained. Rule-2 of the said Rules is quoted below:-

"[2. Determination of correct date of birth or age.- *The date of birth a Government servant as recorded in the certificate of his having passed the High School or equivalent examination at the time of his entry into the Government service or where a Government servant has not passed any such examinations aforesaid or has passed such examination after joining the service, the date of birth or the age recorded in his service book at the time of his entry into the government service shall be deemed to be his correct date of birth or age, as the case may be,*

for all purposes in relation of his service, including eligibility for promotion, superannuation, premature retirement or retirement benefits, and no application or representation shall be entertained for correction of such date of age In any circumstances whatsoever.]

9. I fully agree with the finding recorded by the Executive Engineer. It is more than clear that the first entry in the service book was "*01.08.1986 ko 48 varsh..*' Subsequent entry was made after two or three months of the first entry and that also on the direction of camp-clerk, which was illegal and utterly unauthorized. The subsequent entry was, therefore, rightly scored off.

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

11. Office is directed to supply a copy of this judgment free of cost to Sri S.P. Mishra, learned standing counsel, within a week. Petition Dismissed.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 30.08.2007

BEFORE
THE HON'BLE RAVINDRA SINGH, J.

Criminal Misc. Application No. 20017 of 2007

Surendra Kumar and others ...Applicants
Versus
State of U.P. & another ...Opposite Parties

Counsel for the Applicants:
Sri S.C. Pandey

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

Code of Criminal Procedure-Section 482-Summoning Order-passed without perusing case Diary as well as final report-treating the protest petition as Complaint-without recording statement of witnesses-held-magistrate committed manifest error-order impugned can not sustain.

Held: Para 4

But in the present case for passing any order in respect of the conclusion drawn by the I.O. The learned Magistrate has not perused case diary for which he was under obligation to do so, whereas the protest petition has been treated as a complaint straightway, it is not proper. The learned Magistrate has committed a manifest error by adopting such a procedure, the learned Magistrate has again committed the manifest error in passing the impugned order without recording the statement of the witnesses under section 202 Cr.P.C. The prescribed procedure for taking the cognizance in a complaint case has not been followed. The impugned order dated 26.6.2007 is illegal and is liable to be set aside.

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

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

2. This application has been filed with a prayer to quash the order dated 26.6.2007 passed by learned A.C.J.M, Bhadoi in Criminal case No. 171 of 2005 whereby the learned Magistrate concerned has taken the cognizance and summoned the applicant to face the trial for the offence punishable under sections 147, 323, 504, 506, 452 IPC. It is contended by learned counsel for the applicant that O.P. No. 2 Smt. Saraswati Devi lodged the F.I.R. in case crime No. 46 of 2005 under sections 147,323,504, 506,452 IPC P:S. Suriyawan, District Sant Ravidas Nagar

(Bhadoi), after investigation the final report dated 25.2.2005 was submitted in the Court of learned Magistrate concerned on which notice was issued to the complainant O.P. No.2 on 31.5.2007. After receiving the notice the first informant O.P. No. 2 appeared before the court concerned and filed a protest petition, the same was treated as a complaint by learned Magistrate concerned and next date for recording the statement of the first informant as complainant under section 200 Cr.P.C. was fixed, her statement was recorded under section 200 Cr.P.C. on 9.2.20006, thereafter the next dated was fixed for recording the statement of witnesses under section 202 Cr.P.C. For this purpose many dates were fixed but no statement under section 202 Cr.P.C. was recorded and for recording the statement under section 202 Cr.P.C. and without passing any order on final report, the learned Magistrate has taken the cognizance and summoned the applicant to face the trial for the offence punishable under sections 147, 323, 504, 506, 452 IPC on 26.6.2007. The order dated 26.6.2007 is illegal and liable to be set aside.

3. In reply of he above contention, it is submitted by learned A.G.A. that there is no illegality in the impugned order dated 26.6.2007, but it has been admitted that without recording the statement of the witness under section 202 Cr.P.C. for which many dates were fixed, the learned Magistrate has taken the cognizance and no order has been passed on the final report.

4. Considering the facts, circumstances of the case, submissions made by learned counsel for the applicants and learned A.G.A. and from the perusal of the record it appears that in the present case the learned Magistrate has not passed any order on the final report even the learned Magistrate has not perused the case diary and without any reason the protest: petition has been treated as a complaint straightway and for recording the statement of the witnesses under section 202 Cr.P.C. many dates were fixed and without any reason the statement of the witnesses under section 202 Cr.P.C. have not been recorded and without recording the statement under section 202 Cr.P.C. the impugned order·26.6.2007 has been passed. It is settled position of the law that after investigation if any final report is submitted the learned Magistrate concerned is under obligation to peruse the material collected by the I.O. in case diary, if learned Magistrate concerned is satisfied with the conclusion drawn by the I.O. after perusing the case diary, the same may be accepted, or if after perusal of the case diary the learned magistrate comes to the conclusion, that on the basis of the material collected by the I.O. prima facie any offence is made out, the conclusion drawn by the I.O. submitting the final report may be rejected and cognizance may be taken. In case the learned Magistrate comes to the conclusion that for drawing any proper conclusion the further investigation is required, the order of further investigation may be passed or if after perusing the case diary the learned Magistrate comes to the conclusion that the protest petition may be treated as a complaint, the same may be treated as a complaint and procedure of the complaint case shall be followed. But in the present case for passing any order in respect of the conclusion drawn by the I.O. The learned Magistrate has not

perused case diary for which he was under obligation to do so, whereas the protest petition has been treated as a complaint straightway, it is not proper. The learned Magistrate has committed a manifest error by adopting such a procedure, the learned Magistrate has again committed the manifest error in passing the impugned order without recording the statement of the witnesses under section 202 Cr.P.C. The prescribed procedure for taking the cognizance in a complaint case has not been followed. The impugned order dated 26.6.2007 is illegal and is liable to be set aside. The impugned order is set aside on a technical ground, therefore, it is necessarily required to remit the matter to the court of learned Magistrate concerned to pass a fresh order after perusing the case diary in accordance with provisions of law.

5. In view of the above discussion, the impugned order dated 26.6.2007 passed by learned A.C.J.M. Bhadohi in Criminal case F.R. No. 171 of 2007 in case crime No. 46 of 2005, P.S. Suriyawan, District Sant Ravidas Nagar (Bhadohi) is set aside. The learned Magistrate concerned shall pass a fresh order in accordance with the provisions of law.

6. With this direction, this application is finally disposed of.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 09.10.2007

BEFORE
THE HON'BLE RAVINDRA SINGH, J.

Criminal Misc. Bail Application No. 21192 of 2007

Devendra Singh ...Applicant
Versus
State of U.P. & another ...Opposite Parties

Counsel for the Applicant:
Sri Satish Trivedi
Sri Santosh Tripathi
Sri Manoj Tiwari

Counsel for the Opposite Parties:
Sri G.S. Hajela
A.G.A.

Code of Criminal Procedure-Section 439-Bail Application-offence under Section 13 (2) rule 13 (1) (D) of Prevention of Corruption Act 120-B, 167, 420, 511,468,471 IPC-applicant one of the co-accused-got recorded his name other the revenue record on the basis of forged lease deed-most of the lease holders belongs to another village-a big land seam worth of more than Rs.600 Crors-forgery committed in malkan register-shaking the confidence of common people-considering the gravity of offence-not entitled for bail-Rejected.

Held: Para 7

Considering the facts, circumstances of the case, submissions made by learned counsel for the applicant, learned counsel for C.B.I. and in view of the above discussions it appears that the gravity of the offence is too much, it is a big land scam in which the C.B.I. has collected the material against the applicant to show his involvement and without expressing any opinion on the merits of t he case, the applicant is not

entitled for bail. The prayer for bail is refused.

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

1. This application has been filed by the applicant Devendra Singh with a. prayer that he may be released on bail in case crime No.1-A of 2007 RC No. 0072005 AOO 19th 2005 under sections 120-B, 167,420, 511,468,471 IPC and U/s 13(2) r/w 13(1)(D) of the Prevention of the Corruption Act, P.S., C.B.I. Dehradun.

2. The brief facts of the present case are that the F.I.R. of this case has been lodged by Sri Girivar Singh, Lekhpal of Kasana, Tahsi1 and district Gautam Budh Nagar on 27.2.2005 alleging therein that the village Kasana is a notified village of Greater Noida, a major part of land has been acquired by Greater Noida but some of the land of Gaon Sabha and lease holders has been illegally acquired by co-accused Moti Lal Goel and others on the basis of 89 forged lease deeds by committing a forgery in the register of the Malkan, in the Khataunies No. 1405F to 1410F with the connivance of revenue officers/ officials and the land has been mutated in their names in the revenue records. The total land illegally acquired by the applicant and other co-accused persons is having the area of about 100 hectares equal to 400 Vighas, it is more than 10 lacs Sq. meters, having the valuation of Rs.600/- corers. The applicant is one of the accused whose name has also been entered into the revenue record on the basis of the forged lease deed. His name has been recorded in Khasra No. 1841 having the area of 1:265 Hectare. Subsequently the Addl. Commissioner, Meerut came to the conclusion that all the 89 lease deeds were forged it was held by learned Addl. Commissioner, Meerut in his order dated 4.4.2001. In pursuance of the order dated 4.4.2001 all the forged lease deeds were cancelled. It has also been revealed that most of the lease holders including the applicant, Moti. Lal Goel and others were not resident of village Kasana. By playing the fraud and committing a forgery they have shown themselves to be resident of Kasana by preparing the lease deeds got entered in to the revenue records by committing forgery with the Malkan register and Khataunies No. 1405F to 1410 F. It is a big **land scam**, which has been committed in pre planned manner by hatching a conspiracy in a fraudulent manner by committing the forgery even in the revenue records. The matter was investigated by the civil police and submitted the charge sheet dated 7.6.2005 only against nine persons namely Moti Lal Goel, Rekesh Goel, Mahavir Prasad, Ajit Gupta, Nitin, Jitendra, Firey, Charan Singh and Ajaj Husain but in the present case the certain lease holders named as accused in case crime No. 57 of 2005 approached this court and challenged the F.I.R. dated 27.2.2005 by way of filing Criminal Misc. Writ petition No. 3783 of 2005 which has been finally decided along with some other writ petitions vide order dated 27.5.2005 whereby the direction was issued that the matter be got investigated by C.B.I. In pursuance of the order dated 27.5.2005 passed by Division Bench of this court a fresh F.I.R. was registered with C.B.I. (SPE), Dehradun as F.I.R. No. R.C. 007/05, A-0019 on 15.7.2005. After completing the investigation the C.B.I. has submitted the charge sheet against the applicant and other co-accused persons. The applicant applied for' bail before learned Special

Judge (C.B.I.) (Prevention of Corruption Act), U.P. East, Ghaziabad who rejected the same on 11.7.2007.

3. Heard Sri Satish Trivedi, Senior Counsel assisted by Sri Santosh Tripathi and Sri Manoj Tiwari, learned counsel for the applicant and Sri G.S. Hajela, learned counsel for C.B.I.

4. It is contended by learned counsel for the applicant that in the pr sent case no specific allegation of committing the fraud or forgery has been made against the applicant in the F.I.R. dated 27 .2.2005, it has been made against the co-accused Moti Lal Goel. It has been specifically alleged that co-accused Moti Lal Goel prepared the forged lease deeds in the name of his mother, brother, Bhabhi, sister, family members and close associates with him, on the basis of forged lease deeds a forgery has been committed in the register of Malkan and Khatauni 1405F to 1410F in which the names of forged lease holders were entered in connivance with the officials of revenue department. The applicant was having no knowledge that any forgery has been committed in his name by preparing a forged lease deeds and by playing a fraud his name was entered into the revenue record. The applicant has not claimed his title/ownership or the possession over the land which was entered into the revenue records in his name, even the applicant has not used to gain something on the basis of such forged entries recorded in the revenue record. The matter was investigated by the civil police and the charge sheet was submitted only against nine persons including tile Moti Lal Goel and others. The I.O. has failed to collect any evidence to prove the involvement and participation of the applicant in the alleged forgery. But in pursuance of order dated 27.5.2005 passed by Division Bench of this courts even after the submission of the charge sheet by the civil police, the matter was transferred to C.B.I. But the C.B.I. has submitted the charge sheet against the applicant also. It is contended that the C.B.I. has not sought the permission from the court concerned for further investigation under section 173(8) Cr.P.C. In the present case two F.I.Rs. have been registered against the same cause of action. The second F.I.R. registered by C.B.I. is not permissible under the law. C.B.I. has recorded the statement of the witnesses namely Dheeraj Singh, Om Prakash, Khushi Ram and Har Saran Sharma in which the name of the applicant did not figure. The statement of Naib Tahsildar namely Sanjay Kumar has also been recorded on 18.8.2005 and the second statement has been recorded on 31.8.2005. In the statement of the Naib tahsildar also, there is nothing against the applicant. But the name of the applicant came in the light in the statement of Mr. D.C. Saxena, Advocate. The applicant is not acquainted with Sri D.C. Saxena, Advocate, he has never been engaged by the applicant to plead to his case in revenue court, even Sri D.C. Saxena, Advocate is not in a position to identify the applicant. There is no expert opinion against the applicant to show his involvement also. The applicant did not play any role in the **land scam** done by co-accused Moti Lal Goel. The applicant had also left the employment of Moti Lal Goel many years prior the alleged F.I.R. and the applicant has himself lodged the F.I.R. in respect of the same forgery committed by Sri Moti Lal Goel, on 27.2.2005. The F.I.R. was lodged in pursuance of the order passed under section 156 (3) Cr.P.C. passed by

the learned Magistrate concerned. The F.I.R. was registered under sections 420, 467, 468, 471 IPC in case crime No. 261 of 2005 against Moti Lal Goel at P.S. Kasana in which the charge sheet has been submitted against the co-accused Moti Lal Goel on which the cognizance has been taken by learned Magistrate concerned on 5.6.2006, it's case is pending in the court of learned I-A.C.J.M., Ghaziabad vide criminal case No. 3724 of 2006 and the applicant was witness against Lajja Ram, the father of the co-accused Moti Lal Goel in case no. 169 of 2005 under sections 420; 466, 467, 468, 469,472, 120-B IPC and 13(1)(D) read with 13(2) and 7/12 Anti Corruption Act, in which the charge sheet has been submitted. In such circumstances, there is no possibility to enter into the conspiracy hatched by the co-accused Moti Lal Goel, the name of the applicant has been deliberately mentioned in the Malkan register by the Moti Lal Goel due to ulterior motive. The prosecution of the applicant in the present case on the basis of the F.IR. lodged by the C.B.I. is abuse of the process of law/court. The applicant is having no criminal antecedent and no forged document has been used as genuine, applicant is innocent, he may be released on bail.

5. In reply of the above contention, it is submitted by learned counsel for the C.B.I. that applicant is a member of the racket headed by co-accused Moti Lal Goel and by way of playing fraud and committing the forgery the name of the applicant has been entered into the register of Malkan and Khatauni and by way of committing the forgery in connivance with the officials of the revenue department the applicant and other co-accused persons acquired the huge land having the area of 100 hectares, having the valuation of Rs.600/- corors. It is a case in which the applicant and other co-accused persons have made the forged entries, in connivance with the officials of revenue department to show the ownership/ title over the land of Gaon Sabha. The entries have been made on the basis of forge proposals of the Gaon Sabha for allotting the land to the applicant and other co-accused persons on the lease. The applicant is one of the main beneficiary and applicant was doing pairavy and claimed his ownership over the land which was entered in his name in the revenue records, he had engaged Sri D.C. Saxena, Advocate and he has handed over his vakalatnama. The vakalatnama was bearing the signatures of the applicant, the same was sent for the opinion to the hand writing expert, according to the hand writing expert the vakalatnama was signed by the applicant. It is a case in which the land having the valuation of Rs.600/- crores is involved, revenue officials are also involved in the same scam because on the basis of the forged entries the mutation of the land was done in the name of the applicant and other co-accused persons. After lodging the F.I.R., ignoring the documentary evidence available against the applicant the charge sheet was submitted by the civil police only against nine persons including the Moti Lal Goel and others, though the investigation was kept pending against the applicant and other co-accused persons but considering the gravity of the offence the Division Bench of this court handed over the investigation to C.B.I. On 27.5.2007, in pursuance of the order dated 27.5.2005, the F.I.R. was registered by C.B.I, there is no need of getting the permission for further investigation from the court concerned under section 173(8)

Cr.P.C. because this direction was given by Division Bench of the High Court and there is no illegality in the further investigation done by C.B.I. It has admitted by applicant himself that he was in the employment of the co-accused Moti Lal Goel but prior lodging the F.IR. he had left his employment and lodged the F.I.R. against the co-accused Moti Lal Goel but the F.I.R. lodged by the applicant against Moti Lal Goel was on legal advice to save the skin from the offence committed by the applicant because the F.I.R. was lodged by the applicant against co-accused Moti Lal Goel after submission of the charge sheet by the civil police against Moti Lal Goel and eight other co-accused persons. It was submitted on 26.6.2005, thereafter the Division Bench of this court has transferred the matter for further investigation to C.B.I. on 27.5.2007. For the purpose of creating a defence the applicant has lodged the F.I.R. against Moti Lal Goel on 15.7.2.005. The applicant has lodged the F.I.R. against Moti Lal Goel on 26.6.2005 i.e. after the submission of the charge sheet by the civil police against Moti Lal Goel and others and it has no relevancy that subsequently the applicant became against Lajja Ram, the father of co-accused Moti Lal Goel because both developments have taken place after commission of the alleged offence under the changed circumstances. The F.I.R. was lodged by the applicant against Moti Lal Goel and he became witness against his father in another case. The applicant is also a gainer; in his name 1.264 hectares land has been entered into revenue records vide Khasra No. 1841. The applicant was resident of village Kasana, legally he is not entitle to have any patta of the land belonging to village Kasana because such patta can be given only to the holders of the Gaon Sabha. The hand writing expert has also given the positive opinion. It is the hand writing under which applicant claimed over the disputed land on behalf of 89 patta holders. There is sufficient evidence to show that the applicant is actively involved in the commission of the alleged offence, which is of grave in nature. In such circumstances the applicant may not be released on bail.

6. From the perusal of the record it appears that it is a big **land scam** because about 100 hectares of land has been illegally acquired having the valuation of more than Rs.600/- crores on the basis of committing forgery in register Malkan and Khatauni No. 1405 to 1410F in connivance with officials of revenue department. In the present case the forged lease deed were also prepared whereas the applicant was not entitled to have any land of village: Kasana on Patta (lease) because he was not resident of Gaon Sabha, Kasana. The lease of Gaon Sabha can be allotted only to resident of Gaon Sabha. It is also surprising that on the basis of forged entries made in the revenue records the land was mutated in the name of the applicant and other co-accused persons. It reflects that revenue officials who passed such orders were also involved in the commission of the alleged offence. It is a very serious matter in which the forgery has been committed with register Malkan. It is such important register on which the title/ownership of land is decided but forgery has been made, in such a important register which shows that the racket involved was having high stakes, in such a big **land scam** the involvement of the many persons including the department concerned is not ruled out. The present case is a big **land**

scam, it has shaken the roots of the revenue department, it has shaken the confidence of a common man. It has attacked on a system. In such cases before passing any order it has to be considered that the confidence of a common man may not be eroded.

7. Considering the facts, circumstances of the case, submissions made by learned counsel for the applicant, learned counsel for C.B.I. and in view of the above discussions it appears that the gravity of the offence is too much, it is a big land scam in which the C.B.I. has collected the material against the applicant to show his involvement and without expressing any opinion on the merits of the case, the applicant is not entitled for bail. The prayer for bail is refused.

8. Accordingly this application is rejected. Application Rejected.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.08.2007

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Writ Petition No. 21717 of 2007

Ranjana Pandey ...Petitioner
Versus
Union of India and others ...Respondents

Counsel for the Petitioner:
Sri Anil Tiwari

Counsel for the Respondents:
Sri A.B.L. Gaur
Sri Vikash Budhwar
Sri Ram Gopal Tripathi
Addl. Solicitor General of India

National Council for Teachers Education (Standards Norms & Procedure) Regulation 2005-Regulation3.201 readwith Policy framed by Allahabad University for Admission B.Ed. Course 2006-07-clause 1.1.1 and 2.2-university fixed minimum eligibility marks 40% in each paper to appear in entrance Text-while NCTE provides 50% marks whether arbitrary, excessive or in violation of Regulation 3.2.1? -held-'No' not in derogation-reasons explained.

Held: Para 19

In view of the aforesaid, this Court is of the opinion that the policy adopted by the University in fixing a minimum eligibility criteria of obtaining 40% marks in each paper, is not in derogation of clause 3.2.1 of the NCTE Regulations. In fact, the policy framed by the University, is in accordance with clause 3.3 of the NCTE Regulations.

Case law discussed:
1995 (4) SCC-104, 2004 (5) E.S.C.-147, AIR 1998 SC-795, 2005 (3) ESC-1594, 2001 (3) ESC-1257, 1986 Suppl. SCC-543, AIR 2003 SC-235, 1998 (6) SCC-720, 2004 (1) ESC-19, 2003 (3) ESC-1478, 1995 (4) SCC-104, 2005 (6) AWC-6199

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

1. Admissions in B.Ed. course is governed by the regulations framed by National Council for Teacher Education (Standards Norms and Procedures) Regulations 2005 (hereinafter referred to as the 'NCTE'). These Regulations were amended by a notification dated 20.7.2006 wherein the norms and standards were modified. Previously the minimum eligibility for admission was 45% marks in a Bachelor's degree or in a Master's Degree, but after the amendment, vide notification dated 20.7.2006, the eligibility criteria was increased from 45% to 50%. The controversy involved in

the present petition revolves around clause 3.2.1, 3.2.3 and 3.3 of the Regulations framed by NCTE. For facility the said Regulations are quoted herein below:-

"3.2.1 Candidate with at least 50% marks either in the Bachelor's Degree and/or in the Master's degree or any other qualification equivalent thereto, are eligible for admission to the programme.

3.2.2 There shall be relaxation of marks/reservation of seats for candidates belonging to SC/ST/ OBC communities and other categories as per the Rules of the Central / State Government, U.P. Administration concerned.

3.3. ***Admission*** *Procedure*

Admission shall be made on merit on the basis of marks obtained in the qualifying examination and/or in the entrance examination or any other selection process as per the policy of the State Government, U.P. Administration and the University."

2. From a perusal of clause 3.2.1, it transpires that the candidates who held 50% marks either in B.A. or in M.A. or in an equivalent examination would be eligible for admission to the programme. Clause 3.3 prescribes the procedure for the admission and stipulates that admissions would be made on merit on the basis of the marks obtained in the qualifying examination and/or in the entrance examination or through any other selection process, as per the policy of the authorities or the University, as the case may be.

3. The B.Ed. course is being conducted in two colleges in the district of Allahabad, namely, K.P. Training College and S.S. Khanna Girls Degree College. The present dispute is with regard to the denial of admission to the petitioner in S.S. Khanna Girls Degree College. The aforesaid two colleges are constituent colleges of the Allahabad University which has been declared to be a Central University by the University of Allahabad Act 2005.

4. As per clause 3.3 of the Regulations, the University has framed its own policy providing the procedure for the admission in the B.Ed. Course. A copy of the policy framed by the University is enclosed as Annexure 4 to the writ petition. A perusal of the policy framed for the B.Ed. course 2006-07 indicates that the forms would be made available from 5.10.2006 to 17.10.2006 and that the examination would be conducted on 12.11.2006. Clause 1.1.1 of the policy indicates that a candidate must possess a minimum of 40% marks in B.A. in order to be eligible for applying for the B.Ed. course. Clause 2.2. stipulates that a candidate would be required to appear in a common entrance examination conducted by the University and if the candidate obtained 40% marks in each paper, he would qualify and would be eligible to be included in the select list. Clause 2.6 stipulates that the marks obtained in the examination papers would be, computed and added together and thereafter weightage, if any, would be given and thereafter the candidate would be placed in the select list.

5. Based on the aforesaid policy framed by the University, the petitioner applied for the B.Ed. course and appeared

in the entrance examination. The petitioner secured 35% marks in one paper and 45% in the second paper. Since she did not fulfil the minimum eligibility requirement contemplated under Clause 2.2, namely 40% marks in each paper, she could not qualify and therefore, her name did not appear in the list of successful candidates.

6. It is pertinent to mention here that the examination was conducted in November, 2006. It has been stated at the Bar that within a fortnight thereafter, the results were declared in December, 2006 and thereafter the session had begun. Admittedly, the course is of one year. The present writ petition was filed on 1.5.2007, after more than 5 months from the date of the declaration of the result. The petitioner has prayed for the following reliefs, namely,

i. *Issue a writ, order or direction in the nature of certiorari calling for the records of the case and to quash the para 2.2 and 2.6 of the rules, in so far as the same provides minimum cut of marks and addition of weightage after securing minimum 40% marks as violative of regulations 2006, namely* ***"National Council for Teacher Education (Standards Norms and Procedure) (Amendment) Regulations 2006"*** *framed by N.C.T.E. (Annexure No.2).*

ii. *Issue a writ, order or direction in the nature of mandamus directing the respondents to admit the petitioner in B.Ed. Course session 2006-2007 by treating her eligible in as much as she has obtained total 169.75 marks, whereas the lowest merit is 166 marks."*

7. Heard Sri Anil Tiwari, the learned counsel for the petitioner, Sri A.B.L. Gaur, the learned senior counsel for the University of Allahabad and Sri Vikash Budhwar, the learned counsel appearing for the Committee of Management of Sri S.S. Khanna Girls Degree College, Allahabad.

8. The learned counsel for the petitioner submitted that as per the regulation framed by NCTE, the minimum eligibility criteria for a candidate to apply for a B.Ed. course is, that the candidate must have a minimum marks of 50%, whereas the University had fixed 45% as the minimum eligibility criteria in the qualifying examination. The fixation of 45% marks was done by the University as per the norms fixed by the regulation of 2005 whereas it should have been 50% as per the notification dated 20.7.2006. Consequently, the learned counsel submitted that the entire selection process conducted by the University was ex-facie illegal and against clause 3.2.1 as amended by the notification dated 20.7.2006. The learned counsel further submitted that the criteria fixed by the University for conducting an entrance examination was higher than the criteria fixed by the NCTE norms, that is to say the criteria fixed by the University under clause 2.6 and 2.2 requiring a candidate to obtain a minimum of 40 marks in each paper was in violation of clause 3.2.1 of the NCTE Regulations and therefore, submitted that clauses 2.2 and 2.6 of the Regulations framed by the University should be quashed. The learned counsel also submitted that out of 100 seats available in the College, 15% are filled up through the management quota and 48 seats were filled up through the common entrance examination and that 31 seats

remained vacant which could not be filled up till date. The learned counsel submitted that no useful purpose would be served in keeping the 37 seats vacant for the remainder of the academic course and therefore, the University should be directed to relax the norms of obtaining the minimum marks in the common entrance examination. Alternatively, the College may be allowed to fill the remaining seats on the basis of the select list prepared by them on the basis of the qualifying marks obtained by the candidate. In support of his submission, the learned counsel placed reliance on a decision of the Supreme Court in the case of **State of Tamil Nadu and another vs. Adhiyaman Educational & Research Institute and others**, (1995)4 SCC 104.

9. The learned counsel for the College supported the contention of the petitioner and further submitted that the left over seats may be filled up in accordance with the select list prepared by the College on the basis of the qualifying marks. In support of his submission the learned counsel for the college also placed reliance upon two decisions of this Court in **Welfare Association of Self Financed Institutions and others vs. State of U.P. and others, 2005(6) AWC 6199 and Welfare Association of Self Financed Institutes, Noida and others vs. State of U.P. and others,** 2004(5) ESC 147.

10. On the other hand, Sri A.B.L. Gaur, the learned counsel for the University submitted that the admission procedure adopted by the University was in accordance with the procedure laid down in the policy framed by the University, which in turn, was in accordance with clause 3.3 of the regulations framed by NTCE. The learned counsel for the University further submitted that the University of Allahabad has been declared to be a Central University and it is the endeavour of the University to ensure that high standard of education is maintained and therefore, there was no question of reducing the standard of examination conducted by them or reducing the minimum eligibility criteria for the common entrance examination. The learned counsel for the petitioner submitted that if the standards are lowered, it would render futile, the entire exercise of conducting a common entrance examination.

11. Having given my considerable thought in the matter and after hearing the parties at length, this Court is not at all impressed by the submission made by the learned counsel for the petitioner. No doubt, the NCTE norms, as modified by the notification dated 20.7.2006, stipulated that the eligibility criteria for a candidate to apply for a B.Ed. course was 50% marks in the qualifying, examination, i.e. in the B.A. examination or an examination equivalent thereto. The University had taken the old norms fixing the eligibility criteria of 45% in the qualifying examination. In my opinion, the mere fact that the University had fixed 45% marks for applying in the B.Ed. course would not make the entire selection void or illegal for the reasons, namely, that there is no allegation made in the writ petition that a person holding 45% to 49% marks in the qualifying examination succeeded in the entrance examination and thereafter obtained an admission in the B.Ed. course. Further, the selected candidates are not before this Court. Consequently, in their absence, the selection process cannot be set-aside on

this score. In my opinion, the fixation of 45% as the minimum eligibility criteria for applying for B.Ed. course was a mere irregularity and was not fatal to the selection process. Further, this court is of the opinion that once the petitioner had participated in the admission process and having failed to qualify, cannot turn around and challenge the selection process as being void. In this regard, there are a plethora of decisions of this Court as well as the Supreme Court.

In **Union of India and another Vs. N. Chandrasekharan and others, AIR 1998 SC 795**, the Supreme Court observed-

"It is not in dispute that all the candidates were made aware of the procedure for promotion before they sat for the written test and before they appeared before the Departmental Promotion Committee. Therefore, they cannot turn around and contend later when they found that they were not selected, by challenging that procedure."

In **Ramesh Rai Vs. Chairman, S.K.G. Bank, Azamgarh and others**, (2005) 3 E.S.C.1594, a Division Bench of this Court held-

"The petitioner did not raise the issue at the time of selection and in view of the settled legal proposition, as explained above, he cannot be permitted to agitate the issue merely because he could not succeed in the selection process."

Similarly, in **Rajendra Kumar Srivastava and others Vs. Samyut Kshetriya Gramin Bank and others, (2001) 3 ESC 1257** a Division Bench of this Court held –

"Moreover the petitioners and others appeared in the interview and thus were obviously aware of the fact that in the interview merit is also to be taken into consideration. Hence they should have protested at that time but they appeared in the interview without any protest. Hence as held by the Supreme Court in Union of India v. N. Chandrasekharan, 1998 (3) SCC 694, they cannot subsequently turn around and challenge the selection."

In **Ambesh Kumar (Dr.) vs. Principal, LLRM Medical College, 1986 Suppl SCC 543,** the Supreme Court held that since the number of seats for admission to various postgraduate courses was limited and that a large number of candidates applied for admission, the impugned order laying down the qualification for the candidates to be eligible for being considered for selection for admissions could not be said to be in conflict with the regulations framed by the Indian Medical Council, nor was in any encroached upon the standards prescribed by the said regulations.

12. In view of the aforesaid, the submission of the learned counsel for the petitioner to the effect that the selection process was void as per clause 3.2.1 of the NCTE norms cannot succeed and is rejected.

13. On the question as to whether the University had fixed a higher criteria than laid down by clause 3.2.1 of the NTCE Regulations, this Court is of the opinion that the procedure framed by the University was in accordance with the

provisions of clause 3.3 of the NCTE norms and was not in violation of clause 3.2.1 or 3.2.2 of the NCTE Regulations.

14. In **T.M.A. Pai Foundation vs. State of Karnataka, AIR 2003 SC 235**, the Supreme Court recognised three modes for judging the merit of a candidate for an admission to a professional course. The Supreme Court held that an admission in a private unaided institution must be a merit based selection. The merit is, determined for admission in a professional course, by marks that a student may obtain in the qualifying examination or by a common entrance test. The Supreme Court, in paragraphs 58, 59 and 68 of the aforesaid judgment held:

"58. For admission into any professional institution, merit must play an important role. While it may not be normally possible to judge the merit of the applicant who seeks admission into a School, while seeking admission to a professional institution and to become a competent professional, it is necessary that meritorious candidates are not unfairly treated or put at a disadvantage by preference shown to less meritorious but more influential applicants. Excellence in professional education would require that greater emphasis be laid on the merit of a student seeking admission. Appropriate regulations of this purpose may be made keeping in view the other observations made in this judgment in the context of admissions to unaided institutions.

59. Merit is usually determined, for admission to professional and higher education colleges, by either the marks that the student obtain at the qualifying examination or school leaving certificate stage followed by the interview, or by a common entrance test conducted by the institution, or in the case of professional colleges, by Government agencies.

68. It would be unfair to apply the same rules and regulations regulating admission to both aided and unaided professional institution. It must be borne in mind that unaided professional institutions are entitled to autonomy in their administration while, at the same time, they do not forego or discard the principle of merit. It would, therefore, permissible for the university or the Government at the time of granting recognition, to require a private unaided institution to provide for merit based selection while at the same time, give the management sufficient discretion in admitting students. This can be done through various methods. For instance, a certain percentage of the seats can be reserved for admission by the management out of those students who have passed the common entrance test held by itself or by the State/University and have applied to the college concerned for admission, while the rest of the seats may be filled up on the basis of counseling by the State agency. This will incidentally take care of poorer and backward sections of the society. The prescription of percentage for this purpose has to be done by the Government according to the local needs and different percentages can be fixed for minority unaided and non-minority unaided and professional colleges. The same principles may be applied to other non-professional but unaided educational institutions viz. graduation and post graduation non-professional colleges or institutes."

