ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.08.2008

BEFORE
THE HON,BLE B.A. ZAIDI, J.
THE HON'BLE V.K. VERMA, J.

Criminal Contempt Petition No. 7 of 2007

Kripa Shanker Sharma ...Contemner
Versus
State of U.P. & others ...Opposite Parties

Counsel for the Contemner:
Sri. Shashi Nandan
Sri. Sanjeev Kumar

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

Contempt of Court Act 1971-Section 15-criminal contempt-filing false affidavit dated 27.02.2007 to the effect that minutes of regional committee meeting are not maintained again in other affidavit-made just contrary statements-held-register maintained upto March 2006, contemner taken additional charge on 08.02.2007-after getting search of register in its office-at once produced before the Court-if any dishonest intention-contemnor would have never produced before the Court-cannot be held guilty for the charges-entitled exoneration.

Held: Para 8

It is also to be noticed that this register was only upto the March, 2006 while the contemner took the charge on 8.2.2007 when the petitioner got a search made in the office, the register was discovered, and he duly produced the same before the Court in the condition in which, it was found, if there was any dishonest intention on the part of the contemner, he would have not laid the register before the Court, at all.

(Delivered by Hon'ble B.A. Zaidi, J.)

1. This is a reference made by the Bench of Hon'ble Mr. Justice Arun Tandon in Civil Misc. Writ Petition No. 5991 of 2007. The matter was referred to the erstwhile contempt of Court Bench and Hon'ble Mr. Justice K.S. Rakhra and Hon'ble Mr. Justice S.C. Nigam, framed the following charges against the contemner:-

"Charge under section 15 read with 2C of the Contempt of Court Act 1971.

You are hereby charged as follows:-
Firstly that in Writ Petition no.6991 of 2007 Committee of Management and others Vs. State of U.P. And others you as Regional Joint Director of Education holding charge Moradabad Region Moradabad gave a false statement before this Court on 27.02.2007 to the effect that minutes of the Regional Level Committee are not being recorded in any register while in your affidavit filed before this Court in the said writ petition on 19.03 2007 you specifically mentioned para 4 that the register in respect of meeting of Regional Level Committee is available and you have brought it to court and you are in a position to place before the court. This shows that your aforesaid statement on oath was patently wrong and was intended to mislead the court and it was in the nature of substantial interference with due course of justice which is an offence punishable under section 12 read with section 2C and section 15 of the contempt of Court Act 1971.

Secondly that in the aforesaid writ petition on 19.3.2007 you produced before this Court a register of meeting of Regional Level Committee constituted by Government order dated 19. 12.2000 and the said register was not maintained in normal course of business and was subsequently prepared for the purpose of the said writ petition as was held by this Court in its order dated 19.3.2007. This again was an act on your part to mislead the court which amounts to substantial interference with due course of justice in the said judicial proceeding and this you have committed an offence punishable u/s 12 read with section 15 of the Contempt of Court Act 1971.Tthis Court, therefore, serves the above charge on you and you are hereby given one month's time to file an affidavit in your defence.
This matter be listed for hearing on 09.10.2007."

2. That petitioner's alibi is that he was given additional charge of Moradabad as Joint Director of Education, and High School and Intermediate examinations were in the offing, because of which, there was huge pressure of work and the petitioner was not in a position, to verify all the details. He was informed, that no register of the Regional Committee is being maintained, and that is what he unhesitatingly stated before the Court in his Statement. If there was any intention of misleading the Court on the part of the contemner, he would not have subsequently produced the register of Regional Committee before the Court, and would have allowed to remain suppressed. This is the explanation of the petitioner as regards the first charge.

3. Heard Sri Shashi Nandan, learned Senior Advocate, assisted by Sri Sanjeev Kumar, counsel for the alleged contemner and Sri A.J. Singh, Addl. Government counsel for the State.

4. We are inclined to believe, that the petitioner was unaware of the fact that any register of the Regional Committee was being maintained, and he relied on the information given by the office that there was no register and that is why he made a statement before the Court to the effect that there was no register. If the intention of the contemner was to mislead the Court, he would have not allowed the production of the register at a subsequent stage, and would have concealed and suppressed the register. That indicates that the contemner was himself mislead by the office, and that is why he made a statement to the effect that no register was being maintained.

5. While we accept, that there was no malafide or dishonest intention on the part of the contemner to mislead the Court, we would observe that there has been laxity, in the supervision by the contemner, and his supervision of the office was not upto the mark.

6. As regards the first charge, we are, therefore, of the view that since there was no deliberate contempt on the part of the contemner to mislead the Court, it would not be appropriate in the circumstances to find him guilty on that charge.

7. As regards the second charge of the register of the Regional Committee being fabricated, it is to be seen, that the register is maintained by some clerk in the office of the Joint Director and the Joint Director is not supposed to maintain the register. No notice has been issued to the

clerk, who was supposed to maintain the register. His version has not been taken as to why the register was not being maintained, and is in loose scattered sheets.

8. It is also to be noticed that this register was only upto the March, 2006 while the contemner took the charge on 8.2.2007 when the petitioner got a search made in the office, the register was discovered, and he duly produced the same before the Court in the condition in which, it was found, if there was any dishonest intention on the part of the contemner, he would have not laid the register before the Court, at all.

9. As stated above, in the circumstances, the register was in such a state, could have been disclosed by the clerk, who was maintaining the register and his explanation has not been obtained, and it cannot, therefore, be said as to how and why the register was in such a state and why proceedings subsequent to March,:2006 were not recorded, in the register.

10. In view of the aforesaid circumstances, it would not be fair to hold the contemner guilty of the charges levelled against him, and he deserves exoneration.

11. Contempt is discharged.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.08.2008

BEFORE
THE HON'BLE V.M. SAHAI, J.
THE HON'BLE S.P. MEHROTRA, J.

Civil Misc. Writ Petition No. 34193 of 2008

Shyam Singh Yadav ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Shashi Nandan
Sri V.K. Srivastava
Sri Kashif Zaidi
Sri A.K. Mishra

Counsel for the Respondents:
Sri M.C. Chaturvedi
Sri R.N. Singh
Sri G.K. Gingh
Sri C.K. Parekh
Sri M.C. Dwivedi
Sri V.K. Singh
Sri Rajesh Kumar Singh
Advocate General,
S.C.

U.P. Govt. Servant Rules 1999-Rule 4 (1)-Suspension-on the basis of news paper-without objective consideration-No serious charges which warrant major punishment- order vitiated.

Held: Para 8 & 9

In the present case, we do not find that the Competent Authority has made any objective consideration of the material on record, or has arrived at a conclusion that the charges against the petitioner are so serious as are likely to result in imposition of major penalty against the petitioner.

Unless the Competent Authority arrives at such a conclusion on objective

consideration of the material on record for the reasons to be recorded, the suspension order passed by the Competent Authority would be vitiated.

Case law discussed:

2007 (4) A.W.C. 4163

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

1. The present Writ Petition has been filed under Article 226 of the Constitution of India, inter-alia, praying for quashing the order dated 7th July, 2008 (Annexure No.19 to the Writ Petition) passed by the respondent No.3, whereby the petitioner has been placed under suspension.

2. Pursuant to our orders dated 21-7-2008, 5-8-2008 and 13-8-2008, various affidavits have been filed on record by both the sides. The matter is being disposed of finally at this stage itself with the consent of the learned counsel for the parties.

3. We have heard the learned counsel for the petitioner and the learned counsel appearing for the respondents.

In our order dated 13-8-2008, we, inter-alia, directed as under:

"The Appointment Secretary, U.P. Government in his affidavit will also explain as to whether the requirements of the first proviso to sub-rule (1) of Rule 4 of the U.P. Government Servant Rules, 1999 were complied with by making objective consideration before passing the impugned suspension order dated 7-7-2008. The Appointment Secretary, U.P. Government will further state as to what material was before him on the objective consideration of which he exercised his power of suspension, and such material be also filed alongwith his affidavit."

4. The averments in regard to the aforesaid direction are contained in paragraph 5 of the affidavit of the Appointment Secretary -Anoop Chandra Pandey, sworn on 18-8-2008.

5. From the material filed along with the Affidavit of the Appointment Secretary-Sri Anoop Chandra Pandey, it is clear that before the Appointment Secretary as well as the Competent Authority only the letter of the District Magistrate dated 30-6-2008, the letter of the District Magistrate dated 28-6-2008 and the reply of the petitioner dated 29-6-2008 and a newspaper cutting were available which were forwarded by Sri S. R. Lakha, Principal Secretary, Nagar Vikas Anubhag-7, U.P., Lucknow with his letter dated 2-7-2008.

6. On the basis of the aforesaid letters and the newspaper cutting, the competent authority has suspended the petitioner. There is no material on record which has been filed before us to demonstrate that any objective consideration has been made by the Competent Authority prior to passing the impugned suspension order as required by the first proviso to ***sub rule (1) of Rule 4 of The U.P. Government Servant (Discipline and Appeal) Rules, 1999*** which has been considered by a Division Bench of this Court in **Dr. Arvind Kumar Ram Vs. State of U.P. and others** (Civil Misc. Writ Petition No.35923 of 2007), decided on 6-9-2007, since reported in **2007 (4) A.W.C. 4163**.

7. The Division Bench has held that the first proviso to sub-rule (1) of Rule 4

is mandatory and suspension should be an exception, and the Authority competent to suspend the employee must apply its mind to the material on record, and after objectively considering such material, the Authority should arrive at a conclusion and record his reasons that charges against the employee are so serious as are likely to warrant imposition of major penalty.

8. In the present case, we do not find that the Competent Authority has made any objective consideration of the material on record, or has arrived at a conclusion that the charges against the petitioner are so serious as are likely to result in imposition of major penalty against the petitioner.

9. Unless the Competent Authority arrives at such a conclusion on objective consideration of the material on record for the reasons to be recorded, the suspension order passed by the Competent Authority would be vitiated.

10. In view of the aforesaid discussion, the impugned suspension order cannot be sustained.

11. In the result, this writ petition succeeds and is allowed. The impugned suspension order dated 7th July, 2008 (Annexure 19 to the Writ Petition) is quashed.

12. However, the State Government is at liberty to proceed with the enquiry against the petitioner in accordance with law.

13. Before parting with the case we may add that even though, affidavits have been filed by the petitioner as well as by the respondents on the question of malafides as well as the merits of the case but we have refrained from going into the question of malafides or the merits of the case as it may affect the interest of either of the parties in the enquiry proceedings.

14. We order accordingly.

Parties shall bear their own costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.08.2008

BEFORE
THE HON'BLE IMTIYAZ MURTAZA, J.
THE HON'BLE S.N.H. ZAIDI, J.

Criminal Misc. Writ Petition No. 15254 of 2008

Azad alias Azad Khan ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Dev Brat Mukherjee
Sri Md. Abrar Khan

Counsel for the Respondents:
Sri P.K. Singh
A.G.A.

Constitution of India-Art. 226-Quashing of F.I.R.-offence under Section 379/411 IPC readwith Rule 57 and 70 of U.P. Mines and Mineral Rules (Concession) Rules 1963-challanged on the ground without prior permission of Magistrate police can not go with investigation-held-since offences both categories emanate from integrated facts-police not prevented from investigation-No interference called far-petition dismissed.

Held: Para 14

No doubt, Rule 74 of the Rules 1963 envisages that no court shall take cognizance of any offence punishable under these rule except on a complaint in writing of the facts constituting such offences by the District officer or by any officer authorised by him in this behalf and further the offences under Rules 57 and 70 are non-cognizable offences, but at the same time since the petitioner has also been challaned under section 379/411 IPC, alongwith the offences under Rules 57 and 70 of the Rules 1963 and since the offences of both the categories emanate from the integrated facts, the police is not prevented from investigating the non-cognizable offences along-with cognizable offences as cognizable offences.

Case law discussed:

(1961) 3 SCR 563, AIR 1965 SC 1185, AIR 1958 Punjab 172, AIR 1997 SC 1

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

1. Impugned herein is the proceeding launched against the petitioner pursuant to F.I.R. dated 12.8.2008 registered at case crime no. 525 of 2008 under section 57 and 70 of the U.P. Minor, Minerals (Concession) Rules, 1963 and section 379/411 of the I.P.C. P.S. Dildarnagar District Ghazipur.

2. Heard learned counsel for the petitioner and also learned A.G.A. appearing for the State authorities.

3. It would appear that the F.I.R. lodged refers to letter received from Deputy Collector Zamania Ghazipur that the accused named in the F.I.R. was indulging in illegal activities of excavations of sands and its sale and pursuant thereto, the police of P.S. Dildarnagar District Ghazipur raided the place and found the sands stored to the extent mentioned in the F.I.R on the land belonging to Rustam which according to further allegation had been collected there for sale and the accused was indulging in illegal sale of the sands. It is mentioned that the accused had no valid licence for excavation or sale of the sands. Thereafter, F.I.R. was lodged in the case as stated supra at case crime no. 525 of 2008 under Rules 57and 70 of the Minor, Minerals (Concession) Rules and section 379/411 IPC.

4. To begin with the learned counsel for the petitioner referring to Section 22 of the Mines, Minerals (Regulation and development) Act 1957 canvassed that the Magistrate is not vested with the power to take cognizance on the basis of charge sheet submitted by the Police. The learned counsel further referred to Section 23 A and canvassed that the offences under the Act can be taken cognizance of on the basis of complaint by person authorized under section 22 of t he Act attended with further submissions that the offences for which the petitioner has been indicted is compoundable as would be apparent from Section 23 A of the Act and also the Rules framed there-under. It is further canvassed that Rule 57 and Rule 70 of the Rules 1963 being non-cognizable offences, it is not permissible for the police to investigate the non-cognizable offence. Lastly, he argued that the F.I.R lodged in the case be quashed in exercise of power under Article 226 of the Constitution of India.

5. Since learned counsel for the petitioner has laid great stress on sections 22 and 23 A of the Act, we feel called to quote the same as under:

"22. Cognizance of offences-No court shall take cognizance of any offence

punishable under this actor any rules made there-under except upon complaint in writing made by a person authorized in this behalf by the Central Government or State Government."

"23-A. Compound of offences- (1) Any offence punishable under this act, or any rule made there-under may, either before or after the institution of the prosecution, be compounded by the person authorized under section 22 to make a complaint, to the court with respect to that offence, on payment to that person for credit to the Government of such sum as tha5 person may specify.
Provided that in the case of an offence punishable with fine only no such sum shall exceed the maximum amount of fine which may be imposed for that offence.
(2) where an offence is compounded under sub section (1), no proceeding or further proceeding, as the case may be, shall be taken against the offender in respect of the offence so compounded, and the offender, in custody, shall be released forthwith."

6. We have also glanced through section 190 attended with section 155 of the Cr.P.C. along-with section 20 of the Mines, Minerals (Regulation and Development) Act, 1957. Section 155 of the Cr.P.C as amended envisages (1) when information is given to an officer in charge of a police station of the commission within the limits of such station of a non-cognizable offence, he shall enter or cause to be entered the substance of the information in a book to be kept by such officer in such form as the State Government may prescribe in this behalf, and refer, the information to the Magistrate, (2) No police officer shall investigate a non-cognizable case without the order of a Magistrate having power to try such case or commit the case for trial, (3) any police officer receiving such order may exercise the same powers in respect of the investigation (except the power to arrest without warrant) as an officer in charge of a police station may exercise in a cognizable case, and (4) where a case relates to two or more offences of which at least one is cognizable, the case shall be deemed to be a cognizable case, notwithstanding that the other offences are non-cognizable.

7. Before proceeding further, we would like to quip here as a prologue that the issue involved in this petition has suffered too much theorising and therefore it would be supererogatory on our part to go the whole hog discussing the various provisions on the point. It would suffice to say that the legal position on the point has since been streamlined by legion of decisions. Few of the decisions which are illuminating and apply on the basis of the ratio flowing there-from to the facts of the present case may be dwelt upon.

8. Having examined the matter, it would appear from a perusal of the Rules 57 and 70 of the Rules, 1963 that the action contemplated in the Rules is in fact intended to eliminate private individuals or general public from initiating the prosecution (though the contention of the learned counsel was on the lines that the provisions of the Minor, Minerals (Concession) Rules, 1963 purport to eliminate role of police from initiating the prosecution) and to insist that before cognizance is taken the complaint must emanate from a public servant. In this connection, we may refer to a decision of the Apex Court in **Bhagwati Saran v.**

State of U.P. (1961) 3 SCR 563, in which the Apex Court explained the nature of a report under section 11 of the Essential Supplies (Temporary Powers) Act, 1946 which was a provision in the same words as in the case in hand. The Apex Court held that the purpose of Section 11 of the Essential Supplies Act 1946 is to eliminate private individuals such as rival traders of general public from initiating the prosecution and to insist that before cognizance is taken, the complaint must emanate from a public servant. It was contended in that case that since the report in writing which the police officer makes under section 11 of the E.C. Act, 1955 is not a charge sheet under section 173 of the Code, it must be equated to a complaint of facts under section 190 (1) (a) of the Cr.P.C. It was further contended that while the offence under section 420 of the IPC was triable under the procedure laid down in Sec. 251 A, Cr.P.C, the offence under section 7 of the E.C. Act was triable under section 252 Cr.P.C. The question substantially was who should launch the criminal prosecution. The Apex Court observed that where the law requires a report in writing by a public servant the requirements of the law are satisfied when a report is filed by a public servant who is also a police officer. The Apex Court further observed that where the police officer cannot investigate a non-cognizable offence without the permission of a Magistrate, he is not prevented by anything in the Code from investigating a non-cognizable offence alongwith a cognizable offence when the two arise from the same facts. The Apex Court also observed that police officer is a public servant. The aforesaid view was countenance in approval in **Pravin Chandra Mody v. State of A.P AIR 1965 SC 1185** and in para 6 of the said decision, the Apex Court held as under:

"Section 156 (2) provides that where a police officer enquires into an offence under section 156 (1) his action cannot be called into question on the ground that he was not empowered to investigate the offence. The enquiry was an integrated one, being based on the same set of facts. Even if the offence under the Essential Commodities Act may not be cognizable though it is not alleged by the appellant, it is non cognizable, the police officer would be competent to include it in the charge sheet under section 173 with respect to a cognizable offence."

9. The Apex Court also relied upon a decision with approval in **Ram Krishna Dalmia v. State, AIR 1958 Punjab 172**. The crux of what has been held in the said decision is excerpted below.

"The provisions of S. 155 (1), Criminal Procedure Code, must be regarded as applicable only in those cases where the information given to the police relates solely to a non-cognizable offence. Where information is given to the police of a cognizable offence and the case is registered regarding that offence, the investigating officer, while investigating the cognizable offence cannot possibly be debarred from investigating any subsidiary and non-cognizable offence which may arise out of the facts and can also include those latter cases in his main report under section 173."

10. Ultimately, the Apex Court in **Pravin Chand Mody's case (Supra)** held that *"We entirely agree that both the offences if cognizable could be*

investigated together under Chapter XIV of the Code and also if one of them was a non-cognizable offence."

11. In **State of Orissa v. Sharat Chandra Sahu, AIR 1997 SC 1**, the Apex Court held the view that under Section 155 (4) of the Cr. P.C., the police can in case of complaint of cognizable and non-cognizable offences, investigate cognizable as well as non-cognizable offences irrespective of the fact as to who filed it. In para12 of the said decision, the Apex Court held as under:

"12. Sub-section (4) of Section 155 is a new provision introduced for the first time in the Code of 1973. This was done to overcome the controversy about investigation of non-cognizable offences by the police without the leave of the Magistrate. The statutory provision is specific, precise and clear and there is no ambiguity in the language employed in sub-section (4). It is apparent that if the facts reported to the police disclose both cognizable and non-cognizable offences the police would be acting within the scope of its authority in investigating both the offences as the legal fiction enacted in sub-section (4) provides that even non-cognizable case shall, in that situation, be treated as cognizable."

12. In the above decision, there was bar of section 198 Cr.P.C. which deals with the prosecution for offences against marriage. Section 198 envisages that (1) no court shall take cognizance of an offence punishable under Chapter XX of the Indian penal Code except upon a complaint made by some person aggrieved by the offence. The above provisions set out the prohibition for the Court from taking cognizance of an offence punishable under Chapter XX of the I.P.C. The cognizance however can be taken only if the complaint is made by the person aggrieved by the offence. Clause (c) appended to the proviso to sub section (1) provides that where a person aggrieved is the wife, a complaint may be made on her behalf by her father mother, brother, sister son or daughter or other relations who are related to her by blood, marriage or adoption. In the said case, it would appear, complaint was made to Women's Commission which in turn directed registration of the case, the High Court relying upon the provisions contained in clause (c) held that since the wife herself had not filed the complaint the Magistrate could not legally take cognizance of the offence. The Apex Court set aside the verdict holding that the High Court was clearly in error in quashing the charge under section 494 IPC on the ground that the trial court could not take cognizance of that offence unless complaint was filed personally by the wife or any other near relation contemplated by clause (c) of the proviso to Section 198 (1). It was further observed that the High Court forgot that the other offence namely offence under section 498 A of the IPC was a cognizable offence and the police was entitled to take cognizance of the offence irrespective of the person who gave the first information to them. Then the Apex Court proceeded to refer to Section 155 Cr.P.C particularly clause 4 of the said section. In para 11 of the said decision, the Apex Court observed that sub-section (4) of section 155 creates a legal fiction and provides that although a case may comprise of several offences of which some are cognizable and others are not, it would not be open to the police to investigate the cognizable offences only and omit the

non-cognizable offences. Since the whole case (comprising of cognizable and non-cognizable offences) is to be treated as cognizable, the police had no option but to investigate the whole of the case and to submit a charge sheet in respect of all the offences, cognizable or non-cognizable both, provided it is found by the police during investigation that the offences appear, prima facie, to have been committed. In the facts and circumstances of the case, it would suffice to say that the above case bears close similarly to the facts of the present case.

13. The other case on the point is **State of Punjab v. Raj Singh AIR 1998 SC 768**. The observations of the Apex Court in the above decisions are excerpted below.

"We are unable to sustain the impugned order of the High Court quashing the F.I.R. lodged against the respondents alleging commission of offences under sections 419, 420, 467 and 468 IPC by them in course of the proceeding of a civil suit, on the ground that Section 195 (1) (b) (ii) Cr.P.C prohibited entertainment of and investigation into the same by the police. From a plain reading of section 195 Cr.P.C. It is manifest that it comes into operation at the stage when the Court intends to take cognizance of an offence under section 190 (1) Cr.P.C and it has nothing to do with the statutory power of the police to investigate into an F.I.R which discloses a cognizable offence in accordance with Chapter XII of the Code even if the offence is alleged to have been committed in or in relation to, any proceeding in Court. In other words, the statutory power of the police to investigate under the Code is not in any way controlled or circumscribed by Section 195 Cr.P.C. It is of course true that upon the charge sheet if any filed on completion of the investigation into such an offence the court would not be competent to take cognizance thereof in view of the embargo of section 195 (1) (b) Cr.P.C but nothing therein deters the Court from filing a complaint for the offence on the basis of the F.I.R. (filed by the aggrieved private party) and the materials collected during investigation, provided it forms the requisite opinion and follows the procedure laid down in section 340 Cr.P.C....."

14. Having discussed the above decisions in all its ramifications, we revert to the facts of the present case. It would appear that the petitioner has been indicted, besides the offences under Section 57 and 70 of the Mines, Minerals (Concession) Rules which are non-cognizable, under section 379/411 IPC which are cognizable and regard being had to the fact that at the relevant time, when recovery of sand was made from the possession of the petitioner, he was not possessed of valid licence, we are not inclined to subscribe to the submissions that the police was prevented from investigating the offences under Rules 57 and 70 of the Rules 1963 by reason of the same being non cognizable offences together with offences under Section 379/411 IPC which on the other hand are cognizable offences notwithstanding the fact that both the offences both cognizable and non-cognizable offences are based on the same facts. No doubt, Rule 74 of the Rules 1963 envisages that no court shall take cognizance of any offence punishable under these rule except on a complaint in writing of the facts constituting such offences by the District

officer or by any officer authorised by him in this behalf and further the offences under Rules 57 and 70 are non-cognizable offences, but at the same time since the petitioner has also been challaned under section 379/411 IPC, alongwith the offences under Rules 57 and 70 of the Rules 1963 and since the offences of both the categories emanate from the integrated facts, the police is not prevented from investigating the non-cognizable offences along-with cognizable offences as cognizable offences. In this connection we feel called to revert to the contents of the F.I.R lodged by the police constable on the basis of the written report submitted by the S.D.M. Zamania. In the F.I.R, the police constable explicitly stated that the accused person was engaged in illegal excavation of sands and its sale without there being any valid licence and acting upon the report of the S.D.M. Zamania, the police swung into action and initiated criminal action of raiding the place and lodging the F.I.R. Since the accused person has been charged with offence under section 379/411 IPC which are cognizable offences, in the circumstances we have no reason to take a view different from the view taken by the Apex Court in state of Orissa (supra) that the police was authorised to investigate the cognizable offence alongwith non-cognizable offence irrespective of the fact who was the author of the report lodged at the police station regard being had to the provisions of Rule 76 which envisages that the officer referred to in Rule 66 may request for the help of the local police for lawful exercise of his powers under these rules and the local police shall render all possible assistance as may be necessary to enable the officer to exercise the powers under these rules. The view we are taking in this matter, also finds reinforcement from the decisions cited above.

15. The learned counsel for the petitioner has not brought forth anything cogent or convincing to manifest that no cognizable offence is disclosed Prima facie on the allegations contained in the F.I.R. or that there was any statutory restriction operating on the police to investigate the case.

