APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.10.2009

BEFORE
THE HON'BLE ARUN TANDON, J.

Second Appeal No. 802 of 2008

Smt. Katori Devi ...Defendant/Appellant
Versus
Nawab Singh and others ...Respondent

Counsel for the Appellant:
Sri Jai Shanker Prasad Singh

Counsel for the Opposite Parties:
Sri Madhav Jain

Code of Civil Procedure-Order XXXI Rule-3, 4 and 4-A-Appointment of legal Guardian-during pendency of suit mother of appellant died-Substitution of appellant being grandson through his sister- filed through the sister of minor-dismissed- even on record appeal stage same objection raised-held-hyper technical-finding recorded to the effect the sister had right to appear through minor- finding became final- if no challenge of the appointment of natural guardian-court not oblige to appoint legal guardian.

Held: Para 14 & 18

In the facts of the present case the Court records that the real sister had right to act as the guardian of the minor brother in view of Order XXXII Rule 4A of the Code of Civil Procedure and therefore it is in this background that appropriate orders were not passed on the application being paper no. 98A, as the real sister responded after substitution to represent the interest of minor brother, Shanker. It is legally to be presumed that she was authorised by the Court to act as such. In the opinion of the Court, objection now raised by co-defendant is hyper technical in nature and the courts below are legally justified in rejecting the same.

It is settled law that all Courts of law are established for furtherance of interest of substantial justice and not to obstruct the same on technicalities. Reference-- Jai Jai Ram Manohar Lal vs. National Building Material Supply; AIR 1969 SC 1267, wherein it has been held that if substantial justice and technicalities are pitted against each other, the cause of substantial justice should not be defeated on technicalities. No procedure in a Court of law should be allowed to defeat the cause of substantial justice on some technicalities. Reference-Ghanshyam Dass & Ors. vs. Dominion of India & Ors; (1984) 3 SCC 46.

Case law discussed:
AIR 1968 SC 954, W.P. No.45549 of 1993, decided on 20th December, 1993, AIR 1992 Punjab and Haryana 95. 1972 AIR(All) 513, AIR 1969 SC 1267, (1984)3 SCC 46.

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

1. Heard learned counsel for the appellant.

2. This is defendant's second appeal.

3. One Lochan Singh executed an agreement to sell in favour of respondent-plaintiff Nawab Singh on 1st July, 1995. Before the sale-deed could be executed in terms of agreement to sell, Lochan Singh expired. For specific performance of the contract, Nawab Singh filed original Suit No. 141 of 1996, impleading the mother of Lochan Singh, namely, Ramshree, as the defendant being the legal heir of Lochan Singh. In between, said Ramshree is stated to have executed a sale-deed in respect of same property in favour of Katori Devi and Sushila Devi. During the pendency of the suit, said Ramshree also expired and in her place, an application

for substitution of grand-son of Ramshree namely, Shanker, who was minor at the relevant time, and was orphan, as his mother and father pre-deceased the grand mother, was filed through his sister, namely, Babali. On the substitution application, notices were issued. It appears that natural guardian, Babali did not respond to the notice and therefore, an application was made by the plaintiff for appointment of an advocate as Guardian to Shanker under order of the Court with reference to the provisions of Order XXXII Rule 3 of the Code of Civil Procedure. Before formal orders could be passed on the application, Babali responded and appeared to protect the interest of her minor brother. She appeared before the trial court and filed her written submissions. She also contested the proceedings in the suit filed by Navab Singh. The suit was ultimately decreed under judgment and decree dated 31st January, 2007. Not being satisfied, Shankar through his sister Babali as well as subsequent purchasers, namely, Katori Devi and Sushila Devi filed Civil Appeal No. 13 of 2007. The appeal filed has also been dismissed by the first appellate court vide judgement and order dated 31st May, 2008. Hence the present second appeal.

4. This present second appeal has been filed by subsequent purchaser of the property in question, namely, Katori Devi only. Shanker through his guardian, Babali has been impleaded as proforma respondent no.2.

5. On behalf of the appellant, judgment and orders of the courts below are being challenged on the ground that despite application having been made under Order XXXII Rule 4 (4) of the Code of Civil Procedure, no orders on the applications were passed by the court concerned appointing a guardian for the minor defendant, Shanker and Smt. Babali therefore, had no right to represent the interest of Shanker. The decree was passed against the minor in absence of any guardian having been appointed under Order XXXII Rule 3 of the Code of Civil Procedure and therefore be declared as null and void.

6. I have considered the submissions made by the learned counsel for the appellant and have examined the records of the present second appeal.

7. The trial court framed issue no.9 for deciding as to whether the suit as filed by the plaintiff is hit by Order XXXII Rule 3 of the Code of Civil Procedure or not.

8. This Court finds that suit was instituted against Smt. Ramshree. After her death, Shanker, who was minor was substituted through her real sister. Notices were issued to the substituted legal heir through Babali. However, Smt. Babali did not respondent. Plaintiff therefore, made an application under Order XXXII Rule 4 (4) read with Section 151 of the Code of Civil Procedure for a guardian being appointed for Shanker. Before orders could be passed on the said application, Smt. Babali appeared as the Guardian of Shanker and filed her written statement, she also contested the proceedings. At no point of time, any objection was raised by the appellant qua substitution of Shanker, who was minor through her real sister in whose custody, he was residing. The suit was decreed by the trial court vide judgment and decree dated 31st January, 2007. Against the said decree, civil appeal no. 13 of 2007 was filed by Shanker

through her sister along with Smt. Katori Devi and Smt. Sushila Devi and the plaintiff was impleaded as respondent in the appeal. The first appellate court considered the objection with regard to the orders under Order XXXII Rule 4 (4) having not been passed on the application made by the plaintiff being paper no. 98-A and held that present appeal itself has been filed by Shanker through her natural guardian as the sister and at no point of time, any objection was raised, even when substitution was directed and amendments were made in the plaint itself before the trial court. The Court, therefore, held that in these circumstances, it cannot be said that sister was not looking after the interest of her minor brother or that she had any adverse interest in the property vis-a-vis minor brother Shanker. The first appellate court therefore, held that objection in that regard by the appellant was too technical in nature and cannot be used as a tool to defeat the lawful decree of the court below.

9. Before this Court the same plea has been raised qua orders being not passed on application being paper no. 98-A made under Order XXXII Rule 3 & 4 of the Code of Civil Procedure and therefore, the judgement and decree of the courts below be declared null and void.

10. This Court may record that Shanker has not chosen to file any appeal against the judgement and decree of the first appellate court and he has permitted the order become final.

11. For appreciating the controversy, it would be worthwhile to reproduce Order XXXII Rule 3, 4 and 4A as substituted in the State of Uttar Pradesh, which reads as follows:

"ORDER XXXII
SUITS BY OR AGAINST MINORS AND PERSONS OF UNSOUND MIND

3. **Guardian for the suit to be appointed by Court for minor defendant.--**(1) Where the defendant is a minor the Court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit for such minor.

(2) An order for the appointment of a guardian for the suit may be obtained upon application in the name and on behalf of the minor or by the plaintiff.

(3) Such application shall be supported by an affidavit verifying the fact that the proposed guardian has no interest in the matters in controversy in the suit adverse to that of the minor and that he is fit person to be so appointed.

(4) No order shall be made on any application under this rule except upon notice to any guardian of the minor appointed or declared by an authority competent in that behalf, or, where there is no such guardian, [upon notice to the father or where there is no father, to the mother, or where there is no father or mother, to other natural guardian] of the minor, or, where there is [no father, mother or other natural guardian], to the person in whose care the minor is, and after hearing any objection which may be urged on behalf of any person served with notice under this sub-rule.

[(4A) The Court may, in any case, if it thinks fit, issue notice under sub-rule (4) to the minor also.]

[(5.) A person appointed under sub-rule (1) to be guardian for the suit for a minor shall, unless his appointment is terminated by retirement or removal or death, continue as such throughout all

proceedings arising out of the suit including proceedings in any Appellate or Revisional Court and any proceedings in the execution of a decree.]"

4. **Who may act as next friend or be appointed guardian for the suit.** --(1) Any person who is of sound mind and has attained majority may act as next friend of a minor or as his guardian for the suit:

HIGH COURT AMENDMENTS

Allahabad.--(a) In Order XXXII, for rule 4, substitute the following rule, namely:---

"4.(1) Where a minor has a guardian appointed or declared by competent authority no person other than such guardian shall act as next friend, except by leave of the Court.

(2) Subject to the provisions of sub-rule (1) any person who is of sound mind and has attained majority may act as next friend of a minor, unless the interest of such person is adverse to that of the minor, or he is a defendant, or the Court for other reasons to be recorded considers him unfit to act.

(3) Every next friend shall, except as otherwise provided by clause (5) of this rule, be entitled to be reimbursed from the estate of the minor any expenses incurred by him while acting for the minor.

(4) The Court may, in its discretion, for reasons to be recorded, award costs of the suit, or compensation under Section 35A or section 95 against the next friend personally as if he were a plaintiff.

(5) Costs or compensation awarded under clause (4) shall not be recoverable by the guardian from the estate of the minor, unless the decree expressly directs that they shall be so recoverable."

4A. (1) Where a minor has a guardian appointed by competent authority no person other than such guardian shall be appointed his guardian for the suit unless the Court considers, for reasons to be recorded, that it is for the minor's welfare that another person be appointed.

(2) Where there is no such guardian or where the Court considers that such guardian should not be appointed it shall **appoint as guardian for the suit the natural guardian of the minor, if qualified, or where there is no such guardian the person in whose care the minor is, or any other suitable perso**n who has notified the Court of his willingness to act or failing any such person, an officer of the Court.

Explanation.---An officer of the Court shall for the purposes of this sub-rule include a legal practitioner on the roll of the Court."

12. From conjoint reading of Order XXXII Rule 3, 4 and 4A as applicable in the State of Uttar Pradesh, it would be apparently clear that if there is no guardian appointed by a competent authority and the Court considers that such guardian should not be appointed, or the Court feels that such appointed guardian should not act as the guardian for the minor in the suit, the natural guardian of the minor, if qualified or where there is no guardian, person in whose care the minor is, or nay other suitable person, who has notified the Court of his willingness to act or failing any such person, an officer of the Court can be appointed as the Guardian. What follows from the aforesaid is that the Court is under legal obligation to appoint the person declared to be the guardian of the minor by a competent authority at the first instance and if no such appointed guardian is available or when the Court

finds that such appointed guardian should not act, it has to appoint the natural guardian of the minor, if qualified, and where there is no such guardian the person in whose care the minor is as the guardian.

13. In the facts of the present case, it is apparently clear that the minor Shanker was in the care of his real sister as the father and mother had predeceased the grand parents. Further the minor was impleaded through is real sister and no objections were filed to such impleadment at any point of time by the respondent-defendants. Suit was contested all along and having lost before the trial court. Civil appeal was also preferred through the same guardian, namely, his real sister. The civil appeal has also been dismissed. The Subsequent purchaser, who has preferred the second appeal objects to the acting of the real sister as the guardian.

14. In the facts of the present case the Court records that the real sister had right to act as the guardian of the minor brother in view of Order XXXII Rule 4A of the Code of Civil Procedure and therefore it is in this background that appropriate orders were not passed on the application being paper no. 98A, as the real sister responded after substitution to represent the interest of minor brother, Shanker. It is legally to be presumed that she was authorised by the Court to act as such. In the opinion of the Court, objection now raised by co-defendant is hyper technical in nature and the courts below are legally justified in rejecting the same.

15. On a simple reading of the aforesaid provision, this Court may record that it is only an enabling provision, which permits the representation of the minor in a suit, in case it is found that natural guardian is not representing the interest of minor to the best of his interest or they have interest themselves in the dispute in question. Such enabling provisions cannot be read so as to suggest that if interest of minor is already represented by a natural guardian, even then an application under Order XXXII Rule 3 of the Code of Civil Procedure is required to be filed and any orders on such application are mandatory. If the interest of minor is protected by a natural guardian and there is no challenge either by the minor or by the plaintiff to such representation of the minor by the natural guardian, the provisions of Order XXXII Rule 3 of the Code of Civil Procedure will have no application.

Learned counsel for the appellant contends that there has to be an order by the Court, permitting the natural guardian to represent the interest of the minor.

16. I am of the considered opinion that such orders are procedural in natural and cannot be permitted to be used to defeat the judgment and decree of the Court at the behest of a third person, who is neither the minor nor his guardian of the minor, more so when there is nothing on record to establish that the natural guardian was not acting in the best interest of the minor or that she had some interest in the suit proceedings.

Learned counsel for the appellant has placed reliance upon the following various judgements in support of the case:

(1) Ram Chandra Arya vs. Man Singh & Anr. Reported in AIR 1968 SC 954,

(2) Sri Arjun Singh vs. IInd Addl. Civil Judge, Aligarh & Ors. passed in Civil Misc. Writ Petition No. 45549 of 1993, decided on 20th December, 1993,
(3) Gurpreeet Singh vs. Chatterbhuj Goel, reported in AIR 1992 Punjab and Haryana 95,
(4) Bachcha vs. Lakhpali Devi & Ors., reported in 1972 AIR (All) 513.

17. The judgements relied upon by the learned counsel for the appellant are clearly distinguishable in the facts of the present case, wherein the intent and scope of Order XXXII Rule 4A of the Code of Civil Procedure was neither under consideration nor has been examined.

18. It is settled law that all Courts of law are established for furtherance of interest of substantial justice and not to obstruct the same on technicalities. Reference-- Jai Jai Ram Manohar Lal vs. National Building Material Supply; AIR 1969 SC 1267, wherein it has been held that if substantial justice and technicalities are pitted against each other, the cause of substantial justice should not be defeated on technicalities. No procedure in a Court of law should be allowed to defeat the cause of substantial justice on some technicalities. Reference-Ghanshyam Dass & Ors. vs. Dominion of India & Ors; (1984) 3 SCC 46.

19. This Court may record that the findings recorded by the courts below in respect of right of Babali to represent Shanker under the impugned judgment has become final between the plaintiff and defendant-Shanker, as he has not chosen to file any second appeal.

20. No other point was pressed. No substantial questions of law arises. The second appeal is dismissed.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 26.08.2009

BEFORE
THE HON'BLE RAJESH CHANDRA, J.

Criminal Revision No. 2971 of 2009

Kailash Babu Gupta ...Revisionist
Versus
Sate of U.P. and another...Opposite Party

Counsel for the Revisionist:
Sri Satish Trivedi
Sri Ram Kishor Gupta

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

Code of Criminal Procedure-Section 397-Criminal Revision offened under Section 302,307,504 IPC-after committe of case before session judge-Discharge application or ground-during investigation nowhere named the revisionist merely on suspicion no charge can be framed-held-court not bound with conclusion of investigation officer-even on suspicion-charges can be framed-No illegality committed by Trail Court-No interference called for

Held: Para 13

It is true that the investigating officer has concluded that the involvement of the revisionist Kailash Gupta has not been found in the murder of Gaurav but the court is not bound by the conclusions arrived at by the investigating officer. There is sufficient material in the case diary showing that the accused Kailash Gupta is also prima facie involved in the murder of Gaurav and the infliction of injuries to Mangal Tiwari.

Case law discussed:
(2008) 10 SCC 681, C.B.I. (2007) 2 SCC (Cri) 514.

(Delivered by Hon'ble Rajesh Chandra, J.)

1. This revision has been filed for setting aside the order dated 7.7.2009 passed by Sessions Judge Jalaun rejecting the prayer of the revisionist for his discharge in S.T. No. 200/2008.

2. In brief the facts of the case are that the first informant Dinesh Kumar Tiwari lodged a report at P.S. Kandaura, District Jalaun on 16.8.2008 at 5.40 p.m. alleging therein that on 16.8.2008 at about 12.30 p.m. accused Kapil Gupta and Kailash Gupta abused Mangal Tiwari and Gaurav. When Mangal Tiwari objected to this, accused Kailash Gupta exorted Kapil to kill Mangal and Gaurav. Kapil thereafter, opened fire upon Mangal Tiwari and Gaurav causing injuries to both of them. Subsequently, Gaurav was declared dead.

3. After registration of case at crime no. 140 of 2008 for the offences under Section 302, 307, 504 I.P.C., investigation ensued and culminated in the filing of the charge sheet against Kapil Gupta and Kailash Gupta.

4. The Magistrate committed the case to the court of of Sessions where the case was registered as S.T. No. 200 of 2008.

5. The Revisionist Kailash Gupta moved an application in the court of Sessions Judge alleging therein that from the evidence collected during the investigation and the conclusions recorded by the investigating officer, it is confirmed that the revisionist Kailash Gupta was not present at the spot and as such there is no evidence against him for framing charges. He requested for his discharge from the case.

6. The learned Sessions Judge after hearing the prosecution as well as revisionist Kailash Gupta rejected the application vide order dated 7.7.2009 and it is against this order that the present revision has been filed.

7. I have heard the learned counsel for the revisionist as well as learned AGA and perused the papers filed with the revision.

8. The learned counsel for the revisionist argued that during investigation the statements of the eye witnesses namely Ramesh Shiv Hare, Pappu @ Abdul Kalam, Vijay Gupta, Vikram Singh, and Anil Gupta were recorded in which they all stated that the revisionist Kailash was not present at the spot at the time of alleged incident. The contention of the revisionist is that the learned Sessions Judge without appreciating the evidence collected during the investigation has passed the impugned order in arbitrary manner and that the order is illegal. In fact there was no evidence against the revisionist to frame the charge hence the impugned order passed by the Sessions Judge is liable to be set-aside.

9. I have considered over the argument and I feel that it does not contain any water. It is an established principal of law that the charge may be framed against accused even where there is a strong suspicion that the accused has committed the offence. In this connection

the judgement of Hon'ble Supreme Court in **Sanghi Brothers (Indore) Private Ltd. Vs. Sanjay Chaudhari and others (2008) 10 SCC 681** may be referred in which it was held that

10. *"even if there is a strong suspicion about the commission of offence and the involvement of the accused, it is sufficient for the court to frame a charge. At that stage, there is no necessity of formulating the opinion about the prospect of conviction".*

11. Similarly Hon'ble Supreme Court in **Soma Chakravarty Vs. State through C.B.I. (2007) 2 SCC (Cri) 514** held as under :

"it may be mentioned that the settled legal position, is that if on the basis of material on record the court could form an opinion that the accused might have committed offence it can frame the charge, though for conviction the conclusion is required to be proved beyond reasonable doubt that the accused has committed the offence. At the time of framing of the charges the probative value of the material on record cannot be gone into, and the material brought on record by the prosecution has to be accepted as true at that stage. Before framing a charge the court must apply its judicial mind on the material placed on record and must be satisfied that the commitment of offence by the accused was possible. Whether, in fact, the accused committed the offence, can only be decided in the trial".

12. In view of the above rulings it is clear that if there is sufficient material on record that the accused might have committed the offence, a charge can be framed against him.

13. In the present case there is sufficient evidence to show the involvement of the accused in the commission of the Crime. There is evidence of Dinesh Kumar Tiwari as well as Mangal Tiwari that it was the accused applicant Kailash Gupta who had exorted for opening fire and thereafter, Kapil Gupta had opened fire causing injuries to Gaurav and Mangal. Subsequently, Gaurav succumbed to the injuries. It is true that the investigating officer has concluded that the involvement of the revisionist Kailash Gupta has not been found in the murder of Gaurav but the court is not bound by the conclusions arrived at by the investigating officer. There is sufficient material in the case diary showing that the accused Kailash Gupta is also prima facie involved in the murder of Gaurav and the infliction of injuries to Mangal Tiwari.

14. The learned Sessions Judge has not committed any illegality in rejecting the discharge application of the accused Kailash Gupta and I do not find any reason to interfere with the order of the Sessions Judge passed on 7.7.2009.

15. The revision is therefore, dismissed.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 07.10.2009

BEFORE
THE HON'BLE VIJAY KUMAR VERMA, J.

Criminal Misc. Application No. 19770 of 2009

Anil Kumar Vashisth ...Applicant
Versus
State of U.P. & others ...Opposite Parties

Counsel for the Applicant:
Sri R.K. Kaushik

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

Code of Criminal Procedure-482- Procedure after receiving final report on protest application an order accepting final report ignoring protest application- even without giving any notice to informant-illegal-procedure contained in Chapter XV should be followed treating complaint to the protest application- order passed by Courts below set-aside- matter remanded for fresh consideration.

Held: Para 14

Consequently, both the applications under Section 482 Cr.P.C. are allowed. Setting aside the impugned orders, the courts below are directed to pass orders on the protest petitions filed by the applicants against final reports in both the cases, treating the same as complaint and following the procedure laid down under section 200 and 202 Cr.P.C.

Case law discussed:
2003 (46) ACC182.

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

1. *"Whether the final report can be accepted without passing any order on the protest petition filed by the complainant in the case where prima facie offences are disclosed from the averments made in the FIR,: is the main legal question that falls for consideration in both these applications under section 482 of the* Code of Criminal Procedure (in short, 'the Cr.P.C.').

2. By means of Criminal Misc. Application No. 19770 of 2009, order dated 21.03.2009 passed by the Special Judge, (D.A.A.), Jhansi in Criminal Misc. Case No. 690 of 2007 (Anil Kumar Vashisth Vs. Shiv Prakash and others) under section 395 IPC, P.S. Irach, District Jhansi is sought to be quashed, whereas in Criminal Misc. Application No. 19771 of 2009, prayer to quash the order dated 20.05.2009 passed by the judicial Magistrate, Garotha in Criminal Misc. Case No. 52 of 2008 (Km. Bhanwati Vs. Badri and others) under section 379,352,504, 506 IPC P.S. Garotha, District Jhansi has been made.

3. Although different orders have been challenged by means of these applications under section 482 Cr.P.C., but since the common legal question is involved in both these applications, hence for the sake of convenience, they are being decided by this common order.

4. Shorn of unnecessary details, the facts emerging from the record leading to the filling of these applications, in brief, are that an FIR was lodged on 17.10.2007 by Anil Kumar Vashisth (applicant in Application No. 19770 of 2009) at P.S. Irach (Jhansi), where a case under section 395, 397 IPC at case crime No. 320 of 2007 was registered against Sri Prakash, Ashok Kumar, Sri Ram, Ram Kumar, Lakhan Lal, Mahadev (opposite parties

No. 2 to 7) and 30 unknown persons. After investigation, final report was submitted on next day i.e. 18.10.2007. Against that final report, the applicant Anil Kumar Vashisth filed protest petition in the Court of Special Judge, (D.A.A.), Jhansi in Criminal Misc. Case No.690 of 2007. After hearing parties counsel, the learned Special Judge, (D.A.A.) Jhansi accepted the final report vide impugned order dated 21.03.2009, but did not pass any order on the protest petition. This order has been challenged in Application No.19770 of 2009. On the basis of the application under section 156 (3) Cr.P.C. moved by Km. Bhanwati (applicant in Application No. 19771 of 2009), an FIR was registered in pursuance of the order passed on that application on 20.07.2008 at P.S. Garotha, where a case under section 379, 352, 504, 506 IPC was registered at case crime No. 378 of 2008 against Badri, Phool Singh, Ajay, Indra Kumar and Hari (opposite parties No. 2 to 6). After investigation of this case also, final report was submitted by the investigating officer, against which the applicant Km. Bhanwati filed protest petition on 14.12.2008 in Criminal Misc. Case No. 52 of 2008 in the Court of Judicial Magistrate, Garotha, who vide impugned order dated 20.05.2009 accepted the final report, without passing any order on the protest petition. This order has been challenged in Criminal Misc. Application No.19971 of 2009.

5. I have heard arguments of Sri R.K. Kaushik, Advocate appearing for the applicants and AGA for the State. Since the accused/opposite parties had no right to participate in the proceedings, which have arisen due to submission of final report and filing protest petition by the complainants (applicants), hence notices have not been issued to the accused/opposite parties in both the cases.

6. The first and foremost submission made by the learned counsel for the applicants was that at the time of disposal of the final reports, the learn ed courts below were bound to treat the protest petitions of the complainants as complaint and after adopting the procedure laid down in Chapter XV Cr.P.C., order under Section 203 or 204, as the case may be, ought to have been passed and since this procedure was not followed by the Courts below while deciding the final reports and protest petitions, hence, the impugned orders being wholly illegal should be set-aside and the cases be sent back to the Courts below for passing fresh order on the protest petitions filed by the complainants against the final reports treating the same as complaints and following the procedure under Section 200 and 202 Cr.P.C.

7. The learned A.G.A. on the other hand submitted that the Magistrate is not bound in each and every case to treat the protest petition as complaint, and hence, there is no scope to make any interference by this Court in the impugned orders, as the said orders do not suffer from any legal infirmity.

8. Having taken the submissions made by the parties' counsel into consideration and after carefully going through the averments made in the first information reports in both the cases, I am of the opinion that in present cases, the protest petitions filed by the applicants against final reports, ought to have been treated as complaint and after following the procedure laid down under Chapter XV Cr.P.C., order under section 203 or

204 Cr.P.C., as the case may be, should have been passed.

9. There is no provision in the Code of Criminal Procedure to file the protest petition the final report. However, the Hon'ble Apex Court in the case of ***Bhagwant Singh Vs. Commissioner of Police*** (supra) hold that when on consideration of the report made by the Officer Incharge of the Police Station under Sub-Section (2)(i) of Section 173 Cr.P.C., the Magistrate is not inclined to take cognizance of the offence and issue process, the informant must be given an opportunity of being heard, so that he can make his submission to persuade the Magistrate to take the cognizance of the offence and issue process. Siminlar view has been expressed by the Hon'ble Apex Court in the case of ***Gangadhar Janardan Mhatre Vs. State of Maharashtra*** (supra). It is further held in ***Gangadhar Janardan Mhatre*** case (supra) that in a case where the Magistrate, to whom a report is forwarded under sub-section (2) (i) of Section 173 Cr.P.C., decides not to take cognizance of the offence and to drop the proceeding or takes the view that there is no sufficient ground for proceeding against some of the persons mentioned in the first information report, the Magistrate must give notice to the informant and provide him an opportunity to be heard at the time of consideration of the report. There is nothing in both the rulings that in each and every case the Magistrate is bound to adopt the procedure of complaint case on the protest petition. Only the opportunity of hearing is to be granted to the informant at the time of consideration of the final report. If from the allegations made in the first information report any criminal offence is not primal facie disclosed, then the Magistrate is not bound to treat the protest petition as complaint and in such case after dismissing the protest petition, the final report may be accepted. However, if in any case, from the averments made in the First Information Report, prima facie criminal offence is disclosed, but the material in the case diary submitted with the final report is not sufficient to take cognizance and to issue process against the accused, then in such case, as held by this Court in the cases of **Anil Kumar Chauhan Vs. State of U.P.** and **Mohd. Yusuf Vs. State of U.P.** (supra), the accused can not be summoned to face the trial merely on the basis of the protest petition and other material including affidavits filed in support thereof without following the procedure laid down under section 200 and 202 Cr.P.C.

10. The Division Bench of this Court in the case of ***Pakhandu Vs. State of U.P.***(supra) after making reference of certain decisions of Hon'ble Apex Court has held as under in para 14 of the report at page 2546:-

"***14.*** *From the aforesaid decisions, it is thus clear that where the Magistrate receives final report, the following four courses are open to him and he may adopt any one of them as the facts and circumstances of the case may require:*
(i) he may agreeing with the conclusions arrived at by the police, accept the report and drop the proceedings. But before so doing, he shall give an opportunity of hearing to the complainant; or
(ii) he may take cognizance under Section 190 (1)(b) and issue process straightway to the accused without being bound by the conclusions of the

investigating agency, where he is satisfied that upon the facts discovered or unearthed by the police, there is sufficient ground to proceed; or
(iii) he may order further investigation, if he is satisfied that the investigation was made in a perfunctory manner; or
(iv) he may, without issuing process or dropping the proceedings decide to take cognizance under Section 190 (1)(a), upon the original complaint or protest petition treating the same as complaint, Cr.P.C. and thereafter decide whether complaint should be dismissed or process should be issued.

11. From the afore-cited observations of the Division Bench also, it is clear that the Magistrate is not bound to treat the protest petition as complaint in each and every case and if the Magistrate agreeing with the conclusions arrived at by the police decides to accept the final report and to drop the proceedings, then opportunity of hearing has to be given to the complainant before passing order on the final report. According to the ***Pakhandu*** case (supra), the fourth course open to the Magistrate is that without issuing process or dropping the proceedings, he may decide to take cognizance under Section 190 (1)(a) Cr.P.C., upon the original complaint or protest petition treating the same as complaint and proceed to act under Section 200 and 202 Cr.P.C. and thereafter to deicde whether the complaint may be dismissed or process should be issued. The procedure of fourth course of ***Pakhandu case*** (supra) should be followed in the cases where prima facie offences are disclosed from the averments made in the First Information Reports; but in the cases, where the first information report does not disclose any criminal offence and final report is submitted by the investigating officer, then there is no justification in such cases to compel the Magistrate to treat the protest petition against final report as complaint and to follow the procedure laid down in Chapter XV Cr.P.C.

12. In view of the observations made herein-above, let us now see whether in instant cases, the learned Courts below were justified in accepting the final report without passing any order on the protest petitions. Annexure 12 in Criminal Misc. Application No. 19770 of 2009 is the copy of the FIR of case crime No. 320/2007 of P.S. Erach (Jhansi). On the basis of the averments made in the FIR, prima facie offences are disclosed. In the like manner, from the averments made in the First Information Report (Annexure-1 of Criminal Misc. Application No.19771 of 2009) of case crime no. 378 of 2008 of P.S. Garotha (Jhansi), prima facie offences are disclosed. Therefore, if the materials in the case diary submitted with the final reports by the investigating officer in both these cases were not sufficient to take cognizance against the accused persons, then having regard to the allegations made in the first information reports, the protest petitions of the applicants ought to have been treated as complaint and after following the procedure laid down in Chapter XV Cr.P.C., the courts below ought to have decided whether the complaint may be dismissed or process against the accused should be issued. In case the process is issued against the accused, then the final report has to be rejected.

13. The Hon'ble Apex Court in the case of ***Mahesh Chand Vs. B. Janardhan Reddy and another 2003 (46) ACC182***

has held that even after accepting the final report, cognizance of the offence can be taken on the complaint/protest petition filed by the complainant on the same or similar allegations. Therefore, having regard to the law laid down by the Hon'ble Apex Court in the case of ***Mahesh Chand Vs. B. Janardhan Reddy*** (supra) and the observations made by the Division Bench of this Court in the case of ***Pakhando Vs. State*** (supra) if would be in the interest of justice to send the cases back to the court below for passing order on the protest petitions treating the same as complaint and following the procedure laid down in Chapter XV Cr.P.C.

14. Consequently, both the applications under Section 482 Cr.P.C. are allowed. Setting aside the impugned orders, the courts below are directed to pass orders on the protest petitions filed by the applicants against final reports in both the cases, treating the same as complaint and following the procedure laid down under section 200 and 202 Cr.P.C.

15. This order shall form part of the record of Criminal Misc. Application No. 19770 of 2009 and copy thereof will be kept on the record of Criminal Misc. Application No.19771 of 2009.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.11.2009

BEFORE
THE HON'BLE ARUN TANDON, J.

Civil Misc. Writ Petition No.42640 of 2009

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

Counsel for the Petitioner:
Sri Shatrughan Singh

Counsel for the Respondent:
C.S.C.

Constitution of India-Article 14-discrimination-exclusion from eligibility of B.Ed. degree holders from the State of J. & K for Special B.T.C. Training Course 2007-held-not discriminatory.

Held: Para 21

In these set of circumstances if the State with reference to the letter of the NCTE has decided to entertain the applications of the candidates who have obtained a B.Ed. Degree from the institutions recognized by NCTE or who under the Full Bench judgment of the High Court may become entitle to such consideration alone. Such decision cannot be termed as arbitrary in view of the specific norms of teachers education provided under the NCTE Act which are not applicable to the institutions in Jammu & Kashmir. The candidate with a Degree of B.Ed. from institutions in Jammu & Kashmir form a different class and if such class of candidates have been excluded from consideration for admission to BTC Special Training Course, 2007 by the State Government purposely, it cannot be said to be violative of Article 14 of the Constitution of India. Such action of the district authorities to exclude the candidates like

the petitioner from the zone of consideration is in conformity with the terms and conditions laid down in the Government Order issued under the permission granted by the NCTE.

Case law discussed:

(2006) 9 SCC, 1.

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

1. This bunch of writ petitions has been filed for a writ of mandamus commanding the Director, State Council for Educational Research and Training, U.P. Nishatganj, Lucknow as well as Principal of District Institute of Education and Training of various districts of State of Uttar Pradesh to not to reject the application made by the petitioners for admission to Special BTC Training Course, 2007 only on the ground that they had obtained a Degree of B.Ed. from an institution/University situate in the State of Jammu & Kashmir.

2. Facts giving rise to the present writ petition in short are as follows:

On 14.11.2008 the State Government after obtaining permission from National Council for Teachers Education (NCTE) decided to admit students to Special BTC Training Course of the year 2007. Accordingly an advertisement has been published. Besides other one of the essential conditions provided for being considered for admission to aforesaid Special BTC Course is that the candidate must have a Degree of B.Ed. From a Degree College established by the State Government/Central Government/a recognized affiliated Degree College, duly approved by the NCTE for the B.Ed. Course. Since the issue raised in the present writ petitions is confined to the aforesaid condition only, all other conditions mentioned in the Government Order are not being referred to.

3. The petitioners before this Court claim that they have obtained a Degree of B.Ed. from an educational institute/University situate in the State of Jammu & Kashmir. According to the petitioners as per Section 1 (2) of the NCTE Act, 1993, the area of operation of the aforesaid Act is the entire country of India except the **State of Jammu & Kashmir**. It is contended that the eligibility clause under the Government Order which requires a candidate to be possessed of a Degree of B.Ed. from institute/University duly approved by NCTE (for grant of such Degree/Certificate) cannot be applied qua the candidates like the petitioners who have obtained the B.Ed. Degree from an institution within the State of Jammu & Kashmir. Therefore, it is prayed that the applications made by the petitioner be directed to be entertained by the State respondents as petitioners have a Degree of B.Ed. from a University duly established.

4. On behalf of the writ petitioners a large number of interim orders which have been granted in similar matters have been referred to.

5. The contention raised on behalf of the writ petitioners is opposed by the Standing Counsel and it is submitted that the State Government has the competence to lay down the norms and conditions for admission to Special BTC Training Course 2007 inasmuch as the purpose of such Special BTC Training Course is to train the candidates for appointment as Assistant Teacher in Parishadiya Vidyalayas, appointment whereof is

regulated by the **U.P. Basic Education Teachers Service Rules, 1981**. He submits that the State Government in its wisdom had decided to permit admission to Special BTC Course to only those candidates who have a Degree of B.Ed. from duly established Degree Colleges which have been approved for B.Ed. Course by the NCTE. It is clarified that NCTE Act, 1993 has been promulgated by the Parliament for regulating the standards of teachers training for appointment from the stage of Nursery schools to the stage of Secondary Education throughout the country. If the State Government insists that a candidate for admission to BTC Special Course must have obtained his B.Ed. Degree from NCTE Recognized College, it cannot be said that such condition is arbitrary. It is clarified that the State is presumed to know that the NCTE Act is not applicable to the State of Jammu & Kashmir and, therefore, it has conscientiously decided to exclude the candidates like the petitioners who have a Degree from institutions which cannot be granted recognition by NCTE.

6. I have heard learned counsel for the parties and have gone through the records of the present writ petition.

7. The State legislature by means of U.P. Basic Education Act, 1972 has constituted U.P. Basic Shiksha Parishad which in turn has established Parishadiya Vidyalayas throughout the State of U.P. for imparting education from classes Nursery to Class VIII. The institutions have been categorized as Nursery Schools, Junior Basic Schools and Senior Basic Schools (herein after referred to as as Basic Schools). For appointment of teachers in these Basic Schools a set of statutory Rules have been framed namely U.P. Basic Education (Teachers) Service Rules, 1981 (herein after referred to as Rules of 1981) in exercise of power under Section 9 of the U.P. Basic Education Act, 1972. Rule 8 of the Rules of 1981 lays down the essential qualification for appointment of Assistant Master and Assistant Mistress of Basic Schools. According to it a candidate has to be possessed of Bachelor's Degree from a University established by law in India together with Teachers Training qualification namely a Basic Teacher's Certificate, HTC etc. or any other training qualification recognized by the Government as equivalent thereto.

8. Thousands of post of Assistant Teacher in Basic Schools are vacant due to non-availability of candidates having Basic Teacher's Training Certificate (BTC), HTC etc.

9. The Basic Training Course is offered by District Institute of Education and Training (herein after referred to as the DIET) established by the State in different districts. However, the intake of the students for imparting training in respective DIET's is limited. The number of candidates who have regular Basic Teachers Training is too meager to cope with the requirement of Assistant Teachers in Basic School. To meet the requirements of Assistant Teacher in basic schools, the State formulated a scheme for imparting Special Basic Training to the candidates, who are already B.Ed., knows as Special Basic Training Course. The case in hand relates to Special Basic Training Course 2007.

10. The Parliament has enacted the National Council for Teacher Education

Act, 1993 (herein after referred to as the Act of 1993) with a view to achieve planned and coordinated development for teacher's education for the regulation and proper maintenance of norms and standards in the teacher's education and for matter connected therewith. Prior to enforcement of the Act of 1993, the National Council for Teacher Education was in existence since 1973 to guide the system of teacher education as an advisory body till it was declared as an statutory body with the functions and object entrusted to it under the Act of 1993. The National Council for Teacher Education Act, 1993 has been enforced w.e.f. 1st July, 1995 by virtue of notification issued by the Central Government under Section 1 (3) of the 1993 Act. The Act of 1993 has been enacted by Parliament in exercise of power under Entry 66 of the Union List of Seventh Schedule of the Constitution of India.

11. A Constitution Bench of the Apex Court in the case of **State of Maharashtra vs. Sant Dhyaneshwar Shiksha Shastra Mahavidyalaya and others reported in (2006) 9 SCC, 1** had the occasion to consider the provisions of National Council for Teacher Education Act, 1993 in context of power of the State regarding recognition of educational institution to start B.Ed. course. The Apex Court in paragraph 62 and 63 has held as follows :

"**62**. From the above decisions, in our judgment, the law appears to be very well settled. So far as coordination and determination of standards in institutions for higher education or research, scientific and technical institutions are concerned, the subject is exclusively covered by Entry 66 of List I of Schedule VII to the Constitution and the State has no power to encroach upon the legislative power of Parliament. It is only when the subject is covered by Entry 25 of List III of Schedule VII to the Constitution that there is a concurrent power of Parliament as well as the State Legislatures and appropriate Act can be made by the State Legislature subject to limitations and restrictions under the Constitution.

