ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 04.09.2009

BEFORE
THE HON'BLE VIJAY KUMAR VERMA, J.

Criminal Misc. Application No. 14284 of 2009

Ram Narayan and others ...Applicants
Versus
State of U.P. and another ...Opposite Parties

Counsel for the Petitioners:
Sri P.K. Dubey

Counsel for the Respondent:
Govt. Advocate

Code of Criminal Procedure Section 155 (2)-Direction for investigation in N.C.R. Case-on application of third person-held-maintainable-order passed by Magistrate as well as the Revisional Court-requires no interference.

Held: Para 7

In my opinion, such permission can be granted by the Magistrate on the basis of the application moved by the complainant or any other aggrieved person.

Case law discussed:
2007 (57) ACC 331

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

1. *"Whether permission under section 155 (2) of the Code of Criminal Procedure (in short 'the Cr.P.C.') to investigate the case can be granted by the magistrate on the basis of the application of complainant or other aggrieved person",* is the main legal question that falls for consideration in this proceeding under section 482 Cr.P.C. by means of which prayer to quash the order dated 04.12.20097 passed by Judicial Magistrate/ Additional Civil Judge (Jr. Div.) Tilhar, Shahjahanpur, in Crl. Case No. 154 of 2007, arising out of NCR No. 114 of 2006, under sections 323, 504 IPC, P.S. Madanapur, District Shahjahanpur as well as order dated 03.06.2009 passed by Additional Session Judge/ Spl. Judge (E.C. Act), Shahjahanpur, in Crl. Revision No. 29 of 2009 (Ram Narayan & others vs. State of U.P. & another), have been made.

2. Heard Sri P.K. Dubey, learned counsel for the applicant and A.G.A. for the State

3. From the record, it transpires that NCR No. 114 of 2006, under sections, 323, 504 IPC was registered on the basis of the report made by Deena Nath, s/o Dharam (O.P. No. 2 herein) at P.S. Madanapur, District Shahjahanpur. The complainant Deena Nath moved an application before the Judicial Magistrate/ Additional Civil Judge (Jr. Div.) Tilhar, District Shahjahanpur, under section 155 (2) Cr.P.C. for granting permission to investigate the case. The learned magistrate, vide impugned order dated 04.12.2007 allowed that application and direction was issued to S.O. P.S. Madanapur to investigate the case after converting the same in proper sections. Order dated 04.12.2007 was challenged by the applicant-accused in the court of Sessions Judge Shahjahanpur by means of Crl. Revision No. 29 of 2008, which was decided by Additional Sessions Judge/ Spl. Judge (E.C. Act), vide impugned order dated 03.06.2009, whereby the revision has been dismissed. Both these orders have been challenged by the

accused persons by means of this proceeding under section 482 Cr.P.C.

4. The main submission made by learned counsel for the applicants is that the magistrate concerned is not empowered to grant permission to investigate a non-cognizable case on the basis of the application moved by third person or complainant and such permission can be granted only on the report of police officer of the police station concerned and since the learned magistrate in present case has granted permission to investigate a non-cognizable case registered at NCR No. 114 of 2006 on the basis of the application moved by the complainant, hence the impugned order dated 04.12.2007 being illegal and without jurisdiction was liable to be set aside, but the learned lower revisional court did not consider the matter in proper perspective and Revision has been dismissed without sufficient reasons. The contention of the learned counsel for the applicants is that on registration of a non-cognizable case, permission to investigate can only be sought by S.O. of P.S. concerned or by some other police officer authorised by him and the magistrate is not empowered to entertain the application under section 155 (2) Cr.P.C. moved by the complainant or any other person.

5. In response, it is submitted by learned AGA that there is no legal bar for the magistrate to grant permission under section 155 (2) Cr.P.C. to investigate a non-cognizable case on the basis of the application moved by the complainant or aggrieved person.

6. I have given my thoughtful consideration to the submissions made by learned counsel for the parties. Section 155 Cr.P.C. reads thus:-

155. Information as to non-cognizable cases and investigation of such cases.-
(1) When information is given to an officer in charge of a police station of the commission within the limits of such station of a non-cognizable offence, he shall enter or cause to be entered the substance of the information in a book to be kept by such officer in such form as the Stte Government may prescribe in this behalf, an refer the informant to the Magistrate.
(2) No police officer shall investigate a non-cognizable case without the order of a Magistrate having power to try such case or commit the case for trial.
(3) Any police officer receiving such order may exercise the same powers in respect of the investigation (except the power to arrest without warrant) as an officer in charge of a police station may exercise in a cognizable case.
(4) Where a case relates to two or more offences of which at least one is cognizable, the case shall be deemed to be a cognizable case, notwithstanding that the other offences are non-cognizable.

7. Sub section (2) of Section 155 Cr.P.C. provides that no police officer shall investigate a non-cognizable case without the order of a Magistrate having power to try such case or commit the case for trial. Sub section (3) of Section 155 Cr.P.C. provides that any police officer receiving such order may exercise the same powers in respect of the investigation (except the power to arrest without warrant) as an officer in-charge of a police station may exercise in a cognizable case. Sub section (2) of Section 155 Cr.P.C. does not envisage

that permission to the police officer to investigate a non-cognizable case can be granted on the basis of the report of police officer only. In my opinion, such permission can be granted by the Magistrate on the basis of the application moved by the complainant or any other aggrieved person. In this context reliance can be placed on ***Kunwar Singh vs. State of U.P. 2007 (57) ACC 331***, in which it is held by this Court that complainant/ third party also can move application before the magistrate for order to direct investigation in NCR case. In view of the law laid down by this Court in *Kunwar Singh vs. State (supra*), the impugned order dated 04.12.2007 passed by the learned magistrate concerned as well as the impugned order dated 03.06.2009 passed by learned lower revisional court do not require any interference by this Court, as there is no illegality in both these orders.

8. Consequently, the application under section 482 Cr.P.C. is hereby rejected.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 01.09.2009

BEFORE
THE HON'BLE VIJAY KUMAR VERMA, J.

Criminal Misc. Bail Application No. 15803 of 2008

Sanjay ...Applicant (In Jail)
Versus
State of U.P. ...Opposite Party

Counsel for the Applicant:
Sri K.K. Tiwari
Sri Indra Mani Tripathi

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

Code of Criminal Procedure-Section-439-Bail Application offence under Section 302, 506 IPC applicant set fire after pouring Kerosene oil by his father-post mortum report shows burn injuries-keeping in view of evidence and material available in case diary-taking life of innocent lady-not deserves for bail-claim of parity or long period of jail of prisoner-not violative of Art. 21.

Held: Para 12

I have carefully gone through the entire material on record. There is sufficient prima facie evidence to show that the applicant Sanjay had set the deceased on fire after pouring kerosene oil by his father. The post-mortem report (annexure 2) shows that the deceased had died due to burn injuries. Therefore having regard to overall facts and circumstances of the case and keeping in view the evidence available in the case diary, but without expressing any opinion about merit of the case, in this heinous crime of taking the life of an innocent lady without any lawful excuse, the applicant does not deserve bail.

Case law discussed:
2009 (66) ACC 189, 2008(68) ACC 115.

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

1. Heard Sri Indra Mani Tripathi, Advocate, appearing for the applicant and AGA for the State.

2. The allegations made in the FIR lodged on 05.10.2006 by Arun, son of Ram Naresh Giri at P.S. Pilkhuwa, district Ghaziabad at case crime no. 254 of 2006, under section 302, 506 IPC, in brief, are that the accused Sanjay had borrowed Rs.25,00/- from Mithilesh, mother of the complainant and when she demanded that money on 04.10.2006, he became angry. It is also alleged that on next day, i.e. 5.10.2006 at about 4.00 P.M., Sanjay and

his father Om Prakash set Smt. Mithlesh on fire, due to which she died.

3. The main submission made by learned counsel for the applicant is that motive as alleged in the FIR is very weak and for the sake of Rs.25,00/- only, no person would commit the murder of innocent lady.

4. Next submission made by learned counsel is that if the applicant was having country made pistol, then he could commit the murder of deceased by shooting her.

5. Drawing my attention towards the site plan paper no. 21, it is submitted by learned counsel that the incident is said to have been witnessed by the complainant from a distance of 50 mts. only, but he did not make any effort to save his mother, and hence on this ground the presence of the complainant at the time of incident is doubtful.

6. Further submission made by learned counsel is that applicant is resident of other village and story of committing the murder of deceased is false and concocted. For this submission attention of the Court has been drawn towards statement of Ram Naresh Giri, husband of the deceased also , which has been filed with listing application dated 05.05.2009.

7. It is also submitted that incident of burning the deceased is said to have occurred below the *chhappar*, but the *chhappar* was not burnt, which also makes the story doubtful.

8. It is also submitted that co-accused Om Prakash has been granted bail by another Bench of this Court vide order dated 27.11.2007 passed in Criminal Misc. Bail Application No. 3540 of 2007 and hence on this ground of the principle of parity, the applicant is also entitled to be released on bail, because the role of pouring kerosene oil was assigned to the co-accused Om prakash, who has been enlarged on bail.

9. It is also submitted that the applicant is languishing in jail since October, 2006 and hence on the basis of long incarceration in jail, he is entitled to be released on bail, as due to delay in trial, his fundamental right of speedy trial envisaged under article 21 of the constitution is being violated.

10. The bail application has been opposed by AGA contending that specific role of setting the deceased on fire has been attributed to the applicant and hence in this heinous crime, he should not be released on bail.

11. On the point of granting bail on this ground of parity, it is submitted by learned AGA that parity can not be the sole ground for bail.

12. I have carefully gone through the entire material on record. There is sufficient prima facie evidence to show that the applicant Sanjay had set the deceased on fire after pouring kerosene oil by his father. The post-mortem report (annexure 2) shows that the deceased had died due to burn injuries. Therefore having regard to overall facts and circumstances of the case and keeping in view the evidence available in the case diary, but without expressing any opinion about merit of the case, in this heinous crime of taking the life of an innocent

lady without any lawful excuse, the applicant does not deserve bail.

13. I entirely agree with the contention of learned AGA that parity cannot be the sole ground for bail. Reliance can be placed on ***Shahnawaz @ Shanu Vs. State of U.P. 2009 (66) ACC 189***.

14. In my considered opinion, on the basis of long incarceration in jail also, the applicant cannot be released on bail. In this context, reference may be made to the case of ***Pramod Kumar Saxena vs. Union of India and others 2008(68) ACC 115***, in which the Hon'ble Apex Court has held that mere long period of incarceration in jail would not be per-se illegal. If the accused has committed offence, he has to remain behind bars. Such detention in jail even as an under trial prisoner would not be violative of Article 21 of the Constitution.

15. Consequently, the bail application is hereby rejected.

16. The trial court concerned is directed to conclude the trial of the applicant and other accused within a period of six months making sincere efforts and applying the provisions of section 309 Cr.P.C.

17. S.S.P. Ghaziabad is also directed to depute special messenger to procure the attendance of the witnesses after obtaining their summons from the court concerned and it must be ensured that all the witnesses are produced in the session trial arising out of aforesaid case without causing any delay.

18. The office is directed to send a copy of this order within a week to the trial court concerned and S.S.P. Ghaziabad for necessary action.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.09.2009

BEFORE
THE HON'BLE C.K. PRASAD,C. J.
THE HON'BLE R.K. AGRAWAL, J.
THE HON'BLE PRAKASH KRISHNA, J.

Income Tax Appeal No. 78 of 2002

Commissioner of Income Tax-I, Kanpur ...Appellant

Versus

Shri Mohd. Farooq ...Respondent

Counsel for the Appellant:
Sri Shambhu Chopra
Sri Ashok Kumar
Sri Ashok Trivedi
Sri Ashok Trivedi
Sri Krishna Agrawal
Sri R.P. Kapoor
Sri R.P. Agrawal
Sri V.K. Dwivedi

Counsel for the Respondent:
Sri V.B. Upadhyay
Sri Hanuman Upadhyay

Income Tax Act-1961-Section 260 A(2)-Tax Appeal-Beyond 120 days-question as to whether the provisions of limitation contained in section 4 to 24 as provided under Section 29(2) of limitation Act 1963 are applicable of considering the principle of natural justice can be entertained and decided on merit-held-it has to be presented in accordance with procedure and within the time prescribed by statute-principle of natural justice not alienated-appeal beyond that liable to be dismissed as barred by limitation.

Held: Para-29

We are of the opinion that appeal has to be presented according to the procedure prescribed. The remedy of appeal is a statutory right and hence it has to be presented in accordance with the procedure, the manner and within the time prescribed by the Statute, and the principles of natural justice are not remotely attracted so far as the question of limitation is concerned.

Case Law discussed:

AIR 1995 SC 2272, AIR 1966 All. 161(2007), 289 ITR 382 (Bom), (1974) 2 SCC 133, AIR 1975 SC 1039, (2009) 5 SCC 791, AIR 1979 Delhi 26.

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

1. As identical question of law is involved in all these appeals, they have been heard together and are being disposed off by this common judgment.

2. All these appeals have been preferred under Section 260A (2) of the Income Tax Act, 1961 (hereinafter referred to as the "Act 1961') by the Revenue as well as by the Assessee. It provides for filing of an appeal in the form of a memorandum of appeal within 120 days from the date on which the order appealed against is received by the Assessee or the Chief Commissioner or the Commissioner. It is an admitted position that all these appeals have been preferred beyond the period of limitation as provided under the aforesaid Section and the appellants have filed applications for extension of prescribed period of limitation and for admission of appeals after condoning the delay. When said applications for condonation of delay were placed for consideration before a Division Bench of this Court, the Division Bench by order dated 20.08.2007 referred the following question for determination by a larger Bench:-

"As to whether the period of limitation prescribed for filing an appeal under Section 260-A (2) of the Income Tax Act, 1961 is subject to the provisions contained in Sections 4 to 24 of the Limitation Act, 1963 as provided under Section 29 (2) of the Limitation Act, 1963?"

3. Hon'ble the Chief Justice on reference so made, directed the matter to be heard by three Judges' Bench and that is how, these appeals have come up before us for determination of the aforesaid question.

4. The question so formulated necessitates examination of the provisions of the Limitation Act, 1963 (hereinafter referred to as the "Act 1963') as also the Act 1961. Section 29 of the Act 1963, which is relevant for the purpose, reads as follows:-

"29. Savings.- (1) Nothing in this Act shall affect Section 25 of the Indian Contract, 1872 (9 of 1872).

(2) Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed by the Schedule, the provisions of Section 3 shall apply as if such period were the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in Sections 4 to 24 (inclusive) shall apply only in so far as, and to the extent to which, they are not

expressly excluded by such special or local law.

(3) Save as otherwise provided in any law for the time being in force with respect to marriage and divorce, nothing in this Act shall apply to any suit or other proceeding under any such law.

(4) Sections 25 and 26 and the definition of "easement" in Section 2 shall not apply to cases arising in the territories to which the Indian Easements Act, 1882 (5 of 1882), may for the time being extend."

5. From a plain reading of Section 29 (2) of the Act 1963, it is evident that where in any special or local law, a period of limitation different from the period prescribed by its Schedule is provided, the provisions of Section 3 of the Act 1963 shall apply as if such period was the period prescribed by the Schedule to the Act 1963. It also provides that for the purpose of determining any period of limitation prescribed, the provisions contained in Sections 4 to 24 of the Act 1963 shall apply only insofar as and to the extent they are not expressly excluded by such special or local law.

6. In view of aforesaid, the question which, at the first instance, falls for consideration is as to whether an appeal preferred under Section 260A (2) of the Act 1961 comes within the ambit of Section 29 (2) of the Act 1963 so as to include the application of Sections 4 to 24 of the Act 1963. To come within the ambit of Section 29 (2) of the Act 1963, three main ingredients are required to be satisfied, namely:-

(1) The special or local law must provide for a period of limitation for any suit or appeal.

(2) The said period of limitation must be different from the period prescribed by the Schedule to the Act 1963.

(3) The application of Sections 3 and 4 to 24 of the Act 1963 has not been expressly excluded by the special law.

7. It is common ground that the Act 1961 has provided for a period of limitation for filing an appeal and the said period of limitation is different from the period prescribed by the Schedule to the Act 1963. It is relevant here to state that Section 260A of the Act 1961 prescribes limitation of 120 days whereas Article 116 of the Schedule appended to the Act 1963 provides limitation of 90 days for filing appeal to the High Court.

8. In view of the above, unhesitatingly, the first two requirements are satisfied.

9. It is contended on behalf of the appellants that once conditions nos. 1 and 2, referred to above, have been satisfied, Section 29 (2) of the Act 1963 would apply. Reliance has been placed on a decision of the Supreme Court in the case of Mukri Gopalan Vs. Cheppilat Puthanpurayil Aboobacker, AIR 1995 SC 2272, in which it has been held as follows:-

"22. As a result of the aforesaid discussion it must be held that appellate authority constituted under Section 18 of the Kerala Rent Act, 1965 functions as court and the period of limitation prescribed therein under Section 18

governing appeals by aggrieved parties will be computed keeping in view the provisions of Sections 4 to 24 of the Limitation Act, 1963 such proceedings will attract Section 29 (2) of the Limitation Act and consequently Section 5 of the Limitation Act would also be applicable to such proceedings. Appellate Authority will have ample jurisdiction to consider the question whether delay in filing such appeals could be condoned on sufficient cause being made out by the concerned applicant for the delay in filing such appeals. ... "

10. We do not find any substance in the aforesaid submission of the counsel for the appellants and we are of the opinion that the special law providing for a period of limitation and that being different from the period prescribed by the Schedule to the Act 1963 itself, would not attract the provisions of Section 29 (2) of the Act 1963. The judgment of the Supreme Court in the case of Mukri Gopalan (supra), relied on by the appellants, in no way, suggests that if there is period of limitation under any special or local law and that prescription of period of limitation under such special law is different from the period prescribed by the Schedule to the Act 1963, Section 29 (2) of the Act 1963 on its own force will get attracted. It has further been held in the said case that one has to see that there is no express exclusion taking out the applicability of Section 5 of the Act 1963. In fact, this would be evident from the following passage of paragraph 11 of the judgment:-

***"11**. It is also obvious that once the aforesaid two conditions are satisfied S. 29 (2) on its own force will get attracted to appeals filed before appellate authority under S. 18 of the Rent Act. When Section 29 (2) applies to appeals u/S. 18 of the Rent Act, for computing the period of limitation prescribed for appeals under that Section, all the provisions of Ss. 4 to 24 of the Limitation Act would apply. Section 5 being one of them would therefore get attracted. It is also obvious that there is no express exclusion anywhere in the Rent Act taking out the applicability of S. 5 of the Limitation Act to appeals filed before appellate authority under S. 18 of the Act. Consequently, all the legal requirements for applicability of S. 5 of the Limitation Act to such appeals in the light of S. 29 (2) of Limitation Act can be said to have been satisfied. ..." (Underlining ours)*

11. Submission of the counsel for the appellants is that neither Section 260A of the Act 1961 nor any other provision thereof expressly excludes the applicability of Sections 4 to 24 of the Act 1963 and, therefore, Section 29 of the Act 1963 will apply and once it is held so, Section 5 of the Act 1963 would be available for extending the time for filing appeals and condoning the delay in filing appeals under Section 260A of the Act 1961. It is further contended that when the legislature has used the expression "expressly excluded", one has to bank upon the provisions of the Act 1961 to come to that conclusion and the said conclusion cannot be arrived at by process of a detailed reasoning. Reference in this connection has been made to a decision of this Court in the case of Harbir Singh Vs. Ali Hasan & Ors., AIR 1966 All. 161, and our attention has been drawn to the following paragraph of the judgment:-

(9) The expression "expressly excluded" is clear enough. It signifies exclusion by

words. It will not mean exclusion by a process of construction or reasoning. In Vidyacharan's case, AIR 1964 SC 1099, Subba Rao, J. observed in paragraph 27 that S. 29 speaks of express exclusion and that though S. 116-A of the Representation of the People Act 1951 provides a period of limitation for an appeal and also the circumstance under which the delay can be excused, yet it does not amount to an express exclusion within the meaning of S. 29 of the Limitation Act."

12. Reliance has also been placed on a Full Bench decision of the Bombay High Court in the case of Commissioner of Income-Tax Vs. Velingkar Brothers, (2007) 289 ITR 382 (Bom). In the said case, on review of a large number of authorities, the Bombay High Court has finally concluded as follows:-

"25. We shall finally conclude thus: Section 5 of the Limitation Act shall apply in case of the appeals filed under Section 260A of the Income-tax Act, 1961."

13. While coming to the aforesaid conclusion, the Full Bench has observed as follows:-

"21. Thus, there is an overwhelming line of cases holding Section 5 of the Limitation Act applicable to the matters in appeal and reference applications to the High Court under the Indian Income-tax Act, the Customs Act and the Bombay Sales Tax Act. Our conclusion in this regard is in line with these cases."

14. Counsel for the respondents, excepting those in which Revenue is the respondent, however, contend that the expression "expressly excluded" does not mean that the provision providing for appeal itself should say so and that can be inferred from the scheme of the Act 1961 itself. Accordingly, it has been contended that the scheme of the Act 1961 clearly excludes application of Section 5 of the Act 1963 and, therefore, an appeal preferred under Section 260A of the Act 1961 cannot be admitted by extending the period of limitation.

15. In our opinion, for express exclusion of Sections 4 to 24 of the Act 1963, the special law need not provide for its exclusion in the provision providing for appeal itself and the express exclusion can be inferred from the scheme of the Act. We are further of the opinion that in a case where the special law does not exclude the provisions of Sections 4 to 24 of the Act 1963 by an express provision, it would, nonetheless, be open to the Court to examine whether and to what extent the nature of those provisions or the nature of the subject matter and the scheme of the special law excludes their operation. One can come to the conclusion that when a special law does not provide for application of Section 5 of the Act 1963, it is expressly excluded. A reference in this connection can be made to a decision of the Supreme Court in the case of Hukumdev Narain Yadav Vs. Lalit Narain Mishra, (1974) 2 SCC 133, in which it has been held as follows:-

"... Even assuming that where a period of limitation has not been fixed for election petitions in the Schedule to the Limitation Act which is different from that fixed under Section 81 of the Act, Section 29 (2) would be attracted, and what we have to determine is whether the provisions of this Section are expressly excluded in the case of an election

petition. It is contended before us that the words "expressly excluded" would mean that there must be an express reference made in the special or local law to the specific provisions of the Limitation Act of which the operation is to be excluded. As usual the meaning given in the Dictionary has been relied upon, but what we have to see is whether the scheme of the special law, that is in this case the Act, and the nature of the remedy provided therein are such that the Legislature intended it to be a complete code by itself which alone should govern the several matters provided by it. If on an examination of the relevant provisions it is clear that the provisions of the Limitation Act are necessarily excluded, then the benefits conferred therein cannot be called in aid to supplement the provisions of the Act. In our view, even in a case where the special law does not exclude the provisions of Sections 4 to 24 of the Limitation Act by an express reference, it would nonetheless be open to the Court to examine whether and to what extent the nature of those provisions or the nature of the subject-matter and scheme of the special law exclude their operation. The provisions of Section 3 of the Limitation Act that a suit instituted, appeal preferred and application made after the prescribed period shall be dismissed are provided for in Section 86 of the Act which gives a peremptory command that the High Court shall dismiss an election petition which does not comply with the provisions of Sections 81, 82 or 117. It will be seen that Section 81 is not the only Section mentioned in Section 86, and if the Limitation Act were to apply to an election petitioner under Section 81 it should equally apply to Sections 82 and 117 because under Section 86 the High Court cannot say that by an application of Section 5 of the Limitation Act, Section 81 is complied with while no such benefit is available in dismissing an application for non-compliance with the provisions of Sections 82 and 117 of the Act, or alternatively if the provisions of the Limitation Act do not apply to Section 82 and Section 117 of the Act, it cannot be said that they apply to Section 81. Again Section 6 of the Limitation Act which provides for the extension of the period of limitation till after the disability in the case of a person who is either a minor or insane or an idiot is inapplicable to an election petition. Similarly, Sections 7 to 24 are in terms inapplicable to the proceedings under the Act, particularly in respect of the filing of election petitions and their trial."

16. Yet another decision of the Supreme Court in the case of The Commissioner of Sales Tax, Uttar Pradesh, Lucknow Vs. M/s. Parson Tools and Plants, Kanpur, AIR 1975 SC 1039, lends support to aforesaid view, which would be evident from paragraphs 12 and 13 of the judgment, which read as follows:-

"12. If the legislature willfully omits to incorporate something of an analogous law in a subsequent statute, or even if there is a casus omissus in a statute, the language of which is otherwise plain and unambiguous, the Court is not competent to supply the omission by engrafting on it or introducing in it, under the guise of interpretation by analogy or implication, something what it thinks to be a general principle of justice and equity. " To do so"--(at p. 65 in Prem Nath L. Ganesh v. Prem Nath L. Ram Nath, AIR 1963 Punj. 62. per Tek Chand, J.) "would be entrenching upon the preserves of

Legislature", the primary function of a court of law being jus dicere and not jus dare.
13. In the light of what has been said above, we are of the opinion that the High Court was in error in importing whole hog the principle of Section 14(2) of the Limitation Act into Section 10 (3-B) of the Sales-tax Act."

17. The Supreme Court had the occasion to consider this question in the case of L.S. Synthetics Ltd. Vs. Fairgrowth Financial Services Ltd. & Anr., (2004) 11 SCC 456, in which it has been held as follows:-

"38. A Special Court having regard to its nature and functions may be a court within the meaning of Section 3 of the Indian Evidence Act, 1872 or Section 3 of the Limitation Act, 1963 but having regard to its scope and object and in particular the fact that it is a complete code in itself, in our opinion, the period of limitation provided in the Schedule appended to the Limitation Act, 1963, will have no application. For the applicability of Section 29 (2) of the Limitation Act, the following requirements must be satisfied by the court invoking the said provision:

(1) There must be a provision for period of limitation under any special or local law in connection with any suit, appeal or application.

(2) Such prescription of the period of limitation under such special or local law should be different from the period of limitation prescribed by the Schedule to the Limitation Act, 1963."

18. In view of the authoritative pronouncement of the Supreme Court in the case of Commissioner of Customs & Central Excise Vs. M/s. Hongo India (P) Ltd. & Anr., (2009) 5 SCC 791, this question does not need further elaboration. Paragraph 20 of the judgment, which is relevant in this regard, reads as follows:-

"**20.** Though, an argument was raised based on Section 29 of the Limitation Act, even assuming that Section 29 (2) would be attracted what we have to determine is whether the provisions of this section are expressly excluded in the case of reference to High Court. It was contended before us that the words "expressly excluded" would mean that there must be an express reference made in the special or local law to the specific provisions of the Limitation Act of which the operation is to be excluded. In this regard, we have to see the scheme of the special law here in this case is Central Excise Act. The nature of the remedy provided therein are such that the legislature intended it to be a complete Code by itself which alone should govern the several matters provided by it. If, on an examination of the relevant provisions, it is clear that the provisions of the Limitation Act are necessarily excluded, then the benefits conferred therein cannot be called in aid to supplement the provisions of the Act. In our considered view, that even in a case where the special law does not exclude the provisions of Sections 4 to 24 of the Limitation Act by an express reference, it would nonetheless be open to the court to examine whether and to what extent, the nature of those provisions or the nature of the subject-matter and scheme of the special law exclude their operation. In other words, the applicability of the provisions of the Limitation Act, therefore, to be judged not

from the terms of the Limitation Act but by the provisions of the Central Excise Act relating to filing of reference application to the High Court. The scheme of the Central Excise Act, 1944 support the conclusion that the time limit prescribed under Section 35H (1) to make a reference to High Court is absolute and unextendable by court under Section 5 of the Limitation Act. It is well settled law that it is the duty of the court to respect the legislative intent and by giving liberal interpretation, limitation cannot be extended by invoking the provisions of Section 5 of the Act."

19. Bearing in mind the principle aforesaid, we proceed to consider the scheme of the Act. It hardly needs any discussion to hold that the Act 1961 is a complete Code in itself. Chapter XX of the Act 1961 deals with appeals and revision. Section 249 of the Act 1961 provides for appeal to the Commissioner and the limitation thereto, and sub-section (3) thereof specifically provides that the Commissioner (Appeals) may admit an appeal after the expiration of the period of limitation if he is satisfied that the appellant had sufficient cause for not presenting the appeal within time. Section 253 of the Act 1961 provides for appeal to the Appellate Tribunal and the limitation for filing the appeal, but again sub-section (5) thereof confers power on the Appellate Tribunal to admit an appeal after expiry of the period of limitation. The power of the Commissioner (Appeals) and the Appellate Tribunal to condone the delay is not hedged and they can condone the delay of any period. However, Section 256 of the Act 1961, before its omission by the National Tax Tribunal Act, 2005, though provided for the Appellate Tribunal to make reference to the High Court and the limitation for filing such an application for reference was 120 days, but the proviso thereof had given power to entertain an application within a further period not exceeding 30 days. The proviso to sub-section (3) of Section 264 of the Act 1961 providing for filing revision also contemplates admission of an application beyond the period of limitation on showing sufficient cause.

