APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.02.2008

BEFORE
THE HON'BLE H.L. GOKHALE, C.J.
THE HON'BLE VINEET SARAN, J.

Special Appeal No. (110) of 2008

State of U.P. and others ...Appellants
Versus
Kuldeep ...Respondent

Counsel for the Appellants:
Sri M.C. Chaturvedi
Sri Ravi Shanker Prasad
S.C.

Counsel for the Respondent:
Sri Ashok Khare
Sri Sunil Kumar Srivastava

U.P. Public Service (Reservation for physically Handicapped Dependents of Freedom Fighters and Ex-Service Man) Act 1993-as amended 1997-2(e)-Loco motor disability-without description of percentage-even in advertisement 40% disability not mentioned-petitioner with 5% disability was selected-completed B.T.C. Training course much earlier 2004-cancellation of appointment-absolutely technical and bureaucratic manner-Single Judge rightly quashed the impugned order-No interference by appellate court required.

Held: Para 9

It is also material to note that the respondent had not made any wrong mention in his application form. He had disclosed that he was suffering from 5% disability and that was accepted by the authorities concerned. He was given admission and he thereafter joined the course and passed the same in September, 2002. He was thereafter appointed as Assistant Teacher on 8.11.2002, which post he joined and started working. Much later i.e. on 29.9.2004 a complaint was filed and prima facie, in our view, in an absolutely technical and bureaucratic manner the officer concerned has proceeded to cancel the appointment of the respondent writ-petitioner. The officer concerned ought to have noted that under the advertisement there was no specific reference to 40% disability and this being so, when a person has himself disclosed the percentage of his physical disability correctly and when he had already been admitted and has completed the course, there was no reason for the officer concerned to cancel the appointment and to issue a direction for cancellation of his certificate which was earned by the respondent after completing his course.

(Delivered by Hon'ble H.L. Gokhaley, CJ)

1. Heard Sri M.C. Chaturvedi, Chief Standing Counsel of the State of U.P. along with Sri Ravi Shanker Prasad for the appellants. Sri Ashok Khare, Senior Advocate with Sri Sunil Kumar Srivastava appear for the respondent.

2. The appellants seek to challenge the order of the learned Single Judge dated 9.5.2007 whereby the learned Judge has allowed the petition filed by the respondent herein.

3. The short facts leading to this appeal are this wise. The respondent is a physically handicapped person with 5% locomotor disability. In pursuance to an advertisement for two years B.T.C. Course 2000, he applied for joining the same. The course was to be conducted in two academic years 2000-01 and 2001-02. The respondent was admitted to that course in the quota for physically handicapped persons, on the basis of his physical disability. He cleared both the

examinations and on 20.9.2002 received the mark-sheet and thereafter the certificate also. He subsequently joined as an Assistant Teacher in a government primary school run by the Basic Shiksha Parishad. It is material to note that there is a need of large number of primary teachers (about 60,000) in the State of U.P. and under "Sarva Shiksha Abhiyan" special short courses known as Special B.T.C. Courses are also separately being run by the State of U.P. for making such appointments on the post of Assistant Teachers.

4. In this background, it appears that some kind of complaint was received against the petitioner by the authorities on 29.9.2004, which led to an enquiry by the District Basic Education Officer, Fatehpur. The complaint was this wise. According to the understanding of the officer concerned, for being eligible to the handicapped category one must have 40% locomotor disability and on that footing the respondent could not have been admitted to the course in that category. The respondent had got 174.74 quality marks whereas the last candidate admitted in the general category was at 186.62 marks. On that basis the officer cancelled the appointment of the respondent as Assistant Teacher and recommended that steps be taken to cancel the certificate of the respondent. Such order was passed by the Basic Shiksha Adhikari on 15.10.2005.

5. Being aggrieved by this order, the respondent filed the writ petition. It was heard by a learned Single judge. The learned Judge noted that under the advertisement for the particular course it was not specifically mentioned that one should suffer 40% locomotor disability. The learned judge also noted that BTC Course is essentially a training course for teachers and is not for employment as such under the State Government. For these reasons the learned Judge set aside the order dated 15.10.2005 and also directed that the benefits which must have accrued to the petitioner be released to him within a period of two months.

6. Sri M.C.Chaturvedi, learned counsel for the appellants, submitted that requirement of 40% disability is under the Central Act known as The Person With Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. He therefore submitted that the officer was right in cancelling the certificate. He also drew our attention to a Circular issued by the Secretary of the concerned department of the State Government dated 30.9.2000 which refers to this Act and lays down the requirement of 40% disability for being considered in such category.

7. Sri Khare, learned senior counsel appearing for the respondent, on the other hand submitted that this Circular will not govern the case of the respondent for a number of reasons. Firstly because he was admitted in the course 2000-01, the session of which starts from July 2000, and obviously this Circular is subsequent thereto. That apart, he also pointed out that as far as the concerned advertisement goes, it reserves 2% seats for physically handicapped and it refers to The Uttar Pradesh Public Services (Reservation for Physically Handicapped, Dependents of Freedom Fighters and Ex-Servicemen) Act, 1993. This Act was amended in the year 1997 and the definition of a physically handicapped person as provided in section 2(e) refers, amongst

others, to locomotor disability or cerebral palsy. It does not as such, lay down any percentage of such disability. This being the position, in his submission, the order passed by the officer was obviously wrong order and the order passed by the learned Judge was fully justified.

8. We have noted the submissions of both the counsel. On the face of it the facts of the present case cannot be said to be governed under the Central Act. It was a training course started by the State Government. The State Government referred to its own Act of 1993, specifically in the advertisement and under the said Act there is no specific requirement that one must be suffering with 40% locomotor disability. That apart, the Circular issued by the State Government is of 30.9.2000, of which there is no mention in the advertisement (although certain other Circulars have been mentioned therein). Even otherwise, the said Circular dated 30.9.2000 will surely not apply to a person who has been admitted to the course of the academic year 2000-01. This is on the footing that the Circular refers to the Central Act and requires compliance thereof.

9. It is also material to note that the respondent had not made any wrong mention in his application form. He had disclosed that he was suffering from 5% disability and that was accepted by the authorities concerned. He was given admission and he thereafter joined the course and passed the same in September, 2002. He was thereafter appointed as Assistant Teacher on 8.11.2002, which post he joined and started working. Much later i.e. on 29.9.2004 a complaint was filed and prima facie, in our view, in an absolutely technical and bureaucratic manner the officer concerned has proceeded to cancel the appointment of the respondent writ-petitioner. The officer concerned ought to have noted that under the advertisement there was no specific reference to 40% disability and this being so, when a person has himself disclosed the percentage of his physical disability correctly and when he had already been admitted and has completed the course, there was no reason for the officer concerned to cancel the appointment and to issue a direction for cancellation of his certificate which was earned by the respondent after completing his course.

10. As such the learned Single Judge has rightly quashed the order dated 15.10.2005 and granted all consequential benefits to the respondent. Such judgment does not call for any interference.

11. We are told that subsequent to this order of 15.10.2005 and in pursuance thereof, the appellants have proceeded to pass another order on 15.1.2008 which now cancels the certificate issued to the respondent. This order specifically refers to the earlier direction issued on 15.10.2005. It is a consequential order. Inasmuch as the earlier order is set aside, this order dated 15.1.2008 will also have to be held as inoperative and not effecting the rights of the respondent in any manner whatsoever.

12. For these reasons we dismiss this appeal with cost, quantified at Rs.5,000/- to be paid to the respondent.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.02.2008

BEFORE
THE HON'BLE SABHAJEET YADAV, J.

Civil Misc. Writ Petition No. 35276 of 2002

Sri Mainuddin ...Petitioner
Versus
Managing Director, U.P. State Road Transport Corporation, Lucknow and others ...Respondents

Counsel for the Petitioner:
Sri A.R. Dube
Sri Satyendra Singh
Sri Sanjay Dwivedi
Sri Anubhav Chandra

Counsel for the Respondents:
Sri Ganga Prasad Gupta
Sri Neeraj Tripathi

Constitution of India-Practice & Procedure-Dismissal from Service-earlier High Court remanded the matter for consideration of question of punishment-as with similar charges alongwith petitioner 28 employees in same incident-punished with stoppage of 4 or 5 increments-even on second inning-inflicted same punishment of dismissal-held-approach of authority-contrary to law-when the matter remitted back with limited point of consideration-not open for the authority to sit over the Court.

Held: Para 16

However, such argument could be advanced by the learned counsel for the respondents in the first innings of litigation in earlier writ petition filed by the petitioner. In case such argument could not find favour, it was open to the UPSRTC to challenge the decision rendered by this court dated 15.3.2002 before available higher forum but it is not open to the authorities to sit over the judgement of this court and take different view in the matter of its own contrary to the tenor of the decision and direction of this Court when the issue was concluded against the respondents and case was remanded to the Managing Director, UPSRTC for limited purpose of passing fresh order on the quantum of punishment similar to the punishment awarded against those 27 other employees. While doing so, it was not open to him to deal with the quantum of punishment independently from other employees on merit. In my opinion, such approach of authority is contrary law being in the teeth of the decision of this court.

Case law discussed:
(2006) 2 UPLBEC 1862, (2007) 2 UPLBEC 1788, 2005(6) S.C.C. 796, (2004) 1 S.C.C. 605 (Pr.12), (2004) 1 SCC 605, (2005) 6 SCC 796

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

1. The main question in controversy involved in this case is that whether the issue concluded at higher forum can be re-agitated in remand proceeding or only that issue can be considered which has been remanded by higher forum?

2. The relevant facts having material bearing with the question in controversy involved in the case are that after holding disciplinary inquiry on the charges of misconduct levelled against 28 employees including the petitioner in respect of same incident on similar misconducts various penalties have been inflicted upon them, some persons were inflicted minor penalties and some were inflicted major penalties including the stoppage of 3,4 or 5 increments but a very harsh penalty of dismissal from service has been imposed upon the petitioner. Feeling aggrieved against the order of dismissal passed by disciplinary authority on 22.5.1996 the petitioner has unsuccessfully preferred

departmental appeal before the Appellate Authority and thereafter has filed earlier writ petition no. 31704 of 1996 before this court.

3. While deciding the aforesaid case on 15.3.2002 this court has been pleased to observed as under:-

"According to the petitioner certain allegations was made against 28 employees of UPSRTC Regional Office, Varanasi in the Body and re conditioning Section in the Regional Office of UPSRTC, Varanasi. The disciplinary action against all the 28 employees including the petitioner was taken. The petitioner has been dismissed from service. The appeal filed by the petitioner has also been dismissed by the Regional Manager. A supplementary affidavit was filed by the petitioner, in which it has been stated that in respect of the remaining employees a lenient view has been taken by giving some minor punishment and the petitioner has been arbitrarily discriminated. Copies of some of the orders has been collectively filed as Annexure SA-1 to the supplementary affidavit. From perusal of the aforesaid annexures it appears that all the employees were involved in similar type of misconduct. Some of them have been given minor punishment whereas the petitioner has been dismissed from service. It goes without saying that if all the employees were involved in similar type of misconduct then the punishment ought to be same. The petitioner appears to have been discriminated without any rhyme or reason as he has been imposed major punishment of dismissal from service, which in the circumstances cannot be sustained. Since the misconduct has been found to have been proved by the authorities, the interest of justice would be best served, if the petitioner is directed to approache the Managing Director, UPSRTC, Lucknow within one month from today, he shall consider the case of the petitioner alongwith the order passed in respect of other employees of the same incident and may pass similar order of punishment. The Managing Director shall decide the matter within six weeks thereafter.

With the aforesaid observations, the writ petition is finally disposed of."

4. Learned counsel for the petitioner has informed the court and pointed out that the petitioner has made representation before the Managing Director, UPSRTC alongwith the copy of order dated 15.3.2002 passed by this court in aforesaid writ petition but while mis-interpreting the contents and tenor of the decision rendered by this court on 15.3.2002 in earlier writ petition filed by the petitioner the Managing Director, UPSRTC has passed the impugned order dated 18th May 2002 whereby the stand taken earlier by UPSRTC dismissing the petitioner from service has again been reiterated hence this petition.

5. Learned counsel for the petitioner has submitted that the impugned order dated 18.5.2002 passed by Managing Director, UPSRTC runs contrary to the contents and tenor of the decision of this court dated 15.3.2002 passed in writ petition earlier filed by the petitioner, therefore, cannot be sustained at all.

6. Contrary to it, Sri Ganga Prasad Gupta, Advocate appearing for UPSRTC has vehemently contended that the case of petitioner was quite distinguishable from the case of other 27 employees who were

subjected to disciplinary action alongwith the petitioner in respect of the same incident and some of them were subjected with the minor penalty whereas some of them given major penalty including stoppage of 3 to 5 Annual increments proportionately to the gravity of the charges found proved against them. Since the gravity of the charges levelled and found proved against other employees were quite distinguishable from the charges which were found proved against the petitioner and the charges were much more grave than them, therefore, the case of petitioner was quite distinguishable and accordingly he has been punished appropriately by punishment of dismissal from service thus, no fault can be found in the order of dismissal having regard to the gravity of charges found proved against him.

7. Learned counsel appearing for UPSRTC has further submitted that since a fresh decision was to be taken on the quantum of punishment by the Managing Director of UPSRTC and while remanding the case matter has been left over by this Court upon the Managing Director of U.P.S.R.T.C., therefore, while taking the impugned decision dated 18th May 2002 the Managing Director himself has examined the matter and cases of all those employees who have been awarded lesser punishment than the petitioner and found that the charges which were proved against the petitioner were much serious and grave than that of those employees, therefore, the penalty of dismissal of petitioner was found justified. In support of his aforesaid submissions he has also placed reliance upon the decisions rendered in **Ramjit Gupta Vs. The Labour Court, U.P., Betia Hata, Gorakhpur and others, (2006) 2 UPLBEC 1862** and **B. Swamy Vs. The Depot Manager, APSRTC, (2007) 2 UPLBEC 1788**.

8. While refuting the contention of Sri Ganga Prasad Gupta, learned counsel for respondents, Sri A.R. Dubey, learned counsel for the petitioner has further submitted that in the light of findings recorded by this court in judgement and order dated 15.3.2002 in writ petition earlier filed by the petitioner, there appears hardly any scope for such arguments by the counsel appearing for respondents. He has submitted that the Hon'ble Apex Court in **Bharat Coke Company Vs. Trade Tax Officer, 2005(6) S.C.C. 796** and **in Radha Raman Samant Vs. Bank of India and others (2004) 1 S.C.C. 605 (Pr.12)** has held that the issue concluded at higher forum can not be re-agitated in remand proceeding and only that issue can be considered, which has been remanded by the higher forum.

9. Heard Sri A.R. Dube, learned counsel for the petitioner and Sri Ganga Prasad Gupta for the U.P.S.R.T.C.

10. In view of rival submissions of learned counsel appearing for the parties the question which arises for consideration of this court is that as to whether Managing Director of UPSRTC could pass impugned order dated 18.5.2002 afresh on merit of the charges found proved against the petitioner by re-agitating the matter concluded by this Court in the judgement and order dated 15.3.2002 independently of other employees who have been subjected to disciplinary proceeding alongwith the petitioner in respect of same incident for similar charges or his quantum of

punishment could be restricted to be at par with them or on such remand the Managing Director was required to examine only that issue which was left over for his disposal according to the direction contained in the order of remand?

11. In this connection, it is to be noted that a mere reading of the decision of this court rendered in Writ Petition No. 31704 of 1996 earlier filed by the petitioner, indicates that while deciding the case this court has clearly held that from a perusal of enclosures filed with the supplementary affidavit it appears that all the employees were involved in similar type of misconduct, some of them have been given minor punishment whereas the petitioner has been dismissed from service. It goes without saying that if all the employees were involved in similar type of misconduct then punishment ought to be same. The petitioner appears to have been discriminated without any rhyme or reason as he has been imposed major punishment of dismissal from service, which in the circumstances cannot be sustained. Since the misconduct has been found proved by the authorities, the interest of justice would be best served if the petitioner is **directed to approach Managing Director, UPSRTC who shall consider the case of petitioner alongwith other employees of same incident and may pass similar order of punishment.**

12. Now coming to the decisions of Hon'ble Apex Court upon which learned counsel for the petitioner has placed reliance in support of the case of the petitioner. In ***Radha Raman Samant Vs. Bank of India and others (2004) 1 SCC 605*** the Hon'ble Apex Court has held that only that issue can be considered which have been remanded by Higher court or authority. The pertinent observation made in para 12 of the decision is extracted as under:-

"12. ..... Therefore, the learned Single Judge was bound to address only on one issue upon which the matter had been remanded. Thus, the Division Bench could not have overlooked these facts in the appeal arising from the order of the learned Single Judge on the second occasion after remand and need not have gone into the question as to whether the writ petition could have been entertained at all or not. Therefore, we are of view that the High Court could not have overlooked these facts and interfered with the order of the learned Single Judge."

13. The same view has been reiterated by Hon'ble Apex Court in ***Bharat &Co. Vs. Trade Tax Officer and another (2005) 6 SCC 796***. The pertinent observation made by Hon'ble Apex Court in para 19 of the decision is extracted as under:-

"19. .....The Trade Tax Tribunal as early as on 31.3.2000 had held that the appellant had the locus standi to ask for the release of goods because the appellant was the owner of the goods. The decision of the Tribunal was not challenged by the respondents. The decision of the Tribunal not being challenged, the issue of title was concluded in the appellant's favour. In the face of this order, it was not open to the Assistant Commissioner, Trade Tax on remand to reject the application of the appellant on the ground that it was not the owner of the goods. The High Court should have considered this aspect of the matter particularly when it had been expressly drawn to the High Court's

attention. The High Court was also precluded from re-deciding the same issue between the same parties."

14. In view of aforestated legal position, I am of the considered opinion that there can be hardly any scope for argument on behalf of respondents that the misconduct of the petitioner is distinguishable from other employees and he has not been discriminated from other employees in respect of punishment imposed upon him in wake of clear and unambiguous finding of this court on the question of similarity of charges of misconduct and discrimination made against him while awarding penalty and further finding that the petitioner appears to have been discriminated without any rhyme or reason as he has been imposed major punishment of dismissal from service, which in the circumstances can not be sustained. After recording the aforesaid fining this Court has given liberty to approach the Managing Director who was required to pass similar order of punishment, therefore, in my opinion, the aforesaid issue has already been concluded by this Court. In remand proceeding the same could not be re-agitated on merits; in view of law laid down by Hon'ble Apex Court in **Bharat Coke Company's case (supra)** and **Radha Raman Samant case (supra)** and the only course was open to the Managing Director to pass similar order of punishment in case of petitioner like other employees.

15. In given facts and circumstances of the case, the Managing Director of UPSRTC could pass appropriate order on the question of quantum of punishment of petitioner without insisting upon the earlier punishment imposed against him by taking the view in mind as taken in other aforesaid 27 employees. In such situation, it is needless to say that at the most, the Managing Director could impose any maximum punishment upon the petitioner to the extent of which the punishment has been imposed against any one of 27 employees subjected to the disciplinary action in respect of same incident on similar charges. But it was not at all open to the Managing Director of UPSRTC to insist and go on justifying earlier decision taken against the petitioner, which has been quashed by this court on finding it harsh and discriminatory. The decisions cited by learned counsel for UPSRTC in my considered opinion can be of no assistance to the case of respondents, as this court is neither called upon to review the judgment and order dated 15.3.2002 passed by this court nor can take different view in matter on merit as if sitting in appeal over the aforesaid decision.

16. However, such argument could be advanced by the learned counsel for the respondents in the first innings of litigation in earlier writ petition filed by the petitioner. In case such argument could not find favour, it was open to the UPSRTC to challenge the decision rendered by this court dated 15.3.2002 before available higher forum but it is not open to the authorities to sit over the judgement of this court and take different view in the matter of its own contrary to the tenor of the decision and direction of this Court when the issue was concluded against the respondents and case was remanded to the Managing Director, UPSRTC for limited purpose of passing fresh order on the quantum of punishment similar to the punishment awarded against those 27 other employees. While doing

so, it was not open to him to deal with the quantum of punishment independently from other employees on merit. In my opinion, such approach of authority is contrary law being in the teeth of the decision of this court.

17. In view of aforesaid discussions, the impugned order passed by Managing Director, UPSRTC dated 18th May 2002, contained in Annexure-1 of the writ petition cannot be sustained and is hereby quashed. However the matter is again remitted back to the Managing Director of UPSRTC to take fresh decision on the question of quantum of punishment to be imposed upon the petitioner in the light of observations made herein before.

18. Since no person out of 27 persons involved in the aforesaid incident has been dismissed or removed from service, therefore, the petitioner can also not be removed from service, Accordingly the respondents are directed to reinstate the petitioner in service from the date of dismissal alongwith the continuity of service and consequential benefits of seniority and the respondents are further directed to pay the petitioner 40% monthly salary as arrears of salary alongwith other emoluments attached to the post for the period during which the petitioner was out of employment within a period of three months, provided he furnishes proof of his non-employment during the aforesaid period before the authorities concerned and authorities concerned is satisfied about his non-employment during the said period.

19. With the aforesaid observations and directions, the writ petition succeeds and allowed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.03.2008

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

Second Appeal No. 233 of 2008

Soney Lal ...Plaintiff/Appellant
Versus
U.P. Electricity Board, Lucknow and another ...Defendant/Respondents

Counsel for the Appellant:
Sri Anjani Kumar Dubey
Sri Dr. S.B. Singh

Counsel for the Respondents:
Sri H.P. Dubey
Sri S.C. Pandey

Code of Civil Procedure-Section 100-Second Appeal-Substantial question of law-must be debatable-not previously settled-material bearing of case.

Held: Para 13

The Apex Court in the recent case of *Santosh Hazari Vs. Purshottam Tiwari, (2001) 3 SCC, 179*, ruled that a point of law which admits of no two opinions may be preposition of law but cannot be a substantial question of law. To be 'substantial' a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, in so far as the rights of the parties before it are concerned. It will, therefore, depend on the facts and circumstances of the each case whether a question of law is substantial one and involved in the case or not? The same view has been expressed by the Apex Court in the case of *Govinda Raju Vs. Mariamman (2005) 2 Supreme Court Cases, 500*.

Case law discussed:
1997 Supreme Appeals Reporter (S.C.) page 363, (2002) I SCC, 134, JT 2004 (5) SC, 54, (2005) 7 Supreme Court Cases, 60, 2006 All.C.J. (Supreme Court) 1481 (1999) 3 Supreme Court Cases, 722, (2005) 2 Supreme Court Cases, 500

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

1. Heard learned counsel for the plaintiff/appellant and Sri S.C. Pandey, counsel for the defendant/respondents.

2. The plaintiff/appellant instituted a suit no. 564 of 1992 for mandatory injunction against Power Corporation to restore electricity connection, which was disconnected illegally despite the fact that all the dues and electricity bills were duly paid. A demand notice was served on the plaintiff for an amount of Rs.19,115/- towards minimum bill charges, which was challenged in civil suit. The trial court dismissed the suit on 23.9.2002. Against which civil appeal no.17/47 of 2002 was preferred, and the same was also dismissed on 3.1.2008. Both the judgment and orders are challenged in the instant second appeal.

3. Counsel for the appellant has placed extract of ledger book and submitted that the alleged electricity dues from August to December, 1986 was paid on 9.1.1987 and thus findings of the courts below are perverse on the face of it.

4. Counsel for the defendant/ respondents has categorically argued that civil suit against the demand notice is barred under Section 4 of U.P. Government Electrical Undertaking (Dues Recovery) Act, 1958 and Regulation 8 of Electricity Supply Consumer Regulations of 1984. The courts below have concluded that notice for recovery of dues once issued to the consumer, it cannot be challenged in a civil suit and the suit was not maintainable. The dues recoverable as arrears of land revenue cannot be challenged in a civil suit. The jurisdiction of civil court is completely barred under Section 145 of Electricity Act, 2003. Section 145 of the said Act is quoted below:

"145. Civil court not to have jurisdiction.- *No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which an assessing officer referred to in section 126 or an appellate authority referred to in Section 127 or the adjudicating officer appointed under this Act is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act."*

5. Counsel for the appellant has argued that the Electricity Act 2003 is not applicable to the appellant as it is subsequent Act and therefore, question of maintainability of the suit does not arise. This was never challenged before the courts below. Besides, findings recorded by the two courts are absolutely perverse and liable to be set aside.

6. Counsel for the respondents has placed Section 5 of U.P. Electrical Undertaking (Dues Recovery) Act, 1958, which provides that if the dues for which notice of demand has been served are not deposited with the prescribed authority within 30 days from the date of service, or such extended period as the prescribed authority may allow, the same together

with cost of recovery as may be prescribed shall be recoverable as arrears of land revenue notwithstanding contained in any other law instrument or agreement.

7. The two courts below have also recorded findings that there was a demand notice for an amount of Rs,19,115/- towards minimum charges, which the appellant was liable to pay since the electricity connection was not disconnected, only power supply was stopped for non-payment of the dues but connection continued in the name of the appellant.

8. Submission of the counsel for the appellant assuming to be correct that there was no dues even then no objection was filed and recovery notice was not challenged under Regulation, 1984. Issue nos. 4 and 5 were specifically on the question of maintainability of the suit. The two issues were whether the suit is barred under section 4 of Recovery Act, 1958 and Clause 8 of Electricity Supply (Consumer) Regulation, 1984? Both issues were decided against the appellant. In the case of *Punjab State Electricity Board and another Vs. Ashwani Kumar, 1997 Supreme Appeals Reporter (S.C.) page 363*, the Apex Court ruled that Section 9 C.P.C. though provides that civil court has jurisdiction to try all suits of civil nature, subject to pecuniary jurisdiction, unless cognizance of such suit is expressly or by necessary implication barred. It was also held that the Indian Electricity Act has provided alternative remedy to hear complaint of the consumer, therefore, no civil suit for injunction is maintainable, the demand by the Electricity department was recoverable as arrears of land revenue and, therefore, the recovery could not be challenged in a civil suit, the court could not injunct the power corporation from realizing its dues.

9. Counsel for the appellant has tried to emphasize substantial questions of law, which are in fact factual in nature and question of validity of the demand notice and its consequent recovery.

10. Counsel for the appellant has tried to argue that the Electricity Act, 2003 is not applicable and question of maintainability of the suit was never raised before the courts below. Besides, findings recorded by the two courts are absolutely perverse and liable to be set aside in the instant appeal as there was nothing due. Perusal of the provision of Electricity Act, 1958, Section 5 of the said Act entitles the Power Corporation to serve demand notice for the consumption of electricity supply of the consumer, who is required to deposit the dues within 30 days of service of notice. If dues are not paid, the Power corporation has a right to disconnect the supply. However, if the electricity connection continues, the consumer is liable to deposit minimum charges. There is no illegality whatsoever least to say any substantial question of law arises worth consideration in the instant second appeal. Besides, I am satisfied that civil suit is not maintainable and jurisdiction of civil court is completely barred.

11. The Apex Court depreciated the liberal construction and generous application of provisions of Section 100 C.P.C. Hon'ble Supreme Court was of the view that only because there is another view possible on appreciation of evidence that cannot be sufficient for interference

under Section 100 C.P.C. For ready reference, extract of paragraph no.7 of the case of *Veerayee Ammal Vs. Seeni Ammal (2002) I SCC, 134* is quoted below:

"7. .....We have noticed with distress that despite amendment, the provisions of Section 100 of the Code have been liberally construed and generously applied by some Judges of the High Courts with the result that objective intended to be achieved by the amendment of Section 100 appears to have been frustrated. Even before the amendment of Section 100 of the Code, the concurrent finding of facts could not be disturbed in the second appeal. This Court in Paras Nath Thakur Vs. Mohani Dasi held: (AIR p.1205 para 3).

It is well settled by a long series of decisions of the Judicial Committee of the Privy Council and of this Court, that a High Court, on second appeal, cannot go into questions of fact, however, erroneous the findings of fact recorded by the courts of fact may be. It is not necessary to cite those decisions. Indeed, the learned counsel for the plaintiff-respondents did not and could not contend that the High Court was competent to go behind the findings of fact concurrently recorded by the two courts of fact."

12. Similar view has been expressed in a number of other decisions by the Apex Court in the cases of *Thiagarajan and others Vs. Sri Venugopalaswamay B. Koil and others, JT 2004 (5) SC, 54, Rajeshwari Vs. Puran Indoria (2005) 7 Supreme Court Cases, 60, Gurdev Kaur and others Vs. Kaki and others 2006 All.C.J. (Supreme Court) 1481 and Kondiba Dagadu Kadam Vs. Savitribai Sopan Gujar and others (1999) 3 Supreme Court Cases, 722*.

13. The Apex Court in the recent case of *Santosh Hazari Vs. Purshottam Tiwari, (2001) 3 SCC, 179*, ruled that a point of law which admits of no two opinions may be preposition of law but cannot be a substantial question of law. To be 'substantial' a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, in so far as the rights of the parties before it are concerned. It will, therefore, depend on the facts and circumstances of the each case whether a question of law is substantial one and involved in the case or not? The same view has been expressed by the Apex Court in the case of *Govinda Raju Vs. Mariamman (2005) 2 Supreme Court Cases, 500*.

14. In view of the aforesaid decisions and after going through the entire record, I do not find any substantial question of law worth consideration in the instant appeal. I am satisfied that the civil court has no jurisdiction and the findings recorded by the two courts do not call for any interference. The instant second appeal lacks merit and is, accordingly, dismissed with costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.03.2008

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

First Appeal No.47 of 1980

State of U.P. through Collector, Saharanpur ...Appellant
Versus
Mohd. Ashik Khan ...Respondent

Counsel for the Appellant:
Sri Surya Nath Upadhyaya
S.C.

Counsel for the Respondent:

Land Acquisition Act-principle for determination of market value-sale deed executed after 40 days of Notification-relied by revisional Court-held-not proper-uniform deduction 25% comes Rs.5.70 per square yard instead of 7.62/- with proportionate interest and solatium thereon.

Held: Para 9

Accordingly, in my opinion, an uniform deduction of 25% is the most informed guess, which may be made in this case. The rate of Rs.7.62/- (of the exemplar) deducted by 25% comes to Rs.5.72/-, which is rounded off to Rs.5.70/- per square yard.

Case law discussed:
AIR 1996 SC 3140, AIR 1997 SC 3889, AIR 1997 SC 2664, AIR 1998 SC 781, AIR 1998 SC 1028, AIR 1999 SC 317, AIR 2002 SC 1105, AIR 2006 SC 447, AIR 1933 Bombay 361, AIR 1997 SC 3889, 2007 AIR SCW 7835, AIR 2007 SC 740, AIR 2005 SC 355, AIR 2004 SC 1031, AIR 2003 SC 202,

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

1. Even after 24 years of elevation of learned counsel for the respondent, respondent did not engage any other counsel. Notices issued to the respondent to engage another counsel returned un-served. Accordingly, only arguments of learned counsel for the appellant were heard.

2. This appeal is directed against judgment, award and decree dated 26.05.1979 given by V A.D.J., Saharanpur in L.A. Case No.56 of 1973. It appears that 25 claimants, whose lands had been acquired under Land Acquisition Act being dissatisfied with the award of S.L.A.O., applied for making reference under Section 18 of Land Acquisition Act. Accordingly, references were made. It appears that all the references were registered as one case, i.e. L.A. Case No.56 of 1973. This appeal is confined to the claim of the respondent Mohd. Ashik Khan.

3. A large area of land of about 33 bighas (81279 squire yards) was acquired. Notification under Section 4 of Land Acquisition Act was issued/ published on 20.11.1968. Land was situate in village Pathan Pura, Saharanpur appurtenant to main Saharanpur-Delhi Road. Land was acquired for construction of residence for various categories of Government Servants at Saharanpur.

4. Special Land Acquisition Officer for determining the market value of the land placed reliance upon sale deed dated 03.11.1968 in respect of 344 squire yards of land for Rs.2500/-, situate in a residential colony called Vinay Nagar. The rate comes to about Rs.7.62/- per squire yard. Copy of this sale deed was filed before reference court also. S.L.A.O. divided the acquired land into two belts. In the belt adjacent to the road, 40 % deduction from the aforesaid rate of Rs.7.62/- per squired yard was made and in the other belt, 50% deduction was made. Through the impugned judgment, award and decree, learned A.D.J. awarded uniform rate of Rs.6.70/- per squire yard.

5. As far as awarding uniform rate is concerned, no fault can be found in view of the following authorities:-

1. AIR 1996 SC 3140 "Ram Piari v. Land Acquisition Collector, Solan"
2. AIR 1997 SC 3889 "Karan Singh v. Union of India"
3. AIR 1997 SC 2664 "Meharban v. State of U.P."
4. AIR 1998 SC 781 "Land Acquisition Officer, Revenue Divisional Officer, Chittoor v. L. Kamalamma"
5. AIR 1998 SC 1028 "U.P. Avas Evam Vikas Parishad v. Jainul Islam"
6. AIR 1999 SC 317 "Kanwar Singh v. Union of India"
7. AIR 2002 SC 1105 "Kashiben Bhikabai v. Special Land Acquisition Officer"
8. AIR 2006 SC 447 "Union of India v. Harinder Pal Singh"

However, the principle adopted for determining the market value by the learned A.D.J. cannot be approved. Copies of about 15 sale deeds had been filed before the learned A.D.J., however learned A.D.J. placed reliance upon a sale deed dated 30.12.1968, i.e. executed after 40 days of notification under Section 4 of Land Acquisition Act. The learned A.D.J. placed reliance upon **AIR 1933 Bombay 361** to hold that post Section 4 notification, sale deed could also be relied upon. Through the said sale deed, an area of more than 11000 squire yards land was sold @ Rs.6.70/- per squire yard.

6. The Supreme Court **AIR 1997 SC 3889 "Karan Singh v. Union of India"** has held that only in rare cases sale deed executed after notification under Section 4 of Land Acquisition Act can be relied upon. One of such situations, where such sale deed can be relied upon, is where no sale deed of the land in the area in question during last three years from notification under Section 4 of Land Acquisition Act is available.

7. The S.L.A.O. had applied the deduction percentage of 40-50. When exemplar is of small area in comparison to the total area, some deduction is necessary. However, percentage of deduction varies from 10% to 50%. (vide **2007 AIR SCW 7835 "Atma Singh Vs. State of Haryana," AIR 2007 SC 740 "Deputy Direction of Land Acquisition Vs. Malla Atchinaidu", AIR 2005 SC 355 "Ahad Brothers, M/s. v. State of M.P.", AIR 2004 SC 1031 "L.A.O., Kammarapally Village (A. P.), v. Nookala Rajamallu", AIR 2003 SC 202 "Kasturi v. State of Haryana"**). In the first authority of Atma Singh, 10% deduction was applied.

8. In the instant case, the exemplar, even though of a small area, was of a land situate in a residential colony, which must be containing roads etc. and the amount for which the said plot was sold must have taken care of aspect of development to some extent.

9. Accordingly, in my opinion, an uniform deduction of 25% is the most informed guess, which may be made in this case. The rate of Rs.7.62/- (of the exemplar) deducted by 25% comes to Rs.5.72/-, which is rounded off to Rs.5.70/- per squire yard.

10. Accordingly, appeal is allowed in part. Impugned judgment, award and decree is modified and it is held that claimants are entitled to the compensation taking the market value of the acquired land at the relevant time to be Rs.5.70/- per squire yard. Impugned judgment modified accordingly. Proportionate

interest and solatium shall be paid at the rates awarded in the impugned judgment.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.03.2008

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

Civil Misc. Writ Petition No. 45321 of 2004

Ram Nayan Singh & others ...Petitioners
Versus.
State of U.P and others ...Respondents

Counsel for the Petitioners:
Sri V.K. Singh
Sri G.K. Singh

Counsel for the Respondents:
S.C.

Constitution of India, Art. 300-A-Construction of Road-over private land of citizen-without adopting recourse of law without consent of recorded tenure holder-held-illegal-unconstitutional collector either to pay full compensation at the market rate within 4 months with 30% solatium and interest @ 12% or to give back the possession by dismasting the road-court expressed deep concern regarding illegal approach of the authorities.

Held: Para 13

In view of our above discussions, we allow the writ petition and direct the Collector, Azamgarh to pay compensation to the petitioners for their land on which road has been constructed within a period of four months from the date, a certified copy of this order is produced before him. While assessing the compensation, the Collector will give opportunity to the petitioners to produce evidence and then decide the market value of the land on the date of taking possession. The petitioners will also be given solatium on the market value at the rate of 30% and interest @ 12 % per annum from the date of taking possession till the date of payment. If the compensation is not paid within the said period, the petitioners will be given back possession of their land by dismantling the road.

Case law discussed:
1999(1) AWC 661, 2004(4) SCC 79, 2005(2) SCC 126, 2004(2) UPLBEC 1820, (Civil Misc. Writ Petition No. 46187 of 2000 decided on 25.2.2004), 2008(2) ADJ 476

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

1. The petitioners have come up before this Court for wrongful act of the respondents in taking away their land against the provisions of law. They have claimed compensation and damages for their dispossession from the land.

2. We have heard Sri G.K. Singh, learned counsel for the petitioners and learned Standing Counsel for the respondents.

3. The facts disclosed in the writ petition show that the petitioners were owners of plots mentioned in para 4 to 8 of the writ petition separately and different portion of different plots were taken away by the respondents for the construction of Lalganj by-pass Road on Azamgarh-Varanasi highway. No legal procedure was adopted by the respondents in taking away the land of the petitioners. The compensation awarded was also nominal. The land of the petitioners was taken in the year 1986 as disclosed in para 20 of the writ petition, but the compensation has not been paid so far. The Executive Engineer, PWD, Azamgarh had proposed compensation at

the rate of Rs.1000/ per sq. meter to the petitioners which was not accepted by the Special Land Acquisition Officer. Similar land of other persons were also taken by the respondents, for which the compensation at the rate of Rs.1400/ per sq. meter was paid but the petitioners were offered compensation at the rate of Rs.234/ per sq. meter. By way of the writ petition, the petitioners want payment of compensation at the enhanced rate along with interest and damages and in alternative, they have sought for recovery of possession.

4. In the counter affidavit filed by Mr. Satya Prakash Bharti, Assistant Engineer, PWD, Azamgarh, this fact has been admitted that the land of the petitioners was taken by the respondents for construction of Lalganj bye-pass Road in Azamgarh-Varanasi highway. The compensation at the rate of Rs.6,63,265.30 per acre was fixed for the land situate in village Maseerpur and Rs.3,78,181.82 per acre for the land situate in village Retwa Chandrabhanpur and a number of tenure-holders received compensation on the said rate and executed sale deeds in favour of respondents but the petitioners refused to receive compensation. The land for which compensation at the rate of Rs.1400/ per sq. meter was awarded to some tenure-holders was situate by the side of main highway. Due to construction of bye-pass road, remaining portion of land of the petitioners have become more valuable. In the supplementary counter affidavit, filed by Mr. Sultan Ahmad, Assistant Engineer, PWD, Azamgarh, it has been mentioned that by mutual understanding a number of tenure holders have executed sale deeds in favour of respondents and have received compensation. The land of the petitioners was totally unfit for agriculture and the respondents are ready to pay compensation to the petitioners at the rate of Rs.3,78,181.82 per acres. They are not entitled for more compensation.

5. From the contents of writ petition and counter affidavit referred to above, it is clear that land of the petitioners was taken by the respondents for construction of Lalganj bye-pass road in the year 1986 and road has already been constructed thereon and is being used by the public but no where it has been disclosed in the counter affidavit that land of the petitioners was taken by the respondents with their consent or there was any mutual understanding or agreement between them. In the supplementary counter affidavit, only this much has been said that a number of tenure holders have executed sale deeds and received compensation fixed by the respondents by mutual understanding. No where it has been alleged that the petitioners had also given consent for transfer of land or were ready to receive compensation fixed by the respondents. Annexure- CA-1 clearly shows that the meeting was called by the Executive Engineer PWD and some other officers of district Azamgarh, in which a number of tenure holder had participated but contents of minutes of meeting show that the parties could not reach to any conclusion and no mutual understanding could be formed. There is nothing on record to show that how the compensation amount was determined. Annexure-3 to the writ petition only shows that the Collector, Azamgarh had fixed rates for the land of different villages but on what basis rate was fixed is not clear.

6. No doubt, right to property is not a fundamental right but nonetheless the

Constitution of India under Article 300A guarantees its citizens that this legal right can be taken away only by some enactment. For ready reference Article 300A of Constitution of India is quoted below:

"Article 300A. Persons not to be deprived of property save by authority of law. No person shall be deprived of his property save by authority of law".

7. The property of any citizen can be taken by the State only in accordance with law. The Land Acquisition Act has been enacted for said purpose. If any acquisition is not made within the provisions of said Act, the land can be taken by consent or mutual agreement also. The consent or mutual agreement should be on record. It cannot be oral. The land can also be purchased from the owners by registered sale deeds by giving its price acceptable to them. But in no case, the property of a citizen can be taken away by the State without following the procedure of law and without consent or agreement between the parties.

8. In the present case before us, this is admitted position that the land of the petitioners was taken by the State for construction of road without their consent and without following the procedure prescribed under Land Acquisition Act. Admittedly road had already been constructed and the petitioners have been dispossessed from their land and no compensation has yet been given to them. No where it is on the record that the petitioners' land was taken by the State with their consent or with their agreement. In the counter affidavit, it has been mentioned that District Level Committee convened a meeting on 8.10.2002, in which several tenure holders had also participated and the matter for payment of compensation was discussed and the rate for the land situate in village Maseerpur was fixed as Rs.6,63,265.30 per acre and that of village Retwa Chandrabhanpur Rs.3,78,181.82 per acres. It has also been mentioned in the affidavit that the respondents are ready to pay compensation to the petitioners on the above rate. The petitioners have alleged that said rates are too low whereas respondents had already paid to some tenure holders at the rate of Rs.1400/ per sq. meter and not only this, the Executive Engineer, PWD, Azamgarh had suggested rate of Rs.1000/ per sq. meter which was not accepted by Special Land Acquisition officer.

9. In the case of **Santosh Kumar Tiwari Vs. District Magistrate, Deoria and others 1999(1) AWC 661**, Division Bench of this Court adversely criticised the manner in which the petitioner of that case was dispossessed from his Sehan land for construction of Sulabh Sauchalaya. In that case, the Sehan Land of the petitioner was forcibly occupied by the Goan Sabha and Sulabh Sauchalaya was constructed thereon. No procedure of acquisition was followed and no consent was taken. The compensation was also not paid. The High Court ordered for removal of Sulabh Sauchalaya constructed on the land. In the case of **R.L. Jain Vs. DDA and others 2004(4) SCC 79**, the Apex Court has also observed that generally the acquisition of property of a citizen is made by following provisions of the Act. The property can also be taken by voluntarily agreement. If the property is taken by force and without following the procedure prescribed, that is not permissible under law. In the case of

State of U.P. and others Vs. Manohar 2005(2) SCC 126, the Apex Court awarded exemplary cost of Rs.25,000/ on the State who had taken land of respondents without following the procedure of law. In that case, the land of respondents was taken by the State for construction of building without process of law and without consent of the owner and no compensation was paid. In the case of **Luxmi Narain and others Vs. Nagar Palika, Shamli, distt. Muzaffarnagar and others 2004 (2) UPLBEC 1820**, the Division Bench of this court referring the case of **Awadh Narain Vs. State of U.P. (Civil Misc. Writ Petition No. 46187 of 2000 decided on 25.2.2004)** made following observations :

"This country is governed by the rule of law. Nobody's land can be acquired except in accordance with the provisions of some statute, otherwise Article 300A of the Constitution will be violated.

10. In that case, land of the petitioner was forcibly occupied by Nagar Palika Shamli for construction of road without following procedure prescribed under Land Acquisition Act and no compensation was paid. The court directed the State either to restore possession of the property to the owner or to pay compensation on the market value with other benefits provided under Land Acquisition Act. Same view was taken by another Division Bench of this court in Civil Misc. Writ Petition No. 5766 of 2004 Ram Pyare and others Vs. State of U.P. and others decided on 28.10.2004. In the case of **Binu Sinha and others Vs. State of UP and others 2008(2) ADJ 476**, another Division Bench of this court also took the matter very seriously where the land was occupied by the State without following any of the legal mode. During the pendency of that writ petition, the part payment of compensation was made which was totally inadequate. The case of R.N. Gupta and others Vs. State of U.P. and other (Writ Petition No. 48 (L/A) of 1997 decided on 6.4.2004 was referred in which following observations was made:

"Before parting, we express our concern in the manner the State and the L.D.A has dealt with the issue involved in the present case. Land of the petitioner was taken without acquiring under the provisions of law in February, 1986. L.D.A made several requests and also sent proposal to the State Government for acquiring the said land as per law and on 1.8.1996 also made certain payment to the Additional District Magistrate, as demanded by him but despite the correspondence made by the L.D.A the land was not notified under the provisions of Land Acquisition Act and though the possession was taken in February, 1986 but compensation was not awarded nor paid. The result is that a huge liability of money along with interest has accrued on the State Government or the L.D.A or the HAL as the case may be. The payment of interest for indefinitely long period without there being just case would be acting in a manner which does not protect the interest of public exchequer. Indifferent and casual attitude on the part of the respondents in not awarding compensation immediately when the possession was taken and not taking proceedings for acquisition even though L.D.A approached the State Government in this regard and allowing increasing liability of interest cannot be appreciated. It is a matter which has to be considered

by the State Government and therefore, it is desirable hat all such cases be looked into by the State Government where possession has been taken without following the provisions of Land Acquisition Act or any other such Act. The compensation should be awarded at the earliest so that liability of interest is not multiplied by leaps and bounds. The state would be at liberty to fasten the liability upon the erring officers, who may be found responsible for accrual of such a large amount of interest and for recovering the same either wholly or partly if the State so desires".

11. In the present case before us, same story has been repeated. Since land of the petitioners has not been acquired under Land Acquisition Act, therefore, no method is prescribed for fixing compensation except agreement between the parties. As we have discussed earlier, there was no agreement between the parties about compensation. This plea of the respondents is not acceptable that since a large number of tenure holders have received compensation fixed by the Collector, Azamgarh and have executed sale deeds in favour of the State, therefore, the petitioners should also raise no objection and execute sale deed on the same rate. In the case of State of U.P. Vs. Manohar (supra), the Apex Court awarded interest @ 9% per annum on the compensation amount. Since assessment of compensation has been given under Land Acquisition Act and in the present case land has not been acquired under said Act, therefore, it is not clear that what should be method of assessment of compensation. Some light has been thrown by the Division Bench of this court in the case of Luxmi Narain and others referred to earlier. In that case, following directions were given:

"In the circumstances, we direct the respondents to either restore possession of the property in dispute forthwith to the petitioner or to pay the full market value of the land as well as additional compensation under section 23(1-A) and solatium of 30% under section 23(2) of the Land Acquisition Act as ell as interest at 12 % per annum on the above amounts from 1986 (when possession was taken by the respondents) till the date of payment. The payment of the entire amount mentioned above must be made within six months from today. The District Judge, Muzaffarnagar shall fix the market value of the property in accordance with the Land Acquisition Act after hearing the parties within four months from today and the entire payment must be made to the petitioners within two months thereafter i.e. within six months from today. In addition to the above the amounts, the Nagar Palika Shamli will also pay an exemplary cost of Rs. Two lacs within two months from today to the petitioner for their wholly illegal and high handed action. Petition is allowed. The petitioner shall communicate this order to the DM Muzaffarnagar forthwith".

12. In the case of Binu Sinha also referred to above, some relevant observations have been made. It is pertinent to mention here that if property of a citizen is acquired under Land Acquisition Act, he can get market value plus solatium and interest but if same land is taken away by the State without following process of law, the amount of compensation is fixed arbitrarily. If there is agreement between the parties, then nothing is wrong but if there is no

agreement, the owner is put to loss because his land has not been acquired under the provisions of any Act. Therefore, this view taken by earlier Division Benches of this Court referred to above is quite reasonable that whenever property of a citizen is taken by the State without following the procedure prescribed by law, it is open for the owner of the property to claim back possession or compensation on the market value along with solatium and interest.

13. In view of our above discussions, we allow the writ petition and direct the Collector, Azamgarh to pay compensation to the petitioners for their land on which road has been constructed within a period of four months from the date, a certified copy of this order is produced before him. While assessing the compensation, the Collector will give opportunity to the petitioners to produce evidence and then decide the market value of the land on the date of taking possession. The petitioners will also be given solatium on the market value at the rate of 30% and interest @ 12 % per annum from the date of taking possession till the date of payment. If the compensation is not paid within the said period, the petitioners will be given back possession of their land by dismantling the road.

14. Before parting, we express our deep concern regarding practice prevailing in these days by the State authorities in taking property of the citizens without following the procedure prescribed by law, which is clear violation of Article 300A of Constitution of India. Such act of the officers of the State cannot be justified in any way. Therefore, it is necessary to give clear direction to the officers and acquiring bodies.

15. Let a copy of this order be sent to Chief Secretary, Government of U.P. Lucknow for issuing clear direction to all the Collectors or acquiring bodies of the State that in future when they need any property of citizens for public purpose, they should acquire or requisition the same by following the procedure prescribed by law or with the mutual consent of the parties in writing. If the property is taken by the State beyond the scope of Land Acquisition Act, the compensation should be determined either on mutual agreement or in the way prescribed under the said Act. In case of deviation, the public accountability of the erring officers or officials should also be fixed and departmental action be taken against them. Petition Allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.01.2008

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

Civil Misc. Writ Petition No. 13476 of 2006

Suraj Narain Bhatt ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri D.K. Srivastava
Samiksha Bhatt

Counsel for the Respondents:
Sri C.P. Mishra
Sri S.K. Garg
S.C.

Civil Services Regulation-361- Retirement benefits-petitioner initially

appointed as Boring Mechanic 29.12.1966 after regularization–promoted on the post of Junior Engineer on 07.07.1983–worked till the date of his retirement–pension fixed as Boring Mechanic-and the claim for fixation as Junior Engineer denied on the ground that no regular promotion given–held service during this period cannot be ignored–entitled for fresh fixation as Junior Engineer–last pay drawn salary basic–consequential direction issued.

Held: Para 9

Having heard the learned counsel for the parties at length and perused the entire record including decision and relevant Government Orders, I find that the petitioner had been promoted on the stop gap arrangement though he was never formally promoted on the said post of Junior Engineer (Minor Irrigation) on regular basis but the work was being taken from him as junior engineer and salary was also being paid on the pay scale of junior engineer with all benefits of the increment in pay scale as such available for the said post from time to time was rightly said to be not recoverable as per the impugned order dated 13.09.2005. More so, as it is now settled law that once salary has been paid to an employee on higher pay scale not because of any fraud or fault on the part of the said employee the same cannot be recovered from him. Thus, the order of recovery/adjustment as per order dated 19.03.2005 (Annexure No. 14 of the counter affidavit) passed by the Block Development Officer, Hollagarh, Allahabad is not justifiable and sustainable in the eyes of law. The petitioner is also entitled to all retiral benefits available to a permanent Junior Engineer as he has served on the said post as such and was being paid salary for more than 10 years as required in terms of clause 2 of the aforesaid G.O./Office Memorandum dated 01.07.1989 for more than 20 years of temporary service by way of stop gap arrangement on the post of Junior Engineer in terms of Clause 3. In the present case, the petitioner fulfills all the conditions and, therefore, he was qualified for the pension, having been retired as Junior Engineer on which post, admittedly, he had been continuing to work as such though on temporary or officiating capacity in service, under the orders of the authority concerned without interruptions and, therefore, no reason seems to take a different view, in the case of the petitioner as the same view has already been takenh by this Court while disposing the writ petition No. 3491 of 1988 (Abhimanyu Dev Pandey Vs. State of U.P.) and writ petition no. 1782 (s/s) 2004 (Shamim Ahmad Siddique Vs. State of U.P.) similarly placed boring technician who promoted as Junior Engineer as the petitioner was promoted and they had been allowed pensionary benefits of the post of Junior Engineer. In the present case, there is no dispute that the petitioner worked as Junior Engineer till he attained the age of superannuation. The petitioner was allowed higher pay scale than that of the boring technician right from the date of his promotion on the post of Junior Engineer till the date of his superannuation and the petitioner had been discharging duties and responsibility of the said post as such, therefore, period of services of the petitioner cannot be ignored by the respondents while settling the pension and payment of other retiral benefits admissible to him.

Case law discussed:

(1999) 3 SCC 438, AIR 2000 SC 3513 (2)

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

1. Heard Sri D.K. Srivastava, learned counsel for the petitioner, learned standing counsel and perused the record of the case. Counter and rejoinder affidavit have been exchanged. On the joint request of learned counsel for the parties, this writ petition is being decided

finally at the admission stage itself in terms of the Rules of the Court.

2. The facts of the case of the petitioner in brief are that the petitioner was appointed on 29.12.1966 to the post of Boring Mechanic in the office of the respondents, and this services were regularized w.e.f. 01.04.1975. He was promoted to the post of Junior Engineer on 07.07.1983 and continued to discharge his duties as such till he attained the age of superannuation i.e. 31.07.2004. The respondents did not release his post retiral benefits, as pension, Gratuity, G.P.F. Etc, therefore, he filed writ petition no. 5416 of 2004 before this Court which was disposed off with the direction to the respondents to decide the representation of the petitioner expeditiously. Since his representation was not decided by the respondents in terms of the direction issued by this court, the petitioner invoked the jurisdiction of this court in Contempt Petition No. 1048 of 2005 and only when the respondents were directed to appear in person before the court, the respondents passed order dated 10.05.2005 for payment of retiral benefits, but they wrongly fixed vide impugned order4 dated 13.09.2005 his salary @ Rs.6,375.00 per month for the purpose of his pension against the post of Boring Mechanic, though the petitioner had worked for more than 23 years on the post of Junior Engineer on the ground that the petitioner had not been regularized on the post of Junior Engineer and therefore he was not entitled for promotional pay scale of Class II.

3. Being aggrieved the petitioner has filed the present writ petition for quashing impugned order dated 13.09.2005 to the extent whereby the petitioner was treated as having retired from the post of Boring Mechanic and he was not entitled to get the benefit of promotional pay scale of Class II. The relief sought in the writ petition is i in the nature of mandamus directing the respondents to fix the pension of the petitioner against the post Junior Engineer and to release Rs.59,915.00 as gratuity amount available to him and fix monthly pension proving increment for the year 2001-2004 after consequential relief.

4. In support of his case the petitioner has enclosed the order dated 31.07.2004 (Annexure No. 3 to the writ petition) passed by the Block Development Officer, Hollagarh, Allahabad, wherein he has been shown as Junior Engineer in the irrigation department. The impugned order at the bottom has also a reference to the effect that the petitioner had worked on the post of Junior Engineer in stop-gap arrangement and was also paid salary in the pay scale of Junior Engineer. Learned counsel for the petitioner contended that vide order dated 05.12.2005, the respondents illegally an arbitrarily withheld the payment of Rs.59,915/- towards gratuity. This was against the provisions of C.C.R. Rules and in contravention of Article 351 (A) and Article 41 of the Constitution of India. In para 14 of the writ petition it has been stated that junior persons to the petitioner including other similarly situated employees had been awarded promotional pay scale of Rs.8000-13500 w.e.f. 01.04.1997, whereas the said pay scale was not provided to the petitioner arbitrarily and illegally.

5. Learned counsel for the petitioner has relied upon decisions of this court

passed on 14.12.1999 in writ petition no. 3491 of 1988, Abhimanyu Dev Pandey Vs. State of U.P. and others and on 18.10.20906 in Writ Petition No. 1783 (S/S) 2004, Shamim Ahmad Siddique Vs. The State of U.P. And others, wherein the incumbents were similarly situated person who had been appointed as Boring Mechanic and thereafter promoted to the post of Junior Engineer on stop-gap arrangement and had worked continuously several years till the date of their retirements. The said writ petitions have been allowed on the ground that they had worked on the post of Junior Engineer for substantial period, which could not be ignored while settling the pension and for payment of other retiral benefits admissible to them. He has relied upon a decision rendered in the case of State of Dr. Uma Agrawal Vs. State of U.P. and another (1999) 3 SCC 438), wherein it has been held that pension is not a bounty but right to retired employee. Government is obliged to initiate process for payment according to time scheduled prescribed in the departmental rules. Non-observance of the time schedule is one of the factors which court may take not of. He has also relied upon a decision of the Hon'ble Apex Court rendered in the case of Vijay L. Mehrotra Vs. State of U.P. and others (AIR 2000 SC 3513 (2) wherein it has been observed that the State is liable to pay simple interest at the rate of 18% per annum, if the retiral benefits are wrongly withheld.