63. In the instant case, admittedly, Parliament has enacted the 1993 Act, which is in force. The preamble of the Act provides for establishments National Council for Teacher Education (NCTE) with a view to achieving planned and coordinated development of the teacher education system throughout the country, the regulation and proper maintenance of norms and standards in the teacher education system and for matters connected therewith. With a view to achieving that object, the National Council for Teacher Education has been established at four places by the Central Government. It is thus clear that the field is fully and completely occupied by an Act of Parliament and covered by Entry 66 of List I of Schedule VII. It is, therefore, not open to the State Legislature to encroach upon the said field. Parliament alone could have exercised the power by making appropriate law. In the circumstances, it is not open to the State Government to refuse permission relying on a State Act or no ? policy consideration?.

12. The permission to run the Special Basic Training Course 2007 has been granted by the Regional Committee under Section 15 of the Act of 1993. It is useful to quote the relevant portion of

order of the Regional Committee granting permission to run Special Basic Training Course vide its order dated 27th June, 2007, which reads as follows :

"Whereas, NRC in its 118th (1st sitting) meeting held on 16th - 18th June, 2007 after thorough discussion and observation related documents, noted the following:-

As per proposal submitted by the Government, it has been informed that admission will be granted in this special programme of six months duration only to those candidates who are already B.Ed.

The NRC appreciated the proposal of U.P. Government decided to grant approval to conduct the special BTC programme bridge course as proposed by the state. It will be only one approval. Teachers are to be trained only in DIETs recognizes NRC-NCTE. The committee also observed that as this programme will be conducted only in recognised DIETs, so there is not for any inspection.

Now, therefore, in exercise of the powers vested Section 15(3)(b) of the NCTE Act, the Regional Commissioner hereby grants one time approval for training 60,000 candidates primary teachers who are already B.Ed. subject to the fulfil of the following :

a. The teachers are to be trained only in the list of recognised by NRC-NCTE.

b. The SCERT to submit the date of commence of the course along with the list of the recognized where the proposal training is to be conducted.

c. The quarterly progress report of the programme to be submitted to NRC-NCTE.

d. The curriculum as finalized in the meeting between NCTE and the State Government of U.P. followed for the programme.?

13. From the above quoted order of the NCTE, it is clear that NCTE granted permission to run the Special Basic Training Course for the candidates, who are already B.Ed.

14. The Full Bench of this Court in the case of Bhupendra Nath Tripathi and others vs. State of U.P. and others (Special Appeal No. 858 of 2008) had examined the following three issues:

(I) Whether after the enforcement of 1993 Act the candidates who obtained B.Ed. degree from an institution or a University during the period when the application of the Institution or University for grant of recognition was pending are eligible for Special B.T.C. Course-2007 as held by Division Bench judgement in ***Ekta Shukla's*** case?

Whether the candidates who have obtained degree from an institution or University recognised by NCTE are only eligible for Special B.T.C. Course 2007 as held by Division Bench judgement in Sanjai Kumar and Sunita Upadhyay's case?

Or

(II) Whether recognition, as referred to in the proviso to Section 14(1) of the N.C.T.E. Act 1993 Act can be treated to be deemed recognition under the 1993 Act of an institution or a University for the period application were pending ?

(III) Whether the exclusion of those candidates from field of eligibility for Special B.T.C. Course ? 2007 who have obtained B.Ed. degree prior to enforcement of 1993 Act or after the enforcement of 1993 Act during the period when the application of the Institution or the University was pending consideration, is arbitrary and unreasonable violative of Articles 14 and 16 of the Constitution of India ?

15. The Full Bench after referring to the words who are already B.Ed. has held that the permission does not require that such B.Ed. Degree should have been obtained from a NCTE recognized institution alone and no such limited interpretation or scope is contemplated in the letter of the NCTE granting the permission.

16. The aforesaid observation of the Full Bench in the case of Bhupendra Nath Tiwari have to be read with reference to the questions which were examined as quoted above inasmuch as the Full Bench even after making the aforesaid observations in its answer to question no. 1 has held as follows :

17.. "The candidates, who have B.Ed. degree obtained from an institution or University during the period when the application of the institution or the University for grant of recognition under Section 14 of National Council for Teacher Education Act, 1993 was pending, are eligible for Special Basic Training Course 2007 as laid down by the Division Bench in ***Ekta Shukla's*** case (supra)?.

18. Similarly while answering question no. 2 it has been held as follows:

"The proviso to Section 14(1) recognizes continuance of the course, which was being run immediately before the appointed day provided application is submitted within the continuance of such course is deemed recognition of such course and degree awarded therein by express provisions of proviso to Section 14(1) of National Council for Teacher Education Act, 1993."

Lastly while answering question no. 3 it has been held as follows:

"The exclusion of the candidates from the field of eligibility for Special Basic Training Course 2007, who have obtained B.Ed. degree prior to enforcement of National Council for Teacher Education Act, 1993 or after the enforcement of National Council for Teacher Education Act, 1993 during the period when the application of the institution or the University was pending consideration is arbitrary, unreasonable and violative of Articles 14 and 16 of the Constitution of India. The above two categories of candidates are also eligible to participate in Special Basic Training Course 2007."

It will thus be seen that the Full Bench of this Court has not held that any candidate who has obtained a Degree of B.Ed. subsequent to the enforcement of NCTE Act of 1993 from an institution whose application for approval was not pending consideration before the NCTE or was rejected to be qualified for the purposes of admission to BTC Course, 2007. The Full Bench has recognized the B.Ed. Degree granted prior to enforcement of Act of 1993 or such B.Ed. Degrees granted by only those institutions which had made their applications for

recognition to the NCTE after coming into the force of NCTE Act but their recognition applications had not been finally decided.

The students who had a degree of B.Ed. from other two categories of institutions i.e.:

a. the institution which did not make any application for recognition after coming into the Act of 1993.

b. The institutions which made the applications but their applications had been rejected by the NCTE on various grounds have not been held entitled for admission to Special BTC Course, 2007.

This Court has been made aware of the interim order passed by the Hon'ble Apex Court in the Special Leave to Appeal against the Full Bench judgment of this Court in the Case of Bhupendra Nath Tripathi which in the opinion of the court does in any way help the petitioners.

The issue before this Court is more or less similar to the category of institutions who had not made the applications for recognition even after coming into force by NCTE Act of 1993. The only difference being that the institutions in the State of Jammu & Kashmir can not make such applications as the Act of 1993 had no territorial application in that State.

19. In the opinion of the Court the State of U.P. in its wisdom has decided to entertain applications of those candidates only who have obtained a Degree of B.Ed. from the institution recognized by NCTE. The words had a Degree of B.Ed. even if given the broader interpretation as per the answers given by the Full Bench in the case of Bhupendra Nath Tripathi to question nos. 1, 2 and 3 will not cover an institution situate in the State of Jammu & Kashmir inasmuch as qua the State of Jammu & Kashmir, the NCTE Act has no territorial operation. Therefore, the issue of any approval being applied or being granted by the NCTE to such institutions of the State of Jammu & Kashmir will not arise.

20. The competence of the State Government to lay down the conditions for entertaining the applications for admission to BTC Course 2007 as well as those which flow from the letter of the NCTE while granting permission to start Special BTC Course 2007 are not under challenge.

21. In these set of circumstances if the State with reference to the letter of the NCTE has decided to entertain the applications of the candidates who have obtained a B.Ed. Degree from the institutions recognized by NCTE or who under the Full Bench judgment of the High Court may become entitle to such consideration alone. Such decision cannot be termed as arbitrary in view of the specific norms of teachers education provided under the NCTE Act which are not applicable to the institutions in Jammu & Kashmir. The candidate with a Degree of B.Ed. from institutions in Jammu & Kashmir form a different class and if such class of candidates have been excluded from consideration for admission to BTC Special Training Course, 2007 by the State Government purposely, it cannot be said to be violative of Article 14 of the Constitution of India. Such action of the district authorities to exclude the candidates like the petitioner from the zone of consideration is in conformity

with the terms and conditions laid down in the Government Order issued under the permission granted by the NCTE.

22. Writ petition is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.10.2009

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

Civil Misc. Writ Petition No. 57354 of 2009

C/M Lok Bharti Inter College & another ...Petitioner
Versus
State of U.P. and others ...Respondent

Counsel for the Petitioner:
Sri Chandra Shekhar Srivastav
Sri Sudhanshu Srivastava

Counsel for the Respondent:
Sri P.K. Srivastava
Sri N.S. Yadav
Sri Ajay Kumar Yadav
C.S.C.

Constitution of India Art-226-Natural justice-Dismissal order passed-in absence of reply filed by the petitioner-inspite of repeated request to supply the copy of complaint for proper explanation-not given even of the direction of Court-held- non sustainable-non supply of copy cause great prejudice the petitioner-order impugned quashed.

Held: Para 6

In the opinion of the Court non-supply of the said document to the petitioner inspite of repeated demands violates the principles of natural justice and the Court is supported in its opinion by the Division Bench in the case Rayeen Fruits Co. and others Vs. State of U.P. and others reported in 2000 RD 440 and M/s Nagarjuna Constructions Co. Vs. Govt. of A.P. and others reported in 2008(12) JT 371 Paragraph 30. On account of non-supply of the objection filed by the respondent no.4 the cause of the petitioner has been prejudiced and therefore, the order impugned dated 13.10.2009 is un-sustainable.

(Delivered by Hon'ble A.P. Sahi, J.)

1. Heard Sri Sudhanshu Srivastava learned counsel for the petitioner and Sri P.K.Srivastava for the respondent no.4 and the learned standing counsel for the respondent nos. 1,2 and 3. In view of the consent of the learned counsels the petition is being disposed of finally at this stage without awaiting any further affidavits.

2. The prime issue raised by the petitioner in this petition is that the impugned order dated 13.10.2009 is in violation of principles of natural justice inasmuch as the directions of this Court in the judgment dated 3.8.2009 have not been complied with in right earnest and the petitioner's claim has been non-suited without letting the petitioner know about the objection raised by the respondent no.4. Learned counsel for the petitioner contends that on account of the aforesaid twin errors committed by the District Inspector of Schools the impugned order is liable to be set aside as it is in gross violation of principles of natural justice.

3. Learned counsel for the petitioner contends that there is no indication or mention of the demand made by the petitioner for supplying a copy of the reply submitted by the respondent no.4 on 29.9.2009.

4. Sri Srivastava contends that after having received the contention on behalf of the petitioner the District inspector of Schools vide order dated 2.9.2009 called upon the respondent no.4 to submit his reply which was submitted and which has been considered in detail while passing the impugned order. The error committed by the District Inspector of Schools is that inspite of a written request made, the said reply of the respondent no.4 had never been made available to the petitioner and in the absence of any knowledge of the contents of such objection, the petitioner had absolutely no occasion to submit a reply to the same.

5. Having heard learned counsel for the parties, this Court does not find any recital in the order dated 13.10.2009 that the petitioner was ever made aware about the reply submitted by the respondent no.4 and the objections taken therein. This was necessary as the reply submitted by the respondent no.4 has been accepted by the District inspector of Schools and has also been made the basis of passing of the impugned order. Learned counsel for the respondents have also not been able to point out any such material or recital to that effect.

6. In the opinion of the Court non-supply of the said document to the petitioner inspite of repeated demands violates the principles of natural justice and the Court is supported in its opinion by the Division Bench in the case Rayeen Fruits Co. and others Vs. State of U.P. and others reported in 2000 RD 440 and M/s Nagarjuna Constructions Co. Vs. Govt. of A.P. and others reported in 2008(12) JT 371 Paragraph 30. On account of non-supply of the objection filed by the respondent no.4 the cause of the petitioner has been prejudiced and therefore, the order impugned dated 13.10.2009 is un-sustainable.

7. For the reasons stated herein above the order dated 13.10.2009 is set aside and a direction is issued to the respondent no.3 to proceed to pass a fresh order after giving opportunity of hearing to the petitioner committee of management to rebut the response submitted by the respondent no.4 as expeditiously as possibly preferably within a period of four weeks from the date of production of a certified copy of this order before him.

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

ORIGINAL JURISDICTION
CIVIL SIDE
DATED ALLAHABAD: 19:08:2009.
BEFORE
THE HON'BLE A.P. SAHI J.

Civil Misc. Writ Petition No. 3268 of 2006

Sanskrit Grah Nirman Sahkari Samiti Ltd. ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri S. Niranjan,
Sri. Dharam Pal Singh
Sri Vinod Kumar Singh

Counsel for the Respondents:
Sri Ramesh Upadhyaya
Sri Ajit Kumar Singh
Sri M.C. Tripathi
S.C.

Constitution of India Art.-226- Expungtion of long term entry in favour of petitioner-without notice opportunity-

held-order passed utter violation of principle of Natural Justice-not sustainable.

Held: Para 8

Having heard learned counsel for the parties and the submissions raised on their behalf , the petitioners have a remedy of getting their rights declared by filing a regular suit. Nonetheless, keeping in view the law laid down in the judgment referred to herein above, the order expunging the entries that have continued for decades together ought not to have been passed without putting the petitioner to notice.

Case law discussed

Chaturgun and others Versus State of U.P. and others reported in 2005 ALJ 756.

(Delivered by Hon'ble A.P. Sahi, J.)

1. Heard Sri M.N.Singh learned counsel for the petitioner and the learned standing counsel for the respondent nos. 1,2 and 3 and Sri Ajit Singh for the respondent no.4.

2. The challenge is to the order dated 10.4.95 as upheld by the learned Commissioner in revision vide order dated 23.11.05 whereby the entries allegedly in favour of the petitioner have been expunged.

3. The contention advanced on behalf of the petitioner is that the petitioner society is in possession of plot nos. 268M, 270M and 281M total area of 20 Bighas and 3 Biswas situate in Mauja Bingawan Pargana/Tahsil Kanpur , district Kanpur Nagar. It is submitted that the land in question was recorded in the name of the tenure holder since 1359 F and the said tenure holder executed a sale deed in favour of one Umesh Chandra Bharadwaj. The said Umesh Chandra Bharadwaj had executed a registered sale deed in favour of the petitioner society in 1966 where after the petitioner society is in continuous possession of the land in dispute.

4. It is alleged that an ex-parte report had been submitted by the revenue authority behind the back of the petitioner, and the S.D.M. vide order dated 10.4.95 directed the name of the petitioner society to be expunged from the revenue record. It is further alleged that the petitioner had no knowledge about the same and after obtaining a copy of the Khatauni they preferred a revision under section 219 of the U.P.Z.A. & L. R. Act which has been dismissed.

5. The main contention raised on behalf of the petitioner is that even if the proceeding had been under taken for expunging the name of the petitioner society then the same ought to have been done after giving an opportunity of hearing, and having not done so, the impugned orders are in violation of principles of natural justice.

6. The submission advanced is that long standing entries should not be ordinarily expunged summarily and at least an opportunity should be given before passing such an order. In support of his submissions learned counsel for the petitioner has relied upon a decision in the case of **Chaturgun and others Versus State of U.P. and others** reported in **2005 ALJ 756**.

7. Learned standing counsel and Sri Ajit Singh learned counsel for respondent no.4 contend that the entries in favour of the petitioner society are fictitious and manipulated inasmuch as they are not in

possession of any valid title over the land and that the entries have been manipulated which were rightly expunged by the S.D.M. They further contend that there is no requirement for interference by this Court under Article 226 of the Constitution. It is further submitted that the nature of the proceeding being summary in nature, the petition should not be entertained against such an order.

8. Having heard learned counsel for the parties and the submissions raised on their behalf , the petitioners have a remedy of getting their rights declared by filing a regular suit. Nonetheless, keeping in view the law laid down in the judgment referred to herein above, the order expunging the entries that have continued for decades together ought not to have been passed without putting the petitioner to notice.

9. In view of this no useful purpose would be served by keeping the writ petition pending before this Court. The impugned order dated 10.4.95 as well as the order of the learned Commissioner dated 23.11.2005 are hereby set aside. The S.D.M respondent no.3 shall be at liberty to pass a fresh order in accordance with law after giving an opportunity of hearing to the petitioner.

10. The writ petition is allowed. No order as to costs. Learned counsel for the petitioner prays that the S.D.M. be directed to dispose of the matter expeditiously. The S.D.M., Kanpur Nagar shall proceed to conclude the proceedings as expeditiously as possible but not later than six months.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.11.2009

BEFORE
THE HON'BLE R.K AGARWAL, J.
THE HON'BLE JAYASHREE TIWARI, J.

Civil Misc. Writ Petition No. 64223 of 2009

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

Counsel for the Petitioner:
Sri Ashok Khare
Sri Durga Tiwari

Counsel for the Respondents:
Sri Ghanshyam Maurya
Sri Sunil Kumar Singh
Sri Sanjiv Singh
C.S.C.

Constitution of India-Article 226-Natural Justice-Cancellation of Residence certificate-before cancellation No Notice or opportunity of hearing given-held-order not sustainable.

Held: Para 5

From a perusal of the order and the averments made in paragraph 16 of the writ petition, we are of the considered opinion that neither any show cause notice nor any opportunity of hearing was afforded to the petitioner stands established and the impugned order has been pased in gross violation of principle of equity, fair play and natural justice. The same cannot be sustained which is hereby set aside. The respondent no.3 may proceed in accordance with law.

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

1. By means of the present writ petition the petitioner sought a writ , order

or direction in the nature of certiorari calling for the record of the case and quashing the order dated 11th November, 2009 passed by the the Sub Divisional Magistrate Sadar, district Deoria-respondent no.3, filed as Annexure 7 to the writ petition by which the residence certificate issued to the petitioner on 23rd July, 2009 has been cancelled on the basis of the complaint made on 9th November, 2009 by one Sanjay Tiwari, respondent no.6.

2. According to the petitioner the complaint was made on 9th November, 2009 and without affording any opportunity to show cause or hearing the order has been passed in haste on 11th November, 2009. The entire exercise has been done within a short span of two days which according to the petitioner itself speaks about the motive. The averment regarding neither issuing any show cause notice nor affording any opportunity of hearing to the petitioner has been made in paragraph 16 of the writ petition.

3. We have heard Sri Ashok Khare, learned Senior Advocate assisted by Ms. Durga Tiwari, learned standing counsel appearing for respondent nos. 1 to 4, Sri Sunil Kumar Singh, learned counsel appearing for respondent no.6 and Sri Sanjiv Singh has filed his appearance on behalf of respondent no.5.

4. With the consent of the learned counsel for the parties, the writ petition is being disposed of at the admission stage without calling for counter affidavit. From a perusal of the impugned order dated 11th November, 2009, we find that the Sub Divisional Magistrate has mentioned that the complaint was filed by Sri Sanjay Tiwari on 9th November, 2009, an enquiry was conducted on 10th November, 2009 and the impugned order has been passed on 11th November, 2009 whereby the petitioner's residence certificate has been cancelled. It does not mention that any showcause notice or opportunity of hearing was given to the petitioner before passing the impugned order.

5. From a perusal of the order and the averments made in paragraph 16 of the writ petition, we are of the considered opinion that neither any show cause notice nor any opportunity of hearing was afforded to the petitioner stands established and the impugned order has been pased in gross violation of principle of equity, fair play and natural justice. The same cannot be sustained which is hereby set aside. The respondent no.3 may proceed in accordance with law.

6. The writ petition succeeds and is allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 24.08.2009

BEFORE
THE HON'BLE RAKESH TIWARI, J.

Civil Misc. Writ Petition No. 4006 of 2005

Smt. Raman Pandey & others ...Petitioners
Versus
State of U.P. and others ...Respondent

Counsel for the Petitioners:
Sri A.C. Tiwari
Sri Akhilesh Kuamr Pandey
Sri D.K. Jaiswal
Sri Pawan Kumar Tiwari

Counsel for the Respondents:
Sri H.M.B. Sinha (S.C.)

C.S.C.

Constitution of India-Art-226- Post retirel benefits-claim by second wife on basis of nomination made by deceased employee even the marriage of second wife declared void- in view of law laid down by apex court children of the second wife entitled equally half share with first wife.

Held: Para 5

In the present case, daughter of petitioner Priyanka Pandey (Petitioner no. 1/1), who had filed impleadment application, has also attained majority. But Deepak Pandey (petitioner no. 1/2) son of the deceased with the petitioner- Smt. Raman Pandey is still a minor being 13 years of age, therefore, he is entitled to retirement benefits of the deceased employee particularly in the backdrop that Smt. Raman Pandey had been nominated as wife by the deceased in the service records for receiving his benefits.

Case law discussed:
[200(1) E.S.C. Page 577 (SC)

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

1. Heard counsel for the parties.

This petition has been filed by Smt. Raman Pandey claiming herself to be wife of deceased employee Jayanti Prasad Pandey.

Son of Smt. Savitri Devi claimed appointment on compassionate ground on the basis that Smt. Raman Pandey, the second living wife of the deceased is not entitled to the benefits on compassionate ground under Dying in Harness Rules as she is not within the definition of family therein. In that context, the Court in Writ Petition No. 18397 of 2002, wherein present petitioner- Smt. Raman Pandey was a party as respondent no. 4 and had also filed counter affidavit, held as follows :

"In my opinion, If Smt. Raman Pandey is not legally wedded wife and the marriage of Smt. Raman Pandey is void. According to Hindu Marriage Act, she can not claim the benefits to claim and appointment under Dying in Harness because she does not come under the definition of family. The judgment relied upon by the counsel for the petitioner fully supports the contention of the petitioner."

2. Now by means of this petition, Smt. Raman Pandey claims for a writ in the nature of mandamus commanding opposite party no. 1 to 3 to appoint the petitioner on compassionate ground according to eligibility on any suitable post. This prayer has not been pressed by the counsel for petitioner in the backdrop that Rajesh Kumar Pandey, elder son of the deceased employee has been provided appointment under Dying in Harness Rules pursuant to order passed by the Court in the aforesaid writ petition No. 18397 of 2002.

Counsel for the petitioner has confined his arguments only in respect of prayer no. 2 which is for a writ of mandamus "commanding the opposite parties to make payment of G.P.F., Group insurance and other dues in favour of the petitioner and family pension month to month towards the services rendered by her husband late Jayanti Prasad Pandey on consideration of the fact that she is only nominee of her husband in the service records."

Notices were issued vide order dated 4.5.2007 to respondent no. 4 to 6. His Lordship Hon. Mr. Justice Sabhajeet Yadav vide order dated 10.4.08 directed the office to submit report about service upon aforesaid respondents and they were directed to file counter affidavit within four weeks.

From the service report submitted by the office, it appears that neither acknowledge nor registered cover has been received back, therefore, in view of the High Court Rules, service is deemd to be sufficient upon respondent no. 4 to 6 who have not put in appearance in the matter.

Counsel for the petitioner has also submitted that respondent no. 6- Smt. Savitri is now living with one Ramfer Yadav, resident of Pura Meharban Ka Purva, village Panchayat Gobari, Tehsil Sadar, Pratapgarh after death of her husband and has now six issues from him.

3. In support of his second prayer, the counsel for the petitioner has placed reliance upon the judgment of the Apex Court in **Rameshwari Devi Vs. State of Bihar,(2000 (1) E.S.C. page 577 (S.C.)** wherein it was held that where a Govt. servant being a Hindu having two living wives, died while in service, then his second marriage was void under the Hindu law and as regards the status of second wife and children from second marriage is concerned, considering the question whether they were entitled to any share in the family pension and death cum retirement gratuity etc, , the Apex Court ruled that second wife having no status of widow is not entitled for anything. However, children from the second wife would equally share the benefits of death cum retirement gratuity and family pension till they attain their majority.

In the present case, it appears that first wife of deceased employee is now living with another person.Both her sons have attained majority. One of the sons has also been given appointment by the department on compassionate ground. While the present petitioner- Smt. Raman Pandey, who is said to be the second wife, is nominated in the service records by the deceased whereas first wife Savitri Devi is not so nominated.

4. The standing counsel on the basis of paragraph no. 4 of the counter affidavit submitted that marriage of Smt. Raman Pandey-second wife, is void as has also been held in Writ Petition No. 18397 of 2002 referred to above, therefore, she is not entitled to any claim on retiral dues of the deceased govt. employee. The argument is fallacious and incorrect. The Court had not decided the status of Smt. Raman Pandey, the petitioner in that case as second wife nor had declared the marriage as void. The Court has laid emphasis that if Raman Pandey is second wife, even her marriage is void. Until and unless it is so declared, it cannot be said tobe a void marriage unless it is so declared by a court of cmpetent jurisdiction . The claim in her petition was for compassonate appointment and not for any declaration or adjudication that Smt. Raman Pandey is not the wife of the deceased. However, even if the petitioner can be said to be the second wife, in that case also she may not have any status of widow and will be entitled to anything but progenies of the deceased govt. employee through her, would equally share the benefits of death cum retirement gratuity and family pension till they attain

majority in accordance with ratio laid down in Rameshwari Devi's case (supra),.

4. In the present case, daughter of petitioner Priyanka Pandey (Petitioner no. 1/1), who had filed impleadment application, has also attained majority. But Deepak Pandey (petitioner no. 1/2) son of the deceased with the petitioner-Smt. Raman Pandey is still a minor being 13 years of age, therefore, he is entitled to retirement benefits of the deceased employee particularly in the backdrop that Smt. Raman Pandey had been nominated as wife by the deceased in the service records for receiving his benefits.

5. For all the reasons stated above, this petition is allowed. The respondents are directed to release retiral dues in favour of minor son Deepak Pandey in the form of Fixed Deposit in a nationalised bank earning maximum interest payable to him on his attaining majority i.e. 18 years of age. The F.D. shall be made in the name of the minor Deepak Pandey, expeditiously within a period of two months from the date of presentation of a certified copy of this order and the petitioner who is natural guardian of the minor at present, will be entitled to draw interest half yearly on the deposit so made to meet expenses of education etc. of the children. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 28.10.2009

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 43643 of 2006

Smt. Shailendra Rai ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Markandey Rai
Sri D.S.P. Tripathi

Counsel for the Respondents:
Sri R.P. Dubey
Sri C.K. Rai
Sri Vipul Tripathi
Sri Neeraj Tripathi
Sri Prabhat Rai
C.S.C.

Constitution of India, Art.-226-Salary Art.21, 300-A- Salary of petitioner withheld since March 2005-inspite of repeated direction R-5 neither filed counter non appeared-only after issuing warrant- although payment made through cheque- but the fact remain regarding fixing liability- R.5 and R3 both equally responsible direction for release of arrears of salary with 8% interest given- considering conduct of authorities exumplory cost imposed of Rs.2 lacs, out of which Rs.1,5000/ shall be recover from the personal benefit of R.5 an remaining 50,000/- from R3 in case of default to recover the same as arrears of land Revenue.

Held: Para 22 and 25

In this case, as already discussed above, the act of respondent no. 5 in non payment of salary to the petitioner is wholly unjustified and illegal. Simultaneously, this Court cannot leave

the respondent no. 3 as wholly innocent in the matter for the reason that he, being a superior and higher officer, if found that someone in his office is not acting properly and is causing a glaring injustice and illegality, it was incumbent upon him to apprise the State Government of such act of the respondent no. 5 recommending a suitable disciplinary action against him, but the respondent no. 3 also kept silence in this matter and it is only when he was personally summoned, took steps which he could have taken earlier for paying the salary to the petitioner. To this extent, the respondent no. 3 is also guilty and is to be held responsible.

In view of the above discussion, this Court is satisfied that here is a case where the conduct of the respondents makes them liable for an exemplary cost which I quantify to Rs. two lacs. This would also be compensatory to the petitioner. The liability is distributed to the extent of Rs. 1.5 lacs against respondent no. 5 and fifty thousands against respondent no. 3. The above cost shall be paid by them within six months failing which it would be open to the Registrar General of this Court to take steps to realize the same amount as arrears of land revenue. After realizing the amount of cost, the same may be released in favour of the petitioner.

Case law discussed:

AIR 1979, SC 49, JT 2009 (13) SC 643, 2009 (2) SCC 592, JT 2007(3) SC 112, AIR 1979 SC 429, AIR 2006 SC 182, AIR 2006 SC 898, (2007)9 SCC 497; (2009) 6 SCALE 17; (2009)7 SCALE 622, JT(2009) 12 SC 198, 1972 AC 1027, 1964 AC 1129, JT 1993 (6) SC 307, JT 2004 (5) SC 17, (1996) 6 SCC 558, AIR 1996 SC 715.

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

1. Heard Sri Markandey Rai for the petitioner, Learned Chief Standing Counsel assisted by Standing Counsel representing respondents no. 1, 3, 4 and 5 and Sri C.K. Rai, Advocate, for respondent no. 2.

2. As agreed by learned counsels for the parties, since the pleadings are complete, the writ petition is being heard and decided finally under the Rules of the Court at this stage.

3. Though the controversy, which has engaged the attention of this Court by means of the present writ petition is very short but shows the ways and means adopted by the respondents for harassing their employees to the extent of not only putting him/her to great inconvenience but making the entire family to suffer to the extent of starvation without there being any illegality or irregularity on the part of such an employee.

4. The petitioner, Smt. Shailendra Rai, an Assistant Teacher in a Junior High School has approached this Court on account of non payment of her salary by the respondents since March' 2005 without there being any fault on her part. A writ of mandamus has been prayed directing the respondents to pay salary to the petitioner since March' 1985.

5. To start with, this Court directed the respondents to file counter affidavit informing the Court as to why salary has not been paid to the petitioner. On 21.8.2006, the following order was passed by this Court:

"Sri C.K. Rai Advocate has accepted notice on behalf of respondent nos. 2 and 3, Standing Counsel accepts notice on behalf of respondent nos. 1, 4 and 5.

Respondents may seek instruction as to why payment of salary is not being effected in favour of the petitioner. The

District Basic Education Officer, Sonebhadra may also file his affidavit along with the objection of the Finance and Audit Officer in his office, referred to in the letter dated 27.4.2006 List on 31st August, 2006."

6. When the matter again came up on 27.10.2006, a vague and incomplete reply was filed which was noticed by this Court in its order dated 27.10.2006 as under :

"Learned counsel for the petitioner states that he has not been served with counter affidavit filed by the District Basic Education Officer, Sonebhadra. Moreover, the affidavit filed is not accompanied with the objection of the Finance and Audit Officer referred to in the letter of the District Basic Education Officer dated 27th April, 2006, as was directed under order of this Court dated 21st August, 2006.

Let Sri C.K. Rai, learned counsel for respondent nos. 2 and 3 file a better affidavit in strict compliance of the order of this Court dated 21st August, 2006, by 20th November, 2006.

Put up on 20th November, 2006."

7. Noticing that there was no fault shown on the part of the petitioner for non payment of salary, but inter alia shifting of responsibility sought to be indulged by the respondents, this Court on 11.11.2007 passed the following order :

"In the present case short counter affidavit has been filed and the same is only on behalf of respondent no. 3. In pith and substance the said short counter affidavit supports the version of the petitioner and entire burden has been fastened upon Finance and Accounts Officer, based at the office of District Basic Education Officer, Sonebhadra for ensuring payment of salary to petitioner. Backdrop of the case reflects that some adjustment has been made and the reason why Finance and Accounts Officer is not ensuring payment of salary to petitioner is not all before this Court, as such it would be expedient that the version of Finance and Accounts Officer should come before this Court.

In these circumstances and in this background, Finance and Accounts Officer, Office of District Basic Education Officer indicating as to why salary is not being ensured to petitioner. While preparing counter affidavit details furnished in short counter affidavit filed on behalf of respondents no. 3 shall also be explained. For this purpose, learned counsel for petitioner is directed to serve a copy of this short counter affidavit upon Finance and Accounts Officer, Basic Education, Sonebhadra within three weeks from today. In the event of service of short counter affidavit alongwith a copy of this order in all eventuality counter affidavit has to be filed by Finance and Accounts Officer within next three weeks.

List after one month."

8. Thereafter, on 13.8.2009, 5.10.2009 and 9.10.2009 having found that the respondents were neither able to give any justification for non payment of salary to the petitioner nor had made any effort to pay her salary, the following orders were passed :

"The only grievance of the petitioner is that he is not being given salary since March 2005, though she is a regularly appointed teacher in a Junior High School maintained by the Basic Shiksha

Parishad. Though counter affidavit has been filed on behalf of respondent no. 3 though his counsel but he learned counsel is not present. Sri Prabhat Rai, holding brief of Sri Neeraj Tripathi, learned counsel for the respondent no. 5 is present but he is not able to tell as to why the salary has not been paid to the petitioner till date. Since the Court is not getting any assistance from them so it is directed that respondents no. 3 and 5 are shall be present in Court and explain as to why the salary of the petitioner has not been paid so far.

List this matter on 30th September on which date appropriate orders will be passed in this matter. Sri Prabhat Rai, holding brief for Sri Neeraj Tripathi, who has filed his Vakalatnama on behalf of respondent no. 5 and the learned standing counsel for respondents 3 & 5 are directed to make compliance of this order. The office is directed to furnish a copy of this order by Monday, i.e 17.08.2009.

13.08.2009"

"Vide order dated 13.08.2009 the respondents no. 3 and 5 both were required to appear before this Court on 30.09.2009 in person to explain as to why the petitioner has not been paid salary so far but since 30.09.2009 was declared as holiday, Sri C.K. Rai, learned counsel appearing for respondent no. 3 stated that the respondent no. 3 is not present. Sri Vipul Tripathi, holding brief on behalf of Sri Neeraj Tripathi stated that he has filed his Vakalatnama on behalf of respondent no. 5 but it appears that the respondent no. 5 has engaged some other counsel. It is not concerned with the Court as to how many counsels were engaged in a matter but once notice has been issued to the party concerned and he is aware with the case, it is his obligation to keep watch of the case.

In the facts and circumstances of the case, respondents no. 3 and 5 both are directed to be present in person before this Court on 09.10.2009. Sri Rai and Sri Tripathi shall communicate this order to respondents no. 3 and 5 respectively as the same has been passed in their presence.

05.10.2009"

"On 13.08.2009 this Court passed order directing the respondents no. 3 and 5 both to be present in person before this Court to explain as to why the salary of petitioner has not been paid though he is a regularly appointed teacher in Junior High School maintained by Basic Shiksha Parishad.

The respondent no. 3, Sri Rajesh Kumar is present but the respondent no. 5 is not present.

Sri Vipul Tripathi holding brief on behalf of Sri Neeraj Tripathi states that he has communicated the direction of this Court to respondent no. 5 but he has not responded.

Let non-bailable warrant be issued to respondent no. 5 to ensure his presence before this Court on 21.10.2009. The office shall take appropriate steps for compliance of this order. The respondent no. 3 shall also remain present on the next date.

List this matter on 21.10.2009.

09.10.2009"

9. The reluctant attitude shown by the respondent no. 5 compelled this Court in issuing non-bailable warrant on 9.10.2009 as already noted above. However, this time, the Registry of this Court came to rescue of the respondents by not taking steps for issuing non bailable warrant as directed and on 21.10.2009 a report was submitted that due to rush of work, no further action

could be taken by them and, therefore, they may be granted some further time to comply with the Court's order dated 9.10.2009.

10. In the meantime, an application no. 274455 of 2009 was filed on behalf of respondent no. 5 stating that firstly due to mistake of Sri Neeraj Tripathi, Advocate, he did not get any information of the order dated 17.8.2009 and, therefore, could not appear on 5.10.2009 and secondly that on 6.10.2009 when he received the information by that time he suffered viral fever and hence could not appear on 9.10.2009. The above statement is sought to be supported by a medical certificate issued by the Medical Officer, District Hospital, Sonebhadra dated 12.10.2009 certifying that the respondent no. 5 Rajesh Kumar was in his treatment as an outdoor patient since 8.10.2009 to 10.10.2009 and fitness certificate is being issued from 12.10.2009.

11. It is to be noted that though respondent no. 5 is impleaded by his office and, therefore, he ought to be represented by learned Standing Counsel appointed by the State Government but in this case, the application has been filed through Sri Neeraj Tripathi, Advocate, who has also filed counter affidavit on behalf of respondent no. 5 earlier. The respondent no. 5 thus has engaged this private counsel but whether for the said purpose he obtained permission from the Government or not is not clear from the record.

12. On the request of learned counsels for the parties, this matter was taken up on 28.10.2009 on which date Sri Manohar Prasad, Basic Shiksha Adhikari, Sonebhadra and Sri Rajesh Kumar, Finance and Accounts Officer in the office of Basic Shiksha Adhikari, Sonebhadra, both were present. A supplementary counter affidavit sworn on 27.10.2009 at 3.10. P.M. by the respondent 3 was also filed stating that by cheque dated 15.10.2009, salary of the petitioner for the period of March' 2005 to October' 2009 has been paid and a photocopy of Treasury Cheque dated 26.10.2009 was annexed. In para 4 and 5 of the supplementary counter affidavit, it is said that due to some confusion and misconception, some delay has occurred in making payment of salary to the petitioner, which is regretted and it is said that since the petitioner's salary has been paid, therefore, no further cause of action survives and, the writ petition may be dismissed as infructuous. The deponent of the affidavit has also tendered his unconditional apology.

13. Normally, when the relief sought in the writ petition is met in the hands of the respondents and this Court finds that no further cause of actions survives, as a normal practice, the writ petitions are dismissed having become infructuous but here is a case where the petitioner's salary was detained by the respondents illegally and without any lawful justification, as is evident from the above facts, and when she made this complaint to this Court in August 2006, even then the respondents did not look into the matter as a model and law abiding employer having some sense of sympathy and justice for their employees, but here in a casual fashion they filed incomplete and vague affidavits shifting blame from one and another. No attempt shown to be made to remedy the grievance of the petitioner and that is how she was compelled to suffer not only herself but the entire family for a further

period of three years and more. Not only this, the respondents shown the audacity and courage of even not attending this Court flouting its order to the maximum possible level and it is only when they found no other option, the salary is paid to the petitioner. This Court is thus clearly satisfied that their action by means of the supplementary counter affidavit is not bona fide but just to bury a just and valid grievance of harassment of the petitioner by their extraordinary, not only belated but also illegal and arbitrary act, and they are trying to get the matter consigned so as to wriggle out of the clutches of law in respect to affixing of responsibility and liability upon the officer concerned for not only illegal detention of salary of a person for almost four years but also by harassing and victimizing her for no fault on her part.

14. In my view, here is a case which cannot be allowed to shut in such a manner by simply confining the matter to record without considering as to whether the respondents are in fact guilty of an illegal and arbitrary act, and, if so, how they must be made accountable/responsible for the same.

15. An equity Court exercising jurisdiction under Article 226 of the Constitution of India is not only entitled to look into valid grievances of the citizen but also to pass appropriate orders against the State or its officers and instrumentality as the case may be where they are found to have acted in a wholly illegal and arbitrary manner. From the own admission of the respondents in the counter affidavit where they have not shown any fault on the part of the petitioner as a reason for non payment of salary to her since March' 2005, the denial of salary to the petitioner is evidently arbitrary and also infringes her constitutional right under Articles 21 and 300A which provides that no person shall be deprived of her property except in accordance with the procedure prescribed in law. In the case in hand, the petitioner has been deprived of her lawful salary and wages, which she has earned after rendering service, in a manner which is not prescribed in law.