20. It is relevant here to state that proviso to sub-section (1) of Section 269G of the Act, 1961 provides for extension of period of limitation for filing an appeal before the Appellate Tribunal against an order of the competent authority under Section 269F of the Act, 1961. Not only this, in relation to an appeal to the High Court against the order of the Appellate Tribunal under Section 269G of the Act, 1961, jurisdiction has been conferred to the High Court to admit the appeal after the expiry of the period of limitation on an application made before the expiry of the period. In the background aforesaid, when one considers the provision of Section 260A of the Act 1961 providing for appeal to the High Court, it is evident that no such power has been given to the Court. Absence of any provision in Section 260A of the Act, 1961 conferring jurisdiction to condone the delay in filing the appeal and in view of the scheme of the Act, referred to above, in our opinion, provisions of Sections 4 to 24 of the Act, 1963 would not be applicable in the case of an appeal preferred under Section 260A of the Act, 1961.

21. Now referring to the decision of this Court in the case of Harbir Singh (supra), same in no way supports the plea

of the appellants. Various provisions of the Act 1961, which we have referred to above, signify exclusion of the Act 1963.

22. True it is that the Full Bench of the Bombay High Court in the case of Velingkar Brothers (supra) has held that Section 5 of the Act 24 of 1963 shall apply in case of appeals filed under Section 260A of the Act 1961, but in view of the decision of the Supreme Court in the case of Hongo India (Pvt.) Ltd. (supra), it is difficult to follow its reasoning. The decision of the Bombay High Court is based on its earlier decisions in the cases relating to Customs Act and other Acts. However, the Supreme Court in the case of Hongo India (Pvt.) Ltd. (supra) considered the provisions of the Central Excise Act vis-à-vis Section 29 (2) of the Act 1963 and in face of enunciation of law in this case, it is difficult to follow the reasoning and conclusion of the Bombay High Court in the aforesaid case relied on by the appellants.

23. Accordingly, answer to the question formulated is in the negative and it is held that the period of limitation prescribed for filing an appeal under Section 260A (2) of the Act, 1961 is not subject to the provisions contained in Sections 4 to 24 of the Act, 1963, as provided under Section 29 (2) of the Act, 1963.

24. Aforesaid answer, in our opinion, would have concluded the reference, but in deference to the plea taken by the appellants that Order XLI Rule 3-A of the Code of Civil Procedure (hereinafter referred to as the "Code'), being applicable to an appeal under Section 260A of the Act, 1961, the delay in filing the appeal can be condoned under the aforesaid provision. It has been pointed out that sub-section (7) of Section 260A of the Act, 1961 provides for application of the provisions of the Code in the case of an appeal preferred under Section 260A of the Act, 1961. It has further been pointed out that Order XLI Rule 3-A of the Code, which has been inserted by the Code of Civil Procedure Amendment Act, 1976 (Act No.104 of 1976), provides for condonation of delay. Accordingly, it has been submitted that even if the provisions of the Act, 1963 may not be fit to be invoked, but delay can be condoned by resorting to the power under Order XLI Rule 3-A of the Code. Reliance has been placed on a Single Judge decision of the Delhi High Court in the case of Miss. Nirmala Chaudhary Vs. Bisheshar Lal, AIR 1979 Delhi 26, in which it has been held as follows:-

"34. ...The newly added provision of R. 3A of O. 41 in the Civil P.C. gives an additional right to a litigant to claim condonation at the time of presenting the appeal...."

25. We do not have the slightest hesitation in rejecting this submission. Order XLI Rule 3-A of the Code of Civil Procedure reads as follows:

"3-A. Application for condonation of delay.--(1) When an appeal is presented after the expiry of the period of limitation specified therefor, it shall be accompanied by an application supported by affidavit setting forth the facts on which the appellant relies to satisfy the Court that he had sufficient cause for not preferring the appeal within such period.

(2) If the Court sees no reason to reject the application without the issue of a notice to the respondent, notice thereof shall be issued to the respondent and the matter shall be finally decided by the Court before it proceeds to deal with the appeal under Rule 11 or Rule 13, as the case may be.
(3) Where an application has been made under sub-rule (1), the Court shall not make an order for the stay of execution of the decree against which the appeal is proposed to be filed so long as the Court does not, after hearing under Rule 11, decide to hear the appeal."

26. Sub-rule (1) of Rule 3-A of Order XLI of the Code provides for procedure for presenting an appeal after the expiry of period of limitation and it contemplates filing of an application supported by an affidavit setting forth the facts to satisfy the Court about the sufficient cause for not preferring the appeal within time. Sub-rule (2) thereof provides for notice to the respondent in case such an application is not rejected at the threshold and sub-rule (3) mandates that an order for stay of execution of a decree against which appeal is proposed to be filed shall not be granted so long the decision is not taken to hear the appeal. Therefore, in our opinion, Order XLI Rule 3-A of the Code is not an independent provision conferring jurisdiction on the Appellate Court to condone the delay, but provides for the procedure to be followed for filing and considering the application for condonation of delay.

27. In our opinion, in view of the language of Order XLI Rule 3-A of C.P.C., it is difficult to hold that it gives any additional right to claim condonation under this provision. A Division Bench of the Madras High Court had the occasion to consider this question in the case of Managing Director, Thanthal Periyar Transport Corpn. Villupuram Vs. K.C. Karthiyayini, AIR 1995 Mad. 102, wherein it has been held as follows:-

"7. Counsel for one of the petitioners also contends that Order 41, Rule 3-A (1) gives a further right to claim condonation of the delay, in addition to such right under Section 5 of the Limitation Act and that O. 41, Rule 3-A will have application only if the said Section 5 is invoked. According to him these petitions to condone delay are filed under Section 173 of the Motor Vehicles Act and not under Section 5 of the Limitation Act. In this connection, he relied on Nirmala Chaudhary Vs. Bisheshar Lal (AIR 1979 Delhi 26) and State of Assam V. Gobinda Chandra Paul (AIR 1991 Gauhati 104). The observation in AIR 1979 Delhi 26 is no doubt as follows (at p. 31):-

"The newly added provision of R.3 of O.41 in the Civil P.C. gives an additional right to a litigant to claim condonation at the time of presenting the appeal."

In State of Assam V. Gobinda Chandra Paul (AIR 1991 Gauhati 104) also similar view appears to have been expressed in the following words (at p.110):-

"Besides, this rule is not in derogation of S.5 of the Limitation Act, in fact, it is in addition to that".

But, we are unable to subscribe to this view, since O.41, R.3-A, C.P.C. has only been inserted by the Amending Act, 1976 in order to prescribe the procedure for securing the final determination of the

question as to limitation even at the stage of admission of the appeal. The rule does not prescribe the period of limitation for an appeal. The period of limitation is provided only under Art. 116 of the Limitation Act, 1963 in respect of appeals and it cannot be said that O.41, Rule 3-A gives any additional right to litigants to claim condonation. Moreover, condonation of delay is not a matter of right. The litigant who comes to court after the prescribed period of limitation is bound to satisfy the Court that he has sufficient cause for the delay."

28. We respectfully agree with the aforesaid observation.

To put the record straight, it is relevant here to state that it has also been contended on behalf of the appellants that principles of natural justice demand that in case of the appellants showing sufficient cause, the appeal deserves to be heard, though presented beyond the period of limitation.

29. We are of the opinion that appeal has to be presented according to the procedure prescribed. The remedy of appeal is a statutory right and hence it has to be presented in accordance with the procedure, the manner and within the time prescribed by the Statute, and the principles of natural justice are not remotely attracted so far as the question of limitation is concerned.

30. Having held that the delay in filing the appeals cannot be condoned, we have no option than to dismiss all the appeals as barred by limitation and they are dismissed accordingly.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.09.2009

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

Civil Misc. Writ Petition No. 1104 of 2008

Jagdev ...Petitioner
Versus
Commissioner, Gorakhpur Division and others ...Respondents

Counsel for the Petitioner:
Sri Sri R.C.Singh

Counsel for the Respondents:
Sri V.K. Singh
Sri R.N. Bhakta
S.C.

U.P. Z.A. & L.R Act-Section 122-C- Allotment of land under section 115-Q- respondent failed to make any effort either to get possession or raise construction within statutory period of 3 years-admittedly the petitioner never disturbed the possession inspite of knowledge of proceeding since 99- Dakhalnama executed in the year 2003- direction for registration F.I.R against petitioner-not sustainable-quashed -with direction to proceed further keeping in view of observation after affording opportunity of hearing to both parties.

Held: Para-7

It is evident that Rule 115-Q prescribes a clear time limit for raising constructions after allotment for the purpose of which it was allotted. In the instant case the admitted position is that the land was allotted in 1994 and no efforts appear to have been made either for taking possession or for raising constructions within three years of the date of allotment. There is also no evidence to indicate that it was the petitioner who prevented the taking of such possession

or that the respondents in any way were responsible for not allowing the respondents to raise constructions. As a matter of fact the Additional District Magistrate has not adverted at all to determine as to what were the factors existing that led to this situation of Dakhalnama being executed in the year 2003. Further the finding that the petitioner approached the authorities after a lapse of time is not supported by any cogent reason. If the petitioner was aware of the proceedings of 1994, his possession and alleged occupation had not been disturbed till 2003 when the Dakhalnama was issued and when subsequently the first information report was lodged. In view of the aforesaid the findings recorded by the Additional District Magistrate that the petitioner was guilty of lapses is unsubstantiated from the pleadings and the evidence on records. Accordingly, the order of the Additional District Magistrate is unsustainable.

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

1. Heard Sri R.C. Singh learned counsel for the petitioner and Sri R.N. Bhakta for the respondent nos. 5 and 6 and the learned standing counsel for the respondent nos. 1 and 2.

2. A counter affidavit has been filed on behalf of the contesting respondents as also on behalf of the Gaon Sabha. However, no counsel is present for the Gaon Sabha when the matter is taken up by this Court.

3. The challenge in the present petition is to the order passed by the Additional District Magistrate (Finance and Revenue) dated 6.12.2007 whereby the authority has refused to take action on the proceedings initiated by the petitioner under Section 122-C of the U.P.Z.A. & L.R. Act. The application was moved under Clause 6 of Section 122-C praying that the allotment be cancelled keeping in view the provisions of Section 115-Q of the rules framed under the aforesaid Act. The same is quoted below:-

"115-Q. The person to whom the housing site is allotted shall be required to build a house and begin to reside in it or to use it for the purpose for which it was built within three years from the date of allotment: If he fails to do so or uses it at any time for a purpose other than that for which it was allotted his rights shall be extinguished and the site may be taken over by the Land Management Committee:

Provided that in the case of a person belonging to Scheduled Caste or Scheduled Tribe the aforesaid time limit for building of the house shall not apply."

4. The ground taken is that the allotment was made in favour of the contesting respondent in 1994. The fact that possession was not handed over to the contesting respondents is also admitted in the counter affidavit where a copy of Dakhalnama had been filed which is dated 3.4.2003. A first information report was lodged that the petitioner failed to deliver the possession and in the first information report it is admitted that the possession was sought to be given on 3.4.2003. It was submitted by Sri R.C. Singh learned counsel for the petitioner that in view of the aforesaid admitted position the contesting respondents could not be permitted to raise constructions after a lapse of nine years in view of the bar as contained in Rule 115-Q. It is not disputed that the contesting respondents are not scheduled caste and, therefore, the bar of three years would operate against them.

5. Learned standing counsel contends that these proceedings were initiated by the petitioner after a lapse of nine years and the same could not have been done in view of the fact that it was heavily barred by time and latches as well and that the petitioner cannot claim any semblance of title over the land in question.

6. In rejoinder learned counsel for the petitioner contends that that the petitioner has claimed allotment and possession keeping in view sub section 3 of Section 122-C of the U.P.Z.A. & L.R. Act and, therefore, the contention advanced on behalf of the respondents deserves to be rejected. He further submits that the cause arose when the Dakhalnama was executed and as a matter of fact respondents taking aid of the administrative machinery started disturbing the petitioner. He further submits that the petitioner had filed a revision even though ill advised inasmuch no revision would lie against the order under Section 122-C(6). He , therefore submits that the time which has been consumed in the aforesaid proceedings clearly explains the delay in approaching the Court.

7. It is evident that Rule 115-Q prescribes a clear time limit for raising constructions after allotment for the purpose of which it was allotted. In the instant case the admitted position is that the land was allotted in 1994 and no efforts appear to have been made either for taking possession or for raising constructions within three years of the date of allotment. There is also no evidence to indicate that it was the petitioner who prevented the taking of such possession or that the respondents in any way were responsible for not allowing the respondents to raise constructions. As a matter of fact the Additional District Magistrate has not adverted at all to determine as to what were the factors existing that led to this situation of Dakhalnama being executed in the year 2003. Further the finding that the petitioner approached the authorities after a lapse of time is not supported by any cogent reason. If the petitioner was aware of the proceedings of 1994, his possession and alleged occupation had not been disturbed till 2003 when the Dakhalnama was issued and when subsequently the first information report was lodged. In view of the aforesaid the findings recorded by the Additional District Magistrate that the petitioner was guilty of lapses is unsubstantiated from the pleadings and the evidence on records. Accordingly, the order of the Additional District Magistrate is unsustainable.

8. The contention of the learned standing counsel that the petitioner had preferred a revision against the said order also cannot be entertained in view of the order having been passed under Section 122-C which is final and not revisable.

9. For the conclusions drawn herein above the impugned order dated 6.12.07 and 13.12.07 are quashed. The matter is remanded back to the respondent no.2 to decide the matter in view of the observations made herein above after giving an opportunity of hearing to the concerned parties preferably within a period of three months from the date of production of a certified copy of this order.

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

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.09.2009

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

Civil Misc. Writ Petition No.33589 of 2007

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

Counsel for the Petitioner:
Sri Ramendra Asthana
Sri Atul Srivastava

Counsel for the Respondents:
Sri P.N. Rai,
Sri Jai Prakash Singh
S.C.

U.P.Panchayat Raj Act, 1947-Section 5-A(a)- readwith Representation of People Act 1551-Section 8(3)- Disqualification-respondent -7 elected as village Pradhan-admittedly convicted under section 302-defence taken about bail in appeal and stay of conviction in pending criminal appeal-not available-writ of 'quo warrante' issued declaring the election of respondent 7 as illegal -who shall not be construed to hold public office of village Pradhan.

Held: Para-13 & 20

It has been held that mere filing of an appeal would not take away the disqualification incurred by the petitioner by virtue of his conviction. The aforesaid decision has taken notice of the decision in the case of K. Prabhakaran Vs. P. Jayarajan, in which it has been held that once the conviction has been pronounced and the sentence awarded, then the disqualification is attached in view of the provisions, which are presently in consideration. Section 5-A of the Act 1947 clearly entails that a person shall be disqualified for being chosen in the event he is convicted. In the instant case, it is an admitted position that the conviction has been pronounced and sentence awarded.

In view of the aforesaid conclusion drawn and in view of the fact that the respondent no. 7 admittedly suffers from an inherent disqualification as provided under Section 5-A, a declaration is hereby issued that the election of the respondent no. 7 as Gram Pradhan was illegal and invalid and he shall not be construed to hold the public office of Gram Pradhan of Gram Panchayat Muriari, District Ghazipur forthwith as it stands accordingly annulled. The impugned order dated 30.03.2007 is also quashed.

Case law discussed:
1964 ALJ 1118, 2003 (2) AWC 1385, 2005 (99) RD 746, 2001 (7) SCC 231, AIR 1999 SC 1723.

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

1. Heard Shri Atul Srivastava, learned counsel for the petitioner and Shri Jai Prakash Singh, learned counsel for the respondent no. 7 and Shri C.P. Mishra, learned standing counsel appearing on behalf of the respondent nos. 1 to 6.

2. In spite of repeated time having been granted by the Court no counter affidavit was filed, as a result whereof, the Court had to summon the concerned officials. Today a short counter affidavit supported with an application has been filed by Shri Arvind Kumar Singh, District Panchayat Raj Officer, Ghazipur stating therein that unqualified apology is being tendered for the delay caused in providing assistance to the Court and another short counter affidavit has been filed by Shri Jitendra Mohan Singh, Sub-Divisional Magistrate, Jakhaniya, Ghazipur stating therein that pursuant to

the interim order of this Court, the District magistrate passed an order restraining the respondent no. 7 from functioning as Gram Pradhan. Keeping in view the allegations as contained in the writ petition, the functions of the Gram Pradhan are being carried out by a person appointed and deputed vide order dated 17.12.2007.

3. This writ petition has been filed on the ground that the respondent no. 7-Shyam Narain has been convicted in a criminal case under Section 302 I.P.C. and has been awarded a punishment of life imprisonment, and as such in view of the provisions of Section 5-A(a) of the Uttar Pradesh Panchayat Raj Act, 1947 (hereinafter referred to as 'the Act'), the respondent no. 7 could have neither contested the election of the Gram Pradhan nor could have been elected and therefore a writ of quo warranto should be issued to prevent the respondent no. 7 to function as such as he is totally disqualified to hold any such public office. A further prayer has been made to quash the order dated 30.03.2007 passed by the Tehsildar rejecting the petitioner's representation.

4. Notices were issued and a counter affidavit has been filed on behalf of the respondent no. 7 as well.

5. The fact that the respondent no. 7 has been convicted in a criminal case has not been disputed. It has further been stated that the respondent no. 7 did not conceal this fact at the time when the nomination was filed. The further contention of the learned counsel for the respondent is that the removal of the answering respondent can be brought about only by an appropriate election petition or under a procedure prescribed in any law for the time being in force for such purpose. It has further been submitted that a criminal appeal filed against the said conviction is still pending before this Court and, therefore, the said conviction should not be taken to be a disqualification.

6. Learned standing counsel, on the other hand, submitted that it appears that it was on account of an erroneous calculation of the period of 5 years as provided for under Rule 3 of the Uttar Pradesh Panchayat Raj Rules, 1994. He contends that so far as the question of continuance or otherwise of the respondent no. 7 is concerned, the same has to be construed in accordance with the provisions of the Act and Rules and the authorities are equally bound by it. He contends that so far as the election of the respondent no. 7 has not been set aside under any election petition or any other proceeding provided for in law. He submits that the records have already been filed along with the writ petition and there is nothing which is required to be added on facts. He contends that the criminal appeal, which is pending before this Court, would finally decide the fate of the respondent no. 7.

7. The petitioner had earlier come up before this Court for a quo warranto in Writ Petition No. 62339 of 2006 alleging the aforesaid disqualification. The petition was disposed of on 16.11.2006 with a direction to approach the Presiding Officer who was to take a decision in the matter. The impugned order dated 30.03.2007 was passed holding that no authority could be shown to the effect that a person convicted under Section 302 I.P.C. would stand disqualified under

Section 5A (g) of the Act. The contention of the petitioner is that the disqualification is under Section 5A (a) of the Act and therefore the impugned order proceeds erroneously.

8. Having heard learned counsel for the parties and having perused the facts on record, it is evident that the impugned order overlooks the provisions of Section 5-A(a) of the Act. The disqualification of a person to be elected as a member of the legislative assembly is also provided for as a disqualification for being chosen as Pradhan. This would be clear upon a combined reading of Section 5-A(a) of the Act and Section 8 (3) of the Representation of the People Act, 1951 quoted below:-

[5-A. Disqualification of membership. - A person shall be disqualified for being chosen as, and for being, [the Pradhan or] a member of a Gram Panchayat, if he- (a) is so disqualified by or under any law for the time being in force for the purposes of elections of the State Legislature:

Provided that no person shall be disqualified on the ground that he is less than twenty-five years of age, if he has attained the age of twenty-one years;

8(3). A person convicted of any offence and sentenced to imprisonment for not less than two years [other than any offence referred to in sub-section (1) or sub-section (2)] shall be disqualified from the date of such conviction and shall continue to be disqualified for a further period of six years since his release.]

9. Apart from this, it is true that as held by this Court in the case of Harsukh Lal Vs. Sarnam Singh and others reported in **1964 ALJ 1118**, a sentence of life imprisonment awarded upon a conviction under Section 302 I.P.C., may not necessarily involve moral turpitude if the offence was a result of provocation as distinct from a cold-blooded murder. Reference may be had to the decision in the case of Ran Vijay Chandra Vs. State of U.P. and others reported in **2003 (2) AWC 1385**.

10. A perusal of the said decision therefore carves out exceptions where moral turpitude can be inferred. The respondent no. 7 was a teacher and professed rivalry with the deceased. His wife contested elections of Pradhan against the wife of the respondent. The murder was committed and from a perusal of the judgment of the trial court, it is evident that it was a well planned murder, not on provocation but by taking the deceased by surprise. The respondent no. 7 is alleged to have exhorted and the other accused fired with country made pistols. The intention therefore is indicated, not on provocation, but as a pre-planned commission of an offence. In such circumstances to say that the elements of moral turpitude did not exist is a total misconception of law.

11. Apart from this it is doubtful as to whether the Tehsildar had any authority to decide the matter. Thus on all three scores as concluded hereinabove, the order dated 30.03.2007 is unsustainable.

12. There is no doubt that the respondent no. 7 is holding a public office. He was elected as Gram Pradhan in spite of the fact that he was convicted in a criminal case and has been awarded a sentence of life imprisonment. The issue as to whether such disqualification can be

computed in the given circumstances of a case such as presently involved has already been considered by this Court in the case of Amrendra Singh Vs. State of U.P. and others reported in **2005 (99) RD 746**. In paragraphs 12 and 13 of the said judgment it has been held that since an accused/convict had not undergone the sentence of imprisonment therefore the computation of 5 years does not commence until and unless he serves out the sentence. The contention advanced on behalf of the respondent no. 7 is that an appeal has been filed. The aforesaid issue has also been answered in the aforesaid decision in paragraph 11, which is quoted below:

"11. Thus the mere fact that an appeal has been filed by the petitioner against his conviction which has been admitted and he has been released on bail, does not wipe out the disqualification which has been attached on the strength of conviction dated 13.06.1977. The submission of the petitioner that the conviction has not yet started since the petitioner is on bail has also to be repelled in view of the clear pronouncement of the Apex Court as quoted above. The mere fact that the petitioner has not yet served his sentence he cannot be heard in saying that he is not disqualified."

13. It has been held that mere filing of an appeal would not take away the disqualification incurred by the petitioner by virtue of his conviction. The aforesaid decision has taken notice of the decision in the case of K. Prabhakaran Vs. P. Jayarajan, in which it has been held that once the conviction has been pronounced and the sentence awarded, then the disqualification is attached in view of the provisions, which are presently in consideration. Section 5-A of the Act 1947 clearly entails that a person shall be disqualified for being chosen in the event he is convicted. In the instant case, it is an admitted position that the conviction has been pronounced and sentence awarded.

14. The said issue has been answered by the Apex Court in the case of **B.R. Kapur Vs. State of T. N. and another** reported in **2001 (7) SCC 231**, paragraphs 34 and 40 as follows:

"**34.** It is true that the order of the High Court at Madras on the application of the second respondent states: "Pending criminal appeals the sentence of imprisonment alone is suspended and the petitioners shall be released on bail .....", but this has to be read in the context of Section 389 under which the power was exercised. Under Section 389 an appellate court may order that "the execution of the sentence or order appealed against be suspended ....:. It is not within the power of the appellate court to suspend the sentence; it can only suspend the execution of the sentence pending the disposal of appeal. The suspension of the execution of the sentence does not alter or affect the fact that the offender has been convicted of a grave offence and has attracted the sentence of imprisonment of not less than two years. The suspension of the execution of the sentences, therefore, does not remove the disqualification against the second respondent. The suspension of the sentence, as the Madras High Court erroneously called it, was in fact only the suspension of the execution of the sentences pending the disposal of the appeals filed by the second respondent. The fact that she secured the suspension of the execution of the sentences against her did not alter or

affect the convictions and the sentences imposed on her and she remained disqualified from seeking legislative office under Section 8(3).

40. In much the same vein, it was submitted that the presumption of innocence continued until the final judgment affirming the conviction and sentence was passed and, therefore, no disqualification operated as of now against the second respondent. Before we advert to the four judgments relied upon in support of this submission, let us clear the air. When a lower court convicts an accused and sentences him, the presumption that the accused is innocent comes to an end. The conviction operates that the accused has to undergo the sentence. The execution of the sentence can be stayed by an appellate court and the accused released on bail. In many cases, the accused is released on bail so that the appeal is not rendered infructuous, at least in part, because the accused has already undergone imprisonment. If the appeal of the accused succeeds the conviction is wiped out as cleanly as if it had never existed and the sentence is set aside. A successful appeal means that the stigma of the offence is altogether erased. But that is not to say that the presumption of innocence continues after the conviction by the trial court. That conviction and the sentence it carries operate against the accused in all their rigour until set aside in appeal, and a disqualification that attaches to the conviction and sentence applies as well."

15. The next issue, which has been raised is as to whether a writ petition under Article 226 of the Constitution of India praying for prohibiting or recalling a person who is holding a public office can be a issue or not. The aforesaid issue came up for consideration before the Apex Court in the case of **K. Venkatachalam Vs. Swamichan and another reported in AIR 1999 SC 1723**. In which the Supreme Court ruled as follows:

"26. The question that arises for consideration is if in such circumstances High court cannot exercise its jurisdiction under Article 226 of the Constitution declaring that the appellant is not qualified to be member of the Tamil Nadu Legislative Assembly from Lalgudi Assembly Constituency. On the finding recorded by the High Court it is clear that the appellant in his nomination from impersonated a person known as Venkatachalam s/o Pethu, taking advantage of the fact that such person bears his first name. Appellant would be even criminally liable as he filed his nomination on affidavit impersonating himself. If in such circumstances he is allowed to continue to sit and vote in the Assembly his action would be fraud to the Constitution.

27. In view of the judgment of this Court in the case of Election Commission of India V. Saka Venkata Rao, AIR 1953 SC 210, it may be that action under Article 192 could not be taken as the disqualification which the appellant incurred was prior to his election. Various decisions of this Court which have been referred to by the appellant that jurisdiction of the High Court under Article 226 is barred challenging the election of a returned candidate and which we have noted above do not appear to apply to the case of the appellant now before us. Article 226 of the Constitution is couched in widest possible term and

unless there is clear bar to jurisdiction of the High Court its powers under Article 226 of the Constitution can be exercised when there is any act which is against any provision of law or violative of constitutional provisions and when recourse cannot be had to the provisions of the Act for the appropriate relief. In circumstances like the present one bar of Article 329(b) will not come into play when cause falls under Articles 191 and 193 and whole of the election process is over. Consider the case where the person elected is not a citizen of India. Would the Court allow a foreign citizen to sit and vote in the Legislative Assembly and not exercise jurisdiction under Article 226 of the Constitution?

28. We are, therefore, of the view that the High Court rightly exercised its jurisdiction in entertaining the writ petition under Article 226 of the Constitution and declared that the appellant was not entitled to sit in Tamil Nadu Legislative Assembly with consequent restraining order on him from functioning as a member of the Legislative Assembly. The net effect is that the appellant ceases to be a member of the Tamil Nadu Legislative Assembly. Period of the Legislative Assembly is long since over. Otherwise we would have directed respondent no. 2, who is Secretary to Tamil Nadu Legislative Assembly, to intimate to Election Commission that Lalgudi Assembly Constituency seat has fallen vacant and for the Election Commission to take necessary steps to hold fresh election from that Assembly Constituency. Normally in a case like the Election Commission should invariably be made a party."

16. A perusal of the aforesaid decision leaves no room for doubt that the Article 226 of the Constitution of India would be clearly maintainable even if there was a provision for filing of an election petition.

17. Such an issue also came before the Apex Court in B.R. Kapur's case (supra) which involved the continuance of the then Chief Minister of Tamil Nadu Ms. J. Jayalalitha upon being convicted in the case under the Prevention of Corruption Act, 1988. A writ of quo warranto was prayed for as she had been sworn in as Chief Minister. The contention was that she was ineligible for being elected to the legislative assembly having earned a conviction as such she could not continue as Chief Minister. The Apex Court in para 45 of the said decision ruled as under:

"45. Our conclusion, therefore, is that on the date on which the second respondent was sworn is as Chief Minister she was disqualified, by reason of her convictions under the Prevention of Corruption Act and the sentences of imprisonment of not less than two years, for becoming a member of the Legislature under Section 8(3) of the Representation of the People Act."

