ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.11.2010

BEFORE
THE HON'BLE ASHOK BHUSHAN, J.
THE HON'BLE RAN VIJAI SINGH, J.

Civil Misc. Writ Petition No. 65773 of 2010

L.I.C. of India and another ...Petitioners
Versus
District Magistrate and others ...Respondents

Counsel for the Petitioner:
Sri Prakash Padia

Counsel for the Respondent:
Sri K.P. Singh
C.S.C.

Constitution of India Art 226-Officers and staff of L.I.C. Entrusted in election duties in accordance with Representation of People Act-argument that they are neither within definition of employee of either State or Central Govt.-not available -LIC established by Parliament Life Insurance Corporation of India Act 1956 by Section 159.(2) (iv)They can be engaged in preparation of electoral Roll of Graduate Constituency-No grand for interference-Called for.

Held: Para 14

It is relevant to note that the judgment of the apex Court was considering the unamended section 159 as quoted above. Subsequent to the judgment of the apex Court, section 159 has been amended with effect from 23.12.1997 and apart from staffs of the local authority, three more other new categories have been added in section 159, which could be requisitioned for conduct of the election duties. Section 159 (2) (iv) embraces in itself any other institution, concern or undertaking which is established by or under a Central, Provincial or State Act or which is controlled or financed wholly or substantially by funds provided, directly or indirectly, by the Central Government or a State Government. Life Insurance Corporation of India having been established by the Parliamentary Act namely; Life Insurance Corporation Act 1956, is clearly covered by section 159 (2)(iv). Thus, the engagement of the staffs of the L.I.C. after the amendment of the Section 159, cannot be questioned on the ground that Life Insurance Corporation of India is not covered within the definition of the local authority.

Case law discussed:
AIR 1995 S.C. 1078, Division Bench judgment dated 27.10.2010 passed in Writ Petition No. 64288 of 2010, Writ Petition No. 28736 of 2010.

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

1. These four writ petitions have been filed by Life Insurance Corporation of India, challenging the orders , passed by the District Election Officer, Kanpur Nagar by which the officers/employees of the Corporation have been engaged for conduct of the elections of the graduate constituency. Facts and issue raised in all these writ petitions being similar, have been heard together and are being decided by this common judgment. For deciding all the writ petitions, it is sufficient to refer the pleadings of writ petition No. 65773 of 2010

2. The Life Insurance Corporation of India is established by Life Insurance Corporation Act, 1956. The District Election Officer by orders impugned in the writ petition, has informed the Head of the Department/Head of the Office of Life Insurance Corporation of India Zonal office, Kanpur that officers and employees of the Corporation have been deputed for conduct

of elections to the Legislative Council Kanpur Khand Teachers Graduate Constituency Election 2010. The petitioner's case in the writ petition is that officers and employees of the Life Insurance Corporation of India cannot be directed to perform the election duties. Reference in the writ petition has been made of the Division Bench judgment of this Court dated 7.9.2010, passed in writ petition No. 41501 of 2008, Life Insurance Corporation of India and others Vs. Additional City Magistrate (ii), the interim order dated 12.10.2010, passed by the Division Bench in writ petition No. 62772 of 2010, Life Insurance Corporation of India Vs. D.M./District Election Officer and another, as well as another, (iii) judgment dated 27.10.2010 of this Court in writ petition No. 64288 of 2010, Life Insurance Corporation of India and others Vs. District Magistrate/D.E.O. and another and judgment of the apex Court reported in AIR 1995 S.C. 1078 **Election Commission of India Vs. State Bank of India, Patna** and others. The reliefs claimed in all the writ petitions are to the similar effect. In writ petition No. 65773 of 2010 following reliefs have been claimed:

"a) issue a writ, order or direction, including a writ in the nature of certiorari quashing the order dated 30.10.2010 (Annexure-5) passed by the respondent no. 2 appointing 9 Officers/employees working in the Central Zone Office, Kanpur Nagar of the petitioners Life Insurance Corporation of India to participate in Graduate Constituency Election 2010;

b) issue a writ, order or direction, including a writ in the nature of mandamus directing the respondents not to compel the officers/employees working in the Zonal Office, Kanpur Nagar of the petitioner Corporation to participate in Graduate Constituency Election 2010 in pursuance of the order dated 30.10.2010 in pursuance of the order dated 30.10.2010 issued in this regard by respondent no. 2;"

3. Sri Prakash Padia, leaned Counsel for the petitioners challenging the orders impugned, contended that staffs and officers of the Life Insurance Corporation of India cannot be deputed for election duties. It is contended that earlier employees and officers working with the Life Insurance Corporation of India were called for election duties, which were challenged by the Life Insurance Corporation of India in writ petition No. 41501 of 2008 in which an interim order was passed on 19.8.2008 and the writ petition was subsequently allowed by the judgment of the Division Bench dated 7.9.2010. Reference has been made to the interim order dated 12.10.2010 passed in writ petition No. 62772 of 2010 Life Insurance Corporation of India Vs. D.M./ District Election Officer and another and Division Bench judgment dated 27.10.2010 passed in writ petition No. 64288 of 2010. Sri Padia placed reliance on the judgment of the apex court in **Election Commission of India** (supra) in which the orders passed by the District Election Officers deputing the staff of State Bank of India was questioned before the High Court and the High Court allowed the writ petition against which the Election Commission of India filed appeal and the appeal was dismissed, holding that the State Bank of India is not covered within the definition of 'local authority' hence, under section 159 the Staffs of the State Bank of India could not be deputed the duty pertaining to elections of Parliament or Legislative Assembly. Sri Padia further submits that with regard to the Panchayat Election, the State Election Commission, U.P. itself has issued a circular dated

23.9.2010, directing all the District Magistrates /District Election Officers to exempt staffs and officers of the Life Insurance Corporation of India from election duty. Learned Counsel for the petitioners has also referred to and relied on the provisions of Article 324(6) of the Constitution of India and submits that unless the orders are passed by the President of India or Regional Election Commissioner, no officer or employee of the Life Insurance Corporation of India can be entrusted any election duty towards conduct of election of Parliament or Assembly.

4. Learned Standing Counsel appearing for the respondents has refuted the submissions of learned Counsel for the petitioner and submits that officers and staffs of the Life Insurance Corporation of India can very well be entrusted election duties in accordance with the provisions of Representation of the People Act, 1951. It is submitted that earlier only the staff under the control of the State and Union as well as staffs of the local authorities could have been deputed for election duties but section 159 of the Representation of the People Act having been amended, the Life Insurance Corporation of India is also now included under the amended provisions. It is submitted that the judgment of the apex Court in the case of **Election Commission of India** (supra), which considered the provisions of unamended section 159 is no longer helpful to the petitioners after amendment of the definition of section 159. With regard to Division Bench Judgment of this Court dated 7.9.2010, it has been submitted that the said judgment having not considered section 159 as amended, is distinguishable and not applicable in the facts of the present case.

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

6. Part XV of the Constitution of India deals with "ELECTIONS". Article 324 provides for Superintendence, direction and control of elections to be vested in an Election Commission. Article 327 provides for the power of Parliament to make provision with respect to elections of the Legislatures. Articles 324 and 327 of the Constitution of India are quoted below:

"324. Superintendence, direction and control of elections to be vested in an Election Commission.- *(1) The superintendence, direction and control of the preparation of the electoral rolls for, and the conduct of, all elections to Parliament and to the Legislature of every State and of elections to the offices of President and Vice-President held under this Constitution 272 shall be vested in a Commission (referred to in this Constitution as the Election Commission).*

(2) The Election Commission shall consist of the Chief Election Commissioner and such number of other Election Commissioners, if any, as the President may from time to time fix and the appointment of the Chief Election Commissioner and other Election Commissioners shall, subject to the provisions of any law made in that behalf by Parliament, be made by the President.

(3) When any other Election Commissioner is so appointed the Chief Election Commissioner shall act as the Chairman of the Election Commission.

(4) Before each general election to the House of the People and to the Legislative Assembly of each State, and before the first

general election and thereafter before each biennial election to the Legislative Council of each State having such Council, the President may also appoint after consultation with the Election Commission such Regional Commissioners as he may consider necessary to assist the Election Commission in the performance of the functions conferred on the Commission by clause (1).

(5) Subject to the provisions of any law made by Parliament, the conditions of service and tenure of office of the Election Commissioners and the Regional Commissioners shall be such as the President may by rule determine:

Provided that the Chief Election Commissioner shall not be removed from his office except in like manner and on the like grounds as a Judge of the Supreme Court and the conditions of service of the Chief Election Commissioner shall not be varied to his disadvantage after his appointment:

Provided further that any other Election Commissioner or a Regional Commissioner shall not be removed from office except on the recommendation of the Chief Election Commissioner.

(6) The President, or the Governor _273 of a State, shall, when so requested by the Election Commission, make available to the Election Commission or to a Regional Commissioner such staff as may be necessary for the discharge of the functions conferred on the Election Commission by clause (1).