15. In the light of the aforesaid judgment, clause 3.2.1 provides that a candidate must hold 50% marks in the qualifying examination in order to be eligible to apply for a B.Ed. course. Clause 3.3 stipulates that the admission would be made on merit on the basis of the marks obtained in the qualifying examination **and/or** (emphasis is mine) in the entrance examination, as per the policy of the University. Based on clause 3.3 of the Regulations, the University has framed a policy, in order to short list the candidates. It is well known that a large number of candidates apply for a limited number of seats and, in order to select meritorious candidates, it is necessary to conduct a common entrance examination in order to remove the chaff from the grain. The University, based on clause 3.3, has framed a policy stipulating that an eligible candidate holding 45% marks in the qualifying examination can apply for a B.Ed. course and must obtain 40% marks in each paper in order to be eligible in the select list. The question is, whether the criteria of 40% marks in each paper is arbitrary, excessive or is the said criteria in violation of Regulation 3.2.1 framed by NCTE. The submission of the learned counsel for the petitioner is that the petitioner was eligible as per clause 3.2.1 of the NCTE Regulations, namely, that the petitioner held more than 45% marks in the qualifying examination and therefore, was eligible for the B.Ed. course but on the basis of the criteria fixed by the University, the petitioner became ineligible. In my opinion, clause 2.2 of the policy framed by the University is not in derogation of clause 3.2.1 of the Regulations framed by the NCTE. In fact, clause 2.2 of the policy, framed by the University, is in consonance with clause 3.3 of the NCTE Regulations.

16. In **B.V. Sivaiah and others Vs. K.Addanki Babu and others**, (1998) 6 SCC 720, the Supreme Court held that for assessing the minimum necessary merit, the competent authority could lay down the minimum standard that was required and also prescribe the mode of assessment of merit of the employee who was eligible for consideration for promotion. The Supreme Court held:

"For assessing the minimum necessary merit, the competent authority can lay down the minimum standard that is required and also prescribe the mode of assessment of merit of the employee who is eligible for consideration for promotion. Such assessment can be made by assigning marks on the basis of appraisal of performance on the basis of service record and interview and prescribing the minimum marks which would entitle a person to be promoted on the basis of seniority-cum-merit."

17. Similarly in **Vinod Kumar Verma and others Vs. Union of India and others**, 2004 [1] All. ESC 19, a Division Bench of this Court held-

"In our opinion, it is always open to the authorities to fix a minimum requirement, which a candidate must have before he can be considered for promotion on the basis of seniority-cum-merit. Hence it is not correct to say that only those who have some adverse entries or other adverse material in their service record can be eliminated while considering promotions on the basis of seniority-cum-merit.

No doubt one standard which the authorities can adopt for determining unfitness is the existence of adverse

material in the service record of the candidate, but that is not the only way in which the authorities can declare a person unfit for being considered for promotion. The authorities can fix any objective criterion for this purpose, and this Court cannot sit in appeal over this minimum merit criterion fixed by the authorities. The authorities must be given wide latitude in the manner and mode of fixing this minimum merit."

18. In **N.K.Agrawal and others Vs. Kashi Gramin Bank, Varanasi and others**, 2003 [3] ESC 1478 a Division Bench of this Court held-

"However, this not the invariable rule in giving promotions on the basis of seniority-cum-merit. An alternative procedure can be resorted to by the authorities, and that is that they can fix a minimum objective eligibility requirement and only those candidates who possess the same are then promoted on the basis of seniority. For considering this minimum eligibility requirement there can be a selection by a Selection Committee, vide Sivaiah's case [supra]"

19. In view of the aforesaid, this Court is of the opinion that the policy adopted by the University in fixing a minimum eligibility criteria of obtaining 40% marks in each paper, is not in derogation of clause 3.2.1 of the NCTE Regulations. In fact, the policy framed by the University, is in accordance with clause 3.3 of the NCTE Regulations.

20. This bring us to the last contention. Admittedly, after the selection process, 37 seats still remains vacant. The learned counsel for the petitioner submitted that on account of the policy of the University in fixing 40% marks in each paper, it resulted in the seats remaining vacant. Further, candidates are available who have the minimum qualifying marks, as fixed under the NCTE Regulations. In such a scenario, the management should be given the permission to fill up the vacant seats through the management quota by applying the minimum qualifying marks obtained by the candidate in the qualifying examination. In support of his submission, the learned counsel placed reliance upon the decision of the Supreme Court in **State of T.N. and another vs. Adhiyaman Educational & Research Institute and others**, 1995 (4)SCC 104 wherein, the Supreme Court, in paragraph 41 held as under: -

(v) When there are more applicants than the available situations/ seats, the State authority is not prevented form laying down higher standards or qualifications than those laid down by the Centre or the Central authority to short-list the applicants. When the State authority does so, it does not encroach upon Entry 66 of the Union List or make a law which is repugnant to the Central law.

(vi) However, when the situations/seats are available and the State authorities deny an applicant the same on the ground that the applicant is not qualified according to its standards or qualifications, as the case may be, although the applicant satisfies the standards or qualifications, laid down by the Central law, they act unconstitutionally. So also when the State authorities de-recognise or disaffiliate an institution for not

satisfying the standards or requirement laid down by them, although it satisfied the norms and requirements laid down by the Central authority, the State authorities act illegally.

21. In addition to the aforesaid, the learned counsel for the College also placed reliance upon a decision of this Court in **Welfare Association of Self Financed Institutes, Noida and others vs. State of U.P. and others**, 2004(6)ESC 147 wherein the Court in paragraph 37 held as under:-

"However, it is further provided that the State Government shall permit the Management of private unaided professional colleges to grant admission to students against the Management quota seats strictly in accordance with the option exercised by them in accordance with the notification of the All India Council for Technical Education and the brochure published by the U.P. Technical University, which in turn refers to Government Order dated 20th June, 2003. If, after exhausting the mode so opted by the private management, there still remain certain vacancies within the Management quota seats, the State shall permit the institutions to fill up the same from the other modes of admission as notified in the Government Order dated 20th June, 2003. The benefit of this Court is available to only those institutions which have exercised their opinion in accordance with the brochure published by U.P. Technical Education, referred to in the body of the judgment."

22. Similarly reliance placed upon in another decision in the case of **Welfare Association of Self Financed Institutions and others vs. State of U.P. and others**, 2005 (6) AWC 6199, wherein in the Court in paragraph 18 held as under-

"Having regard to the totality of the circumstances, this Court is of the opinion that no further counseling be permitted to be done by the respondents in respect of SEE-UPTU: 2005 and balance seats, (as per the chart supplied by the Additional Advocate General) may now be permitted to be filled by the private self financed institutions as the left over seats, as part and parcel of their management quota seats, on the basis of one of the recognised modes of judging the merits of the candidates. It is ordered accordingly."

23. In my considered opinion, the aforesaid judgements are distinguishable and is not applicable to the present facts of the case. I have already held that the eligibility criteria for the candidate to be eligible for admission in B.Ed. course as fixed by the University was neither in derogation nor in conflict with the regulations framed by the NCTE nor had the University, in any way, encroached upon the standard prescribed in the said regulations. On the other hand, by laying down such standards, it furthers the standard of instructions. The Supreme Court, in T.M.A. Pai's case (supra) has categorically held in paragraph 59 of the said judgment that merit is to be determined for admission in a professional course either by the marks that the student obtained in the qualifying examination or by a common entrance test conducted by the institution. The Supreme Court in para 68 of the said judgment further held that an unaided professional institution is entitled for autonomy in their administration, but at the same time they

cannot forego or discard the principle of merit and therefore, even a private unaided institution was required to provide for a merit based selection.

24. In the present case, the University has conducted the examination and a merit based selection has taken place. If certain seats remained vacant, the same cannot be filled up by a back door method by cutting down the eligibility criteria and fixing the eligibility criteria of holding the minimum qualifying marks obtained in the qualifying examination. Once a standard or norm for admission is fixed, the same has to be followed. It is not possible that certain number of seats are filled up by following the norms laid down by the University and for the remaining seats, norms fixed as per NCTE regulations are followed. In the considered opinion of the Court, the fixation of 40% marks to be obtained in each paper was neither arbitrary nor was in conflict with the regulations framed by N.C.T.E. In fact, in *Welfare Association of Self Financed Institutions and others vs. State of U.P. and others, 2005(6)AWC 6199*, the minimum marks were not prescribed as a result of which, even a candidate who had secured minus marks was declared successful and was called for counselling. The Court deprecated the practice for not fixing the minimum marks .

25. In the light of the aforesaid, the criteria of fixing a minimum 40% marks in each paper cannot be held to be arbitrary or in derogation of the norms laid by the NTCE regulations of 2006. Further, the Court cannot sit in appeal over the minimum criteria fixed by the University. The University must be given a wide latitude in the manner and mode of fixing the minimum eligibility criteria in the common entrance examination. Similar view was given by a Division Bench of this Court in Vinod Kumar Verma's case (supra). Consequently, the submission raised by the learned counsel for the petitioner as well as by the learned counsel for the College cannot be accepted.

26. However, the University should ponder over the matter and consider the impact of the seats remaining vacant for a professional course, namely, the B.Ed. course. There are only two colleges in Allahabad imparting B.Ed. course in which admissions are done through a common entrance examination conducted by the University. There are only limited seats. The candidates applying for this professional course are large in numbers. No useful purpose is served in keeping the seats vacant. Consequently, for conducting the common entrance examination in future, the University may reframe its policy, while keeping in mind, the standard of education and may reduce the minimum marks to be obtained by a candidate in the common entrance examination. A decision in this regard may be taken by the University before holding the next common entrance examination.

27. In view of the aforesaid, the writ petition fails and is dismissed. In the circumstances of the case, there shall be no order as to cost. Petition dismissed.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 19.09.2007

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

Civil Misc. Application No. 22382 of 2007

Amar Singh and others ...Applicants
Versus
State of U.P. and another ...Opposite Party

Counsel for the Applicants:
Sri S.K. Tiwari

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

Code of Criminal Procedure-Section 319-Guide lines and the circumstances-explained-for exercise power under Section 319.

Held: Para 12

In view of the above rulings of the Hon'ble Apex Court the legal position regarding summoning of any person as accused u/s 319 Cr.P.C. can be summed up as under:

1. **The power u/s 319 Cr.P.C. is not to be exercised mechanically on the ground that some evidence has come on record implicating the person sought to be made an accused.**
2. **There is no compelling duty on the Court to proceed against those persons against whom no charge sheet has been submitted.**
3. **The power u/s 319 Cr.P.C. is discretionary and should be exercised to achieve criminal justice and the Court should not turn against another person simply because it has come across some evidence connecting that person also with the offence. The court should exercise judicial discretion in the matter considering all the relevant facts and circumstances.**
4. **The Court must be satisfied that the other person , who had not been arrayed as accused, had also participated in commission of the offence.**
5. **The power u/s 319 Cr.P.C. is extraordinary power conferred on the court and this should be used very sparingly if the compelling reasons exist for taking cognizance against other accused persons against whom no charge sheet has been submitted.**
6. **There must be reasonable prospect of the case against the newly added accused ending in his conviction for the offence concerned and then only that person should be summoned as an accused otherwise the Court should refrain from adding him as an accused.**
7. **The Court shall exercise a judicial discretion taking into consideration conspectus of the case including the stage at which the trial has proceeded and the quantum of evidence collected till the date and time spent by the Court for collecting such evidence while passing the order of summoning the person u/s 319 Cr.P.C.**
8. **The satisfaction whether there exists likelihood of conviction of the person to be summoned as accused can be arrived at inter alia upon cross examination of the witness naming him and so the orders for summoning a person as accused u/s 319 Cr.P.C. should be passed after cross examination of the witness.**
9. **The Court concerned may also take into consideration other evidence before passing an order for summoning a person as an accused u/s 319 Cr.P.C.**

Case law discussed:
2000 SCC (Crl.) 609
1983 (2) ACC-50 (SC)
2006 (1) SCC (Crl.)-568
2007 (58) ACC-254

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

1. This is an application u/s 482 Cr.P.C. to quash the order dated 5.12.2006 passed by the Judicial Magistrate IVth, Aligarh in case no. 450/06, State Vs. Harpal and others, u/s 147,148,323,504,506,332,353 I.P.C., P.S. Dadon, District Aligarh.

2. The facts relevant for disposal of this application is that on 22.9.2000 at about 2.30 P.M. Constable Rajendra Singh of P.S. Dadon lodged a F.I.R. against nine accused persons named therein including the present applicants and 15-20 unknown persons on which case crime no.364/2000, u/s 147,148,324,504,506,332,353 I.P.C. and Section 7 Criminal Law Amendment Act, was registered against the accused persons.

3. The police after investigation submitted the charge sheet against six accused persons only named in the F.I.R. and no charge sheet was filed against the present applicants though they were named in the F.I.R.. The case proceeded against six accused only named in the charge sheet and the statement of the informant Constable Rajendra Singh was recorded as P.W.1 and in his statement he named the present applicants also as accused. Thereafter an application was moved from the side of the prosecution to summon the applicants u/s 319 Cr.P.C. The learned Magistrate after hearing the prosecution allowed the application and summoned the applicants accused u/s 319 Cr.P.C. Against the above order this application has been filed u/s 482 Cr.P.C. by those accused summoned u/s 319 Cr.P.C.

4. I have heard learned counsel for the applicants and learned A.G.A. at the admission stage.

5. Since the point involved in the case is legal one, I am deciding it at the admission stage after hearing both the parties.

6. The scope of power of the court u/s 319 Cr.P.C. was considered by Hon'ble Apex Court in Municipal Corporation of Delhi Vs. Ram Kishan Rohtagi and others 1983 (20) ACC 50 (SC), and it was observed in the above case:

".....if the prosecution can at any stage produce evidence which satisfies the Court that the other accused or those who have not been arrayed as accused against whom proceedings have been quashed have also committed the offence the Court can take cognizance against them and try them along with the other accused. But, we would hasten to add that this is really an extraordinary power which is conferred on the Court and should be used very sparingly and only if compelling reasons exist for taking cognizance against the other person against whom action has not been taken."

7. The above view was followed by Hon'ble Apex Court in ***Michael Machado V. Central Bureau of Investigation 2000 SCC (Cri) 609*** holding that unless the Court is hopeful that there is a reasonable prospect of the case against the newly added accused ending in their conviction for the offence concerned, the Court shall refrain from adding them as accused.

8. In the case of ***Palanisamy Gounder and another Vs. State***

Represented by Inspector of Police (2006) 1 SCC (Cri) 568. The facts were that a charge sheet had been submitted against 5 accused persons, but on the basis of further investigation the names of two accused were dropped and the case proceeded against three accused persons only. However during trial, the prosecution witnesses named all the five accused persons and then an application was moved from the side of the prosecution to summon those two accused also who had been subsequently discharged. The Sessions Judge allowed that application and that order was confirmed by the High court but on appeal the Apex Court considering the law laid down in ***Municipal Corporation of Delhi Vs Ram Kishan Rohtagi and others (Supra) and Michael Machado V. Central Bureau of Investigation*** (supra), allowed the appeal and set aside the summoning order passed by the learned sessions Judge against those co accused who had been discharged on the basis of the further investigation, and observed therein as follows:

"In Michael Machado accused V. Central Bureau of Investigation construing the words' the court may proceed against such person' in Section 319 Cr.P.C., this Court held that the power is discretionary and should be exercised only to achieve criminal justice and that the court should not turn against another person whenever it comes across evidence connecting that other person also with the offence. This Court further held that a judicial exercise is called for, keeping a conspectus of the case, including the stage at which the trial has already proceeded and the quantum of evidence collected till then, and also the amount of time which the court had spent for collecting such evidence. The court, while examining an application under Section 319 Cr.P.C., has also to bear in mind that there is no compelling duty on the Court to proceed against other persons. In a nutshell, it means that for exercise of discretion under Section 319 Cr.P.C. all relevant factors, including the one noticed above, have to be kept in view and an order is not required to be made mechanically merely on the ground that some evidence had come on record implicating the person sought to be added as an accused."

9. In the case of ***Mohd. Shafi Vs. Mohd. Rafiq and another (2007 (58) ACC 254***, the facts were that the appellant Mohd. Shafi and one Karimullah were named as the accused persons in a case u/s 302 I.P.C. The police after investigation submitted a charge sheet against Karimullah @ Arif only and discharged Mohd. Shafi. Thereafter when the statement of P.W.1 Rafiq was recorded, he stated in his examination- in-chief that Mohd. Shafi had also participated in the murder, and on that basis the prosecution moved an application for summoning Mohd. Shafi u/s 319 Cr.P.C. The learned Sessions Judge rejected that application on the ground that only the examination in chief of the witnesses had been recorded and he had not been put to cross examination and so on the basis of examination in chief of P.W.1 Karimullah could not be summoned as accused u/s 319 Cr.P.C.

10. Then the complainant O.P. no. 2 filed an application u/s 482 Cr.P.C. before this Court which was allowed and the order of the Sessions Judge rejecting the application u/s 319 Cr.P.C. was set aside

and the court passed an order for summoning Mohd. Shafi u/s 319 Cr.P.C.

11. Aggrieved with that order Mohd. Shafi filed an appeal before the Apex Court and the Hon'ble Apex Court holding that the order passed by the High court was erroneous made the following observations:

"From the decisions of this Court, as noticed above, it is evident that before a Court exercises its discretionary jurisdiction in terms of Section 319 of the Code of Criminal Procedure, it must arrive at the satisfaction that there exists a possibility that the accused so summoned is in all likelihood would be convicted. Such satisfaction can be arrived at inter-alia upon completion of the cross-examination of the said witness. For the said purpose, the Court concerned may also like to consider other evidence."

12. In view of the above rulings of the Hon'ble Apex Court the legal position regarding summoning of any person as accused u/s 319 Cr.P.C. can be summed up as under:

1. The power u/s 319 Cr.P.C. is not to be exercised mechanically on the ground that some evidence has come on record implicating the person sought to be made an accused.
2. There is no compelling duty on the Court to proceed against those persons against whom no charge sheet has been submitted.
3. The power u/s 319 Cr.P.C. is discretionary and should be exercised to achieve criminal justice and the Court should not turn against another person simply because it has come across some evidence connecting that person also with the offence. The court should exercise judicial discretion in the matter considering all the relevant facts and circumstances.
4. The Court must be satisfied that the other person, who had not been arrayed as accused, had also participated in commission of the offence.
5. The power u/s 319 Cr.P.C. is extraordinary power conferred on the court and this should be used very sparingly if the compelling reasons exist for taking cognizance against other accused persons against whom no charge sheet has been submitted.
6. There must be reasonable prospect of the case against the newly added accused ending in his conviction for the offence concerned and then only that person should be summoned as an accused otherwise the Court should refrain from adding him as an accused.
7. The Court shall exercise a judicial discretion taking into consideration conspectus of the case including the stage at which the trial has proceeded and the quantum of evidence collected till the date and time spent by the Court for collecting such evidence while passing the order of summoning the person u/s 319 Cr.P.C.
8. The satisfaction whether there exists likelihood of conviction of the person to be summoned as accused can be arrived at inter alia upon cross examination of the witness naming him and so the orders for summoning a person as accused u/s 319 Cr.P.C. should be passed after cross examination of the witness.

9. The Court concerned may also take into consideration other evidence before passing an order for summoning a person as an accused u/s 319 Cr.P.C.

13. The position in the present case is that the learned Magistrate has not taken into consideration the above aspects of the case which he was bound to consider while passing the order for summoning the applicant u/s 319 Cr.P.C. Hence, the order passed by him cannot be sustained and it is liable to be set aside.

14. The present application u/s 482 Cr.P.C. is, therefore, allowed. The order of the learned Magistrate concerned summoning the accused applicant under section 319 Cr.P.C. is set aside. The application for summoning the accused applicant under section 319 Cr.P.C. is rejected. However, if at any subsequent stage of the proceedings there comes any credible evidence regarding participation of the present accused applicant in commission of the crime, then the learned Magistrate can reconsider the feasibility of summoning him taking into consideration the observations of the Hon'ble Apex Court in the above quoted judgements.

15. Let a copy of this judgement be sent to the Registrar General of the court for circulation amongst Judicial Officers of the subordinate judiciary for their information and guidance.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.09.2007

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

Civil Misc. Writ Petition No.23282 of 2007

Sri Krishna Kumar Gupta ...Petitioner
Versus
The Registrar General High Court, Allahabad and others ...Respondents

Counsel for the Petitioner:
Sri Siddhartha Srivastava

Counsel for the Respondents:
Sri Neeraj Upadhyay
Sri Yogesh Kumar Saxena
Sri A.Z. Rizvi
Sri K.R. Sirohi
S.C.

Subordinate Civil Courts Ministerial Establishment Rules, 1947-Rule-20-Criteria for Promotion-merit-cum-seniority-petitioner being Senior most by-passed- as the private respondent got several outstanding entries by different officers while petitioner got good and satisfactory-otherwise every thing equal-No guide lines for determination of better candidates provided-held-committee possess full discretion-promotion of private respondent-valid.

Held: Para 14

On the touchstone of the rules which are applicable in the present case and dictum noted above, claim of the petitioner is being looked into. This fact is undisputed that post in question is selection post and promotion has to be based on the principle of merit with due regard to the seniority i.e. on the principle of merit-cum-seniority where merit has to be given precedence. As per note appended due weight has to be given to previous record of service and

seniority has to be disregarded only when junior persons compared with his senior is of outstanding merit. In the present case, criteria of selection, which had been adhered to by the Committee constituted for considering the matter of promotion was respective service record of the incumbent in question. This fact is not disputed that petitioner is senior viz-a-viz contesting respondent Sayed Zafar Hussain. 'Merit-cum seniority' lays greater emphasis on merit and ability, and it is only when merit and suitability are roughly equal then seniority will be determining factor. Selection Committee has unrestricted choice of best available talent from amongst eligible candidates, determined by reference to reasonable criteria applied in assessing the facts revealed by service records of all eligible candidates so that merit and not mere seniority is governing factor.

Case law discussed:

AIR 1967 SC-1910, 1998 (6) SCC-720, AIR 1966 SC-1547, 2000 (6) SCC-698, 2001 (5) SCC-60, 2006 (6) SCC-145, 2006 (5) SCC-789, 1971 (2) SCC-452

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

1. Present writ petition has been filed by the petitioner assailing the validity of the decision dated 1.5.2007 according promotion to Sri Syed Zafar Husain as Sadar Munsarim in the judgeship of District Bareilly.

2. Brief facts of the case is that in the judgeship of District Bareilly on account of attaining age of superannuation of Sadar Munsarim Sri Kailash Chandra Agarwal, post of Sadar Munsarim fell vacant and then senior most employee Sri Margoob Hussain was accorded promotion vide order dated 30.3.2007. Thereafter said Margoob Hussain also attained the age of superannuation and then exercise was undertaken for according promotion on the post of Sadar Munsarim. In the said exercise so undertaken, petitioner, who is un-disputedly senior, has been non suited and Sri Syed Zafar Husain has been accorded promotion as Sadar Munsarir, on the recommendation of Committee, at this juncture present writ petition has been filed.

3. Counter affidavit has been filed and therein it has been stated that rightful decision has been taken and the post of Sadar Munsarim was selection post, promotion has been made on the basis of the merit with due regard to the seniority, in this background there is no occasion to interfere.

4. Counter affidavit has been filed on behalf of the District Judge, Bareilly and therein to action taken, has been justified.

5. Rejoinder affidavit has been filed to the counter affidavit and supplementary has also been filed reiterating all mosi all the averments mentioned on the earlier occasion.

6. After respective arguments have been advanced, present writ petition has been taken for final disposal/hearing with the consent of the parties.

7. Original record on the basis of which impugned decision in question has been taken has also been produced.

Sri Sidhhartha Srivastava, Advocate, learned counsel for the petitioner contended with vehemence that in the present case petitioner was senior and merely on the basis of assessment made in the A.C.R. and old stale reports opinion has been formed in respect of outstanding merit and promotion has been accorded,

as such action, is unjustified action, and same cannot be subscribed by any means.

8. Sri Neeraj Upadhaya, Advocate, representing District Judge, Bareilly and Sri Yogesh Kumar Saxena representing private respondents on the other hand contended that selection is based on merit-cum-seniority and here on the basis of the merit, contesting respondents has been accorded promotion as such no interference be made in exercise of authority of judicial review.

9. Before proceeding to consider the respective arguments advanced, relevant rules which holds the field of promotion, Rule **20** of Subordinate Civil Courts Ministerial Establishment Rule, 1947 is being quoted below for being looked into

20. Promotion:- (1) The posts in a judgeship reserved for clerks in that judgeship and promotion to higher posts shall be made from amongst them, If, however no suitable clerk is available in the judgeship for promotion to a particular post, promotion as a special case may be made from another judgeship with the sanction of the High Court or the Chief Court, as the case may be .

(2) Except in cases of Amins, promotion shall be made according to seniority subject to efficiency up Rs.80 grade in the case of persons getting pre-1931 scale of pay and the scale of Rs.70-4-90 (Callas III in the case of persons getting pay on the post -1931 scale of Rs.85-6-145 in the case of persons drawing the revised 1947 scale.

(3) Post other than those mentioned in Clause (2) above, for persons in the pre 1931 scale on post 1931 scale respectively shall be treated as selection posts, promotion to which shall be based on merit with the due regard to seniority.

Note- In passing over a person for inefficiency as well as promotion for a selection post due weight shall be given to his previsions record of service and seniority should be disregarded only when the junior official promoted is of outstanding merit as compared with his seniors.

10. Perusal of the aforementioned rules would go to show that as far as post of Sadar Munsarim is concerned, same being covered in sub Rule 3 of Rule 20 of Subordinate Civil Courts Ministerial Establishment Rules, 1947, is selection post, promotion whereof, is to be made, based on merit with due regard to seniority. Note has been appended therein providing that for passing over a person for inefficiency as well as promotion for selection post due weight has to be given to his previous record of the service and seniority is to be disregarded only when junior official promoted is of outstanding merit as compared with his seniorities.

11. Criteria of merit-cum-seniority has been subject matter of consideration time and again and same is approved method of selection and promotion to selection grade post is not automatic on the basis of ranking in gradation list and promotion is based primarily on merit and not on seniority alone.

Hon'ble Apex Court in the case of ***Sant Ram Sharma v. State of Raiasthan, AIR 1967 SC 1910*** held that promotion to 'selection grade posts' is not automatic on the basis of ranking in Gradation list and the promotion is primarily based on merit and not on seniority alone. At page 1914

of the Judgment, it is stated as under (para 6):-

"The circumstance that these posts are classed as 'Selection Grade Posts' itself suggests that promotion to these posts is not automatic being made only on the basis of ranking in the Gradation List but the question of merit enters in promotion to selection posts. In our opinion, the respondents are right in their contention that the ranking or position in the Gradation List does not confer any right on the petitioner to be promoted to selection post and that it is a well established rule that promotion to selection grades or selection posts is to be based primarily on merit and not on seniority alone. The principle is that when the claims of officers to selection posts is under consideration, seniority should not be regarded except where the merit of the officers is judged to be equal and no other criterion is, therefore, available"

Hon'ble Apex Court in the case of ***State of Orissa v. Duroa Charan Das. AIR 1966 SC 1547***, the Constitution Bench held that the promotion to a selection post is not a matter of right which can be claimed merely by seniority.

Hon'ble Apex Court thereafter in the case of ***B. V. Sivaiah v. K. Addanki Babu (1998) 6 SCC 720*** held that the principle of "merit-cum-seniority" lays greater emphasis on merit and ability and seniority plays a less significant role. Seniority is to be given weight only when merit and ability are approximately equal.

Hon'ble Apex Court in the case of ***Union of India v: Lt. Gen Raiendra Singh Kadyan (2000) 6 SCC 698*** observed as under

"Wherever fitness is stipulated as the basis of selection, it is regarded as a non-selection post to be filled on the basis of seniority subject to rejection of the unfit. Fitness means fitness in all respects. "Seniority-cum-merit" postulates the requirement of certain minimum merit or satisfying a benchmark previously fixed Subject to fulfilling this requirement the promotion is based on seniority. There is no requirement of assessment of comparative merit both in the case of Seniority-cum-fitness and seniority-cum-merit. Merit-cum-suitability with due regard to seniority as prescribed in the case of promotion to All India Services necessarily involves assessment of comparative merit of all eligible candidates, and selecting the best out of them."

Hon'ble Apex Court in the case of ***Central Council for Research in Ayurveda and Siddha and another. Vs. Dr. K. Santhakumari report in (2001)5 SCC 60*** has taken the view that where promotion is based on merit-cum-seniority basis by departmental promotion on the recommendation of Departmental Promotion Committee, then a candidate cannot challenge the select list on ground that therein his/her juniors were placed above him/her without following seniority-cum-fitness criterion. Relevant para 12 are being quoted below:-

12. In the instant case, the selection was made by Departmental Promotion Committee. The Committee must have considered all relevant facts including the inter-se merit and ability of the candidates and prepared the selects list on that basis. The respondent though senior in comparison to other candidates, secured a lower place in the select list, evidently

because the principle of "merit-cum-seniority" held been applied by the Depal1rnental Promotion Committee The respondent has no grievance that there was any mala fides on the part of the Departmental Promotion Committee. The only contention urged by the respondent is that the Departmental Promotion Committee did not follow the principle of "seniority-cum-fitness" In the High Court, the appellants herein failed to point out that the promotion is in respect of a selection post' and the principle to be applied is "merit-cum-seniority". Had the appellants pointed out the true position, the learned Single Judge would not have granted relief in favour of the respondent. If the learned Counsel has made an admission or concession inadvertently or under a mistaken impression of law, it is not binding on his client and the same cannot ensure to the benefit of any party.

12. Hon'ble Apex Court in the case of ***Harigovind Yadav Vs. Rewa Sidhi Gramin Bank and others reported in (2006) 6 SCC 145*** has taken the view that policy which did not prescribe a minimum standard for assessing merit which promoted candidates on the basis of comparative merit, with reference to total marks obtained by the eligible candidate, followed the merit-cum seniority principle, and same was not in consonance with the principle of seniority-cum-merit. Relevant para nos. **26 and 27** are being quoted below:-

26. The next question that arises for consideration is the relief to be granted. The appellant was first considered for promotion during 1991 and was not promoted, by wrongly adopting the principle of merit-cum-seniority. The said procedure was found to be erroneous by the single Judge, Division Bench and by this Court. The Bank was directed to consider the case of Appellant for promotion on the basis of seniority-cum-merit Thereafter, in the contempt proceedings initiated by the appellant, the Bank undertook to comply with the order directing consideration of the appellant's case by the procedure of seniority-cum-merit But the Bank, again by adopting the merit-cum-seniority method, failed to promote the appellant and promoted third respondent The procedure adopted by the Bank had been found to be faulty on three occasions by this Court and the High Court, one of which was in the case of Appellant himself. The appellant had been denied promotion for more than 16 years by repeatedly adopting such an erroneous procedure In the circumstances, we do not think it necessary to drive the appellant once again to face the process of selection for promotion. This Court in Comptroller and Auditor General of India v. K.S. Jagannathan [1986 (2) SCC 679] observed thus:_ There is thus no doubt that the High Courts in India exercising their jurisdiction under Article 226 have the power to issue a writ of mandamus or a writ if the nature of mandamus or to pass orders and given necessary directions where the Government or a public authority has failed to exercise or has wrongly exercised the discretion conferred upon it by a statute or a rule or a policy-decision of the Government or has exercised such discretion mala fide or on irrelevant considerations or by ignoring the relevant considerations and materials or in such a manner as to frustrate the object of conferring such discretion or the policy for implementing which such discretion has been conferred. In all such cases and in any other fit and proper case a High Court can, in the

exercise of its jurisdiction under Article 226, issue a writ of mandamus or a writ in the nature of mandamus or pass orders and given directions to compel the performance in a proper and lawful manner of the discretion conferred upon the government or a public authority, and in a proper case, in order to prevent injustice resulting to the concerned parties, the court may itself pass an order or give directions which the government or the public authority should have passed or given had it properly and lawfully exercised its discretion"

27. Having regard to the factual background of the case, and having regard to the fact that even under the merit-cum-seniority basis adopted by the bank the appellant had secured high marks and he was denied promotion on the ground that he failed to secure minimum marks in the interview, there is no need to refer the matter for fresh consideration. With a view to do complete justice, in exercise of our power under Article 142 we hereby direct the first respondent bank to promote the appellant as a Field Supervisor, from the date the third defendant was promoted as Field Supervisor and place him above the third Respondent. However, he will be entitled to monetary benefits flowing from such promotion only prospectively, though the pay is to be refixed with reference to the retrospective date of promotion.

13. Hon'ble Apex Court in the case of ***K.K. Parmar and others Vs. H.C. of Gujarat through Registrar and others reported in (2006) 5 SCC 789*** has taken the view that Selection Committee cannot ignore past performance. Moreover, it was for the Selection Committee to devise mode for assessing past performance such as consideration of ACRs and having not done so, the candidates cannot be blamed on the ground that they having appear ed in the examination were estopped from questioning the selection process. Scope of judicial review and the meaning of the merit has also been considered in the said judgment. The relevant para nos. **21.22,23,27, 28** are being quoted below.

21. The superior court exercising its power of judicial review is not concerned as to whether a wrong provision of law has been taken recourse to, but is only concerned with the question as to whether the authority passing the order had the requisite jurisdiction under the law to do so or not. In the event, it is found that the impugned order is not ultra vires or illegal or without jurisdiction, the same would not be interfered with only because it at one point of time proceeded on a wrong premise. A jurisdictional question, in our opinion, can always be permitted to be raised. We, therefore, do not find any substance in the said contention of Mr Kapur.

22. In so far as the second contention raised on behalf of the appellants is concerned apparently the same has merit. Merit was the only consideration for promotion to the post of Section Officer. They were selection posts Selection was, therefore, required to be made strictly on the basis of respective merit of the candidates as also on the basis of their past performance No employee had a claim to those posts only on the basis of their seniority.

23. Sub-rule (2) of Rule 47 of the Rules categorically provides for the mode and manner as to how the merit should be determined. In terms thereof, merit of a

candidate was to be determined on the basis of; (i) past performance, (ii) performance at the written test and (iii) performance at the oral test to be taken by the selection committee.

27. Merit of a candidate is not his academic qualification. It is sum total of various qualities. It reflects the attributes of an employee. It may be his academic qualification. He might have achieved certain distinction in the University. It may involve the character, integrity and devotion to duty of the employee. The manner in which he discharges his final duties would also be relevant factor (See Guman Singh v. State of Rajasthan and others (1971) 2 SCC 452) 1972 Lab IC 1295.