16. Having scanned the allegations contained in the F.I.R. the Court is of the view that the allegations in the F.I.R. do disclose commission of cognizable offence and therefore no ground is made out warranting interference by this Court. The petition is accordingly dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.08.2008

BEFORE
THE HON'BLE PRAKASH KRISHNA, J.

Civil Misc. Writ Petition No. 55129 of 2006

Nagar Palika Parishad & anr ..Petitioners
Versus
Controlling Authority & ors. ...Respondents

Counsel for the Petitioners:
Sri. R.K. Awasthi

Counsel for the Respondents:
Sri. Vishnu Sahai
Sri. Bhupeshawar Dayal
S.C.

Municipalities Act 1916-Section 297-Gratuity-claimed by employees not governed by centralized Services Rules-no exemption granted as per Rule 5 of the Act-held-entitled for gratuity under regulation framed by the Government and not under Payment of Gratuity Act.

Held: Para 18

Viewed as above, I find sufficient force in the argument of the learned counsel for the petitioner and it is held that the contesting respondent is entitled to get the gratuity as per the Regulations framed by the State Government in this regard and not under the Payment of Gratuity Act. The writ petition succeeds and is allowed and the impugned order is quashed.

Case law discussed:

AIR 1999 SC 293; (2001) 3 SCC 71;.(1993) 2 SCC 144; (1977) 1 SCC 750; (2000) 4 SCC 406; AIR 1956 SC 614; 1987 UPTC 850; AIR 1999 SC 293.

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

1. Raising a somewhat interesting question the present writ petition has been filed. The question involved in the present petition is regarding the applicability of Payment of Gratuity Act, 1972 (hereinafter referred to as the Act) and the U.P. Nagar Mahapalika Non Centralized Services Retirement Benefit Regulations, 1984 (hereinafter referred to as the Regulation) with respect to employees of Nagar Mahapalika Non Centralized Services.

2. The facts of the case are not much in dispute. Ram Saran Ruhela, the respondent no.3, who was working with the petitioner was placed under suspension,. charge-sheeted and his services were terminated vide order dated .8th of January, 1991. He was dismissed by the order dated 8th of December, 1995. The said order was modified by the appellate authority and dismissal was substituted by an adverse entry and stoppage of two increments. The matter came up before this Court in two writ petitions being writ petition nos. 1998 of 1996 and 7140 of 1996. Both the writ petitions were clubbed together and were decided by a common judgement dated 15th of October, 2003. It was held by this Court that the contesting respondent herein is entitled for subsistence allownce and in addition thereto 30 per cent of back wages from the date of suspension to the date of reinstatement. The, amounts were directed to be paid within three months. The necessary payments were made to the respondent no.3 which is evident from the receipt dated 27th February, 2004. In the meantime, the respondent retired and he filed an application before the Controlling Authority under the Payment of Gratuity Act, 1972 claiming gratuity for a total period of service i.e. 40 years three months and 11 days. The said proceeding was contested on the ground that the petitioner is not entitled for any gratuity as he was removed from the services by the order dated 18th February, 1995. It was further stated that in view of the Rule 10, the respondent no.3 is not entitled either for gratuity or family pension. The Controlling Authority by the order dated 7th October, 2005 directed the petitioner to pay a sum of RS.61,347/- as gratuity with interest etc. as per the Gratuity Act. The said amount has also been paid. However, an appeal being appeal NO.138 of 2005 was filed before the appellate authority under the Act.

3. The Appellate Authority, U.P., under the Payment of Gratuity Act by the impugned order dated 3rd of May, 2006 has allowed the appeal and directed that the gratuity amount should be calculated as per the provisions of the Act instead of Regulation. Challenging the said order the present writ petition has been filed.

4. Shri R.K. Awasthi, the learned counsel for the petitioner submits that the provisions of the Act are not attracted. The Appellate Authority committed illegality in ordering the calculation of the gratuity amount as per the Regulation. He submits that the Regulations having been framed under the provisions of U.P. Municipalities Act will be applicable to the facts of the present case. Shri Vishnu Sahai, learned counsel for the respondent no.3, on the other hand, submits that the provisions of the Act will be applicable and has placed reliance upon a judgement of the Apex Court in **Municipal Corporation Delhi Vs. Dharam Prakash AIR 1999 SC 293.**

5. A pristine question of law is involved as to whether the provisions of the Regulation will be attracted as submitted by the learned counsel for the petitioner or the gratuity shall be payable as per the provisions of the Gratuity Act.

6. Considered the respective submissions of learned counsel for the parties.

7. The Act applies to every factory, mines, oilfields, plantations ports, railway companies, shops or other establishments or classes of establishments in which ten or more persons are employed, or were employed, on any date of the preceding twelve months, as the Central Government may, by notification, specify in this behalf, as provided by section 1 of the Act. The learned counsel for the respondents submits that the petitioner is an establishment and therefore, the provisions of the Act shall apply ipso facto. He submits that section 14 of the Act provides that it will prevail over the other enactments notwithstanding any thing in consistence therewith contained in any enactment other than the Act or in any instrument or contract. Power to grant exemption by the appropriate government has been provided for by section 5 of the Act. The crux of the argument is that there being no exemption notification by the State of U.P. in respect of non centralized services of Nagar Mahapalika, the Regulations shall not be applicable.

8. The Regulations have been framed in exercise of power under sub section (2) of section, 297 of the Municipalities Act, 1916 by the Governor. Section 297 of the U.P. Municipalities Act empowers a Board to make Regulations consistent with the Municipalities Act in respect of matters enumerated therein including the conditions of service, including period of service of all servants of Board as also the conditions under which gratuities or compassionate allowances may be paid to the surviving relatives of any such servant whose death has been caused through the execution of his duty vide clause (K) of Section 297. Under sub section (2) of section 297, the State Government has been empowered to make Regulations consistent with the provisions of the Municipalities Act in respect of the matters specified in clauses (d, h to n) of Section 1. A conjoint reading of Section 1 and sub section (2) of Section 297 amply makes it clear that the State Government has been empowered to provide Regulations consistent with the Municipalities Act with respect to the payment of gratuities. Thus, the power of the State Government to frame the Regulation for payment of gratuity cannot be doubted. The validity of the Regulation has not been questioned by the respondent in the present writ petition.

9. The only question which survives is whether the gratuity would be payable to non centralized services of Nagar Mahapalika as per provision of the Gratuity Act or as per Regulations framed by the State Government.

10. A brief survey of the provisions of the Act would show that the Act is general enactment for the purposes of payment of gratuity and is applicable to the all the factories, mine, oilfields, establishments as mentioned in section 1 of the Act. This enactment by section 14 has been given overriding effect over the other Statutes. Section 5 of the Act empowers the State Government to exempt any employee or class of employee etc. by issuing a notification if in the opinion of the State Government such employee or class of employee is in receipt of gratuity or pensionary benefits not less favourable than the benefits under the Act. A close reading of section 5 would show that if there is already in existence any scheme for payment of gratuity or pensionary benefits and if the appropriate government is of the opinion that the said scheme is more favourable than the benefits conferred under the Act, it by issuing a notification may exempt the operation of the Act. In other words, it talks about such schemes which were in existence and were more beneficial on the date of commencement of the Act.

11. A scheme which has been framed subsequent to the commencement of the Act by an appropriate government, does not come within the ambit of section 5 of the Act.

12. The Regulation has come into force subsequent to the enactment of the Act, w.e.f. 1st of October, 1984. The date on which the Regulations were framed, it is presumed that the State Government was aware about the existence of the Act on the Statute book. The argument that there being no exemption notification, therefore, the provisions of Regulation will not be attracted, is liable to be rejected for the reasons more than one. Firstly, section 5 of the Act which talks about the power to exempt is not applicable to such enactments which have come into operation subsequent to the commencement of the Act. Secondly, the Regulations have been validly made by the appropriate government in exercise of power conferred on it by section 297 (2) of the Municipalities Act. It cannot be presumed that the Act has denuded the power of the State Government which is otherwise possessed by it under section 297 of the Municipalities Act.

13. There is another aspect of the case. The Act is a general Act to deal with the subject of payment of gratuity in general to all the employees working in factories etc.. The Regulation is a special Act and has its limited area of the operation. Under the said Regulation, the non centralized employees of the U.P. Nagar Mahapalika are only covered. Even if it is taken that the Act and Regulations both are special Acts, it has been laid down by the Apex Court in no uncertain terms that in such an event it is a later Act which must prevail, as observed in **Solidaire India Limited Vs. Fairgrowth Financial Services Limited and others (2001) 3 SCC 71**. In this case the Supreme Court has referred, in this context the following cases:-

1. Maharashtra TubeS Ltd. v. State Industrial & Investment Corpn. of Maharashtra Ltd. (1993) 2 SCC 144;

2. Sarwan Singh v. Kasturi Lal (1977) 1 SCC 750;
3. Allahabad Bank v.Canara Bank (2000) 4 SCC 406 and
4. Ram Narain V. Simla Banking & Industrial Co. Ltd. AIR 1956 SC 614.

14. Facts in brief from the case of **Solidaire India Ltd.(supra)** relevant for the present purposes may be noticed. The appellant therein had taken a loan from the respondent therein and the agreement was to repay the loan within the specified time together with interest at 15% per annum. The respondent was notified under section 3 of the Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992 and; proceedings were initiated by the custodian for recovery of the said amount before the Special Court. During the pendency of the appeal before the Apex Court, the appellant has become sick and proceedings were initiate under the provisions of the Sick Industrial Companies (Special Provisions) Act, 1982. It was contended that in view of special provisions contained in the Sick Industrial Companies (Special Provisions) Act, 1955 no proceedings should have been initiated or continued under the Special Court Act 1992. In this factual background Apex Court took the view that the Legislature being aware of the provisions of section 22 under the Sick Industrial Companies (Special Provisions) Act, 1985 still empowered only the Special Court under the 1992 Act to give directions to recover and to distribute the assets of the notified persons in the manner set down under Section 11 (2) of the 1992 Act. It was held that this only means that the Legislature wanted the provisions of Section 11 (2) of the 1992 Act to prevail over the provisions of any other law including those of the Sick Industrial Companies (Special Provisions) Act, 1985. Thus, it is clear that in the instant case, there was no intention of the legislature to permit the 1985 Act to apply, notwithstanding the fact that proceedings in respect of. a company may be going on before the BIFR. The 1992 Act is to have an overriding effect notwithstanding any provision to the contrary in another Act.

15. The learned counsel for the petitioner could not place any exemption notification issued by the State of U.P. under section 4 of the Act but in my view that is of little consequence. The Regulation may be treated as a combined notification both the exemption notification under section 5 of the Act as also the intention of the State Government to make a special provision through the Regulation for its non centralized services of U.P. Nagar Mahapalika so far as payment of gratuity is concerned. Somewhat a similar situation came for consideration before the Apex Court in a slightly different context in a sales tax matter in **Commissioner of Sales Tax U.P. Vs. Agra Belting Work, 1987 UPTC 850.** In this case the commodity in question was exempt from payment of sales tax under section 4 of the U.P. Sales Tax Act. Subsequently a notification was issued under section 3-A of the Act levying the tax. Repelling the argument of the dealer that unless a notification withdrawing the exemption under section 4 is issued, the notification levying tax under section 3A of the Act would not be operative, it was held that, in fact, the notification under section 3 A can easily be treated as a combined notification both for withdrawal of exemption as also for

providing higher tax. The relevant portion is reproduced below:-

"In fact, the second notification can easily be treated as a combined notification both for withdrawal of exemption and also for providing higher tax. When power for both the operations vests in the State and the intention to levy the tax is clear we see no justification for not giving effect to the 2nd notification. We would like to point out that the exemption was in regard to a class of goods and while the exemption continues, a specific item has now been notified under section 3-A of the Act. "

16. **Municipal Corporation of Delhi Vs. Dharam Prakash Sharma and another AIR 1999 SC 293** was heavily relied upon by the learned counsel for the respondents. From the report it appears that the Pension Rules were already in existence at the time of commencement of the Act. The Apex Court was of the view that unless an exemption notification under section 5 of the Act is issued, the provisions of the Act will be applicable. In the case on hand, the Regulation has come into force subsequent to the commencement of the Act, thus the ratio as laid down in the above case by the Apex Court is distinguishable.

17. Apart from the above, the Apex Court proceeded to decide a controversy on the footing that the Payment of Gratuity Act being a special provision for payment of gratuity unless there is any provision which excludes its applicability to an employee who is otherwise governed by the provisions of Pension Rules, it is not possible to hold that an employee of Municipal Corporation of Delhi is not entitled to the gratuity under the Act. In the present case, position is different in as much as the Regulations for payment of gratuity have been enacted by the State Legislature for a class of its employees. In this view of the matter also, on facts the ruling given in the case of **Municipal Corporation of Delhi** (supra) is distinguishable.

18. Viewed as above, I find sufficient force in the argument of the learned counsel for the petitioner and it is held that the contesting respondent is entitled to get the gratuity as per the Regulations framed by the State Government in this regard and not under the Payment of Gratuity Act. The writ petition succeeds and is allowed and the impugned order is quashed.

But no order as to costs.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 28.08.2008

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

Criminal Appeal No. 2853 of 1982

Ram Babu and others ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Sri. Akhilesh Singh.
Sri. Janardan Yadav.

Counsel for the Respondent:
A.G.A.

Indain Penal Code Section 34, 302- Punishment of life imprisonment-eye witness stated in examination -in -chief- applicant was armed with lathi-but nothing whisper about carrying lathi

while chasing them-no inference can be drawn that the appellant with intention to cause death joined the co-accused-held-prosecution failed to prove the common intention of appellant to kill the deceased-appeal allowed-sentence set aside.

Held: Para 23

In the instant case there is no evidence that the appellant Ram Autar shared common intention with co-accused, the main assailants. There is every possibility of the witnesses falsely implicating the appellant alongwith main assailants with the commission of offence. The testimony of eye witnesses that the appellant alongwith co-accused pursued them cannot be accepted. It is remarkable to observe that in the first part of examination-in-chief the eye witnesses stated that the appellants came armed with lathi but there is omission in-the latter part that the appellant was carrying a lathi while chasing them. There is no evidence to draw an inference that the co-accused went to the tube-well with the intention to cause death and such intention was known to the appellant. Looking to the involvement of uncle of first informant and of witness Rajendra (P.W.6) in the murder of two brothers of appellant in two separate incidents the possibility of his false implication cannot be ruled out. Thus, we conclude that the prosecution has failed to prove beyond all reasonable doubt that the appellant Ram Autar shared common intention with co-accused to kill the deceased.

Case law discussed:

2003 (47) ACC 388 (SC); 1999 Cri.L.J. 1334 (SC); 2001(42) ACC 770 (SC); 2001 (4) SCC 193; 1999 (8) SCC 555; 1999 (1) SCC 174.

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

1. This criminal appeal is directed against the judgment and order dated 11.11.82 passed by the Additional Sessions Judge-III, Moradabad in S.T. No. 181 of 1981 whereby convicting the appellants, namely Ram Babu, Ram Autar and Jas Ram for the offence punishable under Section 302 read with 34 I.P.C. and sentencing each of them to rigorous imprisonment for life. Appellants Ram Babu and Jas Ram having died during the pendency of appeal, the appeal against them stood abated vide orders dated 1.11.2007 and 6.8.2008. The appellant no. 2 Ram Autar remains the sole surviving appellant.

2. The prosecution case shorn of unnecessarily details is as follows:

3. On 17.1.80, the first informant Rama Kart Sharma (P.W.4) and his brother-in-law Vishesh Chandra Sharma (P.W.5) had been irrigating their fields from tube-well (Rehat). At about 12-1 O'clock noon Vimla Devi (deceased). first informant's mother came at the fied to serve meals. She had been washing her hands and face at the tube-well. At the same time appellant alongwith co-accused Rama Shankar, Ram Babu and Jas Ram armed with gun, country-made pistol and lathi came there. Co-accused Ram Babu and Rama Shankar who were armed with gun and country-made pistol opened fire at first informant's mother. She succumbed to the injuries at the spot. Appellant Ram Autar and co-accused Jas Ram chased the first informant and other witnesses but could not catch them. The motive behind the commission of offence was illicit relationship of Ram Kumar, brother of appellant with Shanti wife of late Jagdish first informant's cousin brother and murder of Ram Kumar about two months before the incident. Rama Kant Sharma (P.W.4) scribed the written report of the incident (Ext.Ka-4) and

lodged it at Police station Sambhal at 3.50 P.M. On the basis of written report check F.I.R. (Ext.Ka-l) was prepared by H.M. Vishun Dutta Sharma (P.W.l) and crime was registered at serial number 37 of G.D. (Ext. Ka.-2).

4. S.S.I. Mahendra Saxena (P.W.8) was entrusted with the responsibility to investigate the crime. He visited the spot and conducted inquest on the dead body. He prepared the inquest report (Ext. Ka-9), challan lash (Ext. Ka-1O) letter to C.M.O. (Ext. Ka. 11) and handed over the sealed bundle containing the dead body alongwith police papers to constables Surendra Pal (P.W.2) and Ranjit Singh for transportation to mortuary for post-mortem.

5. The autopsy on the dead body was conducted by Dr. M.C.Tripathi (P.W.3) on 18.1.80 at 4.30 P.M. and following ante-mortem injuries were found on the person of deceased:

1. Two rounded abrasions over left inferior axillary region near posterior fold of axilla 1.5 cm. x 1cm. to .2.5 cm x 1.2 cm, 1 cm. apart from each other. Blackening present on the posterior inferior margins of these injuries.

2. Two gun shot wounds of entry just above the middle of outer posterior aspect of left arm 1.5 cm. apart from each other measuring 1.5 cm. x1.5 cm to 1.5 cm x 1 cm on probing each of these inner surface of arm deep communicating to the wounds of exit 2 cm x 1.5cm. to 2.2. cm x 1.5 cm exactly and directly under the above wounds of entries. Blackening and slight scorching was present around the wounds of entries on the outer aspect.

3. Abrasion 3 cm x 1 cm on upper part of back of left side of chest. Slight blackening present around it.

4. Incised wounds 3 cm. x 1.5 cm. to 3 cm x 2 cm. x muscle deep each; 1 cm apart from each other over root of left side of neck 7 cm behind and below left ear.

5. Abrasion 1.2 cm x 1 cm on left infra clavicular region of chest. Blackening present on latero inferior margin of wound.

6. Wound of gun shot entry 1.2 cm x 1 cm, tatooing present all around x communicating to wound of exit over upper wall of chest near shoulder joint. Wound of entry at left upper part of upper arm 6 cm. above injury no. 2. Wound of exit size being 2.2 cm x 1.5 cm Direction left to right and medially.

7. Abrasion 1 cm x 1 cm over top of left shoulder near injury no. 6 entry. Slight blackening present around it.

8. Gun shot wound of entry 2.5 cm x 2.2 cm near left inferior angle of scapula on back. Blackening and slight scorching present all around the wound. On probing and dissection the under-lying tissues of back of chest wall left pleura and left lung were lacerated. Direction from back to front and medially. Two big metallic distorted shots were removed from upper lobe of left lung. The left pleural cavity contained about one pint of blood.

Injury no. 4 was caused by sharp edged weapon. All other injuries were due to discharge of fire arm weapon. The death was caused due to shock and haemorrhage as a result of ante-mortem injuries. The post-mortem certificate was Ext. Ka.-3.

6. Investigating officer collected the samples of blood stained earth and plain earth (Exts. 6 and 7) from the scene of offence under the memo (Ext. Ka-13). He prepared the site plan of the place of offence (Ext. Ka. 14). He interrogated the relevant witnesses. On 20.1.80 Inspector I/c Jag Vir Singh (P.W.7) took the investigation. After completing the necessary formalities he submitted the charge sheet (Ext. Ka. 5) against four accused persons. Co-accused Rama Shankar, brother of sole surviving appellant was murdered before the committal of this case.

7. The C.J.M., Moradabad committed the accused to the court of Sessions for standing trial for the offence under Section 302 I.P.C. The accused were charged for the offence under Section 302/34 I.P.C. by the Additional Sessions Judge-III. They pleaded not guilty and claimed to be tried.

8. The prosecution in order to support the charge examined as many as eight witnesses. Rama Kant (P.W4), Vishesh Chandra Sharma (P.W.5) and Rajendra Sharma (P.W.6) were witnesses of fact. H.C. Vishnoo Dutt Mishra (P.W.l). C.P. Surendra Pal (P.W.2), Dr. M.C.Tripathi (P.W.3), Inspector Jag Vir Singh (P.W.7) and S.S.I. Mahendra Saxena (P.W.8) were formal witnesses.

9. The accused in their statements under Section 313 Cr.P.C. stated that they were falsely implicated due to enmity.

10. The trial court on appraisal of evidence recorded the finding of conviction against the accused persons.

11. We have heard Sri Akhilesh Singh, learned counsel for the appellant No.2 Ram Autar, the learned A.G.A. and have gone through the trial court record.

12. The learned counsel for the appellant has challenged the finding of conviction on the grounds: the eye witness account does not receive corroboration from the medical evidence; Rajendra Sharma (P.W.6) being an accused in the case of murder of co-accused Rama Shankar, he is an interested witness; the appellant did not share common intention with co-accused nor he actively participated in the commission of offence, the prosecution case was not proved against him; the incident took place in broad day light but no independent witnesses were examined. The learned counsel in support of his arguments placed reliance on the decisions in **Harjit Singh & others Vs. State of Punjab- 2003 (47) ACC 388 (SC) and Mohan Singh & another Vs. State of Madhya Pradesh -1999 Cri.L.J. 1334 (SC).**

13. The eye witness account narrated by Rama Kant (P.W4), Vishesh Chandra (P.W.S) and Rajendra Sharma (P.W.6) at the trial is required to be stated in necessary details for the purpose of appreciation and evaluation of the prosecution case.

14. Rama Kant (P.W.4) is the first informant and the son of deceased. He deposed that at the time of incident he was cleaning the irrigation drain. His brother-in-law was operating the tube-well (Rehat) and his mother was washing her face and hands at the tube-well. On that day they were irrigating their wheat field. At about 12-1 O'clock noon Rama

Shankar, Ram Autar, Ram Babu and Jas Ram came there. Ram Babu was armed with gun, Rama Shankar had country-made pistol and remaining two were carrying lathis. On seeing them they moved towards western side. No sooner his mother got up and stood straight the accused Ram Babu and Rama Shankar opened fire from gun and country-made pistol which hit her. On sustaining injuries his mother ran towards the field of Rameshwar and fell-down at a short distance. The accused opened another shot of fire at her from close range. The accused Ram Autar and Jas Ram chased them while they ran away towards western direction for safety. He admitted that Pooran was his real uncle and Veerpal brother of Pooran was accused in the case of murder of Ram Kumar. His third uncle Har Charan alias Sahukar was murdered. Ram Kumar was son of real sister of mother of Pooran. Ram Kumar resided in Peepal wali Madaiya and owned 100 bighas agricultural land and a tube-well. His sister-in-law had called Ram Kumar to look after her agricultural land. He admitted that after this incident accused Rama Shankar was killed and witnesses of present case namely, Rajendra (P.W.6) and Maqsood were accused in the said case.

15. Vishesh Chandra Sharma (P.W.5) testified that about two years four months before at about 12-1 O'Clock noon he was operating the tube-well in the field of his brother-in-Law (Jeeja). The mother of his brother-in-law came at the field to serve meals to them. She was washing her face and hands at the drain of the tube-well. At the same time Ram Babu, Ram Autar and Rama Shankar came from the eastern side. Co-accused Jas Ram was seen coming at a distance from them. Ram Babu and Rama Shankar opened fire with gun and country made pistol at Vimla Devi. When they ran for safety towards eastern direction accussed Jas Ram and Ram Autar chased them. He went on to state that while running away they were seeing behind by turning their back and saw the accused opening other shot at Vimla Devi.The remaining accused pursued them but they could not catch them. In his cross examination he deposed that Ram Autar and Jas Ram chased them with lathis but they continued running through the fields. Both the accused chased them to a distance of 15-20 paces. They were running 2½ to 3 yards ahead of the accused.

16. Rajendra Sharma (P.W.6.) stated that he alongwith Maqsood was cutting sugar-cane in the fields of Bihari situated towards the northern side of the field of Rama Kant. Accused Ram Autar and Jas Ram chased the witnesses Rama Kant and Vishesh Chandra Sharma but they could not catch them. He admitted that he owned 100 bighas agricultural land and a flour mill. He admitted that he was an accused in the case of murder of Rama Shankar.

17. The evidence of eye witnesses brings out that three shots were fired at the deceased by co-accused Ram Babu and Rama Shankar. Co-accused was murdered during the pendency of committal proceedings and Rajendra Sharma (P.W. 6) and Maqsood are accused in the said case. Co -accused Ram Babu appellant no.1 and Jas Ram appellant no.3 died during the pendency of appeal. Ram Kumar brother of co-accused Rama Shankar and appellant was killed two or three months before the

incident and Veerpal uncle of Rama Kant (P.W.4) was accused in the said case. The witness Vishesh Chandra Sharma (P.W.5) is a resident of village Sirohi situated within the territorial limits of Police Station Behjoi whereas witness Rajendra Sharma (P.W.6) resided at Sherpur, Police Station Hayat Nagar. The incident took place in village Akhtiyarpur within the territorial limits of Police Station Hayat Nagar. The father of Vishesh Chandra Sharma owned 125 bigha land and he (P.W.5) is real brother-in-law of Rama Kant(P.W.4). According to the medical evidence there was more possibility of the injuries having been caused by more than three shots of fire. The appellant Ram Autar was armed with lathi. According to the eye witnesses he alongwith co-accused Jas Ram (since deceased) chased Rama Kant (P.W.4) and Vishesh Chandra Sharma (P.W.5) but could not catch them. They had pursued them to a distance of 15-20 paces. There is no independent witness of the incident. The witnesses examined are interested persons. The appellant and co-accused chased the witness after the firing of two shots at the deceased.