6. Learned counsel for the petitioner submitted that Office Memorandum No. Sa. 3-1152/Das-915/89, Lucknow: dated 1 July, 1989, was issued by the Government of U.P. for providing retiral benefits to the Government employees who retired without their services being regularized and as to how their services were to be regularized. The regulation 368 of Civil Service Regulation is not available to the Government Servant unless and until he is not regularized on the said post. The aforesaid Government Order was issued for the removal of such difficulties, since there was grievance of a lot of retired employees who were working on ad hoc basis in stop gap arrangement and regularization of their services though had been granted for consideration, but the Government due to fulfillment of certain technicality in the process of regularization could not do so. The incumbent retired on attaining the age of superannuation and he was deprived of his pensionary benefits. In Clause-2 itself, it has been mentioned that the State Government has been pleased to provide the benefit of pension, gratuity and family pension etc to such Government servants who though had not been regularized but had completed their 10 years regular service and had been retired on attaining the age of superannuation and that they would be treated at par with the permanent employee on the said post. In Clause-3, it has been provided that the said condition shall also be applied in case the incumbent has completed 20 years of temporary service. This order has been made applicable and effective from 01.06.1989 vide the aforesaid Office Memorandum.

7. The regulation 361 of the Civil Service Regulations (hereinafter referred to as the (CSR) service of an official does not quality for pension wherein it has been laid down that unless it conforms to the following three conditions ie first, the service must be under Government, secondly the employment must be

substantive and permanent and thirdly, the salary must be paid by Government.
Further Regulation 370 provides that Continuous temporary or officiating service under the Government of Uttar Pradesh followed without interruptions by confirmation in the same or any other post shall quality except:-

(i) periods of temporary or officiating service in non-pensionable establishment;
(ii) periods of service in work-charged establishment; and
(iii) periods of service in a post paid form contingencies

(The amendment takes effect from April 20, 1977)

9. In the counter affidavit, the respondents in support of the impugned order has stated that services of the petitioner had not been regularized by the competent authority on the post of Junior Engineer since he had been working on the stop gap arrangement, as referred to herein above as Junior Engineer in minor irrigation department in terms of the order dated 05.07.1983 till the date of his retirement i.e. 31.07.2004 and, therefore, he was not entitled to any pensionary benefits on the sole ground of having worked on the said post for the said period, at par with regulation and since all the retiral benefits have been released in favour of the petitioner on the substantive post of boring mechanic on which he was posted and regularized in terms of the departmental rules of stop gap arrangement and had not been regularized in accordance with the rules and regulations on the post of junior engineer and that the petitioner had been wrongly provided senior grade pay scale at Rs.1640-2900. Accordingly, his representation has been rightly rejected. It is stated in para 13 of the counter affidavit that the Senior Grade Rs.1640-2900 was wrongly and illegally provided to the petitioner which was subsequently cancelled by the prescribed authority-Executive Engineer minor irrigation, Allahabad vide order dated 05.06.1996 and the entire excess amount of Rs.59995/- so paid by way of salary was order to be recovered/adjusted and, therefore, the same was validly withheld.

Having heard the learned counsel for the parties at length and perused the entire record including decision and relevant Government Orders, I find that the petitioner had been promoted on the stop gap arrangement though he was never formally promoted on the said post of Junior Engineer (Minor Irrigation) on regular basis but the work was being taken from him as junior engineer and salary was also being paid on the pay scale of junior engineer with all benefits of the increment in pay scale as such available for the said post from time to time was rightly said to be not recoverable as per the impugned order dated 13.09.2005. More so, as it is now settled law that once salary has been paid to an employee on higher pay scale not because of any fraud or fault on the part of the said employee the same cannot be recovered from him. Thus, the order of recovery/adjustment as per order dated 19.03.2005 (Annexure No. 14 of the counter affidavit) passed by the Block Development Officer, Hollagarh, Allahabad is not justifiable and sustainable in the eyes of law. The petitioner is also entitled to all retiral benefits available to a permanent Junior Engineer as he has served on the said post as such and was being paid salary for

more than 10 years as required in terms of clause 2 of the aforesaid G.O./Office Memorandum dated 01.07.1989 for more than 20 years of temporary service by way of stop gap arrangement on the post of Junior Engineer in terms of Clause 3. In the present case, the petitioner fulfills all the conditions and, therefore, he was qualified for the pension, having been retired as Junior Engineer on which post, admittedly, he had been continuing to work as such though on temporary or officiating capacity in service, under the orders of the authority concerned without interruptions and, therefore, no reason seems to take a different view, in the case of the petitioner as the same view has already been taken by this Court while disposing the writ petition No. 3491 of 1988 (Abhimanyu Dev Pandey Vs. State of U.P.) and writ petition no. 1782 (s/s) 2004 (Shamim Ahmad Siddique Vs. State of U.P.) similarly placed boring technician who promoted as Junior Engineer as the petitioner was promoted and they had been allowed pensionary benefits of the post of Junior Engineer. In the present case, there is no dispute that the petitioner worked as Junior Engineer till he attained the age of superannuation. The petitioner was allowed higher pay scale than that of the boring technician right from the date of his promotion on the post of Junior Engineer till the date of his superannuation and the petitioner had been discharging duties and responsibility of the said post as such, therefore, period of services of the petitioner cannot be ignored by the respondents while settling the pension and payment of other retiral benefits admissible to him.

10. Accordingly, the impugned order dated 13.09.2005 (Annexure No. 5 to the writ petition) passed by respondent no. 4 is hereby quashed. The writ petition is allowed. The respondents are directed to calculate and settle the pension of the petitioner and pay all post retiral benefit to him taking into consideration that he had worked on the post of Junior Engineer w.e.f. 07.07.1983 till the date of his retirement i.e. 31.07.2004 and shall also release the amount so recovered/adjusted vide dated 19.03.2005 (Annexure No. 14 to the counter affidavit) passed by the Block Development Officer, Hollagarh, Allahabad within a period of three months from the date of production of a certified copy of this order before the authority concerned. However, it is also provided that the petitioner shall cooperate with the pension sanctioning authority. Petition Allowed.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 15.02.2008

BEFORE
THE HON'BLE (MRS.) SAROJ BALA, J.

Criminal Misc. Application No. 11946 of 1986

M/s Neeraj Dyeing, Khatrana, Farukkhabad and others ...Applicants
Versus
Union of India and others ...Respondents

Counsel for the Applicants:
Sri V.K. Goel

Counsel for the Respondents:
Sri Bharat Ji Agrawal
Sri Shambhoo Chopra, S.C.
Sri Dhananjay Awasthi
A.G.A.

Code of Criminal Procedure-Section 482-Quashing of Criminal proceeding-offence under Section 277 of Income Tax Act-

applicants No. 3 and 4 are partner of the firm-false returns verified by applicant No.2-Magistrate committed gross error issuing process against applicant No. 3 and 4-allegation in complaint do not constitute any offence-to present the abuse of the process of court-inherent power can be exercised.

Held: Para 11

In the case in hand as already stated above no offence under Section 277 of the Act was made out against the applicants No. 3 and 4 as the return in question was verified by the applicant No.2. In the complaint the only allegation against applicants No.3 and 4 was that they were partners of the firm-applicant no. 1. Having regard to the facts stated the Magistrate committed gross error in issuing process against the applicants No. 3 and 4 for the offence under Section 277 of the Act. On the face of the material brought on record process could have been issued only against applicants No.1 and 2 for the offence under Section 277 of the Act. The allegations made in the Complaint do not constitute an offence against the applicants No.3 and 4, no useful purpose would be served by allowing the criminal prosecution to continue against them. The inherent power under Section 482 Cr.P.C. can be exercised for quashing the prosecution to prevent the abuse of the process of any Court or otherwise to secure the ends of justice.

Case law discussed:

1992 Supp (1) SCC 335 (Cri) 426, 1988 (25) ACC 163 (SC), 2000 (40) ACC 680 (SC),

(Delivered by Hon'ble (Mrs.) Saroj Bala, J.)

1. By means of this application under Section 482 Cr.P.C., the applicants have prayed for quashing the complaint of Criminal Case No. 834 of 1985-Union of India through Income-tax Officer, Fatehgarh Vs. M/s Neeraj Dyeing & others, under Section 277 of the Income Tax Act 1961 (hereinafter referred to as the 'Act') pending in the Court of Special Chief Judicial Magistrate (Economic Offences), Allahabad.

2. The relevant facts giving rise to these proceedings are:

3. The Criminal Complaint was instituted with the allegations that accused applicant no. 1 was a firm registered with the Income Tax Department and accused applicants No.2 to 4 are its partners having shares of profit and loss at the rate of 60%, 25% and 15% respectively. The return of the firm for the assessment year 1983-84 showing income at Rs.30,780/- was verified by accused applicant No.2. The search of business and residential premises of applicants under Section 132 (1) of the Act was conducted and unaccounted purchases were detected from the purchase vouchers seized. The purchase made through vouchers seized was not entered in the account book. Unaccounted Hundis and loan transactions were also detected. The accused applicant No.2 Suraj Prasad when confronted offered Rs.80,000/- to be clubbed in the income of the firm for the assessment year 1983-84. A revised return under Section 139 (5) of the Act was filed by him on 19.1.1984 showing income of Rs.1,10,780/- for the assessment year 1983-84. It was alleged that the accused-applicant No.2 verified the return for the assessment year 1983-84 submitted on 28.7.83 and delivered false account which he knew or believed to be false.

4. The contention of the applicants is that the Commissioner, Income Tax, Agra came to Farrukhabad on camp ten days after the raid. Applicant no. 2 met him and the Commissioner, Income Tax asked

him for agreed assessment on the lines of other assessees. The applicant no. 2 moved an application on 1.12.83 stating that he was agreeable for agreed assessment on mutual settlement basis. Another application was moved on 2.12.83 agreeing that a sum of Rs.80,000/- be added in the income over and above the income disclosed in the return relating to the assessment year 1983-84. A revised return was filed on 24.2.84 for the assessment year 1983-84. The proceedings for imposing penalty concluded on 20.7.84. An application for reduction or waiver of penalty imposed was also made by applicant no.1 which was rejected by the order dated 10.1.86. The present complaint was instituted prior to the dismissal of the application moved for reduction or waiver of penalty. The order of refusal of reduction or waiver of penalty was challenged by applicant no. 1 in the writ petition No. 432 of 1986 which is pending disposal. The prosecution of the applicants during the pendency of writ petition was abuse of process of the Court. According to the applicants the Income-tax return was filed by the firm applicant no. 1 and was verified by applicant no. 2. There are no allegations against the applicants No.3 and 4 for constituting the offence under Section 277 of the Act.

5. Heard Sri V.K. Goyal, learned counsel for the applicants, Sri Dhananjay Awasthi, the learned counsel appearing on behalf of Opposite Parties No. 1 and 2, learned A.G.A. and have perused the record.

6. The learned counsel for the applicants submitted that applicants No. 3 and 4 having not verified the return, their prosecution is sheer misuse of the process of the Court. It was argued that there are no allegations of abetment or knowledge about submission of false return against applicants No.3 and 4. The statement of account having been verified by applicant no. 2 he is liable. The learned counsel urged that under Section 278 of the Act a person Incharge of and responsible to the Company for the conduct of the business of the Company as well as the Company is liable to be proceeded against. According to the learned counsel applicant no. 2 was liable for the affairs of the Company.

7. The learned counsel for the opposite parties No. 1 and 2 submitted that a person abetting or inducing another person to make and deliver an account or a statement or declaration relating to any income chargeable to tax which is false and which he either knows to be false or does not believe to be true is liable. The applicants no. 3 and 4 having abetted and induced the applicant no. 2 to submit a false return they are equally liable for prosecution. It was argued that the Magistrate is empowered to examine which of the applicant is to be exonerated from the prosecution. The applicants no. 3 and 4 being partners of the firm are responsible for its affairs.

8. Admittedly the return for the assessment year 1983-84 was submitted by applicant no. 2 Suraj Prasad on behalf of the firm applicant no. 1. In para 3 of the complaint it is stated that the return of the firm for the assessment year 1983-84 was filed on 28.7.83 showing income of Rs.30,780/ and the return was verified by applicant no. 2 Suraj Prasad. In para 2 of the complaint it is stated that applicants no. 2 to 4 are partners of the firm having profit and loss share at the rate of 60%

25% and 15% respectively. The allegations contained in para 3 to 8 of the complaint are against applicant no. 2 Suraj Prasad. There are no allegations against applicants No.3 and 4 about abetment and knowledge about the filing of false return.

9. Section 277 of the Act which is relevant for the adjudication of the question in controversy is reproduced as below:

["False statement in verification, etc.

277. If a person makes a statement in any verification under this Act or under any rule made thereunder, or delivers an account or statement which is false, and which he either knows or believes to be false, or does not believe to be true, he shall be punishable;-

(i) in case where the amount of tax, which would have been evaded if the statement or account had been accepted as true, exceeds one hundred thousand rupees, with rigorous imprisonment for a term which shall not be less than six months but which may extend to seven years and with fine;

(ii) in any other case, with rigorous imprisonment for a term which shall not be less than three months but which may extend to three years and with fine.]

[Falsification of books of account or document, etc.

277 A. If any person (hereafter in this section referred to as the first person) wilfully and with intent to enable any other person (hereafter in this section referred to as the second person) to evade any tax or interest or penalty chargeable and imposable under this Act, makes or causes to be made any entry or statement which is false and which the first person either knows to be false or does not believe to be true, in any books of account or other document relevant to or useful in any proceedings against the first person or the second person, under this Act, the first person shall be punishable with rigorous imprisonment for a term which shall not be less than three months but which may extend to three years and with fine.

Explanation-For the purposes of establishing the charge under this section, it shall not be necessary to prove that the second person has actually evaded any tax, penalty or interest chargeable or imposable under this Act).]"

10. Section 277 of the Act provides for the prosecution of a person making a false statement in any verification, delivering a false account or statement which he either knows or believes to be false. Section 278 of the Act provides for prosecution of a person abetting or inducing in any manner another person to make and deliver a false account or statement or declaration relating to any income chargeable to tax. In the present case the complaint has been instituted for the offence under Section 277 of the Act. There are no allegations that applicants no. 3 and 4 abetted and induced the applicant no. 2 to make and deliver a false account or statement or declaration relating to income of the firm for the assessment year 1983-84. Section 277 of the Act makes a person submitting false statement in verification liable for prosecution. The return for the assessment year 1983-84 having been verified by applicant no. 2, he is liable for prosecution. In the case of State of Haryana Vs. Bhajan Lal, 1992 Supp (1) SCC 335 (Cri) 426 the Apex Court has held as under:

"(1) Where the allegations made in the first information report 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.

(2) Where the allegations in the first information report and other materials, if any, accompanying the First Information Report do not disclose a cognizable offence, justifying an investigation by police officers under section 156 (1) of the Code except under an order of a Magistrate within the purview of Section 155 (2) of the Code.

(3) Where the uncontroverted allegations made in the First Information Report or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where the allegations in the First Information Report do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the First Information Report or 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.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the Act concerned (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/ or where there is a specific provision in the Code or the Act concerned, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with malafides 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."

In ***Madhavrao Jiwajirao Scindia and others Vs. Sambhajirao Chandrojirao Angre and other- 1988 (25) ACC 163 (SC)*** the Apex Court has held as under;

"The legal position is well settled that when a prosecution at the initial stage is asked to be quashed, the test to be applied by the court is as to whether the uncontroverted allegations as made prima facie establish the offence. It is also for the court to take into consideration any special features which appear in a particular case to consider whether it is expedient and in the interest of justice to permit a prosecution to continue. This is so on the basis that the court cannot be utilized for any oblique purpose and where in the opinion of the court chances of an ultimate conviction is bleak and, therefore, no useful purpose is likely to be served by allowing a criminal prosecution to continue, the court may while taking into consideration the special facts of a case also quash the proceeding even though it may be at a preliminary stage."

In ***Irisuns Industry and Medical Chemicals & Pharma (P) Ltd. Vs. Biological E. Ltd. and others- 2000 (40) ACC 680 (SC)*** the Apex Court has held as below:

"Exercise of jurisdiction under the inherent power as envisaged under Section 482 of Criminal Procedure Code

to have the complaint or the charge-sheet quashed is an exception rather than a rule and the case for quashing at the initial stage must have to be treated as rarest of rare so as not to scuttle the prosecution. In the event, however, the court on perusal of the complaint comes to a conclusion that the allegations levelled in the complaint or charge-sheet on the face of it does not constitute or disclose any offence as alleged, there ought not to be any hesitation to rise up to the expectation of the people and deal with the situation as is required under the law."

11. In the case in hand as already stated above no offence under Section 277 of the Act was made out against the applicants No. 3 and 4 as the return in question was verified by the applicant No.2. In the complaint the only allegation against applicants No.3 and 4 was that they were partners of the firm-applicant no. 1. Having regard to the facts stated the Magistrate committed gross error in issuing process against the applicants No. 3 and 4 for the offence under Section 277 of the Act. On the face of the material brought on record process could have been issued only against applicants No.1 and 2 for the offence under Section 277 of the Act. The allegations made in the Complaint do not constitute an offence against the applicants No.3 and 4, no useful purpose would be served by allowing the criminal prosecution to continue against them. The inherent power under Section 482 Cr.P.C. can be exercised for quashing the prosecution to prevent the abuse of the process of any Court or otherwise to secure the ends of justice.

12. Having regard to the facts and circumstances discussed above, partly allowing the application under Section 482 Cr.P.C. the prosecution and proceedings of abovementioned complaint case against the applicants No.3 and 4 being abuse of process of the Court are quashed. The proceedings of complaint case shall go on against the applicants No. 1 and 2. Application Allowed Partly.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.02.2008

BEFORE
THE HON'BLE SUSHIL HARKAULI, J.
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 369 of 2002

Taj View Hotel, Agra & another ..Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioners:
Sri Mool Behari Saxena

Counsel for the Respondents:
S.C.

U.P. Taxation & Land Revenue Act, 1975-Section 3(e), 5 (2)-Luxury Tax-liability of Hotel to pay interest on Luxury Tax-starts after expiry of five days in each falling months.

Held: Para 9

In the circumstances, we are of the opinion that Section 5 (2) read with Rule 3 lay down that the liability to pay interest would start running from the end of five days after the end of the month to which the tax relates, that is the month in which the luxury was availed by the customer in the hotel and consequent liability to pay the luxury tax arose. The respondent no. 3 will,

accordingly, determine and charge the interest from the petitioners.

Case law discussed:

(1958) Vol. IX STC 267, AIR 1961 SC 1534

(Delivered by Hon'ble Sushil Harkauli J.)

1. The question for consideration in this case is as to whether the interest payable because of late deposit of 'luxury tax' payable by Hotels under the provisions of Uttar Pradesh Taxation and Land Revenue Act 1975 (U.P. Act No.8 of 1975) would start running:

(a) from the date on which the said tax is actually collected by the petitioner from the customer, as contended by the petitioners.

or

(b) from the date on which the liability of the customer for payment arose i.e. the billing dates or the date on which the hotel room was occupied by the customer, as contended by the respondents.

2. The petitioners contend that the liability to pay interest would begin from the date on which the tax is actually realized by the hotel from the customer. In support, reliance has been placed on the use of the words "realized from" in the definition given in Section 3 (f) of the Act, which is reproduced below:

"3 ……..

(f) "rent" means the aggregate of all charges, by whatever name called, realized from the occupier of a room in a hotel, and includes lodging, boarding or service charges or any sum charged by the proprietor on account of tips payable to servants of the hotel or any of them ".

3. Reliance has also been placed on Rules 3 & 4 of the rules framed under the Act, known as U.P. Luxuries (in Hotel) Tax Rules 1975. For ready reference, the said rules are reproduced below:

"3. Period within which and the manner in which the tax be paid: Section 5(1)- The amount of Tax payable by a proprietor under sub-section (1) of Section 5 of the Act shall be paid into a Government Treasury or the State Bank of India by a challan in LT Form 1 within five days after the end of the month to which the tax collected by the proprietor relates. "

"4. Returns: Section 5(1) - (1) Every proprietor liable to pay tax under the Act shall submit a return in L.T. Form II, L.T. Form III and L.T. Form IV, maintained by him under Rule 16, within seven days after the end of the month to which the returns relate.

(2) Every proprietor signing the return shall subscribe on solemn affirmation that the facts mentioned in that return are true to the best of his information and belief

(3) The Collector may verify the return from the bound registers maintained under Rule 16."

4. Having examined the provisions of the entire Act, we are of the opinion that both (i) the liability to pay interest, as well as (ii) the date from which the interest will begin to run are clearly defined by Section 5 (2) read with Rule 3.

For ready reference Section 5 in its entirety is reproduced below:

"5. Manner of payment: (1) The tax shall be collected along with rent by the proprietor of the hotel from the persons liable to pay it and shall be paid by the proprietor to the State Government in such manner as may be prescribed.

(2) ***If any proprietor fails to pay the tax within the prescribed period he shall be liable to pay*** *simple* ***interest*** *at the rate of eighteen per cent per annum* ***on the amount remaining unpaid,*** *and such interest shall be added to the amount of Tax and deemed for the purposes to be part of the tax:*

Provided that where as a result of an order passed on appeal the amount of tax is varied the interest shall be recalculated."

It is clear from Section 5 (2) quoted above, that:

(1) the liability to pay interest arises if the proprietor (of hotel) fails to pay tax within the prescribed period;

(2) Interest is payable on the amount remaining un-paid.

5. Thus, because (a) that there would be no liability to pay interest if the tax is paid within the prescribed period; and (b) the interest is payable only on the amount remaining unpaid at the end of the prescribed period; therefore the liability of paying interest would start at the end of the prescribed period and would be confined to the tax remaining unpaid at the end of that period.

6. The "prescribed period" referred under Section 5 (2) has been given in Rule 3 (quoted above). Because there has been some debate about the correct interpretation of Rule 3, therefore, the said Rule is again reproduced below with the relevant words being given in bold letters so as to make the meaning clear.

*"**3**. Period within which and the manner in which the tax be paid: Section 5(1)-The amount of* ***Tax*** *payable by a proprietor under sub-section (1) of Section 5 of the Act* ***shall be paid*** *into a Government Treasury or the State Bank of India by a challan in L.T Form 1* ***within five days after the end of the month to which the tax*** *collected by the proprietor* ***relates."***

7. Thus, it is clear that the tax collected by the proprietor has to be deposited within five days after the end of the month of which the tax "relates". Obviously, the tax "relates" to the month in which the luxury of the hotel was availed by the customer whereby liability of luxury tax arose. The tax cannot 'relate' to the month in which it was actually collected for the simple reason that such interpretation would mean that if for some reason the amount remains unpaid/uncollected the prescribed time for deposit of tax by the hotel would never end. The liability to pay tax has been imposed upon the hotelier with liberty to pass on the burden to the customer and is therefore irrespective of whether he actually collects the same from the customer. Passing on the tax burden to the customer is a matter exclusively between the hotelier and the customer, and does not concern the State. It has been held by two Constitution Benches of the Supreme Court of India in the case of *The Tata Iron & Steel Co. Ltd. Vs. The State of Bihar* **(1958) Vol. IX STC 267** (at page 284) and *M/s J.K. Jute Mills Co. Ltd. Vs. State of Uttar Pradesh* **AIR 1961 SC 1534** (para 13) that the fact that dealer has been permitted to pass on the liability, of

the trade tax imposed upon the dealer, to the customer does not mean that if the dealer does not collect the tax or fails to pass on that liability, the dealer can be absolved from paying the tax which is primarily imposed upon the dealer.

8. In the light of the above reasoning, the words "realized from" in Section 3 (f) must be interpreted to mean “realizable" from the customer or billed to the customer. The column in the prescribed Form L.T. III for mentioning the amount of luxury tax collected from each of the occupants is only for verification by the department and in our opinion it would not lead to the inference that there would be no liability to pay the tax on the part of the hotelier if he fails to realize the tax from the customer. Non-realisation from the customer would obviously be due to the fault of the hotelier in granting credit to undeserving persons. In such a case the hotelier cannot be absolved of the liability to pay tax.

9. In the circumstances, we are of the opinion that Section 5 (2) read with Rule 3 lay down that the liability to pay interest would start running from the end of five days after the end of the month to which the tax relates, that is the month in which the luxury was availed by the customer in the hotel and consequent liability to pay the luxury tax arose. The respondent no. 3 will, accordingly, determine and charge the interest from the petitioners.

10. The writ petitions is disposed of with the aforesaid directions.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.02.2008

BEFORE
THE HON’BLE DR. B.S. CHAUHAN, J.
THE HON’BLE BHARATI SAPRU, J.

Civil Misc. Writ Petition (P.I.L.) No. 9059 of 2008

New Sun Education Society and another ...Petitioners
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioners:
Sri Arvind Srivastava
Sri Ravindra Srivastava

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

Constitution of India, Art. 226-Public Interest Litigation- Society-challenging advertisement-seeking reservation quota for physically handicapped person-neither public injury-or omission of state or public authority-or fundamental right or statutory right those poor down trodden, ignorant, illiterates affected-No contribution to wards the cause of handicapped persons either part or in present disclosed-held-petitioner not a bonafide litigant-petitioner dismissed with cost of Rs.50,000/-

Held: Para 29, 35 & 36

Thus, in view of the above, the ratio of all these judgements is that there must be a public injury and public wrong caused by wrongful or ultra vires acts or omission of the state or a public authority. It is for the enforcement of basic human rights of weaker sections of the community who are poor, downtrodden, ignorant, illiterates and whose fundamental rights and statutory rights have been violated. In fact, it is

for compelling the executive to carry out its constitutional and legal obligations. It must not be frivolous litigation by persons having vested interest.

In view of the above, it is evident that the petitioners are not bona fide litigants nor they can be held to be public spirited persons who have any right to abuse the process of the Court by filing this kind of petition. The petition is dismissed with the cost of Rs.50,000/- (Rupees Fifty Thousand Only), which shall be recovered by the District Collector, Aligarh from the petitioners as arrears of land revenue and shall be deposited in the account of the Mediation and Conciliation Centre of the High Court, Allahabad.

A copy of this order be transmitted to the learned District Collector, Aligarh within a week for compliance.

Case law discussed:

AIR 1962 SC 1044, AIR 1977 SC 276, AIR 1987 SC 331, AIR 1989 SC 49, AIR 1996 SC 2736, AIR 1998 SC 3104, AIR 1999 SC 943, AIR 1976 SC 578, (2000) 7 SCC 552, (2000) 7 SCC 465, AIR 1981 SC 298, AIR 1981 SC 344, AIR 1982 SC 149, 1994 (Supp) 2 SCC 116, AIR 1983 SC 339, AIR 1985 SC 910, JT (1988) 4 SC 557, AIR 1995 SC 1847, AIR 1993 SC 1769, 1994 (Supp) 1 SCC 145, (1999) 1 SCC 53, (2000) 7 SCC 618, AIR 2001 SC 1544, (2003) 7 SCC 546, (2003) 8 SCC 100), AIR 1999 SC 393, AIR 2002 SC 350, (2005) 1 SCC 590, (2005) 3 SCC 91, (2007) 14 SCALE 500, (2005) 5 SCC 136, (2006) 5 SCC 28, AIR 1993 SC 892, AIR 1999 SC 114, 2005 AIR SCW 46, JT 2007 (1) SC 452

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

1. This writ petition has been filed seeking following reliefs:-

(i) issue a writ, order or direction in the nature of certiorari quashing the impugned advertisement dated 22.12.2007 issued by U.P. Public Service Commission, Allahabad (Annexure-5 to the public interest petition);

(ii) issue a writ, order or direction in the nature of certiorari quashing the resolutions dated 30.04.2005, 27.08.2005 and 28.8.2005 passed in Full Court Meeting of this Hon'ble Court (Annexure Nos. 13, 14 and 15 of this public interest petition).

(iii) issue a writ, order or direction in the nature of mandamus directing the respondents· to provide reservation quota for physically handicapped persons in all services including judicial services.

2. In fact the challenge in this petition is to the advertisement dated 22.12.2007 issued by the U.P. Public Service Commission to appoint Assistant Prosecution Officers and petitioners are seeking direction that the impugned advertisement be quashed and a fresh advertisement be issued providing reservation in favour of the handicapped persons. The question does arise as under what circumstances, the petitioners claim to be aggrieved by the aforesaid advertisement or by what means they are interested in the present recruitment of Assistant Prosecution Officers.

3. So far as the locus of the petitioners is concerned, it has been stated as under:-

"That this is the first public interest petition on behalf of the petitioner which is a registered society which works for the welfare and benefit of persons who have no means to approach this Hon'ble Court for redressal of their grievance and for the relief sought for in this public interest petition and no other public interest petition or appeal for the relief sought for

in this public interest petition is pending before any court of law."

No other detail has been furnished except the aforesaid. It is not the case of the petitioners that either the Society or the petitioner no.2, in person, has done anything till today to advance the cause of handicapped persons or they are running any institution to impart any kind of education to such handicapped persons. Merely a bald statement has been made that the petitioners work for the welfare of the petitioners who cannot seek the redressal of their grievances before the Court. We fail to understand as under what circumstances, such a noble cause has been taken by them unless they have indulged in any service to such handicapped persons. We are very much doubtful regarding the bona fides of the petitioners and the petition is merely a 'benami' litigation and amounts to abuse of process of the Court. More so, PIL is not maintainable in service matters.

4. It is settled law that a, person who suffers from legal injury only can challenge the act/action/order etc. Writ petition under Article 226 of the Constitution is maintainable for enforcing the statutory or legal right or when there is a complaint by the petitioner that there is a breach of the statutory duty on the part of the respondents. Therefore, there must be judicially enforceable right for the enforcement on which the writ jurisdiction can be resorted to. The Court can enforce the performance of a statutory duty by public bodies through its writ jurisdiction at the behest of a person, provided such person satisfies the Court that he has a legal right to insist on such performance. The existence of the said right is the condition precedent to invoke the writ jurisdiction. (Vide Calcutta Gas Company (Proprietor Ltd.) Vs. State of West Bengal & Ors., AIR 1962 SC 1044; Mani Subrat Jain & Ors. Vs. State of Haryana, AIR 1977 SC 276; State of Kerala Vs. Smt A. Lakshmikutty & Ors., AIR 1987 SC 331; State of Kerala & Ors. Vs. K.G. Madhavan Pillai & Ors., AIR 1989 SC 49; Rajendra Singh Vs. State of Madhya Pradesh, AIR 1996 SC 2736; Rani Laxmibai Kshetriya Gramin Bank Vs. Chand Behari Kapoor & Ors., AIR 1998 SC 3104; & Utkal University Vs. Dr. Nrusingha Charan Sarangi & Ors., AIR 1999 SC 943).

5. In Jasbhai Motibhai Desai Vs. Roshan Kumar Haji Bashir Ahmed, AIR 1976 SC 578, the Apex Court has held that only a person who is aggrieved by an order, can maintain a writ petition. The expression "aggrieved person" has been explained by the Apex Court observing that such a person must show that he has more particular or peculiar interest on his own beyond that of general public in seeing that the law is properly administered.

6. In M.S. Jayaraj Vs. Commissioner of Excise, Kerala & Ors., (2000) 7 SCC 552, the Hon'ble Supreme Court considered the matter at length and placed reliance upon a large number of its earlier judgments including the Chairman, Railway Board Vs. Chandrimadas, (2000) 7 SCC 465; and held that the Court must examine the issue of locus standi from all angles and the petitioner should be asked to disclose as what is the legal injury suffered by him.

7. In Ghulam Qadir Vs. Special Tribunal & Ors., (2002)1 SCC 33, the

Hon'ble. Supreme Court considered the similar issue and observed as under:-

"There is no dispute regarding the legal proposition that the rights under Article 226 of the Constitution of India can be enforced only by an aggrieved person except in the case where the writ prayed for is for habeas corpus or quo warranto. Another exception in the general rule is the filing of a writ petition in public interest. The existence of the legal right of the petitioner which is alleged to have been violated is the foundation for invoking the jurisdiction of the High Court under the aforesaid article. **The orthodox rule of interpretation regarding the locus standi of a person to reach the court has undergone a sea change** with the development of constitutional law in our country and the constitutional courts have been adopting a liberal approach in dealing with the cases or dislodging the claim of a litigant merely on hyper-technical grounds.----------In other words, if the person is found to be not merely a stranger having no right whatsoever to any post or property, he cannot be non-suited on the ground of his not having the locus standi."

8. The party has to satisfy as what is the legal injury caused by that violation of law for the redressal of which the party has approached the Court.

9. However, need was felt to relax the rule of locus standi wherever person aggrieved could not have the resources to approach the Court. The Hon'ble Apex Court entertained the petition even of unregistered Association espousing the cause of over down-trodden or its members observing that the cause of "little Indians" can be espoused by any person having no interest in the matter. However, the said person should be bona fide, not a **intermeddler** or **busy-body**. (Vide Bandhua Mukti Morcha Vs. Union of India & Ors., AIR 1984 SC 802).

10. In Akhil Bharatiya Soshit Karamchari Sangh (Railway) Vs. Union of India & Ors., AIR 1981 SC 298, the Hon'ble Supreme Court while dealing with the issue of locus standi observed as under:-

"Our current processual jurisprudence is not an individualistic Anglo-Indian mould. It is broad based and people-oriented, and envisions access to justice through 'class actions', 'Public Interest Litigation', and representative proceedings'. Indeed, **little Indians** in larger numbers seeking remedies in courts through collective proceedings, instead of being driven to an expensive plurality of litigations, is an affirmation of participative justice in our democracy. We have no hesitation in holding that the narrow concept of 'cause of action' and 'person aggrieved' and individual litigation is becoming obsolescent in some jurisdictions."

11. In Fertilizer Corporation Kamagar Union (Regd.), Sindri & Ors. Vs. Union of India & Ors., AIR 1981 SC 344, the Hon'ble Supreme Court held as under:-

"Public Interest Litigation is part of the process of participate justice and 'standing' in civil litigation of that pattern must have liberal reception at the judicial doorsteps."

12. Public Interest Litigation is not in the nature of adversary litigation. The

purpose of PIL is to promote the public interest which mandates that violation of legal or constitutional rights of a large number of persons, poor, down-trodden, ignorant, socially or economically disadvantaged should not go un-redressed. The Court can take cognizance in PIL when there are complaints which shocks the judicial conscience. PIL is pro bono publico and should not smack of any ulterior motive and no person has a right to achieve any ulterior purpose through such litigations.

13. In S.P. Gupta & Ors. Vs. President of India & Ors., AIR 1982 SC 149, the Hon'ble Apex Court has warned by saying that the Court must be careful that the members of the public who approach the court are acting bona fide and not in personal garb of private profit or political motivation or other oblique considerations. "The Court must not allow its process to be abused". Similar view has been taken in Kazi Lhendup Dorji Vs. Central Bureau of Investigation & Ors., 1994 (Supp) 2 SCC 116.

14. In Veena Sethi Vs. State of Bihar & Ors., AIR 1983 SC 339, the Apex Court has observed that the role of law requires to be played for the poor and ignorant who constitute a large bulk of humanity in this country and the Court must uphold the basic human rights of weaker sections of the society.

15. In the case of State of Himachal Pradesh Vs. A Parent of a Student of Medical College, AIR 1985 SC 910, the Hon'ble Supreme Court held asunder:

"Where the Court finds, on being moved by an aggrieved party or by **any public spirited individual** or social action group, that the executive is remiss in discharging its obligation under the Constitution or the law, so that the poor and the under-privileged continued to be subjected to exploitation and injustice or are deprived of their social and economic entitlements or that social and economic entitlements or that social legislation enacted for their benefit is not being implemented thus depriving of their rights and benefits conferred upon them, the Courts certainly can be must intervene and compel the executive to carry out its constitutional and legal obligations and ensure that the deprived and vulnerable sections of the community are no longer subjected to exploitation or injustice and they are able to realise their social and economical rights."

16. In Sachidanand Pandey (Supra), the Apex Court observed that the Court should not take cognizance in such matters merely because of its attractive name. The petitioner must inspire the confidence of the Court and must be above suspicion.

17. In Ram Saran Ayotan Parasi Vs. Union of India, JT (1988) 4 SC 557, the Hon'ble Supreme Court observed that the P.I.L. is for making basic human rights meaningful to the deprived and vulnerable sections of the community and to assure them social, economic and political justice.

18. In Giani Devender Singh Sant Sepoy Sikh Vs. Union of India & Ors., AIR 1995 SC 1847, the Hon'ble Supreme Court has held that the High Court, while entertaining a PIL must indicate how the public interest was involved in the case.

19. In R.K. Jain Vs. Union of India & Ors., AIR 1993 SC 1769, the Apex Court observed that it was for the aggrieved person to assail the illegality of the offending action and no third party has a locus standi to canvass the legality or correctness of the action. Similarly, in Mohmmed Anis Vs. Union of India & Ors., 1994 (Supp) 1 SCC 145, the Apex Court has held that a case should not be entertained unless the petitioner points out that his legal rights have been infringed.

20. In Jasbhai Motibhai Desai (Supra), the Hon'ble Supreme Court observed as under:

"If a person wants a relief in a Court independent of a statutory remedy, he must show that he is injured or subjected to or threatened with a legal wrong. The Courts can interfere only where legal rights are involved. In fact legal wrong requires judicially enforceable right and 'the touchstone to justifiability is injury to a legally protected right'. A nominal or a highly speculative adverse effect on the interest of a person or right of a person is sufficient to give him the 'standing to sue'. Again, the 'adverse effect' and the requisite for 'standing to sue' must be an illegal effect..... .Such persons are merely busy body of meddlesome interloper...They masquerade as crusaders for justice. They pretend to act in the name of pro bono publico, though they have no interest of the public or even of their own to protect. They indulge in the .....judicial process.....from improper motives.....The High Court should do well to reject the application of all such busybodies at the threshold."

21. In S.P. Anand (supra), the Hon'ble Supreme Court has observed that, "no person has a right to waiver of the locus standi rule and court should permit it only when it is satisfied that the carriage of proceedings is in the competent hands of a person, who is **genuinely concerned in public interest** and is not moved by other **extraneous considerations**, so also the Court must be careful to ensure that the process of the court is not sought to be abused....."

22. P.I.L. can also be filed by any person challenging the misuse or improper use of any public property, including the political party in power for the reason that interest of individuals cannot be placed above or preferred to a larger public interest. But such a petition can be entertained for the protection of the society. (Vide J. Jayalalitha Vs. Govt. of Tamil Nadu & Ors., (1999) 1 SCC 53; L. Muthukumar & Anr. Vs. State of Tamil Nadu & Ors., (2000) 7 SCC 618; and M.C. Mehta Vs. Union of India & Ors., AIR 2001 SC 1544; Guruvayoor Devaswom Managing Committee & Anr. Vs. C.K. Rajan & Ors., (2003) 7 SCC 546; 5 M & T. Consultants Secunderabad Vs. S.Y. Nawab & Anr., (2003) 8 SCC 100).

23. In Raunaq International Ltd. Vs. I.V.R. Construction Ltd. & Ors., AIR 1999 SC 393, the Apex Court observed as under:-

"The Public Interest Litigation should not be merely a cloak for **attaining private ends** of a third party or of the party bringing the petition. The Court can examine the previous record of public service rendered by the organization bringing the Public Interest Litigation. Even when a Public Interest Litigation is entertained, the court must be

careful to weigh conflicting public interests before intervening."

24. In BALCO Employees' Union (Regd.) Vs. Union of India & Ors., AIR 2002 SC 350, the Hon'ble Supreme Court held that the jurisdiction is being abused by unscrupulous persons for their personal gain. Therefore, the Court must take care that the forum be not abused by any person for personal gain. The Court observed as under:-

'There is, in recent years, a feeling which is not without any foundation that Public Interest Litigation is now tending to become publicity interest litigation or private interest litigation as a tendency to be counter productive. PIL is not a pill or a panacea for all wrongs. It is essentially meant to protect basic human rights of the weak and disadvantaged and was a procedure which was innovated where a public spirited person files a petition in effect on behalf of such persons who, on account of poverty, helplessness or economic and social disabilities could not approach the Court for relief. There have been in recent times, increasingly abuse of PIL."

25. Similarly, in Dattaraj Nathuji Thaware Vs. State of Maharastra & Ors., (2005) 1 SCC 590, the Hon'ble Supreme Court expressed its anguish on misuse of the forum of the Court under the garb of PIL observing as under:-

"Public Interest Litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that behind the beautiful veil of public interest, an ugly private malice, vested interest and/or publicity seeking is not lurking. It is to be used as an effective weapon in the armoury of law for delivering social justice to citizens. The attractive brand name of public interest litigation should not be used for suspicious products of mischief. It should be aimed at redressal of genuine public wrong or public injury and not be publicity oriented or founded on personal vendetta. As indicated above, Court must be careful to see that a body of persons or member of public, who approaches the Court is acting bona fide and not for personal gain or, private motive or political motivation or other oblique considerations. The Court must not allow its process to be abused for oblique considerations by masked phantoms who monitor at times from behind. Some persons with vested interest indulge in the pastime of meddling with judicial process either by force of habit or from improper motives, and try to bargain for a good deal as well to enrich themselves. Often they are actuated by a desire to win notoriety or cheap popularity."

26. In R & M Trust Vs. Koramangala Residents Vigilance Group & Ors., (2005) 3 SCC 91, the Hon'ble Supreme Court cautioned the Courts that the Public Interest Litigation should be entertained in rare cases where it is satisfied that public at large stands to suffer. The jurisdiction cannot be allowed to be invoked for the purpose of serving private ends and professional rivalry. The Court observed that the Public Interest Litigation is no doubt a very useful handle for redressing the grievances of the people but unfortunately lately it has been abused by some interested persons and it has brought a very bad name. Courts should be very slow in entertaining petitions involving public interest: in very rare

cases where the public at large stand to suffer. This jurisdiction is meant for the purpose of coming to the rescue of the downtrodden. This sacrosanct jurisdiction of public interest litigation should be invoked very sparingly and in favour of vigilant litigant and not for the persons who invoke this jurisdiction for the sake of publicity or for the purpose of serving their private ends. It has now become common for unscrupulous people to serve their private ends and jeopardise the rights of innocent people so as to wreak vengeance for their personal ends. This has become very handy to the developers and in matters of public contract. In order to serve their professional rivalry they utilise the service of the innocent people or organisation in filing public interest litigation. The courts are sometimes persuaded to issue certain directions without understanding the implications and giving a handle in the hands of the authorities to misuse it. Therefore, courts should not exercise this jurisdiction lightly but should exercise in very rare and few cases involving public interest of a large number of people who cannot afford litigation and are made to suffer at the hands of the authorities.

27. The Hon'ble Supreme Court has laid down parameters for entertaining public interest litigations. In Seema Dhamdhere, Secretary, M.P.S.C. Vs. State of Maharashtra & Ors., (2007) 14 SCALE 500, while touching upon the issue of Public Interest Litigations qua service matters relying on its earlier judgment in Gurpal Singh Vs. State of Punjab & Ors., (2005) 5SCC 136, the Hon'ble Court has strongly criticised the public interest litigations instituted to assail the justifiable executive actions.

28. In T.N. Godavarman Thirumulpad Vs. Union of India & Ors., (2006) 5 SCC 28, relying upon its earlier judgments in S.P. Gupta (supra); and The Janata.Dal Vs. H.S. Chowdhary & Ors., AIR 1993 SC 892, after noticing that lakhs of rupees had been spent by the petitioner to prosecute the case, held as under:

"It has been repeatedly held by this Court that none has a right to approach the court as a public interest litigant and that court must be careful to see that the member of the public who approaches the court in public interest, is acting bona fide and not for any personal gain or private profit or political motivation or other oblique considerations.

.....While this Court has laid down a chain of notable decision with all emphasis at their command about the importance and significance of this newly developed doctrine of PIL, it has also hastened to sound a red alert and a note of severe warning that courts should not allow their process to be abused by a mere busybody, or a meddlesome interloper or wayfarer of officious intervener without any interest or concern except for personal gain or private profit or other oblique consideration."

29. Thus, in view of the above, the ratio of all these judgements is that there must be a public injury and public wrong caused by wrongful or ultra vires acts or omission of the state or a public authority. It is for the enforcement of basic human rights of weaker sections of the community who are poor, downtrodden, ignorant, illiterates and whose fundamental rights and statutory rights have been violated. In fact, it is for

compelling the executive to carry out its constitutional and legal obligations. It must not be frivolous litigation by persons having vested interest.

30. In M/s. Holicow Pictures Pvt. Ltd. Vs. Prem Chandra Mishra & Ors., the Hon'ble Supreme Court held that Public interest litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that behind the beautiful veil of public interest an ugly private malice, vested interest and/or publicity seeking is not lurking. It is to be used as an effective weapon in the armoury of law for delivering social justice to the citizens. The attractive brand name of public interest litigation should not be used for suspicious products of mischief. It should be aimed at redressal of genuine public wrong or public injury and not publicity oriented or founded on personal vendetta. As indicated above, Court must be careful to see that a body of persons or member of public, who approaches the Court is acting bona fide and not for personal gain or private motive or political motivation or other oblique considerations. The Court must not allow its process to be abused for oblique consideration by masked phantoms who monitor at times from behind. Some persons with vested interest indulge in the pastime of meddling with judicial process either by force of habit or from improper motives, and try to bargain for a good deal as well to enrich themselves. Often they are actuated by a desire to win notoriety or cheap popularity. The petitions of such buy bodies deserve to be thrown out by rejection at the threshold, and in appropriate cases with exemplary costs.

31. In Dr. Duryodhan Sahu & Ors. Vs. Jitendra Kumar Mishra & Ors., AIR 1999 SC 114, the Hon'ble Supreme Court held that in service matters, PILs should not be entertained. If the inflow of so-called PILs involving service matters continues unabated at the instance of strangers and allowed to be entertained, the very object of speedy disposal of service matters would get defeated.

32. In Dattaraj Natthuji Thaware Vs. State of Maharastra, 2005 AIR SCW 46, the Hon'ble Supreme Court observed that the High Courts must throw the PILs in service matters merely by placing reliance on the judgment in Duryodhan Sahu (supra) at the threshold.

33. Similar view has been reiterated in Neetu Vs. State of Punjab & Ors., JT 2007 (1) SC 452.

34. In the present case, petitioners failed to disclose in the writ petition their contribution towards the cause of handicapped persons, either In the past or in the present. It appears that the petitioners are not the bona fide litigants.

35. In view of the above, it is evident that the petitioners are not bona fide litigants nor they can be held to be public spirited persons who have any right to abuse the process of the Court by filing this kind of petition. The petition is dismissed with the cost of Rs.50,000/- (Rupees Fifty Thousand Only), which shall be recovered by the District Collector, Aligarh from the petitioners as arrears of land revenue and shall be deposited in the account of the Mediation and Conciliation Centre of the High Court, Allahabad.

36. A copy of this order be transmitted to the learned District Collector, Aligarh within a week for compliance. Petition dismissed with cost.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.03.2008

BEFORE
THE HON'BLE RAKESH TIWARI, J.

Civil Misc. Writ Petition No. 2682 of 2008

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

Counsel for the Petitioner:
Sri Saroj Kumar Yadav

Counsel for the Respondents:
Sri Neeraj Tiwari
Sri Neeraj Sharma
S.C.

U.P. Public Service Commission (Reservation for Physically Handicapped Dependent of Freedom Fighters and Ex-Service man Act, 1993-readwith U.P. State Universities Act (Regulation of Admission to courses Institution for Degree in Education in affiliated and constituent college order, 1987-Entrance Examination for B.Ed. education-selection challenged-as no reservation of 2% quota for fighters of freedom provided-G.O. 1987 provides weightage of 15 marks-held-except weightage under the Act as the examination is neither conducted by U.P. Public Service Commission, nor the public service post advertised.

Held: Para 10 & 11

A perusal of the Act shows that it has been legislated for the benefit of handicapped dependents of freedom fighters and ex-servicemen, who apply in Public Services. It does not apply in the field of education wherein the other Government Order dated 5.5.1987 is applicable.

Since the petitioner is neither a handicapped person nor she is appearing in any examination held by the Public Service Commission. She cannot get the benefit of Act No. 4/1993.

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

1. Heard learned counsel for the parties.

2. The petitioner has graduated from Allahabad University from arts side. An advertisement dated 13.4.2007 for holding Joint Entrance Examination for B.Ed. course for session 2007-2008 by the Registrar Chhtrapati Shahuji, Maharaj University, Kanpur for filling up 60,000 (Sixty Thousand) vacancies was advertised. She applied under the category of dependant of Freedom Fighter in the aforesaid examination held on 22.7.2007 and secured rank no.45459 in female category and rank no. 118897 in general category.

3. The advertisement provide that the Rules of reservation of U.P. Government issued in this regard to reservation shall apply but when the result was declared she came to know that no horizontal reservation of 2% in her vertical category had been determined. Aggrieved she has come up in this petition on the ground that reservation aforesaid not provided for dependants of freedom fighter vitiates the whole proceedings being against the Government Policy and the law said to have been laid down by the State Government as well as the guidelines laid

down for B.Ed. examination 2006 and C.P.M.T. examination held in 2007 wherein 2% reservation is provided for the category freedom fighter candidates.

4. Aggrieved she filed the writ petition alleging that she has been awarded 216 marks in the entrance examination and if 2% reservation is granted to her then she would undoubtedly be selected for the course. At the time of admission an order dated 16.1.2008 was passed as under:-

"It appears from the advertisement issued that reservation is to be granted to the candidates according to the Government Orders applicable in the State of U.P.

Sri Neeraj Tiwari, counsel for the petitioner states that dependent of freedom fighters were given weightage of 15 marks in the examination.

Whether the weightage of 15 marks given by the University to the dependent of freedom fighters amounts to reservation according to various Government orders is to be considered."

Counter and rejoinder affidavit have been exchanged.

Learned counsel for the petitioner has relied upon annexure no. 2 in the rejoinder affidavit, which is a Government Order providing for reservation, (1) Physically handicapped 2%, (2) Dependent on freedom fighters 2% and (3) ex-army 1%. Para 2 of the annexure no. RA-2 is as under:-

"2. उक्त धारा 3 (2) द्वारा प्रदत्त शक्ति का प्रयोग करके राज्य सरकार ने समसंख्यक अधिसूचना, दिनांक 4 मई, 1995 (प्रति संलग्न) जारी की है, जिसके अनुसार उपरोक्त श्रेणियों के लिए अलग-अलग निम्नवत् कोटा निर्धारित किया गया है-

(1)	शारीरिक रूप से विकलांगों के लिए	2 प्रतिशत
(2)	स्वतंत्रता संग्राम सेनानियों के आश्रितों के लिए	2 प्रतिशत
(3)	भूतपूर्व सैनिकों के लिए	2 प्रतिशत'

5. He has then relied upon annexure no. RA-4 which is said to be clarification of the aforesaid order. According to him, the order is fully applicable to the petitioner, he being a dependent of the freedom fighter.

6. Sri Neeraj Tewari, learned counsel for the respondents submits that the aforesaid Government Order dated 10th May, 1995 and the so called clarification of the same day appended as annexure no. 2 and 4. He relied upon the averments made to the rejoinder affidavit respectively have been framed.

7. In the counter affidavit wherein it has been averred that the petitioner is only entitled to weightage of 15 marks as provided in Government Order dated 5th May, 1987 published in the extraordinary gazette known as U.P. State Universities (Regulation of Admission to courses on instructions for Degree in Education in affiliated and constituent Colleges) 1987.

8. A perusal of the government Order annexed as Annexure No. CA-1 to the counter affidavit shows that it provides only for grant of 15 marks as weightage for dependent of freedom fighters not for any type of reservation in the degree course of education.

9. It is stated that in the aforesaid circumstances the U.P. Public Service Commission (Reservation for Physically handicapped dependents of freedom fighters and ex-servicemen) Act, 1993

does not apply to the case of the petitioner.

10. A perusal of the Act shows that it has been legislated for the benefit of handicapped dependents of freedom fighters and ex-servicemen, who apply in Public Services. It does not apply in the field of education wherein the other Government Order dated 5.5.1987 is applicable.

11. Since the petitioner is neither a handicapped person nor she is appearing in any examination held by the Public Service Commission. She cannot get the benefit of Act No. 4/1993.

12. In the circumstances, the case of the petitioner is being governed by the Government Order dated 5th May, 1987, which provides for grant of 15% marks as weightage. She is not entitled to 2% reservation under the Uttar Pradesh Public Services (Reservation For Physically Handicapped, Dependents of Freedom fighters and Ex-servicemen) Act 1993 (U.P. Act no. 4 of 1993).

13. The writ petition is accordingly, dismissed, as such no relief can be granted to the petitioner.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 22.04.2008

BEFORE
THE HON'BLE AMAR SARAN, J.

Criminal Misc. Application No. 8688 of 2008

Asif ...Applicant
Versus
State of U.P. and another
...Opposite Parties

Counsel for the Applicant:
Sri Ashok Kumar Srivastava

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

Code of Criminal Procedure Section 205- Exumption from personal appearance- accused applicant working at Saudi Arbiya-statements of complainant recorded-charge sheet framed- appearance of accused essential-No illegality in rejection of application seeking exemption from personal appearance shown-Trail court to conclude Trail within time bound period.

Held: Para 2

This application has been filed for challenging an order dated 17.11.2007 passed by the Judicial Magistrate-I, Jaunpur in case No. 4516 of 2006 whereby the applicant's application for exemption of his attendance under section 205 of the Code of Criminal Procedure has been rejected.

Case law discussed:
1995(2) JIC 1915 (All), 1995(2) JIC 1845 (All)

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

1. Heard learned counsel for the applicants and learned Additional Government Advocate.

2. This application has been filed for challenging an order dated 17.11.2007 passed by the Judicial Magistrate-I, Jaunpur in case No. 4516 of 2006 whereby the applicant's application for exemption of his attendance under section 205 of the Code of Criminal Procedure has been rejected.

3. In the said order, it has been observed by the trial judge that the applicant was not appearing as he was in Saudi Arabia and when non-bailable warrant was issued, he appeared and thereafter non-bailable warrant was recalled and he was granted bail. The statement of the complainant under section 244 Cr.P.C. has been recorded and now the charge has to be framed, in which the appearance of the accused is essential. The visa of the applicant was only up to 11.3.2008 and now the said date has expired. Although learned counsel for the applicant states orally that Visa has been extended, but no proof has been filed in support thereof.

4. Learned counsel for the applicant has drawn my attention of the two decisions of learned Single Judge of this Court in ***Laxmi Narain Agarwal and another Vs. State and another, 1995(2) JIC 1915 (All) and Sardar Jaspal Singh Vs. State and others, 1995(2) JIC 1845 (All)*** for the proposition that when the accused resides at a long distance, his appearance should be exempted and he should be allowed to appear through counsel, but those decisions were not at the stage when the charge was to be framed, but were related to an earlier stage.

5. In this view of the matter, I think that the learned Magistrate has committed no illegality in passing the impugned order.

6. However, as the applicant's work is involved, which he claims to be doing in Saudi Arabia, as far as possible the trial court shall make an endeavour to conclude the trial within three months from the date of receipt of a certified copy of this order provided the applicant cooperates with the trial and there is no legal impediment.

7. With the aforesaid observations, this application is disposed of.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.03.2008

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

Civil Misc. Writ Petition No.12250 of 2008

Samar Pal Singh ...Petitioner
Versus
The State Public Services Tribunal and others ...Respondents

Counsel for the Petitioner:
Sri Ramendra Asthana

Counsel for the Respondents:
S.C.

Constitution of India Art. 226-Service Law-Promotion-once an employee transferred at the place of his choice-accepted zero place in seniority list-can not claim promotion on the basis of length of service-where the criteria for promotion is seniority cum suitability.

Held: Para 12

In view of the above, the law stands crystallized that where an employee is transferred on his request to another unit or department and losses his seniority as per the rules applicable therein, he cannot be deprived of other benefits except seniority. Thus in a case where the promotion is based on a particular length of service or experience and not based on seniority alone, employee is entitled to take benefit of his past services.

Case law discussed:

AIR 1994 SC 1152, AIR 1998 SC 2318, AIR 1996 SC 764, (1998) 9 SCC 425, AIR 1999 SC 598, 2004 AIR SCW 1399, 2008 AIR SCW 937

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

1. This writ petition has been filed challenging the judgment and order passed by the U.P. State Public Services Tribunal (hereinafter called the 'Tribunal') dated 05/11/2007, by which the claim of the petitioner seeking promotion giving the benefit of the past services at the earlier place of posting has been rejected.