327. Power of Parliament to make provision with respect to elections to Legislatures.- *Subject to the provisions of this Constitution, Parliament may from time to time by law make provision with respect to all matters relating to, or in connection with, elections to either House of Parliament or to the House or either House of the Legislature of a State including the preparation of electoral rolls, the delimitation of constituencies and all other matters necessary for securing the due constitution of such House or Houses."*

7. Article 324 (6) of the Constitution of India on which reliance has been placed by counsel for the petitioner provides that when so requested by the Election Commission, the President or the Governor of the State shall make available to the Election Commission or to a Regional Commissioner such staff as may be necessary for discharge of the functions conferred on the Election Commission by Clause (1). Article 324 vests power of Superintendence, direction and control of the preparation of the electoral rolls for, and the conduct of, all elections to Parliament and to the Legislature of every State and of elections to the offices of President and Vice-President in an Election Commission. Article 324(6) enables the Election Commission to request the President or the Governor of the State to make available such staff as may be necessary. Article 327 specifically provides that subject to the provisions of the Constitution of India, Parliament may from time to time by law make provision with respect to matters relating to, or in connection with, elections to either House of Parliament or to the House or either House of the Legislature of a State including the preparation of the electoral rolls. The Parliament in exercise of its power under Article 327 and all other enabling power has enacted the Representation of the People Act, 1950 (hereinafter referred to as "1950 Act") to

provide for the allocation of seats in, and the delimitation of constituencies for the purpose of elections to the House of the people and Legislatures of the State, the qualifications of voter at such elections and the preparations of electoral rolls, the manner of filling seats in the State and the matters connected therewith. The Parliament enacted the Representation of the People Act, 1951 (hereinafter referred to as "1951 Act") for the conduct of elections of the Houses of Parliament and to the House or Houses of the Legislature of each State, the qualifications and disqualifications for membership of those Houses, the corrupt practices and other offences at or in connection with such elections and the decision of doubts and disputes arising out of or in connection with such elections. Section 13A of 1950 Act provides for Chief electoral officers, Section 13AA provides of District election officers. Section 13 A and Section 13AA of the 1950 Act are quoted below:

"13A. Chief electoral officers.--*(1) There shall be for each State a chief electoral officer who shall be such officer of Government as the Election Commission may, in consultation with that Government, designate or nominate in this behalf.*

(2) Subject to the superintendence, direction and control of the Election Commission, the chief electoral officer shall supervise the preparation, revision and correction of all electoral rolls in the State under this Act.

13AA. District election officers.--*(1) For each district in a State, the Election Commission shall, in consultation with the Government of the State, designate or nominate a district election officer who shall be an officer of Government:*

Provided that the Election Commission may designate or nominate more than one such officer for a district if the Election Commission is satisfied that the functions of the office cannot be performed satisfactorily by one officer.

(2) Where more than one district election officer are designated or nominated for a district under the proviso to sub-section (1), the Election Commission shall in the order designating or nominating the district election officers also specify the area in respect of which each such officer shall exercise jurisdiction.

(3) Subject to the superintendence, direction and control of the chief electoral officer, the district election officer shall coordinate and supervise all work in the district or in the area within his jurisdiction in connection with the preparation and revision of the electoral rolls for all parliamentary, assembly and council constituencies within the district.

(4) The district election officer shall also perform such other functions as may be entrusted to him by the Election Commission and the chief electoral officer."

Section 29 of the 1950 Act provides as follows:

***"29.** Staff of local authorities to be made available .-- Every local authority in a State shall, when so requested by the chief electoral officer of the State, make available to any electoral registration officer such staff as may be necessary for the performance of any duties in connection with the preparation and revision of electoral rolls."*

8. According to Section 2(cc) of 1951

Act, "district election officer" means the officer appointed under section 13A of the Representation of the People Act, 1950. Section 20 A of 1951 Act provides for General duties of district election officer which are as follows:

"20A. General duties of district election officer. --*(1) Subject to the superintendence, direction and control of the chief electoral officer, the district election officer shall coordinate and supervise all work in the district or in the area within his jurisdiction in connection with the conduct of all elections to Parliament and the Legislature of the State.*

(2) The district election officer shall also perform such other functions as may be entrusted to him by the Election Commission and the chief electoral officer."

9. Section 26 of 1951 Act provides for Appointment of presiding officers for polling stations. Part X of 1951 Act contains heading **"Miscellaneous"** Section 159 of 1951 Act , which is material for the present case as it exists in the Statute Book is as follows:

"159. Staff of certain authorities to be made available for election work.--*(1) The authorities specified in subsection (2) shall, when so requested by a Regional Commissioner appointed under clause (4) of article 324 or the Chief Electoral Officer of the State, make available to any returning officer such staff as may be necessary for the performance of any duties in connection with an election.*

(2) The following shall be the authorities for the purpose of sub-section (1), namely:--

(i) every local authority;

(ii) every university established or incorporated by or under a Central, Provincial or State Act;

(iii) a Government company as defined in section 617 of the Companies Act, 1956 (1 of 1956);

(iv) any other institution, concern or undertaking which is established by or under a Central, Provincial or State Act or which is controlled, or financed wholly or substantially by funds provided, directly or indirectly, by the Central Government or a State Government."

10. Section 159 as it existed and was substituted by Act No. 12 of 1998 w.e.f. 23.12.1997 prior to the Amendment Act 159 was to the following effect:

"159. Staff of every local authority to be made available for election work. (Every local authority in a State shall, when so requested by a Regional Commissioner appointed under clause (4) of Article 324 or the Chief Electoral Officer of the State, make available to any returning officer such staff as may be necessary for the performance of any duties in connection with an election."

11. After having noticed the relevant Constitutional provisions and the provisions of 1950 Act and 1951 Act, the submissions of the petitioners' counsel that the election duty can be entrusted in accordance with Article 324(6) may be considered now. As noticed above Article 324 (6) is an enabling power of the Election Commission to request for such staff to be deputed by the President or the Governor of the State. Under Article 327 of the Constitution of

India, the Parliament has enacted 1950 Act and 1951 Act. Both the aforesaid Acts having been enacted for the purposes as noted above, the source of power to requisition officers and employees for performing election duties can be traced from 1950 Act and 1951 Act also. The submission of the learned counsel for the petitioner that engagement of the officers and staffs should be only done in accordance with Article 324(6) of the Constitution of India, is misconceived and ignores the statutory provisions and scheme of 1950 and 1951 Act.

12. In the writ petition, the main ground for challenging the impugned order is that the Life Insurance Corporation of India is not covered by the definition of the local authority and for election duties only the employees of the State and the Union and the Local Authorities can be engaged and the Life Insurance Corporation of India being not covered by the definition of the local authority, the direction issued by the District Election Officer is illegal. For this submission, much reliance has been placed by learned counsel for the petitioner on the judgment of the apex Court in **Election Commission of India** (Supra). It is useful to refer the said judgment in detail which has been relied by counsel for the petitioners. Election Commission of India had filed two appeals, challenging the judgment and order of the Patna High Court as well as Rajasthan High Court regarding conduct of elections. The District Election Officer had issued an order on 22.9.1991, directing the Chief General Manager, State Bank of India forwarding list of the officers and staffs for appointment of Presiding Officers for mid-term parliamentary elections and Assembly by-election. The said order was challenged before the Patna High Court. The Patna High Court allowed the writ petition taking the view that District Election Officer had no power under section 26 of the 1951 Act to requisition the services of the employees of the State Bank of India, it being not a local authority within the meaning of Section 159 of the 1951 Act. Following was observed in paragraph 9:

"9. The High Court, by the impugned judgment dated 21-5-1993, held that the District Election Officer had no power under Section 26 of the 1951 Act to requisition the services of employees of the State Bank of India for election duty. The High Court took the view that the State Bank of India was not a local authority within the meaning of Section 159 of the 1951 Act. Accordingly, the High Court quashed the orders and issued a writ in the nature of mandamus commanding the Election Commission of India not to requisition the services of the employees of State Bank of India in exercise of its power under Section 26 of the 1951 Act."

13. The apex Court referring to the Constitutional provisions of 1951 Act, took the view that officer of the State Bank being not such staff which may be engaged under section 159, the orders were without jurisdiction following was laid down in paragraphs 18, 20 and 21:-

"18. We assume that the powers of the Election Commission under Article 324 are plenary. Therefore, the Election Commission may issue any direction in the matter of conduct of elections. But the question is, in the grab of conduct of elections, can the Election Commission usurp the power not vested in it? This will depend on the understanding of clause (6) of Article 324. For the conduct of elections when the Election Commission makes a request to the President or the Governor to

make available the staff they are obliged to provide the services. What is the meaning of 'such staff? According to Mr. Dushyant Dave we should refer to Article 310 which talks of a member of Civil Service (in contradistinction to Defence Service of the Union or the State), holding office during the pleasure (Durante bene placito) of President or the Governor. Obviously 'such staff' can only mean that staff which is under the control of the President or the concerned Governor and not any staff over which they do not exercise control. It could mean only the staff on which the President or the Governor, as the case may be, would be in a position to exercise disciplinary powers should they refuse the President's or Governor's directive. Although the Constitution-makers did not say the Union or the State Governments but only the President or the Governor, it is obvious they would have to act consistently with Articles 74(1) and 163(1), respectively. Therefore, on a request by the Election Commission the services of those Government servants who are appointed to public services and posts under the Central or state Governments will have to be made available for the purpose of election. When the Constitution came into force the services of these officers were readily available. Of course, there were also local authorities and the services of the employees of the local authorities were also available. That is why Section 159 of the 1951 Act provides that on request from the Regional Commissioner or the Chief Electoral Officer of the State the local authority of the State shall make available to any Returning Officer such staff as may be necessary to carry out the duties in connection with an election.