18. After having recorded the said finding the Apex Court also ruled that in such an event the Court is obliged to intervene through a writ of quo warranto. Reference be had to paras 51 to 55 quoted below:

"51. If perchance, for whatever reason, the Governor does appoint as Chief Minister a person who is not qualified to be a member of the

Legislature or who is disqualified to be such, the appointment is contrary to the provisions of Article 164 of the Constitution, as we have interpreted it, and the authority of the appointee to hold the appointment can be challenged in quo warranto proceedings. That the Governor has made the appointment does not give the appointee any higher right to hold the appointment. If the appointment is contrary to constitutional provisions it will be struck down. The submission to the contrary-unsupported by any authority-must be rejected.

52. The judgment of this Court in Kumar Padma Prasad v. Union of India is a case in point. One K.N. Srivastava was appointed a Judge of the Gauhati High Court by a warrant of appointment signed by the President of India. Before the oath of office could be administered to him, quo warranto proceedings were taken against him in that High Court. An interim order was passed directing that the warrant of appointment should not be given effect to until further orders. A transfer petition was then filed in this Court and was allowed. This Court, on examination of the record and the material that it allowed to be placed before it, held that Srivastava was not qualified to be appointed a High Court Judge and his appointment was quashed. This case goes to show that even when the President, or the Governor, has appointed a person to a constitutional office, the qualification of that person to hold that office can be examined in quo warranto proceedings and the appointment can be quashed.

53. It was submitted that we should not enter a political thicket by answering the question before us. The question before us relates to the interpretation of the Constitution. It is the duty of this Court to interpret the Constitution. It must perform that duty regardless of the fact that the answer to the question would have a political effect. In State of Rajasthan v. Union of India it was said by Bhagwati, J.: (SCC pp. 660-61, para 149)

"But merely because a question has a political complexion, that by itself is no ground why the court should shrink from performing its duty under the Constitution if it raises an issue of constitutional determination. Every constitutional question concerns the allocation and exercise of governmental power and no constitutional question can, therefore, fail to be political ..... So long as a question arises whether an authority under the Constitution has acted within the limits of its power or exceeded it, it can certainly be decided by the court. Indeed it would be its constitutional obligation to do so. It is necessary to assert the clearest possible terms, particularly in the context of recent history, that the Constitution is suprema lex, the paramount law of the land, and there is no department or branch of Government above or beyond it."

54. We are satisfied that in the appointment of the second respondent as the Chief Minister there has been a clear infringement of a constitutional provision and that a writ of quo warranto must issue.

55. We are not impressed by the submissions that the writ petitions for quo warranto filed in this Court are outside our jurisdiction because no breach of fundamental rights has been pleaded therein; that the appeal against the decision of the Madras High Court in the writ petition for similar relief filed before it was correctly rejected because the same issue was pending here; and that the transferred writ petition for similar relief should, in the light of the dismissal of the writ petitions filed in this Court, be sent

back to the High Court for being heard. Breach of Article 14 is averred in at least the lead writ petition filed in this Court [WP (C) No. 242 of 2001]. The writ petition which was dismissed by the High Court and against which order an appeal is pending in this Court was filed under Article 226, as was the transferred writ petition. This Court, therefore, has jurisdiction to issue a writ of quo warranto. We propose to pass the order in the lead writ petition, and dispose of the other writ petitions, the appeal and the transferred writ petition in the light thereof."

19. In the instant case, there being no doubt about the admitted position of disqualification having been incurred by the respondent no. 7, there is no occasion for this Court to dismiss the writ petition on the ground of availability of any other alternative remedy. Apart from this, it is evident that the respondent no. 7 had been restrained by this Court by an interim order commanding the opposite parties not to allow the said respondent to function as Gram Pradhan. It is to be noted that the order was passed by this Court on 25th July, 2007 whereas the District Magistrate took 5 months to pass a consequential order. The aforesaid situation is absolutely unfortunate, inasmuch as, the authorities are required to obey the orders forthwith without any hesitation. It is not understood as to why the District Magistrate took 5 months to obey the command of this Court.

20. In view of the aforesaid conclusion drawn and in view of the fact that the respondent no. 7 admittedly suffers from an inherent disqualification as provided under Section 5-A, a declaration is hereby issued that the election of the respondent no. 7 as Gram Pradhan was illegal and invalid and he shall not be construed to hold the public office of Gram Pradhan of Gram Panchayat Muriari, District Ghazipur forthwith as it stands accordingly annulled. The impugned order dated 30.03.2007 is also quashed.

21. The writ petition is allowed with the directions aforesaid with no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.09.2009

BEFORE
THE HON'BLE RAN VIJAI SINGH, J.

Civil Misc. Writ Petition No.43575 of 2009

Committee of Management and another ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Vinod Sinha
Sri Mahesh Sharma

Counsel forthe Respondents:
Sri P.N. Saxena
Sri K.C. Shukla
C.S.C.

Constitution of India Article-226- Appointment of authorized controller without affording opportunity- while the order of withdrawal of approval granted to the selection of petitioner was stayed by single judge with specific direction restraining the authorities from interfering with functioning of petitioner as manage-special appeal also dismissed-held-order impugned passed in utter violation of principle of natural justice-can not sustain.

Held: Para-10

After going through the records I am of the view that the impugned order suffers from breach of principles of natural justice and biased one as Sri Bhuri Singh has associated himself throughout and vitiated the decision making process.

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

1. I have heard Sri Vinod Sinha, learned counsel for the petitioner, Sri P.N. Saxena, learned Senior Advocate assisted by Sri K.C. Shukla, learned counsel appearing for respondent no. 4 and learned Standing Counsel appearing for respondents no. 1 to 3.

2. This writ petition has been filed against the orders dated 06.08.09 passed by the Regional Committee, Meerut region Meerut and the order dated 24.06.09 passed by the Joint Director of Education, Meerut region Meerut. Vide order dated 06.08.09 the Regional Committee had derecognized the election of the Committee of Management, Intermediate College, Kakod, district Bulandshahr pursuant to the election dated 22.12.08. Through this election, the petitioner was elected as a Manager of Committee. While passing this order a direction was also issued for holding fresh election of the Committee of Management within a period of two months by the Authorised Controller of the Institution. Whereas by order dated 24.06.09 the Joint Director of Education has appointed Authorised Controller in the said institution on the recommendation of District Inspector of Schools, Bulandshahr dated 08.06.09.

3. It appears that election of Committee of Management was held on 22.12.08 of which the petitioner was elected as Manager. The election was approved by the Regional Committee on 03.01.09. This order of approval was recalled by the District Inspector of Schools on 14.03.09 (Sri Bhuri Singh, District Inspector of Schools, Bulandshahr). This order was challenged through Writ Petition No. 21427/09. This Court has interfered with the matter and not only stayed the operation of the order dated 14.03.09 passed by the District Inspector of Schools withdrawing the recognition/approval of the petitioner's election but also directed the District inspector of Schools not to interfere in the functioning of the petitioner as a Manager of the institution.

4. Aggrieved by this order the respondent no. 4 has filed a Special Appeal No.719/09 which was dismissed by this Court on 15.05.09 and the writ petition was allowed by quashing the order dated 14.03.09 passed by the District Inspector of Schools withdrawing the recognition/approval of the petitioner's election. While dismissing the appeal, however, this Court has directed the Regional Committee to consider the application of respondent no. 4 for recalling the order dated 03.01.09.

5. After the order of special appeal it appears that the District Inspector of Schools has made recommendation for appointment of Authorised Controller in the petitioner's institution. Thereafter, the Joint Director of Education has appointed Authorised Controller vide order dated 24.06.09 and thereafter recall application of respondent no. 4 was taken up for disposal by the Regional Committee of which the District Inspector of Schools

namely Sri Bhuri Singh was made a member.

6. Sri Vinod Sinha, learned counsel for the petitioner submits that while passing the impugned order reliance has been placed upon a report of Committee dated 23.05.08 headed by Sri Bhuri Singh in which he has reported that there are 56 valid members of the society. He has also submitted that one of the principles of natural justice is that no person shall be a Judge of his own cause or the adjudicating authority must be impartial and must act without any kind of bias. The said Rule is based on the principle that justice not only be done but should manifestly be seen to be done. This could be possible only when a Judge or adjudicating authority decide the matter impartially and without carrying any kind of bias. It may be pecuniary, personal or there may be bias as to the subject matter. In the present case Sri Bhuri Singh, District Inspector of Schools was a member of the Committee which has found 56 valid members to which the petitioner has made his objection and that is still undisposed of. Secondly, even after passing of the order by this Court, staying the operation of the order dated 14.03.09 withdrawing the recognition of the petitioner's election and even after allowing the writ petition vide order dated 15.05.09 by the special appeal court, he has made recommendation to the Joint Director of Education for appointment of Authorised Controller and not permitted the petitioner to function in spite of the clear direction of this court in the writ petition. Thereafter he sat as a member of Regional Committee and passed the impugned order. In his submission, the impugned order not only suffers from the breach of principles of natural justice, but also suffers from bias. Therefore, it deserves to be quashed.

7. Refuting the submission of learned counsel for the petitioner, Sri P.N. Saxena, learned Senior Advocate submitted that in the present election proceedings 146 members have participated whereas in the report of Committee dated 23.5.08 only 56 members were found to be genuine and valid. In his submission Sri Jagdishwar Singh Tomar had continuously been functioning as a Manager and thereafter Authorised Controller was appointed, therefore, there was no scope to induct new members and the election in question is unsustainable as it has not been held in accordance with the societies bye laws. He has also submitted that no objection has been filed against the report dated 23.5.08. In his submission the impugned order has been passed in accordance with law and it should not be interfered with because Sri Bhuri Singh has been member of the Committee.

8. I have heard learned counsel for the parties. Counsel for the parties has agreed for final disposal of the present writ petition, therefore, with the consent of the parties counsel, the matter is taken up for final disposal. After hearing counsel for the parties and perusing the record without discussing the other points involved in this case I find it appropriate to discuss the principle of breach of natural justice and bias. In case it is found that impugned decision is biased one and suffers from breach of principles of natural justice, the other points involved in this case need not be discussed.

9. It has not been disputed either by learned standing counsel or by Sri Saxena

that Sri Bhuri Singh, the present District Inspector of Schools in the capacity of associated District Inspector of Schools has participated in the inquiry and as a Chairman of the enquiry committee has submitted the report dated 23.5.08 in which 56 members were found to be genuine and valid and it has been made basis for passing the impugned order dated 08.06.09. It could also not be disputed by the learned counsel for the respondents that the election of the petitioner's institution was approved on 03.01.09 by the then District Inspector of Schools Smt. Indu Bala Ghosh and subsequently, on the instance of respondent no. 4 the present District Inspector of Schools has withdrawn the order dated 3.01.09 on 14.03.09. This order was stayed by this Court in Writ Petition No. 21427/09 and the direction was given to the District Inspector of Schools not to interfere in the functioning of the petitioner as a Manager of the institution. The special appeal against the said order was dismissed and the writ petition was allowed after quashing the order dated 14.03.09 passed by the District Inspector of Schools even then the present District Inspector of Schools who is member of the Regional Committee has recommended for appointment of the Authorised Controller and associated himself in the process of decision making body as member of the Committee and passed the impugned order. The Apex Court in the case of Amar Nath Chowdhary Vs. Braithwaite & Company Ltd & Others reported in J.T. 2002 V. 1 S.C. Page 156 while dealing such mater has found that this kind of order are not only biased but also amounts to have been passed in breach of principles of natural justice. In paragraphs 6 and 8, the Apex Court has observed as under:-.

(6).....Where an authority earlier had taken a decision, he is disqualified to sit in appeal against his own decision, as he already prejudged the matter otherwise, such an appeal would be termed an appeal from caesar to caesar and filing of an appeal would be an exercise in futility. In that view of the matter, in the present case, fair play demanded that Shri Krishnaswami, the then chairman-cum-managing director of the company ought not to have participated in the deliberations of the meeting of the board when the board heard and decided the appeal of the appellant.(para-6)

(8).....The board could have constituted a committee of the board/management or any officers of the company by excluding chairman-cum-managing director of the company and delegated any of its power, including the appellate power, to such a committee to eliminate any allegation of bias against such an appellate authority. It is therefore, not correct to contend that rule against bias is not available in the present case in view of doctrine of necessity'. We are , therefore, of the view that reliance of the doctrine of necessity in the present case is totally misplaced.(para 8)"

10. After going through the records I am of the view that the impugned order suffers from breach of principles of natural justice and biased one as Sri Bhuri Singh has associated himself throughout and vitiated the decision making process.

11. In view of that writ petition succeeds and is allowed. The order dated 24.06.09 passed by the Regional Joint

Director of Education, Meerut region, Meerut as well as the order dated 06.08.09 passed by the Regional Committee are hereby quashed. The matter is remitted back to the Regional Committee to pass a fresh order on the recall application of respondent no. 4 after hearing all concerned in accordance with law. It is also provided that while constituting the Regional Committee some other District Inspector of Schools of other district be made a member of the Committee and the Committee shall decide the matter expeditiously, if possible, within a period of three months from the date of receipt of certified copy of the order of this Court. It is further directed that in the meantime the petitioner shall be permitted to function as a Manager of the Committee of Management.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.08.2009

BEFORE
THE HON'BLE RAKESH SHARMA, J.

Civil Misc. Writ Petition No. 25657 of 2006
Alongwith
Civil Misc. Writ Petition No. 42771 of 2004

Constable 3461 Baliram Singh
...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri G.K. Singh
Sri V.K. Singh
Sri Pramod Kumar Pandey
Sri Satyendra Nath Srivastava
Sri S.K. Shukla

Counsel for the Respondents:
Sri A.C. Misra
Sri S.M. Haider Zaidi
S.C.

Constitution of India Art. 226-311 (2)- Dismissal order-petitioner being P.A.C. personal-being shocked with accidental death of his colleague-used un constitutional language against Senior-other P.A.C. personal who were also involved have been reinstated-held-discriminatory and the punishment of dismissal too harsh-order set-a side with all consequential entitle benefits.

Held: Para 17 & 20

In view of the above, it is amply clear that the departmental enquiry was not conducted fairly and only on the basis of evidence of Vikas Srivastava, Company Commander, who was also facing a criminal case relating to the same incident, the petitioners have been held guilty without any corroboration. The Enquiry Officer and the Punishing authority ought to have considered this aspect of the matter, which it did not.

Undoubtedly, the petitioners, being members of a disciplined force, have acted in an irresponsible manner, however, considering the totality of the circumstances, it would be appropriate that they may be awarded a minor penalty and not a major penalty, that is, removal or dismissal from service or reduction in rank. The petitioners' cases are covered by the judgments of the Hon'ble Apex Court cited above.

Case law discussed:
2007 SCCL.COM 1235, AIR 1983 SC 454, AIR 1992 SC 417, (1999) 8 SCC 582, (1998)9 SCC 666, (2005) 1 UPLBEC 276.

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

1. Since similar and common controversy is involved in these two writ petitions, both the writ petitions are being decided by this one and common judgment.

2. Heard Sarvasri G.K. Singh and V.K. Singh, learned counsel for the petitioners as well as learned Standing Counsel and perused the record.

3. Under challenge in these two petitions is an order of dismissal passed on 31st July, 2004 dismissing the petitioners from service and the other subsequent orders passed on 30th May, 2005 dismissing the appeal of the petitioner and the order dated 28.12.2005 by which the petitioner's revision was dismissed.

4. It emerges from the record that the petitioners, who were working as Constables in 35 Battalion in Provincial Armed Constabulary (hereinafter referred to as the PAC), were posted on security duty of Ram Janam Bhumi, Ayodhya, Faizabad with other PAC personnel. On 9th April, 2003, they were on the duty of the Watch Towers to keep a watch on the disputed premises. One Sri Rajesh Kumar Tiwari and other PAC personnel were also posted on the duty at Watch Tower No.12. Accidentally, he fell from the Watch Tower and died on the spot. When the news of accident and sudden death of a colleague Constable Rajesh Kumar Tiwari spread, the other Constables assembled at the spot. The PAC Constables, who were present on the spot, were shocked by the accident and on the death of their colleague. They became emotionally surcharged and wanted to talk to their Circle Officer before sending the dead body to mortuary. According to the PAC Constables present on duty, the superior Officers did not take proper care of the Watch Tower and the area surrounding it and adequate safety arrangements were not made on the Watch Tower. There was lack of safety measures as a result of which the PAC Constable had fallen from the Watch Tower and died.

5. Since a mob was gathered at the spot of accident, some Constables might have reacted and uttered improper words for the superior officers in the emotionally charged atmosphere. A preliminary enquiry was ordered and some of the officers were transferred immediately. On account of charges, a departmental enquiry was initiated against the petitioners also and they were put under suspension vide an order dated 11.4.2003. Chargesheets were also served on them on 11.7.2003 and 14.7.2003 to which they had submitted detailed replies on 28.7.2003 and 21.7.2003. The Enquiry Officer has submitted his report on 6.5.2004. After conclusion of the enquiry, show cause notices were issued against the petitioners on 15.5.2004, which was replied by the petitioner by submitting his explanation on 10.6.2004.

6. As per learned counsel for the petitioners, without considering detailed reply of the petitioners to the chargesheet, the petitioners were dismissed from service vide an order dated 31.7.2004. Their Appeals and revision were also dismissed by the appropriate authority without application of mind and without dealing with the defence taken by the petitioners.

7. Learned counsel for the petitioners has further submitted that four other Constables, who had been dismissed from service alongwith the petitioners, had approached the U.P. Public Services Tribunal challenging the order of dismissal, appellate and revisional order by filing Claim Petition Nos. 357/2005,

736/2005, 729/2005 and 653/2005. These claim petitions were decided by a common judgment of the U.P. Public Services Tribunal, rendered on 20.12.2007. The Tribunal had quashed the order of dismissal and directed the respondents to reinstate the four dismissed Constables. It is relevant to mention here that 13 Constables belonging to PAC establishment were dismissed from service in pursuance of a common proceeding out of which four similarly placed Constables have been reinstated pursuant to the judgment of the Tribunal. The petitioners may also be dealt with accordingly, taking into account the aforesaid judgment rendered by the U.P. Public Services Tribunal and the submissions put-forth in these writ petitions.

8. Learned counsel for the petitioners has assailed the orders of dismissal passed against the petitioners on the ground that a very harsh view has been taken in the matter and the orders of dismissal and punishment do not commensurate with the gravity of charges levelled against them. It is natural that due to death of a colleague, the atmosphere was highly surcharged with emotions and if any act was done by the petitioners in that atmosphere after seeing the dead body of their colleague, it could not be defined as misconduct and such act could have been pardoned taking into account past work, conduct and performance of the petitioners, which always remained satisfactory. The petitioners have not created any disturbance on the spot nor they had indulged in any such act of indiscipline, which may result in removal or dismissal from service.

9. It has been submitted by Sri G.K. Singh, learned counsel for the petitioners that the charges levelled against the petitioners were not at all proved from the materials on record. They were awarded with the punishment of dismissal from service only on the sole testimony of Vikas Srivastava, Company Commander. Vikas Srivastava's statement could not be believed as he himself was an accused in a criminal case relating to the same incident. It appears that in order to save himself, he named the petitioners and other Constables showing their involvement in the incident. The U.P. Public Services Tribunal has also taken note of these facts in its judgment rendered on 20.12.2007, a copy of which has been annexed as Annexure-13 to the writ petition, and directed for reinstatement of four Constables in service.

10. The departmental enquiry, was not conducted in accordance with the relevant Service Rules and the principles of natural justice were completely violated. A criminal case, under Section 147, 148, 149, 323, 427, 452 and 336 of the Indian Penal Code read with 7th Criminal Law Amendment Act and Section 6 of the U.P.P.A.C. Act and 3/4, Prevention of Damage to the Public Property Act was registered at Police Station Ram Janma Bhumi, Faizabad against the petitioners and other Constables. In the said criminal case, a final report was submitted on 10.8.2004 before the court of Additional Chief Judicial Magistrate, Faziabad. It was clearly mentioned in the Final Report that no concrete evidence was available against the petitioners and other Constables to prove the charges levelled against them in the chargehsheet, but on

the same charges, the petitioners have been dismissed from service. On this count also, the orders of dismissal passed against the petitioners are liable to be set aside. The appellate and the revisional authority did not deal with the submissions put forth by the petitioners and passed the orders with pre-determined mind dismissing the appeal and revision of the petitioners.

11. Learned Standing Counsel, appearing for the respondents, has resisted the motion. He has submitted that the petitioners, while being posted in the security duty at Ram Janma Bhoomi, Ayodhya, Faizabad had committed serious misconduct. They were involved in creating law and order problem at Ram Janma Bhoomi complex, along with their other colleagues when the dead body of late Constable Rajesh Kumar Tiwari was being taken to mortuary for post mortem. The petitioners and the other PAC personnel surrounded the vehicle and obstructed the movement of the vehicle which was carrying the dead body of the dead Constable to Faizabad mortuary for post mortem. Several PAC personnel alongwith the petitioners were involved in this incident and as such a departmental enquiry was ordered against them. A detailed chargesheet was issued against the petitioners to enable them to meet out the allegations levelled against them. The petitioners had submitted their reply, but failed to prove themselves to be innocent of the charges levelled against them. A show cause notice was issued to them and after conducting a detailed departmental enquiry in accordance with the relevant Rules of 1999, services of the petitioners were dismissed on 31.7.2004. The petitioners were members of a disciplined armed force, that is, the Provincial Armed Constabulary, but serious misconduct was committed by them at a sensitive place like Ram Janma Bhoomi, Ayodhya. The petitioners were afforded ample opportunity of hearing and were also permitted to lead their cases at all the stages in the departmental trial. There were documentary and oral evidence against them on the basis of which they were found guilty of the charges levelled against them. The appeals and the revisions of the petitioner were appropriately dealt with by the competent authorities and the same were rightly rejected in accordance with law by passing reasoned and speaking orders.

12. In rejoinder, Sri G.K. Singh, learned counsel for the petitioners, has submitted that the extreme punishments of dismissal from service have been awarded to the petitioners, which was disproportionate to the level of misconduct on the part of the petitioners. Similarly placed Constables, who had approached U.P. Public Services Tribunal, their Claim Petitions have been allowed as a result of which they have been reinstated in the services. Learned counsel for the petitioners has placed reliance on following judgments of the Hon'ble Apex Court as reported in 2007 SCCL.COM 1235, Vishwanath Vs. Union of India and others, AIR 1983 SC 454 Bharat Ram Vs. State of Himachal Pradesh and others, AIR 1992 SC 417, Ex- Naik Sardar Singh v. Union of India and others, (1999) 8 SCC 582, Hardwari Lal v. State of U.P., (1998)9 SCC 666, Ram Avatar Singh v. State Public Services Tribunal and of this Court reported in (2005) 1 UPLBEC 276, Atul Kumar v. U.P. Export Corporation Ltd., Lucknow and others in support of his case.

13. Learned counsel for the petitioners has reiterated that when the similarly placed persons have been reinstated, the petitioners' case also deserves to be reconsidered and be also given a fresh look. Further, only on the testimony of Vikas Srivastava, Company Commander, the services of the petitioners ought not to have been dismissed in such a way.

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

15. In the present case, it appears that a serious accident took place at Ram Janma Bhoomi Complex, Ayodhya, Faizabad on 9.4.2003 where the petitioners alongwith their other colleagues of PAC personnel had been deputed in the security duty on Watch Towers. One of the colleague of the petitioners, Constable Rajesh Kumar Tiwari, had fallen down from the Watch Tower and died on the spot. This incident has shocked the petitioners as well as other PAC personnel, who had gathered on the spot. It further appears that the petitioners and other PAC personnel/constables were shocked due to sudden death of their colleague. On seeing the dead body of their colleague, they became surcharged with emotions and anguished due to which the Constables must have reacted. The reaction, like stopping the dead body from immediately being taken away to mortuary and other actions might have happened, which have been defined as misconduct. Undoubtedly, they had acted in a very irresponsible manner, not expected of members of a disciplined armed force, but as has been observed by the Hon'ble Apex Court in the case of Vishwanath v. Union of India (supra), the conduct of the delinquent Police personnel must be seen in the background of the entire episode. In the instant case, the authorities have acted without looking into the entire background, the entire episode. As a result of the departmental enquiry, the petitioners (PAC Constables) were held guilty and were dismissed from service. The matter has not been seen in its entirety.

16. This Court has also perused the record. Statement of 16 witnesses were recorded in the departmental trial, but out of this lot, 14 witnesses had not adduced any evidence against the petitioners. Only on the basis of the statement of Vikas Srivastava, Company Commander, who had recorded his statement before the Enquiry Officer naming the petitioners and other Constables to be involved in demonstrations and Gherao of the vehicle carrying the dead body of late Constable Rajesh Kumar Tiwari, which action of the petitioners according to him created law and order problem on the spot, the petitioners were held guilty. The petitioners' case was that Vikas Srivastava, Company Commander, has wrongly implicated the petitioners and other PAC personnel (who were claimant-petitioners before the U.P. Public Services Tribunal in Claim Petition nos. 357/2005, 736/2005/ 729/2005 and 653/2005) in order to save himself from the criminal liability, as he was an accused in the criminal case registered by the Police in respect of the incident of death of Constable late Rajesh Kumar Tiwari. The petitioners and other PAC personnel have demanded cross-examination of Vikas Srivastava, Company Commander, the complainant and main witness, but this opportunity was not provided to the petitioners. On the basis of sole evidence

of Vikas Srivastava, Company Commander, alone, the enquiry officer held the petitioners guilty of the charges levelled against them. While holding the petitioners guilty of the charges levelled against them, the statements of the petitioners and their defence witnesses were excluded from consideration.

17. In view of the above, it is amply clear that the departmental enquiry was not conducted fairly and only on the basis of evidence of Vikas Srivastava, Company Commander, who was also facing a criminal case relating to the same incident, the petitioners have been held guilty without any corroboration. The Enquiry Officer and the Punishing authority ought to have considered this aspect of the matter, which it did not.

18. It is note-worthy that the Tribunal in its judgment has also taken note of this fact and has also recorded the opinion that the Deputy Inspector General of Police, Faizabad, and the Senior Superintendent of Police, Faizabad had made statements that the PAC personnel posted at the Ram Janma Bhoomi site at Ayodhya, Faizabad were disciplined and did not create any law and order problem in the town. This Court has also taken note of the fact that a large number of emotionally charged PAC personnel were present on the spot of incident. In a large crowd, having so many Constables and members of the Police force of different wings and the local people, it was difficult to establish the identity of an erring Police personnel. It appears that the most of the members of the PAC were held guilty of the alleged charges. The appropriate authority could have waited for the outcome of the criminal investigation in order to satisfy itself whether any law and order problem was, in fact, created by these PAC personnel or not. The veracity of statement of only Vikas Srivastava, Company Commander, cannot be believed as he himself was an accused in the criminal case and as such he tried to fasten the responsibility on the petitioners and other similarly placed Constables.

19. This Court has also taken note of the fact that extreme punishment of dismissal from service imposed on the petitioners seems to be shockingly disproportionate to the charges levelled against them. The Court has also taken note of the fact that the other PAC personnel, who were involved in the same incident have been reinstated in furtherance of the judgment and order passed by the U.P. Public Services Tribunal. The Tribunal had given a well considered, reasoned and speaking judgment in their favour taking note of the events, which took place on 9.4.2003 and the conduct of the PAC personnel.

20. Undoubtedly, the petitioners, being members of a disciplined force, have acted in an irresponsible manner, however, considering the totality of the circumstances, it would be appropriate that they may be awarded a minor penalty and not a major penalty, that is, removal or dismissal from service or reduction in rank. The petitioners' cases are covered by the judgments of the Hon'ble Apex Court cited above.

21. In view of the discussions made above, the writ petitions succeed and are allowed. The orders of dismissal dated 31.7.2004 and the orders dated 30.5.2005 and 28.12.2005 are quashed. The petitioners shall be immediately reinstated in the service and shall be entitled to all

the consequential benefits. However, it is open to the Disciplinary authority to pass fresh orders after initiating denovo disciplinary proceedings in accordance with law, if the Department deems it proper, but the petitioners shall not be awarded any major penalty of removal or dismissal from service or reduction in rank.

22. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.09.2009

BEFORE
THE HON'BLE SYED RAFAT ALAM, J.
THE HON'BLE KRISHNA MURARI, J.

Civil Misc. Writ Petition No. 2415 of 1995

Purvanchal University Jaunpur and another ...Petitioners
Versus
Shabana Khatoon and others ...Respondents

Counsel for the Petitioner:
Sri Ajit Kumar Singh
Sri Pankaj Mittal

Counsel for the Respondents:
SC

Constitution of India Art. 226-Order passed by consumer forum-activities of university in conducting examination-non commercial-students not came within the definition of consumer forum-any order passed by consumer forum-held-without jurisdiction.