28. For the purpose of judging the merit, thus, past performance was a relevant factor. There was no reason as to why the same had been kept out of consideration by the Selection Committee. If a selection is based on the merit and suitability, seniority may have to be given due weight but it would only be one of the several factors affecting assessment of merit as comparative experience in service should be.

14. On the touchstone of the rules which are applicable in the present case and dictum noted above, claim of the petitioner is being looked into. This fact is undisputed that post in question is selection post and promotion has to be based on the principle of merit with due regard to the seniority i.e. on the principle of merit-cum-seniority where merit has to be given precedence. As per note appended due weight has to be given to previous record of service and seniority has to be disregarded only when junior persons compared with his senior is of outstanding merit. In the present case, criteria of selection, which had been adhered to by the Committee constituted for considering the matter of promotion was respective service record of the incumbent in question. This fact is not disputed that petitioner is senior viz-a-viz contesting respondent Sayed Zafar Hussain. 'Merit-cum seniority' lays greater emphasis on merit and ability, and it is only when merit and suitability are roughly equal then seniority will be determining factor. Selection Committee has unrestricted choice of best available talent from amongst eligible candidates, determined by reference to reasonable criteria applied in assessing the facts revealed by service records of all eligible candidates so that merit and not mere seniority is governing factor.

15. Qua petitioner selection Committee, has found that he has been accorded pay scale of Rs.4500/- to 7000/- w.e.f. 01.02.1997 and since last ten years there is no adverse comment and no enquiry is pending. Character Roll has also been seen where for year 2000 "good" entry has been provided for and for year 2002-03 2003-04 and 2004,05 "satisfactory" entry has been provided for. Qua Sayed Zafar Hussain, it has been mentioned that he is in pay scale of Rs.4500/--7000/- w.e.f. 01.02.1997, and his character roll reflects that for year 2001, "outstanding" entry was awarded. Similarly for year 2002, "outstanding" entry was awarded. In the year 2002-03 "good" entry was awarded, and in year 2005-06 "outstanding" entry was awarded. Note has also been taken of the award given by his Court on 25.03.1996. On the basis of comparative assessment of merit, Committee has resolved to accord

promotion to Sayed Zafar Hussain. Sayed Zafar Hussain has been awarded outstanding entries in respect of his functioning by various officer from time to time and as far as petitioner is concerned, no such entry of outstanding performance has been awarded to the petitioner. In the ACRs, which are maintained, said entries find place. Said ACRs have not only been made foundation and basis of making comparative assessment of merit, but in respect of service of respondent, the other positive factor, which was there, same has also been taken into account by the Selection Committee. Under the rules, no criteria judging the merit has been provided for. In the absence of there being any provision in the rules, the Selection Committee was fully competent to assess the facts revealed by service records of all eligible candidates, so that merit and not seniority is, governing factor. Merit is sum total of various qualities, and same reflects attributes of an employee, in different spheres of life. Same may involve character integrity and devotion to duty of the employee to-wards his employer, and manner in which he/she discharges duty is also relevant factor. See ***Gumnam Singh Vs. State of Raishthan*** 1971 (2) SCC 452. Here respondent no. 3 by his sheer work has earned outstanding entries, which has given edge to the respondent no. 3, at the point of time of assessing merit and consequently he has outscored on merit. Once objective consideration has been there and there is no element of malafides against member of Selection Committee then once Selection Committee seized of the matter on the basis of record maintained has found that qua contesting respondents, there were much more outstanding entries, and has proceeded to form opinion that said junior incumbent was of outstanding merit as compared with his senior, then as far as this court is concerned in exercise of its authority of judicial review this court cannot set aside the aforementioned selection proceedings, by means of which promotion has been accorded.

16. Much capital has been sought to be made out of the fact that on the earlier occasion all these entries were there but in spite of the same Syed Zafar Hussain was not promoted and this time senior incumbent has been non suited. It is prerogative of the Selection Committee to consider the matter of selection. Here in the present case, it may be true that in the opinion of the earlier Selection Committee, said material though available may not have weighed, but that does not mean that subsequent Selection Committee is debarred of consideration of relative merit of the candidates.

17. In the present case, looking into the record of the case, which has been produced and there being outstanding entries in favour of respondent no.3 and other material on the basis of which he has been preferred, no interference is warranted.

18. Consequently, writ petition lacks substance and same is dismissed.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED ALLAHABAD 26.10.2007

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

Crl. Misc. Application No. 24771 of 2007

Jokhan ...Applicant
Versus
State of UP & others ...Opposite Parties

Counsel for the Applicant:
Sri. Ravindra Prakash Srivastava

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

(A) Code of Criminal Procedure- Section-497- Criminal Revision- direction to register and investigate the case issued by the Magistrate under section 156(3) of the act.- revision by the accused- held not maintainable- as no case has been registered nor any right of the prospective accused is going to be affected.

Held: Para 4

This contention of the learned counsel for the applicant is correct. If an application is filed under Section 156(3) Cr.P.C. in the Court of a learned Magistrate, it is a matter between the applicant and the Court and the accused does not come into picture as no cognizance of the of fence is taken in the matter. If the learned Magistrate finds that a *prima facie* case is made out which requires investigation, he can direct for registration and investigation under Section 156(3) Cr.P.C. Unless the report is registered against the person named therein as accused his legal or fundamental rights are not infringed and he has no locus to challenge that order
Case law discussed:
1977 SCC(Criminal) 585

(B) Code of Criminal Procedure- Section-36 Superior Officer to the rank of Officer in Charge- direction of Magistrate under section 156(3)- to the Officer in Charge of police station to register and investigate the case within 3 days- offense under ST/SC Act.- contention the investigation can be made only by superior officer misconceived- once the offense is registered- no bar for investigation by superior officer.

Held: Para 6

Therefore, if any order is passed by the learned magistrate under Section 156(3) Cr.P.C. and if investigation is required to be made by any officer above the rank of police officer in charge of the police station , there is no bar and such matter: can be investigated by his Superior Officer also.
Case law discussed:
2001(2) A.C.R. 1875

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

1. This application has been filed under Section 482 Cr.P.C. for setting aside the order dated 6.9.2007 passed by Sessions Judge Basti, in Criminal Revision No.451/07 Nagendra Tiwari Vs. State of U.P. and another with the further prayer to restore the order dated 13.4.2007 passed by the learned Magistrate directing for registration and investigation of the case under Section 156(3) Cr.P.C.

2. Heard Sri Ravindra Prakash Srivastava the learned counsel for the applicant, learned AGA and perused the material on record.

3. The brief facts of the case are that the applicant filed an application under Section 156(3) Cr.P .C. alleging that on

12th December 2005 at about 10.00 in the day Awadesh Prasad Tiwari, Ram Krishna Tiwari, Ram Singhasan Tiwari and Nagendra Tiwari armed with lathis and dandas came near the canal in village Bhitiya Digar where he and his brother Sadhu Prasad were grazing pigs. These persons abused the informant and his brother and also called them with caste denoting words and beat them with lathis and dandas. On the alarm raised the witnesses came and saved them. The informant and his brother received injuries. The learned magistrate finding a prima facie case directed for registration and investigation of the case and further directed the S.O. concerned to submit compliance report within three days. Against that order Nagendra Tiwari filed Criminal Revision No.451/07 in the Court of Sessions Judge Basti and the learned Sessions Judge by the impugned order dated 6.9.2007 held that the revision was maintainable and that in view of Section 156(3) Cr.P.C. the Station Officer of a police station could only investigate the matter. But in this case allegations were also under the SC/ST Act and that case could be investigated by officer not below the rank of the Deputy Superintendent of Police and therefore, no such direction-could have been issued by the learned Magistrate. Feeling aggrieved, the present application has been filed.

4. Learned counsel for the applicant has contended that the revision as filed in the Court of Sessions Judge against the order of the learned Magistrate was not competent because Nagendra Tiwari is only a prospective accused and he had no *locus standi* to file revision and the learned Sessions Judge erred in holding that the revision was maintainable. This contention of the learned counsel for the applicant is correct. If an application is filed under Section 156(3) Cr.P.C. in the Court of a learned Magistrate, it is a matter between the applicant and the Court and the accused does not come into picture as no cognizance of the offence is taken in the matter. If the learned Magistrate finds that a *prima facie* case is made out which requires investigation, he can direct for registration and investigation under Section 156(3) Cr.P.C. Unless the report is registered against the person named therein as accused his legal or fundamental rights are not infringed and he has no locus to challenge that order. The Hon'ble Apex Court has laid down in several cases that the accused does not have any right to interfere in the registration of an FIR or investigation of the same. In the case of Amar Nath Vs. State of Harayana 1977 Supreme Court Cases (Criminal) 585 it has been held that the accused has got no right to be heard before he is summoned and no proceeding in his respect takes place before that stage. Therefore Nagendra Tiwari had no right to file the revision against the order passed by the learned Magistrate and the learned Sessions Judge has erred in holding that revision was maintainable.

5. Learned Sessions Judge has also observed that in this case the offense was also allegedly committed within the provisions of the SC/ST Act and that could only be investigated by an Officer not below the rank of Deputy Superintendent of Police and therefore, the learned Magistrate could not have directed for registration and investigation of the case under Section 156(3) Cr.P.C. In order to arrive, at this conclusion the learned Sessions Judge has placed reliance on the case of C.B.I. Vs. State of

Rajasthan 2001 (2) Allahabad Criminal Ruling 1875, but the learned Sessions Judge has not correctly interpret the law as laid down in that case. In paragraph 9,10, 11 it has been held as under-:

9. It is clear that a place or post declared by the Government as police station, must have a police officer in charge of it and if he, for any reason, is absent in the station house, the officer who is next in the junior rank present in the police station, shall perform the function as officer in charge of that police station. The primary responsibility for conducting investigation into offenses in cognizable cases vests with such police officer, Section 156(3) of the Code empowers a Magistrate to direct such officer in charge of the police station to investigate any cognizable case over which such Magistrate has jurisdiction.
10. In this context a reference has to be made to Section 36 of the Code which says that:

"36 Police Officers superior in rank to an officer in charge of a police station may exercise the same powers, throughout the local area to which they are appointed, as may be exercised by such officer within the limits of his station."
11. This means any other police officer, who is superior in rank to an officer in charge of the police station, can exercise the same powers of the officer in charge of a police station and when he so exercises the power he would do it in his capacity as officer in charge of the police station. But when a Magistrate orders investigation under Section 156(3), he can only direct an officer in charge of a police station to conduct such an investigation and not a superior police officer, though such an officer can exercise such powers by virtue of Section 36 of the code. Nonetheless, when such an order is passed any police officer superior in the rank of such officer, can as well exercise the power to conduct an investigation, and all such investigations would then be deemed to be investigation conducted by the officer in charge of a police station. Section 36 of the Code is not meant to substitute the magisterial power envisaged in Section 156(3) of the Code, though it could supplement the powers of an officer in charge of a police station. It is permissible for any superior officer of police to take over investigation from such officer in charge of the police station either *suo motu* or on the direction of the superior officer or even that of the Government.

6. Therefore, if any order is passed by the learned magistrate under Section 156(3) Cr.P.C. and if investigation is required to be made by any officer above the rank of police officer in charge of the police station, there is no bar and such matter can be investigated by his Superior Officer also.

7. The allegations as made in the application under Section 156 (3) Cr.P.C show that prima facie a cognizable case is made out and the learned Magistrate rightly directed for registration and investigation of the case. However, he was not required to call for compliance report in 3 days.

8. Therefore, in any case I come to the conclusion that learned Sessions Judge has erred in allowing the revision and setting aside the order passed by the learned Magistrate is to be restored to an extent of registration and investigation of the case.

9. The application under Section 482 Cr.P.C. is hereby allowed and the impugned order dated 6.9.2007 is hereby set aside. The order passed by learned Magistrate on 13th April; 2007 is restored as above.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.09.2007

BEFORE
THE HON'BLE KRISHNA MURARI, J.

Civil Misc. Writ Petition No. 30051 of 2004

Up Ganna Aayukta & another ...Petitioner
Versus
Up Shram Aayukta, U.P. Saharanpur Kshetra, Saharanpur and others ...Respondents

Counsel for the Petitioners:
Sri I.N. Singh
Sri Ajay Yadav

Counsel for the Respondents:
Sri Shiv Avtar Sharma
Sri Virendra Kumar
S.C.

U.P. Industrial Dispute Act 1947-Section-33-C (2)-arrears of wages-period of working between 58-60 years-based on interim order passed in writ petition-still pending question of entitlement and working still to be decided-application under section 33-C(2) not maintainable.

Held: Para 12 & 13

There being no pre-existing right vested in respondent no. 3 or the corresponding obligation upon the petitioners to make payment of wages for the disputed period, the application under Section 33 C (2) filed by respondent no. 3 was not at all maintainable.

Obviously, the Presiding Officer/ respondent no. 2 fell in error in directing the petitioners to pay emoluments to the respondent no. 3 in proceedings under Section 33-C (2) of the Act for the period he had not worked without any pre-determination of the question that respondent no. 3 was entitled to continue in service and had a right to be paid salary.

Case law discussed:
1978 FLR-383
1988 (3) SCC-457
1982 LAB IC-284
AIR 1974 SC-1604

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

1. Heard Sri 1. N. Singh, learned counsel for the petitioners, learned standing counsel for State-respondents and Sri Shiv Avtar Sharma appearing for respondent no.3.

2. By means of this writ petition filed under Article 226 of the Constitution of India, the petitioners have challenged the award dated 22.05.2004 passed by Presiding Officer, Labour Court U.P. Saharanpur under Section 33-C(2) of Uttar Pradesh Industrial Disputes Act (for short the 'Act') directing the petitioners to pay a sum of Rs.48,875/- as wages for the period 1.2.1994 to 11.7.1995 and the consequential order dated 22.7.2004 passed by Deputy Labour Commissioner, U.P. Saharanpur Kshetra, Saharanpur under Section 33-C (1) of the Act for recovery of the said amount.

3. Facts giving rise to the dispute are as under;

Respondent no. 3 was appointed as Kamdar vide order dated 8.10.1954 in the year 1965. The post of Kamdar was re: designated as Ganna Gram Sewak and later on as Cane Supervisor (Ganna Paryavekshak) vide order dated 5.7.1989/

4.8.1989. The said post was upgraded to the post of Rajkeey Ganna Paryavekshak. The post held by respondent no. 3 is Group 'C' post. A notice dated 12.4.1993 was issued to respondent no. 3 informing him that he would retire from service on 31.3.1994 on attaining the age of 58 years. The validity of the said notice was challenged by respondent no. 3 before this Court by filing Civil Misc. Writ Petition No. 46131 of 1993 on the ground that he is entitled to continue in service till he attains the age of 60 years. Initially, counter affidavit was called for. When no counter affidavit was filed on 4.5.1995 following order was passed;

"Issue notice.

No counter affidavit has been filed till today. In spite of earlier direction no instruction has been obtained. Thus, upon prima facie satisfaction there will be an interim order staying the operation of impugned order dated 12.4.1993 at Annexure No. 2 to the writ petition until further orders.

Sd/-A. Chakrabarti, J.

4. In pursuance to the aforesaid interim order of this Court, respondent no. 3 joined his post on 12.7.1995 and worked till 31.1.1996, when his services came to an end on attaining the age of 60 years. He was paid salary for the period 12.7.1995 to 31.1.1996, however he was not paid salary for the period 1.2.1994 to 11.7.1995. Respondent no. 3 moved an application under Section 33-C (2) of the Act claiming salary for the period 1.2.1994 to 11.7.1995. Respondent no. 2 Presiding Officer, Labour Court U.P, Saharanpur vide order dated 22.5.2004 allowed the said application and awarded wages amounting to Rs.48875/- for the said period and Rs.l000/- as cost. Subsequently, on an application moved by respondent no. 3 under Section 33-C (1) of the Act, Deputy Labour Commissioner, U.P Saharanpur Region, Saharanpur issued notices to the petitioners for recovery of the awarded amount as arrears of land revenue.

5. It has been urged by learned counsel for the petitioners that in exercise of powers conferred by Section 33-C (2) of the Act, there must be a existing right of the workman and since the dispute whether age of superannuation of the respondent no. 3 is 60 years or 58 years is still sub judice and there is no final adjudication in that regard, the application filed by respondent no. 3 claiming wages for the said period I was not at all maintainable and has wrongly and illegally been allowed. In support of the contention, learned counsel for the petitioners has placed reliance on judgements of Hon'ble Apex Court in the case of ***M/s. Punjab Beverages Pvt. Ltd. Chandigarh vs. Shri Suresh Chand and another 1978 FLR 383*** and ***P.K. Singh and others vs. Presiding Officer & others (1988) 3 SCC 457***. Reference has also been made to a decision of learned single Judge of this Court in the case of ***U.P. State Electricity Board and another vs. Jhagreshwar Prasad & another 1982 LAB. I.C. 284***.

6. In reply, it has been contended on behalf of respondent no. 3/ workman that since the Interim order was passed in his favour in writ petition no. 46131 of 1993 filed by him as such he was entitled to be reinstated back in service till he attained the age of 60 years and he was also entitled for payment of wages for the said period and in this view of the matter

application filed by him under Section 33-C (2) of the Act has rightly been allowed.

7. I have considered the arguments advanced on behalf of learned counsel for the parties and perused the record.

8. It is undisputed that as per notice dated 12.4.1993, respondent no. 3 was to superannuate on 31.3.1994 on attaining the age of 58 years. Said notice was put to challenge before this Court wherein an interim order was passed on 4.5.1995 in pursuance whereof he joined back the post on 12.7.1995 and continued to work till 31.1.1996. Equally undisputed is the fact that he has been paid salary for the period 12.7.1995 to 31.1.1996 during which he has worked.

9. The scope and ambit of the provisions of Section 33-C (2) of the Act stands well settled by pronouncement of Hon'ble Supreme Court relied upon by the learned counsel for the petitioners and various other pronouncements. Reference may be made to the following observations made by Hon'ble Apex Court in paragraph 12 of the judgement in the case of ***Central Inland Water Transport Corporation Ltd. Vs. The Workmen A1R 1974:S.C 1604;***

"It is now well settled that a proceeding under S. 33-C (2) is a proceeding, generally, in the nature of an execution proceeding wherein the Labour Court calculates the amount of money due to a workman from his employer, or if the workman is entitled to any benefit which is capable of being computed in terms of money, the Labour Court proceeds to compute the benefit in terms of money. This calculation or computation follows upon an existing right to the money or the benefit, in view of its being previously adjudged, or, otherwise, duly provided for. In Chief Mining Engineer, East India Coal Co. Ltd. v. Rameshwar AIR 1968 5 C 218, it was reiterated that proceedings under S. 33 C (2) are analogous to execution proceedings and the Labour Court called upon to compute in terms of money the benefit claimed by workmen is in such cases in the position of an executing court. It was also reiterated that the right to the benefit which is sought to be computed must be an existing one, that is to say, already adjudicated upon or provided for and must arise in the course of and in relation to the relationship between an industrial workman and his employer."

In ***M/s. Punjab Beverages Pvt. Ltd. Chandigarh (supra)***, it has been observed as under;

".....It is now well settled as a result of several decisions of this Court that a proceeding under S. 33C(2) is a proceeding in the nature of execution proceeding in which the Labur Court calculates the amount of money due to a workman from his employer or if the workman is entitled to any benefit which is capable of being computed in terms of money, proceeds to compute the benefit in terms of money. But the right to the money which is sought to be computed must be an existing one that is to say, already adjudicated upon or provided for and must arise in the course of and in relation to the relationship between the Industrial Workman, and his employer.....It is not competent to the Labour Court exercising jurisdiction under S. 33C(2) to arrogate to itself the functions of an industrial tribunal and entertain a claim which is not based on an

existing right but which may appropriately be made the subject matter of an industrial dispute in a reference under S. 10 of the Act....."

10. Thus, it is clear that under Section 33-C (2), the Labour Court is called upon to compute in terms of money a benefit to which a workman is entitled on the basis of a pre-existing right which is either already adjudicated upon or provided for and arises in the course of or in relation to the relationship between the workman and his employer. Incidental matters can be inquired into by the Labour Court for such computation. But it is not entitled to investigate that the workman had a right to the relief claimed or that the employer had corresponding obligation. In other words, where it has to be determined whether the workman had a right to the relief claimed by him, then such determination cannot be made as a matter incidental to the computation of the benefit claimed by him. Such determination is left to be made by the adjudicatory process.

11. In the present case, there was a dispute as to whether respondent no. 3 was entitled to continue in service till 58 years or 60 years. Obviously, it was not. a case where relief could have been granted to the respondent no. 3 without determining that he had a right to continue in employment and to be paid wages on account thereof till he attained the age of 60 years. Before respondent no. 3 could claim computation of wages for the said period it had to be found in his favour in the first instance that he had a right to continue in service till he attained the age of 60 years. This could only be determined in appropriate adjudication proceedings and could not be assumed by the labour court in exercise of jurisdiction confirmed by Section 33-C(2) of the Act.

12. Admittedly, the dispute was pending adjudication before this Court in writ petition no. 46131 of 1993 filed by respondent no. 3. Under the interim order dated 4.5.1995, respondent no. 3 was reinstated back in service and was allowed to be continued till he attained the age of 60 years on 31.1.1996. For the period he was worked he was entitled to payment of wages and admittedly the same has been paid to him by the petitioners. Dispute before the labour court/ respondent: no. 2 was in respect of payment of wages for the period 1.2.1994 to 11.7.1995 during which respondent no. 3 has not actually worked. Whether he would be entitled for payment of wages of the said period would depend upon the adjudication, yet, to be made by this Court in writ petition no. 46131 of 1993 as to whether he was entitled to continue in service till he attained the age of 60 years or was liable to superannuated at the age of 58 years. There being no pre-existing right vested in respondent no. 3 or the corresponding obligation upon the petitioners to make payment of wages for the disputed period, the application under Section 33 C (2) filed by respondent no. 3 was not at all maintainable.

13. Obviously, the Presiding Officer/ respondent no. 2 fell in error in directing the petitioners to pay emoluments to the respondent no. 3 in proceedings under Section 33-C (2) of the Act for the period he had not worked without any pre-determination of the question that respondent no. 3 was entitled to continue in service and had a right to be paid salary.

14. In view of the above, the impugned order passed by Labour Court and consequential notice issued under Section 33-C (1) are not liable to be sustained in law and deserves to [be set aside.

15. As a consequence, the writ petition succeeds and is allowed. Impugned 22.05.2004 passed by Presiding Officer, Labour Court U.P. Saharanpur (Annexure -6) and consequential order dated 22.7.2004 passed by Deputy Labour Commissioner, U.P. Saharanpur Kshetra, Saharanpur (Annexure-7) are hereby quashed.

16. Respondent, no. 3 has already been paid wages for the period he has worked under the interim order of this Court. However payment of wages for the period 1.2.1994 to 11.7.1995 shall depend upon, the adjudication to be made by this Court in Writ Petition No. 46131 of 1993 with regard to the question as to whether respondent no. 3 was entitled to be superannuated at the age of 58 years or 60 years and the consequential order which may be passed in that regard. Petition allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.08.2007

BEFORE
THE HON'BLE ARUN TANDON, J.

Civil Misc. Writ Petition No. 37617 of 2007

Mujahid ...Petitioner
Versus
State of U.P. and another ...Respondents

Counsel for the Petitioner:
Sri Vivek Prakash Mishra

Counsel for the Respondents:
Sri Shahbuddin
S.C.

U.P. Punchayat Raj Act-1947-Section 95 (1)-Power of District Magistrate-removal of gram Pradhan-petitioner contested Pradhan election as OBC candidate-admittedly belongs to 'Turk by cast-a general cast-cast certificate issued by Tehsildar having no power-fraud vitiate every thing-even if the District Magistrate has no power-order impugned-not interfered by writ Court.

Held: Para 11

In view of the aforesaid settled legal position even if it is presumed that the District Magistrate could not have exercised powers under Section 95 (1) (g) in the facts of the present case, this Court is not willing to exercise its jurisdiction under Article 226 of the Constitution of India inasmuch as setting aside of the order impugned in the present writ petition could only result in perpetuating illegal continuance of the petitioner as Pradhan against the seat reserved for Other Backward Classes although petitioner does not belong to the said caste.

Case law discussed:
J.T. 2000 (3) 151, 2003 (6) J.T. SC-20

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

1. The petitioner Mujahid contested the elections of Pradhan of Gram Panchayat Hareta Vikas Khand Said Nagar, District Rampur. It is admitted on record that the seat of Pradhan of the village was reserved for Backward Class. The petitioner who belongs to Turk by Caste and as such is a member of General Category produced a caste certificate from the Tehsildar Sadar, Rampur dated 06.9.1995 which recorded that the petitioner is to Jhojha by caste and,

therefore, within the category of Other Backward Class.

On a complaint made in respect of certificate so produced, a notice was issued on 10.7.2007 to which the petitioner has filed his reply.

2. After examination of the explanation furnished and the records the District Magistrate under the impugned order dated 23.7.2007 has recorded that the reply filed by the petitioner to the notice dated 10.7.2007, is not satisfactory. He has held that petitioner has produced a forged caste certificate and therefore, his election is null and void. The District Magistrate has removed the petitioner from the office of the Pradhan under the impugned order.

3. On behalf of petitioner it is contended that the certificate which has been issued by the Tehsildar has not been cancelled and, therefore, the order of the District Magistrate holding that the petitioner is not a member of the Backward Class cannot be legally sustained. Counsel for the petitioner has also referred to the judgment of this Court in the case of Hotilal Vs. State of U.P. and others reported in 2002 (3) AWC, 176, wherein it has been held that the election of the Pradhan cannot be set aside by the District Magistrate, nor any restrain on discharge of duties qua administrative and financial powers can be directed, in exercise of power under Section 95 (1) (g) of the U.P. Panchayat Raj Act on the ground that the Pradhan does not belong to the Caste for which the seat was reserved. The proper remedy has been held to be by way of election petition.

I have heard counsel for the parties and have gone through the records of the case.

Two issues arises before this Court:

(a) should equitable writ jurisdiction under Article 226 of the Constitution of India be exercised in favour of the person who has contested the elections claiming to be the member of a caste on the basis of a forged certificate.
(b) should this Court set aside an order of the District Magistrate on the plea that the proper remedy available is to file an election petition as has been held in the case of **Hotilal (Supra).**

4. In the opinion of the Court the answer to first question is in itself sufficient to dis-entitle the petitioner any relief under Article 226 of the Constitution of India. This Court may record that the Hon'ble Supreme Court in the case of **United India Insurance Co. Ltd. Vs. Rajendra Singh & Ors.** Reported in *JT 2000 (3) 151,* has held that fraud and justice cannot go together. The relevant paragraph-3 reads as follows:

"Fraud and justice never dwell together". (Frans et jus nunquam cohabitant) is a pristine maxim which has never lost its temper over all these centuries. Lord Denning observed in a language without equivocation that "no judgment of a Court, no order of a Minister can be allowed to stand if it has been obtained by fraud, for, fraud unravels everything" (Lazarus Estate Ltd. v. Beasley 1956 (1) QB 702.)"

Similarly it has been held that writ jurisdiction cannot be invoked for

questioning an order which may perpetuate illegality.

5. In the facts of this case it has been found that as a matter of fact, the certificate produced by the petitioner in respect of his being member of the Other Backward Classes is a forged document.

6. Even otherwise the certificate enclosed by the petitioner as Annexure 3 to the present writ petition and which is the sheet anchor of the petitioner is only a waste paper. It is worthwhile to produce the contents of the certificate said to have been issued:

"Bhulekh Nirikshak Umrao Singh Ki Akhya Ke Adhar Per Pramanit Kiya Jata Hai Ki Mujahid Hussain, putra Shri Ahmad Hussain, Niwari Gram Haraita, Tehsil Sadar Nagar Zila Rampur (U.P.) Rajya Ki Jhojha Pichri Jati Ke Vyakti Hain. Yah Jati Uttar Pradesh Lok Sewa (Anusuchit Jatiyon, Anusuchit Jan Jatiyon Ke Liye Arakshan Adhiniyam 1994 Ki Soochi Ke Antargat Manyata Prapt Hai. Yah Bhi Pramanit Kiya Jata Hai Ki Shri Mujahid Hussain Ukt Adhiniyam, 1994 Ki Anusuchi-2 Se achchadit Nahi Hai.

Shri Mujahid Hussain Tatha/Athwa Unka Parivar Uttar Pradesh Ke Gram Haraita Tehsil Sadar Nagar Va Zila Rampur Mein Samanyata Rahta Hain."

7. Uttar Pradesh Public Service (Reservation for Scheduled Caste and Scheduled Tribes and Other Backward Classes) Act, 1994 defines Other Backward Classes of citizens to mean the backward classes of citizens specified in Schedule-I of the Act. Turk is not one of the caste mentioned in Schedule-I of the said Act. The Counsel for the petitioner even today could not demonstrate before this Court as to how the petitioner could be treated to be a member of Jhojha Caste for the purposes of his being treated as a member of Other Backward Classes.

8. It may also be recorded that a caste certificate under Section 9 of the said Act can be issued by an authority or officer in such manner as the State Government may by order provide. There is absolutely nothing on record which can establish that the Tehsildar has been conferred a power to issue any caste certificate with reference to the aforesaid Act.

9. The findings recorded by the District Magistrate in the impugned order could not be successfully assailed before this Court. It is recorded that the petitioner could not dispute before this Court that he is Turk by caste and, therefore, a member of General Category. He could not have contested the elections for the post of Pradhan which was reserved for Other Backward Classes only. Fraud as such is writ large on the records.

10. The Hon'ble Supreme Court in the case of ***Chandra Singh vs. State of Rajasthan and others*** reported in *2003 (6) J.T. S.C., 20 in paragraph 42* has held as follows :

*"Issuance of a writ of Certiorari is a discretionary remedy. [See **Champalal Binani v. CIT, West Bengal**, AIR 1970 SC 645]. The High Court and consequently this Court while exercising its extraordinary jurisdiction under Articles 226 or 32 of the Constitution of India may not strike down an illegal order although it would be lawful to do so. In a given case, the High Court or this Court*

may refuse to extend the benefit of a discretionary releif to the applicant. Furthermore, this Court exercised its discretionary jurisdiction under Article 136 of the Constitution of India which need not be exercised in a case where the impugned judgment is found to be erroneous if by reason thereof substantial justice is being done. [See ***S.D.S. Shipping Pvt. Ltd. v. Jay Container Services Co. Pvt. Ltd. & Ors.].*** *Such a relief can be denied, inter alia, when it would be opposed to public policy or in a case where quashing of an illegal order would revive another illegal one. This Court also in exercise of its jurisdiction under Article 142 of the Constitution of India is entitled to pass such order which will be complete justice to the parties."*

Again the Hon'ble Supreme Court in the case of ***Maharaj Chintamani Saran Nath Shahdeo vs. State of Bihar & Others*** *reported in (1999) 8 S.C.C., 16 in paragraph 14 and 13 has held as follows :*

"13.....this Court cosndiered the action of the State Government under the Andhra Prdesh Panchayats Samithis and Zila Parishads Act, 1959 and came to the conclusion that the Government had no power under Section 72 of the Act to review an order made under Section 62 of the Act but refused to inerfere with the orders of the High Court on the ground that if the High Court had quashed the said order, it would have restored an illegal order and, therefore, the High Court rightly refused to exercise its extraordinary jursidctional power.

14. In Mohd. Swalleh v. IIIrd ADJ similar view was also expressed by this Court. In that case the order passed by the prescribed authority under the U.P. (Temporary) Control of Rent and Eviction Act, 1947 was set aside by the District Judge in appeal though the appeal did not lie. The High Court came to the finding that the order of the prescribed authority was invalid and improper but the District Judge had no power to sit in appeal. The High Court did not interfere with the orders of the District Judge. The order of the High Court was affirmed by this Court on the ground that though technically the appellant had a point regarding the jurisdiction of the District Judge but the order of the prescribed authority itself being bad, no exception can be taken against the refusal of the High Court to exercise power under Article 226."

11. In view of the aforesaid settled legal position even if it is presumed that the District Magistrate could not have exercised powers under Section 95 (1) (g) in the facts of the present case, this Court is not willing to exercise its jurisdiction under Article 226 of the Constitution of India inasmuch as setting aside of the order impugned in the present writ petition could only result in perpetuating illegal continuance of the petitioner as Pradhan against the seat reserved for Other Backward Classes although petitioner does not belong to the said caste.

12. In view of the aforesaid conclusion the second issue is also answered against the petitioner.

13. Writ petition is accordingly dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.08.2007

BEFORE
THE HON'BLE ARUN TANDON, J.

Civil Misc. Writ Petition No. 37896 of 2007

Anil Kumar Yadav ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Miss Bushra Maryam

Counsel for the Respondents:
Sri. Abhinav Prasad

Payment of wages Act Section 17-read with U.P. Dukan aur Vanijya Adhisthan Adhiniyam 1962-section-18(2) and (3)-Petitioner working as manager in Cinema Hall-claim wages-allowed by the prescribed authority -appellate authority decided the claim on the ground provision of payment of wages not applicable on cinema oil-and being the manager excluded from the definition of workman -held-totally misconceived-complete non consideration of the Act of 1962-nature of duty discharged by the workman is material and not the designation- Appellate authority directed to consider and decide as fresh.

Held: Para 7 & 9

From the aforesaid provisions it is apparently clear that the commercial establishments, which include a Cinema Hall are covered by the provision of U.P. Dookan Aur Vanijya Adhishthan Adhiniyam, 1962 and employees of such commercial establishment, if not paid their wages as provided under the Act, the withheld wages can be recovered in accordance with the provisions of the Payment of Wages Act, 1976 (Reference Section 2 (4) read with Section 18 of the Act). The provisions of Payment of Wages Act have been made applicable by in corporation. The aforesaid aspect of the matter has completely been ignored by the Appellate Authority while passing the impugned order. Consequently the finding recorded in the impugned order to the effect that provisions of Payment of Wages Act do not apply to Cinema Halls is totally misconceived.

Counsel for the petitioner submits that the petitioner although designated as Manager in fact did not discharge any duties, which can be termed as managerial in nature. He clarifies that it is the character of the duties discharged which is material and not the designation.

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

1. Heard learned counsel for the parties.

Counsel for the parties agree that the writ petition may be finally disposed at this stage without calling for a counter affidavit specifically in view of the order proposed to be passed today.