20. Merely because the provisions of the two Acts require that they must be officers of Government or local authority, unlike in the case of officers falling under Section 27 of the 1951 Act, it does not, in our opinion, follow that the services of the officers of the State Bank of India could be requisitioned. Section 26 of the 1951 Act is not a source of power at all. It does not, in any manner, enable the Election Commission to draft in the services of officers other than officers of Government and local authority. To draw inspiration from these sections to support an argument that the services of any person could be drafted for the purpose of election is untenable. May be, to conduct the elections many polling stations are set up. Consequently, the services of many persons may be required. May be, the Election Commission may draw the minimum staff from the banks to ensure that the banking business is not disrupted but the question here is of power and not discretion. If there is power it may be exercised with circumspection and minimum staff may be requisitioned but if there is no power the question of the mode of its exercise will not arise at all. It is a question of existence of power and not the manner of its exercise.

21. Article 324 does not enable the Election Commission to exercise untrammelled powers. The Election Commission must trace its power either to the Constitution or the law made under Article 327 or Article 328. Otherwise as was held by this Court Digvijay Mote's case, (1993 AIR SCW 2895) (Supra) (in which one of us, Mohan J., was a party) it would become an imperium in imperio which no one is under our constitutional order."

14. It is relevant to note that the judgment of the apex Court was considering the unamended section 159 as quoted

above. Subsequent to the judgment of the apex Court, section 159 has been amended with effect from 23.12.1997 and apart from staffs of the local authority, three more other new categories have been added in section 159, which could be requisitioned for conduct of the election duties. Section 159 (2) (iv) embraces in itself any other institution, concern or undertaking which is established by or under a Central, Provincial or State Act or which is controlled or financed wholly or substantially by funds provided, directly or indirectly, by the Central Government or a State Government. Life Insurance Corporation of India having been established by the Parliamentary Act namely; Life Insurance Corporation Act 1956, is clearly covered by section 159 (2)(iv). Thus, the engagement of the staffs of the L.I.C. after the amendment of the Section 159, cannot be questioned on the ground that Life Insurance Corporation of India is not covered within the definition of the local authority. The judgment of the apex Court in **Election Commission of India** (supra) is not applicable in the context of amended section 159 thus, the above judgment does not help the petitioners in this case. The next judgment relied by learned Counsel for the petitioner is the Division Bench Judgment of this Court in Life Insurance Corporation of India and others Vs. Additional City Magistrate and others, writ petition No. 41501 of 2008 decided on 7.9.2010 (Annexure-1 to the writ petition) In the said judgment the Division Bench, while allowing the writ petition made following observation:

"The employees/officers are working with the Life Insurance Corporation, who have been called for to prepare the electoral roll, identity card etc. and conducting the elections by the Additional City Magistrate, Agra. They cannot be called for either by the Collector or by the Returning Officer in view of clear cut provision contained in Section 28-A of The Representation of the People Act, 1950 and the law laid down by the Apex Court in Election Commission of India (supra).

In this view of the matter, the writ petition succeeds and is allowed. The impugned orders passed by the respondents are quashed. No order as to costs."

15. Section 159 as amended w.e.f. 23.12.1997, was not placed before the Division Bench deciding the aforesaid case. Reliance was placed on the judgment of the apex Court in Election Commission of India (supra) which is no longer applicable in view of the amendment of section 159. Only section 28A was placed before the Division Bench and the Section 159 of 1951 Act as amended was not placed before the Division Bench, in the said judgment no such proposition could be read that Staff and Officers of the Life Insurance Corporation of India cannot be requisitioned for conduct of the election duties of the Legislative Council.

16. Learned Counsel for the petitioners has relied on an another Division Bench Judgment in writ petition No. 64288 of 2010, Life Insurance Corporation of India and others Vs. District Magistrate/D.E.O. and another decided on 27.10.2010. The said judgment is based on the circular issued by the State Election Commission of India dated 23.9.2010. The Circular dated 23.9.2010 of the State Election Commission of India has been filed as Annexure-2 to the writ petition, which is a letter issued by the Additional Commissioner of the State Election Commission informing the decision of the

Commission that in Panchayat General Election 2010, the officer and Staffs of Life Insurance Corporation of India be exempted. The said order was relevant for general Panchayat Election 2010 and have no effect with regard to conduct of election of Legislative Council. The Division Bench in the aforesaid judgment dated 27.10.2010 having been based on the Circular of the State Election Commission, is not relevant with regard to the election of the Legislative Council and the directions passed by the Division Bench was only with regard to the election of Panchayat 2010 and does not help the petitioners in any manner.

17. Another detailed interim order dated 28.5.2010, passed by the Division Bench of this Court in writ petition No. 28736 of 2010, **Life Insurance Corporation of India & others Vs. Municipal Commissioner, Kanpur** has been relied, which has been filed as Annexure-8 to the writ petition. The said case was considering the requisition of staffs of Life Insurance Corporation of India for the purposes of census. Section 4-A of the Census Act as noticed by the Division Bench are to the following effect:

" 4A. Staff of every local authority to be made available for taking census-- Every local authority in a State shall, when so directed by a written order by the Central Government or by an authority appointed by that Government in this behalf, make available to any Director of Census Operations such staff as may be necessary for the performance of any duties in connection with the taking of census."

18. The said Division Bench judgment was considering the requisition of Staff for the purpose of Census Act and as per section 4 A, the Staff of local authority is to be made available for taking census. In the said case, there was no consideration of requisition for Legislative Assembly Election. Although section 159 unamended has been noticed by the Division Bench but the said order at best can relate with regard to Census Act, 1948 and is clearly distinguishable. None of the submissions of the counsel for the petitioners has any substance. In the writ petition no other ground has been raised for challenging the orders passed by the District Election Officer.

19. Section 159(1) provides that the authorities specified in sub-section (2) shall, when so requested by a Regional Commissioner or the Chief Electoral Officer of the State, make available to any returning officer such staff as may be necessary for the performance of any duties in connection with an election. The writ petition does not raise any ground that Chief Electoral Officer of the State has not issued any such direction. As noticed above, the District Election Officer is to perform such functions as may be entrusted to him by the Election Commission and the Chief Electoral Officer. Neither any ground having been raised on the aforesaid point nor any submission having been made, it is not necessary for us to express any opinion as to whether the requisition of staff is on the basis of the direction of the Chief Electoral Officer or not.

20. No ground have been made out to interfere with the impugned orders. The petitioner is not entitled to any relief in the writ petition.

All the writ petitions are dismissed.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 26.10.2010

BEFORE
THE HON'BLE B.K. NARAYANA, J.

Criliminal Misc. Transfer Appli. No. 591 of 2010

Dileep Singh and another ...Applicants
Versus
State of U.P. and another ...Opposite Parties

Counsel for the Applicant:
Sri Prashant kumar Singh
Sri R.B. Singhal

Counsel for the Complainent:
Sri Mohit Singh
A.G.A.

Code of Criminal Procedure-Transfer of Criminal Trail-from one court to another-rejection thereof without recording the reasons for rejection-held-can not sustained-concept of reasoned judgment became indispensable part of basic rule of law-matter remitted back for fresh consideration.

Held: Para 16

The learned Sessions Judge, refused the prayer for transfer without making any effort to determine the veracity of the grounds on which the transfer was sought and rejected the transfer application without assigning any reason.

Case law discussed:
JT 2010(10) SC 26

(Delivered by Hon'ble B.K. Narayana, J.)

1. Learned counsel for the applicants is permitted to correct the prayer.

2. Heard Sri R.B.Singhal learned Senior Advocate assisted by Sri Prashant Kumar Singh and Sri Mohit Singhfor opposite party No.2 and learned AGA for the State.

3. Since the facts of the case are not in dispute, with the consent of the learned counsel for the parties this transfer application is being finally disposed of at this stage without calling for any counter affidavit.

4. The applicants are facing trial for the offence punishable under Section 323/324/325/498A IPC and 3/4 D.P.Act arising out of case crime no.770 of 2007, Police Station Chandausi, District Moradabad, in case no.427 of 2008, State Vs Abhijeet Singh and others, pending in the court of Additional Chief Judicial Magistrate, Chandausi, Moradabad. Two criminal appeals being Criminal Appeal Nos. 9 and 16 of 2008 Mandakini Vs State and Madhavendra Singh Vs State filed by the applicant No.2 and opposite party No.2 respectively are also pending before the Additional Sessions Judge, Chandausi, Moradabad .

5. From the averments made in the affidavit filed in support of the transfer application it appears that the applicants moved a transfer application being transfer application no.39 of 2010 Dilip Singh and another Vs State and another before the Sessions Judge Moradabad. with a prayer that the aforementioned cases be transferred from the court of Additional Chief Judicial Magistrate, Chandausi, Moradabad and Additional Sessions Judge, Chandausi, Moradabad to any other court of co-ordinate jurisdiction in the same sessions division.

6. The transfer was sought on the ground that the ancestors of the complainant/ opposite party No .2 have

been erstwhile rulers of Chandausi state and as a result the complainant -opposite party no.2 commands great influence in the area and as such there is danger to the family members of the applicants while appearing in the concerned criminal misc. case No.50 of 2010(Dileep Singh Vs State) Criminal Appeal No.9 of 2008(Mandakanai Vs State) and Criminal Appeal No.16 of 2008(Madhavendra Singh Vs State) before the outlying courts at Chandausi, Moradabad.