18. In the background of the abovementioned facts we switch over to the question of joint liability of conviction of accused appellant no. 2 Ram Autar under Section 302/34 I.P.C.

19. The prosecution witness have not attributed any overt act to the accused appellant. The appellant was armed with lathi. He alongwith co-accused chased the witness P.W.4 and P.W.5 to a distance of 15-20 paces but no injury was caused to them. The question for consideration is whether the sharing of common intention to cause death with co-accused Rama Shankar and Ram Babu could be drawn. In order to establish the charge under under Section 302 with the aid of Section 34 I.P.C. it is to be established that the criminal act was done by one of the accused in furtherance of common intention of all. Section 34 I.P.C. enjoins the principle of joint liability in doing the criminal act based on common intention. The common intention can be inferred from the manner in which the accused reached at the scene of crime and mounted assault, injuries caused by one or some of them and subsequent conduct after the death. The co-accused who opened fired at the deceased were related to each other as maternal uncle and nephew. The appellant and co-accused armed with lathis did not scare the witnesses while the main shooters were opening fire. The witness being inimically deposed against the appellant, the possibility of his false implication with main assailants cannot be ruled out. There is nothing on record for drawing an inference that the intention of causing death was unknown to the appellant.

20. The Apex Court in **Suresh & another Vs. State of U.P. -2001(42) ACC 770 (SC)** has held that " *the accused who is to be fastened with liability on the strength of Section 34 I.P.C. should have done some act which has nexus with the offence. Such act need not be very substantial, it is enough that the act is only for guarding the scene for facilitating the crime. The act need not necessarily be overt, even if it is only a covert act it is enough, provided such a covert act is proved to have been done by the co-accused in furtherance of the common intention. Even an omission can, in certain circumstances, amount to an act.*" It was further held that " *an act,*

whether overt or covert, is indespensable to be done by a co-accused to fastened with the liability under the section. But if no such act is done by a person, even if he has a common intention with the others for the accomplishment of crime, Section 34 IPC cannot be invoked for convicting that person. In other words, the accused who only keeps the common intention in his mind, but does not do any act at the scene, cannot be convicted with the aid of Section 34 IPC."

21. In **Mithu Singh Vs. State of Punjab- 2001 (4) SCC 193**, the Apex Court has held that the common intention has to be distinguished from same or similar intention on the basis of facts of each case. In that case the Court opined that merely because the appellant armed with pistol alongwith co-accused came to the place of deceased did not indicate the common intention of the appellant for causing death of deceased.

22. In **Ramashish Yadav & others Vs. State of Bihar-1999 (8) SCC 555,** and **Ajai Sharma Vs. State of Rajasthan-1999 (1) SCC 174**, the Apex Court held that accused caught hold of the deceased whereas the co-accused mounted assault did not indicate that the accused who caught hold the deceased shared common intention of main accused.

23. In the instant case there is no evidence that the appellant Ram Autar shared common intention with co-accused, the main assailants. There is every possibility of the witnesses falsely implicating the appellant alongwith main assailants with the commission of offence. The testimony of eye witnesses that the appellant alongwith co-accused pursued them cannot be accepted. It is remarkable to observe that in the first part of examination-in-chief the eye witnesses stated that the appellants came armed with lathi but there is omission in-the latter part that the appellant was carrying a lathi while chasing them. There is no evidence to draw an inference that the co-accused went to the tube-well with the intention to cause death and such intention was known to the appellant. Looking to the involvement of uncle of first informant and of witness Rajendra (P.W.6) in the murder of two brothers of appellant in two separate incidents the possibility of his false implication cannot be ruled out. Thus, we conclude that the prosecution has failed to prove beyond all reasonable doubt that the appellant Ram Autar shared common intention with co-accused to kill the deceased.

24. In view of the aforesaid findings the appeal of appellant no. 2 Ram Autar is allowed and his conviction and sentence under Section 302 read with 34 l.P.C. are set aside. The appellant is accordingly acquitted. The appellant is on bail to which he need not surrender. His bail bonds are cancelled and sureties are discharged.

25. Certify the judgment to the lower court within a week. The record of the case be also transmitted to the court below immediately. Appeal allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.08.2008

BEFORE
THE HON'BLE RAKESH TIWARI, J.

Civil Misc. Writ Petition No. 43367 of 2008

Shree Marwari Seva Sangh, Varanasi
...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri. Sunil Tripathi
Sri. Amitabh Trivedi

Counsel for the Respondents:
S.C.

Constitution of India Article 226-writ of certiorari quashing of notification dated 24.02.2006-column 2 serial no. 24-by which for the first time charitable 'Dharmashala' except no charges or charge upto Rs.5/-brought within purview of income tax-parity claimed of institutions run by charitable trust-held-Dharmashala may have object of charity but its employees are not governed by said object-provisions of minimum wages equally applicable -cannot seek exemption from tax-petition dismissed.

Held: Para 8

Even Charitable hospitals have been included in the definition of industry by virtue of decision rendered by the Apex Court in A.1.R. 1978 S.C. 548 Banglore Water Supply and Sewerage board Vs. A Rajappa and others. This decision still holds good, therefore, Dharmashala run by the society may be for charity and engaged in providing social services and means as stated above, but its employees are not governed by the objects of the society and minimum wages are required to be paid to them. Those objects are of the society running Dharmashala and not of its employees, therefore, in my opinion, Dharmashala is also an industry and notification can be issued by the Government for bringing it within the schedule employment and minimum wages can be fixed according to the procedure prescribed under the Minimum Wages Act.
Case law discussed:
A.1.R. 1978 S.C. 548

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

1. Heard counsel for the petitioner.

2. According to the counsel for petitioner, " Shree Marwari Seva Sangh" the petitioner is a registered society managing "Dharmshala" and rendering services for stay etc. to the pilgrims, passengers, old people and their attendants without taking any charge from them and there is no business or commercial activities in the Dharmashala. The source of income of the society is donations from charity minded persons and its income is also exempted under section 80 G(5) of the Income Tax Act, 1961.

3. For the first time, by notification dated 30.12.1994 appended as annexure-11 to the writ petition, minimum wages were fixed for employment in Dharmashala except those charging no rent or charging upto Rs.5/- per day as rent, were exempted from the purview of aforesaid notification.

4. It is stated that since no charge/ rent is being realised by the petitioner for rendering aforesaid services, it belongs to the exempted category. The petitioner Dharmashala was inspected on 27.5.2008 and against the inspection note dated 27.5.2008 under the Minimum Wages

Act, 1948, the petitioner filed a representation dated 2.7.2008 to Labour Enforcement Officer, Varanasi which is appended as annexure-10 to the writ petition, inter alia that the society is a charitable society which provide services to the public like free fooding to saints, poors, students and helpless down trodden people of the society, extend all sort of free services in case of famine, other epidemic diseases and other causalities, free medical facilities and arrangements for temporary and permanent stay to pilgrims , old people etc., therefore, it is not covered under U.P. Dookan Avam Vanijya Adhishthan Adhiniyam, 1962.

5. It is urged that by notification dated 30.12.1994 Dharmashala was for the first time included in the schedule employment. It was revised vide draft notification dated 4.2.2000 appended as annexure 12 to the writ petition. By the notification dated 4.2.2000, 26 employments have been included in the schedule employment in which Dharmashala is included at serial no. 24. It is stated by the counsel for petitioner that due to clerical mistake in the draft notification, exemption was not given to the Dharmashalas as was given in the notification dated 30.12.1994 and this mistake continued in the final notification dated 24.2.2006 also including Dharmashala in the schedule employments without granting any exemption.

6. It is urged that in similar situation a notification dated 31.1.1991 in respect of schools has also been issued in which exemption had been granted to private coaching classes, private schools including nursery school and private technical institutions. This notification has been appended as annexure 13 to the writ petition. The relevant extract of exemption given in the notification dated 31.1.1991 is as under:

"In exercise of the powers under clause (a) of sub section (1) of Section 3 read with clause (ii) of sub section (1) of section 4 of the minimum Wages Act, 1948 (Act 11 of 1948) and after consulting the Advisory Board and having considered the objections and suggestions received in respect of the proposals published by Government Notification No. 2903/XXXVI-3-21 (M.W.)-83, dated August 13, 1990, the Government is pleased to fix the minim rates of wages for employees employed in the employment in Private Coaching Classes, Private Schools including Nursery School and Private Technical Institutions in Uttar Pradesh other than (a) a Madarsa run by Muslom community where no fee or a nominal fee is being charged from the students, (b) a Private school run by any religious or charitable institution where no fee or a nominal fee is being charged, from the students, (c) a Balbadi run by the U.P. Council for Child welfare and (d) a recognized Private school receiving government aid. "

7. From the reading of extract of the aforesaid notification, it appears that certain educational institutions belonging to minority community and religious or charitable institutions as well as governed or aided by State for welfare for children belonging to weaker section of the society only which are charging nominal fee or no fee have been exempted from class of establishment to which the Act applies. The exemption clause shows that government is sincere towards propagating education amongst poor and

down trodden students who are unable to get proper education, in primary or coaching institutions.

8. Even Charitable hospitals have been included in the definition of industry by virtue of decision rendered by the Apex Court in A.1.R. 1978 S.C. 548 **Banglore Water Supply and Sewerage board Vs. A Rajappa and others**. This decision still holds good, therefore, Dharmashala run by the society may be for charity and engaged in providing social services and means as stated above, but its employees are not governed by the objects of the society and minimum wages are required to be paid to them. Those objects are of the society running Dharmashala and not of its employees, therefore, in my opinion, Dharmashala is also an industry and notification can be issued by the Government for bringing it within the schedule employment and minimum wages can be fixed according to the procedure prescribed under the Minimum Wages Act.

9. Counsel for the petitioner has failed to place any document to substantiate his submission that report submitted by the committee constituted for comparative study of minimum wages, was not placed in the meeting of the Advisory Board and minimum wages was fixed without consultation with Advisory Board or that there was any clerical mistake in not granting exemption to the petitioner. Therefore, parity cannot be sought with the notification dated 31.1.1991 in which exemption has been granted to private coaching classes, private schools including nursery school and private technical institutions, for benefit of education to next generation. The notification dated 31.1.1991 is for the benefit of society at large by the Government as it also includes Balbadi run by the U.P. Council for Child welfare and recognized Private school receiving government aid. It cannot be compared with Dharmashala and there is no violation of Article 14 of the Constitution.

10. For the reasons stated above, no case is made out for quashing the schedule employment "Dharmashala" notified in column 2 at serial no. 24 of Schedule-1 of impugned notification dated 24.2.2006 and the inspection note dated 27.5.2008.

11. The writ petition is accordingly dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.08.2008

BEFORE
THE HON'BLE SHISHIR KUMAR, J.

Civil Misc. Writ Petition No. 13135 of 2002

Triveni Engineering & Industries Limited ...Petitioner

Versus

State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri. Dilip Singh.
Sri. S.P. Singh.

Counsel for the Respondents:
Sri. Siddtarth
S.C.

Constitution of India Article 226-Back wages-lower Court award challenged-on the ground-petitioner being Registered Company running seasonal Industry for manufacturing crystal sugar through "vacuum pan process"-workman never worked after 1992-93-in terms of award

as per interim direction of writ Court- reinstated the workman and paying regular salary for the last seven years- Court declined to interfere with modification of no back wages for the period not actually worked.

Held: Para 15

But as the facts remains, respondent no.3 has been reinstated and back wages from the date of award till date of reinstatement has been paid as informed by the counsel for the parties, therefore, at this stage, after a lapse of about six or seven years, when the respondent No.3 is working, it will not be appropriate to pass an order to set aside the award. But in the facts and circumstances of present case award dated 24.4.1998 is modified to the extent that respondent no.3 will not be entitled for any back wages from 1994 till the date of award.

Case law discussed:

1995 Judgement Today (6), Supreme Court, 547, 2004 (8) Supreme Court Cases 246, 2005(8) Supreme Court Cases 750, 2007(115) FLR 619, 2005 (8) Supreme Court Cases 481.

(Delivered by Hon'ble Shishir Kuamr, J.)

1. This writ petition has been filed for quashing the award dated 24th April, 1998, passed in Adjudication Case No. 146 of 1995, contained in Annexure 1 to the writ petition passed by respondent no.2.

2. The facts as stated in the writ petition are that petitioner- Triveni Engineering & Industries Limited, Deoband, Saharanpur is a company incorporated under the Indian Companies Act, 1956, having its registered office at Deoband, Saharanpur. The company formally known as 'Gangeshwar Limited, Deoband, Saharanpur. Petitioner is engaged in the manufacture of crystal sugar through 'vacuum pan process'.

3. Petitioner is a seasonal industry and relationship between the sugar factory and its employees is regulated and governed by Standing Orders issued under Section 3 of the Act for vacuum pan industries known as Standing Orders covering the condition of employment of workmen in Vacuum Pan Sugar Factories in U.P. The workmen, who are classified in Class B of the Standing Orders are thus:

"B. Classification of workmen
(i) Permanent,
(ii) Seasonal,
(iii) Temporary,
(iv) Probationers,
(v) Apprentices, and
(vi) Substitutes."

4. When there is an excess sugarcane, sugar factory necessarily needs more man-power to deal with the production and supply of sugarcane and when there is a shortage of sugarcane in any given year, the need of employee - workmen also goes down. It has been stated that to meet these exigencies of service, requirement keeps fluctuating and that there is a temporary need, it is open to sugar factory to engage temporary hands to meet the temporary need. The respondent No.3 was engaged as an apprentice/ causal labour to meet the exigencies of services from time to time. However, the respondent No.3 had a reference raised stating that he has been deprived of work from season 1994-95. The workman filed a written statement on 19th January, 1996. Petitioner also filed his written statement clearly stating therein that respondent No.3 Luxman Singh has worked as a causal labour to meet the requirements of work. Rejoinder statement was also been filed clearly

stating therein that workman had never worked beyond 21st October, 1993 and therefore, had no cause of action for filing the case. In paragraph 17 of the rejoinder statement, petitioner has clearly stated the period in which respondent no.3 had worked as a temporary/causal workman and, therefore, no cause of action arose in the season 1994-95. The evidence was adduced and the award has been given in favour of respondent no.3 for reinstatement with full back wages.

5. It has been submitted on behalf of petitioner that workman concerned was unable to establish that he had worked for the whole of the second half of crushing season 1993-94 because unless the workman would established that he has worked for season 1993-94 up to end he would have no right to be called as seasonal workman in coming season in 1994-95. Although labour court has recorded a finding that respondent workmen has shifted his stand from time to time yet has given no reason for believing the pleadings and evidence as given by workmen. Although from the award, it clearly appears that labour court has refused respondent No.3 as seasonal workmen but has given him benefit as seasonal workman and directed the petitioner to reinstate him in the status of permanent work. The said order of labour court is contrary to the judgement of the Apex Court reported in 1995 Judgement Today (6), Supreme Court, 547, ***Morinda Co-op. Sugar Mills Ltd. Vs. Ram Kisan and others***. From perusal of the Standing Orders of the vacuum pan Sugar Factories under Clause 2-K of special condition, which governs the seasonal workman is defined. Petitioner submits that labour court has not examined the issue whether the workman concerned had infact fulfilled the requirement of Clause 2-K in giving benefit under Clause 2-K. As workman concerned is unable to establish that he has worked for whole of the second half of crushing season 1993-94, he would have no right to be called as seasonal workman in coming season 1994-95. In the absence of the aforesaid finding labour Court has no jurisdiction to pass order in favour of workman concerned.

6. Aggrieved by the aforesaid order, writ petition was filed before this Court and by order dated 30.10.2003, this Court has passed an order that subject to petitioner's reinstating respondent no.3 within three weeks from today and paying back wages from the date of award till the date of reinstatement and continuing to pay the same in future as and when the same falls due, further execution of award shall remain stayed. Petitioner submits that in view of the order passed by this Court, respondent no.3 has been reinstated and order of this Court has been complied with. But as regards the back wages prior to the date of award is concerned, in the facts and circumstances of the case, petitioner submits that he is not entitled for the same. Reliance bas been placed upon a judgement of 2004 (8) Supreme Court Cases, 246 ***M.P. Electricity Board Vs. Hariram***. Paragraphs, 4, 5, 8 and 10 are being reproduced below:-

*"**4.** The appellant-Board denied the allegations made in the said application which had termed the non-employment as retrenchment of their service by contending that the question of retrenchment does not arise in the nature of employment because the service of the respondents were on work requirement*

basis. Before the Labour Court, an application was made by the respondents to produce the Muster Rolls for the period 1987 to 1992. That apart no other material was produced by the respondents to establish a fact that they had worked for 240 days continuously in any given year. Though some other applicants examined themselves before the Labour Court no other document was produced. While the appellant-Board examined three witnesses who are Engineers-in-Charge of the Project and produced the Muster Rolls for the period between 1986 to 1990 but did not produce the Muster Rolls for the later period. The Labour Court after examining the entries in the Muster Rolls came to the conclusion that the respondents-applicants had not worked for 240 days continuously in any given year, hence, they cannot claim permanency nor could they term their non-employment as a retrenchment. On the said basis, it rejected the applications of the respondents.

5. *Being aggrieved by the said rejection of their application, the respondents preferred an appeal before the Industrial Court at Bhopal Bench. The Industrial Court noticing the fact that though the application for production of the Muster Rolls was for the years 1987 to 1992, the appellant had only produced the Muster Rolls for the year ending 1990. Therefore, an adverse inference against the appellant was drawn and solely based on the said adverse inference it accepted the case of the Respondents that they had worked for 240 days continuously in a given year, hence, proceeded to grant relief, as stated hereinabove.*

8. *In these appeals, learned counsel appearing on behalf of the appellant-Board contended that the Courts below could not have drawn any adverse inference against the Board for not having produced the Muster Rolls for the year 1990-1992 when it complied with the request of the respondent by producing the Muster Rolls for the year 1980-90. It is submitted that the said Muster Rolls which were produced before the Court clearly indicated that the respondents had not worked continuously for 240 days in a year, at any point of time between 1988-90. It is argued that it is not the case of the respondents that between the year 1990-92 for which period the Muster Rolls were not produced they had worked for 240 days continuously only in those years. Their entire case was that between 1988 and 1992 they have been working in 240 days continuously in a year which having not been established at least for the years 1988 and 1990 without there being a specific allegation that between 1990 and 1992 there was such continuous employment a mere non-production of the Muster Rolls for the said year could not have been made the basis of drawing an adverse inference by the Courts below. It is also argued that the non-employment of a daily wager when there is no work would not amount to retrenchment. Learned counsel also submitted that the nature of work that was being done by the appellant was a work for a project and that project having come to an end, question of regularising the services of the respondents or making them permanent did not arise.*

10. *Having heard the learned counsel for the parties and having perused the documents, we notice that the case of the appellant that these respondents were employed for the purpose of digging pits for erecting electric poles in the course of*

drawing electric wire from one point to another point is not disputed. It is an accepted finding of the Courts below that the employment of the respondents have been discontinuous and intermittent during the period from 1982 till their employment was discontinued. We can take judicial notice of the fact that drawing of an electric line is in the nature of project work and once the polls are erected and the electric wire is drawn from the starting pole to the ending pole that work comes to an end. Therefore, it cannot be contended that the nature of work which was only to dig pits for the purpose of erecting poles could be construed as a permanent job. Of course, during the course of electrifying more places, job of this nature may be done by the Board continuously in different parts of the State but that does not deviate from the fact that drawing of electric line from one point to another at one part of the State would be a project and not a continuous job. Therefore, employment of people in that local area for the limited job cannot be construed as an employment for a continuous and regular work of the Board. This fact is also recorded in the Muster Rolls which shows that at regular intervals the services of the respondents were sought obviously for the reason that there was no continuous need for such work. A perusal of the Muster Rolls, a copy of which is produced. along with the writ appeal which pertains to the respondents in the first appeal clearly indicates the above fact. If as an example, we take the case of the respondent in CA. No. 2240/01 we notice that he worked between 16.11.1987 to 15.12.1987 for 30 days. His next employment was from 16.12.1987 to 15.1.1988 for 26 days. Therefore, it could be said that during the period 16.11.1987 to 15.1.1988 this respondent worked continuously for 56 days. He was then not employed between 15.1.1988 till 16.2.1988. After the said break he was re-employed from 16.2.1988 to 15.9.1988 which is for a period of 106 days. Thereafter, he was not employed till 16.11.1988. From 16.11.1988 he was re-employed till 15.12.1988 for 30 days. Thus it is noticed that the employment during the period 1987 to 1988 was not continuous and his total employed days for one year if taken from 16.11.1987 till 16.11.1988, same comes to 136 days. Similar is the case if we have a look at a subsequent employment during the years 1989-1990, this clearly shows the fact that the employment of the respondent was on a job required basis and was not for any continuous services required by the Board. The respondent, therefore, cannot claim either permanency or regularisation since there is no such permanent post to which he could stake his claim nor could he claim the benefit of completion of 240 days of continuous work in a given year, because as stated above the figures do not show that the respondents whose particulars are referred to hereinabove or the other respondents for that matter have worked for 240 days. In such a factual background, in our opinion, the Industrial Court or the High Court could not have drawn an adverse inference for the non-production of the Muster Rolls for the year 1990 to 1992 in the absence of specific pleading by the respondents-applicants that at least during that period they had worked for 240 days continuously in a given year. "The application calling for the production of the documents was for the years 1987 to 1992. As stated above, between the period 1987 to 1990, as a matter of fact, till end

of the year 1990 the respondents have not been able to establish the case of continuous work for 240 days. Considering these facts in our view drawing of an adverse inference for the non-production of the Muster Rolls for the years 1991-92, is wholly erroneous on the part of the Industrial Court and the High Court. We cannot but bear in mind the fact that the initial burden of establishing the factum of their continuous work for 240 days in a year rests with the applicants-respondents. "

7. Further reliance has been placed upon judgement reported in 2005(8) Supreme Court Cases, 750, ***Surendranagar District Panchayat Vs. Dahyabhai Agmarsingh*** Reliance has been placed upon paragraphs 3, 4 and 18 are being quoted below:-

"3. *The respondent examined himself and deposed that he was employed for 10 years at the salary of Rs 470 per month whereas Mr. Vinod Misra, an official from the appellant side was examined to show that the workman never worked for 240 days in a year.*

4. *Before the Labour Court, oral evidence was given by the respondent. The Labour Court relied on the oral evidence of the respondent-workman and drew an adverse inference for non-production of muster roll and the salary register from the year 1976 to 1986 and held that the respondent-workman had worked for more than 240 days and therefore his termination was illegal. The Labour Court directed the reinstatement of the workman with back wages of 20% from the date of reference for non-compliance of sections 25F, 25G and 25H.*

18. *In the light of the aforesaid, it was necessary for the workman to produce the relevant material to prove that he has actually worked with the employer for not less than 240 days during the period twelve calendar months preceding the date of termination. What we find is that apart from the oral evidence the workman has not produced any evidence to prove the fact that he has worked for 240 days. No proof of receipt of salary or wages or any record or order in that regard was produced; no co-worker was examined; muster roll produced by the employer has not been contradicted. It is improbable that workman who claimed to have worked with the appellant for such a long period would not possess any documentary evidence to prove nature of his engagement and the period of work he had undertaken with his employer. Therefore, we are of the opinion that the workman has failed to discharge his burden that he was in employment for 240 days during the preceding 12 months of the date of termination of his service. The Courts below have wrongly drawn an adverse inference for non production of the record of the workman for ten years. The scope of enquiry before the Labour Court was confined to only 12 months preceding the date of termination to decide the question of continuation of service for the purpose of Section 25F of the Industrial Disputes Act. The workman has never contended that he was regularly employed in the Panchayat for one year to claim the uninterrupted period of service as required under Section 25B(1) of the Act. In the fact and situation and in the light of the law on the subject, we find that the workman-respondent is not entitled for the protection or compliance of Section 25F of the Act before his service was terminated by the employer.*

As regards non-compliance of Sections 25G and 25H suffice is to say that witness Vinod Mishra examined by the appellant has stated that no seniority list was maintained by the department of daily wagers. In the absence of regular employment of the workman, the appellant was not expected to maintain seniority list of the employees engaged on daily wages and in the absence of any proof by the respondent regarding existence of the seniority list and his so called seniority no relief could be given to him for non-compliance of provisions of the Act. The Courts could have drawn adverse inference against the appellant only when seniority list was proved to be in existence and then not produced before the Court. In order to entitle the Court to draw inference unfavourable to the party, the Court must be satisfied that evidence is in existence and could have been proved. "

8. Reliance has been placed upon a judgement reported in 2007(115) FLR, 619 ***Ganga Kisan Sahkari Chini Mills Ltd. Vs. Jaivir Singh*** (Paragraphs 4, 6, 8, 11 and 12) and another judgement reported in 2005 (8) Supreme Court Cases, 481 ***Batala Coop. Sugar Mills Ltd. Vs. Sowaran Singh*** and reliance has been placed upon paras 4, 6, 8,11 and 12. The same are being reproduced below:-

"4. *The Labour Court was of the view that though the stand of the employer was that the respondent-workman was employed on casual basis on daily wages for specific work and for specific period, yet evasive reply was given in respect of the workman's stand that he was appointed in April 1986. It was observed that no attendance record was produced. There was also no material to show that the workman had left the job on his own accord and in any event the employer had not proved that the workman had worked for less than 240 days in 12 calendar months preceding the date of termination. Accordingly, it was held that there was violation of Section 25F of the Act. Direction was given to re-instate the workman with 50% back wages.*

6. *In support of the appeal, learned counsel for the appellant submitted that both the Labour Court and the High Court fell in grave error by acting on factually and legally erroneous premises. The definite stand of the appellant was that the workman was engaged on casual basis on daily wages for specific work and for specific period. Details in this regard were undisputedly filed. Therefore, the provisions of Section 2(oo) (bb) of the Act are clearly applicable. In addition, the onus was wrongly placed on the employer to prove that the workman had not worked for 240 days in 12 calendar months preceding the alleged date of termination. No material was placed on record by the workman to establish that the workman had offered himself for job after 12-2-1994. The award of the Labour Court does not speak of the requirement to maintain the muster roll. This point was taken up suo motu by the High Court without any opportunity to the appellant to have its say.*

8. *We find that the High Court's judgment is unsustainable on more than one count. In Morinda Co-op. Sugar Mills Ltd. v. Ram Kishan and Ors. (1995 (5) SCC 653) it was observed as follows:*
"4. It would thus be clear that the respondents were not working throughout the season. They worked during crushing seasons only. The respondents were taken

into work for the season and consequent to closure of the season, they ceased to work.