16. Now, I may give in brief the explanation given by the respondents for non payment of salary to the petitioner. The petitioner was initially working as Assistant Teacher in a Primary School, Billi Obra and was promoted as Assistant Teacher (C.T. Grade) on 7.2.2004. It appears that a Government Order was issued on 9.6.2004 that the Teachers in the Primary Schools be allowed to be adjusted/accommodated according to the strength of the students in the schools and may be shifted to other schools where there is deficiency. The Board of Basic Education issued certain directions on 24.7.2004 that the Teachers who are posted/appointed after July 2003 if are found in excess may be transferred/adjusted and those who have the longest period of posting should first be adjusted. It appears that the Secretary, Basic Education, Allahabad passed an order on 11.2.2005 stating that in the Junior High School, Billi, 8 teachers working and five of such Teachers were to be adjusted by the District Basic Education Officer but since Sri Shailendra Rai and Rajani Rajvanshi were two teachers who were posted after July, 2003 therefore first of all the said two teachers be adjusted and thereafter adjustment of rest of three teaches should be made. Pursuant to the said order of Secretary,

Basic Education, Allahabad, the respondent no. 3 passed an order on 2.3.2005 cancelling adjustment of Smt. Nirmala Devi-II, another teacher working in the Junior School, Billi, Sonebhadra. He also directed for compliance of the Secretary, Board of Basic Education's letter dated 11.2.2005. It is also said that in view of the aforesaid orders, no further teacher was required to be adjusted from aforesaid Junior High School since the strength of teachers was as per the requirement and standard fixed, therefore, the petitioner continued to work in the said institution and it was in the interest of the students at large. It is also said that in June 2006, the strength of Junior School reduced to three due to promotion and transfer of Sri Munni Lal, a senior Teacher of Junior High School, Billi, Chopan as Head Master to Junior High School, Obradeeh, Vikas Kshetra Chopan, Sonebhadra. It is further said that the petitioner's functioning in the institution concerned was justified in all these circumstances and, therefore, when the salary bills of the petitioner were received in the office of respondent no. 3, the same were countersigned by respondent no. 3, in particular Sri Vinod Sharma holding office of respondent no. 3, and, the file sent to the office of respondent no. 5 for payment of salary but it is he (respondent no. 5) who is not making payment to the petitioner. Para 10 and 11 of the counter affidavit of respondents no. 3 are reproduced as under:

"10. That is is most respectfully submitted that since there was no requirement and occasion for adjustment of the petitioner for the reasons stated above and as such she remained posted in the institution in question and was discharging her duties and accordingly, her attendance was also certified by the Regional Asstt. Basic Shiksha Adhikari, Chopan, Sonebhadra and her salary bill was submitted in the office of the deponent upon which the same was counter-signed by the deponent and was sent of the the office of Finance and Accounts Officer of the office of B.S.A. Sonebhadra for payment of her salary.

11. That it is relevant to mention here that the Finance and Accounts Officer of the office of the deponent without there being any order of the competent authority, deleted the salary of the petitioner and made payment of salary to the rest of the teachers working in Vikas Kshetra Chopan and their salary were transmitted in the Bank accounts concerned."

17. It is said that on the representation made by the petitioner to respondent no. 3, repeated directions were issued to respondent no. 5 but he did not take steps for payment of salary to the petitioner. When the matter was brought to the notice of District Magistrate, Sonebhadra, he also passed an order on 6.1.2006 for disbursement of salary to the petitioner but even thereafter the respondent no. 5, adopting an adamant attitude, did not pay salary to the petitioner. The stand taken by respondent no. 3 in para 14, 15 and 16 of his counter affidavit is reproduced as under:

*"**14**. That it is relevant to mention here that the abovenoted direction issued by the District Magistrate was also apprised to the Finance and Accounts Officer vide Letter dated 18.1.2006 issued by the office of the deponent but despite of the same, he has not paid the salary to the petitioner.*

15. *That it is also pertinent of the mention here that at present in the institution in question in view of strength of students, at least five teachers are required but against the same, only 3 teachers are working and as such no occasion has arisen for adjustment of the petitioner, accordingly she continued to work in the said institution and has performed teaching work but despite of repeated directions issued by the higher authorities concerned as well as deponent, the Finance and Accounts Officer of the office of the deponent, is not making payment of salary to the petitioner for the reason best known to him.*

16. *That it is pertinent of the mention here that in pursuance to the order passed by this Hon'ble Court dated 21.8.2006, the deponent has written a letter to the Finance & Accounts Officer asking him about the non-payment of salary to the petitioner. Copy of the said letter dated 25.8.2006 is filed herewith as Annexure CA-5 to this affidavit."*

18. In the Counter affidavit filed on behalf of respondent no. 5, it is evident that he has levelled serious allegations against the respondent no. 3 stating that in his (respondent no. 3) affidavit he has concealed several facts. In fact in view of the Secretary, Board of Education's letter dated 24.7.2004, the petitioner ought to have been adjusted in some other institution but the same having not been done, her non payment of salary by respondent no. 5 is absolutely just and valid. From the documents appended to the affidavit filed by respondent no. 5, it is evident that the justification of a Teacher in a particular school and necessity of adjustment, if any, was to be considered firstly by the Board of Basic Education and, thereafter, by the District Basic Education Officer of the concerned District. No other authority or officer was entitled or empowered by any order either by the State Government or the Board of Basic Education authorizing him/her to flout either the orders passed by the District Basic Education Officer or to take a decision of his/her own so as to disobey or not to comply the order passed by the District Basic Education Officer.

19. The respondent no. 5, Sri Rajesh Kumar, who was present in the Court when enquired as to how he was authorized and empowered to ignore the direction/order issued by District Basic Education Officer, and, whether the respondent no. 3 is not an officer higher in rank than him in the hierarchy, he could not give any justification for his action. He also could not explain as to how he could disobey the order of the District Basic Education Officer (respondent no. 3). In fact, even from the documents filed as enclosures to his counter affidavit in support of his averments made in the counter affidavit, he failed to show as to which part of those orders either of the State Government or that of Board of Board of Basic Education authorises him to take a decision as to whether a particular teacher would be entitled for payment of salary when the District Basic Education Officer in his own discretion has not found any reason for shifting or transfer a teacher and has cleared the salary bill of such teacher.

20. With regard to non compliance of the Courts order regarding his presence, I find that on the one hand he claim to have fallen ill on 6.10.2009 but the medical certificate is for the period of 8.10.2009 to 10.10.2009, it appears that only to cover up the date on which he was

supposed to appear before this Court, i.e 9.10.2009. Moreover, swearing of para 5 of the affidavit accompanying the recall application wherein he has said that he did not receive any information due to mistake on the part of the office of Sri Neeraj Tripathi, Advocate, is on the basis of the information received and regarding sickness and medical certificate, the averments contained in para 6 of the said affidavit have been partly sworn on the basis of personal knowledge and partly on the basis of record. This itself makes the aforesaid averments unreliable and incredible.

21. Having found myself satisfied that the respondent no. 5 has no valid and lawful justification for detaining salary of the petitioner, I am also satisfied that his act was not only illegal and arbitrary but travels in the realm of malice in law, therefore, it deserves to be dealt with severely by this Court so that no Government officer in future may have the audacity of harassing a helpless poor employee, firstly, by torturing him/her by detaining his/her lawful dues and thereafter to escape from any liability so as to boast that nobody can touch him even if he commits an ex facie illegal or unjust act. Every Government officer, howsoever high, must always keep in mind that nobody is above law. The hands of justice are meant not to only catch out such person but it is also the constitutional duty of a Court of law to pass suitable order in such a matter so that such an illegal act may not be repeated, not only by him/her but others also. This should be a lesson to everyone committing an act which is ex facie unjust and having not been done for any just or lawful reason. Prima facie it must be treated to have been done for collateral purposes and covered by the term "malice in law'.

22. The Apex Court has **summarised "malice in law " in (Smt.) S.R.Venkatraman Vs. Union of India and another, AIR 1979, SC 49** as under :

"It is equally true that there will be an error of fact when a public body is prompted by a mistaken belief in the existence of a non-existing fact or circumstance. This is so clearly unreasonable that what is done under such a mistaken belief might almost be said to have been done in bad faith; and in actual experience, and as things go, these may well be said to run into one another." (Para 8)

12. The Apex Court further in para 9 of the judgment in **S.R.Venkatraman (supra)** observed:

" 9. The influence of extraneous matters will be undoubted where the authority making the order has admitted their influence. It will therefore be a gross abuse of legal power to punish a person or destroy her service career in a manner not warranted by law by putting a rule which makes a useful provision for the premature retirement of Government servants only in the "public interest', to a purpose wholly unwarranted by it, and to arrive at quite a contradictory result. An administrative order which is based on reasons of fact which do not exist must, therefore, be held to be infected with an abuse of power."

13. In **Mukesh Kumar Agrawal Vs. State of U.P. and others JT 2009 (13) SC 643** the Apex Court said :

"We also intend to emphasize that the distinction between a malice of fact and malice in law must be borne out from records; whereas in a case involving malice in law which if established may lead to an inference that the statutory authorities had acted without jurisdiction while exercising its jurisdiction, malice of fact must be pleaded and proved."

14. In **Somesh Tiwari Vs. Union of India and others 2009 (2) SCC 592** dealing with the question of validity of an order of transfer on the ground of malice in law , the Apex Court in para 16 of the judgment observed as under:

"16. .... Mala fide is of two kinds--one malice in fact and the second malice in law. The order in question would attract the principle of malice in law as it was not based on any factor germane for passing an order of transfer and based on an irrelevant ground i.e on the allegations made against the appellant in the anonymous complaint. It is one thing to say that the employer is entitled to pass an order of transfer in administrative exigencies but it is another thing to say that the order of transfer is passed by way of or in lieu of punishment. When an order of transfer is passed in lieu of punishment, the same is liable to be set aside being wholly illegal."

15. In **HMT Ltd. and another Vs. Mudappa and others JT 2007(3) SC 112** the Apex Court in paras 18 and 19 defined malice in law by referring to "Words and Phrases Legally Defined, 3rd Edn., London Butterworths, 1989" as under:

"The legal meaning of malice is "ill-will or spite towards a party and any indirect or improper motive in taking an action". This is sometimes described as "malice in fact". "Legal malice" or "malice in law" means "something done without lawful excuse'. In other words, "it is an act done wrongfully and wilfully without reasonable or probable cause, and not necessarily an act done from ill feeling and spite'. It is a deliberate act in disregard of the rights of others."

***"19**. It was observed that where malice was attributed to the State, it could not be a case of malice in fact, or personal ill-will or spite on the part of the State. It could only be malice in law, i.e legal mala fide. The State, if it wishes to acquire land, could exercise its power bona fide for statutory purpose and for none other. It was observed that it was only because of the decree passed in favour of the owner that the proceedings for acquisition were necessary and hence, notification was issued. Such an action could not be held mala fide."*

16. In brief malice in law can be said when a power is exercised for an unauthorized purpose or on a fact which is claimed to exist but in fact, is non-est or for the purpose for which it is not meant though apparently it is shown that the same is being exercised for the purpose the power is supposed to be exercised. (See **Manager Govt. Branch Press and another Vs. D.B.Belliappa AIR 1979 SC 429; Punjab Electricity Board Vs. Zora Singh and others AIR 2006 SC 182; K.K.Bhalla Vs. State of U.P. and others AIR 2006 SC 898; P. Mohanan Pillai Vs. State of Kerala and others (2007) 9 SCC 497; M.P.State Corporation Diary Federation Ltd. and another Vs. Rajneesh Kumar Zamindar and others (2009) 6 SCALE 17; Swarn Singh**

Chand Vs. Punjab State Electricity Board and others (2009) 7 SCALE 622 and Sri Yemeni Raja Ram Chandar Vs. State of Andhra Pradesh and others JT (2009) 12 SC 198.

17. Regarding harassment of a Government employee referring to observations of Lord Hailsham in **Cassell & Co. Ltd. Vs. Broome, 1972 AC 1027** and Lord Devlin in **Rooks Vs. Barnard and others 1964 AC 1129**, the Apex Court in **Lucknow Development Authority Vs. M.K. Gupta JT 1993 (6) SC 307** held as under;

"An Ordinary citizen or a common man is hardly equipped to match the might of the State or its instrumentalities. That is provided by the rule of law..... A public functionary if he acts maliciously or oppressively and the exercise of power results in harassment and agony then it is not an exercise of power but its abuse. No law provides protection against it. He who is responsible for it must suffer it.....Harassment of a common man by public authorities is socially abhorring and legally impermissible. It may harm him personally but the injury to society is far more grievous." (para 10)

18. The above observation as such has been reiterated in **Ghaziabad Development Authorities Vs. Balbir Singh JT 2004 (5) SC 17.**

19. In the case of **Registered Society Vs. Union of India and Others (1996) 6 SCC 530** the Apex court said as under:

"No public servant can say "you may set aside an order on the ground of mala fide but you can not hold me personally liable" No public servant can arrogate in himself the power to act in a manner which is arbitrary".

20. In the case of Shivsagar Tiwari Vs. Union of India (1996) 6 SCC 558 the Apex Court has held as follows:

"An arbitrary system indeed must always be a corrupt one. There never was a man who thought he had no law but his own will who did not soon find that he had no end but his own profit."

21. In the case of **Delhi Development Authority Vs. Skipper Construction and Another AIR 1996 SC 715** has held as follows:

"A democratic Government does not mean a lax Government. The rules of procedure and/or principles of natural justice are not mean to enable the guilty to delay and defeat the just retribution. The wheel of justice may appear to grind slowly but it is duty of all of us to ensure that they do grind steadily and grind well and truly. The justice system cannot be allowed to become soft, supine and spineless."

22. In this case, as already discussed above, the act of respondent no. 5 in non payment of salary to the petitioner is wholly unjustified and illegal. Simultaneously, this Court cannot leave the respondent no. 3 as wholly innocent in the matter for the reason that he, being a superior and higher officer, if found that someone in his office is not acting properly and is causing a glaring injustice and illegality, it was incumbent upon him to apprise the State Government of such act of the respondent no. 5 recommending a suitable disciplinary action against him,

but the respondent no. 3 also kept silence in this matter and it is only when he was personally summoned, took steps which he could have taken earlier for paying the salary to the petitioner. To this extent, the respondent no. 3 is also guilty and is to be held responsible.

23. In the circumstances, the writ petition is allowed with the direction to the respondents to pay simple interest on the delayed payment of salary to the petitioner at the rate of 8% p.a. from the date the same became due till actual payment.

24. Liberty is given to respondent no. 1 to realize the amount of interest paid to the petitioner under this order from the officials concerned who, it may found responsible after holding an appropriate departmental enquiry in this matter.

25. In view of the above discussion, this Court is satisfied that here is a case where the conduct of the respondents makes them liable for an exemplary cost which I quantify to Rs. two lacs. This would also be compensatory to the petitioner. The liability is distributed to the extent of Rs. 1.5 lacs against respondent no. 5 and fifty thousands against respondent no. 3. The above cost shall be paid by them within six months failing which it would be open to the Registrar General of this Court to take steps to realize the same amount as arrears of land revenue. After realizing the amount of cost, the same may be released in favour of the petitioner.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.11.2009

BEFORE
THE HON'BLE PANKAJ MITHAL, J.

Civil Misc. Writ Petition No.51528 of 2009

Rishi Pal Singh ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Vijay Gautam

Counsel for the Respondents:
C.S.C.

Constitution of India-Article 226-Transfer of Sub-Inspector-who remained in adjoining District for 24 years-involved in Criminal Case offence under 379 IPC-on ground of challenge made that the approving authority-'Police Establishment Board' not properly constituted-G.O. dated 12.08.09 providing the approval of the decision of Board by D.G.P.-which put further check on exercise of power of Transfer-held-direction of Supreme Court in Prakash Singh Case fully complied with-No scope for technical plea-Transfer order can not be interfered.

Held: Para 16 & 17

In the aforesaid facts and circumstances, in so far as the police Establishment Board that has granted approval to the transfer of the petitioner is concerned has subserved the object with which the guidelines were laid down by the Supreme Court, the approval so granted would not stand vitiated only for the reason that the Director General of Police has not been included as one of its members specially when the approval granted by the Police Establishment Board is further required to be approved by the Director General of Police.

Thus, in effect the guidelines issued by the Supreme Court with regard to the creation of the Police Establishment Board have been followed and implemented by the State Government in pith and substance according to the true spirit. Any technical infraction in the implementation of the said guidelines cannot be a subject of consideration by this Court.

Case law discussed:

(2006) 8 SCC 1, Writ Petition No.1525 of 2009 decided on 4.9.2009, 2003(1) UPLBEC 636.

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

1. Petitioner who is a Sub-Inspector (Special Category) in U.P. Police has challenged the order dated 16.9.2009 passed by the Deputy Inspector General (Establishment), U.P. Police Headquarters, Allahabad transferring him from district Gautam Budh Nagar to Mau in public interest with the approval of Police Establishment Board.

2. On behalf of the petitioner a supplementary affidavit and then a second supplementary affidavit has been filed. Learned Standing Counsel was earlier allowed time to obtain instructions and to file counter affidavit. A counter affidavit as well as a supplementary counter affidavit has been filed by the learned Standing Counsel on behalf of respondents no.1 to 5 and respondent no.7 to which even rejoinder affidavit has been filed. The counsel for the parties as such agree for final disposal of the writ petition at the admission stage itself. Accordingly, having heard Sri Vijay Gautam, learned counsel for the petitioner and the learned Standing Counsel for the respondentsat length, I proceed to decide the matter finally.

3. Before addressing various points which have been canvassed by the learned counsel for the petitioner in order to assail the impugned order, it is tiride to mention that under the service jurisprudence transfer of an employee who holds a transferable post is a normal feature and has been recognised throughout as an incident of service. In the matter of the transfer, the Government/employer has a wide discretion and it is the employer who is the best judge to utilise the service of its employee and to place and post him at its discretion accordingly. The employee has no legal say in the matter of his posting except to bring to the notice of the authority concerned his personal difficulty or any hardship. The employee as such, as no vested right either to insist for a particular post or to be posted at a particular place or to stick to a particular one. In fact, transfer has been considered necessary in public interest and to maintain efficiency in public administration. Therefore, it has been settled by a catena of authorities that ordinarily transfer orders are not to be interfered with on the judicial side until and unless it is shown that the order of transfer passed is without jurisdiction; is in breach of any statutory rule or it has been motivated by malice of fact or law or is proved to be punitive, vindictive or stigmatic in nature.

4. It is in the above settled legal background that I have to examine the validity of the impugned order.

5. The first submission of the learned counsel for the petitioner is that the Police Establishment Board (hereinafter referred to as "the Board") which had granted approval to the transfer is not properly constituted as per the

directions of the Apex court in the case of ***Prakash Singh and others Vs. Union of India and others (2006) 8 SCC 1*** and, as such, there is no approval by the Board and the order of transfer stands vitiated. The only defect pointed out in the constitution of the Board is that the Director General of Police is not the Chairman of the Board as it is headed by the Inspector General of Police (Establishment).

6. In reply to this argument, learned Standing Counsel has submitted that in the case of ***Prakash Singh (supra)*** the Apex Court has merely issued guidelines for the better administration of the Police Force and one of the guidelines provides for establishment of a Police Establishment Board in each State for the purpose of transfer, posting and promotion and other matters relating to the services of the officers of the Police Force. In pursuance of the guidelines so issued by the Supreme Court, the Principal Secretary, U.P. Government vide letter dated 12.3.2008 notified six different Boards for supervising transfer, posting, promotion and other service related matters of the police department depending upon the category of officers. The Board in respect to the officers of the Police Force of the rank of Sub-Inspector and below comprises of Inspector General of Police (Establishment), Deputy Inspector General of Police (Establishment), Superintendent of Police (Karmik) and Additional Superintendent of Police (Karmik) and Deputy Superintendent of Police (Karmik). The transfer of the petitioner has been approved by the aforesaid Board and, as such, there is no illegality.

7. No doubt, the directions/guidelines issued by the Supreme Court in the case of ***Prakash Singh (supra)*** are mandatory in nature, being one issued in exercise of power under Article 142 of the Constitution of India, but to find out the true mandate of the said guidelines it is imperative to underline the object behind issuing the same.

8. Police force is a disciplined force which comprises of persons who are not only specialised and skilled but are charged with the preservation of public order and tranquillity; promotion of public heath and safety; and with prevention, detection and investigation of crime. Such persons in uniform are distinguishable from common man so that a person in need may recognise and approach them easily for necessary assistance. Therefore, the duty of the police personnel is basically to serve the public and to maintain the rule of law. Their approach has to be service oriented. The commitment, devotion and responsibility of the police personnel has to be to the rule of law so that they serve the people impartially, irrespective of their status and position. The police force therefore, has to maintain professional independence free of interference and influence of the Government.

9. Realising the importance of the police force in a democratic set up, the Government of India appointed a National Police Commission to comprehensively review the police administrative system so as to secure its professional independence and to provide a supervisory mechanism which may dispense with unhealthy interference, influences and pressure in the matter of frequent and indiscriminate transfer of

officers of the police force on political considerations. The Commission so appointed submitted various reports in phases and the ultimate recommendation was to the effect that the police force be granted professional independence to enable it to work impartially as an agent of law so that the rule of law does not become a causality and the offenders are brought to book without any outside pressure or influence. It was with this object; to frame a new Act for the police force as recommended by the National Police Commission; and to constitute various boards for the purposes of ensuring that the police performs their duties and functions free from any pressure with the aim to serve the law of the land and the people that guidelines were issued by the Supreme Court in the case of Prakash Singh (supra) till appropriate legislation in terms of the guidelines so issued is framed. One of the guidelines so issued provided for the creation of the Police Establishment Board in each State comprising of Director General of Police and four other senior officers of the department to decide about the transfer, promotion and posting and other service related matters police officers up to a particular rank. Thus, in pith and substance the idea behind the creation of Police Establishment Board is to avoid frequent and indiscriminate transfers of the police officers at the behest of the Government. The guidelines issued by the Apex Court though mandatory but cannot be interpreted like a statute and in case the guidelines are principally followed and implemented in the true tenor as per the ratio decendi of the ***Prakash Singh case (supra)*** there would be no error in the constitution of the Board.

10. In view of the object behind issuing the guidelines in the case of ***Prakash Singh (supra)*** it is obvious that the purpose is to streamline the police administration and to make the police force more efficient, free from all outside pressure, particularly from the Government side. Thus, the constitution of the Board which includes senior officers of the Police Department having specialised knowledge of the police administration is sufficient compliance of the guidelines so issued by the Apex Court. The non-inclusion of the Director General of Police as its Chairman by itself would not make the constitution of the Board illegal as it is otherwise able to serve the purpose for which it has been established.

11. Reliance has been placed upon a decision of a learned Single Judge of the Lucknow Bench of this Court in ***Civil Misc. Writ Petition No.1525 of 2009 Sunder Singh Solanki Vs. State of U.P. and others decided on 4.9.2009*** to the effect that the State or its instrumentality have not no right to avoid the directions issued by the Hon'ble Supreme Court.

12. The aforesaid decision, in no way helps the petitioner, inasmuch as the guidelines/directions so issued by the Apex Court have not been flouted and rather have been carried out in its true character and nature.

13. The Secretary, Government of Uttar Pradesh vide letter dated 12.8.2009 has further provided that the decisions taken by the Board so established are ultimately to be further approved by the Director General of Police before passing of any order by the superior officer/authority concerned. This is to put

a further check on the exercise of any power in the matter of transfer, promotion and posting of the officers of the police force.

14. In view of the aforesaid direction so issued providing for further approval of the Director General of Police the irregularity, if any, in the constitution of the Board stands cured and the transfer would not stand vitiated on account of non constitution of the Board strictly in accordance with the guidelines of the Supreme Court. It is not the case of the petitioner that the approval of the Director General of Police was not taken before affecting the transfer. In my opinion, therefore, there is no substance in the above argument.

15. Besides the above, in the counter affidavit in paragraph 12 it has been stated that the Supreme Court itself has subsequently appointed a Committee under the Chairmanship of Hon'ble Mr. Justice K.T. Thomas, retired Justice of the Supreme Court to supervise the implementation of the guidelines laid down in the case of ***Prakash Singh (supra)***. The said Committee has not pointed out any defect in the implementation of the guidelines by the State of U.P. or in the constitution of the Police Establishment Boards in U.P. Thus, when the Apex Court itself is monitoring the implementation of the aforesaid guidelines through a Committee appointed for the purpose, the petitioner is no one to complain that the Board is not properly constituted by means of this petition and the proper forum, if any, for the petitioner to raise the issue either before the said Committee or to approach the Supreme Court itself.

16. In the aforesaid facts and circumstances, in so far as the police Establishment Board that has granted approval to the transfer of the petitioner is concerned has subserved the object with which the guidelines were laid down by the Supreme Court, the approval so granted would not stand vitiated only for the reason that the Director General of Police has not been included as one of its members specially when the approval granted by the Police Establishment Board is further required to be approved by the Director General of Police.

17. Thus, in effect the guidelines issued by the Supreme Court with regard to the creation of the Police Establishment Board have been followed and implemented by the State Government in pith and substance according to the true spirit. Any technical infraction in the implementation of the said guidelines cannot be a subject of consideration by this Court.

18. The second argument from the side of the petitioner is that the transfer of the petitioner is in violation of the Government Policy dated 6.6.2009 as there is no approval of the Chief Minister.

19. Learned Standing Counsel, to counter the said argument, has submitted that the transfer policy is not binding in nature and otherwise also the aforesaid transfer policy is not applicable to the Police Department. In this connection he has placed reliance upon Annexure CA - 3 to the counter affidavit which is a Government Order issued by the Special Secretary, U.P. Government on 15.10.2009 clarifying that the Police Department is free from the transfer

policy dated 6.6.2009 right from the inception of the policy.

20. In one of the writ petition i.e. Civil Misc. Writ Petition No.51317 of 2009 (Narendra Sharma Vs. State of U.P. and others) involving the officers of the police department I had earlier referred the matter with regard to the binding nature and enforceability of the said transfer police to a larger Bench vide order dated 12.10.2009 but as to whether the said transfer policy is applicable to the police department or not is another question which I am called upon to examine herein.

21. The service conditions of the police officers, both gazetted and non gazetted are covered by the Police Act, 1961 and the U.P. Police Regulations which are said to have been framed under the said Act. The aforesaid Act and the Regulations provide a complete mechanism for the transfer of the police personnel. Further, the said mechanism has been strengthen by the guidelines issued by the Supreme Court in the case of Prakash Singh (supra). The said guidelines read with the provisions of the aforesaid Act and Regulations completely occupy the field leaving no scope for the Government to supplement them by any Government Order, Circular or any policy decision. Therefore, any policy decision governing the matter of transfer of police officers would not override the statutory provisions and the guidelines of the Supreme Court which are quasi legislative and of mandatory nature. The said policy, as such is ex facie of a general nature and is applicable only to those departments where there are no service rules and the field is not occupied. If it is allowed to run parallel it would be in direct conflict with the Regulations and guidelines of the Supreme Court. Accordingly, the said policy which is of general nature cannot be applied to the police department.

22. The above view taken by me also finds support by a decision of another Single Judge of this Court dated 15.10.2009 passed in Civil Misc. Writ Petition No.51998 of 2009 Constable 289 CP Tahsildar Singh and others Vs. State of U.P. and others where dealing with a similar controversy in relation to transfers involving officers of U.P. Police it was observed that the transfer of officers of the police force are governed by the U.P. Police Regulations framed under the Police Act of 1961 and it is well settled that executive instruction or order cannot prevail over the statutory provision and therefore, the Government Order dated 6.6.2009 would be inoperative and inconsistent to the said Regulations.

23. It is for this reason that the Government issued a clarification on 15.10.2009 vide Annexure - 3 to the counter affidavit that the police department is not outside the preview of the transfer policy dated 6.6.2009.

24. Next submission of the learned counsel for the petitioner is that the transfer of the petitioner is a colourable exercise of power, inasmuch the same has been made on caste basis. He has submitted that from the western districts of U.P., namely, Gautam Budh Nagar, Ghaziabad, Baghpat, Meerut, Muzaffar Nagar, Saharanpur only Constables belonging to Jat and Gurjar community alone have been picked up and transferred to other districts.

25. As far as the petitioner is concerned, he has been transferred from Gautam Budh Nagar to Mau. It has come on record that from the district Gautam Budh Nagar only six transfers have been made out of more than 2000 police officers of sub-ordinate rank posted in the district. Thus, the number of officers transferred out of the district is negligible and on its basis it cannot be even imagined that any discrimination in the matter of transfer has been practised on the basis of caste.

26. In the first supplementary affidavit a completely vague averment has been made that from the Meerut Zone about 400 Police Officers have been transferred in September, 2009 and approximately all of them belong to a particular community. In the second supplementary affidavit, it has been stated that approximately 250 Police Officers of a particular community are transferred from Meerut Zone in September, 2009. These two averments are contradictory to each other and cannot be reconciled. Further, as per the averments made in the second supplementary affidavit, the total number of police officers posted in a particular district and the number of police officers transferred is as under:

District	Total number of Police Officers	Number of Police Officers of a particular community	Number of transferred Police Officers of particular community
Meerut	1500	22% i.e. 330	65
Saharanpur	1275	20% i.e. 255	60
Baghpt	360	32% i.e. 115	24
Muzaffar Nagar	1250	25% i.e. 312	59

27. The number of officers so transferred appears to be quite insignificant looking to the number of officers posted in each district.

28. The learned Standing Counsel in this regard rightly submits that the process of transfer is not complete and the possibility of transfer of others officers which may include those of other community cannot be ruled out. In such a situation, in the absence of a clear cut averment as to why the department, rather the high level committee i.e. Police Establishment Board, would choose and transfer the police personnels of a particular community alone, the contention that the transfers are in colourable exercise of power is general in nature and too remote to be accepted.

29. Apart from the above, Police Force is a disciplined force established for the purpose of maintaining law and order and for investigation of crimes. Therefore, in order to maintain strict discipline, sometimes whole sole transfers are necessary in administrative exigencies. It is a common phenomena that in such circumstances a whole Battalion or a Brigade or a Regiment is transferred, which may include generally Constables/Sepoys of a particular caste. In Army particularly there are specific Regiments for Jats, Gorakhas and Sikhs etc. Thus, where the Regiment as a whole is transferred it would result in the transfer of persons of particular community alone but such a transfer cannot be faulted on account of arbitrariness or discrimination.

30. Sri Vijay Gautam, learned counsel for the petitioner has placed reliance upon a decision reported in

2003(1) UPLBEC 636 Bishan Pal Malik and others Vs. State of U.P. and others in support of the contention that the transfer on caste basis is a colourable exercise of power. In the aforesaid case, though the transfers were said to have been made in administrative exigencies, the Court found that the purpose was actually to flush out the officers belong to a particular caste due to out come of an action which involved the father of the Chief Minister. However, in the present case no such incident has been placed on record on the basis of which it can be imagined that the transfer of the police officers of a particular community is tainted with ulterior motive.

31. In the last, a faint submission has been made that the impugned order of transfer of the petitioner is punitive in nature as is apparent from paragraph 5 of the counter affidavit.

32. A perusal of the aforesaid paragraph reveals that the petitioner had remained posted for 25 years in the adjoining districts of Bulandshahr and Ghaziabad. He was involved in case crime no.983 of 2008 u/s 379 IPC pertaining to demand of illegal gratification in respect whereof an enquiry was conducted and a censure entry was awarded to the petitioner. It is in view of above circumstances and the conduct of the petitioner that a recommendation for his transfer was made, which on being approved by the Board has been implemented. Neither the impugned order of transfer nor the above paragraph 5 of the counter affidavit is stigmatic or punitive in nature. It only narrates the basis of award of censure entry to the petitioner which may have formed one of the grounds for his transfer. Obviously, transfers have to be made on consideration of certain aspects and the past record of the petitioner as such becomes an essential aspect within the domain of administrative exigency. Therefore, even if such an entry has formed a part of decision making process it can not be said to be objectionable. It is a well recognised principle of law that the legality of the order has to be judged independently only on the basis of the reasons mentioned in the order itself and more reasons can not be supplemented by material other than the order itself.

33. In view of the above discussion, I am not inclined to exercise my extra ordinary discretionary jurisdiction under Article 226 of the Constitution so as to interfere with the impugned order of transfer. There is no merit in the petition and it is accordingly dismissed with no order as to costs. Petitioner is permitted to join at the transferred place within a week.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.10.2009

BEFORE
THE HON'BLE SHISHIR KUMAR, J.

Civil Misc. Writ Petition No. 60367 of 2005

No.63829833 Naik R.K. Mahapatra
...Petitioner
Versus
Chief of Army Staff and others
...Respondents

Counsel for the Petitioner:
Sri Colonel Ashok Kumar
Sri Rohit Kumar

Counsel for the Respondents:
Sri K.C. Sinha, A.S.G.I.

S.S.C.

Defence Service Regulation (Regulation for Army) 1987-Para 164-Discharge from Service-on charges of overstaying on leave-held-valid can not be interfered by Writ Court.

Held: Para 11 & 12

The Apex Court has further held that in the said circumstances discharge from service cannot be said to be by way of punishment. In Sugreev Singh's case (Supra), the Division Bench has also taken the same view.

After considering all facts and circumstances of the present case and decisions of this Court as well as the Apex Court, I am of view that discharge of petitioner from service cannot be said to be illegal or disproportionate.

Case law discussed:

W.P. No. 10816 of 2000, W.P.No. 3201 of 1994 decided on 2.2.2005, 1990 ACJ, 597, 2002 (2) ESC (Allahabad), 207, 2008 (2) Supreme Court, 302, 2005 (2) ESC, 892.

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

1. This writ petition has been filed for quashing the order of discharge dated 25th May, 2000 (Annexure 10 to the writ petition) as well as the order dated 31st May, 2005 (Annexure 17 to writ petition). Further prayer in the nature of mandamus commanding the respondent No.1 to treat petitioner to have continued in Colour Service till he would have completed requisite service laid down in Para 164 of Defence Service Regulation (Regulations for Army), 1987 with all consequential benefits.

2. The facts stated in the writ petition are that petitioner who was recruited in army was granted annual leave from 12th September, 1999 upto 28th December,1999. Various other facts stated in the writ petition are not necessary to be mentioned herein. It has been stated that during leave period, petitioner was called back and due to aforesaid fact, annual leave of petitioner for the year 1999 has been elapsed. A show cause notice was issued to petitioner submitting reply and subsequently a show cause notice was also issued directing petitioner to submit reply to said show cause notice. Petitioner has submitted reply and an order of discharge from service was passed on the ground that petitioner was awarded four red ink entries during his 13 years of service and petitioner was send on leave for 64 days but without any permission for extension of leave, he has overstayed, which is an offence under the Army Act but respondent without adopting any procedure as provided under the Act, an administrative action has been taken under the Army Rule 13(3)(4) of the Army Rules. The ground taken in the discharge certificate was that as petitioner has earlier been punished under Sections 40, 39, 63 of the Army Act, for various offences, therefore, he is being discharge from service being undesirable as inefficient solider. Petitioner filed a complaint as provided under the Act that too has been dismissed. Hence, the present writ petition.

3. Counter and rejoinder affidavits have already been exchanged, therefore, with the consent of parties, present writ petition is being disposed of on the admission stage.

4. Learned counsel for petitioner submits that the ground taken by respondents while discharging petitioner from service cannot be sustained in view

of the fact that if petitioner has committed some offence, he is liable for trial by the Court Martial. Court Martial being a procedure for punishment under the Act is to be adopted. Under Section 108 of the Army Act, there are four types of Court Martial by which petitioner can be tried. In case in the opinion of respondents, petitioner has committed any offence or overstayed on leave without sanction of the same, unless and until an opportunity to that effect is given, petitioner cannot be discharged from service. Under the Army Act and Rules, there is a procedure that, in case, some offence is committed by a person subject to the Army Act, a court of enquiry as provided under Rule 177 has to be ordered by the competent authority and in case it is found that prima-facie case is made out, then the commanding officer will pass an order for holding a Court Martial either summary, general or district. But taking action under Rule 13, without affording an opportunity to petitioner is not sustainable in law and is liable to be quashed.

5. Assuming without admitting this fact, if petitioner was punished earlier on some offence that cannot be a ground for discharge of petitioner from army service. Petitioner has placed reliance upon a judgement of this Court in **C.M.W.P. No. 10816 of 2000 No.5042301A, L.B.Thapa Vs. Chief of Army Staff and others**. Another judgement has been relied upon by petitioner in **C.M.W.P.No. 3201 of 1994 Shambu Gurung Vs. Union of India and others** decided on 2.2.2005. Further reliance has been placed upon **1990 ACJ, 597, Chaukas Ram Vs. Sub Area Commander and Another.** Taking support of the aforesaid judgements, learned counsel for petitioner submits that, in case, no notice against contemplated discharge having been given to petitioner, it will be treated that order impugned of discharge has been passed in violation of the procedure laid down by Rule 13 and also against the principle of natural justice. Further argument has been raised that unless and until submission is recorded that trial of petitioner by Court Martial is inexpedient or impracticable against Rule 13, cannot be taken. In such situation, learned counsel for petitioner submits that discharge order passed by respondents is liable to be set aside.

6. On the other hand, learned counsel for respondents submits that petitioner was NCO Incharge, Kerbside Petrol Pump and was posted to 45 Company ASC (Supply) Type-B on 3.9.1998. Petitioner had four red-ink entries from his previous units under various sections of the Army Act, awarded by different Commanding Officer under whom he was working. Petitioner requested for annual leave for the year 1999 in the month of December, 1999. His leave was sanctioned and he was issued a railway warrant for both ways in advance as per the existing rules. Petitioner before proceeding on leave has to handover the charge but petitioner became absent without leave with effect from 29.12.1999 without handing over the charge of the petrol pump. An apprehension roll was issued as he left the unit without any proper order and permission. Petitioner reported on 4.1.2000. Thereafter petitioner was sent on 34 days part of annual leave for the year 2000 on compassionate ground. His leave was extended by 30 days till 12th March, 2000. After re-joining on leave, petitioner was awarded "Severe Reprimand" for being absent without

leave with effect from 29.12.1999 to 3.1.2000. This was his 5th red ink entry. Then a show cause notice was issued to petitioner on 17.1.2000 to discharge on account of four red ink entries being an undesirable/ inefficient person. Petitioner submitted a reply and same was considered and statutory complaint filed by petitioner has also been dismissed.