Held: Para 9

In the instant case, admittedly, the University in discharge of its statutory function held the examination in which the petitioner appeared as examinee. No material has been brought on record to show that the University deliberately has declared the petitioner to have passed in Second Division to extend favour to some other student. On the other hand, the University has come up with the plea that it was on account of technical error in the computer and while computing the total marks of the examinee, took the percentage out of 1000 instead of 900 and, therefore, though the petitioner secured more than 60% marks out of 900, yet she has been shown to have secured less than 60% out of 1000 and thus, placed her in Second Division. In the facts and circumstances, we are satisfied with the explanation of the University that the mistake was not deliberate. Besides that the respondent no. 1, the examinee not being a 'consumer' as per definition under the Act and the University not being 'service provider', they do not come within the purview of the Act, hence the impugned order being without jurisdiction, cannot sustain.

Case law discussed:
Civil Appeal No. 3911 of 2003, decided on September 4, 2009, Writ Petition No. 29610 of 2007 - decided on 1.9.2008.

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

1. In the instant writ petition under Article 226 of the Constitution of India the petitioners have prayed for quashing the order of Consumer Protection Forum, Azamgarh dated 7.10.1994 and also the complaint dated 27.8.1993 made by respondent No. 1.

2. We have heard Sri Ajit Kumar Singh, learned counsel for the petitioners University and the learned standing counsel for respondent No. 3. No one has entered appearance on behalf of respondent Nos. 1 and 2 despite notice. In view of office report dated 4.1.2001 service of notice on the said respondents

is deemed to b sufficient under Rule 12, Explanation II of Chapter VIII of the Rules of the Court.

3. It appears that respondent no. 2 was a student of M.A. (Urdu) of Shibli National Post Graduate College, Kazi Gaus Alam, Azamgarh, affiliated to Purvanchal University, Jaunpur. She appeared in M.A. (Urdu) Examination from the aforesaid College and was shown to have passed with Second Division, though in the University records it was shown that she has obtained marks of First Division. It is submitted by the learned counsel for the University petitioner that as per University record she has secured 563 marks out of 900 but due to some technical error the Computer wrongly described that she has secured 563 marks out of 1000. Thus, the percentage of 563 marks out of 1000 being less than 60%, she was shown to have secured Second Division though the percentage should have been taken out of 900 which would come to more than 60%.

4. The respondent no. 1 being aggrieved approached the District Consumer Forum, Azamgarh by moving an application under Section 12 of the Consumer Protection Act on 27.8.1993. The District Consumer Forum by the impugned order dated 7.10.1994, awarded a compensation of Rs.2000/- along with a cost of Rs.200/-.Hence the aggrieved University preferred this petition.

5. Learned counsel for the University petitioner submitted that the mistake was not deliberate nor there was laches on the part of the University but the same has crept in due to technical error in the Computer and the University when learnt about it after notice from the Consumer Forum, immediately corrected the mark sheet given to respondent no. 2 showing that she has obtained 563 marks out of 900 and thus, she has cleared the examination with First Division. It is submitted that an objection regarding maintainability of the application under Section 12 of the Act before the Consumer Forum was also raised but the District Consumer Forum without deciding the same, allowed the application by the impugned order. Learned counsel further placed reliance on the judgment of the Apex Court in the case of Bihar School Examination Board Vs. Suresh Prasad Sinha in Civil Appeal No. 3911 of 2003, decided on September 4, 2009 and also on a Division Bench of this Court in Writ Petition No. 29610 of 2007 - Bundelkhand University, Jhansi Vs. Consumer Disputes Redressal Forum. It is submitted that the Consumer Forum respondent no. 3 ought to have first decided the objection raised by the petitioner about the maintainability of complaint before it but instead the respondent no. 3 passed the impugned order without considering the objection and thus, the same cannot sustain.

6. Nobody appeared on behalf of respondent no. 1, the claimant before the District Consumer Forum and respondent no. 2, Principal of the institution in question. The District Consumer Forum is represented by the Standing Counsel.

7. The question as to whether the activity of the University or the Examination Board can be presumed to be commercial activity and hence covered under the provisions of the Consumer Protection Act, is no more res integra and is concluded by the judgment of the Apex Court in the case of Bihar School

Examination Board Vs. Suresh Prasad Sinha (Supra), In the aforesaid case the District Consumer Forum awarded compensation of Rs.12000/- along with interest at the rate of 12% to the complainant Suresh Prasad Sinha and the appeal preferred by the Bihar School Examination Board before the State Consumer Disputes Redressal Commission and further appeal before the National Consumer Commission under Section 19 of the Act were dismissed. The matter was thereafter taken to the Apex Court and the issue involved was as to whether the statutory School Examination Board comes within the purview of Consumer Protection Act or not. Their Lordships after considering the definition of 'service' and 'deficiency' in clauses (o) and (g) of Section 2 of the Act and also looking to the fact that the Board was conducting the examination in discharge of its statutory function, held that the examinee or the student who undertakes examination is not a consumer and thus, the complaint against the Board or the examining body under the Act is not maintainable. The relevant part of the judgment is extracted herein below:

"The object of the Act is to cover in its net, services offered or rendered for a consideration. Any service rendered for a consideration is presumed to be a commercial activity in its broadest sense (including professional activity or quasi commercial activity). But the Act does not intended to cover discharge of a statutory function of examining whether a candidate is fit to be declared as having successfully completed a course by passing the examination. The fact that in the course of conduct of the examination, or evaluation of answer scripts or furnishing of mark sheets or certificates, there may be some negligence, omission or deficiency, does not convert the Board into a service provider for a consideration, nor convert the examinee into a consumer who can make a complaint under the Act. We are clearly of the view that the Board is not a 'service provider' and a student who takes an examination is not a 'consumer' and consequently, complaint under the Act will not be maintainable against the Board."

8. A Division Bench of this Court in Civil Misc. Writ Petition No. 29610 of 2007 - Bundelkhand University Jhansi Vs. Consumer Disputes Redressal Commission, decided on 1.9.2008, also took the similar view.

9. In the instant case, admittedly, the University in discharge of its statutory function held the examination in which the petitioner appeared as examinee. No material has been brought on record to show that the University deliberately has declared the petitioner to have passed in Second Division to extend favour to some other student. On the other hand, the University has come up with the plea that it was on account of technical error in the computer and while computing the total marks of the examinee, took the percentage out of 1000 instead of 900 and, therefore, though the petitioner secured more than 60% marks out of 900, yet she has been shown to have secured less than 60% out of 1000 and thus, placed her in Second Division. In the facts and circumstances, we are satisfied with the explanation of the University that the mistake was not deliberate. Besides that the respondent no. 1, the examinee not being a 'consumer' as per definition under the Act and the University not being

'service provider', they do not come within the purview of the Act, hence the impugned order being without jurisdiction, cannot sustain.

10. In the result, the writ petition succeeds and is hereby allowed. The impugned order dated 7.10.1994 passed by the District Consumer Forum, Azamgarh is accordingly, quashed. However, there shall be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.09.2009

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 9826 of 1990

Shree Prakash Mishra ...Petitioner
Versus
State of U.P. and another ...Respondents

Counsel for the Petitioner:
Sri D.S.M. Tripathi

Counsel for the Respondents:
Sri Srikant Shukla
S.C.

U.P. Regularisation of Adhoc Appointment (on post outside the purview of the Public Service Commission Rules 1979-Rule 4-Regularisation-appointed on post of Seasonal Clerk-extended from time to time-recommendation for creation of post-itself shows about working without post-illegibility contained in Rule 10 declared irrational held-in view of law laid down in Rakesh Kumar Saxena and Take Chand's case-no right for Regularisation.

Held: Para 6

It is well settled that in the absence of any post neither the question of regularisation nor permanence is permissible. Besides the appointment made for a fixed term or ad hoc appointment does not confer any right upon the incumbent concerned to claim regularisation unless it is provided under the statutory rules.

Case law discussed;
1989(1) UPLBEC 144, Civil Misc. Writ Petition No. 20398 of 1988, Special Appeal No. (7) of 2008, 2007(4) ADJ 186, 2001 (1) AWC 287 (SC), Civil Misc. Writ Petition No.52755 of 2002 decided on 8.8.2003, 2006 (2) AWC 1738.

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

1. List has been revised. None appeared for the petitioner. Learned Standing Counsel and Sri Srikant Shukla, Advocate for the respondents are present. However, I have perused the record.

2. The petitioner has sought the following reliefs:

"(i) issue a writ, order, rule or direction in the nature of writ of mandamus directing the respondent no. 2 to treat the services of the petitioner as permanent being regularised and not to interfere in the discharge of duty by the petitioner as clerk.
(ii) issue a writ, order, rule or direction in the nature of writ of mandamus directing the respondent no. 2 to pass formal order regularising the ad hoc services of the petitioner.
(iii) issue a writ, order, rule or direction in the nature of writ of mandamus directing the respondent no. 2 to pay the salary of the petitioner without any break alongwith arrears forthwith.
(iv) issue any other writ, order, rule or direction which this Hon'ble Court may

deem fit and proper in the circumstances of the case.
(v) award the cost of petition."

3. The entire claim of petitioner is that having worked for 240 days in a year he is entitled to be treated as regular in view of the law laid down by this Court in **Jai Kishan Vs. U.P. Cooperative Bank Ltd., 1989(1) UPLBEC 144**.

4. From the facts narrated in the writ petition, however, it appears that the petitioner was appointed as a seasonal clerk on ad hoc basis for a period of three months in U.P. State Food and Essential Commodities Corporation Ltd, (hereinafter referred to as the "Corporation") and posted at Sewarhi Purchase Centre. Thereafter he was further employed for another period of three months by order dated 15.01.1985 and so on. After amendment of the U.P. Regularisation of Ad hoc Appointments (on Posts Outside the Purview of the Public Service Commission), Rules 1979 (hereinafter referred to as the "1979 Rules") and extension of the cut off date as 01.10.1986 the petitioner claimed regularisation and it appears that the Deputy Finance Manager (Purchase) made a recommendation on 14.06.1998 for sanction of a post where against the petitioner may be considered for regularisation and thereafter this writ petition has been filed.

5. Admittedly, from the facts stated in the writ petition it is evident that there was no post available where against the petitioner could have been appointed or regularised or made permanent in service. It further appears that seeking a similar relief some other writ petitions were filed and one of such is **Civil Misc. Writ Petition No. 20398 of 1988, Rakesh Kumar Saxena Vs. U.P. State Food and Essential Commodities Corporation Ltd. and others**, which was dismissed by this Court vide judgement dated 26.10.2006 and the said judgement of Hon'ble Single Judge has been confirmed in **Special Appeal No. (7) of 2008, Tek Chand and others Vs. U.P. State Food and Essential Commodities Corporation Ltd. and others,** dismissed on 07.01.2008.

6. It is well settled that in the absence of any post neither the question of regularisation nor permanence is permissible. Besides the appointment made for a fixed term or ad hoc appointment does not confer any right upon the incumbent concerned to claim regularisation unless it is provided under the statutory rules. The judgement of this Court in **Jai Kishan (supra)** has no application to the facts of this case inasmuch as this aspect has already been considered by a Division Bench of this Court in **Dukhi Singh Vs. State of U.P. and others, 2007(4) ADJ 186** and it has been held that was a case decided in the absence of any defence taken by the respondents, and it has no universal application to other matters. The validity of cut off date prescribed under 1979 Rules has already been upheld by this Court in several cases. In **Subedar Singh and others v. District Judge, Mirzapur and another, 2001 (1) AWC 287 (SC)** the Hon'ble Apex Court confirmed the judgment of a Division Bench of this Court upholding the cut of date as 1.10.1986 fixed under the U.P. Regularization of Ad hoc Appointment (On Posts outside the Purview of U.P. Public Service Commission) Rules, 1979, as amended by Second (Amendment)

Rules, 1989 where this Court held as under:

".....One of the relevant considerations for regularisation is the length of the service rendered by the ad hoc employee ... but we see no rationale behind the view that all the employees even if they had put in only one day of service as ad hoc should have been made eligible to be considered and, therefore, the cut off date specified in Rule 10 is irrational. .... What should be the length of service is a matter of policy to be decided by the Rule making authority. Further, length of service is not the only criterion to be taken into consideration while making such decision. There can be no rule of thumb in such matters. It is not beyond the competence of the Rule making authority to limit eligibility to the employees who joined service as ad hoc employees upto a specified date..."

7. The judgment of this Court was confirmed by the Hon'ble Apex Court on merit, agreeing with the reasoning and the conclusion given in the judgment, as is apparent from para 3 of the judgment, in **Subedar Singh (supra)** wherein the Hon'ble Apex Court held as under:

"... The High Court has examined all the contentions by a detailed discussion of the relevant provisions of the Rules and we do not find infirmities with the reasoning and conclusions of the High Court in the impugned judgment. No rule, law or regulation, nor even any administrative order had been shown to us on the basis of which the appellants could claim the right of regularisation, in the aforesaid premises, we do not find any merit in any of these appeals which accordingly stands dismissed but in the circumstances, there will be no order as to costs."

8. Again the cut of date of 30.6.1998 provided in U.P. Regularization of Ad hoc Appointment (on posts outside the Purview of U.P. Public Service Commission) Rules, 1979, as amended in 2001 came up for consideration before a Hon'ble Single Judge in **Shivaji Singh and others v. High Court of Judicature at Allahabad and others, Civil Misc. Writ Petition No.52755 of 2002 decided on 8.8.2003** and the Hon'ble Single Judge upheld the aforesaid cut of date. The matter went in Special Appeal No.705 of 2003 and upholding the cut of date a Division Bench held as under:

"It further observed that the proposed amendment substituting the cut off date did not create two classes of persons. It created only one class of persons who possessed requisite qualification for regular appointment at the time of ah hoc appointment and had been directly appointed on ah hoc basis on or before 30.6.1998 and was continuing on service as such on 20.12.2001 and had further completed 3 years of service. From the scheme underlying the amendment only one class of person had been taken up for consideration for regularisation i.e. a person who filled all the 3 conditions given in Rule 4 of the Rules 2001."

9. Following the aforesaid two judgments another Division Bench of this Court in **Vinita Singh and others v. State of U.P. and others, 2006 (2) AWC 1738** has upheld the cut of date 30.6.1998 provided U.P. Regularization of Ad hoc Appointment (on posts within the Purview of U.P. Co-operative Institutional

Service Board) Regulation 1985, as amended vide notification dated 24.3.1993.

10. Besides, the matter is also covered by the decisions of this Court in **Rakesh Kumar Saxena (supra)** and **Tek Chand (supra).** The writ petition, therefore, lacks merit and is accordingly dismissed. Interim order, if any, stands vacated.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.09.2009

BEFORE
THE HON'BLE C.K. PRASAD,C. J.
THE HON'BLE R.K. AGRAWAL, J.
THE HON'BLE A.P. SAHI, J.
THE HON'BLE VIKRAM NATH, J
THE HON'BLE PANKAJ MITHAL, J

Second Appeal No. 284 of 1972

Shree Shri Ram Das...Plaintiff-Appellant
Versus
M/S Punjab Iron Stores and others
...Defendants-Respondents

Counsel for the Appellant:
Sri V.K.S. Chaudhary
Sri Satish Chandra Srivastava
Sri Sanjay Krishna

Counsel for the Respondents:
Sri S.P. Kesarwani
S.C.
ADV. General

Court fee Act-Section-5-Whether the provision of Court fee Act enhancing from time to time is ultravires? held-'No' reason discussed relying law laid down by Apex Court.

Held: Para-10 & 19

Rival submissions necessitate examination of the Constitutional Scheme. Article 245 of the Constitution of India confers on the Parliament power to make laws for the whole or any part of the territory of India and the legislature of the State for the whole or any part of the State. Article 246 of the Constitution gives exclusive power to the Parliament to make laws with respect to any of the matters enumerated in List-I (Union List), whereas the legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters in List II (State List) in the VIIth Schedule. Entry III of State List gives the State Legislature power to make laws inter alia in respect of fee taken in all Courts except the Supreme Court. In view of aforesaid, there is no difficulty in holding that the State Legislature has power to make law in respect of fee taken in all Courts except the Supreme Court.

Accordingly the answer of the question formulated for our decision is in the negative and it is held that the provisions of the Court Fees Act as amended from time to time in the State of Uttar Pradesh is not ultra vires the State Legislature.

Case law discussed:
AIR 1973 SC 724, AIR 1996 SC 676, JT 2001(2)SC 242

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

1. This appeal has come up for consideration before us on a reference made by a learned Single Judge by his order dated 18th of August 1975. The facts, which led the learned Single Judge to make reference, are as follows:-

2. The plaintiff is the appellant. The defendants are his sole selling agent and the plaintiff filed the suit for accounting against the defendants in respect of commission sale made by them at its sole

selling agent. The plaintiff valued the suit at Rs.15437.50 and on the suit so valued, paid an ad-valorem court fee of Rs.1208.25. The trial court decreed the suit with cost on 9th September 1958 but while decreeing so, directed that for the purpose of commission the account of sale effected by the defendants between 18th February 1951 to 15th February 1954, shall alone be considered. It further observed that defendants 3 to 5 shall not be personally liable for the decretal liability. Three first appeals were filed in this Court, one at the instance of the plaintiff, other filed by defendants 3 to 5 and third by the defendant firm and in each of these appeals, the appellants paid a court fee at Rs.1208.25 respectively on the memorandum of appeal. However, before these appeals could be taken up and disposed of by this Court, all were transferred to the court of District Judge, Kanpur in view of the provisions of U.P. Civil Law Amendment Act, 1970. On transfer, these appeals were heard by 1st Addl. District Judge, Kanpur, who by his judgment and decree dated 3rd of July 1972 dismissed the appeal of the plaintiff with cost and the appeal filed by defendants 3 to 5 was allowed. As regards, the appeal preferred by the defendant firm, the same was partly allowed and the decree of the trial court was modified.

3. Against aforesaid judgment and decree, plaintiff filed the present Second Appeal in this Court and he valued the appeal at Rs.15437.50 on which court fee of Rs. 1570.00 was payable. However, the appellant did not pay the court fee but stated that " no court fee is being paid, as the plaintiff appellant contends that the provisions of the Court Fees Act as amended in Uttar Pradesh from time to time are ultra vires the State Legislature, void and unenforceable inasmuch as the amount of fee prescribed by the provisions of that Act bears no relation to the cost of administering justice."

4. As the plea involved necessity of payment of court fee, a reference was made under Section 5 of the Court Fees Act, in which, the learned Single Judge observed as follows:

"It would, therefore, be necessary in this case to find out whether the ad-valorem court fees imposed amounts to a tax. It will, therefore, be necessary to see if there is some sort of a co-relation between the income from court fees and the expenditure incurred for the administration of justice in this State."

5. The learned Judge directed the matter to be laid before Hon'ble the Chief Justice for constituting a larger Bench for decision of the following question :-

"Whether the provisions of the Court-Fees Act as amended from time to time in the State of Uttar Pradesh are ultra vires of State Legislature."

6. Hon'ble the Chief Justice on a reference so made, directed the matter to be heard by a five Judges' Bench and that is how, the matter has been listed before us.

7. A brief history in regard to the levy of court fee deserves notice. Before arrival of British Rule in India, there was no levy on the party approaching the court for redressal of its grievance. Historian say that during Mughal Rule and prior thereto, there was no fee payable on administration of justice and it was totally

free. With the advent of British Rule in this country, regulations were framed imposing court fee and was nominal at the beginning. It was gradually increased to prevent institutions from frivolous and uncalled for litigations on an assumption that it shall act as deterrent to the abuse of the process of the Court. Many do not feel that levy of fee had put restraint on frivolous and groundless litigations. However, in recent times, the scale of fee has been raised to an extent which has given rise to feeling to many that it is no longer a fee but tax on the litigants. Caveators say that in modern times, expenditure on administration of justice has tremendously increased and therefore, in order to meet those expenditures, sharp increase in the court fee is the only answer. Without influenced by any of these considerations, we intend to consider the question involved on its own merit.

8. In fairness to Mr. Kunal Ravi Singh appearing on behalf of the appellant, he does not contend that State Legislature lacks competence to enact or make amendment in Court Fees Act. However, according to him the power to legislate in respect of fee cannot be used to raise revenue of the State. It is contended that the amount of court fee realized is not spent for the administration of justice and therefore, the fee partakes the character of tax and hence it is ultra vires.

9. Mr. S.P. Kesarwani, however, appearing on behalf of the State submits that the quid pro quo need not be established arithmetically and if it is found that its object is not to raise revenue for the general purposes of the State, the act of the legislature cannot be said to be ultra vires.

10. Rival submissions necessitate examination of the Constitutional Scheme. Article 245 of the Constitution of India confers on the Parliament power to make laws for the whole or any part of the territory of India and the legislature of the State for the whole or any part of the State. Article 246 of the Constitution gives exclusive power to the Parliament to make laws with respect to any of the matters enumerated in List-I (Union List), whereas the legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters in List II (State List) in the VIIth Schedule. Entry III of State List gives the State Legislature power to make laws inter alia in respect of fee taken in all Courts except the Supreme Court. In view of aforesaid, there is no difficulty in holding that the State Legislature has power to make law in respect of fee taken in all Courts except the Supreme Court.

11. As the State Legislature has been conferred with the power to make laws in respect of fees taken in all Courts, it cannot make law providing for charging tax.

12. In view of aforesaid, one is required to consider the distinction between fee and tax. Broadly speaking fees and taxes are both for the benefit of the State whereas the levy of fee must have co-relation with the expenditure for which it is collected. However, fee cannot be imposed for increasing the general revenue of the State. Further quid pro quo is not to be established with mathematical accuracy. This point is not res integra and had been the subject matter of decisions

of the Supreme Court in a large number of cases and hence does not require much deliberation. In the case of the Secretary, Government of Madras and another vs. Zenith Lamps and Electrical Limited, AIR 1973 SC 724 the Supreme Court held as follows:

"But even if the meaning is the same, what is "fees' in a particular case depends on the subject-matter in relation to which fees are imposed. In this case we are concerned with the administration of civil justice in a State. The fees must have relation to the administration of civil justice. While levying fees the appropriate legislature is competent to take into account all relevant factors, the value of the subject matter of the dispute, the various steps necessary in the prosecution of a suit or matter, the entire cost of the upkeep of courts and officers administering civil justice, the vexatious nature of a certain type of litigation and other relevant matters. It is free to levy a small fee in some cases, a large fee in others, subject of course to the provisions of Art. 14. But one thing the Legislature is not competent to do, and that is to make litigants contribute to the increase of general public revenue. In other words, it cannot tax litigation, and make litigations pay, say for road building or education or other beneficial schemes that a State may have. There must be a broad co-relationship with the fees collected and the cost of administration of civil justice."

13. Further while dealing with the issue, the Supreme Court in the case of Secretary to Government of Madras and another vs. P.R. Sriramulu and another, AIR 1996 SC 676 observed as follows:-

"15. As pointed out earlier with reference to the decisions of this Court the State enjoys the widest latitude where measure of economic regulations are concerned. These measures for fiscal and economic regulation involve an evaluation of diverse and quite often conflicting economic criteria, adjustment and balancing of various conflicting social and economic values and interests. It is for the State to decide what economic and social policy it should pursue. It is settled law that in view of the inherent complexity of the fiscal adjustments, the Courts give a large discretion to the legislature in the matter of its references of economic and social policies and effectuate the chosen system in all possible and reasonable ways. If two or more methods of adjustment of an economic measure are available, the legislative preference in favour of one of them cannot be questioned on the ground of lack of legislative wisdom or that the method adopted is not the best or there are better ways of adjusting the competing interests and the claims as the legislature possesses the greatest freedom in such areas. It is also well settled that lack of perfection in a legislative measure does not necessarily imply its constitutionality as no economic measure has so far been discovered which is free from all discriminatory impact and that in such a complex area in which no fool-proof device exists, the Court should be slow in imposing strict and rigorous standard of scrutiny by reason of which all local fiscal schemes may be subjected to criticism under the equal protection clause. Having regard to these settled principles the impugned judgment of the High Court could not be sustained."

"16.....it may be noted that factually it is neither possible nor practicable to give the exact break up of figures in regard to the expenses incurred under different heads and other departments of the Government in relation to the administration of civil justice."

14. In view of aforesaid enunciation of law in unequivocal terms, it is inexpedient to multiply the authority on this issue.

15. The next question, which requires consideration, is as to whether the State has to satisfy with mathematical precision that the fee collected is spent for the purpose it has been levied. In the present case, therefore, one has to see as to whether court fee levied is spent on administration of justice. One has to bear in mind that there has to be a broad co-relationship with the fee collected with the cost of administration of civil justice and the State cannot enrich itself or to secure revenue for general administration by levy of fee. It is neither possible nor practicable to give exact breakup of the figures in regard to the expenses in relation to the administration of justice. It is not the requirement of law that the collection raised through the fee should exactly tally with the expenditure. The amount raised through the fee and expenses incurred in providing the services is not to be examined with exactitude with a view to ascertain any accurate or arithmetical equivalence. The test that the State cannot enrich itself by levy of fees would be satisfied if there is a broad co-relation between the amount raised from fee and the expenses incurred in administration of justice.

16. The Supreme Court had occasion to consider this question in the case of B.S.E. Brokers Forum, Bombay & others vs. Securities & Exchsample head noteange Board of India and others JT 2001(2)SC 242 and on a review of its earlier decisions the law has been laid down in categorical terms as follows:

"While examining the reasonableness of the quantum of levy, the same will not be done with a view to find out whether there is a co-relatable quid pro quo to the quantum of levy, because as noticed hereinabove, the quid pro quo is not a condition precedent for the levy of a regulatory fee. Such examination will have to be made in the context of the levy being either excessive or unreasonable for the requirement of the authority for fulfilling its statutory obligations."

17. No facts and figures have been brought on record by the appellant so as to demonstrate that the fee levied is so high and intended to secure revenue for general administration. However, the State has placed on record the figures, which clearly show co-relationship with the amount of fee collected and the expenditure on administration of justice. Therefore, it cannot be said that in the garb of fee the impugned legislation provides for tax and thus it cannot be said to be a colourable exercise of power.

18. It is relevant here to state that a large number of authorities on the same issue have been brought to our notice but in order to avoid multiplicity of decisions, we have refrained from referring each one of them.

19. Accordingly the answer of the question formulated for our decision is in the negative and it is held that the provisions of the Court Fees Act as amended from time to time in the State of Uttar Pradesh is not ultra vires the State Legislature.

20. The appellant shall now deposit the court fee within four weeks from today, failing which appeal shall stand dismissed without further reference to the Bench.

21. If appellant so deposits the court fee, the appeal shall be placed for consideration on merit before the Judge in jurisdiction.

22. Reference is answered accordingly.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.08.2009

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Writ Petition No.12929 of 1988

Ram Asrey ...Petitioner
Versus
Collector, Banda & others ...Respondents

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

Counsel for the Respondents:
Sri Pradep Verma
S.C.

U.P. Zamindari Abolition & Land Reforms Rules 1956-Rule 285: Confirmation of auction sale- default repayment of loan-land of barrower in auction-confirmed by Sub Divisional Officer-held-confirmation order without jurisdiction-only the collector has power.

Held: Para 3 & 4:

Amongst the other grounds raised by the petitioner, this Court is confining the submission to only one ground, namely, that the sale could not have been confirmed by the Sub Divisional Officer and could only have been confirmed by the Collector, as contemplated under Rule 285-J of the U.P. Zamindari Abolition and Land Reforms Rules.

In Ajay Upadhayay vs. Collector, Ballia & Ors., 2008 (26) LCD 623, a Division Bench of this Court, after analysing various Government Orders, issued from time to time, held that the Sub Divisional Officer/the Deputy Collector had no power to confirm or set aside the sale, and was only given the power to conduct the same. The Division Bench held that the power to confirm or aside the sale only lies with the Collector, and to no other authority. Similar view was again held by another Division Bench in Ram Awadh Tiwari vs. Sudarshan Tiwari & Ors., 2008(6) ALJ 24.

Case law discussed:
2008 (26) LCD 623, 2008(6) ALJ 24.

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

1. Heard the learned counsel for the petitioner and the learned Standing Counsel for the respondents. List of hearing cases has been revised. The learned counsels for the private respondents are not present.

2. The petitioner is a landless labourer and took a loan from the bank for purchasing a pumping set. The petitioner committed a default and, accordingly, his land was attached and sold by public auction, in which, the bid of the respondent no. 5 was found to be the

highest. The auction sale was consequently confirmed by the Sub Divisional Officer, Banda, the respondent no.2, by its order dated 31st May, 1988. The petitioner, being aggrieved by the confirmation of the sale, has filed the present writ petition.

3. Amongst the other grounds raised by the petitioner, this Court is confining the submission to only one ground, namely, that the sale could not have been confirmed by the Sub Divisional Officer and could only have been confirmed by the Collector, as contemplated under Rule 285-J of the U.P. Zamindari Abolition and Land Reforms Rules.