2. Facts and circumstances giving rise to this case are that petitioner was appointed as 'Seenchpal' in the Irrigation Department of the State of U.P. on 21/9/1978. On his own request with a clear understanding that he would loose seniority, he was transferred from Irrigation Division, Kashipur, Nainital to Irrigation Division, Bijnore on 01/11/1994. When the process for filling up the higher post by promotion on the basis of seniority subject to being unfit was initiated, petitioner who joined at Bijnor on bottom seniority in. 1994, also claimed promotion that he was entitled for getting the benefit of his services prior to his transfer at Bijnor. His claim was not considered, hence he preferred the Claim Petition before the learned Tribunal which has been rejected vide impugned judgment and order. Hence this petition.

3. The sole question thus arises as to whether a person who has sought transfer voluntarily by his free will and on his own request has joined another department or another unit of the same department can be deprived of benefits of his past services in view of the fact that if he seeks such a change voluntary, with an understanding that he would join another unit/department at zero seniority i.e. below of the persons in the regular cadre of that department on that date.

4. The issue involved herein is no more res integra. The Hon'ble Supreme Court considered it in the case of Smt. Renu Mullick Vs. Union of India, AIR 1994 SC 1152 wherein the Court came to the conclusion that in case the eligibility condition for promotion or other benefits is not depend on seniority, he can be given benefit of the past services. In the said case, the question arose as to whether the promotion which was based on a particular length of service, the service rendered by the employee in earlier department could be taken into consideration. The Apex Court held that as the promotion was depending on the length of service and the rules involved therein did not provide the length of service in the said department itself, she was entitled to take the benefit of her past services.

5. 1n Scientific Advisor to Raksha Mantri & Anr. Vs. V.M. Joseph, AIR 1998 SC 2318, the eligibility condition for promotion was similar as in earlier case i.e. the length of service and it was held that the issue of promotion should not be confused with seniority and in case

the eligibility for promotion had been the length of service, the employee was entitled to take the benefit of the past services. The Court held as under:-

"Even if a place employee is transferred on his own request, from one to another on the same post, the period of service rendered by him at the earlier place where he held a permanent post and had acquired permanent status, cannot be excluded from consideration for determining his eligibility for promotion, though he may have been placed at the bottom of the seniority list at the transferred place. Eligibility for promotion cannot be confused with seniority as these are two different and distinct factors."

6. While deciding the said case, the Apex Court placed reliance on its earlier judgement, involving the same issue and having similar facts in Union of India Vs. C.N. Ponnappan, AIR 1996 SC 764.

7. In A.P. State Electricity Board & Ors. Vs. R. Parthasarathi & Ors., (1998) 9 SCC 425, the Apex Court while deciding a case wherein the eligibility for promotion had been experience of ten years in service held as under:-

"Such inter se seniority will be a relevant factor when a number of employees come in the zone of consideration on the basis of ten years experience for being considered for promotion to the post of Assistant Executive Engineer. Mere seniority in the cadre will not enable an employee to be considered for such promotion if he lacks experience of ten years as indicated."

8. Thus, in view of the above while deciding the statutory provisions applicable therein, the Court held that as the requisite eligibility was ten years experience and seniority was not the criteria for promotion, the benefit of past services had to be given to the employee.

9. A similar view has been reiterated in Dwijen Chandra Sarkar and Anr. Vs. Union of India & Ors., AIR 1999 SC 598 where the eligibility for promotion for time bound promotion scheme in Post and Telegraph Department was 16 years service in the grade. In the said case also, the seniority was held to be of no consequence and it was directed to give benefit of the past service.

10. In Union of India Vs. V.N. Bhat, 2004 AIR SCW 1399, the question arose that while seeking promotion in the time bound promotion scheme, the past service rendered by an employee who had been assigned bottom seniority list in view of his transfer on his own request, forgoing his seniority, was entitled to be considered for promotion. The Apex Court held that on such transfer the employee merely looses his seniority, he cannot be deprived of other benefits. If the scheme provides for promotion on the basis of an experience, the seniority becomes meaningless and **unless there is a case where promotion to the higher post is to be made only on the basis of seniority, employee is entitled to take benefit of his past services. Therefore the case is to be determined on the basis of the statutory rules applicable in a given case.**

11. In State of Maharashtra and Anr. Vs. Uttam Vishnu Pawar, 2008 AIR SCW 937, a similar view has been reiterated.

12. In view of the above, the law stands crystallized that where an employee is transferred on his request to another unit or department and losses his seniority as per the rules applicable therein, he cannot be deprived of other benefits except seniority. Thus in a case where the promotion is based on a particular length of service or experience and not based on seniority alone, employee is entitled to take benefit of his past services.

13. In the instant case, admittedly, the petitioner sought his transfer voluntarily with a clear understanding that he would join in Bijnore Division at zero seniority and he never challenged the said transfer order or loss of past seniority. Promotion to the higher post is to be made only on the basis of seniority subject to being unfit and not on the basis of length of service and experience. No fault can be found with the impugned judgment and order of the learned Tribunal.

Petition is devoid of merit and is accordingly dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.03.2008

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

Civil Misc. Writ Petition No. 36355 of 2007
Connected with
Civil Misc. Writ Petition No. 12015 of 2008

District Administrative Committee and another ...Petitioners
Versus
Presiding Officer, Labour Court, Bareilly and another ...Respondents

Counsel for the Petitioners:
Sri Sujeet Kumar Rai

Counsel for the Respondents:
Sri A.R. Dube
S.C.

U.P. Industrial Dispute Act 1947-Section 4 K-Dismissal of Secretary of primary cooperative Societies-appeal also dismissed-state government referred the dispute-held-cooperative society itself a complete code-society is not within the meaning of industry-reference as well as the award held-without jurisdiction.

Held: Para 11

Thus, from the above, it is apparent that there is no conflict between the two decisions and in fact the ratio of Ghaziabad Zila Sahakari Bank Ltd (supra) and RC. Tiwari's case (supra) is fully applicable to the facts of the present case. A learned Single Judge of this Court in the case of U.P. Co-operative Spinning Mills (supra) considering the ratio of Ghaziabad Zila Sahakari Bank (supra) and Himanshu Kumar's case (AIR 1973 SC 3657) has went on to hold that the State Government had committed a manifest error in referring a dispute under Section 4-K of the U.P. Industrial Disputes Act in the case of an employee of a cooperative society. This view has also been followed by another learned Single Judge of this Court in the case of District Administrative Committee vs. Labour Court, Kanpur (Writ Petition no. 45448 of 1993 decided on 7.12.2007).

Case law discussed:
(2007 (Vol II) ADJ 25 SC), (2007 (Vol. X) ADJ 4), (AIR 1978 SC 548), (1986 SC 806), (AIR 1985 SC 1293), (1997 SCC (L&S) page 1128, (2003 (99) FLR 1175)

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

1. Heard Sri S.K. Rai, learned counsel for the petitioner, learned

Standing Counsel for the respondent no.1 and Sri A.R. Dube, learned counsel appearing for the respondent workman.

2. The leading petition no. 36355 of 2007 is against an award dated 29.3.2007 rendered by the labour court and the connected petition is against an order dated 24.1.2008 passed for execution of the aforesaid award. With the consent of the parties, both the petitions are being disposed of and the- necessary facts of the leading petition are being considered.

3. The respondent workman was appointed a Cadre Secretary and the Chief Executive of the Co-operative Society in 1976. He was placed under suspension on 11.3.1992 whereafter a charge sheet levelling several charges, including for financial misdemeanour was served on him on 23.3.1993 and after holding a domestic enquiry, the District Administrative Committee, after examining the record, the report of the enquiry officer etc., passed a resolution on 23.4.1994 for his dismissal whereafter by order dated 31.5.1994 he was dismissed.

4. The respondent preferred a statutory appeal before the Regional Administrative Committee which was dismissed vide order dated 28.3.1998. He, thereafter, caused an industrial dispute to be referred to the labour court under Section 4-K of the U.P. Industrial Disputes Act, 1947 (here- in-after referred to as "the Disputes Act"), as to whether his termination dated 31.5.1994 was justified. The Labour Court, Bareilly registered the dispute as Adjudication Case no. 19 of 1999 and after the parties had entered their defence, had accepted the reference holding that the dismissal was not justified and reinstated him with continuity of service but with 20% back wages vide its award dated 29th March 2007 and published on 4.7.2007 which is impugned in this petition.

5. The learned counsel for the petitioner has urged that the U.P. Co-operative Societies Act, 1965 (here-in-after referred to as "the Societies Act") is special enactment and a complete Code under which the dispute even with regard to the termination of an employee can be decided and in fact has been decided and the statutory appeal has been· rejected and therefore the entire proceedings under the Disputes Act stood vitiated and therefore the award has to be quashed. In support of his contention he has relied upon a decision rendered by the Apex Court in the case of **Ghaziabad Zila Sahakari Bank Ltd. vs. Addl. Labour Commissioner & others** (2007 (Vol II) ADJ 25 SC), which has also been followed by learned Single Judges of this Court in several cases including in the case of **U.P. Co-operative Spinning Mills vs. Ram Magan & Another** (2007 (Vol. X) ADJ 4).

6. Learned counsel for the workman, however, has contended that the judgment in Ghaziabad Zila Sahakari Bank Ltd. (Supra) was rendered by the two learned Judges of the Apex Court without considering the effect of a Constitution Bench judgment rendered in **Bangalore Water Supply and Sewerage Board vs. A. Rajappa & others** (AIR 1978 SC 548) and therefore the judgment has to be ignored and this court has to follow the decision rendered by the Constitution Bench.

7. No doubt if there are conflicting decisions of the Apex Court, then the

High Court is obliged to follow the ratio laid down by the Larger Bench as held in **Union of India vs. Godfrey Philips** (1986 SC 806) and **State of Orissa vs. Titagarh Paper Mills** (AIR 1985 SC 1293). However, the Court firstly has to examine the ratio laid down by the Apex Court in the two respective cases and find out the point of conflict between the two ratios, if any.

8. In Ghaziabad Zila Sahakari Bank case (supra) the workman had approached the Labour Court for payment of ex-gratia under Section 6H of the Disputes Act and the Labour Court had accepted the claim which was upheld by this court. It was urged on behalf of the Bank before the Apex Court that under the Societies Act read with the regulations, a full fledged remedy had been provided to the employees of the Co-operative Society to agitate their grievances and it being a special enactment, would prevail over the U.P. Industrial Disputes Act and therefore its provision would not apply. The Apex Court, even taking notice of Section 135, held that the Societies Act was a special Act and therefore would override the provisions of the Disputes Act. It also relied upon its earlier decision rendered in the case of **R.C. Tewari vs. M.P. State Cooperative Marketing Federation Ltd. & another** (1997 SCC (L&S) page 1128.

9. In Banglore Water Supply case (supra) the Apex Court was considering the definition of the word "industry" as defined under the Disputes Act and it considered its import and laid down parameters which are to be considered to find out whether a establishment is an industry for the purposes of the Disputes Act.

10. The issue before the Apex Court in the Ghazibad Zila Sahakari Bank Ltd.'s case (supra) was whether with regard to the service conditions of the employees of the bank, the Societies Act was special Act or the Disputes Act would govern it. In Ghaziabad Bank's case the Apex Court proceeded on the basis that the bank is an industry and it did not advert itself to the issue settled in Banglore Water Supply's case.

11. Thus, from the above, it is apparent that there is no conflict between the two decisions and in fact the ratio of Ghaziabad Zila Sahakari Bank Ltd (supra) and RC. Tiwari's case (supra) is fully applicable to the facts of the present case. A learned Single Judge of this Court in the case of U.P. Co-operative Spinning Mills (supra) considering the ratio of Ghaziabad Zila Sahakari Bank (supra) and Himanshu Kumar's case (AIR 1973 SC 3657) has went on to hold that the State Government had committed a manifest error in referring a dispute under Section 4-K of the U.P. Industrial Disputes Act in the case of an employee of a cooperative society. This view has also been followed by another learned Single Judge of this Court in the case of District Administrative Committee vs. Labour Court, Kanpur (Writ Petition no. 45448 of 1993 decided on 7.12.2007).

12. There is yet another facet to the issue. Admittedly the workman had availed the statutory remedy of appeal which has been decided against him. This decision would act as res judicata and therefore, the Labour Court could not have proceeded with the reference. The Apex Court in the case of **Pondicherry Khadi and Village Industries Board vs. P. Kulothangan & another** (2003 (99)

FLR 1175) has held that where the issue was substantially the same in earlier proceedings and has been decided by the competent authority, even though the entire Civil Procedure Code is not applicable to industrial adjudication, the principles of Section 11 C.P.C. including the principles of constructive res judicata will apply.

13. Thus, in the opinion of the court, the reference itself was beyond jurisdiction and therefore the writ petitions succeed and are allowed and the award dated 29.03.2007 is hereby quashed. The consequential order in the connected petition is also quashed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.03.2008

BEFORE
THE HON'BLE SABHAJEET YADAV, J.

Civil Misc. Writ Petition No. 40611 of 2006

Smt. Shikha and another ...Petitioners
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioners:
Sri V.B. Khare
Sri A.K. Shukla

Counsel for the Respondents:
S.C.

U.P. Direct Recruitment to Group D Post (Inclusion of member nominated by District Magistrate in Selection Committee) Rules 2006 readwith Constitution of India 306-U.P. Intermediate Education Act 1921-Chapter III Regulation 100-107-appointment of Class 4th employee-in Intermediate College-run by Management-D.I.O.S. disapproved on the ground in selection committee not properly constituted-as nominee of D.M. not participated-held-wholly erroneous-misconceived can not sustain.

Held: Para 9

In view of these facts and circumstances of the case, impugned order passed by District Inspector of Schools recalling earlier permission-granted by D.I.O.S. dated 4.5.2006, in my considered opinion, is wholly erroneous, misconceived and cannot be sustained, therefore, the same is hereby quashed.

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

1. A short question arises for consideration before this court is that as to whether U.P. Direct Recruitment to Group 'D" Posts (inclusion of a Member Nominated by District Magistrate in Selection Committee) Rules 2006 promulgated by Governor of State of U.P. under the proviso to Article 309 of the Constitution of India shall apply in selection of Group 'D' posts of Higher Secondary Schools and Intermediate Colleges recognized under U.P. Intermediate Education Act 1921 run and managed by the private managements?

.

2. The brief facts leading to the case are that two posts of Class-IV employees were fell vacant in the institution, one post on account of retirement of Smt. Chando Devi on 30.6.2005 and another on account of retirement of Smt. Raj Kumari on 31.3.2006. On 29.3.2006 the Principal of the institution sought permission from the District Inspector of Schools, Allahabad for filling the aforesaid vacancies. In pursuance thereof, the District Inspector of Schools-II, Allahabad granted permission to the Principal of the institution to fill up the

aforesaid two vacant posts of class IV employees in the institution vide order dated 4.5.2006, contained in Annexure-2 of the writ petition. On receipt of the permission for filling the aforesaid vacant posts advertisement was made in Dainik Jagaran on 29.5.2006. In pursuance of aforesaid advertisement as many as 75 persons have applied for the selection and appointment against the aforesaid two vacancies. The Selection Committee constituted for the purpose held the selection on the basis of interview held on 16.6.2006 and letters of appointment were issued to the petitioners, who have been found selected in the aforesaid process of selection and they have also joined their respective post on 19.6.2006 in the institution in question. Thereafter the Principal of institution has sent a letter alongwith papers for approval to the District Inspector of Schools on 20.6.2006 but instead of granting approval to the aforesaid appointment of the petitioners for payment of salary to them from the State exchequer as the institution is Government aided privately managed Intermediate College, the District Inspector of Schools vide impugned order dated 5.7.2006 has recalled his earlier order dated 4.5.2006 whereby the permission was granted for holding selection and appointment on the aforesaid class IV posts in the institution. The ground taken in the impugned order dated 5.7.2006, contained in Annexure-9 to the writ petition, by the D.I.O.S. is that the composition of selection committee for holding selection has already been changed vide notification dated 3.3.2006. The aforesaid notification has been filed by the petitioners as Annexure-10 to the writ petition. By the said notification the Uttar Pradesh Direct Recruitment to Group 'D' Posts (inclusion of a member nominated by the District Magistrate in the Selection Committee) Rules, 2006, hereinafter referred to as Rules-2006, promulgated by the Governor of Uttar Pradesh has been notified.

3. Learned counsel for the petitioners has submitted that the aforesaid rules-2006 framed under the proviso to Article 309 of the Constitution has no application in respect of selection in question instead thereof the selection in question is governed by the Regulations 100 to 107 of Chapter III framed under U.P. Intermediate Act-1921. While elaborating his submission learned counsel for the petitioners has submitted that the provisions of rule framed under the proviso to Article 309 of the Constitution applies only in respect of public services and posts in connection with the affairs of Union of India or of any State. The said rule has no application with regard to the services of employees of Higher, Secondary Schools and Intermediate Colleges managed by private committee of management recognized under U.P. Intermediate Education Act. The services of non-teaching staff of the such educational institution recognized under said Act are governed by the provisions of aforesaid Act and Regulations framed thereunder, therefore, the recruitment and conditions of services of Group 'D' employees of such educational institutions is not covered by the rules framed under the proviso to Article of the Constitution of India as services of such employees cannot be said to be public services in connection with the affairs of Union of India or of any State. Accordingly the impugned order passed by D.I.O.S. while placing reliance upon Rules-2006 referred above cannot be sustained. The submission of learned

counsel for the petitioners appears to be correct and deserves to be accepted.

4. I have heard learned counsel for the petitioners and learned Standing Counsel : for the respondents and have also gone through the record.

5. For better appreciation of the controversy the provision of Article 309 of the Constitution of India is extracted as under:-

"309. Recruitment and conditions of service of persons serving the Union or a State.-- *Subject to the provisions of this Constitution, Acts of the appropriate Legislature may regulate the recruitment, and conditions of service of persons appointed, to public services and posts in connection with the affairs of the Union or of any State:*

Provided that it shall be competent for the President or such person as he may direct in the case of services and posts in connection with the affairs of the Union, and for the Governor of a State or such person as he may direct in the case of services and posts in connection with the affairs of the State, to make rules regulating the recruitment, and the conditions of service of persons appointed, to such services and posts until provision in that behalf is made by or under an Act of the appropriate Legislature under this article, and any rules so made shall have effect subject to the provisions of any such Act."

6. From a plain reading of provision of Article 309 of the Constitution of India, it is clear that subject to provisions of this Constitution, the Acts of appropriate Legislature may regulate the recruitment, and conditions of services of persons appointed, to public services and posts in connection with the affairs of Union or of any State; provided that President or such person as he may direct in cases of services and posts in connection with the affairs of Union and Governor of State or such person as he may direct in case of services and posts in connection with the affairs of State are competent to make rules regulating the recruitment and conditions of service of persons appointed to such services and posts until the provisions in that behalf is made by or under an Act of appropriate Legislature under this Article and any rules so made shall have effect subject to provisions of any such Act. It implies that an Act of appropriate Legislature may govern the recruitment and service conditions of persons appointed to public services and posts in connection with the affairs of the Union or of any State and the rules framed under the proviso to Article 309 are transitory in nature and they shall apply only in the period interregnum, but in any case neither the enactment of competent Legislature under Article 309 of the Constitution of India nor the rules framed by the President or Governor of the State under the proviso to Article 309 of the Constitution have any application with regard to the services of employees of ,Higher Secondary Schools and Intermediate Colleges recognized under U.P Intermediate Education Act, who are governed by provisions of aforesaid Act and Regulations framed thereunder, for simple reason that the services and posts of such educational institution are not public services and posts either in connection with the affairs of Union of India or of any, State as contemplated by the said Article, therefore, the provisions of Rules-2006 have no application with

regard to the appointment of employees of such educational institutions.

7. For ready reference and better appreciation of controversy the provisions of Rules-2006 referred above are extracted as under:-

"In exercise of the powers conferred by the proviso to Article 309 of the Constitution, the Governor is pleased to make the following rules:

The Uttar Pradesh Direct Recruitment to Group 'D" Posts (inclusion of a Member Nominated by the District Magistrate in the Selection Committee) Rules, 2006:

1. Short title, commencement and application :- *(1) These rules may be called the Uttar Pradesh Direct Recruitment to Group 'D" Posts (inclusion of a Member nominated by the District Magistrate in the Selection Committee) Rules, 2006.*

(2) They shall come into force at once.

(3) They shall apply to direct recruitment to Group 'D' Posts under the rule making power of the Governor under the proviso to Article 309 of the Constitution except the posts which are within the purview of the Uttar Pradesh Public Service Commission.

2. Overriding effect.- *These rules shall have effect notwithstanding anything to the contrary contained in any other rules or orders.*

4. Inclusion of a Member nominated by the District Magistrate in the Selection Committee.- *The Selection Committees prescribed for direct recruitment to Group 'D'" Posts under the provisions of the relevant Service Rules shall, henceforth, invariably include an officer nominated by the District Magistrate as one of the Members of the Selection Committee."*

8. From a plain reading of Rule-l (3) of the said Rule, it is clear that these Rules shall apply to direct recruitment to Group 'D' Posts under the rule making power of the Governor made under the proviso to Article 309 of the Constitution except the posts which are within the purview of the Uttar Pradesh Public Service Commission. It is no doubt true that Rule-2 of the said rules have overriding effect upon other service Rules and by virtue of Rule-4 of the said rule it is provided that Selection Committee prescribed for direct recruitment to Group "D" Posts under the provisions of the relevant Service Rules shall, henceforth, invariably include an officer nominated by the District Magistrate as one of the Members of Selection Committee. At this juncture it is necessary to point out that there can be no doubt that the services and posts of non-teaching staff of secondary schools and intermediate colleges recognized under U.P. Intermediate Act-1921, run and managed by the private committee of Management are not services and posts in connection with the affairs of Union of India or of any States as contemplated under the provisions of Article 309 of the Constitution, therefore, the provisions of Article 309 of the Constitution of India has no application with the recruitment of employees of such institution. Thus the appointment on class IV post of the institution can not be governed and regulated by the rules framed by the Governor of Uttar Pradesh under the proviso to Article 309 of the Constitution, instead thereof the appointment/recruitment of class IV employees in educational institution

recognized under U.P. Intermediate Education Act are governed by the Regulations 100 to 107 of Chapter III framed under the said Act. Therefore despite Rule-2 of said Rules have overriding effect upon other service rules even then such overriding effect of the said Rules in my considered opinion, is confined to only those Rules which have been framed by the Governor of the State under proviso to Article 309 of the Constitution of India, they cannot travel beyond the aforesaid rule making power of the Governor. Accordingly I am of the view that Rules-2006 has no application in case of recruitment of the petitioners on Class IV posts or Group D posts of the institution in question. The view taken by D.I.O.S. contrary to it is misplaced and cannot be countenanced.

9. In view of these facts and circumstances of the case, impugned order passed by District Inspector of Schools recalling earlier permission-granted by D.I.O.S. dated 4.5.2006, in my considered opinion, is wholly erroneous, misconceived and cannot be sustained, therefore, the same is hereby quashed.

10. Since there is nothing from the impugned order that the selection made by the institution has been found faulty otherwise by D.I.O.S. except the ground stated herein before, therefore, the District Inspector of Schools, Allahabad is directed to accord approval to the appointment of petitioners and make payment of salary to them within a period of two months from the date of production of certified copy of the order passed by this court before him, if they are found working in pursuance of their appointments. However the payment shall be made from the date of approval of their appointments and not earlier to it.

11. With the aforesaid observation and direction, writ petition succeeds and allowed.

12. There shall be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.03.2008

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

Civil Misc. Writ Petition No. 9006 of 2003

Pyare Lal and others ...Petitioners
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri W.H. Khan
Sri J.H. Khan

Counsel for the Respondents:
Sri A.K. Mishra
Sri S.K. Garg
S.C.

Land Acquisition Act Section 17-Land acquisition for developing residential colony Notification u/s 4 issued on 21.1.90-declaration under Section 6 on 31.12.91-on alleged urgency inquiry u/s 5D dispense with-stay granted by District court on 7.4.92-dismissed on 24.7.2000-possession taken on 1.11.02 much after 2 years-apparently no urgency as required u/s 17-entire acquisition proceeding automatically laps.

Held: Para 6

The materials on record shows that even after dismissal of the writ petition and vacation of the stay order the possession was not taken within two years and award was not made even after that. This plea of the respondents is not acceptable that as soon as they knew of the dismissal of the writ petition and vacation of the stay order, they proceeded further to acquisition proceedings and took possession because the respondents were party to the aforesaid writ petition and knowledge of the dismissal of the petition was to be presumed-against them. The learned counsel for the respondent no. 2 has argued that since the urgency clause was invoked, therefore, there was no need for award and from the date of possession, the land in dispute vested absolutely in the Government free from all encumbrances. But this argument is not acceptable because under Section 17(1) of the Act the possession was to be taken after expiry of 15 days from the date of publication of notice under Section 9(1) of the Act showing urgency but since the alleged possession was taken much after two years of the dismissal of the writ petition, therefore, this argument of the learned counsel for the petitioners has force that there was no urgency.

Case law discussed:

2007 (5) Supreme 25, 2007 (5) SCC 231, 2007 (5) SCC 85

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

1. This writ petitioners has been filed by the petitioners for issuance of writ, order or direction in the nature of mandamus declaring the land acquisition proceedings in respect of plots in dispute to have lapsed under Section 11A of the Land Acquisition Act (hereinafter referred to as the Act). They have further prayed for the relief from their dispossession over the land. In the alternative they have taken shelter of Section 48 of the Act.

2. We have heard Shri W.H. Khan, learned Senior Counsel assisted by Shri J.H. Khan, learned Standing Counsel for the respondents no. 1 and 3 and Shri A.K. Mishra, learned counsel appearing for the respondent no. 2.

3. Admittedly, the plot nos. 115 and 8 and plot nos. 98, 163, 12, 14, 90, 101 and 102 situate in village Jhalwa tehsil sadar district Allahabad belonged to the petitioners no. 1 to 3 respectively. The respondents proposed to acquire the said plots for the construction of residential colony and notification under Section 4 of the Act was issued on 21.1.1990. Thereafter, declaration under Section 6 of the Act was issued on 31.12.1991. The copies of the aforesaid notifications are annexures 1 and 2 respectively. By way of notification under Section 6 of the Act, the inquiry under Section 5A of the Act was dispensed with alleging the urgency. The petitioners filed civil misc. writ petition no. 13700 of 1992 in which the interim order dated 7.4.1992 was passed by this Court restraining the respondents not to dispossess the petitioners from the disputed plots unless they had already been dispossessed. The copy of the order is annexure-3. The petitioners' houses are situate in plot no.163 since 1992, plot no.90 since 1980 and plot no.115 since 1982. The petitioners are still in possessions of the disputed plots and they were never dispossessed by the respondents. The aforesaid writ petition was dismissed on 24.7.2000 being infructuous by passage of time and accordingly the interim order dated 7.4.1992 also stood vacated. The copy of the order is annexure-4. In the writ petition, it has been alleged that the petitioners were never dispossessed by the respondents and they are still continuing

in possession. No award has been made by the Collector Allahabad as yet and no compensation has been paid to them.

4. In the counter affidavit filed by one Dinesh Mishra, Law Inspector, Allahabad Development Authority, Allahabad, it has been alleged that the possession of the land was taken by Collector on 1.11.2002 and on the same day possession was handed over to the respondents no.2. However, it has been alleged in the counter affidavit that the award has not yet been made. The acquisition has already become final against the petitioners and writ petition challenging the notification under Sections 4 and 6 of the Act have already been upheld, therefore, this writ petition is not maintainable. It has also been alleged in the counter affidavit that the respondents had no knowledge about the dismissal of the earlier writ petition filed by the petitioners on 24.7.2000. Along with the counter affidavit, the possession memo annexure CA-1 has been filed.

5. 'This is admitted fact that the petitioners had challenged the notification under Sections 4 and 6 of the Act in respect of the plots in dispute by filing civil misc. writ petition no. 13700 of 1992, in which interim order regarding dispossession was passed on 7.4.1992 and the said writ petition was dismissed on 24.7.2000 and the stay granted earlier was vacated. The possession memo annexure-CA-1 shows that the possession was allegedly taken on 1.11.2002, meaning thereby much after two years of dismissal of the writ petition in which the stay had been granted. Thus, apparently there was no urgency as required under Section 17 of the Act. The award has not yet been made, this is also admitted position. Thus, it is also clear that the period of much more than two years have passed and the Collector has not made any award regarding the disputed plots. Therefore, under the provisions of Section 11A of the Act, the entire acquisition proceedings automatically lapsed. For ready reference Section 11A is quoted below:-

"Period within which an award shall be made-The Collector shall make an award under Section 11 within a period of two years from the date of the publication of the declaration and if no award is made within that period, the entire proceedings for the acquisition of the land shall lapse.

Provided that in a case where the said declaration has been published before the commencement of the Land Acquisition (Amendment) Act, 1984 (68 of 1984), the award shall be made within a period of two years from such commencement".

6. The materials on record shows that even after dismissal of the writ petition and vacation of the stay order the possession was not taken within two years and award was not made even after that. This plea of the respondents is not acceptable that as soon as they knew of the dismissal of the writ petition and vacation of the stay order, they proceeded further to acquisition proceedings and took possession because the respondents were party to the aforesaid writ petition and knowledge of the dismissal of the petition was to be presumed-against them. The learned counsel for the respondent no. 2 has argued that since the urgency clause was invoked, therefore, there was no need for award and from the date of possession, the land in dispute vested

absolutely in the Government free from all encumbrances. But this argument is not acceptable because under Section 17(1) of the Act the possession was to be taken after expiry of 15 days from the date of publication of notice under Section 9(1) of the Act showing urgency but since the alleged possession was taken much after two years of the dismissal of the writ petition, therefore, this argument of the learned counsel for the petitioners has force that there was no urgency.

7. The learned counsel for the petitioners has cited ***2007 (5) Supreme 25 M/s Girnar Traders Vs. State of & Others*** in which the three judges Bench of the Apex Court has clearly held that if the land is not acquired within the stipulated period and award is not made within two years from the date of declaration under Section 6 the Act, the entire acquisition proceedings come to an end. He has further cited the case of ***Ravi Khullar and another Vs. Union of India & Others 2007 (5) SCC 231*** in which the Apex Court has opined that the provisions of Section 12 of the Limitation Act cannot be read with Section 11A of the Act. Only that period has to be excluded from the stipulated time under Section 11A of the Act for which the proceedings were stayed by any competent Court. In the case of ***Kunwar Pal Singh Vs. State of U. P. and others 2007 (5) SCC 85*** the same view has been taken that if the award is made after expiry of the limitation period under Section 11A of the Act, the entire acquisition proceedings would be lapsed.

8. In view of our above discussions, we come to the conclusion that the entire acquisition proceedings in this case have lapsed in respect of plots in dispute and consequently this writ petition is allowed accordingly.

No order as to cost.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.03.2008

BEFORE
THE HON'BLE AMAR SARAN, J.

Criminal Misc. Application No. 3118 of 2008

Amit Yadav ...Applicant
Versus
State of U.P. and another ...Respondents

Counsel for the Applicant:
Sri Shrawan Kumar Mishra

Counsel for the Respondents:
A.G.A.

<u>Negotiable Instrument Act Section 138 (A)</u>-Complaint neither signed by the Payee-but her power of attorney holder-even the statement u/s 200 and 202 recorded of the husband of payee-summoning order-set a side-with liberty to the Magistrate to take appropriate decision after examining the complainant.

Held: Para 7

The next submission, however, of the applicant was that the complaint in the present case was signed not by the payee i.e. Smt. Urmila Devi, but by the power of attorney holder Harsingh Pal her husband. He has drawn my attention to section 142 of the Negotiable Instruments Act, wherein it is mentioned in clause (a) that no Court shall take cognizance of any offence punishable under section 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due

course of the cheque. The holder in due course has been defined under section 9 to mean any person who for consideration became the possessor of a promissory note, bill of exchange or cheque, if payable to the bearer or payee or the payee or indorsee thereof. Therefore there is force in the submission of the learned counsel for the applicant that the power of attorney holder cannot be said to be either the payee or the holder in due course.

Case law discussed:

2003 SCC (Cri) 1217, 2007 (2) JIC, 457 (All), 2007 (1) JIC, 907 (All)., (2007) 6 SCC, 555, AIR 2007 (NOC) 944 (KAR.)

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

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

2. This application has been filed for quashing a summoning order dated 27.7.2007 passed by the Additional Chief Judicial Magistrate, Court No.1, Aligarh in Complaint Case No. 441 of 2007.

3. The first submission of the learned counsel for the applicant was that in the complaint no date of service of notice was mentioned and the same is in contravention of the decision of the Apex Court in *Shakti Travel and Tours versus State of Bihar and another*, 2003 SCC (Cri) 1217 and two decisions of this Court in *Ravindra Singh Gugyani @ Sanju Versus State of U.P. & others*, 2007 (2) JIC, 457 (All) and *Deepak Kumar & another Versus State of U.P. & another*, 2007 (1) JIC, 907 (All). It may be noted that it has been clearly mentioned in the judgement of the Apex Court that in the assertion of the complaint, there is no averment that the notice has been served, but the said case did not require that the date of service be mentioned. In the decision in Ravindra Singh Gugyani @ Sanju's case again there was no assertion that the notice was served and on this ground relying on the decision of Shakti Travels and Tours, Hon'ble R.K. Rastogi, J., issued notice only. In the decision of Deepak Kumar and. Another passed by Hon'ble Vinod Prasad, J., it has been clarified that the notice had been sent by courier and it had not been sent by registered post.

4. In the present case the allegation in paragraph No.8 of the complaint was that the notice had been sent by the complainant's wife, who was the payee and aggrieved person by registered post on 19.2.2007 and in paragraph No. 9, it was further submitted that the notice had been received by the accused, but he has not given any reply and the registry had not been returned. It may be useful here to quote section 27 of the General Clauses Act.

5. *Meaning of Service by post.*-- Where any (Central Act) or Regulation made after the commencement of this Act authorizes or requires any document to be served by post whether the expressions "give" or "send" or :any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document, and unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

6. The said provision clearly points out that where any letter properly addressed to the recipient is sent and posted by registered post, then unless the

contrary is proved, it shall be deemed that the notice shall have reached the recipient in the ordinary course of post. However, the drawer can rebut the presumption during trial that he was not served the letter or the address was wrong. This is also the view taken by the Apex Court in the very recent decision of *C.C. Alvi Haji Versus Palajetty Muhammad & another*, (2007) 6 SCC, 555. There is, therefore, no force in this contention of the learned counsel for the applicant.

7. The next submission, however, of the applicant was that the complaint in the present case was signed not by the payee i.e. Smt. Urmila Devi, but by the power of attorney holder Harsingh Pal her husband. He has drawn my attention to section 142 of the Negotiable Instruments Act, wherein it is mentioned in clause (a) that no Court shall take cognizance of any offence punishable under section 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque. The holder in due course has been defined under section 9 to mean any person who for consideration became the possessor of a promissory note, bill of exchange or cheque, if payable to the bearer or payee or the payee or indorsee thereof. Therefore there is force in the submission of the learned counsel for the applicant that the power of attorney holder cannot be said to be either the payee or the holder in due course.

8. Learned counsel for the applicant has also drawn my attention to the decision of the Kerala High Court *Ranjitha Balasubramanian and another vs. Shanti Group and others,* AIR 2007 (NOC) 944 (KAR.), which mentions that if the complaint has not been filed or proceeded with by the proper person, the complaint is liable to be dismissed although a complaint may then be filed by the appropriate person and the Court may consider extending the time for filing the complaint.

9. In the present case, admittedly the opposite party No.2 Harsingh Pal is the husband and power of attorney holder of Smt. Urmila Devi, who has signed the complaint and also given a statement under section 200 Cr.P.C. and thereafter one Suraj Pal was examined under section 202 Cr.P.C., and then the impugned summoning order was passed. 8mt. Urmila Devi has neither signed the complaint nor examined herself under section 200 Cr.P.C.

10. Learned A.G.A. submits that no useful purpose would be served in issuing notice to the opposite party No. 2 and keeping the proceedings pending in this Court.

11. In this view of the matter, I deem it proper to set aside the summoning order dated 27.7.2007, provided the applicant files a copy of this order before the Court concerned within three weeks. Thereafter, the learned Trial Court will summon the actual aggrieved person viz. Urmila Devi and pass appropriate orders after examining her under section 200 Cr.P.C. if possible within four weeks. As it appears that the complaint was signed by the power of attorney, who also examined himself under section 200 Cr.P.C. on improper legal advice it would be appropriate for the Court concerned to consider this circumstance for extending the time for filing the complaint under the proviso to clause (b) of section 142 of the Act.

12. With these observations, this application is disposed of.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.03.2008

BEFORE
THE HON'BLE SUNIL AMBWANI, J.

Civil Misc. Writ Petition No.14481 of 2008

Smt. Asha Kapoor ...Petitioner
Versus
Addl. Collector, Ghaziabad and others ...Respondents

Counsel for the Petitioner:
Sri V. Singh
Sri K.K. Pandey

Counsel for the Respondents:
S.C.

Indian Stamp Act 1899-Section 56 (1-A)-Penalty-In insufficient of stamp-No guide line regarding imposition of penalty-government to frame proper rule-so long the allegation of concealment of valuation of property-or specific finding recorded-penalty can not be imposed.

Held: Para 7

The penalty can be imposed, if there is an attempt to evade the stamp duty. The penalty presupposes culpability and an intention to conceal or to play fraud with the authorities. Whereas there is any reasonable doubt with regard to valuation of the property, and nothing material is found to have been concealed by the petitioner in execution of the document, the authorities will loose their discretion to impose penalty. The enhancement of the valuation on the basis of the finding that the property has a potential user as residential or industrial purposes, is subject to appeal. Before imposing penalty, the authorities must record findings based on relevant material that the purchaser or the person liable to pay stamp duty had concealed the relevant facts in execution of sale deed, and had intension to evade the payment of stamp duty. These powers cannot be mechanically used in every case.

(Delivered by Hon'ble Sunil Ambwani, J.)

1. Heard learned counsel for the petitioner and learned standing counsel for all the respondents. With the consent of parties, the matter was heard and is finally disposed of at the admission stage.

2. The petitioner preferred an appeal No. 53 of 2007-08 against an order dated 10.12.2007 passed by the Additional Collector (Finance & Revenue) Ghaziabad, by which in a Stamp Case No. 426/2006-07 under Section 47 A of Indian Stamp Act in respect of sale of Khasra No. 2049 Gha area 0.0942 hectares situate in village & Pargana Dasna, District Ghaziabad by document No. 8223/9.10.2006, it was found that the market value of the property was much higher and while assessing the market value at the residential rates the petitioner was required to pay Rs.1,36,900/- as deficiency in stamp duty and Rs.73,100/- as penalty (total Rs. 2 lacs) with 1.5% interest per month. The Commissioner, Meerut Division, Meerut has, by his order dated 16.1.2008, while admitting the appeal and summoning the records, directed the petitioner to deposit one-half of the disputed amount as a precondition for stay for a period of two months.

3. It is contended that the condition of deposit is highly onerous and that the order was not considered on merit before

directing the parties to deposit one-half of the amount. It is further contended that the deposit of one-half of the amount is against the statutory requirement of deposit of one-third of the disputed amount under the proviso to Section 5 (1-A) of Indian Stamp Act, 1899 (in short the Act) as amended by UP Act No. 38/2001.

4. Learned standing counsel contends that the appellate authority has exercised the discretion in accordance with the law, and that the deposit of one half of the amount includes one third of the disputed amount for the purposes for grant of stay of the remaining amount.

5. The order would show that the appellate authority has considered a limitation imposed by law by proviso to Section 56 (I-A) of the Act for considering the stay application. The Chief Controlling Revenue Authority may admit an appeal but he should not have allowed his discretion to consider the stay application until one third of the disputed amount was deposited and which includes deficiency in stamp duty, registration amount and penalty. The deposit of one third is a precondition for consideration of stay application. The object to deposit atleast one third before the discretion to grant interim order is considered appears to collect at least one third of disputed amount by the revenue as the appeal may remain pending indefinitely.

6. The High Court had earlier held that the assessing authority does not have power to impose penalty. The Act was amended by state amendment vide UP Act No. 38 of 2001 by which the powers to impose penalty upto the extent of four times was given to the assessing authority. Sub section (4) of Section 47 A of the Act, as amended by UP Act No. 38 2001 is quoted as below:-

"47-A (4) If on enquiry under sub-section (2) and examination under sub-section (3), the Collector finds the market value of the property-
(i) truly set forth and the instrument duly tamped, he shall certify by endorsement that it is duly stamped and return it to the person who made the reference;
(ii) not truly set forth and the instrument not duly stamped, he shall require the payment of proper duty or the amount required to make up the deficiency in the same, ***together with a penalty of an amount not exceeding four times the amount of the*** *proper duty or the deficient portion thereof. "*

7. The penalty can be imposed, if there is an attempt to evade the stamp duty. The penalty presupposes culpability and an intention to conceal or to play fraud with the authorities. Whereas there is any reasonable doubt with regard to valuation of the property, and nothing material is found to have been concealed by the petitioner in execution of the document, the authorities will loose their discretion to impose penalty. The enhancement of the valuation on the basis of the finding that the property has a potential user as residential or industrial purposes is subject to appeal. Before imposing penalty, the authorities must record findings based on relevant material that the purchaser or the person liable to pay stamp duty had concealed the relevant facts in execution of sale deed, and had intension to evade the payment of stamp duty. These powers cannot be mechanically used in every case.

8. The conferment of discretion of award of four times penalty in the hands of executive authorities exercising quasi-judicial powers should be provided with sufficient guidelines by the legislature. In the present case the act and rules do not provide for any guidelines for imposing penalty which may exceed to four times of the amount of the proper duty or deficient portion thereof. The State Government should legislate to provide sufficient guidelines in this regard, to check the misuse of powers by the authorities constituted under the Act.

9. In the present case the Commissioner has not insisted upon deposit of third amount of deficiency and penalty before he considered the stay application.

10. The order as such cannot be sustained. At the same time it may be pointed out that the provisions of deposit of one third amount, including the penalty for which no reason have been given, appear too highly onerous to be conceded.

11. The writ petition is **allowed.** The order dated 16.1.2008 passed by Commissioner, Meerut Division, Meerut is set aside. The petitioner will deposit one third of the amount of deficiency and penalty for consideration of stay application. The Commissioner will pass fresh order on stay application only if petitioner deposits one third amount of the disputed amount.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.03.2008

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Writ Petition 59584 of 2007
Connected with-
Civil Misc. Writ Petitions Nos. 59057 of 2007, 63423 of 2007, 12130 of 2008, 828 of 2008, 3992 of 2008, 372 of 2008, 370 of 2008, 521 of 2008, 3539 of 2008, 2739 of 2008, 5135 of 2008, 1630 of 2008

Suresh Prasad Gautam ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Shashi Nandan
Sri Udayan Nandan

Counsel for the Respondents:
Sri K.K. Chand
S.C.

Constitution of India, Art. 226-Selection for Special B.T.C. course-under 10% quota those Shiksha Mitra completed 36 months-working on the date of application-held can be considered-but who were selected for the current session but running on leave can not be denied.

Held: Para 7

Having considered the submissions of the counsel for the parties, this Court holds that a candidate who wants to apply in the Shiksha Mitra category for the Special B.T.C. Training Course 2007 must have the requisite qualifications as per the Government Order dated 10.7.2007, namely, a graduation degree and a B.Ed. degree. Further, the candidate should have an experience certificate of three academic sessions and should also be working in the

academic session 2007-08, i.e., on date of applying for the 2007 BTC Training Course. If all these conditions are met, the candidate would be considered eligible for the B.T.C. Training Course of 2007. Clause (1) of the order dated 1.10.2007 cannot be taken into consideration and is quashed.

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

1. A Government Order dated 10.7.2007 was issued proposing to hold a Special B.T.C. Training Course for such candidates who were eligible for the post of Assistant Teachers. It was proposed that the candidates who are graduate and have a B.Ed. degree could apply for the Special B.T.C. Training Course. In paragraph 18 of the Government Order dated 10.7.2007, 10% seats were reserved for those candidates who were working as Shiksha Mitra and had an experience of three years as a Shiksha Mitra and were also functioning as a Shiksha Mitra at the time when the applications were invited for the Special B.T.C. Training course.

2. Based on the aforesaid Government Order, an advertisement was issued inviting applications for the Special B.T.C. Training Course, 2007. Paragraph 1 of the advertisement contemplated that a candidate, who held the requisite qualifications and who was working as a Shiksha Mitra and had the experience of three years, could also apply.

3. Paragraph 4 of the said advertisement contemplated that 10% of the seats would be reserved for Shiksha Mitra. Under sub clause (4) of condition No.7, it was stated that an experience certificate of three years had to be submitted by the candidate. The Director, Rajya Shaikshik Anusandhan Evam Prashikchan, U.P. issued a letter dated 26.7.2007 clarifying that three years experience would mean three academic sessions. It may be stated hear that an academic session starts on 1st July of the year and concludes on 31st May in the subsequent year. Subsequently by an order dated 1stOctober 2007 three years of experience as a Shiksha Mitra was clarified to mean three academic sessions but, clause 1 of the aforesaid order further clarified that whenever a candidate joins the post of Shiksha Mitra, the date of such joining would be treated as completion of an academic session.

4. As a result of this clarification by an order dated 1.10.2007, various Shiksha Mitra who had completed two academic sessions and their appointments was renewed for the third academic session, namely, 2007-08 applied for the Special B.T.C. Training Course contending that they had three years experience since they have joined the third academic session 2007-08.

5. Based on this order, the respondents issued a list of eligible candidates, in which, it is alleged that the names of those candidates were included who had not completed three academic sessions and were, therefore, not eligible. The petitioners being one of the eligible candidates whose name was not included by the respondents is before this Court. For facility, Writ Petition No.59584 of 2007, **Suresh Prasad Gautam vs. State of U.P. and others,** is being treated as the leading case. The petitioners submitted that there are many candidates who may not have joined the post of Shiksha Mitra in July, namely, at the beginning of the academic session and may have joined at

the fag end of the academic session and therefore, three years experience as a Shiksha Mitra should not be confined to three academic sessions but should be treated only when the candidate completes 36 actual months of training as a Shiksha Mitra. The second submission raised by the counsel for the petitioners is that clause(1) of the order dated 1.10.2007 is patently erroneous and should be quashed and that the person cannot be treated to have completed an academic session the moment he joins the post of Shiksha Mitra at a particular point of time.

6. The respondents have filed a counter affidavit and submitted that the order dated 1.10.2007 should be read as completion of three academic sessions and that an academic session would not be completed upon the date of joining of the candidate. This has been fairly conceded by the learned standing counsel Sri K.K. Chand. The learned standing counsel however submitted that three years experience should be treated as three academic session is completely fair and does not require any interference, inasmuch as, normally by the time a candidate joins one or two month elapses from the date of the selection.

7. Having considered the submissions of the counsel for the parties, this Court holds that a candidate who wants to apply in the Shiksha Mitra category for the Special B.T.C. Training Course 2007 must have the requisite qualifications as per the Government Order dated 10.7.2007, namely, a graduation degree and a B.Ed. degree. Further, the candidate should have an experience certificate of three academic sessions and should also be working in the academic session 2007-08, i.e., on date of applying for the 2007 BTC Training Course. If all these conditions are met, the candidate would be considered eligible for the B.T.C. Training Course of 2007. Clause (1) of the order dated 1.10.2007 cannot be taken into consideration and is quashed.

8. In the light of the aforesaid, the leading petition **No.59584 of 2007 is partly allowed** with the direction to the respondents to reconsider the list of eligible candidates and, if it finds that a candidate does not have three years experience which means three academic sessions, he would not be eligible to apply for the training course. The mere fact that a candidate is working as a Shiksha Mitra for the third academic session 2007-08 would not give the candidate a right to apply for the Special B.T.C. Training course of 2007. Necessary correction in the list would be made by the respondents within six weeks from today. Similarly, **Writ Petition No.59057 of 2007** is also **partly allowed** in terms of the leading writ petition.

9. In **Writ Petition No.63423 of 2007** the petitioner's candidature was rejected on the ground that the petitioner was not working as a Shiksha Mitra on the date when she applied for the training course since she had last worked upto 20.5.2005. In view of the fact, that one of the essential requirements for consideration in this context is that the candidate should be working as a Shiksha Mitra as on the date of applying for the B.T.C. Training course, her application was rightly rejected under the 10% category of Shiksha Mitra. The petitioner is not entitled for any relief. The writ petition is **dismissed.**

10. In **Writ Petition Nos.12130 of 2008, 828 of 2008, 3992 of 2008, 372 of 2008, 370 of 2008, 521 of 2008, 3539 of 2008 and 2739 of 2008** the petitioners had worked for two academic session and renewal was granted for 2007-08 and in view of the order dated 1.10.2007, the said petitioners claimed completion of the third academic session and contended that they became eligible to apply for the B.T.C. Training course. Since I have already quashed clause (1) of the order dated 1.10.2007, and in view of the fact that the said petitioners had joined the third academic session 2007-08 and had not completed the third academic session, the said petitioners do not have the requisite experience as contemplated in the Government Order dated 10.7.2007. Consequently, their applications were rightly rejected. The said petition does not have any merit and are **dismissed** accordingly.

11. In **Writ Petition No.5135 of 2008** the petitioner worked as a Shiksha Mitra from 25.3.2003 to 11.10.2006 and again was given an appointment on 11.9.2007. The petitioner's application was rejected on the ground that she was not found on duty and therefore, her application was rejected. The petitioner contended that she was on leave and that she had joined after availing her leave. In my opinion, the candidature of the petitioner was wrongly rejected. She has the requisite experience of three years and was working as a Shiksha Mitra on the date when she applied for the B.T.C. Training course. The fact that she was not on duty does not mean that she was not working as a Shiksha Mitra. Consequently, the rejection of her candidature by the respondent was unjustified. The writ petition is allowed and a mandamus is issued to the respondents to reconsider her application form and pass consequential orders within four weeks from the date of the production of a certified copy of this order.

12. In **Writ Petition No.1630 of 2008**, the claim of the petitioner was rejected on the ground that she did not have three years experience as a Shiksha Mitra. The petitioner contended before the Court that her claim should have been considered in the General Female category 'Art' group and that her claim had wrongly been considered in the category of Shiksha Mitra. The learned counsel submitted that a clerical error has crept in the application form which was submitted by her and instead of ticking the column of General Female category, by mistake she had been ticked in the column relating to Shiksha Mitra. In my view, the mistake was committed on the part of the petitioner, for which she is alone to be blamed. The respondents while rejecting her claim had not committed any error. Consequently, the claim of the petitioner at this stage cannot be considered afresh in a different category. The writ petition fails and is **dismissed.**

13. A certified copy of this order shall be made available to the learned counsel for the petitioners on payment of usual charges within a week. A certified copy of the order shall be made available to Sri K.K. Chand, the learned standing counsel for the last within the same period.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.03.2008

BEFORE
THE HON'BLE S.S. KULSHRESTHA, J.
THE HON'BLE VIJAY KUMAR VERMA, J.

Criminal Appeal No. 550 of 2008

Ram Das ...Appellant (on Interim Bail)
Versus
State of U.P. ...Opposite Party

Counsel for the Appellant:
Sri Rajeev Sisodia
Sri Atul Sisodia

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

Indian Penal Code-Section 498-A read with ¾ Dowry Prohibition Act-conviction of 6 month R.I. with fine of Rs.1000/- held-improper-in view of amendment- by amending Act 43 of 86-under Section 3- the quantum of fine must not be less than 15000/- on the amount of Dowry- whichever more-without recording special reason-sentence of fine can not be less than 15000/- for guidance- necessary direction issued.

Held: Para 6

It is worthwhile to mention that the learned Trial Court ignoring mandatory provisions of Section 3 of Dowry Prohibition Act (in short, 'the Act') has sentenced the appellant-accused Ram Das as well as co-accused Chetan (husband of the deceased) to undergo rigorous imprisonment for six months and to pay a fine of rupees one thousand each under Section 3/4 of the Act, whereas after amendment of the Act vide Amending Act 43 of 1986, minimum imprisonment under Section 3 of the Act is not less than five years with fine, which shall not be less than fifteen thousand rupees or the amount of the value of such dowry, whichever is more. Although, in view of the Proviso to Section 3 of the Act, the Court may, for adequate and special reasons to be recorded in the judgement, impose sentence of imprisonment for a term of less than five years, but no discretion has been given to the Court to impose fine less than fifteen thousand rupees. The learned Trial Judge has not recorded any adequate and special reason to impose lesser sentence under section 3 of the Act, although both the accused have been convicted under this Section also. As such, the sentence imposed by the learned Trial Judge under section 3 of the Act appears to be wholly illegal, as sentence of fine less than fifteen thousand rupees cannot be imposed, if the accused is convicted under Section 3 of the Act and if adequate and special reasons are available in any case then recording such reasons in the judgement, although the Court may impose sentence of imprisonment for a term of less than five years, but in that case also, sentence of fine less than fifteen thousand rupees cannot be imposed, as no discretion is left to the Court by Legislature to .impose a fine less than fifteen thousand rupees under Section 3 of the Act. The Hon'ble Supreme Court in the case of Kirpal Singh Vs. State of Haryana 2000(40) ACC 136 has held that where minimum sentence is prescribed in the statute, then neither the Trial Court nor the High Court can bypass the minimum limit prescribed by law. Therefore, in instant case also, sentence of fine less than fifteen thousand rupees under Section 3 of the Act could not be imposed.

Case law discussed:
2000 (40) ACC-136

(Delivered by Hon'ble S.S. Kulshrestha, J.)

1. Heard Sri Rajeev Sisodia, learned counsel for the appellant and learned A.G.A. for the State and also perused the material on record.

2. The bail application on behalf of the accused-appellant Ram Das convicted for the offence under Section 498-A I.P.C. and 3/4 Dowry Prohibition Act in S.T. No.5 of 2007 vide judgement dated 08.01.2008 passed by Sri Shiv Sharma, the then Additional Sessions judge, Court No.2, Bijnor has been pressed on the ground that he was awarded two years rigorous imprisonment under Section 498-A I.P.C and six months' imprisonment under Section 3/4 Dowry Prohibition Act. He was also on interim bail.

3. Having regard to all the facts and circumstances, without expressing any opinion on merit of the case, the accused-appellant may be admitted to bail.

4. Let the appellant Ram Das s/o Sri Thani Singh be released on bail for the offences indicated above during the pendency of the appeal on his executing a personal bond and furnishing two sureties each in the like amount to the satisfaction of the Trial Court concerned and subject to the deposit 50% of fine amount awarded by the trial court.

5. On depositing 50% amount of fine by the appellant, realization of remaining amount of fine shall remain stayed.

6. It is worthwhile to mention that the learned Trial Court ignoring mandatory provisions of Section 3 of Dowry Prohibition Act (in short, 'the Act') has sentenced the appellant-accused Ram Das as well as co-accused Chetan (husband of the deceased) to undergo rigorous imprisonment for six months and to pay a fine of rupees one thousand each under Section 3/4 of the Act, whereas after amendment of the Act vide Amending Act 43 of 1986, minimum imprisonment under Section 3 of the Act is not less than five years with fine, which shall not be less than fifteen thousand rupees or the amount of the value of such dowry, whichever is more. Although, in view of the Proviso to Section 3 of the Act, the Court may, for adequate and special reasons to be recorded in the judgement, impose sentence of imprisonment for a term of less than five years, but no discretion has been given to the Court to impose fine less than fifteen thousand rupees. The learned Trial Judge has not recorded any adequate and special reason to impose lesser sentence under section 3 of the Act, although both the accused have been convicted under this Section also. As such, the sentence imposed by the learned Trial Judge under section 3 of the Act appears to be wholly illegal, as sentence of fine less than fifteen thousand rupees cannot be imposed, if the accused is convicted under Section 3 of the Act and if adequate and special reasons are available in any case then recording such reasons in the judgement, although the Court may impose sentence of imprisonment for a term of less than five years, but in that case also, sentence of fine less than fifteen thousand rupees cannot be imposed, as no discretion is left to the Court by Legislature to .impose a fine less than fifteen thousand rupees under Section 3 of the Act. The Hon'ble Supreme Court in the case of **Kirpal Singh Vs. State of Haryana 2000(40) ACC 136** has held that where minimum sentence is prescribed in the statute, then neither the Trial Court nor the High Court can bypass the minimum limit prescribed by law. Therefore, in instant case also, sentence of fine less than fifteen thousand rupees under Section 3 of the Act could not be imposed.

7. The Registrar General is directed to send a copy of this order to Sri Shiv Sharma, the then Additional Sessions Judge, Court No.2, Bijnor for his future guidance. Application disposed of.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.04.2008

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

Civil Misc. Writ Petition No. 29235 of 2007

Tej Pal Kaushik ...Petitioner
Versus
State of U.P. and another ...Respondents

Counsel for the Petitioner:
Sri Shashi Nandan
Sri P.S. Chauhan

Counsel for the Respondents:
Sri R.B. Pradhan
Sri Arvind Kumar
S.C.