7. It has further been submitted on behalf of respondents that army authorities in view of provisions had an option to try a person either by a Court Martial or to take an administrative action as provided under Rule 13 of the Army Rules. Further Section 20 of the Act gives power to Army authority to dismiss or remove any person subject to the act other than officer. The procedure has been prescribed that he can be dismissed from service on the basis of show cause notice and then he will have a remedy under Section 26 of the Army Act. The procedure for discharge has been provided under Rule 13 of the Rules. Reliance has been placed upon a judgement of this Court reported in 2002 (2) ESC (Allahabad), 207 **Sugreev Singh Desuriya Vs. The Central Government (H.C.)**. Placing reliance upon aforesaid judgement, learned counsel for respondent submits that this Court while considering similar provision which is under the Air Force Act and Rules has held that if a non-commissioned officer was discharged from service on the ground of service no longer required and unsuitable retention for Air Force on the ground of red and black ink entries in his conduct book, this Court has held that, in such circumstances, it cannot be said that procedure prescribed and adopted by respondents is faulted. The Court has further held that respondents have followed the procedure of giving warning and also issuing a show cause notice after he again incorporated red-ink entry in the conduct book and after considering the explanation has discharged him from service, it cannot be said to be contrary to the policy of discharge of habitual offender. The submission of petitioner regarding policy as ultra-virus was also not accepted. Further reliance has been placed on a Apex Court judgement reported in Judgement Today, 2008 (2) Supreme Court, 302 **Union of India and others Vs. Rajesh Vyas**. Relevant para 10 is being reproduced below:-

*"**10.** As noted above, policy for discharge of habitual offender was considered by this Court in A.K.Bakshi's case (supra).After analyzing the policy, it was observed that the whole idea underlying the policy was to weed out the indisciplined personnel from the force. It was further observed that it was a discharge simplicitor and as such it cannot be held as termination of service by way of punishment for misconduct."*

8. Learned counsel for respondents has also placed reliance upon a judgement of this Court reported in 2005 (2) ESC, 892 **Ali Jabed Vs. Union of India and others**. Placing reliance upon aforesaid judgement, learned counsel for respondents submits that this Court in similar circumstances taking into consideration the previous four red entries has held that discharge of a person cannot be said to be by way of punishment and has held that policy of discharging of habitual offender cannot be said to be ultra-virus and if a person has been awarded red-ink entries, punishment cannot be said to be illegal. Further it has been held by this Court that the person

concerned has given adequate opportunity of placing his defence in accordance with rules and procedure provided, therefore, it cannot be held that punishment awarded is not correct and proper.

9. I have considered the submissions made on behalf of parties. From the record, it is clear that earlier petitioner has been awarded four red ink entries under various sections of the Army Act and he was punished for the same and it was incorporated in his service record.

(a) Army Act Section 40 (C) on 16 Oct 8914 days RI, by Lt.Col N.C.Dutta
(b) Army Act Section 39 (d) on 30 Mar 96- severe Reprimand by Lt.Col Surjit Singh.
(c) Army Act Section 63 on 16 Sep 96- Severe Reprimand by Col Kamal Mohey.
(d) Army Act Section 63 on 02 Apr 96- Severe Reprimand by Col JS Dhillon.
(e) Army Act Section 30 (a) on 18 Mar 2000- Severe Reprimand by Major J.S. Shekhawat.

10. Lastly, petitioner was awarded Severe Reprimand under Section 39(A) on 18th March, 2000. The argument raised on behalf of petitioner to this effect that if some punishment is to be awarded to petitioner, there was no occasion for initiating an administrative action against petitioner Under Rule 13 (3)(iv) of the Army Rules. It was incumbent on the part of respondents to have an enquiry to hold a trial for the purposes of initiations action against petitioner. Rule 13 gives the power to the Sub Area Commander ordering discharge in the circumstances of the case permit to give the person whose discharge is contemplated, an opportunity to show cause against the contemplated discharge is to be given. From the perusal of aforesaid rule, it is clear that power has been conferred to army authorities to take administrative action against a person who is serving in the army. From the record it is clear that petitioner was habitual offender and earlier he was punished four times under various section of the army. The contention regarding that no administrative action should have been taken against petitioner as no Court Martial has been held, therefore, punishment is bad in law and cannot be accepted in view of provision of Section 125 of the Act. It is the army authority to choose the forum. Under the Army Act, there are two modes of punishment which can be awarded to a army person, one by a Court Martial and another is administrative action provided under Army Act and procedure provided under Rule 13 of the Rules. The decision citied by learned counsel for petitioner is not applicable to the present case as in Chaukas Ram's Case (Supra), it was not a case of red-ink entry. In the aforesaid case, petitioner was involved in a crime and has concealed the said fact. The other two cases relied upon by learned counsel for petitioners relates to the decision of the statutory complaint. This Court in that circumstances has directed the army authorities to pass appropriate orders to decide the statutory complaint. The submission of the learned counsel for petitioner to this effect that punishment awarded to petitioner is very harsh. In my opinion, case in hand is a case of military personnel and discipline in the military service has to be maintained for the purposes and security of the country. In the case of **Vidya Prakash Vs. Union of India** reported in AIR 1988 Supreme Court, 705, question raised before the Apex Court was in order to withdrawing red-ink entries and if a person is absent

without leave, whether the punishment of dismissal is disproportionate or not. The Apex Court has held that if a person is punished for an offence of absent from duty on four occasions and red ink entry has been awarded, punishment awarded by the Court Martial for dismissal from service cannot be said to be disproportionate to the charges levelled against the person concerned. In AIR 1996 Supreme Court, 1368, **Union of India and others Vs. A.K.Bakshi,** while considering similar provision of Air Force, which is in the Army Act, it has been held by the Apex Court that policy of discharge of habitual offender as prescribed in the policy discharging a person in accordance with law with the procedure laid down does not amount to removal by way of punishment. It is a discharge under the Rules. Similar policy for removal for undesirable and inefficient solders have been framed by the Army Authorities dated 28th December, 1988. The relevant part is being quoted below:-

"JCOs, Wos and OR who have proved inefficient:

3.(a) Before recommending or sanctioning discharge, the following points must be considered-

(i) if lack of training is the cause of his inefficiency, arrangements will be made for his further training,

(ii) if an individual has become unsuitable in his arm/service through no fault of his own, he will be recommended for suitable extra-regimental employment.

(b) Should it be decided to transfer a JCO, he may be transferred in his acting/substantive rank according to the merits of the case and will not be recommended for further promotion and / or increment of pay until he proves his fitness for promotion and / or increment of pay in his new unit.

(c) Prior to transfer, if such a course is warranted on the merits of the case, a WO or an NCO may be reduced to one rank lower than his substantive rank under Army Act Section 20(4).

Procedure for Dismissal/ Discharge of undesirable JCOs/WOs/OR

4. AR 13 and 17 provide that a JCO/WO/OR whose dismissal or discharge is contemplated will be given a show cause notice. As an exception to this, services of such a person may be terminated without giving him a show cause notice provided the competent authority is satisfied that it is not expedient or reasonable practice to serve such a notice. Such cases should be rare, e.g., where the interests of the security of the State so require. Where the serving of a show cause notice is dispensed with, the reason for doing so are required to be recorded. See provision to AR 17.

5. Subject to the foregoing, the procedure to be followed for dismissal or discharge of a person under AR 13 or AR17, as the case may be, is set out below-

(a) Preliminary Enquiry.

Before recommending discharge or dismissal of an individual the authority concerned will ensure-

(i) that an impartial enquiry (not necessarily a Court of Inquiry) has been made into the allegations against him and that he has adequate opportunity of

putting up his defence or explanation and of adducing evidence in his defence.
(ii) that the allegations have been substantiated and that the extreme step of termination of the individual's service is warranted on the merits of the case.

(b) Forwarding of Recommendations.

The recommendation for dismissal or discharge will be forwarded through normal channels, to the authority competent to authorise the dismissal or discharge, as the case may be, along with a copy of the proceedings of the enquiry referred to in (a) above.

(c) Action by Intermediate Authorities.

Intermediate authorities through whom the recommendations pass will consider the case in the light of what is stated in (a) above and make their own recommendations as to the disposal of the case.

(d) Action by Competent Authority.

The authority competent to authorise the dismissal or discharge of the individual will consider the case in the light of what is stated in (a) above. If he is satisfied that the termination of the individual's service is wait ranted he should direct that show cause notice be issued to the individual in accordance with AR 13 or AR 17 as the case may be. No lower authority will direct the issue of a show cause notice. The show cause notice should cover the full particulars of the cause of action against the individual. The allegations must be specific and supported by sufficient details to enable the individual to clearly understand and reply to them. A copy of the proceedings or the enquiry held in the case will also be supplied to the individual and he will be afforded reasonable time to state in writing any reasons he may have to urge against the proposed dismissal or discharge.

(e) Action on receipt of the reply to the show cause notice.

The individual's reply to the show cause notice will be forwarded through normal channels to the authority competent to authorise his dismissal/discharge together with a copy of each of the show cause notice and the proceedings of the enquiry held in the case and recommendations of each forwarding authority as to the disposal of the case.

(f) Final Orders by the Competent Authority.

The authority competent to sanction the dismissal/discharge of the individual will before passing orders reconsider the case in the light of the individual's reply to the show cause notice. A person who has been served with a show cause notice for proposed dismissal may be ordered to be discharged if it is considered that discharge would meet the requirements of the case. If the competent authority considers that termination of the individuals service is not warranted but any of the actions referred to in (b) to (j) of para 2 above would meet the requirements of the case, he may pass orders accordingly. On the other hand, if the competent authority accepts the reply of the individual to the show cause notices entirely satisfactory, he will pass orders accordingly."

11. The Apex Court has further held that in the said circumstances discharge from service cannot be said to be by way of punishment. In Sugreev Singh's case (Supra), the Division Bench has also taken the same view.

12. After considering all facts and circumstances of the present case and decisions of this Court as well as the Apex Court, I am of view that discharge of petitioner from service cannot be said to be illegal or disproportionate.

13. In view of aforesaid fact, the writ petition is devoid of merits and is hereby dismissed.

No order is passed as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.10.2009

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

Civil Misc. Writ Petition No. 57675 of 2007

Jafar Khan ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Rohit Upadhyay

Counsel for the Respondents:
Sri K.K. Chand
Sri Rajesh Kumar Yadav
C.S.C.

<u>Group-D Employees Service-Rule-1985</u>- Cancellation of appointment of class 4th employee- working government Girls Inter College- Principle is the only competent authority of order impugned passed by Secretary- without Notice opportunity without application of mind held illegal principle of Natural justice violated cannot sustain.

Held: Para 12 & 13

In view of the aforesaid and the undisputed position with regard to applicability of the rules, the competent authority being the Principal, the order of cancellation, termination or otherwise could have only been passed by the Principal of the institution. The State Government does not have any power either defined under the aforesaid Rules, 1985 or even as a residuary power to determine status of employment of a Class-IV employee of a Government Girls Degree College.

In view of this, the directions issued by the State Government and the direction issued by the Director of Education at the best can be administrative recommendations. The proceedings are to be initiated by the Competent Authority. Keeping in view Rule 31 referred to herein above if the appointment of the petitioner was illegal or invalid, the cancellation has to be initiated by the Principal of the Institution and it is the Principal who has to issue a notice to the petitioner and to cancel his appointment. It is admitted in the counter affidavit that the impugned orders have emanated without there being any notice or opportunity to the petitioner and the Principal has, as a matter of fact surrendered his jurisdiction in favour of State Government as well as Director of Education. This in the opinion of the Court is impermissible under law.

(Delivered by Hon'ble A.P. Sahi, J.)

1. Heard Sri Bheem Singh, learned counsel for the petitioner, learned standing counsel and Sri K.K. Chand, learned counsel for respondents No. 1, 2 and 3 and perused the counter affidavit filed on behalf of the State.

2. Sri R.K. Yadav, Advocate for caveator has also been heard under Chapter 22, Rule 5(A) of the Allahabad High Court, Rules.

3. The petitioner has come up against the order dated 27th September, 2007 and 19th October, 2007 whereby the appointment of the petitioner as Class IV employee in a Government Girls Degree College has been cancelled on the ground that the selections held were invalid.

4. The impugned order also recites that the petitioner had not filed his certificate with regard to low-vision before the Competent Authority and in spite of that he was selected.

5. The contention raised on behalf of the petitioner is that the impugned order dated 27th September, 2007 has been passed by the Principal Secretary Government of U.P. who is not the Competent Authority to pass any such order and further the Director of Education had no authority to issue an order to the Principal of the Institution to cancel the appointment of the petitioner. It is urged that the said orders are without jurisdiction and consequently both the orders have been passed without giving any notice or opportunity to the petitioner and, therefore, it is in violation of the principles of natural justice. The averments to that effect have been made in paragraph 19 and 26 of the writ petition. The petitioner has also tried to justify the certificate issued to him by a medical practitioner and has urged that, had the petitioner been given an opportunity, he would have been demonstrated that he was fully qualified and eligible.

6. Lastly, it has been submitted by Sri Bheem Singh, that the impugned order has been passed at the behest of a member of the Legislative Assembly and, therefore, the impugned orders are vitiated on the ground of malice as well.

7. A counter affidavit has been filed on behalf of the State as well as also on behalf of the Caveator who is seeking impleadment. From the perusal of the counter affidavit filed on behalf of the State indicates that the stand taken is that since the State Government controls all Government Institutions, therefore, the Principal of a Degree College is also under the control of Government and there is no illegality in the issuance of the directions either by the Principal Secretary or by the Director of Education.

8. So far as opportunity is concerned, it has been stated in paragraph 16 of the counter affidavit that since the selections were invalid and illegal, therefore, there was no necessity of giving opportunity of hearing to the petitioner.

9. A rejoinder affidavit has also been filed to the said counter affidavit denying the aforesaid allegations.

10. Learned counsel for the proposed respondent has also adopted the same argument and urged that petitioner has obtained the appointment illegally and since his appointment is illegal the direction issued by the State to cancel the appointment of the petitioner does not suffer from any infirmity.

11. It remains undisputed between the parties that the appointment of a Class-IV employee of a Government Girls Degree College has to be made by the

Principal of the Institution. The Competent Appointing Authority has been defined in Group-D Employees Service Rules, 1985 and thereafter the said rules for other matters, makes provision under Rules 31, that for such matters which are not specifically covered under the rules, the rules pertaining to government servants shall apply.

12. In view of the aforesaid and the undisputed position with regard to applicability of the rules, the competent authority being the Principal, the order of cancellation, termination or otherwise could have only been passed by the Principal of the institution. The State Government does not have any power either defined under the aforesaid Rules, 1985 or even as a residuary power to determine status of employment of a Class-IV employee of a Government Girls Degree College.

13. In view of this, the directions issued by the State Government and the direction issued by the Director of Education at the best can be administrative recommendations. The proceedings are to be initiated by the Competent Authority. Keeping in view Rule 31 referred to herein above if the appointment of the petitioner was illegal or invalid, the cancellation has to be initiated by the Principal of the Institution and it is the Principal who has to issue a notice to the petitioner and to cancel his appointment. It is admitted in the counter affidavit that the impugned orders have emanated without there being any notice or opportunity to the petitioner and the Principal has, as a matter of fact surrendered his jurisdiction in favour of State Government as well as Director of Education. This in the opinion of the Court is impermissible under law.

14. Accordingly, the orders impugned are unsustainable and the same are quashed. The impugned orders dated 27th September, 2007 and 19th October, 2007 are set aside with the direction to the respondent No. 3 to offer an opportunity to the petitioner and thereafter proceed to pass an appropriate order in accordance with law as expeditiously as possible preferably within a period of three months from the date of production of certified copy of this order before him.

15. It is made clear that the payment of salary shall be subject to any order being passed by the Principal.

16. With the aforesaid direction, the writ petition stands allowed.

No order is passed as to costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.10.2009

BEFORE
THE HON'BLE SATYA POOT MEHROTRA, J.
THE HON'BLE RAJESH CHANDRA, J.

First Appeal From Order No. 2935 of 2009

New India Assurance Company Ltd.
...Defendant/Appellant
Versus
Mohd. Yameen & another ...Respondents

Counsel for the Appellant:
Sri Dhananjay Awasthi

Counsel for the Respondents:

Motor Vehicle Act, 1988-Section 149-Third party insurance-duty of insever to satisfy the award-Tribunal directed the

insurance Company to pay the entire amount of award-recover the same from vehicle owner-held perfectly justified-appeal by insurance company dismissed.

Held: Para 19

In view of the above, it is evident that the Tribunal did not commit any illegality in directing the Insurance Company/ Appellant to make deposit of the amount of compensation and recover the same from the insured person i.e. the owner of the vehicle in question - respondent no.3 herein.

Case law discussed:

AIR 1998 SC 588, 2004(3) SCC 297 : 2004 (1) T.A.C. 321 : AIR 2004 SC 1531, 2008(1) T.A.C. 803 (S.C.), (2007) 3 S.C.C. 700 : 2007 (2) T.A.C. 398, (2007) 5 S.C.C. 428: 2007 (2) T.A.C. 417.

(Delivered by Hon'ble Satya Poot Mehrotra, J.)

1. The present Appeal has been filed by the Insurance Company under Section 173 of the Motor Vehicles Act, 1988 against the award dated 22.5.2009 whereby Rs. 1,69,940/- with interest @ 6% per annum has been awarded as compensation to the claimants-respondents on account of the death of Wasim in an accident which took place on 23.4.2005 at around 4.00 a.m. in the morning wherein Canter No. UP23B-2043 collided with a Truck.

2. The Motor Vehicles Accident Claims Tribunal framed five issues.

3. Issue No.1 was in regard to the factum of accident having taken place on account of rash and negligent driving by the driver of the aforesaid vehicle, namely, Canter No. UP23B-2043. The Tribunal decided the said Issue in the affirmative.

4. Issue No.2 was as to whether the vehicle in question was insured with the Insurance Company/ Appellant and as to whether the driver of the vehicle was having a valid and effective Driving License on the date of accident. The Tribunal held that the vehicle in question was insured with the Insurance Company/ Appellant on the date of the accident. However, it was held that the driver of the vehicle in question was not having valid and effective Driving License on the date of accident.

5. Issue No. 3 was as to whether the Claim Petition was bad for non-joinder of necessary parties. The said Issue was decided against the opposite parties in the Claim Petition.

6. Issue No.4 was as to whether the deceased was travelling in the vehicle in question as gratituous passenger in an unauthorized manner which was violative of the terms and conditions of the insurance policy. The Tribunal decided the said Issue in the affirmative in favour of the Insurance Company/ Appellant. It was held that the vehicle in question was being used for commercial purposes, and the same was against the terms and conditions of the insurance policy.

7. Issue No.5 was as to whether the claimants-respondents were entitled to get compensation as against the opposite parties in the Claim Petition jointly or separately. It was held by the Tribunal that the claimants/ respondents were entitled for compensation amounting to Rs.1,69,940/- with interest @ 6%. However, the compensation was not payable by the Insurance Company/ Appellant but was payable by Mahmood Hasan, owner of the vehicle in question-respondent no.3 herein.

8. The Insurance Company/ Appellant has filed the present Appeal impugning the aforesaid award.

9. We have heard Shri Dhananjay Awasthi, learned counsel appearing for the Insurance Company/ Appellant, and perused the record.

10. The impugned award has, interalia, directed that even though the amount of compensation is not payable by the Insurance Company/ Appellant, the Insurance Company/Appellant would deposit the amount within 60 days of the award, and the Insurance Company/ Appellant would be entitled to recover the same from the owner of the vehicle in question, i.e., respondent no.3 herein.

11. It is submitted by Shri Dhananjay Awasthi, learned counsel appearing for the Insurance Company/Appellant that having decided Issue Nos. 2 and 4 in favour of the Insurance Company/ Appellant, the Tribunal erred in directing the Insurance Company/ Appellant to deposit the amount of compensation and recover the same from the owner of the vehicle in question, i.e., respondent no.3 herein.

We have considered the submissions made by Shri Dhananjay Awasthi, and we find ourselves unable to accept the same.

Sub-section (5) of Section 147 of the Motor Vehicles Act, 1988 lays down as under:

"147. Requirements of policies and limits of liability .- (1) to (4).....
(5) Notwithstanding anything contained in any law for the time being in force, an insurer issuing a policy of insurance under this section shall be liable to indemnify the person or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of that person or those classes of persons."

The above provision, thus, provides that an insurer issuing a policy of insurance under Section 147 of the Motor Vehicles Act, 1988 shall be liable to indemnify the person or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of that person or those classes of persons.

Section 149 of the Motor Vehicles Act, 1988, in so far as is relevant, provides as follows:

"149. Duty of insurers to satisfy judgments and awards against persons insured in respect of third party risks.-*(1) If, after a certificate of insurance has been issued under sub-section (3) of Section 147 in favour of the person by whom a policy has been effected, judgment or award in respect of any such liability as is required to be covered by a policy under clause (b) of sub-section (1) of Section 147 (being a liability covered by the terms of the policy) [or under the provisions of Section 163-A] is obtained against any person insured by the policy, then, notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy, the insurer shall, subject to the provisions of this section, pay to the person entitled to the benefit of the decree any sum not exceeding the sum assured payable thereunder, as if he were the judgment-debtor, in respect of the liability, together with any amount payable in respect of*

costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.

(2) to (7)....."

The above-quoted provision shows that in case any judgment or award in respect of the liability as is required to be covered by a policy under clause (b) of sub-section (1) of Section 147 (being a liability covered by the terms of the policy) or under the provisions of Section 163-A is obtained against any person insured by the policy, then the insurer shall pay to the person entitled to the benefit of the decree any sum not exceeding the sum assured payable thereunder, as if he were the judgment-debtor, in respect of the liability, together with the amount of costs and interest. This will be so even though the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy.

In view of the aforesaid provisions, we are of the view that the direction given by the Tribunal directing the Insurance Company/ Appellant to make deposit of the amount of compensation and recover the same from the insured person i.e. the owner of the vehicle in question - respondent no.3 herein, does not suffer from any infirmity.

13. The above conclusion is supported by the decisions of the Apex Court:

In **Oriental Insurance Co. Ltd. v. Inderjit Kaur and others, AIR 1998 SC 588**, their Lordships of the Supreme Court opined as under (paragraph 7 of the said AIR):

"7. We have, therefore, this position. Despite the bar created by S. 64-VB of the Insurance Act, the appellant, an authorised insurer, issued a policy of insurance to cover the bus without receiving the premium therefor. By reason of the provisions of Ss. 147(5) and 149(1) of the Motor Vehicles Act, the appellant became liable to indemnify third parties in respect of the liability which that policy covered and to satisfy awards of compensation in respect thereof notwithstanding its entitlement (upon which we do not express any opinion) to avoid or cancel the policy for the reason that the cheque issued in payment of the premium thereon had not been honoured."

(Emphasis supplied)

14. This decision thus supports the conclusion mentioned above on the basis of Sections 147(5) and 149(1) of the Motor Vehicles Act, 1988.

15. In ***National Insurance Co. Ltd.. v. Swaran Singh, 2004(3) SCC 297 : 2004 (1) T.A.C. 321 : AIR 2004 SC 1531***, their Lordships of the Supreme Court held as follows (paragraph 105 of the said AIR):

*"**105**. The summary of our findings to the various issues as raised in these petitions is as follows :*

(i) Chapter XI of the Motor Vehicles Act, 1988 providing compulsory insurance of vehicles against third-party risks is a social welfare legislation to extend relief by compensation to victims of accidents caused by use of motor vehicles. The provisions of compulsory insurance coverage of all vehicles are with this paramount object and the provisions of

the Act have to be so interpreted as to effectuate the said object.

(ii) An insurer is entitled to raise a defence in a claim petition filed under Section 163-A or Section 166 of the Motor Vehicles Act, 1988, inter alia, in terms of Section 149(2)(a)(ii) of the said Act.

(iii) The breach of policy condition e.g., disqualification of the driver or invalid driving licence of the driver, as contained in sub-section (2)(a)(ii) of Section 149, has to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards the insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by a duly licensed driver or one who was not disqualified to drive at the relevant time.

(iv) Insurance Companies, however, with a view to avoid their liability must not only establish the available defence(s) raised in the said proceedings but must also establish 'breach' on the part of the owner of the vehicle; the burden of proof wherefor would be on them.

(v) The Court cannot lay down any criteria as to how the said burden would be discharged, inasmuch as the same would depend upon the facts and circumstances of each case.

(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards the insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insurer under Section 149(2) of the Act.

(vii) The question, as to whether the owner has taken reasonable care to find out as to whether the driving licence produced by the driver, (a fake one or otherwise), does not fulfil the requirements of law or not will have to be determined in each case.

(viii) If a vehicle at the time of accident was driven by a person having a learner's licence, the insurance Companies would be liable to satisfy the decree.

(ix) The claims tribunal constituted under Section 165 read with Section 168 is empowered to adjudicate all claims in respect of the accidents involving death or of bodily injury or damage to property of third party arising in use of motor vehicle. The said power of the tribunal is not restricted to decide the claims inter se between claimant or claimants on one side and insured, insurer and driver on the other. In the course of adjudicating the claim for compensation and to decide the availability of defence or defences to the insurer, the Tribunal has necessarily the power and jurisdiction to decide disputes inter se between the insurer and the insured. The decision rendered on the claims and disputes inter se between the insurer and insured in the course of adjudication of claim for compensation by the claimants and the award made thereon is enforceable and executable in

the same manner as provided in Section 174 of the Act for enforcement and execution of the award in favour of the claimants.

(x) Where on adjudication of the claim under the Act the tribunal arrives at a conclusion that the insurer has satisfactorily proved its defence in accordance with the provisions of Sections 149(2) read with sub-section (7), as interpreted by this Court above, the Tribunal can direct that the insurer is liable to be reimbursed by the insured for the compensation and other amounts which it has been compelled to pay to the third party under the award of the tribunal. Such determination of claim by the Tribunal will be enforceable and the money found due to the insurer from the insured will be recoverable on a certificate issued by the tribunal to the Collector in the same manner under Section 174 of the Act as arrears as land revenue. The certificate will be issued for the recovery as arrears of land revenue only if, as required by sub-section (3) of Section 168 of the Act the insured fails to deposit the amount awarded in favour of the insurer within thirty days from the date of announcement of the award by the tribunal.

(xi)The provisions contained in sub-section (4) with the proviso thereunder and sub-section (5) which are intended to cover specified contingencies mentioned therein to enable the insurer to recover amount paid under the contract of insurance on behalf of the insured can be taken recourse to by the Tribunal and be extended to claims and defences of the insurer against the insured by relegating them to the remedy before regular court in cases where on given facts and circumstances adjudication of their claims inter se might delay the adjudication of the claims of the victims."

*(*Emphasis supplied*)*

16. Proposition nos. (vi) and (x), reproduced above support the conclusion that the direction given by the Tribunal in the award impugned in the present case is in accordance with law.

In ***National Insurance Co. Ltd. v. Laxmi Narain Dhut, 2007 (2) T.A.C. 398 (S.C.)***, their Lordships of the Supreme Court considered the decision in **National Insurance Co. Ltd. v. Swaran Singh** (supra) and held as under (paragraph 35 of the said TAC):

"***35.*** *As noted above, the conceptual difference between third party right and own damage cases has to be kept in view. Initially, the burden is on the insurer to prove that the license was a fake one. Once it is established the natural consequences have to flow.*

In view of the above analysis the following situations emerge:

(1) The decision in Swaran Singh's case (supra) has no application to cases other than third party risks.

(2) Where originally the license was fake one, renewal cannot cure the inherent fatality.

(3) In case of third party risks the insurer has to indemnify the amount and if so advised to recover the same from the insured.

(4) The concept of purposive interpretation has no application to cases relatable to Section 149 of the Act.

The High Courts/Commissions shall now consider the matter afresh in the light of the position in law as delineated above.

The appeals are allowed as aforesaid with no order as to costs."

(Emphasis supplied)

17. In view of the above decision, it is evident that in case of third party risks, the decision in ***National Insurance Co. Ltd. v. Swaran Singh and others*** (supra) would apply, and the insurer has to indemnify the amount to the third party and thereafter may recover the same form the insured.

18. In ***Prem Kumari and others Vs. Prahlad Dev and others, 2008(1) T.A.C. 803 (S.C.)***, their Lordships of the Supreme Court have reiterated the view expressed in National Insurance Company Limited Vs. Laxmi Narain Dhut case (supra) explaining the decision in National Insurance Company Limited Vs. Swarn Singh and others (supra), and held as under (paragraphs 8 and 9 of the said TAC):

*"**8**. The effect and implication of the principles laid down in Swarn Singh's case (supra) has been considered and explained by one of us (Dr. Justice Arijit Pasayat) in* ***National Insurance Co. Ltd.v. Laxmi Narain Dhut, (2007) 3 S.C.C. 700 : 2007 (2) T.A.C. 398****. The following conclusion in para 38 are relevant:*

"38. In view of the above analysis the following situations emerge:

(1) The decision in ***Swaran Singh's*** case (supra) has no application to cases other than third party risks.

(2) Where originally the license was a fake one, renewal cannot cure the inherent fatality.

(3) In case of third-party risks the insurer has to indemnify the amount, and if so advised, to recover the same from the insured.

(4) The concept of purposive interpretation has no application to cases relatable to Section 149 of the Act.

9. In the subsequent decision ***Oriental Insurance Co. Ltd. v. Meena Variyal and Others, (2007) 5 S.C.C. 428: 2007 (2) T.A.C. 417***, which is also a two Judge Bench while considering the ratio laid down in Swaran Singh's case (supra) concluded that in a case where a person is not a third party within the meaning of the Act, the Insurance Company cannot be made automatically liable merely by resorting to Swaran Sing's case (supra). While arriving at such a conclusion the Court extracted the analysis as mentioned in para 38 of ***Laxmi Narain Dhut*** (supra) and agreed with the same. In view of consistency, we reiterate the very same principle enunciated in Laxmi Narain Dhut (supra) with regard to interpretation and applicability of ***Swaran Singh's case*** (supra)."

(Emphasis supplied)

19. In view of the above, it is evident that the Tribunal did not commit any illegality in directing the Insurance Company/ Appellant to make deposit of the amount of compensation and recover the same from the insured person i.e. the owner of the vehicle in question - respondent no.3 herein.

20. After making the deposit of the amount, as directed by the impugned award, it will be open to the Insurance Company/ Appellant to recover the same from the insured person i.e. the owner of the vehicle in question - respondent no.3 herein by moving appropriate application before the Tribunal in this regard.

21. It is made clear that in case the claimants-respondents or the owner of the vehicle in question/ respondent no.3 herein files an Appeal against the impugned award, it will be open to the

Insurance Company/ Appellant to contest the same on the grounds legally open to it.

22. The amount of 25,000/- deposited in this Court while filing the present Appeal will be remitted to the Tribunal for being adjusted towards the amount to be deposited by the Insurance Company/ Appellant, as per the directions given in the impugned award.

23. Subject to the aforesaid observations, the Appeal filed by the Insurance Company/Appellant is dismissed. However, on the facts and in the circumstances of the case, there will be no order as to costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.10.2009

BEFORE
THE HON'BLE S.P. MEHROTRA, J.
THE HON'BLE RAJESH CHANDRA, J.

First Appeal From Order No. 3049 of 2009

National Insurance Company Ltd.
...Petitioner
Versus
Smt. Guddi Devi & others ...Respondent

Counsel for the Petitioner:
Sri Saral Srivastava

Counsel for the Respondents:

<u>Motor Vehicle Act, 1988-Section-170, readwith 149</u>-Appeal by insurance Company-Challenging the quantum of award-application by insurance Company already rejected by claim tribunal-held-quantum of compensation can not be questioned by insurance company.

Held: Para 15

In our opinion, as the application of the Appellant-Insurance Company under Section 170 of the Motor Vehicles Act,1988 was rejected by the Tribunal, it is not open to the Appellant-Insurance Company to raise the question of quantum of compensation, awarded by the Tribunal in the impugned award. The pleas raised in this regard by Sri Saral Srivastava, learned counsel for the Appellant-Insurance Company cannot, therefore be considered.

(Delivered by Hon'ble S.P. Mehrotra, J.)

1. The present appeal has been filed against the judgment and order /award dated 25.7.2009 passed by the Motor Accidents Claims Tribunal, Mainpuri in Claim Petition No. 318 of 2006, filed by the claimant-respondent nos. 1 to 7 under Section 166 of the Motor Vehicles Act, 1988 on account of the death of Ram Prakash in an accident which took place at about 5.45 PM on 14.5.2006.

2. It was, inter-alia, averred in the Claim Petition that on 14.5.2006 at about 5.45 PM, the deceased Ram Prakash with his wife Smt. Guddi Devi, Balister Singh, Prem Chandra, Raj Kishore and others while returning after attending a marriage ceremony in village Dalelpur at the place of the sister of the deceased,was waiting for vehicle on the road -side on GT Road, Kurawali-Etah Marg, a Mini Truck Tata 407 DL-1LG 391,which was coming from the direction of Etah and was being driven by the Driver rashly and negligently, hit the said Ram Prakash, resulting in his death on the spot. The Driver ran away with the said Mini Truck, i.e., the vehicle in question from the spot. The accident was witnessed by Smt.Guddi Devi and others. The First Information Report was lodged in regard to the accident, which was registered as Case Crime No. 174 of

2006 under Sections 279, 304A, Indian Penal Code in Police Station Kurawali, District Mainpuri. The deceased was aged 34 years at the time of his death and was a healthy person. The deceased was an agriculturist and was carrying on the business of sale and purchase of buffaloes, and his monthly income was not less than 7,000/- rupees. An amount of Rs.24,25,000/- with interest @ 12 % per annum was claimed as compensation in the Claim Petition.

3. Joint Written Statement was filed by respondent nos. 8 and 10. The Appellant- Insurance Company also filed its Written Statement.

The Tribunal framed four issues.

Issue no.1 was as to whether the Driver of the aforesaid vehicle in question while driving the same in rash and negligent manner, hit the said Ram Prakash resulting in the death of the said Ram Prakash. The Tribunal decided the said issue in the affirmative in favour of the claimant-respondent nos. 1 to 7.

Issue no.2 was as to whether the vehicle in question was insured with the Appellant-Insurance Company at the time of the accident. The Tribunal held that the vehicle in question was insured with the Appellant-Insurance Company at the time of the accident, and decided Issue no.2 accordingly.

Issue no. 3 was as to whether the Driver of the vehicle in question was having a valid and effective licence at the time of the accident. The Tribunal held that the Driver of the vehicle in question was having a valid and effective licence at the time of the accident, and decided Issue no.3 accordingly.

Issue no.4 was regarding the relief, if any, to which the claimant-respondent nos.1 to 7 were entitled. The Tribunal held that the claimant-respondent nos. 1 to 7 were entitled to compensation amounting to Rs.4,89,500/- with interest @ 6% per annum.

4. The Appellant- Insurance Company has filed the present appeal against the said award.

5. We have heard Sri Saral Srivastava, learned counsel for the appellant and perused the record filed with the appeal.

6. From the perusal of the record, it is evident that an application under Section 170 of the Motor Vehicles Act, 1988 was filed on behalf of the Appellant-Insurance Company before the Tribunal. However, by the order dated 7.3.2009, the Tribunal rejected the said application.

7. *Section 170 of the Motor Vehicles Act, 1988 lays down as under:-*

***"170 Impleading insurer in certain cases**- Where in the course of any inquiry, the Claims Tribunal is satisfied that –*

(a) there is collusion between the person making the claim and the person against whom the claim is made, or

(b) the person against whom the claim is made has failed to contest the claim,

it may, for reasons to be recorded in writing, direct that the insurer who may be liable in respect of such claim, shall be impleaded as a party to the proceeding

and the insurer so impleaded shall thereupon have, without prejudice to the provisions contained in sub-section (2) of Section 149, the right to contest the claim on all or any of the grounds that are available to the person against whom the claim has been made."

Sub-section (2) of Section 149 of the Motor Vehicles Act, 1988 referred to in Section 170 of the said Act is reproduced below:-

"

(1).....

(2) No sum shall be payable by an insurer under sub-section (1) in respect of any judgment or award unless, before the commencement of the proceedings in which the judgment or award is given the insurer had notice through the Court or, as the case may be, the Claims Tribunal of the bringing of the proceedings, or in respect of such judgment or award so long as execution is stayed thereon pending an appeal; and an insurer to whom notice of the bringing of any such proceedings is so given shall be entitled to be made a party thereto and to defend the action on any of the following grounds, namely:-

(a) that there has been a breach of a specified condition of the policy, being one of the following conditions, namely:--

i.a condition excluding the use of the vehicle-

(a) for hire or reward, where the vehicle is on the date of the contract insurance a vehicle not covered by a permit to ply for hire or reward,

or

(b) for organised racing and speed testing, or

(c) for a purpose not allowed by the permit under which the vehicle is used, where the vehicle is a transport vehicle, or

d. without side-car being attached where the vehicle is a motor cycle; or

(ii) a condition excluding driving by a named person or persons or by any person who is not duly licensed, or by any person who has been disqualified for holding or obtaining a driving licence during the period of disqualification; or

(iii) a condition excluding liability for injury caused or contributed to by conditions of war, civil war, riot or civil commotion; or

(b) that the policy is void on the ground that it was obtained by the non disclosure of a material fact or by a representation of fact which was false in some material particular.

(3) to (7.....".

8. Reading Sections 170 and 149(2) of the Motor Vehicles Act, 1988 together, it is evident that in case the Tribunal grants permission to the insurer under Section 170, the insurer will get right to contest the Claim Petition on all or any of the grounds that are available to the person against whom the claim has been made. However, if such permission is not granted by the Tribunal, then the insurer will be entitled to contest the Claim Petition on the limited grounds mentioned in sub-section (2) of Section 149 of the Motor Vehicles Act, 1988.

9. It follows, therefore, that in case an appeal is filed by the insurer against an award in a case where its application under Section 170 of the Motor Vehicles Act, 1988 was rejected by the Tribunal, it (insurer) will be able to challenge the award only on the limited grounds mentioned in sub-section (2) of Section 149 of the said Act.

10. As noted above, in the present case, the Tribunal rejected the application of the Insurance Company for permission under Section 170 of the Motor Vehicles Act, 1988.

11. In view of the rejection of the said application under Section 170 of the aforesaid Act, it is evident that the Appellant-Insurance Company can challenge the impugned award only on the grounds mentioned in sub-section (2) of Section 149 of the Motor Vehicles Act, 1988. Such grounds are evidently in respect of Issue Nos.2 and 3.

12. As noted above, in regard to Issue Nos. 2 and 3, the Tribunal has recorded findings of fact that on the date of the accident, the vehicle in question was insured with the Appellant-Insurance Company, and the Driver of the vehicle in question was having a valid and effective licence.