4. In **Ajay Upadhayay vs. Collector, Ballia & Ors.,** 2008 (26) LCD 623, a Division Bench of this Court, after analysing various Government Orders, issued from time to time, held that the Sub Divisional Officer/the Deputy Collector had no power to confirm or set aside the sale, and was only given the power to conduct the same. The Division Bench held that the power to confirm or aside the sale only lies with the Collector, and to no other authority. Similar view was again held by another Division Bench in **Ram Awadh Tiwari vs. Sudarshan Tiwari & Ors.,** 2008(6) ALJ 24.

5. In View of the aforesaid, this Court is of the opinion that the order of the Sub Divisional Authority dated 31st May 1988 confirming the sale is patently illegal and cannot be sustained and is quashed. The writ petition is allowed. The matter is remanded to the Collector to pass a fresh order on the alleged auction, sale after hearing the objections raised by the petitioner.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.09.2009

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

Civil Misc. Writ Petition No. 35367 of 1992

Ashiq Hussain ...Petitioner
Versus
Commissioner and others ...Respondents

Counsel for the Petitioner:
Sri Subhash Kumar
Sri Subodh Kumar
Sri Udit Chandra
Sri Vijai Kumar Dixit

Counsel for the Respondents:
S.C.

Arms Act-Section-17- Cancellation of gun licence -on ground of Solitary involvement in Criminal Case-finalized on basis of compromise-offence under Section 107/117-not arises out of any public disturbance-inspite of 17 years no counter affidavit filed-held-cancellation order wholly illegal.

Held: Para-7

Having considered the matter on facts as well as in law, this Court finds that the impugned orders dated 20.12.1988 and 26.08.1992 are unsustainable and are accordingly set aside. The arms license of the petitioner shall stand restored.

Case law discussed:
1986 AWC 1166, 1966 SC 740, 2003 (1) ACJ 124

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

1. Heard Shri Udit Chandra holding brief of Shri Subhodh Kumar, learned

counsel for the petitioner and the learned standing counsel.

2. This writ petition arises out of proceedings under the Arms Act, whereby the licensing authority has cancelled the arms license of a D.B.B.L. gun of the petitioner.

3. The appeal filed by the petitioner has met the same fate. The ground for challenge is that there is only a single incident reported against the petitioner and in the said incident the matter was foreclosed after a compromise was entered into between the parties. Learned counsel for the petitioner contends that no ground of disturbing peace and tranquility was made out, and the question of involvement in one criminal case, against the petitioner, is a single incident of law and order, which could not have been made the basis for cancellation.

4. This petition was filed in the year 1992. Inspite of 17 years having lapsed, no counter affidavit has been filed on behalf of the State. In such a situation there is no option for this Court except to dispose of the writ petition finally at this stage. The writ petition was entertained and an interim order was passed on 23.09.1992, whereby the operation of the impugned order was directed to remain stayed for a certain period.

5. I have perused the order of the District Magistrate as also the order of the learned Commissioner. The charges levelled against the petitioner were confined only to the involvement of the petitioner in a solitary criminal case, which has already been settled out side Court and on the basis of the said compromise the petitioner has been discharged. Further the order under Sections 107/116 Cr.P.C. had lapsed keeping in view the period for such orders can be passed and as such in that view of the matter there was absolutely nothing existing so as to warrant the authority to proceed to cancel the license of the petitioner. A perusal of the impugned orders indicate that the petitioner had allegedly used his fire arm to threaten his opponents in a Gaon Sabha meeting. The said incident indicated herein above has already been compromised. In such matters this Court has to find out as to whether a license for a firearm can be allowed to be retained if there is an element of disturbance of public peace and tranquility. In the case of **Illam Singh Vs. Commissioner, Meerut Division, Meerut and others** reported in **1986 AWC 1166**, the distinction between law and order and public order has been explained. The ratio in the case of **Ram Manohar Lohia Vs. The State of Bihar and another** reported in **AIR 1966 SC 740** and followed later on in a large number of decisions by the Apex Court as well as this Court also explain the said distinction.

6. The mere involvement in a solitary criminal case cannot be a ground for cancellation of a firearm license as held by this Court in case of **Mohd. Haroon Vs. The District Magistrate, Siddharth Nagar** reported in **2003 (1) ACJ 124**, unless and until it is shown on the basis of material on record that there was grave danger to public law and order. In the instant case it is only a solitary incident, which was not arising out of any disturbance of public law and order, that has been made the basis for ordering cancellation.

7. Having considered the matter on facts as well as in law, this Court finds that the impugned orders dated 20.12.1988 and 26.08.1992 are unsustainable and are accordingly set aside. The arms license of the petitioner shall stand restored.

8. The writ petition stands allowed in the light of the aforesaid observations made herein above.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.09.2009

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No.71098 of 2006

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

Counsel for the Petitioner:
Sri G.P. Pal
Sri S.C. Dwivedi

Counsel for the Respondents:
Sri Q.H. Siddiqui
S.C.

Civil Services Regulation-424- Qualifying period for pension-petitioner worked from 1963 to 1997 as Seasonal Collection peon-substantive appointment given on 31.1.96. retired on 28.02.05-working of petitioner on substantive basis less than 10 years-disentitled the petitioner from pensionary benefits-case relied by petitioner quite distinguishable-working on temporary capacity can not be equated with seasonal working.

Held: Para-7

The provisions of Civil Service Regulations have been held sub-served to the statutory provision contained in Fundamental Rule 56 which was substituted by Legislative Act, i.e., U.P. Act No. 24 of 1975 only to the extent the regulations inconsistent with the legislative provision would be inoperative. This Court laid down that the provisions of Civil Service Regulations i.e., in respect to Article 361(1) (b), the word "substantive" and "permanent" is redundant since after the amendment made in Fundamental Rule 56 even a temporary Government was entitled for pension and, therefore, temporary service was held to be qualifying service for pension but rest of the provision continued to be valid and operative. A seasonal employee, cannot be equated with a temporary employee. This Court has not been shown any provision where under even a seasonal employee is entitled for pension.

Case law discussed:
2006(1) ESC 611, 1983 (1) SCC 305, 1989 ACJ 337.

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

1. Heard Sri G.P. Pal, learned counsel for the petitioner and learned Standing Counsel for the respondents.

2. It is not in dispute that the petitioner was engaged as Seasonal Collection Peon on 13.06.1963, regularised as Collection Peon on 31.01.1996, confirmed on the post of Collection Peon on 04.09.2000, attained the age of superannuation on 28.02.2005 and retired from the said post. Considering his qualifying service of less than 10 years, the respondents have not paid any pension to him hence this writ petition. Reliance is placed by learned counsel for the petitioner on a Division Bench decision of this Court in Board of

Revenue and others Vs. Prasidh Narain Upadhyay, **2006(1) ESC 611**.

3. However, having heard learned counsel for the petitioner and perusing the record, I do not find any merit in the writ petition.

4. It is no doubt true that pension being deferred wages, as held by Hon'ble Apex Court in D.S. Nakara Vs. Union of India **1983 (1) SCC 305**, is not a bounty but right but simultaneously it is also true that pension when payable is governed by the statuary rules or the statute and in case the rules do not provide for the same it cannot be claimed at all. The petitioner from 1963 to January, 1996 remained a Seasonal Collection Peon and only on 31.01.1996 he was appointed against a substantive vacancy, kept on one year probation and was appointed in pay scale of Rs. 750-940 as Collection Peon. After completion of period of probation vide order dated 04.09.2000 he was also confirmed on the post of Collection Peon. He retired on 28.02.2005 after attaining the age of superannuation i.e., 60 years as provided under Fundamental Rule 56.

5. The submission of learned counsel for the petitioner that in Prasidh Narain Upadhyay (supra) also the incumbent was a Seasonal Collection Peon and was held to be entitled for pensionary benefits taking into account his service rendered as Seasonal Collection Peon as qualifying service is not correct inasmuch as in the said case the Board of Revenue which had filed an intra Court appeal before the Division Bench has taken a plea that the employee was not substantively appointed and confirmed on the post of Collection Peon but had throughout worked as Seasonal Collection Peon which fact was not found correct either by Hon'ble Single Judge or by the Division Bench as is evident from para 5 of the judgement which is reproduced as under:

"5. From the record it is not disputed that the respondent has worked as Collection Peon since 10.2.1962 till 31st July, 1999 when he attained the age of superannuation on attaining 60 years of age and was retired from service (except of notional break of three months in the year 1989). Thus, apparently the respondent worked in the service of the appellants for almost more than 37 years. The appellants although submitted that the respondent was employed as Seasonal Collection Peon but the Hon'ble Single Judge on the basis of the perusal of the service book of the respondent has found that the employment of the petitioner-respondent has been mentioned as Collection Peon (Temporary) but subsequently in the service book it has been mentioned that he is working as Seasonal Collection Peon. The entry of initial appointment of the petitioner-respondent as temporary Collection Peon is not disputed. That being so, it is not possible to assume as to how the respondent has been shown as Seasonal Collection Peon in the subsequent part of the service book. The appellants could not explain this aspect even in the present appeal, although in para-7 of the affidavit they have admitted that in the 2nd column of the service book, a formal entry "temporary" of the service of the respondent is mentioned. It is also mentioned that the notice of retirement dated 5.5.1999 filed as Annexure-2 to the paper book of the appeal shows that the designation of the petitioner-respondent has been shown as Sangrah Chaprasi

(Collection Peon) and not as a Seasonal Collection Peon, i.e. Samyik Sangrah Chaprasi. The order passed on the petitioner-respondent's representation by the appellants also shows that in the year 1996 the appellants recommended the petitioner-respondent for regularization to the Board of Revenue but the matter remained pending for years together and no order could be issued due to inaction on the part of the Board of Revenue and in the meantime the respondents attained the age of superannuation on 31.7.1999."

6. After having recorded a finding that he was a temporary employee since very beginning and not a seasonal one, the only question which was considered in that case whether mere non-confirmation of the employee would be a sufficient reason to deny him pension when he has worked for about 37 years as temporary employee. This question was considered by the court in the light of the amendment made in Fundamental Rule 56 read with Article 424 Chapter 18 of Civil Service Regulations, and, as interpreted by a Division Bench of this Court in Dr. Hari Shankar Asopa Vs. State of U.P. and others, 1989 ACJ 337 and it was held that by amendment in Fundamental Rule 56 even a temporary Government servant was allowed to retire and Clause (e) thereof provide for retiring pension to all such persons meaning thereby the same would also include a temporary Government servant. This Court did not accept the contention that even a Seasonal Collection Peon would be entitled for pensionary benefits. In fact in Prasidh Narain Upadhyay (supra), objection about the status of the employee being seasonal was negatived, as is also find support from para 16 of the said judgment where the Division Bench took the following view:

"16. Learned counsel for the appellants further submitted that since in the service book, the petitioner-respondent was also shown as Seasonal Collection Peon and, therefore, the mention of word "temporary" as his initial appointment will not make any difference. We do not agree. The contention of the appellants that the petitioner-respondent was a Seasonal Collection Peon and his engagement and post was extended from time to time by the Commissioner is totally unsubstantiated, as nothing has been brought on record to substantiate this plea. Even otherwise the continuous working of the petitioner-respondent for more than 37 years cannot be ignored on the basis of a vague and unsubstantiated plea sought to be raised by the appellants. The statutory right of the petitioner-respondent flowing by rendering service for such a long service, cannot be brushed aside lightly."

7. The provisions of Civil Service Regulations have been held sub-served to the statutory provision contained in Fundamental Rule 56 which was substituted by Legislative Act, i.e., U.P. Act No. 24 of 1975 only to the extent the regulations inconsistent with the legislative provision would be inoperative. This Court laid down that the provisions of Civil Service Regulations i.e., in respect to Article 361(1) (b), the word "substantive" and "permanent" is redundant since after the amendment made in Fundamental Rule 56 even a temporary Government was entitled for pension and, therefore, temporary service was held to be qualifying service for pension but rest of the provision

continued to be valid and operative. A seasonal employee, cannot be equated with a temporary employee. This Court has not been shown any provision where under even a seasonal employee is entitled for pension.

8. Consistent with the provisions of Civil Service Regulations and Fundamental Rule 56 several Government Orders were issued from time to time and by the subsequent Government Order dated 01.04.1989 it was clarified that a temporary servant who has completed 10 years of service would also be entitled for pension. No provision has been shown to this Court which provide otherwise.

9. Admittedly, since the petitioner has not rendered qualifying service to the extent provided in the Rules entitling him for pension after his status as Seasonal Collection Peon ceased, I do not find any reason to interfere with the order impugned in this writ petition. The writ petition lacks merit and is accordingly dismissed. No costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.09.2009

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

Civil Misc. Writ Petition No. 38806 of 2009

Smt. Anita Devi ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri R.N. Singh
Sri Nipun Singh
Counsel for the Respondents:
Sri Anurag Sharma
Sri Satish Chaturvedi (AAG)
Sri Neeraj Upadhyay (Addl. C.S.C.)

U.P. Kshetra Panchayat and Zila Panchayat (Removal & Pramukh and Up-Pramuks, Chairman and Vice-Chairman) Enquiry Rules-1997-Rule 5, 6 a ceasure of financial and administrative power of Pramukh-Principal secretary by exercising power under Rule 3 appointed the District Magistrate as enquiry officer-who on its time based upon enquiry conducted by A.D.M.-forwarded the earlier report to the Govt.-on that basis order passed-challenge made on ground District Magistrate instead of himself conducting enquiry committed great illegality-petitioner not making payment of development work labor employed under scheme also not paid-quality of brick also very poor-as her husband was supplier-No prejudice shown in the enquiry-requires no interference.

Held: Para 18

We have gone through the enquiry report dated 25.7.2008 and the reasons given by the State Government for initiating the regular enquiry and to suspend the financial and administrative powers of the petitioner. We do not find that the State Government has committed any error on facts or in law in exercise of its discretion. The petitioner was not making payments for development works even after the supply of material. The labourers employed in the schemes were not paid for almost three months. It was prima facie found that the petitioner was exercising the pressure for making estimates of fresh projects and for making payments of the bricks, the quality of which was doubtful, supplied by her husband's brick field and that her husband had received the payments by the cheques signed by her on behalf of the firm. The impugned order does not require any interference of the Court.
Case law discussed:

AIR 1975 SC 915, (2005) 8 SCC 340, 2003 (4) AWC 3289.

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

1. Heard Shri R.N. Singh, Senior Advocate assisted by Shri Nipun Singh for the petitioner. Shri Shri Satish Chaturvedi, AAG assisted by Shri Neeraj Upadhyay, Addl. Chief Standing Counsel appears for the respondents.

2. The affidavits have been exchanged. With the consent of parties, we heard the matter.

3. This writ petition is directed against the order dated 17.7.2009 passed by the Principal Secretary, Panchayati Raj, Anubhag-2 appointing the District Magistrate, Muzaffar Nagar as enquiry officer under Rule 5 of the U.P. Kshetra Panchayat and Zila Panchayat (Removal of Pramukhs, Up Pramukhs, Chairman and Vice Chairman) Enquiry Rules, 1997. The State Government has by the same order in exercise of its powers under the proviso to Section 16 of the U.P. Kshetra Panchayat and Zila Panchayat Adhiniyam directed that until Smt. Anita Devi, Pramukh, Kshetra Panchayat, Shahpur, Muzaffarnagar- the petitioner is exonerated in the final enquiry, she will not exercise the financial and administrative powers attached to the post.

4. Briefly stated the facts giving rise to this writ petition are that the petitioner was elected as Pramukh Kshetra Panchayat, Shahpur, Muzaffarnagar on 27.2.2006, with 43 out of 81 votes in her favour. She is BAMS doctor and belongs to Rashtriya Lokdal Party and has supported the members of the Rashtriya Lokdal in the Lok Sabha and Vidhan Sabha elections. She was a member of Zila Panchayat, Muzaffar Nagar prior to her elections as Pramukh. It is stated by her that after Shri Yograj Singh was elected as Member of Legislative Assembly from Khatauli Constituency as a candidate of Bahujan Samaj Party and became the Minister of Krishi Shiksha & Anusandhan Vibhag, he started harassing the petitioner. In order to remove her, various complaints were arranged by him to be sent to the District Magistrate, Muzaffar Nagar by the members of Kshetra Panchayat. These complaints did not fulfill the mandatory conditions of filing of affidavits of all the persons from whom the complainants claims to have received information and were not verified before a notary. The complaints also did not enclose all the documents in their possession. Rule 3 of the U.P. Kshetra Panchayat and Zila Panchayat (Removal of Pramukhs, Up Pramukhs, Adhyaksh and Upadhyaksh) Enquiry Rules, 1997 (in short Enquiry Rules, 1997) provides that the complaints shall be verified in the manner laid down in the CPC, 1908 with three copies to be submitted by the complainant. A show cause notice was issued to the petitioner by the Adl. District Magistrate (Administration), Muzaffar Nagar to give reply to the allegations made against her by the complainants. She gave her reply on 17.5.2008. A detailed enquiry report was submitted by the Addl. District Magistrate (Admn.) to the District Magistrate on 25.7.2008 enclosing all the material collected by him.

5. Shri R.N. Singh submits that the District Magistrate or the Addl. District Magistrate did not have power to cause an enquiry in as much as Rule 4 of the Rules

of 1997 provides that the complaints have to be addressed to the State Government and that preliminary enquiry can be directed only under the orders of the State Government. Sub Rule-2 provides the report to be submitted to the State Government within a fortnight. The petitioner, however, submitted a reply on 23.6.2008. The Addl. District Magistrate (Admn.), Muzaffar Nagar conducted the enquiry and submitted a report to the District Magistrate on 25.7.2008. In the meantime, some members of the Kshetra Panchayat initiated the proceedings for moving a no confidence motion against the petitioner on which the Addl. District Magistrate (Admn.), Muzaffar Nagar fixed 16.6.2008 for the meeting. The motion could not be carried out as the complainant failed to muster the requisite prescribed majority in support of the motion.

6. It is stated that after failing in their attempt to remove the petitioner by no confidence motion the same persons sent complaints addressed to the State Government to remove the petitioner. Before making the complaints the enquiry report dated 25.7.2008 was made the basis to suspend the service of Junior Engineer Shri Suresh Verma, Rural Engineering Services, U.P. The State Government entertained the complaints; against the petitioner and directed the District Magistrate to make a preliminary enquiry into the allegations. The District Magistrate instead of holding a fresh preliminary enquiry relied upon the same enquiry report of the Addl. District Magistrate (Admn.), Muzaffarnagar dated 25.7.2008 and forwarded the same to the State Government. By the impugned order dated 17th July, 2009, giving rise to this writ petition the State Government has prima facie found the allegations on the basis of the enquiry report dated 12.6.2008 to be established and has while issuing the show cause notice to the petitioner stopped her from exercising the administrative and financial powers.

7. Shri R.N. Singh, Sr. Advocate submits that the procedure provided under the Enquiry Rules, 1997 is mandatory. The District Magistrate was not authorised to receive the complaints directly and to cause an enquiry through the Addl. District Magistrate. The District Magistrate did not act upon enquiry report. But when the State Government directed him to cause an enquiry, he has instead of holding a fresh preliminary enquiry relied upon the same enquiry report. The District Magistrate has not made any fresh enquiry into the allegations and thus the material relied upon by the State Government was not valid. He would submit that the respondents have put the cart before the horse. The preliminary enquiry was to be initiated after the State Government had taken notice to the allegations. Even if the allegations and material is the same, the District Magistrate was obliged under the Enquiry Rules of 1997 to hold a fresh enquiry. He would further submit that the allegations are not such, which may result into the removal of the petitioner and that in any case, prima facie, there is no financial or other irregularity alleged to be established by the material available on record to take the drastic action to suspend the financial and administrative powers of the petitioner as an elected Block Pramukh.

8. Shri R.N. Singh has relied upon **Ramchandra Keshav Adke (dead) by LRs Vs. Govind Joti Chavare, AIR**

1975 SC 915 to submit that where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all and all other methods of performance are necessarily forbidden. The principle has to be recognised not in vacuum but with the object and purpose for which such powers are vested in the statutory authorities.

9. It is submitted that three allegations were made against the petitioner. Firstly it was alleged that the petitioner did not sign the cheques for the payment of the material in the construction works affecting the development of the block. Secondly it was alleged that the petitioner is creating such circumstances, which have adversely affected the various schemes in as much as she has signed one cheque on 21.9.2007 and 4 cheques on 15.10.2007 after a delay of about 3 to 4 months. Thirdly it was stated that in the employment schemes, the labourers were not paid their dues in time. She did not have any effective control over the officers and employees of the block.

10. Shri R.N. Singh submits that the enquiry report did not prove these allegations. The State Government found the receipt of the cheque issued to M/s Neelkant Brick Field Supply, Garhi, Bahadurpur by the petitioner's husband to be a serious financial irregularity and has made the incident as the foundation of the order. The petitioner's husband had supplied the bricks to the agency. The collection of cheques by the petitioner's husband for the supplies could not be a ground to form any opinion against the petitioner. There are no allegations of misappropriation or embezzlement of funds.

11. Shri Satish Chaturvedi, Addl. Advocate General submits that initially the complaints made to the District Magistrate were subjected to a preliminary enquiry through the Addl. District Magistrate (Admn.). The District Magistrate, however, did not take any action on the report. The complaints were, thereafter, made to the State Government making serious allegations against the petitioner. The State Government forwarded the matter to the District Magistrate to cause an enquiry. The District Magistrate found that the same allegations were subject matter of earlier enquiry and forwarded the report of the Addl. District Magistrate dated 02.09.2008. The object of forwarding the complaint is to make a preliminary enquiry. If the same allegations were subject matter of an earlier enquiry the District Magistrate did not commit any illegality in forwarding the report available in his office to the State government. The object of the preliminary enqiry is to verify the truth of the assertions and collect the material to support the findings. If such material is already available with the District Magistrate, he could have relied upon it to report to the State Government. There were serious allegations against the petitioner. Her husband was supplying the bricks for the development works of the Kshetra Panchayat of which the petitioner is the Pramukh.

12. Shri Chaturvedi submits that the Addl. District Magistrate had caused a detailed enquiry into the allegations. On charge No.1 it was found that the petitioner was delaying the signing of the cheques for oblique purposes. The cheques prepared in March, 2007; May, 2007 and June, 2007 was not signed by

her. The delay affected the development work. The villagers engaged in the employment schemes was not paid their daily wages for almost three months, causing irreparable hardship and serious injustice to them. On charge No.2 the Addl. District Magistrate found that the defence of the petitioner that she delayed the signing of the cheque for verification of the work was not valid. She had not given any directions to her subordinate officers and employees for verification of alleged irregularities. On charge No.3 once again it was found that payment to the suppliers and the workmen for cleaning the irrigation canals, drains and beautification of the block were not made for almost six months. Infact she had refused to sign the cheque for oblique purposes and had delayed the payment of about 12 lacs for which government orders provided for payment within two weeks. The details of the work done and the delay in payments is given in detail in the report. The Addl. District Magistrate further found in his enquiry that M/s Neelkant Brick Field Supply was a firm set up as a grant by the petitioner's husband for supplying bricks. The petitioner denied that her husband had supplied the bricks but that the material on record proved that cheques were issued in the name of M/s Neelkant Brick Field Supply. M/s Neelkant Brick Field Supply is a firm of the petitioner husband. The payments were made to the extent of Rs.10,40,000/-. The allegation Nos.4 and 5 for repair of four 'Kachcha Road' by 'kharanjas' for which no estimates were prepared and supply of pilli bricks by the petitioner husband and for withholding other payments for preparing bills for payment of these bricks supply by petitioner husband was also found to be prima facie established.

13. Learned Addl. Advocate General submits that all the allegations made against the petitioner, that her husband was exercising undue pressure for preparing false estimates and for making payments of the bricks supplied by him, for which the cheques were delayed and were ultimately signed by the petitioner were established. The larger enquiry by the District Magistrate will further confirm these facts.

14. The object and purpose of the preliminary enquiry is to collect material to verify the allegations made against the elected representative of zila panchayat and kshetra panchayat. It is not necessary to give an opportunity of hearing to the person as the enquiry is only a fact finding enquiry. The question whether at this stage any opportunity to be given, if financial and administrative powers are to be ceased, has been referred by this Court to the Larger Bench. In this case, however, the Addl. Distt. Magistrate in his preliminary enquiry had given a show cause notice to the petitioner and has considered her reply. He made a thorough enquiry and found sufficient material against her to find the allegations to be prima facie established. These findings will be the subject matter of the regular enquiry.

15. The allegations made in the affidavit of the complainant to the State Government were the same, which were earlier made to the District Magistrate. The enquiry report of the Addl. Distt. Magistrate after giving an opportunity to the petitioner was available on record. The satisfaction of the District Magistrate that there was sufficient material collected in the report, after giving the opportunity to the petitioner did not require any fresh

enquiry to be made in the matter. The petitioner did not suffer any prejudice at all and was rather given a show cause notice and was associated with the preliminary enquiry held by the Addl. District Magistrate. The rules mandate that preliminary enquiry should be held and that there should be sufficient material to initiate final enquiry.

16. In **Dayandeo Ganpat Jadhav Vs. Madhav Vitthal Bhasker, (2005) 8 SCC 340** the Supreme Court after noticing the judgment in Rama Chandra Keshav Adke (Supra) observed in para 31 of the report that if the requisite procedure is followed by informing the person of his rights and that he was unwilling to purchase the land and surrender his tenancy, the procedure was followed. In substance the Supreme Court held that where the person was fully aware of his rights and was given repeated opportunities to purchase the land and surrender his tenancy the rules were substantially followed. The administrative law has developed the doctrine of 'prejudice' to override the principle of strict and blind adherence to the procedure in the rules. If the substantial compliance of the rules is established and no prejudice is caused to the person, the administrative action cannot be declared to be invalid merely on the ground that the rules were not strictly followed.

17. In **Mukesh Rajput Vs. State of U.P. & Ors., 2003 (4) AWC 3289** this Court has held that where the petitioner was provided all the documents in the preliminary enquiry and had full knowledge of the enquiry proceedings, the decision taken by the State Government on the material collected on the allegations, which are serious in nature would not require interference of the Court.

18. We have gone through the enquiry report dated 25.7.2008 and the reasons given by the State Government for initiating the regular enqiry and to suspend the financial and administrative powers of the petitioner. We do not find that the State Government has committed any error on facts or in law in exercise of its discretion. The petitioner was not making payments for development works even after the supply of material. The labourers employed in the schemes were not paid for almost three months. It was prima facie found that the petitioner was exercising the pressure for making estimates of fresh projects and for making payments of the bricks, the quality of which was doubtful, supplied by her husband's brick field and that her husband had received the payments by the cheques signed by her on behalf of the firm. The impugned order does not require any interference of the Court.

19. The writ petition is dismissed.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 07.09.2009

BEFORE
THE ARVIND KUMAR TRIPATHI, J.

Criminal Misc. Application No. 22022 of 2009

Ali Mohammad Hussain ...Petitioner
Versus
State of U.P. and another ...Respondent

Counsel for the Petitioner:
Sri Jai Singh Yadav

Counsel for the Respondent:
A.G.A.

Code of Criminal Procedure Section-202- Summon order in complaint case- without examining witnesses under Section 202 of the Code-examining witnesses is sole discretion and satisfaction of Magistrate-No requirement of examining the witness as trail of Case-held-provision of Section 202 not violated-order passed by Magistrate justified-However considering the growing age- direction for interim bail issued.

Held: Para 5

If there was material and magistrate after satisfaction issued summons there is no illegality in proceeding. At this stage the evidence will not be examined like trial. Only this much has to be considered whether prima facie offence is disclosed or not. Hence there is no violation of provision of Section 202 Cr.P.C. The offence was not exclusively triable by Session Judge. Hence unless it is found by the magistrate that the offence was exclusively triable by Magistrate, it is not required to examine all the witnesses.

Case law discussed:
1989 AWC, page 604, 2004(57) ALR 390, 2009(2) Crime 4 SC.

(Delivered by Hon'ble Arvind Kumar Tripathi, J.)

1. This Criminal Misc. Application under Section 482 Cr.P.C. has been filed with the prayer to allow this petition and to quash the proceeding in complaint case no. 3890 of 2000, under Sections 420,120B IPC, P.S. Brahmpuri, District-Meerut.

2. Heard learned counsel for the applicant and learned A.G.A. and perused the record.

3. Learned counsel for the applicant submitted that the list of witnesses was given but the witnesses were required to be examined under section 202 Cr.P.C. It was mandatory under Section 202(b) Cr.P.C.. He also contended that, it is a business transaction and no offence is made out under Section 420 and 120B IPC. There was no evidence regarding forgery and conspiracy hence the summoning order as well as the entire proceeding is liable to be quashed. He has relied upon the judgment of the Single Bench of this Court in case of R.K. Kothari and others Vs. Messrs Joshi Pharma and another reported in 1989 AWC, page 604. In the aforesaid case, it was held that if the allegation simply disclose a civil liability and do not constitute any offence and there it would be no criminal liability. It would not be criminal breach of trust unless there is some mensrea of criminal intention.