5. The question is whether such a cessation would amount to retrenchment. Since it is only a seasonal work, the respondents cannot be said to have been retrenched in view of what is stated in clause (bb) of Section 2 (oo) of the Act. Under these circumstances, we are of the opinion that the view taken by the Labour Court and the High Court is illegal. However, the appellant is directed to maintain a register for all workmen engaged during the seasons enumerated hereinbefore and when the new season starts the appellant should make a publication in neighbouring places in which the respondents normally live and if they would report for duty, the appellant would engage them in accordance with seniority and exigency of work.

11. *The materials on record clearly establish that the engagement of the workman was for specfic period and specific work.*

12. *In view of the position as highlighted in Morinda Co-op. Sugar Mills and Anil Baburao,s cases (supra), the relief granted to the workman by the Labour Court and the High Court cannot be maintained."*

9. In support of the aforesaid contention learned counsel for petitioner submits that award given by labour Court is liable to be set aside.

10. On the other hand, learned counsel for the respondents submits that on basis of relevant record labour court has given a finding of fact that the respondent no.3 being a seasonal employee was entitled to be called for 1994-95 season.

11. The award of labour Court is based on unfair labour practice adopted by petitioner by engaging respondent no.3 in employment since 1985 when regularisation of his services which were passed on admission of documents filed by workmen respondent No.3.

12. I have considered the submission made on behalf of petitioner as well as respondent and have perused the record.

13. From the perusal of the record, it IS clear that on the basis of application State Government has referred the dispute to the labour Court u/s 4K of the Industrial Dispute Act, same is reproduced below:-

"KYA SEWAYOJAKO DWARA APNE SHRAMIK SRI LAKSHMAN SINGH PUTRA SRI JAIPAL SINGH KO VARSH 1994-95 KA SEASON PRARAMBH HONE PAR KARYA SE PRITHAK/ VANCHIT KIYA JANA UCHIT TATHA / ATHWA VAIDHANIK HAI, YADI NAHI, TO SAMBANDHIT SHRAMIK KYA HITLABH/ ANUTHOSH (RELIEF) PANE KA ADHIKARI HAI TATHA ANYA VIVRAN VA TITHI SAHIT."

14. Meaning thereby the claim of respondent no.3 was that he has not been called to work in the season 1994-95. The labour court has recorded a finding that from the statement of one Narendra Kumar, time keeper, respondent no.3 has worked in the season 1992-93. A finding to this effect has also been recorded that from the oral evidence of the parties it is

clear that respondent No.3 has worked up to 1992-93 season, a finding to this effect has also been recorded that there is a mistake in the referring order. But it has been stated that this will not effect the right of respondent-workman. In paragraph 8 of the written statement filed on behalf of petitioner, it has clearly been mentioned that "respondent No.3 had never worked even for a single day beyond the end of crushing season 1993-94 hence no cause of action arises to the respondent No.3 on the alleged date mentioned in the reference order." The labour Court has misread the statement mentioned in the written statement. In spite of the finding recorded that respondent No.3 workman is changing the stand from time to time but in spite of the aforesaid fact, has given an award in his favour for reinstatement as well as full back wages. The Apex Court in cases mentioned above has clearly held that in such circumstances, the labour Court cannot grant the relief of reinstatement because the status of seasonal employee and temporary employee are different.

15. But as the facts remains, respondent no.3 has been reinstated and back-wages from the date of award till date of reinstatement has been paid as informed by the counsel for the parties, therefore, at this stage, after a lapse of about six or seven years, when the respondent No.3 is working, it will not be appropriate to pass an order to set aside the award. But in the facts and circumstances of present case award dated 24.4.1998 is modified to the extent that respondent no.3 will not be entitled for any back wages from 1994 till the date of award.

16. The writ petition is disposed of. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.05.2008

BEFORE
THE HON'BLE SUNIL AMBWANI, J.

Civil Misc. Writ Petition No.14915 of 2008

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

Counsel for the Petitioner:
Sri D.K.S. Rathor

Counsel for the Respondents:
Sri Ashok Nath Tripathi
Sri P.K. Tyagi
Smt. Archana Tyagi
S.C.

U.P. Panchayat Raj Act, 1947-Section 95 (I) (g)-ceasure of Administrative and financial power of village pradhan-satisfaction of District Magistrate based on no material or malafide-D.M. required to consider preliminary enquiry report and not the final-held-can not be interfered under writ jurisdiction.

Held: Para 22

There is nothing to show that the satisfaction of the District Magistrate was vitiated by lack of material or malafides. The challenge to the impugned order on the ground that it does not give reasons has no substance as elaborate reasons are not required to be given by the District Magistrate at this stage. He is required to consider the preliminary enquiry report, and not a final enquiry report with the reply given by the petitioner or the material collected and produced by both the enquiry officer and supplied by the

petitioner. Such an enquiry or recording of reasons at this stage is wholly superfluous.

Case law discussed:

Special Appeal. –No.382 of 2008 decided on 13.3.2008, Writ Petition No.4897 of 2008, 2005 (4) AWC 3563; AIR 1971 SC 385 (1993) 1 UPLBEC 414, AIR 1963 SC 786, 2005 (4) AWC 3563, (1999) 1 UPLBEC 718, (1973) 2 SCC 836, (2002) 1 UPLBEC 582, (2003) 1 UPLBEC 736, (2005) 2 UPLBEC 1216, (1991) 4 SCC 139.

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

1. Heard Shri D.K.S. Rathore, learned counsel for the petitioner and learned Standing Counsel. Shri Ashok Nath Tripathi has filed an impleadment application on behalf of Shri Yashveer Singh, the complainant.

2. With the consent of the parties the matter was finally heard and is being decided at the admission stage.

3. The petitioner is the elected Pradhan of Gram Panchayat Dharupur, Development Block-Noorpur, Distt. Bijnor. Shri Yashveer Singh, Shri Mahesh Kumar and Shri Nripendra Kumar, the residents of Gram Panchayat Dharupur made a complaint to the District Magistrate alleging misuse of office and irregularities in carrying out development works. The District Magistrate appointed the Soil Conservation Officer-respondent No.3 as enquiry officer to conduct preliminary enquiry under Section 95 (I) (g) of the U.P. Panchayat Raj Act, 1947 on the allegations made against the petitioner. The enquiry officer submitted a preliminary enquiry report on 2.11.2007 on which a show cause notice was issued to the petitioner on 1.1.2008 alleging. (1) the construction work in pond was made without making the inlet and slope; (2) one of the four rooms constructed in the school campus was incomplete. This room was required to be constructed in a manner that it should be earthquake proof. It has been constructed with one wall on the support of the neighbouring room, which does not make it earthquake proof. The building material used in the construction is not of high quality; (3) Only 209 out of 226 students have received the scholarships. There was no proof of distribution of scholarship to remaining 17 students. The disbursement for which documents were not made available raised doubts over its disbursement; (4) m the mid-day meal scheme Smt. Rajeshwari Devi wife of Shri Mahendra Singh was paid from October 2005 to March 2006, whereas the vouchers were issued for seven months causing misappropriation of Rs.1392/-; (5) in muster roll No.15 the payments to the labourers at Sl.No.1 to 16 for the period 14th to 29th August, 2007 were shown fraudulently, thereby causing misappropriation of Rs.13,760/-; and (7) the technical evaluation shows that there was misappropriation/misuse of Rs.15869/-.

4. The petitioner gave his reply to the show cause notice on January 1st, 2008 alleging that the construction of pond could not be completed due to rainy season. The works were carried out under the supervision of Junior Engineer and that the inlet, outlet and slope are under construction. The fourth room in the school campus is separate, and is in different direction from the other three rooms and that the constructions were completed under the supervision of Junior Engineer, Vikas Khand, Noorpur. The earthquake proof room is in open towards east and is separate from other rooms. The

scholarship for 17 students could not be distributed as the caste wise details were not provided by the Head Master. The amount of Rs.5100/- at the rate of Rs.300/- per students was deposited in the account on 23.8.2007 and the receipt was made available to the enquiry officer. The pay for the 7th month was paid to Smt. Rajeshwari Devi and the receipt and voucher are enclosed. The labourers at Sl.Nos.10, 11, 12 and 13 were paid ten days' wages on muster roll No.15 and the labourers at SI.No.14, 15 and 16 were actually paid for eight days. By mistake they were shown to be present for 10 days With regard to SI.No.16 the receipt of payment was enclosed. With regard to technical evaluation it was stated in reply that 111 mtrs. road from the house of Naththu to Balram was repaired and that the other works of the road from Sachin Book Depot to 'Pacca' road and others were carried out. The measurements were interchanged. The completion certificate was enclosed.

5. The District Magistrate considered the reply. He was not satisfied with the explanation. He has ceased the financial and administrative powers of the petitioner under the proviso to Section 95 (l) (g) of the U .P. Panchayat Raj Act, 1947, pending formal enquiry and has directed appointment of three member committee by his order dated 1.3.2008, giving rise to this writ petition.

6. Shri D.K.S. Rathroe, learned counsel for the petitioner states that the complainant-caveator has no locus standi to oppose the writ petition. He may not be impleaded in the writ petition. He has relied upon Division Bench judgment in **Guru Prasad Yadav Vs. The State of U.P. & Ors., Special Appeal. –No.382 of 2008 decided on 13.3.2008** in which it was held that the complainant has no right to be heard in the proceedings before the Court. He would further submit that once the District Magistrate has issued show cause notice and has received the reply, it was incumbent upon him to consider that reply before suspending financial and administrative powers of the Pradhan. Shri D.K.S. Rathore further submits that in similar circumstances this Court has passed interim orders on 28.1.2008 in **Naresh Kumar Vs. State of U.P. & Ors., Writ Petition No.4897 of 2008**.

7. In Guru Prasad Yadav (Supra) the Division Bench while {setting aside the order in writ petition held that the complainant would not have the standing to file writ petition challenging the orders by which the enquiry was dropped. Shri Guru Prasad Yadav, the petitioner was member of three member committee. It was held that a beneficiary of the order cannot be ordinarily heard as he did not have any lis with the delinquent Pradhan. The Division Bench has relied upon judgment in **Kesari Devi Vs. State of U.P. & Ors., 2005 (4) AWC 3563; Adi Pherozshah Gandhi Vs. H.M. Seervai, Advocate General of Maharashtra, AIR 1971 SC 385** and **Suresh Singh Vs. Commissioner, Moradabad Division, Moradabad, (1993) 1 UPLBEC 414** and then held as follows:-

"We may further clarify that the right of the petitioner-appellant to continue as one of the Members of three members committee pending regular enquiry against the Pradhan is not a vested right nor he has a legal right to continue. Since he was the complainant, he ought not to have been allowed to be a member of the

committee to look after the work of Pradhan.

Thus in view of the above, Sri Parashu Ram, complainant and the alleged member of the Three Member Committee can neither be heard in these proceedings before the Court nor he can be a member of any committee."

8. Shri Yashveer Singh seeking impleadment was a complainant along with Shri Somesh Kumar and Shri Nripendra Kumar. They are residents of the same Gram Panchayat. They are not beneficiaries of the order. A resident of the village has been given rights under Rule 3 of the U.P. Panchayat Raj (Removal of Pradhan, Up-Pradhan and Members) Enquiry Rules, 1997 to make a complaint against the sitting Pradhan. The complaint should be accompanied by an affidavit. There should be sufficient material disclosed by the complainant, in his affidavit to satisfy the District Magistrate to initiate a preliminary enquiry against the sitting Pradhan. The complainant does not have a right to participate in the enquiry as prosecutor. He, however, may be heard by the enquiry officer in the formal enquiry under Rule 5 of the U.P. Panchayat Raj (Removal of Pradhans, Up-Pradhans and Members) Enquiry Rules, 1997 (in short the Rules of 1997). In **Udit Narain Singh Malpaharia Vs. Addl. Member, Board of Revenue, Bihar & Anr. AIR 1963 SC 786** a Constitution Bench of Supreme Court held in para 10 that there may be parties who may be described as proper parties, that is parties whose presence is not necessary for making an effective order, but whose presence may facilitate the settling of all the questions that may be involved in the controversy. It was then held:-

"The question of making such a person as a party to a writ proceeding depends upon the judicial discretion of the High Court in the circumstances of each case. Either one of the parties to the proceeding may apply for the impleading of such a party or such a party may suo motu approach the court for being impleaded therein."

9. In **Smt. Kesari Devi Vs. State of U.P. & Ors. 2005 (4) AWC 3563** a Division Bench of the Court hearing a writ petition filed on behalf of 'Adhyaksh' (Chairperson) of Zila Panchayat, Allahabad, did not prefer to hear the 'Upadhyaksh' in opposition to the prayers made in the writ petition on the ground that he was not a person aggrieved and cannot claim to have any vested right in the office. In para 40 it was observed that he has merely a chance to officiate in case the ‘Adhyaksh' is removed. However, the Court while rejecting the impleadment application observed in para 42 that since the issues raised in the writ petition have wide repercussions and since the questions are of serious nature the Bench had heard Shri Shashi Nandan solely for the assistance of the Court in view of the provisions of Chapter XXIl, Rule 5A of the Allahabad High Court Rules, 1952 in order to secure the ends of justice and in order to prevent any miscarriage of justice.

10. Shri Ashok Nath Tripathi appears for the complainant. He had filed a caveat and has filed a impleadment application. As a complainant he may not be a necessary party in the proceedings, but has sufficient interest in the matter as the proceedings were initiated on his complaint. A member of Gaon Sabha has a right to make a complaint, if the sitting

Pradhan misuses his authority and commits acts of misappropriation or embezzlement. In such a case though an enquiry is to be made by the District Magistrate, the complainant being resident of the same village can provide sufficient material and the particulars of the irregularities. A complainant may not necessary party to such proceedings but where the proceedings have been initiated on his complaint, he would be a proper party to be impleaded at the discretion of the Court. In a given case the Court may find that the impleadment may unnecessarily complicate the issues or there is any vested interest or malafides to be served by the persons seeking impleadment. In such case the Court may refuse impleadment. In the present case, however, I do not find that any malafides haw been alleged nor there is anything to show that the persons seeking impleadment has any vested interest in the office of the Pradhan. The objections of Shri D.K.S. Rathore to the impleadment are as such rejected. The impleadment application is allowed. Shri Ashok Nath Tripathi appearing for the newly impleaded respondent was heard in the matter.

11. Section 95 (1) (g) of the U.P. Panchayat Raj Act, 1947 provides for removal of Pradhan. The State Government or the delegated authorities may remove a Pradhan on the ground given in Section 95 (l) (g) of the Act, which includes absenteeism without sufficient cause for more than three consecutive meeting or sitting: refusal to act or incapable of acting or if he is charged with offences involving moral turpitude; abuse of his position or persistent failure to perform the duties imposed by the acts and the rules making him undesirable to continue in public interest: or has taken the benefit of reservation under sub-section (2) of Section 11A or sub-section (5) of Section 12 on false declaration: or being Sahayak Sarpanch or Sarpanch of the Nyay Panchayat takes active part in politics or suffers from any disqualification mentioned in Clauses (a) to (m) of Section 5A. The first proviso to Section 95 (I) (g) of the Act reads:-

"Provided that where in an enquiry held by such person and in such manner as may be prescribed, a Pradhan, Up-Pradhan is prima facie found to have committed financial and other irregularities, such Pradhan or Up-Pradhan shall cease to exercise and perform the financial and administrative powers and functions, which shall, until he is excluded of the charges in the final enquiry, be exercised and performed by a committee consisting of three members of Gram Panchayat appointed by the State Government."

12. In **Smt. Sandhya Gupta Vs. District Magistrate, Auraiya & Ors., (1999) 1 UPLBEC 718** this Court held that the procedure prescribed in Rule 3 to 7 of the Rules of 1997 must be followed before removing a Pradhan. This judgment essentially related to the removal and not ceasure or suspension of the powers of the Pradhan as an interim measure. The Court had observed in this case that before striping of the administrative and financial powers of Pradhan or Up-Pradhan, a show cause notice must be served on the Pradhan or Up-Pradhan as the case may be and he should be afforded a reasonable opportunity of showing cause against action proposed. Any order passed by the

District Magistrate without calling for the explanation and without giving reasonable opportunity of showing cause against the action proposed would vitiate and would invite judicial intervention. In this case initially the Chief Development Officer, Deoria passed an order suspending the financial powers of Smt. Sandhya Gupta. The order was, thereafter, recalled and her financial powers were restored and an enquiry proceeded into complaints made against her. After holding the enquiry the District Magistrate passed an order removing her from the office of the Pradhan. The question of circumstances and the conditions in which the powers of interim suspension may be exercised and whether an opportunity should have been given to Pradhan or Up-Pradhan before striping of administrative and financial powers was neither involved nor discussed in the judgment. While discussing the findings of corrupt practices in para 11 and referring to the judgment of **Union of India Vs. Mohan Lal Kapoor, (1973) 2 SCC 836**, the learned Judge (Hon'ble Justice O.P. Garg) agreed that the principles of natural justice do not all speak in the same voice and sometimes it is difficult to reconcile. Nevertheless, a duty has been cast on the administrative authorities exercising quasi-judicial functions, to record reasons. In view of the expanding horizon of the concept of natural justice the requirement of recording of reasons as a part fair procedure cannot be dispensed with. Even though the rules do not specifically require the recording of the reasons, the requirement of the principle of natural justice is that the decision should be based on the well informed reasons which should be disclosed in the order itself. The Court then observed in para 11 that it is not expected that the District Magistrate should write the order like a judgment of the Court, but certainly some reasons, however, precise they may be have to be there. The Court then found that in that case the District Magistrate has passed an order which was based on no material and the conclusion arrived at were not supported with any reason. While summing up the case, in para 15, however, the Court formulated guidelines for observance of the District Magistrate so that in future they may be cautioned enough to deal with the affairs of Pradhan, Up-Pradhan and members. The guideline No.8 of these 14 guidelines provides as follows:-

"The provisions of the aforesaid proviso relating to stripping of the administrative and financial power of the Pradhan, Up Pradhan ***can be invoked only after a show cause notice is served on the Pradhan or Up Pradhan, as the case may be, and he is afforded a reasonable opportunity of showing cause against the action proposed, as is contemplated in second proviso to clause (g). Any order passed by the District Magistrate without calling for the explanation and without giving reasonable opportunity of showing cause against the action proposed would be vitiated and would invite judicial intervention."***

13. In **Chandrajit Raj Bhar Vs. District Magistrate, Pilibhit & Ors., (2002) 1 UPLBEC 582** it was held that a conjoint reading of proviso to Section 95 (1) (g) of the Act read with Rule 2 (c), 4 and 5 of the Rules of 1997 leads towards an inescapable conclusion that the District Magistrate considering the preliminary enquiry report submitted by the District Panchayat Raj . Officer and explanation if

any submitted by a Pradhan or Up-Pradhan is to pass a speaking order either depriving a Pradhan or Up-Pradhan from performing his financial and administrative powers and functions or refused to pass such order on merits of each case. Such powers cannot be exercised in perfunctory manner as it was shown in the case decided by the Court.

14. In **Moti Lal Vs. District Magistrate, Lalitpur & Anr., (2003) 1 UPLBEC 736** a Division Bench of this Court had an occasion to consider the powers of the District Magistrate ceasing financial and administrative powers of the sitting Pradhan and constitution of three member committee. After examining the provisions of the Act and the Rules of 1997 the Division Bench observed that these powers can be exercised on a complaint or report referred to in Rule 3 of Rules 1997 "or otherwise'. The words "or otherwise" occurring in sub-rule 1 of Rule 4 are of wide import. Even if no complaint is filed, the State Government does not lack the power to direct holding of preliminary enquiry. Such a report made by the Sub Divisional Magistrate or may come to the knowledge of the District Magistrate personally on coming to note on some serious lapse on the part of Pradhan and in such case also preliminary enquiry may be ordered. The Court then observed that the Land Conservation Officer and the Project Officer, who had conducted the enquiries were both District Level Officer and thus it cannot be said that they were not authorised to hold the enquiry. The Court then upheld the prima facie satisfaction of the District Magistrate about the misuse of the amount in various development works. The order of the learned single Judge was upheld and the special appeal was dismissed.

15. In **Rajeshwari Kushwaha Vs. District Magistrate, Kanpur Nagar & Ors., (2005) 2 UPLBEC 1216** this Court held that the report of Deputy Director (P) appointed by the Divisional Commissioner was not a district level officer to hold an enquiry.

16. Where the Act and the Rules provide for sufficient guidelines, it is not necessary for the Court to summarise them or to put them in different language, either point wise or in any other manner, substituting its opinion in place of the clear statutory provisions. While interpreting the provision of statute the Court may take into account the object and reasons of the enactment to provide answer to the silences, if any, without faulting the text of the statute or to iron out the creases so that the procedure prescribed becomes meaningful and purposive to the object of exercise of powers. The Courts are not required to make an adventure to summarise the provisions of the statute, where they are clearly and explicitly laid down, with an anxiety for the executive to follow the law, on the purported ground that such summarisation will not leave any scope for unnecessary litigation. The Courts under our Constitution interpret the laws and dispense justice in accordance with law. The Courts do not legislate, where there is already a legislation providing for both substantive and procedural aspects and with no ambiguities. Many a times, as in the present case the superfluous exercise of providing guidelines by summarising the legal requirement of a valid order, in the judgment and the anxiety to curb litigation becomes a fresh

ground for litigation. In **Smt. Sandhya Gupta** (Supra) the Court not only exceeded its powers in deciding the matter, which were not before it, but also laid down guidelines providing for affording a reasonable opportunity of showing cause against the action proposed in the first proviso of Section 95 (1) (g) of the Court, wrongly comparing it with the second proviso to Clause (g), and thereby provided an opportunity of showing cause to a delinquent Pradhan, which is not provided under the Act. By way of laying down guidelines the Court legislated and thereby provided fresh rights, which are not provided in the statute, creating new avenue for litigation.

17. The guidelines provided in Smt. Sandhya Gupta's case overstepping the legislative provisions are not only 'obiter', but are also in ignorance of statutory provisions and are thus 'per inqurium', vide **State of U.P. Vs. Synthetics & Chemicals Ltd., (1991) 4 SCC 139** (para 40 and 41):-

'Incuria' literally means 'carelessness'. In practice per incuriam appears to mean per ignoratium. English courts have developed this principle in relaxation of the rule of stare decisis. The 'quotable in law' is avoided and ignored if it is rendered, 'in ignoratium of a stature or other binding authority'. (Young Vs. Bristol Aeroplace Co. Ltd.). Same has been accepted, approved and adopted by this Court while interpreting Article 141 of the Constitution, which embodies the doctrine of precedents as a matter of law2. In Jaisri Sahu Vs. Rajdewan Dubey this Court while pointing out the procedure to be followed when conflicting decisions are placed before a bench extracted a passage from Halsbury's Laws of England incorporating one of the exceptions when the decision of an appellate court is not binding.

Does this principle extend and apply to a conclusion of law, which was neither raised nor preceded by any consideration. In other words can such conclusions be considered as declaration of law? Here again the English courts and jurists have carved out an exception to the rule of precedents. It has been explained as rule of sub-silentio. "A decision passes sub-silentio, in the technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the court or present to its mind." (Salmond on Jurisprudence 12th Edn., p. 153). In Lancaster Motor Company (London) Ltd. Vs. Bremith Ltd. the Court did not feel bound by earlier decision as it was rendered 'without any argument, 'without reference to the crucial words of the rule and without any citation of the authority'. It was approved by this Court in Municipal Corporation of Delhi Vs. Gurnam Kaur. The bench held that, 'precedents sub-silentio and without argument are of no moment'. The courts thus have taken recourse to this principle for relieving from injustice perpetrated by unjust precedents. A decision which is not express and is not founded on reasons nor it proceeds on consideration of issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Article 141. Uniformity and consistency arc core of judicial discipline. But that which escapes in the judgment without any occasion is not ratio decidendi. In B. Shama Rao Vs. Union Territory of Pondicherry it was observed, 'it is trite to say that a decision is binding not because of tis conclusions but in regard to its ratio and the principles, laid

down therein'. Any declaration or conclusion arrived without application of mind or preceded without any reason cannot be deemed to be declaration of law or authority of a general nature binding as a precedent. Restraint in dissenting or overruling is for sake of stability and uniformity but rigidity beyond reasonable limits is inimical to the growth of law."