2. Petitioner Anil Kumar Yadav made three applications under the provisions of Payment of Wages Act alleging therein that the employers M/s. Imperial Cinema have not made payment of wages for the period mentioned in the applications. The applications were numbered as PWA-1 of 1995, PWA-2 of 1995 and PWA-3 of 1995. The Prescribed Authority under the Act vide order dated 15.7.2003 held that the applications made were liable to be allowed and, therefore, directed payment of withheld wages along with interest thereon and penalty.

3. Against this order of the Prescribed Authority, the employers M/s. Imperial Cinema filed an Appeal under

Section 17 of the Payment of the Wages Act. The Additional District Judge, Moradabad/Appellate Authority under the impugned order dated 12.7.2007 has allowed the Appeal filed by the employers only after recording that the provisions of Payment of Wages Act are not applicable in so far as the Cinema Halls are concerned and, therefore, the applications made by the petitioner could not have been entertained.

4. Counsel for the petitioner submits that there has been complete non-consideration of the provision of Section 2 (4) read with Section 18 of the **U.P. Dookan Aur Vanijya Adhishthan Adhiniyam, 1962.** It is, therefore, contended that the impugned order is patently illegal and is liable to be set aside.

5. On behalf of respondents it is stated that petitioner admitted himself to be a Manager. Such persons are excluded from the provisions of U.P. Dookan Aur Vanijya Adhishthan Adhiniyam, 1962 under Section 3 and, therefore, the applications made by the petitioner under the Payment of Wages Act were misconceived. The Appellate Authority has not committed any error in passing the impugned order.

6. For the purposes of appreciating the contention raised on behalf of the parties, it is worthwhile to reproduce Section 2 (4), Section 18 and 3(a) of the **U.P. Dookan Aur Vanijya Adhishthan Adhiniyam, 1962:**

2(4). Commercial establishment means any premises not being the premises of a factory, or a shop, wherein any trade, business, manufacture, or any work in connection with, or incidental or ancillary thereto, is carried on for profit and includes a premises wherein journalistic or printing work, or business of banking, insurance, stocks and shares, brokerage or produce exchange is carried on, or which is used as threatre, cinema, or for any other public amusement or entertainment or where the clerical and other establishment of a factory, to whom the provisions of the Factories Act, 1948, do not apply work;

3. The provisions of the Act not to apply to certain persons, shops and commercial establishments.(1) The provisions of this Act shall have no application to-

(a) employees occupying positions of confidential, managerial or supervisory character in a shop or commercial establishment, wherein more than five employees are employed: Provided that the number of employees so exempted in a shop or commercial establishment shall not exceed ten per cent of the total number of employees thereof;"

18. Recovery of wages.- The wages of an employee, if not paid as provided by or under this Act, shall be recoverable in the manner provided in the Payment of Wages Act, 1936 as if the same wages were payable under that Act."

7. From the aforesaid provisions it is apparently clear that the commercial establishments, which include a Cinema Hall are covered by the provision of **U.P. Dookan Aur Vanijya Adhishthan Adhiniyam, 1962** and employees of such commercial establishment, if not paid their wages as provided under the Act, the withheld wages can be recovered in accordance with the provisions of the Payment of Wages Act, 1976 (Reference Section 2 (4) read with Section 18 of the

Act). The provisions of Payment of Wages Act have been made applicable by in corporation. The aforesaid aspect of the matter has completely been ignored by the Appellate Authority while passing the impugned order. Consequently the finding recorded in the impugned order to the effect that provisions of Payment of Wages Act do not apply to Cinema Halls.is totally misconceived.

8. The issue, which remains for consideration before this Court is as to whether in view of Section 3 of the **U.P. Dookan Aur Vanijya Adhishthan Adhiniyam, 1962** the petitioner is excluded from the purview of the said Act on the plea that in his applications he has stated that he has employed as Manager of the Cinema Hall.

9. Counsel for the petitioner submits that the petitioner although designated as Manager in fact did not discharge any duties, which can be termed as managerial in nature. He clarifies that it is the character of the duties discharged which is material and not the designation.

10. In the opinion of the Court the contention so raised is based on correct reading of Section 3 (a) of the Act. Mere designation of a workman as a Manager will not exclude him from the operation of the provision of **U.P. Dookan Aur Vanijya Adhishthan Adhiniyam, 1962.**

11. The authorities are under legal obligation to examine as to whether employee occupies as a Managerial or supervisory position or not. The aforesaid aspect of the matter has not been examined by the Appellate Authority in its impugned order. No final opinion can be expressed by this Court at this stage of proceedings. The issue is left open to the Appellate Authority to adjudicate upon the same after examining the record as are available and after affording opportunity of hearing to the parties concerned.

12. Accordingly the writ petition is allowed. The order dated 12th July, 2007 is quashed. Let the Appellate Authority decide the Appeal filed by the petitioner afresh preferably within three months from the date a certified copy of this order is filed before him specifically in light of the observations made herein above.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.09.2007

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

Civil Misc. Writ Petition No. 37367 of 2007

Arvind Kumar Sinha ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Ashok Khare
Sri Arun Kumar Mishra

Counsel for the Respondents:
Sri Piyush Shukla
Sri R.S. Parihar
S.C.

U.P. Jail Executive Subordinate (Non Gazetted) Service Rule 1980, rule-20,21-readwith U.P. State Government Servants Confirmation Rules 1991-Rule-4-termination of service-appointment on the post of Deputy Jailor-after facing selection process though Public Service Commission-joined on 22.4.01-probation period come to an end on 21.4.03-prior to it on 24.3.03 left the Jail without by making forged signature - confirmation

based on only satisfaction of the authority-before confirmation-the status of petitioner as temporary employee-held-termination by invoking temporary government servant Rules 1974-held proper.

Held: Para 23 & 28

Once petitioner's service had not been confirmed then as per term and condition the appointment, petitioner continued to be temporary employee and in this background provision of U.P. Temporary Government Servants (Termination of Service) Rules 1975 could have been invoked and consequently in the present case as per term and condition of the appointment action has been taken.

Ratio of the aforesaid two judgments quoted above fully applies to the fact of the present case also and once petitioner was temporary employee and his service have been dispensed with as per the terms and condition of appointment then there is hardly any scope of interference.

Case law discussed:

AIR 1968 sC-1210, 1974 (2) SCC-831, 1987 (Supp.) SCC-643, 1997 (L&S) SCC-1997 1998 (3) SCC-321, 2001 (7) SCC-161, 2004 (10) SCC-721, AIR 2001 SC-625, AIR 2005 SC-2960

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

1. Petitioner has approached this Court questioning the validity of the order dated 26.07.2007 passed by Director General (Prisons Jail Administration & Reform Service) U.P. Lucknow, respondent no. 2 dispensing with the service of petitioner by mentioning that services of petitioner is no longer required in exercise of power vested under U.P. Temporary Government Servants (Termination of Service) Rules 1975.

2. Brief background of the case as mentioned in the writ petition is that in the year 1999 U.P. Public Service Commission U.P. invited application from eligible and desirous candidate for being considered for several category of posts. Petitioner also applied for consideration of his claim. Petitioner participated in each and every stages of the selection which comprised preliminary examination, mains written examination and interview. Petitioner was declared successful in each of the aforesaid stages and ultimately final result of the aforesaid selection was published wherein petitioner was shown to have been selected for the post of Deputy Jailor. On 25.03.2001 appointment order was issued to the petitioner mentioning therein that petitioner can be posted/transferred at any Jail/institution under the Jail Department. Further it was mentioned that nature of appointment of petitioner is temporary and said appointment can be dispensed with at any point of time without giving any notice. Further mention was made that from the date of appointment for period of two years it would be probationary period of petitioner. Petitioner was posted at District Jail Ghazipur and he joined on 22.04.2001 and has started performing and discharging duties. Probation period of petitioner has been completed on 21.04.2003 and at no point of time period of probation as mentioned in the letter of appointment of petitioner has ever been extended. On 02.02.2004 censor entry was awarded to the petitioner by the Director General (Prisons Jail Administration & Reform Service) U.P. Lucknow, respondent no. 2 and thereafter on 27.05.2005 again censor entry was awarded to petitioner by the Director General (Prisons Jail Administration &

Reform Service) U.P. Lucknow, respondent no. 2. Petitioner has contended that he has been sanctioned all benefits available to a confirmed and permanent employee including sanction of annual increment, regular monthly deductions from his salary towards G.P.F. and also Group Insurance. On 19.06.2007 an order was issued by the Director General notifying list of transferred Deputy Jailors and therein petitioner has been transferred and posted at Central Jail Bareilly. Petitioner was relieved on 07.07.2007 from District Jail, Ghazipur for joining at Central Jail Bareilly. Petitioner claims that he joined at Central Jail Bareilly on 09.07.2007 and thereafter after his joining he applied for leave for the period starting with effect from 10.07.2007 to 15.07.2007 for availing admissible joining time. Petitioner has further contended that he could not resume duties on 16.07.2007 on account of his illness accordingly an application on 14.07.2007 seeking medical leave had been sent. Petitioner has contended that said application has been sent by Speed Post accompanied by Medical certificate and on 17.07.2007 he has further intimated in regard to his illness by telegram. On 26.07.2007 petitioner sent a communication to the Director General (Prisons Jail Administration & Reform Service) U.P. Lucknow, respondent no. 2 detailing the facts pertaining to his illness as also the fact that he has been given medical fitness certificate and he would be resuming his duties at Central Jail, Bareilly on 27.07.2007. Thereafter on 28.07.2007, petitioner submitted his joining before Senior Superintendent of Jail Central Jail, Bareilly alongwith the fitness certificate dated 26.07.2007 then at the said juncture petitioner has been served with an order dated 26.07.2007 issued by the Director General (Prisons Jail Administration & Reform Service) U.P. Lucknow, respondent no. 2 terminating the service of the petitioner in exercise of power vested under U.P. Temporary Government Servant (Termination of Services) Rules 1975. Thereafter petitioner has submitted that he represented the matter on 01.08.2007 before the respondent no. 2 and thereafter nothing has been done then present writ petition has been filed questioning the validity of the decision taken against him.

3. Counter affidavit has been filed in the present case and it has been asserted that petitioner was appointed on purely temporary basis and during his continuance in service while he was under probation committed number of faults and as such rightly authority vested under U.P. Temporary Government Servant (Termination of Services) Rules 1975 has been invoked. It has also been contended that petitioner was transferred from District Jail Ghazipur to Central Jail Bareilly and petitioner in spite of joining, never turned up again and has been absconding from service without any notice and it has been reiterated that petitioner's status is that of temporary employee and on earlier three occasion he committed misconduct which were prejudicial and against the interest of the State as well as against the norms of and provisions of service and in this background it has been conducted that petitioner was unsuitable and unfit for the Jail services which is highly disciplined services, as such action taken is not liable to be interfered with.

4. Rejoinder affidavit has been filed and therein it has been reiterated that appointment is to be considered in the

light of recruitment rules and as far as appointment of Deputy Jailor is concerned same is governed by the provisions as contained under U.P. Jail Executive Subordinate (Non Gazetted) Service Rule 1980 and Rule 20 stipulated an appointment to be on probation for the period of two years which can be extended for reasons to be recorded by the appointing authority and that the period of probation except for exceptional reason will not be extended for more than one years and in no circumstances beyond the limit of two years in this background there exists a maximum period of four years of probation period and there can be no extension of probation period beyond the period of four years and on completion of four years of services from the date of joining the petitioner stands confirmed on the post of Deputy Jailor, in this background by invoking the authority vested under U.P. Temporary Government Servant (Termination of Services) Rules 1975, petitioner's services cannot be dispensed with. It has also been contended that 3rd censor entry which has been awarded to the petitioner on 19.07.2007 same had not been communicated to him and through counter affidavit petitioner has acquired knowledge of the same.

5. After pleadings mentioned above have been exchanged present writ petition is being taken up for final hearing and disposal with the consent of parties.

6. Sri Ashok Khare, Senior Advocate, assisted by Sri A.K. Mishra, Advocate made following submissions; (i) that petitioner is confirmed employee under the provisions of U.P. Jail Executive Subordinate (Non Gazetted) Service Rule 1980 and service of the petitioner could not have been dispensed in exercise of authority vested under U.P. Temporary Government Servant (Termination of Services) Rules 1975, as such exercise of authority in the fact of present case is nothing but misuser of the authority. (ii) Petitioner's appointment has been made on substantive basis on substantive post then by no stretch of imagination petitioner's services could have been treated as temporary services in terms of Rule 2 of U.P. Temporary Government Servant (Termination of Services) Rules 1975 and as petitioner does not all fall within the scope and ambit of "temporary employee" defined under aforesaid Rules as such provision of U.P. Temporary Government Servant (Termination of Services) Rules 1975 could not have been invoked. (iii) averments mentioned in the counter affidavit reflects that non-joining of duties at Central Jail Bareilly has been made foundation and basis for dispensing with the services of the petitioner in this background without undertaking regular departmental proceedings services of the petitioner could not have been dispensed with.

7. Sri Piyush Shukla, learned Standing counsel on the other hand countered the said submission by contending that petitioner is temporary government servant and as per the term and condition of the appointment order, as during probation period conduct of the petitioner has not been found fair and as he has not been confirmed, as such rightly said power has been exercised dispensing with the service of the petitioner, in this background it has been contended that writ petition is liable to be dismissed.

8. To start with the first question is to be considered is as to whether petitioner is temporary government servant or services of the petitioner would be deemed to be confirmed as per the provisions of U.P. Jail Executive Subordinate (Non Gazetted) Service Rule 1980.

9. In order to appreciate the arguments, relevant provisions of all the three Rules are being looked into:

1. "**U.P. Temporary Government Servant (Termination of Services) Rules 1975**

In exercise of powers conferred by the proviso to Article 309 of the Constitution, the Governor is pleased to make following Rules:

1. Short title, commencement and application- (i) These rules may be called the Uttar Pradesh Temporary Government Servants (Termination of Service) Rules 1975.

(ii) This rule and rules 2,3, and 4 shall be deemed to have been come into force on 30th January, 1953 and rule 5 shall come into force at once.

(iii) They shall apply to all persons holding a civil post in connection with the affairs of Uttar Pradesh and who are under the rule-making control of Governor, but who do not hold a lien on permanent post under the Government of Uttar Praesh.

2. Definition: In these rules "temporary service" means officiating or substantive service on a temporary post, or officiating service on a permanent post under the Uttar Pradesh Government.

3. Termination of Service- (1) Notwithstanding anything to the contrary in any existing rules or orders on the subject the services of a government servant in temporary service shall be liable to termination at any time by notice in writing given either by the government servant to the appointing authority, or by the appointing authority to the government servant.

(2) The period of notice shall be one month:

Provided that the services of any such government servant may be terminated forthwith and on such termination the government servant shall be entitled to claim a sum equivalent to the amount of his pay plus allowances, if any, for the period of the notice or as the case may be, for the period by which such notice falls, short of one month at the same rates at which he has drawing them immediately before the termination of his services.

Provided further that it shall be open to the appointing authority to relieve a government servant without any notice or accept notice for a shorter period without requiring the government servant to pay any penalty in lieu of notice.

Provided also that such notice given by the government servant against whom a disciplinary proceeding is pending or contemplated shall be effective only if it is accepted by the appointing, authority, provided in the case of contemplated disciplinary proceedings the government servant is informed of the non-acceptance of his notice before the expiry of that notice.

4. Savings:- Notwithstanding anything in these rules, the tenure or continuance of engagement or employment of the following categories of persons shall be governed by the terms of their engagement or employment, and nothing

in these rules shall be construed to require the giving to them, or by them of one month's notice or pay or penalty in lieu thereof before the termination of their engagement of employment-

(a) Persons engaged on contract;
(b) persons not in whole-time employment of Government
(c) Persons paid out of contingencies
(d) Persons employed in work-charged establishment
(e) Persons re-employed after superannuation
(f) persons employed for a specified period whose services stand determined on the expiry of that period.
(g) Persons employed for a specified period on condition that the period may be curtailed at any time.
(h) Persons appointed in short-term arrangement or vacancies whose service stand determined on the expiry of the arrangement or vacancy.

5. Rescission and saving- (1) The Rule promulgated with Appointment (B) Department Notification No. 230/II B-1953, dated January, 30, 1953 shall stand rescinded with effect from the date.

(2) Notwithstanding such rescission, anything done or any action taken or purporting to be done or taken under the said rule shall be deemed to have been done or taken under these rules."

2. U.P. Jail Executive Subordinate (Non Gazetted) Service Rule 1980

English translation of Grih (Karagar) Anubhag-1 Noti. No. 2374/XXII-1392-5 June 6, 1980 published in U.P. Gazette, Extra dated 9th June, 1980. pp 8-13.

In exercise of the powers conferred by the proviso to Article 309 of the Constitution and in super session of all existing rules and orders on the subject the Government is pleased to make the following rules regulating recruitment and conditions of service of persons appointed to the Uttar Pradesh Jail Executive Subordinate (Non-Gazetted) Service:

PART I-GENERAL

1. Short title and commencement -
.....

2. Status of service.....

3. **Definition:-** In these rules unless there is anything repugnant in the subject or context:-

(a).....
(b).....
(c) .....
(d).....
(e).....
(g).....
(h) "Member of service" means a person appointed in substantive capacity under these rules or the rules or orders on force prior to the commencement of these rules to a post in the cadre of the service.
(i) "Service" means the Uttar Pradesh Jail Executive Subordinate (Non-Gazetted) Service and

PART II- CADRE

4. Cadre of service- (1) The strength of the service and of each category of posts therein shall be such as may be determined by the Governor from time to time.

(2) The strength of the service and each category of posts therein shall until orders varying the same are passed under sub-rule (9) shall be as given as Appendix "A" Provided that –

(1) the appointing authority may leave unfilled or the Governor may hold in

abeyance any vacant post without entitling any person to payment of compensation
(2) the Governor may create from time to time such additional permanent or temporary posts as he may consider proper.

PART VI- APPOINTMENT, PROBATION, CONFIRMATION AND SENIORITY

19. APPOINTMENT- (1) On the occurrence of substantive vacancies, the appointing authority shall make appointments by taking candidates in the order in which they stand in the lists prepared under Rule 15,16,17 or 18 as the case may.
(2) The appointing authority may make appointment in temporary and officiating vacancies also from the lists, referred to in sub-rule (1). If no candidates borne on these lists is available, he may make appointments in such vacancies from persons eligible for appointment under these rules, provided that such appointment shall not exceeded the period of one year without the Commission being consulted.
20. PROBATION - (1) A person on appointment to a post in the service in or against a substantive vacancy shall be placed on probation for a period of two years.
(2) The appointing authority may for reasons to be recorded extend the period of probation in individual cases specifying the date up to which the extension is granted.

Provided that save for exceptional reasons, the period of probation shall not be extended for more than one year and in no circumstances beyond the limit of two years.

(3) If it appears to the appointing authority at any time during or at the end of the period of probation or extended period of probation that a probationer has not made sufficient use of his substantive post opportunities or has otherwise failed to give satisfaction he may be reverted to his, if any, and if he does not hold a lien on any post, his services may be dispensed with.
(4) A probationer who is reverted or whose services are dispensed with under sub-rule (3) shall not be entitled to any compensation.
(5) The appointing authority may allow continuous service, rendered in an officiating or temporary capacity in a post included in the cadre or any other equivalent or higher post to be taken into account for the purpose of computing the period of probation.

21. Confirmation- A probationer shall be confirmed in his appointment at the end of the period of probation or the extended period of probation if

(a) he has successfully undergone the prescribed training
(b) his work and conduct are reported to be satisfactory.
(c) his integrity is certified and
(d) the appointing authority is satisfied that he is otherwise fit for confirmation.

APPENDIX A

The sanctioned strength of the service is as follows:

		Number	
	Name of Post	Permanent	temporary
1.	Deputy Jailer	107	18
2	Assistant Jailer	218	19
3	Paid Apprentice Assistant Jailer	35	-

NOTE- (1) (*) Including two posts held in abeyance

(2) (**) Including eight posts held in abeyance.

3. The U.P. State Governments Servants Confirmation Rules 1991:

English translation of Karmik Anubhag-4 Noti No. 1648/XLV VII Ka-4090--48-89 dated February, 07,1991 published in the U.P. Gazette, Extra, Part-4 Section (Ka) dated 7th February, 1991, pp 4-6

1. Short title, commencement and application-
(1).....
(2).....
(3).....
2. Overriding effect-.....
3 Definitions.....
4. Confirmation where necessary -(1) Confirmation of a Government servant shall be made only on the post on which he is substantively appointed (i) through direct recruitment or (ii) by promotion, if direct recruitment is one of the sources of recruitment or (iii) by promotion if the post belongs to a different service.
(2) Such confirmation shall be made:-
(i) against a post, whether permanent or temporary on which any other person does not hold a lien:
(ii) subject to the fulfilment of the conditions of confirmation laid down in the relevant service rules, or executive instructions issued by the Government as the case may be
(iii) formal order shall be necessary to be issued by the appointing authority with regard to confirmation

Explanation- Notwithstanding the fact that a Government servant is confirmed anywhere else. If he is directly recruited on any post, or is promoted to a post where direct recruitment is one of the sources of recruitment he will have to be confirmed thereon.
5. Confirmation where not necessary- (1) Confirmation will not be necessary if a Government servant is promoted on a regular basis after following the prescribed procedure to a post in cadre where promotion is the only source of recruitment.
(2) On promotion to a post referred to in sub-rule(1) the Government servant will have all the benefits that a person confirmed in that grade would have if no promotion had been prescribed.
(3) Where probation is prescribed the appointing authority shall on completion of the prescribed period of probation assess the work and conduct of the Government servant himself and in case the conclusion is that the Government servant is fit to hold the higher grade he will issue a order declaring that the person concerned has successfully completed the probation. If the appointing authority considers that the work and conduct of the Government servant concerned has not been satisfactory or needs to be watched for some more time, he may revert him to the post of grade from which he was promoted or extended the period of probation in the manner prescribed.
(4) where confirmation on a lower feeding post is prescribed as a necessary condition for eligibility for promotion to a higher post, a person confirmed on the lowest under sub-rule (1) of Rule 4 shall be eligible for promotion to the higher post and his confirmation on the lower feeding post shall not be necessary , if his work and conduct on that post has been satisfactory.

Illustrations- (1) in the "Lekhpal Service Rules" direct recruitment is the only source of recruitment to the post of Lekhpal "A" is appointed as Lekhpal through direct recruitment "A" will have to be confirmed on the said post under sub-rule (1) of Rule 4
(2) .....
(3).....
(4).....….
(5).....
(5).....

10. Bare perusal of the provisions as contained under U.P. Temporary Government Servant (Termination of Services) Rules 1975 would go to show that Rule 2 defines "temporary service" meaning as officiating or substantive service on a temporary post, or officiating service on a permanent post under the Uttar Pradesh Government. Rule 3 of the said Rule starts with non-obstinate clause by mentioning that the services of a government servant in temporary service, can be terminated at any time by notice in writing given either by the government servant to the appointing authority, or by the appointing authority to the government servant. Period of notice has been prescribed as one month, as per sub-rule (2) of Rule 3. First proviso to the said rule provides that the services of any such government servant may be terminated forthwith and on such termination the government servant shall be entitled to claim a sum equivalent to the amount of his pay plus allowances, if any, for the period of the notice or as the case may be, for the period by which such notice falls, short of one month at the same rates at which he has drawing them immediately before the termination of his services. Second proviso further provides that it shall be open to the appointing authority to relieve a government servant without any notice or accept notice for a shorter period without requiring the government servant to pay any penalty in lieu of notice. Third proviso deals with situation wherein Government servant against whom disciplinary proceeding is pending or contemplated has given notice and the respective date from which said notice would be effective. Rule 4 deals with saving provision in respect of incumbent who are governed by the terms of their engagement or employment.

11. Under U.P. Jail Executive Subordinate (Non Gazetted) Service Rule 1980, Rule 3(h) defines "Member of service" a person appointed in substantive capacity under these rules or the rules or orders in force prior to the commencement of these rules to a post in the cadre of the service. Rule 3(i) defines "Service" as the Uttar Pradesh Jail Executive Subordinate (Non-Gazetted) Service. Part II deals with cadre of service, and sub rule (1) of Rule 4 of the aforesaid Rules clearly mentions that the strength of the service and of each category of posts therein shall be such as may be determined by the Governor from time to time. Sub rule (1) of Rule 4 of the aforesaid Rules deals with strength of the service and each category of posts to be such as determined by the Government from time to time and further sub-rule (2) of Rule 4 provides that strength of service and each category of post therein shall until orders varying the same are passed under sub-rule (9) shall be as given as Appendix "A". Provisos have been added, wherein first proviso gives authority to the appointing authority to leave unfilled or the Governor hold in abeyance any vacant post without entitling any person to payment of compensation. Second

proviso authorizes the Governor to create from time to time such additional permanent or temporary posts as he may consider proper. Part V deals with procedure of recruitment. Rule 14 deals with determination of vacancies and Rules 15 deals with procedure for direct recruitment of the posts of Deputy Jailor, Assistant Jailor. Part VI deals with appointment, probation, confirmation and seniority. Sub-rule (1) of Rule 19 provides that on the occurrence of substantive vacancies, the appointing authority shall make appointments by taking candidates in the order in which they stand in the lists prepared under Rule 15, 16, 17 or 18 as the case may. Sub-rule (2) of Rule 19 provides that the appointing authority may make appointment in temporary and officiating vacancies also from the lists, referred to in sub-rule (1) and if no candidates borne on these lists is available, he may make appointments in such vacancies from persons eligible for appointment under these rules, provided that such appointment shall not exceeded the period of one year without the Commission being consulted. Thus, sub-rule (1) of Rule 19 deals with appointment on the occurrence of substantive vacancies wherein appointing authority has to make appointments by taking candidates in order in which they stand in the lists prepared under Rules 15,16,17 or 18 as the case may be. Under sub-rule (2) of Rule 19 the appointment authority may make appointment in temporary and officiating vacancies also from the said list. In respect of substantive vacancies, word "shall" has been used and in respect of temporary and officiating vacancies word "may be" has been used. Rule 20 of the aforesaid Rules 1980 is clear and specific which deals with probation specially Sub-rule (1) of Rule 20 which provides that a person on appointment to a post in the service in or against a substantive vacancy shall be placed on probation for a period of two years. Sub-rule (2) of Rule 20 provides that appointing authority may for reasons to be recorded extend the period of probation in individual cases specifying the date up to which the extension is granted. Proviso has been added therein which provides that save for exceptional reasons, the period of probation shall not be extended for more than one year and in no circumstances beyond the limit of two years. Thus, appointments which are made under sub-Rule (1) of Rule 19 i.e. against substantive vacancy are clearly referable to the incumbent who are to be kept on probation in term of Rule 20 and same is clearly indicative of the fact that incumbents appointment has been made against substantive vacancy. Normal rule of placement of an incumbent on probation is two years and thereafter extension of probation period is not to be done in mechanical manner or routine manner rather reasons will have to be recorded for extending the same and save for exceptional reasons the period of probation is not be extended for more than one year and in no circumstance beyond the limit of two years. Thus, normal period of probation is two years and in exceptional circumstance extra two years can be extended but not four years. Sub-rule (3) of Rule 20 clearly provides that if it appears to the appointing authority at any time during or at the end of the period of probation or extended period of probation that a probationer has not made sufficient use of his opportunities or has otherwise failed to give satisfactions. If any, and if he does not hold a lien on any post, his services

may be dispensed with. Rule 21 of the aforesaid Rules deals with confirmation and provides that probationer shall be confirmed in his appointment at the end of the period of probation or the extended period of probation if, he has successfully undergone the prescribed training; his work and conduct are reported to be satisfactory; his integrity is certified and the appointing authority is satisfied that he is otherwise fit for confirmation. In view of this exercise of confirmation has to be done at the end of the period of probation or the extended of period of probation. The U.P. State Government servants confirmation Rules 1991, is a special provision holding the field of confirmation, qua all persons holding a civil post in connection with the affairs of the State of U.P. and who are under the rule making control of the Governor under the proviso to Article 309 of the Constitution of India. Rule 2 of the said rules makes the intention clear, that same has overriding effect and provisions of said Rules shall have effect, notwithstanding anything to the contrary contained in any other Rules made by the Governor, under the proviso to Article 309 of the Constitution of India or orders in force. Rule 4 prescribes confirmation where necessary, and further prescribes that subject to the fulfillment of the conditions of confirmation laid down in the relevant service rules or executive instructions issued by the Government, as the case may be formal order shall be necessary to be issued by the appointing authority with regard to confirmation.

12. After noticing the provisions as quoted above, the view point of Hon'ble Apex Court on this aspect of the matter, as to when no order of confirmation has been passed in writing and the outer limit of probation period prescribed has come to an end then as to whether it would be the case of deemed confirmation or not is being looked into:

13. Hon'ble Apex Court in the case of ***State of Punjab Vs. Dharam Singh*** reported in AIR 1968 SC 1210 took the view that where service rules fix a certain period of time beyond which the probationary period cannot be extended and an employee appointed or promoted to a post on probation is allowed to continue in that post after completion of the maximum period of probation without an express order of confirmation in such case it is permissible to draw the inference that the employee allowed to continue in the post on completion of the maximum period of probation has been confirmed in the post by implication. Relevant paragraphs 1, 5 6, 8 and 9 are being quoted below:

"6 (1) Members of the Service, officiating or to be promoted against permanent posts, shall be on probation in the first instance for one year.
(2) Officiating service shall be reckoned as period spent on probation, but no member who has officiated in any appointment for one year shall be entitled to be confirmed unless he is appointed against a permanent vacancy.
(3) On the completion of the period of probation the authority competent to make appointment may confirm the member in his appointment or if his work or conduct during the period of probation has been in his opinion unsatisfactory he may dispense with his services or may extend his period of probation by such period as he may deem fit or revert him to his former post if he was promoted from some lower post :

Provided that the total period of probation including extensions, if any, shall not exceed three years.

(4) Service spent on deputation to a corresponding or higher post may be allowed to count towards the period of probation if there is a permanent vacancy against which such member can be confirmed.'

The respondents were officiating in permanent posts and under Rule 6 (3) they continued to hold those posts on probation in the first instance for one year. The maximum period of probation fixed by the rules was three years which expired on October 1, 1960. The respondents continued to hold their posts after October 1, 1960, but formal orders confirming them in their posts were not passed. Under Rule 7, the Director of Public Instruction, Punjab was the appointing authority. By two separate orders passed on February 10, 1963 and April 4, l963, the Director terminated their services. The order in each case stated that the services of the respondent concerned ''are hereby terminated in accordance with the terms of his employment. The order shall take effect after one month from the date it is served on him". Rule 12 provides that ill matters relating to discipline, punishment and appeals, members of the service shall be governed by the Punjab Civil Services (Punishment and Appeal) Rules, 1952. The orders dated February 10 and April 4, 1963 were passed without holding any departmental enquiry and without giving the respondents any opportunity of making representations against the action taken against them. The respondents filed separate writ petitions in the Punjab High Court challenging the aforesaid orders on the ground that they had acquired substantive rights to their posts, and that the orders amounted to removal from service, and were passed in violation of Article 311 of the Constitution. The appellants pleaded that the respondents were temporary employees, that their services were terminated in accordance with the terms of their employment, and that the impugned orders did not amount to removal from service and were not in violation of Article 311. Learned single Judge of the High Court rejected the respondents contentions and dismissed the writ petitions. The respondents filed separate Letters Patent appeals against these judgments. The appellate Court allowed the appeals and set aside the impugned orders. The appellate Court held that the respondents were not temporary employees, that they held the posts on probation, that on the expiry of three years period of probation they must be deemed to have been confirmed in their posts, that the impugned orders having deprived them of their right to those posts amounted to removal from service by way of punishment and were passed in violation of Article 311 and the Punjab Civil Services (Punishment and Appeal) Rules, 1952. It is against these appellate orders that the present appeals have been filed after obtaining special leave.

5. In the present case, Rule 6 (3) forbids extension of the period of probation beyond three years. Where, as in the present case, the service rules fix a certain period of time beyond which the probationary period cannot be extended, and an employee appointed or promoted to a post on probation is allowed to continue in that post after completion of the maximum period of probation without an express order of confirmation, he cannot be deemed to continue in that post as a probationer by implication. The

reason is that such an implication is negatived by the service rule forbidding extension of the probationary period beyond the maximum period fixed by it. In such a case, it is permissible to draw the inference that the employee allowed to continue in the post on completion of the maximum period of probation has been confirmed in the post by implication.

6. The employees referred to in R. 6 (1) held their posts in the first instance on probation for one year commencing from October 1,1957. On completion of the one year period of probation of the employee, four courses of action were open to the appointing authority under Section 6 (3). The authority could either (a) extend the period of probation provided the total period of probation including extensions would not exceed three years, or (b) revert the employee to his former post if he was promoted from some lower post, or (c) dispense with his services if his work or conduct during the period of probation was unsatisfactory, or (d) confine him in his appointment. It could pass one of these orders in respect of the respondents on completion of their one year period of probation. But the authority allowed them to continue in their posts thereafter without passing any order in writing under Rule 6 (3). In the absence of any formal order, the question is whether by necessary implication from the proved facts of these cases, the authority should be presumed to have passed some order under Rule 6 (3) in respect of the respondents, and if so, what order should be presumed to have been passed.

8. The initial period of probation of the respondents ended on October 1, 1958. By allowing the respondents to continue in their posts thereafter without any express order of confirmation, the competent authority must be taken to have extended the period of probation up to October 1, 1960 by implication. But under the proviso to R. 6 (3), the probationary period could not extend beyond October 1, 1960. In view of the proviso to R. 6 (3), it is not possible to presume that the competent authority extended the probationary period after October 1, 1960, or that thereafter the respondents continued to hold their posts as probationers.