Second case he relied is case of Mohammad Umar and others Vs. State of U.P. and another reported in the 2006 (3) Allahabad Law Journal 281. In the aforesaid case, it was held the Magistrate did not follow the procedure laid down under Section 202 Cr.P.C. and did not record any statement under Section 202 Cr.P.C. Only the statement was recorded of the complaint under Section 200 Cr.P.C. Hence non observation of Section 202 Cr.P.C. by the magistrate renders summoning order illegal. The aforesaid case was under section 364 IPC triable by the Session Court. In that case the prosecution was required to examine all the witnesses under Section 202(2) Cr.P.C. proviso. Hence, it is not applicable in the present case.

4. He also placed reliance on the case of Mohammad Atullah Vs. Ram Saran Mahto, reported in A.I.R. 1981

Supreme Court, page 1155. In the aforesaid case, it was held that the magistrate directed for investigating in complaint case under Section 202 Cr.P.C. The investigation report did not disclose any additional material, hence it was held that taking of the cognizance and issuing process was not proper. The aforesaid case is also not applicable. In the present case there was no direction under Section 202 Cr.P.C. for inquiry or investigation by the police.

5. Under the provision of Section 202(1)(b), when the complaint was filed, as per provision unless the complainant and the witness present, if any, have been examined under Section 200 Cr.P.C., the court will not proceed against the accused. In the present case the applicant appeared before the court, but witnesses were not produced hence they were not examined by the magistrate. Merely the witness were mentioned in the complaint, they will not be examined. Hence, if witnesses were not present, there was no question to examine unless the magistrate finds it necessary. Normally the statement of witnesses are recorded under Section 202 Cr.P.C. before issuing summons, but this is satisfaction of the magistrate. If there was material and magistrate after satisfaction issued summons there is no illegality in proceeding. At this stage the evidence will not be examined like trial. Only this much has to be considered whether prima facie offence is disclosed or not. Hence there is no violation of provision of Section 202 Cr.P.C. The offence was not exclusively triable by Session Judge. Hence unless it is found by the magistrate that the offence was exclusively triable by Magistrate, it is not required to examine all the witnesses.

6. In view of the fact it appears, that the goods were supplied by the applicant and as per agreement payment was to be made within 30 days, but even a single paisa was not paid. Hence it appears that since very inception there was intention of cheating hence prima facie it cannot be said that the there was no intention of cheating at all or it is not a criminal breach of trust. However, the aforesaid matter requires to be decided, on the basis of evidence produced before the trial court. At this stage, I am not inclined to interfere with the proceeding.

7. The alternative prayer is for consideration of the bail application, preferably, on same day because the applicant is residing in Kerala and is aged about 80 years.

8. In view of the fact and circumstances of the it is provided that if applicant appears and surrenders before the court below and move bail application within thirty days from today, then the same shall be considered, as expeditiously as possible, in accordance with law, in view of the law laid down by Full Bench of this Court in the case of Amrawati and another Vs. State of U.P. reported in 2004(57) ALR 390 and affirmed by Hon'ble Supreme Court in Lal Kamlendra Pratap Singh Vs. State of U.P. and others 2009(2) Crime 4 SC after affording the opportunity. If the bail application can not be decided, due to any reason, he may be released on interim bail as observed in the aforesaid judgment.

With the aforesaid observation this application is finally disposed off.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.08.2009

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

Special Appeal No.1241 of 2009

Vipin Kumar ...Appellant
Versus
State of U.P. and others ...Respondents

Counsel for the Appellant:
Sri A.K. Pandey
Sri K.S. Yadav

Counsel for the Respondents:
S.C.

Constitution of India Art. 226-Dismissal Order-passed on ground of giving false declaration in application-contention regarding acquittal in Criminal Cases-dismissal Order bad-held-wrong declaration itself entails cancellation of appointment.

Held: Para 5

We do not find any substance in the submission of Mr. Pandey. The fact of the matter is that he had made a wrong declaration. The law in question is well settled that wrong declaration made, entails cancellation of the appointment. Reference in this connection can be made to a decision of the Hon'ble Supreme Court in the case of *Kendriya Vidyalaya Sangathan and others Vs. Ram Ratan Yadav (2003) 3 Supreme Court Cases 437*.

Case law discussed:
(2003) 3 Supreme Court Cases 437,
2006 (4) ESC 2625 (All),
2006 (5) ALJ 781.

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

1. Writ petitioner - appellant, aggrieved by an order dated 09.07.2009 passed in Civil Misc. Writ Petition No.33672 of 2009, has preferred this appeal under Rule 5 Chapter VIII of the Allahabad High Court Rules, 1952.

2. Writ petitioner - appellant was recruited as a Constable. As per requirement, the appellant had to furnish information of his involvement in criminal cases and accordingly he gave a declaration that he is not involved in any criminal case. On verification, it was found that he was involved in two criminal cases and accordingly by order dated 7th of August, 2007 his appointment was cancelled.

3. He assailed the aforesaid order in the writ application, which has been dismissed by the impugned order.

4. Mr. A.K. Pandey appearing on behalf of the appellant submits that the appellant having been acquitted in those criminal cases, his appointment ought not to have been cancelled.

5. We do not find any substance in the submission of Mr. Pandey. The fact of the matter is that he had made a wrong declaration. The law in question is well settled that wrong declaration made, entails cancellation of the appointment. Reference in this connection can be made to a decision of the Hon'ble Supreme Court in the case of ***Kendriya Vidyalaya Sangathan and others Vs. Ram Ratan Yadav (2003) 3 Supreme Court Cases 437***.

6. This Court had also the occasion to consider this question in the cases of ***Arvind Kumar Vs. State of U.P. and others 2006 (4) ESC 2625 (All)*** and ***Krishna Kumar Vs. State of U.P. and others 2006 (5) ALJ 781*** wherein the same view has been followed.

7. We are of the opinion that the view taken by the learned Single Judge is in conformity with law. We do not find any merit in the Appeal and it is dismissed accordingly.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.09.2009

BEFORE
THE HON'BLE VIJAY KUMAR VERMA, J.

Criminal Misc. Bail Application No.31956 of 2008

Brijesh Kumar ...Petitioner
Versus
State of U.P. ...Respondent

Counsel for the Petitioner:
Sri Dr. Arun Srivastava

Counsel for the Respondents:
A.G.A.

Code of Criminal Procedure Section 439-Bail-offence under Section 498-A, 304-B IPC read with ¾ Dowry Prohibition Act-deceased talking on mobile on boundary leu roof-fell down sustained injury on particular part of body-at once-bough in hospital by applicant husband-referred to G.A. Medical Institute for better treatment in presence of her parents and other relatives inquest report prepared in their presence-post mortem report also supports the case of applicant-fourth day F.I.R. lodged to black male the applicant-confinement of applicant for more than one year-held- entitled for bail without expressing any opinion about merit of case.

Held: Para 11

I have carefully gone through the entire case diary and other material on record. It is not disputed that the deceased in injured condition was carried to Sharda Hospital Pilibhit, where her treatment was made and thereafter, for better treatment, she was carried by the applicant himself to Gangasheel Advanced Medical Research Institute Bareilly, where she was admitted, but could not survive and died during treatment on 10.05.2008. It is also not disputed that information was given to the complainant, who came with his family members, who were present at the time of inquest proceedings on 10.05.2008 and complainant, his brother Devendra Kumar and daughter Priyanka had signed inquest report (Annexure-6). In the 'opinion of *panc*h witnesses' (*ray panchan*) endorsed at page 3 of the inquest report, it is mentioned that the deceased has died due to falling down from roof. Therefore, having regard to all these facts and keeping in view the aforesaid submissions made by the learned counsel for applicant, but without expressing any opinion about merit of the case, the applicant, who is confined in jail for more than a year, may be released on bail.

Case law discussed:
[2007 (57) ACC 481].

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

1. Prayer for bail in this bail application under section 439 of the Code of Criminal Procedure (in short 'the Cr.P.C.') has been made on behalf of the applicant Brijesh Kumar s/o Prem Kumar, who is the husband of deceased Smt. Neelu Gangwar, who died within a period of 7 years of her marriage due to sustaining injuries.

2. The First Information Report was lodged by Ravindra Prakash Gangwar (father of the deceased) on 13.05.2008 at P.S. Sun Garhi, District Pilibhit, where a case under section 498A, 304B IPC and Section 3/4 D.P. Act, was registered at crime No. 645 of 2008 against Brijesh Kumar (applicant herein), Dharmendra Kumar, Prem Kumar, Durga, Gyani and Sandhya. The allegations made in the FIR (Annexure-1), in brief, are that marriage of Neelu Gangwar had taken place on 15.12.2007 with Brijesh Kumar and dowry as per capacity was given, but her husband and other in-laws were not satisfied with the dowry and they were causing harassment of deceased making demand of four wheeler vehicle and when their demand was not fulfilled, they committed her murder on 09.05.2008.

3. I have heard lengthy arguments of Dr. Arun Srivastava, Advocate, appearing for the applicant and AGA for the State.

4. According to the post mortem report (Annexure-7), the deceased had died due to coma as a result of ante mortem head injury. Seven ante mortem injuries were found on the person of deceased at the time of post mortem examination.

5. The first and foremost submission made by learned counsel for the applicant was that on the fateful night, the deceased had gone on the roof of the house at about 9.00 p.m. to have talks on mobile, as signal in the house were very weak, but she could not see boundary-less roof and fell down from the roof, due to which she sustained injuries. It was further submitted in this context that after sustaining injuries, the deceased was immediately carried by the applicant Brijesh Kumar to Sharda Hospital Pilibhit, where her treatment was made and thereafter, for better treatment, she was carried in the same night to Gangasheel Advanced Medical Research Institute Bareilly, where she was admitted, but she would not survive and died there during treatment and hence, the offence punishable under section 304-B IPC would not be made out in present case, as the deceased had sustained injuries accidentally by falling down on earth from the roof. In this context, my attention was drawn towards the post mortem report also and it was submitted by learned counsel that almost all the ante-mortem injuries were on same side of the body, which indicates that the deceased had sustained injuries by falling down and not by beating her as alleged in the FIR.

6. Next submission made by learned counsel was that as soon as the deceased sustained injuries by falling down from the roof of the house, information was given to her father, who came along with other family members in hospital and when the deceased died, the complainant and his family members were present at the time of inquest proceedings, which was conducted on 10.5.2008. It was also submitted in this context by learned counsel that the applicant Brijesh Kumar was also present at the time of inquest proceeding and he as well as his father Prem Kumar also had signed the inquest report along with the father, uncle and sister of deceased. For this submission, my attention was drawn towards the copy of inquest report (Annexure-6). It was also submitted by learned counsel in this context that at the time of inquest proceeding, no complaint was made by the complainant about causing harassment

of the deceased due to demand of dowry and on fourth day, he lodged false FIR with a view to blackmail the accused persons. In this very context, my attention was drawn towards the case of ***Anil Kumar Singh vs. State of U.P. [2007 (57) ACC 481]***.

7. It was also submitted by learned counsel that had the accused persons committed murder of deceased as alleged in the FIR, they would not have carried the deceased for treatment to hospital, as there was risk of giving statement by her against the accused persons, but after sustaining injuries by deceased by falling down from the roof of the house, she was immediately rushed to Sharda Hospital Pilibhit, and for better treatment, she was admitted by the applicant in Gangasheel Advanced Medical Research Institute Bareilly. Drawing my attention towards annexure-3, (medical papers of Gangasheel Institute), it was submitted by learned counsel that in these papers also, it is mentioned that the deceased had sustained head injuries by falling down from hight and time of sustaining injuries also has been mentioned as 9.00 p.m. on 09.05.2008, as is the case of applicant in his bail application. My attention was drawn towards paper No. 31 also, from which this fact is borne out that the deceased Neelu Gangwar was admitted in Gangasheel Institute Bareilly by her husband Brijesh Kumar Gangwar (applicant herein).

8. Next submission made by learned counsel for the applicant was that from the opinion of *punch* witnesses expressed in the inquest report (Annexure-6) also, this fact is borne out that the deceased had sustained injuries and died as a result of falling down from the roof of the house. It was also submitted in this context that the father, uncle and sister of the deceased were witnesses of this inquest report and they also had opined that the deceased had died due to falling down from the roof.

9. It was further submitted by learned counsel that similar allegations were made against all the accused persons in the FIR and statements of witnesses and since the co-accused Smt. Gyani and Smt. Durga have been granted bail by another Bench of this Court, vide order dated 12.11.2008, passed in bail application No. 30436 of 2008, hence the applicant, who is confined in jail since 25.07.2008, also should be released on bail, because he did not play any role in causing the injuries to the deceased, who had fallen down from the roof of the house and sustained injuries.

10. The bail application was vehemently opposed by learned AGA contending that the deceased had died due to sustaining injuries within a period of seven years of her marriage and since harassment was caused by the applicant and other accused persons making demand of four wheeler vehicle in dowry, hence in this heinous anti-social crime, the applicant should not be released on bail.

11. I have carefully gone through the entire case diary and other material on record. It is not disputed that the deceased in injured condition was carried to Sharda Hospital Pilibhit, where her treatment was made and thereafter, for better treatment, she was carried by the applicant himself to Gangasheel Advanced Medical Research Institute Bareilly, where she was admitted, but could not survive and died

during treatment on 10.05.2008. It is also not disputed that information was given to the complainant, who came with his family members, who were present at the time of inquest proceedings on 10.05.2008 and complainant, his brother Devendra Kumar and daughter Priyanka had signed inquest report (Annexure-6). In the 'opinion of *panc*h witnesses' (*ray panchan*) endorsed at page 3 of the inquest report, it is mentioned that the deceased has died due to falling down from roof. Therefore, having regard to all these facts and keeping in view the aforesaid submissions made by the learned counsel for applicant, but without expressing any opinion about merit of the case, the applicant, who is confined in jail for more than a year, may be released on bail.

12. Let the applicant Brijesh Kumar s/o Prem Kumar be released on bail in Case Crime No 645 of 2008, under sections 498A, 304-B IPC and Section 3/4 D.P. Act, P.S. Sungarhi, District Pilibhit on his executing a personal bond for Rs.40,000/- and furnishing two sureties each in the like amount to the satisfaction of the court concerned.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.09.2009

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Writ Petition No. 30302 of 1991

Brijesh Kumar ...Petitioner
Versus
District Judge and others ...Respondents

Counsel for the Petitioner:
Sri V.K.S. Chaudhary
Sri R.S. Maurya
Sri Kunal Ravi Singh

Counsel for the Respondents:
Sri,Sharad Malviya
Sri C.S. Singh
S.C.

Code of Civil Procedure-Order XXII Rule 3-read with Section 2 (11)-Legal Representative-during pendency of execution proceeding arises out from partition suit-plaintiff died-adopted son moved application-rejection on ground plaintiff being widow had limited rights-can not be touched by the execution Court-except the regular Court-held-both courts below committed great illegality-can not sustain-execution Court directed to allow the substitution Application.

Held: Para 9

In the present case, the petitioner claims to be the legal representative of the deceased plaintiff. The petitioner, in my opinion, falls within the definition of "legal representative", as defined under Section 2 (11) of the Code of Civil Procedure. The court below committed an error in not substituting the petitioner. It may be observed that by substituting the petitioner, the title of the petitioner over the property in question nor the claim of the respondents that the property reverted to the defendants pursuant to the Will is being decided. These questions/claims of the parties or the title over the property in question could not be decided in a proceeding under Order XXII, Rule 3 of the Code of Civil Procedure. Such questions have to be gone into in regular proceedings.

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

1. Heard Shri Kunal Ravi Singh and Shri Sharad Malviya, the learned counsel for respondent.

2. The plaintiff Smt Rambachchi Devi instituted a suit for maintenance and partition in respect of certain movable and immovable properties against the defendants, who were the children of her husband from the first wife. It was alleged that the defendant No. 1 was not maintaining her, and therefore, the suit was instituted for the reliefs claimed by her. The defendants contested the claim and submitted that the plaintiff had only a limited right under a Will dated 15th May, 1967 executed by the husband of the plaintiff, and therefore, she was not entitled either for maintenance or for partition of the properties. The trial court, after considering the material evidence on record, dismissed the suit for maintenance, but decreed the suit for partition of the houses holding that the plaintiff was entitled to 1/16th share. The said decree became final and was not challenged by the defendants. Consequently, the plaintiff filed an application for the preparation of a final decree. During the pendency of the execution proceedings, the plaintiff died. The petitioner, being the adopted son of the plaintiff, by virtue of a registered adoption deed, filed an application under Order XXII, Rule 3 of the Code of Civil Procedure for substitution. This application was opposed by the defendants on the ground that the plaintiff had a limited right in the property in dispute in her life time under the Will, and upon her death, the property devolved upon the defendants, and therefore, the petitioner was not entitled to be substituted. The executing court rejected the application for substitution, against which, the petitioner filed a revision which was also dismissed. The petitioner, being aggrieved by the said order, has filed the present writ petition.

3. The ground for the rejection of the substitution application by the courts below, as culled out from the impugned orders is, that the plaintiff had limited rights in the property in question under the Will executed by her husband and, upon the death of the plaintiff, the property devolved upon the defendant No. 1, who had become the sole owner of the property in question, and therefore, the petitioner was not entitled to be substituted as the legal representative of the plaintiff.

4. Shri Sharad Malviya, the learned counsel for the defendants contended that since the plaintiff had a limited right under the Will, the decree could not be executed since the property had now devolved upon the defendant No. 1 as per the Will executed by the husband of the plaintiff. The learned counsel further submitted that the petitioner is the adopted son and does not come under Section 15 (2) (b) of the Hindu Succession Act, and in the absence of any natural heir of the plaintiff, the property devolved upon the heirs of the husband of the plaintiff.

5. Upon considering the matter, this Court is of the opinion that the impugned orders cannot be sustained and the submission of the learned counsel for the defendants does not hold any merit. At the outset, from a perusal of the decree of the trial court, the Court finds that the property devolved upon the plaintiff under the Will was not prayed for in the suit filed for partition. A finding has been given by the trial court that the property involved in the suit was different from the property involved under the Will. A finding has been given that the property involved under the Will had been left out

by the plaintiff, and on that ground, the trial court declined to grant a decree for maintenance. In the light of this finding, the finding of the executing court that the plaintiff had a limited right in the property in question is against the material evidence and the said finding is based on surmises and conjectures. The court below, without examining as to whether the property in the Will was the same as the property claimed in the suit, has rejected the substitution application.

6. There is another aspect of the matter. The question whether the plaintiff had a limited right or not under the Will becomes disputed and becomes questionable in view of Section 14 of the Hindu Succession Act, which contemplates that a property possessed by a female Hindu becomes absolute.

7. Further, while dealing with the application under Order XXII of the Code of Civil Procedure, the Courts are not required to delve into the question of title. The Court is only required to see whether the person sought to be substituted has any right or whether he is the legal representative of the heirs, as defined under Section 2 (11) of the Code of Civil Procedure. In my opinion, the legal representative, as defined in the Code of Civil Procedure has a wide meaning which also includes inter meddlers.

8. In the present case, the petitioner claims to be a legal representative on the basis of a registered adoption deed. Order XXII, Rule 3 of the Code of Civil Procedure lays down that where the plaintiff dies and the right to sue survives, in that event, the court, on an application made on that behalf, shall cause the legal representative of the deceased plaintiff to be made a party, and consequently, proceed with the suit.

9. In the present case, the petitioner claims to be the legal representative of the deceased plaintiff. The petitioner, in my opinion, falls within the definition of "legal representative", as defined under Section 2 (11) of the Code of Civil Procedure. The court below committed an error in not substituting the petitioner. It may be observed that by substituting the petitioner, the title of the petitioner over the property in question nor the claim of the respondents that the property reverted to the defendants pursuant to the Will is being decided. These questions/claims of the parties or the title over the property in question could not be decided in a proceeding under Order XXII, Rule 3 of the Code of Civil Procedure. Such questions have to be gone into in regular proceedings.

10. In view of the aforesaid, the impugned orders cannot be sustained and are quashed. The writ petition is allowed. The substitution application is liable to be allowed. The executing court is consequently directed to pass a formal order allowing the substitution application. The executing court is also directed to proceed with the case and decide the matter at the earliest.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.09.2009

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

Civil Misc. Writ Petition No. 407 of 2005

Naeem Ahmad ...Petitioner
Versus
State of U.P. & others ...Respondents

Counsel for the Petitioner:
Sri R.K. Pandey

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

Constitution of India Article-226- Cancellation of the licence of fair price shop on ground-father of petitioner already running fair price shop prohibition contained in clause 10 (e) of G.O. 28.10.82 directly comes-theory of separation from family set -up-not reliable-held-cancellation proper.

Held: Para-10

Having found so, the petitioner therefore suffers from a disqualification under the Government Order dated 28.10.2002 and he could not have been granted a license. This being the position, it is not necessary to enter into the merits of the other charges against the petitioner, and his explanation in that respect.

Case law discussed:
1982(2) SCC 210

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

1. The short question raised in this petition is, as to whether the Sub-Divisional Magistrate was right in canceling the license to run a fair price shop issued in favour of the petitioner, as affirmed by the Commissioner in appeal under the provisions of the U.P. Scheduled Commodities Distribution Order, 2004 read with the Government Order dated 28.10.2002.

2. The petitioner was granted a license to run a fair price shop under the Government Order dated 28.10.2002, which was then prevalent, in the year 2003. This was done according to the petitioner under a valid resolution of the Gram Sabha to run the shop at Village Houspura within Gram Panchayat Sainjni. Charges of maldistribution were brought against him coupled with the charge of having concealed the fact that his father, Mohd. Sayeed, was already a license holder of a fair price shop at village Sainjni which disqualifies the petitioner for a license under Clause 10(e) of the Government Order dated 28.10.2002.

3. An enquiry was conducted with opportunity to the petitioner who, apart from defending the charges on the ground of improper procedure adopted during enquiry, went on to urge that since he was living separately from his father, he did not inhere any such disqualification as alleged aforesaid. It was also contended by the petitioner in his reply that the documents which he wanted to support his stand with, were lost on his way to the Sub-Divisional Magistrate's office. Relying on the extract of the family register of Village Juldhakiya, Gram Sabha Sainjni, Nyaya Panchayat Dilari, Tehsil Thakurdwara, District Moradabad, it was pleaded that the petitioner's family has been shown separately from that of his father and as such it is urged that the conclusions drawn by the Sub-Divisional Magistrate as affirmed by the Commissioner are erroneous. In short,

since the petitioner is separated from his father, therefore he does not belong to the same family as per the Government Order dated 28.10.2002 and therefore he does not suffer from any such disqualification. The prayer is to accordingly quash the impugned orders as they proceed on erroneous assumption of law and fact.

4. I have heard learned counsel for the petitioner and Sri C.P. Mishra, learned standing counsel for the State who has cited the decision in the case of **Baldev Sahai Bangia Vs. R.C. Bharin** reported in **1982(2) SCC 210** to support his submissions.

5. Learned counsel for the petitioner has reiterated the submissions that were advanced before the authorities below and has invited the attention of the Court to the extract of the family register appended to this writ petition to support the stand of segregation of the family status of the petitioner. He contends that once the petitioner is recorded as the head of a separate family and the petitioner claims to be living under a separate roof in a distinct household, the authorities have committed an error in construing the provisions adversely against the petitioner.

6. In response, learned standing counsel contends that the definition of separation of family and its interpretation under personal law or under special statutes would not govern the definition of family as occurring in the Government Order dated 28.10.2002. He urges that the word family has not been specifically defined but in view of the purpose of the order governing grant of license of running a fair price shop, the widest possible meaning should be construed, and for that he relies on paras 12 to 17 and para 24 of the decision in the case of Baldev Bangia (supra).

7. Having considered the rival submissions it is not disputed by the petitioner that his father, Mohd. Sayeed, was already possessed of a license to run a fair price shop at Village Sainjni since 1993. Both of them, according to the admitted family register extract, are residents of Village Juldhakiya within the same Gram Panchayat and Nyaya Panchayat. During inspection both shops were allegedly found running from the same premises at Juldhakiya. The petitioner has been granted license at Village Houspura within the same vicinity of Gram Panchayat Sainjni. The Government Order dated 28.10.1982 in Clause 10(e) prohibits the grant of license to a person of the same family. It does not confine it to the same village or the same Gaon Sabha or Gram Panchayat. The emphasis is on the word 'family' which has not been given any definition in the Government Order.

To my mind, giving it any restricted meaning, would defeat the very purpose of the said provision. Grant of license is for a public distribution system through a 'fair price shop'. This cannot be permitted to function so as to create a monopoly in favour of the members of one family. This appears to be a more reasonable interpretation as it serves the purpose and also eliminates any possibility of nepotism and favoritism. If the rule making authority has left some gap, it is the duty of the Court to cull out the intent through purposive interpretation. One can easily apply Heydon's rule to construe that the prohibition contained in Clause 10(e) aforesaid is a reasonable restriction so as

to exclude any other grant of license to a member of the same family. To give a narrow or constricted meaning to my mind would be to do violation to the rule itself. In my considered opinion the widest possible meaning should be given as understood ordinarily in such matters. However in the present case since the relationship of father and son is admitted, it would not be necessary to venture to give any exhaustive definition for deciding the issue involved herein.

8. The petitioner claims separation on the strength of the family register. No other evidence has been led to establish separation like the existence of a separate house or evidence to believe the separation of Kitchen. However such issues are not that relevant as the relationship of the petitioner with his father is a blood relation. This does not snap even if the petitioner claims himself to be sheltered beneath a separate roof. For this the definition of the word family, as generally understood, can be looked into as referred to in the decision of Baldev Sahai's case (supra) paras 12 to 17 and para 24 quoted below:-

12. We have heard counsel for the parties and given our anxious consideration to all aspects of the matter and we feel that the High Court has taken a palpably wrong view of the law in regard to the interpretation of the term 'member of the family' as used in clause (d) of the proviso to Section 14(1) of the Act. In coming to its decision, the High Court seems to have completely overlooked the dominant purpose and the main object of the Act which affords several intrinsic and extrinsic evidence to show that the non-applicants were undoubtedly members of the family residing in the house and the migration of the main tenant to Canada would make no difference. The word 'family' has been defined in various legal dictionaries and several authorities of various courts and no court has ever held that mother or a brother or a sister who is living with the older member of the family would not constitute a family of the said member. Surely, it cannot be said by any stretch of imagination that when the tenant was living with his own mother in the house and after he migrated to Canada, he had severed all his connections with his mother so that she became an absolute stranger to the family. Such an interpretation is against our national heritage and, as we shall show, could never have been contemplated by the Act which has manifested its intention by virtue of a later amendment.

13. Coming now to the definitions, we find that in Words and Phrases (Permanent Edition, Volume 16) at pages 303-11 the word 'family' has been defined thus:

The father, the member, and the children ordinarily constitute a 'family'.

The word 'family' embraces more than a husband and wife and includes children.

A 'family' constitutes all who live in one house under one head.

Father and mother of two illegitimate children, and children themselves, all living together under one roof, constitute a 'family'.

The word 'family' in statute authorizing use of income for support of ward and 'family' is not restricted to those

individuals to whom ward owes a legal duty of support, but is an expression of great flexibility and is liberally construed, and includes brothers and sisters in poor financial circumstances for whom the insane ward, if competent, would make provision.

The general or ordinarily accepted meaning of the word 'family' as used in Compensation Act, means a group, comprising immediate kindred, consisting of the parents and their children, whether actually living together or not.

14. Similarly, in Webster's Third New International Dictionary, the word 'family' is defined thus:

Household including not only the servants but also the head of the household and all persons in it related to him by blood or marriage ..... a group of persons of common ancestry.

15. In Chamber Twentieth Century Dictionary (New Edition 1972, the word 'family' has been defined thus:

The household, or all those who live in one house (as parents, children, servants): parents and their children.

16. In Concise Oxford Dictionary (Sixth Edition), the same definition appears to have been given of the word 'family' which may be extracted thus:

Members of a household, parents, children, servants, etc.; set of parents and children, or of relations, living together or not; person's children. All descendants of common ancestor, ...

17. A conspectus of the connotation of the term 'family' which emerges from a reference to the aforesaid dictionaries clearly shows that the word 'family' has to be given not a restricted but a wider meaning so as to include not only the head of the family but all members or descendants from the common ancestors who are actually living with the same head. More particularly, in our country, blood relations do not evaporate merely because a member of the family-the father, the brother or the son - leaves his household and goes out for some time. Furthermore, in our opinion, the legislature has advisedly used the term that any member of the family residing therein for a period of six months immediately before the date of the filing of the action would be treated as a tenant. The stress is not so much on the actual presence of the tenant as on the fact that the members of the family actually live and reside in the tenanted premises. In fact, it seems to us that clause (d) of the proviso to Section 14(1) of the Act is a Special concession given to the landlord to obtain possession only where the tenanted premises have been completely vacated by the tenant if he ceased to exercise any control over the property either through himself or through his blood-relations.