18. The first proviso to Section 95 (1) (g) of the Act quoted as above, authorises the State Government to cease financial and administrative powers and functions of Pradhan or Up-Pradhan, if it is prima facie found to have committed financial and other irregularities, until he is exonerated of the charges in the formal enquiry, to be exercised and performed by committee consisting of three members of Gram Panchayat. This power is by way of emergency measure and may be exercised, where the Pradhan or Up-Pradhan is prima facie found to have committed financial and other irregularities. In such case the District Magistrate exercising powers of the State Government, is not required to wait by giving show cause notice, and to record reasons after receiving the reply of the Pradhan or Up-Prahdan, to the charges based on the preliminary enquiry report. Such opportunity by way of show cause notice and explanation is neither provided in the Act nor in the Rules of 1997. The formal enquiry in which the Pradhan or Up-Pradhan is to be given an opportunity to defend himself is to follow, if the State Government is of the opinion on the basis of the report under sub-rule (2) of Rule 4, 'or otherwise', that an enquiry should be held against Pradhan or Up-Pradhan. He is required to constitute a committee and by an order ask the enquiry officer other than the enquiry officer nominated under sub-rule (2) of Rule 4 of the Rules of 1997, to hold the enquiry. The opportunity of hearing is to be given in this formal enquiry initiated on the basis of the preliminary enquiry report. It is not necessary for the District Magistrate, exercising delegated power's of the State Government to provide an opportunity to the Pradhan or Up-Pradhan before recording prima facie findings that he has committed financial or other irregularities. This satisfaction is based on the preliminary enquiry report and not after considering the reply given by the Pradhan on such report as no such reply is contemplated by the Act or the Rules.

19. The powers to cease the administrative and financial powers is vested in the competent authority with an object of restraining the persons from committing or continue to commit misuse of the office or financial and other irregularities until the enquiry is concluded. The necessity to give the show cause notice and considering the reply and need to give reasons at this stage would virtually amount to preempting the formal enquiry, which is to be made on the opinion of the State Government based on the report referred to in sub-rule (2) of Rule 4 or otherwise, in Rule 5 of the Rules of 1997. The insertion of the need to give show cause notice by formulating the charges based on preliminary enquiry report, and considering the reply will split the enquiry under Section 95 (1) (g) of the Act, into two parts in which the first part would be rendered superfluous. All that the Court is required in case action is taken under the first proviso to Section 95 (1) (g) of the Act is challenged, is to find out if there was sufficient material collected in the preliminary enquiry by

the DPRO or any District Level Officer, to form a prima facie opinion to cease the financial and administrative powers and functions of the Pradhan or Up-Pradhan, till the conclusion of the enquiry. The reply of the Pradhan or material to be produced by him, is not necessary to be considered at this stage of forming a prima facie opinion on the material collected in the fact finding (preliminary) enquiry. Each case will depend upon the facts and circumstances brought out before the State Government or the delegated authority in the preliminary enquiry. If the charges are not serious and there is no threat of continuation of such misuse of powers or financial or other irregularities, or that the District Magistrate has acted arbitrarily, unreasonably and capriciously or if the action is tainted with malafides, pleaded and established on record, the Court may interfere and require the District Magistrate to justify his satisfaction. In this regard the order must be speaking order. But to say that the order can only be issued after issuing show cause notice and considering the reply and the material given by the Pradhan, would be reading something more than what the object and reasons of the Act and the Rules provide.

20. The suspension of government servant and the ceasure of the powers by an statutory or elected functionary are not unknown to the law. The suspension of such powers, however, should be based on sufficient material on which the power can be justified in law and may be judicially reviewed. The exercise of power may also suffer from arbitrariness or malafides in a given case. The Court, however, should not lay down any guidelines in this regard.

21. The Pradhan of the village holds an elected office. Apart from his constitutional duties in Schedule XI of the Constitution of India, and to carry them out, he or she is provided with large amount of funds under various development schemes to carry out development works including digging up ponds, laying down roads, constructing culverts, housing schemes for upliftment of the poor, public distribution scheme, construction of toilets, the national employment guarantee scheme, the old age pension scheme, the rural health mission, the mid day meal scheme and scholarship scheme in the, schools, construction and up gradation of primary schools and junior high schools, etc. A Pradhan and Up-Pradhan, together with the members of the Gram Panchayat are required to utilise these funds for the social and economic upliftment of the village. A Pradhan or Up-Pradhan may in a given case misuse their powers and the funds. The State Government through the District Magistrate or the Chief Development Officer and its various agencies are required to supervise these schemes. If they find that a Pradhan or Up-Pradhan is misusing his powers or is committing financial irregularities, they are required to step in and stop the misuse of authority and funds. In such case the U.P. Panchayat Raj Act, 1947 gives them sufficient authority under the proviso to Section 95 (l) (g) to intervene and to suspend any further misuse of funds. In such a case the Act does not provide for taking over the powers but to vest the powers in a three member committee appointed from amongst the members of the Gram Panchayat, until the conclusion of the formal enquiry. In case of exercise of such powers, the object of local self-government is not destroyed as the power

of development and use of the funds will still continue to vest in three member committee of the Gram Panchayat. The elected members of the Gram Panchayat will continue to utilise the powers temporarily until the Pradhan or Up-Pradhan is exonerated of the charges found prima facie established against him or is removed and a new incumbent is elected in the bye-elections.

22. Coming to the present case I find that in the preliminary enquiry sufficient material was collected against the petitioner-Pradhan for failing to construct the pond in accordance with norms; the deficiency in the construction of an earthquake proof room of the school; failure to explain the distribution of scholarship to 17 students and irregularities in maintaining the muster rolls under the Employment Guarantee Scheme. Prima facie satisfaction of the District Magistrate to suspend the powers of the Pradhan is based on the material collected and summarised in the report. A perusal of the report, does not show that the District Magistrate acted arbitrary or unreasonably in exercising his powers to cease the financial and administrative powers of the Pradhan and in vesting them in a three member committee. There was no need to call for reply of the petitioner-Pradhan to these charges, at this stage. In any case, such reply was called and was considered by the District Magistrate. There is nothing to show that the satisfaction of the District Magistrate was vitiated by lack of material or malafides. The challenge to the impugned order on the ground that it does not give reasons has no substance as elaborate reasons are not required to be given by the District Magistrate at this stage. He is required to consider the preliminary enquiry report, and not a final enquiry report with the reply given by the petitioner or the material collected and produced by both the enquiry officer and supplied by the petitioner. Such an enquiry or recording of reasons at this stage is wholly superfluous.

23. The reliance placed by Shri D.K.S. Rathore on the interim order passed by me in Naresh Kumar's case is misconceived. While recording reasons for giving interim order I had found that as against the expenditure of Rs.3,50,000/- on development works, the District Agricultural Officer, Bijnor has found the misuse of only Rs.12,264/-, which is less than 3% of the amount spent the suspension of the financial and administrative powers of the Pradhan on misuse of such small fraction of the total amount, which may be a mistake either way was not found to be sufficient to suspend the powers of the Pradhan during the pendency of enquiry. The facts of the present case are entirely different.

24. The writ petition is **dismissed.**

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.08.2008

BEFORE
THE HON'BLE VINEET SARAN, J.
THE HON'BLE SABHAJEET YADAV, J.

Civil Misc. Writ Petition No.15799 of 2003

Prem Chand and others ...Petitioners
Versus
Ghaziabad Development Authority Ghaziabad and others ...Respondents

Counsel for the Petitioners:
Sri Pt. D.N. Dubey
Sri R.A. Tripathi

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

Constitution of India, Art. 226- Enhancement of cost of flats-G.D.A. allotted flats on estimated cost of Rs.70,000/- in 1995-97-those to deposit entire amount in one go-No interest shall be charged-petitioners deposited entire amount as per offer of G.D.A.-demand of addition Rs.24,000/- after 7 years-without any justification-even in counter affidavit no proper reply given-held-recovery of addition cost not justified-Quashed.

Held: Para 8

In the facts of the present case, we are not much impressed by the submissions and justification given on behalf of the respondents. No explanation whatsoever has been given in the counter affidavit for the basis on which the price has been enhanced and the final cost has been fixed. In our opinion, the same cannot be done merely because they have power to do so, even though there may be no basis or justification for the same. Even otherwise, in another identically situated case of Mahesh Chandra Jiyal, cost was fixed at Rs.71,450/- in which no further recovery is sought to be made from the said allottee. Such specific averments have been made in para 11 of the writ petition, to which there is no specific reply given by the respondents. As such, the respondents have not been able to justify their action of fixation of such high final cost and that too after nearly seven years of allotment and payment of the entire amount, after which possession had been given to the allottees.

Case law discussed:
S.C.C. 1989 (II) 116,
S.C.C. 2004 (1) 606

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

1. Heard Sri D.N. Dubey along with Sri R.A. Tripathi, learned counsel for the petitioners as well as Sri A.K. Misra, learned counsel for the respondent. Pleadings have been exchanged between the parties. With the consent of the learned counsel for the parties, this writ petition is being disposed of finally at the admission stage.

2. Short case of the petitioners is that they were allotted separate flats in Kama Vaishali Housing Scheme of the Ghaziabad Development sometime between 1995 to 1997 by separate allotment orders, in which the estimated cost of the flat was shown as Rs.70,000/-. The petitioners were required to deposit the cost in installments and as per the allotment order, on deposit of 70% of the cost, possession was to be given to them. The further condition was that the allottee could deposit the entire amount in one go, in which case no interest would be payable by the allottee. All the petitioners opted for the latter offer mentioned in the allotment order and deposited the entire amount in one go and got the possession of the flats immediately, meaning thereby that the cost, which was stated in the allotment order to be Rs.70,000/- had been deposited by each of the petitioners before getting the possession of their respective flats.

3. Now, by means of separate orders which have been passed in December 2002 in each individual case of all the petitioners, a further demand of Rs.24,810/- has been raised as according to the respondents, the final cost of the flats in question has been determined as

Rs.94,810/-. These orders are challenged in this writ petition.

4. The submission of the learned counsel for the petitioner is that after lapse of nearly seven years, such orders have been passed requiring the petitioners to pay a substantially higher amount. Further it has been stated in para 11 of the writ petition that in a similar case of one Sri Mahesh Chandra Jiyal, an identically situated flat was allotted on 20.2.1995 to said Sri Jiyal in which the final cost of the said flat was determined as 71,450/- and no further amount has been demanded from the said person thereafter. The petitioners being identically placed, the action of the respondents in raising a further demand of Rs.24,810/- from the petitioners is wholly unreasonable, arbitrary and discriminatory.

5. Sri A.K. Misra, learned counsel for the respondent has, however, justified the passing of the impugned orders and submitted that the allotment order only mentioned an estimated cost and the respondent authority always had the right to fix the final cost and realise the difference from the petitioners. He further submitted that at the time of taking possession, all the petitioners had given their affidavits to the effect that whatever difference in the estimated cost and the final cost would be, they would pay the same.

6. Sri Misra has relied on the decision in the case of ***Bareilly Development Authority & others versus Ajai Pal Singh & others, S.C.C. 1989 (II) 116 and Bareilly Development Authority versus Vrinda Gujarati & others, S.C.C. 2004 (1) 606***, wherein the Apex Court has held that such power to fix the final cost later is there with the authority. The contention thus is that since in the present case, the development authority has the power to fix the final cost and the respondents have given an affidavit that they would abide by the same and pay the difference of the final cost and estimated cost, hence they would be liable to pay the same.

7. We do not have doubt with regard to the power of the Development Authority to fix the final cost of the flat, even after the allotment of the flat but the question is as to whether the same can be exercised on the whims and fancies of the respondent authority or they have to justify the enhancement of such cost.

8. In the facts of the present case, we are not much impressed by the submissions and justification given on behalf of the respondents. No explanation whatsoever has been given in the counter affidavit for the basis on which the price has been enhanced and the final cost has been fixed. In our opinion, the same cannot be done merely because they have power to do so, even though there may be no basis or justification for the same. Even otherwise, in another identically situated case of Mahesh Chandra Jiyal, cost was fixed at Rs.71,450/- in which no further recovery is sought to be made from the said allottee. Such specific averments have been made in para 11 of the writ petition, to which there is no specific reply given by the respondents. As such, the respondents have not been able to justify their action of fixation of such high final cost and that too after nearly seven years of allotment and payment of the entire amount, after which possession had been given to the allottees.

9. For the foregoing reasons, the recovery, as is to be made from the petitioners with regard to the enhanced cost, cannot be justified and is thus quashed. The other amounts which are required to be paid by the petitioners, as mentioned in the impugned orders, which would be lease amount and other charges would however be payable by the petitioners.

Writ petition stands allowed to the extent as indicated above. There shall be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABD 29.08.2008

BEFORE
THE HON'BLE V.M. SAHAI, J.
THE HON'BLE S.P. MEHROTRA, J.

Civil Misc. Writ Petition No.12207 of 2001

Hari Raj Prasad Kushwaha ...Petitioner
Versus
Director of Non Formal Education U.P. and others ...Respondents

Counsel for the Petitioner:
Sri. P.R. Maurya

Counsel for the Respondent:
S.C.

U.P. Fundamental Rules(Financial Hand Book Volume II) Part 2 to 4-Rule 54-B(1) and (5)- forfeiture of salary after retirement-without notice or opportunity-held-illegal.

Held: Para 24

In view of the fact that the impugned punishment order dated 14.8.2000 in so far as it has forfeited the salary of the petitioner for suspension period was passed in violation of principles of natural Justice, the said punishment order dated 14.8.2000 is liable to be quashed to the extent it has ordered forfeiture of balance salary of the petitioner for the suspension period.

Case law discussed:
AIR 1999 SC 22

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

1. This writ petition is of the year 2001. On 31.3.2001 the Standing Counsel was allowed one month's time for filing counter affidavit. A stop-order was passed on 22.5.2001 allowing one month's and no more further time to the Standing Counsel for filing counter affidavit. Since no counter affidavit has been filed by the Standing 'Counsel in spite of stop-order, and we are in the year 2008, we are proceeding to dispose of the petition finally.

2. The present Writ Petition has been filed by the petitioner, interalia - praying for issuance of a writ, order or direction in the nature of mandamus commanding the respondents to pay the arrears of salary to the petitioner of the suspension period, and with a further prayer for issuance of writ, order or direction in the nature of certiorari to quash the order:dated 14.8.2000 passed by the respondent no.2 in-so-far-as it has detained the payment of salary for the suspension period.

3. The petitoner was suspended by the order dated 3.11.1999. In departmental proceedings, the Inquiry Officer submitted his enquiry Report dated 7.6.2000. In the said Enquiry Report the Inquiry Officer has concluded that the Charges Nos. 1,2,3 and 4 against the petitioner were proved, and further it was concluded by the Inquiry Officer that

the petitioner alone was not guilty and Gram Shiksha Samiti was also guilty. The Inquiry Officer recommended the punishment of 'Warning' as well as 'stoppage of one annual increment for two years' and for reinstatement of the petitioner in service with salary. Copy of the Enquiry Report has been filed as Annexure-2 to the Writ Petition.

4. The Disciplinary Authority considered the Enquiry Report and passed an order dated 14.8.2000 reinstating the petitioner in service and .forfeiting the balance salary for the suspension period. The continuity in service was granted to the petitioner and for the year 1999-2000 "CENSURE" entry was awarded by the order dated 14.8.2000. Copy of the said order dated 14.8.2000 has been filed as Annexure-3 to the Writ Petition.

5. We have heard Sri. P.R. Maurya learned counsel for the petitioner and the learned Standing Counsel appearing for the respondents, and perused the record.

6. Learned counsel for the petitioner has urged that the balance salary for the suspension period cannot be forfeited by the Disciplinary Authority while reinstating the employee in service. It is further submitted that Rule 54-B (1) and (5) of Chapter VIII of the Uttar Pradesh Fundamental Rules (Financial Hand Book Vol. II, Part II to IV) contemplates giving of notice and opportunity to the employee before any order regarding forfeiture of balance salary of such employee is passed while reinstating him in service. No notice or opportunity in this regard has been given to the petitioner.

7. In reply, the learned Standing Counsel has submitted that the petitioner has an alternative remedy of filing an Appeal against the punishment order, and, therefore, this Court should not exercise its power under Article 226 of the Constitution of India. It is further submitted that Rule 54-B occurs in Chapter VIII of the Financial Hand Book Vol. II, Part II to IV. Chapter VIII deals with "Dismissal, Removal and suspension" . Therefore, the submission proceeds, Rule 54-B is confined to cases where punishment of 'Dismissal' or 'Removal' from service is contemplated, and consequently, the said Rule is not applicable to the present case.

8. We have considered the submissions made by the learned counsel for the parties.

9. The short question, which arises for consideration in this Writ Petition, is as to whether the balance salary during the suspension period could be forfeited by the Disciplinary Authority while reinstating the employee in service without issuing a show-cause notice to him.

10. In order to answer the above question, it is necessary to refer to the relevant provisions of Chapter VIII of Pradesh Fundamental Rules (Financial Hand Book Vol. II, Part II to IV.)

11. Chapter VIII deals with 'dismissal', 'removal' and suspension' as is evident from the Heading of the said Chapter.

12. **Rule 52** occurring in the said Chapter VIII provides that the pay and allowance of a Government Servant, who is dismissed or removed from service,

ceases from the date of such dismissal or removal.

13. **Rule 53** occurring in the said Chapter VIII, interalia, deals with the payments, namely, subsistence allowance and compensatory allowance to be made to a Government Servant under suspension or deemed to have been placed under suspension by an order of the Appointing Authority.

Rule 54 occurring in .the said Chapter VIII deals with a Government Servant, who has been dismissed, removed or compulsorily retired and is reinstated as a result of Appeal or Review or would have been so reinstated but for his retirement on superannuation while under suspension or not. It requires the authority competent, to order reinstatement to consider and make specific order regarding the pay and allowances to be paid to the Government Servant for the period of his absence from duty including the period of suspension preceding his dismissal, removal or compulsory retirement, as the case may be, and further, as to whether or not the said period shall be treated as a period spent on duty.

Rule 54-A occurring in the said Chapter VIII deals with a Government Servant whose dismissal, removal or compulsory retirement is set aside by a Court of Law. It is provided that if such Government Servant is reinstated without holding any further enquiry, the period of absence from duty shall be regularized, and the Government Servant shall be paid pay and allowances in accordance with the provisions of sub-rule (2) or (3) subject to the directions, if any, of the Court.

Rule 54-B occurring in the said Chapter VIII provides as follows:

"54-B. (1) When a Government servant who has been suspended is reinstated or would have been so reinstated but for his retirement on superannuation while under suspension, the authority competent to order reinstatement shall consider and make a specific order-
(a) regarding the pay and allowances to be paid to the Government servant for the period of suspension ending with reinstatement or the date of his retirement or superannuation as the case may be;
and

(b) whether or not the said period shall be treated as a period spent on duty.

(2) Notwithstanding anything contained in Rule 53, where a Government servant under suspension dies before the disciplinary or Court proceedings instituted against him are concluded, the period between the date of suspension and the date of death shall be treated as duty for all purposes and his family shall be paid the full pay and allowances for that period to which he would have been entitled had he not been suspended, subject to adjustment in respect of subsistence allowance already paid.

(3) Where the authority competent to order reinstatement is of the opinion that the suspension was wholly unjustified, the Government servant shall, subject to the provisions of sub-rule (8), to be paid the full pay and allowances to which he would have been entitled, had he not been suspended:

Provided that where such authority is of the opinion that the termination of the

proceedings instituted against the Government servant had been delayed due to reasons directly attributable to the Government servant it may, after giving him an opportunity to make his representation within sixty days from the date on which the communication in this regard is served on him and after considering the representation, if any submitted by him, direct, for reasons to be recorded in writing that the Government servant shall be paid for the period of such delay only such amount (not being the whole) of such pay and allowances as it may determine.

(4) In a case falling under sub-rule (3) the period of suspension shall be treated as a period spent on duty for all purposes.

(5) In cases other than those falling under sub-rules (2) and (3), the Government servant shall subject to the provisions of sub-rules (8) and (9), be paid such amount (not being the whole) of the pay and allowances to which he would have been entitled had he not been suspended, as the competent authority may determine, after giving notice to the Government servant of the quantum proposed and after considering the representation, if any, submitted by him in that connection within such period (which in no case shall exceed sixty days from the date on which the notice has been served) as may be specified in the notice.

(6) Where suspension is revoked pending finalisation of the disciplinary or Court proceedings, any order passed under sub-rule (1) before the conclusion of the proceedings against the Government servant, shall be reviewed on its own motion after the conclusion of the proceedings by the authority mentioned in sub-rule (1), who shall make an order according to the provisions of sub-rule (3) or sub-rule (5), as the case may be .

(7) In a case falling under sub-rule (5) the period of suspension shall not be treated as a period spent on duty unless the competent authority specifically directs that it shall be so treated for any specified purpose:
Provided that if the Government servant desires, such authority may order that the period of suspension shall be converted into leave of any kind due and admissible to the Government servant.

***Note**.- The order of the competent authority under the preceding proviso shall be absolute. and no higher sanction shall be necessary for the grant of :-*
(a) Extraordinary leave in excess of three months in the case of temporary Government servant; and
(b) Leave of any kind in excess of five years in the case of permanent Government servant.

(8) The payment of allowances under sub-rule (2), sub-rule (3) or sub-rule (5) shall be subject to all other conditions under which such allowances admissible.

(9) The amount determined under the proviso to sub-rule (3) or under sub-rule (5), shall not be less than the subsistence allowance and other allowances admissible under Rule 53.

(10) Any payment made under this rule to Government servant on his reinstatement shall be subject to adjustment of the amount, if any, earned by him through an employment during the period between the date of suspension and the date of reinstatement or the date of retirement on

superannuation while under suspension. Where the emoluments admissible under this rule are equal to or less than those earned during the employment elsewhere, nothing shall be paid to the Government servant.

Note.- Where the Government servant does not report for duty within reasonable time after the issue of the order of reinstatement after suspension, no pay and allowance? will be paid to him for such period till he actually takes over charge."

14. Sub-rule (1) of Rule 54-B deals with a Government Servant who has been suspended and is reinstated or would have been so reinstated but for his retirement on superannuation while under suspension. In such a case, the authority competent to order reinstatement shall consider and make a specific order regarding the pay and allowances to be paid to the Government Servant for the period of suspension ending with reinstatement or the date of his retirement or superannuation as the case may be, and further, as to whether or not the said period shall be treated as a period spent on duty.

15. Sub-rule (2) of Rule 54-B deals with a Government Servant under suspension who dies before the disciplinary or Court proceedings instituted against him are concluded. In such a case, the period between the date of suspension and the date of death shall be treated as duty for all purposes and his family shall be paid the full pay and allowances for that period to which he would have been entitled had he not been suspended, subject to adjustment in respect of subsistence allowance already paid.

16. Sub-rule (3) of Rule 54-B, interalia, provides that where the authority competent to order reinstatement is of the opinion that the suspension was "*wholly unjustified*", the Government Servant shall be paid the full pay and allowances to which he would have been entitled, had he not been suspended. In such a case, the period of suspension "*shall be treated*" as a period spent on duty for all purposes in view of sub-rule (4) of Rule 54-B.

17. Sub-rule (5) deals with cases "*other than those falling under sub-rules (2) and (3)*". Sub-rule (5), interalia, provides that in such other cases the Government Servant shall be paid "*such amount (not being the whole) of the pay and allowances*" to which he would have been entitled had he not been suspended, as the competent authority may determine, after giving notice to the Government Servant of the quantum proposed and after considering the representation, if any, submitted by him in that connection within such period (which in no case shall exceed sixty days from the date on which the notice has been served) as may be specified in the notice.

18. Sub-rule (7) of Rule 54-B, interalia, lays down that in a case falling under sub-rule (5) of Rule 54-B, the period of suspension shall not be treated as a period spent on duty unless the competent authority specifically directs that it shall be so treated for any specified purpose.

The above-noted provisions occurring in Chapter VIII show that the provisions occurring in Chapter VIII deal with

different situations when a Government Servant may be placed under suspension. The provisions of Chapter VIII are not confined to the cases of suspension where punishment of 'dismissal' or ' removal' from service is contemplated. The submission of the learned Standing Counsel that Rule 54-B is confined only to cases where punishment of 'dismissal' or 'removal' from service is contemplated, cannot, therefore, be accepted.

Rule 54 and Rule 54-A occurring in Chapter VIII deal with the cases of dismissal, removal or compulsory retirement and, are, therefore, not relevant in the present case.

Again, sub-rule (2) of Rule 54-B deals with a Government Servant under suspension who dies before the disciplinary or Court proceedings instituted against him are concluded, and the said provision also is not relevant in the present case.

The present case also does not fall in sub-rule (3) of Rule 54-B, as no opinion as contemplated in the said sub-rule has been expressed by the authority competent to order reinstatement.

The provisions relevant in the present case, are evidently contained in sub-rules (1) and (5) of Rule 54-B.

Reading sub-rules (1) and (5) of Rule 54-B together, it will be noticed that in case the competent authority acting under the said provisions wants. to forfeit the pay and allowances for the period during which the, Government Servant was under suspension, the competent authority may do so only after giving notice to the Government Servant and after considering the representation, if any, submitted by the Government Servant in that connection.

Further, a comparison of sub-rule (3) with sub-rule (5) of Rule 54-B, shows that while sub-rule (3) deals with a case where the authority competent to order reinstatement is of the opinion that the suspension·was "wholly unjustified", sub-rule (5) deals with "*other cases than those falling under sub-rules (2) and (3)"*. Hence, it is implicit in sub-rule (5) that the competent authority should be of the opinion that the suspension was "wholly justified" or "partly 'justified".

Let us apply the above principles to the facts of the present case

Accordingly, in view of conjoint reading of sub-rules (1) and (5) of Rule 54-B, giving of notice and opportunity to the petitioner was -necessary before an order, regarding forfeiture. of his balance salary for the suspension period could be passed while reinstating him in service.

Further, in view of· the language of sub-rule (5) as compared to that of sub-rule (3) of Rule 54-B, the competent authority was required to record his opinion that the suspension of the petitioner was "wholly justified" or "partly justified", and then on a consideration of the entire facts and circumstances decide whether the entire balance salary for suspension period or part of such balance salary was to be forfeited .