7. The transfer was also sought on the ground that on account of local influence of the opposite party no.2 no Advocate was willing to conduct the case on behalf of the applicants.

8. The learned Sessions Judge by his order dated 17.9.2010 rejected the prayer for transfer.

9 Learned counsel for the applicants submitted that the order by which the transfer application moved on behalf of the applicants before the Sessions Judge has been rejected is a non-speaking and cryptic order and is vitiated by total non application of mind by the Sessions Judge to the facts of the case and the materials brought on record.The learned Sessions Judge has not recorded any reason for rejecting the prayer for transfer.

10. He further submitted that the prayer for transfer made on behalf of the applicants has been rejected by learned Sessions Judge without examining the grounds on which the transfer was sought on merits.

11. Sri Mohit Singh learned counsel for the opposite party No.2 submitted that the learned Sessions Judge did not commit any illegality or mistake in rejecting the transfer application moved before him by the applicants.

12. Learned AGA also advanced submissions in support of the impugned order.

13. After having very carefully examined the submissions advanced by the learned counsel for the parties and perused the grounds on which the transfer has been sought as well as the materials brought on record and the order passed by the learned Sessions Judge by which he rejected applicants' transfer application, I find that the submissions made by learned counsel for the applicants have force and the same are liable to be accepted.

14. The Apex Court in ***JT 2010(10) SC 26 Competition Commission of India Vs Steel Authority of India Limited and another upon*** which reliance has been placed by Sri R.B.Singhal, in paragraph 67 and 68 of the abovementioned judgement has observed as hereunder:

"The proposition of law whether an administrative or quasi judicial body, particularly judicial courts, should record reasons in support of their decisions or orders is no more res integra and has been settled by a recent judgement of this Court in the case of Assistant Commissioner ,CTDWC V M/s Shukla & Brothers (JT2010(4)SC 35) para 67)

15. By practice adopted in all courts and by virtue of judge- made law, the concept of reasoned judgement has become an indispensable part of basic rule of law and in fact, is a mandatory requirement of the procedural law. Clarity of thoughts leads to clarity of vision and

therefore, proper reasoning is foundation of a just and fair decision. Reference can be made to Alexander Machinery(Dudley) Ltd. V Crabtree(1974 ICR 120) in this regard. (Para 68)"

16. Copy of the transfer application moved by the applicants before the court below has been filed as Annexure 12 to the affidavit accompanying the transfer application. Even the most superficial reading of the transfer application shows that the transfer was sought on several grounds which have already been referred to by me hereinabove and which need not be repeated. The learned Sessions Judge , refused the prayer for transfer without making any effort to determine the veracity of the grounds on which the transfer was sought and rejected the transfer application without assigning any reason.

17. For the aforesaid reasons the order passed by learned Sessions Judge, Moradabad dated 17.9.2010(Annexure 15 to the affidavit filed in support of the transfer application), can not be sustained and is accordingly set aside.

18. The matter is remitted back to the learned Sessions Judge, Moradabad with a direction to decide the transfer application moved by the applicants afresh after affording opportunity of hearing to all concerned in accordance with law by a speaking and reasoned order.

19. Necessary exercise in this regard shall be completed by him within a period of one month from the date of production of certified copy of this order.

APPELLATE JURISDICTION
CIVIL.SIDE
DATED: 29.11.2010 LUCKNOW

BEFORE
THE HON'BLE PRADEEP KANT, J.
THE HON'BLE RITU RAJ AWASTHI, J.

Special Appeal No. 804 of 2010

State of U.P. ...Petitioner
Versus
Zunab Ali and others ..Respondents

Drugs and Cosmetics Rules, 1945-Rule 49-Recruitment of Drug Inspector-Post advertised with minimum qualification prescribed under Rule-Subsequent corrigendum-modifying the original advertisement deleting experience of 18 months-issued by Commission.-whether corrigendum issued by commission without justification? held-"No" experience can be there only after appointment and not prior to that.

Held: Para 15 and 16

The proviso does not lay down any essential qualification for being appointed as Inspector, but only speaks about the period of experience, when such an Inspector may be authorized for inspection.

Unless a person is appointed as Inspector, as envisaged in Clause (i), there would be no occasion for him to entrust the work of inspection and for making such authorization, 18 months' experience is necessary.

(Delivered by Hon'ble Pradeep Kant, J.)

1. The delay in filing the special appeal is condoned.

2. Heard learned counsel for the appellant Sri Manjiv Shukla and Sri Kapil Dev, learned Senior Advocate, assisted by Sri Ashwani Kumar for the

respondents.

3. The State challenges the order passed by the learned Single Judge dated 27.8.2010 by means of which, the learned Single Judge has issued a writ in the nature of mandamus commanding the appellant to issue the appointment orders to the respondents, in pursuance of the selection held by the U.P. Public Service Commission on the post of Drug Inspector within a period of one month.

4. The State instead of complying with the orders aforesaid and issuing appointment orders on the recommendation made by the U.P. Pubic Service Commission, has chosen to challenge the said order passed by the learned Single Judge by filing the present special appeal.

5. The ground of attack to the order is that the U.P. Public Service Commission was not authorized legally to modify the essential qualifications for the post in question, for which they had issued a corrigendum, dispensing away with one of the essential qualifications, as prescribed in the advertisement already issued and, therefore, the learned Single Judge could not have issued any such direction for issuance of appointment orders to the respondents, who obviously were not having the said essential qualification, which was mentioned as Number-2 qualification in the advertisement already issued.

6. Corollary to the aforesaid argument is that the U.P. Public Service Commission of its own could not have changed the essential qualification.

7. The argument aforesaid, at the first instance, appears to be impressive, but a little scrutiny of the record proves that it is a totally misconceived argument.

8. Five backlog vacancies of reserved class category for the post of Drug Inspector were advertised by the Commission on 28.12.07 in the news papers. This advertisement notified the following essential qualifications:

"(1) A degree in Pharmacy or Pharmaceutical Science or Medicine with pecialization in clinical Pharmacology or Microbiology from a University established in India by Law; (2) Not less than 18 months experience in the manufacture of at least one of the substances specified in schedule "c" or Not less than 18 months experience in testing of at least one of the substances in schedule "c" in a Laboratory approved for this purpose by the Licensing authority or not less than three years experience in the inspection of firms manufacturing any of the substances specified in schedule "c". Preferential Qualification- A candidate who has (i) Served in the territorial Army for a minimum period of two years; or (ii) Obtained a "B" certificate of National Cadet Corps, shall other things, being equal be given preference in the matter of direct recruitment. Age- 21 to 35 years (Upper age limit relaxable to the candidates of U.P., as per rules)."

9. Later on, the Commission issued a Corrigendum on 23.5.09, saying that the qualification no.2 mentioned in the advertisement relating to 18 months experience was not required and it has been done away. It is this corrigendum, which, in fact, is being challenged by the

State saying that the Commission has no power to modify the essential qualifications, as prescribed.

10. It is not the case of the appellant-State that in the requisition, the said essential qualification was mentioned by the State Government nor it is the case of the State that the essential qualifications advertised did tally to the statutory rules i.e. Rule 49 of the Drugs and Cosmetics Rules, 1945.

11. For appointment on the post of Drug Inspector, statutory essential qualifications have been prescribed under Rule 49 of the Drugs and Cosmetics Rules, 1945.

Rule 49 prescribes as under:

"Qualifications of Inspectors- A person who is appointed as Inspector under the Act shall be a person who has a degree in Pharmacy or Pharmaceutical Sciences or Medicine with specialisation in Clinical Pharmacology or Microbiology from a University established in India by law:

Provided that only those Inspectors:-

(i) who have not less than 18 months' experience in the manufacture of at least one of the substances specified in Schedule C, or

(ii) who have not less than 18 months' experience in testing of at least one of the substances in Schedule C in a Laboratory approved for this purpose by the licensing authority, or

(iii) who have gained experiences of not less than three years in the inspection of firms manufacturing any of the substances specified in Schedule C during the tenure of their services as Drugs Inspectors; shall be authorised to inspect the manufacture of the substances mentioned in Schedule C.

[Provided further that the requirement as to the academic qualification shall not apply to persons appointed as Inspectors on or before the 18th day of October, 1993]"

12. Thus, for being eligible for being considered for appointment as Drug Inspector, neither the State Government can require any additional essential qualification to be prescribed for the purpose nor any such advertisement can be issued nor the Commission would be at liberty to issue any advertisement prescribing the essential qualification, which are not inconformity with the aforesaid rules. If any such advertisement is issued or has been issued, which is contrary or so to say not in accordance with the aforesaid rules, the same is necessarily to be corrected and for that purpose, corrigendum has to be issued.

13. A bare reading of the aforesaid rules shows that the essential qualification for appointment on the post of Drug Inspector is of having a degree in Pharmacy or Pharmaceutical Sciences or Medicine with specialization in Clinical Pharmacology or Microbiology from a University established in India by law. This is the essential qualification for being appointed on the post of Inspector.

14. The proviso attached to the aforesaid Rule is only the prescription of

experience of 18 months to the Inspectors already appointed for being entrusted the job of inspection.