24. Even as far back as 1930, Wright, J. in Price V. Gould (a King's Bench decision) had clearly held that the word 'family' included brothers and sisters and in this connection observed as follows:

I find as a fact that the brothers and sisters were residing with the deceased at the time of her death ..... It has been laid down that the primary meaning of the word 'family' is children, but that primary meaning is clearly susceptible of wider interpretation, because the cases decide

that the exact scope of the word must depend on the context and the other provisions of the will or deed in view of the surrounding circumstances.

* *

Thus, in Snow v. Teed it was held that "the word 'family' could be extended beyond not merely children but even beyond the statutory next of kin"."

9. A common understanding, which also appears to be reasonable from the common man's understanding point of view, of the word family in the present context would include a blood relation without any distinction on separation. The clause referred to herein above does not draw any dissimilarity between a separated or unseparated family member. The family register exists for a different purpose, namely to identify the people living in a village or a locality. The mere mention of the petitioner as a different family head in the family register does not snap his ties with his father and to that extent he has been rightly considered to belong to his father's family.

10. Having found so, the petitioner therefore suffers from a disqualification under the Government Order dated 28.10.2002 and he could not have been granted a license. This being the position, it is not necessary to enter into the merits of the other charges against the petitioner, and his explanation in that respect.

11. Learned counsel contends that the license of the petitioner's father too has been canceled. The same is not a subject matter of this petition and if that is so, the petitioner's father can always raise this issue which can be decided without being prejudiced with the grant or otherwise of a license to the petitioner.

12. The petition is accordingly dismissed subject to the observations made herein above.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.09.2009

BEFORE
THE HON'BLE ASHOK BHUSHAN, J.
THE HON'BLE R.A. SINGH, J.

Civil Misc. Writ Petition No. 39608 of 2009

Nav Nirman Thekedar Kalyan Association and another ...Petitioners
Versus
State of U.P. and another ...Respondents

Counsel for the Petitioners:
Sri S.P. Pandey
Sri S. Sahi

Counsel for the Respondents:
Sri S.C. Chaturvedi(ADDL. Adv. General)
Sri Satyendra Nath Srivastava
S.C.

Constitution of India Article 15(4)-readwith Article 19(1)(g)- Restriction on fundamental Rights-G.O. 30.06.09-providing reservation of 20% to S.C. Govt. contractor and 2 % Schedule Tribe contractor-challenged on ground of restriction on his right of business-held-neither the said G.O. Creates monopoly in favour of S.C. /S.T. Contractors not put any restriction upon the right of petitioners rather the Government exercised power for upliftment and advancement of S.C./S.T. Contractor under Article 15(4)-held G.O. Not violating the provision of Art. 19(1)(g)-warrant no interference by writ court.

Held: Para 27

Taking into consideration the entire facts and circumstances and the contents of the Government order dated 30th June,

2009, we fail to see any restriction on the petitioners' fundamental right to carry on trade or business. The mere fact that 21% of the contract is reserved for scheduled castes and 2% is reserved for scheduled tribes up to the value of Rs.5,00,000/-, cannot be held to mean that fundamental rights of the petitioners to carry on their business or occupation has been violated. As noticed above, the Government order dated 30th June, 2009 is referable to power of the State under Article 15(4) of the Constitution and by that Government order the State Government has not provided for any restriction on exercise of the rights as contemplated under Article 19(6) of the Constitution of India nor the submission of the petitioners that Government order creates any monopoly in favour of scheduled castes and scheduled tribes can be accepted since the Government order dated 30th June, 2009 has been issued by the State Government in exercise of power under Article 15(4) of the Constitution of India providing for a special provision for advancement of scheduled castes and scheduled tribes.

Case Law discussed:

1954 A.I.R. (SC) 728, 1964 A.I.R. (SC) 925, 1986 A.I.R. (SC) 1205, 1963 (SC) 1295, 1962 A.I.R. (SC) 316, 1973 S.C. 458, 1997 S.C. 1413, 1997 Allahabad 343, 2005(1) S.C.C. 679, 2005 NOC 212

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

1. Heard Sri S.P. Pandey, learned counsel for the petitioners and Sri S.C. Chaturvedi, Additional Advocate General assisted by Sri Satyendra Nath Srivastava, learned Standing Counsel for the respondents.

2. By this writ petition, the petitioners have prayed for a writ of certiorari quashing the Government order dated 30th June, 2009 by which Government order 20% reservation for scheduled caste and 2% reservation for scheduled tribe have been provided in the contract awarded by the Government, Corporation, Development Authority and Local Bodies value of which contract is up to Rs.5,00,000/-.

3. The petitioner No.1 is a society registered under the the Societies Registration Act, 1860 constituted to look after the welfare of the contractors of the Public Works Department, who are its members. Petitioner No.2 is a registered contractor in Public Works Department, Gorakhpur. The petitioners have challenged the above mentioned Government order dated 20th June, 2009 on the ground of violation of rights guaranteed under Article 19(1)(g) of the Constitution of India. The petitioners have further stated that representation has also been submitted to the Government for recall of the Government order.

4. Sri S.P. Pandey, learned counsel for the petitioners, challenging the Government order dated 30th June, 2009 has raised following submissions:-

(i) The impugned Government order is violative to constitutional guarantee provided under Article 19(1)(g) of the Constitution of India inasmuch as the impugned Government order imposes restrictions on fundamental rights of the petitioners and other identically situated registered contractors on their carrying on profession to obtain and execute government contracts.

(ii) The restrictions sought to be imposed through the impugned order is beyond the scope and ambit of clause 6 of Article 19 of the Constitution of India, wherein permissible limit to impose restrictions on

fundamental rights given in Article 19(1)(g) of the Constitution of India has been specified.

(iii) The impugned Government order is not a "Law' but an executive order and even if State proceeds to impose restriction on fundamental rights, it can be imposed only by legislation and not by an executive orders.

(iv) The impugned Government order creates a monopoly in favour of a category of persons in getting government contracts without proper competition, which is impermissible.

5. Elaborating his submissions, learned counsel for the petitioners contended that while giving various fundamental rights to the citizen, Constitution makers have taken care of the citizens who belong to socially and economical backward category by providing exceptions in different Articles, which provide for fundamental rights. With regard to rights guaranteed under Article 19 of the Constitution, exception has been provided in Clauses (2) to (6) of Article 19. Clause (6) of Article 19 empowers the State to impose restrictions on fundamental rights subject to fulfilment of conditions as laid down in sub-clause (6). The restrictions imposed by impugned Government order are beyond the ambit and scope of sub clause (6) of Article 19. It is contended that under sub-clause (6) of Article 19, the restrictions which can be imposed are permissible only in the interest of general public and in no manner the scheduled caste and scheduled tribe can be termed as general public. It is contended that by the Government order monopoly has been created in favour of particular category of persons, which is impermissible under the Constitution. It is contended that restrictions, if any, on the rights guaranteed under Article 19(1)(g) can be imposed only through legislation and not by executive orders. The provisions of Article 15(4) of the Constitution of India cannot be applied to constitutional guarantee given under Article 19(1)(g) of the Constitution of India. Learned counsel for the petitioners has further submitted that the special provisions contemplated under Article 15(4) of the Constitution of India has to confine to admissions in educational institutions it having a specific reference to Clause (2) of Article 29 of the Constitution. Learned counsel for the petitioners in support of his submissions placed reliance on the judgment of the Apex Court in the cases of **Saghir Ahmad vs. State of U.P. and others** reported in 1954 A.I.R. (SC) 728, **Khyerbari Tea Company Limited vs. State of Assam** reported in 1964 A.I.R. (SC) 925, **Municipal Corporation of the City of Ahmedabad vs. Jan Mohammed Usmanbhal** reported in 1986 A.I.R. (SC) 1205, **Kharak Singh vs. State of U.P. and others** reported in A.I.R. 1963 (SC) 1295 and **The Collector of Customs, Madras vs, Nathella Sampathu Chetty and another** reported in 1962 A.I.R. (SC) 316.

6. Sri Satish Chaturvedi, learned Additional Advocate General appearing for the State, contended that the Government order dated 30th June, 2009 has been issued in exercise of power of the State under Article 15(4) of the Constitution of India, which is a special provision for advancement of the scheduled caste and scheduled tribe. It is submitted that the Government is duty bound for social and economic upliftment

of different classes of society for providing them reasonable representation in every sphere in the interest of entire society and since in view of the prevailing contract procedure in different Government works the contractors belonging to schedule caste and scheduled tribes could not get proper representation due to which the entry of the persons of aforesaid category in that field is often lacking and as such the decision has been taken to provide the aforesaid reservation. Instances of special provisions made for advancement of socially and economically backward classes, scheduled caste and scheduled tribe have been referred to including reservation in fair price shops. Reference to the provisions of Section 71(3)(b) of the Motor Vehicle Act, U.P. Cooperative Societies Rules, 1968 with regard to reservation/ nomination of seats for weaker sections has also been made. It is submitted that by the Government order no restrictions in right provided under Article 19(1)(g) of the Constitution has been made nor the aforesaid Government order can be said to be creating any monopoly in favour of scheduled caste and scheduled tribe. The Government has affirmative duty to provide opportunities to scheduled caste and scheduled tribe, which has been done in exercise of power under Article 15(4) of the Constitution by the State. It is an affirmative action of the State to achieve the goal of giving adequate representation to the scheduled caste and scheduled tribes in order to uplift them so as to enable them to compete with contracts with higher resources. It does not at all affect the right of any person to practice any profession or to carry on any occupation, trade or business. Learned Additional Advocate General has placed reliance on various judgments of the Apex Court and High Courts including our Court, which shall be referred to hereinafter while considering the submissions in detail.

7. We have considered the submissions of learned counsel for the parties and have perused the record.

8. The principal ground, which has been canvassed on behalf of the petitioners is that the Government order violates the rights guaranteed to every citizen under Article 19(1)(g) of the Constitution of India and further even if it can be treated as restriction to the right guaranteed under Article 19(1)(g), the same cannot be done by executive instructions and further without conforming to the limitations as provided under Article 19(6) of the Constitution of India.

9. Before we proceed to examine the submissions of learned counsel for the parties, it is necessary to have a look over the relevant constitutional provisions contained in Articles 15 and 19 of the Constitution of India.

10. Articles 15 to 17 of the Constitution of India deal with right to equality. Article 15(1) of the Constitution provides that the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. Article 15 of the Constitution as originally enacted contained only three sub clauses. Sub clause 4 was added by the Constitution (First Amendment) Act, 1951 as a result of a decision in the case of Madras vs. Champakam Dorairajan reported in (1951) SCR 525. The object of first amendment was to bring Articles 15 and

29 of the Constitution in line with Article 15(4) of the Constitution. Article 15 of the Constitution is quoted below:-

"**15**. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.- (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.
(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to--
(a) access to shops, public restaurants, hotels and places of public entertainment; or
(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.
(3) Nothing in this article shall prevent the State from making any special provision for women and children.
[(4) Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.]
[(5) Nothing in this article or in sub-clause (g) of clause (1) of article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30.]"

11. The language of Article 15(4) of the Constitution shows, first, that "reservation' as such, is not expressly mentioned in that Article, but fall within the wide expression "special provision for the advancement...". The special provision includes every kind of assistance which can be given to backward classes, scheduled castes and scheduled tribes to make them stand on their feet to bring them into the mainstream of life. At this stage we propose to consider the submission of the petitioners that Article 15(4) of the Constitution confines only to admission in educational institutions. The said submission has been advanced referring to mention of Clause (2) of Article 29 of the Constitution of India in Article 15(4). Article 29(2) of the Constitution provides that no citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State fund on grounds only of religion, race, caste, language or any of them. Sub clause (4) of Article 15 uses two phrases, namely, (i) "Nothing in this article' and (ii) "or in Clause 2 of Article 29'. Thus Article 15(4) empowers the State to make any special provision notwithstanding the injunction contained in Article 29(2) of the Constitution. Article 15(4) thus cannot be held to confine to special provision only pertaining to admission in educational institution as provided in Article 29(2), rather Article 15(4) empowers the State to make a provision notwithstanding to Clause (2) of Article 29 but operation of clause (4) of Article 15 cannot be confined only to admission in educational institution. Thus the submission of the petitioners' counsel that Article 15(4)

shall only confine to admission in educational institution cannot be accepted.

12. At this stage, it is relevant to refer certain cases relied by learned counsel for the respondents in which special provision with regard to scheduled castes and scheduled tribes made with regard to subject matter other than admission in educational institutions. In A.I.R. 1960 Kerala 355; Moosa vs. State of Kerala, an order acquiring land for constructing a colony for Harijans was held valid under Article 15(4) of the Constitution. Similarly the case of **Pavadai Gounder and others vs. State of Madras and another** reported in A.I.R. 1973 S.C. 458 was also a case with regard to acquisition of land for construction of colony for Harijans, which was held valid referring to Article 15(4) of the Constitution. In A.I.R. 1994 Madhya Pradesh 143; Dr. Ram Krishna Balothia vs. Union of India and others, the Madhya Pradesh High Court had occasion to consider the scope and ambit of Article 15(4) of the Constitution in context of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. The validity of the 1989 Act was challenged on the ground that it violates Article 15(1) of the Constitution it being based on caste discrimination and is not saved by Article 15(4) of the Constitution. The Division Bench of the Madhya Pradesh High Court repelling the submission, laid down following in paragraphs 8 and 9 of the said judgment:-

"8. The language used in Art. 15(4) cannot be understood in a narrow sense. Article 15(4) embodies the doctrine of protective discrimination. The word 'advancement' in clause (4) of Art. 15 is not subject to any qualification and by no principle of interpretation it could be said that from the context it should be construed in a restricted sense, as amounting to only social and educational advancement. The expression "special provision for the advancement" is an expression of very wide import and brings within its a sweep each and every kind of advancement. This is so because Scheduled Castes and Scheduled Tribes occupy a special position in our constitution. They have endured great ill treatment as untouchables for centuries, apart from their backwardness. It must be remembered that thousands of years of discrimination cannot be wiped out in one generation. It is in the fitness of things that every effort is to be made to correct this long standing and historical discrimination.

9. A special provision does not only mean to provide for education, agricultural programmes, schemes for training to purpose trade or business, free education, free hostel facilities, free food or clothes, advancement of loans, special facilities regarding recovery of loans etc. as argued by the counsel for the petitioners. To our mind, it would include all out effort by the State to make them stand on their own feet, to bring them into the mainstream of the National life, to live with dignity, self-esteem and with head held high. This is only possible if they are permitted to live in the society without fear or suppression from upper castes or top echelons of the society belonging to the another caste, creed or religion. The Act contains affirmative measures to weed out the root cause of the same, which has denied them civil rights and subjected them to various kinds of indignities, humiliations and harassment for various historical, social

and economic reasons. Advancement of the oppressed people requires dealing with upper levels of the society when they try to suppress or deny legitimate aspirations of Scheduled Castes and Scheduled Tribes, their right to life and dignity, freedom from bonded labour and must protect them from the practice of untouchability, help to protect their self-respect and the honour of their women, and to shield them from oppressive land grabbers of the land allotted to them, protection from all kinds of oppression, social, political, economic and cultural must be provided for to ensure their advancement."

13. In A.I.R. 1997 S.C. 1413; **State of U.P. and another vs. C.O.D. Chheoki Employees' Cooperative Society Ltd. and others,** the provisions of Rules 393-A, 393-B, 440 and 444 of the U.P. Cooperative Societies Act, 1968, which provided for reservation/nomination of seats for weaker section of the society, were under challenge. The Apex Court upholding the provisions as having been made in exercise of power under Article 15(4) of the Constitution, laid down following in paragraph 16 of the said judgment:-

"16. Shri Raju Ramachandran, relying upon the judgment of this Court in Damyanti Naranga v. The Union of the India, 1971 3 SCR 840 : (AIR 1971 SC 966), has contended that in view of the ratio laid down by this Court, the Government is devoid of power to make law unless any of the restrictions as controlled by clause (4) of Article 19 of the Constitution of India are infringed. The Government has no power to enact a law incorporating the reservation to the members of weaker sections and women thereof. We find no force in the contention. It could be seen that therein, the Government had enacted the Sahitya Sammelan Act exercising the power under Entry 63, List I of the Seventh Schedule to the Constitution. This Court pointed out that the Act did not envisage that the Samiti is of national importance. Therefore, it was held that the Parliament had lacked power to enact the law incorporating the society and inducting outside members against the wishes of the founder members of the Society registered under the Societies Registration Act. This Court also held that the properties belonging to the original Society stood vested in the Society incorporated under Section 4 of the Act without any compensation. Therefore, it was violative of Article 31 of the Constitution of India, as it stood then. The ratio therein has no application to the facts in this case. He then contended that "Other Backward Classes" defined under the State Public Services Reservation Act applicable to and covering the public services, they are being inducted as members of the society which are otherwise not eligible and, therefore, the induction of them by amendment of Rules made on 15-7-1994 is unconstitutional. In support thereof, he contends that though Article 15(4) of the Act provides that it is subject to Articles 15(2) and 29(2) of the Constitution, it does not envisage that it is also subject to Article 19(1)(c) of the Constitution. Therefore, the reservation provided to the weaker sections is unconstitutional. We find no force in the contention. The object of Article 15(4) is to lift the prohibition of general equality guaranteed in Articles 15(2) and 29(2) of the Constitution dealing with the right to admission into an educational institution maintained by the State or receiving aid

from the State. Therefore, their object is distinct and different from Article 19(1)(c), though Article 19(1)(c) gives freedom to form association, it is controlled by the provisions of the Act. As held by this Court, once a society has been registered under the Act, the management of the society through Section 29 and the Rules made thereunder, is regulated by duly elected members. In the democratic set up, all eligible persons are entitled to contest the election, as held, according to the provisions of the Act and Rules. In the absence of elected members belonging to the weaker sections and women elected, nomination of them by the Government is the alternative dispensation envisaged as one of the policies of the Act. Therefore, the Court cannot interfere with the policy and declare it is (as) unconstitutional violating Article 19(1)(C) of the Constitution"

14. Similarly a Division Bench of our Court in A.I.R. 1997 Allahabad 343; **Maiyadeen vs. State of U.P. and another** while considering the provisions of Rules 9-A and 53-A of U.P. Minor Minerals (Concession) Rules, 1963 held the provisions intra vires after referring to Article 15(4) of the Constitution of India. Following was laid down in paragraph 7 of the said judgment:-

7. A perusal of clause (4) of Article 15 as well as Directive Principles of State Policy, contained in Articles 38 and 39 of the Constitution will indicate that the State can classify socially and educationally backward classes as different class and can afford to them protection. Any law, Statute, Bye-law, Regulation or Government Order which provide protection or reservation to socially and educationally backward classes cannot be said to be discriminatory, but it in consonance with the principles underlying in clause (4) to Article 15 of the Constitution of India as well as Articles 38 and 39 of the Constitution of India. It is a matter of common knowledge that certain classes of citizens known as Mallah, Kewat, Bind, Nishad or Mahgira are generally engaged in carrying on the profession of excavation of sand of morrum on the banks of the rivers."

15. Now comes the main submission of learned counsel for the petitioner that the Government order dated 30th June, 2009 violates the rights guaranteed under Article 19(1)(g) of the Constitution of India. Article 19(1)(g) confers on a citizen the right to practice any profession, or to carry on any occupation, trade or business subject to restrictions contained in Article 19(6). Articles 19(1) and 19(6) of the Constitution are quoted below:-

"**19. Protection of certain rights regarding freedom of speech**, etc. - (1) All citizens shall have the right—
(a) to freedom of speech and expression;
(b) to assemble peaceably and without arms;
(c) to form associations or unions;
(d) to move freely throughout the territory of India;
(e) to reside and settle in any part of the territory of India; 1[and]
(g) to practise any profession, or to carry on any occupation, trade or business.

(2) .....
(3) .....
(4) .....
(5) .....

(6) Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, 2[nothing in the said sub-clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to,-

(i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or
(ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise]."

16. Article 19 of the Constitution of India declares that all citizen have fundamental right to practice any profession or to carry on any occupation, trade or business, which however be subject to any existing law or the law made by the State in the interest of general public containing reasonable restrictions on exercise of right conferred on the said sub-clause.

17. The question to be answered is as to whether the Government order violates the fundamental rights of the petitioners as guaranteed under Article 19(1)(g) of the Constitution. The rights guaranteed under Article 19(1)(g) of the Constitution has been subject to consideration by the Apex Court and this Court in large number of cases. The judgment relied by learned counsel for the petitioner in Saghir Ahmad's case (supra) was a case where rights under Article 19(1)(g) of the Constitution came for consideration. The appellant before the Apex Court was carrying on the business of plying motor vehicle, which was being regulated according to Motor Vehicle Act, 1939. The U.P. Road Transport Act, 1951 was passed by the State of U.P. under which the State Government has exclusive right to operate road transport services and notification was issued providing that route in question was to be exclusively operated by the State Government. The Act was challenged in the High Court and the High Court dismissed the writ petition against which appeal was filed. The contention of the appellant that provisions of the Act violates fundamental rights guaranteed under Article 19(1)(g) was upheld. It was held that members of the public are entitled as beneficiaries to use public streets and roads as a matter of right. The State is entitled to impose all such limitations on the character and extent of the user as may be requisite for protecting the rights of the public generally but subject to such limitations the right of a citizen to carry on business in transport vehicles on public pathways cannot be denied. Following was laid down by the Apex Court in paragraphs 13 and 14 of the said judgment:-

"**13.** We are in entire agreement with the statement of law made in these passages. Within the limits imposed by State regulations any member of the public can ply motor vehicle on a public road. To the extent he can also carry on the business of transporting passengers with the aid of the vehicles. It is to this carrying on of the trade or business that the guarantee in Article 19(1)(g) is

attracted and a citizen can legitimately complain if any legislation takes away or curtails that right any more than is permissible under clause (6) of that article.

14. The legislation in the present case has excluded all private bus owners from the field of transport business. 'Prima facie' it is an infraction of the provision of Article 19(1)(g) of the Constitution and the question for our consideration therefore is, whether this invasion by the Legislature of the fundamental right can be justified under the provision of clause (6) of Article 19 on the ground that it imposes reasonable restrictions on the exercise of the right in the interests of the general public."

18. It was further held in the above judgment that when an enactment on the face of it is found to violate the fundamental right guaranteed under Article 19(1)(g) of the Constitution, it must be held to be invalid unless those who support the legislation can bring it within the purview of the exception laid down in clause (6) of the article.

19. The question to be answered is as to whether the Government order violates the fundamental rights of the petitioners to carry on trade, business or occupation. The Government order does not in any manner contain any restriction on the rights of the petitioners to take Government contract nor contains any disqualification or prohibition with regard to any person regarding entering into the contract. The Government order only contains certain special provision for advancement of scheduled castes and scheduled tribes. The said Government order in no manner contains any prohibition or any restriction on the rights of the petitioners. The Apex Court had occasion to consider the rights under Article 19(1)(g) in context of an scheme framed by the Government, which restricted the choice of farmers and agriculturists who opt to receive financial assistance under the Government scheme for purchase of pumping set from approved dealers of the Government in the case of Krishnan Kakkanth vs. Government of Kerala and others reported in 1997(9) S.C.C. 495. The circular issued by the Government of Kerala dated 19.5.1995 was challenged by the dealers who claimed their fundamental right under Article 19(1)(g) of the Constitution to carry on business of sale of pump sets and dealership in the pump sets without being subjected to any unreasonable restriction. It was also contended before the Apex Court that the circular cannot be treated to be a restriction within the meaning of Article 19(6) of the Constitution since restriction can be imposed not by circular but only by a "law'. The Apex Court negativated the said submission. Following was laid down in paragraph 26 of the said judgment:-

"After giving our careful consideration to the facts and circumstances of the case and submissions made by the learned counsel for the parties, it appears to us that the fundamental right for trading activities of the dealers in pumpset, in the State of Kerala as guaranteed under Article 19 (1) (g) of the Constitution has not been infringed by the impugned circular. Fundamental rights guaranteed under Article 19 of the Constitution are not absolute but the same are subject to reasonable restrictions to be imposed against enjoyment of such rights. Such reasonable restriction seeks to strike a

balance between the freedom guaranteed by any of the clauses under Article 19 (1) and the social control permitted by the Cls. (2) to (6) under Article 19."

20. It was further held by the Apex Court that although a citizen had a fundamental right to carry on trade or business, but he has no right to insist upon the Government or any other individual for doing business with him. Following was laid down by the Apex Court in paragraphs 32, 33 and 34 of the said judgment:-

"32. It may be indicated that although a citizen has a fundamental right to carry on a trade or business, he has no fundamental right to insist upon the Government or any other individual for doing business with him. Any Government or an individual has got a right to enter into contract with a particular person or to determine person or persons with whom he or it will deal.

33. In the instant case, the farmer or agriculturist who has chosen to receive subsidies or financial assistance under the schemes of the Government has an obligation to accept the terms and conditions for such assistance. One of such conditions is that in the northern region of the State, pumpset for which financial assistance has been given is to be purchased from the approved dealers of the Government. The private dealer cannot insist that the Government is also to enter into contract with any such private dealer to make it an approved dealer. Since the Government has every right to select dealers of its choice for delivery of pumpsets at the price agreed upon and to render after sales service to the purchasers of pumpsets covered by its financial assistance scheme. It is not open to challenge such selection of dealers on the score that, such selection amounts to unreasonable restriction imposed on the dealers of the State to carry on trading activities in pumpsets. It is nobody's case that all the farmers and agriculturists have been compulsorily covered under such schemes. On the contrary, it is open to any farmer or agriculturists not to volunteer for taking such assistance.

34. It has already been indicated that in Vikalad's case (AIR 1984 SC 95) (supra), it has been held by this Court that infringement of fundamental right under Article 19(1)(g) must have a direct impact on the restriction on the freedom to carry on trade and not ancillary or incidental effects on such freedom to trade arising out of any governmental action. It has also been held in that case that unless the trader or merchant is not wholly denied to carry on his trade, the restriction imposed in denying the allotment of wagon in favour of such trader or merchant to transport coal for carrying out trading activities does not offend Article 19(1)(g) of the Constitution. No restriction has been imposed on the trading activity of dealers in pumpsets in the state of Kerala including northern region comprising eight districts. Even in such area, a dealer is free to carry on his business. Such dealer, even in the absence of the said circular, cannot claim as a matter of fundamental right guaranteed under Article 19(1)(g) that a farmer or agriculturist must enter into a business deal with such trader in the matter of purchase of pumpsets. Similarly, such trader also cannot claim that the Government should also accept him as an approved dealer of the Government. The trading activity in dealership of pumpsets has not been stopped or even controlled or regulated generally. The dealer can deal

with purchasers of pumpsets without any control imposed on it to carry on such business. The obligation to purchase from approved dealer has been fastened only to such farmer or agriculturist who has volunteered to accept financial assistance under the scheme on various terms and conditions."

21. The Apex Court had again occasion to consider Article 19(1)(g) of the Constitution of India in the case of Association of Registration Plates vs. Union of India and others reported in 2005(1) S.C.C. 679. A notice was issued inviting tender for supply of high security registration plates for motor vehicles by the State Government for implementing the provisions of the Motor Vehicle Act, 1988. It was contended that tender conditions were discriminatory and they were made to create monopoly in favour of few parties violating the rights guaranteed under Article 19(1)(g). The Apex Court repelled the contention that the tender conditions were violative of Article 19(1)(g).

22. In the judgment relied by learned counsel for the respondents in the case of Kannaiyan vs. State of Tamilnadu reported in A.I.R. 2005 NOC 212 (Madras), the Government order providing for grant of contract to Adi-Dravidars or Tribals being in consonance with the Article 15(4) of the Constitution of India has been upheld. Following was laid down in the said judgment:-

"The scope and object of Article 15(4) to bring Articles 15 and 29 in line with Articles 16(4), 46 and 340 and to make it constitutional for the State to reserve seats for backward classes of citizens, Scheduled Castes and Tribes in the public educational institutions as well as to make other special provisions as may be necessary for their advance. In short, the amendment would validate the reservation and would protect the interests of the Scheduled Castes and Scheduled Tribes. Article 15(4) is an exception to Article 15(1) in so far as it forbids discrimination on the ground of race or caste. It is also in the nature of an exception to Article 29(2).

No doubt that in general statutory provisions of law have the overriding effect on the Government orders passed but since impugned Government Order has been issued in consonance with the enabling provisions of the Constitution particularly under Article 15(4) of the Constitution of India aimed at the advancement of the socially and economically backward sections of the society as a special provision, the Government order has been issued by the first respondent State Govt. and further since the statute cannot override a constitutional right.