19. From a perusal of the impugned order, it is clear that after the receipt of the Enquiry Report, the Enquiry Report was sent to the petitioner for his explanation, which was submitted by the

petitioner on 1.8.2000. But no notice or opportunity was given to the petitioner as to why balance salary during suspension period of the petitioner be not forfeited.

20. Since no notice was given to the petitioner, and punishment of forfeiting the salary of the petitioner during suspension period has been awarded, it is clear that the punishment order forfeiting the salary of the petitioner for suspension period was passed in violating of principles of natural justice.

21. Further, the Disciplinary Authority has not recorded any opinion in the impugned order regarding justification of the suspension of the petitioner.

22. Coming to the submission of the learned Standing Counsel that petitioner has an alternative remedy of filing an Appeal, we are of the view that the same cannot be accepted.

23. In ***Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and others, AIR 1999 SC 22***, it has been laid down by the Apex Court that if the impugned, order is passed in violation of natural justice, the alternative remedy of appeal would be no bar for the maintainability of the Writ Petition.

24. In view of the fact that the impugned punishment order dated 14.8.2000 in so far as it has forfeited the salary of the petitioner for suspension period was passed in violation of principles of natural Justice, the said punishment order dated 14.8.2000 is liable to be quashed to the extent it has ordered forfeiture of balance salary of the petitioner for the suspension period.

25. Having quashed the suspension order, we would normally have remitted the case back to the competent authority for reconsideration of the question of forfeiture of balance salary for the suspension period after giving opportunity to the petitioner as contemplated under sub-rule (5) of Rule 54-B of Chapter VIII. However:, having regard to the fact that this Writ Petition was filed in the year 2001 and has remained pending for the last seven years and remitting back the case to the competent authority for reconsideration of the said question would further delay the matter, this Court itself proceeds to consider the said question.

26. Having considered the entirety of the facts and circumstances of the case including the findings recorded by the Inquiry Officer on various charges, and the nature of punishment awarded to the petitioner, and the period between the date of order of suspension (i.e.., 3.11.1999) and, the date of order of reinstatement (i.e., 14.8.2000) being of about 9, months only, we are of the opinion that the interest of justice would be subserved if the punishment of 'CENSURE' entry awarded to the petitioner is maintained but no forfeiture of the balance salary of the petitioner for the suspension period be made.

27. In view of the above, this Writ Petition deserves to be partly allowed, and the same is accordingly allowed in part. The impugned punishment order dated 14.8.2000 (Annexure-3 to the Writ Petition) is quashed to the extent it orders for the forfeiture of the balance salary of the petitioner for the suspension period. However, the punishment order dated 14.8.2000 in all other respects including the award of 'CENSURE' entry is

maintained. The balance salary for the suspension period of the petitioner shall be paid within a period of four months from the date a certified copy of this order is produced before the concerned respondent.

On the facts and in the circumstances of the case, there will be no order as to costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.08.2008

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

First Appeal From Order No. 1579 of 2008

M/s Ruby International Annapurna Metal, Moradabad & others ...Appellants
Versus
Davendra Singh ...Plaintiff/Opposite Party

Counsel for the Appellants:
Sri. R.K. Awasthi.

Counsel for the Opposite Party:
Sri. R.R. Khan.

Workmen Compensation Act 1923- Appeal against award passed by Commissioner-on ground of no relationship of master and servant-inspite of direction-employer not produced the record of attendance as well as salary register of the relevant time-contention about burden of proof primarily lie with workman-held-Court can look any document at any point of time-section 23 of the Act empowers to produce such document being custodian of the same-burden of proof is static but onus is flexible-if employer tries to avoid the Court-adverse inference can be drawn-award fully justified requires no interference.

Held: Para 12

According to us, when burden of proof is static, onus is flexible. Therefore, as and when the Commissioner called upon certain documents to be produced from the real custodian of the same to come to an appropriate conclusion refusal thereof by the party can not be said to be proper. A party is bound by the direction of the Court to assist it for the purpose of ascertaining the truth. Had the master complied with the direction and the servant called upon to prove but failed, it could have been scenario comparable with referred judgements. In this case, the substantial question is not the burden of proof but shifting of onus to dispel the cloud when the Court called upon to satisfy itself to come to an appropriate finding. If one party tries to avoid the Court it is entitled to draw an adverse inference.

Case law discussed:
AIR 2006 SC 110; AIR 2004 SC 1639; 1976 Lab. I.C. 202; AIR 2002 SC 1147; AIR 2004 SC 4791; AIR 2006 SC 678.

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

1. This is an appeal of the defendants, appellants herein, from the judgment and order dated 29th March, 2008 passed by the concerned Commissioner, Moradabad, appointed under the Workmen's Compensation Act, 1923 (hereinafter called as the 'Commissioner') awarding a sum of Rs.1,87,182/- on account of injury sustained by the claimant/respondent herein, along with penalty of Rs.93,000/-. Learned Counsel appearing for both the contesting parties agreed about hearing of the appeal on the informal papers at the stage of admission, accordingly the Court has proceeded.

2. The question arose before the Commissioner about master-servant

relationship between the appellants-employer and the respondent-employee, who became injured by the cause of accident. The claimant asserted that he was under the employment of the appellants for last ten years, which the appellants have refused. In such circumstances, the Commissioner called upon, the appellants to produce attendance registers and salary registers of the years 2005 and 2006 along with those of the relevant year, but the appellants avoided the same and produced the document only for the relevant period to establish that on the date and time of the accident the injured/claimant was not in the employment. The Commissioner disbelieved the statement of the appellants based on the solitary document and discarded their conduct for non-production of the documents, and drew an adverse inference.

3. By preferring this appeal, the appellants contended that onus to prove employment is primarily lying with the employee not with the employer. Therefore, they are not supposed to produce the documents, as such their refusal to produce the documents is appropriate and no adverse inference can be drawn by the Commissioner.

4. Factually, the claimant was working as a mechanic of a machine, which was suddenly stopped from functioning. The claimant became curious to know the cause of non-functioning in order to repair it, when the machine suddenly started functioning but he got no opportunity to escape and met with the accident, which caused loss of his four fingers. The Commissioner determined the disability and loss of earning on the basis of materials available before him and arrived at the aforesaid amount of compensation. However, the quantum of compensation is not the question hereunder but the master-servant relationship.

5. Learned Counsel appearing for the appellants relied upon various judgements in this regard. Relying upon **AIR 2006 SC 110 (Surendranagar District Panchayat Vs. Dahyabhai Amarsinh)** he contended that it is necessary for the workman to produce the relevant material to prove that he has actually worked with the employer for not less than 240 days during the period twelve calendar months preceding the date of termination. Since no proof of receipt of salary or wages or any record or order in this regard was produced; no co-worker was examined; muster roll produced by the employer has not been contradicted, it is improbable that the workman, who claimed to have worked with the employer for such a long period, would not possess any documentary evidence to prove nature of his engagement and the period of work he had undertaken with his employer. Ultimately, it has been held by the Supreme Court that the Courts below have wrongly drawn an adverse inference for non-production of the records for ten years by the employer. He has also relied upon **AIR 2004 SC 1639 (Workmen of Nilgiri Co-op. Mkt . Society Ltd. Vs. State of Tamil Nadu and others)**, where interpretation of burden of proof is given, as follows:

"**47**. It is a well-settled principle of law that the person who sets up a plea of existence of relationship of employer and employee, the burden would be upon him.

48. In N.C. John v. Secretary, Thodupuzha Taluk Shop and Commercial Establishment Workers' Union and others (1973 Lab IC 398), the Kerala High Courl held:

"The burden of proof being on the workmen to establish the employer-employee relationship an adverse inference cannot be drawn against the employer that if he were to produce books of accounts they would have proved employer-employee relationship."

49. In Swapan Das Gupta and others v. The First Labour Court of West Bengal and others (1976 Lab IC 202) it has been held:

"Where a person asserts that he was a workman of the Company, and it is denied by the Company, it is for him to prove the fact. It is not for the Company to prove that he was not an employee of the Company but of some other person:"

6. To get the persuasive value, the Supreme Court relied upon a Single Bench judgement of the Calcutta High Court reported in **1976 Lab. I.C. 202 (Swapan Das Gupta and others Vs. The First Labour Court of West Bengal and others).** In **AIR 2002 SC 1147 (Range Forest Officer Vs. S.T. Hadimani)** the Supreme Court held that filing of an affidavit is only his own statement in his favour and that can not be regarded as sufficient evidence for any Court or tribunal to come to the conclusion that a workman had, in fact, worked for 240 days in a year without proof of receipt of salary or wages for 240 days or order or record of appointment or engagement for this period. In **AIR 2004 SC 4791 (M.P. Electricity Board Vs. Hariram etc.)** the Court considered the nature of work and held that employment of people in that local area for the limited job can not be construed as an employment for a continuous or regular period to work. Therefore, the respondents, in such referred case, can not claim either permanency or regularisation nor could he claim benefit of completion of 240 days of continuous work in the given year.

7. All the aforesaid cases were discussed from the point of view of the Industrial Disputes Act, 1947 to establish perpetuity of service but not from the point of view of the Workmen's Compensation Act, 1923 (hereinafter called as the 'Act, 1923') to give one time compensation. Therefore, Court's anxiety is appreciable. But other appreciable thing is although the Workmen's Compensation Act is part of labour laws but basically it is a beneficial piece of legislation. A beneficial piece of legislation can not be looked by the eyes of industrial disputes. Equity plays a predominant role to arrive at 'just' compensation in summary manner to give accidental benefit to one who sustained injury or became sufferer due to cause of death. There is no scope of rigid applicability of the law of evidence irrespective of the factum that both the employer and employee are standing on an unequal bargaining position. From the statement of objects and reasons of the Act, 1923 we find that the growing complexity of industry in this country, with the increasing use of machinery and consequent danger to workmen, along with the comparative poverty of the workmen themselves, renders it advisable that they should be protected, **as far as possible from hardship arising from accidents. A consistent endeavour has been made to give as little opportunity for disputes as possible.** Throughout the Bill in the definitions adopted the scales selected, **and the exceptions permitted**

the great aim has been precision in order that, in as few cases as possible should the validity of a claim for compensation or the amount of that claim be open to doubt. At the same time, on the unanimous recommendation of the Committee, provision has been made for special Tribunal to deal cheaply and expeditiously with any disputes that may arise, and generally to assist the parties in a manner which is **not possible for the ordinary Civil Courts.** Therefore, the aims and objects of the Act, 1923 are more open to pay the compensation to an employee ignoring the procedural difficulties than to refuse.

8. It is also to be considered from a different outlook i.e. social point of view. In a developing country like us huge number of unemployed are standing on the queue, therefore, there is a chance of exploitation. In the services particularly which are of private nature, small units, unorganised sectors, domestic, it is very difficult for an employee to seek any document at the cost of employment. There is always apprehension of losing service. In **AIR 2006 SC 678 (Central Mine Planning and Design Institute Ltd. Vs. Ramu Pasi and another)** we find although there was no definite material adduced to show that the claimant was employed in casual for the purpose of employer's trade or business yet, considering the small quantum awarded, a direction was given to pay the same. Therefore, equity played a perfect role in making such decision keeping eyes open to the objects and reasons of the Act, 1923, which should not be overlooked by us.

9. That apart, a further pertinent point before us is who is the custodian of the documents i.e. attendance and salary registers etc. to show that such person was not working under the continuance employment of the appellants, -obviously the master. Therefore, before any evidence to be leel, discovery and inspection of the documents are part of the procedure if it is rigidly followed. The appellants have conveniently avoided production of such documents and only produced the register of the year 2006-07 to establish that the person concerned had not attended his duty on the relevant date and time and/or worked casually. Court can look into any document at any point of time. Section 23 of the Act, 1923 clearly gives power to the Commissioner to compel the production of documents and material objects. If one avoids any document from its production even being custodian, it will obviously create suspicion in the mind of the Court. The Court may think that the document for the date and time is manufactured to avoid the claim, therefore, it is proper to look earlier similar documents chronologically .for the sake of continuity to dispel the cloud. Having not so, cloud will remain.

As per P. Ramanatha Aiyar's The Law Lexicon, Second Edition 1997, meaning of 'custody' is as follows:

"'Custody' means the actual, physical, or corporeal holding of a document regardless of the right to its possession, for example, a holding of a document by a party as servant or agent of the true owner. *B. v. B. (1979) 1 All ER 801, 805(Famd.)*"

10. As per **Black's Law Dictionary, 6th Edition**, 'custody' means "the care and control of a thing or person". Even under Order XI of the Code of Civil Procedure (hereinafter called as 'C.P.C.')

custodian of documents will be directed for discovery by interrogatories under Rule 1 therein. An application for discovery of documents can be made under Rule 12 therein. Protection of the documents can be made under Rule 14. As per Rule 16, inspection can be made. Notice to produce the documents can be given under Rule 16. Order of inspection tan be made under Rule 18 therein. Under Section 23 therein the Commissioner shall have the powers of the Civil Court under the C.P.C. for the purpose ot taking evidence on oath and/or enforcing the attendance of witnesses and **compel a party for production of the documents and material objects**. Even under Section 165 of the Indian Evidence Act, 1872 (hereinafter in short called as the 'Evidence Act') a Judge has power to put question or order the production of any document in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties, about any fact **relevant or irrelevant**; and may order the production of the documents or things; and **neither the parties nor their agents shall be entitled to make any objection to any such question or order**. Only after discovery and inspection at the time of witness action Court will consider burden of proof and discharge of onus. Therefore, it is far to say. that a party can refuse the Court from producing documents for its satisfaction.

11. We find from **Sarkar's Law of Evidence, Sixteenth Edition 2007**, **page 1404,** "Proper Custody", as follows:

"Proper Custody".-**[Proof and Effect of]**.-Proper custody has been explained thus by TINDAL CJ.in Bishop of Meath v. Marquis of Winchester, 3 Bing NC 198 p 200:-

"Documents found in a place in which, and under the care of person with whom such paper might *naturally and reasonably be expected to be found,* are precisely the custody which gives authenticity to documents found within it; for *it is not necessary that they should be found in the best and most proper place of deposit*. If documents continued in such custody, there never would be any question as to their authenticity; but it is when documents are found in other than the proper place of deposit, that the investigation commences, whether it was reasonable and natural under the circumstances in the particular case, to expect that they should have been in the place where they are actually found; for it is obvious, that, while there can be only one place. of deposit strictly and absolutely proper, there may be various and many that are reasonable and probable, though differing in degree; some being more so, some less; and in those cases the proposition to be determined is, whether the actual custody is so reasonably and properly to be accounted for, that it impresses the mind with the conviction that the instrument found in such custody must be genuine. That such is the character and description of the custody, which is held sufficiently genuine, to render a document admissible appears from all the cases."

12. According to us, when burden of proof is static, onus is flexible. Therefore, as and when the Commissioner called upon certain documents to be produced from the real custodian of the same to come to an appropriate conclusion refusal thereof by the party can not be said to be

proper. A party is bound by the direction of the Court to assist it for the purpose of ascertaining the truth. Had the master complied with the direction and the servant called upon to prove but failed, it could have been scenario comparable with referred judgements. In this case, the substantial question is not the burden of proof but shifting of onus to dispel the cloud when the Court called upon to satisfy itself to come to an appropriate finding. If one party tries to avoid the Court it is entitled to draw an adverse inference.

13. Thus, in totality we do not find any cogent reason to interfere with the judgement and order impugned in this appeal. Hence, the appeal is dismissed even at the stage of admission, however, without imposing any cost.

14. The amount deposited by the appellants as lying with the Commissioner concerned will be released in favour of the claimant as early as possible. Appeal dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.08.2008

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

Civil Misc. Writ Petition No. 40620 of 2008

Dr. R.S. Khare ...Petitioner
Versus
Om Narain Gupta ...Respondents

Counsel for the Petitioner:
Sri. Rajesh Dwivedi.

Counsel for the Respondents:
Sri. Nikhil Kumar.

Constitution of India-Article 226-Rent appeal-appellate Court granting stay of eviction-subject to payment of enhanced rent at the rate of Rs.3,000/-per month-against that writ petition dismissed-in the meantime as per verdict of Apex Court-tenant filed modification-application and got stayed the enhanced rate of rent-landlord's recall application bringing true position about concealment of facts by the tenant-appellate Court restored earlier order by imposing Rs.500/- cost-held-too much nominal but on request of expediting the hearing of appeal-lower Court is directed to decide appeal very expeditiously-any adjournment should not be subject to payment of Rs.500/-petition dismissed.

Held: Para 5

Learned counsel for the tenant petitioner states that hearing of appeal may be expedited. Accordingly, it is directed that appeal must be decided very expeditiously. Absolutely no un-necessary adjournment shall be granted to any of the parties. If the court below is inclined to grant any adjournment in any form to any of the parties, then it shall be on very heavy cost, which shall not be less than Rs.500/- per adjournment.

Case law discussed:
2008 (1) A.R.C. 628, 2005 (1) SCC 705, 2008(2)ARC 579.

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

1. Tenant-petitioner is behaving in a most un:reasonable manner. In an appeal (Rent appeal no.30 of 2007) Additional District Judge Court No.13, Kanpur Nagar granted conditional stay order staying eviction on the condition that tenant would pay Rs.3,000/- per month to the landlord during pendency of appeal. Said order was passed on 25.9.2007. Against the said order writ petition no. 59828 of 2007 was filed in this Court

which was dismissed on 4.12.2007. Thereafter tenant-petitioner filed an application before the appellate court for setting aside the order/reduction of rent. The argument was that on the basis of Supreme Court judgment reported in ***M. Sharif vs. F.A. Khan 2008 (1) A.R.C. 628*** rent could not be enhanced as condition of stay. In the said case rent had been enhanced by the High Court from RS.100/- to Rs.4,000/-. It appears that the High Court had enhanced the rent through interim order in landlord's writ petition. The extent of enhancement was also found by the Supreme Court to be quite arbitrary and unreasonable.

2. As the judgment of the Supreme Court was not in between the parties hence appellate court/Additional District Judge could not modify its order dated 25.9.2007, which had been affirmed by the High Court. On the basis of Supreme Court judgement the appellate court recalled its order dated 25.9.2007 through order dated 4.4.2007. However till then the tenant petitioner did not inform the court that writ petition filed against order dated 25.9.2007 had been dismissed. Moreover Supreme Court only said that; rent cannot be enhanced arbitrarily. However, reasonable enhancement as condition of stay is always warranted vide Supreme Court authority reported in ***Atma Ram Properties vs. Federal Motors, 2005 (1) SCC 705***, The Supreme Court in a later authority reported in ***N.A. Khan vs. M.R.U.Khan 2008(2) ARC 579 (decided on 5.5.2008)*** set aside an interim order of the High Court passed in landlord's writ petition through which rent had been: enhanced. However, in para-8 it was observed by the Supreme Court as follows:

"We should however note the distinction between cases where a writ petition is filed by the tenant challenging the order of eviction and seeking stay of execution thereof, and cases where a writ petition is filed by the landlord challenging the rejection of a petition for eviction. What we have stated above is with reference to writ petitions filed by landlords. In writ petitions filed by tenants, while granting stay of execution of the order of eviction pending disposal of writ petition, the High Court has the discretion to impose reasonable conditions to safeguard the interests of the landlord. But even in such cases the High Court cannot obviously impose conditions which are ex facie arbitrary and oppressive thereby making the order of stay illusory. When a tenant files a writ petition challenging the order of eviction, the High Court may reject the writ petition if it finds no merit in the case of the tenant; or in some cases, the High Court may admit the writ petition but refuse to grant stay of execution, in which event, the tenant may be evicted, but can claim restoration of possession if he ultimately succeeds in the writ petition; or in some cases, the High Court finding the case fit for admission, may grant stay of eviction, with or without conditions, so that status quo is maintained till the matter is decided. Where the High Court chooses to impose any conditions in regard to stay, such conditions should not be unreasonable or oppressive or in terrorem. Adopting some arbitrary figure as prevailing market rent without any basis and directing the tenant to pay absurdly high rent would be considered oppressive and unreasonable even when such direction is issued as a condition for stay of eviction. High Court should desist from doing so "

3. In any case as the order dated 25.9.2007 had been affirmed by this court in writ petition hence recall was not maintainable. When landlord brought this fact to the notice of the lower appellate court, the lower appellate court very rightly through order dated 7.5.2008 set aside its order dated 4.4.2008 and restored the order dated 25.9.2007 and further imposed a cost of Rs.500/- upon the tenant for concealing the fact that order dated 25.9.2007 had been approved by the High Court.

4. The only fault which I find in the impugned order is that the lower appellate court was quite lenient in imposing the cost. Heavier cost ought to have been imposed. However, this is tenant's writ petition hence I am not inclined to enhance the cost. This writ petition is utterly devoid of merit hence dismissed.

5. Learned counsel for the tenant petitioner states that hearing of appeal may be expedited. Accordingly, it is directed that appeal must be decided very expeditiously. Absolutely no un-necessary adjournment shall be granted to any of the parties. If the court below is inclined to grant any adjournment in any form to any of the parties, then it shall be on very heavy cost, which shall not be less than Rs.500/- per adjournment. Petition dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.08.2008

BEFORE
THE HON'BLE RAKESH TIWARI, J.

Civil Misc. Writ Petition No. 3995 Of 2000

U.P.S.R.T.C. ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri. Samir Sharma

Counsel for the Respondents:
Sri. B.P. Yadav

Constitution of India-Labour Court award-reinstatement with full back wages except denial of one year salary-challenged on the ground of habitual offender-workman carrying passengers without tickets-held-workman may be in fault for not stopping the bus within 2Km. from the boarding station-but the driver also equally responsible-it could be due to paucity of time could not issue ticket to five passengers out of 50-for negligence ¼ of wages as awarded by the Labour Court would be sufficient-with such modification the terms of award stood confirmed.

Held: Para 16 & 17

In my opinion, it appears that there has been some technical violation of the rule by the driver and the conductor in not stopping the bus within two kilometers from the bus station so as to enable the conductor to issue tickets to all passengers of the bus but it would not reflect any bad intention on the part of conductor for not being able to issue tickets to all 50 passengers in a short time.

However, as regards back wages are concerned, since the labour court has found that there has been some technical violation of rule and has also substituted a lesser punishment, no interference in writ jurisdiction is called for but certainly the workman not be entitled to full back wages in the circumstances as he could have requested the driver to stop the bus to enable him to issue tickets. Therefore, in my opinion, the workman has been

reinstated and has also been paid 1/4th of the back wages, that would be sufficient to meet the ends of justice and accordingly I hold that the workman will not be entitled for remaining 3/4th of the full back wages as awarded by the labour court. The impugned award is accordingly modified to the above extent.

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

1. Heard counsel for the parties.

2. This petition is directed against an award dated 12.11.1998 passed by labour court, U.P., Varanasi in adjudication case No. 63 of 1997.

3. The State Government having formed the opinion that an industrial dispute exists, referred the following matter for adjudication to the labour court aforesaid:

"KYA SEVAJOJAKO DWARA APANE SHRAMIK SRI SHAMBHU CHAUBEY SON OF SRI RAM SAGAR CHAUBEY, PAD PARICHALAK KI SEWAYE DINANK 11.9.1989 SE SAMAPT KIYA JANA UCHIT TATHA/ ATHWA VEDHANIK HAl? YADI NAHI TO SHRAMIK KYA HITLABH PANE KA ADHIKARI HAl ?"

3. Facts of the case are that respondent no. 3- workman was a conductor in petitioner - U.P. State Road Transport Corporation. On 12.12.1985 the workman was deputed as conductor on Bus No. 4500 plying under contract with the corporation on Allahabad-Jaunpur route. The checking authority on checking the bus found that five passengers out of a total of 50 passengers from Phoolpur to Badshahpur, were traveling without ticket even though the respondent no.3 had already realised fare from them. On the basis of report submitted by the checking authority, a charge sheet dated 21.6.1989 was served on respondent no. 3, who also submitted his reply. After holding domestic enquiry, the appointing authority being satisfied that charges of serious misconduct contained in the charge sheet stood fully proved against him, removed the respondent no. 3 from service vide order dated 11.9.1989.

4. Aggrieved the workman filed Writ Petition No. 43140 of 1992 which was dismissed by judgment and order dated 23.3.1995 and Special Appeal No. 252 of 1995 preferred against the judgment in the writ petition, was disposed of vide judgment dated 2.7.1996 granting liberty to the workman to approach the labour court. Subsequently, the workman concerned raised an industrial dispute regarding termination of his service which was referred to the labour court, Varanasi as stated above.

5. The parties filed their respective written and rejoinder statements as well as documents before the labour court and also adduced oral evidence.

6. On the basis of pleadings, a preliminary issue was framed as to whether departmental enquiry held by the employers was fair and proper or not? Vide order dated 12.10.1998, the labour court held that enquiry conducted by the employer was fair and proper. Thereafter the labour court considered the dispute on merits and came to the conclusion that there was no intention on the part of workman to misappropriate any revenue of the corporation. After discussing the evidence on record and on hearing the parties, the labour court held that in the

facts and circumstances of the case the punishment of removal from service of respondent no. 3 was too excessive as such it set aside the order of removal and directed reinstatement of the workman with continuity in service and full back wages with minor punishment of stoppage of one year wage increment with future effect.

7. It is against the aforesaid finding of the labour court that present writ petition has been filed challenging its validity and correctness on the ground that labour court has failed to appreciate that the Corporation could not keep any employee on its rolls who would cause financial loss to it.

8. It is stated that labour court has failed to consider the fact that workman concerned had also been punished on several occasions for similar misconduct which indicated that he was an habitual offender.