13. Sri Saral Srivastava, learned counsel for the Appellant-Insurance Company has not been able to point out any error in the said findings recorded by the Tribunal. The Appellant-Insurance Company has failed to establish any infirmity or illegality in the impugned award on the grounds open to the Appellant-Insurance Company to raise in view of the provisions of sub-section (2) of Section 149 of the Motor Vehicles Act, 1988.

14. Sri Saral Srivastava, learned counsel for the Appellant-Insurance Company submits that the quantum of compensation as determined by the Tribunal is not correct as the Tribunal has erred in applying multiplier of 15 and has wrongly taken the monthly income of the deceased as Rs.4,000/-.

15. In our opinion, as the application of the Appellant-Insurance Company under Section 170 of the Motor Vehicles Act,1988 was rejected by the Tribunal, it is not open to the Appellant-Insurance Company to raise the question of quantum of compensation, awarded by the Tribunal in the impugned award. The pleas raised in this regard by Sri Saral Srivastava, learned counsel for the Appellant-Insurance Company cannot, therefore be considered.

16. In view of the above, we are of the opinion that the appeal filed by the Appellant-Insurance Company lacks merits, and the same is liable to be dismissed.

17. The appeal is, accordingly, dismissed. However, on the facts and in the circumstances of the case, there will be no order as to costs.

18. The amount of Rs.25,000/- deposited by the Appellant-Insurance Company while filing the present appeal, will be remitted to the Tribunal for being adjusted towards the amount payable under the impugned award.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.08.2009

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 63052 of 2007

Vinay Kumar Upadhyay ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Ashok Tripathi
Sri N.L. Srivastava

Counsel for the Respondents:
Sri D.K. Tripathi
Sri P.C. Shukla
S.C.

U.P. Collection Peon Service Rule-2004-Rle-5-Substantive appointment-petitioner was denied as not achieved 70% target of collection during four fasli-fasli means an year e.g. Ravi and Kharif-while petitioner has been awarded satisfactory collection in four fasal-moreover for lessure collection peon can not be held directly responsible-order quashed-direction for reconsideration issued.

Held pare 13

Besides, the rule also required "satisfactory service" in the "last four Fasals" and not "Fasali". The distinction between a "Fasali" and "Fasal" has been considered by this Court in Mithlesh Kumar and another Vs. State of U.P. and others, 2008 (2) ESC 1332 and this Court held as under:

"This Court finds that though in the Rules one has to show his average recovery of at least 70% in the last four Fasals but the chart was submitted by Tahsildars not based on the Fasals but Fasalis i.e. the year which includes both the Fasals namely, Ravi and Kharif. The Selection Committee was also aware of this fact that it has to consider recovery performance of last four Fasals but thereafter it has clearly erred by not confining to consider performance with respect to recovery in last four Fasals but has taken the aforesaid chart to be correct without noticing the fact that the chart (Annexure-CA-2) was prepared on the basis of last four Fasalis and not on the basis of last four Fasals. One Fasali year has more than one Fasal. It is not the entire Fasali year but last four Fasals performance ought to have been considered by the Selection Committee. It has considered performance of the candidates beyond the period for which it is provided under Rule 5(1) of 1974 Rules."

Case law discussed-
2008(2)ESC 1332, Special Appeal No. 294 of 2008, Manbodh Vs. State of U.P. and others connected with Special Appeal No. 398 of 2008.

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

1. Heard Sri N.L. Srivastava, learned counsel for the petitioner and learned Standing Counsel appearing for respondents no. 1 to 3. The respondent no. 4 was issued notice by registered post pursuant to this Court's order dated 13.10.2008. As per the office report the notice through registered post/AD sent on 17.10.2008 and the office report dated 13.07.2009 shows that notice has been received unserved with post office report "refused". In the circumstances the service of notice is deemed sufficient. Neither any counter affidavit has been filed on behalf of respondent no. 4 nor any one has put in appearance on his behalf. Respondents no. 1 to 3 have filed counter affidavit and supplementary counter affidavit. Petitioner has also filed rejoinder affidavit and, therefore, as requested and agreed by learned counsels for the parties, this writ petition has been heard and is being decided finally at this stage under the Rules of the Court.

2. By means of the present writ petition the order dated 03.10.2007 passed by the District Magistrate, Sant Ravidas Nagar (Bhadohi) has been assailed whereby the representation of petitioner against his supersession/non selection for substantive appointment on the post of

Collection Peon has been rejected confirming selection and appointment of respondent no. 4 for such appointment.

3. Learned counsel for the petitioner submitted that he has not been selected for substantive appointment on the post of Collection Peon on the ground that in the Fasali years 1410, 1411, 1412 and 1413 the percentage of recovery was 15.5, 75, 16.9 and 23.4 respectively resulting in average recovery of 32.7 though as per U.P. Collection Peon Service Rules, 2004 (hereinafter referred to as the "Rules, 2004") the average recovery ought to have been at least 70%. The respondent no. 4 who was admittedly junior to the petitioner but his recovery having been noticed above 70% in the said Fasali years, was selected and given appointment to the post of Collection Peon. It is submitted that under Rule 5 of Rules, 2004 the criteria for selection for regular appointment to the post of Collection Peon in respect to Seasonal Collection Peon is satisfactory service in the last at least four "Fasals". The explanation thereof further provides that satisfactory service means good conduct shown from beginning and in the last "four Fasals" he has cooperated for making recovery at least to the extend of 70% as prescribed by the Government. He contended that the respondents no. 1 to 3 have erred in considering the record of preceding four Fasali years instead of four Fasals. Further that the petitioner has not been found guilty or lacking coordination or cooperation in making recovery to the extent of 70% but since the recovery as a matter of fact was less than 70% for that purpose the petitioner has been superseded. He pointed that Rule 5 of Rule, 2004 required only cooperation on the part of the petitioner since the recovery as a matter of fact is the primary duty of the Collection Amin to whom a Collection Peon assist and, therefore, the relevant considerations as contemplated and provided in the Rules, 2004 have not been taken into account.

4. Learned Standing Counsel relying on his counter affidavit, however, supported the selection of respondent no. 4 as well as the impugned order passed by the District Magistrate, Sant Ravidas Nagar (Bhadohi) and said that the same has been passed in accordance with law.

5. Having considered the rival submissions as well as the record I find that the only issue up for consideration in this case is whether the petitioner has been considered and rejected for the post of Collection Peon on relevant considerations as provided under Rule 5 or not.

6. Rule 5 of Rules, 2004 reads as under:

"5. सेवा में विभिन्न श्रेणियों के पदों पर भर्ती निम्नलिखित स्रोतों से की जायेगीः-

(एक) पचास प्रतिशत चयन समिति के माध्यम से सीधी भर्ती द्वारा,

(दो) पचास प्रतिशत पद ऐसे सामयिक संग्रह अनुसेवकों में से जिन्होंने कम से कम चार फसलीं तक संतोषजनक कार्य किया हो और जिनकी आयु उस वर्ष की पहली जुलाई को जिसमें चयन किया जाय ४५ वर्ष से अधिक न हो, चयन समिति के माध्यम से भरे जायेगें।

परन्तु यदि उपर्युक्त अभ्यर्थी उपलब्ध न हो तो खण्ड (एक) के अधीन शेष रिक्तियां सीधी भर्ती द्वारा भरी जायेगीं।

स्पष्टीकरणः- संतोषजनक कार्य का तात्पर्य होगा शुरू से अन्त तक अच्छे आचरण को सम्मिलित करते हुए अन्तिम चार फसलों के दौरान सरकार द्वारा नियत विहित स्तर के अनुसार कम से कम सत्तर प्रतिशत वसूली में पूर्ण सहयोग प्रदान करना।"

7. A perusal of Rules shows that a Seasonal Collection Peon if has

satisfactorily worked for at least "four Fasals" and is not above 45 years of age would have to be considered and if he fulfils the above criteria, is entitled to be selected for the post of Collection Peon.

8. The term "satisfactory service" has been explained and it provides that the Seasonal Collection Peon shall extend "full cooperation for recovery in the last four Fasals" according to the standard prescribed by the State Government i.e. at least 70% recovery. It nowhere provides the Seasonal Collection Peon himself would make recovery to the extent of 70% or at any other level.

9. In taking the aforesaid view I am also supported by a Single Judge decision of this Court in Civil Misc. Writ Petition No. 2421 of 2006, Ishwar Chandra Vs. District Magistrate, Khalilabad, Sant Kabir Nagar and others decided on 22.08.2008. Though that was a case of compulsory retirement but in respect to duties of Collection Peon this Court held that a Collection Peon is only required to assist the Collection Amin and is not responsible for the collection of dues itself which is the primary duty of Collection Amin.

10. The respondents in the counter affidavit have nowhere pleaded or shown as to how a Seasonal Collection Peon can be held directly responsible for lesser recovery. On the contrary, the U.P. Collection Manual, Chapter IX para 61 provides for duties of the Collection Peon and reads as under:

"61. **कर्तव्य**- सरकारी बकायों के संग्रह सम्बन्धी आदेशों मे अमीन के आदेशों का अनुपालन करना चपरासी का परम् कर्तव्य है। जब अमीन सरकारी धन लेकर यात्रा कर रहा हो या अपने क्षेत्र में रूका रहे, तब वह चपरासी उसके साथ रहेगा। विभिन्न प्रकार की क्रूर कालक्रम आदेशिकाओं के निष्पादन के लिए भी चपरासियों की सेवाओं का उपयोग किया जा सकेगा। ऐसे मामलों में वह स्वयं कोई संग्रह नहीं करेगा। तहसीलदार तथा अन्य वरिष्ट अधिकारियों के आदेशों के अधीन, एकीकृत संग्रह अमीनों के अधीन, संग्रह चपरासियों को अन्य कर्तव्य सौंपे जायेंगे।"

11. It shows that the Collection Peon has to obey the orders given by the Collection Amin and when the Amin is travelling alone with Government revenue or is staying in his area of jurisdiction, the Collection Peon will always stay with him so that his services may be utilised by the Collection Amin. Para 61 Chapter IX further provides very clearly that the Collection Peon himself will not make any recovery at all.

12. That being so, and in the light of the statutory provisions contained in Rule 5, it is evident that the Collection Peon himself is not at all responsible for any recovery whatsoever. Hence the assumption on the part of the District Magistrate, respondent no. 2 that the petitioner having failed to make recovery to the extent of 70% in the preceding four Fasali years cannot be said to have failed to satisfy the criteria of "satisfactory service" is patently illegal and in the teeth of the statute.

13. Besides, the rule also required "satisfactory service" in the "last four Fasals" and not "Fasali". The distinction between a "Fasali" and "Fasal" has been considered by this Court in Mithlesh Kumar and another Vs. State of U.P. and others, 2008 (2) ESC 1332 and this Court held as under:

"This Court finds that though in the Rules one has to show his average recovery of at least 70% in the last four

Fasals but the chart was submitted by Tahsildars not based on the Fasals but Fasalis i.e. the year which includes both the Fasals namely, Ravi and Kharif. The Selection Committee was also aware of this fact that it has to consider recovery performance of last four Fasals but thereafter it has clearly erred by not confining to consider performance with respect to recovery in last four Fasals but has taken the aforesaid chart to be correct without noticing the fact that the chart (Annexure-CA-2) was prepared on the basis of last four Fasalis and not on the basis of last four Fasals. One Fasali year has more than one Fasal. It is not the entire Fasali year but last four Fasals performance ought to have been considered by the Selection Committee. It has considered performance of the candidates beyond the period for which it is provided under Rule 5(1) of 1974 Rules."

14. The above judgement was taken in Special Appeal No. 294 of 2008, Manbodh Vs. State of U.P. and others connected with Special Appeal No. 398 of 2008, Dev Kumar Vs. State of U.P. and others, decided on 17.07.2009 and the Hon'ble Division Bench while dismissing both the above appeals and confirming the judgment under appeal held as under:

"In our considered opinion, the learned Judge was perfectly justified in arriving at the findings on the basis of material available on record and thereafter concluding that the selections had been made contrary to the provisions contained in Rule 5 (1) read with Rule 17 (A) of the Rules. In support of the conclusion drawn, the learned Judge has very succinctly and appropriately drawn the distinction between the words "Fasal" and "Fasali". The meaning of the said words are defined in the Law Lexicon 1997 Edition at page 713, which read as follows:-

"Fasl. (A.) Harvest; fasli-jyasti, fasl-kami. (M.) Addition or reduction in the revenue on account of double crops, or the loss of one. (Bad. Pow. iii. 99)

Fasli. Of or belonging to a harvest; the Mahommadan official era. (Bad. Pow. II. 13, 14)
Agricultural lease in which the word 'Fasli' is used unless there are indications that the intention of the parties was to use the word in its strict sense, should be held to be for the agricultural year. (LR 2 A. 139 (Rev.)

Fasli or Fusli. What relates to the seasons; the harvest year. (Mac. Mhn. Law.) The name of an era instituted by Akbar, who made the samwat year agree with that of the hijra by arbitrarily cutting 649 years off from the former. This was done in the year 963 of the hijra which year was therefore also 963 fasli; but fasli or harvest year was necessarily counted according to the seasons while that of the hijra is the lunar year of only 354 days. Thus a difference of several years has arisen between the hijra year and the fasli year. (See also 1896 AWN 123).

Fasli-jasti (Tel.) An extra crop, one more than usual; an extra cess imposed on land bearing more than one annual crop."

The aforesaid definitions would, therefore, reflect that the word Fasal means crop whereas the word Fasali is related to the revenue year, which ordinarily in the State of Uttar Pradesh comprises of two harvest seasons - the Kharif and the Rabi. Learned counsel for the appellants could not point out any material to the contrary to persuade us to opine otherwise.

We find no good reason to differ from the view taken by the learned Judge."

15. In the result, the writ petition is allowed. The impugned order dated 03.10.2007 as well as the selection and appointment of respondent no. 4 is hereby quashed. The respondent no. 2 is directed to reconsider the matter of appointment on the post of Collection Peon of the petitioner and the respondent no. 4 in accordance with law and in the light of the observations made hereabove, expeditiously, preferably within a period of two months from the date of production of a certified copy of this order. There shall be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.10.2009

BEFORE
THE HON'BLE RAN VIJAI SINGH, J.

Civil Misc. Writ Petition No. 34240 of 1997

Aligarh Muslim University, Aligarh and another ...Petitioner
Versus
Industrial Tribunal(4), Agra and another ...Respondent

Counsel for the Petitioners:
Ms. Sunita Agrawal

Counsel for the Respondents:
S.C.
Sri J.J. Munir

U.P. Industrial Dispute Act-Section 6-A-Restoration of Ex Party award published on 20.04.95-publication of Notice Board on 22.05.95-application for recall of award moved on 25.10.96- allowed on 03.05.97 nowhere in restoration application on date of knowledge disclosed- in spite of registered notices workman did not response- after expiry of 30 days from the date of publication-tribunal become "functus officio" at last its jurisdiction to entertain any application- restoration order set-a-side.

Held: Para 15

Under these facts and circumstances, since the application for setting aside the exparte award was filed after the expiry of 30 days of its publication, therefore it could not be entertained as the Tribunal had become functus officio and lost its jurisdiction to entertain any application.

Case law discussed:
AIR 1981 S.C. 606 14, (2005) 9 S.C.C. 331. 6 and 8, A.I.R. 1985 Supreme Court 294, 2005(2) U.P. L.B.E.C. 1751And 2 008(118) F.L.R. 922.

(Delivered by Hon'ble Ran Vijai Singh, J.)

1. This writ petition has been filed for issuing a writ of certiorari quashing the orders dated 3rd May, 1997 and 22nd August, 1997 passed by Industrial Tribunal (4), Agra (respondent No. 1). Vide order dated 3rd May 1997, the Tribunal had allowed the restoration application for setting aside an exparte award dated 10th February, 1995 rendered in Adjudication Case No. 204 of 1994, whereas by the subsequent order dated 22nd August, 1997, the Tribunal had rejected the petitioners' application to recall the order dated 3rd May, 1997.

2. The facts giving rise to this case are that the respondent no 2. claiming himself to be a workman has raised an industrial dispute. The dispute was referred under Section 4-K of the U.P. Industrial Dispute Act, 1947 (hereinafter referred to as Act of 1947) The reference was registered as Adjudication Case No. 204 of 1994 before the Industrial Tribunal (4) Agra. The dispute referred was

'whether the employers were justified in terminating the services of the workman from 16th April, 1993 and if not then to what relief the workman was entitled to.'

3. The petitioners-employers appeared before the Tribunal and filed their written statement stating therein that the State had no jurisdiction to refer the dispute under Section 4-K of the Act of 1947. It was also contented that the respondent no. 2 is not workman as his engagement was only for a fixed period and that had come to an end after expiry of the aforesaid period.

4. The notices were issued to the parties through registered post but it appears the workman did not appear before the Tribunal and on 10th February, 1995, the Tribunal has passed an exparte award deciding the reference against the workman.

5. The aforesaid award was published on 20th April,1995 under Section 6 (3) of the Act of 1947 and it was also published on the notice board on 22nd May, 1995.

6. It appears thereafter the respondent no. 2 filed an application on 25th October, 1996 before the Tribunal for setting aside the exparte award dated 10th February, 1995 with a prayer to restore the Adjudication Case No. 204 of 1994 to its original number. The petitioners-employers have filed a detailed reply to the restoration application supported with an affidavit stating therein that the application itself was not maintainable as it was filed beyond the period of limitation as prescribed under Rule 16 of the rules framed under the Act. It was also stated that the Tribunal had sent registered letters to both the parties on 24th December, 1994 fixing 9th February, 1995 but the workman did not appear. It was also stated that the workman had not stated in his application as to on which date he had acquired knowledge of the exparte award. It was also contended that the award attained finality under Section 6 (5) of the Act on its publication under Section 6(3) of the act and Under Section 6 (A) of the Act of 1972, the award became enforceable after the expiry of 30 days from the date of its publication.

7. The Tribunal after hearing both the parties had allowed the restoration application by the impugned order dated 3rd May, 1997. While allowing the application, the Tribunal has observed that the limitation shall start from the date of the knowledge of the award and not from the date of its publication.

8. Thereafter the petitioners-employers have filed an application on 21st June, 1997 for recalling the order dated 3rd May, 1997 on the ground that the workman had not disputed the address indicated in the summons sent by the Tribunal through registered cover which had not returned back after service. The presumption goes that there was sufficient service on the workman. The Tribunal thereafter hearing the parties had rejected the application of the petitioners vide order dated 22nd August 1997. Hence this writ petition.

9. Ms. Sunita Agarwal learned counsel appearing for the petitioners has assailed the impugned orders on following grounds:

1. Because the exparte award dated 10th February, 1995 was published in accordance with Section 6 (3) of the U.P. Industrial Disputes Act, 1947 on 20th April 1995 and was also put on the notice board on 22nd May, 1995, therefore, it became enforceable after 30 days from its publication as per provision contained under Section 6-A of the Act of 1947.

2. Because the Tribunal had become functus officio after 30 days from the date of publication of award and it had no jurisdiction to proceed any further.

In support of her submissions she has placed reliance upon the few judgments of the Apex court namely ***A.I.R. 1981 S.C. 606 14 Grindlays Bank Vs. Central Government Industrial Tribunal*** *and* ***(2005) 9 S.C.C. 331. 6 and 8 Sangham Tape Co. Vs. Hansraj (Grindlays Bank Ltd.)***

3 Because under Rule 16 (2) of the U.P. Industrial Disputes Rules, 1957 an application to set-aside an exparte award could be filed within ten days from the date of the exparte award and even if it be assumed that the said application could be made within 30 days from the date of publication of the exparte award even then the restoration application filed on 25th October, 1996 was barred by time.

In the submissions of learned counsel for the petitioners, the language used in Section 6 (A) of the U.P. Industrial Dispute Act is identical to Section 17-A of the Industrial dispute Act, 1947 (Act No. 14 of 1947), (Central Act) (hereinafter referred to as Act No. 14 of 1947) and in the cases referred above, it has been held that the award becomes enforceable after expiry of 30 days from the date of its publication and the Tribunal/labour court retain their jurisdiction within thirty days from the publication and thereafter the Tribunal/labour court becomes functus officio. In her submissions, although cases referred above are related to under Section 17-A of the Act No.14 of 1947 but it will be fully applicable with respect to Section 6-A of the U.P. Industrial Dispute Act, 1947.

Refuting the submissions of learned counsel for the petitioners, Sri J.J.Munir learned counsel appearing for the respondent no. 2 submitted that an application for setting aside an exparte award can be entertained by the Tribunal and Tribunal does not become functus officio as argued by learned counsel for the petitioner. In support of his submissions, he has placed reliance upon the judgment of the Apex Court reported in ***A.I.R. 1985 Supreme Court 294 Satnam Verma Vs. Union of India***.

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

11. It has not been disputed by the learned counsel for the parties that the matter was referred by the State Government under Section 4-K of the Act of 1972 for adjudicating the reference as mentioned above and the said reference was registered as Adjudication Case No. 204 of 1994 before the Industrial Tribunal (4) Agra. The notices were issued to the parties through registered post but the respondent no. 2 did not appear and the Tribunal has passed an exparte award on 10th February, 1995 deciding the reference against the workman. The aforesaid award was published on 20th April, 1995 under Section 6 (3) of U.P. Industrial Dispute Act, 1947. The

respondent no. 2 has filed an application for setting aside the exparte award and that was allowed vide order dated 3rd May, 1997 and the application to recall the order dated 3rd May, 1997 was rejected by the Tribunal vide order dated 22nd August, 1997.

12. Rule 16 (2) provides that an application to set aside the exparte award can be filed within 10 days of such award. From the pleadings of the parties, it transpires that the factum of sending of notices through registered post has not been denied and it has also not been stated that on which date the respondent no. 2 acquired knowledge of the exparte award. Further the application for setting aside exparte award was filed after 30 days of its publication. In these circumstances, it cannot be said that the application filed by the respondent no. 2 to set aside the exparte award was within time or there was a reasonable reason to not apply for the same.

13. The Apex Court, in the case of Grindlays Bank (supra) has held that the Tribunal/court retained its jurisdiction to set aside an exparte award provided the application has been filed within 30 days of its publication. In the case of Sangham Tape Co. (supra), the Apex court has held that once the award becomes enforceable, the Industrial Tribunal or labour court becomes functus officio.

14. Here in the present case, as has been mentioned above, the award was given on 10th February,1995 and it was published on 20th April, 1995 and it was also published on the notice board on 22nd May, 1995, whereas the respondent no. 2 has filed the application for setting aside the exparte award on 25th October, 1996 apparently this was beyond 30 days from the date of its publication i.e. 20th April 1995 or 22nd May, 1995. Section 6-A of the U.P. Industrial Dispute Act provides that the award becomes enforceable after 30 days of its publication. The language used in Section 6-A of the U.P. Industrial Dispute Act is identical to the language used in Section 17-A of the Industrial Dispute Act, 1947. In the cases of ***Grindlays Bank*** (supra) and ***Sangham Tape Co.*** (supra), the Apex Court has held that once the award becomes enforceable, the Industrial Tribunal or labour court become functus officio. Although in the case of ***Satnam Verma***, (the case cited by respondent's counsel) the Apex Court has held that the labour court has jurisdiction to entertain the application for setting aside the exparte award but the facts of this case are totally different as in the case of ***Satnam Verma*** the application was filed prior to the publication of the award and was well within time, therefore, the case cited by the respondent's counsel is distinguishable on facts.

15. Under these facts and circumstances, since the application for setting aside the exparte award was filed after the expiry of 30 days of its publication, therefore it could not be entertained as the Tribunal had become functus officio and lost its jurisdiction to entertain any application.

16. This Court has also taken the same view in the cases of ***State of U.P Vs. the Presiding Officer Labour Court (II) U.P. Meerut and another 2005 (2) U.P. L.B.E.C. 1751*** *and* ***2 008 (118) F.L.R. 922 District Panchayat (Zila Parishad) Kanpur Dehat Vs. Presiding Officer,***

Labour Court (IV) Kanpur Nagar and another.

17. In view of that, the impugned order passed by the Tribunal cannot be sustained. The writ petition succeeds and is allowed. The impugned orders dated 3rd May, 1997 and 22nd August, 1997 passed by Industrial Tribunal (4) Agra (respondent no. 1) are hereby quashed. There shall be no order as to costs. However dismissal of this writ petition will not preclude the respondents to approach the appropriate forum if any available under law against the exparte award.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.10.2009

BEFORE
THE HON'BLE C.K. PRASAD, C.J.
THE HON'BLE DILIP GUPTA, J.
THE HON'BLE A.P. SAHI, J.

Civil Misc. Writ Petition No.19101 of 1999
With
Civil Misc. Writ Petition No.21965 of 2003.

Rishikesh Lal Srivastava ...Petitioner
Versus
State of U.P. & others ...Opposite Parties

Counsel for the Petitioners:
Sri Harish Chandra Singh
Sri R.K. Ojha
Sri O.P. Pandey
Sri A.P. Singh
Sri S.C. Singh

Counsel for the Opposite Parties:
Sri R.C. Dwivedi,
Sri N.K. Pandey,
Sri R.C. Singh
Sri Dinesh Dwivedi
Sri M.C. Chaturvedi, C.S.C.
assisted by Dr. Y.K. Srivastava,
Standing Counsel.

U.P. Intermediate Education Act-1921-Chapter III Reg.-31- prior approval of dismissal-whether prior approval for awarding punishment of dismissal to a Class 4th employee is must as contemplated in Regulation 31? held "No" various reasons discussed?

Practice and Procedure-Law Conflicting view of different D.B. Judgment-the judgment reported in 2006 (3) ESC 1765, 2006(65) ALR 767 and 2000 (1) UPLBEC 707 approved hold correct law.

Held: Para -73

Our answer to the questions referred to us are as under:
(i) For awarding a punishment as enumerated under Regulation 31 Chapter III of the U.P. Intermediate Education Act, 1921 to a Class-IV employee of a institution recognized under the aforesaid Act, no prior approval or sanction from the Inspector of Schools is required.
(ii) The Division Bench judgments in the case of Ali Ahmad Ansari Vs. District Inspector of Schools, Kushinagar [2006(3) ESC 1765 (All)] and Pujari Yadav Vs. Ram Briksh Yadav [2006(65) ALR 767] lay down the correct law in contradistinction to the Division Bench judgment of Principal, Rashtriya Inter College, Bali Nichlaul, District Maharajganj And Others [(2000) 1 UPLBEC 707] and the other judgments to that effect.

Case law discussed:
[1991 (1) UPLBEC 467], [1998(2) UPLBEC 1101], [2000(1) UPLBEC 707],[2000 (3) E.S.C. 1880 (All.), [2001(1) UPLBEC 487], [2002 (4) ESC 201], [2006(3) ESC 1765 (All) (DB)], (1998)2 UPLBEC 1101, [2000(3) E.S.C. 1880 (All), 1998 Lab IC 1252, (2007) 1 AWC 253, 1981 U.P.L.B.E.C. 135, 1988 U.P.L.B.E.C 123, 1998(3) A.W.C.1940(L.B.), [AIR 2002 SCC 1334], [(1951) 2 All E.R. 839], [AIR 1953 SCC

394], [(2003) 2 SCC 577], [(2005) 5 SCC 561], [2002 (3) ESC 108]

(Delivered by Hon'ble C.K. Prasad, C.J.)

1. The learned Single Judge while hearing this petition on 21.3.2007 and finding conflicting views between the two Division Bench judgments of this Court in the case of 2000(1) UPLBEC 707 and 2006(3) ESC 1765 (All), referred, under Rule 6 Chapter VIII of the Allahabad High Court Rules, the following questions for determination by a larger Bench:

(i) Whether prior approval for awarding punishment of dismissal to a Class-IV employee is contemplated and required under Chapter-III, Regulation 31 of U.P. Intermediate Education Act, 1921 ?

(ii) Which of the Division Bench judgments, as noticed above, lays down the correct law ?

2. In the light thereof, the case was posted for consideration before a Division Bench on 12.08.2009 which, finding conflict between the judgments rendered by the two Division Benches as referred in the order of the learned Single Judge, directed the matter to be heard by a larger Bench and accordingly the matter has come up before us for consideration.

3. The facts lie in a narrow compass. Petitioner - Rishikesh Lal Srivastava is a class IV employee working in Intermediate College, Vedupar in the district of Kushi Nagar (hereinafter referred to as "the College'). While he was in service, the Principal of the College by order dated 5th of July 1994 dismissed him from service and aggrieved by the same, he filed Writ Petition No. 473 of 1996 (Rishikesh Lal Srivastava vs. State of U.P. & others) before this Court inter alia praying for a direction to the District Inspector of Schools to pay salary. This Court directed the District Inspector of Schools to examine his case and in the light thereof, the District Inspector of Schools passed order dated 21st of April 1998 for payment of his salary. The Committee of Management of the College challenged the said order of the District Inspector of Schools by filing another writ petition and the same was disposed off with a direction to the District Inspector of Schools to record reasons as to whether the service of the said employee was legally terminated, whether approval of the District Inspector of Schools was required for such termination and whether in fact approval was granted or not. In the light of the aforesaid direction, the District Inspector of Schools passed order dated 28th of July 1998 and upheld the order of removal of the petitioner from service. It is this order of the District Inspector of Schools, which has been challenged in Civil Misc. Writ Petition No. 19101 of 1999 (Rishikesh Lal Srivastava vs. State of U.P. & others).

4. Chandra Bali, a class IV employee of Seth Ganga Ram Jaiswal Inter College, Baraut, Allahabad, aggrieved by the order of termination passed by the Principal of the College, represented before the District Inspector of Schools, Allahabad who disapproved his dismissal by order dated 12th of May 2003 inter alia observing that before terminating his service, prior approval under Regulation 31 of Chapter III framed under the U.P. Intermediate Education Act, 1921 was not obtained. The Principal of the College aggrieved by the same has

preferred Civil Misc. Writ Petition No. 21965 of 2003 (The Principal, Seth Ganga Ram Jaisawal Inter College, Baraut, Allahabad vs. The District Inspector of Schools, Allahabad and others).

5. It is not in dispute that both the Colleges are duly recognized by the U.P. Intermediate Education Act 1921 (U.P. Act 2 of 1921) [hereinafter referred to as the "Act'] and the Regulations framed thereunder. It is also an admitted position that both the Colleges receive grant-in-aid from the State Government and disbursement of salary of the employees is governed by the U.P. High School and Intermediate Colleges (Payment of Salaries of Teachers and other Employees) Act, 1971 (U.P. Act No. 24 of 1971).

6. We have heard Sri Harish Chandra Singh, learned counsel for the petitioner in writ petition no.19101 of 1999, Sri R.C. Dwivedi, learned counsel for respondent Nos. 3 and 4 and Sri N.K. Pandey, learned counsel for respondent no.5. We have also heard Sri R.K. Ojha, learned counsel for the Principal of the College - petitioner in writ petition no.21965 of 2003 and Sri R.C. Singh, learned counsel on behalf of the respondent no.4 - employee therein and Sri M.C. Chaturvedi, learned Chief Standing Counsel on behalf of the State in both the petitions.

7. Before we enter into merit of the case, it is apt to go into the legislative history. The legislature enacted the U.P. Intermediate Education Act, 1921 (U.P. Act No 2 of 1921) for regulating and supervising the system of the High School and Intermediate Education.

8. Sections 16-A to 16-I were inserted in the Act by Section 7 of Intermediate Education (Amendment) Act, 1958 (U.P. Act No. 35 of 1958). Section 16-G of the Act as inserted by the U.P. Act No. 35 of 1958 reads as follows:-

"16-G. Conditions of service of teachers -(1) Every person employed in a recognized institution shall be governed by such conditions of service as may be prescribed by Regulations and any agreement between the management and such employee insofar as it is inconsistent with the provisions of this Act or with the Regulations shall be void.

(2) Without prejudice to the generality of the powers conferred by sub-section (1), the Regulations may provide for--

(a) the period of probation, the conditions of confirmation and the procedure and conditions for promotion and punishment, including suspension pending inquiry and the emoluments for the period of suspension and termination of service with notice;
(b) the scales of pay, and payment of salaries ;
(c) transfer of service from one recognized institution to another ;
(d) grant of leave and Provident Fund and other benefits ; and
(e) maintenance of record of work and service.

(3)(a). No Principal, Headmaster or teacher may be discharged or removed or dismissed from service or reduced in rank or subjected to any diminution in emoluments, or

served with notice of termination of service except with the prior approval in writing of the Inspector. The decision of the Inspector shall be communicated within the period to be prescribed by regulations.

(b). The Inspector may approve or disapprove or reduce or enhance the punishment or approve or disapprove of the notice for termination of service proposed by the management:

Provided that in the cases of punishment, before passing orders, the Inspector shall give an opportunity to the Principal, the Headmaster or the teacher to show cause within a fortnight of the receipt of the notice why the proposed punishment should not be inflicted.

(c) An appeal against the order of the Inspector under clause (b), may be made to the Regional Appellate Committee constituted under clause (d) within one month from the date of such order being communicated to the parties concerned and the Regional Appellate Committee may, after such enquiry as it considers necessary, confirm the order or set aside or modify it, and the order passed by the Regional Appellate Committee shall be final.

(d) The Regional Appellate Committee in each region shall consist of--

(i) the Regional Deputy Director, Education who will be President of the Committee,

(ii) a member of the State Maneger's Association nominated by that Association, and

(iii) a member of the U.P. Madhyamik Shiksha Sangh nominated by that Sangh.

(4) An order made or decision given by the competent authority under sub-section (3) shall not be questioned in any court and the parties concerned shall be bound to execute the directions contained in the order or decision within the period that may be specified therein.

(5) In this section and section 16-F the powers conferred on or the duties assigned to the Inspector and the Regional Deputy Director, Education shall, in the case of an institution for girls, be respectively exercised or discharged by the Regional Inspectress of Girl's Schools and the Deputy Director of Education (Women).

9. Section 2 of the U.P. Act No. 7 of 1966 amended Section 16-G of the Act and substituted Section 16 G (3) (c). Section 2(i) of U.P. Act 7 of 1966 reads as follows:

"2. Amendment of Section 16-G of U.P. Act II of 1921.--In Sub-section (3) of Section 16-G of the Intermediate Education Act, 1921, hereinafter referred to as the principal Act,--

(i) For clause (c) the following shall be substituted, namely -

"(c) Any party may prefer an appeal to the Regional Deputy Director, Education, against an order of the Inspector under clause (b), whether passed before or after the commencement of the Uttar Pradesh Intermediate Education (Sanshodhan) Adhiniyam, 1966, within one month from the date of communication of the order to that party, and the Regional Deputy Director may after such further enquiry, if any, as he considers necessary, confirm, set aside or modify the order, and the order

passed by the Regional Deputy Director shall be final. In case the order under appeal was passed by the very person holding the office of Regional Deputy Director while acting as Inspector, the appeal shall be transferred by order of the Director to some other Regional Deputy Director for decision, and the provisions of this clause shall apply in relation to decision by that other Regional Deputy Director as if the appeal had been preferred to himself."

Further Section 15 of the U.P. Secondary Education Laws (Amendment) Act, 1975 (Act No. 26 of 1975) amended Section 16 G of the Act. Same reads as follows:

15. Amendment of Section 16 G.-- In Section 16 G of the principal Act -

(i) in the marginal heading for the words "conditions of service of teachers" the words "conditions of service of Head of Institutions, teachers and other employees" shall be substituted;

(ii) in sub-section (2), in clause (a), for the words "including suspension pending enquiry", the words and brackets "(including suspension pending or in contemplation of enquiry or during the pendency of investigation, enquiry or trial in criminal case for an offence involving moral turpitude)" shall be substituted;

(iii) for sub-section (5), the following sub-sections and Explanation shall be substituted, namely:-

"(5) No Head of Institution or teacher shall be suspended by the Management, unless in the opinion of the Management-

(a) the charges against him are serious enough to merit his dismissal, removal or reduction in rank; or

(b) his continuance in office is likely to hamper or prejudice the conduct of disciplinary proceedings against him; or

(c) any criminal case for an offence involving moral turpitude against him is under investigation, enquiry or trial.

(6) Where any Head of Institution or teacher is suspended by the Committee of Management, it shall be reported to the Instructor within thirty days from the date of the commencement of the Uttar Pradesh Secondary Education Laws (Amendment) Act, 1975, in case the order of suspension was passed before such commencement, and within seven days from the date of the order of suspension in any other case, and the report shall contain such particular as may be prescribed and be accompanied by all relevant documents.

(7) No such order of suspension shall, unless approved in writing by the Inspector, remain in force for more than sixty days from the date of commencement of the Uttar Pradesh Secondary Education Laws (Amendment) Act, 1975 or as the case may be from the date of such order and the order of the Inspector shall be final and shall not be questioned in any Court.

(8) If, at any time, the Inspector is satisfied that disciplinary proceedings against the Head of Institution or teacher or being

delayed, for no fault of the Head of Institution or the teacher, the Inspector may after affording opportunity to the Management to make representation revoke an order of suspension passed under this section.

(9) All appeals pending before the Deputy Director of Education (Women) immediately before the commencement of this sub-section shall be transferred to the Joint Director of Education (Women) for disposal:

Provided that where the Deputy Director of Education (Women) has already commenced the hearing of any such appeal before the commencement of this sub- section, the appeal shall be disposed of by the Deputy Director of Education (Women) herself.

Explanation. - For the purposes of this section, the expression "Regional Deputy Director, Education shall, in relation to a girls' institution mean the Joint Director of Education (Women)."

10. In exercise of power conferred under Section 16-G of the Act, Regulations have been framed and Chapter 3 thereof pertains to Conditions of Service. Regulation 31, which is relevant for the purpose, reads as follows:-

"31. Punishment to employees for which prior sanction from Inspector or Regional Inspectress would be essential may be any one of the following:

(1) Discharge,
(2) Removal or Termination,
(3) Demotion in grade,
(4) Reduction in emoluments.

Principal or Headmaster would be competent to give above punishment to Fourth-class employees. In case of punishment awarded by competent officer, the Fourth-class employee may appeal to Management Committee. This appeal must be preferred within one month of the date of intimation of the punishment and Management Committee on receipt of appeal will decide the matter within six weeks. On consideration of all necessary records and after giving an opportunity of hearing to the employee, if he wants to appear before the Management Committee, it will give its decision.