Constitution of India, Art. 226-Regularisation-petitioner working as Principal on Ad-hoc basis-for the last 17 years-requisite qualification for principal of Government industrial Training Institute is B.Tech (Electronic) while petitioner is M. Tech. From IIT Kharagpur-by impugned order-regularisation refused on the basis of Uma Devi case-nothing whether regarding lack of qualification-or concealment of facts on initial appointment-No reason disclosed for ignoring the expert opinion in favour of petitioner-order not sustainable-direction issued for fresh consideration.

Held: Para 19 & 20

Thus, in view of the above, we are of the considered opinion that the respondent authorities while passing the impugned order did not record any reason for not agreeing with expert opinions and in case of doubt why they failed to refer the matter to Expert Committee for its opinion and under what circumstances experience possessed by the petitioner for about 18 years has been completely ignored.

In the facts and circumstances of the case, it is warranted that the matter be remanded for re-examination. As the petitioner is out of service, the case requires to be decided within a stipulated period.

Case law discussed:
1965 SC 491, AIR 1986 SC 1448, AIR 1975 SC 192, (1979) 2 SCC 339, AIR 1980 SC 2141, AIR 1990 SC 434, AIR 1991 SC 2272, AIR 1992 SC 917, AIR 1994 SC 579, (1997) 8 SCC 31, (2000) 3 SCC 59, (2001) 5 SCC 486, (2006) 4 SCC 1

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

1. This writ petition has been filed for quashing the impugned order dated 01st June, 2007 by which the petitioner has been denied regularisation of services on the ground that at the initial stage of appointment on ad-hoc basis he did not possess the requisite qualification.

2. The facts and circumstances giving rise to this petition are that petitioner was appointed as Principal on ad-hoc basis in Government Industrial Training Institute vide order dated 05-10-1988 for a period of one year or till the regular selections are made by the Public Service Commission whichever was earlier.

3. As the vacancies could not be filled up by the Commission on regular basis, period of employment had been extended from time to time by passing

specific orders. While granting the re-employment, there has been an artificial break of two days' time and the petitioner continued to serve the institution at different places as is evident from different transfer orders till 26-10-2005. After serving 17 years on ad-hoc basis, the petitioner's service came to an end vide order dated 26-10-2005 only on the ground that his service could not be regularized as the regularization have been made in cases of other similarly situate persons on the ground that petitioner did not possess the requisite qualification for appointment on the said post on the date of initial appointment.

4. In fact, the petitioner has passed M.Sc. (Physics) with specialisation in Electronics and subsequent thereto M. Tech. from IIT, Khadakpur though the requisite qualification for the post of Principal as per rules was B. Tech. (Electronics) or any other equivalent qualification.

5. Being aggrieved, petitioner challenged the said order by filing writ Petition No. 72154 of 2005 wherein the interim order was passed on the basis of which petitioner continued to be in service and as an interim measure this Court directed the respondent authorities to re-examine the case of the petitioner. In pursuant thereto, the impugned order dated 1st June, 2007 has been passed refusing the relief of regularisation on the ground that on initial date of appointment the petitioner did not possess the requisite qualification i.e. B. Tech./B.E. (Electronics) or equivalent thereof.

6. We have heard Sri Shashi Nandan, learned Senior Counsel duly assisted by Sri P.S. Chauhan, learned counsel for the petitioner and Sri R.B. Pradhan, learned Standing Counsel for respondents.

7. It has been submitted on behalf of the petitioner that petitioner's experience of 18 years has completely been ignored and while recording the finding of fact that petitioner did not possess the qualification equivalent to requisite qualification, no reasons have been recorded. More so, the opinion sought by the respondents from the Vice Chancellor of Chaudhary Charan Singh University, Meerut and from the Vice Chancellor of U.P. State Technical University, Lucknow, the same had been in favour of the petitioner but benefit of their opinion has not been given to him. Thus, the petition deserves to be allowed.

8. On the contrary, Sri R.B. Pradhan, learned Standing Counsel for the respondents submitted that issue of equivalence of qualification etc. lies within exclusive domain of the authority and as the Court lacks expertise in the subject it should leave the matter to be decided by the Expert Committee. Therefore, petition lacks merit and is liable to be dismissed.

9. We have considered the rival submissions made by the parties and perused the record.

10. Undoubtedly, the issue of determination of equivalence of qualification has to be done exclusively by the Expert Committee and as the Court lacks experience/expertise in the subject, it remains outside the scope of judicial review in ordinary circumstances.

11. A Constitution Bench of the Supreme Court, in The University of Mysore & Anr. Vs. C.D. Govindarao & Anr., 1965 SC 491, held that in academic matters where the decision under challenge has been taken by the Committee of Experts, "normally the Court should be slow to interfere with the opinion expressed by the experts" unless there are allegations of mala fide against any of the members of the expert committee.

12. In Rajendra Prasad Mathur Vs. Karnataka University & Ors., AIR 1986 SC 1448, the Hon'ble Supreme Court held as under:-

"It is for each University to decide the question of equivalence and it would not be right for the Court to sit in judgment over the decision of the University because it is not a matter on which the Court possesses any expertise. The University is best fitted to decide whether any examination held by a University outside the State is equivalent to an examination held within the State having regard to the courses, the syllabus, the quality of teaching or instruction and the standard of examination. It is an academic question in which the Court should not disturb the decision taken by the University."

13. A similar view has been reiterated by the Hon'ble Supreme Court in the State of Bihar & Anr. Vs. Dr. A.K. Mukherjee & Ors., AIR 1975 SC 192; Dr. M.C. Gupta & Ors. Vs. Dr. Arun Kumar Gupta & Ors., (1979) 2 SCC 339; Dr. J.P. Kulshrestha & Ors. Vs. Chancellor, Allahabad University & Ors., AIR 1980 SC 2141; Dalpat Abasaheb Solunke & Ors. Vs. Dr. B.S. Mahajan & Ors., AIR 1990 SC 434; Dr. Uma Kant Vs. Dr. Bhika Lal Jain & Ors., AIR 1991 SC 2272; Bhushan Uttam Khare Vs. The Dean, BJ. Medical College & Ors., AIR 1992 SC 917; The Chancellor & Anr. Vs. Dr. Bijaynananda Kar & Ors., AIR 1994 SC 579; Central Areca Nut & Cocoa Marketing & Processing Co-operative Ltd. Vs. State of Karnataka & Ors., (1997) 8 SCC 31; Chairman, J & K State Board of Education Vs. Feyaz Ahmed Malik & Ors., (2000) 3 SCC 59; and Dental Council of India Vs. Subharti K.K.B. Charitable Trust & Anr., (2001) 5 SCC 486; wherein the Hon'ble Supreme Court held that in the matter of academic courses, the Court should not disturb the decision taken by the educational institution/State etc. unless there are compelling circumstances and sufficient material warranting the interference.

14. Admittedly, two opinions have been sought by the respondent authorities. It is evident from the report of the Vice Chancellor of Chaudhary Charan Singh University, Meerut dated 12-02-2002 that he has opined that the petitioner possessed the equivalent qualification. So far as the report of Vice Chancellor of U.P. Technical University dated 30th May, 2002 is concerned, a similar opinion has been expressed mentioning further that as the petitioner had been working for last 18 years and person having similar qualification had earlier been appointed as Principal on similar institutions, appropriate decision may be taken.

15. Respondent authorities passed the impugned order observing that expert opinions sought by them were not binding on them. The petitioner did not possess the requisite qualification at the time of initial appointment. Placing reliance upon

the judgement of Hon'ble Supreme Court in Secretary, State of Karnataka & Ors. Vs. Uma Devi & Ors., (2006) 4 SCC 1, the claim of the petitioner has been rejected. No reasons have been recorded for not agreeing with the opinions expressed by the two Vice Chancellors though deemed to be expert in their respective fields.

16. It is settled legal proposition that while passing such an order reasons have to be recorded, particularly when a person successfully hold the post for last 18 years and it has not been brought on record that the service rendered by the petitioner had been unsatisfactory or he had played any fraud/misrepresentation at the time of initial appointment. In such a fact situation, the authority ought to have considered that the State authority could not be permitted to take benefit on his own mistake, though estoppel does not lie against the statutory provisions.

17. While dealing with the similar situation, the Hon'ble Supreme Court in Bhagwati Prasad Vs. Delhi State Mineral Development Corporation, AIR 1990 SC 371, wherein the regularisation has been refused on similar ground held as under:

"The indisputable facts are that the petitioners were appointed between the period 1983 and 1986 ever since, they have been working and have gained sufficient experience in the actual discharge of duties attached to the posts held by them. Practical experience would always aid the person to effectively discharge the duties and is a sure guide to assess the suitability. The initial minimum educational qualification prescribed for the different posts is undoubtedly a factor to be reckoned with, but it is so at the time of the initial entry into the service. Once the appointments were made as daily rated workers and they were allowed to work for a considerable length of time, it would be hard and harsh to deny them the confirmation in the respective posts on the ground that they lack the prescribed educational qualifications."

18. Undoubtedly, regularisation has to be granted considering large number of factors including possession of requisite qualification on the date of appointment. But where incumbent had held the post successfully for about two decades, his experience on the post could have also been taken into consideration.

19. Thus, in view of the above, we are of the considered opinion that the respondent authorities while passing the impugned order did not record any reason for not agreeing with expert opinions and in case of doubt why they failed to refer the matter to Expert Committee for its opinion and under what circumstances experience possessed by the petitioner for about 18 years has been completely ignored.

20. In the facts and circumstances of the case, it is warranted that the matter be remanded for re-examination. As the petitioner is out of service, the case requires to be decided within a stipulated period.

21. Thus, in view of the above, we set aside the impugned order dated 01st June, 2007 and request the respondent no. 1 to re-determine the issue involved herein by making reference to an Expert Committee, by a speaking and reasoned order expeditiously, preferably within a period of three months from the date a

certified copy of this order is filed before him. Writ petition is **allowed** subject to the observation made.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.03.2008

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

Civil Misc. Writ Petition No. 12931 of 2008

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

Counsel for the Petitioner:
Sri Vishnu Behari Tiwari

Counsel for the Respondents:
S.C.

Constitution of India, Art. 23-'Begar'-petitioner appointed on honorarium basis for fixed terms-with stipulation no right for regularization-if management taking other work also-petitioner can refused to work or to file damage suit-but public exchequer can not be burdened nor it can be termed as 'Begar'-while complete ban on Ad-hoc appointment.

Held: Para 12

In the instant case, the aforesaid law does not apply at all. It is not the case or petitioner that he had been working as full time teacher or had ever been appointed as full time lecturer nor he has stated that he had been forced to work in contravention of the terms of his appointment letter or the Government Order under which he has been appointed.

Case law discussed:
AIR 1983 SC 328, 2000 (1) AWC 221, A.I.R, 1986 SC 584, (1986) 1 SCC 637, AIR 1982 SC 1473. 2000 (1) A.W.C. 221, (2004) 1 A.W.C. 321, (2002) 2 ESC 427

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

1. This writ petition has been filed seeking the following reliefs:

(i) Issue a writ or order or direction in the nature of mandamus to punish the respondents for contravention of Article 23 of the Constitution of India in accordance with law.
(ii) Issue a writ or order or direction in the nature of mandamus to pay the amount of compensation of Rs. 15 lacs to the petitioner from the respondents.

2. The aforesaid reliefs had been sought by the petitioner on the ground that the petitioner, who is duly qualified to be appointed as a teacher (lecturer) in a degree college affiliated to the University and aided by the State Government, had been exploited and forced to work at a meagre amount of Rs.5,000/= (enhanced to Rs.8,000/=) per month.

3. The petitioner applied in pursuance of an advertisement dated 22-04-1998 for appointment on honorarium for the subject of Botany in D.S.A. College, Unnao. He was appointed and joined on 01-08-1998. Since then the petitioner had been working continuously. In addition to teaching work, he has also been looking after the other responsibilities as being In-charge of game etc. The petitioner was paid honorarium at the rate of Rs.5,000/= per month upto 10th September, 2006 and subsequent thereto he is getting a sum of Rs.8,000/= per month. The petitioner claims that he had been working under compelling circumstances on meagre

salary, such an employment has to be termed as 'begar' which is prohibited under the provisions of Article 23 of the Constitution of India. Therefore, respondents should be prosecuted for contravention of the mandate of Article 23 of the Constitution of India and petitioner should be compensated by awarding Rs. 15 lacs as compensation.

4. Sri Vishnu Behari Tiwari, learned counsel for the petitioner contends that in the facts of this case the law laid down by the Hon'ble Supreme Court in the case of Sanjit Roy Vs. State of Rajasthan, AIR 1983 SC 328 as also the law laid down in Mukesh Chandra Vs. State of UP & Ors., 2000 (1) AWC 221, is squarely applicable and therefore petitioner is entitled for the aforesaid reliefs.

5. On the other hand, learned Standing Counsel has vehemently opposed the petition contending that the petitioner has not stated the correct facts leading to his appointment on honorarium, which in fact has been an arrangement under special circumstances. The U.P. Higher Education Service Commission duly constituted under the provisions of U.P. Higher Education Service Commission Act, 1980 could not complete the regular selection of teachers for certain reasons. The State Government as a special measure provided for re-employment of retired teachers initially under the Government Order of 1997 on part time basis fixing the remuneration on per lecture basis as prescribed by the University Grants Commission. As sufficient number of retired teachers were not available and some retired teachers were not willing to accept the job, the State Government came with a Government Order dated 17th April, 1998 providing for part time teachers on honorarium basis at the rate of Rs.100/= per lecturer (as prescribed by University Grants Commission) to the maximum of Rs.5,000/= in a month. The said Government Order specifically provides that the appointment would be for a fixed tenure and no renewal was to be granted. Though the Government Order did not put any embargo for such a candidate to apply afresh if the post was advertised for the next session. There was a clear cut stipulation that such appointees would not claim regularization. In such a fact situation, as the remuneration had been fixed on per lecture basis and since the engagement of the petitioner is not a full time basis, there is no obligation upon such person to remain on job after he has delivered the particular lecture as assigned to him by the authority concerned, therefore the engagement of the petitioner cannot be termed as a 'begar'.

6. It is further contended by learned Standing Counsel that if the petitioner had been looking after any other work of the institution on the asking of the management, it was a private arrangement between him and the Committee of Management for which he cannot burden the public exchequer, though he may seek relief against the management. Therefore, according to Standing Counsel petition is liable to be dismissed.

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

8. In Surinder Singh & Arn. Vs. The Engineer-in-Chief, C.P.W.D. & ors., A.I.R, 1986 SC 584, the Hon'ble Supreme Court with reference to its earlier

judgment in Dhirendra Chamoli & Anr. Vs. State of U.P., (1986) 1 SCC 637, rejected a similar contention observing as under:-

"This argument lies ill in the mouth of the Central Government for it is an all too familiar argument with the exploiting class and a welfare State committed to a socialist pattern of society cannot be permitted to advance such an argument. It must be remembered that in this country where there is so much unemployment, the choice for the majority of people is to starve or to take employment on whatever exploitative terms are offered by the employer. The fact that these employees accepted employment with full knowledge that they will be paid only daily wages and they will not get the same salary and conditions of service as other class IV employees, cannot provide an escape to the Central Government to avoid the mandate of equality enshrined in Article 14 of the Constitution. This Article declares that there should be equality before law and equal protection of law and implicit in it is the further principle that there must be equal pay for equal work of equal value..... It makes no difference whether they are appointed in sanctioned posts or not. So long as they are performing the same duties, they must receive the same salary and conditions of service as Class IV employees."

9. In Sanjit Roy Vs. State of Rajasthan, AIR 1983 SC 328, the Hon'ble Supreme Court considered the case providing exemption from labour laws, the provisions of Rajasthan Famine Relief Works Employees.(Exemption from Labour laws) Act, 1964 and held that as the said act deprived the workers of the benefit of the Minimum Wages Act, it was violative of Article 23 of the Constitution of India.

10. While deciding the said case, reliance had been placed upon earlier judgement in people's Union for Democratic Rights & Ors. Vs. Un ion of India & Ors., AIR 1982 SC 1473.

11. In Mukesh Chandra Vs. State of U.P. & Ors., 2000 (1) A.W.C. 221, a similar view has been reiterated by this Court holding that forcing a person to work for a meager sum violates Article 23 of the Constitution of India and directions were issued for prosecution of Mandi Samiti guilty of taking 'begar' by exploiting helpless unemployed persons.

12. In the instant case, the aforesaid law does not apply at all. It is not the case or petitioner that he had been working as full time teacher or had ever been appointed as full time lecturer nor he has stated that he had been forced to work in contravention of the terms of his appointment letter or the Government Order under which he has been appointed.

13. For the reasons best known to the petitioner, the institution, where petitioner claims to have been teaching is not impleaded as a party, only the society running the said institution has been impleaded.

14. We may clarify that it is at the option of such teacher appointed on per lecture basis to take as many lectures as he wants and for each lecture he is entitled to get Rs.100/= per lecture subject however the maximum of Rs.5,000/= (now enhanced Rs.8,000/=), meaning thereby that the day an appointee completes 50 lectures in a month or 80

lectures in a month, he has a right to refuse any further responsibility to teach the students and in such a situation the management would have to make alternative arrangement.

15. It may also be pertinent to mention here that under the statutory provisions there is a complete prohibition for ad-hoc appointment of teachers after the withdrawal of Section 16 of the Commissions Act. The Government Order under which the petitioner claims to have been appointed itself has been a subject matter of challenge before this Court in Malvika Shekhar Vs. Director of Higher Education, U.P. & Ors., (2004) 1 A.W.C. 321 wherein after making reference to the statutory provisions, the Court came to the conclusion that the appointment on honorarium is void ab initio as it is prohibited under the statute.

16. Another Division Bench of this court In Alok Singh Vs. State of U.P., (2002) 2 ESC 427 has held that the terms and conditions of appointment as a part time lecture under Government Order dated 7-4-1998 are entirely different vis-a-vis lecturers appointed on regular basis.

17. It is pointed out that the said judgement in Malvika Shekhar (supra) had been challenged before the Hon'ble Supreme Court and still pending consideration and the persons working on honorarium have been allowed to continue because of the interim order passed by the Apex Court in the said case.

18. In view of the above, the petition is devoid of merit and is accordingly dismissed. However, if the petitioner feels aggrieved that he is being exploited by the Committee of Management and is being forced to work in contravention of the said Government Order dated 17th April, 1998 or terms and conditions incorporated in his appointment letter, he is at liberty to approach the Civil Court for damages against the management of the college. However, he cannot be permitted to have any claim against the public exchequer.

Petition dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.03.2008

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

Civil Misc. Writ Petition No. 38949 of 2002

Smt. Sharda Saharan ...Petitioner
Versus
Director General of Police, U.P. and others ...Respondents

Counsel for the Petitioner:
Sri L.P. Naithani
Sri Pankaj Agarwal
Sri M.K. Gupta

Counsel for the Respondents:
Sri G.K. Singh
Sri L.M. Singh
S.C.

Code of Civil Procedure-Order XXI Rule 32-readwith Constitution of India Art. 226-Restoration of possession-civil court decreed the suit in favour of petitioner-upheld upto second Appeal-No SLP filed before Apex Court-private Respondents-on application under Section 156 (3) Cr.P.C. got arrested and during this period wrongly taken possession of the house in question-once decree became final-petitioner to approach before civil Court for execution-No separate suit or writ petition maintainable otherwise there will be endless litigation-petition dismissed.

Held: Para 8

Thus, we are of the opinion that the High Court cannot interfere in the matter in dispute in this writ petition because effective remedy has been provided under Order XXI Rule 32 C.P.C. for execution of decree for prohibitory injunction.

Case law discussed:

AIR 1991 SC 2251, AIR 1993 SC 1225, 1995 (2) ARC 48, 1995(1) ARC 553, 1995(1) ARC 476, 2007 (3) (SCALE) 465, 2001, (1) Punjab LR 23

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

1. The petitioner is aggrieved from her dispossession by respondent no.4 from House No. C-39, Sector 15, Noida, Gautambudh Nagar and by way of this petition, she has sought relief in the nature of mandamus directing the respondent nos. 1 to 3 to restore possession of her house by evicting respondent no.4 and his musclemen. She has also sought relief for investigation of the case by police and submit charge sheet in light of her application Annexure-8 to the writ petition.

2. We have Sri M.K. Gupta learned counsel for the petitioner, Sri G.K. Singh, Sri L.M. Singh and learned Standing Counsel for the respondents.

3. It appears from the record that the petitioner is owner of disputed house. The respondent no.4 wanted to interfere in her possession, therefore, she filed O.S. No. 842 of 1986 before Civil Judge, Ghaziabad which was decreed on 27.4.1991 and Civil Appeal No. 74 of 1991 preferred by respondent no.4 against the judgement and decree of trial court dated 27.4.1991 was dismissed by 7th Addl. District Judge, Ghaziabad vide order dated 23.1.1992.The respondent no.4 preferred Second Appeal No. 448 of 1991 before this Court, which too was dismissed on 18.2.2002. These judgements are Annexure-1 2, and 3 to the writ petition. In para 7 of the writ petition, it has been alleged that respondent no.4 did not prefer any SLP before Hon'ble Supreme Court against the judgement of High Court. When respondent no.4 failed in his efforts to get property in question from civil side, he moved an application, under Section 156 (3) Cr.P.C before Chief Judicial Magistrate, Gautambudh Nagar, copy of which is annexure-4. The case was registered by the police and the petitioner and her husband apprehending their arrest, moved the High Court under Section 482 Cr.P.C. When they were present in Allahabad in connection with their petition under Section 482 Cr.P.C, the respondent no.4 forcibly occupied the house in question. The petitioner moved the police authorities but of no avail, hence she filed this writ petition.

4. The respondent no.4 filed affidavit along with an application to recall the order dated 4.10.2002 and in that affidavit, he again challenged title of house in question. From the judgement Annexure1 to 3, it is evident that title and possession of petitioner has been upheld by the trial court as well as first appellate court and High Court. There is nothing on record to show that the judgement of High Court was challenged by the respondent no.4 before the Apex Court, as such, the decree passed by 4th Addl. Civil Judge (S.D.), Ghazlabad on 27.4.1991 in O.S. No. 842 of 1986 was final. The judgement of trial court shows that plaintiff had filed suit for permanent prohibitory injunction restraining respondent no.4 from

interfering with her title and possession over the house in question. The legal position is very clear. When decree-of civil court has been passed and it has become final, same can be executed by the decree-holder against the judgement-debtor. For this purpose, no fresh suit or writ petition need be filed. The relief sought in the instant writ petition for restoration of possession is not maintainable because the effective remedy to get decree of civil court complied with has been provided In C.P.C. Learned counsel for the respondent no.4 has cited **AIR 1991 SC 2251 Ghan Shyam Das Gupta and another Vs. Anant Kumar Sinha and others**, in which the Apex Court has clearly opined that if the elaborate and exhaustive provision has been made in C.P.C. for execution of decree, the writ petition cannot be entertained. Similar view has been taken by the Apex Court in the case of **Mohan Pandey Vs. Usha Rani Rajgaria; AIR 1993 SC 1225**. In the said case, it has been observed that when there is a dispute between two private persons relating to immoveable property and the eviction suit directly covering the property in dispute is pending in Civil Court, the writ petition for restraining the respondents from disturbing lawful possession of the petitioner alleging some complaints made by respondents and the action taken by police thereon, is not maintainable. Learned counsel for the petitioner has cited following cases:

1. **Mahish Goel Vs. Mohan Lal Mehra and others; 1995 (2) ARC 48**
2. **Mohan Lal Mehra Vs. State of U.P. And others; 1995(1) ARC 553**
3. **Jai Prakash Vashisht Vs. Addl. District Magistrate(E) Meerut and others; 1995(1) ARC 476.**

We have gone through these judgements. The facts were different. In the said cases, prospective allottee had occupied building and there was no decree of civil court against them, therefore, court interfered.

5. Learned counsel for the petitioner has further cited case of **M/s Popcorn Entertainment and another Vs. City Industrial Development Corporation and another 2007 (3) (SCALE) 465**, In which the Apex Court interfered in the matter relating to contract. The was also no decree of civil court.

6. The facts of the present case before us are different. In this case, the petitioner filed suit against the respondent no.4 for permanent prohibitory injunction. The title and possession of petitioner was upheld by the trial court as well as first and second appellate court. Since respondent no.4 was party to that civil litigation, therefore, decree passed by civil court was binding upon him. It appears that respondent no.4 has not obeyed decree rather disobeyed it and occupied the house of the petitioner for which he had been permanently restrained by the civil court, therefore, the petitioner has got effective remedy to approach the court, which passed the decree, for execution under Order XXI rule 32 C.P.C which runs as under:

Rule-32. Decree for specific performance for restitution of conjugal rights, or for an injunction-{1) Where the party against whom a decree for the specific performance of a contract, or for

restitution of conjugal rights, or for an injunction has been passed, has had an opportunity of obeying the decree and has wilfully failed to obey it, the decree may be enforced (in the case of a decree for restitution of conjugal rights by the attachment of his property or, in the case of a decree for the specific performance of a contract or for an injunction) by his detention in the civil prison, or by the attachment of his property or by both.

(2) Where the party against whom a decree for specific performance or for an injunction has been passed is a corporation, the decree may be enforced by the attachment of the property of the corporation or, with the leave of the court, by the detention in the civil prison of the directions or other principal officers thereof, or by both attachment and detention.

(3) Where any attachment under sub-rule (1) or sub-rule (2) has remained in force for (six months) or P) if the judgement debtor has not obeyed the decree and the decree-holder has applied to have the attached property sold, such property may be sold; and out of the proceeds the court may award to the decree-holder such compensation as it thinks fit, and shall pay the balance (if any) to the judgement-debtor on his application (A, AP,D, HP, K. MP, M. PU).

(4) Where the judgement-debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or where, at the end of (six months) (D, HP, MP, PU) from the date of the attachment,(AP, K, M) no application to have the property sold has been made, or if made has been refused, the attachment shall cease.

(5) Where a decree for the specific performance of a contract or for an injunction has not been obeyed, the court may, in lieu of or in addition to all or any of the process aforesaid, direct that the act required to be done may be done so far as practicable by the decree-holder or some, other person appointed by the court, at the cost of the judgement-debtor, and upon the act being done the expenses incurred may be ascertained in such manner as the court may direct and may be recovered as if they were included in the decree.

(Explanation- For the removal of doubt, it is hereby declared that the expression" the act required to be done" covers prohibitory as well as mandatory injunctions).

ILLUSTRATION

A, a person of little substance, erects a building which renders uninhabitable a family mansion belonging to B, A in spite of his detention in prison and the attachment of his property, declines to obey a decree obtained against him by B and directing him to remove the building. The Court is of opinion that no sum realizable by the sale of A's property would adequately compensate B for the depreciation in the value of his mansion. B may apply to the court to remove the building and may recover the cost of such removal from A in the execution proceedings"

7. Learned counsel for the petitioner has argued that provisions of Order XXI Rule 32 C.P.C are applicable in the cases where decree for mandatory injunction has been passed, but this argument is not acceptable in view of explanation added to said Rule by C.P.C.(Amendment) Act 2002 (22/2002 w.e.f 1.7.2002). Learned counsel for the petitioner has further argued that under said provision, the

possession cannot be restored but we are not going to accept this argument. Where a decree-holder has been dispossessed otherwise than in due course of law, he can get possession by filing an application, under Order XXI Rule 32 C.P.C In **Smt. Kasturi Devi and another vs. Harbant Singh, AIR 2000 Punjab** and **Haryana 271) and Nanda Vs. Ram Dhan 2001, (1) Punjab LR 23** it has been held that where judgement-debtor in violation of decree has entered into possession forcibly, civil court cannot sit idle as a mere spectator. It has every power to restore possession back to the decree-holder. The civil court can refer the matter to the police for implementation of decree. If any person has been prohibited by the civil court from doing a particular act, disobedience on his part is actionable under the said provision. The illustration added to the aforesaid provision has clarified the position. Now there is no doubt that the civil court has every power to put the decree-holder in possession of the property in question which was subject matter of dispute between the parties and the judgement-debtor was restrained from interfering with the peaceful possession of the plaintiff. If the plaintiff is allowed to start fresh litigation in respect of same property, on each and every instance of its disobedience by the judgement-debtor, there would be no end of litigation. Any proceeding taken by the police or criminal court at the instance of judgement-debtor has no effect on the decree passed by the civil court.

8. Thus, we are of the opinion that the High Court cannot interfere in the matter in dispute in this writ petition because effective remedy has been provided under Order XXI Rule 32 C.P.C. for execution of decree for prohibitory injunction.

9. As regard the direction to the police authorities about registration of case and submitting charge sheet on the application of petitioner is concerned, she has also got alternative remedy. If the police has not registered the case on her application against respondent no.4, she can very well approach the Magistrate concerned under section 156(3) Cr.P.C or file complaint against him and the court will take appropriate action in accordance with law.

10. In view of above, this writ petition is dismissed.

No order is passed as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.04.2008

BEFORE
THE HON'BLE RAKESH SHARMA, J.

Civil Misc. Writ Petition No. 12197 of 2008

Smt. Geeta Singh ...Petitioner
Versus
State of U. P. and others ...Respondents

Counsel for the Petitioner:
Sri Niraj Tiwari

Counsel for the Respondents:
S.C.

U.P. Recruitment Dependant of Government Servant (Dying in Harness) Rules 1974-Daughter-in law-claim appointment on death of her father-in law-husband of the claimant already expired-rejection of claim on hyper-technical ground-that the daughter-in law is not within the meaning of family

member-illegal non consideration of financial crises-dire need of employment-order impugned quashed-direction for fresh consideration issued.

Held: Para 9

In the present case, the family has no source of income and as such it is in dire need of some employment and source of income. All these factors have been ignored by the appropriate authority-respondents and a hyper-technical view has been taken in the matter while rejecting the application for compassionate appointment. In view of the above discussions, the writ petition deserves to be allowed.

Case law discussed:

2006 (2) 1972, 2008 (2) ADJ 428 (D.B.), 2008 (2) ADJ 433 (DB)

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

1. Heard Sri Niraj Tiwari, learned counsel for the petitioner and learned Standing counsel on behalf of the respondents.

2. Learned Standing counsel, who represents the respondents, was granted one month's time to file a counter affidavit, but no counter affidavit has been filed. The petitioner has brought to the notice of the Court various judgments by which the controversy raised in this petition *"whether the daughter- in- law who becomes a member of her husband's family after marriage is included within the definition of family of her father-in-law*" has been set at rest.

3. The reference of these judgments are as follows:

Smt. Sanyogita Rai Versus **State of Uttar Pradesh and others** reported in 2006 (2) 1972, **Zila Panchayat Kaushambi and another vs. Lalti Devi and another**-2008 (2) ADJ 428 (DB), **CMD, U.P. Power Corporation Ltd. Lucknow and others Vs. Jitendra Pratap Singh and another,** 2008 (2) ADJ 433 (DB).

4. It emerges from the record that the petitioner Smt. Geeta Singh's father-in-law, Anil Kumar Singh, who was working as Assistant Development Officer (Co-operative) had died in harness on 30.4.2007, leaving behind his wife Smt. Naina Singh and daughter in-law, Smt. Gita Sjngh. It is noteworthy that late Anil Kumar Singh's son, namely, Shiv Pratap Singh (husband of petitioner Smt. Gita Singh) had died prior to his father Anil Kumar Singh's death. Thus the dependants of the family comprises of two ladies, namely, Smt. Naina Singh w/o the deceased employee and young daughter-in-law, Smt. Gita Singh, having three minor children and other members to sustain in life. Wife of the deceased employee- Sri Anil Kumar Singh approached the concerned authorities i.e. Joint Registrar Cooperative Societies, U.P. Lucknow and District Assistant Registrar of the same department seeking compassionate appointment for the educated daughter-in-law to enable the family to sustain. The young daughter-in-law is having intermediate qualification and is eligible for providing appropriate employment in the department.

5. In the relevant documents relating to payment of pensionary benefits, G.P.F., Gratuity etc., the petitioner, daughter-in-law, has been shown as one of the nominees of late Sri Anil Kumar Singh. It appears that the matter was referred to the State Government after submitting the application by mother-in-law, Smt. Naina Singh for appointment of the petitioner,

daughter-in-law of late Anil Kumar Singh, which was rejected on the ground that daughter-in-law cannot be treated to be a family member of the deceased employee. The daughter-in-law does not become the family member according to the definition clause of U.P. Recruitment of Dependants of Government Servants (Dying in Harness) Rule, 1974, as it has not been included in the definition of the family.

6. As per learned counsel for the petitioner, the impugned order passed by respondents declining to provide compassionate appointment to the petitioner is wholly illegal and is against the very spirit of the judgments rendered by this Court, as indicated in the forgoing part of this judgment and order.

7. A Division Bench of this Court has held in the case of ***Zila Panchayat, Kaushambi and another vs. Lalti Devi and another***, (supra) that daughter in law who becomes a member of the family of her husband has to be included in the definition clause of the family of father-in-law.

8. Similar view has also been expressed in the judgment rendered by this Court in the case ***Chairman/M.D. U.P. Power Corporation Ltd. Lucknow vs. Jitendra Pratap Singh*** (Supra), in which it has been held that if the person who is claiming compassionate appointment is a needy person, then the respondent-authority must consider the case of such candidate sympathetically and provide compassionate appointment to such needy person.

9. In the present case, the family has no source of income and as such it is in dire need of some employment and source of income. All these factors have been ignored by the appropriate authority-respondents and a hyper-technical view has been taken in the matter while rejecting the application for compassionate appointment. In view of the above discussions, the writ petition deserves to be allowed.

10. Accordingly, the writ petition is allowed. The impugned orders dated 8.1.2008 passed by respondent no.2 and order dated 31.1.2008 passed by respondent no.3 are hereby quashed. However, in the interest of justice, the matter is remanded back to the respondents to take fresh decision in the matter in the light of the judgments cited above which shall be produced by the petitioner before the appropriate authority by supplying photo copies of the judgments and appropriate orders shall be passed within two months from the date of production of a certified copy of this order before the respondents.

11. Certified copy of this judgment and order shall be submitted before respondent no.3 and photo copies of the order may be sent to respondent nos.1 and 2 enabling them to take appropriate action in the matter within the stipulated period. If the petitioner is found suitable, she shall be provided compassionate appointment under the Dying in Harness Rules and her case shall not be rejected only on the ground that she being not the member of the family of deceased Sri Anil Kumar Singh.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 18.04.2008

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

Criminal Misc. Recall Application no. 265084 of 2007
IN
Criminal Misc. Application No.26431 of 2007

Ram Kishan ...Applicant
Versus
State of U.P. & another ...Opposite parties

Counsel for the Applicant:
Sri T.K. Misra
Sri R.M. Srivastava

Counsel for the Opposite Parties:
Sri Shashi Kant Shukla
Sri Ratnesh
A.G.A.

Code of Criminal Procedure-Section 482-Practice of Procedure-earlier application dismissed having no force-subsequent application on the same set of facts by concealing earlier application-amounts to fraud on court-not maintainable-recall application-allowed-direction issued to Registry-to ensure the signature or Thumb impression of the applicant or his pairokar if in Jail-No power of appearance accepted unless duly signed by the person instructing the counsel for appearance-court expressed its great concern for necessary amendment in relevant Rules.

Held: Para 15

Before parting with the judgement, I would like to observe that in criminal cases also there should be a provision requiring the party to sign or put thumb mark on the power/ memo of appearance/Parcha filed by the Advocate except in those cases where accused is in Jail so as to avoid taking of such excuses in future alleging that the power filed by Advocate was not valid and that he had no knowledge of institution of the case. Even in those cases where the accused is in Jail, the Power in favour of the counsel must bear the signature/ thumb mark of the pairokar with his full name and address with particulars of his relationship with the accused in Jail.

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

1. Complainant Satish Kumar Dubey, arrayed as opposite party no. 2 in Crl. Misc. Application No. 26431 of 2007 has filed Criminal Misc. Recall Application No. 265084 of 2007 for recall of the order dated 31.10.2007 passed by Hon'ble S.S. Kulshrestha, J. in the above Criminal Misc. Application no. 26431 of 2007, Ram Kishan Vs. State of U.P. and another.

2. The facts relevant for disposal of this application are that Sri Satish Kumar Dubey had moved an application before the S.S.P. Ghaziabad on 17.6.2006 against the accused Ram Kishan (applicant in Criminal Misc. Application No. 26431/07) and co accused Damodar Das, Suresh Chand Dobariyal, P.K. Banerji, K.C. Dobariyal and K.K. Kaushik with these allegations that he is a member of *'Vartalok Sahkari Samiti Vasundhara'*, P.S. Indrapuram District Ghaziabad and the accused are office bearers of that Society. He and other members of that Society had deposited approximately rupees one Crore in respect of their Flats and they had details of those deposits with them. However, upon inquiry made from the authorities of the Housing Board they came to know that no amount had been deposited by the Society with the Housing Board and in spite of repeated requests,

these office bearers of the Society were not executing any sale deed in favour of their members nor they were depositing the amount with the Housing Board, nor they were giving any satisfactory reply, and, in this way, they had committed criminal breach of trust in respect of that amount of one crore rupees and they were getting the flats released from the Housing Board on the basis of fictitious documents. It was, therefore, prayed that action should be taken in the matter against the accused persons.

3. On the basis of the orders of the S.S.P. Ghaziabad passed on the aforesaid application, the police of P.S. Indirapuram District Ghaziabad registered a F.I.R. against the accused persons on 1.7.2006 as case Crime No. 384/06 under sections 420,467,468, 471 I.P.C P.S. Indirapuram and investigated the same. After completion of investigation, the I.O. submitted a charge sheet against all the above named accused persons in the court of C.J.M, Ghaziabad under Sections 420, 467, 468, 471 I.P.C. The Chief Judicial Magistrate took cognizance on that charge sheet on 9.8.2007.

4. Aggrieved with the above order taking cognizance, all the above named accused persons filed an application, being Criminal Misc. Application No.22268 of 2007, Damodar Das Upadhyay and others Vs. State of U.P. and another under Section 482 Cr.P.C. through Sri Anurag Pathak Advocate on 5.9:2007. Ram Kishan (the sole applicant in Crl. Misc. Application no. 26431/07) was impleaded as applicant no. 6 in this Crl. Misc. Application no.22268/07. Sri Kamal Krishna, Advocate had put in appearance on behalf of the complainant opposite party no. 2 at the time of hearing on admission of this application, and Hon'ble Vinod Prasad, J., after hearing both the parties finally disposed of the above application at the stage of admission on 11.9.2007 with the following order:

"Sri Kamal Krishna Advocate has filed his power on behalf of the respondent, which is taken on record.

Heard learned counsel for the applicants and learned AGA.

The applicants through this application have prayed for quashing of the charge sheet in Case crime no. 384/06 under sections 420,467,468,471 I.P.C. pending in the court of CJM Ghaziabad.

There is no reason to quash the charge sheet. This, application is merit less. The said prayer is refused.

However, it is directed that if the applicants appear or surrender before the trial court on or before 21.9.2007 and move an application for bail in the aforesaid case, the same shall be disposed off as expeditiously as possible, if possible on the same day by both the courts below, after giving opportunity of hearing to the prosecution.

Non bailable warrant issued against the applicants shall remain in abeyance till 21.9.2007 to enable them to appear before the court concerned and to seek bail. In case of default property of the applicants shall be attached forthwith.

With the aforesaid direction this application is finally disposed of."

5. It is apparent form perusal of the above order that the prayer for quashing of the charge sheet was refused on merits but it was directed that if the applicants appear or surrender ,before the Court on or before 21.9.07 and move an application "for bail, the same shall be disposed of as

expeditiously as possible, and if possible on the same day, by both the courts below, after giving opportunity of hearing to the prosecution and execution of non bailable warrant was directed to be stayed till 21.9.2007 to enable the applicants to appear before the trial Court and to apply for bail. It was further ordered that in case of default property of the applicants shall be attached forthwith.

6. It appears that the accused applicants did not comply with the above order and Ram Kishan, who was applicant no. 6 in the above case (Crl. Misc. application no. 22268/07), moved another application being Criminal Misc. Application No.26431/07 under section 482 Cr.P.C. in this court on 29.10:2007 for quashing of the above charge sheet, concealing the filing of aforesaid Criminal Misc. Application No. 22268/07 and obtained orders from Hon'ble S.S. Kulshrestha, J. staying further proceedings of Criminal Case No. 13608 of 2007 under sections 420,467,468 and 471 I.P.C. , P.S. Indirapuram Ghaziabad pending in the court of Addl. District Judge Ghaziabad at that time. When notice of this case was received by opposite party no.2 Satish Kumar Dubey, he moved Criminal Misc. Recall Application No. 265084 of 2007 before this court for recalling the stay order dated 31.10.07 alleging that it had been obtained by concealing the material facts as well as the filing of previous Criminal Misc. Application no. 22268/07 before this court and so the stay order dated 31.10.2007 should be vacated and suitable action may be taken against Ram Kishan for filing a false affidavit in Crl. Misc. Application No. 26431/07.

7. A counter affidavit has been filed by Ram Kishan in this Misc. recall application no. 265084/07 in which he has alleged that he had never instructed any person to move Criminal Misc. Application No. 22268/07 and this application had been moved without his instruction and so the order passed in that case was not binding upon him and he has legal right to move the present application no. 26431/07 and as such no illegality was committed by him by moving this application.

8. I have heard the learned counsel for both the parties and perused the record.

9. It is to be seen that Criminal Misc. Application No. 22268 of 2007 was filed on behalf of all the six accused persons of Case crime no. 384 of 2006 P.S. Indirapuram District Ghaziabad through Sri Anurag Pathak Advocate. The Parcha (power) filed by Sri Anurag Pathak on behalf of the applicants is on record and on this Parcha it is written that he was filing this Memo on behalf of all the accused applicants as instructed by their pairokar. This application is supported by an affidavit of Sri Suresh Chandra Dobariyal, applicant no. 2 in that case and para 1 of his affidavit runs as under:

"That the deponent is the applicant no. 2 and pairokar of remaining applicants in the above noted case and as such he is well acquainted with the facts of the case deposed to below."

10. It is thus clear that the above application under section 482 Cr.P.C. was filed on behalf of all the applicants and Sri Suresh Chanra Dobarlyal, who had

filed his affidavit in support of that application was acting as pairokar on behalf of all the applicants including the present applicant Ram Kishan. It is true that no Vakalatnama or memo of appearance signed by the applicants was filed in that case but there has been an old practice in the court to accept memo of appearance signed by Advocates in criminal cases in which the Advocates state as to on whose behalf they are appearing in the case and that authority is considered to be valid without insisting for signatures of the party. The same practice was adopted in the present case also, and so it can not be said that the previous application no. 22268 of 2007 was filed without authority of Ram Kishan. It is noteworthy that all the accused applicants including Ram Kishan were office bearers in the same Society i.e. '*Vartalok Sahkari Samiti Vasundhara*', P.S. Indirapuram District Ghaziabad, hence it can not be imagined that other office bearers of the Society would have included the name of Ram Kishan in this case without his consent.

11. It is also to be seen that the aforesaid Miscellaneous application no. 22268/07 under section 482 Cr.P.C. was decided on merits by Hon'ble Vinod Prasad, J. vide his order dated 11.9.2007 in which he held that no case for quashing of the charge sheet was made out. He, however, provided an opportunity to the applicants of that case to surrender before the court by 21 .9.2007 and apply for bail. It was further ordered that the bail application moved by them be decided expeditiously, if possible on the same date by both the courts below and execution of non bailable warrant against them shall remain stayed till 21.9.2007 to enable them to appear before the court concerned.

12. If further appears from record that the applicants did not appear before the court concerned by the aforesaid date and as such they moved another application on 24.9.07 Crl. Misc. Application no. 228276/07 for extension of time for their appearance before the court. In this application also, Ram Kishan has been arrayed as applicant no. 6 and it has been moved by the same counsel Sri Anurag Pathak. However, none appeared to press this application for extension of time though it was listed for hearing on 5.10.07, 9.10.07, 10.10.07 and 11.10.07 and so ultimately it was ordered to be listed in ordinary course. On the other hand Ram Kishan moved another application (No. 26431/07) under section 482 Cr.P.C, on 29.10.2007 through) Sri Rakesh Mohan Srivastava Advocate on which the stay order dated 31.10.2007 was passed by Hon'ble S.S. Kulshrestha, J., after admitting the application under section 482 Cr.P.C. However, the noteworthy aspect of this case to be seen is that with this application Ram Kishan has not filed any Vakalatnama or Parcha signed by him but a memo of appearance has been filed by Sri Rakesh Monan Srivastava, Advocate who has stated in it that he was appearing on behalf of the applicant as instructed by Ram Kishan. Thus, the position is that in both the cases, there is no written authority of Ram Kishan and both the counsel have stated that they were appearing in the case as instructed by the party.

13. In this way, it becomes clear that in the previous, Crl. Misc. application No. 22268/07 filed under section 482Cr:P.C. the memo of appearance (Parcha) was

filed under instructions of the applicants of that case including Ram Kishan also, who has filed the present Crl. Misc. application No. 2643/07 and, therefore, he can not be permitted to say that Crl. Misc. application No. 22268 of 2007 was moved without his instructions. When that application, filed under his instructions, had been decided finally with certain directions and when Ram Kishan instead of following those directions moved this fresh Crl. Misc. application No. 26431 of 2007 under section 482 Cr.P.C. concealing the order passed by this court on the previous Crl. Misc. Application no. 22268/07, he is guilty of committing fraud with the court, and so the order passed on the subsequent Crl. Misc. application No. 26431 of 2007 dated 31.10.2007 which has been obtained by committing fraud with the court, can not be permitted to sustain and it is liable to be vacated.

14. Therefore, the application for recall of the interim order dated 31.10.07 passed in Criminal Misc. Application No.26431 of 2007 deserves to be allowed and the interim order dated 31.10.07 passed in the above case is liable to be vacated. Since Crl. Misc. application No. 26431 of 2007 has been filed for the same relief which was sought in Crl. Misc. Application No. 22268/07 concealing the fact of institution of that previous application and concealing the order passed in that case, the present application no. 26431/07 is not maintainable and it is hereby dismissed. The Criminal Misc. Recall Application No. 265084 of 2007 is allowed and the order dated 31.10.2007 passed in Crl. Misc. Application No. 26431/07 stands recalled.

15. Before parting with the judgement, I would like to observe that in criminal cases also there should be a provision requiring the party to sign or put thumb mark on the power/ memo of appearance/Parcha filed by the Advocate except in those cases where accused is in Jail so as to avoid taking of such excuses in future alleging that the power filed by Advocate was not valid and that he had no knowledge of institution of the case. Even in those cases where the accused is in Jail, the Power in favour of the counsel must bear the signature /thumb mark of the pairokar with his full name and address with particulars of his relationship with the accused in Jail.

16. The Registrar General of the Court is, therefore, directed to take necessary steps for making suitable amendments in the relevant Rules in this regard with the assent of the Hon'ble Court. Recall Application allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.04.2008

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

Civil Misc. Writ Petition No.18568 of 2008

Noor Ali Ansari ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Arvind Srivastava
Sri Z.A. Siddiqui

Counsel for the Respondents:
Sri H.N. Singh
Sri R.B. Pradhan
S.C.

Constitution of India, Art. 226-Principle of rounding up-petitioner appeared in written examination-got 54.7% marks-No call given for interview-as minimum eligibility of marks is 55%-the portion falling less than half to be ignored-but the half or more than half be treated as one-if the marks 54.7% work out-it shall be 55%.

(B) Constitution of India-Art. 226-Right for appointment-petitioner even if obtained minimum cut off mark-on basis of rounding up marks-can not be allowed in view of the fact those candidates who have obtained 54.89% or 54.99% marks-can not be superseded as they are not before the Court.

Held: Para 17 & 18

In a competition like this, there may be large number of candidates/applicants who might have secured marks equal to the petitioner or between 54.75 and 54.99 percent. No factual foundation has been laid down to the effect that in case his marks are rounded up to 55 percent, no person either of general category or to which the petitioner belongs would stand superseded.

In such a fact situation, it would be greatest injustice to those who had secured better marks than petitioner, but could not secure 55 percent, the plea of the petitioner is liable to be rejected on this ground also. The validity of the advertisement has been challenged on various grounds inter-alia that in the subsequent advertisement, cut off marks have been reduced from 55 percent to 50 percent. A notification which earlier cannot be challenged on a ground that a different criteria had been adopted by the competent authority at a subsequent stage. More so, the process of selection starts from the issuance of the advertisement and is to be complied with in conformity with the terms and conditions incorporated therein. If for certain reasons, the cut off marks have been reduced in subsequent advertisement, petitioner cannot take benefit thereof.

Case law discussed;

1995 AWC, 744, (2004) 2 UPLBEC 1445, JT (1998) 3 SC 223, 2005, ALJ 284, (2005) 2 SCC 10, (2008) 1 SCC 233, (2003) 1 UPLBEC 427, AIR 1993 Alld 249, (1992) 1 UPLBEC 636

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

1. Petitioner is said to be a member of Other Backward Class. He made an application for being considered to the post of Lecturer in terms of Advertisement No. 38 published by the Uttar Pradesh Higher Education Services Commission.

2. According to the petitioner, he was successful in the written examination, but was not called for interview on the ground that he did not fulfil the minimum standard prescribed for the post in question i.e. did not secure 55 percent qualifying marks. To be precise, the controversy relates to rounding up the fraction of the, marks obtained by the petitioner in respect of his Graduate examination wherein he obtained 54.7 percent. His contention is that it should be read as 55 percent which is tile minimum standard prescribed for the post in question in terms of the aforesaid Advertisement.

3. We have heard Shri Arvind Srivastava, learned counsel for the petitioner; Shri H.N. Singh for U.P. Higher Education Service Commission and Shri R.B. Pradhan, learned Standing Counsel.

4. The facts are not in dispute. The minimum marks required for being considered for the post in question is 55 percent. The petitioner has admittedly

obtained less than 55 percent, i.e. 54.75 percent.

5. The word 'minimum' has been defined in The New Lexicon Webster's Dictionary Deluxe Encyclopedic Edition at page 63 and means "the least possible amount, number or degree". Thus, it is clear that 55 percent is the least possible percentage which the candidate should obtain for being considered eligible for the post in question.

6. In the opinion of the Court, the process of rounding up, in the facts of the case, has no application inasmuch as percentage prescribed is followed by the word minimum' under the aforesaid advertisement and the Rules applicable.

7. The Regulations framed under the U.P. Intermediate Education Act, 1921, particularly, Regulations 2, 4 and 10 of Chapter III provide for promotion to Class III post from Class IV post contains a note that while determining 50 percent posts, the portion falling less than half, will be left out and the portion of half or above half will be considered to be one. Thus, in many cases, the Legislature itself has taken care of providing for solution to such a problem. This aspect has been considered by this Court in Kedar Nath Maurya & ors Vs. District Inspector of Schools & Ors., 1995 AWC, 744.

8. In Prana Vir Singh (Dr.) Vs. Chancellor, Chandra Shekhar Azad University of Agriculture and Technology, Lucknow & Ors, (2004) 2 UPLBEC 1445, a similar controversy was raised. This Court placing reliance upon the judgment of the Hon'ble Supreme Court in Post Graduate Institute of Medical Education and Research, Chandigarh Vs. Faculty Association & Ors., JT (1998) 3 SC 223, held that while making such calculation of posts to be filled up by reserved category candidates, the Court has to bear in mind that it should not exceed the permissible limit fixed for reserved category.

9. In Chandra Kant Bhardwaj Vs. State of U, P. & Anr., 2005, ALJ 284, this Court applied the theory of rounding up while determining the number of vacancies. However, this was a matter determining the number of vacancies. Same formula may be applicable while determining the number of required votes for sending the notice for holding the no confidence motion or for removal of an elected office bearer under various statutes.

10. Counsel for the petitioner has made reference to the judgments of the Hon'ble Supreme Court in the cases of State of U.P. & Anr. Vs. Pawan Kumar Tiwari & Ors., (2005) 2 SCC 10; Bhudev Sharma Vs. District Judge, Bulandshahr & Anr., (2008) 1 SCC 233, and State of Punjab & Anr. Vs. Asha Mehta, (1997) 11 SCC 410 and has contended that if the fraction is .5 or above it has to be rounded up so as to read as 1. On the same analogy, the petitioner contends that the marks obtained by the petitioner should be rounded up and should be read as 55 percent.

11. So far as the judgments in the State of U.P. & Anr. Vs. Pawan Kumar Tiwari & Ors (supra) and Bhudev Sharma Vs. District Judge, Bulandshahr & Anr (supra) are concerned, they are clearly distinguishable from the facts of the present case inasmuch as in the aforesaid cases, the issue for consideration was

regarding the percentage of reservation provided for a particular category. The percentage so provided was not qualified or to be governed by the word minimum, The principle of rounding up is based on logic and common sense: if part is one-half or more, its value shall be increased to one and if part is less than half then its value shall be ignored. More so, while making such a calculation, the Court must keep in mind that the number of reserved vacancies do not exceed the permissible limit i.e. 50 percent.

12. In Pawan Kumar Tiwari (supra), the Hon'ble Apex Court refused to round up 1.86 to 2 for Scheduled Tribes observing that no candidate belonging to Scheduled Tribe had challenged the determination, therefore, it is evident from the aforesaid judgment that the law laid down therein is not of universal application.

13. So far as the judgment in the case of State of Punjat1 & Anr. Vs. Asha Mehta (supra) is concerned, the judgment specifically records that it had been a procedure of the Public Service Commission in all other cases, therefore, the Hon'ble Supreme Court refused to entertain the appeal without recording anything further merely being its order on the principle that practice adopted for a long period should not be disturbed. Such a judgment cannot be relied upon by the petitioner except in support of the contention which has been canvassed before us.

14. The case in hand is squarely covered by the Division Bench judgment of this Court in Vani Pati Tripathi Vs. Director General, Medical Education and Training, Jawahar Bhawan, Ashok Marg, Lucknow & Ors., (2003) 1 UPLBEC 427, wherein this Court considered large number of its earlier judgments making calculations to find out the exact number of members required for removal of an elected office bearer of the local bodies, particularly, Wahid Ullah Khan Vs. District Magistrate, Nainital & Ors, AIR 1993 Alld 249 and Rajan Seth Vs. State of U.P. & Ors., (1992) 1 UPLBEC 636 and came to the conclusion that where inter-se merit of the candidates is to be examined, the rounding up theory is not applicable. In the said case, the candidate seeking admission in the MBBS course could not secure the exact qualifying marks i.e. at least 50 percent and her contention that marks secured by her to the extent of 49.67 percent be rounded up and be read as 50 percent was rejected.

15. It is admitted by Shri Arvind Srivastava, learned counsel for the petitioner that against the said judgment and order in Vani Pati Tripathi (supra), the Hon'ble Supreme Court has rejected the Special Leave Petition.

16. In view of the above, we do not see any cogent reason to take a view contrary to the view taken by the Division Bench of this Court earlier in the case of Vani Pati Tripathi (supra).

17. In a competition like this, there may be large number of candidates/applicants who might have secured marks equal to the petitioner or between 54.75 and 54.99 percent. No factual foundation has been laid down to the effect that in case his marks are rounded up to 55 percent, no person either of general category or to which the petitioner belongs would stand superseded.

18. In such a fact situation, it would be greatest injustice to those who had secured better marks than petitioner, but could not secure 55 percent, the plea of the petitioner is liable to be rejected on this ground also. The validity of the advertisement has been challenged on various grounds inter-alia that in the subsequent advertisement, cut off marks have been reduced from 55 percent to 50 percent. A notification which earlier cannot be challenged on a ground that a different criteria had been adopted by the competent authority at a subsequent stage. More so, the process of selection starts from the issuance of the advertisement and is to be complied with in conformity with the terms and conditions incorporated therein. If for certain reasons, the cut off marks have been reduced in subsequent advertisement, petitioner cannot take benefit thereof.

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

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 09.04.2008

BEFORE
THE HON'BLE VIJAY KUMAR VERMA, J.

Criminal Misc. Application No.6269 of 2008

Lekhraj. ...Appellant
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri Mohd. Irfan

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

Code of Criminal Procedure-Section 482-complaint filed by the applicant-found false-at the time of delivering judgment-direction issued to the S.S.P. to lodge FIR against applicant for offence under Section 182 I.P.C.-held-it can be directed only on the complaint/application by the Public authority under whom working-even otherwise bar created by section 195 (i) Cr.P.C.-order so for it relates to lodging FIR-quashed.