15. The proviso does not lay down any essential qualification for being appointed as Inspector, but only speaks about the period of experience, when such an Inspector may be authorized for inspection.

16. Unless a person is appointed as Inspector, as envisaged in Clause (i), there would be no occasion for him to entrust the work of inspection and for making such authorization, 18 months' experience is necessary.

17. In case the government wanted to introduce some period of experience for appointment on the post of Inspector, it could be done only by making or amending the rules, as may be permissible under law.

18. The U.P. Public Service Commission since had incorrectly issued the advertisement laying down sub-clause (ii) of Rule 49 as an essential qualification for recruitment to the post of Inspector, which was governed by sub-rule (i), if has clarified the aforesaid position by issuing the corrigendum for correcting the mistake committed by it, there cannot be any exception nor it can be said that the Commission lacked competence.

19. We thus, do not find any ground to interfere with the orders passed by the learned Single Judge.

20. The special appeal is dismissed.

APPELLATE.JURISDICTION
CRIMINAL.SIDE
DATED: LUCKNOW 30.11.2010

BEFORE
THE HON'BLE IMTIYAZ MURTAZA, J.

Case: - U/S 482/378/407 No. 810 of 2006

Jai Prakash Tripathi, Advocate and others ...Petitioners
Versus
State Of U.P. and another ...Respondents

Counsel for the Petitioner:
Sri Chandra Bhushan Pandey,
Sri Rohit Tripathi

Counsel for the Respondents:
Govt. Advocate,
Sri U.C.Tripathi,
Sri Umesh Chandra Pandey

Criminal Procedure Code-Section 482-application for quashing order of summoning offence under Section 420,467,468 CPC-on allegation no offence made out-held the question be raised at the time of framing charge-direction to consider bail application in view of full bench decision of Amrawati case-further clarified in Sheoraj Singh Case.

Held: Para 7

However, in the circumstances of the case, it is provided that if the petitioners move an application for surrender before the court concerned within thirty days from today, the Magistrate concerned shall fix a date about two weeks thereafter for the appearance of the petitioners and in the meantime release the petitioners on interim bail on such terms and conditions as the court concerned considers fit and proper till the date fixed for the disposal of the regular bail. The court concerned shall also direct

the Public Prosecutor to seek instructions from the investigating officer by the date fixed and also give an opportunity of hearing to the informant and thereafter decide the regular bail application of the petitioners in accordance with the observations of the Full Bench of this Court in Amrawati and another Vs. State of UP, 2004 (57) ALR 290, affirmed by the Supreme Court in Lal Kamlendra Pratap Singh Vs. State of UP, 2009 (2) Crime 4 (SC) and reiterated by the Division Bench of this Court in Sheoraj Singh alias Chuttan Vs. State of UP and others, 2009 (65) ACC 781. If further instructions are needed or if adjournment of the case on the date fixed for hearing becomes unavoidable, the Court may fix another date, and may also extend the earlier order granting interim bail, if it deems fit.

Case law discussed:

2004 (57) ALR 290, 2009 (2) Crime 4 (SC), 2009 (65) ACC 781.

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

1. By means of this petition the petitioners have challenged the order dated 23.11.2005 passed by Sessions Judge Faizabad and order dated 23.7.2005 passed by Chief Judicial Magistrate, Faizabad in Case No. 6038 of 2005 whereby he has taken cognizance of offence under section 420, 467, 468 I.P.C. and summoned the petitioners as accused as well as the proceedings of Case no. 6038 of 2005.

2. Heard learned counsel for the petitioners, learned A.G.A. for the State and perused the material on record.

3. It is submitted by learned counsel for the petitioners that some of the sections are not made out against the petitioners on the basis of allegations made in the F.I.R.

4. Considering the facts and circumstances of the case I am of the opinion that at this stage it cannot be said that there any misuse of process of court.

5. So far as the submission of learned counsel for the petitioner that all the sections in which the petitioners have been summoned are not made out on the basis of allegations contained in the F.I.R. against the petitioners is concerned, it is open for the petitioners to raise all these points at the time of framing of charge.

6. The order staying the proceedings before the court below is hereby vacated and the court below is directed to proceed in the matter.

7. However, in the circumstances of the case, it is provided that if the petitioners move an application for surrender before the court concerned within thirty days from today, the Magistrate concerned shall fix a date about two weeks thereafter for the appearance of the petitioners and in the meantime release the petitioners on interim bail on such terms and conditions as the court concerned considers fit and proper till the date fixed for the disposal of the regular bail. The court concerned shall also direct the Public Prosecutor to seek instructions from the investigating officer by the date fixed and also give an opportunity of hearing to the informant and thereafter decide the regular bail application of the petitioners in accordance with the observations of the Full Bench of this Court in Amrawati and another Vs. State of UP, 2004 (57) ALR 290, affirmed by the Supreme Court in Lal Kamlendra Pratap Singh Vs. State of UP, 2009 (2) Crime 4 (SC) and reiterated by the Division Bench of this Court in Sheoraj Singh alias Chuttan Vs. State of UP and others, 2009 (65) ACC 781. If further instructions are needed or if

adjournment of the case on the date fixed for hearing becomes unavoidable, the Court may fix another date, and may also extend the earlier order granting interim bail, if it deems fit.

8. In case the petitioners fail to appear before the court concerned on the dates fixed it will be open to the Public Prosecutor to move an application for canceling the order of interim/final bail and the Court concerned may pass an appropriate order on merits.

9. With the aforesaid observations, this petition is disposed of.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.11.2010

BEFORE
THE HON'BLE FERDINO I. REBELLO, C.J.
THE HON'BLE AMRESHWAR PRATAP SAHI, J.

Special Appeal Defective No. 1017 of 2010

Rajendra Singh Negi ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Vinay Kumar Rai
Sri Anil Kumar Aditya

Counsel for the Respondents:
C.S.C.

U.P. Governments Servants (Employment Leave) Rules, 2003-Rule-5(1)-Employment Leave-appellant without sanction of leave-proceeded on leave-the languages used "may" and not "shall"-meaning thereby the authority can sanction on refuse-the appellant without prior sanction can not go on leave as a matter of rights-considering the offer given by employer for joining -direction for favorable consideration given.

Held: Para 10

The second question for consideration is whether there is a provision for Ex post-facto sanction. The rules themselves do not so provide as noted earlier. On a reading o the rules including Rule 5, it would be clear that the employment leave must be sanctioned before an employee can go on a leave. This being the position no ex post facto leave can be granted.

(Delivered by Hon'ble F.I. Rebello, C.J.)

1. This appeal has been preferred against the judgment of a learned single Judge dated 19.7.2010

2. The State of U.P. Framed a rule known as the Uttar Pradesh Government Servants (Employment Leave) Rules, 2003 (hereinafter referred to as the rules) were to remain in force only upto 31st March, 2008.

3. The appellant herein applied for employment leave under the aforesaid rues. The leave was not sanctioned, inspite of that the appellant proceeded on leave. The appellant sent various remainders but no action was taken on his application. Thereafter he filed a petition being Writ Petition No. 5578 of 2010 which was disposed of this Court on 3.2.2010.

4. The grievance of the appellant before this court was that he is entitled for sanction for employment leave which he availed of in the expectation that the same would be sanctioned in accordance with the rules. The learned single Judge after considering the contentions was pleased to observe that the appellant herein may approach the Director Panchayat Raj U.P.

along with the copy of the order who shall proceed to process the request of the petitioner and pass an appropriate order within a period of six weeks

5. The grievance of the appellant is that considering the object for which the rules had been framed the employee had a right to apply for leave and the same will have to be considered and be sanctioned. The appellant herein so applied for leave and then his leave ought to be sanctioned. In these circumstances he has proceeded on leave. The leave application was not decided for no fault of the appellant and in these circumstances considering the judgment of the learned single Judge the respondents were bound to pass appropriate orders on his application.

6. By the time application came up for consideration, the rules were no longer in force. The appellant applied for a period of three years leave before the enforcement of the rules. Subsequently after the aforesaid period rules had come to an end but that by itself would not disentitle the appellant for leave for the period for which he was entitled to proceed to leave.

7. We have heard learned counsel for the appellant. Under the rules of employment leave has been defined under Rule 3(b) which rule is as under:

Rule 3(b): "Employment Leave" means such leave which is sanctioned by the competent authority to a Government servant for undertaking any kind of private trade or business or employment etc. in an organisation other than the Government Departments, Semi-Government Departments, a Corporation, a Board, a Public Undertaking or a Body owned or controlled by the State Government of Uttar Pradesh.

Similarly what is relevant is Rule 5(1) and 5(2)

5. Condition of Employment Leave.- (1) Government servants may be sanctioned Employment Leave for a minimum period of three years and a maximum period of five years. Such Government servants shall, in no case, be allowed to return to duty in the Government service fro, the Employment Leave before the completion o three years.

(2) State Government in case of Government servants belonging to Group 'A' and Group 'B' posts and the Head of the Departments in case of Government servants belonging to Group 'C' and Group 'D' posts will be empowered to sanction/disallow the Employment Leave.

8. From a reading of Rule 5(1), it would be clear that the language used is "may" and not shall. The expression may also considering the definition clause of Rule 3(b) cannot be read as shall. In other words it was for the appropriate authority either to sanction leave or not to sanction leave. From this it has to be inferred that it was the discretion of the sanctioning authority to grant leave or not to grant leave.