Fourth-class employee would also have a right to represent against the decision of the Management Committee on his appeal to the District Inspector of Schools/Regional Inspectress of Girls Schools within one month of the date of intimation of the decision:

11. By this juncture, it would be appropriate to quote Regulation 100 of Chapter 3, which reads as follows:-

"100. In respect of clerks, which includes Librarian also, the Management Committee and **in respect of Fourth class employees, the Principal/Headmaster shall be the appointing authority**. Regarding appointment, probation of clerk, which includes Librarian also, **and Fourth class employees, the period for which is one year**, confirmation and other service conditions, etc. relating to it, provisions with necessary changes described in Regulations 1, 4 to 8, 10, 11, 15, 24 to 26, 30, 32 to 34, 36 to 38, 40 to 43, 45 to 52, 54, 66, 67, 70 to 73 and 76 to 82 shall apply. **But in respect of Fourth class**

employees Regulations 77 to 82 would apply only when necessary directions in this regard are issued by the State Government. Provisions in Regulations 9, 12, 13, 14, 16 to 20, 27, 28, 54, 55 to 65 and 97 would not apply in respect of such employees."

12. From a plain reading of the aforesaid Regulation, it would be evident that various Regulations would be applicable in the case of Class IV employees for the purpose of confirmation and other service conditions, but Regulation 31 has not been made applicable in the case of Class IV employees. It is, at this stage, to apt to quote Regulation 37, which reads as follows:-

"37. Soon after the report of the proceedings and recommendation from the inquiring authority are received, the Committee of Management shall after notice to employee, meet to consider the report of the proceeding and recommendation made and take decision on the case. The employee shall be allowed, if he so desires, to appear before the Committee in person to state his case and answer any question that may be put to him by any member present at the meeting. The Committee shall then send a complete report together with all connected papers to the Inspector or Regional Inspectress as the case may be, for approval of action proposed by it.

But, regarding fourth-class employees, no report shall be sent to the Inspector or Inspectress for approval. Abovesaid all proceedings in this regard shall be done by appointing authority."

13. It has been contended on behalf of Class IV employees that prior approval from the District Inspector of Schools is sine qua non for dismissing Class IV employee and in support of the submission, reliance has been placed on the following judgments of this Court :-
Shankar Saran Vs. Vesli Inter College, [1991 (1) UPLBEC 467], Daya Shankar Tewari Vs. Principal, R.D.B.M. Uchchatar Madhyamik Vidyalaya, Neogaon, Mirzapur and others, [1998 (2) UPLBEC 1101], Principal, Rastriya Inter College, Bali Nichlaul, District Maharajganj and another Vs. District Inspector of Schools, Mahrajganj and others, [2000 (1) UPLBEC 707], Sita Ram Vs. District Inspector of Schools, Allahabad and others, [2000 (3) E.S.C. 1880 (All.)], Committee of Management, St. Charles Inter College, Sardhana and others Vs. District Inspector of Schools, Meerut and others, [2001 (1) UPLBEC 487], Ram Khelawan Maurya Vs. District Inspector of Schools, Jaunpur and others, [2002 (4) ESC 201].

14. However, counsel representing the Committee of Management and the Principal, contend that prior approval of the District Inspector of Schools is not necessary before terminating the services of Class IV employees and in support thereof, reliance has been placed on the following judgments of this Court:

Principal, Shitladin Inter College, Bagbana, District Allahabad Vs. District Inspector of Schools, Allahabad and another, [1994 (3) ESC 112 (All)], Swami Vivekanand Uchchatar Madhyamik Vidyalaya, Unnao and another Vs. District Inspector of Schools, Unnao and another, [1998 (3) A.W.C. 1940 (L.B.)], Ali Ahmad Ansari Vs. District Inspector

of Schools, Kushinagar and others, Reported in [2006 (3) ESC 1765 (All)(DB)].

15. In the case of Shankar Saran (Supra), a Division Bench of this Court has held that an order of dismissal passed against a class IV employee without prior approval of the District Inspector of Schools, is illegal. Relevant portion of the judgment of this Court in the aforesaid case reads as follows:

"13- इसके अतिरिक्त अधिनियम के अन्तर्गत बनाये नियमों के अध्याय-३ के विनियम ३१ के आधार पर याची की सेवायें बिना जिला विद्यालय निरीक्षक की पूर्व अनुमति के समाप्त किया जाना भी पूर्णतया अवैधानिक था। पूरे तथ्यों से यह भी स्पष्ट है कि प्रबन्ध समिति और प्रधानाचार्य ने घोर रूप से अनुचित दृष्टिकोण याची के सम्बन्ध में अपनाया और जिला विद्यालय निरीक्षक और प्रधानाचार्य ने याची को अवैधानिक रूप से बाहर रखा।"

16. A more detailed and exhaustive consideration is found in the case of Daya Shankar Tewari (supra), wherein the learned Single Judge concluded as follows:

"8. While considering the aforesaid contention, I find that sub-section (3) of Section 16-G of U.P. Intermediate Education Act, 1921 clearly provides for approval of Inspector in case of discharge, removal, dismissal from service, reduction in rank diminution in emoluments and termination of service but this provision only makes reference of Principal, Headmaster and teachers and no categorical reference of Class-IV employee has been made therein. But sub-section (1) of Section 16-G provides that the condition of service of every person employed in a recognized institution shall be governed by Regulations. Therefore, Statute permits framing of Regulations providing conditions of service every person employed and therefore, this includes Class-IV employees also. Regulation 31 of Chapter-III of the Regulations so framed under the U.P. Intermediate Education Act, 1921, provides for prior approval in case of certain punishments including termination. Regulation 100 of the said Regulations though does not categorically make Regulation 31 applicable in case of Class-IV employees but it also does not categorically exclude Regulation 31 from its applicability to Class-IV employees. Therefore, the only provisions of Regulation 31 indicates its scope of applicability. It is true that first paragraph of Regulation 31 while providing for prior approval in case of some punishment, does not refer to Class-IV employees specially but the said first paragraph providing for prior approval refers to all employees and there is no reason to presume exclusion of Class-IV employees from the applicability of the said Regulation. The subsequent paragraphs in Regulation 31 clearly refer to Class-IV employees."

17. A perusal of the said decision indicates that the Court came to the conclusion that even though Regulation 100 does not categorically apply Regulation 31, yet it also does not exclude the same. Further, the learned Single Judge in paragraph 11 found that Regulation 37, which provides for sending of a report, limits the same in respect of Class-IV employees to be sent to the appointing authority instead of the Inspector and nothing more, which is quoted below:

"11. A perusal of Regulations 36 and 37 of the said Regulations indicate that they provide for procedure in respect of

disciplinary proceeding. Proviso to Regulation 37 only excludes Class-IV employees to the extent the said Regulation 37 requires sending of the report and the recommendation to the District Inspector of Schools for approval making it clear that the said entire proceedings relating to Class-IV employees are to be performed by the appointing authority. This has been done as in respect of Class-IV employees the appointing authority is the Principal whereas in respect of teachers the appointing authority is committee of management and Regulation 37 provides for sending of report and recommendation of the Enquiry Officer to committee of management which was to consider the same and take a decision and then to send the entire record to the Inspector for his approval. Therefore, proviso to Regulation 37 was required making it clear that for Class-IV employees ending of papers to the Inspector was to be made by the Principal, being the appointing authority and in this case papers were not to be sent by the committee of management which is not the appointing authority."

18. For ready reference, at this juncture, we may record that even though there was a decision to the contrary in the case of *Principal, Shitladin Inter College* (supra), the same appears to have not been noticed in the judgment of *Daya Shankar Tewari* (supra), which was rendered at later point of time.

19. The decision in the case of *Daya Shankar Tewari* (supra) came to be considered by a Division Bench in the case of ***Principal, Rastriya Inter College***, (supra) and the Division Bench affirmed the decision of ***Daya Shankar Tewari's*** (supra) case, with an approval in paragraph 4 and 5, which is as follows:-

"4. A learned Single Judge of this Court (Hon'ble Aloke Chakrabarti, J.) in Daya Shankar Tewari Vs. Principal and others, (1998) 2 UPLBEC 1101, has held that such prior approval is necessary. The learned Single Judge has gone into the matter in great detail and has examined the relevant provisions in the U.P. Intermediate Education Act as well as Regulations 31 and 100 of the Regulations made under the aforesaid Act.

5. We are in respectful agreement with the aforesaid decision of the learned Single Judge in *Daya Shankar Tewari's case*. The decision of the Full Bench of this Court in Magadh Ram Yadav v. Dy. Director of Education and others, 1979 ALJ 1351, which is relied upon by the learned Counsel for the appellant is in our opinion not applicable as it has not considered Regulations 31 and 100 of the U.P. Intermediate Education Regulation."

20. A learned Single Judge of this Court followed the case of *Daya Shankar Tewari* (supra) in the decision of ***Sita Ram Vs. District Inspector of Schools, Allahabad and others,*** [2000 (3) E.S.C. 1880 (All.)] and held as follows :

"6. Now there is no escape from the in holding that prior approval of the DIOS is essential in awarding punishment of termination, dismissal etc. of Class-IV employee. The contention of the learned Counsel for the respondent is that approval was not required because petitioner was a Class-IV employee, is not acceptable. It is not disputed by the respondents that no approval of the DIOS prior to his termination by the Principal

was obtained. The petition, therefore, deserves to be allowed and the impugned order of termination be quashed on this ground alone. Since the impugned order is liable to be quashed on the ground that no approval of the DIOS was obtained in the case of the petitioner, prior to terminating him from service, the other grounds sought to challenge the propriety of the impugned order is not considered."

21. It may again be pointed out that none of the aforesaid decisions took notice of the decision in the case of ***Principal, Shitladin Inter College, (***supra). The same position was reiterated in the case of ***Committee of Management, St. Charles Inter College, Sardhana*** (supra) by a learned Single Judge of this Court, as contained in paragraph 12, which reads as follows:-

"12. The next question is whether the management could dismiss a class IV employee without obtaining prior approval of the DIOS as provided in Chapter III, Regulation 31. Counsel for the petitioners argued that no prior approval of DIOS was required for dismissing a class IV employee. On the other hand Counsel for the respondent No. 2 urged that prior approval of DIOS was necessary. In the alternative the learned Counsel urged that in cases where prior approval of DIOS has not been obtained the class IV employee could prefer appeal before the management and representation before the DIOS. The argument is supported by a Single Judge decision of this Court in *Daya Shanker Tiwari v. Principal, R.D.B.M. Uchchatar Madhyamik Vidyalaya, Neogaon, Mirzapur and others*, 1998 (1) ESC 403 (All). The learned Single Judge held that the provisions of Regulation 31 read with Section 16-G (1) were applicable before dismissing a class IV employee. And prior approval of Inspector or Regional Inspectress was required to be obtained by the management. This decision was approved by a Division Bench of this Court in *Principal, Rastriya Inter College, Bali Nichlaul, District Maharajganj and others v. District Inspector of Schools, Maharajganj and others*, (2000) 1 UPLBEC 707. Therefore, since prior approval of DIOS was not obtained by the petitioners before dismissing the respondent No. 2, the DIOS rightly set aside the dismissal order."

Another learned Single Judge in the case of *Ram Khelawan Maurya Vs. District Inspector of Schools* (supra) arrived at the same conclusion by holding as follows:-

"7. It is settled law that the punishment can be awarded after prior approval of the District Inspector of Schools or the Regional Inspectress of Girls School. Since approval of the District Inspector of Schools was not been obtained, the decision of the Committee of Management is bad in law.

It is submitted on behalf of respondents that Regulation 31 of the U.P. Intermediate Education Regulations while providing for prior approval in case of Class IV employees the said paragraph refers to all employees and there is no reason to exclude Class IV employees from the applicability of the said regulation. Subsequent paragraph of the Regulation 31 also refers to Class IV employee.

This Court in the case of *Principal, Rashtriya Inter College* (supra) has held that prior approval in case of dismissal of

non-teaching staff is necessary and if such prior approval is not taken before termination of the services, the termination is illegal.

The learned Single Judge in *Daya Shankar Tiwari v. Principal, Smt. Ramwati Devi Beni Madho Uchchatar Madhyamik Vidyalaya, Mirzapur and others*, 1998 Lab IC 1252, has held that the provision of Regulation 31 read with Section 16-G (1) of the Act make it clear that in case of Class IV employees prior approval of Inspector or Regional Inspectress is necessary. This case has been approved by the Division Bench of this Court."

22. There is yet another decision of a learned Single Judge to the same effect in the case of ***Principal, P.N.V. Inter College, Chilli Hamirpur & another Vs. D.I.O.S. Hamirpur & another***, (2007) 1 AWC 253.

Thus, it can be seen that the decision in the case of *Shankar Saran Vs. Vesli Inter College* (supra), which was delivered on 3rd March, 1991, there was no detailed discussion on the various provisions of the Act and a conclusion was drawn on the strength of Regulation 31 only to the effect that prior approval was required. The latter decisions from *Daya Shankar Tewari's case* (supra) onwards, upon a discussion of the relevant provisions, came to the conclusion that prior approval was required, but as pointed out hereinabove, none of the said decisions took notice of the decision in the case of *Principal, Shitladin Inter College,* (supra).

23. The decisions, which hold that no such prior approval is required begin with the case of ***Principal, Shitladin Inter College*** (supra), wherein a learned Single Judge drew the following conclusion:

"9. Regulations 35 to 44-A provide the manner in which enquiry is to be conducted. In case the enquiry is not conducted against the delinquent employee, any order awarding punishment will be illegal. In case all the procedures were followed, the order of punishment imposed by the authority concerned cannot be set aside. The District Inspector of Schools has not recorded any finding that the enquiry officer or the Principal did not follow the procedure prescribed for holding enquiry and in giving opportunity of hearing before awarding punishment.

The disciplinary proceedings against a Class IV employee of the institution is in the nature of domestic enquiry. If the disciplinary authority, after holding the enquiry, in a fair manner, comes to the conclusion on the basis of appreciation of evidence on record that the charges against the delinquent employee is proved, the Committee of Management on appeal being filed can re-appraise the evidence and can come to different conclusion. The aggrieved employee is given right of making representation against the decision of the Committee of Management given in appeal. The power given to the District Inspector of Schools is in the nature of supervisory jurisdiction. He can set aside the findings recorded by the disciplinary authority of the Committee of Management when it is either perverse or based on no material evidence or certain material evidence has been ignored. He has further to examine whether procedure prescribed for holding the enquiry was followed and it was fair and impartial enquiry. He has, however,

no jurisdiction to re-appraise the evidence on record.

Learned counsel for the respondent urged that the order of dismissal from service was otherwise illegal as before passing the order of dismissal no prior approval of the District Inspector of Schools was taken as provided under Regulation 31 of Chapter III of the Regulations framed under the Act Regulation 31 of Chapter III of the Regulation framed under the Act had been amended by Notification No. 7/562/5-8 (Board, September 1974) Allahabad dated 10th March, 1975 issued in pursuance to the approval of the State Government contained in G.O. No. 789(1)-15/(7) 75 dated March 1, 1975 and by the amendment so brought specific provisions have been made pertaining to appointment, disciplinary proceedings, appeal etc. in so far as Class IV employees are concerned. Amendment to Regulation 31 lays down power to appoint, punish and further provides for the appellate authority to hear appeals against punishment imposed and procedure for disposal of appeal and against the said appeal a further representation has been provided to the District Inspector of Schools, Regional Inspectress of Girls Schools concerned. The said Regulation is extracted hereunder.

"31- कर्मचारियों को प्रायः दण्ड, जिसके लिए निरीक्षक अथवा मण्डलीय निरीक्षिका की पूर्व स्वीकृति आवश्यक होगी, निम्नलिखित में से किसी एक रूप से हो सकती है:-

(क) पृथक्करण अथवा प्रमुक्ति।

(ख) श्रेणी में अवनति।

(ग) परिस्थितियों में कमी।

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

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

किन्तु प्रतिबन्ध यह होगा कि यदि प्रबंध समिति उपर्युक्त निर्धारित छः सप्ताह की अवधि के भीतर अपना निर्णय उपरोक्त अपील पर न दे तो सम्बंधित कर्मचारी अपना अभ्यावेदन सीधे जिला विद्यालय निरीक्षक मण्डलीय बालिका विद्यालय निरीक्षिका को उपरोक्त छः सप्ताह की अवधि बीत जाने पर दे सकता है। जिला विद्यालय निरीक्षक मण्डलीय बालिका विद्यालय निरीक्षिका द्वारा उपरोक्त अभ्यावेदन पर अभ्यावेदन की प्राप्ति की तिथि से अधिकतम तीन माह के भीतर निर्णय दे दिया जायेगा और यह निर्णय अन्तिम होगा।

अभ्यावेदन के प्रस्तुतीकरण, विचार एवं निर्णय के संबंध में आवश्यक परिवर्तन के साथ इस अध्याय के विनियम ८६ से ९२ लागू होगे।"

24. Regulation 100 of Chapter III inserted by the said Notification Regulations 1, 4 to 8, 10, 11, 15, 24 to 26, 30, 32 to 34, 36 to 38, 40 to 43, 45 to 52, 66, 67, 70 to 73 and 76 to 82 with necessary modifications have been made applicable in the case of Class IV employee. Unamended Regulation 31 has not been applicable.

25. From a reading of amended Regulation 31 it is clear that as far as employees who are employed by Committee of Management a different procedure has been prescribed but as regards Class IV employees, different procedure has been prescribed before passing an order of punishment. In case of an employee other than Class IV employee it is Committee of Management who has to impose punishment and such punishment cannot be made without prior

approval of the District Inspector of Schools/Regional Inspectress of Girls Schools concerned. But in a case of Class IV employee the imposition of punishment is made by the Principal or the Headmaster of the institution concerned and against the said order an appeal is maintainable before the Committee of Management of the institution within a prescribed time and after the dismissal of appeal by the management a right to make further representation has been given within a prescribed time. The procedure for disposal of representation by the District Inspector of Schools is to be made in accordance with Regulations 86 and 98 of the Regulations framed under the Act.

26. This provision clearly makes distinction in the manner of imposition of punishment. In case of Class IV employees no prior approval of the District Inspector of Schools is required. In case, the intention of the Legislature had been to obtain prior approval of the District Inspector of Schools before imposition of penalty, the right of appeal could have not been given to the Management and thereafter a further right to make representation to the District Inspector of Schools.

27. Learned counsel for respondent No. 2 has placed reliance upon the *Committee of Management, Janta Inter College, Karni, Faizabad vs. District Inspector of Schools, Faizabad and others,* 1981 U.P.L.B.E.C. 135, wherein it was held that prior approval of the District Inspector of Schools is to be obtained to the decision of the Committee of Management to award punishment. It was a case of Class III employee and is not applicable to the facts of the present case.

In *Brij Raj Singh vs. District Inspector of Schools and other*, 1988 UPLBEC 123, it was held that if the order of termination is passed in violation of Regulations 35 and 36 in terminating the services of a Class IV employee the same cannot be upheld. The court did not hold that prior approval was necessary even in Class IV employees' services.

In *Shankar Sharan vs. Waslee Inter College*, 1991(2) ALR 1, it was held that if the services of Class IV employee is terminated without giving opportunity of hearing it is liable to be quashed. The decision was mainly based on the facts of the case."

28. The other decision, which has been cited at the Bar in support of the said proposition is that of *Swami Vivekanand Uchchatar Madhyamik Vidyalaya, Unnao and another Vs. District Inspector of Schools, Unnao and another*, 1998 (3) A.W.C. 1940 (L.B.). We are not referring to any paragraph of the said judgment, as in our opinion, the same is not a case directly for the proposition as advanced before us as we shall explain it later on.

29. The Division Bench decision, on the basis whereof the conflict has been referred to be resolved by us, is the case of ***Ali Ahmad Ansari Vs. District Inspector of Schools, Kushinagar and others*** (supra), where the Division Bench after having traced the various provisions held as follows:

"8. Although the opening words of Regulation 31 provides that punishment to employee requires prior sanction from the District Inspector of Schools or

Regional Inspectress of Girls Schools but the later part of the said regulation provides that Principal or the Headmaster would be competent to give the above punishment to Class-IV employee. The first part of the said regulation specifically provide that prior sanction from Inspector for awarding punishment to employee is necessary whereas in the next part of the said regulation it is said that for Class-IV employee the Principal or Headmaster would be competent to give punishment. Further with regard to punishment awarded to a Class-IV employee, right of appeal has been given to the employee before the Management Committee within one month. The Class-IV employee has also been given right of representation against the decision of the Management Committee on his appeal to the District Inspector of Schools. The proviso to the said regulation further provides that if the Management Committee does not give a decision on the appeal of the employee within six weeks, the employee has right to represent the District Inspector of Schools directly. Had the prior approval for awarding the punishment to the Class IV employee was also required, there was no object and purpose for giving the right of representation to the same authority. The provisions of seeking prior approval for awarding punishment from the District Inspector of Schools and the provisions for right of representation to the District Inspector of Schools cannot go together. The above intend is further clear from the subsequent regulations of Chapter-III, i.e., Regulations 44 and 44-A. Regulation 44 clearly mentions that the Inspector or Regional Inspectress shall for the purpose of proceedings as envisaged in sub-section 3(a) of Section 16(G) of the Act or for adjudication of proposed punishment against any employee of clerical cadre within six weeks of receipt of complete proposal inform the Management about his decision. Regulation 44-A further provides that Inspector or Regional Inspectress may accept or reject the punishment proposed in respect of employee of clerical cadre. Had the prior approval of Inspector was also contemplated for Class-IV employees under Regulation 31, the mention of only Class-III employee in Regulations 44 and 44-A would not have been there. Regulations 44 and 44-A are extracted below:

"44. The Inspector or Regional Inspectress shall for the purpose of proceedings as envisaged in sub-section 3(a) of Section 16(g) of the Act or for adjudication of proposed punishment against any employee of clerical cadre within six weeks of receipt of complete proposal inform the Management about his/her decision. If incomplete proposal is received from the Management, the sanctioning authority shall ask to re-submit the complete proposal and period of six weeks as proposed in this regulation would be counted from the date of receipt of complete papers to the sanctioning authority. These papers may be sent either by registered post or by special bearer.

44-A. (1) The Inspector or Inspectress may accept or reject the punishment proposed in respect of employees of clerical cadre. He may either extend or reduce it :

Provided that Inspector or Inspectress would give a notice to the concerned employee before issuing an order in respect of punishment to show cause within fifteen days of service of the notice as to why he should not be punished as proposed.

Either party within a period of one month from the date of receipt of information may appeal to the Regional Deputy Director of Education against an order of Inspector or Inspectress and Regional Deputy Director of Education, after any such additional enquiry, if any, which he may deem fit, can affirm or cancel or modify the order, which will be final. On appeal of an employee, decision of Regional Deputy Director of Education would be given within a period of three months."

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

31. Learned counsel, appearing for the employees, namely Sri Harish Chandra Singh and Sri R.C. Singh, have urged that Regulation 31, clearly stipulates that the Conditions of Service of all Employees of an Intermediate College including Class-IV employees are to be governed by the same and, therefore, the decision by the Division Bench in the case of ***Ali Ahmad Ansari Vs. District Inspector of Schools, Kushinagar And Others*** (supra) does not lay down the law correctly.

32. Sri R.C. Singh vehemently urged that the opening part of Regulation 31 leaves no room for doubt that prior approval is required for all class of punishments referred to therein in respect of all employees and that such prior approval cannot be excluded. He contends that the latter part of the procedure, which makes provision for appeal from the decision of the Head of the Institution to the Committee of Management and further representation to the District Inspector of Schools does not take away the power of granting prior approval.

33. He further submits that Regulation 37, which carves out a proviso in respect of Class-IV employees, not obliging the disciplinary authority to forward papers for approval, does not curtail the powers of District Inspector of Schools to grant prior approval. He contends that if such an interpretation is given, then Regulation 31 would become redundant and, therefore, the principle of harmonious construction should be applied for which, he drew support from the conclusion drawn by the learned Single Judge in the case of Daya Shankar Tewari (supra). He further contends that Class-IV employees are clearly covered by Regulation 31, and if the legislature has omitted the use of specific words, then the said gap or omission, being an accidental omission, should be filled in by this Court by applying the tools of purposive interpretation.

34. Shri R.C. Singh in his written submissions has also invited the attention of the Court to the general principles relating to addition of words when permissible and the duty of the Court to avoid anomalies and ambiguity including inconsistencies and repugnancies. The rules of interpretation, as enunciated in Chapter II of the Statutory Rules of Interpretation by Justice G.P. Singh, have been pressed into service. He contends that the Court should avoid a construction that was never intended by the legislature and the provisions made for the protection of an employee should be construed in a manner that it provides for a complete umbrella under the law to an employee,

designed for protection of his interest against any arbitrary action by the disciplinary authority.

35. The submission is that the level of satisfaction at the time of grant of prior approval by the District Inspector of Schools would be different and would be of a far lesser intensity, as at that point of time, he has to simply accord his approval and not enter into the validity or otherwise of the merits of the charges for punishment. He contends that if the provision is read in this way, then there would be no embarrassment to the Committee of Management to hear an appeal against an order of dismissal even if there is a prior approval and the District Inspector of Schools would not be deprived of his authority to decide a representation on merits, which he can do uninfluenced by the prior approval granted by him. It is urged that when an appeal or representation is filed, then the level of investigation and the scope of power exercised would be entirely different from that at the stage of prior approval being granted at the time of dismissal. He, therefore, submits that the omission by the legislature and keeping in view the provisions of Regulation 31, 37 and 100, this Court should interpret the provisions so as to resolve the conflict by pressing into service the recital in the title heading of Section 16-G, which has neither been considered or interpreted from this angle in any of the decisions which have been cited by the Bar.

36. Sri Harish Chandra Singh has supported the same contentions and submitted that the view expressed by this Court in Daya Ram Tewari's (supra) case, as upheld by the Division Bench later on should be approved as laying down the correct law.

37. Sri R.K. Ojha, Sri R.C. Dwivedi and Sri Yadav, for the employers, namely the Principal of the Institution have relied their submissions in spite of only a couple of decisions in their favour, to urge that the entire Scheme of the Act is clear enough to hold that prior approval of the District Inspector of Schools is not contemplated and any such interpretation would be a violation of the provisions resulting in absurdity. They contend that this situation has arisen on account of the decision in Principal, Shitladin Inter College, (supra) having not been noticed either in *Daya Shankar Tewari's* (supra) case or any of the latter decisions. On the strength of his written submissions, he also invited the attention of the Court to the fact that the Division Bench decision in the case of *Principal, Rashtriya Inter College* (supra) holding that prior approval was necessary and approving the decision of *Daya Shankar Tewari's* (supra) case was put in jeopardy before the Apex Court in Special Leave Petition No.2337 of 2001, wherein initially the judgment of the Division Bench was stayed by the Apex Court in the following terms:

"The Hon'ble Supreme Court by filing Special Leave petition, numbered as Appeal (Civil) no.2337 of 2001 and Hon'ble Apex Court in its interim order was pleased to pass following orders:

"LA 1 is allowed.

It is contended that the action under Regulation in question does not require prior approval of the Inspector in the Case of Class IV employee and further more

the action in question was taken on the basis of the complaint and order of the Inspector himself.

Issue notice.

Stay in the meanwhile.

Sd/ B.N. Kirpal J.

Sd/ Ruma Pal, J."

38. It has been stated that the said appeal was even though dismissed on 02.11.2001, yet the question of law raised therein was left open to be decided. The said order of the Apex Court is quoted below :

"Leaving the question of law open, the Special Leave petition is dismissed."

39. Relying on the decision of Shri Shitladin Inter College (supra) case and the latter Division Bench judgment in the case of Ali Ahmad Ansari (supra), Sri Ojha contends that the words of Regulation 31 read with Regulation 37, are unambiguous and clear enough, which do not require any purposive interpretation as suggested by the other side and further, the history of various amendments brought about in Section 16-G and the Regulations framed would clearly demonstrate that had the legislature intended to bring about any such provision seeking prior approval, then the same would have been expressly included, and the legislature or the Regulation making authority having not done so, there is no occasion for this Court to read into the provisions, the requirement of a prior approval in respect of a punishment to be awarded to a Class-IV employee. He further submits that if that is done, then it would be encroaching upon the function of the legislature or the rule making authority, which our Courts have held to be outside their jurisdiction and even otherwise, there is no necessity of doing so, as there is an ample protection in the Act making room for reconsideration of the matter at the stage of appeal before the Committee of Management and by way of a representation even thereafter to the District Inspector of Schools himself.

40. Mr. Ojha further submits that Regulation 37 clarifies the position, where the sending of reports for the purpose of approval has been clearly excluded, and Regulation 31 stands specifically excluded in the matter of Class-IV employees by way of Regulation 100. He submits that Regulation 31, therefore, cannot be read beyond for which it has been intended, and he further submits that if such a provision was necessary, then the legislature could have done it, as was done in the case of Class-III employees by introducing Regulation 44 and 44-A of the Regulations under Chapter III aforesaid, which have been already quoted and reproduced hereinbefore while referring to Ali Ahmad Ansari's case.

41. He submits that if the interpretation of having a prior approval is accepted, then it would be an anomalous situation where the Committee of Management would hear an appeal in respect of a decision taken after approval by a higher authority, namely the District Inspector of Schools. This incongruity would further stand multiplied, if the District Inspector of Schools is called upon to hear a representation in respect of the same matter, for which he has granted prior approval.

42. He further submits that the words 'prior approval' in respect of the punishments referred to in Regulation 31

also envisage the examination of the matter by the District Inspector of Schools on merits, and it is for this reason that all documents are required to be sent to the District Inspector of Schools, as per Regulation 37. However for Class-IV employees, such documents would not be required to be sent to the District Inspector of Schools and the entire procedure has to be followed by the disciplinary authority, i.e., the Head of the Institution in the instant case. Sri Ojha, therefore, submits that this provision itself specifically excludes the exercise of power by the District Inspector of Schools to grant prior approval, as he cannot enter into the merits of the charges nor the papers in respect thereof are required to be sent to the District Inspector of Schools. He submits that, fortified with the decisions in the case of **Ali Ahmad Ansari** (supra) and **Principal, Shitladin Inter College** (supra), his submissions should be accepted and the ratio in the aforesaid two decisions should be approved as laying down the correct law.

43. Sri M.C. Chaturvedi, learned Chief Standing Counsel for the State with the aid of his written submissions and the decisions cited at the Bar, raised the same submissions, and urged that the District Inspector of Schools is under no legal obligation to grant prior approval in respect of the proposal of punishment against a Class - IV employee. He submits that the word 'employees' occurring in the opening part of Regulation 31 would stand restricted to such employees about whom reference has been made in the latter Regulations and a Class-IV employee would stand excluded by virtue of the specific provision contained in Regulation 100. He contends that the ratio of the decision in the case of ***Daya Shankar Tewari's*** (supra) does not lay down the correct position of law inasmuch as the Court could not have read into a provision by employing any tool of interpretation, so as to include something, which has been specifically excluded. He contends that the wisdom of the legislature cannot be doubted as the legislature will be presumed to be conscious of the existence of Regulation 31, while framing Regulation 100, and when there is a conscious departure by excluding the applicability of Regulation 31, then in that event, it would be inappropriate for this Court to read into a provision, which has not been made applicable. He submits that in the event the interpretation as contended by the other side is accepted, the same would result in incongruity and would not be in accordance with the Scheme of the Act and Regulations referred to hereinabove.

44. Having heard learned counsel for the parties, it would be appropriate for us to declare the law on the basis of first principles underlying the interpretation on the basis whereof the dispute has to be resolved. This is necessary in view of the conflict of the two Division Bench decisions, as pointed out in the referring order.

45. Before proceeding to do so, we may, at the very outset, record that another Division Bench decision relating to the same subject, which arose out of a reference in a second appeal and which was not cited at the Bar, has come to our notice and which, in our opinion, substantially answers the issues referred before us. The same is reported in *2006 (65) ALR Page 767 Pujari Yadav Vs. Ram Briksh Yadav* decided on 09.10.2006. The said decision has distinguished the ratio of

the decisions in the case of *Daya Shankar Tewari* (supra) as approved in *Principal Rashtriya Inter College* (supra), by tracing the legislative history of Section 16-G of the Act and Regulation 31, and has proceeded to approve and follow the view taken by the Division Bench in the case of Ali Ahmad Ansari (supra), thereby holding that it is not necessary to seek prior approval of the District Inspector of Schools before terminating the services of a Class-IV employee. Our task therefore, has been rendered more convenient and our burden is lessened.

46. The Scheme of the provisions as contained in Regulation 31 clearly demonstrates that the said Regulation uses the word 'employees' in the opening sentence, where the recital is that prior sanction from the Inspector would be essential for awarding any of the punishments as enumerated from Sl. No. 1 to 4 therein. The word 'employees' has not been defined under the U.P. Intermediate Education Act, 1921. However, the said word employee has been defined under Section 2 (f) of the Uttar Pradesh High Schools and Intermediate Colleges (Payment of Salaries of Teachers and other Employees) Act, 1971 as follows :

"2. Definitions .- "employee' of an institution means a non-teaching employee in respect of whose employment maintenance grant is paid by the State Government to the institution ;"

47. In our opinion, the word 'employees' occurring in the opening words of Regulation 31 does not include Class - IV employees, as it is clearly distinct in its operation as compared to the definition of the word 'employees' occurring in Section 2(f) of U.P. Act No. 24 of 1971. The reason is not far to see. In the Regulations framed under Chapter III, a specific procedure has been carved out for taking disciplinary action against Class-IV employees, whereas in U.P. Act No.24 of 1971, the purpose is distinct, namely the payment of salary to all the employees who receive the same, as a result of extension of benefit of grant-in-aid given by the government. Thus, the purpose for which the said words have been used in the two enactments are clearly different and, therefore, the word "employee' as understood in U.P. Act No.24 of 1971 is altogether in a different context. It is well settled that the same words used in separate statutes may not connote the same meaning as they operate in different fields.

48. Regulation 31 was amended twice, firstly by notification dated 1st March, 1975 and subsequently vide notification dated 27th February, 1978. The Division Bench judgment in the case *of Pujari Yadav Vs. Ram Briksh Yadav* (supra) clarified and interpreted the aforesaid amendments in Regulation 31 and the impact thereof was discussed in paragraph 21 to 23 of the said decision which is as follows :

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

facie include non-teaching staff as well as Class-IV employees also.
Regulation 31 has been amended twice:
By the Notification No.789 (1)/15 (7)-75 dated 1st March 1975 published vide No. Board-7/562-V-8 (Board September, 1974) Allahabad dated 10th March 1975 (the 1975 Notification). By this notification two clauses were added in Regulation 31.

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

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

49. Thereafter, the Court came to the conclusion that in view of the aforesaid amendments as noted above and the addition of the two clauses in Regulation 31, the Principal or Headmaster of the Institution became competent to terminate the services of a Class-IV employee with further provision of an appeal and a representation to the Inspector of Schools thereafter. The Division Bench carefully examined the impact of the said amendments and came to the conclusion that the purpose of including the two clauses as brought by way of amendments in 1975 and 1978, clearly establish that the Principal is empowered to terminate the services of a Class-IV employee without taking prior approval of the Inspector. Such a decision by the Principal or Headmaster was to be final, subject to an appeal before the Committee of Management and then a further appeal to the Inspector. The relevant paragraphs of the said judgment namely paragraphs 24 to 26 are quoted below :

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

It is correct that the cases (mentioned in paragraph 19 of this judgment) do support the submission of the plaintiff-appellant. However, these cases have not taken into account the amendment made in Regulation 31 by the 1975 or 1978 Notification. They have taken into account Regulation 31 as it was originally framed. These cases have not considered the Regulation 31as amended from time to time and cannot be pressed to show that prior approval was necessary before terminating services of Class-IV employees. This question has to be decided in the light of the Regulation 31 of Chapter-III as amended.

Regulation 31 as it was originally framed required prior approval of the D.I.O.S. before terminating service of an employee. However, after addition of two clauses in Regulation 31 in 1975 it clearly empowered the principal to terminate the services of Class-IV employee. It further provided an appeal to the Committee of Management and thereafter to the Inspector itself. In case prior approval of

Inspector was necessary before terminating services of Class-IV employee then what was the point in providing appeal first to the Committee of Management and then to the Inspector. In case the Inspector has already granted approval for terminating the service then can he change his decision in the appeal. In our opinion the purpose of including two clauses by 1975 notification, which continued with some modification by 1978 notification, clearly show that the principal is empowered to terminate the services of the Class-IV employee without taking any prior approval of the Inspector and his decision is final; it is subject to an appeal before the Committee of Management then to the appeal before the Inspector."

50. We have given our thoughtful consideration to the aforesaid reasoning given in the decision of **Pujari Yadav** (supra) and we find that Regulation 31 stands qualified by making an express and separate provision for the procedure to be followed in the case of Class-IV employees and, therefore, the word 'employees' occurring in the opening sentence of Regulation 31 does not include within its fold, a Class-IV employee. It is for this reason that Regulation 31 to that extent stood excluded in its applicability to Class-IV employees. To our mind, the Regulation making Authority was conscious of the amendments brought about in Regulation 31 in 1975 and 1978, and it is for the said reason that the applicability of Regulation 31 to that extent has not been included in Regulation 100. The reasoning given in Pujari Yadav's case (supra) has our firm approval as we find that the amendments bring about a sea-change of procedure in relation to Class-IV employees with an exclusive dominant role assigned to the Head of the institution for taking disciplinary action. These amendments, which were introduced stepwise, in our opinion, exclude the role of the Inspector of Schools at the stage of taking action by the disciplinary authority. The amendments clearly and unambiguously, which have been quoted in detail in Appendix A to the judgment in Pujari Yadav's case (supra), exhibit the intention of the rule making authority to clothe the Head of the institution with exclusive powers of initial disciplinary control unfettered by any prior sanction from any other authority.

51. With profound respect, we find fallacy in the reasoning of learned Single Judge, in the case of Daya Shankar Tewari (supra) as upheld by the Division Bench in the case of Principal, Rashtriya Inter College (supra) and quoted hereinabove. The learned Single Judge in Daya Shankar Tewari's case proceeded on a consideration of Section 16-G (3) of the Act, and held that the said provision provides for Conditions of Service of all employees including Class-IV employees as well. According to the learned Single Judge, Regulation 31 of Chapter III, so framed would, therefore, apply to a Class-IV employee and in order to explain the impact of Regulation 100, held that even if, Regulation 31 had not been made specifically applicable, yet the same was not categorically excluded.

52. Apart from the reasons given by the Division Bench in the case of ***Pujari Yadav*** (supra) hereinabove, we may further add that there is a legal principle engrained in the maxim *"expressum facit cessare tacitum*". The said maxim means when there is express mention of certain

things, then anything not mentioned is excluded. The aforesaid well-known maxim was described as a principle of logic and commonsense and not merely a technical rule of construction. Reference may be had to the decision in the case of *B. Shankara Rao Badami Vs. State of Mysore, [1969 (1) SCC 9]* and followed in *Union of India Vs. Tulsiram Patel [(1985) 3 SCC 398] [paragraph 70]*.