Held: Para 6

Section 195 Cr.P.C. bars the lodging of FIR for certain offences. According to sub section (1) (a)(I) of section 195 Cr.P.C. cognizance for the offence punishable under section 182 IPC can be taken on the complaint in writing of the public servant concerned or of some other public servant to whom he is administratively subordinate. In view of this specific bar created by section 195 (1)(a)(I) Cr.P.C., the learned Sessions Judge Rampur at the time of passing the judgment in Session Trial No. 223 of 2007 had no jurisdiction to issue direction to S.S.P. Rampur, to get the FIR lodged against the informant for the offence punishable under section 182 I.P.C.

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

1. Heard Sri Mohd. Irfan learned counsel for the applicant, learned AGA for the State and perused record.

2. By means of this application under section 482 of the Code of Criminal Procedure (in short the 'Cr.P.C.'), the applicant has invoked inherent jurisdiction of this Court, praying for quashing of that part of the judgment dated 20.02.2008 passed by Sri N.K. Jain, the then Sessions Judge Rampur in S.T. No. 223 of 2007 (State Vs. Mahendra & others), whereby SSP Rampur has been directed to get the FIR lodged against the

applicant for the offence punishable under section 182 of Indian Penal Code (in short the 'IPC') for lodging false, report against the, accused persons at crime; No.322 of 2002 under section 307/586 IPC at P.S. Kotwali Rampur.

3. Shorn of unnecessary details, the facts leading to the filing of the application under section 482 Cr.P.C. in brief, are that the applicant Lekh Raj had lodged an FIR at P.S. Kotwali, Rampur at Crime 322/2002. After investigation of the case, chargesheet was filed and on committal of the case to the Court of Session for trial S.T. No. 223 of 2007 was registered against the accused Mahendra and others. While passing judgment in that Session Trial on 20.02.2008, the learned Sessions Judge Rampur, was of the opinion that the informant Lekh Raj (applicant herein) had lodged false FIR against him for the offence punishable under section 182 I.P.C. Consequently, SSP Rampur was directed to get the FIR lodged against the informant for lodging false report against the accused.

4. It is contended by learned counsel for the applicant that at the time of passing the judgment in session trial No. 223 of 2007, the court below could not issue direction for lodging the FIR for the offence punishable under section 182 IPC against the informant and if the informant had given false evidence during the trial, then he could be punished either by adopting the procedure provided under section 344 Cr.P.C. or complaint could be filed against him in the competent court for giving false evidence, but FIR cannot be lodged at this stage for the offence punishable under section 182 IPC.

5. Having given my thoughtful consideration, in my view, aforesaid contention of the learned counsel for the applicant has got force and must be accepted. If the applicant had given false evidence in S.T. No. 223 of 2007, it was open to the learned trial court to initiate proceedings under section 344 Cr.P.C. for punishing him for giving false evidence. In the alternative, complaint could also be filed against the informant in the competent court for the offences punishable under section 193 or 211 IPC. None of these procedures was adopted by the learned Trial judge and at the time of passing the impugned judgment, S.S.P. Rampur has been directed to get the FIR lodged against the informant (applicant herein) for the offence punishable under section 182 I.P.C. In my considered opinion, the procedure adopted by the learned Trial Court for punishing the applicant for lodging false report by way of lodging FIR against him is not in accordance with law.

6. Section 195 Cr.P.C. bars the lodging of FIR for certain offences. According to sub section (1) (a)(I) of section 195 Cr.P.C. cognizance for the offence punishable under section 182 IPC can be taken on the complaint in writing of the public servant concerned or of some other public servant to whom he is administratively subordinate. In view of this specific bar created by section 195 (1)(a)(I) Cr.P.C., the learned Sessions Judge Rampur at the time of passing the judgment in Session Trial No. 223 of 2007 had no jurisdiction to issue direction to S.S.P. Rampur, to get the FIR lodged against the informant for the offence punishable under section 182 I.P.C.

7. The applicant had lodged FIR against the accused persons at P.S. Kotwali Rampur. The averments made by the informant in that FIR were not found false and after investigation charge sheet was filed by the investigating officer in case crime No.322 of 2002. Hence there was no occasion for the S.H.O. P.S. Kotwali Rampur or his superior officer to file complaint against the informant for the offence punishable under section 182 IPC. During trial in S.T. No. 223 of 2007, the applicant Lekh Raj did not support FIR version in his statement recorded as P.W. 1 and he stated that name of the accused persons were mentioned in the report on the saying of village people. If this statement was false in the opinion of learned Trial Judge, then the informant Lekh Raj could either be punished for giving false evidence in the summary proceedings under section 344 Cr.P.C. or complaint could be filed against him in competent court for the offence punishable under section 193 IPC, as lodging of FIR for this offence is barred by section 195 (1) Cr.P.C. If the informant (applicant) had falsely charged the accused persons with having committed an offence, knowing that there is no just or lawful ground for such charge against the accused persons, then also complaint could be filed against the informant/applicant for the offence punishable under section 211 IPC, as lodging of FIR for the offence punishable under section 211 IPC is also prohibited by sub section (1) (b) (I) of section 195 Cr.P.C. for these offences, cognizance can be taken on the basis of the complaint only, as provided in section 195 Cr.P.C. and lodging of FIR for committing these offences is not permissible. In any case, there was no occasion for the learned Trial Judge at the time of passing the judgment in S.T. No. 223 of 2007 to direct SSP Rampur to lodge the FIR against the informant for the offence punishable under section 182 IPC.

8. For the reasons mentioned herein-above, the challenged part of the impugned judgment being wholly illegal and without jurisdiction deserves to be quashed.

9. Consequently, the application under section 482 Cr.P.C. is allowed and that part of the impugned judgment dated 20.02.2008, passed by the Sessions Judge Rampur in S.T. No. 223 of 2007 (State Vs. Mahendra & others), whereby direction has been issued to SSP Rampur to get the FIR lodged against the informant/applicant Lekh Raj for the offence punishable under section 182 IPC and consequent FIR, if lodged in pursuance of that direction, are hereby quashed.

The Registrar General is directed to send a copy of this order to Shri N.K. Jain, the then Sessions Judge Rampur (Now Sessions Judge Ghaziabad) for his guidance in future. Application allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.04.2008

BEFORE
THE HON'BLE S.RAFAT ALAM, J.
THE HON'BLE R.K. RASTOGI, J.

Criminal Misc. Writ Petition No.6514 of 2007

Rajan Mittal ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Amit Daga

Counsel for the Respondents:
A.G.A.

U.P. Control of Gundas Act 1970-Section 3-only one criminal case under section 186/353/504 IPC pending-due to civil litigation-can not be said to be gunda-notice quashed with liberty to issue fresh notice if sufficient material found.

Held: Para 10

In the case in hand, admittedly, the only case against the petitioner is pending under Sections 186, 353 and 504 IPC and that too on account of civil litigations pertaining to eviction from a-house and for the enhancement of the rent of another house between the parties, which are of civil nature. Therefore, in the facts of the case and looking to the definition of 'Goonda' in the Act, it is difficult to hold that the petitioner can be said to be a Goonda as per provisions of Section '(2) (b) of the Act.

(B) Constitution of India, Art. 226-Writ Petition-maintainability-against show cause notice-when the allegations do not cover with the definition of 'Gunda'-No use of issuing notice -petitioner can not be denied on technical plea.

Held: Para 11

On the other hand, from a perusal of the impugned notice it is apparent that only one incident has been given in the notice of Case Crime No. 75 of 2005, under Sections 186, 353 and 504 IPC, Police Station Civil Lines, District Muzaffarnagar and so it is illegal in view of the above ruling of the Hon'ble Apex Court.

Case law discussed:
1984 Vol.3 SCC 14, 2007 (57) ACC 791, 1999 (39) ACC 321.

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

1. In the instant writ petition the petitioner· has questioned validity of the notice dated 20.3.2007 (Annexure-1 to the writ petition) issued under Section 3 of U.P. Control of Goondas Act, 1970 (in short the Act).

2. We have heard learned counsel for the petitioner and the learned Additional Government Advocate for the State-respondents.

3. It is submitted that the petitioner is an Advocate of the District Court Muzaffarnagar, and has no criminal antecedent, inasmuch as, he has not been involved in any criminal case nor any anti social activity except the incident mentioned in the impugned notice as Case Crime No.75 of 2005, under Sections 186, 353 and 504 IPC, Police Station Civil lines, District Muzaffarnagar and thus, he does not come within the meaning of Goonda, as defined under Section 2 (b) of the Act. It is submitted that the petitioner is co-owner of a large number of properties and some of them are under the tenancy of various departments of the State Government. It is stated that one of the house known as 'Sheronwali Kothi' situated in City Muzaffarnagar is under the tenancy of the State Government. However, when there was default in the payment of rent S.C.C. Suit No.1 of 2001 (Yatendra Kumar Jain and others v. State of U.P. and another) was filed for eviction and recovery of arrears of rent, which was allowed and decreed vide judgment dated 30.8.2003. It is stated that the above judgment has also been affirmed by the High Court in Civil Revision No.758 of 2003 vide judgment dated 22.10.2003. Similarly, in another house, in which

police club was inducted as tenant by original tenant Harish Tayal, an application was moved for enhancement of rent. The said application was partly allowed vide judgment dated 23.9.2002 and the tenants were directed to pay Rs.2,76,000/- towards annual rent. The enhancement of rent was challenged before this Court in Civil Misc. Writ Petition Nos.40467 of 2006 and 40470 of 2006. It is further submitted before us that in the aforesaid writ petitions the District Magistrate and the Senior Superintendent of Police, Muzaffarnagar appeared in person and gave undertaking to vacate the premises by 31st December, 2006. It is submitted that the local administration was having grudge and prejudice against the petitioner and, therefore, the impugned notice has been issued only to harass and put pressure on him. Learned counsel for the petitioner further relying on a judgment of Hon'ble Apex Court in the case of ***Vijay Narain Singh Vs. State of Bihar and others, 1984 Vol.3 SCC 14*** submitted that the alleged single incident, mentioned in the impugned notice, does not come within the definition of clause (1) Section 2 (b) of the Act, hence it cannot be said that the petitioner was habitually committing or attempting to commit an offence to level him as Goonda.

4. On the other hand, learned AGA opposed the writ petition and submitted that the order impugned is simply a notice calling upon the petitioner only to show cause and thus, he instead of approaching this Court ought to have shown cause before the concerned authority and, therefore, this petition is premature and does not lie at this stage.

We have considered the rival submissions made before us.

5. Section 2 (b) of the Act defines 'Goonda' which is as under:-

"(b) 'Goonda, means a person who-

(i) either by himself or as member or leader of a gang, habitually commits or attempts to commit, or abets the commission of an offence punishable under Section 153 or Section 153-B or Section 294 of the India Penal Code or Chapter XV, Chapter XVI, Chapter XVII or Chapter XXII of the said Code; or

(ii) has been convicted for an offence punishable under the Suppression of Immoral Traffic(Prevention) Act, 1956; or

(iii) has been convicted not less than thrice for an offence punishable under the U.P. Excise Act, 1910 or the Public Gambling Act, 1867 or Section 25, Section 27 or Section 29 of the Arms Act, 1959; or

(iv) is generally reputed to be a person who is desperate and dangerous to the community; or

(v) has been habitually passing indecent remarks or teasing women or girls; or

(vi) is a tout;"

Explanation.- 'Tout' means a person who-

(a) accepts or obtains, or agrees to accept or attempts to obtain from any person for himself or for any other person, any gratification whatever as a motive or reward for inducing, by corrupt or illegal means any public servant or member of Government, Parliament or of State Legislature, to do or forbear to do anything or to

show favour or disfavour to any person or to render or attempt to render any service or disservice to any person, which the Central or State Government, Parliament or State Legislature, any local authority, corporation, Government company or public servant; or

(b) procures, in consideration of any remuneration moving from any legal practitioner interested in any legal business, or proposes to any legal practitioner or to any person interested in legal business to procure, in consideration of any remuneration moving from either of them, the employment of legal practitioner in such business; or

(c) for the purposes mentioned in explanation (a) or (b), frequents the precincts of civil, criminal or revenue courts, revenue or other offices, residential colonies or residences or vicinity of the aforesaid or railway or bus stations, landing stages, lodging places or other places or public resort: or

(vii) is a house-grabber.

Explanation.-"House-grabber' means a person who takes or attempts to take or aids or abets in taking unauthorized possession or having lawfully entered unlawfully remains in possession, of a building including land, garden, garages or out-houses appurtenant to a building."

6. From a perusal of the impugned notice it is evident that Clauses (ii) to (vii) of Section 2 have no application to the present case; as the notice does not contain any allegation mentioned in these clauses. It appears from record that a report was submitted that the petitioner is a land grabber under the last clause of the Section but that proposal was subsequently dropped and the impugned notice was issued to him containing allegations of Clause (i) only.

7. In the impugned notice there is allegation of commission of Crime No. 75 of 2005 of Police Station Civil Lines punishable under Sections 186, 353 and 504 IPC. The offence under Section under Section 186 IPC is not covered in the offences referred to in Clause (i). The offences under Sections 353 and 504 IPC are covered in Chapter XVI & XXII respectively of the IPC and so the present case falls under Clause (i). The basic requirement of applicability of Clause (I) is that the person concerned must be habitually committing the offences referred to in this clause. In the impugned notice there is description of one individual case only which was registered as Case Crime No. 75 of 2005 at Police Station Civil Lines; but one cannot be treated to be habitual unless and until there is recurrence of the offence. Since there is reference at one stray incident only in the notice, the petitioner could not be deemed to be a habitual offender on the basis of that single incident only and so the notice fails to satisfy the legal requirement.

8. The learned Additional Government Advocate submitted before us that one may be a habitual criminal and it is not essential to prove repetition of offence for holding a person to be habitual criminal, so the notice cannot be deemed to be invalid. In reply the learned counsel for the petitioner cited before us a ruling of the Hon'ble Apex Court in **Vijay Narain Singh Vs. State of Bihar and others** (supra). This was a case on the Bihar Control of Crimes Act and definition of the term 'Anti Social

Element' in Section 2(d), of this Act is similar to that of the term 'Goonda' in our Act. Section 2(d) of the above Act runs as under:

"2. (d) "Anti-Social Element" means a person who is-

(i) either by himself or as a member of or leader of a gang, habitually commits, or attempts to commit or abets the commission of offences, punishable under Chapter XVI or Chapter XVII of the Indian Penal Code; or

(ii) habitually commits or abets the commission of offences under the Suppression of Immoral Traffic in Women and Girls Act, 1956; or

(iii) who by words or otherwise promotes or attempts to promote on grounds of religion, race, language, caste or community or any other grounds whatsoever feelings of enmity or hatred between different religions, racial or language groups of castes or communities; or

(iv) has been found habitually passing indecent remarks to or teasing women or girls; or

(v) who has been convicted of an offence under Sections 25,26,27, 28 or 29 of the Arms Act of 1959."

9. Interpreting the word "habitually" in Clause (i) their Lordships observed as under:

"The word 'habitually' used separately in clauses (i), (ii) and (iv) of Section 2 (d) means 'repeatedly' or 'persistently'. It implies a thread of continuity stringing together similar repetitive acts. Repeated, persistent and similar, but not isolated, individual and dissimilar acts are necessary to justify an inference of habit. It connotes frequent commission of acts omissions of the same kind referred to in each of the said sub-clauses or an aggregate of similar acts or omissions. Absence of the word 'habitually' in clauses (iii) and (v) of Section 2(d) suggests that in order to treat a person as 'anti-social element' under clauses (iii) and (v) a single act or omission referred to therein may be enough, whereas in the case of clauses (i), (ii) and (iv) there should be a repetition of acts or omission of the same kind referred to therein. If the acts or omissions in question are not of the same kind or even if they are of the same kind when they are committed with a long interval of time between them they cannot be treated as habitual ones." Commission of an act or omission referred to in one of the clauses (i), (ii) and (iv) and of another act or omission referred to in any other of the clauses of Section 2(d) would not be sufficient to treat a person as an 'anti-social element'. A single act or omission falling under clause (i) and a single act or omission falling under clause (iv) of Section 2 (d) cannot, therefore, be characterized as a habitual act or omission referred to in either of them."

10. The above observations apply with full force to Clause (i) of Section 2 (b) of the U.P. Goonda Act also. Therefore, in order to declare a person Goonda under Clause (i) of Section 2 (b) of the U.P. Control of Goondas Act, it is necessary that he is a habitual or is wanted in more than one case. In the case in hand, admittedly, the only case against the petitioner is pending under Sections 186, 353 and 504 IPC and that too on account of civil litigations pertaining to eviction from a-house and for the enhancement of the rent of another house between the parties, which are of civil

nature. Therefore, in the facts of the case and looking to the definition of 'Goonda' in the Act, it is difficult to hold that the petitioner can be said to be a Goonda as per provisions of Section '(2) (b) of the Act.

11. On the other hand, from a perusal of the impugned notice it is apparent that only one incident has been given in the notice of Case Crime No. 75 of 2005, under Sections 186, 353 and 504 IPC, Police Station Civil Lines, District Muzaffarnagar and so it is illegal in view of the above ruling of the Hon'ble Apex Court.

12. Learned Additional Government Advocate submitted before us that the petitioner could take all these pleas before the Additional District Magistrate concerned, as he has been given an opportunity to put up his case before that authority and so this writ petition filed before this Court was not maintainable. In support of this contention, he cited before us a Division Bench ruling of this court in the case of **Jaindendra @ Chhotu Singh Vs. State of U.P., 2007 (57) ACC 791** and referred to para 15 of the ruling in which it has been observed:

"It is well settled by now that when there is no material, the Court will interfere but when there is some material the Court will not interfere."

13. His contention was that the present case is not a case of 'no material' because there is reference of one incident in the notice, and so this aspect of the case whether the material is sufficient or not is to be considered by the authority which issued the notice and so this Court has got no jurisdiction as laid down in the above ruling.

14. We do not agree with the above contention. In view of the ruling of the Hon'ble Apex Court in the case of **Vijay Narain Singh Vs. State of Bihar and others (Supra)** it is essential to refer to at least two incidents of commission of crime for applicability of Clause (i) of Section 2(b) of the Act. Since there was reference of one incident only in the notice, it fell short of the legal requirement as provided in Clause (i) of Section 2 (b) and in this way the notice being illegal could be challenged before this Court as laid down by the Full Bench of this Court in the case of **Bhim Sain Tyagi Vs. State of U.P. & others, 1999 (39) ACC, 321**. If there had been reference of two or more incidents in the impugned notice, then the minimum legal requirement of Section 2(b) Clause (i) would have been satisfied, and then in that case sufficiency of the material on merits could not be challenged before this Court, but before the authority concerned as laid down in the Division Bench ruling in the case of **Jaindendra @ Chhotu Singh Vs. State of U.P. (supra)** but since the impugned notice in the present case is short of the legal requirement, it could be challenged in this Court. The following observations in para 12 of the ruling in the case of **Jaindendra (supra)** which are quoted below, also support this conclusion:

"We can not have any doubt nor we can raise any dispute with regard to aforesaid two Full Bench judgements of this High Court consisting of three Judges in Ramji Pandey (supra), which was also held good by another five Judge Bench in Bhim Sain Tyagi (supra). It is to be

remembered that if there is no material, the individual petitioner has every right to challenge the notice in the writ jurisdiction of the Court and there is no bar to that extent. But if there is some material, then the notice can not be held to be defective but will be tested on the basis of the factual analysis by the appropriate Magistrate."

15. Hence, in view of the discussions made above, the impugned notice cannot sustain and the same is hereby quashed. The writ petition is, accordingly, allowed. However, the respondents will be at liberty to issue a fresh notice, if they have got sufficient material against the petitioner and in that case the proceedings may be started again in accordance with law in the light of the observations made in the body of the judgment after referring to that material in the fresh notice. Petition allowed.

REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.03.2008

BEFORE
THE HON'BLE KRISHNA MURARI, J.

Civil Revision No. 98 of 200S

Shyam Lal ...Defendant/Revisionist
Versus
Smt. Shanti Devi ...Plaintiff/Opposite Party

Counsel for the Revisionist:
Sri Divakar Rai Sharma

Counsel for the Opposite Party:
Sri Atul Dayal

Code of Civil Procedure-Section 21 (2)-Compromise deed-after finality of litigation-even before the execution Court-such compromise not produced-No applicability of limitation Act-delay can not be condoned.

Held: Para 12

In view of the aforesaid pronouncement of the Hon'ble Apex Court, in the case in hand, the alleged compromise having not been presented within time before the executing court for recording adjustment of the decree and the delay being not liable to be condoned in as much as Section 5 of the Limitation Act is not applicable being expressly excluded, the alleged compromise will not effect executability of the decree in favour of the landlord-respondent and the execution is not liable to be struck off/dismissed on the basis of the said compromise.

Case law discussed:
1981 AWC 727, (2000) 7 SCC–240, (2006) 12 SCC-138

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

1. Heard Sri Divakar Rai Sharma, learned counsel for the applicant and Sri Atul Dayal appearing for opposite party.

2. The short question which arises for determination in this case is whether provisions of Section 5 of Limitation Act are applicable and delay can be condoned in making application to record adjustment or satisfaction of decree under Section 21(2) of the Code of Civil Procedure, 1908 (for short the 'Code').

3. Facts, giving rise to the dispute, are as under.

Suit filed by the plaintiff-respondent before the Judge, Small Causes Court for arrears of rent and ejectment was decreed vide exparte judgment and order dated 30.3.1990. Application flied by the tenant-application under Order IX Rule

13 of the Code was also dismissed on 24.4.1991. The said order was put to challenge by the tenant-applicant by filing Civil Revision No. 381 of 1991 before this Court which was dismissed on 10.4.2007. However, this Court allowed six months time to the tenant-applicant to vacate the premises subject to his giving undertaking before the court below to hand over vacant possession of the premises in dispute and deposit of the entire decretal amount as well as damages fur use and occupation.

4. It is alleged by the applicant that after the order was passed by this Court, the respondent-landlord entered into compromise with him and he was allowed to continue as tenant in the shop in question on enhanced rent of Rs.925/- per month. It appears that the decree was put into execution by the respondent-landlord. An application dated 2.1.2008 was filed by the tenant-applicant to recall 'Dakhal Parvana' and objection dated 5.1.2008 was also filed on the ground that the matter has been compromised between the parties on 27.10.2007 under which he has been allowed to continue as tenant on enhanced rent of Rs.925/- per month and as such the execution proceedings are not maintainable and liable to be dismissed. It was also pleaded that pendency of the execution proceedings came to his knowledge only on 12.12.2007. On 22.2.2008 applicant filed another application to transfer the execution proceedings from the court of Additional District Judge (Court No.6), Muzaffarnagar to the court of Civil Judge (Kairana), Muzaffarnagar on the ground that pecuniary jurisdiction of the Civil Judge has been enhanced and thus execution proceedings are liable to be transferred. Application was dismissed by the executing court on 22.2.2008 which was challenged in revision before this Court which was also dismissed on 4.3.2008. Respondent-landlord filed his reply to the objection denying the compromise. Another application dated 30.1.2008 was made by the tenant-applicant seeking amendment in the application 72/Ga flied on 2.1.2008. The facts sought to be added by means of the amendment was that decree-holder/landlord had undertaken that he will get his execution not pressed and will not evict the tenant from the shop in, question and also that he is 85 years old and not aware of the legal procedure and the compromise be recorded by the executing court and the delay In filing the same be condoned. Court below vide impugned order dated 28.2.2008 dismissed the amendment application on the ground that since the amendment for recording compromise was moved beyond the prescribed period of limitation and the provisions of Section 5 of the Limitation Act was not applicable as such delay was not liable to be condoned.

5. It has been urged by the learned counsel for the applicant that court below has wrongly held that amendment is barred by limitation and completely fatted to appreciate that even a time barred amendment can be allowed. It has further been urged that since the objection was flied under Section 47 of the Code to dismiss the execution on the basis of compromise hence the provisions of Order XXI Rule 2 of the Code does not come in way and the same could not have been dismissed as barred by limitation. Next submission is that since the decree has been satisfied in view of the compromise dated 27.10.2007 execution

cannot proceed and is liable to be dismissed.

6. In reply, it has been submitted that apart from the fact that compromise was denied by the landlord-respondent being forged and fabricated since the amendment was sought to record satisfaction of the decree on the basis of compromise beyond the prescribed period of limitation, the same has rightly been rejected as provisions of Section 5 of Limitation Act are not at all attracted and delay cannot be condoned.

7. I have considered tile arguments advanced by the learned counsel for the parties and perused the record.

8. A complete sequence of fact narrated above goes to show that tenant-applicant has been delaying disposal of the execution proceedings on one pretext or the other. Inspite of liberty given by this Court to retain possession for a period of six months subject to certain conditions, he neither vacated the premises nor complied with condition. It was only when 'Parvana Dakhal' was issued, he came with objection before the executing court that matter has been compromised and he has been allowed to retain on enhanced rent. Subsequently, he moved an amendment seeking to record satisfaction of the decree in view of the compromise. Admittedly, the alleged compromise is dated 27.10.2007. For the first time objection in the execution case on the basis of the said compromise was filed on 5.1.2008. Further, admittedly the amendment to record satisfaction of the decree on the basis of the compromise was made before the executing court vide application dated 30.1.2008. Article 125 to the Schedule of Indian Limitation Act, 1963 provides that an application to record an adjustment or satisfaction of a decree is to be made without 30 days of the date when the payment or adjustment is made. Without entering into the question of legality or validity of the alleged compromise even if for the sake of argument it is taken to be lawful compromise it is clear that executing court was not moved to record satisfaction of the decree within the prescribed period of 30 days and admittedly, the application was made much after the prescribed period of limitation. Section 5 of the Limitation Act is excluded in its application to the proceedings under Order XXI of the Code. The said section reads as under:

"Extension of prescribed period in certain cases.- Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908, may be admitted after the prescribed period, if the appellant or the applicant satisfies the Court that he had sufficient cause for not preferring the appeal or making the application within such period."

9. In view of the aforesaid provisions, it is clear that provisions of Section 5 of Limitation Act would not be attracted in the case of an application under Order XXI Rule 2 of the Code made beyond the prescribed period of limitation.

10. The aforesaid view taken by me finds support from the judgment of learned single Judge of this Court in the case of ***Devi Prasad Chaubey Vs. Pati Ram -1981 AWC 727*** wherein the delay of one day in moving the application

under Order XXI Rule 2 of the Code was held not liable to be condoned.

11. It is well settled by the pronouncement of the Hon'ble Apex Court in the case of ***Lakshmi Narayan Vs. S.S. Pandian (2000) 7 SCC–240*** as well as ***Padma Ben Banushali and another Vs. Yogendra Rathore and others, (2006) 12 SCC-138*** that unless the agreement/adjustment is recorded as required under Order XXI Rule 2 of the Code it cannot be recognized by the executing court and the executability of the decree would not be effected.

12. In view of the aforesaid pronouncement of the Hon'ble Apex Court, in the case in hand, the alleged compromise having not been presented within time before the executing court for recording adjustment of the decree and the delay being not liable to be condoned in as much as Section 5 of the Limitation Act is not applicable being expressly excluded, the alleged compromise will not effect executability of the decree in favour of the landlord-respondent and the execution is not liable to be struck off/dismissed on the basis of the said compromise.

13. In view of the aforesaid facts and discussions, no illegality has been committed by the court below in rejecting the application filed by the tenant-applicant. Revision accordingly falls and stands dismissed in *limine*.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.03.2008

BEFORE
THE HON'BLE PRAKASH KRISHNA, J.

Civil Misc. Writ Petition No.2307 of 1999

Vijay Kumar and another ...Petitioners
Versus
Commissioner & another...Respondents

Counsel for the Petitioners:
Sri Siddhartha

Counsel for the Respondents:
S.C.

<u>Indian Stamps Act, Section 49-A</u>- Deficiancy of stamp duty-based upon report of sub Registrar without any basis-such report can be basis for proceeding but can not be basis for penality-imposition of additional duty-held-illegal-half of the amount deposited in compliance of court order-be refunded with 10% interest.

Held: Para 16

The sole basis of the impugned orders holding that proper stamp duty has not been paid by the petitioners is the report of the Sub Registrar, reporting the matter to the ADM(F&R) that proper stamp duty has not been paid. Except the said report, there is no material on record to show that the petitioners by arrangement deliberately under valued the property while setting forth the market value in the instrument.

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

1. By means of a registered sale deed registered on 21.3.1992 in the office of Sub Registrar, Tehsil Kairana, District Muzaffarnagar, the petitioner purchased a double-storey shop measuring 58 square

meter situate in Mohalla Dhimanpura, M.S.K Road Shamli, District Muzaffamagar from one Manohar Singh for a sum of Rs.1,70,000/- and paid the stamp duty thereon as per the circle rate fixed by the District Magistrate. The Sub Registrar, Tehsil Kairana District Muzaffarnagar on 25.3.1992 sent a report to the Additional District Magistrate (Finance & Revenue) that the valuation of the property has not been correctly disclosed in the sale deed. According to him the market value of the property is Rs.3,60,000/- instead of Rs.1,70,000/- on which a sum of Rs.52,200/- was payable as stamp duty. In other words according to him there was a deficiency of stamp duty of Rs.27,550/-. Proceedings under section 47-A of Indian Stamp Act was initiated by the Additional District Magistrate (Finance & Revenue) on the basis of the said report. He also called for a report regarding the market value of the property in question from the Tahsildar who reported that the market value of the land is around Rs.l,40,400/- and the cost of the construction standing there on is approximately Rs.40,000/-. Thus the total value of the property sold as per his report was Rs.1,80,400/- while it was shown as Rs.l,70,000/- in the instrument i.e. the sale deed.

2. The petitioner, in response to the show cause notice, appeared before the ADM (F&R) and contended that the sale consideration in the instrument has been properly and correctly set out. The stamp duty has been paid as per the circle rate fixed by the District Magistrate. He further submitted that the exemplar referred to in the report of the Sub Registrar are not applicable to the facts of the present case as properties mentioned there in are differently situated.

3. The ADM (F&R) by the order dated 29.11.1995 rejected the report of the Tahsildar as well as the case of the petitioner and presumed that at the time of the transfer, the monthly rent of the property in question could not have been less than Rs.1,200/- and by multiplying it by 300/- as provided for under Rule 341 of Indian Stamp Rule, it estimated the valuation at Rs.3,60,000/-. This order was challenged by way of revision No.4 of 1995-1996 before the Commissioner, Meerut Division, Meerut, under section 56 of the Indian Stamp Act. The revision having been dismissed by the impugned order dated 29.11.1998, the present writ petition has been filed for quashing the impugned orders.

4. Heard and considered the respective submissions of the learned counsel for the parties and perused the record.

5. Section 47-A of the Act, for the sake of convenience, is reproduced below:-

47-A Under valuation of instrument- (1)(a) If the market value of any property, which is the subject of any instrument, on which duty is chargeable on market value of the property as set forth in such instrument is less than even the minimum value determined in accordance with the rules made under this Act, the registering officer appointed under the Registration Act, 1908 shall, notwithstanding anything contained in the said Act immediately after presentation of such instrument, and before accepting it for registration and taking any action under section 52 of the said Act, require the person liable to pay stamp duty under section 29, to pay the deficit stamp duty as computed on the

basis of the minimum value determined in accordance with the said rules and return the instrument for presenting again in accordance with section 23 of the Registration Act, 1908.

(b) When the deficit stamp duty required to be paid under clause (a), is paid in respect of any instrument and the instrument is presented again for registration, the registering officer shall certify by endorsement thereon, that the deficit stamp duty has been paid in respect thereof and the name and the residence of the person pay them and register the same.

(c) Notwithstanding anything contained in any other provisions of this Act, the deficit stamp duty may be paid under clause (a) in the form of impressed stamps containing such declaration as may be prescribed.

(d) If any person does not make the payment of deficit stamp duty after receiving the order referred to in clause (a) and presents the instrument again for registration, the registering officer shall, before registering the instrument refer the same to the Collector for determination of market value of the property and the proper duty payable thereon.

(2) On receipt of a reference under sub-section (1), the Collector shall, after giving the parties a reasonable opportunity of being heard, and after holding an inquiry in such manner as may be prescribed by rules made under this Act, determine the market value of the property which is the subject of such instrument, and the proper duty payable thereon.

(3) The Collector may, suo motu, on a reference from any Court or from the Commissioner of Stamps, or an Additional Commissioner of Stamps or a Deputy Commissioner of Stamps or an Assistant Commissioner of Stamps or any officer authorised by the State Government in that behalf, within four years from the date of registration of any instrument, on which duty is chargeable on the market value of the property not already referred to him under sub-section (1), call for and examine the instrument for the purpose of satisfying himself as to the correctness of the market value of the property, which is the subject of such instrument, and the duty payable thereon and if after such examination he has reason to believe that the market value of such property has not been truly set forth in such instrument, he may determine the market value of such property and the duty payable thereon:

Provided that, with the prior permission of the State Government an action under this sub-section may be taken after a period of four years but before a period of eight years from the date of registration of the instrument on which duty is chargeable on the market value of the property.

Explanation ----------

Sub-sections (4-A) to (6) are not relevant."

6. Section 47-A refers to minimum value determined in accordance with Rules made under the Act, as held by the Apex Court in **Ramesh Chandra Bansal Vs. District Magistrate, AIR 1999 SC 2126**, confers power upon a registering authority to deal with the case of under valuation. Section 47-A uses the words 'minimum value' determined in accordance with any Rules made under the Act in sub clause (1) of Section 47-A.

A Division Bench of this Court in **Kaka Singh Vs. The Additional Collector and District Magistrate (Finance and Revenue) Bulandshahr and another, 1986 A.L.J. 49** has held that Section 47-A empowers the Collector to deal with those cases where the parties by arrangement deliberate under valued the property while setting forth the market value less than the minimum value determined under Rule 341 with a view to defraud the Government of legitimate revenue by way of stamp duty. In the present case, it is not disputed by the respondents that the petitioners have not paid even the minimum value fixed under the Rules i.e. 'circle rate'. The power appears to have been exercised under sub section (3) of Section 47-A. It may be noticed that in sub section (3) of Section 47-A, power has been conferred on the Collector to examine any instrument within four years from the date of registration on which duty is chargeable on a market value of the property. The Collector, if after such examination, has 'reason to believe' that the market value of such property has not been truly set forth, he may determine the market value of such property and duty payable thereon. On a close reading of sub section (3) of Section 47-A the words used therein are 'reason to believe' and 'market value' of such property. These are key words.

7. The Stamp Act is a fiscal statute and it has to be interpreted strictly and construction of hardship or equity has no role to pay in its construction. It is a taxing statute and has to be read as it is. In other words, the literal rule of interpretation applies to it. See- **State of Rajasthan Vs. Khandaka Jain Jewellers, AIR 2008 SC 509**. In this case the Supreme Court has referred its earlier judgment in the case of **A.V. Fernandez Vs. State of Kerala AIR 1957 SC 657, Also Government of A.P & others versus Smt. P. Laxmi Devi 2008 AIR SCW 1826.**

8. In the above background the phrase 'reason to believe' occurring in sub section (3) of Section 47-A has to be considered. Identical phrases have been placed in almost every fiscal statutes such as Income Tax Act, Sales Tax Act etc. With reference to the expression 'reason to believe' used in Section 34 of the Old Income Tax Act it has been held that they do not mean purely subjective satisfaction on the part of the Income Tax Officer. The 'belief must have been held in good faith, it cannot be merely a pretence. To put it differently it is open to court to examine the question whether the reasons to believe have a rational connection or a relevant bearing to the formation of belief and are not extraneous or irrelevant to the purpose of section, as held in **S. Narayanappa and others Vs. CIT Bangalore, AIR 1967 SC 523.** The words 'reason to believe' are stronger than the expression 'for satisfaction' Belief must not be arbitrary or irrational. It must be reasonable or must be based on reasons which are relevant and material.

9. In view of the fact that expression 'reason to believe' has been used in sub section (3) of Section 47-A of the Act, the power conferred under this section though is wide but they are not plenary. The power cannot be exercised when the Collector has reason to suspect that there is evasion of proper stamp duty.

10. A Division Bench of this Court in **Kishore Chandra Agarwal versus**

State of U.P and others 2008 (104) RD 235 has held as follows:

"25. Every wide power, the exercise of which has far reaching repercussion, has inherent limitation on it. It should be exercised to effectuate the purpose of the Act. In legislations enacted for general benefits and common good the responsibility is far graver. It demands purposeful approach. The exercise of discretion should be objective. Test of reasonableness is more strict. The public functionaries should he duty conscious rather than power charged. It actions and decisions, which touch the common man, have to be tested on the touchstone of fairness and justice. An arbitrary action is ultra vires."

11. In **Hajari Lal Sahu Vs. State of U.P. and others, 2004(1) A WC 899** a learned Single Judge of this Court has taken the similar view.

12. The other phrase used in sub section (3) of Section 47-A is 'market value' The 'market value' means what a willing purchaser would pay to a willing seller for the property having regard to the advantages available to the land and the development activities which may be going in the vicinity and potentiality of the land and as such, an offer of sale of land to an industrialist on concessional rate with a view to induce him to set up industry in a particular area is not market value. See- **Mahabir Prasad Vs. Collector, Cuttack, AIR 1987 SC 720**.

13. The 'market value' of land means a price at which both buyers and sellers are willing to do business; the market or current price.

14. Having noticed the imports of the aforesaid two expressions used in sub section (3) of Section 47-A now the facts of the present case may be looked upon.

15. The learned counsel for the petitioner submits that indisputably the shop in question was not let out at any point of time. Except the report of the Sub Registrar, there is no material on record to show that the market value set out in the instrument is incorrect. He further submits that the said report of the Sub-Registrar cannot be relied upon for the purposes of determining the deficiency if any in payment of Stamp Duty under section 47-A of the Act as the said report is not relevant or admissible for passing the order thereunder. Elaborating the argument he submits that the exemplars were wrongly relied upon being document 1485 of 1989 and 6960 of 1989 wherein the rent of that property has been shown at Rs.800/- and 1200/- per month. The submission is that there is no evidence to show that the property in question is similarly situate as those of the properties referred in the aforesaid two documents. In substance the documents No. 1485 of 1989 and 6960 of 1989 cannot be treated as exemplar in the absence of material to show that they are comparable with the property in question. The learned standing counsel on the other hand supports the impugned orders.

16. The sole basis of the impugned orders holding that proper stamp duty has not been paid by the petitioners is the report of the Sub Registrar, reporting the matter to the ADM (F&R) that proper stamp duty has not been paid. Except the said report, there is no material on record to show that the petitioners by arrangement deliberately under valued the

property while setting forth the market value in the instrument.

17. In **Ram Khelawan alias Bachacha versus State of U.P through Collector, Hamirpur and another, 2005(98) RD 511**, it has been held that report of Tahsildar may be a relevant factor for initiation of proceedings under section 47-A of the Act but it cannot be relied upon to pass an order under the aforesaid section. In other words the said report cannot form itself basis of the order passed under section 47-A of the Act. As already pointed out above, the only material is the report of Sub Registrar. It may also be noticed that the report of the Tahsildar was rejected by the authorities.

18. The learned counsel for the petitioners rightly pointed out that in the two impugned orders, there is no such discussion to show that the shop in question is similarly situate as the shops mentioned in document No. 1483 of 1989 or 6960 of 1989. These documents therefore, cannot be relied upon as exemplar.

In the case of ***Prakashwati versus Chief Controlling Revenue Authority Board of Revenue, Allahabad, 1996 (87) R.D.419*** *"Hon'ble the Apex Court has held that situation of a property in an area close to a decent colony not by itself would make it part thereof and should not be a factor for approach of the authority in determining the market value. According to said decision, valuation has to be determined on constructive 'materials, which could be made available before the authorities concerned.*

19. There is another aspect of the case. The sine qua non for invoking the provisions of Section 47-A(3) of the Act is that the Collector has reason to believe that the stamp duty has not been properly set forth in the instrument as per market value of the property. Once the instrument is registered and the prescribed stamp duty as prescribed by the Collector as has been paid, the burden to prove that the market value is more than the minimum as prescribed by the Collector under the rules, is upon the Collector. The report of the Sub Register or Tahsildar itself is not sufficient to discharge that burden. Reference can be made to a Division Bench judgment of this Court in ***Kaka Singh versus The Additional Collector and District Magistrate (Finance and Revenue) Bulandshahr and another, 1986 A.L.J. 49.***

20. Viewed as above, the impugned orders cannot be sustained and they are liable to be quashed. This Court while entertaining the writ petition granted a conditional stay order on 27.1.1999 wherein it was provided that on deposit of half of the deficiency within one month, the further recovery shall be stayed. It was further directed that the amount so deposited shall be subject to the decision of the writ petition.

21. In view of the above order, the respondents are liable to refund the amount thus deposited by the petitioner along with the accrued interest within a period of one month from the date of production of a certified copy of this order failing which they shall be liable to pay the interest @ 10% per annum thereafter on the sum due to the petitioner, till the date of actual payment.

22. In the result, the writ petition succeeds and is allowed. The impugned

orders dated 29.11.1995 (Anenxure-5) and 19.11.1998 (Annexure-7) are hereby quashed and it is held that the petitioners are not liable to pay any further stamp duty on the instrument in question. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.04.2008

BEFORE
THE HON'BLE JANARDAN SAHAI, J.
THE HON'BLE S.P. MEHROTRA, J.

Civil Misc. Writ Petition No. 13317 of 2008
Connected with
Civil Misc. Writ Petition No. 13318 of 2008
Civil Misc. Writ Petition No. 13734 of 2008

Zunaid Ahmad ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri S.P. Singh
Sri Deo Prakash Singh

Counsel for the Respondents:
Sri Vishnu Pratap
Sri Alok Kumar Singh
S.C.

U.P. Minor Minerals (Concession) Rules, 1963-Rule45-Restrictions-no use of machine-a part of contract-petitioner can not be allowed to resigned from that and resist the stoppage of the user of Machine.

Held: Para 19

Moreover, there is another important aspect in respect of these cases. The condition regarding the prohibition on the use of machine is part of a contract between the State of Uttar Pradesh and the lease holder and if the lease holder has accepted the imposition of the condition and has acted upon the contract by taking the lease, it is not open to the lease holder to turn back and to retract from the condition. We find that there is no illegality in the imposition of the condition in the lease deed and the condition is not in breach of any Government Order nor in breach of any Statute or constitutional provision. In view of the condition that the lessee has no right to carry on mining operations without the permission of the District Magistrate in writing contained in lease the petitioner has no right to resist stoppage of user of machine for mining.

Case law discussed:
AIR 1980 SC 1789 (1), Civil Misc. Writ Petition No. 46770 of 2004, Satyendra Kumar Tripathi Vs. State of U.P. and others

(Delivered by Hon'ble Janardan Sahai, J.)

1. In these three Writ Petitions identical controversy is involved and as such all these Writ Petitions have been heard together and are being disposed of by a common order. Counter and rejoinder affidavits have been exchanged in these cases and the counsel for the parties are agreed that the Petitions may be disposed of finally.

2. The petitioners are mining lease holders of Sand on the Yamuna River bed in portions of District-Kaushambi. They were granted mining leases in the year 2006 which are operative for a period of three years i.e. till 2009. There is a condition in the lease deed that they will not conduct mining operations by use of machines except with the permission of the District Magistrate. It is not in dispute that the petitioners have not obtained any permission from the District Magistrate. The petitioners are aggrieved by the stoppage of mining operations on the basis of oral orders of the District

Magistrate. Other contentions have also been advanced by Shri S.P. Singh, learned Senior Counsel assisted by Shri Deo Prakash Singh, counsel for the petitioners challenging the condition in the lease prohibiting them from using machines without permission of the District Magistrate.

3. Before examining the various contentions advanced by Shri S.P. Singh learned Senior Counsel appearing for the petitioners, and the learned Standing Counsel appearing for the respondents, it is necessary to refer to the Government Orders upon the point which have been issued from time to time.

4. By the Government Order dated 30.12.2000, the Government of Uttar Pradesh replaced the system of grant of lease by auction under Chapter IV of the U.P. Minor Minerals (Concession) Rules, 1963 by the system of grant of lease on application under Chapter II. The Government Order notices the fact that use of machines by the Thekedars under the auction system has an adverse effect upon the environment and natural flow of the river and also causes damage to the river banks besides causing loss of job opportunity to persons belonging to castes traditionally engaged in the excavation of sand and morrum for their livelihood. In Rule 9(2)(e) of the U.P. Minor Minerals (Concession) Rules, 1963 the names of several castes traditionally engaged in excavation of sand/morrum for their livelihood, have been given in the context of giving preference to them in the grant of leases. This Government Order directs the lease granting authority to incorporate a condition in the lease deed prohibiting use of machines in mining work. In the subsequent Government Order dated 30.11.2002, which too is applicable to grant of leases by auction system, paragraph 3 contains a condition that use of machines will be prohibited in excavation work and this fact be intimated to the bidders at time of auction and the condition be incorporated in the lease documents. It appears that the Directorate of Geology had doubts about the validity of incorporation of a blanket condition prohibiting the use of machines in excavation work. A letter dated 16.1.2003 was sent by the Director of Geology and Mines to the State Government. This letter was in reference to the condition in paragraph 3 of the Government Order dated 30.11.2002 relating to the prohibition to the use of machines. The letter states that a lease holder was free to do all such things as were covered under conditions (a) to (g) of Rule 40 and that the nature of activity covered by these clauses suggests that the lessee was free to use machines in excavation work if such use would cause no damage. It was stated that the condition prohibiting the use of machines altogether was inconsistent with Rule 40 and a recommendation was made that the blanket ban on the use of machines directed to be imposed in the terms of the lease is not proper and such condition be not imposed unless it was felt that the use of machine would cause damage to the environment or would obstruct the natural flow of the river. The Secretary to the Government of Uttar Pradesh by a letter dated 5.2.2003 addressed to the Director, Geology and Mines informed him that the proposal sent, had met the approval of the State Government. The latest Government Order upon the point is the Government Order dated 16.10.2004. This Government Order was issued in the wake of auction system again being replaced by

the system of settlement of leases under Chapter II. Condition (xiii) of paragraph (3) of this Government Order permits use of machines in the mining operations but provides that the lease deed would contain a condition that if the authorities are satisfied that the use of machines would cause damage to the environment or to the river bank or to the natural flow of the river, it would be open to the authorities to stop the use of machines. As regards the letter of the Director, Geology and Mines, which has been approved by the State Government upon which Sri Singh relied it is enough to say that the said letter stands superseded by the new policy of the Government comprehended in the government order dated October 16, 2004.

5. Shri S.P. Singh learned Senior Counsel for the petitioners submitted that use of machine is not prohibited in the Government Order and in fact it can be prohibited only if the use of machine is likely to adversely affect the environment or the natural flow of the river or would damage the banks. The learned Counsel placed reliance upon Rule 40 of the U.P. Minor Minerals (Concession) Rules, 1963, particularly clauses (a), (b) and (c) of that Rule. Referring to these clauses, it was contended that the nature of the activity contemplated in these clauses by implication permits the use of machine as the works, such as mining, boring, digging, drilling etc. can only be performed by the use of machines. Rule 40, Clauses (a), (b) and (c) are quoted below:

"40. Liberties, powers and privileges of the lessee.- *Subject to the restrictions and conditions mentioned in rule 41, a person holding a mining lease under these rules may have the liberty, power and privilege:-*
(a) to enter upon the lands mentioned in the lease and to search for mine, bore, dig, drill or win, work, dress, process, convert, carry away and dispose of the mineral for which the lease is held;
(b) to make in the said lands any pits, shafts, inclines, levels, waterways or other works;
(c) to erect and obstruct on the lands any machinery, plant, dressing, floors, furnaces, brick-kilns, workshops, storehouses and other building of the like nature;
(d) to (g)....."

6. It was, thus, contended that the condition in the lease deed prohibiting altogether the use of machines is repugnant to the letter dated 16.1.2003 of the Director and of the Secretary, Government of Uttar Pradesh dated 5.2.2003 communicating the approval of the State Government to the Director's proposal and to the Government Order dated 16.10.2004 as well as to Rule 40 of the U.P. Minor Minerals (Concession) Rules, 1963. Learned Standing Counsel appearing for the State submitted that Rule 40 of the U.P. Minor Minerals (Concession) Rules, 1963 is subject to Rule 41 of those Rules. He referred to Rule 41 (g) of the U.P. Minor Minerals (Concession) Rules, 1963, which is as follows:

"41. Restrictions and conditions as to exercise of the liberties, powers and privileges of- *The holder of a lease shall exercise the liberties, power and privileges mentioned in rule 40 subject to the following restrictions and conditions:*
"(a) to (f).....

(g) the lessee is bound to keep vigilance for not polluting the environment of the lease-hold area and nearby area in connection with mining operation and also maintain ecological balance of the area. It at any time it is found that the mining operation are leading to environmental pollution or imbalance of ecology, then after giving an opportunity of being heard, the lease may be prematurely terminated."

7. Clause (g) of Rule 41 permits premature termination of lease if the mining operations lead to environmental pollution or imbalance of ecology. These are words of wide meaning and effect upon the natural flow of the stream or damage to the banks would also be covered under the expression. If the use of machines has such an effect, it can be stopped. If a lease can be prematurely terminated if ecological imbalance or environmental pollution is caused, it is implicit that any condition which has the effect of protecting the environment or ecology including a condition prohibiting the use of machines in mining operations can be imposed.

8. The Standing Counsel also relied upon Rule 68 of the U.P. Minor Minerals (Concession) Rules, 1963 which provides relaxation of Rules in special cases. The said Rule is quoted below:

"68. Relaxation of rules in special cases.- *The State Government may, if it is of opinion that in the interest of mineral development it is necessary so to do, by order in writing and for reasons to be recorded authorise in any case the grant of any mining lease or the working of any mine for the purpose of winning any mineral on terms and conditions different from those laid down in these rules."*

Sub-section 2 of Section 4A of the Mines and Minerals (Development and Regulation) Act, 1957 is also relevant and is being quoted below:

"4A. Termination of prospecting licences or mining leases - (1).....

(2) Where the State Government, is of opinion that it is expedient in the interest of regulation of mines and mineral development; preservation of natural environment, control of floods, prevention of pollution or to avoid danger to public health or communications or to ensure safety of buildings, monuments or other structures or for such other purposes, as the State Government may deem fit, it may, by an order, in respect of any minor mineral, make premature termination of a prospecting licence or mining lease with respect to the area or any part thereof covered by such licence or lease.

(3) to (4)....."

9. This Section gives very wide powers to the State Government to make a premature termination of a mining lease in the interest of regulation of mines and minerals development, for preservation of natural environment, control of floods, prevention of pollution or to avoid danger to public health or communications or to ensure safety of buildings, monuments or other structures or for such purposes as the State Government may deem fit.

10. The words 'for such purposes as the State Government may deem fit' have a wide sweep. They would cover even the Directive Principles of State policy under Chapter IV of the Constitution which

though not enforceable by Court, are nevertheless fundamental in the governance of the country and it is the duty of the State to apply these principles in making laws.

11. Thus, even though there may not be any condition in the lease deed prohibiting the use of machines, the State Government may, in the circumstances specified in sub-section (2) of Section 4A, prematurely terminate the lease. If the State Government has powers to terminate a lease prematurely in the wide range of circumstances specified in sub-section (2) of Section 4A without there being such a condition in the lease deed, it is implicit that such a condition can be imposed in the lease if such condition relates to a matter specified in sub-section (2) of Section 4A. The State Government may also use the provisions under Rule 68 of the U.P. Minor Minerals (Concession) Rules, 1963 and grant lease on terms and conditions different from those provided under the Rules. In view of the provisions of Rule 41 and 68 and Section 4A of the Mines & Mineral (Development and Regulation) Act, 1957, a condition in the lease prohibiting the use of machines can be incorporated. It also appears that even in the absence of any such condition prohibiting the use of machines, the Government may stop the use of machines if such use adversely affects the environment or for any of the purposes specified in Section 4A(2) of the Mines & Mineral (Development and Regulation) Act, 1957.

12. The learned Standing Counsel relied upon the averments made in paragraph 13 of the counter affidavit that the use of machines also creates a social problem of unemployment of mining labourers who are traditionally engaged in this profession, causing law and order problem also. Various provisions from the Constitution of India have been cited to drive home the fact that the interest of labour belonging to the castes traditionally occupied in the mining work has to be taken into account in regulating the right of the lessees to carry on mining activity with the use of machines. Special reference was made by the Standing Counsel to the Directive Principles of State Policy including **Article 38** of the constitution of India which provides that the State shall strive to secure a social order for the welfare of its people; **Article 39(a)** of the Constitution of India which provides that the State will provide adequate means of livelihood to the citizens; **Article 41** of the Constitution of India which provides that the State shall make effective provision for securing the right to work**; Article 46** which provides that the State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Schedules Tribes and shall protect them from social injustice and all forms of exploitation; **Article 48-A** of the Constitution of India which provides that the State shall endeavour to protect and improve the environment.

13. **Article 19(1)(g)** of the Constitution of India gives right to every citizen to carry on any occupation, trade or business but the right is subject to imposition of reasonable restrictions under Article 19(6) of the Constitution of India in the interests of general public or for providing professional or technical qualifications necessary for practising any profession or carrying on any occupation

etc. or for creating monopoly in favour of the State in respect of any trade etc.

14. In ***Minerva Mills Ltd. and others Vs. Union of India and others, AIR 1980 SC 1789 (1)*** (paragraphs 60,61 & 62), the Supreme Court has emphasised that a balance be struck between the fundamental rights given in Part -III of the Constitution of India and the Directive Principles contained in Part-IV of the Constitution of India. Rule 40 of the U.P. Minor Minerals (Concession) Rules, 1963 is a facet of the fundamental right given in Article 19(1)(g) of the Constitution of India while Rule 41 of the U.P. Minor Minerals (Concession) Rules, 1963 as well as Section 4A (2) of the Mines and Minerals (Development and Regulation) Act, 1957 are facets of the reasonable restrictions contemplated in Clause (6) of Article 19 of the Constitution of India as also the Directive Principles pertaining to the preservation of environment.

15. The term in the lease deed regarding prior permission of the District Magistrate before use of machines strikes a balance between the right to carry on mining operations with the preservation of environment etc. Such a clause in the lease deed is in consonance with the principles laid down in the **Minerva Mills case (supra).**

16. Under Section 4A (2) of the Mines & Mineral (Development and Regulation) Act, 1957, the State Government can prematurely terminate the lease in the circumstances specified in that Section and 'for such other purposes as the State Government may deem fit'. The words 'other purpose' are wide enough to cover the Directive Principles of State policy. It follows by implication that if the State Government can permanently terminate the lease in order to give effect or to secure the objects given in Section 4A(2), it can also impose conditions in lease which are different from those express or implicit in Rule 40. This can be done under Rule 68 and even otherwise under Rule 41(g). The condition in the lease that the lessee shall not use machines in mining work without permission of the authorities is not repugnant to the provisions of the Government Order.

17. It appears that the prohibition on the use of machines can be made not only on account of the fact that the use of machines will cause damage to the environment or would affect the natural flow of the river but also if it is found that the use of the machines will displace the persons of castes traditionally engaged in mining. The importance of this aspect is also clear from the provisions of Rule 9(2)(e)of the U.P. Minor Minerals (Concession) Rules, 1963 which provides that even leases can be granted on preferential basis to such persons. The validity of new Rule 9(2)(e) of the U.P. Minor Minerals (Concession) Rules, 1963 was challenged but it has been upheld by this Court in ***Civil Misc. Writ Petition No. 46770 of 2004, Satyendra Kumar Tripathi Vs. State of U.P. and others,*** decided on 23.12.2004 in certain circumstances.

18. The contention of Shri S.P. Singh, learned Senior Counsel appearing for the petitioner that the condition is violative of the Government Order or of Rule 40 of the U.P. Minor Minerals (Concession) Rules, 1963, in our view, cannot be accepted in view of the fact that Rule 40 is subject to Rule 41 and to the

relaxation power of the State Government under Rule 68 of the U.P. Minor Minerals (Concession) Rules, 1963 and also in view of the provisions of Section 4A (2) of the Mines and Minerals (Development and Regulation) Act, 1957.

19. Moreover, there is another important aspect in respect of these cases. The condition regarding the prohibition on the use of machine is part of a contract between the State of Uttar Pradesh and the lease holder and if the lease holder has accepted the imposition of the condition and has acted upon the contract by taking the lease, it is not open to the lease holder to turn back and to retract from the condition. We find that there is no illegality in the imposition of the condition in the lease deed and the condition is not in breach of any Government Order nor in breach of any Statute or constitutional provision. In view of the condition that the lessee has no right to carry on mining operations without the permission of the District Magistrate in writing contained in lease the petitioner has no right to resist stoppage of user of machine for mining.