9. The employee could not have proceeded on leave as the expression used in Rule 5(3) is during employment of leave. Therefore the employee could proceed to go on leave only after sanction. In the absence of a sanction there was no question of the employee proceeding on employment leave.

10. The second question for

consideration is whether there is a provision for Ex post-facto sanction. The rules themselves do not so provide as noted earlier. On a reading o the rules including Rule 5, it would be clear that the employment leave must be sanctioned before an employee can go on a leave. This being the position no ex post facto leave can be granted.

11. We are therefore clearly of the opinion that the very object of the provision was to shed excess employees. At the same time, the decision making process was of the sanctioning authority, who had the discretion either to sanction or not to sanction the leave. No employee could therefore proceed on leave without an appropriate order from the sanctioning authority.

12. In the instant case the appellant proceeded to go on employement leave without it being sanctioned. We therefore find no fault in the action taken by the respondents, consequently there is no merit in the appeal and the same is accordingly dismissed to that extent.

13. Learned counsel for the appellant draws the attention of the Court to the letter dated 11th June, 2010 whereby he was given time to resume his duties. It is submitted that on account of pending proceedings, he had not joined and in these circumstances he has to be given an opportunity to resume his duties.

14. Considering the submission advanced and considering the fact that the respondents themselves by the notice dated 11th June, 2010 had given an option to the appellants o resume duties, on an application being moved by the appellant herein, before the concerned authorities, they are to consider the same favorably and pass appropriate orders as early as possible but not later than fifteen days from the date of receipt of application.

The appeal is disposed of.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.09.2010

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

Civil Misc. Writ Petition No. 3066 of 2007

Km. Sonam Sharma ...Petitioner
Versus
Bank of Baroda and others...Respondents

Counsel for the Petitioner:
Sri M.D.Singh 'Shekar'
Sri R.D.Tiwari

Counsel for the Respondent:
Sri Kartikeya Saran
Sri Vipin Sinha
Sri A.K. Singh
A.S.G.I.

Constitution of India Art 226- Compassionate appointment petitioner's father died in harness on 29.6.04-claim by vidow rejected due to overage on 6.4.05-application by petitioner being son put claim on 31.5.05 rejected in garb o G.O. Dated 30.06.2006 and 12.10.06 instead of that Rs. 6 lacs as ex-gratia payment-held-both Government Order have not retrospective application-entitled for Compassionate appointment-necessary direction issued.

Held: Para 6

The ratio of the aforesaid decision is that the circular, which was in existence at the time of the moving of the application has to be taken into consideration. On facts, it

is admitted between the parties that the application of the petitioner was moved on 31st May, 2005. This was obviously prior to the issuance of the circulars dated 4th October, 2005 and 2nd February, 2006. Apart from this, the circulars aforesaid do not in any way wipe out the effect and the rights that had accrued in favour of the petitioner prior to the issuance of the said circulars. This is evident from a bare perusal of the same and as per the clauses contained in the subsequent circular dated 2nd February, 2006. Accordingly, the action of the respondents in denying compassionate appointment to the petitioner is contrary to the position of law as discussed hereinabove.

Case law discussed:

JT (3) SC 35, Special Appeal No. 954 of 2009**.**

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

1. Heard Sri M.D. Singh Shekhar, learned Senior Counsel for the petitioner and Sri Kartikeya Saran holding brief of Sri Vipin Sinha, learned counsel for the respondent nos. 1 to 4. None appears on behalf of the respondent no. 5.

2. The case of the petitioner is that her father died on 29th June, 2004 while working in the respondent-Bank in harness. Consequent thereto, the petitioner's mother applied for compassionate appointment, which claim was rejected on 6th April, 2005 on account of her advanced age. The petitioner moved an application for compassionate appointment on 31st May, 2005. The respondents have refused to accept the request of compassionate appointment and have alternatively offered a financial sanction of Rs. 6,00,000/- (Six lacs) as ex-gratia payment described as financial relief to the family.

3. Sri M.D. Singh Shekhar, learned Senior Counsel for the petitioner submits that in view of the scheme, which was prevalent at the time of death of the petitioner's father, the petitioner is entitled for being considered for compassionate appointment and any subsequent circular issued by the Bank would not divest the petitioner of her legitimate claim of consideration. He relies on the judgment of the Supreme Court in the case of ***State Bank of India and others Vs. Jaspal Kaur*** reported in ***JT (3) SC 35***. He has further invited the attention of the Court to the Division Bench judgment of this Court in the case ***Baroda Eastern Uttar Pradesh Gramin Bank and another Vs. Smt. Vijay Laxmi Srivastava and another (Special Appeal No. 954 of 2009)*** decided on 14.07.2009. He submits that the rejection of the claim of the petitioner is founded on the erroneous application of a circular and, therefore, the relief claimed for by the petitioner by quashing the orders dated 30th June, 2006 and 12th October, 2006 should be granted with a further direction to engage the petitioner on compassionate basis.

4. Sri Saran, learned counsel for the respondent-Bank submits that it is on account of the circular dated 4th October, 2005 read with the subsequent circular dated 2nd February, 2006 that the claim of the petitioner cannot be considered and she has been, under the new scheme, offered ex-gratia payment which satisfies her claim. It is submitted that in view of this subsequent circular, no claim for compassionate appointment can be entertained.

5. Having heard learned counsel for the parties and keeping in view the submissions raised, the decision of the Supreme Court in the case of State Bank of India (supra) in paragraph 30 rules as under:

"Finally in the fact situation of this case, Sri Sukhbir Inder Singh (late), Record

Assistant (Cash & Accounts) on 01.08.1999 in the Dhab Wasti Ram, Amritsar branch passed away. The respondent, widow of Sri Sukhbir Inder Singh applied for compassionate appointment in the appellant Bank on 05.02.2000 under the scheme which was formulated in 2005. ***The High Court also erred in deciding the matter in favour of the respondent applying the scheme formulated on 04.08.2005, when her application was made in 2000. A dispute arising in 2000 cannot be decided on the basis of a scheme that came into place much after the dispute arose, in the present matter in 2005.*** *Therefore, the claim of the respondent that the income of the family of deceased is Rs.5855/- only, which is less than 40% of the salary last drawn by Late Shri. Sukhbir Inder Singh, in contradiction to the 2005 scheme does not hold water."*

6. The ratio of the aforesaid decision is that the circular, which was in existence at the time of the moving of the application has to be taken into consideration. On facts, it is admitted between the parties that the application of the petitioner was moved on 31st May, 2005. This was obviously prior to the issuance of the circulars dated 4th October, 2005 and 2nd February, 2006. Apart from this, the circulars aforesaid do not in any way wipe out the effect and the rights that had accrued in favour of the petitioner prior to the issuance of the said circulars. This is evident from a bare perusal of the same and as per the clauses contained in the subsequent circular dated 2nd February, 2006. Accordingly, the action of the respondents in denying compassionate appointment to the petitioner is contrary to the position of law as discussed hereinabove.

7. The orders dated 30th June, 2006 and 12th October, 2006 are quashed. The writ petition is allowed.

8. The respondent-Bank is directed to forthwith consider the claim of the petitioner for compassionate appointment and issue necessary orders within a period of six weeks from the date of presentation of a certified copy of this order.

ORIGINAL JURISDICTION
CRIMINAL.SIDE
DATED: 18.11.2010 LUCKNOW

BEFORE
THE HON'BLE RAJ MANI CHAUHAN, J.

Case: - U/S 482/378/407 No. 4478 of 2010

Faiyaz ...Petitioner
Versus
The State Of U.P ...Respondent

Counsel for the Petitioner:
Sri Girish Kumar Pandey

Counsel for the Respondent:
G.A.

Criminal Procedure Code-Section 207(2), 457-release application-vehicle ceased by RTA-rejected by CJM-held-perfectly justified-call for no interference-liberty to approach before the Assistant Transport Authority or any other officer authorised by State Govt. under section 207(2)-who will pass appropriate order in accordance with law.

Held: Para 15

Considering the law laid down by this Court in the above cited case, I do not find any ground to take a different view other than the view taken by this court in the above cited cases. I am of the view that the application moved by the petitioner for release of the

vehicle which was seized by the Assistant Transport Officer was not maintainable before the learned Chief Judicial Magistrate, which has rightly been rejected by him.

Case law discussed:

[(1978) 2 Supreme Court Cases 491], [1995 (2) AWC 849 (DB)],[2006 (9) ADJ 655 (All) (DB)],[2010 (69) ACC 259]

(Delivered by Hon'ble R.M. Chauhan, J.)

1. Heard Sri Girish Kumar Pandey, learned counsel for the petitioner and Sri Rajendra Kumar Dwivedi, learned Additional Government Advocate for the State as well as perused the documents available on record.

2. This petition under Section 482 of the Code of Criminal Procedure (hereinafter referred to as the 'Code') has been filed by the petitioner for quashing the impugned order dated 18.10.2010 passed by the learned Chief Judicial Magistrate, Ambedkar Nagar in Misc. Case No. 1511/2010, under Section 207 of the Motor Vehicle Act, 1988 (hereinafter referred to as the 'Act') whereby he has rejected the application moved by the petitioner to release his vehicle seized by the A.R.T.O., Ambedkar Nagar under Section 207 of the Act.