Though it apparently looks as if the statute has been overridden by the Government order, if it is seen in the light of Article 15(4), the Government order can be given effect to and it cannot be said that the statute is being overridden especially when the fundamental obligation of the State is given effect to for the purpose of giving effect to Article 15(4) of the Constitution of India.

The Government order impugned is not class legislation which the constitution forbids but a reasonable classification which the Constitution of India promotes and therefore there is no inconsistency or illegality or even arbitrary exercise of power by the first respondent Government in passing the impugned Government order and since

within the parameters of their relevant provisions of the Constitution of India as aforementioned the impugned Government order issued by the first respondent Government has to be held valid and proper."

23. The petitioners have placed reliance on the judgment in Kharak Singh's case (supra) in which the Apex Court laid down that restriction contemplated under Article 19 can be imposed only by way of law. The Apex Court held that restriction, which was contained in Police Regulations were not "law', hence cannot be saved under Article 19 clause (2) to (6). It was held, ".... In our view clause (b) of Regulation 236 is plainly violative of Article 21 as there is no "law" on which the same could be justified it must be struck down as unconstitutional". Following was laid down in paragraph 5 of the said judgment:-

5. Before entering on the details of these regulations it is necessary to point out that the defence of the state in support of their validity is two - fold : (1) that the impugned regulations do not constitute an infringement of any of the freedoms guaranteed by part III of the Constitution which are invoked by the petitioner, and (2) that even if they were, they have been framed "in the interests of the general public and public order" and to enable the police to discharge its duties in a more efficient manner and were therefore "reasonable restrictions" on that freedom. Pausing here it is necessary to point out that the second point urged is without any legal basis for if the petitioner were able to establish that the impugned regulations constitute an infringement of any of the freedoms guaranteed to him by the Constitution then the only manner in which this violation of the fundamental right could be defended would be by justifying the impugned action by reference to a valid law, i.e., be it a statute, a statutory rule or a statutory regulation. Though learned Counsel for the respondent started by attempting such a justification by invoking S. 12 of the Indian Police Act he gave this up and conceded that the regulations contained in Ch. XX had no such statutory basis but were merely executive or departmental instructions framed for the guidance of the police officers. They would not therefore be "a law" which the state is entitled to make under the relevant cls. (2) to (6) of Art. 19 in order to regulate or curtail fundamental rights guaranteed by the several sub-clauses of Art. 19 (1), nor would the same be "a procedure established by law" within Art. 21. The position therefore is that if the action of the police which is the arm of the executive of the state is found to infringe any of the freedoms guaranteed to the petitioner the petitioner would be entitled to the relief of mandamus which he seeks, to restrain the state from taking action under the regulations."

24. The next judgment relied by the petitioners' counsel is Khyerbari Tea Company's case (supra) where it was held that burden to prove that restrictions are reasonable is on the State when prima facie it is shown that fundamental rights are being violated. Reliance has been placed upon paragraphs 33, 34 and 35 of the said judgment. Paragraphs 33 and 34 are quoted below:-

"**33**. On the other hand, Mr. Pathak strenuously argues that the initial presumption would be rebutted as soon as

it is shown that the fundamental rights under Art. 19 (1) (g) is invaded by a statute, or the freedom of trade guaranteed by Art. 301 is assaulted by the impugned statute. Once a citizen shows that the impugned statute invades either his individual fundamental right, or the right of freedom of trade, the presumption has worked itself out and the onus shifts to the State to show that the invasion amounts to a restriction which is reasonable or it is in the interest of the general public.

34. It may be conceded that, prima facie there is some force in the argument raised before us by Mr. Setalvad. If the freedom guaranted to an individual citizen is not absolute and its content must be determined by reading Art. 19(1) (g) and clause (6) of Art. 19 together it can perhaps be said that the initial presumption cannot be rebutted merely by showing that the freedom under Art. 19(1) (g) has prima facie been invaded. But we do not think it necessary to pursue this matter any further because we are satisfied that the question raised by Mr. Setalvad is concluded against him by a decision of this Court."

25. Another judgment relied by petitioners' counsel is Municipal Corporation of the City of Ahmedabad case (supra), which was a case of closure of slaughter house, which was challenged on the ground that rights under Article 19(1)(g) of the Constitution has been violated. Following was laid down in paragraph 17 of the said judgment:-

"7. The present case is apparently another attempt, though on a slightly different ground, to circumvent the judgment of this Court in Mohd. Hanif Quareshi's case (AIR 1958 SC. 731) (supra). The writ giving rise to the present appeal sought to challenge two Standing Orders made by the Municipal Commissioner of the Municipal Corporation of the City of Ahmedabad, in exercise of his powers under S. 466(1)(D)(b) of the Bombay Provincial Municipal Corporation Act 1949 directing that the Municipal slaughter houses should be kept open for use on all days except on seven days mentioned in the two standing orders."

26. From the decisions of the Apex Court and the High Courts, as noticed above, it is clear that restrictions on a fundamental right guaranteed under Article 19 of the Constitution can be saved when it has been imposed by a "Law" and further in accordance with the limits as prescribed under Article 19(6) of the Constitution.

27. Taking into consideration the entire facts and circumstances and the contents of the Government order dated 30th June, 2009, we fail to see any restriction on the petitioners' fundamental right to carry on trade or business. The mere fact that 21% of the contract is reserved for scheduled castes and 2% is reserved for scheduled tribes up to the value of Rs.5,00,000/-, cannot be held to mean that fundamental rights of the petitioners to carry on their business or occupation has been violated. As noticed above, the Government order dated 30th June, 2009 is referable to power of the State under Article 15(4) of the Constitution and by that Government order the State Government has not provided for any restriction on exercise of the rights as contemplated under Article 19(6) of the Constitution of India nor the submission of the petitioners that Government order creates any monopoly

in favour of scheduled castes and scheduled tribes can be accepted since the Government order dated 30th June, 2009 has been issued by the State Government in exercise of power under Article 15(4) of the Constitution of India providing for a special provision for advancement of scheduled castes and scheduled tribes.

28. In view of the foregoing discussions, the Government order dated 30th June, 2009 cannot be held to be violative of Article 19(1)(g) of the Constitution of India and it does not deserve to be quashed. No ground is made out to quash the Government order dated 30th June, 2009.

The writ petition is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.09.2009

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

Civil Misc. Writ Petition No.19495 of 1995

P.N. Shukla ...Petitioner
Versus
The Chairman, Uttar Pradesh, State Handloom Corporation Limited, Lucknow and others ...Respondents

Counsel for the Petitioner:
Sri V.B. Singh
Sri Vijay Sinha
Sri U.N. Sharma
Sri Chandan Sharma

Counsel for the Respondents:
Sri Shiv Nath Singh

U.P. State Handloom Corporation (Staff and Officers Condition of Service Rules-Rule-11-Natural Justice termination without holding enquiry without show cause notice-held-illegal petitioner may or may not be regular employee-awarding major punishment without enquiry-held-not sustainable.

Held: Para 4

We are of the view that petitioner may or may not be regular government employee or employee under other authorities but the question of natural justice at the time of awarding punishment particularly in respect of major punishment enquiry cannot be dispensed with. There is no scope to defending the issue by filing an affidavit nor we are satisfied, if any such plea has been taken by the respondents herein. Therefore, in totality the order of punishment to be quashed along with the appellate order and the order of recovery.

Case law discussed:
AIR 2008 Supreme Court 2463,
(2006) 8 Supreme Court Cases, 129.

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

1. The petitioner has challenged the order of termination dated 18th March, 1994 by saying that it is illegal, arbitrary and has been caused in flagrant violation of principles of natural justice.

2. It appears to this Court that neither any enquiry proceeding was initiated nor any cause has been shown for dispensation of such enquiry by the respondents authority. Only by way of affidavit, the respondents wanted to establish the case that there is no necessity of enquiry. Therefore, their case is for violation of principle of natural justice. Rule 11 of the Rules relating to U.P. State Handloom Corporation (Staff and Officers Conditions of Service Rules) speaks as follows:-

"11. Procedure for imposing major penalties:-

(i) No order imposing any of the major penalties shall be made except after an enquiry held in accordance with this sub-rule.

(ii) Whenever the disciplinary authority is of the opinion that there are grounds for enquiring into the truth of any imputations against an employee, it may itself enquire into the truth thereof or may appoint any officer (hereinafter called the enquiring officer) for the purpose.

(iii) Where it is proposed to hold such enquiry, the disciplinary authority shall frame definite charges on the basis of the allegations against the employee. The charges, together with the said allegations, shall be communicated in writing to the employee who shall be required to submit within a reasonable time a written statement whether he admits or denies any or all of the charges. He shall also be required to state whether he desires to be heard in person, whether he desires to cross-examine any of the witnesses proposed to be produced against him and also whether he has any witnesses to produced in his defence, and, if so, what each witness is expected to testify. He shall also give the full particulars and the address of each witness.

Note:- the charge-sheet shall be accompanied by copies of any statement made previously in any informal and confidential enquiry into the allegations against the employee. Further, below each charge shall be listed the documents and proofs proposed to be taken into account at the enquiry and the particulars of any witnesses proposed to be examined in support of each charge.

(iv) Before submitting his written statement of defence to the enquiring officer the charged employee may ask to be allowed to inspect the documents cited in the charge-sheet or any other relevant records and / or also ask for copies of any relevant documents. Reasonable facilities for inspection will be allowed to him and he may be supplied with copies of such documents as, in the opinion of the enquiring officer, are such that the requirements of reasonable opportunity of defence cannot be fulfilled without their inspection or the supply of copies, as the case may be.

(v) The disciplinary authority may nominate any officer to be known as the presenting officer to present on its behalf of the case in support of the charges.

(vi) The charged employee may take the assistance of anyone of his colleagues in the Corporation, but shall not engage any legal practitioner for the purpose.

(vii) On the date fixed for hearing by the enquiring officer the oral and documentary officer the oral and documentary evidence by which the charges are proposed to be proved shall be considered.

(viii) the enquiring officer may allow the production of evidence no specified in the charge-sheet or may him-self call for new evidence or recall or re-examine any witness. In such a case the charged employee shall be given an opportunity to inspect the documentary evidence brought on record or to cross-examine a witness who has been so summoned.

(ix) The evidence on behalf of the charged employee shall then be produced. The employee may himself have his statement recorded as a witness in his own behalf of he so chooses. The witnesses produced by the employee shall then be examined, cross-examined and re-examined, as may be necessary, with power to the enquiring officer to put any question to any witness.

(x) The enquiring officer may, after the the employee closes his case, generally question him on the circumstances appearing against him in the prosecution evidence with a view to enabling the employee to explain any circumstances appearing in the evidence produced against him.

Provided that such questioning may not be necessary if the employee has already given his statement as a witness and in the course of which the enquiring officer has already questioned him as aforesaid."

Respondents want to establish their case on the basis of Service Rules of U.P. State Handloom Corporation Ltd. Rule 16(1) (c) is being quoted below:-

"where the disciplinary authority is satisfied that, in the interest of the basic principles underlying the incorporations of the Corporation and its effective functioning or in the interest of the security of the country, it is not expedient to hold an enquiry in the manner provided for in these subrules."

3. However, even if the same is applicable with a specific case even then some cause will have to be shown for the purpose of dispensation of the inquiry. We have not seen that any such step has been taken by the authority on the ground of dismissal or recovery of amount of Rs.49.75 lacs on the ground of alleged embezzlement. The learned counsel for respondents further cited the judgement reported in **AIR 2008 Supreme Court 2463 Union Public Service Commission V. Dr. Jamuna Kurup & Ors**. to establish that a Municipal Corporation is not 'government' and municipal employees are not government servants governed by Articles 309 and 311 of the Constitution of India. He has further cited a judgement in support of his contention reported in **(2006) 8 Supreme Court Cases, 129 Indu Shekhar Singh and others Vs. State of U.P. and others**. It has been stated that right of seniority is not a fundamental right. It is merely a civil right. Controversy is not related to seniority, therefore, the ratio is inapplicable herein. In any event, in para 32 and 37 of counter affidavit, there is an admission on the part of the respondents that only after calling reply, the punishment has been imposed. Therefore, the dispute is whether the authority has infringed the principle of natural justice at the time of awarding punishment or not.

4. We are of the view that petitioner may or may not be regular government employee or employee under other authorities but the question of natural justice at the time of awarding punishment particularly in respect of major punishment enquiry cannot be dispensed with. There is no scope to defending the issue by filing an affidavit nor we are satisfied, if any such plea has been taken by the respondents herein. Therefore, in totality the order of punishment to be quashed along with the appellate order and the order of recovery.

5. Writ petition is allowed without imposing any cost.

6. However, this order will not be construed as reinstatement of the petitioner. It is open for the respondent authority to initiate proceeding or to issue appropriate notice by saying as to why the enquiry will be dispensed with. It is open to the respondents to complete the enquiry proceeding in accordance with law as early as possible preferably within a period of one month from the date of communication of this order.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.09.2009

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

Civil Misc. Writ Petition No. 500 of 2007

Picket Inter College Khatauli, District Muzaffar Nagar ...Petitioner
Versus
District Inspector of Schools, Muzaffar Nagar and others ...Respondents

Counsel for the Petitioner:
Sri N.S. Chahar

Counsel for the Respondents:
Sri Vikrant Pandey
Sri S.K. Awasthi
C.S.C.

U.P. Inter Mediate Education Act 1921-16 D (4)-Appointment of authorized Controller-in minority institution-clear statutory prohibit fact of minority institution not denied in counter affidavit-held-unsustainable.

Held: Para 7

The only question which survives for determination is as to whether the Authorized Controller could have been appointed or not. The aforesaid legal question stands squarely answered in favour of the petitioner and Section 16D(14) of the U.P. Intermediate Education Act, 1921 recites clearly that the provisions of supersession do not apply in respect of minority institutions. The aforesaid statutory bar therefore prohibits the respondents from appointing an Authorized Controller.

Case law discussed:
1993 ALL.L.J. 318

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

List has been revised.

1. Shri N.S. Chahar, learned counsel for the petitioner has advanced his submissions on behalf of the petitioner and the learned standing counsel for the respondent nos. 1 to 4. In spite of an impleadment application having been filed and allowed by this Court on 28.03.2008, the respondent no. 5-Smt. Jaswanti Singh remains unrepresented. None has appeared on her behalf to assist the Court nor any counter affidavit has been filed.

2. A counter affidavit has been filed on behalf of the State, wherein the fact that the institution is a minority institution, has not been denied The counter affidavit does not disclose the source of power exercised on the basis whereof the committee has been superseded.

3. The writ petition has been filed challenging the order dated 16th December, 2006, whereby the Regional Director of Education Saharanpur, Region Saharanpur has appointed an Authorized

Controller in the institution purporting to exercise powers on the ground that there are certain irregularities in the institution.

4. Shri Chahar, learned counsel for the petitioner contends that the order is without jurisdiction inasmuch as Minority institutions are exempted from such supersession and the protection guaranteed under Article 30 of the Constitution of India obliges the respondents not to supersede the Committee of Management of a Minority institution.

5. The fact that the petitioner is a minority institution has been clearly stated in paragraphs 3 and 4 of the writ petition, which has not been denied in the counter affidavit of Shri Arvind Kumar, Associate District Inspector of Schools, Muzaffar Nagar filed on behalf of the respondent nos. 1 to 4. Learned standing counsel has also not been able to point out any provision under the U.P. Intermediate Education Act, 1921 that may authorise the respondents to supersede the petitioner's Committee of Management and appoint an Authorized Controller. This fact was also taken notice at the time of granting interim relief by this Court on 05.01.2007.

6. Having heard learned counsel for the parties and in view of the fact that no one has chosen to put up any defence on behalf of the respondent no. 5, there is no option for this Court except to dispose of the writ petition at this stage.

7. The only question which survives for determination is as to whether the Authorized Controller could have been appointed or not. The aforesaid legal question stands squarely answered in favour of the petitioner and Section 16D(14) of the U.P. Intermediate Education Act, 1921 recites clearly that the provisions of supersession do not apply in respect of minority institutions. The aforesaid statutory bar therefore prohibits the respondents from appointing an Authorized Controller.

8. There is yet another aspect of the matter. Even if it is presumed that the power exists to supersede a management under U.P. Act No. 24 of 1971, there also it is extremely doubtful as to whether such a power can be exercised in respect of a management of a Minority Institution protected under Article 30 of the Constitution of India.

9. In the instant case the query made by the District Inspector of Schools is in relation to alleged irregularities of management and not with regard to default in payment of salary. The order of single operation was passed in public interest which is in violation of the provision of U.P. act No. 24 of 1971 and therefore the same was stayed by this Court on 08.12.2006. The impugned order does not record any further persistent default of payment of salary so as to warrant supersession. It has been held in the case of ***Committee of Management, Sahid Sansmaran Inter College, Sherpur and another Vs. Deputy Director of Education, Varanasi and another, 1993 ALL.L.J. 318***, that it is for default in payment of salary as defined under Section 2 (g) of the Act that such a power can be exercised under Section 6 of the 1971 Act. There is nothing contained in the impugned order reflecting any such default. A dispute about allegations of general nature relating to mismanagment or maladministration other than those as

mentioned in the 1971 Act, cannot be made subject matter of scrutiny under Section 6 of the 1971 Act. The order impugned is therefore unsustainable on this ground as well.

10. There is therefore no option for this Court except to allow the writ petition. The impugned order dated 16.12.2006 passed by the respondent no. 4 is hereby quashed with costs on parties. Disposed of accordingly.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.08.2009

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

Civil Misc. Writ Petition No. 26204 of 1992

Ram Sahodar ...Petitioner
Versus
State of U.P. and another ...Respondents

Counsel for the Petitioner:
Sri K.D. Tripathi
Sri N.K. Saxena

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

Ceiling on Land Holdings Act 1961-Section 38-B-Surplus land-prescribed authority by order dated 25.05.78 declared 1.24 acres land as surplus-after 11 years restoration Application by state rejected by Prescribed authority-appellate authority by exceeding its jurisdiction without valid and cogent reasons-declared 9.84 acres land as surplus-held-not sustainable.

Held: Para 14

Apart from this, it is surprising that if the order dated 25.05.1978 of the Prescribed Authority in any way prejudiced the State then the State ought to have filed a regular appeal against the order, which was admittedly not done. The appeal appears to have not been filed within time and it is for this reason that a restoration application appears to have been moved after 11 years so as to avoid limitation, for which there is no plausible reason available on record. The action of the Naib Tehsildar after 11 years of the order dated 25.08.1978 was actuated by malice in law and the prescribed authority was fully justified in rejecting the same on valid and cogent reasons.

Case law discussed:
2009 (5) ADJ 529.

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

1. Heard learned counsel for the petitioner and the learned standing counsel for the respondents. The proceedings arise out of orders passed under the U.P. Imposition of Ceiling on Land Holdings Act, 1961 (hereinafter referred to as 'the Act').

2. The present writ petition has been preferred against the order dated 03.07.1992 passed by the learned Additional Commissioner, Jhansi Division, Jhansi, whereby the appeal filed on behalf of the State, questioning the order of the Prescribed Authority dated 25.10.1991, has been allowed and the land to the tune of 9.84 acres in the irrigated sense has been declared as surplus in the hands of the petitioner.

3. Learned counsel for the petitioner contends that the order is erroneous, inasmuch as, the order dated 25th May, 1978 passed by the Prescribed Authority, whereby only an area of 1.24 acres has been declared surplus, had become final and there was no further land available so

as to reopen the entire proceedings on the principles of Section 38-B of the Act, 1960 . Learned counsel for the petitioner contends that the proceedings were not ex-parte and had been decided upon an order of remand having been passed by the then Appellate Authority on two specific issues. It is urged that the impugned order incorrectly without appreciating the facts on record on the issue of ex-parte proceedings has caused prejudice. The Appellate Authority has proceeded to reopen the entire case, which was impermissible in law. He contends that the declaration of the land as surplus in the hands of the petitioner has attained finality and, therefore, the authority could not have exceeded its jurisdiction by restoring an order which had already been set aside and had been finalized by the Prescribed Authority on 25.05.1978.

4. Learned standing counsel, on the other hand, contends that, as a matter of fact, the order dated 25.05.1978 was ex-parte and had proceeded on an incorrect assumption and, therefore, the Additional Commissioner was justified in reopening and rehearing the entire matter and restore the earlier order of the Prescribed Authority passed in the year 1976.

5. Having heard learned counsel for the parties, the facts shorn of details are that a notice was issued to the petitioner's father late Prabhu Dayal, where after vide order dated 29.06.1976 the Prescribed Authority declared an area of 9.84 acres as surplus. The petitioner's father late Prabhu Dayal preferred an appeal bearing Ceiling Appeal No. 877 of 1976 and the said appeal was allowed on 03.11.1976. A copy of the judgment in the said appeal is annexure 5 to the writ petition. The matter was remanded calling upon the Prescribed Authority to ascertain the fact as to whether Ram Sahodar was major at the relevant date or not and further the impact of the consolidation proceedings which brought about the change in the nature of the chaks that had earlier been carved during the consolidation operation. Upon remand, the matter was gone into by the Prescribed Authority and vide order dated 25.05.1978 the Prescribed Authority found that an area of 1.24 acres was only surplus in the hands of the tenure holders. This order was not challenged by the State and as such the same became final.

6. It appears that the Nayab Tehsildar (Ceiling) moved an application for restoration of the said order on the ground that it was an ex-parte order. This application was moved on 24.02.1989 after a lapse of almost 11 years. To this, the petitioner filed an objection and ultimately vide order dated 25.10.1991, the Prescribed Authority rejected the said application moved by the Nayab Tehsildar (Ceiling) clearly holding that the proceedings dated 25.05.1978 were not ex-parte and the dispute had been decided after giving full opportunity to the State to lead evidence.

7. Against the aforesaid order the State filed an appeal, which has been allowed giving rise to the present writ petition, the Appellate Authority has held that the order passed by the Prescribed Authority was based on surmises and conjectures and without putting the Nayab Tehsildar (Ceiling) to notice about the same.

8. Learned counsel for the petitioner contends that a clear finding has been recorded by the Prescribed Authority in

the order dated 25.10.1991 that the order had been passed after giving full opportunity to the State to cross-examine the witnesses of the tenure holder. Further finding has been recorded by the Prescribed Authority that one Fateh Bahadur, the Lekhpal of the area concerned, had also been produced and he was also cross-examined. It is further submitted that the finding of the learned Commissioner that the proceedings were ex-parte is absolutely unfounded and based upon an erroneous assumption of fact and, therefore, liable to be set aside.

9. Learned standing counsel, on the other hand, contends that the order dated 25.05.1978 was ex-parte and further even on merits the order dated 25.05.1978 did not conform to the provisions of law. He contends that the learned Commissioner rightly proceeded to hear the matter on merits and lawfully revived the orders of the Prescribed Authority dated 29.06.1976.

10. Having heard learned counsel for the parties, the fact remains that the ceiling proceedings initiated against the petitioner's father was taken up to the stage of the Appellate Authority whereupon the order of the Prescribed Authority was set aside and the matter was remanded back on 03.11.1976 calling upon the Prescribed Authority to decide the matter afresh. The Prescribed Authority vide order dated 25.05.1978 decided the matter holding that an area of 1.24 acres was surplus in the hands of the tenure holder in the irrigated sense. The said order was sought to be set aside and proceedings restored after 11 years on the allegation that it was ex-parte to the State. The Prescribed Authority in the order dated 25.10.1991 while rejecting the restoration moved by the State clearly found that the proceedings were not ex-parte and that the entire proceedings had been concluded after giving fully opportunity to the State to cross-examine the witnesses. The learned Commissioner has attempted to reverse the said finding on the ground that the Nayab Tehsildar (Ceiling) had not been put to notice for the same and, therefore, it appears that prejudice has been caused.

11. In my opinion, the aforesaid reversal by the learned Commissioner is perverse, inasmuch as, the said reversal has come without upsetting the finding of the Prescribed Authority, which was to the effect that the matter had been heard on merits and the State was allowed to lead evidence and cross-examine the witnesses of the tenure holders. This finding having not been reversed, it was therefore not open to the Commissioner to have reopened the entire issues which had on the same set of evidence been finalised earlier. The conclusion drawn by the learned Commissioner is not only erroneous but is also against the weight of evidence on record. This is also evident from a perusal of the counter affidavit, which has been filed on behalf of the State.

12. Further the ceiling proceedings are not a pandoras box to be opened on the whims of an official at any stage. The proceedings had become final in the year 1978. The Nayab Tehsildar (Ceiling) had no legally available foundation to move a restoration application after 11 years in a proceeding that had become final on the same set of evidence and same issues without there being any new discovery. Reference may be had to the decision in the case of ***Mahmood Rais and others Vs.***

State of U.P. and others reported in ***2009 (5) ADJ 529***. The relevant paragraphs 12, 16 and 17 of the said decision are being quoted below:

*"**12.** In view of the aforesaid circumstances, it is clear that neither the family settlement was overturned by this Court nor was the theory of any fraud or misrepresentation on the part of the petitioners believed by this Court. In such a situation, there was no occasion for the Prescribed Authority to have re-opened the issue which had already became final after contest and after having led evidence in this regard. The appellate order dated 27.9.77 has attained finality almost in all respects and no room was left for the Prescribed Authority to travel beyond it keeping in view of the provisions of Section 38-B of the Act which has been explained by the Court in the case of D.N. Singh v. State of U.P., AIR 1999 SC 2264 and in the case of Ram Bhau Singh v. Addl. Commissioner, 2007 (5) ADJ 593.*

***16.** The authorities therefore have to keep in mind that they are no magicians to draw out some evidence from a magical hat nor they have unlimited powers to re-agitate issues already settled upon evidence having been taken. The proceedings have not to be placed at par with a Pandoras Box as they are very near to judicial adjudication. They do not have to repeat the same performance for a better result. This would be against law and against public policy. It is only where some new acquisitions have been made or some new fact which may come into existence later on, that the provisions of 38-B rescue the State against res-judicata. This is only to ensure any escape from assessment by the authorities that was otherwise capable of being considered.*

***17.** There is yet another aspect which has to be dealt with in such matters. The provisions of the Act do not altogether throw away over board the doctrine relating to finality. The question of issue estoppel and its distinction from res-judicata and constructive res-judicata has been dealt with in paras 39 and 40 of the judgment in the case of Dadu Dayal Maha Sabha reported in 2008 (11) SCC 753. It is true that these general doctrines may not over ride a statutory provision yet the principles enshrined therein cannot be construed to have been whittled down in law. The provisions contained under the Ceiling Act cannot be construed to the extent of diluting the impact of the said principles when the matter has been decided between the same parties on the same set of evidence without there being anything new. It is akin to the principles employed while dealing with the doctrine of precedents which also finds mentioned in Ambika Prasad v. State of U.P., AIR 1980 SC 1762 and in the Full Bench decision of our Court in the decision of Rana Pratap Singh v. State, 1995 ACJ 200. The doctrine of finality has also been discussed as being a doctrine which is to promote public interest. Reference may be had to the case of Krit Kumar Chaman v. Union of India, 1981 (2) SCC 436 and in the matter of taxation in the case of Devi Lal Modi v. Sales Tax Officer, AIR 1965 SC 1150. In the instant case after the order of the appellate authority was pronounced on 27.9.77 regarding a finding on the issue of family settlement, and the State did not choose to file any writ petition questioning the said order, then in the opinion of this court to doctrine of finality would be attracted in such a situation."*

13. The reason given that the proceedings were ex-parte are not founded on any material and the prescribed authority was therefore right in concluding that the proceedings that had been finalized after giving full opportunity to the State. The proceedings could have been reopened on the principles as referred to under Section 38-B of the Act. However, there was no new material before the authority to invoke the said provision and, therefore, they could not have proceeded under the garb of the restoration application after 11 years that there was an incorrect calculation made by the Prescribed Authority in the order dated 25.05.1978. The learned Commissioner erred in entering into the merits of the claim when the State had failed to file any appeal within time against the order dated 25.05.1978.

14. Apart from this, it is surprising that if the order dated 25.05.1978 of the Prescribed Authority in any way prejudiced the State then the State ought to have filed a regular appeal against the order, which was admittedly not done. The appeal appears to have not been filed within time and it is for this reason that a restoration application appears to have been moved after 11 years so as to avoid limitation, for which there is no plausible reason available on record. The action of the Naib Tehsildar after 11 years of the order dated 25.08.1978 was actuated by malice in law and the prescribed authority was fully justified in rejecting the same on valid and cogent reasons.

15. The learned Commissioner appears to have overlooked the aforesaid aspects of the matter and has thus arrived at a conclusion which is erroneous in law as well as on facts. The impugned order dated 03.07.1992 is not legally sustainable and is hereby quashed.

With the aforesaid observations, the writ petition is allowed.