9. Immediately upon completion of the extended period of probation on October 1, 1960, the appointing authority could dispense with the services of the respondents if their work or conduct during the period of probation was in the opinion of the authority unsatisfactory. Instead of dispensing with their services on completion of the extended period of probation, the authority continued them in their posts until sometime in 1963, and allowed them to draw annual increments of salary including the increment which fell due on October 1, 1962. The rules did not require them to pass any test or to fulfil any other condition before confirmation. There was no compelling reason for dispensing with their services and re-employing them as temporary employees on October 1, 1960 and the High Court rightly refused to draw the inference that they were so discharged from services and re-employed. In these circumstances, the High Court rightly held that the respondents must be deemed to have been confirmed in their posts. Though the appointing authority did not pass formal orders of confirmation in writing, it should be presumed to have passed orders of confirmation by so allowing them to continue in their posts after October 1, 1960. After such confirmation, the authority had no power to dispense with their services under Rule

6 (3) on the ground that their work or conduct during the period of probation was unsatisfactory. It follows that on the dates of the impugned orders, the respondents had the right to hold their posts. The impugned orders deprived them of this right and amounted to removal from service by way of punishment. The removal from service could not the made without following the procedure laid down in the Punjab Civil Services (Punishment and Appeal) Rules, 1952 and without conforming to the constitutional requirements of Article 311 of the Constitution. As the procedure laid down in the Punjab Civil Services (Punishment and Appeal) Rules, 1952 was not followed and as the constitutional protection of Article 311 was violated, the impugned orders were rightly set aside by the High Court."

14. Thereafter in the case of ***Samsher Singh Vs. State of Punjab and another*** reported in 1974 (2) SCC 831 Hon'ble Apex Court has approved the principal set out in the Dharm Singh case (supra) but in fact of the said case confirmation by implication has been negatived because before completion of 3 years High Court found primafacie that the work as well as the conduct of the appellant was unsatisfactory and notice was given to the appellant on 4 October, 1968 to shows cause as to why his services should not be terminated, as such it was held that as notice was given at the end of the probation the period of probation gets extended till the inquiry proceedings commenced by the notice under Rule 9 comes to an end and further in this back ground the explanation to Rule 7 (1) shows that the period of probation shall be deemed to have been extended impliedly if a Subordinate Judge is not confirmed on the expiry of this period of probation.

"70. Counsel for the appellant relied on the decision of this Court in State of Punjab v. Dharam Singh, (1968) 3 SCR 1 = (AIR 1968 SC 1210) where this Court drew an inference that an employee allowed to continue in the post on completion of the maximum period of probation is confirmed in the post by implication. In Dharam Singh's case (supra) the relevant rule stated that the probation in the first instance is for one year with the proviso that the total period of probation including extension shall not exceed three years. In Dharam Singh's case (supra) he was allowed to continue without an order of confirmation and therefore the only possible view in the absence of anything to the contrary in the Service Rules was that by necessary implication he must be regarded as having been confirmed.

71. Any confirmation by implication is negatived in the present case because before the completion of three years the High Court found prima facie that the work as well as the conduct of the appellant was unsatisfactory and a notice was given to the appellant on 4 October, 1968 to shows cause as to why his services should not be terminated. Furthermore, Rule 9 shows that the employment of a probationer can be proposed to be terminated whether during or at the end of the period of probation. This indicates that where the notice is given at the end of the probation the period of probation gets extended till the inquiry proceedings commenced by the notice under Rule 9 come to an end. In this back ground the explanation to Rule 7 (1) shows that the period of probation shall be deemed to have been extended

impliedly if a Subordinate Judge is not confirmed on the expiry of this period of probation. This implied extension where a Subordinate Judge is not confirmed on the expiry of the period of probation is not found in Dharam Singh's case (1968) 3 SCR 1 = (AIR 1968 SC 1210) (supra). This explanation in the present case does not mean that the implied extension of the probationary period is only between two and three years. The explanation on the contrary means that the provision regarding the maximum period of probation for three years is directory and not mandatory unlike in Dharam Singh's case (supra) and that a probationer is not in fact confirmed till an order of confirmation is made.

72. In this context reference may be made to the proviso to Rule 7 (3). The proviso to the Rules states that the completion of the maximum period of three years' probation would not confer on him the right to be confirmed till there is a permanent vacancy in the cadre. Rule 7 (3) states that an express order of confirmation is necessary. The proviso to Rule 7 (3) is in the negative form that the completion of the maximum period of three years would not confer a right of confirmation till there is a permanent vacancy in the cadre. The period of probation is therefore extended by implication until the proceedings commenced against a probationer like the appellant are concluded to enable the Government to decide whether a probationer should be confirmed or his services should be terminated. No confirmation by implication can arise in the present case in the facts and circumstances as also by the meaning and operation of Rules 7(1) and 7 (3) as aforesaid.

15. Thereafter in the case of ***M.K. Agarwal v. Gurgaon Gramin Bank, 1987 Supp SCC 643 : (AIR 1988 SC 286)*** Hon'ble Apex Court has taken the view that if order of confirmation or discharge at the end of probation period has not been passed and consequences of absence of express confirmation has not been specified then in that event non-discharge of such a probationer after the expiry of probation period, held would result in implied confirmation. Relevant paragraph 8 is being quoted below:

"8. The first point need not detain us. The period of the probation was one year, in the first instance. The employer could extend it only for a further period of six more months. The limitation on the power of the employer to extend the probation beyond 18 months coupled with the further requirement that at the end of it the services of the probationer should either be confirmed or discharged render the inference inescapable that if the probationer was not discharged at or before the expiry of the maximum period of probation, then there would be an implied confirmation as there was no statutory indication as to what should follow in the absence of express confirmation at the end of even the maximum permissible period of probation. In cases where, as here, these conditions coalesce, it has been held, there would be confirmation by implication. (See: State of Punjab v. Dharam Singh, AIR 1968 SC 1210, Om Prakash Maurya v. U. P. Cooperative Sugar Factories Federation Lucknow, AIR 1986 SC 1844."

16. Hon'ble Apex Court thereafter in the case of ***Daya Ram Dayal Vs. State of M.P.*** 1997 SCC (L&S) 1797 has taken the

view that continuance in service beyond maximum period up to which probation could be extended in such situation, the employee is deemed to have been confirmed. Thereafter on the ground of unsatisfactory performance without holding disciplinary enquiry, termination has not been approved. Relevant paragraphs 5,6,7, 12 and 13 are being quoted below:

5. The point that arises for consideration in the appeal is : Whether in view of the fact that Rule 24 of the Rules prescribes not only the original period of 2 years of probation but also provides for extension of probation subject to a maximum of another 2 years, the appellant must be deemed to have been confirmed at the end of 4 years of probation even though no order of confirmation was issued and whether termination of his services without any inquiry must be held to be in violation of Art. 311 of the Constitution of India?

6. We have already set out the facts and the contentions. We shall now set out the rule which both sides tried to interpret in their favour. Rule 24 of the Rules reads as follows :

"24.(1) Every candidate appointed to the cadre shall undergo training for a period of six months before he is appointed on probation for a period of two years which period may be extended for a further period not exceeding two years. The probationers may, at the end of the period of their probation be confirmed subject to their fitness for confirmation and to having passed by the higher standard, all such departmental examination as may be prescribed.

(2) During the period of probation, he shall be required to do magisterial work and acquire experience in office routine and procedure.

(3) If during the period of probation (he) has not passed the prescribed departmental examinations, or has been found otherwise unsuitable for the service, the Governor may, at any time, therefore, dispense with his service."

It will be noticed that the rule does not merely fix a period of probation but also fixes a maximum period beyond which the probation cannot be continued and if that be so, the question is whether by implication the officer who is continued beyond the said maximum period must be deemed to have been confirmed by implication?

7. An examination of the rulings of this Court on the question of probation and confirmation shows that in some cases this Court has held that mere continuation beyond the period of probation does not amount to confirmation unless the order of appointment or the rule contains a deeming provision while in some other cases, it has been held that in certain exceptional situations, it is permissible to hold that the services must be deemed to be confirmed. We shall show that there is no real conflict between the two sets of decisions and it depends on the conditions contained in the order of appointment and the relevant rules that are applicable.

12. Thus, even though the maximum period for extension could lead to an indication that the officer is deemed to be confirmed, still special provisions in such rules could negative such an intention.

13. It is, therefore, clear that the present case is one where the Rule has prescribed an initial period of probation and then for the extension of probation subject to a maximum, and therefore the case squarely falls within the second line of case, namely, Dharam Singh's case (AIR 1968

SC 1210) and the provision for a maximum is an indication of an intention not to treat the officer as being under probation after the expiry of the maximum period of probation. It is also significant that in the case before us the effect of the rule fixing a maximum period of probation is not whittled down by any other provision in the rules such as the one contained in Samsher Singh's case (AIR 1974 SC 2192) or in Ashok Kumar Mishra's case (1991 AIR SCW 1241). Though a plea was raised that termination of service could be effected by serving one month's notice or paying salary in lieu thereof, there is no such provision in the order of appointment nor was any rule relied upon for supporting such a contention.

17. Hon'ble Apex Court in the case of ***Wasim Beg Vs. State of U.P*** 1998 (3) SCC 321 has taken the view qua the question as to whether an employee at the end of the probationary period automatically gets confirmation in the post or whether an order of confirmation or any specific act on the part of the employer confirming the employee is necessary, will depend upon the provisions in the relevant Service Rules relating to probation and confirmation. There are broadly two sets of authorities of this Court dealing with this question. In those cases where the Rules provide for a maximum period of probation beyond which probation cannot be extended, this Court has held that at the end of the maximum probationary period there will be a deemed confirmation of the employee unless Rules provide to the contrary. Relevant paragraphs 12, 15,16, 17 and 18 are being extracted below:

"12. The appellant was appointed on probation as Divisional Manager on 10-1-1978. The letter of appointment mentioned that his probation was for a period of one year. Under the earlier Service Rules then in force, the respondents had the discretion to extend the period of probation without assigning any reason therefor. But there was no such order extending the period of probation of the appellant. As per the Rule relating to probation, the appointing authority was required to issue to the appellant a certificate of having satisfactorily completed probation at the end of the probationary period. No such certificate has been issued. The Rule relating to confirmation states that the employee shall be deemed to have become a confirmed employee after he has successfully completed the period of probation. The deemed confirmation depends on satisfactory completion of probation. The High Court has taken the view that since no certificate has been issued by the respondents at the end of one year about the appellant having satisfactorily completed his period of probation, he remained on probation for a period of seven years till 1985 when his services were terminated by the order of 31st of March, 1985.

15. Whether an employee at the end of the probationary period automatically gets confirmation in the post or whether an order of confirmation or any specific act on the part of the employer confirming the employee is necessary, will depend upon the provisions in the relevant Service Rules relating to probation and confirmation. There are broadly two sets of authorities of this Court dealing with this question. In those cases where the Rules provide for a maximum period of probation beyond which probation cannot

be extended, this Court has held that at the end of the maximum probationary period there will be a deemed confirmation of the employee unless Rules provide to the contrary. This is the line of cases starting with State of Punjab v. Dharam Singh, (1968) 3 SCR 1 : (AIR 1968 SC 1210); M.K. Agarwal v. Gurgaon Gramin Bank, 1987 Supp SCC 643 : (AIR 1988 SC 286); Om Parkash Maurya v. U.P. Co-operative Sugar Factories Federation, Lucknow, 1986 Supp SCC 95 : (AIR 1986 SC 1844); State of Gujarat v. Akhilesh C. Bhargav, (1987) 4 SCC 482 : (AIR 1987 SC 2135).

16. However, even when the Rules prescribe a maximum period of probation, if there is a further provision in the Rules for continuation of such probation beyond the maximum period, the Courts have made an exception and said that there will be no deemed confirmation in such cases and the probation period will be deemed to be extended. In this category of cases we can place Samsher Singh v. State of Punjab, (1974) 2 SCC 831 : (AIR 1974 SC 2192) which was the decision of a Bench of seven Judges where the principle of probation not going beyond the maximum period fixed was reiterated but on the basis of the Rules which were before the Court, this Court said that the probation was deemed to have been extended. A similar view was taken in the case of Municipal Corporation, Raipur v. Ashok Kumar Misra, (1991) 3 SCC 325 : (1991 AIR SCW 1241). In Satya Narayan Athya v. High Court of Madhya Pradesh, (1996) 1 SCC 560 : (1996 AIR SCW 55), although the Rules prescribed that the probationary period should not exceed two years, and an order of confirmation was also necessary, the termination order was issued within the extended period of probation. Hence the termination was upheld.

17. The other line of cases deals with Rules where there is no maximum period prescribed for probation and either there is a Rule providing for extension of probation or there is a Rule which requires a specific act on the part of the employer (either by issuing an order of confirmation or any similar act) which would result in confirmation of the employee. In these cases unless there is such an order of confirmation, the period of probation would continue and there would be no deemed confirmation at the end of the prescribed probationary period. In this line of cases one can put Sukhbans Singh v. State of Punjab, (1963) 1 SCR 416 : (AIR 1962 SC 1711); State of Uttar Pradesh v. Akbar Ali Khan, (1966) 3 SCR 821 : (AIR 1966 SC 1842); Shri Kedar Nath Bahl v. The State of Punjab, (1974) 3 SCC 21 : (AIR 1972 SC 873); Dhanjibhai Ramjibhai v. State of Gujarat, (1985) 2 SCC 5 : (AIR 1985 SC 603) and Tarsem Lal Verma v. Union of India, (1997) 9 SCC 243; Municipal Corporation, Raipur v. Ashok Kumar Misra, (1991 AIR SCW 1241) (supra) and State of Punjab v. Baldev Singh Khosla, (1996) 9 SCC 190 : (1996 AIR SCW 2518). In the recent case of Dayaram Dayal v. State of M.P., AIR 1997 SC 3269 : (1997 AIR SCW 3331) (to which one of us was a party) all these cases have been analysed and it has been held that where the Rules provide that the period of probation cannot be extended beyond the maximum period there will be a deemed confirmation at the end of the maximum probationary period unless there is anything to the contrary in the Rules.

18. In the present case under the Service Rules in force at the time when the appellant was appointed on probation,

there was no time-limit on the period up to which probation can be extended. The appointing authority was required to issue a certificate of the appellant having satisfactorily completed the period of probation. The provision relating to deemed confirmation would come into effect on his satisfactorily completing probationary period. From the affidavit filed by the respondent-Corporation as also looking to the report which was submitted by the Managing Director to the Board of Directors on 8-2-1985, it is clear that the appellant was considered by the respondents as having satisfactorily completed his period of probation on 9-1-1979, and he was considered as a regular employee from 10-1-1979. In the affidavit of the respondent-Corporation before the High Court also it has been very fairly stated that the services of the appellant were satisfactory for the first few years and his work was very good. It was only thereafter that serious problems arose regarding his work and the Corporation suffered losses on that account. It is, therefore, not possible to hold that the appellant remained a probationer till his discharge.

18. Hon'ble Apex Court, thereafter in the case of ***High Court of Madhya Pradesh Vs. Satya Narain Jhavar*** (2001) 7 SCC 161 took the view, that case of Dayaram Dayal does not lay down correct law, in regard to interpretation of Rule 24 of the Rules. Relevant paragraphs 11,36,37 and 38 are being extracted below for ready reference:

11. The question of deemed confirmation in service Jurisprudence, which is dependent upon language of the relevant service rules, has been subject matter of consideration before this Court times without number in various decisions and there are three lines of cases on this point. One line of cases is where in the service rules or the letter of appointment a period of probation is specified and power to extend the same is also conferred upon the authority without prescribing any maximum period of probation and if the officer is continued beyond the prescribed or extended period, he cannot be deemed to be confirmed. In such cases there is no bar against termination at any point of time after expiry of the period of probation. Other line of cases is that where while there is a provision in the rules for initial probation and extension thereof, a maximum period for such extension is also provided beyond which it is not permissible to extend probation. The inference in such cases is that officer concerned is deemed to have been confirmed upon expiry of the maximum period of probation in case before its expiry order of termination has not been passed. The last line of cases is where though under the rules maximum period of probation is prescribed, but the same require a specific act on the part of the employer by issuing an order of confirmation and of passing a test for the purposes of confirmation. In such cases, even if the maximum period of probation has expired and neither any order of confirmation has been passed nor the person concerned has passed the requisite test, he cannot be deemed to have been confirmed merely because the said period has expired.

36. In the case on hand, correctness of the interpretation given by this Court to Rule 24 of the Rules in the case of Dayaram Dayal (supra) is the bone of contention. In the aforesaid case, no doubt, this Court has held @ page-SC3251 that a maximum period of probation having been provided

under sub-rule (1) of Rule 24, if a probationer's service is not terminated and he is allowed to continue thereafter. It will be a case of deemed confirmation and the sheet anchor of the aforesaid conclusion is the Constitution Bench decision of this Court in the case of Dharam Singh (supra). But, in our considered opinion in the case of Dayaram Dayal (supra) Rule 24 of the Rules has not been interpreted in its proper perspective. A plain reading of different sub-rules of Rule 24 would indicate that every candidate appointed to the cadre will go for initial training for six months whereafter he would be appointed on probation for a period of 2 years and the said period of probation would be extended for a further period not exceeding 2 years. Thus, under sub-rule (1) of Rule 24 a maximum period of 4 years' probation has been provided. The aforesaid sub-rule also stipulates that at the end of the probation period the appointee could be confirmed subject to his fitness for confirmation and to have passed the departmental examination, as may be prescribed. In the very sub-rule, therefore, while a maximum period of probation has been indicated, yet the question of confirmation of such a probationer is dependent upon his fitness for such confirmation and his passing of the departmental examination by the higher standard, as prescribed. It necessarily stipulates that question of confirmation can be considered at the end of the period of probation, and on such consideration, if the probationer is found suitable by the Appointing Authority and he is found to have passed the prescribed departmental examination then the Appointing Authority may issue an order of confirmation. It is too well settled that an order of confirmation is a positive act on the part of the employer which the employer is required to pass in accordance with the Rules governing the question of confirmation subject to a finding that the probationer is in fact fit for confirmation. This being the position under sub- rule (1) of Rule 24, it is difficult for us to accept the proposition, broadly laid down in the case of Dayaram Dayal (supra) and to hold that since a maximum period of probation has been provided thereunder, at the end of that period the probationer must be held to be deemed to be confirmed on the basis of the judgment of this Court in the case of Dharam Singh (supra).

37. In the case of the Judicial Officers who are respondents before us, it is the positive case of the High Court that their case for confirmation was considered while they were continuing on probation but the Full Court did not consider them suitable for confirmation and they were given a further opportunity of improving themselves. Even notwithstanding such opportunity they having failed to improve themselves and the High Court having considered them unsuitable for confirmation the order of termination emanated. It is difficult for us to comprehend that a probationer while continuing on probation, on being considered is found unsuitable for confirmation by the Appointing Authority and yet it can be held to be a deemed confirmation because of maximum period of probation indicated in the rule, merely because instead of termination of the services he was allowed to continue and was given an opportunity for improving and even after the opportunity he failed to improve and finally the Appropriate Authority finding him unsuitable directs termination of his services. The very fact that sub-rule (I) of Rule 24 while prescribing a maximum period of

probation therein entitles a probationer for being considered for confirmation and confers a right on the Appointing Authority to confirm subject to the fitness of the probationer and subject to his passing the higher standard of all departmental examination must be held to be an inbuilt provision in sub-rule (I) which would negative the inference of a confirmation in the post by implication, as interpreted by this Court in the case of Dharam Singh (supra) while interpreting Rule 6 of the Punjab Educational Services (Provincialised Cadre) Class III , Rules 1961. AIR 1968 SC 1210 : 1968 Lab IC 1409.

38. Ordinarily a deemed confirmation of a probationer arises when the letter of appointment so stipulates or the Rules governing service condition so indicate. In the absence of such term in the letter of appointment or in the relevant Rules, it can be inferred on the basis of the relevant Rules by implication, as was the case in Dharam Singh (supra). But it cannot be said that merely because a maximum period of probation has been provided in Service Rules, continuance of the probationer thereafter would ipso facto must be held to be a deemed confirmation which would certainly run contrary to Seven Judge Bench Judgment of this Court in the case of Shamsher Singh (supra) and Constitution Bench decisions in the cases of Sukhbans Singh (supra), G.S. Ramaswamy (supra) and Akbar Ali Khan (supra). AIR 1968 SC 1210 : 1968 Lab IC 1409.

19. Hon'ble Apex Court in the case of ***Mir Mohd Khasim Vs. Union of India*** reported in 2004 (10) SCC 721 has taken the view that where employee is continued after maximum period of probation then probationer has to be deemed to have been confirmed, but where no maximum period of probation is provided for there would be no automatic confirmation of employee on the expiry of the period unless an order is passed in this regard. Relevant paragraph 9 and 11 are being extracted below:

"The moot question which arises for consideration is about the effect of the order of granting relaxation to the appellant from R. 7(e) and the consequences which flow from the said order. According to the appellant on successful completion of period of probation nothing further is required to be done before confirming the officer. All that was required had been accomplished since the appellant had cleared the tests as required under R. 6(b) as well as has undergone the period of probation which has been considered to be successful completion @page-SC3262 of period of probation as per R. 7(e). That being the position the appellant shall be deemed to have been confirmed. Whereas Ms. K. Amareshwari, learned senior counsel for the respondent No. 3 submits that unless an order of confirmation is passed the appellant cannot be deemed to have been confirmed. It is further pointed out that the rules do not prescribe any maximum period of probation nor any provision says that it shall not be extended beyond any given period of time. In such circumstances, it is submitted, the law is settled that there will be no automatic confirmation unless such an order is passed. In our view, there cannot be any dispute about the proposition that where no maximum period of probation is provided there would be no automatic confirmation of the employee on expiry of period of probation unless an order is passed in that regard. In such cases it is

taken that the period of probation continues unless and until an order of confirmation is passed. Our attention has been drawn to a decision in the case of Commissioner of Police, Hubli and another v. R. S. More, (2003) 2 SCC 408. In this case the appointing authority was empowered to extend the period of probation up to certain prescribed limit but there was a further provision that mere expiry of the prescribed period or extended period of probation would not entitle the probationer to claim satisfactory completion of his probation. Hence he would continue to be under probation and it would not be treated as deemed confirmation. In connection with this case it may be observed that the rule itself provided for extension of period of probation and thereafter that completion of period of probation or extended period of probation will not automatically entitle the employee deemed to have been confirmed unless a specific order in that regard is passed. Hence the above decision would not be of any help to the respondent. It may further be observed that in the matter of period of probation and confirmation it would always depend upon the language of the rule on the point. A reference has also been made to a decision of this Court in the case of High Court of M. P. through Registrar and others v. Satya Narayan Jhavar, reported in (2001) 7 SCC 161 , more particularly to paragraph 11 of the judgment which we beneficially quote as under : AIR 2003 SC 983 : 2003 AIR SCW 478 : 2003 Lab IC 745 : 2003 AIR ? Kant HCR 462"

The question of deemed confirmation in service Jurisprudence, is dependent upon language of the relevant service rules, terms and conditions of appointment and as noted above there are clearly three lines of cases on said point. (i) One line of cases is where in the service rules or the letter of appointment a period of probation is specified and power to extend the same is also conferred upon the authority without prescribing any maximum period of probation and if the officer is continued beyond the prescribed or extended period, he cannot be deemed to be confirmed. In such cases there is no bar against termination at any point of time after expiry of the period of probation. (ii) Other line of cases is that where while there is a provision in the rules for initial probation and extension thereof, a maximum period for such extension is also provided beyond which it is not permissible to extend probation. The inference in such cases is that officer concerned is deemed to have been confirmed upon expiry of the maximum period of probation in case before its expiry order of termination has not been passed. (iii) The last line of cases is where though under the rules maximum period of probation is prescribed, but the same require a specific act on the part of the employer by issuing an order of confirmation and of passing a test for the purposes of confirmation. In such cases, even if the maximum period of probation has expired and neither any order of confirmation has been passed nor the person concerned has passed the requisite test, he cannot be deemed to have been confirmed merely because the said period has expired.

20. On the touch stone of the provisions quoted above and the judgment Hon'ble Apex Court which have been looked into the facts of the present case are being adverted to. In the present case categorical statement of fact has been mentioned in paragraph 31 of the writ

petition that appointment granted to the petitioner is a regular and substantive appointment granted against a permanent post. This categorical statement of fact has not been categorically denied in the counter affidavit, and averments mentioned in paragraphs 23 to 36 of the writ petition has been dealt with in paragraph-14 of the counter affidavit by mentioning that contention have been repeated once again though same contention has been raised in the foregoing paragraphs which have already been replied. Thus, the fact of matter is that this fact has not been disputed that appointment of petitioner was on substantive basis. Letter of appointment dated 25.03.2001 did mention that appointment of petitioner would be temporary and same can be dispensed with without providing any opportunity or reasons but at same time it has also been clearly and specifically mentioned that from the date of appointment probation period would be two years. Condition which has been imposed in the letter of the appointment of the petitioner that appointment is purely temporary and same can be dispensed with at any point of time without disclosing reasons has to be harmonised with the condition that petitioner would be kept on probation for a period of two years. Under relevant service rules as per Appendix-A either there was permanent post or temporary post. Once appointment was to be made on temporary basis then certainly there is no requirement of keeping as incumbent on probation appointed against temporary or officiating vacancies but once appointment was made against substantive post after following due procedure prescribed for making appointment against the substantive vacancy, then incumbent has to be kept on probation for the period of two years. Incumbent who has been appointed on substantive basis, his appointment is to be governed under the provision as contained under Rules 19 and 20 of U.P. Jail Executive Subordinate (Non-Gazetted) Service Rules 1980, which clearly provides that on the occurrence of substantive vacancies the appointing authority shall make appointments by taking candidates in the order in which they stand in the lists prepared under Rule 15, 16, 17 or 18 as the case may. Only incumbent appointed against the substantive vacancy has to be placed on probation for a period of two years which by giving reasons could be further extended for next two years and during continuance of probation period appointing authority has got full right to disengage and dispense with the services of probationer, without providing opportunity of hearing and without disclosing reasons, if it appears to the appointing authority, at any time during or at the end of period of probation or extended period of probation, that probationer has not made sufficient use of opportunities or has failed to give satisfaction. Appointing authority can impose only said conditions in the appointment letter which are subscribed by the rules and are compatible with the Rules, and in case any inconsistent condition has been imposed, then same has to be ignored, being irrelevant and out of context. Condition No. 3 of the appointment letter is clearly co-related with confirmation as "temporarily" usually denotes a person appointed in Civil Service for the first time and appointment is not permanent but temporary for the time being with no right to post. Condition no. 4 could be conveniently harmonised as probationer is

on test and trial and during the probation period, or at the end of probation period or extended period of probation period, he/she could be disengaged without disclosing reasons and without providing opportunity of hearing and similarly till he/she is not confirmed his/her services could be disengaged as per the terms and conditions of appointment letter, as confirmation is to be regulated by terms and conditions contained in the order of appointment and the relevant rules that are applicable.

21. In the present case two years probation period has been provided for in term of sub-rule (1) of Rule 20 of 1980 Rules. At no point of time appointing authority has ever proceeded to exercise and invoke the authority vested under sub-rule (2) of Rule 20, and the proviso for extending the period of probation and four years period which is the maximum period of probation was permitted to be bypassed. Sub-rule (3) of Rule 20 gave authority to the appointing authority to dispense with the service of probationer at any time during or at the end of probation or extended period of probation if probationer has not made used of his opportunities. Undisputedly appointing authority further never proceed to exercise its authority under Sub-rule (2) of Rules 20 of the 1980 Rules by extending initial period of probation of two years and further at no point of time any steps were undertaken to dispense with the services of probationer. Rule 21 of Rules 1980 deals with confirmation and same clearly mentions that probationer shall be confirmed in his appointment at end of period of probation or the extended period of probation and further pre requisite term and condition as contained under Clause (a) to (d) has to be fulfilled. Thus, under Rules 21 confirmation is provided for. Confirmation is not automatic, as same is dependant on following four factors (a) has successfully undergone the prescribed training (b) work and conduct is reported to be satisfactory (c) integrity is certified and (d) appointing authority is satisfied that he is fit for confirmation. Thus, under this Rule itself at the end of period of probation or the extended period of probation, probationer has to be confirmed, but said confirmation is not automatic and same is possible and feasible when pre-requisite terms and conditions are fulfilled, i.e. if he has successfully undergone the prescribed training; his work and conduct is satisfactory, his integrity is certified and the appointing authority is satisfied that he is otherwise fit for confirmation. Confirmation is positive act on the part of employer, which the employer is required to pass in accordance with Rules governing the question of confirmation subject to finding that the probationer is fit for confirmation. In the State of U.P., there is special rule, which covers exclusively the field of confirmation i.e. Rules of 1991, and as per the same, confirmation of government servant has to be made on the post which he is substantively appointed through direct recruitment, and such confirmation has to be made, subject to fulfilment of condition laid down in relevant service rules and formal order is necessary to be passed by appointing authority with regard to confirmation. Deemed confirmation theory is completely ruled out, from the language of the rule on the point, even though the maximum period of extension could lead to an indication that the officer is deemed to be confirmed,

still special provision of such rules negates such contention.

22. Here petitioner was appointed on 25.03.2001 and pursuant to said order petitioner joined at District Jail Ghazipur on 22.04.2001. In the appointment letter it was mentioned that appointment is purely temporary and could be dispensed with at any time, without any notice or reason, and from the date of appointment probation period would be two years. Said term and condition of appointment was accepted without any reservation. Probation period was to come to an end on 21.04.2003. Prior to it, record reflects that unsatisfactory work of petitioner dated 24.03.2003, was there as on 24.03.2003, he left the jail while leaving for Varanasi, without making his signature and getting signature of another incumbent Sri K.C. Chaubey, and on account of same jail administration was effected. Before expiry of period of probation, traces of unsatisfactory work was there then there was no occasion for the petitioner to be confirmed as confirmation is positive act, and same could have been performed when pre-requisite terms and conditions of confirmation were fulfilled. Rule 21, makes it mandatory to confirm a probationer, but qua the said probationer, appointing authority has to satisfy himself, that pre-requisite term and condition are fulfilled. This is inbuilt provision in sub-rule (1) of Rule 21 which would negate the inference of confirmation by implication. Confirmation by default is not at all in the scheme of things provided for. Often for administrative reasons, confirmation is delayed and made at subsequent time. If confirmation by implication, would be the sum and substance of the same then it would give handle to unscrupulous elements in service to manipulate things to their advantage, and render the specific provision of Rule 21 of 1980 Rules and Rule 4 of 1991 Rules, meaningless and otiose as both these rules convey for positive act of confirmation. If there is delay in undertaking exercise for confirmation by the authority in question, who is obligated to take positive decision, then request could be made to the said authority for taking decision, as confirmation cannot be left to be one of the inglorious certainties of government service. Even if after making request no action is taken then complaining inaction, writ of mandamus could be prayed for, against the said authority, wherein time frame could be set up to take decision on confirmation. It is difficult to comprehend that when there is material on record to show that work was unsatisfactory during probation period, and merely because instead of passing of order of termination incumbent was given an opportunity to further work it would be deemed confirmation. For his unsatisfactory work dated 24.03.2003, petitioner was put to show cause, and order of censor for said unsatisfactory work was awarded on 02.02.2004, by the Director General Jail Administration. During his continuance without confirmation there has been no much improvement as he was again censored for laxity in duties, when inspection was carried out in Jail on 25.12.2004 vide order dated 27.05.2005 of Director General, Jail Administration. Petitioner has accepted that these orders have been permitted to become final. In the facts of present case, deemed confirmation is completely ruled out, and case in hand would fall in the third category of case, where though under the rules, maximum period of probation is

provided for, but same requires a specific act on the part of employer by issuing an order of confirmation. Consequently even if maximum period of probation has expired, and neither any order of confirmation has been passed, then he cannot be deemed to be confirmed merely because said period has expired.

23. Now coming to the second question, as to whether provision of U.P. Temporary Government Servants (Termination of Service) Rules 1975 could have been invoked or not is being looked into. Rule 2 of the said Rules clearly and categorically mentions that temporary service means officiating or substantive service on a temporary post, or officiating service on a permanent post under the U.P. Government. Petitioner's appointment was clearly covered under the said definition inasmuch as petitioner's appointment was against substantive vacancy, but till he was not confirmed, his status continued to be of temporary employee. Officiating service means services rendered as non permanent holder of the office whereas substantive service connotes permanent holder of the office. Temporary service connotes existing or continuing for limited time. Once petitioner's service had not been confirmed then as per term and condition the appointment, petitioner continued to be temporary employee and in this background provision of U.P. Temporary Government Servants (Termination of Service) Rules 1975 could have been invoked and consequently in the present case as per term and condition of the appointment action has been taken.

24. Lastly it has been contended that in the present case impugned order is stigmatic/punitive in nature as counter filed on behalf of respondents clearly reflects that petitioner remained absent unauthorisedly and was absconding from duties and in this background action has been taken.

25. Impugned order in question has been perused. Impugned order mentions that in exercise of authority vested under U.P. Temporary Government Servants (Termination of Service) Rules 1975 notice is being given to the petitioner, that his services were no longer required, and his service shall be dispensed with from the date of receipt of notice and would be entitled for one months pay in lieu of notice. This dispensation of service has been done as per term and condition of the appointment order.

26. In the present case merely because in the counter affidavit it has been mentioned that petitioner absented himself and his conduct was not satisfactory will not make order of termination ipso facto punitive and stigmatic. Admittedly order of confirmation has not been passed petitioner continued to function as temporary employee and merely because something has been mentioned in the counter affidavit that would not indicate that same has acted as foundation for action in question, specially when action has been taken as per the term and condition of appointment.

27. Two judgements of Hon'ble Apex Court on this aspect of the matter ***Krishnadevaraya Education Trust and another, vs. L. A. Balakrishna***, AIR 2001 SC 625 would negate the arguments advanced. Relevant paragraphs 5 and 6 is being quoted below:

"5. There can be no manner of doubt that the employer is entitled to engage the services of a person on probation. During the period of probation, the suitability of the recruit/appointee has to be seen. If his services are not satisfactory which means that he is not suitable for the job, then the employer has a right to terminate the services as a reason thereof. If the termination during probationary period is without any reason, perhaps such an order would be sought to be challenged on the ground of being arbitrary. Therefore, normally services of an employee on probation would be terminated, when he is found not to be suitable for the job for which he was engaged, without assigning any reason. If the order on the face of it states that his services are being terminated because his performance is not satisfactory, the employer runs the risk of the allegation being made that the order itself casts a stigma. We do not say that such a contention will succeed. Normally, therefore, it is preferred that the order itself does not mention the reason why the services are being terminated.