53. In our opinion, the aforesaid principle squarely applies in the present context and for the reasons given hereinabove and hereinafter, we would interpret Regulation 31 read with Regulation 100 to mean that the sanction of prior approval in respect of the termination of a Class-IV employee would stand excluded. The reasoning given by the learned Single Judge in Daya Shanakar Tiwari (supra) to that extent does not lay down the law correctly and, therefore, its approval by the Division Bench in the case of Principal Rashtriya Inter College, (supra) also cannot be said to be laying correct law.

54. There is yet another reason to come to this conclusion, which has also been taken note of in the case of ***Pujari Yadav*** (supra). The provision of appeal against an order of termination passed by the Head of the Institution lies to the Committee of Management. The order of the Committee of Management can be put in jeopardy in a further appeal before the District Inspector Schools. The hierarchy so provided, therefore, clearly amplifies the intention of the legislature that a Class-IV employee would have the benefit of appeals to the higher authorities at two stages. If a prior approval or sanction was intended before the punishment to be awarded, then the District Inspector of Schools would be supposed to go into the merits of such a punishment. That is the purpose for a prior approval or sanction, which requires the sanctioning authority to examine an order of punishment in depth before proceeding to grant sanction. It is for this reason that Regulation 37 quoted hereinabove, makes it imperative for the punishing authority to send all documents including reports to the Inspector of Schools for approval.

55. There is yet another reason to come to the same conclusion. Regulation 37 specifically excludes for sending of any such report to the Inspector in the case of Class-IV employees and all proceedings in relation to Regulation 37 have to be undertaken by the appointing authority. The aforesaid statutory provision, therefore, does not allow the sending of any such documents to the Inspector in the case of Class-IV employees. It injuncts the sending of any such papers to the District Inspector of Schools for examination. In our opinion, the intention of the legislature is clear enough that the District Inspector of Schools is not required to examine the material on the basis whereof any punishment has been awarded to a Class-IV employee. To our mind, there is no purpose to seek prior approval or sanction when the Inspector cannot examine the documents, which are necessary for granting such sanction. To interpret it otherwise, would be to do violation to the procedure, which specifically states that all proceedings in this regard have to be performed by the appointing authority, namely the Head of the Institution. If we interpret the provisions making it compulsory to obtain a sanction, then the aforesaid procedure as engrained in

Regulation 37 would be rendered inoperative. There being no requirement of sending the papers to the Inspector, the intention appears to be clear that the role of the Inspector stands excluded at that stage. The question of granting prior sanction without any purpose would be a meaningless exercise, and therefore, we would refrain from rendering an interpretation that leads to futility.

56. While applying the rules of harmonious construction, the Court has to be cautious in interpreting the provisions, which may lead to anomalous results. We find it apt to record that the rules of harmonious construction, while interpreting such statutes, immediately come into play in a situation of the present kind and reference in this connection can be made from Interpretation of Statues by Justice Markandey Katju in which it has been stated as follow:

"Where different interpretations of a statute are possible, the court can adopt that which is just, reasonable and sensible as it can be presumed that the legislature would have used the words in the sense which least offends our sense of justice. Similarly, if the harmonical construction leads to some absurd or repugnant result or inconsistency with the rest of the instrument, it may be departed from so as to avoid that absurdity and inconsistency. There may be cases where there appears to be inconsistency or repugnancy in a statute and in such cases the principle of harmonious construction is applied. This is, however, subject to the principle that the special rule will override the general rule. Similarly, it is ordinarily not open to the court to add words to a statute on the grounds that there is an omission in the words used in the statute."

(Interpretation of Statutes, by Justice Markandey Katju, Judge Supreme Court of India.)

57. In the case of ***Padmasundara Rao and others Vs. State of Tamil Nadu and others, [AIR 2002 SCC 1334]***, a Constitution Bench of the Supreme Court ruled that the principle of casus omissus can be permitted to be pressed into service in case of a clear necessity and when reason for it is found in the four corners of the statute itself but at the same time a casus omissus should not be readily inferred.

58. In the case of ***Magor and St. Mellons Rural District Council Vs. Newport Corporation, [(1951) 2 All E.R. 839]***, the remarks of Lord Denning in the Court of Appeals has been quoted, which read as follows :

"We sit here to find out the intention of Parliament and Ministers and carry it out, and we do this better by filling in the gaps and making sense of the enactment than by opening it up to destructive analysis."

59. It has also been held by the Supreme Court in the case of *Rao Shiv Bahadur Singh and another Vs. The State of Vindhya Pradesh* [AIR 1953 SCC 394] that the Court has to avoid a construction, which may render devoid any part of the statute. It has been held by the Supreme Court in the case of *Nasiruddin and others Vs. Sita Ram Agarwal* [(2003) 2 SCC 577] in paragraph 37 that the use of negative words are mandatory in character and the Court has to proceed accordingly. Sounding a caution to the Courts while interpreting a Rule, the

Supreme Court in the case of *State of Kerala and Another Vs. P.V. Neelakandan Nair and others* [(2005) 5 SCC 561] in paragraphs 8 to 16 held that while interpreting a Rule, attention should be paid not only to what has been said, but also to what has not been said. The Rule has to be interpreted not like a Euclid's theorem, but with some imagination of the purposes, which lie behind the Rule. A Full Bench of the Andhra Pradesh High Court in *B. Prabhavathi Vs. Govt. of Andhra Pradesh*, [2002 (3) ESC 108] in paragraph 44 ruled that Rules framed under the Act should be harmoniously interpreted as they form part of the Act.

60. Having considered the principles enunciated and referred to hereinabove and applying them to the present controversy, it is clear to us that nothing has been omitted by the legislature, which may require filling up by the Court as suggested by Sri R.C. Singh. As explained hereinabove in Pujari Yadav (supra), the rule making authority itself proceeded to fill in the gaps by making express recitals in Regulations 31, 37, 100 and the other provisions relating thereto. The amendments in Regulation 31 lead to a heavy full stop to the role of the Inspector and is not a silent comma expressing doubt. The same brings about a clarity which has an almost window pave effect and removes the cloud of doubt that has been raised to be resolved by us.

61. There is yet another principle, which deserves to be taken notice of. If the sanction is required prior to giving effect to a punishment in respect of a Class-IV employee, then the District Inspector of Schools would hear an appeal against his own approval. This, to our mind, would bring about an anomaly, which may extend to an absurdity. The same authority cannot be presumed to have been conferred with a power to hear an appeal against its own approval. This would be rendering nugatory the hierarchy provided for in Regulation 31 itself, where an appeal is provided to the Committee of Management against the order of disciplinary authority and a further appeal to the Inspector of Schools. The purpose, therefore, is clear enough and it does not suffer from any ambiguity which may require us to render an interpretation, which otherwise would bring about an incongruous result. As observed above, the Rules of Interpretation as enunciated by the Apex Court do not permit us to give an interpretation, which would obviously result in a clear anomaly as pointed out hereinabove. This we adopt, as the law permits us to apply 'the intention seeking' Rule of Interpretation to illustrate the anomaly that may result in the event we accept the proposition that a prior sanction is required.

62. A feeble submission raised by Sri R.C. Singh was that the District Inspector of Schools has to merely grant prior approval and not to make an in-depth examination, as at that stage, he would be proceeding as if to perform a routine work. Such an action would not, therefore, prevent him from hearing an appeal when the matter may arise out of an appeal before the Committee of Management.

63. We are not inclined to accept the aforesaid submission for the simple reason that the District Inspector of Schools, in our opinion, does not perform a mere ministerial act while granting

sanction. We agree with the submission of Sri Ojha that a combined reading of Regulations 31 and 37 makes it amply clear that the District Inspector of Schools is not required to undertake any such exercise, which is to be done only by the Head of the Institution in the case of Class - IV employees. The submission is, therefore, devoid of substance and has been noted only to be rejected.

64. We have also perused the notes submitted by Sri R.C. Singh annexing therewith the General Principles of Interpretation as contained in Chapter II of the Statutory Rules of Interpretation, by Justice G.P. Singh. Having given our anxious consideration to the said Rules, as contained therein and as pointed out by Sri R.C. Singh, we find that said Rules on the contrary militate against the submissions as advanced on behalf of the employees pointed out hereinabove. The aforesaid principles have been considered in a large number of authorities and the conclusion drawn is that the intent and purpose of the provisions in the light of the enactment made, has to be considered in order to avoid any absurdity. We have already pointed out that by a reading of the Regulations, it is more than clear that the Rule making authority clearly intended to exclude the applicability of prior sanction as contained in Regulation 31 in respect of Class-IV employees. To add further, would be repeating what has already been observed hereinabove.

65. Another aspect of the matter, which clarifies the intention of the Rule making authority as pointed out by Sri R.K. Ojha is that in respect of Class-III employees, Regulations 44 and 44-A were expressly included under Chapter III, which envisage a separate procedure in respect of disciplinary action for the clerical cadre of employees. This however, illustrates that the Rule making authority did not apply any other provision to Class-IV employees and specifically empowered the Head of the Institution, namely the Principal or the Headmaster to take action at his end in respect of a disciplinary proceeding against a Class-IV employee. The aforesaid illustration further removes the cloud and expresses clarity on a comparison of the provisions that had been referred to hereinabove.

66. Responding to the submissions that were raised, Sri M.C. Chaturvedi, learned Chief Standing Counsel appears to be right in his submissions that the Rule making authority clearly intended to restrict the meaning of the word 'employees' occurring in Regulation 31 in accordance with Regulation 100 to mean that a prior sanction would not be required in the case of a Class-IV employee. We accept his submission that the wisdom of the legislature should not be doubted and the Rule making authority will be presumed to be conscious of the departure that was deliberately made for the procedure to be adopted in the case of Class-IV employees.

67. Having laid threadbare the first principles on which we have interpreted the provisions, we have no hesitation in coming to the conclusion that there is no requirement under the Regulations for a prior sanction or approval of the Inspector of Schools in respect of order of termination of Class-IV employees.

68. Coming to the decisions that have been cited at the Bar, we may point out that in the case of *Shankar Saran Vs.*

Vesli Inter College (supra), the learned Single Judge has merely recorded conclusions without discussing the impact of the provisions, and it appears that no such issues were raised therein to contradict the opinion of the requirement of a prior sanction. The decision in the case of *Daya Shankar Tewari* (supra), which was rendered in the year 1998, unfortunately did not take notice of the decision in the case of *Principal, Shitladin Inter College* (supra), which had been rendered way back in 1994 itself. The decision in the case of *Principal Shitladin Inter College* (supra), in our opinion, has correctly construed the provisions and we accordingly, approve the same.

69. Unfortunately, the Division Bench judgment in the case of *Principal Rashtriya Inter College* (supra), which approved the decision in the case of *Daya Shankar Tewari* (supra) also did not notice the reasoning given by the learned Single Judge in the case of *Principal, Shitladin Inter College* (supra). The same was religiously followed in the subsequent decisions in the case of *Sita Ram* (supra) as well as in the decision of Ram *Khelawan Maurya Vs. District Inspector of Schools* (supra).

70. On the other hand, the Division Bench decision in the case of Ali Ahmad Ansari (supra) also did not take notice of the earlier Division Bench decision in the case of *Rashtriya Inter College* (supra) and while holding that no prior approval/sanction is required, the said Division Bench also appears to have not been apprised of the decision in the case of *Principal Shitladin Inter College* (supra). The other decision in the case of *Swami Vivekanand Uchchatar Madhyamik Vidyalaya* (supra), in our opinion, does not dwell upon the controversy presently involved and does not contain any discussion on the issue raised in the present matter, as such a reference to the said decision by the learned counsel is of no assistance in resolving the present dispute. As noticed above, the Court has come across the Division Bench decision in ***Pujari Yadav*** (supra), which has substantially answered the question referred before us and having taken notice of the same, we fully approve the view taken therein.

71. In view of the conclusions, as drawn hereinabove, we are respectfully unable to agree with the view expressed in *Daya Shankar Tiwari's* case as upheld by the Division Bench in the case of ***Principal Rastriya Inter College*** (supra) and followed later on in the decisions of learned Single Judges referred to hereinabove.

72. We approve the view taken in the case of *Principal, Shitladin Inter College* (supra), the Division Bench judgment in the case of Ali Ahmad Ansari (supra) and the decision in the case of Pujari Yadav (supra) as laying down the correct law.

73. Our answer to the questions referred to us are as under :

(i) For awarding a punishment as enumerated under Regulation 31 Chapter III of the U.P. Intermediate Education Act, 1921 to a Class-IV employee of a institution recognized under the aforesaid Act, no prior approval or sanction from the Inspector of Schools is required.

(ii) The Division Bench judgments in the case of *Ali Ahmad Ansari Vs. District*

Inspector of Schools, Kushinagar [2006(3) ESC 1765 (All)] and *Pujari Yadav Vs. Ram Briksh Yadav [2006(65) ALR 767]* lay down the correct law in contradistinction to the Division Bench judgment of Principal, Rashtriya Inter College, Bali Nichlaul, District Maharajganj And Others [(2000) 1 UPLBEC 707] and the other judgments to that effect.

The reference is answered accordingly.

74. Let the papers be placed before the learned Single Judges before whom the writ petitions are pending to proceed with the matter in the light of the answers given by us in the present reference.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.10.2009

BEFORE
THE HON'BLE SUNIL AMBWANI, J.
THE HON'BLE RAN VIJAY SINGH, J.

Civil Misc. Writ Petition No.7751 of 2009

Matloob Gaur ...Petitioner
Versus
State of U.P. and another ...Respondents

Counsel for the Petitioner:
Sri Kesari Nath Tripathi
Sri Suneet Kumar

Counsel for the Respondents:
Sri Devendra Kumar
S.C.

U.P. Nagar Palika Adhiniyam 1916- Section 48 (2) (b) Removal of chairman of Nagar Panchayat burden of Proof wrongly shifted upon petitioners- allegations not fall within the meaning of misconduct- No concern with the duty discharged by petitioner-held- order of removal- illegal

Held: Para 19

On the aforesaid discussion we find that the State Government not only wrongly placed the burden of proof of the charges on the petitioner to be disproved by him, but also failed to discuss the evidence led by the petitioner. The charge No.1 had no concern with the misconduct and did not fall in any of the grounds given in Section 48 (2) (b) and that charge No.2 was wholly vague and was not related to the duties performed by the petitioner. The third and fourth charge, were also not proved against the petitioner.

Case law discussed:
2005(3) AWC 2818, 2000(3) ESC 1611(All), 2005(4) AWC 3563.

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

1. Heard Shri Kesari Nath Tripathi, Senior Advocate assisted by Shri Suneet Kumar, learned counsel for the petitioner. Learned Standing Counsel appears for the respondents. Shri Devendra Kumar has entered caveat for the Administrator and Executive Officer of the Nagar Panchayat, Kithore, Distt. Meerut.

2. Shri Matloob Gaur, the petitioner was elected as Chairman of Nagar Panchayat, Kithore, Distt. Meerut in November, 2006. A notice dated 5.2.2008 was issued to him by the State Government on 5th February, 2008 and was served upon him by the District Magistrate, Meerut by his letter dated 8.2.2008 to show cause as to why he should not be remove from the post of the Chairman of the Nagar Panchayat under Section 4 (2) (b) (ii), (iv), (ix), (x), (xi), (xii) and (xvii) of the U.P. Municipalities Act, 1916. The notice also contained an

order by which the petitioner's financial and administrative powers under the proviso to Section 48 (2) of the U.P. Nagar Palika Adhiniyam, 1916 were ceased, and were directed to be exercised by the District Magistrate, or an officer nominated by the District Magistrate, who shall not be Sub Divisional Magistrate to exercise such powers until the petitioner is exonerated of the charge. The District Magistrate by his communication letter dated 8.2.2008 directed the Sub Divisional Officer, Mawana to exercise the financial and administrative powers, until the conclusion of the proceedings.

3. The show cause notice contained four charges namely; (1) that the petitioner had stated in his affidavit filed along with nomination paper on 5.10.2006 that there was no case pending against him in any Court. He did not disclose the cases, which are pending against him and thus concealed the facts; (2) the log book dated 2.8.2007 of the consumption of diesel was only with regard to tractor. The tractor driver stated that the diesel is filled directly at the petrol pump and is not consumed separately. No log book was maintained for the period prior to the period 2.8.2007, causing doubt over the consumption of diesel; (3) the contract for parking place for the year 2007-08 of Nagar Panchayat Kithore, was settled by the petitioner in favour of his brother Shri Maroof Ahmad. Three persons namely Shri Maroof Ahmad, Dilshad and Sher Mohammed participated in the auction held on 30.5.2007, whereas the amended bylaws were published in the gazette on 14.7.2007. The petitioner violated the conditions of Section 18 (b) (ii), which prohibits the Chairman of the Nagar Palika to give benefits to his family members either directly or indirectly; and (4) the plot No.908, 903, 935 are registered as a pond and is not in the possession of the Chairman of the Nagar Panchayat, but plot No.702, which is entered as 'khata kuria' (manure pits) has been used to construct a house for which a suit is pending in the civil court and that Court directed the parties to maintain status quo. In preliminary enquiry the charge was found fully proved against the Chairman.

4. The petitioner in his reply dated 20.2.2009 after referring to the documents in his support denied the allegations and submitted that no enquiry was made from him nor any facts were placed before him. He has not misused the property and money of Nagar Panchayat in any manner. With regard to allegations in charge No.1 relating to concealment of the cases at the time of filing nomination does not come within the purview of Section 48 of the Nagar Palika Adhiniyam, 1916. He has not been convicted in any offence, and that in all the cases in which the decisions were made, the petitioner was either discharged or acquitted. Regarding Charge No.2 the petitioner stated that the consumption of diesel relates to the tractor of Nagar Panchayat. The log book of the period prior to 2.8.2007 is available in the office of Nagar Panchayat in which entreis have been made by the tractor driver. The petitioner has not used the diesel in any other vehicle or for any other purpose. The driver had stated that he directly fills the diesel in the tractor. The petitioner is not responsible for maintenance of the log book of the tractor. On charge No.3 the petitioner alleged that Shri Maroof Ahmad is a contractor of collecting parking fees from 1.4.2006, much before

the petitioner was elected as Chairman. At that time Shri Shams Parvez was the Chairman. There are no dues pending on Shri Maroof and that Nagar Panchayat has not sufferred any loss. The petitioner's brother Maroof Ahamd is living separately from the petitioner and has ration card in his own name. The petitioner has no concern with his business. The contract of parking fees has been given in accordance with the rules and that the contract settled after due execution vide publication in Amar Ujala and Punjab Kesari newspapers on 17.5.2007, 23.5.2007 and 29.5.2007 was approved by the Board. The Munadi was also made in Nagar Kithore area on 16.5.2007 and 21.5.2007 before auction was held on 30.5.2007. Shri Maroof was the highest bidder and as old contractor with no complaint against him, his highest bid was accepted and approved by the Board.

5. On the last charge the petitioner stated in his reply that Khasra No.702 is situated in Mohalla Mausam Khani, Nagar Panchayt Kithore, whereas the petitioner's house is situate in Mohalla Badbaliyan Nagar Panchayat Kithore. There is no dispute or suit pending in any Court relating to Plot No.702 and that charge is entirely false and baseless. He further submitted that the enquiry report has been prepared on the pressure exercised by Shri Munkad Ali, member of Rajya Sabha/ leader of Bahujan Samaj Party. Shri Munkad Ali has illegally occupied Nagar Panchayat land. The petitioner has initiated proceedings for his eviction from Khasra No.632 Kabristan and 633 Rasta belonging to Nagar Panchayat and had also made complaint to the Sub Divisional Magistrate, Mawana on 24.9.2007 and 26.9.2007. A writ petition No.42015 of 2007 filed by the petitioner impleading Shri Munkad Ali as respondent is pending. The petitioner had defeated Shri Majid Ali, the brother of Munkad Ali in the elections giving rise to the complaint against him. Khasra No.702 is old abadi on which house of Farooq, Mashroor, Hazi Aarif, Shahid Manzoor and Shamshad have been constructed.

6. It is alleged that the Principal Secretary, Nagar Vikas Anubhag No.1 fixed 27.8.2008 for hearing. The intimation of the date was received by the petitioner on 23.8.2008. On the date fixed no document was shown to the petitioner. The petitioner was required to submit his reply either orally or in writing. Since no further documents were relied upon, the petitioner stated that he has already given his reply in writing. The petitioner, thereafter, waited for a decision to be taken by the State Government. By an order dated 14.11.2008 giving rise to this writ petition the petitioner has been removed from the office of the Chairman of Nagar Panchayat, Kithore giving rise to this writ petition.

7. Shri Keshari Nath Tripathi, learned counsel for the petitioner submits that the powers under Section 48 to remove the elected Chairman of the Nagar Panchayat should be sparingly exercised by the State Government. These powers cannot be compared with the powers of misconduct of a government servant. An elected Chairman can be removed on the grounds given in Section 48 (2) (b) of the U.P. Municipalities Act, 1916 but that the charge should be serious enough to initiate the action and to exercise the powers of removal. In the present case the first charge relating to the cases pending against the petitioner at the time of filing

of the nomination and the failure to disclose the pendency of the case can not be a ground of removal as the disqualification under Section 12 (D) and Section 43 (AA) of the Act, may be incurred after the petitioner is elected. The State Government did not disclose the pendency of any case against the petitioner by giving the details and that the impugned order also does not give reference to the pendency of any case against the petitioner on the day, when he contested the election. The charge is not only vague but is also non existing and does not fall in any of the conditions of exercise of powers under Section 48 (1) (b) of the Act.

8. With regard to second charge relating to the consumption of diesel, it is submitted that the petitioner as Chairman of the Nagar Panchayat was not directly concerned with the consumption of diesel and the supervision of the log book. The charge does not give the details of the consumption of the diesel and the alleged discrepancy in the log book. The allegation that the log book dated 2.8.2007 only relates to the diesel consumed by the tractor, and that log book prior to 2.8.2007 was not maintained was entirely vague and did not allege or establish any misconduct against the petitioner. The petitioner had clearly stated that the maintenance of log book is a matter to be looked after by the Executive Officer and that log book of the period prior to 2.8.2007 is available. The Executive Officer, incharge for maintaining log book may not have produced the same before the enquiry officer but that by itself could not be a ground to make an enquiry unless it was shown that the diesel was misused.

9. On the third charge the State Government has illegally and arbitrarily accepted the report of the District Magistrate that the proceedings of auction held on 30.5.2007 should have awaited the selection of the parking place in accordance with the amended bylaws published on 14.7.2007, and that the petitioner has not given any reply or evidence to disprove the fact. The Chairman has given direct benefit of contract to his brother in violation of Section 48 (b) (2) of the Act and has thus committed an act, which makes him liable to be removed from the office. It is submitted by Shri K.N. Tripathi that Section 48 (2) (b) (ii) relates to knowingly acquire or continued to have, directly or indirectly or by a partner, any share or interest, whether pecuniary or of any other nature, in any contract or employment with by or on behalf of the Municipality or (iii) knowingly acted as President or as a member in a matter other than a matter referred to in clauses (a) to (g) of sub-section (2) of Section 32, in which he has, directly or indirectly, or by a partner, any share or interest whether pecuniary or of any other nature, or in which he was professionally interested on behalf of a client, principal or other person. There are no allegation that the petitioner has any pecuniary interest in the contract awarded to his brother, who was working as a contractor of the Nagar Panchayat from before the election of the petitioner as Chairman. The allegations that the petitioner had approved the contract before the matter could be considered by the Board is entirely incorrect as the petitioner as Chairman of the Nagar Panchayat did not approve the contract. The proceeding of the auction and the highest bid was approved by the

Executive Officer and was approved by the Board.

10. With regard to findings on the last allegations Shri Kesari Nath Tripathi submits that the report of the District Magistrate accepted by the State Government was entirely vague and did not give the details either of the construction of the house or the pendency of the case. The petitioner had clearly stated in his reply that his house was not constructed at Plot No.702 Mohalla Khani but was situated in Mohalla Badbalian and that infact the house of Farooq, Mashroor and others were constructed on the Khasra No.702 recorded as purani abadi. The State Government without considering the petitioner's reply has mechanically believed the report of the District Magistrate in exercising the extreme powers of removal of elected Chairman of the Nagar Panchayat.

11. Shri Kesari Nath Tripathi has relied upon the judgments in **Munna Lal Gupta Vs. State of U.P. & Ors., 2005 (3) AWC 2818; Nasimuddin Vs. State of U.P. & Ors., 2000 (3) ESC 1611 (All.)** and **Smt. Kesari Devi Vs. State of U.P. & Ors., 2005 (4) AWC 3563** in support of his submission that the burden of proving of charges is upon the State Government. It cannot be shifted on the petitioner. An elected Chairman of the Nagar Panchayat cannot be removed only on the ground that he could not defend himself of the charges, which were entirely vague and were not supported by any material in proof of the allegations by the District Magistrate. In Nasimuddin Vs. State of U.P. (Supra) the Court relied upon Israt Ali Khan Vs. State of U.P. in finding that the State Government did not hold enqiry in a quasi judicial manner and found the charges to be proved without discussing the evidence on its merits. In Smt. Kesari Devi (Supra) this Court held that in removing the elected representative the State Government must record specific finding of misconduct on the charges after considering the material placed by such elected representative.

12. Learned Standing Counsel on the other hand submits that the charges were fully proved. The petitioner had misused his office. He was facing several criminal cases at the time, when he contested the elections and that charge of misuse of diesel in failing to maintain the log book properly and allowing his brother to be awarded the contract for parking place was sufficient to remove the petitioner. Further the petitioner had occupied public utility land in Khasra No.702 for constructing his house. The State Government considered the preliminary enqiry report and the reply submitted by the petitioner in taking action against him. The Writ Petition No.8761 of 2008, Matloob Gaur Vs. State of U.P. against notice dated 5.2.2008 was dismissed by the High Court on 7.5.2008. He was given full and adequate opportunity to defend himself both by filing a reply in writing and to appear and making oral submissions. The preliminary enquiry report was found established against the petitioner. The complaint made by Hazi Rais Ahmad and Smt. Naeem, Nagar Panchayat Kithore were supported by the affidavits verified by them and that Regional Naib Tehsildar had caused an enquiry and found the allegations to be proved. There is no illegality in the order of the State Government to cause interference in the matter.

13. A Nagar Panchayat under Art.243 (Q) of the Constitution of India is a local body of a transitional area, in transition from a rural area to an urban area to which the elections are held in accordance with the procedure prescribed in the U.P. Municipalities Act, 1916. The Chairman is elected directly and that his term is coterminous with the term of the Nagar Panchayt. He may resign in writing to the State Government and can be removed, under Section 48, where the State Government has at any time reason to believe that (a) there has been a failure on the part of the President in performing his duties or that he is under clause (b) incurred any of the disqualification or conducted himself in a manner provided in the fifteen clauses of Clause (b) of sub-section (2) of Section 48. The proceedings for removal must serve the principle of nature justice and that decision must show that the authority had applied its mind to the allegations made, the explanation furnished and the material produced by the elected representative.

14. The elected public representative of local body is accountable to his electorate. His removal by the State Government has serious consequence as the people, who had elected him, loose their voice to be represented by him. The power of judicial review, in such matters is limited but has to be exercised with caution. An elected representative should ordinarily be allowed to complete his term for which he is elected. If the State Government wants to curtail the term on any of the ground given in Section 48 (2) (b) of the Act, there must be a complaint on which a preliminary enquiry is made, and that material collected during the enquiry must be put to the elected representative in the form of specific charge. The burden of proving such charges is upon the complainant. The charges must be specific and must contain all the details to submit effective reply. The findings must not only be based on material but should also relate to the grounds given in detail in Section 48 (2) (b) of the Act. The State Government must consider and after enquiries serving the principles of natural justice find with reasons to be recorded in writing that the allegations are sufficiently serious to remove him from the elected office. The proviso to sub-section (2) (A) provides that where the State Government has issued notice in respect of any of the grounds in clause (a) or sub-clause (ii), (iii), (iv), (vi), (vii) and (viii) of Clause (b) and sub-section (2), it may instead of removing him, given him a warning.

15. In the present case the charge No.1 against the petitioner did not fall in any of the clauses for removing the Chairman under Section 48 (2) of the Act. The disclosure of the pendency of the case, at the time of contesting the elections is a matter of incurring disqualification for contesting the elections with an object to inform the electorate as well as to verify whether the person is qualified to contest the election of the President. Such a charge will not fall within the meaning of the ground in Section 48 (2) (b) (i), which provides for incurring any disqualification mentioned in Section 12-D and 43 (aa) of the Act. Section 12-D of the Act provides for disqualification for registration in an electoral roll, such as the person is not a citizen of India or is of unsound mind, and so declared by the competent court or is for the time being disqualified from voting under the provisions of any law relating to corrupt practice and other

offences in connection with elections. In such case his name has to be struck of the electoral roll. Section 43 AA provides for disqualification for a Presidentship and which includes the disqualification such as the person is not the elector for any ward or has not attained the age of 30 years on the date of his nomination. A person is also disqualified under sub-section (2) for being chosen and for being President of the municipality, if he is or has become subject to any disqualification mentioned in clauses (a) to (g) and for (i) to (k) of Section 13D. The failure to disclose the pendency of case is not a ground of disqualification unless such case has resulted into the disqualification for contesting the elections such as conviction for any offence punishable with imprisonment under Section 171 (E) or under Section 17 (F) of the IPC, 1860 in Section 13D (h) (ii) or sentence to imprisonment for contravention of any of the order under the Essential Commodities Act etc. or for an offence, which is declared by the State Government to involve such moral turpitude as to render him unfit to be a member etc. given in Section 13-D (h) (j) provided that in case of (j) the disqualification shall cease on the expiry of five years.

16. The disqualification of a person to be elected as a member under Section 12-D and the disqualification to contest as a President under Section 43-AA can be a ground to file and declare the election of the President to be invalid but that these grounds cannot be the subject matter of complaint and enquiry by the State Government in removing a President under Section 48 of the Act.

17. The second charge related to the negligence in maintaining the log book of the use of diesel in the tractor of the Nagar Panchayat. The charge only related to the maintenance of log book, which is the job of the driver and has to be supervised under Section 60 of the Act by the Executive Officer. The Act does not provide for supervision of maintenance of log book and consumption of diesel to be made by the Chairman of the Nagar Panchayat. The State Government neither charged nor alleged any misuse of the diesel, purchased by the Nagar Panchayat, by the petitioner. The charge, therefore, did not relate to the petitioner and any case did not prove any misuse of the property and assets of the Nagar Panchayat. In respect of third charge the State Government has found substance in the report of the District Magistrate that the auction took place on 30.5.2007, whereas the amended bylaws for identifying the parking place were published on 14.7.2007 and that Chairman has not given any reply or evidence in this regard. The Chairman is not permitted to give any contract either directly or indirectly and that he had approved the contract before it was placed before the Board. The State Government did not consider the petitioner's reply that the brother of the petitioner was already working as a contractor of the Nagar Panchayat prior to his election. He was living separately and that notification of the bylaws, was subsequent to the auction held after giving due publicity in which three persons had participated. There was no finding that the petitioner had obtained any financial gain or that he had given any favour to his brother. The burden of proving was also wrongly shifted upon the petitioner. No one had challenged settlement of the contract or that the offer

was inadequate. There was no allegation of any direct or indirect benefit accrued to the petitioner in respect of award of the contract to his brother. There are no findings on the reply given by the petitioner that his brother is living separately and has a separate ration card in his name and that the petitioner had no concern with him.

18. With regard to the last charge, once again the State Government wrongly placed the burden on the petitioner. There is no finding that the petitioner's house is constructed on the Khasra No.702. On the contrary the finding is that the Chairman could not prove by any evidence in his reply that his house is not constructed at Khasra No.702 and that no case is pending in respect of his house on Khasra No.702 in any civil court or any revenue court filed either by the petitioner or his father. The State Government has not given clear finding with regard to construction of the house of the petitioner on public utility land and has not considered the petitioner's reply that his house is not constructed on Khasra NO.702 but is actually constructed in Mohalla Badbaliyan. Further there was no finding on the reply given by the petitioner that the house of Farooq, Mashroor and others are constructed on Khasra No.702.

19. On the aforesaid discussion we find that the State Government not only wrongly placed the burden of proof of the charges on the petitioner to be disproved by him, but also failed to discuss the evidence led by the petitioner. The charge No.1 had no concern with the misconduct and did not fall in any of the grounds given in Section 48 (2) (b) and that charge No.2 was wholly vague and was not related to the duties performed by the petitioner. The third and fourth charge, were also not proved against the petitioner.

20. Since we have found that four charges levelled against the petitioner were not proved, we are not going into allegations of malafide. We may, however, observe that in order to remove an elected Chairman of Nagar Panchayat, the State Government must have a good case, falling within the grounds given in Section 48 of the Act and on which the explanation of the person is not sufficient. The charges, even if proved, may not always result in a decision of removing him from the office. The State Government may exceed unless the charges are very serious giving him a warning in as much as a President removed under sub-section (2-A) shall also cease to be a member of the Nagar Panchayat and in case of his removal of any of the ground mentioned in Clause (a) or sub-clauses (vi), (vii) or (viii) of clause (b) of sub-section (2) is not eligible under sub-section (4) for reelection as President or member for a period of five years from the date of his removal. This penalty clause put the State Government under a duty to remove a President only if the charges are serious and that in the opinion of the State Government the person does not deserve to continue in the office as the Chairman of Nagar Panchayat. Each case, however, will depend upon its own facts.

21. The writ petition is **allowed**. The order of the State Government dated 14th November, 2008 removing the petitioner from the office of the Chairman of Nagar Panchayat, Kithore, Distt. Meerut is set aside. The petitioner shall be allowed to resume the charge, if the charge of the

Chairman, Nagar Panchayat has been taken away from him.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.08.2009

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

Civil Misc. Writ Petition No. 40476 of 2009

Ashutosh Kumar Tripathi ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Bhanu Prakash Singh
Sri Avinash Chandra Srivastava

Counsel for the Respondents:
Sri Amit Sthalekar
S.C.

U.P. Services (Reservation of Physically Handicapped, Dependent of Freedom fighter and Ex-Serviceman, Amendment Act-1997-Claim of 2% reservation of 1556 post- can be done only by the state govt. with consultation of High Court- Question of reservation not approved by full bench- no such direction can be issued-petition dismissed.

Held: Para 3

We have also gone through the Full Bench judgement of our High Court reported in 2005 (4) ESC 2378 (All) Sarika Vs. State of U.P. and others where also it has been held that the reservation will be made, if required, for the judicial service by the State Government, then it should be made in consultation with the High Court. Therefore, when such Full Court of this High Court did not approve any such proposal for reservation, we are of view that the prayer of the petitioner cannot be considered and as such writ petition is liable to be dismissed and is accordingly dismissed, however, without imposing any cost.

Case law discussed
2000 (IV) SCC 640, 2005 (4) ESC 2378 (All).

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

1. This writ petition has been made to obtain an appropriate direction upon the Registrar General of this High Court to keep 2% of the posts in direct recruitment to U.P.H.J.S.- 09 reserved for the candidates of dependent of freedom fighters. The learned counsel has relied upon U.P. Public Services (Reservation of Physically Handicapped, Dependence of Freedom Fighters and Ex-servicemen) (Amendment) Act 1997. He said that by way of amendment in Section 3 (1) there shall be reservation at the stage of direct recruitment in public services i.e. two per cent of vacancies for dependents of freedom fighters and one per cent of vacancies for ex-servicemen.

2. However, we have considered the Constitution Bench judgement of the Supreme Court reported in 2000 (IV) SCC 640 **State of Bihar and another Vs. Bal Mukund Sah and others** which speaks as follows:-

"Any scheme of reservation foisted on the High Court without consultation with it directly results in truncating the High Court's power of playing a vital role in the recruitment of eligible candidates to fill up these vacancies and hence such appointments on reserved posts would remain totally ultra vires the scheme of the Constitution enacted for that purpose by the Founding Fathers."

3. We have also gone through the Full Bench judgement of our High Court reported in 2005 (4) ESC 2378 (All) **Sarika Vs. State of U.P. and others** where also it has been held that the reservation will be made, if required, for the judicial service by the State Government, then it should be made **in consultation with the High Court**. Therefore, when such Full Court of this High Court did not approve any such proposal for reservation, we are of view that the prayer of the petitioner cannot be considered and as such writ petition is liable to be dismissed and is accordingly dismissed, however, without imposing any cost.

APPELLATE JURISDITION
CIVIL SIDE
DATED ALLAHABAD:04.08.2009

BEFORE
THE HON'BLE C.K. PRASAD, C.J.
THE HON'BLE A.P. SAHI, J.

Special Appeal (D) No. 318 of 2006
With
Special Appeal (D) No. 615 of 2009

Superintending Engineer, Jhansi Lalitpur Circile, P.W.D. Jhansi and others
...Appellants/Respondents
Versus
Anoop Kumar Rathore
...Respondent/Petitioner

Counsel for the Appellants:
Sri K.S. Kushwaha, S.C.
Sri M.S. Pipersenia, Addl. CSC

Counsel for the Respondent:
Sri Indra Raj Singh

U.P. Subordinate Offices Ministerial Staff (Direct Recruitment) Rules 1985- Rule 23-Rule provides mode of selection-written test and Hindi typing test-only these candidate after qualifying in both test on basis of merit shall be called for interview-advertisement provides preference of Hindi Type knowing Candidates- petitioner respondent qualify in written test but remain unsucess in type test-nor called for interview-held-on conflict of rules as well as in advertisement-rule shall prerail as per law developed by apex Court-held-petitioner/ respondent can not be selected- order passed by Single Judge-set a side.

Held: Para-27

In view of the judgment dated 09.09.2005 having been set aside by us, we have no hesitation in further expressing the same opinion in respect of the judgment dated 12.01.2009 passed in Writ Petition No.51691 of 2006, inasmuch as the said judgment proceeds on the same presumption and findings that were drawn in favour of the petitioner in Writ Petition No.7660 of 1999. Therefore, the judgment dated 12.01.2009 passed in Writ Petition No.51691 of 2006 is also set aside.

Case law discussed
JT 2007(3) SC 352.

(Delivered by Hon'ble C.K. Prasad, C.J.)

1. These two special appeals arise, though against separate judgments dated 09.09.2005 and 12.01.2009 respectively, out of common questions of law and fact pertaining to the same process of selection on the post of Junior Clerk in the Public Works Department, against an advertisement dated 10.08.1998 published by the Chief Engineer, Public Works Department, Jhansi Region, Jhansi, where the respondent-petitioner Anoop Kumar Rathore (hereinafter referred to as the "petitioner') claimed appointment on the basis of the said selection.

2. The dispute raised by the petitioner is that knowledge of Hindi typewriting was only a preferential qualification, and not essential, as per the advertisement itself, and therefore, the appellants - employer could not have disqualified the candidature of the petitioner on that count. The stand of the appellants in response is that the word preference in the advertisement was a mistake, and that the Rules provide for knowledge of Hindi typewriting as an essential qualification for the post in question, which would prevail as against an error in the advertisement. The learned Single Judges while allowing the writ petitions have found favour with the plea of the petitioner, hence these appeals under Rule 5 Chapter VIII of the Allahabad High Court Rules, 1952.