20. Shri S.P. Singh, learned Senior Counsel appearing for the petitioner also drew our attention to the Newspaper Report in the Amar Ujala of 29.02.2008 (Annexure-7 to the Writ Petition). This Report says that about 5000 labour traditionally engaged in excavation of sand who were rendered unemployed on account of use of machines launched an agitation on the river bank of Yamuna in the Kaushambi and Allahabad Districts and destroyed machines and one Thekedar had also fired to protect his machines and had thereby severely wounded a labourer. The Report goes on to say that the unemployed labourers had been agitating against the use of machines by the Thekedars for a long time but the district administration paid no heed. Even a week before the incident the workers had held a meeting warning the district administration but even that had no impact upon the administration. No doubt a Newspaper Report is not admissible as primary evidence, but it has also been stated in paragraph 13 of the counter affidavit of the State that use of machines creates a social problem of unemployment which in turn leads to a law and order problem. In paragraph 14 of the counter affidavit the incident relating to destruction of machines has been referred to. Although there may be different versions about the incident but the occurrence reported in the newspaper has not been denied. The shape which the agitation took takes time to ferment. It appears that timely intervention of the district administration stopping the use of machines and response to the grievances of the people could have averted the incident referred to in the Newspaper. The sentiment of the people in the situation of this case may be expressed in the following words:

For ages has the Yamuna brought
From Mountains high the golden sands
And we did make a living bare
From the bounty strewn on the submerged lands
But now the minerals have been leased
To people who have better means
They use machines to suck the stream
And employment for us a wishful dream
While they get richer day by day
Our right to live has been snatched away
Oh injustice and thine serpent 'hisss'!
We wont bear thee but strike against this!

And it is stated in paragraph 26 of the writ petition a fact not denied in the counter affidavit that on 27.2.2008 thousands of persons of the Nishad community marched in procession against the use of loader machines and damaged and burnt them. We part by saying that an indifferent attitude of the administration to peoples grievances can result in people taking law into their own hands for securing justice.

21. In view of the aforesaid discussion we are of the opinion that the Writ Petition lacks merits and is liable to be dismissed. We do so accordingly.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 09.04.2008

BEFORE
THE HON'BLE VIJAY KUMAR VERMA, J.

Criminal Misc. Application No. 6278 of 2008

Awadhesh Singh ...Applicant
Versus
State of U.P. and others...Opposite parties

Counsel for the Applicant:
Sri Jitendra Prasad Mishra

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

Code of Criminal Procedure Section 156 (3)-Rejection of application for lodging FIR-on the ground-the basis of information given by the eyewitness-investigation going on-No second F.I.R. for same occurrences can be lodged-held-second FIR is not barred-but the order passed by Magistrate require no interference.

Held: Para 7

Therefore, having regard to the facts and circumstances of this case, the learned Chief Judicial Magistrate, Banda had not committed any illegality in rejecting the application under Section 156(3) Cr.P.C. moved by the application Awadhesh Singh for lodging second F.I.R. regarding the murder of his brother Kamlesh Singh against the opposite parties no. 2 to 5. Although, as held by this Court in the case of *Vipin Chaudhary and others Vs. State of U.P. and others 2005 (51) ACC 533,* second F.I.R. regarding the same incident is not barred, but for the reasons mentioned herein-above, in instant case, second F.I.R. cannot be permitted to be lodged, as the first F.I.R. of case crime no. 206/2007 was lodged by the eyewitnesses of the incident of murder of deceased Kamlesh Singh. The law laid down by Hon'ble Apex Court in the case of *Vikram Singh and others Vs. State of Maharashtra* (supra) is not helpful in instant case for the reasons mentioned above.

Case law discussed:
(2008) 1 Supreme Court Cases (Cri) 362, 2005 (51) ACC 533, (2008) 1 SCC (Cri) 440

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

Heard Sri Jitendra Prasad Mishra, learned counsel for the applicant and learned A.G.A. for the State and perused the record.

2. By means of this application under Section 482 of the Code of Criminal Procedure (in short, the Cr.P.C.), order dated 10.03.2008 passed by the C.J.M., Banda on the application of the applicant under Section 156(3) Cr.P.C. has been challenged.

3. By the impugned order, the application moved by the applicant under Section 156(3) Cr.P.C. has been rejected.

4. From the record, it transpires that an F.I.R. was lodged at P.S. Kamasin by Shankar Singh s/o Shiv Nayak Singh resident of Shohut. On the basis of that F.I.R., a case under Section 302 I.P.C. at case crime no. 206/07 was registered against unknown persons on 27.11.2007 at 1.10 a.m. It was alleged in that F.I.R. that when Kamlesh Singh, brother of the informant along with Dhanpat S/o Bahori was irrigating his field from the tube-well of Indresh Singh on 26.11.2007 at about 9.30 p.m., four unknown persons committed his murder by causing injuries to him by firearms. During pendency of the investigation of that case, the applicant Awadesh Singh, who is also the brother of the informant Shankar Singh moved an application under Section 156(3) Cr.P.C. in the Court of C.J.M. Banda nominating opposite party no. 2 to 6 as accused. It is alleged in that F.I.R. that his brother Kamlesh taking Rs.46,000/- from his mother had gone with the accused Brij Kumar Singh, Ram Chandra Singh, Dhanpat, Pappu and Ram Bharat Singh for purchasing building material to construct the house, who committed his murder at about 9.30 p.m. and robbed the money, which he was carrying. After calling for a report from police station concerned, the learned Chief Judicial Magistrate vide impugned order dated 10.03.2008 has rejected the application under Section 156(3) Cr.P.C. vide impugned order. Being aggrieved, the applicant has approached this Court to quash that order.

5. The application moved by the applicant under Section 156(3) Cr.P.C. has been rejected by the learned C.J.M., Banda vide impugned order mainly on the ground that F.I.R. regarding murder of Kamlesh has already been lodged at P.S. Kamasin at case crime no. 206/07 and investigation is going on and hence, for the same murder second F.I.R. cannot be lodged.

6. Placing reliance on the case of ***Vikram and others Vs. State of Maharashtra (2008) 1 Supreme Court Cases (Cri) 362***, it is submitted by learned counsel for the applicant that second F.I.R. in this case is not barred, as first F.I.R. was not properly lodged by S.O. P.S. Kamasin. It is further submitted that application naming the opposite party nos. 2 to 6 was submitted by Shankar Singh regarding the murder of Kamlesh, but S.O. P.S. Kamasin did not lodge the F.I.R. on the basis of that application and F.I.R. against unknown persons has been lodged and hence, on this ground also second F.I.R. is not barred.

7. Having heard learned counsel for the parties and carefully gone through the case of **Vikram and others Vs. State of Maharashtra** (supra), I am of the considered view that there is no justification to direct registration of second F.I.R. in this case regarding murder of the deceased Kamlesh Singh. From the First Information Report (Annexure -I), it is revealed that Dhanpat was the eyewitness of the incident of murder of Kamlesh Singh as he was helping the deceased in irrigating his field from the tube well of Indresh Singh. The informant Shankar Singh has also shown himself as the eyewitness of that incident. First Information Report was lodged by the informant Shankar Singh against unknown persons and it is specifically mentioned in that report that four unknown persons had committed the murder of Kamlesh Singh by causing injuries to him by firearms. The informant

Shankar Singh has not made any complaint that his F.I.R. was not recorded properly by S.O. P.S. Kamasin. He did not move any application under Section 156(3) Cr.P.C. for lodging another F.I.R. Investigation of the case registered at crime no. 206/2007 is going on. Therefore, having regard to the facts and circumstances of this case, the learned Chief Judicial Magistrate, Banda had not committed any illegality in rejecting the application under Section 156(3) Cr.P.C. moved by the application Awadhesh Singh for lodging second F.I.R. regarding the murder of his brother Kamlesh Singh against the opposite parties no. 2 to 5. Although, as held by this Court in the case of ***Vipin Chaudhary and others Vs. State of U.P. and others 2005 (51) ACC 533,*** second F.I.R. regarding the same incident is not barred, but for the reasons mentioned herein-above, in instant case, second F.I.R. cannot be permitted to be lodged, as the first F.I.R. of case crime no. 206/2007 was lodged by the eyewitnesses of the incident of murder of deceased Kamlesh Singh. The law laid down by Hon'ble Apex Court in the case of ***Vikram Singh and others Vs. State of Maharashtra*** (supra) is not helpful in instant case for the reasons mentioned above.

8. Next submission made by learned counsel for the applicant is that F.I.R. was lodged on 26.11.2007, but no action has been taken so far by the Investigating Officer and hence, direction should be issued to the Investigating Officer concerned to make proper investigation. This prayer of the applicant's counsel may be accepted. The Hon'ble Apex Court in the case of ***Sakiri Basu Vs. State of U.P. and others (2008) 1 SCC (Cri) 440*** has held that under the provisions of Section 156(3) Cr.P.C., the Magistrate has implied jurisdiction to monitor the investigation. Hence, direction can be issued to the Chief Judicial Magistrate, Banda to ensure proper investigation of case crime no. 206 of 2007.

In the result, the application under Section 482 Cr.P.C. is hereby **rejected**. However the Chief Judicial Magistrate, Banda is directed to issue necessary directions to the Station Officer of Police Station Kamasin (Banda) to make proper investigation of case crime no. 206/07 under Section 302 I.P.C.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.04.2008

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

Civil Misc. Writ Petition No. 52599 of 2000

Gopal Kumar Mathur ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri D.C. Mathur
Sri Rajeev Gupta
Sri. Ashok Khare

Counsel for the Respondents:
Sri. R.B. Pradhan
S.C.

Constitution of India, Article 226-Service law-dismissal order-petitioner working as executive engineer-expended excess money than sanctioned-no allegation of misappropriation or embezzlement of public money or corruptive motive or any loss caused to the Government-held-punishment of dismissal-disproportionate-liable to be quashed.

Held: Para 20

In view of the above, in appropriate cases, where the punishment is found to be shocking, the Court in exercise of limited power of judicial review, can also interfere with the quantum of punishment. In the instant case, there is no whisper even of misappropriation or embezzlement of public money or corrupt motive and in fact no loss has been incurred by the State and the charge which stood proved against the petitioner had been only to the extent of spending the amount over and above the sanctioned amount. We are of the considered opinion that the punishment of removal imposed upon the petitioner is disproportionate to the delinquency and thus liable to be quashed.

Case law discussed:

AIR 1975 SC 2025, (1997) 11 SCC 370, (2000) 7 SCC 517, AIR 2001 SC 930, JT 2001 (10) SC 12, AIR 2006 SC 2730, (2008) 1 SCC 115, AIR 1983 SC 454, AIR 1987 SC 2386, AIR 1994 SC 215, 1995 Suppl (3) SCC 519, (1996) 10 SCC 461, AIR 1996 SC 484, (1998) 9 SCC, 416, (2004) 2 SCC 130, (2005) 7 SCC 338.

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

1. This writ petition has been flied challenging the order dared 26.02.1988 by which the petitioner has been removed from service; the judgment and order dated 08.02.2000 passed by the U.P. Public Service Tribunal (hereinafter called the 'Tribunal') by which the claim petition of the petitioner has been rejected and also the order dated 05.09.2000 by which the review application filed against the order dated 05.09.2000 has been rejected by the Tribunal.

2. The fact and circumstances giving rise to this case are that the petitioner , while posted as Executive Engineer at Allahabad, was served with a charge sheet dated 31.01.997 containing following three charges:

Charge No.1: He spent more than allotted funds on the projects sanctioned by the Government in different financial years and, thus, has violated para 375 ** of Financial Hand Book Vol.6 and is guilty cf dereliction to duties in observing para 108 of the U.P. Budget Manual.

Charge No.2: He got the work done from the contractors for a sum of Rs. 2.20 crores without .allocation of fund and thereby 220 vouchers in respect to aforesaid payment remained pending. He has, thus, violated para 375 of, Financial Hand Book Vol.6 and is guilty of dereliction to duties in observing para 108 of the U.P. Budget Manual by getting the work done from the contractors without allocation of funds.

Charge No.3: For the financial years 1990-91 to 93-94, temporary imprest for a total sum of Rs.506.24 lacs were opened but have not been adjusted and still adjustment of temporary imprest of Rs. 2,64,783.10 is pending and in view thereof payment of labourers could not be made and thereby temporary imprest have been kept unadjusted. Non-payment of wages to labourers and absence of any demand for payment by the labourers creates doubt on the genuinity of the work makes **integrity doubtful**.

3. The petitioner submitted reply to the aforesaid charges on 12.03.1997. After conclusion of the enquiry, the Inquiry Officer submitted the report recording following findings on the aforesaid charges:-

Charge No.1 has been found to be proved partly to the extent of non-observance of para 376 of Financial Hand Book Vol.6, i.e. excess expenditure than

the allotted funds on the work of Magh mela, however, rest of the charge has not been found proved.

Similarly, Charge No.2 has been found proved as the payments were stopped due to non-availability of funds.

In Charge No.3, only non-adjustment of temporary imprest has been found proved and rest of the charge has not been found proved. **Therefore, charge of lack of integrity stands disproved.**

4. Thereafter, a copy of the said report was served upon the petitioner on 19.08.1997. The petitioner submitted his reply to the enquiry report on 28.09.1997 and after considering the same, the order of punishment dated 26.02.1998 was passed by the Disciplinary Authority removing the petitioner from service. Being aggrieved, the petitioner preferred claim petition before the Tribunal which has been dismissed vide order dated 08.02.2000. Review application filed against the said order has also been dismissed vide order dated 05.09.2000. Hence the present writ petition.

5. We have heard Shri Ashok Khare, learned Senior Advocate for the petitioner and Shri R.B. Pradhan, learned Standing Counsel for the respondents.

6. Large number of submissions have been made including that the enquiry has not been conducted giving adherence to the statutory provision or meeting the requirement of principles of natural justice. Copies of the documents were not supplied to the petitioner etc, but the Tribunal has considered all these aspects and rejected the submissions in those regards.

7. It is evident from the charge sheet dated 31.01.1997 that except a part of charge no. 3 there was not even a slightest whisper against the petitioner for misappropriation, embezzlement or mis-utilisation of public fund. The charges had been only in respect of incurring expenditure in anticipation as per the demands raised by him for meeting the requirement of various works and projects under him and thereby incurring, expenditure over and above the allotted fund. It was recorded by the Inquiry Officer that there was, nothing on record to hold that his integrity could be doubtful. The Inquiry Officer found the charges partly proved.

8. The basic issue which has been agitated before the Tribunal admittedly had been that to the extent the charges stood proved, the punishment awarded to the petitioner was disproportionate. However the Tribunal rejected it observing that the gravity of charges were serious in nature warranting maximum penalty and the Tribunal has no competence to substitute its punishment over the punishment awarded by the Disciplinary Authority as the -matter fell exclusively with the domain of the Competent Authority.

9. In the facts of this case admittedly no charge of embezzlement, corruption or even corrupt motive, mis-utilisation or misappropriation had been levelled. A part of charge no.3 had been raising doubts about his integrity which could not be proved at all. The charge, against the petitioner had been mainly of incurring the expenditure over and above the sanctioned limit i.e. merely a technical mis-conduct, whether the penalty of removal from service can be held to be

proportionate and as to whether such matter can be subject matter of judicial review. inasmuch as on the quantum of punishment.

10. In Municipal Committee, Bahadurgarh Vs. Krishnan Blhari & Ors., AIR 1996 SC 1249, the Hon'ble Supreme Court held as under:-

"In a case of such nature - indeed, in cases involving corruption - there cannot be any other punishment than dismissal. Any sympathy shown in such cases is totally uncalled i for and opposed to public interest. The amount misappropriated may be small or large; it is the act of misappropriation that is relevant."

11. Similar view has been reiterated in Ruston & Hornsby (I) Ltd. Vs. T.B.. Kadam, AIR 1975 SC 2025; U.P. State Road Transport Corporation Vs. Basudeo Chaudhary & Anr, (1997) 11 SCC 370; Janatha Bazar South Kanara Central Cooperative Wholesale Stores Ltd. & Ors. Vs. Secretary, Sahakari Noukarara Sangha & Ors., (2000) 7 SCC 517; Karnataka State Road Transport Corporation Vs. B.S. Hullikatty, AIR 2001 SC 930; and Regional Manager, R.S.R.T.C. Vs. Ghanshyam Sharma, JT 2001 (10) SC 12.

12. In Divisional Controller N.E.K.R.T.C. Vs. H. Amaresh, AIR 2006 SC 2730, the Hon'ble Supreme Court held that the punishment should always be proportionate to the gravity of the misconduct. However, in a case of corruption, the only punishment is dismissal.

13. Similar view has been reiterated by the Hon'ble Supreme Court In U.P.S.R.T.C. Vs. Vinod Kumar, (2008) 1 SCC 115.

14. In the instant case, as the charge of corruption or corrupt motive had not been proved and the proved misconduct remained only to the extent of technical misconduct we are of the considered opinion that the Tribunal had erred in observing that it was the case of imposing the maximum penalty.

15. The second issue involved herein as to what is the scope of judicial review of quantum of punishment has been considered by the Hon'ble Supreme Court in a catena of judgments, and it was held that if the punishment awarded is disproportionate to the gravity of the misconduct, it would be arbitrary, and thus, would violate the mandate of Article 14 of the Constitution. (Vide Bhagat Ram Vs State of Himachal Pradesh & Ors AIR 1983 SC 454; Ranjit Thakur Vs. Union of India & Ors AIR 1987 SC 2386; Union of India and Ors Vs. Giriraj Sharma, AIR 1994 SC 215; S.K. Giri Vs. Home Secretary, Ministry of Home Affairs & Ors, 1995 Suppl (3) SCC 519; Bishan Singh and Ors. Vs. State of Punjab & Anr, (1996) 10 SCC 461; and B.C. Chaturvedi Vs. Union of India & Ors., AIR 1996 SC 484).

In Ranjeet Thakur (supra), the Hon'ble Apex Court observed as under:-

"But the sentence has to **suit the offence and the offender**. It should not he vindictive or unduly harsh. It should not be so disproportionate to the offence as to shock the conscience and amount in itself to conclusive evidence of bias. The

doctrine of **proportionality**, as part of the concept of judicial. review, would ensure that even on the aspect, which is otherwise, within the exclusive province of the Court Martial If the decision of the court even as to sentence is an outrageous defiance of logic, then the sentence would not be immune from correction. In the present case, the punishment is so stringently disproportionate as to call for and justify Interference. It cannot be allowed to remain uncorrected in judicial review."

16. The said Judgment has been approved and followed by the Apex Court in Union of India & Ors. Vs. G. Ganayutham, AIR 1997 SC 3387, and after examining elaborately the concept of reasonableness, rationality and proportionality, the same view has been reiterated.

17. In B.C Chaturvedi (supra), after examining various earlier decisions of the Supreme Court, the Court observed that in exercise of the powers of judicial review the Court cannot "normally" substitute its own conclusion or penalty. However, if the penalty imposed by an Authority "shocks the conscience" of the Court, it would appropriately. mould the relief either directing the Authority to reconsider the penalty imposed and in exceptional and rare cases, in order to shorten the litigation, itself, impose appropriate punishment with cogent reasons in support thereof. While examining the issue of proportionality, Court can also consider the circumstances under which the misconduct was committed. In a given case, the prevailing circumstances might have forced him to do so though he had no intention to do so. (Vide Giriraj Sharma (supra). The Court may further examine the effect, if order is set aside or substituted by some other penalty.

18. In G. Ganayutham (supra), the Apex Court has considered the entire law on subject and compared the Indian Law with English, Australian and Canadian Laws, and held that in case the Court comes to the conclusion that the punishment awarded is disproportionate or the Disciplinary Authority was irrational in imposing the punishment, the punishment cannot be quashed as even then the matter has to be remitted back to the appropriate authority for reconsideration and it is only in very rare cases that the Court might- to shorten the litigation-think of substituting its own view as to the quantum of punishment in place of punishment awarded by the Competent Authority. In Aniltej Singh Dhaliwal (supra); U.P.S.R.T.C. & Ors. Vs. A.K. Parul, (1998) 9 SCC, 416; and Teri Oat Estates (P) Ltd Vs. U.T., Chandigarh & Ors., (2004) 2 SCC 130, the Apex Court has taken the same view.

19. In V. Ramana Vs. A.P.S.R.T.C. & Ors., (2005) 7 SCC 338, the Hon'ble Supreme Court reconsidered the whole issue, compared the Indian Law With English Law on judicial review and after placing reliance on large number of judgments, came to the conclusion that every administrative order should be rational and reasonable and the order should not suffer from any arbitrariness. The scope of judicial review as to the quantum of punishment is permissible only if it is found that it is not commensurate with the gravity of the charges and if the Court comes to the conclusion that the scope of judicial review as to quantum of punishment is

permissible only if it is found to be "shocking to the conscious of the Court, in the sense that it was in defiance of logic or moral standards." In a normal course, if the punishment imposed "is shockingly disproportionate, it would be appropriate to direct the Disciplinary Authority to reconsider the penalty imposed. However, in order to shorten the litigation, it may, in exceptional and rare cases, itself can impose appropriate punishment by recording cogent reasons in support thereof.

20. In view of the above, in appropriate cases, where the punishment is found to be shocking, the Court in exercise of limited power of judicial review, can also interfere with the quantum of punishment. In the instant case, there is no whisper even of misappropriation or embezzlement of public money or corrupt motive and in fact no loss has been incurred by the State and the charge which stood proved against the petitioner had been only to the extent of spending the amount over and above the sanctioned amount. We are of the considered opinion that the punishment of removal imposed upon the petitioner is disproportionate to the delinquency and thus liable to be quashed.

21. At this stage Shri A.B. Pradhan, learned Standing Counsel has suggested that instead of substituting the order of punishment, the judgment of the Tribunal be set aside and the matter be remanded to the State authorities to reconsider the issue of punishment afresh.

22. In view thereof, we allow the writ petition, quash the order of punishment dated 26.02.1998, set aside the judgement and orders of the Tribunal dated 08.02.2000 and 05.09.2000. The matter is remanded to the respondent no.1 for passing a fresh order in view of the observations made above, which should be less than the punishment of removal from service, within a period of three months from the date of filing a certified copy of this order before him.

23. Needless to say that the petitioner shall be entitled for all consequential benefits. Petition allowed.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 30.04.2008

BEFORE
THE HON'BLE S.S. KULSHERSTHA, J.
THE HON'BLE VIJAY KUMAR VERMA, J.

Criminal Appeal No. 1955 of 2008

Mohd. Shafi ...Appellant
Versus
State of U.P. ...Opposite party

Counsel for the Appellant:
Sri. Raghu Bans Sahai
Sri. Amrish sahai

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

Indian Penal Code-section 304 B (2)-imposition of fine alongwith punishment of imprisonment-no provision of fine by legislature-held-illegal-stayed-Registrar General to inform the concerned Officer for future action.

Held: Para 5 & 6

Although sentence of imprisonment can be extended up to life imprisonment under Section 304-B (2) I.P.C., but no fine can be imposed as the legislature has not prescribed imposition of fine under this Section.

The Registrar General is directed to send a copy of this order within a week through the District Judge concerned to Sri Gopal Singh Chandel, the then Additional Sessions Judge, Court No.2, Fatehpur for his future guidance.

(Delivered by Hon'ble S.S. Kulshrestha, J.)

1. Heard Sri Raghu Bans Sahai, learned counsel for the accused-appellant and learned A.G.A. for the State and also perused the materials on record.

2. Bail application on behalf of accused-appellant Mohd. Shafi, convicted for the offences under Sections 304- B and 498-A I.P.C. in S.T. No. 664 of 2002 (State of U.P. vs. Kallu @ Nafees and others) vide judgement and order dated 28.02.2008 passed by Sri Gopal Singh Chandel, the then Additional Sessions Judge, Court No.2, Fatehpur has been pressed on the ground that he is the father-in-law of the victim woman and was residing separate from her at the relevant time. General allegations have been attributed against him.

3. Having regard to the facts and circumstances of the case, the accused appellant deserves bail.

4. Let the accused-appellant Mohd. Shafi convicted for the offences indicated above be released on bail during the pendency of the appeal on his executing personal bond and furnishing two sureties each in the like amount to the satisfaction of the Trial Court subject to deposit of fine imposed for the offences under Section 498-A I.P.C.

5. Realisation of the total amount of fine imposed under Section 304-B I.P.C. shall remain stayed, as no fine can be imposed for the offence punishable under Section 304- B I.P.C. It is very unfortunate that the learned Trial Court without going through Section 304-B I.P.C. has imposed fine of Rs.5,000/- on the appellant-accused under this Section, where as no fine is prescribed in sub-Section (2) of Section 304-B I.P.C., which reads thus:-

304-B. Dowry death.-
(1) .....
(2) Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life.

5. Although sentence of imprisonment can be extended up to life imprisonment under Section 304-B (2) I.P.C., but no fine can be imposed as the legislature has not prescribed imposition of fine under this Section.

6. The Registrar General is directed to send a copy of this order within a week through the District Judge concerned to Sri Gopal Singh Chandel, the then Additional Sessions Judge, Court No.2, Fatehpur for his future guidance.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.04.2008

BEFORE
THE HON'BLE SABHAJEET YADAV, J.

Civil Misc. Writ Petition No.2l692 of 2008

Prem Shankar Mishra ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri. Vishal Tandon

Counsel for the Respondents:
S.C.

(A) Constitution of India Art 226-aggrieved person public interest litigation-petitioner a legal practitioner-residing in same village of Respondent No. 6-who retired from the post of peon in Junior High School-seeking direction to hold enquiry against her appointment alleged to be illegal-in services cases, except the employee-an stranger has no locus standi-petition-held-not maintainable-

Held: Para 10

From the aforestated legal position enunciated by Hon'ble Apex Court, there can be no scope for doubt to hold that the petitioner is not an "aggrieved person" entitled for seeking reliefs of certiorari for quashing impugned order dated 10.3.2008, which is also not on record to enable the court to know the actual order which is alleged to have been passed by the concerned respondent and reasons therefore. Therefore, the instant writ petition is liable to be dismissed on the aforesaid ground alone in view of law laid down by Hon'ble Apex Court in Surinder Singh Vs. Central Government and others

(B) Constitution of India Art 226-Public interest litigation-petitioner a practicing Advocate-unnecessary dragging the poor widow in futile litigation-questioning her appointment after retirement-conduct of petitioner shocking to the conscience of Court-a black spot on noble profession-no locus standi to press the writ petition-petition dismissed with exemplary cost of Rs.25,000/-.

Case law discussed:
AIR 1975 SC 2092, AIR 1976 SC 578, 2002 Vol. (1) SCC 33=2001 AIR SCW 4022, AIR 1986 SC 2166, AIR 1993 SC 1769, AIR 1999 SC 114, AIR 2002 SC 350, (2005) 1 SCC 590, (2005) 3 SCC 91.

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

1. By this petition the petitioner, who is an Advocate in district court Deoria claims himself to be social worker, has dragged a poor widow lady Smt. Gulabi Devi widow of Late Mohan Misra of his own village up to this Court pretending it to be in Public Interest without describing the writ petition as Public Interest Litigation and sought relief of certiorari for quashing the order dated 10.3.2008 by which respondent no.4 has alleged to have recalled his earlier order dated 15.12.2007 and has directed the Senior Treasury Officer to release all the payments to Smt. Gulabi Devi. A further writ in the nature of mandamus has also been sought for directing the respondents no.3 and 4 to complete the inquiry against Smt. Gulabi Devi, who is respondent no.6 in the writ petition, within a specific time and further commanding the respondent no.5 not to release the payment due to the respondent no.6.

2. The reliefs sought for in the writ petition rest on the assertions that the petitioner lodged a complaint vide letter dated 3.7.2006 to the Secretary (Basic) Education, Government of Uttar Pradesh alleging therein that respondent no.6 who was working on the post of Paricharika (Class IV post) in Indira Gandhi Kanya Junior High School, Deoria, at the time of her appointment had submitted a forged migration/transfer certificate dated 24.5.58 indicating her age as 10 years 10 months on the date of on the date of issue of the said certificate, whereas on the death of her husband she obtained a succession certificate from the Collector,

Deoria on 14.2.1992 disclosing her age as 50 years. Thus, according to such succession certificate the respondent no.6 ought to have been retired from service in the year 2002 instead of 2007 as availed by her on the strength of forged migration/transfer certificate. It is stated that on the said complaint Up Basic Shiksha Adhikari was directed to enquire into the matter and find out as to what is the truth in the allegations made in the complaint. Thereupon Up Basic Shiksha Adhikari vide his letter dated 28.7.2006 directed the respondent no.6 to appear in his office to defend the allegations made in the complaint. A copy of letter of petitioner dated 3.7.2006, a copy of migration/transfer certificate of respondent no.6, a copy of succession certificate dated 14.2.1992 and a copy of letter of Up Basic Shiksha Adhikari dated 28.7.2006 are on record as Annexures- 1 to 4 of the writ petition. Thereafter Up Basic Shiksha Adhikari sent a copy of alleged migration/transfer certificate to the District Basic Education Officer, Gorakhpur to verify the genuineness of the same. Thereafter on 18.12.2006 the petitioner sent a detail representation to the Collector, Deoria to look into the matter and get it enquired by District Basic Education Officer, Deoria within a week so that public interest at large may be protected.

3. It is further stated that on 6.1.2007 the Additional District Magistrate, Deoria sent a letter to the Basic Shiksha Adhikari, Deoria requiring certain documents in regard to the appointment of respondent no.6. On 13/15.12.2007 the Additional District Magistrate, Deoria again issued an official letter to Basic Shiksha Adhikari, Deoria to send the required documents to his office within a week. On 15.12.2007 the petitioner again personally served a letter to Prabhari Zila Adhikari (Chief Development Officer, Deoria) contending that the appointment of respondent no.6 on the post, of Paricharika has been obtained by committing fraud and proper inquiry should be made in this connection by the Chief Development Officer, Deoria and the petitioner vide this letter also requested the concerned officer to stop all payments to the respondent no.6 till completion of inquiry. In pursuance of aforesaid letter of the petitioner, the respondent no.4 directed the Basic Shiksha Adhikari, Deoria to stop all payments due to the respondent no.6 till the inquiry with regard to appointment of respondent no.6 is completed. It is stated that now vide order dated 10.3.2008 the respondent no.4 has recalled his order dated 15.12.2007 without completing the inquiry. It is further submitted that despite so many reminders sent by the petitioner to all the authorities concerned, inquiry against the respondent no.6 has not yet been completed and now by order dated 10.3.2008 the respondent no.4 has directed the Senior Treasury Officer to release the payments due to the respondent no.6. It is also stated that despite best effort the petitioner could not obtain order dated 10.3.2008, hence finding no alternative the petitioner approached this Court through above noted writ petition.

4. Heard learned counsel for the petitioner and learned Standing Counsel for the respondents no. 1 to 5. The order which I propose to pass in the writ petition, I need not to ask any counter affidavit either from the respondents no.1 to 5 or from the respondent no.6, instead thereof the writ petition is liable to be

disposed of as fresh on preliminary issue of locus standi of the petitioner itself to file instant writ petition.

5. At the very outset, it is necessary to point out that in connection of locus standi of the petitioner to move before this Court in para 5 of this petition only this much has been stated that the petitioner is social worker and has complained against the respondent no.6, therefore, he has locus standi to file this petition. Except the aforesaid statement he has nowhere stated that as a social worker what services he has rendered to the downtrodden and weaker section of society by now and how for and in what manner he is ventilating their cause who are not in a position to ventilate their grievances by their own in the Courts of law or at other appropriate forum. In absence of necessary averments made in the writ petition in this regard, it is very difficult for this Court to make any inquiry about his working as social worker and assume his locus standi for approaching this Court under Article 226 of the Constitution of India for seeking writ of certiorari and mandamus.

6. Now the question which arises for consideration is that as to whether the petitioner can be said to be aggrieved person so as to entitle him to approach this Court for relief sought for or not? In this connection, it would be useful to examine some case law on the question of locus standi for seeking relief under Article 226 of the Constitution of India.

7. In ***Bar Council of Maharastra Vs. M.V. Dabholkar AIR 1975 SC 2092***, the question for consideration before Hon'ble Apex Court was that whether the Bar Council of State of Maharashtra was **"a person aggrieved"** to maintain an appeal under Section 38 of the Advocate Act 1961? A Seven Judges Constitution Bench while answering the aforesaid question in affirmative in para 28 of the decision has observed as under:-

"28. Where a right of appeal to Courts against an administrative or judicial decision is created by statute, the right is invariably confined to a person aggrieved or a person who claims to be aggrieved. The meaning of the words "a person aggrieved" may vary according to the context of the statute. One of the meanings is that a person will be held to be aggrieved by a decision if that decision is materially adverse to him. Normally, one is required to establish that one has been denied or deprived or something to which one is legally entitled in order to make one "a person aggrieved". Again a person is aggrieved if a legal burden is imposed on him. the meaning of the words "a person aggrieved" is sometimes given a restricted meaning in certain statutes which provide remedies for the protection of private legal rights. The restricted meaning requires denial or deprivation of legal rights. A more liberal approach is required in the background of statues which do not deal with property rights but deal with professional conduct and morality. The role of the Bar Council under the Advocates Act is comparable to the role of guardian in professional ethics. The words "person aggrieved" in Section 37 and 38 of the act are of wide import and should not be subjected to a restricted interpretation of possession or denial of legal rights or burdens or financial interests. The test is whether the words "person aggrieved" include "a person who has a genuine grievance because an order has been made which

prejudicially affects his interests." It has, therefore, to be found out whether the Bar Council has a grievance in respect of an order or decision affecting the professional conduct and etiquette. "

8. In ***Jasbhai Motibhai Desai Vs. Roshan Kumar Haji Bashir Ahmed and others A.I.R. 1976 SC 578***, the question in controversy was that whether the proprietor of a Cinema Theatre holding a license for exhibiting cinematography films is entitled to invoke certiorari jurisdiction against no objection certificate granted under Rule 6 of Bombay Cinema Rules 1954 by District Magistrate in favour of rival in the trade? While answering the aforesaid question in paras 34, 35 and 39 of the decision the Hon'ble Apex Court has been pleased to observe as under:-

"34. This Court has laid down in a number of decisions that ***in order to have the locus standi to invoke the extraordinary jurisdiction under Article 226, an applicant should ordinarily be one who has personal or individual right in the subject matter of the application, though in the case of some of the writs like habeas corpus or quo warranto this rule is relaxed or modified. In other words, as a general rule, infringement of some legal right or prejudice to some legal interest inhering in the petitioner is necessary to give him a locus standi in the matter.*** *(see State of Orissa v. Madan Gopal Rungta A. I. R. 1952 SC 12; Calcutta Gax Co. v. State of W.B. A.I.R. 1962 SC 1044; Ram Umeshwari Suthoo v. Member, Board of Revenue, Orissa (1976) 1 SCA 413; Godde Venkateswara Rao v. Government of A.P. A.I.R. 1966 SC (AIR 1972 SC 2112) 828; State of Orissa v. Rajasaheb Chandanmall. Dr. Satyanarayana Sinha v. M/s S. Lal & Co.) (1973) 2 SCC 696 : (AIR 1973 SC 2720).*

35. The expression "ordinarily" indicates that this is not a cast-iron rule. It is flexible enough to take in those cases where the applicant has been prejudicially affected by an act or omission of an authority, even though he has no proprietary or even a fiduciary interest in the subject matter. That apart, in exceptional cases even a stranger or a person who was not a party to the proceedings before the authority, but has a substantial and genuine interest in the subject-matter of the proceedings will be covered by this rule. The principles enunciated in the English cases noticed above, are not .inconsistent with it.

39. To distinguish such applicants from 'strangers'; among them, some broad tests may be deduced from the conspectus made above. These efficacy varies according to the circumstances of the case, including the statutory context in which the matter falls to be considered. These are whether the applicant is a person whose legal right has been infringed? Has he suffered a legal wrong or injury, in the sense, that his interest, recognised by law, has been prejudicially and directly affected by the act or omission of the authority, complained of ? Is he a person who has suffered a legal grievance, a person against whom a decision has been pronounced which has wrongfully deprived him of something or wrongfully refused him something, or wrongfully affected his title to something ? Has he a special and substantial grievance of his own beyond some grievance or inconvenience suffered by him in common with the rest of the public? Was he entitled to object and be heard by the authority before it took the impugned action? If so, was he

prejudicially affected in the exercise of that right by the act of usurpation of jurisdiction on the part of the authority? Is that statute, in the context of which the scope of the words "person aggrieved" is being considered, a social welfare measure designed to lay down ethical or professional standards of conduct for the community? Or is it a statute dealing with private rights of particular individuals?

9. In ***Ghulam Qadir v. Special Tribunal and others 2002 Vol. (1) SCC 33 = 2001 AIR SCW 4022*** in para 38 of the decision the Apex Court has been pleased to observe as under:

"38. There is no dispute regarding the legal proposition that the rights under Article 226 of the Constitution of India can be enforced only by an aggrieved person except in the case where the writ prayed for is for ***habeas corpus*** *or* ***quo warranto.*** *Another exception in the general rule is the filing of a writ petition* ***in public interest****. The existence of the legal right of the petitioner which is alleged to have been violated is the foundation for invoking the jurisdiction of the High Court under the aforesaid article."*

10. From the aforestated legal position enunciated by Hon'ble Apex Court, there can be no scope for doubt to hold that the petitioner is not an "aggrieved person" entitled for seeking reliefs of certiorari for quashing impugned order dated 10.3.2008, which is also not on record to enable the court to know the actual order which is alleged to have been passed by the concerned respondent and reasons therefore. Therefore, the instant writ petition is liable to be dismissed on the aforesaid ground alone in view of law laid down by Hon'ble Apex Court in ***Surinder Singh Vs. Central Government and others AIR 1986 S.C. 2166*** (para-9). The pertinent observations made in para 9 of the decision are as under:9-

9..... The respondents who had challenged the order of Shri Rajni Kant should have filed a copy of the order. In the absence of the order under challenge the High Court could not quash the same. Normally whenever an order of Govt. or some authority is impugned before the High Court under Art. 226 of the Constitution, the copy of the order must be produced before it. In the absence of the impugned order it would not be possible to ascertain the reasons which may have impelled the authority to pass the order. It is therefore improper to quash an order which is not produced before the High Court in a proceeding under Art. 226 of the Constitution. The order of the High Court could be set aside for this reason, but we think it necessary to consider the merits also....."

11. Not only this, but the petitioner did neither seek nor can seek relief of writ of quo warranto against the respondent no.6 as she has already been retired from service some times seems to be in July 2007, therefore, it is necessary to examine as to whether any other relief sought for can be granted by this court? In this connection, it is also noteworthy to point out that once the relief of writ of certiorari can not be granted for reasons that the petitioner has not brought the impugned order on record, other writ or order like mandamus can also not be granted to him so long as the impugned order is not quashed. Therefore, there appears hardly any scope for grant of any other relief

prayed by the petitioner for aforestated reasons even then I propose to examine the matter further. In this connection it is necessary to point out that except the statement made in para 5 of the writ petition that the petitioner is social worker and has complained against the respondent no.6, thus has locus standi to file this writ petition, nothing more has been stated in the writ petition. In para 10 of the writ petition also only this much is Stated that the authorities were called upon by the petitioner through his letter referred hereinbefore to look into public interest at large, otherwise the public interest would be suffered.

12. Now the question which arises for consideration of this Court is that as to whether this writ petition **filed as service matter without describing it as public interest litigation** can be entertained as public interest litigation? In this connection it would be useful to refer few decisions of Hon'ble Apex Court having material bearing on the question in controversy involved in the case hereinafter.

13. In ***R.K. Jain Vs. Union of India AIR 1993 SC 1769***, the appointment of President of Custom, Excise and Gold Control Appellate Tribunal was under consideration before Hon'ble Apex Court. In para 74 of the decision while dealing with question of locus standi the Hon'ble Apex Court has been pleased to observe as under: .

"74. Sri Harish Chander, admittedly was the Sr. Vice President at the relevant time. The contention of Sri Thakur of the need to evaluate the comparative merits of Mr. Harish Chander and Mr. Kalyasundaram a senior most Member for appointment as President would not be gone into in a public interest litigation. Only in a proceeding initiated by an aggrieved person it may be open to be considered. This writ petition is also not a writ of quo warranto. In service jurisprudence it is settled law that it is for the aggrieved person i.e. non-appointee to assail the legality of the offending action. Third party has no locus standi to canvass the legality or correctness of the action. Only public law declaration would be made at the behest of the petitioner, a public spirited person. "

14. In Dr. Duryodhan Sahu and others v. Jitendra Kumar Mishra and others, AIR 1999 SC 114, the Hon'ble Supreme Court held that in service matters, PILs should not be entertained. If the inflow of so-called PILs involving service matters continues unabated at the instance of strangers and allowed to be entertained, the very object of speedy disposal of service matters would get defeated.

15. In ***BALCO Employees' Union (Regd.) v. Union of India and others, AIR 2002 SC 350,*** the Hon'ble Supreme Court held that the jurisdiction is being abused by unscrupulous persons for their personal gain. Therefore, the Court must take care that the forum be not abused by any person for personal gain. The Hon'ble Apex Court observed as under:

"There is, in recently years, a feeling which is not without any foundation that Public Interest Litigation is now tending to become publicity interest litigation or private interest litigation as a tendency to be counter productive PIL is not a pill or a panacea for all wrong. It is essentially meant to protect basic human rights of the

weak and disadvantaged and was a procedure which was innovated where a public spirited person flied a petition in effect on behalf of such persons who, on account of poverty, helplessness or economic and social disabilities could not approach the Court for relief There have been in recent times, increasingly abuse of PIL."

16. In ***Dattaraj Nathuji Thaware v. State of Maharastra and others, (2005) 1 SCC 590***, the petitioner was member of the legal profession and had resorted to blackmailing respondents no.6 and 7, wherein Hon'ble Apex Court has proceeded with the observation that this case is sad reflection on the members of legal profession and is almost back spot on the noble profession. While approving imposition of Rs.25,OOO/- (Twenty five thousands) exemplary cost by the High Court on the petitioner, sounded note of caution that it is high time that Bar Councils and Bar Associations ensure that no member of Bar becomes party as petitioner or in aiding and/or abetting files frivolous petitions carrying the attractive brand name of "public interest litigation". That will be keeping in line, the high traditions of the Bar. No one should be permitted to bring disgrace to the noble profession. In para 12 and 16 of the decision the Hon'ble Apex Court observed as under:-

"12. Public Interest Litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that behind the beautiful veil of public interest, an ugly private malice, vested interest and/or publicity seeking is not lurking. It is to be used as an effective weapon in the armoury of law for delivering social justice to citizens. The attractive brand name of public interest litigation should not be used for suspicious products of mischief It should be aimed at redressal of genuine public wrong or public injury and not be publicity oriented or founded on personal vendetta. As indicated above, Court must be careful to see that a body of persons or member of public, who approaches the Court is acting bona fide and not for personal gain or private motive or political motivation or other oblique considerations. The Court must not allow its process to be abused for oblique considerations by masked phantoms who monitor at times from behind. Some persons with vested interest indulge in the pastime of meddling with judicial process either by force of habit or from improper motives, and try to bargain for a good deal as well to enrich themselves. Often they are actuated by a desire to win notoriety or cheap popularity. ***The petitions of such busybodies deserve to be thrown out by rejection at the threshold, and in appropriate cases with exemplary costs.***

16. As noted supra, a time has come to weed out the petitions which though titled as public interest litigations are in essence something else. It is shocking to note that courts are flooded with a large number of so-called public interest litigations where even a minuscule percentage can legitimately be called as public interest litigations. Though the parameters of public interest litigation have been indicated by this Court in a large number of cases, yet unmindful of the real intentions and objectives, courts are entertaining such petitions and wasting valuable judicial time which, as noted above, could be otherwise utilised for disposal of genuine cases. ***Though in Duryodhan Sahu (Dr.) v. Jitendra***

Kumar Mishra this Court held that in service matters PILs should not be entertained, the inflow of so-called PILs involving service matters continues unabated in the courts and strangely are entertained. The least the High Courts could do is to throw them out on the basis of the said decision...".

17. Similarly in ***R & M Trust v. Koramangala Residents Vigilance Group and others, (2005) 3 SCC 91***, the Hon'ble Supreme Court cautioned the Courts that the Public Interest Litigation should be entertained in rare cases where it is satisfied that public at large stand to suffer. The jurisdiction cannot be allowed to be invoked for the purpose of serving private ends and professional rivalry. This jurisdiction is meant for the purpose of coming to the rescue of the downtrodden. It has now become common for unscrupulous people to serve their private ends and jeopardise the rights of innocent people so as to wreak vengeance for their personal ends. The pertinent observations made in para 24 of the decision are as under:-

"24. Public interest litigation is no doubt a very. useful handle for redressing the grievances of the people but unfortunately lately it has been abused by some interested persons and it has brought a very bad name. Courts should be very slow in entertaining petitions involving public interest: in very rare cases where the public at large stand to suffer. This jurisdiction is meant for the purpose of coming to the rescue of the downtrodden and not for the purpose of serving private ends. It has now become common for unscrupulous people to serve their private ends and jeopardise the rights of innocent people so as to wreak vengeance for their personal ends.... "

18. From the aforesaid decisions it is clear that in **R.K. Jain's case (supra)** Hon'ble Apex Court has observed that in service jurisprudence it is well settled that it is for the aggrieved person i.e. non-appointee to assail the legality of the offending action. Third party has no locus standi to canvass the legality or correctness of the action, only public law declaration would be made at behest of the petitioner a public spirited person. The same principle has been reiterated by Hon'ble Apex Court in **Duryodhan Sahu's case (supra)** holding that in service matter P.IL. should not be entertained. If inflow of so called P.LL.s involving service matters continues unabated at the instance of strangers and allowed to be entertained, the very object of speedy disposal of service matters would get defeated. In **BALCO Employees Union's case (supra)** it was observed that PILs are essentially meant to protect basic human rights of the weak and disadvantaged and was innovated where a public spirited person filed a petition in effect on behalf of such persons, who on account of poverty, helplessness or economic and social disabilities could not approach the court for relief.

19. In **Dattaray Nathuji Thaware's case (supra)** while reiterating the view of Duryodhan Sahu's case Hon'ble Apex Court held that in service matters PILs should not be entertained, High Courts should throw them out at very threshold on the basis of said decision. While approving Rs.25,000/-(Rupees twenty five thousand) exemplary cost imposed by the High Court upon the petitioner, who

was member of legal profession; and involved in blackmailing of respondent no.6 and 7 of that case speaking through the Bench Hon'ble Mr. Justice Arjit Pasayat observed that this case is sad reflection on the members of legal profession and is almost black spot on the noble profession and cautioned High Courts to throw such petitions at very threshold by placing reliance upon ***Duryodhan Sahu's*** case. If such frivolous petitions would be entertained by the Courts unmindfully, the precious time of the courts would go waste which could be utilised for disposal of genuine cases of those who are in queue and waiting for their turn, their interest would get defeated. While explaining the nature and purpose, His Lordship observed that public interest litigation is weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that behind the beautiful veil of public interest, an ugly private malice, vested interest and/or publicity seeking is not lurking. The attractive brand name of public interest litigation should not be used for suspicious product of mischief. It would be aimed at redressal of genuine public wrong or public injury and not be publicity oriented or founded on personal vendetta. It has also been observed that a writ petitioner who comes to the court for relief in public interest must come not only with clean hands like any other writ petitioner but also with clean heart, clean mind and clean objective by taking note of earlier decisions. The court must be careful to see that a body of persons or member of public who approaches the court is acting bonafide and not for personal gain or private motive or political motivations or other oblique considerations. The court must not allow its process to be abused for oblique considerations at the instance of person who approach the court with improper motive and for personal gain or other private ends. Similar view has also been taken by Hon'ble Apex Court in R.M. Trust's case (supra).

20. Now examining the facts of the case from the point of view of afore stated legal position, it is to be noted that from the description of particulars and address of the parties, it appears that the petitioner and respondent no.6 are resident of the same Village and Post Katarari District Deoria. From perusal of Annexure- 3 of the writ petition, it appears that it is copy of alleged succession certificate appears to have been issued from the office of District Magistrate, Deoria on 14.2.1992, It reveals that on death Sri Mohan Mishra S/o Sri Deo Narayan Mishra of Village and Post Katarari, Tehsil and District Deoria on 12.7.1973 the aforesaid certificate was issued and the respondent no.6 was shown as widow of deceased Mohan Mishra and her age was mentioned as 50 years at the time of issue of said certificate. Annexure-2 of the writ petition is copy of alleged migration/transfer certificate appears to have been issued on 24.5.1958 in which the date of birth of Gulabi Devi-respondent no.6 has been mentioned as 15.7.1947 and her age as 10 years, 10 months by that time. On that basis the petitioner has complained that the appointment of respondent no.6, is based on forged migration certificate. But there is nothing to indicate that when and how the petitioner has obtained copy of aforesaid migration certificate issued from Primary School on 24.5.1958, and the copy of aforesaid succession certificate issued on 14.2.1992. It is also not clear

that as to whether the aforesaid documents were procured by him from lawful custody in lawful manner or he himself has manufactured the aforesaid documents for the aforesaid purpose.

21. Although from the averments of writ petition, there is nothing to indicate that the aforesaid alleged succession certificate sought to be utilised by the petitioner against the respondent no.6 for contradicting her age recorded in her alleged migration certificate, has ever been admitted document by the respondent no.6 either before any authority or court of law, but assuming for the sake of argument that the same cannot be disputed by the respondent no.6, even then, age of respondent no.6 mentioned therein cannot be assumed to be absolutely correct as gospel truth for the purpose of holding any disciplinary/departmental inquiry against her at the instance of a stranger like the petitioner. The reason behind it is that it was quite possible that while making application for issue of succession certificate due to some sort of inadvertence of the counsel, the age of respondent no.6 would have been mentioned more than that of her actual age or it would have been written by the counsel merely on the basis of her physical appearance or it could be mentioned some time on the basis of entries made in the family register or Voter list of the village which are normally prepared by the officials, merely by asking from some persons of the village without actually verifying correctness from the person concerned, therefore, the same cannot be taken as a gospel truth without any proof in respect of the entries made therein particularly for dislodging the entry regarding the date of birth of respondent no.6 made in migration certificate.

22. Sometimes it so happens that in the school register of students different age at variance of other documents regarding the age are mentioned. For which some times guardians of students while giving details of students at the time of admission of their children give notional date of birth and age which might be lesser than actual age. Sometimes even teachers note notional date of birth at the time of admission of the students in scholar's Register of schools, therefore, mere variance in the age and date of birth of respondent no.6 recorded in various different documents who is a villager merely educated upto Primary level in Village school cannot be a ground for holding any departmental inquiry against her on account of contradictions in her date of birth between aforesaid documents, particularly when it is not the case that she has manipulated and changed her date of birth already recorded in service book at the strength of aforesaid migration certificate subsequently and continued in service on account of changed/ manipulated date of birth for some longer time and that too at the instance of stranger like petitioner.

23. That apart, it is also no where pointed out in the writ petition that when the respondent no.6 was appointed on the post of Paricharika which was merely a lowest class IV post in the institution. It is also not stated that as to whether at the time of her appointment any educational qualification was essential for the said post or not or as to whether her such appointment was made on compassionate ground under dying in harness Rules or it was based on open market selection. After

her retirement, no service Rules has been pointed out under which inquiry sought for by the petitioner who is stranger can be held at this stage. It is also not stated that how the petitioner has any concern with such inquiry sought for and what are the past activities of the petitioner in public interest. Except the statement that he has written letter to the authorities on 3.7.2006 to enquire into the matter when the respondent no.6 was likely to be retired from service, nothing has been indicated that as to whether he has ever pointed out any such illegality in respect of the appointment of the respondent no.6 to the concerned authorities, and how he woke up all of a sudden when the respondent no.6 was at the verge of her retirement, particularly when the records show that respondent no.6 is resident of same village of the petitioner, why he was sleeping for such long lapse of time? These suspicious circumstances undoubtedly created doubts about the bonafide of filing of instant writ petition.

24. Not only this but another suspicious circumstance is that the petitioner has also not filed impugned order dated 10.3.2008 to enable the Court to know the reasons for which the concerned respondent allegedly declined to hold such inquiry or dropped the same as alleged by the petitioner without concluding such inquiry or after holding alleged inquiry they were satisfied about no longer need of such inquiry. In the wake of the provisions of Right to Information Act, it is very difficult to accept that despite his best effort, the petitioner could not obtain copy of the impugned order dated 10.3.2008. In given facts and circumstances of the case the aforesaid statement of the petitioner does not appear to be true and fair, rather appears to be mischievous and misleading to the Court. As held earlier, the writ petition is liable to be dismissed on this ground alone in view of law laid down by the Hon'ble Apex Court in **Surinder Singh's case (supra)** that the petitioner has not brought on record the copy of the alleged order dated 10.3.2008 passed by respondent no.4 sought to be quashed in instant writ petition.

25. Besides, learned counsel for the petitioner could not point out any authority of this Court or Hon'ble Apex Court, where any departmental inquiry can be directed at the instance of stranger like petitioner against employee in respect of his/her illegal appointment after his/her retirement from service for forfeiture of post retrial dues of such employee and for recovery of salary paid to him/her during his/her service tenure. I have also held earlier that writ of quo warranto is also not available after retirement of employee. Besides, as held by Hon'ble Apex Court in R.K. Jain's case (supra), Duryodhan Sahu's case (supra), BALCO Employees Union's case (supra) and again in Dattaray Nathuji Thaware's case (supra) in service matter PIL should not be entertained, rather it must be thrown at very threshold by imposing exemplary cost upon the petitioner in appropriate cases where it is found that the petition has been moved by unscrupulous person with ulterior or oblique motive or for some personal gain or other oblique considerations.

26. In view of foregoing discussions in given facts and circumstances of the case, I am of the considered opinion that the petitioner has approached this Court not in public interest to ventilate grievances of any weaker sections of

society for redressal of their grievances on their behalf who on account of their social and economic disabilities are not in a position to approach this Court on their own, contrary to it, it appears that instant writ petition has been filed by the petitioner against the respondent no.6, who is poor widow lady of his own village seeking direction for holding departmental inquiry against her after her retirement and for forfeiture of her salary and other post retiral dues on account of her alleged forged appointment on the post of Paricharika, which is lowest Class IV post in the Junior High School. In my opinion, having regard to the attending circumstances of the case the petitioner appears to be unscrupulous person of the same village of respondent no.6, has approached this Court to harass the respondent no.6 due to some personal malice against her and with oblique or ulterior motive to serve his own private end. This equitable jurisdiction cannot be permitted to be abused at the instance of the petitioner, who is an advocate and member of noble legal profession, but has no sympathy with the weaker section of society and poor widow lady of his own village. In my mind he must have filed instant writ petition with oblique or ulterior motive for oblique considerations. Such petition cannot be held to have been filed to root out the alleged corruption as there is nothing to indicate that he has ever done such work in public interest and this work is an instance in chain of his such continued past activities.

27. Since the petitioner is an Advocate and member of noble legal profession, therefore, his such approach is shocking to the conscience of Court and in the words of Hon'ble Mr. Justice Arjit Pasayat it is black spot on noble legal profession. In fact and in effect to my mind, the petitioner has attempted to blackmail the respondent no.6 and by doing so he has brought disgrace to the noble legal profession, therefore, in order to give lesson to him that noble legal profession should not be brought to such a disgrace and he should not carry his profession as blackmailer and to give a message to the public at large that this court is not favouring such litigation. I am of the considered opinion that writ petition is liable to be dismissed with exemplary cost of at least Rs.25,000/- (Twenty five thousand) payable by the petitioner, accordingly the same is hereby dismissed as such.

28. District Magistrate, Deoria is directed to recover the aforesaid amount of Rs.25000/- (Rupees Twenty Five Thousand) from the petitioner as arrear of land revenue within a month from the date of communication of this order to him and shall deposit the same in the Account of Mediation and Conciliation Centre of the High Court, Allahabad within two weeks thereafter. The Registrar General of this Court is directed to communicate this order to the Collector, Deoria by 15th May 2008 through fax/speed post and/or other device available to him as earliest as possible.

29. With the aforesaid observation and direction, writ petition is hereby dismissed with exemplary cost of Rs.25,000/- (Twenty five thousand) upon the petitioner.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.04.2008

BEFORE
THE HON'BLE ASHOK BHUSHAN, J.