6. If such an order is challenged, the employer will have to indicate the grounds on which the services of a probationer were terminated. Mere fact that in response to the challenge the employer states that the services were not satisfactory would notipso factomean that the services of the probationer were being terminated by way of punishment. The probationer is on test and if the services are found not to be satisfactory, the employer has, in terms of the letter of appointment, the right to terminate the services.

State of Punjab and others, v. Sukhwinder Singh, reported in AIR 2005 (SC) 2960. Relevant paragraph-19 is being quoted below:

"19. In the present case neither any formal departmental inquiry nor any preliminary fact-finding inquiry had been held and a simple order of discharge had been passed. The High Court has built an edifice on the basis of a statement made in the written statement that the respondent was habitual absentee during his short period of service and has concluded therefrom that it was his absence from duty that weighed in the mind of Senior Superintendent of Police as absence from duty is a misconduct. The High Court has further gone on to hold that there is direct nexus between the order of discharge of the respondent from service and his absence from duty and, therefore, the order discharging him from service will be viewed as punitive in nature calling for a regular inquiry under Rule 16.24 of the Rules. We are of the opinion that the High Court has gone completely wrong in drawing the inference that the order of discharge dated 16-3-1990 was, in fact, based upon the misconduct and was, therefore, punitive in nature, which should have been preceded by a regular departmental inquiry. There cannot be any doubt that the respondent was on probation having been appointed about eight months back. As observed in Ajit Singh and others etc. v. State of Punjab and another (supra) the period of probation gives time and opportunity to the employer to watch the work ability, efficiency, sincerity and competence of the servant and if he is found not suitable for the post, the master reserves a right to dispense with his service without anything more during or at the end of the prescribed period, which is styled as period of probation. The mere holding of

preliminary inquiry where explanation is called from an employee would not make an otherwise innocuous order of discharge or termination of service punitive in nature. Therefore, the High Court was clearly in error in holding that the respondent's absence from duty was the foundation of the order, which necessitated an inquiry as envisaged under Rule 16.24 (ix) of the Rules.

28. Ratio of the aforesaid two judgments quoted above fully applies to the fact of the present case also and once petitioner was temporary employee and his service have been dispensed with as per the terms and condition of appointment then there is hardly any scope of interference.

29. In terms of observations made above, present writ petition is dismissed.

No order as to cost.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.09.2007

BEFORE
THE HON'BLE RAKESH TIWARI, J.

Civil Misc. Writ Petition No. 42146 of 2007

Khursheed Alam and others ...Petitioners
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioners:
Sri Khalil Ahmad Ansari

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

Constitution of India, Art. 226-Regularization-and claim for minimum pay scale-Daily wager-appointed without following the recruitment process-held-such direction can not be issued by the Court but under the scheme prepared by the Department-claim of minimum pay scale payable to regular employee-can not be granted by writ Court-if petitioner discharging same duty as regular employee-may approach before labour court-petition dismissed.

Held: Para 13

In this writ petition it is not the argument of the petitioners that they are not being paid minimum wages, which are admissible to daily rated employees notified by the appropriate Government. Only parity is claimed in the pay scale, which can only be paid to an employee holding permanent post. In case the petitioners are discharging the duties of a regular employee they may approach to the Labour Court for adjudication of the disputed question of fact.

Case law discussed:
1988 (9) SCC-709
2003 (1) SCC-250
2004 (1) FLR-592
1988 (3) SCC-91
1995 (5) SCC-210
1989 (1) SCC-121

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

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

2. This petition has been filed by the petitioners for a direction to the respondent nos. 3 and 4 to pay them the salary which is being paid to the other employees and to consider the case of the petitioners for regularization by deciding representation dated 23.5.2007 against the existing vacancies or the vacancies which may be created or for which sanction may be obtained from the State Government.

3. The case of the petitioners is that they are continuously working as a Clerk in the office of Nagar Palika Parishad, Mugghal Sarai, District Chandauli on daily wages basis since 1991.

4. It is alleged that petitioner no.1 filed Civil Misc. Writ Petition No. 32405 of 1993 which was disposed of vide order dated 19.1.2004 directing the petitioner no.1 to make a representation within a period of two weeks along with a certified copy of the order. Nagar Palika may pass appropriate orders preferably within three months in accordance with law taking into consideration the Government Order dated 8th September, 1992. Petitioner no.1 filed representation which was decided in his favour and he was allowed to work as Clerk and since then he is continuously working.

5. It is further alleged that similarly petitioner nos. 2 and 3 who were employed as clerk on daily wage basis filed Civil Misc. Writ Petition No. 29263 of 1991 before this Court which was finally disposed of vide order dated 5.1.2005 directing respondent no.1 to consider the case of petitioner nos. 2 and 3 according to Government Order and pass a detailed and reasoned order expeditiously, preferably within a period of two months from the date of production of a certified copy of the order. They filed representation before the authority concerned which was decided in their favour and since then they are continuously working as Clerk.

6. The counsel for the petitioners submits that since the petitioners are discharging their duties continuously and regularly and are performing the work identically to the regular employees for the last several years, hence they are entitled to receive the same salary and conditions of service as the other employees regularly appointed against sanctioned posts are receiving and denial of this benefit would amount to violation of Article 14 of the Constitution of India.

7. The Standing counsel appearing for the respondents submits that a daily wage employee cannot claim parity regarding salary at par with a regular employee unless his services are regularized.

8. In **State of Punjab and others Vs. Sardara Singh (1998) 9 SCC 709**, it has been held that High Court under Article 226 of the Constitution should not issue any direction for regularization of an employee and it is for the authorities to frame the scheme for regularization of daily wagers. State Govt. has also framed Group "D' Employees Service Rules, 2001 and the case of the petitioners is to be considered under the aforesaid Rules if he is eligible otherwise.

9. In so far as the payment of salary of the petitioners at par with a regular employee is concerned admittedly the petitioners are daily wagers and are not working against any post. The concept of minimum wages and minimum pay scale is different. When an employee is engaged on daily wages he is paid minimum daily wages. As per notifications of the Central Government or the State Government minimum wages whichever is applicable as Minimum Pay Scale is attached to the post and is applicable to the regular employees. The educational qualifications, methods of recruitment as well as responsibilities and liabilities of regular employees are

different from daily wage employees. The regular employees are also liable to be transferred while daily wage employees cannot be transferred. The apex court in a catena of decisions has recently held that in the absence of proper material the High Court cannot grant parity in pay to daily wage workers or casual workers with regularly appointed workers merely on presumption of equality of nomenclature or work. Reference may be given of the decision rendered by the apex court in ***State of Orissa Vs Balaram Sahu, (2003) 1 S.C.C. 250*** in this regard. In a catena of decisions the apex court has directed that daily wagers be entitled to only minimum pay as notified by the State Government for daily wagers and not the minimum pay scale. There has been a significant shift in law, as the doctrine of equal pay for equal work cannot be applied mechanically merely because the daily wagers are discharging similar duties as their counter part regular employees are discharging. The shift in law is evident from the following cases:

1 State of Orissa Vs Balaram Sahu, (2003) 1 SCC 250
2 State of Punjab Vs Savender Kaur, 2004 (1) FLR 592
3 State of Haryana Vs Tilak Raj & others, 2003 AIR SCW 3382
4 Federation of All India Customs and Central Excise Stenographers (Recognized) & others Vs Union of India & others, 1988 (3) SCC 91
5 Harbans Lal Vs State of Himachal Pradesh, 1989 (4) SCC 459
6 Ghaziabad Development Authority Vs Vikram Chaudhary, 1995 (5) SCC 210
7 State of U.P. Vs J.P.Chaurasia, 1989 (1) SCC 121
8 State of Haryana Vs Jasmer Singh, (1996) 11 SCC 77

10. In **State of Orissa Vs Balaram Sahu, (2003) 1 SCC 250,** it has been held that in the absence of proper material High Court cannot grant parity in pay to daily wage workers with regularly appointed workers merely on presumption of equality of nomenclature or work. In **State of Punjab Vs Savinderjit Kaur, 2004 (101) FLR 592**, it has been held that the doctrine of equal pay for equal work would not apply where it has not been established that duties and functions of two categories of employees are at par. In **State of Haryana & another Vs Tilak Raj & others, 2003 A.I.R. S.C.W. 3382 = 2003 (4) A.W.C. 2597 (S.C.)**, it has been held that the claim by daily wagers in comparison with regular and permanent staff is not tenable since daily wager holds no post and scale of pay is attached to a definite post. In **Federation of All India Customs and Central Excise Stenographers (Recognized) and others Vs. Union of India and others (1988 (3) S.C.C. 91)**, the apex court explained the principle of "equal pay for equal work" by holding that differentiation in pay scales among Government servants holding the same posts and performing similar work on the basis of difference in the degree of responsibility, reliability and confidentiality would be a valid differentiation. In **Harbans Lal Vs. State of Himahcal Pradesh (1989 (4) S.C.C. 459),** it is held that a mere nomenclature designating a person as a carpenter or a craftsman was not enough to come to a conclusion that he was doing the work as another carpenter in regular service. A comparison cannot be made with

counterparts in other establishments with different managements or even in the establishments in different locations though owned by the same management. The accuracy required and the dexterity that the job requires may differ from job to job. In **Ghaziabad Development Authority Vs Vikram Chaudhary (1995 (5) S.C.C. 210)** it has been held that it must be left to be evaluated and determined by an expert body. In **State of U.P. Vs J.P. Chaurasia (1989 (1) S.C.C. 121)**, it is pointed out that the principle of "equal pay for equal work" has no mechanical application in every case of similar work. In the case of **State of Haryana Vs Jasmer Singh, (1996) 11 S.C.C. 77**, it has been held that the daily wage employees cannot be treated as on a par with persons in regular service holding similar posts.

11. A Division Bench of this Court in an Special Appeal No. (334) of 2004 arising out of the order and judgment in Writ Petition No. 37747 of 2002 quashed the order and judgment of the learned Single Judge in so far as it treated the daily wage employees of the Public Service Commission at par with the regularly appointed employees and held: -

"We do not agree with certain other directions given in the said judgment. For instance, the learned Single Judge after giving the direction that the petitioners should be considered for regularization has thereafter in the same sentence given a direction that the petitioners are also entitled to regular wages in the regular pay scale from 17.2.2001. Thus, we find that there is a contradiction in the same sentence of the learned Single Judge. In our opinion the learned Single Judge could not validly direct that the petitioners be regularized. He could only direct that the petitioners should be considered for regularization. Having directed that the petitioners should be considered for regularization, we fail to understand how he came in the same sentence say that the petitioners are entitled to regular pay scale. This direction for payment of regular wages and regular pay scale in the impugned judgment cannot be sustained and is hereby set aside.

We are further of the opinion that direction nos. 4 and 5 at the end of the judgment of the learned Single Judge also cannot be sustained. The learned Single Judge has directed in direction no. 4 in the impugned judgment that the petitioners whose services are not regularized shall be allowed to continue in minimum of the pay scale. This direction is clearly illegal as has been held by the Supreme Court and this Court in a series of decisions, which have been referred to in the Division Bench decision of this Court in State of U.P. Vs. U.P. Madhyamik Shikshak Parishad, 2004 ALJ 232. That decision was followed in State of U.P. Vs Rajendra Prasad 2004 (1) UPLBEC 60 etc. The aforesaid decisions have relied on several Supreme Court decisions, which have held that an employee who is not a regular employee cannot be given the minimum of the pay scale. The minimum of the pay scale can only be given to the employees who have been regularized. For the same reason the direction no. 5 contained in the impugned judgment of the learned Single Judge that the petitioners should be given minimum of pay scale is also illegal. In fact none of the petitioner can be given minimum of the pay scale, and only those who are subsequently regularized can be given the minimum of the pay scale as and when they are regularized. Those who are not

regularized will not be given the minimum of pay scale at all in view of the aforesaid decisions.

For the reasons given above, this special appeal is partly allowed. No order as to costs.

S/d M. Katju, J.
S/d R.S.Tripathi, J.
27.4.2004"

12. In ***State of Punjab Vs Savinderjit Kaur, 2004 (101) F.L.R. 592***, a three judge bench of the apex court held: -

"even the doctrine of equal pay for equal work would not apply where it has not been established that duties and functions of two categories of employees are at par"

13. In this writ petition it is not the argument of the petitioners that they are not being paid minimum wages, which are admissible to daily rated employees notified by the appropriate Government. Only parity is claimed in the pay scale, which can only be paid to an employee holding permanent post. In case the petitioners are discharging the duties of a regular employee they may approach to the Labour Court for adjudication of the disputed question of fact.

14. The judgments of the apex court as well as of Division Bench of this Court are binding upon this Bench. Thus, the petitioners are not entitled to the pay scale at par with the regular employees.

15. For the reasons stated above, this petition is dismissed. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.09.2007
I
BEFORE
THE HON'BLE RAKESH TIWARI, J.

Civil Misc. Writ Petition No. 46449 of 2007

Rishabh Raj Singh ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the petitioner:
Sri. Rajesh Kumar Singh

Counsel for the Respondents:
S.C.

Constitution of India- Article 226- Compassionate appointment-deceased employee working as D.I.G. Karagar died in harness- application to appoint her minor son moved within 5 years- widow offered appointment- but she did not turn up-after completing B. Tech. Education–son claimed parity for appointment on the post of Vishesh Karyadhikari-when widow can survive for more than 8 years- given better education and living standard-no financial crisis exist- under rule no provision of reservation of post provided- appointment can not be claimed as a matter of right.

Held: Para 11

Rule, 1974 given a legal right to the family member of the deceased to request a post to be reserved for minor son or daughter till attaining the majority. Normally the application is to be moved within five-years after the death of the father, which was done in the instance case by the mother but decline to accept. She could not have moved another-application for appointing her son at the end of five years limitation provided under the Rules. If she had not applied for the job

then only the second application could have been moved by the petitioner within five years.

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

1. Heard learned counsel for the parties.

2. Heard learned counsel for the petitioner died on 18.5.2001 in Harness while working on the post of Deputy Inspector General Karagar, Allahabad.

3. The mother of the petitioner moved an application dated 4.7.2001 before the respondent no. 2 requesting to reserve a post for compassionate appointment for her son, who is a minor at that time.

4. Pursuant to the application dated 4.7.2001, the Additional Director General (Administrative), Karagar, Prashasan Avam Sudhar Sevayen, Uttar Pradesh, by means of letter dated 28th July, 2001 asking to the mother of the petitioner about her qualification and about the post for which she was intending to apply. Mother of the petitioner did not submit any claim or request for appointment on compassionate ground and according to the petitioner she decided to look after her family or whatever financial resources were available.

5. On 21.2.2006, the mother of the petitioner by a letter dated 28th July, 2001 proposed candidature of her selection for appointment on compassionate ground on the post of Vishesh Karyadhikari in the pay scale of Rs.6500-10500 (outside the purview of Uttar Pradesh, Public Service Commission) and application was moved by the mother of the petitioner before State of U.P. through Principal Secretary, Karagar Prashasan Avam Sudhar Seyayen, Government of Uttar Pradesh, Lucknow praying for compassionate appointment of the petitioner, her son on the aforesaid post of Vishesh Karyadhikari considering the education qualification of the petitioner. The petitioner is B, Tech in Biology Technology and about of 22 years of age according to his date of birth 17.8.1985.

6. It appears that the Director General, Karagar, Prashasan Avam Sudhar Sevayen, Uttar Pradesh, Lucknow offered the petitioner to face Hindi Typist Test on 22.2.2007 for appointment on the post of Kanishtha Sahaik/typist.

7. The contention of the learned counsel for the petitioner is that the claim of the petitioner for appointment on the post of Vishesh Karyadhikari has not been decided. This consumerates education qualification and on the contrary he being offered the post of typist. It is vehemently urged as the father was the "Top Proposed" petitioner should be offered the post of Vishesh Karyadhikari in the pay scale of 6500-10550.

8. Particularly in view of the fact that another person in similar circumstances i.e. son of late R.S. Tripathi, Addl. Director General, Karagar has been given the said post. It is alleged that the petitioner cannot discriminated in the matter of employment and parity should be maintained. It is further urged that Government of U.P. is not interfered to decide the claim of the petitioner on the post of Vishesh Karyaadhikari and on the other hand is offering the petitioner to face test for the post of typist, which is quite irrproportional to the qualification

as well as to the "High Brass Hierarchy late father of the petitioner" and as such inaction regarding adjudication of the claim of petitioner the respondent no. 1 is illegal and violates the valuable rights of the petitioner without any rhyme and reason.

9. It is admitted fact that (1) immediately after the death of the petitioner's father, his mother moved an application for appointment on compassionate ground, which later on she declined and decided to carry on the family with whatever resources (2) the petitioner was a minor at the time of death of his father as he has been educated by his mother and at present he holds decree of B. Tec. in Bio Technology (3) mother able to sustained the family about more than 5 years and has given education to the petitioner. The daughter according to the learned counsel for the petitioner is major and she has not disclosed her age appended as annexure no. 10 A to the writ petition is sufficient to show that the family of the deceased was not in indigent circumstances.

10. It might be that in the case of Sri R. S. Tripathi a vacancy was available for appointment on the post of Vishesh Karyadhikari, Manwadhikar Ayog at that time and was offered. The appointment on compassionate ground is not a legal right of any member of the family of the deceased. If the family is not old penury and or not in indigent circumstances, the other needy families of the deceased employee may be considered. As stated earlier, his mother offered for a job and later on decline to accept the job because she wanted her son to get employment on compassionate ground and for this purpose a request was also made to set aside the post reserved for the appointment of the petitioner. In my opinion there is no such reason in the U. P. Dependent of Government Servant.

11. Rule, 1974 given a legal right to the family member of the deceased to request a post to be reserved for minor son or daughter till attaining the majority. Normally the application is to be moved within five-years after the death of the father, which was done in the instance case by the mother but decline to accept. She could not have moved another-application for appointing her son at the end of five years limitation provided under the Rules. If she had not applied for the job then only the second application could have been moved by the petitioner within five years.

12. For the reason stated above, this court is not inclined to interfere in the matter.

The writ petition is accordingly dismissed.

No order as to costs.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.10.2007

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

Criminal Misc. Application No. 23597 of 2007

Smt. Kiran Devi ...Applicant
Versus
State of U.P. & others ...Opposite Parties

Counsel for the Applicant:
Sri Mithilesh Kumar Gupta

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

Code of Criminal Procedure-Section-2 (d) "Complaint"-meaning and scope explained-any application made before the Magistrate u/s 156 (3) also within the meaning of complaint.

Held: Para 12

Therefore, in case the complainant files an application under Section 156(3) Cr.P.C. the same can be treated as complaint under Section 200 Cr.P.C.
Case law discussed:
2007 ACC-521
2001 (43) ACC-50
2001 (3) Crim.-384

Code of Criminal Procedure-156 (3)-application before Magistrate-whether the Magistrate is bound to direct the Police to register and investigate the case in each and every cases? Held-"No".

Held: Para 20

Therefore, the Magistrate cannot be held to be bound to direct for registration of case on every application filed under Section 156 (3) Cr.P.C. otherwise this provision would result in harassment to innocent persons and become a tool for shrewd litigants.
Case law discussed:
2006 (1) SCC (Crl.)-678, 2006 (4) SCC-359, 2004 (7) SCC-768, 1996 (11) SCC-582, 2007 (3) SCC (Crl.)-1, 2002 (44) ACC-670

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

1. This application has been filed for quashing the orders dated 20.8.2007 and 28.5.2007 passed by Sessions Judge Gazipur, in Criminal Revision No. 385/07, Smt. Kiran Vs. State of U.P. and Judicial Magistrate, Saidpur, District Ghazipur in Criminal Misc. Case No. 134/IX/07 respectively.

2. Heard Sri Mithilesh Kumar Gupta learned counsel for the applicant, learned AGA and perused the material on record.

3. The brief facts of the case are that the applicant filed an application under Section 156(3) Cr.P.C. against 7 accused persons. The learned Magistrate by order dated 28th May 2007 directed that the application be treated as complaint and accordingly fixed 3rd July 2007 for the statement of the complainant under Section 200 Cr.P.C. Against that order the applicant filed a criminal revision in the Court of the Sessions Judge which has been dismissed by order dated 20.8.2007. Feeling aggrieved the present application has been filed.

4. The contention of the learned counsel for the applicant is that the learned Magistrate has erred in directing that the application under Section 156(3) Cr.P.C. be treated as a complaint case. According to him the accused persons had caused injuries to the applicant and in the circumstances the learned Magistrate should have directed for registration and investigation as prima facie case was made out from the allegations made in the application under Section 156(3) Cr.P.C. He has further contended that learned Sessions Judge has erred in rejecting the revision. In support of his contention he also referred the case of Om Singh Vs. State of U.P. 2007(57) ACC 521.

5. Learned counsel for the State has contended that the learned Magistrate was perfectly justified in directing that the application under Section 156(3) Cr.P.C. be treated as complaint and there is nothing illegal in the impugned orders and the application is liable to be dismissed.

He also contended that the case cited by the applicant does not help her.

6. If any application is filed under Section 156(3) Cr.P.C. and a cognizable offence is made out from the allegations made therein the Magistrate empowered under Section 190 Cr.P.C. can direct for investigation of the case as is done under Section 156(1) Cr.P.C. But in case he finds that there is nothing particular which requires investigation by the police, he can certainly direct that application be treated as complaint and can proceed under chapter 15 of the Criminal Procedure Code.

7. Section 2(d) of the Criminal Procedure Code defines complaint as under-

Complaint means any allegation made orally or in, writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown has committed an offence but does not include a police report.

Explanation- A report made by a police officer in a case which discloses, after investigation, the commission of a non-cognizable offence shall be deemed to be a complaint; and the police officer by whom such report is made shall be deemed to be the complainant;

8. Therefore, if any allegations are made in writing to the Magistrate with a view to his taking action under this Code it can be treated as a complaint. The application under Section 156(3) Cr.P.C. is filed before a Magistrate with allegations and he can certainly treat it as a complaint.

9. In the case of Rambabu Gupta and another Vs. State of Uttar Pradesh and others 2001(43) ACC 50, a full bench of this Court has held that an application filed under Section 156(3) Cr.P.C. for all practical purposes would be a complaint.

10. In the case of Yogendra Singh Vs. State of U.P. and another 2005 Criminal Law General 2762 it has been held that an application filed under Section 156(3) Cr.P.C. can be treated as complaint under Section 200 Cr.P.C. and no separate complaint is required to be filed.

11. Again in the case of Joseph Mathuri @ Vishveshwaranand and another Vs. Swami Sachidanand Harisakshi and another 2001(3) Crime 384(SC) an order passed by this Court was challenged and the Hon'ble Apex Court held, that the High Court was wrong to hold that the application moved by the complainant under Section 156(3) Cr.P.C. before the Magistrate for directing the police to register the case against the appellants, could not be treated as complaint.

12. Therefore, in case the complainant files an application under Section 156(3) Cr.P.C. the same can be treated as complaint under Section 200 Cr.P.C.

13. In view of the above legal position the judgement relied on by the applicant does not help her. In this case it has been held by the Hon'ble Court that the complainant in the present case never wanted to file a complaint. The Court cannot convert *suo motu* application under Section 156(3) Cr.P.C. into one of complaint and take cognizance under

chapter 15. But in view of the above legal position as enunciated by the Hon'ble Apex Court as well as this Court, with due respect, the above observation cannot be accepted and it does not lay down correct law. In a law Court the wish or desire of the complainant that is whether the complainant ever wanted to file a complaint or not is not material. What is material is the legal right of the complainant and how to enforce the same. If a person is aggrieved and sets into motion the machinery for prosecuting the wrong doers, he can file a report at the police station or can present an application (complaint before the Court). If his report is not written at the police station he has again an option to file a complaint in the Court. Simply on the ground that application under Section 156(3) Cr.P.C. discloses cognizable offence the Magistrate is not required to direct for registration of the case. Normally an application under Section 156(3) Cr.P.C. is presented with the legal assistance and in the circumstances the allegations disclosing a cognizable offence are bound to be there. Therefore, merely on this ground the Magistrate cannot be directed to direct the police to register the case. The Magistrate has also to consider if any investigation is required by the police as is done under Section 156(1) Cr.P.C. The words used in Section 156(3) Cr.P.C. are as under:-

"Any Magistrate empowered under Section 190 Cr.P.C. may order such an investigation as above mentioned"

14. The word used is may and not shall. The Magistrate is expected to exercise his judicial discretion as in all the cases police investigation may not be required even where the allegations made disclose a cognizable offence as there may be nothing to be investigated by the police. [reference Gulab Chandra Upadhyay Vs. State of U.P. 2002 (44) ACC 670 (Allahabad HC)]. However if cognizable offence is disclosed, the case cannot be thrown out at the initial stage.

15. Under the Criminal Procedure Code two procedures have been provided- that of State case and the Complaint case. But the net result is same that is conviction or acquittal including discharge.

16. Therefore the contention of the learned counsel for the applicant that if cognizable offence is made out from the allegations a Magistrate is bound to direct for registration of the case is not correct and cannot be accepted.

17. The right of the complainant to get the case registered for investigation can be considered from another angle also. According to the complainant as alleged in the application under Section 156(3) Cr.P.C. she had gone to the police station to lodge the report but it was not written. She also gave an application to Superintendent of Police by registered post but no action was taken and then she filed this application. In such a situation the right course for the complainant to adopt was to file a complaint under Section 200 Cr.P.C.

18. While considering the right of a person aggrieved by the police inaction in lodging the report, even in cognizable case, the full bench of the Hon'ble Apex Court in the case of Aleque Padamsee and others Vs. Union of India and others (2007) 3 SCC (Crl) 1, has reiterated the legal position as was earlier stated in the

cases of All India Institute of Medical Sciences Employees' Union (Regd.) Vs. Union of India (1996) (11) SCC 582, Gangadhar Janardan Mhatre Vs. State of Maharastra (2004) 7 SCC 768, Minu Kumari Vs. State of Bihar 2006(4) SCC 359 and Hari Singh Vs. State of U.P. (2006) 5 SCC 733.

The Apex Court has held as under:-

6. "4. When the information is laid down with the police but no action in that behalf is taken, the complainant [can under Section 190 read with Section 200 of the Code lay] the complaint before the Magistrate having jurisdiction to take cognizance of the offence and the Magistrate is required to enquire into complaint as provided in Chapter XV of the Code. In case the Magistrate after recording evidence finds a *prima facie* case, instead of issuing process to the accused, he is empowered to direct the police concerned to investigate into the offence under Chapter XII of the Code and to submit a report. If he finds that the complaint does not disclose any offence to take further action, he is empowered to dismiss the complaint under Section 203 of the Code. In case he finds that the complaint/evidence recorded *prima facie* discloses an offence, he is empowered to taken cognizance of the offence and [could] issue process to the accused."

19. In the case of Ramesh Kumari Vs. State (NCT of Delhi) and others (2006) 1 SCC (Criminal) 678, the division bench of the Hon'ble Apex Court held that it was the duty of the police to register a case under Section 154 Cr.P.C. and the genuineness or credibility of the allegations could not be considered at this stage. But in the case of Aleque Padamsee (supra), this ruling has been distinguished and explained and it has been held that the correct position in law, therefore, is that the police officials ought to register the FIR whenever facts brought to their notice show that cognizable offence has been made out. In case the police officials fail to do so the modalities to be adopted are as set out in Section 190 read with Section 200 of the Code.

20. Therefore, the Magistrate cannot be held to be bound to direct for registration of case on every application filed under Section 156 (3) Cr.P.C. otherwise this provision would result in harassment to innocent persons and become a tool for shrewd litigants.

21. Thus I come to the conclusion that there is nothing illegal in the impugned order and the application under Section 482 Cr.P.C. is devoid of merits and is liable to be dismissed and is hereby dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.09.2007

BEFORE
THE HON'BLE V.M. SAHAI, J.
THE HON'BLE SHISHIR KUMAR, J.

Civil Misc. Writ Petition No. 52482 of 2003

Bhagwati Prasad Verma ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri. H.M.B. Sinha

Counsel for the Respondents:
Sri. R.K. Saxena

Sri. B.P. Singh
Sri. Veer Singh
S.C.

Uttar Pradesh Retirement benefits Rules-1961-Rule-9-recovery from gratuity-after retirement-Disciplinary proceedings initiated -inquiry officer out of four allegations reported one charge proved- show cause notice issued-duly replied by petitioner- no formal inquiry indicating date, place and time to appear before the officer given- inquiry being contrary to rule 99 in violation of principle of Natural justice – recovery from gratuity can not be made-necessary direction issued with 9% interest in case of default in payment.

Held: Para 22 & 42

In the circumstances we are of the opinion that gratuity is not part of pension. Both are conceptually different. In other words, recovery from gratuity and family pension for the loss, suffered by the Government due to negligence or misconduct of the employee can be made by the government provided the procedure as laid down in Regulation 351-A of the Civil Service Regulations is followed with regard to limitation and compliance of principles of natural justice etc. In the instant case no notice or opportunity had been given by the State Government informing the petitioner that as a measure of punishment his gratuity is liable to be withheld or forfeited. In absence of any notice or opportunity the order of the State Government withholding the gratuity of the petitioner is without jurisdiction. The petitioner is entitled to his gratuity.

Thereafter, the inquiry officer did not fix any date, time and place for holding the inquiry. The inquiry officer was under a statutory duty to intimate the petitioner of the date, time and place of the inquiry. This was not done. The inquiry officer after considering the explanation of the petitioner straightway submitted the inquiry report to the government. The inquiry proceedings were, thus, vitiated. The inquiry was contrary to U.P. Government Servants (Discipline & Appeal) Rules, 1999. We, therefore, hold that the inquiry proceedings as well as the inquiry report were in violation of the principles of natural justice.

Case law discussed

1998(4) AWC 595, AIR 2004 SC-1462, 1993(1) SCC 47, JT 1994(2) 569, JT 2006(9) SC 567, 2006(2) ESC (All) 1294, 2005(4) ESC 2899, 2004(3) UPLBEC 2864

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

1. The questions that arise for consideration in this petition filed by a retired government servant are whether Gratuity can be withheld or forfeited under Regulation 351-A of the Civil Service Regulations; whether payment of Gratuity can be stopped under the Uttar Pradesh Retirement Benefit Rules, 1961 and the Uttar Pradesh Liberalised Pension Rules, 1961, without initiating proceedings under the aforesaid rules; whether the inquiry suffered for non-compliance of principles of natural justice and whether permanent curtailment of 5% pension under Regulation 351-A of the Civil Service Regulations was arbitrary and contrary to law?

2. The petitioner was selected and appointed in 1964 by the Public Service Commission, U.P as a teacher in Government Inter College. He was promoted as lecturer in 1974. In 1991 he was promoted to the post of Vice Principal. In 1994 he was promoted on the post of District Non Formal Education Officer and was posted at Allahabad. He retired from service on 31st July 1996. After about two years of superannuation the Governor on 22.6.1998 granted

sanction for institution of disciplinary proceedings under Regulation 351-A of the Civil Service Regulations (in brief the Regulations). Shri Shyam Narain Rai, Director of Education III Allahabad was appointed as inquiry officer. The inquiry officer sent a charge sheet dated 22.6.1998 on four counts. It was served on the petitioner on 14.7.1998. The petitioner submitted his reply on 28.7.1998. The inquiry officer submitted the report dated 31.8.1998 on 12.10.1998. A copy of the inquiry report, as directed by the State Government, was sent on 4.5.2001 to the petitioner by Joint Director of Education, Allahabad Region. He by another letter dated 23.8.2001 asked the petitioner to submit his representation to the inquiry report. The petitioner made a representation on 4.9.2001. The inquiry officer exonerated the petitioner of the first charge. He found him guilty of second and third charge and the fourth charge was found to be technically proved. The State Government acting on the report of inquiry officer found the petitioner guilty of the charges and directed under Regulation 351-A of the Civil Service Regulations that the payment of gratuity to the petitioner should be stopped and an amount of 25% of the pension payable to the petitioner be deducted and referred the matter to the Commission for its opinion. The Commission agreeing with the view of the State Government that gratuity payable to the petitioner should be stopped, recommended that instead of 25% only 5% of the pension amount be deducted. Thereafter the State Government passed the impugned order dated 3.5.2002, directing that petitioner's gratuity be stopped and 5% deduction be made from his pension permanently. However, the other post retiral benefits were released to the petitioner. The petitioner has challenged the order dated 3.5.2002 by means of this writ petition.

3. In the counter affidavit filed by the Joint Director of Education (Basic), U.P. it has been stated that while the petitioner was posted as District Non Formal Education Officer at Allahabad, certain irregularities were found in purchase of some departmental items, therefore, after his retirement Regulation 351-A was invoked.

4. In the counter affidavit to the amendment application filed by the Deputy Director of Education, Services-II it has been stated that permission under Regulation 351-A was granted by the Governor on 22.6.1998 and thereafter charge sheet was served. In both the counter affidavits it has been stated that ample opportunity of hearing was given to the petitioner during the inquiry. The inquiry proceedings were concluded, according to the respondents, in accordance with the principles of natural justice.

5. In the supplementary counter affidavit sworn on 21.5.2007 and filed on 25.5.2007 in pursuance to the direction of this court, it is admitted that no date of inquiry was fixed. Neither the petitioner was summoned to participate in inquiry nor he was heard. It is, however, stated that the inquiry officer while serving the charge sheet had clearly mentioned that the petitioner may indicate the evidence he proposed to rely and whether he desired oral hearing. What was the effect of it in the inquiry and whether it was sufficient compliance of the principles of natural justice would be discussed by us a little later while considering whether the

impugned order suffered from violation of principles of natural justice.

6. We have heard Sri H.M.B. Sinha, learned counsel for the petitioner and Sri R.K. Saxena, learned standing counsel appearing for the respondents who has also produced the records.