3. The only question involved for consideration before this Court is whether the vehicle under release seized by Assistant Transport Officer, Ambedkar Nagar under Section 207 of the Act can be released by the Chief Judicial Magistrate, which can be decided at this stage. Therefore, the petition is being decided at this stage.

4. From a perusal of the record, it appears that the petitioner moved an application before the learned Chief Judicial Magistrate, Ambedkar Nagar under Section 457 of the Code for release of his vehicle which was seized by Assistant Transport Officer, Ambedkar Nagar under Section 207 of the Act. The learned Chief Judicial Magistrate on the application of the applicant called a report from the A.R.T.O., Ambedkar Nagar but he neither submitted his report nor any challan. The learned Chief Judicial Magistrate, therefore, did not think it proper to release the vehicle in favour of the applicant. He, therefore, by the impugned order dated 18.10.2010 rejected the application of the applicant. The petitioner being aggrieved by the impugned order passed by the learned Chief Judicial Magistrate, Ambedkar Nagar has filed the present petition under Section 482 of the Code.

5. The learned counsel for the petitioner submits that Section 457 of the Code lays down the provision for releasing the property seized by the police. The petitioner was the registered owner of the vehicle under release. He, therefore, moved an application before the learned Chief Judicial Magistrate for release of his vehicle. The learned Chief Judicial Magistrate without assigning any reason has rejected his application by the impugned order which is bad in the eye of law.Since the petitioner is registered owner of the vehicle, therefore, the same be ordered to be released in his favour.

6. Learned counsel for the petitioner in support of his argument has placed reliance on the cases ***Phool Chandra Vs. Assistant Regional Transport Oficer (A/s) Banda and Ors.***

decided by this court in Civil Misc. Writ Petition No. 30978 of 1996 and ***Ram Prakash Sharma Vs. State of Haryana*** reported in [***(1978) 2 Supreme Court Cases 491]*** decided by the Hon'ble Apex Court.

7. Sri R.K. Dwivedi, learned A.G.A. opposed the petition and supported the impugned order passed by the learned Chief Judicial Magistrate, Ambedkar Nagar.

8. Sri Dwivedi submits that Section 207 (2) of the Act specifically provides that when any vehicle is seized under under Sub Section (1) of Section 207 of the Act by the ARTO or RTO, the registered owner or person in charge of the motor vehicle may apply to the transport authority or any officer authorized in this behalf by the State Government under Section 207 (2) of the Act. He cannot move application for release of the vehicle before the Judicial Magistrate or Chief Judicial Magistrate. Sri Dwivedi has argued that in catena of judgments, it has been held by the Division Bench as well as Single Judge of this Court that the vehicle seized by the ARTO or RTO under Section 207 of the Act may be released only by the Transport Authority or any Officer authorized by the State Government in this behalf. The impugned order passed by the learned Chief Judicial Magistrate, Ambedkar Nagar is, therefore, perfectly right which does not call for any interference. Sri Dwivedi in support of his argument has placed reliance on the cases ***Mazhar Ali Khan Vs. Chief Judicial Magistrate and Others*** reported in ***[1995 (2) AWC 849 (DB)], Gyan Prakash Mishra Vs. Asstt. Regional Transport Officer-II (Enforcement) Allahabad and Others*** reported in ***[2006 (9) ADJ 655 (All) (DB)], Jagat Pal Singh Vs. State of U.P. and Others*** reported in ***[2001 (1) AWC 551]*** and ***Deoraj Singh Vs. State of U.P.*** reported in ***[2010 (69) ACC 259]*** decide by the this Court.

9. I have considered the submissions advanced by learned counsel for the petitioner and learned A.G.A as well as gone through the case laws cited by the learned counsel for the parties.

10. Section 207of the Act provides for seizure of vehicle in contravention of certain provisions under the Act as well as the provision for release of such vehicle which is being extracted below:

"207. Power to detain vehicles used without certificate of registration permit, etc.

(1) Any police officer or other person authorized in this behalf by the State Government may, if he has reason to believe that a motor vehicle has been or is being used in contravention of the provisions of section 3 or section 4 or section 39 or without the permit required by sub-section (1) of section 66 or in contravention or any condition of such permit relating to the route on which or the area in which or the purpose for which the vehicle may be used, seize and detain the vehicle, in the prescribed manner and for this purpose take or cause to be taken any steps he may consider proper for the temporary safe custody of the vehicle:

Provided that where any such officer or person has reason to believe that a motor vehicle has been or is being used

in contravention of section 3 or section 4 or without the permit required by sub-section (1) of section 66 he may, instead of seizing the vehicle, seize the certificate of registration of the vehicle and shall issue an acknowledgment in respect thereof.

(2) Where a motor vehicle has been seized and detained under sub-section (1), the owner or person incharge of the motor vehicle may apply to the transport authority or any officer authorised in this behalf by the State Government together with the relevant documents for the release of the vehicle and such authority or officer may, after verification of such documents, by order release the vehicle subject to such conditions as the authority or officer may deem fit to impose."

11. In case of ***Ram Prakash Sharma Vs. State of Haryana (supra)*** relied upon by learned counsel for the petitioner, the matter related for release of currency notes which were seized by the police in connection with the offence registered by the police against the third party accused under the Code while this case relates to release of vehicle seized by the Assistant Transport Officer under Section 207 of the Act where sub section (2) of Section 207 of the Act provides specific provision for release of vehicle. The facts before the Hon'ble Apex Court in the above cited case were different from the facts of the present case, therefore, the law laid down by Hon'ble Apex Court in the above cited case will have no application0.79" to the facts of the present case.

12. In the case of ***Phool Chandra Vs. Assistant Regional Transport Oficer (A/s) Banda and Ors.*** the Division Bench of this Court had held that where a vehicle was seized by the Transport Authority under Section 207 of the Act, the registered owner or the person incharge of the vehicle, could move application for release of the vehicle either under Section 207 (2) of the Act before the Transport Authority or the Officer authorized by the State Government in this behalf or under Section 457 of the Code but in the case of ***Mazhar Ali Khan Vs. Chief Judicial Magistrate and Others (supra)*** decided by Division Bench of this Court, it had been specifically held that where a vehicle is sized by Transport Authority under Section 207 of the Act only Transport Authority or any Officer authorized by the State Government in this behalf has power to release the vehicle. The relevant observation of the court finds place in para 4 of the judgment which is being reproduced below:

"Sub-section (2) of Section 207 provides for release of the Vehicle. Although under sub-section (1), any police officer or any other person authorized in this behalf can seize and detain the vehicle, but under sub-section (2), only transport authority or the officer authorized in this behalf by the State Government has the power to release the vehicle irrespective of the fact that the vehicle was seized and detained by some one else but for this purpose the owner or the person incharge of the motor vehicle has to apply before them. For the reasons given above, the Regional Transport Officer was not justified to refuse to entertain the application for release on the ground that it was seized by police officer."

13. In the case of ***Jagat Pal Singh VS. State of U.P. and Others (supra)*** the same view as above had been expressed by the Division Bench of this Court. The relevant observation of the court finds place in para 4 of the judgment which is being extracted below:

"From a perusal of Section 207 of the Act is appears that the remedy available to the petitioner is to apply to the transport authority or any officer authorized in this behalf by the State Government together with relevant documents for the release of the vehicle in terms of sub-section (2) of Section 207 of the Act. We are of the view that since statue provides power to release the vehicle on the concerned authority under sub-section (2) of section 207 of the Act and the application of the writ petitioner, the writ petitioner should act according to the statute and take appropriate steps in terms of section 207 (2) of the Act and make appropriate application before the concerned authority. We are of the further view that it is incumbent on the part of the parties to follow the procedure laid by the statute and have no jurisdiction or authority to direct release of the vehicle through Chief Judicial Magistrate with all respect to the other Divisions Bench orders which have been passed from time to time which are not in the form of judgment and in fact no ratio has been laid down therein. It is well settled that mere order will not have binding unless a ratio has been laid down."

14. In the case of Deoraj Singh Vs. State of U.P. (supra), the court relying on earlier case laws cited therein has laid down the same principle of law as laid down in the above cited case. The relevant observation of the Hon'ble Court finds place in para 10 of the judgment which is being extracted below:

"From a perusal of the Section 207 (2) of the Motor Vehicles Act, 1988 the remedy available to the applicant to apply to the transport authority or to officer authorized in this behalf by the State Government together with relevant documents for the release of the vehicle. This issue has been considered by the Division Bench of this Court on case of Jagat Pal Singh V State of U.P. And others in Criminal Misc. Writ Petition No. 5528 of 2000 (M/B) as reported in 2001 (1) AWC 551."

15. Considering the law laid down by this Court in the above cited case, I do not find any ground to take a different view other than the view taken by this court in the above cited cases. I am of the view that the application moved by the petitioner for release of the vehicle which was seized by the Assistant Transport Officer was not maintainable before the learned Chief Judicial Magistrate, which has rightly been rejected by him.

16. In view of the discussions made hereinabove, the petition stands disposed of finally with the observation that it will be open to the petitioner to move application for release of his vehicle before the appropriate authority under Section 207 (2) of the Act and the said authority will pass appropriate orders in accordance with law.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 01.11.2010

BEFORE
THE HON'BLE RAVINDRA SINGH, J.