9. It is then submitted that the labour court has erred in exercising jurisdiction under section 6(2-a) of the U.P. Industrial Disputes Act, 1947 and in any case the workman was not entitled to any back wages in the facts and circumstances of the case.

10. Counsel for the petitioner has submitted that bus of the corporation was checked about four Kilometers away from the originating bus station yet the workman concerned had not been able to issue tickets to five passengers which a conductor is supposed to issue within two kilometers. It shows that he had ill intentions.

11. Counsel for the respondent workman submitted that the labour court has rightly come to the conclusion on the basis of evidence and records produced before it, that there was no intention of the workman to embezzle any amount of the corporation. He submits that admittedly there were 45 passengers to whom the workman had already issued tickets but he could not issue tickets to five passengers by the time the bus was checked after four Kilometers though it is a rule that bus can be checked within two kilometers, therefore, he submits that it was due to mistake of the driver who had driven the bus beyond four kilometers distance and had not stopped it before two kilometers from starting the bus from the station so that tickets of all passengers could be made.

12. At the time of admission, the following interim order was passed in this petition on 27.1.2000:

"Notice on behalf of respondent nos. 1 & 2 have been accepted by learned standing counsel, on behalf of respondent no. 3 by Sri B.P. Yadav. He prays for and is granted three weeks time to file counter affidavit. Petitioner will have two weeks thereafter to file rejoinder affidavit. List thereafter.

Learned standing counsel may also file counter affidavit within the same time.

Learned counsel for the petitioner submitted that there was no justification for respondent no. 2 to award back wages to the respondent as he did not perform his duties as conductor for the last 12 years. However, it was stated that petitioner was willing to reinstate respondent no. 3 on the post held by him in terms of the impugned award.

Under the facts and circumstances, it is hereby directed that operation of

impugned order shall remain stayed subject to the condition the petitioner pays ¼th of the total amount awarded by respondent no.1, reinstates respondent no. 3 on the post held by him and pays the current salary as and when it falls due month to month, failing which this order shall stand vacated automatically. "

13. The workman respondent no. 3 has been reinstated and has also been paid 1/4th of the total amount in terms of the aforesaid interim order.

14. After considering all facts and circumstances, the labour court has come to the conclusion that services of the workman were illegally terminated and he is entitled to continuity of service with full back wages and accordingly substituted the punishment of removal from service by stoppage of one year wage increment with future effect. In fact the labour court has given a finding that the workman was not carrying passengers without ticket with any malafide intention and the employers could not prove that he is guilty of taking passengers without ticket. There may be circumstances as the labour court has observed, where a bus conductor may not be able to issue tickets to all passengers in certain set of facts and circumstances as in the present case that 50 passengers had boarded the bus at the previous station and he could not have issued tickets to all 50 passengers during the time the bus was checked.

15. After hearing counsel for the parties and on perusal of the record, this Court is of the opinion that it was not only the duty of the driver to have stopped the bus within two kilometers to enable the workman concerned to issue all tickets but being conductor he too could have got the bus stopped earlier. However, in admitted set of facts, he had already issued tickets to 45 passengers and it appears that due to paucity of time, he could not prepare tickets of five passengers when the bus was checked. There was no independent evidence of any passenger that the workman had not issued tickets to 5 passengers deliberately. If the driver of the bus continued to drive the bus, it cannot be said that respondent workman-conductor was completely not at fault for non issuance of tickets to all passengers in the bus.

16. In my opinion, it appears that there has been some technical violation of the rule by the driver and the conductor in not stopping the bus within two kilometers from the bus station so as to enable the conductor to issue tickets to all passengers of the bus but it would not reflect any bad intention on the part of conductor for not being able to issue tickets to all 50 passengers in a short time.

17. However, as regards back wages are concerned, since the labour court has found that there has been some technical violation of rule and has also substituted a lesser punishment, no interference in writ jurisdiction is called for but certainly the workman not be entitled to full back wages in the circumstances as he could have requested the driver to stop the bus to enable him to issue tickets. Therefore, in my opinion, the workman has been reinstated and has also been paid 1/4th of the back wages, that would be sufficient to meet the ends of justice and accordingly I hold that the workman will not be entitled for remaining 3/4th of the full back wages as awarded by the labour court. The impugned award is accordingly modified to the above extent.

18. For the reasons stated above, the writ petition is partly allowed with aforesaid modification in the award. No order as to costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.08.2008

BEFORE
THE HON'BLE ASHOK BHUSHAN, J.
THE HON'BLE ARUN TANDON, J.

Special Appeal No. 212 of 2007

State of U.P. and another ...Appellants
Versus
Krishnendra Gaur and another
...Respondents/Petitioners

Counsel for the Appellants:
S.C.

Counsel for the Respondents:
Sri. R.R. Singh
Sri. M.K. Kushwaha
Sri. B.B. Paul
Mrs. Mahima Kushwaha

U.P. Secondary Education Services Selection Board Act 1982-Ad-hoc appointment on L.T. Grade post-short term vacancy-advertisement in one newspapers instead of two-DIOS disapproved the appointment keeping in view of Radha Raizada case-held-proper-view taken by learned single Judge about requirement of publication in two newspapers is mere technicality-held-not proper-however the salary for the period of actual working be given.

Held: Para 12 & 13

In the facts of the present case, it is admitted on record that advertisement has been published in only one newspaper. Therefore, we have no hesitation to record that there has been violation of law as declared by the Full Bench of this Court, in respect of ad-hoc appointment against short term vacancy as claimed by the petitioner. Further we are of the opinion that the District Inspector of Schools was justified in refusing to accord financial approval to the ad hoc appointment of the petitioner on said ground, inasmuch as, as stated above, is in strict conformity with the law laid down by the Full Bench of this Court.

The Hon'ble Single Judge was not justified in upsetting the said order passed by the District Inspector of Schools by observing that non-publication of the vacancy for ad hoc appointment against short term vacancy in two newspapers was only technical in nature.

Case law discussed:
(1994) 3 UPLBEC 1551; Writ Petition No. 51370 of 2005 decided on 11.06.2007.

(Delivered by Hon'ble Ashok Bhushan, J.)

1. Heard learned Standing Counsel for appellants and Sri R.R. Singh, learned counsel for respondents.

2. State of Uttar Pradesh has filed this intra court appeal against the judgement and order of the Hon'ble Single Jude dated 15th July, 2004, passed in Civil Misc. Writ Petition No. 19736 of 2001.

3. Brief facts of the case relevant to be noticed for deciding the present appeal are as follows:

4. Barauli Inter College, Barauli Rao, Aligarh is a recognised and aided intermediate college. The provisions of U.P. Intermediate Education Act, 1921 and those of U.P. Secondary Education Services Selection Board Act, 1982 are fully applicable to the teachers and staffs of the institution. One L.T. Grade teacher

working in the institution, namely, Govind Singh was promoted on ad-hoc basis as lecturer under order dated 9th July, 1997. As a consequence thereto resultant short term vacancy was caused in the institution in L.T. Grade. The vacancy is stated to have been advertised by the Committee of Management of the institution for the purposes of making ad-hoc appointment in one daily newspaper, namely, Amar Ujala on 12th August, 1997. From the record it is established that nearly 20 applications were received In response to the advertisement. Out of candidates, who actually appeared for interview, petitioner-respondent no.1 was found to be most suitable and therefore, he was issued an appointment letter by the Manager of the institution dated 22nd September, 1997. The petitioner joined in pursuance thereto. Since the petitioner was. not being paid salary, despite his appointment as such by the District Inspector of Schools, he approached this Court by means of Writ Petition No. 4438 of 1999. The writ petition was disposed of by the Hon'ble Single Judge by means of the judgment and order dated 16th February, 1999 requiring the District Inspector of Schools to examine the legality of the appointment of the petitioner and to pass appropriate orders within the time specified in the order of the Court qua payment of salary as claimed. The District Inspector of Schools by means of order dated 29th April, 1999 refused to accord approval to the said ad-hoc appointment of the petitioner against short term vacancy on following three grounds:

(a) Vacancy has been advertised in only one newspaper, when under law it should have been advertised in at least two newspapers,

(b) The management of the institution had no jurisdiction to make ad- hoc appointment against short term vacancy on the relevant date, and

(c) There was a ban imposed on ad-hoc appointment by the State Government.

5. Not being satisfied with the order of the District Inspector of Schools petitioner filed writ petition no, 19736 of 2001. The Hon'ble Single Judge after noticing the objections raised in the order of the District Inspector of Schools, has allowed the writ petition vide judgment and order dated 15th July, 2004 and has held that the petitioner-respondent no.1 was entitled to salary from the date of appointment. It is against this judgement and order of the Hon'ble Single Judge that the State has filed the present intra court appeal.

6. Learned Standing Counsel on behalf of State-appellants contends that the Hon'ble Single Judge was not justified in recording a finding that publication of the vacancy in one newspaper alone was sufficient and the breach of the requirement of advertisement being made in two newspapers was only a technical lapse, for which the ad-hoc appointment of the petitioner could not have been disapproved. Learned Standing Counsel with reference to the Full Bench Judgement of this Court in the case of **Radha Raizada & Ors. vs. Committee of Management, Vidyawati Darbari Girls Inter College & Ors.**, reported in (1994) 3 UPLBEC 1551, submits that the Full Bench has categorically laid down as a proposition of law that for ad-hoc appointment against short term vacancies, advertisement must be made in at least two newspapers having adequate circulations. He therefore, submits that

such law which has been declared by the Full Bench of this Court in the case of Radha Raijada (Supra) could not have been diluted by the Hon'ble Single Judge by providing the publication in one newspaper was sufficient.

7. So far as other two grounds mentioned in the order of the District Inspector of Schools are concerned, learned Standing Counsel has fairly conceded that on the relevant date the management was competent to make appointment on ad-hoc basis against short term vacancy and further that no ban was imposed on ad-hoc appointment against short term vacancy by the Sate Government.

8. Faced with the aforesaid contention, Sri R.R. Singh, learned counsel for the respondents submits that although there cannot be any dispute with regard to the law as explained by the Full Bench of this Court in the case of Radha Raijada (Supra), but in the facts of the present case, since advertisement was made in a well known daily newspaper, namely, Amar Ujala, the Appellate Court may not interfere with their judgment and order of the Hon'ble Single Judge. More so when nearly 20 applications were received in response to the advertisement. He lastly submits that the petitioner has actually discharged duties in the institution, therefore, for the period he has actually worked, he is entitled to the salary.

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

10. For the purposes of appreciating the controversy raised in the present appeal it would be worthwhile to reproduce relevant portion of the Full Bench Judgement of this Court in the case of **Radha Raijada (Supra)**, which reads as follows:

"43. ..... I am, therefore, of the view that the procedure for notifying the short terms, vacancy should be the same as it is for the ad hoc appointment by direct recruitment under the First Removal of Difficulties Order. ***The management after intimating such vacancy to the District Inspector of Schools advertise such short term vacancy at least in two News Papers having adequate circulation in Uttar Pradesh*** *in addition to notifying the said vacancy on the notice board of the institution and further the application may also be invited from the local employment exchange.*

11. From the aforesaid, it is apparently clear that the Full Bench of this Court has clarified that even a short term vacancy is required to be advertised in like manner as provided for the substantive vacancy, before making ad hoc appointment as per the First Removal of Difficulties Order. It has been further clarified that advertisement in respect of short term vacancy should be published **in at least two newspapers** having adequate circulation through out the State of Uttar Pradesh.

12. In the facts of the present case, it is admitted on record that advertisement has been published in only one newspaper. Therefore, we have no hesitation to record that there has been violation of law as declared by the Full Bench of this Court, in respect of ad-hoc

appointment against short term vacancy as claimed by the petitioner. Further we are of the opinion that the District Inspector of Schools was justified in refusing to accord financial approval to the ad hoc appointment of the petitioner on said ground, inasmuch as, as stated above, is in strict conformity with the law laid down by the Full Bench of this Court.

13. The Hon'ble Single Judge was not justified in upsetting the said order passed by the District Inspector of Schools by observing that non-publication of the vacancy for ad hoc appointment against short term vacancy in two newspapers was only technical in nature.

14. This Court may emphasize that the Hon'ble Supreme Court as well as the Division Benches of the Hon'ble High Court have repeatedly held that if law requires something to be done in a particular manner, it has to be done in the manner prescribed or not at all. Reference be had to the recent judgment in the case of ***Professor Ramesh Chandra Vs. State of Uttar Pradesh & Others;*** Civil Misc. Writ Petition No. 51370 of 2005, decided on 11th June, 2007, wherein the Division Bench has held as follows:

"When the Statute provides for a particular procedure, the authorities has to follow the same and cannot be permitted to act in contravention of the same. It has been hither to uncotroverted legal position that where a statute requires to do a certain thing in a certain way, the thing must be done in that way or not at all. Other methods or mode of performance are impliedly and necessarily forbidden. [(1) State of Uttar Pradesh Vs. Singhara Singh & Ors.; AIR 1964, SC 358, (2) A.K. Roy & Anr. vs. State of Punjab & Ors., AIR 1986 SC 2160, and (3) Chandra Kishore Jha vs. Mahavir Prasad, (1998) 8 SCC 266]

The aforesaid settled legal proposition is based on a.legal maxim "Expressio unius est exclusio alterius", meaning thereby that -if a statute provides -for a thing to be done in a particular, then it has to be. done in that manner and in no other manner and following other course is not permissible. This maxim has consistently been followed, as is evident from the cases referred to above. A similar view has been reiterated in Haresh Dayaram Thakur vs. State of Maharashtra & Qrs., (2000) 6 SCC 179; Delhi Administration vs. Gurdip Singh Uban & ors., (2000) 7 SCC 296; Dhananjaya Reddy vs. State of Karnataka ete.etc., (2001) 4 SCC 9; Commissioner of Income Tax, Mumbai Vs. Anjum M.H. Ghaswala & ors., (2002) 1 SCC 633; Prabha Shankar Dubey vs. State of Madhya Pradesh, AIR 2004 SC 486; and Ram Phal Kundu vs. Kamal Sharma, AIR 2004 SC 1657."

15. In view of the aforesaid, the judgement and order of the Hon'ble Single Judge dated 15th July, 2004 upsetting the order of the District Inspector of Schools dated 29th April, 1996 cannot be legally sustained. We are of the considered opinion that the order of the District Inspector of Schools refusing to accord approval to the ad hoc appointment of the petitioner against short term vacancy was legal and valid and could not have been set aside in writ jurisdiction by this Court under Article 226 of the Constitution of India. The judgement and order of the Hon'ble Single Judge dated 15th July, 2004 is hereby set aside.

16. At this stage we may consider the grievance of the petitioner that

subsequent to his ad hoc appointment by the Management, because of the interim order granted by this Court in writ petition as well as under final judgment of the Hon'ble Single Judge referred to above, he has actually worked in the institution, he is therefore, entitled for salary for the period of actually working.

17. In the facts of this case we feel that it would be too harsh to deny the salary to the petitioner for the services actually rendered, we therefore, provide that the appellants shall ensure payment of salary to the petitioner for the period he has actually discharged his duties in the institution under interim order of this Court passed in writ petition as well as under final judgment and order of the Hon'ble Single Judge till date, if not already paid.

18. This special appeal is allowed subject to the observations made above.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.08.2008

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

Civil Misc. Writ Petition No.9701 of 1983

Ram Kumar Barnwal ...Petitioner
Versus
Ram Lakhan and others ...Respondents

Counsel for Petitioner:
Sri S.K. Misra
Sri Somesh Khare
Sri A.K. Gupta
Smt. Komal Khare

Counsel for the Opposite Parties:
Sri M.D. Singh Shekhar
Sri T.P. Singh
Sri K.M. Dayal
Sri Shashi Nandan
Sri Atteq Ahmad
Sri R.D. Tiwari
Sri S.P. Pandey
Sri A.K. Mishra
Sri Rahul Sripat
Sri S.K. Mehrotra
Sri Bharat Garg
Sri Sudhir Chandra
S.C.

U.P. Urban Building (Regulation of Letting Rent and Eviction) Act 1972-Section 21-Release application by land lord to settled his son on business-showing his bonafide need-rejected by the court below on the ground-the son of land lord has already joined the business of his father in a tenanted building-held-illegal-tenanted shop of the land lord can not came in way of consideration of bonafide need-even the son of land lord can not be compelled to join the business of his father-finding of both the court below on both points patently erroneous-liable to quash.

Held: Para 14

Accordingly, in my opinion, bona fide need of landlord was/is fully proved. Balance of hardship also lies in his favour. Findings of both the courts below on both the points are patently erroneous in lay and liable to be quashed.

Case law discussed:
2007 AIR SCW 3250, 2005 (2) A.R.C. 793,AIR 2003 SC 780

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

1. Heard learned counsel for the parties.

2. This is a landlord's writ petition arising out of eviction/release proceedings initiated by him against tenant-respondent

no. 1 on the ground of bona fide need under Section 21 of U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act in the form of case no. 2 of 1980. Property in dispute is a shop rent of which is Rs.40/- per month. Landlord has died and substituted by his legal representatives.

3. Prescribed Authority/Munsif City, Azamgarh through judgment and order dated 26.05.1982 dismissed the release application. Against the said judgment and order, landlord-petitioner filed Misc. Civil Appeal No. 171 of 1982. A.D.J./Special Judge (E.C. Act), Azamgarh dismissed the appeal through judgment and order dated 22.04.1983, hence this writ petition.

4. I dismissed this writ petition on 05.01.2004 without looking into the merits of the case on the ground that even if arguments of the learned counsel for petitioner were accepted, matter would require remanded as release application had been dismissed by both the courts below. However, while dismissing the writ petition, liberty was granted to the landlord-petitioner to file fresh release application. Against judgment and order dated 05.01.2004, appeal was filed before Supreme Court (Civil Appeal no.2480 of 2007). Supreme Court allowed the appeal through judgment and order dated 14.05.2007 set aside the order of the High Court and remanded the matter to the High Court to decide the matter finally. Supreme Court also directed that subsequent events shall also be considered by the High Court, if necessary. The judgment of Supreme Court is reported in **2007 AIR SCW 3250 "Ram Kumar Barnwal v. Ram Lakhan**."

5. It may be mentioned that even before the judgment of the Supreme Court in this case, I had changed my view and held that even if release application of the landlord has been dismissed by both the courts below still in suitable cases High Court in exercise of writ jurisdiction can grant final relief to the landlord vide **Mohd. Arif Vs. A.D.J. 2005 (2) A.R.C. 793**.

6. Landlord stated in the release application that he was doing business from a tenanted shop and he had three sons whose names were Ashthbhuji, Sangam Lal and Kameshwar and one of his sons was doing business from a shop owned by the landlord. Both the courts below held that all the three sons were doing business from the shop owned by the landlord jointly, hence need was not bona fide.

7. In the counter affidavit filed on 02.01.2008, it has been stated in Para 7 onward that Kameshwar Prasad, one of the sons of the landlord has shifted to Varanasi and is practising there as Chartered Accountant and has got two residential buildings in Varanasi (Property in dispute is situated in Azamagarh). In Para 9 of the said counter affidavit, it has been stated that Sangam Lal second son of landlord-petitioner is doing business of Kirana Merchant (general merchant) under the name and style of M/s Ashthbhuji Prasad Barnwal in his own shop situated adjacent to the shop in question and the said shop was in existence since before the institution of the release application.

8. Thereafter in Para 15, details of properties owned by petitioner and his sons has been given. Under the heading

'business of petitioner's son (Ashthbhuji)', it is mentioned that at present he is doing business of Kirana in the shop adjacent to the shop in question under the name and style of M/s Ashthbhuji Prasad Barnwal.

9. A perusal of Para 9 and Para 15 of the counter affidavit makes it quite clear that according to the tenant himself there is only one shop owned by the landlord in which two of his sons are doing business i.e. Sangam Lal and Ashthbhuji Prasad. Supreme Court in the case of **Sushila Vs. IInd Addl. District Judge, Banda, AIR 2003 SC 780** and **Mustaquin & R.K. Govil** has held that every adult family member of the landlord has got right to start his independent separate business and no landlord or adult member of the family of the landlord can be compelled to participate in the joint business of family business.

10. Learned counsel for landlord-petitioner has stated that the shop which was in tenancy occupation of the landlord was got vacated by its landlord. This fact is not admitted by the learned counsel for tenant-respondent. Be that as it may, Supreme Court in the case of **G.K.Devi vs. Ghanshyma Das, AIR. 2000 S.C. 656** has held that a tenanted accommodation in possession of the landlord cannot be taken into consideration while deciding his release application.

11. In any case, Ashthbhuji and Sangam Lal are having only one shop, hence need for one additional shop is more that proved.

12. As far as comparative hardship is concerned, landlord asserted and tenant admitted that he and his sons had got following additional business:-

1. Atta Chakki

2. Two of his sons had started Cloth and Kirana business in another shop"

13. Accordingly, balance of hardship squarely lay in favour of the landlord and against the tenant. Tenant did not show that he made any efforts to search another accommodation after filing of the release application. This omission further titled balance of hardship against the tenant vide **B.C. Bhutada vs. G.R. Mundada (A.I.R. 2003 S.C. 2713).**

14. Accordingly, in my opinion, bona fide need of landlord was/is fully proved. Balance of hardship also lies in his favour. Findings of both the courts below on both the points are patently erroneous in lay and liable to be quashed.

15. Writ petition is accordingly allowed. Both the impugned judgment and orders are set aside. Release application of landlord-petitioner is allowed.

16. Tenants-respondents are granted six months time to vacate provided that :-

1. Within one month from today respondent tenant files an undertaking before the Prescribed Authority to the effect that on or before the expiry of aforesaid period of six months he will willingly vacate and handover possession of the property in dispute to the landlord-petitioner.

2. For this period of six months, which has been granted to the tenant-respondent

to vacate, he is required to pay Rs.6,000/- (at the rate of Rs.1000/- per month) as rent/damages for use and occupation. This amount shall also be deposited within one month before the Prescribed Authority and shall immediately be paid to the landlord-petitioner.

17. In case of default in compliance of any of these conditions tenant-respondent shall be evicted through process of Court after one month and shall also be liable to pay damages at the rate of Rs.2000/- per month since after one month till the date of actual eviction.

18. Similarly, if after filing the aforesaid undertaking and depositing Rs.6,000/- the accommodation in dispute is not vacated on the expiry of six months then damages for use and occupation shall be payable at the rate of Rs.2000/- per month since after six months till actual eviction. It is needless to add that this direction is in addition to the right of the landlord to file contempt petition for violation of undertaking and execution application under Section 23 of the Act.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.08.2008

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 42876 of 2008

Priti Chauhan ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri S.C. Srivastava
Sri Rajendra Jaiswal

Counsel for the Respondents:
Sri J.N. Maurya
S.C.

Constitution of India Art. 226- Departmental and Criminal proceeding- prayer to stay the departmental proceeding so long criminal proceeding concluded-No complicated question of law involved-only show cause notice issued-in departmental proceeding-held-premature-No interference-at this stage.

Held: Para 6

Moreover, no final order has been passed in the departmental proceeding and only a show cause notice has been issued to the petitioner. Therefore, in my view, even otherwise, the writ petition is pre-mature.

Case law discussed:
1999 (3) SCC 679, JT 2005 (8) SC 425, JT 2006 (1) SC 444, AIR 2007 SC 199, 2008 (4) SCC 1, JT 2008 (4) SC 577, JT 2007 (2) SC 620

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

1. The short grievance raised by the petitioner in this writ petition is that in respect to the charges, on which departmental enquiry is being conducted against him, a criminal proceeding has also been initiated and, therefore, so long as the criminal proceeding is going on, the authorities cannot proceed with the departmental enquiry and, therefore, a writ of mandamus has been sought for staying the pending departmental enquiry. Reliance is placed on the Apex Court's decision in **Capt. M. Paul Anthony Vs. Bharat Gold Mines Ltd. & another 1999 (3) SCC 679**.

2. In my view, the submission is thoroughly misconceived. The Apex Court, in the **Capt. M. Paul (supra)** has

clearly held that the departmental as well as criminal, both the proceedings, can go on simultaneously as there is no bar in their being conducted simultaneously. The question as to whether during the pendency of criminal proceeding, the departmental proceeding should be stayed depends upon the facts and circumstances of the individual case. In **Ajit Kumar Nag Vs. General Manager I.O.C. JT 2005 (8) SC 425**, the Apex Court said that the procedure followed in both the cases as well as the subject matter of the departmental enquiry and criminal proceeding has different scope and it cannot not be said that when a criminal proceeding is going on a particular criminal charge, in that regard, the departmental proceeding cannot be allowed to proceed. The same view has been reiterated subsequently, in **Chairman/ Managing Director TNCS Corporation Ltd. & others Vs. K. Meerabai JT 2006 (1) SC 444, Suresh Pathrella Vs. Oriental Bank of Commerce AIR 2007 SC 199** and **Union of India & others Vs. Naman Singh Shekhawat 2008 (4) SCC 1**.

3. Referring to **Capt. M. Paul Anthony (supra),** recently the Apex Court in **Managing Director, State Bank of Hyderabad & another Vs. P. Kata Rao JT 2008 (4) SC 577** observed that the legal principle enunciated to the effect that on the same set of facts, the delinquent shall not be proceeded in a departmental proceeding and in a criminal proceeding simultaneously has been deviated from. It it also said that the dicta laid down by the Apex Court in **Capt. M. Paul Anthony (supra),** though has remained unshaken but its applicability has been found to be dependent on the facts and situations obtained in each case.

4. Similarly, in the case of **Noida Entrepreneurs Assn. Vs. NOIDS & others JT 2007 (2) SC 620**, the Court has reproduced the following conclusion deducible from various judgments as noticed in para-22 of the judgment in **Capt. M. Paul Anthony (supra),** namely:

"(i) Departmental proceedings and proceedings in a criminal case can proceed simultaneously as there is no bar in their being conducted simultaneously, though separately.