7. Learned counsel for the petitioner has urged that no opportunity of hearing was afforded to the petitioner by the inquiry officer after submission of the reply to the charge sheet nor any date, time and place for inquiry was fixed. The inquiry officer submitted his report, only after considering the reply of the petitioner which was in violation of principles of natural justice and contrary to U.P. Government Servants (Discipline & Appeal) Rules, 1999, and on the basis of such an inquiry report no punishment could be imposed on the petitioner by the State Government. Learned counsel has further urged that gratuity payable to the petitioner could not be stopped by the respondents under Regulation 351-A, in view of The Uttar Pradesh Retirement Benefits Rules, 1961 and Uttar Pradesh Liberalised Pension Rules 1961. He urged that the entire disciplinary proceedings, being time barred, were liable to be set aside, in view of the fact that the petitioner had retired from service in July 1996, and he is at present about 70 years of age. The learned counsel further submitted that even if the charges were found to be proved it was at the most an irregularity and not misconduct or negligence, much less grave misconduct. The learned counsel lastly urged that the provisions of U. P. Pension Cases (Submission, Disposal And Avoidance Of Delay) Rules, 1995 being mandatory in nature and the disciplinary proceedings having been completed beyond the time limit fixed by the rules are liable to be quashed.

8. On the other hand the learned Standing Counsel by placing reliance on the counter affidavits and supplementary counter affidavit has urged that full opportunity of hearing was afforded to the petitioner. The inquiry proceedings were concluded by the inquiry officer in accordance with principles of natural justice. The inquiry report and the order passed by the State Government under Regulation 351-A were liable to be upheld as there was no violation of U.P. Government Servants (Discipline & Appeal) Rules, 1999, The Uttar Pradesh Retirement Benefits Rules, 1961 and Uttar Pradesh Liberalised Pension Rules 1961. The provisions of U. P. Pension Cases (Submission, Disposal And Avoidance Of Delay) Rules, 1995 are directory in nature. The writ petition has no merits and is liable to be dismissed.

9. Before considering the arguments raised by the learned counsel for the parties we consider it necessary to notice the provisions relating to withholding and curtailment of pension and gratuity. We may also mention that we propose to consider first the legality of stopping payment of gratuity, then the order curtailing pension, and in the end the finding whether the order was liable to be quashed for violation of principles of natural justice, and in any case the proceedings under Regulation 351-A having not been completed within three months as provided by U. P. Pension Cases (Submission, Disposal And Avoidance Of Delay) Rules, 1995, are liable to be set aside.

10. Regulation 351-A of the Civil Service Regulations, which had been framed under Proviso to Article 309 of the Constitution, is extracted below :-

"351-A .- *The Governor reserves to himself the right of withholding or withdrawing a pension or any part of it, whether permanently or for a specified period and the right of ordering the recovery from a pension of the whole or part of any pecuniary loss caused to Government, if the pensioner is found in departmental or judicial proceedings to have been guilty of grave misconduct, or to have caused pecuniary loss to Government by misconduct or negligence, during his service, including service rendered on re-employment after retirement. Provided that*

(a) such departmental proceedings, if not instituted while the officer was on duty either before retirement or during reemployment.
(i) shall not be instituted save with the sanction of the Governor;
(ii) shall be in respect of an event which took place not more than four years before the institution of such proceedings; and
(iii) shall be conducted by such authority and in such place or places as the Governor may direct and in accordance with the procedure applicable to proceedings on which an order of dismissal from service may be made.
(b) judicial proceedings, if not instituted while the officer was on duty either before retirement or during re-employment, shall have been instituted in accordance with sub-clause (ii) of clause (a); and
(c) the Public Service Commission, U.P., shall be consulted before final orders are passed.

(Provided further that if the order passed by the Governor relates to a case dealt with under the Uttar Pradesh Disciplinary Proceedings (Administrative Tribunal) Rules, 1947, it shall not be necessary to consult Public Service Commission.)

Explanation-- For the purposes of this article—

(a) departmental proceedings shall be deemed to have been instituted when the charges framed against the pensioner are issued to him, or, if the officer has been placed under suspension from an earlier date, on such date; and
(b) judicial proceedings shall be deemed to have been instituted:
(i) in the case of criminal proceedings, on the date on which a complaint is made, or a charge-sheet is submitted, to a criminal court; and
(ii) in the case of civil proceedings, on the date on which the plaint is presented or, as the case may be, an application is made, to a civil court."

11. The Governor under this rule can withhold or curtail the pension and direct recovery of the pecuniary loss suffered by the government even after retirement for the reasons mentioned in the rule. The rule lays down not only the circumstances in which the right can be exercised but it further details the manner of institution of proceedings against a retired employee, the period during which it can be instituted and the manner in which the inquiry can be completed, resulting in withholding or curtailment of pension and recovery for pecuniary loss suffered by the government. But it does not provide for withholding gratuity or family pension.

12. These were provided by two set of rules framed by the State Government in the year 1961. The Uttar Pradesh Retirement Benefits Rules, 1961 and Uttar Pradesh Liberalised Pension Rules 1961. Rule 3(f) of the Uttar Pradesh Liberalised Pension Rules 1961 was framed in exercise of powers conferred by Proviso to Article 309 of the Constitution by the Governor of Uttar Pradesh which came into force on 1.4.1961. Rule 3(f) defines 'Officer' as a government servant, whether belonging to superior or inferior service, who holds a lien on a permanent pensionable post under the Government or would have held a lien on such a post had his lien not been suspended. The word 'Qualifying Service' under rule 3(h) means service which qualifies for pension in accordance with the provisions of the Civil Service Regulations. Rule 2 lays down that these rules shall apply to all officers under the rule making control of the Governor who become eligible for pension after the promulgation of these rules and to all the serving officers who are eligible for pension. Rule 3 provides that an officer shall, on retirement, be paid gratuity. Rule 5 provides for family pension and Rule 6 provides for pension.

13. Rule 8 provides that the pension actually payable under the proviso to rule 6 shall be paid to the officer till the date of his death. If the officer dies before retirement, no pension is payable. Rule 9 provides for commutation of pension and rule 10 provides that Government will have the right to effect recoveries from gratuity or family pension sanctioned under Parts I and II in the same circumstances as recoveries can be effected from an ordinary pension under Regulation 351-A of the Civil Service Regulations. Relevant rule 10 (1) of the aforesaid Rules is extracted as under:-

"10. (1) Government will have the right to effect recoveries from a gratuity or family pension sanctioned under Parts I and II in the same circumstances as recoveries can be effected from an ordinary pension under Article 351-A of the Civil Service Regulations."

14. The other set of Rules is known as the Uttar Pradesh Retirement Benefits Rules, 1961 which has been framed under Proviso to Article 309 of the Constitution of India by the Governor and has come into force with effect from 1.4.1961. These Rules apply to all officers under the rule making power of the Governor other than those who retired before the date of the coming into force of these rules. Rule 3(6) defines the word 'officer' which means a government servant (whether belonging to superior or inferior service) who holds a lien on a permanent pensionable post under the Government or would have held a lien on such a post had his lien not been suspended. Rule 3(8) of the aforesaid Rules defines the word 'qualifying service' which means service which qualifies for pension in accordance with the provisions of Regulation 368 of the Civil Service Regulations. Rule 4 provides the payment of pension. Rule 5 provides for death-cum-retirement gratuity. Rule 7 provides for family pension and Rule 8 provides for commutation of pension. Rule 9 provides for recovery. The relevant Rule 9(1) is extracted below:-

"9. (1) Government will have the right to effect recoveries from a gratuity or family pension sanctioned under Parts II and III in the same circumstances as

recoveries can be effected from an ordinary pension under Article 351-A of the Civil Service Regulations."

15. From a combined reading of Regulation 351-A of the Civil Service Regulations with two set of rules, namely the Uttar Pradesh Liberalised Pension Rules 1961 and Uttar Pradesh Retirement Benefits Rules, 1961 it is clear that the pension, gratuity and family pension of a government servant can be withheld or curtailed permanently or for a specified period and pecuniary loss caused to the government can be recovered even after retirement. Further such action can be taken for pension under Regulation 351-A of the Civil Service Regulations whereas for gratuity and family pension it can be proceeded with under the U.P. Rules. Another significant feature is that the substantive and procedural law for taking action against the employee is provided by Regulation 351-A of the Civil Service Regulations. The U.P. Rules on the other hand, instead of providing any procedure for taking action for recovery from gratuity and family pension adopted the 'same circumstances' as mentioned in Regulation 351-A of the Civil Service Regulations. The question is what is the effect in law of it. Two questions need consideration. One, whether it resulted in adopting both, the substantive and procedural law as provided in Regulation 351-A of the Civil Service Regulations and second, whether the rules can be stretched to mean that gratuity can be withheld or stopped while exercising powers under Regulation 351-A of the Civil Service Regulations. As mentioned earlier the action for recovery from gratuity can be taken, only, under the U.P. Rules. By adopting the 'same circumstances' as mentioned in Regulation 351-A of the Civil Service Regulations, it shall be understood that gratuity can be stopped or withheld for grave misconduct or recovery can be made for misconduct and negligence. But the rule stops here. It is silent about the procedure for determining grave misconduct or misconduct etc. It may result in rendering the rule unworkable. The intent of the Rule making authority being clear, the rule in our opinion should be read harmoniously to avoid it becoming redundant by construing it to read in the circumstances and the manner provided in Regulation 351-A of the Civil Service Regulations. But by no principle of construction or rule of interpretation the rule can be read as empowering the government to withhold gratuity or effect recovery from it while proceeding under Regulation 351-A of the Civil Service Regulations for withholding or curtailing pension. Consequently, if the gratuity was to be forfeited or withheld, it was necessary for the respondents to issue notice for it in the inquiry and proceed in accordance with law. From the sanction granted by the Governor it is clear that it was for withholding or curtailing pension under Regulation 351-A of the Civil Service Regulations, and the sanction was not for gratuity. Therefore, the order of the State Government directing stopping of gratuity cannot be upheld.

16. The learned standing counsel relying on the division bench decision of this court in **Krishna Kumar v State of U.P. and others, 1998 (4) AWC 595** vehemently urged that under Regulation 351-A of the Civil Service Regulations, recovery can be made, for the loss suffered by the Government, from the gratuity which was payable to the employee. We have carefully gone

through this decision. The Division Bench held that for the loss suffered by the Government gratuity could be forfeited. The bench relied on section 4(6)(1) of the Payment of Gratuity Act, 1972. We respectfully find that the Division Bench has not considered section 2(e) of the Payment of Gratuity Act, 1972 which in clear terms lays down that the Payment of Gratuity Act, 1972 would not apply to a person who holds a post under the Central Government or a State Government and is governed by any other Act or by any rules providing for payment of gratuity. Therefore, the Payment of Gratuity Act, 1972 was not applicable as the employee before the division bench was a government servant, working as Deputy Excise Commissioner. The decision, in our opinion, is of no help to the respondents. We may also mention that the Apex Court in **Ahmedabad Private Primary Teacher Association v. Administrative Officer, AIR 2004 SC 1426** held that in view of the definition of employee in section 2(e) of the Payment of Gratuity Act, 1972 gratuity could be paid to the skilled, semi-skilled, unskilled, manual, supervisory, technical, clerical, managerial and administrative employees covered by labour enactments.

17. However, we proceed to examine, whether gratuity can be deemed to be included in pension. Gratuity is a statutory right. When a government servant is sought to be deprived of his gratuity, such deprivation must be in accordance with law. It is paid to the employee to tide over post retirement hardship and inconveniences. If the employee has committed misconduct or caused loss to the government then it cannot be said that the employee has rendered such a service so as to make him entitled to receive the favour of the grant of gratuity for the services rendered by him to the Government.

18. Pensionary benefits, on the other hand, are the benefits which arise out of the service condition that after retirement one should be given some benefits so that he can maintain himself. But pension is not a charity or bounty nor it is gratuitous payment solely dependent on the whim or sweet will of the employer. It is earned for rendering long service and is described as deferred portion of compensation for past services.

19. At this stage it is necessary to extract Article 366(17) of the Constitution of India which reads as under:-

"Article 366 Pension - (17) *"Pension" means a pension, whether contributory or not, of any kind whatsoever payable to or in respect of any person, and includes retired pay so payable, a gratuity so payable and any sum or sums so payable by way of the return, with or without interest thereon or any other addition thereto, of subscriptions to a provident fund."*

20. The apex court in **Jarnail Singh v Secretary, Ministry of Home Affairs and others, (1993) 1 SCC 47** has held that pension includes gratuity. In another decision **State of U.P. v. U.P. University Colleges Pensioners' Association, JT 1994(2) SC 569** the apex court considered and explained **Jarnail Singh's** case and held that pension and gratuity are conceptually different. It is necessary to extract paragraphs 13, 14 and 15 of the aforesaid decision of the apex court which are as under:

"13. Before we express our views on the aforesaid matter, we would deal with the submission of Shri Jain that gratuity has to be taken as a part of pension, to support which contention our attention has been invited to this court's judgment in Jarnail Singh's case (supra). Perusal of that judgment shows that gratuity was taken to be a part of pension because of the definition of "pension" as given in clause (o) of sub-rule (i) of rule 3 of Central Civil Services (Pension) Rules, 1972. It is because of this definition that the case of D.V. Kapoor v. Union of India, 1990 (4) SCC 314, in which it had been held that gratuity was not a part of pension, was not followed, as the bench which decided that case had not been referred to the aforesaid definition of pension. Similar observation was made in Jarnail Singh's case regarding F.R. Jaisuratnam v. Union of India, 1990 (Supp.) SCC 604 wherein also gratuity was not regarded as part of pension without noting the above noted definition.

14. To buttress his aforesaid submission, Shri Jain also refers to clause (17) of Article 366 of the Constitution which has defined pension to include gratuity. Merely because what has been stated in clause (17) it cannot be held that gratuity has to be taken always and for all purposes as part of pension, because this definition apparently has enlarged the meaning of the word "pension" by stating that this would include gratuity. It is well known that legislature very often wants to give enlarged meaning to a particular word and this is done by stating that the defined word would include some named related subjects also.

15. We, therefore, state that either because of what was stated in Jarnail Singh's case or the way 'pension' has been defined in the Constitution, it cannot be held that pension and gratuity are conceptually same, as stated in paragraph 9 of Jarnail Singh's case to which our attention is invited by Shri Jain. According to us, this Court took the view in question in Jarnail Singh because of the definition of the word 'pension' in the concerned rule, otherwise, what was held in D.V. Kapoor and F.R. Jaisuratnam cases seem to be correct legal position."

21. Therefore, the gratuity being conceptually different cannot be deemed to be included in pension.

Regulation 41 of the Civil Service Regulations provides as under:-

"41. Pension - *Except when the term "Pension" is used contradistinction to gratuity "Pension" includes Gratuity."*

22. The expression 'contradistinction' means distinction by contrast or opposite qualities. To distinguish one thing from other, by contrasting. The question is whether pension includes gratuity. Pension is not a bounty of the State. It is the right of a government servant. It provides economic security after superannuation by assured periodical payments till the employee is alive. The right to gratuity is a statutory right, it is paid once after superannuation by the employer. For depriving the government employee of his gratuity, opportunity has to be given, before forfeiting or withholding it as a measure of punishment. Rule 10 of the Uttar Pradesh Liberalised Pension Rules, 1961 and rule 9 of the Uttar Pradesh Retirement Benefits Rules, 1961 lay down the law for effecting recovery from the government employee from his gratuity. It can be

recovered in the same circumstances as recovery is effected from ordinary pension under Regulation 351-A of the Civil Service Regulations. Under these rules the expression gratuity has been used in contradistinction to pension. Therefore, regulation 41 of the Civil Service Regulations is of no help to the respondents. Had gratuity been included in pension then under Rule 10 of the Uttar Pradesh Liberalised Pension Rules, 1961 or rule 9 of the Uttar Pradesh Retirement Benefits Rules, 1961 there was no necessity of mentioning that recovery could be made from gratuity and family pension. The rule making authority was conscious that under Regulation 351-A of the Civil Service Regulations recovery could be made from pension only, therefore, both the Rules of 1961 provided for recovery from gratuity and family pension. In the circumstances we are of the opinion that gratuity is not part of pension. Both are conceptually different. In other words, recovery from gratuity and family pension for the loss, suffered by the Government due to negligence or misconduct of the employee can be made by the government provided the procedure as laid down in Regulation 351-A of the Civil Service Regulations is followed with regard to limitation and compliance of principles of natural justice etc. In the instant case no notice or opportunity had been given by the State Government informing the petitioner that as a measure of punishment his gratuity is liable to be withheld or forfeited. In absence of any notice or opportunity the order of the State Government withholding the gratuity of the petitioner is without jurisdiction. The petitioner is entitled to his gratuity.

23. We have already held that gratuity of a retired employee in the State cannot be withheld nor can recovery be made from it treating it as pension. The learned standing counsel vehemently relied on the decision of the Apex Court in **State of U.P. and others v. Harihar Bhole Nath JT 2006 (9) SC 567**. We have gone through it carefully. This decision was not concerned with stopping of gratuity. The Hon'ble Apex Court, no doubt, has observed in paragraph 11 that gratuity and pension were covered in Regulation 351-A read with Regulation 470 of the Civil Service Regulations, but in view of what has been stated above gratuity of an employee could be stopped only if the proceedings for it were taken under U.P. Pension Rules 1961. It being a special provision for the recovery of gratuity, the gratuity cannot be stopped by deeming it to be included in pension under Regulation 351-A.

24. We may further mention that the State Government had issued notice under Regulation 351-A of the Civil Service Regulations. We have already extracted it earlier. It provides for recovery from pension. It does not provide recovery from gratuity. The State Government has not proceeded to recover the amount under Rule 10 of the U.P. Liberalised Pension Service Rules, 1961 or under Rule 9 of the Uttar Pradesh Retirement Benefits Rules, 1961. Both the Rules are independent of Regulation 351-A of the Regulations. Under these rules it is nowhere provided that pension includes gratuity. As observed earlier pension is subject matter of Regulation 351-A, whereas gratuity can be recovered under the aforesaid rules. The State Government has not chosen to proceed with the recovery under the rules but it has

proceeded to initiate departmental disciplinary proceedings to make recovery under Regulation 351-A. Therefore, recovery, if any, could be made, only from the pension of the petitioner. It could not be made from the gratuity. In our opinion, gratuity has wrongly been withheld by the respondents, which is liable to be paid to the petitioner forthwith.

25. We would now examine whether the order withholding 5% pension can be upheld. We have already extracted Regulation 351-A. It provides for withholding or withdrawing pension permanently or for specific period if the pensioner is found guilty of grave misconduct in departmental disciplinary proceedings or to have caused pecuniary loss to government by misconduct or negligence during his service. The use of two expressions grave misconduct for withholding pension and misconduct or negligence for pecuniary loss brings out fully the scope and purpose of the Regulations. Misconduct literally means wrong or improper conduct. It may be failure to do what is required by law to be done. In other words, omission to follow a rule without any intention may amount to misconduct. Therefore, where there is pecuniary loss of the government by failure or omission to follow any rule or law deliberately or otherwise, it may amount to misconduct or negligence and it can be recovered from the pension. But withholding or forfeiting pension permanently or for a specified period, can only be for grave misconduct. The use of the word grave misconduct makes it abundantly clear that it is not every omission or failure which can attract this provision. According to the Black's Law Dictionary the word 'misconduct' is of wide import. But once it has been qualified with the word grave, its ambit is curtailed. It intends to convey that the action can be taken only if the omission or failure is not ordinary but something more. Mere neglect or default may not be covered by it. In service jurisprudence grave has its own connotation. It is not a mistake or mere irregularity. Pension is a right of an employee. It cannot be withheld or curtailed for technical omission.

26. We may now advert to the charges framed against the petitioner to decide whether the petitioner could be held guilty of grave misconduct on the findings recorded by the inquiry officer accepted by the State Government and whether it warrants the punishment of permanent curtailment of 5% pension. Four charges were framed against the petitioner. He was exonerated of the first charge by the inquiry officer.

27. The second charge was that for students kit new pencil, new rubber and new scale were to be purchased and distributed as per the letter of Director of Education, (Basic) U.P. and Chairman, U.P. Basic Shiksha Parishad, Allahabad dated 9.3.1994. In the district there were 2100 centres and the number of students of both the years to whom the kits were to be distributed were 52,400. For them 2,89,600 new pencils, 1,57,200 new rubbers and 1,04,800 new scales were to be purchased but the petitioner had purchased 4,20,000 new pencils, 3,15,000 new rubbers and 10,500 new scales which were more than norms fixed by the G.O. dated 9.3.1994. The petitioner was charged for excess payment of Rs.4,10,988/-. The petitioner submitted in his reply that this letter dated 9.3.1994

was not received in his office. He has made purchases as per the norms fixed in the letter issued by the Directorate dated January 1989. Since the purchases of scales was less than the norms fixed in 1994 no action was taken for it. With regard to pencils and rubbers the inquiry officer found that the letter dated 9.3.1994 was in the knowledge of the petitioner, therefore, he was guilty of making excess purchase of 1,30,400 pencils @ Rs.1.20/- per pencil total Rs.1,56,480/- and 1,57,800 rubbers @ Rs.1/- per rubber total Rs.1,57,800/-. In the supplementary counter affidavit filed on 25.5.2007 it is stated that from the records available in the office it was clear that out of 4,20,000 pencils purchased by the petitioner 4,00,000 were distributed to students. The distribution of remaining 20,000 pencils could not be verified as records were not available. Similarly, out of 3,15,000 rubbers 3,00,000 were found to be distributed to students. The distribution of remaining 15,000 rubbers could not be verified as records were not available.

28. It is further not denied that no opportunity of hearing was afforded by the inquiry officer. The question is whether in the circumstances this charge was proved and even assuming it to be so, was it sufficient to warrant the finding that the petitioner was guilty of grave misconduct or misconduct or negligence? Even though the findings recorded by the inquiry officer that the petitioner had knowledge of the 1994 G.O., cannot be gone into by this court in writ jurisdiction but there is no finding that the purchases made by the petitioner were not in accordance with the 1989 G.O. There is no finding that the petitioner was guilty of embezzlement or the pencils and rubbers purchased by the petitioner were misutilised by him and were not distributed to the students.

29. In absence of any finding that purchases were not contrary to earlier G.O. of 1989 coupled with failure of opportunity to the petitioner in the inquiry it could not be said that the petitioner had misutilised the funds or was guilty of embezzlement or grave misconduct within the meaning of Regulation 351-A of the Civil Service Regulations.

30. The third charge was that payment of trade tax (sales tax) could have been avoided by obtaining Form 3-D from the trade tax department. The explanation of the petitioner was that despite letters and even personal meeting with the Trade Tax Officer the form could not be issued as they were not available with the trade tax department. It was alleged that the correspondence in this regard was available in the office of Zila Anuapcharik Shiksha Adhikari, which may be verified. The inquiry officer did not find that the explanation of the petitioner that he had written many letters to the trade tax officer and also personally contacted him for Form no.3-D and the trade tax officer informed him that the form was not available was incorrect. In the supplementary counter affidavit it is alleged that the petitioner failed to prove that Form No.3-D was not available. The allegation has not been made with responsibility. The varacity of the petitioner's statement was not verified either by the inquiry officer or by the officer who has filed the supplementary counter affidavit on 25.5.2007. The inquiry officer did not care to verify by summoning the records, he did not issue notice to the petitioner to participate in the inquiry. Even the officer who filed the

supplementary counter affidavit did not say that there was no such letter on the record. If the explanation of the petitioner was correct, no blame could be placed on him. Further the money passed from one pocket of the Government to another. Thus, there was no loss to the Government. In any case it could not, by any stretch of imagination, be termed as grave misconduct within the meaning of the words 'grave misconduct' used in the Regulations.

31. The fourth charge against the petitioner was that he had not purchased copies from M/s. Sudhir & Company, Kanpur on rate contract. The petitioner submitted in his reply that he compared the copy supplied by M/s. Sudhir & Company with the specimen copy and found that the copies supplied were of very bad quality and it could not be used by the students, therefore, he invited quotations and purchased good copies on the same rate in the interest of students. On this charge the inquiry officer has held that the petitioner was not guilty of causing any loss to the government, but he held that the petitioner having failed to purchase from the dealer approved by the department was guilty of violating departmental rules. It has been supported in the supplementary counter affidavit filed on 25.5.2007. It states that the petitioner should have purchased from the dealer who was approved by the department. There is no doubt that, normally, the purchases should have been made from the approved dealer. But the circumstances do establish that what was done by the petitioner was in the interest of the students. It was neither to benefit himself nor cause any loss to the government. That is why the inquiry officer found that it was a technical violation. It could not be held grave misconduct justifying curtailing the pension.

32. We may make it clear that we have discussed the findings recorded by the inquiry officer and the disciplinary authority not with a view to examine their correctness or otherwise but to decide whether these findings individually or collectively can result in the finding that the petitioner was guilty of grave misconduct.

33. We may now examine whether the inquiry officer has complied with the principles of natural justice while conducting the inquiry. In paragraphs 12 and 13 of the writ petition the petitioner has specifically stated that no inquiry proceedings was ever conducted by the inquiry officer nor any date for inquiry was fixed and no opportunity was given to lead oral or documentary evidence. It is necessary to extract paragraphs 12 and 13 of the writ petition which is as under:-

"12.That after the petitioner submitted his reply, no further proceedings for inquiry was ever conducted by the inquiry officer. It is relevant to mention here that neither inquiry officer fixed any date nor petitioner was ever informed of any date being fixed in the inquiry proceedings. The petitioner was never informed to appear before the inquiry officer nor he was ever afforded opportunity of any kind to lead evidence orally as well as documentary in his support..

13. That as a matter of fact the inquiry officer never conducted any inquiry proceedings and submitted his report after more than two years of issuance of the charge sheet. It is once

again submitted that the said report is only based on the charges levelled against the petitioner and the reply submitted by him without any opportunity to the petitioner to lead the evidence in support of his case..."

34. In reply to the assertions made in paragraphs 12 and 13 of the writ petition the respondents submitted the reply in paragraph 8 of the counter affidavit which is extracted below:

"8. That the contents of paragraphs no.12 to 16 of the petition are misleading hence denied. In reply thereof it is stated that the petitioner was given full opportunity by asking him whether he would like personal hearing in the matter or would he like to adduce evidence and examination of witnesses or produce witness in his favour in the charge sheet dated 22.6.1998 itself but in the written reply dated 28.7.1998 Annexure 2 to the writ petition, the petitioner has nowhere indicated his desire to cross examine any witness regarding personal hearing."

35. Accordingly, the allegation made by the petitioner in paragraph under reply that he was not given opportunity is manifestly incorrect and is denied. It is further stated that upon consideration of the reply of the petitioner, the inquiry officer submitted his report exonerating the petitioner from charge no.1 while charge no.2 and 3 were proved against him whereas charge no.4 was partly proved against the petitioner. A copy of the inquiry report has already been filed as Annexure 3 to the writ petition."

36. It had been stated by the respondents that the petitioner was asked whether he would like to have personal hearing in the matter or would like to adduce evidence and cross-examination of witnesses or produce witness, but the petitioner did not express any desire to cross-examine any witness or to have personal hearing. However, in paragraph 8 of the counter affidavit it is admitted that the inquiry officer after considering the reply of the petitioner submitted his report. The allegation of the petitioner that the inquiry officer did not fix any date, place or time for inquiry or intimated the same to the petitioner is not denied in the counter affidavit. In the supplementary counter affidavit filed on 25.5.2007 it is admitted that no date, place and time was fixed for inquiry. But it is stated that the petitioner did not make any request in his reply for any hearing nor he proposed to examine any oral evidence, therefore, the inquiry was in accordance with U.P. Government Servant (Discipline & Appeal) Rules, 1999.

37. The stand taken in the supplementary counter affidavit shows complete misapprehension about Rule 7 of the U.P. Government Servant (Discipline & Appeal) Rules, 1999. It provides the procedure for major punishment. It lays down in detail the steps to be taken by the inquiry officer in conducting the inquiry. Two of its sub-rule (iv) and (vii) need discussion. Sub-rule (iv) is extracted below:

"The charged Government servant shall be required to put in a written statement of his defence in person on a specified date which shall not be less than 15 days from the date of issue of charge-sheet and to state whether he desires to cross-examine any witness mentioned in the charge-sheet and whether he desires to give or produce evidence in his defence.

He shall also be informed that in case he does not appear or file the written statement on the specified date, it will be presumed that he has none to furnish and inquiry officer shall proceed to complete the inquiry ex parte."

38. The sub-rule is in three parts. First, the duty of the inquiry officer requiring the charged officer to appear in person on a specified date and file his written statement, second the right of the employee to cross-examine the witness mentioned in the charge-sheet and produce evidence in his defence and the third the power of the inquiry officer to proceed ex parte and complete the inquiry, if the charged officer does not appear on the specified date nor files his written statement. The expression, 'in case he does not appear or file the written statement on the specified date' makes the appearance optional. But it does not absolve the inquiry officer from his duty of fixing a specified date for appearance and filing written statement.

39. Sub-rule (vii) of rule 7 provides the procedure to be followed during inquiry. It is reproduced below :

"Where the charged Government servant denies the charges the Inquiry Officer shall proceed to call the witnesses proposed in the charge-sheet and record their oral evidence in presence of the charged Government servant who shall be given opportunity to cross examine such witness. After recording the aforesaid evidence, the Inquiry Officer shall call and record the oral evidence which the charged Government servant desires in his written statement to be produced in his defence:

Provided that the Inquiry Officer may for reasons to be recorded in writing refuse to call a witness."

Where the charge is not admitted, the inquiry officer is obliged to call the witnesses mentioned in the charge-sheet in presence of the delinquent employee who shall be at liberty to cross examine witnesses and produce his evidence. The rule contains the basic principle of natural justice. It cannot be ignored by taking the stand that the employee having failed to make request for oral hearing or opportunity to produce oral evidence, the inquiry officer could conclude the inquiry on the reply of the employee. The requirement of examining of witnesses in presence of the employee makes the rule mandatory. The inquiry officer is duty bound to prove the case against the employee by taking evidence in his presence, otherwise it becomes an inquiry which is contrary to the principles of natural justice.

40. Therefore, even if in the charge sheet the inquiry officer had mentioned or intimated to the employee that if he wants to lead any oral or documentary evidence or to examine any witness he may inform him but if the inquiry officer had not fixed any date, time and place for inquiry then it would not be compliance of principles of natural justice.

41. In short, from Rule 7 of U.P. Government Servants (Discipline & Appeal) Rules, 1999, it is clear that where the charges levelled in the charge-sheet is either not admitted or denied by the employee it is the statutory duty of the inquiry officer to hold the inquiry for proving the charges by documentary and oral evidence in presence of the employee

and by asking him to cross-examine the witnesses, if he so desires, and adduce his own oral and documentary evidence in his defence. The inquiry officer, without holding such an inquiry could not straightway submit any report, only after considering the reply of the employee, holding the employee guilty of the charges mentioned in the charge-sheet. If a charge sheet has not been replied or the employee does not appear in the inquiry proceedings, despite service of notice of the date fixed for inquiry, the inquiry officer can proceed to hold ex-parte inquiry in the absence of employee on the basis of oral and documentary evidence mentioned in the charge sheet but even that could be done, only, after fixing date, time and place for inquiry. The only exception is where the employee appears before the inquiry officer and admits the charges levelled against him. Similar view has been expressed by this court in **Shiv Shanker Saxena v State of U.P. and others, 2006 (2) ESC (All) 1294, Gopal Chandra Sinha v State of U.P. and others, 2005(4) ESC (All) 2899, Managing Director U.P. State Warehousing Corporation and others v. Radhey Shyam, (2004) 3 UPLBEC 2864, Subhash Chandra Sharma v. Managing Director and others (2000) 1 UPLBEC 541.** The Apex Court had dismissed the SLP on 16.8.2000 in Subhash Chandra Sharma's case.

42. In this case a perusal of the charge sheet shows that the inquiry officer at the bottom of every charge mentioned that the letter of the officer concerned and the list of article is attached. There was no mention of any evidence in support of the charge. The petitioner submitted his reply denying the charges. Thereafter, the inquiry officer did not fix any date, time and place for holding the inquiry. The inquiry officer was under a statutory duty to intimate the petitioner of the date, time and place of the inquiry. This was not done. The inquiry officer after considering the explanation of the petitioner straightway submitted the inquiry report to the government. The inquiry proceedings were, thus, vitiated. The inquiry was contrary to U.P. Government Servants (Discipline & Appeal) Rules, 1999. We, therefore, hold that the inquiry proceedings as well as the inquiry report were in violation of the principles of natural justice.

43. We may mention that it was argued that proceedings were barred under sub-para (ii) of the proviso to Regulation 351-A, but in absence of any material to show the incident for which inquiry was initiated occurred four years prior to grant of sanction by the Governor, the argument of learned counsel for the petitioner that the proceedings were barred cannot be accepted.

44. It was further argued that the proceedings having been initiated after the sanction of the Governor on 22.6.1998 it should have been completed within three months from the date the sanction order was received. It was urged that the time limit has been fixed by the rule U. P. Pension Cases (Submission, Disposal And Avoidance Of Delay) Rules, 1995, framed by the Governor in exercise of powers under Proviso to Article 309 of the Constitution of India. It was notified on 2.11.1995 and it came into force at once. We do not propose to decide this question in this petition.

45. We have held that the order withholding gratuity and curtailing pension

permanently is contrary to rules. It has further been held that the inquiry proceedings were in violation of U.P. Government Servant (Discipline & Appeal) Rules, 1999, and contrary to the principles of natural justice. In such circumstances the question arises whether a fresh inquiry is desirable. The Apex Court in **M.V. Bijlani v. Union of India and others JT 2006 (4) SC 469** while setting aside the orders of the Disciplinary Authority etc., as there was no charge that the amount was misappropriated by the charged employee did not direct fresh inquiry as the employee had suffered enough due to delay in proceedings. In this case the incident is of 1994. The petitioner had retired in the year 1996. The disciplinary proceedings were initiated against the petitioner in 1998. The State Government passed order on 3.5.2002. The petitioner is more than 70 years of age. Charge no.1 has not been found to be proved. In view of the supplementary counter affidavit charge no.2 stood diluted. Most of the pencils and rubbers purchased were distributed. It did not appear to be a case of misappropriation causing loss of government funds. The findings on charge no.3 and 4 at the most, amounts to a technical violation. In the circumstances it would not be expedient in the interest of justice to direct a fresh inquiry.