Civil Misc. Writ Petition No. 2350 of 2008

Subba and another ...Petitioners
Versus
Deputy Director of Consolidation and another ...Respondents

Counsel for the Petitioners:
Sri. Abhishek Kumar

Counsel for the Respondents:
Sri Rahul Sahai
S.C.

U.P. Consolidation of Holding Act 1953-Section 48-Revision-against the order passed by appellate authority in proceeding 109 of the U.P. Consolidation of Holding Rules, 1954-held-maintainable.

Held: Para 23
The judgement in the case of Ram Pujan *(supra)* also fully supports the view taken by me in this case. In *Ram pujan's* case same question fell for consideration as to whether an order passed in appeal under Rule 109-A is revisable. This Court after considering the the provisions of section 48 of U.P. Consolidation of Holdings Act, took the view that Deputy Director of Consolidation can exercise the powers under section 48.

Case law discussed:
AIR 1973 SC 203, (1988) 1 SCJ 598, AIR 1989 Supreme Court 922, AIR 1938 Alld 456, 1972 R.D. 228, 2000(91) R.D. 43, (1987) 66 STC 145 (All).

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

1. Heard Sri Abhishek Kumar, learned counsel for the petitioner and Sri Rahul Sahai, learned Counsel for the contesting respondents.

2. By this writ petition, the petitioner has prayed for quashing the order dated 27.7.2007, passed by the Deputy Director of Consolidation rejecting the objection raised by the petitioners regarding maintainability of the revisions filed by the respondent no. 2 before the Deputy Director of Consolidation under Section 48 of the U.P. Consolidation of Holdings Act, 1953 and the order dated 18.10.2007 by which the application to recall the order dated 27.7.2007 has also been rejected.

3. Brief facts necessary for deciding the issues raised in the writ petition are; the Consolidation Officer passed an order under Rule 109 of the U.P. Consolidation of Holdings Rules, 1954. Against the aforesaid order, an appeal was filed by the respondents which was dismissed by the Settlement Officer, Consolidation. In the revision, objection was raised by the petitioners that revision is not maintainable under Section 48 of the U.P. Consolidation of Holdings Act, 1953. The Deputy Director of Consolidation by order dated 27.7.2007 overruled the objection and held the revision maintainable. Again the petitioner moved an application for recall of the order of the Deputy Director of Consolidation taking the ground that during the arguments reliance had been placed on Rule 109 (3) by which the order of the Settlement Officer, Consolidation had been made final hence, the revision did not lay but the said argument had not been considered by the Deputy Director of Consolidation. The Deputy Director of Consolidation rejected the application by order dated 18.10.2007 holding that

earlier order having been passed after hearing the parties, deciding the issue of maintainability of revision, the same cannot be permitted to be raised again. This writ petition has been filed challenging the aforesaid order of the Deputy Director of Consolidation.

4. Sri Abhishek Kumar, learned Counsel for the petitioner contended that the order passed by the Settlement Officer, Consolidation has been given finality under Rule 109 (3) of the U.P. Consolidation of Holdings Rules, 1954 hence, the revision under Section 48 of the Act is barred. Reliance has been placed by learned Counsel for the petitioner on the judgment of the Apex Court in the case of **Aundal Ammal Vs. Sadasivan Pillai** reported in *AIR 1973 SC. 203*, **M/s Jetha Bai and sons, New Town Cochin etc etc. Vs. M/s Sunderdal Rathemal etc.**, reported in *(1988) 1 S.C.J. 598,* **Commissioner of Sales Tax U.P. Vs. M/s. Super Cotton Bowl Refilling Works,** reported in *AIR 1989 Supreme Court 922.*

5. Sri Rahul Sahai, learned Counsel for the respondents refuting the submission of learned Counsel for the petitioner contended that section 48 of the Act is wide enough to examine the correctness, legality or propriety of any order or of any case decided by subordinate authority hence, the order passed by the Settlement Officer, Consolidation under Rule 109 is also subject to such scrutiny. He further submits that the power of section 48 of the Act cannot be whittled down by the provision of Rule 109 (3). Reliance has been placed by learned Counsel for the respondent on the judgement of the Full Bench of this Court in the case of **Shah Chaturbhuj Vs. Shah Mauji Ram** reported in *AIR 1938 ALLD 456*, **Smt. Devi Vs. Board of Revenue U.P. at Allahabad,** reported in 1972 R.D. 228 and **Ram Pujan and others Vs. Dy. Director of Consolidation Ghazipur and others**, reported in *2000 (91) R.D. 43*.

6. I have considered the submission of the learned Counsel for the parties and have perused the record.

7. The issue which has arisen in the present writ petition is as to whether against an order passed by the Settlement Officer, Consolidation in appeal under Rule 109, a revision is maintainable under Section 48 of the Act before the Deputy Director of Consolidation or not. Section 48 of the Act and the relevant Rule 109 A are as follows:

"***48. Revision and reference.*** *- (1) The Director of Consolidation may call for and examine the record of any case decided or proceedings taken by any subordinate authority for the purpose of satisfying himself as to the regularity of the proceedings; or as to the correctness, legality or propriety of any order other than interlocutory order passed by such authority in the case of proceedings and may, after allowing the parties concerned an opportunity of being heard, make such order in the case of proceedings as he thinks fit.*

(2) Powers under sub-section (1) may be exercised by the Director of Consolidation also on a reference under subsection (3).

(3) Any authority subordinate to the Director of Consolidation may, after

allowing the parties concerned an opportunity of being heard, refer the record of any case or proceedings to the Director of Consolidation for action under sub-section (1)."

***Rule 109-A**. (1) Order passed in cases covered by subsection (2) of section 52 shall be given effect to by the consolidation authorities, authorised in this behalf under sub-section (2) of section 42. In case there be no such authority, the Assistant Collector-incharge of the subdivision, the Tahsildar, The Naib- Tahsildar, the Supervisor Kanungo, and the Lekhpal of the area to which the case relates shall respectively, perform the functions and discharge the duties as the Settlement Officer, Consolidation, Consolidation Officer, the Assistant Consolidation Officer, the Consolidator , and the Consolidation Lekhpal respectively for the purpose of giving effect to the order, aforesaid.*

(2) If the purpose of giving effect to an order referred to in sub-rule (1) it becomes necessary to reallocate affected chaks, neceDsary orders may be passed by the Consolidation Officer, or the Tahsildar, as the case may be, after affording proper opportunity of hearing to the parties concerned. ,..

(3) Any person aggrieved by the order of the Consolidation Officer, or the Tahsildar, as the case may be, may, within 15 days of the order passed under sub-rule (2), file appeal before the Settlement Officer, Consolidation or the Assistant Collector incharge of the sub-division, as the case may be, who shall decide the appeal and after affording reasonable opportunity of being heard to the parties concerned, which shall be final.

(4) In case delivery of possession becomes necessary as a result of orders passed under sub-rule (2) or sub-rule (3), as the case may be, for the provisions of Rules 55 and 56 and shall, mutatis mutandis, be followed. "

8. Section 48 of the Act is couched in a very wide language and confers the powers upon the Director of Consolidation to call for and examine the record of any case decided or proceedings taken by any subordinate authority. The power under Sub Section (1) can be exercised both suo-moto or on an application filed by any person as well as on a reference made by any authority subordinate to Director of Consolidation under sub section (3) of Section 48. Explanation (1) provides that for the purpose of section 48 Settlement Officer, Consolidation shall be treated to be subordinate to Director of Consolidation. Thus, on a plain reading of the language of section 48, for an order passed by Settlement Officer, Consolidation who is explained to be subordinate to the Director of Consolidation, there is no exception to such exercise of power except in respect to interlocutory orders which has been added by U.P. Land Laws (Amendment) Act No. 20 of 1982. The power of Revision conferred upon Director of Consolidation is to be exercised with regard to any case decided or proceedings taken.

9. Rule 109 A sub rule (3) which is sheet anchor of the submission of learned Counsel for the petitioner provides that any person aggrieved by the order of the Consolidation Officer, or the Tahsildar,

may file appeal before the Settlement Officer, Consolidation or the Assistant Collector who shall decide the appeal after affording reasonable opportunity of being heard to the parties concerned, which shall be final. The similar provisions are contained in several other statutes including U.P. Zamindari Abolition and Land Reforms Act, 1950 and U.P. Zamindari Abolition and Land Reforms Rules, 1952. Such issues came up for consideration in context of U.P. Agriculturist Relief Act 1934 also. Section 5 of the Act provides an appeal to a court to which the Court passing the order under sub-section (1) of Section 5 is subordinate and decision of the appellate court was treated to be final. In **Shah Chaturbhuj** *(supra)*, the question arose as to whether an appellate order passed under sub section (2) of section 5 can be challenged in the revision before the High Court under Section 115 of the C.P.C. on strength of sub-section (2) of section 5. It was contended before the Full Bench that the order was not revisable since finality was not attached under section 1934 Act. Following was laid down by the Full Bench:

" By Cl. (2), S. 5, a judgement-debtor is no doubt placed in a more favourable position than a decree-holder in the matter of appeal and a right of appeal is not given to a decree-holder against an order passed under Cl. (1) of that section. But the mere denial to the decree-holder of a right of appeal cannot warrant the inference that the Legislature intended to bar the revisional jurisdiction of this Court. In the first place the remedy open to a litigants by means of an application in revision to this Court is a much narrower and restricted remedy than the remedy open to him by way of appeal. It follows that the mere fact that a right of appeal is denied to a litigant is no ground for holding that he is debarred from invoking the revisional jurisdiction of this Court. In the second place the jurisdiction of this Court to revise the orders passed by the Courts below is independent of a motion being made by a party to the case. This Court can of its own motion exercise its revisional jurisdiction even though no application has been made for the revision of the order passed by a subordinate Court. The fact that a right of appeal is not given to the decree-holder cannot therefore in any way affect the jurisdiction vested in this Court by S. 115, Civil P. C.

In our judgment the provision in Cl. (2) of S. 5 that "the decision of the Appellate Court shall be final" means no more than this that the order passed by the Appellate Court cannot be made the subject of a second appeal."

10. The Full Bench took the view that finality attached to an order passed under Section 5 (2) does not take away the right of revision given to the High Court.

11. Again a similar issue arose before the Division Bench in the case df Smt. Krishna Devi (supra). Before the Division Bench, a question was referred as to whether the revision lie to the Board of Revenue under Section 333 of the U.P. Zamindari abolition and Land Reforms Act against an order of the Assistant Collector passed under Rule 115 N of the U.P. Zamindari Abolition and Land Reforms Rules. Section 333 of the U.P. Zamindari Abolition and Land Reforms Act and Rule 115 N (before 1975) being

relevant in the present context are being quoted herein below:

"333. Power of Board to call for cases.-*The Board may call for the record of any suit or proceeding decided by any subordinate court in which no appeal lies or where an appeal lies by has not been preferred, and if such subordinate court appears*
(a) to have exercised a jurisdiction not vested in it in law, or
(b) to have failed to exercise a jurisdiction so vested, or
(c) to have acted in the exercise of jurisdiction illegally or with material irregularity,
the Board may pass such order in the case as it thinks fit. "

***"Rule 115-N**. (1) The Assistant Collector incharge of the sub-division shall, on the application of any person interested, filed, within three months of the date of auction, and may, at any time in his own motion, cancel for reasons to be recorded in writing, the allotment order on one or more of the following grounds:*
(i) the bid accepted was inadequate;
(ii) the auction was collusive or unfair;
(ii) the auction proceedings were not followed in accordance with the rules;
(iv) any other ground.

(2) No order under sub-rule (1) shall be passed unless the allottee has been given an opportunity to show cause against the proposed action.

(3) The decision of the Assistant Collector incharge of the sub-division shall be final.

Provided that the limit of 250 sq. yds. Shall not apply to case of allotment of land for construction of buildings in an area of waste land earmarked for a new abadi site and to cases of allotment for construction of building for a charitable purpose or for setting up a cottage industry in the existing abadi sites. "

12. It is relevant to note that under Rule 115 N (3) as it existed at the relevant time, the decision of the Assitant Collector was made final. The question before the Division Bench was as to whether revision lay. The Division Bench took the view that rule 115-N (3) by which finality is attached to the order of the Assistant Collector does not restrict the jurisdiction of the Revisional Court as conferred by Section 333 of U.P. Zamindari Abolition and Land Reforms Act, 1950. Following the judgment of the Full Bench in **Shah Chaturbhuj** (supra), following was laid down by the Division Bench in paragraph 11:

11. It is true that Rule 115-N (3) provides that the decision of the Assistant Collector shall be final. It is well settled that such finality does not restrict the revisional jurisdiction conferred upon higher courts. In the case of Shah Chaturbhuj Vs. Mauji Ram (2) a Full Bench of this Court interpreted the phrase "the decision of revenue court shall be final" occurring in Section 5 of the U. P. Agriculturists Relief Act, 1934, as not depriving the higher courts of revisional powers under section 115 of the C.P.C. The Full Bench held that the finality mentioned in the provision only meant that there was o right of appeal vesting in the litigants against such an order. In our opinion, this Full Bench decision equally applies to Section 333. The finality mentioned by sub-Rule (3) of Rule 115-N cannot whittle down the amplitude of the

revisional power conferred upon the Board of Revenue by section 333 of the Z.A. And L. R. Act."

13. I had also an occasion to consider the similar issue in context of Rule 115 P and section 333 of the U.P. Zamindari Abolition and Land Reforms Act in the case of **Wahajuddin Vs. Board of Revenue U.P. at Allahabad,** reported in *2002 (93) R.D. page 186*. Under sub rule (5) of Rule 115-P , the order of the Collector was made final. The issue raised was as to whether against an order passed by the Collector under Rule 115-P revision lay under Section 333 of the U. P. Zamindari Abolition and Land Reforms Act. Relying on the law laid down by the Division Bench in the case of **Smt. Krishna Devi** (supra) as well as Full Bench judgment in the case of **Ram Swaroop Vs. Board of Revenue**, reported in 1990 R.D. Page 291, following was laid down in paragraph 13:

"The law laid down by the aforesaid Division Bench is fully applicable to an order passed by the Collector under Rule 115-P. Thus despite sub-rule (5) of Rule 115-P. Thus despite sub-rule(5) of Rule 115-P making the order of the Collector under Rule 115-P final the revision is maintainable under section 333 of the U.P. Zamindari Abolition and Land Reforms Act. In the present case the application was filed under Rule 115-P and the allotment is not claimed under section 122-C since the respondent no.3 is neither agricultural labourer nor village artisan or member of the Scheduled Caste or Schedule Tribes. Thus the order of the Collector is not referable to sub-section (6) of Section 122-C; hence sub-section (7) of Section 122-C is not attracted and revision is maintainable under section 333 against the order of the Additional Collector dated 23.3.1990. "

14. The Full Bench judgement of this Court in the case of **Ram Swaroop** *(supra)* is also necessary to be noted. The question arose in the Full Bench was as to whether the order passed by the Commissioner under Rule 285-1 U.P. Zamindari Abolition and Land Reforms Rules is amenable to revisional jurisdiction before the Board of Revenue under Section 333 of the U.P. Zamindari Abolition and Land Reforms Act. Rule 285-1 is as follows:

" 285-1. (i) At any time within thirty days from the date of sale, application may be made to the Commissioner to set aside the sale on the ground of some material irregularity or mistake in publishing or conducting it; but no sale shall be set aside on such ground unless the applicant proves to the satisfaction of the Commissioner that he has sustained substantial injury by reason of such irregularity or mistake. "

(ii) The order of the Commissioner under this rule shall be final. "

15. The finality is also attached to an order passed by the Commissioner under Rule 285-1 by virtue of sub-rule (ii) of Rule 285-1. Despite that finality, the Full Bench held that the order of the Commissioner was subject to revisional jurisdiction of the Board of Revenue under Section 333 of the U.P. Zamindari Abolition and Land Reforms Act.

16. The Apex Court in the case of **Aundal Ammal** *(supra)* relied by learned Counsel for the petitioners, considered the provisions of sections 18 and 20 of the

Kerala Buildings (Lease and Rent Control) Act, 1965. Under Section 18 (b), the decision of the appellate authority and subject to such decision an order of the Rent Controller was made final except as provided in section 20. Section 20 provided that where the appellate authority empowered under Section 18 is a subordinate judge to the District Judge and in other cases the High Court may, at any time, on the application of any aggrieved party, call for and examine the records relating to any order passed or proceedings taken. In the case before the Apex Court, a revision was filed before the District Court under Section 20 against the order of the Rent Control Appellate Authority which was dismissed then the revision was filed in the High Court under Section 115 of the C.P.C. In the above context, the Apex Court laid down that the revision was not maintainable in the High Court. The ratio of the judgment of the Apex Court is that since revision was already filed under Section 20 before the District Court, the second revision in the High Court is not maintainable. Following was observed in paragraph 15:

"Under the Scheme of the Act it appears that a landlord who wants eviction of his tenant has to move for eviction and the case has to be disposed of by the Rent Control Court. That is provided by sub-section (2) of Section 11 of the Act. From the Rent Control Court, an appeal lies to the Appellate Authority under the Conditions laid down under sub-section (1) (b) of S. 18 of the Act. From the Appellate Authority a revision in certain circumstances lies in case where the appellate authority is a Subordinate Judge to the District Court and in other cases to the High Court. In this case as mentioned hereinbefore the appeal lay from Rent Control Court to the appellate authority who was the Subordinate Judge and therefore the revision lay to the District Judge. Indeed it is indisputed that the respondent has in his case taken resort to all these provisions. After the dismissal of the revision by the District Judge from the appellate decision of the Subordinate Judge who confirmed the order of the Rent Controller, the respondent-landlord chose again to go before the High Court under section 115 of the Code of Civil Procedure. The question is, can he have a second revision to the High Court? Shri Poti submitted that he cannot. We are of the opinion that he is right. This position is clear if sub-section (5) of S. 18 of the Act is read in conjunction with S. 20 of the Act. Sub-section (5) of Section 18, as we have noted hereinbefore, clearly stipulates that the decision of the appellate authority and subject to such decision, an order of the Rent Controller 'shall be final' and 'shall not be liable to be called in question in any Court of law', except as provided in Section 20. By Section 20, a revision is provided where the appellate authority is Subordinate Judge to the District Judge and in other cases, that is to say, where the appellate authority is District Judge, to the High Court. The ambits of revisional powers are well-settled and need not be restated. It is inconceivable to have two revisions. The Scheme of the Act does not warrant such a conclusion. In our opinion, the expression 'shall be final' in the Act means what it says. "

17. The above case is clearly distinguishable since in the relevant statute only one revision was contemplated either to the District Court

or to the High Court when one revision was filed before the District Court, the second revision was obviously barred.

18. The next case relied by learned Counsel for the petitioner in the case of **M/s Jetha Bai and Sons** *(supra)* was also a case which considered the provisions of section 20 of Kerala Buildings (Lease and Rent Control) Act, 1965. The Apex Court reiterated the same view as was taken in the case of **Aundal Ammal** *(Supra)* and held that second revision before the High Court when one revision was taken before the District Court, was not maintainable. The judgment in the case of **Jetha Bai** *(supra)* is also clearly distinguishable since a different issue fell for consideration before the Apex Court in the said case. The next judgment of the Apex Court in the case of **Commissioner of Sales Tax** *(supra)* was a case where the Apex Court had occasion to consider Section 35 (5) of U.P. Sales Tax Act, 1948. The question was as to whether revision lay to the High court against an order passed by Commissioner of Sales Tax which had been the subject matter of an appeal before the Tribunal. The Apex Court in the said judgment approved an earlier Division Bench judgment of this Court in the case of **Indo Lube Refineries Vs. Sales Tax Officer Sector-I, Gorakhpur** (1987) 66 STC 145 (All).

19. The Apex Court noted the legislative history of section 35 and noticed that earlier the appeal lay to the High Court against the order of the Commissioner Sales Tax and by amendment U.P. Act No. 12 of 1999, the word 'High Court' has been deleted and substituted by the word 'Tribunal'. The Apex Court also noticed the constitution of the Tribunal which provided that Government from time to time appoint from amongst persons who have been or who are qualified to be Judges of the High Court and the persons who hold or held the post a post not below the rank of Deputy Commissioner of Sales-tax. Following was observed by the Apex Court in paragraph 8:

"Section 10-A deals with orders against which no appeal or revision lies and Section 10-B stands for revision by the Commissioner of Sales-tax. Section 11, as mentioned hereinbefore, stands for revision by the High Court and has been amended from time to time. In the aforesaid background the question posed in those appeals will have to be examined in the light of the decision of the High Court. The High court in its judgment under appeal aster analysing the provisions of Section 35 observed that the Commissioner entered into the determination of the disputed questions. Sub-clause (2) of Section 35 of the Act, according to the High Court, enjoins on the commissioner to decide the questions referred to him as he deems fit after giving the applicant an opportunity of being heard. Under sub-clause (5) of Section 35 it has been stated that the decision given by the Commissioner of Sales-tax shall subject to an appeal to the Tribunal be final. The High court while examining the section noticed that when an appeal against the order passed under section 35 of the Act is before the Tribunal, the appeal is to be heard and disposed of by a bench of three members, although in regard to other appeals before the Tribunal these can be disposed of even by a single member or by a bench consisting of two members. The High Court noted that under sub-clause (5) of Section 35 of the Act prior to its

amendment brought out by U. P. Act No. 12 of 1979, an appeal used to lie to the High Court against the order of the Commissioner of the Sales-tax. By the aforesaid amendment brought out by U.P. Act No. 12 of 1979, under clause (5) of section 35 the words "High Court" have been deleted and substituted by the word "Tribunal". The learned Judge of the High Court observed that an appeal before the Tribunal was specially treated by the Legislature and it was enjoined that it should be disposed of by a bench of not less than three members. The learned Judge noted that the Division Bench of the High Court in the case of Indo Lube Refineries Vs. Sales-tax Officer, Sector-I, Gorakhpur, (1987) 66 TC 145 (All) had taken the view that an order passed by the Commissioner under section 35 of the Act was an administrative order and in so doing he did not act as a Tribunal. "

20. In the Sales Tax Act section 11 which was noticed by the Apex Court in the said judgment, the revision was provided in limited category of cases as enumerated in section 11 (1) and taking into consideration the provisions of section 11 and section 35, the Apex Court observed that revision was not contemplated against the order passed by the Commissioner. The provisions of revision contemplated under section 48 of the U.P. Consolidation of Holdings Act, 1953 gives very wide power to the Deputy Director of Consolidation and is not limited to any category of cases and exclusion was only interlocutory orders. Thus, the revision provided under section 11 of the Sales Tax Act, 1948 was a limited right of revision provided in a limited category of cases. Further only on the ground that case involves any question of law. Following was further observed in paragraph 11:

"..... In the scheme of the Act, in our opinion, it was enjoined that such an appeal is to be heard by a bench of three judges. Where it was provided that the decision of the Commissioner would be final subject to an appeal to the Tribunal, in our opinion, it would be incorrect to contemplate that in such a situation a further revision under section 11 lay to the High Court, Revision to the High Court in special cases under section 11 is contemplated on the ground that the case involved a question of law. It may be mentioned that the High Court had mentioned that under sub-clause (5) of section 35 of the Act prior to its amendment that an appeal used to lie to the High Court against an order of the Commissioner of Sales-tax. By the aforesaid amendment brought forward by the U.P. Act 12 of 1979 under clause (5) of Section 35 the words "High Court" have been deleted and substituted by the word "Tribunal". It appears that the High Court was right, therefore, in holding that an appeal to the Tribunal against an order of the Commissioner lies. So far as the appeal before the Tribunal against the order passed under section 35 is concerned, special treatment has been provided for by the legislature. The Tribunal has come in place of the High Court in hearing the appeal. In such a situation to contemplate when the language of the section envisages that the order of the Commissioner would be final, subject to an appeal to the Tribunal that a further revision lay to the High court would be unwarranted. As mentioned hereinabove, we have to find out the intention of the Legislature in such a situation. The intention of the Legislature

is slippery phrase as observed in Aron Salomon V. A. Solomon and Company Ltd. 1897 AC 22, 38: See also observations in Lord Howard departmental enquiry Walden V. Inland Revenue Commissioners, (1948) 2 All ER 825. In such cases it is better to find out the intention of the legislature from the words used by the natural meaning of the words and the spirit and reason of the law. See Cross on Statutory Interpretation, Second Edition, page 21."

21. Thus, the judgment of the Apex Court in Commissioner of Sales Tax is also distinguishable and does not help the petitioners in the present case.

22. As noticed above, the Division Bench judgment in the case of **Smt. Krishna Devi** *(supra)* as well as earlier Full Bench judgment in the case of **Shah Chaturbhuj** *(supra)* had considered the similar issues in context of other Statutes despite the finality of the order as provided under U.P. Zamindari Abolition and Land Reforms Rules. The Division Bench in the case of **Smt. Krishna Devi** *(supra)* held that revision under section 333 of the U.P. Zamindari Abolition and Land Reforms Act, 1950 is not barred. The revisional power provided under section 48 is equally extensive and wide as revisional power under section 333 U.P. Zamindari Abolition and Land Reforms Act, 1950. Hence, the above judgments apply to the facts of the present case in full force. The Full Bench in the case of **Ram Swaroop** (*supra)* after noticing that finality has been attached to an order passed by the Commissioner under Rule 285-I, held that said order is revisable under section 333 of U.P. Zamindari Abolition and Land Reforms Act, 1950.

23. The judgement in the case of **Ram Pujan** *(supra)* also fully supports the view taken by me in this case. In *Ram Pujan's* case same question fell for consideration as to whether an order passed in appeal under Rule 109-A is revisable. This Court after considering the provisions of section 48 of U.P. Consolidation of Holdings Act, took the view that Deputy Director of Consolidation can exercise the powers under section 48.

24. In view of the above discussions, it is to be held that Director of Consolidation is not precluded from examining the correctness of an order passed by the Settlement Officer Consolidation under Rule 109 of the U.P. Consolidation of Holdings Rules. Although the Deputy Director of Consolidation in the impugned order has not considered the submissions raised by learned counsel for the petitioner but in view of the fact that respective submissions have been examined in this writ petition, I do not find it a fit case to interfere in the impugned order, passed by the Deputy Director of Consolidation rejecting the objection of the petitioner regarding maintainability of the revision. In the result, the writ petition is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.04.2008

BEFORE
THE HON'BLE SABHAJEET YADAV, J.

Civil Misc. Writ Petition No.58441 of 2006

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

Counsel for the Petitioner:
Sri. H.R. Misra
Sri. K.M. Misra

Counsel for the Respondents:
Sri. Nripendra Misra
Sri. S.N. Singh
S.C.

Constitution of India Art 311(2)- Dismissal order-without holding enquiry-without indicating the date time place-enquiry officer submitted report-without supplying the copy of supporting document-the disciplinary authority ought to have either hold fresh enquiry after affording opportunity of hearing or to differ his opinion from enquiry report-dismissal order cannot sustain.

Held: Para 16

At any rate, in my considered opinion, the case in hand is a case where there is violation of principles of natural justice of such a fundamental character, whose violation itself is a proof of prejudice which is self evident and court is not required to insist for further proof of prejudice. As held earlier that the fault found in disciplinary inquiry is such a fundamental character which cannot be repaired, without having recourse of holding fresh inquiry from the stage of submission of reply of the charge-sheet. Therefore, the impugned order passed by the Respondent no 4 has to be held nullity and void ab-initio which cannot be sustained. Accordingly the same is hereby quashed. In the result the petitioner is reinstated in service only for limited purpose of holding fresh disciplinary inquiry from the stage of submission of reply of the charge sheet.

Case law discussed:
2006 (4) AWC 3719, 2005 (4) ESC 2899, 2004 (4) AWC 3536, 2006 (1) SAC 261, AIR 1963 SC 1719, A.I.R. 1962 S.C. 1348, 2005 ESC 2899, AIR 1984 SC 1227, AIR 1985 SC 1416, 1986 SC 1173, AIR 1988 SC 1000, AIR 1991 SC 471, AIR 1994 SC 1074, A.I.R. 1996 SC 1669.

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

1. By this petition, the petitioner has sought relief of writ of certiorari for quashing the order dated 28.9.2006 (Annexure-9 of the writ petition) passed by respondent no.4 namely Managing Director, U.P. Sahkari Gram Vikas Bank Ltd., Lucknow, whereby petitioner's services have been dispensed with after holding disciplinary inquiry against him and the payment of salary was also denied during the period of suspension except the subsistence allowance already paid to him nothing more paid to him.

2. The relief sought in the writ petition rests on the assertions that while working on the post of Assistant Field Officer in U.P. Sahkari Gram Vikas Bank Ltd, on account of some financial irregularities alleged to have been committed by the petitioner in Pilkhuwa branch, Co-operative Land Development Bank, Ghaziabad, a First Information Report was also lodged against him and he was arrested on 30.10.2004 but was released on bail on 2.11.2004. Thereafter he was placed under suspension on 3.11.2004 pending disciplinary inquiry against him. Thereafter, disciplinary inquiry was initiated and a charge sheet has been served upon him on 3.3.2005 by the Inquiry Officer i.e. Deputy General Manager of the Head Office, Lucknow containing as many as six charges based on the preliminary inquiry report, conducted on 3.11.2004 ex-parte behind the back of the petitioner. A copy of charge sheet is on record as Annexure-l of the writ petition. It is stated that from bare perusal of it, it indicates that the charges

levelled in the charge sheet were sought to be proved either on the basis of inquiry report of Ajay Pal Singh, Deputy Manager, Head Office, Lucknow dated 17.11.2004 and/or on the basis of joint inquiry report of Additional Collector, (Land Acquisition) Irrigation, Ghaziabad and Regional Manager of the Bank, but material on the basis of which charges levelled in the charge sheet were shown to be proved, were not supplied to the petitioner along with the charge sheet, therefore, the petitioner sought inspection of relevant documents vide his letter dated 9.3.2005, in pursuance thereof he was permitted to inspect the record of Pilkhuwa branch on 25.4.2005 but he could not inspect all the documents, hence sought further time to inspect the same but on 27.4.2005 no further time was given to the petitioner to make inspection of the remaining records. However, some how or other, he submitted his reply to the charge sheet on the basis of available materials denying the charges levelled against him.

3. It is further stated that after submission of reply of the charge sheet, the Inquiry Officer without holding any disciplinary inquiry against the petitioner has submitted inquiry report dated 12.8.2005 against the petitioner. Before submission of said inquiry report no notice regarding the date and place of disciplinary inquiry has been issued and served upon the petitioner by the Inquiry Officer nor he has, in fact, any knowledge about the date and place of holding of inquiry nor he could participate in the said disciplinary inquiry. It appears that the Inquiry Officer has prepared the inquiry report against the petitioner and straight way submitted the same on 12.8.2005 to Disciplinary Authority in fact without holding any disciplinary inquiry, who acting upon the aforesaid inquiry report issued and served a show cause notice upon the petitioner vide order dated 9.3.2006 contained in Annexure-6 of the writ petition proposing the punishment of dismissal or the petitioner from service. On receipt of show cause notice the petitioner has submitted a comprehensive reply on 25.4.2006 pointing out glaring illegalities in holding departmental inquiry against him. Ultimately, the Managing Director, vide order dated 28.9.2006 has dismissed the petitioner from service by taking prior approval/consent from U.P. Cooperative Institutional Service Board as contained in Annexure-9 of the writ petition. Feeling aggrieved against which the petitioner has filed above noted writ petition.

4. The submission of Sri K.M. Misra, learned counsel for the petitioner in nutshell is that after submission of reply of charge sheet since no notice regarding the date and place of inquiry has been communicated to the petitioner and served upon him, therefore, the petitioner could not participate in the said inquiry. The inquiry report submitted by the Inquiry Officer on 12.8.2005 was prepared only on the basis of preliminary inquiry report as revealed from it which was never supplied to the petitioner either along with charge sheet shown as documents in support of charges or thereafter nor it was proved before Inquiry Officer while holding the said disciplinary inquiry in accordance with the provisions of law or principles of natural justice, as such the said inquiry report can be said to be no inquiry report in the eye of law and could not have been acted upon by the Disciplinary Authority.

Secondly learned counsel for the petitioner has further submitted that since the aforesaid preliminary inquiry report has never been proved in accordance with the provisions of law before Inquiry Officer, therefore, the same could not be treated to be admissible piece of evidence to be relied upon against the petitioner to prove the charges levelled against him and such preliminary inquiry report could not be made basis in support of the charges levelled in the charge sheet and since except the aforesaid preliminary inquiry report no other material has been shown in support of the charges contained in the charge sheet, therefore, the petitioner could not be connected with the aforesaid charges of misconduct levelled against him, as it would be a case of no evidence to establish the delinquency of petitioner on the basis of admissible evidence on record, therefore, impugned order based on such inquiry report cannot be sustained. In support of his aforesaid submission learned counsel for the petitioner placed reliance upon the decisions rendered in ***Shiv Shanker Saxena Vs. State of U.P. and others 2006 (4) AWC 3719, Gopal Chandra Sinha Vs. State of U.P. and others 2005 (4) ESC 2899, Rajendra Prasad Tripathi Vs. State of U.P. and others 2004 (4) AWC 3536 and Bhupendra Kumar Misra Vs. M.D., U.P.F.C. & others 2006 (1) SAC 261.***

5. Contrary to it, Sri Nripendra Mishra, learned counsel for the respondents has submitted that before passing the impugned order full opportunity of hearing has been given to the petitioner. In pursuance of earlier direction of this Court Sri Nripendra Mishra has also produced the record before this Court at the time of hearing. On the basis of record produced before the Court Sri Nripendra Mishra has made statement that the petitioner was given opportunity of personal hearing before the Managing Director of the Bank, who was disciplinary authority of the petitioner and he has appeared before the Managing Director on 24.6.2006 before impugned order was passed against him but except to written reply earlier submitted by him, he could not adduce any defence evidence in support of his case. Therefore, the petitioner cannot be heard on that count at this stage before this Court and he cannot blame the Disciplinary Authority on alleged fault in disciplinary proceedings held against him.

6. Heard Sri K. M. Misra, learned counsel for the petitioner and learned Standing counsel for the State respondents and Sri Nripendra Misra for Land Development Bank, Ghaziabad.

7. Having heard learned counsel for the parties and on perusal of the records, the question which arises for consideration of this court is that as to whether before the impugned order was passed against the petitioner he was afforded reasonable opportunity of hearing in consonance with the principles of natural justice or not, if not, what would be its effect?

8. In this connection it is to be pointed out that somewhat similar contention as raised by Sri Nripendra Mishra had been rejected by Hon'ble Apex Court more than four decades ago in ***Meenglas Tea Estate Vs. The Workmen AIR 1963 SC 1719*** wherein while stating the import of principles of natural justice in domestic inquiry in para

24 of the decision the Hon'ble Apex Court has held as under:-

"It is an elementary principle that a person who is required to answer a charge must know not only the accusation but also the testimony by which the accusation is supported. He must be given a fair chance to hear the evidence in support of the charge and to put such relevant questions by way of cross-examination as he desires. Then he must be given a chance to rebut the evidence led against him. This is the barest requirement of an enquiry of this character and this requirement must be substantially fulfilled before the result of the enquiry can be accepted. A departure from this requirement in effect throws the burden upon the person charged to repel the charge without first making it out against him. In the present case neither was any witness examined nor was any statement made by any witness tendered in evidence. The enquiry, such as it was, made by Mr. Marshall or Mr. Nichols who were not only in the position of Judges but also of prosecutors and witnesses. There was no opportunity to the persons charged to cross-examine them and indeed they drew upon their own knowledge of the incident and instead cross-examined the persons charged. This was such a travesty of the principles of natural justice that the Tribunal was justified in rejecting the findings and asking the Company to prove the allegation against each workman de novo before it. "'

9. In view of aforestated legal position enunciated by Hon'ble Apex Court it is clear that a person who is required to answer a charge must know not only the accusation but also the testimony by which the accusation is supported. He must be given fair chance to hear the evidence in support of the charge and to put such relevant questions by way of cross-examination as he desires then he must be given chance to rebut evidence led against him. This is the barest requirement of a domestic enquiry and this requirement must be substantially fulfilled before the result of inquiry can be accepted. A departure from requirement in effect throws the burden upon the person charged to repel the charge without first making it out against him. In instant case there is nothing from the records shown by Sri Nripendra Mishra to indicate that before submission of inquiry report on 12.8.2005 while holding the petitioner guilty of charges levelled against him, Inquiry Officer has ever given any notice to the petitioner indicating the date and place of holding disciplinary inquiry against him, or the petitioner has ever appeared before Inquiry officer and participated in said disciplinary inquiry. Besides this, Sri Nripendra Mishra could not point out any thing from record indicating as to whether Inquiry Officer has ever conducted any disciplinary inquiry before submission of his inquiry report against the petitioner wherein he has ever examined any witness in support of the charges levelled against the petitioner. There is no indication from the record inasmuch as from inquiry report itself as to whether any person was ever examined to prove preliminary inquiry report before the Inquiry Officer, which was only material in support of the charges levelled against the petitioner. In such a situation it is very difficult to accept the contention of learned counsel for the respondents that since the petitioner was given opportunity to appear before the Disciplinary

Authority in pursuance of which he appeared before him on 24.6.2006 before impugned order was passed against him, therefore, he has been afforded adequate opportunity to defend his case before impugned action was taken against him.

10. In this connection I would make the position further clear that even in the ex-parte inquiry, the charges are to be proved before Inquiry Officer even in absence of delinquent employee under the circumstances warranting for holding such ex-parte inquiry such as where despite notice or knowledge about the date and place of disciplinary inquiry, delinquent employee does not participate in such disciplinary inquiry or fails to participate in it, but not in other circumstances like present case where no notice was given to the petitioner indicating date and place of disciplinary inquiry. Hon'ble Apex Court in ***Imperial Tobacco Co. Ltd. Vs. its workmen A.I.R. 1962 S.C. 1348*** has held that even if an employee refuses to participate in the inquiry, the employer cannot straight way dismiss him but he must hold an ex-parte inquiry where the evidence must be led to prove the charges levelled against him. Therefore, in my opinion a distinction has to be drawn between the cases of "no inquiry" and "ex-parte inquiry". An ex-parte inquiry can be justified on principle of waiver that despite notice and/or knowledge about the date and place of inquiry, the delinquent employee refuses or fails to participate in disciplinary inquiry whereas the case of "no inquiry" can be justified only in a situation where delinquent employee admits the charges before the inquiry officer and not in other situations as dealt with by this Court in quite detail in ***Gopal Chand Sinha Vs. State of U.P. and others 2005 ESC 2899*** (pr. 17,18, 18-A).

11. In view of aforesaid settled legal position, I am of the considered opinion that unless aforesaid minimal requirement of natural justice is complied with and the respondents have made out a case first against the petitioner in the manner aforestated, it is not understandable as to how the petitioner could rebut the evidence which were not led before Inquiry Officer to prove the charges levelled against him and as to how he could repel those charges without being first made out against him even by appearing before the Disciplinary Authority at that stage of disciplinary proceeding. Therefore, in absence of compliance of aforesaid minimal requirement of principle of natural justice, in my opinion, the findings of Inquiry Officer could not be accepted by the Disciplinary Authority and only course which was open to him was either to ask the Inquiry Officer to hold fresh inquiry from the stage of submission of reply of charge sheet or to hold fresh disciplinary inquiry himself from the aforesaid stage.

12. In this connection, at this juncture, it is also necessary to point out that there is a vast and fundamental difference between two stages of disciplinary inquiry, one before the inquiry officer and another before disciplinary authority if the disciplinary inquiry is conducted by an officer other than the disciplinary authority as found in present case. In the first stage of the proceeding the inquiry officer after conducting such disciplinary inquiry submits his inquiry report to the disciplinary authority by holding the delinquent employee either guilty of

charges found fully proved or partly proved or by exonerating him from the charges levelled in the charge sheet. Thereupon at subsequent stage of the proceeding for sake of convenience, I may say second stage, if the disciplinary authority agrees with the findings of inquiry officer, contained in the inquiry report, under which charges are found fully or partly proved against the delinquent employee, he gives show cause notice to the employee along with the findings of inquiry officer contained in the inquiry report asking him to make comments thereon, thereupon passes appropriate final order in the matter. But where he does not agree with the findings of inquiry officer in cases where inquiry officer exonerated or partly exonerated the delinquent employee from the charges levelled, he communicates his tentative opinion of disagreement with inquiry report along with the show cause notice and after seeking comment thereon, takes final decision in the matter. As stated earlier unless first stage of such disciplinary proceeding is conducted before inquiry officer in compliance of aforesaid minimal requirement of principles of natural justice, in given facts and circumstances of the case it is very difficult to comprehend the situation under which the petitioner could repel the charges which were not proved before inquiry officer even by appearing before the Disciplinary Authority at the second stage of the proceeding. At this stage of proceeding unless the Managing Director being disciplinary authority of the petitioner either directs the Inquiry Officer to hold inquiry de-novo from the stage of reply of charge sheet or decides to hold fresh disciplinary inquiry by himself from the aforesaid stage, in my opinion, no useful purpose could be served on mere appearance of the petitioner before the Managing Director, as the fault pointed out by the petitioner in said disciplinary inquiry proceeding are such a fundamental in nature, which could not be repaired by Disciplinary Authority without having recourse of fresh disciplinary proceeding from the aforesaid stage.

13. In this connection I would like to make it further clear that aforesaid division of disciplinary proceeding in two different stages indicated hereinbefore should be understood only in common parlance; it should not be understood in legal parlance as synonymous of two opportunities as were provided under Article 311 (2) prior to Forty Second Amendment of the Constitution. After aforesaid amendment the provisions for making representation against proposed punishment has been deleted from the provisions of Article 311 (2) of the constitution. The effect of aforesaid amendment under said Article has been examined by the Hon'ble Apex Court in ***Associated Cement Companies Ltd. Vs. T.C. Srivastava AIR 1984 SC 1227, Union of India and another Vs. Tulsiram Patel AIR 1985 SC 1416, Ram Chander Vs. Union of India AIR 1986 SC 1173, Union of India Vs. E. Bashya AIR 1988 SC 1000. Union of India Vs. Mohd. Ramzan Khan AIR 1991 SC 471 and Managing Director E.C.I.L Vs. B. Karunakar AIR 1994 SC 1074***. On such examination in last two cases Hon'ble Apex Court has held that the right to receive the finding of inquiry officer contained in inquiry report before any action is taken thereon is part of reasonable opportunity of hearing of an employee to defend his case as an integral part of principles of natural justice. This

aspect of the matter has been discussed by Division Bench of this Court in quite detail with the assistance of law laid down by Hon'ble Apex Court from time to time in ***Gopal Chandra Sinha Vs. State of U.P***. (supra).

14. Before concluding the issue, it would also be useful to refer a decision of Hon'ble Apex Court rendered in ***State Bank of Patiala and others Vs. S.K. Sharma A.I.R. 1996 SC 1669,*** wherein after making survey of entire case law on the question in issue in para 32 of the decision (at page 1683-84 of the Report) the Hon'ble Apex Court has summarised the principles holding that these principles are not exhaustive rather illustrative in nature which are as under:-

"32. We may summarise the principles emerging from the above discussion. (These are by no means intended to be exhaustive and are evolved keeping in view the context of disciplinary inquiries and orders of punishment imposed by an employer upon the employee):

(1) An order passed imposing a punishment on an employee consequent upon a disciplinary/departmental enquiry in violation of the rules/regulations/statutory provisions governing such enquiries should not be set aside automatically. The Court or the Tribunal should enquire whether (a) the provision violated is of a substantive nature or (b) whether it is procedural in character.

(2) A substantive provision has normally to be complied with as explained hereinbefore and the theory of substantial compliance or the test of prejudice would not be applicable in such a case.

(3) In the case of violation of a procedural provision, the position is this: procedural provision are generally meant for affording a reasonable and adequate opportunity to the delinquent officer/employee. They are, generally speaking, conceived in his interest. Violation of any and every procedural provision cannot be said to automatically vitiate the enquiry held or order passed. Except cases failing under 'no notice', 'no opportunity', 'no hearing' categories, the complaint of violation of procedural provision should be examined from the point of view of prejudice, viz. Whether such violation has prejudiced the delinquent officer/employee in defending himself properly and effectively. If it is found that he has been so prejudiced, appropriate orders have to be made to repair and remedy the prejudice including setting aside the enquiry and/or the order of punishment. If no prejudice is established to have resulted therefrom, it is obvious, no interference is called for. In this connection, it may be remembered that there may be certain procedural provisions which are of fundamental character, whose violation is by itself proof of prejudice. The Court may not insist on proof of prejudice in such cases. As explained in the body of the judgment, take a case where there is a provision expressly providing that after the evidence of the employer/Government is over, the employee shall be given an opportunity to lead defence in his evidence, and in a given case, the Inquiry Officer does not give that opportunity in spite of the delinquent officer/employee asking for it. The prejudice is self-evident. No proof of prejudice as such need be called for in such a case. To repeat, the test is one of prejudice, i.e., whether the person has received a fair hearing

considering all things. Now, this very aspect can also be looked at from the point of view of directory and mandatory provisions, if one is so inclined. The principle stated under (4) hereinbelow is only another way of looking at the same aspect as is dealt with herein and not a different or distinct principle.

(4) (a) In the case of a procedural provision which is not of a mandatory character, the compliant of violation has to be examined from the stand point of substantial compliance. Be that as it may, the order passed in violation of such a provision can be set aside only where such violation has occasioned prejudice to the delinquent employee.

(b) In the case of violation of a procedural provision, which is of a mandatory character, it has to be ascertained whether the provision is conceived in the interest of the person proceeded against or in public interest. If it is found to be the former, then it must be seen whether the delinquent officer has waived the said requirement, either expressly or by his conduct. If he is found to have waived it then the order of punishment cannot be set aside on the ground of said violation. If, on the other hand, it is found that the delinquent officer/employee has not waived it or that the provision could not be waived by him, then the Court or Tribunal should make appropriate directions (include the setting aside of the order of punishment), keeping in mind the approach adopted by the Constitution Bench in B.Karunakar, 1994 AIR SCW 1050. The ultimate test is always the same, viz., test of prejudice or the test of fair hearing, as it may be called.

(5) Where the enquiry is not governed by any rules/ regulations/ statutory provisions and the only obligation is to observe the principles of natural justice- or, for that matter, wherever such principles are held to be implied by the very nature and impact of the order/action- the Court or the Tribunal should make a distinction between a total violation of natural justice (rule of audi alteram partem) and violation of a facet of the said rule, as explained in the body of the judgment. In other words, a distinction must be made between "no opportunity" and "no adequate opportunity", i.e. between "no notice"/ "no hearing and no fair hearing". (a) In the case of former, the order passed would undoubtedly be invalid (one may call it "void" or a nullity if one chooses to). In such cases, normally, liberty will be reserved for the authority to take proceedings afresh according to law, i.e. in accordance with the said rule (audi alteram partem) has to be examined from the stand-point of prejudice, in other words, what the Court or Tribunal has to see is whether in the totality of the circumstances, the delinquent officer/employee did or did not have a fair hearing and the orders to be made shall depend upon the answer to the said query. (It is made clear that this principle (No.5) does not apply in the case of rule against bias, the test in which behalf are laid down elsewhere).

(6) While applying the rule of audi alteram partem (the primary principle of natural justice) the Court/Tribunal/ Authority must always bear in mind the ultimate and overriding objective, underlying the said rule, viz" to ensure a fair bearing and to ensure that there is no failure of justice. It is this objective which should guide them in applying the rule to varying situations that arise before them.

(7) There may be situations where the interests of State or public interest

may call for a curtailing or the rule of audi alteram partem. In such situations the Court may have to balance public/State interest with the requirement of natural justice and arrive at an appropriate decision. "

15. Although while stating the aforesaid principles Hon'ble Apex Court itself has observed that they are not exhaustive, rather illustrative in nature, but principles enunciated hereinbefore have covered almost all the situations which may arise in such disciplinary inquiry, therefore, the facts of the case has to be tested on the aforesaid principles. While doing so I find that the case in hand would come to a category of case akin to case of 'no notice', 'no opportunity' and 'no hearing' before submission of inquiry report by the Inquiry Officer which was acted upon by the Disciplinary Authority. In view of aforesaid legal position it cannot be held to be merely a case of "no adequate opportunity" or "no fair hearing" requiring the action to be tested further on the touchstone of prejudice caused to the employee on account of violation of rules or any facet of principles of natural justice for the simple reason that it is neither a case of mere denial of cross-examination of any witnesses, who were examined in support of the charges nor the case of non-supply of inquiry report along with show cause notice, contrary thereto it is a case where no notice about the date and place of inquiry was given to the petitioner and in fact neither any inquiry nor even ex-parte inquiry was held before inquiry officer as neither any witnesses were examined nor any material shown in support of the charges levelled against the petitioner in the charge-sheet were proved according to law or in consonance with the principles of natural justice before Inquiry Officer even in absence of the petitioner. Therefore, question of any cross-examination or denial of opportunity of such cross-examination by Inquiry Officer does not arise in the instant case.

16. As distinguished from ex-parte inquiry, as stated earlier, it is case of "no inquiry" wherein the inquiry officer did not examine any witness and any material in support of the charges. At any rate, in my considered opinion, the case in hand is a case where there is violation of principles of natural justice of such a fundamental character, whose violation itself is a proof of prejudice which is self evident and court is not required to insist for further proof of prejudice. As held earlier that the fault found in disciplinary inquiry is such a fundamental character which cannot be repaired, without having recourse of holding fresh inquiry from the stage of submission of reply of the charge-sheet. Therefore, the impugned order passed by the Respondent no 4 has to be held nullity and void ab-initio which cannot be sustained. Accordingly the same is hereby quashed. In the result the petitioner is reinstated in service only for limited purpose of holding fresh disciplinary inquiry from the stage of submission of reply of the charge sheet.

17. However, during the period of such inquiry to be held against the petitioner, the petitioner shall be deemed to be placed under suspension and be paid his subsistence allowance, since deemed suspension would relate back from the date of initial order of suspension, therefore, the petitioner shall be paid his subsistence allowance from the date since when his services were dispensed with, as earlier to it he was paid subsistence but on

dismissal he could be paid such subsistence allowance during the pendency of writ petition till now but by virtue of this order since his suspension would be deemed to be revived from initial date of suspension, therefore, he is entitled for -Subsistence allowance for the aforesaid period as admissible to him under rule. The arrears of subsistence allowance for the aforesaid period shall be paid to him within one month from the date of production of certified copy of this order before the Disciplinary Authority and only on payment of arrears of subsistence allowance fresh disciplinary inquiry shall be held against the petitioner as indicated in this judgement. However, such subsistence allowance shall be continuously paid to him till the conclusion of inquiry.

18. With the-aforesaid observation and direction, writ petition succeeds and is allowed to the extent indicated hereinabove.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.03.2008

BEFORE
THE HON'BLE ASHOK BHUSHAN,J.

Civil Misc. Writ Petition No. 3475 of 2008

Kameshwar and others ...Petitioners
Versus
The Dy. Director of Consolidation, Kushinagar and others ...Respondents

Counsel for the Petitioners:
Sri. A.P. Tewari
Sri. S.S. Tripathi

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

U.P. Consolidation of Holding Act 1953-Section 48-Revision-Appeal decided by S.O.C. on the basis of consent-petitioner has been given more excess land consequent to low valuation-variation of valuation not more than 25%-revision against consent order-not maintainable-unless the consent challenged before the same Court-petitioner can not be allowed to raise technical plea-Dy. Director rightly refused to exercise revisional power.

Held: Para 10
The less valuation plot having been given, the petitioners' area has been increased but it is relevant to note that variation is not of more than 25% in the original area of the petitioners as compared to the area, which was allotted in pursuance of the order of Settlement Officer of Consolidation. Thus the increase of the area by Settlement Officer of Consolidation of the petitioners and allotment of the less valuation plot does not violate the provisions of Section 19 of U.P. Consolidation of Holdings Act, 1953 moreso when the petitioners consented that their chak on Plot No.1267 be removed and the valuation be added on Plot No.1170. The petitioners' father was aware of the consequence because valuation of the plot was already fixed on the record. When the chaks were modified by consent, the petitioners' submission that their good quality land was taken away and they were given less valuation land cannot be heard.

Case law discussed:
1999(90) R.D. 212, AIR 1982 S.C. 1249, AIR 2003 Supreme Court 2418.

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

1. Heard Sri A.P. Tiwari, learned counsel for the petitioners and Sri R.C. Singh, learned counsel appearing for the contesting respondents.

2. By this writ petition, the petitioners have prayed for quashing the order dated 26th December, 2007 passed by the Deputy Director of Consolidation in Revision No. 5/390/468/537/81, Revision No.6/642/791 of 2005 and the order dated 11th February, 1981 passed by the Settlement Officer of Consolidation as well as the order dated 10th April, 2006 passed by the Consolidation Officer.

3. Brief facts necessary for deciding the writ petition are; the petitioners were allotted Chak No. 571 in chak allotment proceedings under the U.P. Consolidation of Holdings Act, 1953. The Assistant Consolidation Officer proposed three chaks to the petitioners father, Madan Gopal. An objection was filed by petitioners' father under Section 20 of U. P. Consolidation of Holdings Act, 1953 objecting allotment of Chak on Plot No.1163 etc. The Consolidation Officer decided the objection affecting certain changes in the chak of the petitioners and other tenure holders. An appeal was filed by the petitioners before the Settlement Officer of Consolidation. The respondents and other tenure holders also filed appeals. The Settlement Officer of Consolidation made spot inspection and after hearing all the parties decided the appeal by order dated 11th February, 1981. The Settlement Officer of Consolidation recorded in the order that petitioners' father was agreeable that his chak at Plot No.1267 be totally removed and the valuation be added in his chak at Plot No.1170. Against the order passed by Settlement Officer of Consolidation a revision was filed by petitioners' father challenging the orders passed by Settlement Officer of Consolidation in different appeals. The Deputy Director of Consolidation initially by order dated 15th April, 2002 allowed the revision, which order, however, was subsequently recalled. An order was passed on 12th July 1996 rejecting the impleadment application of one Yasin and thereafter dismissing the revision. Against the said orders a writ petition being Writ Petition No.26420 of 1996 was filed by the petitioners, which writ petition was disposed of directing the Deputy Director of Consolidation to dispose of the revision finally within a period of three months. An objection regarding maintainability of the revision was raised by the respondents, which was decided by order dated 28th February, 2002 holding the revision maintainable. Subsequently on an application moved for recall of the order by Manokamna and others the order dated 28th February, 2002 was recalled on 12th May, 2006. The petitioners filed a writ petition challenging the aforesaid order. This Court by order dated 10th July, 2006 passed in Writ Petition No.30957 of 2006 disposed of the writ petition directing the Deputy Director of Consolidation to decide the revision after hearing the concerned parties on merits. The respondents moved an application for modification of the above order of this Court, which application was disposed of permitting the respondents to raise all the questions of law and facts before the Deputy Director of Consolidation including the question of maintainability. Subsequently, the Deputy Director of Consolidation by the impugned order dated 26th December, 2007 has rejected the revision. In the writ petition order dated 26th December, 2007 has been prayed to be quashed. Another set of orders, which have sought to be quashed in the writ petition are the order dated 10th April, 2006 passed by the Consolidation Officer under Rule 109 of U.P.

Consolidation of Holdings Rules, 1954 and the order of Deputy Director of Consolidation dated 26th December, 2007 dismissing the revision filed by the petitioners against the order dated 10th April, 2006.

4. Learned counsel for the petitioners challenging the orders, contended that the order of the Settlement Officer of Consolidation dated 11th February, 1981 was an order by which petitioners' chak, which was in good quality fertile land, was removed and the chak had been given to the petitioners in low water logging land of less valuation. Learned counsel for the petitioners contends that petitioners' father did not enter into any compromise before the Settlement Officer of Consolidation agreeing to take chak in Tal area. He contends that Deputy Director of Consolidation having once held that revision was maintainable by order dated 28th February, 2002, it was not open for the Deputy Director of Consolidation to hold that revision was not maintainable.

5. Sri R.C. Singh, leanred counsel appearing for the contesting respondents, refuting the submission of counsel for the petitioners, contends that the order of Settlement Officer of Consolidation was passed on consent given by petitioners' father and it was not open for the petitioners' father to file a revision or challenge the amendment made by the Settlement Officer of Consolidation. He contends that in the revision filed against the order dated 11th February, 1981 even the consent was not challenged. Learned counsel submits that petitioners' father having once given consent for modification of his chak, it was not open for him to challenge the said consent. Reliance has been place on the judgment of this Court reported in 1999(90) R.D. 212; ***Som Datta vs. The Deputy Director of Consolidation***, Saharanpur and the judgment of the Apex Court reported in A.I.R. 1982 S.C. 1249; ***State of Maharasthra vs. Ramdas Shrinivas Nayak and others*** and A.I.R. 2003 Supreme Court 2418; ***Roop Kumar vs. Mohan Thedani***.