(ii) If the departmental proceedings and the criminal case are based on identical and similar set of facts and the charge in the criminal case against the delinquent employee is of a grave nature, which involved complicated questions of law and fact, it would be desirable to stay the departmental proceedings till the conclusion of the criminal case.

(iii) Whether the nature of a charge in a criminal case is grave and whether complicated questions of fact and law are involved in that case, will depend upon the nature of offence, the nature of the case launched against the employee on the basis of evidence and material collected against him during investigation or as reflected in the charge-sheet.

(iv) The factors mentioned at (ii) and (iii) above cannot be considered in isolation to stay the departmental proceedings but due regard has to be given to the fact that the departmental proceedings cannot be unduly delayed.

(v) If the criminal case does not proceed or its disposal is being unduly delayed, the departmental proceedings, even if they were stayed on account of the pendency of the criminal case, can be resumed and proceeded with so as to conclude them at an early date, so that if the employee is

found not guilty his honour may be vindicated and in case he is found guilty, the administration may get rid of him at the earliest."

5. A similar view has also been taken in **Indian Overseas Bank Vs. P. Ganesan & others AIR 2008 SC 553** and the Court held that where a prayer is made that so long as criminal proceedings are going on, departmental proceeding may not be proceeded, the Court must record a finding that the non grant of stay on departmental proceeding would not only prejudice the delinquent officer, but the matter also involve a complicated question of law. Noting of that sort has been shown by the learned Counsel for the petitioner in the case in hand.

6. Moreover, no final order has been passed in the departmental proceeding and only a show cause notice has been issued to the petitioner. Therefore, in my view, even otherwise, the writ petition is pre-mature.

7. I, therefore, do not find any reason to interfere at this stage. The writ petition is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.08.2008

BEFORE
THE HON'BLE TARUN AGARWAL, J.

Civil Misc. Writ Petition No. 17595 of 2004

Smt Lila Vishwakarma ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri S.K. Yadav
Sri Anil Kumar Sharma
Sri G.D. Mukherji
Sri Satyajit Mukerji
Sri R.K. Vaish

Counsel for the Respondents:
Sri Mohan Yadav
S.C.

Constitution of India-Art. 226-Salary-petitioner working as A.N.Ms.-transferred from P.H.C. Chail to Newada-on representation considering her personal hardships the authority concern cancelled the Transfer order-subsequently on approach of interested person-revoked the cancellation order-consequently the petitioner was directed to open her account at Newada Block only then salary shall be released-inspite of direction of Court-insisting petitioner to open her account at Newada-held-patently arbitrary-clear cut harassment of petitioner-direction issued to give entire arrears of salary with 40,000/-towards interest alongwith Rs.10,000/-as cost-payment be made through cheque or D.D. within 4 weeks-direction to initiate disciplinary proceeding against the erring Officer.

Held: Para 10

The Court finds that during the pendency of the writ petition, no effort was made by the respondents to solve this imbroglio made by the respondents. No effort was made by the respondents to evolve an amicable solution. The respondents remained adamant, insisting that the petitioner should open an Account in Nevada and only then she would be paid her salary. The respondents have paid the arrears of salary to the petitioner by cheque through the Court, and that too, only when the Court, directed the respondents to do so. A clear case of arbitrariness on the part of the respondents is spelt out. The action of the respondents cannot be condoned.

This Court had asked the learned Standing Counsel as to why the arrears of salary till April, 2008 had only been cleared and why the salary for May, June and July, 2008 had not been released. The learned Standing Counsel submitted that in this regard, the salary for these months had not been received from the State Government, and therefore, no salary could be disbursed.

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

1. Heard Shri Anil Kumar Sharma, learned counsel for the petitioner and Shri Mohan Yadav, learned Standing Counsel for respondents.

2. The petitioner has filed the present writ petition praying that the respondents be restrained from interfering with the peaceful working of petitioner as A.N.M. at Prathmik Swasthya Kendra, Chail in District Allahabad and that a writ of mandamus be also issued directing the respondents to pay the salary and arrears of salary along with 12% interest since August, 2003 onwards.

3. The facts leading to the filing of the writ petition is, that the petitioner was appointed as A.N.M. in the year 1981 and since then is working in the Primary Health Centre at Chail in District Allahabad. On 23rd July, 2003, the petitioner was transferred from Chail to Kada and was directed to hand over the charge to Smt Suman Dwivedi, who was posted on that place in her place. The petitioner made a representation for the cancellation of her transfer order on personal ground, which was duly considered by the authority, and by an order dated 4th September, 2003, the transfer order of the petitioner was cancelled, and she was allowed to work at the place where she was originally working, namely, Primary Health Centre, Chail in District Allahabad (now District Kaushambi). As a result of the cancellation of the transfer order, the petitioner remained at Chail. It has also come on record that during the pendency of the petitioner's representation, she did not hand over the charge to Suman Dwivedi, though the learned counsel for the respondents, on the other hand, submitted that Suman Dwivedi was allowed to join at Chail.

4. The problem arose when the petitioner and Suman Dwivedi started working at the Primary Health Centre at Chail. Whereas, Suman Dwivedi was paid her salary, the petitioner was not paid her salary. The petitioner made a representation, which fell on deaf ears. It is alleged in the writ petition that the petitioner was threatened with dire consequences by respondent nos. 5 and 7, namely, by the then Chief Medical Officer and the Medical Officer In-charge I, respectively. It has been stated that subsequently the Chief Medical Officer issued an order dated 1st November, 2003/4th November, 2003 directing that the petitioner would be paid the salary from PHC, Chail and that Smt Suman Dwivedi, who was earlier working at PHC, Nevada, would draw her salary from that Centre alone. This suited the petitioner, but subsequently, without any rhyme or reason, the Chief Medical Officer reversed its order and issued a fresh order dated 12th of December, 2003 directing that Suman Dwivedi will receive her salary from the Primary Health Centre, Chail and that the petitioner should approach the authority at the Public Health Centre, Nevada for release of her salary. This order was not accepted

by the petitioner, and consequently, the stalemate continued. The petitioner continued to discharge her duties at Chail and the authorities remained adamant not to release her salary and insisted that the petitioner should open an Account in a Bank at Nevada so that her salary could be released from Primary Health Centre, Nevada.

5. In this manner, the situation continued, and eventually, the petitioner approached the writ Court in the year 2004. The Court by an interim order dated 7th September, 2005, directed the respondents to show cause why salary to the petitioner had not been paid for two years. The Court further directed respondent nos. 4 and 5 to file their personal affidavit, in spite of which, the respondent no. 5 did not file his personal affidavit. However, on 21st September 2005, the respondents produced two treasury cheques for a sum of Rs.48350/- and another for Rs.50100/- and 3 cheques drawn on Bank of Baroda, Branch Nevada, District Kaushami for a sum of Rs.51942/-, 8350/- and 25490/- towards the arrears of salary payable to the petitioner. The order sheet of 13th October, 2006 further records that the respondents produced three cheques from the Nevada Branch, total Rs.2,40,023/- towards the arrears of salary and again impressed upon the Court praying that the petitioner should open an Account in Nevada so that her salary could be deposited in that Account.

6. This matter was taken up in August, 2008 and the same thing was reiterated all over again, namely, that the petitioner has not been paid the salary from September, 2006 onwards. The learned Standing Counsel sought instructions and again intimated the Court that the salary has not been paid to the petitioner on account of the fact that the petitioner has not opened an Account in Bank in Nevada in district Kaushambi, and therefore, the salary could not be deposited in her Account. On 27th August, 2008 the respondents produced three cheques drawn from the Nevada Branch for a sum of Rs.19900/-, 113130/- and 88085/- towards arrears of salary for the period September, 2006 to April, 2008.

7. This is the situation which exists as on date. The admitted position which stands today is that the petitioner is still working at Chail which is now in district Kaushambi. Therefore, she is entitled to be given the salary from the Primary Health Centre, Chail. The insistence of the respondents to disburse the salary of the petitioner from Primary Health Centre, Nevada is apparently arbitrary and without jurisdiction. The petitioner has never worked at any moment of time at the Primary Health Centre, Nevada. This centre is also 20-30 kilometres away from this Primary Health Centre, Chail. It does not stand to reason as to why the petitioner should open an Account at Nevada when the petitioner has neither worked at that place, nor is residing at that place, nor had been transferred to that place. If for any administrative convenience the respondents are disbursing the salary from the Primary Health Centre, Nevada, it is their own internal arrangement, in which, the petitioner has no role to play and the petitioner cannot be forced to open an Account at Nevada on the whims and fancies of the respondents merely because it is convenient for the respondents to disburse the salary from Nevada.

8. On the other hand, the order of 4th November, 2003 gives a clear indication of the internal arrangement made by the respondents, namely, that the petitioner was already working at Allahabad and, therefore, she would continue to withdraw her salary from Chail, and that Suman Dwivedi, who was earlier working at Nevada, would continue to draw her salary from Navada. But, this arrangement was reversed by the respondents by an order dated 12th December, 2003 which is indicative and it can be safely presumed that the said order was passed either to benefit someone or to harass the petitioner.

9. In view of the aforesaid, the insistence of the respondents directing the petitioner to draw salary from Nevada and further insisting the petitioner to open an Account in Nevada, is patently arbitrary, and, in my opinion, a clear cut case of harassment is made out against the petitioner, for reasons best known to the respondents. It is alleged by the petitioner that this arrangement was specifically made in order to ensure that Suman Dwivedi remains posted at Chail and is paid the salary from that centre. Without going into this controversy, it is sufficient for the Court to hold that when the transfer order of the petitioner was cancelled and she was directed to work at Chail, the respondents should have passed another consequential order for the placement of Suman Dwivedi. The respondents, in any case, could not have forced the petitioner to draw salary from Nevada, the place where she had never worked, nor had she been transferred to that place. Consequently, the action of the respondents is a clear indication of vindictive attitude against the petitioner and indicates favouritism given to Suman Dwivedi who was transferred to Chail.

10. The Court finds that during the pendency of the writ petition, no effort was made by the respondents to solve this imbroglio made by the respondents. No effort was made by the respondents to evolve an amicable solution. The respondents remained adamant, insisting that the petitioner should open an Account in Nevada and only then she would be paid her salary. The respondents have paid the arrears of salary to the petitioner by cheque through the Court, and that too, only when the Court, directed the respondents to do so. A clear case of arbitrariness on the part of the respondents is spelt out. The action of the respondents cannot be condoned. This Court had asked the learned Standing Counsel as to why the arrears of salary till April, 2008 had only been cleared and why the salary for May, June and July, 2008 had not been released. The learned Standing Counsel submitted that in this regard, the salary for these months had not been received from the State Government, and therefore, no salary could be disbursed.

11. In view of the aforesaid, the writ petition is allowed. A writ of mandamus is issued to the respondents directing the petitioner to work at the Primary Health Centre, Chail and would be entitled to draw her salary from the Primary Health Centre, Chail. The respondents will ensure that the salary is released and paid to the petitioner every month or credited in her account at Chail. The arrears of salary from May, 2008 till date would also be cleared within four weeks from today.

For the harassment caused to the petitioner and for the non-payment of the arrears of salary, the petitioner has made out a case for grant of cost and payment of interest on the delay in payment of the salary. The petitioner has claimed cost as well as 12% interest on arrears of the salary from September, 2003 onwards was not paid and was only cleared when the Court directed. If a reasonable rate of interest at the rate of 6% is charged, approximately Rs.40,000/- would come towards interest. This Court, consequently, quantifies a sum of Rs.40,000/- as interest and cost of this petition at Rs.10,000/-. The amount of Rs.50,000/- shall be paid to the petitioner by means of a cheque/pay order/demand draft in favour of the petitioner within four weeks from today or may be credited in her Account. If the amount is not paid to the petitioner within the said period, it would be open to the petitioner to move an appropriate application for the execution of the order. Since the respondents were responsible for not paying the salary to the petitioner, the Secretary, Department of Health, Lucknow is consequently directed to hold an enquiry and recover the cost and interest from the erring officials.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.08.2008

BEFORE
THE HON'BLE V.M. SAHAI, J.
THE HON'BLE S.P. MEHROTRA, J.

Civil Misc. Writ Petition No.14709 of 2005

B.K. Kushwaha ...Petitioner
Versus
Union of India and others ...Respondents

Counsel for the Petitioner:
Sri A.D. Saunders
Sri R.K. Nigam
Sri H.L. Pandey
Sri S.M. Ali

Counsel for the Respondents:
Sri K.C. Sinha, Addl. Solicitor General of India
Sri Vishnu Pratap
Sri Sahab Tiwari

Constitution of India, Art. 226-Service law-two different punishment on two different charge sheet-run consecutively-held-shocking the confidence of court-modified to run concurrently-with life of five years.

Held: Para 11

As held above, the view taken by the respondent - Bank that the punishments given to the petitioner under the two orders passed by the Appellate Authority and confirmed by the Reviewing Authority would run consecutively and not concurrently, is shocking to our conscience. Therefore, in view of the above decisions, a direction is liable to be issued to the respondent-Bank that both the punishments to the petitioner with regard to both the charge-sheets shall run concurrently and not consecutively. After the period of five years is over, both the punishment orders will come to an end.

Case law discussed:
AIR 2003 SC 1571, (2003) 4 SCC 364, AIR 2005 SC 3417, AIR 2006 SC 2208, (2006) 10 SCC 388

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

1. Notice on behalf of the respondent no.1 has been accepted by Shri K.C. Sinha, learned Additional Solicitor General of India. Notice on behalf of the respondent nos. 2 to 8 has been accepted by Shri Vishnu Pratap,

learned counsel appearing for the said respondents.

2. The petitioner is an Officer of Scale-II in the respondent - Bank. A charge-sheet dated 31.7.2000 was issued to the petitioner levelling against him nine charges. While the enquiry in respect of the said charge-sheet was going on, another charge-sheet dated 13.1.2001 was issued to him levelling six charges. After the departmental proceedings were completed, the Enquiry Reports were submitted by the Inquiry Officer with regard to the said two charge-sheets.

3. The Disciplinary Authority passed a punishment order on 30.11.2002 awarding punishment to the petitioner with regard to the first charge-sheet. The petitioner filed an Appeal against that order.

4. Similarly, the Disciplinary Authority passed a punishment order on 14.12.2002 with regard to the charges levelled in the second charge-sheet. An Appeal was also filed by the petitioner against this punishment order.

5. The Appellate Authority decided both the Appeals by separate orders dated 22.12.2003 and dated 24.12.2003, and substantial reliefs were granted to the petitioner. However, aggrieved with the orders of the Appellate Authority, the petitioner filed a Writ Petition before this Court being Civil Misc. Writ Petition No.44406 of 2004. This Court by its order dated 12.11.2004 dismissed the Writ Petition as withdrawn with liberty to the petitioner to file a Review Application before the Reviewing Authority.

6. The petitioner then filed a Review Application before the Reviewing Authority in both the matters. The Reviewing Authority passed a common order dated 11.1.2005, wherein it considered both the punishment orders and the orders passed in the Appeal, and came to the conclusion that the Appellate Authority had granted substantial relief to the petitioner, and, accordingly, the Reviewing Authority confirmed the reduced punishments granted by the Appellate Authority for the separate charge-sheets. The order passed by the Reviewing Authority was communicated to the petitioner on 24.1.2005. It is this order, which has been challenged by the petitioner in the present Writ Petition.

7. We have heard Shri R.K. Nigam, learned counsel for the petitioner and Shri Vishnu Pratap, learned counsel appearing for the respondent nos. 2 to 8, and perused the record.

8. The learned counsel for the petitioner has vehemently urged that the punishments, which have been awarded by the Disciplinary Authority with regard to both the charge-sheets, and have been reduced by the Appellate Authority, should run concurrently and not consecutively. It was not the intention of the Appellate Authority or the Reviewing Authority that when the first punishment is over, the second punishment will start. As the orders passed by the Appellate Authority and the Reviewing Authority do not suggest that these punishments will run one after another, the inference to be drawn is that both the punishments will run concurrently.

9. If the view of the Bank that when the punishment with regard to the first

charge-sheet is over, the punishment with regard to the second charge-sheet would start, then the petitioner will be seriously prejudiced and will suffer ten years instead of five years. The view taken by the respondent - Bank is shocking to our conscience.

10. It has been laid down by the Supreme Court in various decisions that the punishment imposed by the Disciplinary Authority or the Appellate Authority should not be subjected to judicial review unless the same is shocking to the conscience of the Court/Tribunal. Reference in this regard may be made to the following decisions:

1. ***Chairman and Managing Director, United Commercial Bank and others v. P.C. Kakkar, AIR 2003 SC 1571*** (paragraphs 12,13 and 14***)=(2003) 4 SCC 364*** (paragraphs 12, 13 & 14).
2. ***V. Ramana v. A.P.S.R.T.C. and others, AIR 2005 SC 3417*** (paragraphs 12,13 and 14).
3. ***General Secretary, South Indian Cashew Factories Workers Union v. Managing Director, Kerala State Cashew Development Corporation Ltd. and others, AIR 2006 SC 2208*** (paragraph 16).
4. ***Union of India and others v. Dwarka Prasad Tiwari, (2006) 10 SCC 388*** (paragraphs 10,11,15,16 and 17).

11. As held above, the view taken by the respondent - Bank that the punishments given to the petitioner under the two orders passed by the Appellate Authority and confirmed by the Reviewing Authority would run consecutively and not concurrently, is shocking to our conscience. Therefore, in view of the above decisions, a direction is liable to be issued to the respondent - Bank that both the punishments to the petitioner with regard to both the charge-sheets shall run concurrently and not consecutively. After the period of five years is over, both the punishment orders will come to an end.

12. For the reasons given above, We are of the opinion that this Writ Petition deserves to be allowed, and the same is accordingly allowed. The punishment awarded to the petitioner by the Appellate Authority and confirmed by the Reviewing Authority is modified to the extent that both the punishments awarded, with regard to charge-sheet dated 31.7.2000 and with regard to charge-sheet dated 13.1.2001, shall run concurrently and after the period of five years is over, both the punishment orders will come to an end. Petition allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.08.2008

BEFORE
THE HON'BLE V.M. SAHAI, J.
THE HON'BLE S.P. MEHROTRA, J.

Civil Misc. Writ Petition No. 32623 of 2001

Dr. Ram Khelawan Singh ...Petitioner
Versus
State of U.P. and another ...Respondents

Counsel for the Petitioner:
Sri Shiv Nath Singh
Sri H.R. Misra
Sri Vikram Bahadur Yadav
Sri Ashutosh Tiwari

Counsel for the Respondents:
Sri A.N. Shukla
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S.C.

U.P. Govt. Servant (Discipline & Appeal) Rules 1999-Rule 4(2)-Suspension-during pendency of Criminal proceeding-after acquittal-the employee held-entitled for reinstatement with all consequential benefits, seniority, promotion etc.-in view of the fact there is no provision in Rules-against acquittal if appeal pending-how such employee treated, hence after determination of Criminal proceeding the suspension order automatically comes to an end.

Held: Para 6

The words "until the termination of all proceedings relating to that charge" occurring in the end of the above-noted Rule evidently refer to the words "an investigation, inquiry or trial relating to a criminal charge" occurring in the beginning of the said Rule. Therefore, the expression "termination of all proceedings relating to that charge "means that with regard to the charge all proceedings in the trial should come to an end. Since the Rule is confined only to the stage of trial and not to appellate stage, the respondents were under a legal duty to reinstate the petitioner in service after the petitioner was acquitted by granting all benefits of service available to the petitioner including the arrears of salary for the period of suspension.

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

1. The short question that arises for consideration in this writ petition is whether under Rule 4 (2) of U.P. Government Servant (Discipline & Appeal) Rules, 1999 (in brief "Rules 1999") if a government servant has been suspended on the ground of pendency of a criminal charge, whether after his acquittal in the criminal trial, he is entitled to reinstatement in service with all benefits of service even though an appeal has been filed by the State against the acquittal order.

2. The facts in brief are that the petitioner was working as Divisional Manager, Bijnor in the U.P. Forest Corporation. A trap was laid against the petitioner in which he was alleged to have accepted Rs.5000/- as illegal gratification. Consequently, he was arrested on 13.6.2001 and an FIR was lodged and Case Crime o. 214 of 2001 under section 7/13(1) of the Prevention of Corruption Act, 1988 was registered against him. Since the petitioner was in jail for more than 48 hours, the State Government on 2.7.2001 passed an order deeming him to have been suspended under Rule 4(3) (a) of the Rules, 1999, and further suspending him (the petitioner) under Rule 4{2) of the Rules, 1999 till the pendency of the criminal inquiry or trial against him as stated in paragraph 3 of the suspension order. The petitioner has been acquitted of the criminal case by judgment and order dated 16.9.2003 passed in Sessions Trial No.8 of 2002 by the Additional Sessions Judge, Court No.3, Bijnor. Copy of the said judgment and order dated 16.9.2003 has been filed as Annexure SA 1 to the Third Supplementary Affidavit filed on behalf of the petitioner.

3. In paragraph 6 of the Second Supplementary Affidavit filed on behalf of the petitioner, it is, *inter-alia*, stated that no departmental enquiry/proceeding is pending against the petitioner.

4. We have heard Sri H.R. Misra, learned Senior Counsel assisted by Sri Ashutosh Tiwari for the petitioner and Sri A.N. Shukla, learned Standing Counsel appearing for the respondents. Learned counsel for the petitioner has urged that

after the petitioner was acquitted of the criminal charge, the suspension order would automatically come to an end, and the respondents were under a legal obligation to reinstate the petitioner and the petitioner was entitled for his entire arrears of salary for the suspension period including other service benefits, seniority, promotion etc. On the other hand, Sri A.N. Shukla, learned Standing Counsel has filed a Supplementary Counter Affidavit wherein it has been stated that the petitioner had been reinstated in service with effect from 21.12.2001 by office memorandum dated 4.6.2002, which was communicated to the petitioner. In view of the stay order dated 21.12.2001 passed by this Court, the petitioner was reinstated in service subject to the decision of the writ petition. Learned Standing Counsel has further urged that since the criminal appeal is pending, the petitioner is not entitled for reinstatement in service with all benefits of service. Learned Standing Counsel has urged that the appeal is regarded as continuation of a trial and unless the appeal is decided and the petitioner is acquitted of the criminal charge in appeal, he is not entitled to be reinstated in service and given the benefits of service. He has further urged that the State Government has filed an appeal against the acquittal of the petitioner under Section 378 Cr.P.C.

5. On the basis of the arguments advanced by the learned Standing Counsel, the question that arises for consideration is that in case a person, who was deemed to have been suspended under Rule 4(3)(a) of the Rules, 1999 on a technical ground of being in jail for more than 48 hours and was suspended under Rule 4(2) of the Rules, 1999, during the pendency of investigation/inquiry/trial with regard to a criminal charge against him, is acquitted in the criminal trial, then whether, after acquittal, he is entitled for reinstatement with all benefits of service even though an appeal has been filed by the State Government against the order of the acquittal and the same is pending. It is necessary to extract Rule 4 (2) of the Rules 1999 as under:

"4(2) A Government servant in respect of, or against whom an investigation, inquiry or trial relating to a criminal charge, which is connected with his position as a Government servant or which is likely to embarrass him in the discharge of his duties or which involves moral turpitude, is pending, may, at the discretion of the appointing authority or the authority to whom the power of suspension has been delegated under these rules, be placed under suspension until the termination of all proceedings relating to that charge."

6. We have carefully examined this Rule. It applies only to those cases where investigation, inquiry or report relating to a criminal charge against a government servant is pending. Once the learned Sessions judge passes an order, either convicting or acquitting the person against whom criminal charge is under trial, the trial comes to an end. This Rule does not postulate a situation nor provide that in case appeal is filed by the State against the order of acquittal of a government servant under Section 378 Cr.P.C., even then the government servant would remain under suspension or he could not be reinstated even after his acquittal by the Sessions Judge. The words "until the termination of all proceedings relating to that charge"

occurring in the end of the above-noted Rule evidently refer to the words "an investigation, inquiry or trial relating to a criminal charge" occurring in the beginning of the said Rule. Therefore, the expression "termination of all proceedings relating to that charge "means that with regard to the charge all proceedings in the trial should come to an end. Since the Rule is confined only to the stage of trial and not to appellate stage, the respondents were under a legal duty to reinstate the petitioner in service after the petitioner was acquitted by granting all benefits of service available to the petitioner including the arrears of salary for the period of suspension.

7. It may be mentioned that the words "investigation", "inquiry", "trial" and "appeal" have been used in distinct senses in the Code of Criminal Procedure. Once Rule 4(2) of the Rules, 1999 uses the expression "investigation, inquiry or trial", it evidently excludes "appeal" from its purview even if we were to accept the submission of the learned Standing Counsel that "appeal" is continuation of "trial".

8. For the reasons given above, since the petitioner has already been reinstated in service under the interim order of this Court with effect from 21.12.2001 by order dated 4.6.2002 which was communicated to the petitioner, Annexure SCA-1 to the Supplementary Counter Affidavit, he would be deemed to be continuing in service and would be given all benefits of service including the arrears of salary during the suspension period.

9. In the result, this writ petition succeeds and is allowed. A writ of certiorari is issued and the impugned suspension order dated 2.7.2001 is quashed with the declaration that as the petitioner had already been acquitted on 16.9.2003, the said suspension order automatically came to an end and the effect of which would be that the suspension would be deemed to be non existent. A writ of mandamus is issued directing the respondents to give all service benefits to the petitioner including the arrears of salary during the suspension period, seniority, promotion etc. within a period of four months from the date of production of a certified copy of this order before the respondent no. 1.

Parties shall bear their own costs. Petition allowed.