3. Short facts giving rise to the present appeals are that the petitioner applied for the post of Junior Clerk in the Public Works Department in the Jhansi Region against the advertisement issued by the Chief Engineer of the said region dated 10.08.1998. He appeared in the written examination, which was conducted on 13th December 1998 and by a subsequent letter dated 5th February 1999, he was called upon to appear in the typing test scheduled on 13.02.1999. The petitioner appears to have made himself available for the typing test, but could not qualify the same. The result of the written test was declared and a merit list was prepared, which was sent to the State Government. The petitioner was, however, not interviewed, as only those candidates were called for interview who qualified in the Hindi typing test with a speed of 25 words per minute.

4. At this stage, the petitioner filed Writ Petition No. 7660 of 1999 praying for a writ of mandamus commanding the respondent authorities (appellants herein) to give him an opportunity to appear in the interview for the post of Junior Clerk and thereafter declare his result. This Court entertained the writ petition and thereafter vide order dated 26.02.1999 stayed the declaration of the result of the said selections. Out of the selected candidates, one Santosh Kumar Yadav filed Writ Petition No. 7903 of 2000 and the said writ petition was heard along with Writ Petition No. 7660 of 1999, where after by an order dated 20.04.2001, the interim order dated 26.02.1999 was modified directing the respondents therein to declare the results, which were made subject to the final decision of the writ petition. These facts are mentioned in the order dated 26.08.2006 passed by the Chief Engineer, Public Works Department, Jhansi Region, Jhansi.

5. The writ petition filed by the petitioner, i.e. Writ Petition No. 7660 of 1999 was finally decided on 9th September 2005 after exchange of affidavits, and the learned Judge held that the qualification of possessing proficiency in Hindi typewriting was only a preferential qualification as per the advertisement for the post in question, and since it was not an essential qualification, the Department had erred in excluding the petitioner from the interview. Accordingly, a direction was issued to interview the petitioner separately and to convey the result of the said interview to the Board for final consideration. The Department preferred Special Appeal (Defective) No. 318 of 2006 assailing the said judgment, which was presented before the Court on

08.05.2006 and an order was passed on 11.05.2006 to list the appeal after the delay condonation application was disposed off.

6. The Department interviewed the petitioner on 24.07.2006 in compliance of the directions of this Court. The petitioner also filed Contempt Petition No. 2092 of 2006 alleging disobedience of the order dated 09.09.2005, in which an order was passed on 27th July, 2006 directing the Chief Engineer to decide the claim of the petitioner within a period of six weeks. Accordingly, the Chief Engineer proceeded to consider the claim of the petitioner and rejected the same by order dated 26.08.2006.

7. The aforesaid order dated 26.08.2006 gave rise to Writ Petition No. 51691 of 2006 preferred by the petitioner assailing the said order on the ground, that once this Court had already held that knowledge of Hindi typewriting by a candidate was a preferential qualification, then the same could not have been made a ground to reject the candidature of the petitioner. The said writ petition was finally allowed on 12.01.2009 by this Court, which has given rise to Special Appeal (Defective) No. 615 of 2009. It is in the aforesaid backdrop that both the appeals have been heard and are being disposed off together.

8. Shri M.S. Pipersenia, learned Additional Chief Standing Counsel, appearing on behalf of the appellants, addressed the Court in both the appeals and Shri Indra Raj Singh has been heard in response thereto on behalf of the petitioner - Anoop Kumar Rathore.

9. Shri Pipersenia, while advancing his submissions in Special Appeal (Defective) No. 318 of 2006 against the judgment of the learned Judge dated 09.09.2005, urged that the said judgment proceeds on an erroneous assumption of fact as well as in law, inasmuch as the knowledge of typewriting in Hindi, as reflected in the advertisement dated 10.08.1998 as a preferential qualification, was a mistake and which had been pointed out through the averments contained in the counter affidavit and further, even otherwise the Rules applicable to the controversy clearly provide the knowledge of Hindi typewriting as an essential qualification and not as a preferential qualification. He contends that in view of the above, the finding recorded by the learned Judge in the judgment dated 09.09.2005 treating the knowledge of Hindi typewriting as a preferential qualification is erroneous and, therefore, the same deserves to be set aside. For this, he has invited the attention of the Court to the contents of the advertisement, the averments contained in the counter affidavit filed on behalf of the State in the writ petition as well as the provisions contained in the Public Works Department Ministerial Establishment Rules 1965, the Subordinate Offices Ministerial Staff (Direct Recruitment) Rules 1975, the U.P. Subordinate Offices Ministerial Staff (Direct Recruitment) Rules, 1985 and the Uttar Pradesh Procedure for Direct Recruitment for Group "C" Posts (Outside the Purview of the Uttar Pradesh Public Service Commission) Rules, 1998. On the strength of the relevant Rules prescribed therein, Shri Pipersenia contends that since the Rules provide for knowledge of Hindi typewriting as an essential qualification, therefore, the learned Judge

committed an error in accepting the contention on behalf of the petitioner that the said qualification was preferential.

10. Shri Indra Raj Singh, on the other hand, urged that the advertisement clearly indicates that the knowledge of typing in Hindi was a preferential qualification and the Rules 1998, which have an overriding effect read with the subsequent amendments, ruled out the possibility of possession of the knowledge of typewriting in Hindi as an essential qualification.

11. Shri Indra Raj Singh further contends that since the order passed by the Chief Engineer on 26.08.2006 suffered from the same infirmity, and since the learned Judge in the judgment dated 09.09.2005 had already held that the qualification was only a preferential qualification, therefore, the subsequent writ petition filed by the petitioner, i.e. Writ Petition No. 51691 of 2006 was rightly allowed and, as such, the judgment dated 12.01.2009 also does not require any interference at the instance of the appellants.

12. Shri Pipersenia, in rejoinder, has urged that the judgment of the learned Judge dated 12.01.2009 in Writ Petition No. 51691 of 2006, giving rise to Special Appeal No. 615 (Defective) No. 2009, is founded on an earlier decision of this Court dated 09.09.2005. Therefore, in the event the judgment dated 09.09.2005 is set aside, then the judgment dated 12.01.2009 in the subsequent writ petition has also to fall through. He contends that the order of the Chief Engineer dated 26.08.2006 is valid and in accordance with the Rules and, therefore, the same was unjustifiably interfered with by the learned Judge.

13. Having heard the learned counsel for the parties, it would be appropriate to refer to the relevant Rules, which have been relied upon by the contesting parties. From the record, it appears that for the purposes of recruitment to the post of ministerial staff, the State Government framed "Rules for the Recruitment of Ministerial Staff to the Subordinate Offices", which were promulgated on 11.07.1950 and published in the gazette on 16.07.1950. Rule 6 of the said Rules provided as follows:-

"6. Subjects of the test. - (1) The competitive tests shall comprise a written test as well as an oral test.

(2) The subjects of the tests and maximum marks on each subject shall be as follows:-

Subjects	**Marks**
Oral	
1. Personality	25
2. General knowledge and suitability for the particular post.	25
Written	
1. Simple drafting (in Hindi)	50
2. Essay and Precis writing (in Hindi)	50
3. Simple drafting and Precis writing (in English)	50
Optional	
1. Typewriting in English and Hindi ...	50
2. Shorthand in Hindi and English ...	50

NOTE- Candidates must take one of the optional subjects but may take both if they so choose."

14. The aforesaid Rule along with the other provisions in the said Rules was incorporated as Appendix "B' in "the Public Works Department Ministerial Establishment Rules, 1965". The relevant Rule 5 (2) is quoted below:-

"5. Sources of recruitment –

(1) ... ...

(2). Direct recruitment to the post of Junior Noters and Drafters, Record Keepers, Routine Clerks and the Lower Grade Clerks in all the offices shall be made on the results of a competitive examination prescribed in the "Rules for the Recruitment of Ministerial Staff to the Subordinate Offices' published under Government notification no.**0-1119/II-B/50**, dated July 11, 1950, as amended from time to time.

NOTE- A copy of the Rules referred to above in force at the time of commencement of these rules in given in Appendix "B' to these rules."

15. These Rules continued to be in vogue till the new Rules were framed by the State Government notified on 29th July, 1975 known as "the Subordinate Offices Ministerial Staff (Direct Recruitment) Rules, 1975". The aforesaid Rules were made applicable to all the departments as per Rule 2 of the said Rules. Simultaneously, the said Rules were given an overriding effect insofar as the pre-existing Rules were inconsistent with the said Rules. This provision was contained in Rule 3 thereof. The State Government, however, through a specific Rule 20 of the said Rules further rescinded the Rules for the Recruitment of Ministerial Staff to the Subordinate Offices, which had been promulgated on 11.07.1950 and published in the gazette on 16.07.1950, referred to hereinabove. Thus, the Rules 1975 thereafter held the field. The State Government promulgated another set of new Rules known as "the U.P. Subordinate Offices Ministerial Staff (Direct Recruitment) Rules, 1985", which also has an overriding effect insofar as the previous Rules are inconsistent in this regard. Rule 35 of the said Rules provided for regulation of other matters, if they were not specifically covered by the said Rules. Sri Pipersenia, during the course of his submission, specifically invited the attention of the Court to sub-rule (5) of Rule 23, which makes a provision for the procedure of selection on the post of Clerk/Typist. The same is quoted below:-

"23. Procedure of Selection.-(1). ... ...

(2) ....

(3) ....

(4) ....

(5) In the case of candidate to be selected for the post of clerk/typist as also for any other post for which typing has also been prescribed as an essential qualification **only those candidates who know typewriting will be considered and final assessment of merit shall be made only after adding the marks obtained in Hindi typewriting**. The candidates shall be required to appear at a competitive test for Hindi typing. Marks shall be allowed for Hindi typing out of the maximum marks of 50. The marks obtained in Hindi typing shall be added to the marks already obtained under sub-rule (4) and the final merit list shall in such case be prepared on the basis of aggregate marks." (Emphasis supplied).

16. The aforesaid Rule, therefore, clarifies that in the case of a candidate to be selected for the post of a Clerk or Typist, only those candidates who know

Hindi typewriting would be considered and the final assessment of merit shall be made only after adding the marks obtained in the Hindi typewriting.

17. Sri Indra Raj Singh, questioning the applicability of the said Rule, urged that the said Rule would apply only to the post of Clerk-cum-Typist and, therefore, the said Rule would not be applicable in the present case.

18. Having given our anxious consideration to the aforesaid aspect of the matter, we are unable to subscribe to the suggestion made by the learned counsel for the petitioner that the aforesaid Rule would apply in the case of a candidate applying for Clerk-cum-Typist. The words Clerk and Typist are clearly segregated by an oblique stroke, which clearly means the said words do not, in any way, suggest a single post of Clerk-cum-Typist, rather the placement of the words are clearly narrated in the alternative and separate. The words cannot be construed to mean a post, which has both the connotations.

19. Nonetheless, taking any view of the matter, whether the post is of a Clerk or a Typist or a Clerk-cum-Typist, the position remains the same, namely that the candidate for any of such posts has to qualify a Hindi typewriting test for being selected.

The advertisement also clearly indicates the post of a Junior Clerk and, therefore, the essential qualification of typing as prescribed in the said Rule is clearly relatable to both the posts separately. A candidate applying for the post of a Clerk shall only be considered provided such a candidate knows typing as well. It is a well-known Rule of Interpretation that the Legislature or the Rule-making Authority cannot be presumed to have used surplusage and the literal meaning has to be given its true sense. Viewed from any angle, it is more than clear that the Rule provides that for both the posts, i.e. posts of Clerk as well as Typist, a candidate should know typewriting in order to enable him to qualify for appointment on such a post. The preparation of the final merit has to be made after assessment of the knowledge of tying as indicated in the aforesaid Rule. We are, therefore, of the firm view that the post of Junior Clerk, which was advertised by the Department, was clearly governed by the qualifications prescribed and referred to herein above under the 1985 Rules.

20. It is further clear that the Department itself realized its mistake and error in the advertisement and took up a clear stand before the learned Judge in Writ Petition No.7660 of 1999 that the advertisement suffered from an error to the effect that the knowledge of typing was a preferential qualification. The said position has been reiterated before us by the learned counsel for the appellants that the word "preferential" occurring against the column of "knowledge of typing" was a clear mistake and de hors the Rule aforesaid. The order dated 26.08.2006, which was impugned in Writ Petition No.51691 of 2006, also narrates the same position. We do not find any error in the stand taken by the appellants and, therefore, we hold that the knowledge in typing in Hindi was an essential qualification as per the Rule aforesaid and that the advertisement suffered from an error to that extent. In view of this, the conclusion drawn by the learned Judge in

the judgment dated 09.09.2005 does not appear to be in conformity with law.

21. At this juncture, it would be apt to record that whenever there is a conflict between the Rules and the advertisement, it is settled law that the Rules would prevail. Reference may be had to the decision of the Supreme Court in the case of Malik Mazhar Sultan & Anr. Vs. U.P. Public Service Commission & Ors., JT 2007 (3) SC 352.

22. This is not a case where any change of qualification has been brought about after the advertisement was made. This is a clear case where the incorrect qualification was reflected in the advertisement. A qualification, which was essential under the Rules, was wrongly referred to as a preferential qualification. In our opinion, an incorrect advertisement referring to a wrong Rule would neither create or confer a right on a candidate to claim selection nor would it give rise to any legitimate expectation to a candidate, in law. The Rule on the date of advertisement, which has been pointed out on behalf of the appellants, was very much in existence and was applicable. Learned counsel for the petitioner could not successfully dispute the applicability of the Rules 1985.

23. Sri Indra Raj Singh alternatively urged that the Rules 1998 have an overriding effect. We have perused the same and the said argument is stated only to be rejected, inasmuch as the Rules 1998 are the Rules of procedure and they, in no way, take away the impact of the substantive Rules, which held the field on the date when the advertisement was issued. Even otherwise, the Rules 1998, in no way, contradict the Rules 1985 and rather they supplement the same, as would be evident from a perusal of Rules 5 and 6 of the Rules 1998.

24. We may hasten to add that the Rules have been subsequently modified in the year 2001 and even thereafter, but such modifications are not at all relevant to be discussed herein, as this matter specifically concerns the 1985 Rules that were applicable on the date of advertisement, i.e. 10.08.1998. No other Rule apart from the Rules 1985 was applicable in respect of the selections in question in the year 1998 and the learned counsel for the petitioner could not show anything to the contrary.

25. In view of the findings aforesaid, we are of the view that the learned Single Judge committed an error in allowing Writ Petition No.7660 of 1999 and permitting the petitioner to be interviewed. We, accordingly, set aside the judgment dated 09.09.2005 passed in Writ Petition No.7660 of 1999.

26. The judgment in Writ Petition No. 51691 of 2006 dated 12.01.2009 appears to have been delivered under the impression that the said judgment dated 09.09.2005 had become final and had not been challenged. We may record that the judgment dated 09.09.2005 had already been assailed through Special Appeal (Defective) No.318 of 2006, which fact appears to have escaped the notice of the learned Judge, while rendering the judgment dated 12.01.2009. In view of the fact that Writ Petition No.7660 of 1999 stands dismissed upon the judgment dated 09.09.2005 having been set aside, the very foundation of the judgment dated 12.01.2009 is taken away. Accordingly, the petitioner would, therefore, not be

entitled to any benefit under the judgment dated 09.09.2005 and, therefore, he would not be entitled for being considered against the post of Junior Clerk in question.

27. In view of the judgment dated 09.09.2005 having been set aside by us, we have no hesitation in further expressing the same opinion in respect of the judgment dated 12.01.2009 passed in Writ Petition No.51691 of 2006, inasmuch as the said judgment proceeds on the same presumption and findings that were drawn in favour of the petitioner in Writ Petition No.7660 of 1999. Therefore, the judgment dated 12.01.2009 passed in Writ Petition No.51691 of 2006 is also set aside.

28. Accordingly, both the special appeals are allowed and the writ petitions filed by the petitioner, i.e. Writ Petition No.7660 of 1999 and Writ Petition No.51691 of 2006 are dismissed.

29. In the facts and circumstances of the case, there shall be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.10.2009

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

Civil Misc. Writ Petition No. 37549 of 2009

Dr. Ram Chandra Agrawal and another ...Petitioners
Versus
Bharat Press and others ...Defendant-Respondents

Counsel for the Petitioner:
Sri Manish Trivedi
Sri A.K. Bajpai

Counsel for the Respondents:
Sri M.K. Gupta
Sri Nikhil Kumar
Sri Shikha Singh

U.P. Urban Building (Control of Rent and Eviction) Act 1972 Sec-21(i) (a)- Bona-fide need-Land lord -very old man-suffering from massive heart attack-strictly restrained from using stairs-his son being Doctor-wants to open a clinic-rejection by the authorities below- held-not proper if the case remanded-very purpose of eviction frustrated.

Held: Para 27

I am conscious of the fact that this Court cannot reevaluate the evidence and substitute its own findings because two views are possible. A bare perusal of the release application, objections filed by tenants and the various affidavits it is abundantly clear that the landlords (psetitioners) who are owners, require the shops for their personal need. They are the first and the rightful claimant to use their own property as they want it. This is a situation where father and son with their spouses are facing a number of problems and therefore the release of the shops cannot be refused. The very purpose of the Act stands frustrated if the two judgments of the courts are left to stand.

Case law discussed
AIR 1999 Supreme Court, 100, 2009(1) ARC, 829, 2008(3) ARC 532.(2000)1 SCC, 679, 2000 SCF BRC,24, (1996) 5 SCC, 353, (2002) 5 SCC, 397:2002 SCFBRC 388, AIR 1965 AP 435, (1979)1 SCC 273: 1986 SCFBRC 346, JT 2002(10) SC 203:2003 SCFBRC 137, JT 2004(Suppl.1) SC 538: 2004 SCFBRC 338, 1977 ARC 46, 2007 (68) ALR,555, 2007(68) ALR, 603, 2008(71) ALR, 857, 2009(2) ARC,715, 2003(1) ARC, 256, (1993) 3 SCC, 483, AIR 2002 Supreme Court,200, 2004 All. C.J., 304 (S.C.).

(Delivered by Hon'ble Ms. Poonam Srivastav, J.)

1. Heard Sri Manish Trivedi and Sri A.K. Bajpai, learned counsels for the petitioners, Ms. Shikha Singh Advocate for the respondent no. 1, Sri Nikhil Kumar Advocate for the respondent no. 2 and Sri M. K. Gupta Advocate for the respondent no. 3.

2. Counter and rejoinder affidavits have been exchanged and as agreed between the counsels for the parties, writ petition is heard finally.

3. Notices were accepted by Sri M.K. Gupta Advocate on behalf of respondent no. 3 Yogesh Kishan Dhall, son of Late Kishan Chand Dhall, Sri Nikhil Kumar Advocate on behalf of respondent no. 2 Sohan Agrawal and Ms. Shikha Singh Advocate on behalf of respondent no. 1 Bharat Press. Counter affidavit has been filed on behalf respondent nos. 1 and 2. Sri M.K. Gupta Advocate filed an application on 3.9.2009 bringing on record a compromise application on behalf of the petitioners and respondent no. 3. Joint affidavits have been filed by Anoop Chandra Agrawal and Sri Neeraj Dhall where the parties have entered into an agreement on account of the reason that father of the respondent no. 3 who is a very old man and was admitted in Apolo Hospital, New Delhi and therefore he requested for some sympathetic consideration. Finally they entered into an agreement after institution of the writ petition that the respondent no. 3 will continue as tenant of the disputed shop on the ground floor for a period of 5 years at the government rental value of Rs. 3,000/- per month from the date of order of the court and parties have agreed that for a period of 5 years, the petitioners will not seek eviction of the respondent no. 3 alone and the respondent no. 3 has further agreed to vacate the disputed shop in recognition of the fact that the petitioner no. 1 Dr. Ram Chandra Agrawal will require the shop for his proposed registered clinic for his private practice only. Accordingly the writ petition was decided in terms of compromise viz.-a-viz between the petitioners and respondent no. 3 on 11.9.2009.

4. The dispute relates to a shop situated on the ground floor of accommodation No. 106/93, K.P. Kakkar Road, Allahabad. The respondents are three different tenants occupying entire ground floor. The respondent no. 1 is a tenant at the rate of Rs. 100/- per month and respondent nos. 2 and 3 are paying Rs. 200/- per month as rent. The petitioner no. 1 retired as eye surgeon from Sitapur Eye Hospital Trust and was living with his family in his ancestral house. The petitioner no. 2 is his only son who has now shifted from Sultanpur to Allahabad with his entire family in the year 1995 and is living in the residential accommodation situated above the shop. Petitioner no. 1 and his wife have also shifted to Allahabad and are living on the second floor with his son petitioner no. 2.

5. A release application was filed by the petitioners under Section 21(1)(a) of U.P. Act No. 13 of 1972 (hereinafter referred to as the Act) for release of three shops on the ground floor. The need and requirement pleaded in the release application is that the petitioner no. 2 was previously enrolled as an Advocate but did not practice and

finally surrendered his registration certificate to the Bar Council of U.P. on 25.5.1995. He started printing business in partnership of one Sanjeev Misra in the name and style of M/s Printrite which was run from the house of Mr. Sanjeev Misra, 523/450, Badshahi Mandi, Allahabad. The partnership was dissolved in the year 2001 and the petitioner no. 2 having no other option was compelled to take away the printing machines, computer, furniture etc. which are now kept on the second floor of the disputed shop. Since then the petitioner no. 2 is idle without any work and unemployed, therefore, he required the shops in dispute for his personal use to set up his printing business. The need of the petitioner no. 1 was also set up for the ground floor accommodation i.e. the disputed shop as petitioner no. 1 had suffered massive heart attack on 15.9.2002 and was admitted in Nazareth Hospital, Allahabad. He was referred to Escort Hospital, New Delhi and is also a patient of diabetes and high blood pressure and doctor has strictly advised him not to use stairs but having no other option but to ascend and descend the staircase on the second floor number of times during the day. The petitioner no. 1 also required job as he wanted to open a small clinic on the ground floor after shifting so that he may be engaged and also put his skill to good use. Thus the bonafide need set up in the release application was on the aforesaid two grounds. On perusal of the release application, it transpires that it was urgently required for both the petitioners. Request to the respondents to vacate the ground floor failed to yield any result.

6. The respondents-tenant filed their objection denying their bonafide need of the petitioners pleading comparative hardship in their favour. Specific objection was that the petitioner no. 1 and his wife did not reside in Allahabad and they are permanently residing at Sultanpur and they have two big houses at Sultanpur. He is rerunning his medical clinic at Sultanpur and claim by the petitioner that he had a massive heart patient and diabetes is concocted and not worth reliance. The ground for release of the disputed shop was also denied. Sales tax registration, partnership deed and dissolution deed were also denied. The petitioner had also filed affidavit of Sanjeev Misra, erstwhile partner of the petitioner no. 2 which is numbered as Paper No. 48B supporting the contention of the petitioner no. 2 regarding partnership business of printing press for the period from 1995 to 2001. Subsequently when Sanjeev Misra was got employed after death of his father in Allahabad University on compassionate ground, the partnership firm was dissolved. Neeraj Dhall, son of respondent no. 3 had given his affidavit on 1.7.2008 expressing willingness to vacate the back portion hall of the first floor of the disputed house. The petitioners had also offered an alternative accommodation to respondent nos. 2 and 3 to shift their business to the first floor from the ground floor of the same building but they refused to agree and instead preferred to contest the release application.

7. The trial court dismissed the release application vide its judgment dated 11.8.2008. The petitioners

preferred an appeal under Section 22 of the Act challenging the judgment passed by the Prescribed Authority which was numbered as Rent Appeal No. 119 of 2008.

8. During pendency of the appeal, additional documentary evidence was also brought on record on behalf of the petitioner. A request was made by the landlord that documents brought on record at the stage of appeal were old documents and were misplaced and mixed up with the old unused papers and not traceable and, therefore, it could not be brought on record while the proceedings were pending before the Prescribed Authority. The said documents were refused by the appellate court primarily on the ground that the petitioners failed to file the partnership deed which was very essential and, therefore, document relating to partnership with Sanjeev Misra was not acceptable and thus the contention of learned counsel for the petitioners is that the same were refused illegally. Another application was moved on behalf of the petitioners under Section 34 read with Rule 22(f) of the Rules framed under the Act bringing to the notice of the Court that the partnership deed was also on record of the trial court and, therefore, the court has wrongly rejected the application for taking the documents on record. However, this application was once again rejected by the appellate court on 17.3.2009. However, the appellate court required both the contesting parties to submit their written submissions and thereafter dismissed the appeal vide judgment and order dated 28.5.2009. Both the judgments are impugned in the instant writ petition.

9. The submission of learned counsels appearing for the landlord-petitioners is that both the courts below have erred in law and also principles laid down by the Apex Court as well as this Court in its various decisions taking lop sided view in favour of the tenants on wholly irrelevant consideration. Besides refusal to accept documents relating to partnership with Sanjeev Mishra on one hand and taking an adverse view for want of those very documents are evidently erroneous.

10. The respondent nos. 1 and 2 have contested the release application. Counter and rejoinder affidavits as well as written submissions have been filed by respective counsels. Two judgments of the courts below have been supported by Ms. Shikha Singh and Nikhil Kumar Advocates. It is submitted on behalf of the tenants that both the courts below have come to conclusion that the landlord does not require the accommodation in question and need is not bonafide therefore the writ petition is liable to be dismissed.

11. Learned counsels on behalf of the petitioners have challenged each and every findings of the two courts and have laid emphasis that once the Prescribed Authority had taken into consideration and given findings on the partnership deed, the appellate court could not have refused documents who is the last court of fact. However, affidavit of partner Sanjeev Misra was already on record and that was sufficient to substantiate that some printing business was carried out in the partnership of Sanjeev Misra and petitioner no. 2. Besides the claim of the petitioner no. 1 that on every day he has

to climb 50 steps on second floor and the courts were completely misled while rejecting the release application.

12. I have heard the respective counsels at length and also examined two judgments in detail as well as various documents filed in support of the respective submissions. On a close scrutiny of the judgments and arguments advanced by the learned counsels appearing on behalf of the petitioners and respondents, it is apparent that the judgments are not legally balanced. Both the courts while holding that the petitioner no. 1 is having two big houses at Sultanpur as well as taking into consideration the fact that he is a retired eye surgeon at Sultanpur has completely lost sight of the fact that now the same retired man is living at Allahabad with his son on the second floor and he cannot be compelled to live in Sultanpur. He may have a number of houses in different cities but it is absolutely immaterial. It is not for the court to direct the landlord to choose the place where he should reside, specially in the instant case where the courts below have completely given a goodbye to the consideration that the petitioner no. 1 is an old ailing man having heart problem and if he wants to live with his son and his family, it ought to have been respected. The courts cannot compel the petitioner to live and run business in a particular city or in a particular building, specially the courts were liable to take into consideration that the petitioner no. 2 is the only son of the petitioner no. 1 and if he has preferred to live with him despite the misery of scaling steep stairs every day, the findings cannot be said to be justiciable, specially when both the courts have accepted the fact that the petitioner no. 1 is a heart patient but declined to release on the basis of an assumption that he is living in Sultanpur. Some stray prescriptions have been relied upon to come to this conclusion whereas it is amply explained that he had gone to Sultanpur for a few days and some of his old acquaintances approached him and he had written out the said prescriptions. The ground of bonafide need has not been accepted only on account of the finding that he has two houses at Sultanpur but the courts completely overlooked the fact that it is situated outside the municipal limit of Allahabad where the landlord has preferred to reside in his old age with his only son. The appellate court has also gone to the extent of taking into consideration some family settlement which cannot be taken into consideration and it is something between the landlords interse. Both the courts have completely failed to appreciate the grounds as well as evidence on record and also the fact that all the printing machineries and appliances are kept at the residence of petitioner no. 2 on the second floor. In fact while declining to accept the case of the landlord, the courts have relied upon seal of the treasury on the back side of the stamp of first page of dissolution deed which mentions 19.5.1998. It is absolutely insignificant as this was not a case or objection set up by the tenant. It is not unusual, old stamps are in possession and there is no limitation for using them. No inference can be drawn on its basis. While coming to conclusion against the landlord the courts below have taken into consideration that first floor portion was vacated by some tenant and was given

to Neeraj Dhall. This has specifically been replied by the landlord on affidavit that he had agreed to vacate the ground floor portion and, therefore, the first floor was offered to him as an alternative accommodation but subsequently he declined from his own assurance. It is also stated on affidavit that the petitioner no. 2 is doing job work by getting orders from different Universities and is getting printing work from the market which is hardly profitable and he gets only nominal commission. Thus he is suffering in day to day business.

13. In fact after going through the judgment, I realize that the courts have taken small and extraneous matter into consideration and not considered broadly the principles laid down for coming to definite conclusion whether the accommodation is required bonafidely or not and also regarding the comparative hardship. I have also noticed that the appellate court though has halfheartedly come to a conclusion that the landlords are suffering hardship but since the finding on the bonafide need was recorded against the landlord, the appeal has also been dismissed. The courts have strenuously tried to negate the case of the landlord ignoring specific assertions on affidavit. The court has also disbelieved the assertion that partnership stands dissolved for want of the partnership deed on one hand while they have refused to accept the document in evidence.

14. The Apex Court in the case of ***Sarla Ahuja Vs. United India Insurance Co. Ltd., AIR 1999 Supreme Court, 100*** has held that to deprive a landlord of the benefit of release on account of availability of alternative residential accommodation in another city is not a ground to disentitle the landlord from recovery of possession of tenanted accommodation. The Apex Court has categorically come to a conclusion that it is unnecessary to make endeavour as to how the landlords have adjusted in another accommodation. This is what exactly the courts below have done in the instant case. They have tried to somehow advise the landlord and also grant heavy consideration to the tenant only because they have set up a goodwill since last 40-50 years or because they do not have any other place to go. The courts below were liable to take into consideration that it is the landlord himself who is the best judge of his requirement. The courts cannot dictate how and where he should live. Same view was expressed in the case of Nanak ***Chand (since deceased) and others Vs. Jai Bhagwan, 2009 (1) ARC, 829***. In the said case the landlord had sought release on the ground that he is retired and wants to live in his hometown and also to do the research work and write articles and papers on the subject of science and also teach some students free of charge. This court was of the view that it is a very valid ground and held that the landlord was entitled for his accommodation. Similar view was expressed in the case of ***Shamshad Ahmad and others Vs. Tilak Raj Bajaj (d) by L. Rs. and others, 2008 (3) ARC 532***. Extract of relevant paragraph is quoted below:-

"The Counsel is also right in submitting that admittedly, Matloob Ahmad had retired from service. Even if the tenant was right in submitting that

the landlord belonged to a higher strata of society, it did not mean that all throughout his life after retirement, Matloob Ahmad, husband of applicant No. 6 should not do any work. If he wanted to get himself engaged in doing some business. It could not be held that he would not be entitled to possession of property for doing business since he was rich and even without doing any business, he could maintain himself. A finding as to bonafide requirement for doing ready made business by Matloob Ahmad has been expressly recorded by the Appellate Authority. The said finding was a finding of fact. Neither it could have been interfered with, nor it has been set aside by the writ Court. In view of the above position, the High Court was wrong in allowing the writ petition."

15. ***Ragavendra Kumar Vs. Firm Prem Machinery and Company, (2000) 1 SCC, 679, 2000 SCFBRC, 24,*** is another authority for the proposition that the landlord is the best judge of his own requirement for residential or commercial purpose and has complete freedom in the matter. In this authority the Apex Court has relied upon its earlier judgment in ***Prativa Devi Vs. T.V. Krishnan, (1996) 5 SCC, 353***.

16. In ***Joginder Pal Vs. Naval Kishore Behal, (2002) 5 SCC, 397 : 2002 SCFBRC 388***, the Apex Court with a reference to the provisions of East Punjab Urban Rent Restriction Act, on the question of bonafide need, after surveying its earlier pronouncements, has held that the requirement of a major son and a coparcener in a joint Hindu family intending to start a business is the requirement of the landlord himself as was held in ***B. Balaiah Vs. Chandoor Lachaiah, AIR 1965 AP 435***. The words "for his own use" must receive a wide, liberal and useful meaning rather than a strict or narrow construction. It has been further held that while casting its judicial verdict, the Court shall adopt a practical and meaningful approach guided by the realities of life.

17. In ***Mst. Bega Begum and others Vs. Abdul Ahad Khan and others, (1979) 1 SCC 273: 1986 SCFBRC 346***, it has been held that rent control laws must be construed reasonably. They should be interpreted in such a way as to achieve the object of enabling landlord to evict tenant where the statute grants such right in favour of landlord.

18. It has been held by the Apex Court in the case of ***Akhileshwar Kumar and others Vs. Mustaqim and others, JT 2002 (10) SC 203 : 2003 SCFBRC 137***, that landlord has the right of choosing the accommodation which would be reasonable to satisfy his requirements. In **Sarla Ahuja Vs. United India Insurance Co. Ltd. (supra)** it has been held by the Apex Court that the fact that landlady was in possession of another flat in another city is not a ground to disentitle her to seek recovery of possession of tenanted premises.

19. The Apex Court in ***Shakuntala Bai and others Vs. Narayan Das and others, JT 2004 (Suppl. 1) SC 538 : 2004 SCFBRC 338,*** has held that there is no warrant for interpreting a Rent Control legislation in such a manner. The basic object of which is to save harassment of tenants from

unscrupulous landlords. The object is not to deprive the owners of their properties for all time to come.

20. ***Smt. Sharda Devi Vs. Colonel Dinesh Chandra and others, 1977 ARC 46,*** is an authority for the proposition that if a landlord owns house at several places and needs one of several other houses to settle after retirement, need is genuine and landlord can settle at any place of his liking. Tenant cannot superimpose his wishes on landlord.

21. In the case of ***Raj Kumar Vs. IIIrd Additional District Judge, Meerut and others, 2007 (68) ALR, 555,*** the Court was of the view that it is settled position of law that the landlord is the best judge of his requirement for residential or business purpose.

22. In the case of ***Mohd. Ayyub Vs. District Judge, Lucknow and another, 2007 (68)*** ALR, 603, it was held that bonafide need and requirement of a premises for business purposes and augmentation of income for oneself and for the family cannot be negativated in any circumstances. The intention to establish son in his career and the requirement of the premises for the same purpose cannot be termed as malafide. Need of landlord to settle his son in independent business cannot be defeated on mere fact that the son was working in a tailoring shop. Every individual has a right to settle himself independently in business.

23. This Court in the case of ***Harish Bhatia Vs. Smt. Johra Begum, 2008 (71) ALR, 857,*** has held that to establish her son in business the landlady could establish the business of her son from the room available on the second floor and it is not for the tenant to dictate to the landlord how he should adjust without getting possession of the tenanted premises.

24. In the case of ***Mohabbey Ali Vs. Tej Bahadur and others, 2009 (2) ARC, 715*** the Court declined to look and examine comparative hardship of the tenant. An identical situation appear in the instant case, the tenant has nowhere stated that he has tried to look an alternative accommodation whatsoever, after initiation of the proceedings before the Prescribed Authority. In such a circumstance, I am of the view that the tenant is not entitled for comparison of his hardship while recording a finding on the question. In the case of ***Sushila Vs. IInd Additional District Judge, 2003 (1) ARC, 256*** similar view was adopted. Also in the case of ***Gulab Bai Vs. Nalin Narsimonia, (1993) 3 SCC, 483*** the Apex Court held that the tenant should make an effort to search for an alternative accommodation and a specific assertion is essential to establish his 'hardship'.

25. The Apex Court held that the word 'reasonable requirement' undoubtedly postulate that there must be an element of need to a mere desire or wish. The view taken by the Apex Court was that the distinction between desire and need should doubtless be kept in mind but it should not be extended so far as to make even a genuine need as a desire. Perusal of two judgments apparently has stretched its arms too long while declining to accept the need of the landlords as 'bonafide'. Stray circumstances have been given tall

meaning only to discard the evidence and the contention of the landlord. It is eloquent on the face of the two judgments of the courts below that conscious and deliberate effort has been made to negate the valid contention of the petitioners.

26. In view of the aforesaid discussions, it is a foregone conclusion that the need of the landlord is genuine, bonafide and the landlords are defenitely suffering greater hardship and they are entitled for release of the two shops in possession of respondent nos. 1 and 2. Both the father and son have conclusively pleaded and affirmed their independent need for a vacant accommodation and therefore, both the shops are liable to be released in their favour. I am not inclined to remand the matter for afresh decision. Admittedly, father is a very old man and remand of the case might render the entire purpose of institution of the release application fruitless. The Apex Court in the case of ***G. C. Kapoor Vs. Nand Kumar Bhasin and others, AIR 2002 Supreme Court, 200*** allowed the release application straightaway setting aside the findings of the Prescribed Authority, Appellate Authority and the High Court on the question of bonafide need and comparative hardship. The Apex Court was of the view that no fruitful purpose will be solved in remanding the matter and thereby opening another gate of fresh series of litigation. Similar view was adopted by the Apex Court in the case of ***R.V.E. Venkatachala Gounder Vs. Viswesaraswami V.P. Temple and another, 2004 All. C.J., 304 (S.C.)***.

27. I am conscious of the fact that this Court cannot reevaluate the evidence and substitute its own findings because two views are possible. A bare perusal of the release application, objections filed by tenants and the various affidavits it is abundantly clear that the landlords (petitioners) who are owners, require the shops for their personal need. They are the first and the rightful claimant to use their own property as they want it. This is a situation where father and son with their spouses are facing a number of problems and therefore the release of the shops cannot be refused. The very purpose of the Act stands frustrated if the two judgments of the courts are left to stand.

28. In the circumstances and for the reasons detailed herein above the writ petition is allowed. The judgment and order dated 11.8.2008 passed by the Small Causes Court, Allahabad in P.A. Case No. 13 of 2005 and judgment and order dated 28.5.2009 passed by the Additional District and Session Judge, Court No. 12, Allahabad in Rent Control Appeal No. 119 of 2008 are quashed.

29. In the end, learned counsels for the tenants have made a request for granting some time to the tenants to vacate the shops in question. However, the request of the learned counsels for the tenants that some time may be allowed to vacate the shops in question appears to be reasonable and justified.

30. The tenants are permitted six months' time from today to vacate the shops in question and handover vacant possession to the landlord till 25.4.2010 provided they file an undertaking within a period of four weeks before the

Prescribed Authority that they will continue to pay rent at the rate of Rs. 3000/- per month from the date of judgment till they hand over vacant possession and also they will not sublet or handover possession to any third person but for the landlords. In the event the tenants fail to file an undertaking in the shape of an affidavit within the aforesaid period, this liberty of six months shall automatically come to an end.