6. I have considered the submissions raised by learned counsel for the parties and perused the record.

7. The order of Settlement Officer of Consolidation dated 11th February, 1981 has been filed as Annexure-1 to the writ petition. A perusal of the said order indicates that Settlement Officer of Consolidation specifically recorded in the order that Madan Gopal, father of the petitioners, was agreeable that his chak on Plot No.1267 be removed and the valuation be added in his chak at Plot No.1170. The amendment chart, which is part of the order of Settlement Officer of Consolidation, has been brought on the record as Annexure SA·3 to the supplementary affidavit, which chart indicates that chak on Plot No.1267 has been removed and the valuation has been given at Plot NO.1170 and others. The ground of revision filed by the petitioners against the order of Settlement Officer of Consolidation has been brought on the record as Annexure SA-4 to the supplementary affidavit. Although the petitioners took as may as ten grounds challenging the order of Settlement Officer of Consolidation but in none of the grounds it was even claimed that no such consent was given by the revisionist before the Settlement Officer of Consolidation for affecting his chaks. It is

useful to note that in the earlier writ petition, which was filed by the petitioners being Writ Petition No. 26420 of 1996 the submission raised by the respondents that the order of Settlement Officer of Consolidation being based on sent the revising authority cannot interfere was specifically noted, which was to the following effect:-

"Learned counsel for the respondent has, however, urged that in view of the observations made in the judgment passed by Assistant Settlement Officer (Consolidation), which is the subject matter of the revision it is apparent that the alterations made by the Assistant Settlement Officer (Consolidation) in the chak of the revisionists were made with the consent of the revisionists and in this view of the matter there was no scope for any interference by the revising authority specially when the correctness of the observations noticing the consent of the revisionist had not been challenged."

8. Although in this writ petition as well as in the supplementary affidavit, the petitioners have come up with the case that no such consent was given by the father of the petitioners before the Settlement Officer of Consolidation. An observation recorded in an order of consolidation authorities of the proceedings as transpired before the Court has to be accepted as true. In chak allotment proceedings the equities of the parties and their convenience are to be looked into while deciding chak objections, appeals and revisions. When in a chak appeal filed before the Settlement Officer of Consolidation the parties come up with some prayer with their consent for amendment of their chaks, no exception can be taken to the procedure adopted by Settlement Officer of Consolidation. It is categorically recorded in the order of Settlement Officer of Consolidation that Madan Gopal was agreeable that his chak at Plot No.1267 be removed and the said valuation be added at Plot No.1170. The amendment chart, which is part of the order of Settlement Officer of Consolidation dated 11th February, 1981 also indicates that chak of Madan Gopal being Chak No.571 was accordingly changed. The judgment relied by counsel for the respondents in **Som Datta's** case (supra) fully supports the submission of learned counsel for the respondents. In the above case the adjustment of chak was made in the appeal on the agreement of the parties. A revision was filed challenging the said order, which was allowed on the ground that there was no written compromise before the Settlement Officer of Consolidation. This Court set-aside the order of Deputy Director of Consolidation and laid down following in paragraph 4:-

***"4**. It is well settled that statement of fact appearing in the judgment of a Court below as to what happened before Court below cannot be challenged in appeal or revision and the statement of fact incorporated in judgment is to be taken to be correct unless both parties to litigation agree that it was not so (see State of Bihar vs. Mahabir Lal). Same principle of law will apply to statement of fact incorporated in judgment of Consolidation Authority. Referring to the remedy available to such a person, the Apex Court held, "if the record of a Court is to be assailed a review in that Court and not SLP or appeal in the Supreme Court is the remedy." There cannot be any any different view for seeking remedy*

in this respect for the party before any Court or tribunal subordinate to this Court in this respect. Consolidation Authorities discharging functions similar to Courts, adjudicating disputes, have to proceed accordingly and, therefore, it was not open to contesting opposite party to challenge the concession made in appeal before the Deputy Director of Consolidation in revision. The opposite parties could approach the Assistant Settlement Officer Consolidation and point out that no concession for making adjustment was made by him. As the contesting opposite-party did not take recourse to such remedy before Assistant Settlement Officer Consolidation, the setting aside of such an order passed in appeal by exercising revisional power by Deputy Director of Consolidation is bad in law. The Deputy Director, Consolidation exceeded his revisionaI power conferred on him under Section 48 of the Act in doing so.

9. The Apex Court in the case of ***State of Maharashtra vs. Ramdas Shrinivas Nayak*** also laid down the same principle. Following was laid down in paragraph 4 of the said judgment:-

"4. When we drew the attention of the learned Attorney General to the concession made before the High Court, Shri A.K. Sen, who appeared for the State of Maharashtra before the High Court and led the arguments for the respondents there was who appeared for Sri Antulay before us intervened and protested that he never made any such concession and invited us to peruse the written submission made by him in the High Court. We are afraid that we cannot launch into an inquiry as to what transpired in the High Court. It is simply not done. Public policy bars us Judicial decorum restrain us. Matters of judicial records are unquestionable. They are not open to doubt. Judges cannot be dragged into the arena. 'Judgements cannot be treated as mere counters in the game of litigation". (Jper Lord Atkinson in Somasundaran v. Subramaniam, AIR 1926 PC 136). We are bound to accept the statement of the Judges recorded in their judgment, as to what transpired in court. We cannot allow the statement of the Judges to be contradicted by statements at the Bar or by affidavit and other evidence. If the Judges say in their judgment that something was done, said or admitted before them, that has to be the last word on the subject. The principle is well settled that statements of fact as to what transpired at the hearing, recorded in the judgment of the Court, are conclusive of the facts so stated and no one can contradict such statement by affidavit or other evidence. If a party thinks that the happenings in court have been wrongly recorded in a judgment, it is incumbent upon the party, while the matter is still fresh in the minds of the Judges, to call the attention of the very Judges who have made the record to the fact that statement made with regard to his conduct was a statement that had been made in error (Per Lord Buckmaster in Madhusudan v. Chandrabati, AIR 1017 PC 30). That is the only way to have the record corrected. If no such step is taken, the matter must necessarily end there..."

10. To the same effect there is a judgment of the Apex Court in **Roop Kumar's** case (supra). The submission of the petitioners on which much emphasis has been laid is that petitioners entire good quality land was taken away by Settlement Officer of Consolidation and

they were given land of less valuation by the Settlement Officer of Consolidation. From the amendment chart it does appear that plots of petitioners, which were taken away were the plots of valuation 11 anna and 12 anna and the plots which were given were of less valuation, ie., 5 anna, 9 anna, 10 anna and 11 anna but it is also apparent that area which was taken away from the petitioner was 2.95 hectare whereas the petitioners were given an area of 5.71 hectare in place of the plots, which were taken away. The less valuation plot having been given, the petitioners' area has been increased but it is relevant to note that variation is not of more than 25% in the original area of the petitioners as compared to the area, which was allotted in pursuance of the order of Settlement Officer of Consolidation. Thus the increase of the area by Settlement Officer of Consolidation of the petitioners and allotment of the less valuation plot does not violate the provisions of Section 19 of U.P. Consolidation of Holdings Act, 1953 moreso when the petitioners consented that their chak on Plot No.1267 be removed and the valuation be added on Plot No.1170. The petitioners' father was aware of the consequence because valuation of the plot was already fixed on the record. When the chaks were modified by consent, the petitioners' submission that their good quality land was taken away and they were given less valuation land cannot be heard.

11. The last submission of the petitioners' counsel is that once the Deputy Director of Consolidation has held that revision was maintainable, it was not open for him to dismiss the revision. Under Section 48 of U.P. Consolidation of Holdings Act, 1953, the Deputy Director of Consolidation has very wide power. When an order was passed by Settlement Officer of Consolidation on 11th February, 1981, the revision filed by the petitioners against the said order was clearly maintainable. The maintainability of the revision is clearly different from the grounds to interfere in the revision. Every order passed by the subordinate consolidation authorities be that of Settlement Officer of Consolidation can be challenged before the Deputy Director of Consolidation under Section 48 but as to whether in the said revision grounds have been made out to interfere with the order is clearly a different thing. The revision filed by the petitioners' father was maintainable but the Deputy Director of Consolidation was entitled to consider the merits of the revision and decide as to whether the order is to be interfered with or not. The Deputy Director of Consolidation dismissed the revision observing that the order of Settlement Officer of Consolidation dated 11th February, 1981 was passed on the basis of consent given before him. It was also noticed by the Deputy Director of Consolidation that revisionist has not even challenge giving his consent. The Deputy Director of Consolidation further observed that even if consent was to be challenged, the same ought to have been done in the same Court, i.e., before the Settlement Officer of Consolidation, which having not done, the revision is to be dismissed. The Deputy Director of Consolidation in substance has taken the view that revision is liable to be dismissed due to above reason. Mere use of words by Deputy Director of Consolidation that revision is not maintainable is of no consequence. The substance of the order is that revision is to be dismissed. The Deputy Director of Consolidation has, thus, rightly come to

the conclusion that revision against the order dated 11th February, 1981 is to be dismissed.

12. In so far as the challenge to the order of Consolidation Officer dated 10th April, 2006 and the order of Deputy Director of Consolidation dated 26th December, 2007 passed under Rule 109 of U.P. Zamindari Abolition and Land Reforms Rules, 1952 are concerned, in view of the above mentioned observation that the order of Settlement Officer of Consolidation dated 11th February, 1981 was correct and the revision having been dismissed, the orders passed by Consolidation Officer dated 10th April, 2006 and the order dated 26th December, 2007 being consequential cannot be interfered with.

13. In view of the foregoing discussions, no error has been pointed out in the impugned orders, which may warrant interference under Article 226 of the Constitution of India.

14. The writ petition is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.04.2008

BEFORE
THE HON'BLE ASHOK BHUSHAN, J.

Civil Misc. Writ Petition No. 10166 of 2008

Deena Nath and others ...Petitioners
Versus
Deputy Director of Consolidation and others ...Respondents

Counsel for the Petitioners:
Sri Rahul Sahai

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

U.P. Consolidation of Holding Act 1935- Section 48-Revision against then order-passed by S.O.C.-remanding the case to be decided by the Consolidation Authority-amounts to final or interlocutory-held-question referred to larger Bench.

Held-Para 22

In view of the above, I am of the considered opinion that against those orders of Settlement Officer Consolidation passed in appeal which have effect of finally deciding the appeal be it may an order of remand, the provisions of section 48 shall apply but in view of the fact that a contrary view has been taken in the above noted cases, judicial propriety demands that the question be referred to the Hon'ble the Chief Justice for constituting a Division Bench for consideration.

In view of the foregoing discussions, following questions are framed to be considered by a Division Bench:

(i) Whether an order passed in appeal under section 11 of the U.P. Consolidation of Holdings Act by the Settlement Officer Consolidation deciding the appeal finally by setting aside the order of the Settlement Officer Consolidation and remanding the matter to the Consolidation Officer is an interlocutory order within the meaning of section 48 of the U.P. Consolidation of Holdings Act and revision is barred against such order under section 48.

(ii) Whether the law down in Ajab Singh and others Vs. Jt. Director of Consolidation and others, reported in *1996 R. D. 104*, Rajbir Vs. Dy. Director of Consolidation, reported in *1999 (90) R.D. 313*, Rajit Ram Singh and others Vs. Mahadev Singh and others, reported in

2002 (93) R.D. 224 **lay down the correct law.**

Case law discussed:

AIR 1981 Supreme Court 707, 1996 R.D. 104, 1999(90) R.D. 313, 2002(93) R.D. 224, AIR 1960 Supreme Court 941, (1996) 2 Supreme Court Cases 270, (1977) Supreme Court Cases 155, (1979) 2 Supreme Court Cases 463, 2001(92) R.D. 330, AIR 1965 Allahabad page 172, 1996 R.D. 104, 1996(90) R.D. 313, 2002(93) R.D. 224

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

1. Heard Sri Rahul Sahai, learned Counsel for the petitioner and Sri Sanjay Singh, learned Counsel appearing for the contesting respondent no. 2.

2. By this writ petition, the petitioner has prayed for quashing the order dated 13.2.2008, passed by the Deputy Director of Consolidation, Ballia holding the revision filed by the respondents against the order dated 27.9.2007 of the Settlement Officer, Consolidation as maintainable.

3. Brief facts of the case necessary to be noted for deciding the issue raised in the writ petition are; an objection under Section 9-B of the U.P. Consolidation of Holdings Act, 1953 was filed by the respondent no. 2 praying that plot no. 603/1 area 40 Are be kept out of consolidation after condoning the delay in filing the objection. The Consolidation Officer passed an order dated 18.1.2005 condoning the delay in filing the objection directing plot no. 603/1 area 40 Are be kept out of consolidation. Against the order passed by the Consolidation Officer, an appeal was filed by the petitioner before the Settlement Officer Consolidation. The Settlement Officer, Consolidation by order dated 27.9.2007 allowed the appeal and set aside the order of the Consolidation Officer dated 18.1.2005 and remanded the matter to the Consolidation Officer to pass a fresh order after hearing both the parties. Against the order dated 27.9.2007 of the Assistant Settlement Officer, Consolidation, the respondent no. 2 filed revision No. 674 under Section 48 of the U.P. Consolidation of Holdings Act, 1953. An objection was raised by the petitioners who were respondents in the revision that the revision having been filed against the remand order, is not maintainable and the question of maintainability of the revision be decided first after hearing the parties. The Deputy Director of Consolidation heard the parties on the question of maintainability of revision and by the impugned order dated 13.2.2008 held that the revision is maintainable, which has been challenged in the present writ petition.

4. Sri Rahul Sahai, learned Counsel for the petitioners challenging the order of the Deputy Director of Consolidation contended that the order of Settlement Officer, Consolidation being only a remand order, the revision was not maintainable. He submits that remand order is an interlocutory order and revision against an interlocutory order is expressly excluded under Section 48 of the U.P. Consolidation of Holdings Act. Learned Counsel for the petitioner placed reliance on the judgment in the cases of **Kshitish Chandra Bose Vs. Commissioner of Ranchi**, reported in *AIR 1981 Supreme Court 707*, **Ajab Singh and others Vs. Jt. Director of Consolidation and others**, reported in *1996 R.D. 104*, **Rajbir Vs. Dy. Director of Consolidation**, reported in *1999 (90) R.D. 313*, **Rajit Ram Singh and others Vs. Mahadev Singh and others**, reported in *2002 (93) R.D. 224.*

5. Sri Sanjay Singh, learned Counsel for the contesting respondents refuting the submission of learned Counsel for the

petitioners, contended that appeal having been finally allowed by the Settlement Officer, Consolidation after setting aside the order of the Consolidation Officer, the order of the appellate court is not an interlocutory order and the revision was fully maintainable. He further submits that according to section 48 Explanation (3), the Deputy Director of Consolidation has very wide power and the revision is fully maintainable.

6. I have considered the submissions of learned Counsel for the parties and have perused the record.

7. The only issue which has arisen for consideration in this writ petition is as to whether against an order of Settlement Officer, Consolidation, passed in appeal under Section 11 of the Act, remanding the case to the Consolidation Officer, a revision is maintainable under Section 48 of the U.P. Consolidation of Holdings Act, 1953. It is useful to look into the provisions of section 48 of the U.P. Consolidation of Holdings Act, 1953 before proceeding further to examine the issue. Section 48 of the Act empowers the Director of Consolidation to examine the record of any case decided or proceeding taken by any subordinate authority for the purpose of satisfying himself as to the regularity of the proceedings or the correctness, legality or propriety of any order. By U.P. Land Laws (Amendment) Act No. 20 of 1982, the words 'other than interlocutory order' has been added excluding the correctness or otherwise of an interlocutory order. An explanation (2) was also added by same U.P. Land Laws (Amendment) Act No. 20 of 1982 explaining the expression 'interlocutory order'. Section 48 as stood after the above amendment is as follows:

***"48. Revision and reference**. - (1) The Director of Consolidation may call for and examine the record of any case decided or proceedings taken by any subordinate authority for the purpose of satisfying himself as to the regularity of the proceedings; or as to the correctness, legality or propriety of any order other than interlocutory order passed by such authority in the case of proceedings and may, after allowing the parties concerned an opportunity of being heard, make such order in the case of proceedings as he thinks fit.*

(2) Powers under sub-section (1) may be exercised by the Director of Consolidation also on a reference under sub-section (3).

(3) Any authority subordinate to the Director of Consolidation may, after allowing the parties concerned an opportunity of being heard, refer the record of any case or proceedings to the Director of Consolidation for action under sub-section (1)

Explanation (1).- for the purposes of this section, Settlement Officers, Consolidation and Consolidation Lekhpals shall be subordinate to the Director of Consolidation.

Explanation (2).- for the purposes of this section, the expression 'interlocutory order' in relation to a case or proceedings, means such order deciding any matter arising in such case or proceeding or collateral thereto as does not have the effect of finally disposing of such case or proceeding.

Explanation (3). - for the purposes of this section to examine the correctness, legality or propriety of any order includes the power to examine any finding, whether of

fact or law, recorded by any subordinate authority, and also includes the power to re-appreciate any oral or documentary evidence. "

8. A perusal of section 48 thus, indicate that the power of revision can be exercised with regard to an order passed by any subordinate authority of any case decided or proceedings taken other than interlocutory order. The expression 'interlocutory order' has been explained in Explanation (2) which means in relation to a case or proceedings such order deciding any matter arising in such case or proceeding or collateral thereto as does not have the effect of finally disposing of such case or proceeding.

9. The question to be answered thus, is as to whether an order passed by the Settlement Officer, Consolidation allowing the appeal after setting aside the order of the Consolidation Officer and remanding the matter is an 'interlocutory order' and secondly as to whether against such interlocutory order, the revision is barred. Learned Counsel for the petitioner has relied on the judgement of **Kshitish Chandra Bose** (*supra*) for the proposition that the order of remand is an interlocutory order. In the above case, the suit filed by the plaintiff was decreed by the trial Court. The first appeal was filed which court affirmed the order of the trial court. Second appeal was filed before the High Court in which second appeal, the High Court by judgment dated 17.2.1967 remanded the case to the trial court for decision on the question of title. After remand, suit was dismissed. An appeal was filed before the High Court and High Court dismissed the appeal by judgment dated 13.9.2007 thereafter the appeal was filed before the Apex Court. It was contended that the plaintiff did not come up in the appeal against the first judgment of the High Court because the order passed by the High Court was not a final order but was in the nature of interlocutory order. The Apex Court in paragraph 6 laid down that it was open for the appellant to assail even the first judgment of the High Court. Paragraphs 5 and 6 of the judgment are being quoted herein below:

"5. Secondly, it was contended that even so the finding of the High Court on the question of adverse possession was given without at all considering the materials and evidence on the basis of which the two posts had concurrently found that the plaintiff had acquired title by adverse possession. It is contended that the plaintiff did not come up in appeal before this court against the impugned judgment of the High Court obviously because the order passed by the High Court was not a final one but was in the nature of an interlocutory order as the case had been remanded to the Additional Judicial Commissioner and if the revisional court had affirmed the finding of the trial court, no question of filing a further appeal to the High Court could have arisen. Thus, the appellant could not be debarred from challenging the validity of the first judgment of the High Court even after the second judgment by the High Court was passed in appeal against the order of remand. In support of this contention, the counsel for the appellant relied on a decision of this Court in the case of Satyadhavan Ghosal V. Shiksha Mitra. Deorajin Debi, (1960) 3 SCR 590: (AIR 1960 SC 941) where under similar circumstances this Court observed as follows:

"In our opinion the order of remand was an interlocuroty judgment which did not

terminate the proceedings and so the correctness thereof can be challenged in an appeal from the final order. " In coming to this decision this Court relied on an earlier decision in the case of Keshardeo Chamria V. Radha Kissen Chamria and vice versa, 1953 SCR 136: (AIR 1953 SC 23) where the same view was taken.

6. Mr. Sinha appearing for the respondent was unable to cite any authority of this Court taking a contrary view or overriding the decisions referred to above. In this view of the matter we are of the opinion that it is open to the appellant to assail even the first judgment of the High Court and if we hold "that this judgment was legally erroneous then all the subsequent proceedings, namely, the order of remand, the order passed after remand, the appeal and the second judgment given by the High Court in appeal against the order or remand would become non est. "

10. The proposition laid down in the above case was thus that even if against the first judgment passed by the High Court, appeal was not taken to the Supreme Court since it was a remand order, in appeal against the latter judgment of the High Court, the correctness of the first order of the High Court can be looked into. The Apex Court also referred to the earlier judgment of the High Court as an interlocutory order. There cannot be any dispute to the proposition laid down by the Apex court in the said case. It is however, relevant to note that the question as to whether against the first judgment i.e. the remand order passed by the High Court, the appeal was maintainable to the Supreme court in the above case was not there in the said case nor it was held that against an interlocutory order appeal did not lie.

11. The judgment on which much emphasis was laid by learned counsel for the petitioners is the case of **Ajab Singh** (supra). The other cases relied by learned Counsel for the petitioners i.e. **Rajbir Vs. Dy. Director of Consolidation** (supra), **Rajit Ram Singh and others Vs. Mahadev Singh and others**, also take the same view that the remand order by Settlement Officer, Consolidation being an interlocutory order, the revision shall not lie under Section 48 of the Act.

12. The judgment in the case of **Ajab Singh** *(supra)* is required to be noted in some detail. An objection was filed by the petitioner under Section 9-A (2) of the Act claiming succession to one Smt. Nihali on the basis of the Will. Another objection was filed by another set. The Consolidation Officer by order dated 18.9.1992 rejected the objection of the petitioner. Appeal was filed before the Settlement Officer, Consolidation. Settlement Officer, Consolidation allowed the appeal, set aside the order of the Consolidation Officer and remanded the matter to the Consolidation Officer with a view to give an opportunity to the petitioner to prove execution and attestation of the Will. A revision was filed before the Deputy Director of Consolidation which was allowed and the order of the Consolidation Officer was restored. The writ petition was filed challenging the order of the Deputy Director of Consolidation. One of the submissions raised before the High Court was that order of remand being interlocutory order, the revision was not maintainable. This Court laid down following in paragraph 15:

"15. It is next to be seen whether the order of remand passed by Settlement Officer Consolidation was not open to revision it being an 'interlocutory order'

within the meaning of section 48 of the U.P. Consolidation of Holdings Act which excludes, in no uncertain terms, an 'interlocutory order' from the purview of revisional jurisdiction. In Satya Dhayan Ghosal V. Smt. Oeo Rajan Oevi an order of remand has been held to be an interlocutory judgment in that it does not terminate the proceeding and its correctness can be challenged in appeal from the final order. In coming to the aforesaid conclusion the Apex Court has relied on its earlier decision rendered in Keshar Deo Chamaria Vs. Radhey Kissen Chamaria and the proposition laid down therein has been reiterated in Kshistish Chandra vs. Commissioner of Ranchi. In view of these authorities, I am of the considered view that the order of remand passed by Settlement Officer Consolidation was an 'interlocutory order' within the meaning of section 48 of the U.P. Consolidation of Holdings Act and, therefore, not open to revision. Its legality can, however, be examined in revision against the final judgments and orders rendered pursuant to the order of remand and if at that stage the Deputy Director of Consolidation finds that the order of remand was legally erroneous, all subsequent proceedings, viz. The order passed by the Consolidation Officer pursuant to the order of remand as also the appellate order passed in appeal preferred against such order of the Consolidation Officer would become non est. Since the order of remand is neither appealable nor revisable, its correctness is open to examination at subsequent stage when the matter comes up finally in revision. The impugned order is therefore, liable to be quashed on this ground as well. The decision in Bhawat and others v. Deputy Director of Consolidation and others has no application to the facts of this case and in any case it cannot be accepted in view of the Apex Court's direct decisions on the point. "

13. This court relied on three judgments of the Apex Court in coming to the conclusion that revision was not maintainable. The first judgment relied was **Satyadhan Ghoshal Vs. State of U.P,** reported in AIR 1960 Supreme Court 941. The apex Court in the aforesaid case had occasion to consider the principle of res-judicata as enshrined under Section 11 C.P.C. as well as section 105 C.P.C. The apex Court laid down that principles of res-judicata applies as also between two stages in the same litigation. The Apex Court in the said judgment also laid down that correctness of the remand order can be challenged in an appeal from final order. Following was laid down in paragraph 16:

(16) It is clear therefore that an interlocutory order which had not been appealed from either because no appeal lay or even though an appeal lay an appeal was not taken could be challenged in an appeal from the final decree or order. A special provision was made as regards order of remand and that was to the effect that if an appeal still the appeal was not taken the correctness of the order of remand could not later be challenged in an appeal from the final decision. If however an appeal did not lie from the order of remand the correctness thereof could be challenged by an appeal from the final decision as in the cases of other interlocutory orders. The second subsection did not apply to the Privy Council and can have no application to appeals to the Supreme Court, one reason being that no appeal lay to the Privy Councilor lies to the Supreme Court against an order of remand.

14. The judgment of the Supreme Court in the case of **Keshar Deo Chamaria V. Radhey Kissen Chamaria,** reported in *A. I. R. 1953 Supreme Court 23* was also not a case where the question as to whether against a remand order appeal or revision will lie or not, was considered. The third judgment relied was judgment of the Apex Court in the case of **Kshitish Chandra Bose Vs. Commissioner of Ranchi** (supra) which has already been noticed in the preceding paragraph, and was also a case where the proposition was laid down that a remand order which was not challenged earlier can be challenged against the final order. Another judgment which is relevant to be noticed is the case of **Preetam Singh Vs. Assistant Director of Consolidation** reported in *(1996) 2 Supreme Court Cases 270.* In the case before the Apex court against the order of Consolidation Officer an appeal was filed which was allowed and the matter was remanded to the Consolidation Officer for a fresh decision. On remand, the Consolidation Officer allowed the objection. Appeal was dismissed. A revision was filed before the Assistant Director of Consolidation, who also dismissed the revision. A writ petition was filed in this court in which the question was referred as to whether the finding recorded by the Settlement Officer, Consolidation for remand order was open to correction in revisional jurisdiction since the remand order had not been directly challenged in the revision. The High Court took the view that the remand order of Settlement Officer, Consolidation became final. The apex Court referring to two judgements in the case of **Jasraj Inder Singh Vs Hemraj Multanchand**, reported in *(1977) Supreme Court Cases 155* and **Sukhrani Vs. Hari shanker** reported in *(1979) 2 Supreme Court Cases 463*, laid down that the Assistant Director of Consolidation had ample power to examine the correctness of the order of the Settlement Officer, Consolidation even if remand order of Settlement Officer, Consolidation have not been specifically put to challenge in separate and independent proceedings. Following was laid down in paragraph 6:'

"When the matter was in revision before the Assistant Director (Consolidation), he had to the entire matter before him and his jurisdiction was unfettered. While in seisin of the matter in his revision a jurisdiction, he was in complete control and in position to test the correctness of the order made by the Settlement Officer (Consolidation) effecting remand. In other words, in exercise of revisional jurisdiction the Assistant Director (Consolidation) could examine the finding recorded by the Settlement Officer as to the abandonment of the land in dispute by those tenants who had been recorded at the crucial time in the Khasra of 1359 Fasli. That power as a superior court the Assistant Director (Consolidation) had, even if the remand order of the Settlement Officer had not been specifically put to challenge in separate and independent proceedings. It is noteworthy that the Court of the Assistant Director (Consolidation) is a court or revisional jurisdiction otherwise having suo motu power to correct any order of the subordinate officer. In this situation the Assistant Director (Consolidation) should not have felt fettered in doing complete justice between the parties when the entire matter was before him. The war of legalistics fought in the High Court was of no material benefit to the appellants. A decision on merit covering the entire controversy was due from the Assistant Director (Consolidation). "

15. The above judgment of the apex Court is also an authority for the proposition that the remand order if not challenged can be questioned subsequently when challenge is put to final order after remand before the higher Court. No such proposition was laid down in the above case that remand order could not be challenged in revision. The basis of judgment of this Court is the cases of **Ajab Singh, Rajbir and Rajit Ram Singh** *(supra)* that remand order being interlocutory order, revision is barred. However, the judgment of the Supreme Court referred by this Court in the above cases also held that that remand order is interlocutory order. One more judgment which is required to be noted is the judgment of this Court in the case of **Ram Bhajan Vs. Deputy Director of Consolidation**, reported in *2001 (92) R.D. 330*. This Court in the said judgment further classified a remand orders in two categories. The Court held that order of remand will be interlocutory, if they are simplicitor remand. However, if the Court while remanding the matter records finding of fact or law which may be binding, the remand order could not be interlocutory order. Following was laid down in paragraph 3 of the judgment:

"3. Learned counsel for the petitioner contends that the revision of the respondents was not maintainable because the order of S. O. C. Dated 5. 1. 1985 passed in appeal was remand order and, therefore, interlocutory order as held by decision of this Court in the case of Ram Narayan v. Deputy Director of Consolidation and decision reported in 1990 (90) RD 313. Both these decisions rely upon the decision of the Supreme Court in the case of Kshitish Chandra Bose V. Commissioner, Ranchi. The decision of the Supreme Court has been given in the context of Civil Procedure Code. Learned counsel for the respondents has relied upon a decision of the Division Bench of this Court in the case of Pritam Singh V. Assistant Director of Consolidation, for the proposition that remand orders are not always interlocutory order and it depends upon the remand order. Learned counsel for the petitioner has argued that the bar of revision against interference order was introduced in section 48 of the U.P. Consolidation of Holdings Act in the year 1982 for the first time and, therefore, the decision of the Division Bench of the year 1978 cited by the respondents is no longer good law. Having considered all the decisions as well as logical points I am of the opinion that remand orders would be interlocutory order if they are simplicitor remand orders. However, if the Court remanding matter has recorded finding of facts or even finding of law which would be binding after remand upon the Court to which matter has been remanded, the remand order would not be interlocutory order, as in respect of those issues it has finally decided the controversy."

16. In view of the law laid down in the above noted case, treating the order of remand as an interlocutory order, the second question which still is to be answered is as to whether against such an interlocutory order of remand by which the appeal has been finally decided by setting aside the order of the Consolidation Officer and remanding the matter, the revision is maintainable.

17. Section 48 Explanation (2) of the U.P. Consolidation of Holdings Act, 1953 while defining the expression 'interlocutory order' confines the 'interlocutory order' to mean such order deciding any matter arising in such case or proceeding or collateral thereto as does not have the effect of finally

disposing of such case or proceeding. A plain reading of section 48 (1) with Explanation (2) is that revision only such interlocutory order was barred which does not have the effect of finally disposing of such case or proceeding. The remand order which have effect of finally disposing of such case or proceedings are not included where revision is contemplated to be barred. Thus, each and every interlocutory order is not contemplated to be covered by prohibition under Section 48. Only a particular category of interlocutory orders have been contemplated to be excluded from the scrutiny of section 48. For example, if objection under Section 9-A or in appeal an interim order is passed granting injunction or any kind of Interim relief, the revision will be barred since that order does not have the effect of finally disposing of case or proceeding but when an interlocutory order has consequences of finally disposing of case or proceeding that is clearly out of prohibition contemplated under section 48. The judgment of this Court in the case of **Ajab Singh** *(supra)* has not adverted to Explanation (2) of Section 48 which defines the 'interlocutory order'. In the facts of the present case, the appeal was finally decided by setting aside the order of the Consolidation Officer and remanding the matter to the Consolidation Officer, the order of the Settlement Officer, Consolidation thus, finally terminated the appellate proceeding. Such kind of order was not contemplated to be interlocutory order against which revision was barred.

18. There is one more aspect of the matter which cannot be lost sight of i.e. as to whether the appeal under Section 11 of the U.P. Consolidation of Holdings Act, 1953 can be said to be a proceeding because section 48 refers to any case decided or proceeding taken. In case the appeal is treated to be a case then obviously the appeal having been decided, the case is decided. The word 'proceeding' is a wider term than a case. This court in **Ram Nayan Vs. Director of Consolidation**, reported in AIR 1965 Allahabad page 172 held that *"word 'proceeding' is wider than the word 'case' it may also include administrative proceeding."* The word proceeding has been used in several provisions of the U.P. Consolidation of Holdings Act and it is useful to refer sections 40 and 41 of the Act, which throw considerable light as to what is contemplated by proceeding under the U.P. Consolidation of Holdings Act. Sections 40 and 41 are quoted below:

"40. Proceedings before Settlement Officer Consolidation, Consolidation Officer and Assistant Consolidation Officer to be judicial proceedings. *_ A proceeding before a Director of Consolidation, Deputy Director of Consolidation, Settlement Officer, Consolidation, Consolidation Officer and Assistant Consolidation Officer, shall be deemed to be judicial proceedings within the meaning of sections 193 and 228 and for the purposes of Section 196 of the Indian Penal Code.*

41. Application of U.P. Land Revenue Act, 1901*. Unless otherwise expressly provided under this Act, the provisions of Chapter IX and X of the U.P. Land Revenue Act, 1901, shall apply to all proceedings including appeal and applications under this Act. "*

19. Section 40 of the Act provides that a proceeding before the Director of Consolidation shall be deemed to be judicial proceeding within the meaning of section 193 and 228. An appeal before Settlement Officer Consolidation under section 11 is also a judicial proceeding as per section 40.

20. Section 41 of the Act more clearly explain the intendment of the Legislature. Section 41 provides that provisions of Chapter IX and X of U.P. Land Revenue Act shall apply to all proceedings including appeal and applications under this Act. Thus proceeding has been defined in an inclusive manner which includes the appeal also. Section 41 clearly indicates that appeal is a proceeding. The appeal before Settlement Officer Consolidation being a proceeding and it has been finally decided by the order of the Settlement Officer Consolidation dated 27.9.2007 since nothing more was to be done in the appeal, the said order is clearly not covered by the definition of 'interlocutory order' as given in Explanation (2). Thus, the bar under section 48 against filing of revision was not attracted.

21. From the judgment of this Court in **Ajab Singh and others Vs. Jt. Director of Consolidation and others** *(supra)*, **Kshitish Chandra Bose Vs. Commissioner of Ranchi** *(supra)*, **Rajbir Vs. Dy. Director of Consolidation**, **Rajit Ram Singh and others Vs. Mahadev Singh and others** *(supra)*, it is clear that Explanation of section 48 has not been considered and without considering the distinction between two kind of interlocutory orders, a general proposition has been laid down that revision is barred against interlocutory orders.

22. In view of the above, I am of the considered opinion that against those orders of Settlement Officer Consolidation passed in appeal which have effect of finally deciding the appeal be it may an order of remand, the provisions of section 48 shall apply but in view of the fact that a contrary view has been taken in the above noted cases, judicial propriety demands that the question be referred to the Hon'ble the Chief Justice for constituting a Division Bench for consideration,

In view of the foregoing discussions, following questions are framed to be considered by a Division Bench:

(i) Whether an order passed in appeal under section 11 of the U.P. Consolidation of Holdings Act by the Settlement Officer Consolidation deciding the appeal finally by setting aside the order of the Settlement Officer Consolidation and remanding the matter to the Consolidation Officer is an interlocutory order within the meaning of section 48 of the U.P. Consolidation of Holdings Act and revision is barred against such order under section 48.

(ii) Whether the law down in **Ajab Singh and others Vs. Jt. Director of Consolidation and others**, reported in *1996 R. D. 104*, **Rajbir Vs. Dy. Director of Consolidation**, reported in *1999 (90) R.D. 313*, **Rajit Ram Singh and others Vs. Mahadev Singh and others**, reported in *2002 (93) R.D. 224* lay down the correct law.

23. Let the papers be placed before Hon'ble the Chief Justice for constituting a Division Bench to consider the above noted questions. Referred to larger bench.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.04.2008

BEFORE
THE HON'BLE SABHAJEET YADAV, J.

Civil Misc. Writ Petition No.46568 of 2000

Ramesh Chandra Pathak ...Petitioner
Versus.
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri. A.P. Tewari
Sri. S.S. Tripathi

Counsel for the Respondents:
Sri. Ravi Ranjan
S.C.

U.P. Government Servant Seniority Determination Rules 1991-Rule 6-Seniority-person senior in feeding cadre-promoted subsequent to his junior-by applying wrong criteria-suitability cum seniority-no adverse entry or allegation of misconduct-held-after promotion-petitioner entitled to maintain seniority of his feeding cadre.

Held: Para 11

It is no doubt true that the petitioner has been promoted subsequent to the aforesaid persons on the post of Assistant Accountant but once he has been promoted on the post of Assistant Accountant even subsequent to the aforementioned persons he will regain his seniority position as it was in the feeding cadre of Junior Accounts Clerk. In my opinion the view taken by concerned authority while preparing the impugned seniority list, contrary to it ,appears to be contrary to the statutory provisions of Rule 6 of 1991, cannot be sustained, therefore, the impugned seniority list dated 1.9.1998 of Assistant Accountant cannot be maintained accordingly, the same is hereby quashed.

Case law discussed:
AIR 1985 SC 582, AIR 1999 SC 2583, JT 2003 (3) SC 183, JT 2005 (4) SC 40.

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

1. A short question which arises for consideration is that as to whether a senior person in the feeding cadre if promoted subsequent to his juniors on next higher post can regain his seniority as it was in feeding cadre on his such subsequent promotion?

2. The brief facts leading to the case is that the petitioner was initially appointed on the post of Junior Clerk in the Office of Laghu Krishak Vikas Abhikaran, Gorakhpur on 14/15.11.1980 on regular basis after due process of selection, and by efflux of time the persons appointed as Junior Clerk in Laghu Krishak Vikas Abhikaran were redesignated as Junior Accounts Clerk on its redesignation as Zila Gramya Vikas Abhikaran. Thereafter the petitioner was given promotion to the next higher post of Assistant Accountant vide order dated 23.11.1990. Next promotion from the post of Assistant Accountant is the post of Accountant. A tentative seniority list for the post of Assistant Accountant was published on 13.6.1996 inviting objection against the said seniority list. The petitioner moved his representation/objection against the said tentative seniority list on 24.7.1996. Thereafter a final seniority list was published by the respondent vide covering letter dated 1.9.1998 (Anneuxre-6 to the writ petition). Thereafter on the basis of aforesaid seniority list promotion order from the post of Assistant Account to the post of Accountant was issued vide order

dated 10.11.1999 (Annexure-7 of the writ petition) from the office of Commissioner. Gramya Vikas. U.P. Lucknow. The petitioner moved a representation to the Commissioner, Gramya Vikas, U.P. Lucknow on 12.11.1999 and ultimately filed Civil Misc. Writ Petition No.51833 of 1999 earlier to it. While deciding writ petition vide judgment and order dated 10.12.1999, this Court has directed the respondent to decide representation dated 12.11.1999 moved by the petitioner before respondent no.2. In compliance of the aforesaid order passed by this Court, the Commissioner, Gramya Vikas, U.P. Lucknow respondent no.2 vide impugned order dated 10.8.2000 (Annexure-l0 to the writ petition) has rejected the aforesaid representation of the petitioner, hence this petition.

3. Heard Sri A.P. Tewari, learned counsel for the petitioner and Sri Ravi Ranjan, learned Standing Counsel for respondents.

4. The submission of learned counsel for the petitioner in nutshell is that the services of employees of Gramya Vikas Abhikaran is not regulated of any statutory rules rather it is regulated by G.O. issued from time to time. A such G.O. dated 17.3.1994 has been issued regulating the recruitment and other terms and conditions of services of employees of Gramya Vikas Abhikaran. Under para-6 of the said G.O., it is provided that seniority of the employees has to be determined in accordance with U.P. Government Servants Seniority Rules, 1991 (hereinafter referred to as 1991 Rules) as amended from time to time. The learned counsel for the petitioner has also drawn attention of the Court, on the appendix of the said rules which enumerates various categories of post existing in Gramya Vikas Abhikaran including number of sanctioned post, appointing authority and source of recruitment on such posts. At Serial no.l0 of the appendix, the post of Junior Accounts Clerk is mentioned which is to be filled by the selection committee through direct recruitment. At Serial no.9 of the said appendix, the post of Assistant Accountant has been mentioned which is liable to be filled by cent per cent promotion of Junior Accounts Clerk on the basis of seniority subject to rejection of unfit by departmental selection committee. At Serial no.8 of the appendix, the post of Accountant is mentioned which is also liable to be filled by cent percent promotion of Assistant Accountant on the basis of seniority subject to rejection of unfit by the departmental selection committee. Learned counsel for the petitioner has urged that from the aforesaid facts it is clear that the post of Junior Accounts Clerk is lowest post in the aforesaid hierarchy of service and liable to be filled through direct recruitment. The next higher promotional post is Assistant Accountant is liable to be filled only by promotion from a single feeding cadre of Junior Accounts Clerk, therefore, for determination of seniority on the post of Assistant Accountant Rule 6 of 1991 Rules is attracted and it is also revealed from the impugned seniority list dated 1.9.1998 that the seniority on the post of Assistant Accountant is determined under 1991 Rules as amended from time to time. Rule 6 of 1991 Rules provides that where according to the service rules, appointments are to be made only by promotion from a single feeding cadre, the seniority *inter se* of persons so appointed shall be the same as it was in

the feeding cadre. Explanation appended to the said rules further provides that a person senior in the feeding cadre shall, even though promoted after the promotion of a person junior to him in the feeding cadre shall, in the cadre to which they are promoted, regain the seniority as it was in the feeding cadre. According to him, virtually it is seniority position in the feeding cadre which is decisive factor to determine the seniority position in the promotional cadre also instead of respective date of promotion on such promotional post.

5. Sri A.P. Tewari has further submitted that although impugned seniority list it has been drawn purporting it to be under 1991 Rules but in fact while determining the i*nter se* seniority of members of service of Assistant Accountant the provisions of Rule 6 has not been adhered to and seniority list was not drawn in conformity of Rule 6 of 1991 Rules. While substantiating his submission he has placed reliance upon a chart shown in para-4 of the supplementary affidavit filed in the writ petition, whereby he has demonstrated that the persons mentioned therein, though promoted earlier to the petitioner on the post of Assistant Accountant but they were appointed on the post of feeding cadre i.e. Junior Accounts Clerk subsequent to the appointment of petitioner and they were junior to the petitioner on the said post of Junior Accounts Clerk. However, the petitioner was promoted on the post of Assistant Account subsequent to them but once he has been promoted on the post of Assistant Accountant even subsequently from the promotion of aforesaid persons he will regain his seniority position on the post of Assistant Accountant as it was in feeding cadre of Junior Accounts Clerk, and he should be treated to be senior to the aforesaid persons mentioned in para-4 of the supplementary affidavit on the post of Assistant Accountant. In my opinion, the submission of learned counsel for the petitioner appears to have some substance and requires to be examined.

6. In order to appreciate the controversy, it would be useful to extract the provision of Rule 6 of 1991 Rules along with explanation, as under:

6. Seniority where appointments by promotion only from a single feeding cadre- *Where according to the service rules, appointments are to be made only by promotion from a single feeding cadre, the seniority inter se of person so appointed shall be the same as it was in the feeding cadre.*
Explanation-*A person senior in the feeding cadre shall, even though promoted after the promotion of a person junior to him in the feeding cadre shall, in the cadre to which they are promoted, regain the seniority as it was in the feeding cadre.*

7. Although from a plain reading of the aforesaid Rules it is clear that where the appointments on a post are to be made only by promotion from single feeding cadre, the inter-se-seniority of the persons so appointed by promotion shall be the same as it was in the feeding cadre but the explanation appended to the said rules further clarified the position that if a junior person in the feeding cadre promoted earlier and senior person promoted later in point of time subsequent to the junior persons, but once senior person is promoted he will regain his seniority position as it was in the feeding

cadre but before applying the aforesaid rules in given facts and circumstances of the case one must be clear about the function of the explanation appended to the particular statute.

8. In this connection it would be useful to refer the decision of Hon'ble Apex Court rendered in ***S. Sundaram Pillai etc. Vs. V.R. Pattabiraman AIR 1985 SC 582*** wherein after referring earlier cases and juristic opinions in paras 45 and 52 of the decision, the Hon'ble Apex Court has observed as under:

"45. *We have now to consider as to what is the impact of the Explanation on the proviso which deals with the question of wilful default. Before, however, we embark on an enquiry into this difficult and delicate question, we must appreciate the intent, purpose and legal effect of an Explanation. It is now well settled that an Explanation added to a statutory provision is not a substantive provision in any sense of the term but as the plain meaning of the word itself shows it is merely meant to explain or clarify certain ambiguities which may have crept in the statutory provision. Sarathi in 'Interpretation of Statutes' while dwelling on the various aspect of an Explanation observes as follows:*

"(a) The object of an explanation is to understand the Act in the light of the explanation.

(b) It does not ordinarily enlarge the scope of the original section which it explains, but only makes the meaning clear beyond dispute. "

52. Thus, from a conspectus of the authorities referred to above, it is manifest that the object of an Explanation to a statutory provision is--

(a) to explain the meaning and intendment of the Act itself,

(b) where there is any obscurity or vagueness in the main enactment, to clarify the same so as to make it consistent with the dominant object which it seems to subserve,

(c) to provide an additional support to the dominant object of the Act in order to make it meaningful and purposeful,

(d) an Explanation cannot in any way interfere with or change the enactment or any part thereof but where some gap is left which is relevant for the purpose of the Explanation, in order to suppress the mischief and advance the object of the Act it can help or assist the Court in interpreting the true purport and intendment of the enactment, and

(e) it cannot, however, take away a statutory right with which any person under a statute has been clothed or set at naught the working of an Act by becoming an hindrance in the interpretation of the same. "

9. Thus in view of law laid down by the Hon'ble Apex Court, it is clear that the explanation appended to Rule 6 of 1991 Rules is intended to clarify the substantive provisions of Rules by providing additional support to it, leaving no scope for doubt about the true import of the said Rules, indicated hereinbefore.

10. Now applying the aforestated principles on the facts of the case it is not in dispute that the petitioner was appointed on the post of Junior Clerk on 15.11.1980 which was redesignated as Junior Accounts Clerk, it is to be further pointed out that the petitioner Ramesh Chandra Pathak finds place at Serial

no.82 in the impugned seniority list dated 1.9.1998 on the post of Assistant Accountant and his date of promotion on the said post has been mentioned as 23.11.1990. The persons who have been promoted earlier to him on the said post in the year 1987-88 to 1988-89, they have been placed above in the said gradation list irrespective of the fact that they were junior to the petitioner on the post of Junior Accounts Clerk and appointed subsequent to the appointment of petitioner in the feeding cadre of Junior Accounts Clerk. From a perusal of para 4 of the supplementary affidavit filed in the writ petition, it appears that Sri Mathura Prasad Dubey was appointed as Junior Accounts Clerk on 13.7.1982 and placed in the impugned seniority list at Serial no.41 above the petitioner. Sri Ramadhin was appointed as Junior Accounts Clerk on 25.4.1981 was placed in the seniority list at Serial no.44. Sri Chandan Singh Parihar was appointed as Junior Accounts Clerk on 31.12.1981 and placed in seniority list at Serial No.54. Sri Amod Pratap Singh was appointed on 20.5.1982 on the post of Junior Accounts Clerk and placed at Serial No.55 in the impugned final seniority list. Sri Ajit Kumar was appointed on 5.8.1981 as Junior Accounts Clerk and placed at Serial no.59 in the seniority list. Sri Shyam Singh was appointed as Junior Accounts Clerk on 12.2.1982 and placed at Serial no.60 of the seniority list. Sri C.S. Chauhan was appointed as Junior Accounts Clerk on 13.12.1982 and placed at Serial No.61 in the seniority list. Sri Mewa Lal was appointed as Junior Accounts Clerk on 1.2.1983 and placed at Serial No.64 in the seniority list. Sri Amar Jeet was appointed as Junior Accounts Clerk on 1.1.1982 and placed at Serial No.65 of the seniority list. Sri Anand Kumar Tiwari was appointed as Junior Accounts Clerk on 17.6.1985 and placed at Serial No.66 of the seniority list. Sri Shashi Kant Tiwari was appointed on 4.1.1982 on the post of Junior Accounts Clerk and placed at Serial no.69 of the seniority list. Sri Naveen Pathak was appointed as Junior Accounts Clerk on 28.3.1985 and placed at Serial No.74 of the seniority list. Sri Sanjay Kumar Paliwal was appointed on the post of Junior Accounts Clerk on 29.3.1985 and placed at Serial No.75 in the impugned seniority list. Sri Kripa Shankar was appointed on 24.3.1981 as Junior Accounts Clerk and placed at Serial No.76 of the impugned seniority list. Sri Brij Lal was appointed as Junior Clerk on 25.3.1981 and placed at Serial no.77 of the seniority list. Sri B.S. Rawat was appointed on 18.5.1985 as Junior Accounts Clerk and placed at Serial No.79 of the seniority list.

11. It is no doubt true that the aforesaid persons have been promoted on the post of Assistant Accountant earlier to the promotion of petitioner but since the post of Assistant Accountant is liable to be filled up by cent per cent promotion from single feeding cadre post of Junior Accounts Clerk, therefore, their seniority has to be determined as per seniority in the feeding cadre i.e. on the post of Junior Accounts Clerk according to Rule 6 of 1991 Rules, but there is nothing on record either revealed from the counter affidavit or record shown by the learned Standing Counsel that except the date of promotion on the post of Assistant Accountant the criteria for determination of seniority as existing in the feeding cadre was applied while preparing the impugned seniority list dated 1.9.1998 on the post of Assistant Accountant which is liable to be filled up by cent per cent promotion from

the post of Junior Accounts Clerk. In my opinion, according to Rule 6 of 1991 Rules the date of promotion on the post of Accountant is not determinative factor for the purposes of determination of seniority instead thereof in cases like present one the date of appointment on the post of feeding cadre is determinative factor for the purpose of determination of seniority amongst the members of Assistant Accountant. It is no doubt true that the petitioner has been promoted subsequent to the aforesaid persons on the post of Assistant Accountant but once he has been promoted on the post of Assistant Accountant even subsequent to the aforementioned persons he will regain his seniority position as it was in the feeding cadre of Junior Accounts Clerk. In my opinion the view taken by concerned authority while preparing the impugned seniority list, contrary to it appears to be contrary to the statutory provisions of Rule 6 of 1991, cannot be sustained, therefore, the impugned seniority list dated 1.9.1998 of Assistant Accountant cannot be maintained accordingly, the same is hereby quashed.

12. Since the next higher promotion on the post of accountant has been made on the basis of impugned seniority list by adopting criteria of seniority subject to rejection of unfit. Therefore, the said promotion can also not be sustained for the same reasons. Accordingly, the promotion order dated 10.11.1999 as contained in Annexure-7 of the writ petition is hereby quashed. The order passed by the Commissioner, Gramya Vikas, U.P. Lucknow on 10.8.2000 while deciding the representation of petitioner as contained in Annexure-10 of the writ petition appears to be erroneous and misconceived for; the reasons aforestated. Therefore, the same is also liable to be quashed and accordingly is hereby quashed. In the result, the writ petition succeeds and is allowed.

13. The respondents are directed to draw fresh seniority list of Assistant Account according to the observation made hereinbefore by taking into account aforesaid principle after seeking objection from all the persons likely to be affected within a period of three months from the date of production of certified copy of this order before the concerned authority. The respondents are further directed to draw fresh seniority list by taking into account the date of substantive/regular appointment on the post of Junior Accounts Clerk in the feeding cadre and not the date of promotion on the post of Assistant Accountant.

14. It is no where mentioned in the counter affidavit that during the service of petitioner on the post of Junior Accounts Clerk or the post of Assistant Accountant the petitioner has any adverse entry in the character roll and annual confidential reports. Therefore, the petitioner cannot be denied promotion on the next higher post of Accountant as the criteria for promotion on the said post from the post of Assistant Accountant is seniority subject to rejection of unfit, unless he is found unfit for promotion he can claim his promotion on the next higher post as a matter of right from the date when his juniors have been promoted on the said post of Accountant.

15. The respondents are further directed to undertake and decide the issue of promotion within another period of one month after finalisation of seniority list. Until such exercise is undertaken and

completed by the respondent authorities, the persons who have been promoted vide order dated 10.11.1999 which has been quashed by this Court shall not be disturbed. If at the time of final promotion the persons already promoted are found to be entitled for promotion they shall be retained. In case those promoted persons are to be reverted on account of order passed by this Court, they should also be heard by the respondents before their reversion from the post of accountant to the post of Assistant Accountant.

16. Before parting with the judgment I, need to clarify that since the issue has been decided only on principle for determination of seniority and promotion which could not be disputed by learned Standing Counsel and factual aspect of the matter has been left over for determination to the concerned authority afresh after hearing the persons likely to be affected, therefore, hearing of individual private persons before this Court who are likely to be affected by this judgment, was merely an empty formality. As such in view of law laid down by Hon'ble Apex Court in ***M.C. Mehta Vs. Union of India and others AIR 1999 SC 2583, Canara Bank and others Vs. Sri Debasis Das and others JT 2003 (3) SC 183 and Canara Bank Vs. V.K. Awasthy JT 2005 (4) SC 40,***useless formality theory can be pressed into service.

17. In view of the aforesaid observation and direction, the writ petition succeeds and is allowed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.06.2008

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

First Appeal From Order No.968 of 1990

New India Assurance Company
...Defendant-Appellant
Versus
Kalawati Devi and others ...Respondents

Counsel for the Appellant:
Sri V.C. Dixit

Counsel for the Respondents:
Sri A.K. Bhatt
Sri S.C. Dwivedi
Sri P.K. Misra

Motor Vehicle Act 1939-Section-95-Limited liability-Vehicle insured with Insurance Company-Photostat copy of policy filed before Tribunal-Rejection on the ground the Registration number not mention, while the Engine and chassis numbers are the same-held-not proper-considering limited liability-the Insurance Company liable to pay 15,000/- half amount of award to be paid by the vehicle owner.

Held: Para 3

Merely because in the insurance policy the registration number of the vehicle was not mentioned, it could not be said that it was not connected with the vehicle in question. Address of the owner was the same. Engine number/chassis number given in the policy tallied with the said numbers of the engine and chassis of the vehicle. Accordingly under Section 95 of Motor Vehicle Act 1939 liability was limited. In the insurance policy there was no mention that liability was un-limited or enhanced than minimum.

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

1. At the time of arguments in this appeal no one appeared for the respondents even though case was taken up in the revised list accordingly, only the arguments of learned counsel for the appellant were heard.

2. This appeal is directed against judgment award and order dated 31.5.1990 given by Motor Accident Claim Tribunal/IXth Additional District Judge, Allahabad in Motor Accident Case No.81 of 1986 Smt. Kalawati Devi and others vs. Jaishree Singh and others. One Amar Nath died in a motor accident. His widow Kalawati Devi and others (respondents) filed the claim petition giving rise to this appeal claiming compensation of Rs.2,05,000/-. The tribunal below awarded the compensation of Rs.93,600/-. Half of the awarded compensation was directed to be paid by owner/insurer of the vehicle bearing no. URS 9650 and the other half by owner/insurer of the vehicle bearing no.RNB 331. 12% interest was also awarded. The deceased was traveling in mini bus bearing no. URS 9650. It collided with the truck no. RNB 331 head-on. Appellant insurance company was insurer of mini bus bearing no. URS 9650.

3. In para-14 of the impugned judgment the argument of appellant regarding limited liability has been considered. It is also mentioned in the said para that the appellant had filed photostat copy of insurance policy. The contention was rejected on the ground that in the insurance policy number of the vehicle was not mentioned. Copy of the said photocopy has been filed alongwith Supplementary affidavit in this appeal. In the said policy engine number and chassis number has been mentioned. Address of the owner given therein is also the same as was given in the claim petition. Learned counsel for the appellant has argued that normally insurance policy is taken before taking out the vehicle from the show room and registration number by R.T.O. is provided after about a week. I fully agree with the contention of learned counsel for the appellant. An owner of a motor vehicle is entitled to get the vehicle registered with R.T.O. within a week from its purchase. Merely because in the insurance policy the registration number of the vehicle was not mentioned, it could not be said that it was not connected with the vehicle in question. Address of the owner was the same. Engine number/chasis number given in the policy tallied with the said numbers of the engine and chasis of the vehicle. Accordingly under Section 95 of Motor Vehicle Act 1939 liability was limited. In the insurance policy there was no mention that liability was un-limited or enhanced than minimum.

4. Accordingly appeal is **allowed in part**. Impugned order is modified. It is directed that appellant is not liable to pay more than Rs.15,000/- alongwith awarded interest under the impugned judgment and award. Rest of the 50% amount shall be payable by the mini bus owner i.e. respondent no.2-Jai Shri Singh.