46. In the result this writ petition succeeds and is allowed and the order of the State Government dated 3.5.2002, Annexure-6 to the writ petition is quashed. A writ of mandamus is issued directing the respondents to release the gratuity and pension along with the total amount of pension already deducted by the respondents within a period of three months. In case the aforesaid amount is not paid within time as directed above the petitioner shall be entitled for interest at the rate of 9% per annum from the date gratuity and pension became due to the petitioner.

Parties shall bear their own costs. Petition allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 16.08.2007

BEFORE
THE HON'BLE JANARDAN SAHAI, J.

Civil Misc. Writ Petition No. 41514 of 2006

Arjun Prasad ...Petitioner
Versus
Smt. Ameer Jahan Begum ...Respondent

Counsel for the Petitioner:
Sri. A.K. Roy

Counsel for the Respondent:
Sri. Promod Kumar Jain

Code of Civil Procedure- Order 21 rule 106(3)- Execution proceeding- on execution application Court summoned the original record- on the adjourned date application- dismissed in default- application for restoration- would lie under section151 CPC and not under rule 106.

Held: Para 7

The date was not one where the court proposed to apply mind or to hear the parties. Such a date cannot be treated as the date for hearing within the meaning of Rule 105 (2) of Order 21 CPC. The application for restoration in such a case would lie under Section 151 CPC and not under Rule 106.

Case law discussed:
AIR 2003 Kar.-226, AIR 1986 M.P.-66, 2005(7) SCC 300

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

1. An application for execution of the decree was filed by the respondent Smt. Ameer Jahan Begum. It appears that 23.5.2003 was fixed in the execution case. It is common ground between the counsel for the parties that the date was fixed for summoning the file of the Suit. That is also the finding of the court below which has observed that earlier dates were also fixed for that purpose but the record had not been received and the execution was again posted on 23.5.2003 for the production of the record. On that date the executing court passed an order dismissing the execution case in default. An application for restoration described as being under Order 21 Rule 106 CPC was filed by the respondent. The application was not filed within the period of 30 days time limit provided under Order 21, Rule 106 (3) CPC but was filed after about three months with an application to condone the delay. The application was allowed by the executing court by its order dated 16.5.2005. Against that order a revision was filed which has been dismissed by order dated 24.4.2006. Both these orders have been challenged in this writ petition.

2. Sri A.K. Roy counsel for the petitioner submitted that provisions of Section 5 of the Indian limitation Act are not applicable to execution proceedings and therefore the courts below have committed an error in allowing the respondent's application under Order 21, Rule 106.

3. Sub Rule (2) of Rule 105 of Order 21 CPC provides that where on the day fixed or on any other day to which the hearing may be adjourned, the applicant does not appear when the case is called on for hearing, the court may make an order that the application be dismissed. In the present case the date fixed was not a date for hearing but a date for summoning the file. In this view of the matter the order of dismissal in default could not be treated as an order passed within the meaning of Order 21, Rule 105 (2). That being so, the provisions of Rule 106 were not really attracted. In such a case the restoration application would lie under Section 151 CPC. The mere fact that the respondent wrongly described the application as one under Order 21, Rule 106 would not mean that that is the provision which would govern the situation.

4. Learned counsel for the petitioner relied upon a decision of the Karnataka High Court in **Smt. Vithabai G. Ghodake and another Vs. United Western Bank Ltd and others** [AIR 2003 Karnataka 266] - para 16] While considering the meaning of the word 'hearing' in the context of Rule 105 of Order 21, the Karnataka High Court relying upon interpretation of Statutes Eighth Edition by N.S. Bindra, at page 985, held that even if the case is posted for filing of the verified statement it has to be construed that the case has been posted for hearing for all purposes. It is in this real sense, said the Karnataka High Court that the meaning of 'hearing' has to be taken into consideration and therefore the dismissal of the application comes within the meaning of Rule 105 (2) of Order 21, CPC. The Karnataka High Court then held that even if it is construed that an application under Order 21, Rule 106, CPC is not maintainable, it is open for the Court to exercise inherent powers under S. 151 CPC.

5. In **Khoobchand Jain and another Vs. Kashi Prasad and others** [AIR 1986 Madhya Pradesh 66] the executing court had ordered issuance of a warrant of attachment of moveable property on furnishing by the decree holder of a list of moveable properties but the decree-holders failed to submit the list and the court adjourned the case to another date awaiting the execution of the warrant and on the adjourned date neither the decree holders nor their counsel appeared when the case was called out and the execution case was dismissed. It was held by the Madhya Pradesh High Court that the date was not a date for hearing within the meaning of Order 21 Rule 105 CPC and the dismissal of the execution application therefore did not fall under Rule 105 (2), and consequently the provisions of Rule 106 were not attracted. The said case was considered by the Apex Court in **Damodaran Pillai and others Vs. South Indian Bank Ltd** [2005 (7) SCC 300] and was distinguished but not overruled. It was however held by the Apex Court that Section 5 of the Limitation Act cannot be invoked for condoning delay where an order has been passed dismissing an application under Order 21, Rule 105 CPC. In **Radhakrishnan Vs. State of Kerala** W.P. (C) Nos. 5927 and 28645 of 2005 decided on 24.11.2005 the Kerala High Court also agreed with the view taken in Khoobchand's case. In the Kerala case which has also been relied upon by the court below the Execution Petition was ordered to be put up with the records on the date fixed. It was held that the dismissal of the Execution Petition in default was not under Order 21 Rule 105 CPC but under inherent powers and a restoration application was maintainable under Section 151 CPC. This decision of the Kerala High Court with which I am in agreement applies to the facts of the present case.

6. Sub Rule 1 of Rule 105 provides that the court before which an application under Order 21 is pending may fix a day for the hearing of the application. It is thus clear that it is not every date fixed in a pending application which is a date for hearing. A date for hearing would be a date fixed by the court for that purpose. A date for hearing would be one where the court proposes to hear the case or to apply mind to the case. The power of dismissal of the application in the absence of the applicant provided under Sub Rule (2) can be exercised on a day fixed for hearing or on a day to which the hearing has been adjourned. When the court fixes a date for production of the file it does not fix a date for hearing within the meaning of Sub Rule 1. If the record is not produced on that date and the court fixes another date for the production of the record, such adjourned date would not be a date to which the hearing has been adjourned within the meaning of Sub Rule (2) of Rule 105.

7. In the present case it has been held by the courts below that the date fixed was for summoning the file. The date was not one where the court proposed to apply mind or to hear the parties. Such a date cannot be treated as the date for hearing within the meaning of Rule 105 (2) of Order 21 CPC. The application for restoration in such a case would lie under Section 151 CPC and not under Rule 106. The view taken by the courts below therefore appears to be correct. In the result the writ petition is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.05.2007

BEFORE
THE HON'BLE ARUN TANDON, J.

Civil Misc. Writ Petition No. 7374 of 2007

Vinod Kumar Mishra ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Abhishek Dwivedi
Sri Amitabh Tripathi

Counsel for the Respondents:
S.C.

U.P. Intermediate Education Act 1921-S-16 (3) and16 e-10 –Grant –of exemption from requisite qualification–Petitioner allowed to take intermediate classes in Hindi subject–but in Graduation Sanskrit was not the one of the subject as per essential qualification required under chapter II Appendix-A-parity claimed as per Ram Ballabh Pathak–held–illegality can not be allowed to perpetuated However direction issued to Secretary to examine the legality of grant of relaxation in accordance with law.

Held: Para 22

Although this Court may refuse the plea of parity as raised by the petitioner qua Sri Nandan Ballabh Pathak on the ground that the illegality-cannot be permitted to be perpetuated on the plea of parity or similar treatment, yet the Court feels that the matter with regard to Sri Nandan Ballabh Pathak also requires reconsideration by the authorities, concerned, not only for the purposes of ensuring that the rule of law applies equally to all as per Article 14 of the Constitution of India more so when public money is involved.

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

1. Petitioner Vinod Kumar Mishra claims to have been appointed as L.T. Grade Teacher in Ganesh Shanker Vidyarthi Inter College, Kanpur (hereinafter referred to as college) on 30.09.1989. The petitioner claims to have been working as such since then and in support thereof has placed reliance upon the certificate issued by the Principal of the institution. Petitioner is possessed of a degree of M.A. in Hindi. However, at the graduation level i.e. B.A. He did not have Sanskrit as one of the subject. The Inter College is added and recognized under the provisions of the Intermediate Education Act. The U.P. High School and Intermediate Colleges (Teachers and other Employees) (Payment of Salary) Act, 1971 as well as those of the U.P. Secondary Education Services Selection Board Act, 1982 are fully applicable to the teachers of the institution in question.

2. One Sri Amrit Lal Singh, who was working as Lecturer Hindi in the institution retired on 30th June, 2001. Petitioner claims that he has been permitted to teach Intermediate Classes subsequent to retirement of Sri Amrit Lal Singh. As the petitioner did not have Sanskrit as one of the subject at the graduation level [which is admittedly an essential qualification prescribed under Appendix-A to Chapter-II of the regulations framed under the Intermediate Education Act for being appointed as Lecturer (for teaching Classes XI and XII)], he has made an application under Section 16E(3) of the U.P. Intermediate Education Act to the Madhyamik Shiksha Parishad U.P. Allahabad (Board) for grant of necessary relaxation in the minimum qualification prescribed. The petitioner,

with reference to various documents brought on record, alleges that the Board has not taken any final decision in the matter till date and therefore, seeks a writ of mandamus commanding the respondents to grant exemption from the essential qualifications prescribed for appointment as Lecturer Hindi.

3. The petitioner has also brought on record a copy of the order passed in favour of one Sri Nandan Ballabh Pathak (annexed as Annexure-10 to the writ petition) where under the Regional Secretary, Bareilly is said to have communicated a decision of the Manyata Samiti of the Bareilly Region dated 12th November, 1997 granting relaxation in the essential qualification prescribed in the similar set of facts.

4. This Court, while entertaining the present writ petition, on 12th February, 2007 framed two basic issues which arose for consideration in this petition. The issues so framed by this Court as per the order dated 12th February, 2007 read as follows:

"(a) Whether Section 16-E(3) proviso survives even after enforcement of the provisions of U.P. Secondary Education Services Selection Board Act 1982 inasmuch as 1982 Act; which provides that appointment shall be made in accordance with the provisions of the U.P. Secondary Education Services Selection Board Act only which would necessarily include the Rules framed thereunder.

(b) Even if it is presumed that the power under Section 16-E(3) is exercisable, the said power can be exercised by the Madhyamik Shiksha Parishad. The Director of Education/Joint Director of Education has not authority of law to grant any relaxation.

5. Under order of the Court the original records pertaining to Sri Nandan Ballabh Pathak have been produced before this Court. On record is a letter of the Deputy Secretary dated 28.02.2007, relevant portion of which reads as follows:

"उक्त के सम्बन्ध में सूच्य है कि सम्बन्धित प्रकरण के सम्बन्ध में मात्र १२ नवम्बर, १९९७ की बैठक की कार्यवाही (सभापति, मा०शि०प० से अनुमोदित) उपलब्ध है, जिसकी छायाप्रति प्रेषित है। शेष समस्त अभिलेख/पत्रावलियां उत्तरांचल राज्य के गठन के समय रामनगर (नैनीताल) प्रेषित की जा चुकी हैं।"

6. However, subsequently the original records pertaining to the meeting of the Manyata·Samiti of Madhyamik Shiksha Parishad pertaining to Bareilly Region have been produced before this Court. The original minutes of the meeting so produced have been taken on record.

7. A personal affidavit has been filed by the Secretary of the Madhyamik Shiksha Parishad as well as by the Director (Secondary Education); The Secretary in paragraph 45 of his affidavit has stated that under Section 13 of the Intermediate Education Act the Madhyamik Shiksha Parishad (Board) has been authorized to continue certain committee for different purposes, accordingly there is a Manyata Samiti to look into the matters related to recognition of the institution as well as for relaxation in the essential qualification as prescribed under Section 16E(3) of the U.P. Intermediate Education Act. It has further been stated that the Manyata

Samiti was constituted at regional level for Bareilly Region and the said Manyata Samiti of the Bareilly Region had in fact granted relaxation in favour of Sri Nandan Ballabha in compliance to the judgment and order of the Hon'ble High Court dated 22.02.1992 passed in Writ Petition No. 22209 of 1990. Various other facts with regard to non-maintenance of the certain records i.e. agenda of the meeting of the Regional Level Committee has also been stated.

8. The Chairman of the Board namely the Director in paragraph 11 of his counter affidavit has stated that the Secondary Education Board, in view of the decision taken at the level of Manyata Samiti of the Board on 12.11.1997 exercising powers as conferred under Section 16E(3), had granted exemption from qualification prescribed in favour of Sri Nandan Ballabh Pathak.

9. With regard to petitioner it has been stated that the Manyata Samiti in its meeting held on 25th June, 2004 considered the request of the petitioner and with reference to Section 16E(3) read with regulation 2(3) of Chapter-VII as well as Government Order dated 16.03.1979 decided to refuse relaxation in the essential qualification prescribed. For justifying the decision so taken, reliance has also been placed upon the Government Order dated 17th March 1979 where under it has been provided that relaxation from the essential qualification of having Sanskrit as one of the subject at graduation level (for promotion on the post of Lecturer) is to be permitted only in respect of teachers appointed prior to 5th April, 1975. In respect of teachers appointed subsequent to 5th April, 1975 it is directed that there shall not be any relaxation in the essential qualifications.

10. From the records, which have been produced as well as from the stand, which has been taken by the Secretary of the Madhyamik Shiksha Parishad as well as by the Director/Chairman of the Board, following two divergent facts emerge:

(a) With reference to Sri Nandan Ballabh Pathak it is stated that Regional Level Manyata Samiti of the Bareilly Region decided to grant relaxation in the essential qualification prescribed in its meeting dated 12th November, 1997. From the records it is established that Sri Nandan Ballabh Pathak was not appointed as teacher in the institution concerned prior to 1975. Therefore, the Government Order dated 16th March, 1979 referred to by the Chairman in his paragraph 9 of the affidavit was equally applicable in the case of Sri Nandan Ballabh Pathak. The Manyata Samiti does not even refer to the same nor any explanation has been furnished by the Secretary or by the Chairman qua non-consideration of the said Government order viz-a-viz the exemption granted to Sri Nandan Ballabh Pathak, while the same Government Order is being relied upon for refusing similar exemption prayed for by the petitioner.

11. It is further apparent from the affidavit of the Chairman and the Secretary that relaxation has been granted by the Manyata Samiti at the regional level, said to have been constituted with reference to Section 13 of the Intermediate Education Act. Section 13 reads as follows:

13. Appointment and Constitution of Committees.-*(1) The Board shall appoint the following Committees and different Committees may be appointed for different areas of the State, namely:-*

(a) Curriculum Committee,
(b) Examination Committee,
(c) Results Committee, 7374
(d) Recognition Committee, and
(e) Finance Committee."

12. from the aforesaid provision it is apparent that the power to grant relaxation in the essential qualifications, as applicable at the relevant time vested with the Board alone. The constitution of the Board has been provided under Section 3(1) of the Intermediate Education Act. Any committee constituted under Section 13 of the U.P. Secondary Education Services Selection Board Act, 1982 is only for the assistance of discharge of its function by the Board. No provision of the Intermediate Education Act permits the Board to delegate its power to any sub-committee and even otherwise having regard to specific language of Section 16-E (3), the relaxation, if any, in the essential qualification could be granted by the Board only. Since on record there is no order of the Board granting relaxation in favour of Sri Nandan Ballabh Pathak, this Court has no hesitation to record that the order issued in that regard on the recommendation of the Regional Level Manyata Samiti is no order in the eyes of law with reference to Section 16-E(3).

13. The petitioner cannot be permitted to take benefit of, or to claim parity with such illegal and arbitrary order, not contemplated by the Act. Consequently, the Court refuses to entertain the plea of parity as claimed by the petitioner with Sri Nandan Ballabh Pathak.

14. This leads the Court to examine the issue as to whether subsequent to enforcement of U.P. Secondary Education Services Selection Board Act, 1982, the power conferred under Section 16-E (3) of the Intermediate Education Act still survive for grant of relaxation or not.

15. Section 16 of the U.P. Secondary Education Services Selection Board Act, 1982 provides that appointment on the post of teachers in recognized and added Intermediate Colleges shall be made in accordance with the said Act only and any appointment to the contrary would be null and void. Reference Section 16(2) of the Act, which reads as follows:

"16(2). Any appointment made in contravention of the provisions of sub-section (1) shall be void."

16. Section 35 of the U.P. Secondary Education Services Selection Board Act, 1982 (U.P. Act No. 5 of 1982) confers a power to make rules for giving effect to the provisions of the Act. U.P. Secondary Education Services Selection Board Rules, 1998 have accordingly been enforced. The qualifications prescribed for appointment of teachers in recognized Intermediate Colleges as per Rule 5 reads as follows:

"5. Academic Qualifications.- *A candidate for appointment to a post of teacher must possess qualifications specified in regulation 1 of Chapter II of the Regulations made under the Intermediate Education Act 1921."*

17. Section 32 of the U.P. Secondary Education Services Selection Board Act, 1982 declares that the provisions of the Intermediate Education Act, insofar as they are inconsistent with the provisions of the U.P. Secondary Education Services Selection Board Act, 1982, shall be inapplicable and shall therefore not apply.

18. From the statutory provisions noticed herein above, it may be noticed that the U.P. Secondary Education Services Selection Board Act lays down minimum qualification for appointments of assistant teachers to be the one provided for under Appendix-2 to Chapter-II of the regulations framed under the Intermediate Education Act, this is a case of legislation by incorporation. Meaning thereby that the qualifications laid down in Appendix-A to Chapter-II of the regulations framed under the Intermediate Education Act are broadly lifted and treated to be a part of the U.P. Secondary Education Services Selection Board Act, 1982 and rules framed thereunder.

19. The U.P. Secondary Education Services Selection Board Act does provide for any power of relaxation in respect of the qualifications so prescribed. Consequently, appointments under the U.P. Secondary Education Services Selection Board Act can be made only in strict compliance of the qualifications provided as per Appendix-A of Chapter-II.

20. This Court records that the provisions of Section 16-E(3) of the Intermediate Education Act cease to be operative qua appointment of teachers in L.T. Grade/ Lecturer in recognized Intermediate and High School (except minority institutions). It is held that the provisions of Section 16-E (3) of the Intermediate Education Act, subsequent to enforcement of U.P. Secondary Education Services Selection Board Act, 1982, will have no application in respect of the teachers who are required to be appointed in recognized institutions (except minority institutions) under the provisions of the U.P. Secondary Education Services Selection Board Act. It is, therefore, held that there exists no power to grant relaxation in the essential qualifications prescribed in respect of appointment of teachers in recognized and added Intermediate Colleges, appointment where of is regulated by the provisions of the U.P. Secondary Education Services Selection Board Act, 1982. The relief prayed for by the petitioner, for grant of relaxation in the essential qualification, in the facts of the present case cannot be entertained.

21. At this stage the Court may also record that petitioner is justified in contending that the State cannot be permitted to adopt two different standards for two different teachers. Petitioner is right in contending that there is nothing so good about Sri Nandan Ballabh Pathak that he can be granted relaxation from the essential qualifications at the same time the petitioner being refused similar treatment.

22. Although this Court may refuse the plea of parity as raised by the petitioner qua Sri Nandan Ballabh Pathak on the ground that the illegality-cannot be permitted to be perpetuated on the plea of parity or similar treatment, yet the Court feels that the matter with regard to Sri Nandan Ballabh Pathak also requires reconsideration by the authorities, concerned,

not only for the purposes of ensuring that the rule of law applies equally to all as per Article 14 of the Constitution of India more so when public money is involved.

23. It is, therefore, provided that the Director of Education shall exercise his suo moto power under Section 16-E(10) of the Intermediate Education Act and shall examine the legality of the relaxation in the essential qualification prescribed, as granted to Sri Nandan Ballabh Pathak strictly in accordance with law by means of a reasoned speaking order after affording opportunity of hearing to Sri Nandan Ballabh Pathak. The aforesaid exercise may be completed within four weeks from the date the Standing Counsel communicate the order passed today. In the facts of the case it is further necessary to direct the Secretary, Madhyamik Shiksha, U.P. Government to examine the manner in which the relaxation has been granted in favour of Sri Nandan Ballabh Pathak, specifically the issue of non-consideration of the provisions of Section 16-E(3) read with the Government Order dated 16th March, 1979. If it is found that there has been deliberate disregard to the provisions as well as the Government Order applicable, the officers responsible should be proceeded with departmentally.

24. Writ petition is dismissed subject to the observations made above.

25. The original records produced by the Standing Counsel be returned to the Standing Counsel by the Bench Secretary. Petition dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.09.2007

BEFORE
THE HON'BLE V.M. SAHAI, J.
THE HON'BLE RAKESH SHARMA, J.

Civil Misc. Writ Petition No. 48806 of 2000

Gulab Sonkar ...Petitioner
Versus
Nagar Nigam, Allahabad and another ...Respondents

Counsel for the Petitioner:
Sri V.P. Varshney

Counsel for the Respondents:
Sri Syed Atiq Ahmad
S.C.

Constitution of India, Art. 226- reconstruction of shop-G.T. Road passing through Allahabad-even after the demolition by P.W.D.-major State Highways samples-narrow bridges, dangerous curves surface-pothole cracked cement, collapsed culverts-missing sidewalks-death of 75 people every year-courts expressed its great concern-general mandamus issued to all the concerned court can not allow to perpetual illegalities-petition dismissed.

Held: Para 9

Under the above compelling circumstances, we are recording these observations to be conveyed to the concerned authorities like Regional officers of National Highways Authority of India located in Uttar Pradesh, Engineer-in-Chief, U.P. Public Works Department, Lucknow and other concerned authorities. Learned standing counsel shall send a copy of this judgment and order to the State Government and National Highways Authority of India by communicating it through Dr. Ashok Nigam, learned

Additional Solicitor General of India pursuing the cases of Union of India.

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

1. We have heard Sri V.P.Varshney, learned counsel for the petitioner and learned standing counsel appearing for the respondents and perused the record.

2. The petitioner has approached this court seeking a writ of mandamus commanding the respondents to allow the petitioner to re-construct his shop on main Grand Trunk Road passing through Allahabad city. This shop was demolished in anti encroachment drive carried out on G.T. Road in Allahabad. It emerges from the record that the House no. 3 Ka/1, Karbala, Allahabad is registered as a residential house in the municipal records. The map/plan of the said accommodation was sanctioned as a residential house not for commercial purposes like constructing a shop therein.

3. It has further born out from the record that no shop was permitted to be constructed by the appropriate authorities in the residential house. It has been indicated in the counter affidavit that the house tax was assessed for a residential house and not for the shop. The petitioner was running his business from the shop which was illegally constructed encroaching upon the main Grand Trunk Road. The appropriate authorities of Public Works Department, not of Allahabad Nagar Nigam, in anti encroachment drive, had demolished the aforesaid shop. Even under section 3 of the U.P. State Roadside Land Control Act, no body is permitted to raise any construction up to 220 feet from the centre line of the road on either side. No encroachment is permitted under the relevant law on the highways, pavements, footpaths or on the boundary of the road and khadanja. Admittedly, the petitioner's alleged shop, an illegal encroachment, on the high way as per the version of the respondents in the counter affidavit, has already been demolished by the respondents. The petitioner has tried to get the status quo ante restored by filing this writ petition to allow the petitioner to re-construct his shop on the same site i.e. Grand Trunk Road. Such a writ can only be issued when the petitioner establishes that he has a legal right to raise construction of a shop on the National High Way i.e. Grand Trunk Road passing through the busy city of Allahabad. None of the elements, for issuance of a writ of mandamus, is present in this petition. Accordingly no direction can be issued to the petitioner to re-construct his shop on the main Grand Trunk Road in violation of law, therefore, the writ petition is liable to be dismissed.

4. We have taken note of the fact that large scale encroachments have been made on the National Highways and the State High Ways of Uttar Pradesh. The main High Ways passing through towns, cities and villages have been encroached by people by putting stalls (gumti, khokha) and kiosks. Temporary structures have been raised. The markets are held just close to busy highways causing obstruction. For example the High Way connecting Lucknow to Allahabad (205 kms.) has been encroached upon by the shop keepers etc. at more than 40 places. Most part of the road looks like an extended market, bazar. Road users/drivers have to negotiate these points wasting 5 to 10 minutes at each place while performing road journey from

Allahabad to Lucknow. Allahabad Varanasi high way has also become a difficult zone to traverse. It is harassing for a driver to negotiate this small distance. Uttar Pradesh is the second largest State having poor roads. It appears that no action is being taken by the concerned authorities of Public Works Department, Nagar Palikas, Nagar Nigams and Regional National Highways Authority of India to keep the highways encroachment free.

5. Even the police does not take any action for which they are empowered under the Indian Penal Code, Criminal Procedure Code for removing nuisance from the roads, streets under their police stations. Effective measures are to be taken for removing these encroachments. Provisions of the Road Side Land Control Act are to be strictly followed and implemented. The traffic has increased manifold, but the motorable surface of the road available for the use of vehicle drivers has shrinked. The concerned must conduct a detailed survey of the highways of the State.

6. Newspaper reports show that one full month Kanwarias occupy the highways in western and eastern Uttar Pradesh. After occurrence of road accidents people take law in their hands, the vehicles are openly damaged and sometimes burnt on the roads by frenzied mobs and hooligans. There are several instances which are published in the newspapers that kanwarias virtually rule the Highways for about a month in 'Shrawan' stopping the traffic on the main roads like Delhi- Haryana, Allahabad-Varanasi and other parts of the country. Similarly one can find mushroom growth of religious places, temples and mazars on the roadside. Sometimes even a simple 'peepal' tree is converted to a place of worship after putting symbols just because it has grown on the side of the road. The road side eateries, restaurants and dhabas can be located away from the road.

7. We found that even after sixty years of independence, our national highways and major state highways are in a shambles; narrow bridges; dangerous curves; abraded surface; potholes, cracked cement; collapsed culverts; bulging parapets, uneven or missing sidewalks, bumps and caving, poor or absent lighting. In the global village a nation is judged by the roads it keeps. It can not pretend to have both ways; bad roads and prosperity in case of India specially Uttar Pradesh the most populous region of the country. Under the present road conditions, India suffers losses worth hundreds of crores of rupees in terms of economy, damage to vehicles and the environment. One factor that made India quickly loose the war with China in the 1960s was the lack of roads in the Himalayas. According to some reports nearly 75,000 Indians are killed in road accidents every year. Most of these deaths occur in Uttar Pradesh. Countless persons and families are ruined. The transportation by trucks, buses and private vehicles has now become difficult to be undertaken.

8. Travellers while touring Uttar Pradesh see here a tragedy no less grievous. It is the deplorable condition of the Highways from Ghaziabad to Ghazipur and from Lalitpur to Pilibhit. Bad roads, difficult adverse travelling conditions in Uttar Pradesh has darkened its reputation of a land most favoured

destination for tourists and pilgrims, the land of Rama, Krishna and Gautam.

9. Under the above compelling circumstances, we are recording these observations to be conveyed to the concerned authorities like Regional officers of National Highways Authority of India located in Uttar Pradesh, Engineer-in-Chief, U.P. Public Works Department, Lucknow and other concerned authorities. Learned standing counsel shall send a copy of this judgment and order to the State Government and National Highways Authority of India by communicating it through Dr. Ashok Nigam, learned Additional Solicitor General of India pursuing the cases of Union of India.

Subject to the observations made above, the writ petition is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.09.2007

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

Civil Misc. Writ Petition No. 2686 of 1989
Connected with
Civil Misc. Writ Petition No.4602 of 1989

Kailash Chandra Tiwari ...Petitioner
Versus
IInd Additional District Judge, Allahabad ...Respondents

Counsel for the Petitioner:
Sri K.N. Tripathi
Sri Prabhat Tripathi
Sri G.S. Dwivedi
Sri S. Chatterji

Counsel for the Respondents:
Sri Govind Saran
S.C.

Payment of Wages 1936-Section-15 (2)-claim of wages for the period of unauthorise absence-after Transfer petitioner instead of joining at transferred place-remained absent from 20.08.81 to 08.10.94-unless the leave sanctioned-not entitled for wages prescribed authority as well as appellate authority ignored this aspect during illness period he was found roaming in the office-apparently making false application-held-appellate authority cannot usurp the power of management-deduction in accordance with the provisions of Act-application not maintainable.

Held: Para 8

The authority under the relevant service rules would be empowered to pass order either treat the absence as leave with or without pay on the principles of no work, no pay. But neither the Prescribed Authority or its appellate authority under the Act cannot usurp the power of the Management. Unless there was an order regularizing or condoning the absence of the employee, the deduction was fully covered by the provisions of the Act and therefore the application under section 15(2) of the Act was not maintainable.

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

1. Heard counsel for the petitioner and Sri Govind Saran for the contesting respondent.

2. The petitioner was employed as a clerk in the respondent Railway Establishment and was posted as Head Clerk within the jurisdiction of the Divisional Railway Manager, Allahabad in the Electrical Department when he was transferred on 20.8.1981 to the office of Senior Foreman (Train Lighting) in Allahabad itself. He did not join at the

transferred place but made an application for medical leave which was not granted. He remained absent from duty till 8.10.1984 when he was able to get his posting in the Electrical Department on the interference of a Member of Parliament and thus joined on 9.10.1984. He claimed wages for the period of his aforesaid absence which was denied by the Railway Establishment and, thus, he preferred an application under section 15 (2) of the Payment of Wages Act, 1936 before the Prescribed Authority (here-in-after referred to as the Act). After pleadings were exchanged, the Prescribed Authority repelled the contention of the Railway Establishment that the application under section 15(2) was not maintainable and granted the alleged deducted/delayed wages to the extent of Rs.43,302.56 together with Rs.86,605.12 i.e. twice amount of wages as compensation, Rs.150/- as cost and Rs.4800/- as litigation cost of a litigation during the intervening period vide its order dated 21.3.1988.

3. The Railway Establishment preferred an appeal under section 17 of the Act and the Appellate Authority referred to various paragraphs of Railway Establishment Code and after recording finding that certain leave was outstanding in the account of the petitioner, it thus granted the leave and directed for payment together with twice the amount as compensation.

4. The petitioner aggrieved by the latter part of the judgement reducing the payment to be made to him, has preferred writ petition no. 2686 of 1989 while the Railway Establishment preferred writ petition no. 4602 of 1989 challenging both the orders.

5. Learned Counsel for the Railways has contended that the application itself was not maintainable under section 15 (2) as deductions were made for absence of the petitioner and was referable to section 7 (2) (b) read with section 9 of the Act. He has further urged that the Appellate Authority could not have usurped managerial functions of the authorities of the Railway Establishment to adjust the leave standing in the account of the petitioner.

Section 15 (2) of the Act provides as under:-

"(2) Where contrary to the provisions of this Act any deduction has been made from the wages of an employed person or any payment of wages has been delayed, such person himself,....., may apply to such authority for a direction under sub section 3."

Under sub section 3 the authority may direct refund of the wages so deducted or so delayed together with payment of compensation not more than ten times the deductions.

6. Thus, the sine qua non for making an application under section 15 (2), it is necessary to allege and prove that deduction of wages or delay in payment thereof is against the provisions of the Act. Section 7 of the Act directs that wages to an employed person shall be paid without any deductions except those authorized under the Act. Clause 2-(b) of section 7 of the Act authorizes deductions for absence from duty. Section 9 (2) of the Act stipulates deductions of wages not more than the proportion of absence from work. The Apex Court in the case of Dilbag Rai Jerry Vs. Union of India. [1974(3) SCC 554 has held that deductions from wages is the same thing as deductions of wages. In this background, the application of the employee has to be considered.

7. In the application made under section 15 (2) the employee has alleged that while working in the Electrical Branch he was transferred by a competent authority to the office of Senior Foreman (Train Lighting) and as it was a hazardous job and he was not well, he made a representation dated 5.9.1981 in pursuance of which, the transfer was cancelled in May, 1984 but the same was not informed to him and when he was declared fit, he joined the Establishment on 9.10.1984. On these averments he has claimed wages from 20.8.1981 to 8.10.1994. However, there is neither any averment that he worked between those dates nor there is any averment that any leave was sanctioned to him. In the reply filed by the Establishment, a specific allegation was made that he did not join at his transferred place and stayed away from work with effect from 20.8.1981 and only joined on 9.10.1984 and that no leave was ever sanctioned by the Establishment. The question is whether on these allegations the application was maintainable?

8. It is neither the case of the employee nor there is any finding by any of the two authorities that any leave was granted to him for the aforesaid period. The Prescribed Authority and so also the Appellate Authority have held that an enquiry for unauthorized absence was started against the employee where the charge of unauthorized absence was not found proved and, therefore, it has proceeded on assumption that the absence of the employee has been regularized. The Appellate Authority, after examining as to the amount of leave due to the employee, has usurped the power of the Management and has awarded the wages for the period for which leave was due in the account of the employee. In the counter affidavit filed by the employee in the connected petition filed by the Railways, a copy of the alleged enquiry is annexed as Annexure-1. Its perusal shows that an enquiry was initiated in pursuance of an order dated 9.8.1982 and the charges shown in the preamble are that though the employee had applied for 15 days leave with effect from 20.8.1981 on the ground of his illness, he was found roaming in the office. It is evident that the charge was apparently for making false applications which was found to be not proved on the ground that the entire record was missing. A note was put up and the Disciplinary Authority informed the employee through letter dated 15.4.1985 (Annexure-III to the said Counter Affidavit) that as the records were missing, the charge was dropped. Therefore, it cannot be said that there was an order regularizing or condoning the absence of the employee. The authority under the relevant service rules would be empowered to pass order either treat the absence as leave with or without pay on the principles of no work, no pay. But neither the Prescribed Authority or its appellate authority under the Act cannot usurp the power of the Management. Unless there was an order regularizing or condoning the absence of the employee, the deduction was fully covered by the provisions of the Act and therefore the application under section 15(2) of the Act was not maintainable.

9. For the reasons above, the writ petition no. 2686 of 1989 is hereby dismissed while the writ petition no. 4602 of 1989 is allowed and both the orders of the authority below dated 21.3.1988 and 22.11.1988 are hereby quashed. In the circumstances of the case, no order as to cost.