Criminal Appeal No. 4699 of 2010

Khoob Chand ...Petitioner
Versus
State of U.P. and others ...Respondent

Counsel for the Appellant:
Sri Atul Srivastava

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

Code of Criminal Procedure Code Section 372-appeal order of acquittal passed by C.J.M.-maintainable before the Session Judge-not before High Court-liberty granted to approach before competent court.

Held: Para 4

The proviso confers the right to victim to prefer the appeal against any order passed by the court acquitting the accused or convicting for lesser offence for imposing inadequate compensation and such appeal shall lie to the Court to which an appeal ordinarily lies against he order of conviction of such court. In present case the order of acquittal has been passed by the court of learned III-A.C.J.M. Gautambudh Nagar, if the order of conviction is passed by such court, its appeal ordinarily lies in the court of sessions. The proviso of section 372 Cr.P.C. does not permit to prefer the appeal before this court by bye passing the Court of Sessions. The appeal against the order of the acquittal passed by learned A.C.J.M.-III, Gautambudh Nagar shall lie in the court of sessions at Gautambudh Nagar. This appeal does not lie to this court, therefore this appeal is not maintainable.

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

1. Heard Sri Atul Srivastava, learned counsel for the appellant and learned A.G.A. for the State of U.P.

2. This appeal has been preferred under the proviso of section 372 Cr.P.C. against the judgement and order dated 22.5.2010 passed by the learned A.C.J.M.-III, Gautam Budh Nagar in Criminal Case No. 955 of 2010 by which the O.P. No. 2 to 9 have been acquitted for the offence punishable under section 147, 452, 323, 324 and 325 IPC.

3. This appeal has been preferred by the appellant Khoob Chand who had lodged the FIR of the present case at P.S. Dadari on 28.1.1986 at 12.45 P.M. in case crime No. 30-A of 1986 under the proviso of section 372 Cr.P.C. It has been inserted by the Cr.P.C. (Amendment) Act (2008) (Act No. 5 of 2009). The proviso of section 372 Cr.P.C. reads as under:

"Provided that the victim shall have a right to prefer an appeal against any order passed by the Court acquitting the accused or convicting for a lesser offence or imposing inadequate compensation, and such appeal shall lies to the Court to which an appeal ordinarily lies against the order of conviction of such Court."

4. The proviso confers the right to victim to prefer the appeal against any order passed by the court acquitting the accused or convicting for lesser offence for imposing inadequate compensation and such appeal shall lie to the Court to which an appeal ordinarily lies against he order of conviction of such court. In present case the order of acquittal has been passed by the court of learned III-A.C.J.M. Gautambudh Nagar, if the order of conviction is passed by such

court, its appeal ordinarily lies in the court of sessions. The proviso of section 372 Cr.P.C. does not permit to prefer the appeal before this court by bye passing the Court of Sessions. The appeal against the order of the acquittal passed by learned A.C.J.M.-III, Gautambudh Nagar shall lie in the court of sessions at Gautambudh Nagar. This appeal does not lie to this court, therefore this appeal is not maintainable.

5. The Reporting Section of this court has not gone through the 'proviso of section 372 Cr.P.C.'s and without making any remarks of objection, the appeal has been reported.

6. This appeal is disposed of as non maintainable to this court with a liberty to file fresh appeal before the court of sessions concerned.

7. Let a certified copy of this order be communicated to the Reporting Section of this court.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 02.11.2010

BEFORE
THE HON'BLE S.C. AGARWAL, J.

Criminal Revision No. 4755 of 2010

Indra Pal and another ...Petitioner
Versus
State of U.P. and another ...Respondents

Counsel for the Revisionists:
Sri P.K. Kashyap

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

Code of Criminal Procedure-Section 315-Right of Cross-examination earlier Defence Counsel fail to cross examine the prosecution witness-offence under Section 328, 304 I.P.C.-Subsequently new counsel engaged who find out such lacuna-application to cross examination-Rejected by Trail Court on ground earlier even on opportunity failed to cross-examine-held-in such a serious matter for negligence of earliar Counsel Revisionist not be punished-opportunity subject to payment of cost of Rs. 3000 given.

Held: Para 7

Admittedly, P.W.1, P.W.3 & P.W.5 were examined by the prosecution and they were not cross-examined at all by the then learned counsel for the defence. Now, the revisionists - accused have engaged a new counsel and on perusal of the record, he found that these three witnesses could not be cross-examined at all and consequently he moved an application under section 311 Cr.P.C. for this purpose. In view of the facts that these three witnesses have not been cross-examined at all, learned Addl. Sessions Judge was not justified in rejecting the application. The case against the revisionists is under sections 328, 304 IPC, which is punishable with life imprisonment. In such a serious case, the right of cross-examination of the accused should not be foreclosed forever due to the fault of the counsel and client should not be penalized for the fault of the counsel. It was the duty of the trial court to afford reasonable opportunity to the accused for cross-examination of the witnesses.

(Delivered by Hon'ble S.C. Agarwal, J.)

1. Heard learned counsel for the revisionists, learned A.G.A. for the State and perused the material available on record.

2. No notice is issued to private opposite party in view of the order proposed to be passed today, however, liberty is

reserved for private opposite party to apply for variation or modification of this order if she feels so aggrieved.

3. This revision is directed against the order dated 25.8.2010 passed by Additional Sessions Judge, Court No.12, Bareilly in Sessions Trial No.492 of 2006 State Vs. Indra Pal & others under sections 328, 304 IPC, P.S. Kotwali, District Bareilly, whereby application of the accused - revisionists under section 311 Cr.P.C. was rejected.

4. The facts of the case are that P.W.1 Smt. Amlawati, P.W.3 Neetu and P.W.5 Dr. Harish Chandra were examined as prosecution witnesses on 2.2.2007, 26.7.2007 and 24.4.2010 respectively, but they could not be cross-examined on behalf of the defence.

5. The application under section 311 Cr.P.C. was moved for recalling P.W.1, P.W.3 & P.W.5 for cross-examination on the ground that these witnesses could not be cross-examined by the then defence counsel. The accused persons are illiterate and poor and have no knowledge of law. On 28.7.2010, they appointed Sri M.A. Ansari, advocate as their new counsel and thereafter it came to light that these three witnesses could not be cross-examined.

6. The aforesaid application under section 311 Cr.P.C. was rejected by the trial court on the ground that earlier, opportunity for cross-examination was given to the accused persons, which was not availed of by them and there was no ground to summon these witnesses for cross-examination. Hence, this revision.

Learned A.G.A. supported the impugned order.

7. Admittedly, P.W.1, P.W.3 & P.W.5 were examined by the prosecution and they were not cross-examined at all by the then learned counsel for the defence. Now, the revisionists - accused have engaged a new counsel and on perusal of the record, he found that these three witnesses could not be cross-examined at all and consequently he moved an application under section 311 Cr.P.C. for this purpose. In view of the facts that these three witnesses have not been cross-examined at all, learned Addl. Sessions Judge was not justified in rejecting the application. The case against the revisionists is under sections 328, 304 IPC, which is punishable with life imprisonment. In such a serious case, the right of cross-examination of the accused should not be foreclosed forever due to the fault of the counsel and client should not be penalized for the fault of the counsel. It was the duty of the trial court to afford reasonable opportunity to the accused for cross-examination of the witnesses.

8. Even though the conduct of the defence, during trial, has not been exemplary, but if the counsel for the defence was not cooperating in further progress of the case and deliberately avoiding the cross-examination of the witnesses, the trial court was always at liberty to cancel the bail of the revisionists, but their right of cross-examination should not have been closed.

9. Thus, the order passed by Addl. Sessions Judge cannot be sustained and is liable to be set-aside, however, subject to heavy cost.

10. Revision is allowed.

11. Impugned order dated 25.8.2010 is set-aside. The revisionists are directed to deposit a sum of Rs.3000/- before the trial court within a period of three weeks from

today along with a certified copy of this order. On deposit of cost, learned Addl. Sessions Judge shall fix a date for cross-examination of P.W.1 Smt. Amlawati, P.W.3 Neetu and P.W.5 Dr. Harish Chandra and on such date these three witnesses shall be summoned and the defence shall be given an opportunity for cross-examination of these three witnesses. However, no adjournment shall be granted to the accused persons for the purpose of cross-examination of P.W.1, P.W.3 & P.W.5. Thereafter, the case shall proceed in accordance with law.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.11.2010

BEFORE
THE HON'BLE F.I. REBELLO, C.J.
THE HON'BLE SUNIL AMBWANI, J.
THE HON'BLE DILIP GUPTA, J.

Civil Misc. Writ Petition No.11111 of 1996

Smt. Sumitra Dhuliya ...Petitioner
Versus
The Director of Education and others ...Respondents

Counsel for the Petitioner:
Sri Shashi Kant Shukla
Sri Shashi Kant Gupta

Counsel for the Respondents:
C.S.C.

Constitution of India Art 226-Benefit of academic session -Petitioner working as Professor-in C.P.I.-whether entitled to a benefit of academic session-held-'No'.

Held: Para 23

The questions posed by us, arising out of two decisions with conflicting opinions, are thus answered as follows:-

"1. The Government Order dated 21.3.1984 granting extension of service to the Teachers, Headmasters and Principals of Government Colleges and Government Degree Colleges, till the end of the academic session i.e. 30th June of the year in which such Teacher, Headmaster or Principals retire, is not applicable to the employees including Professors working in Central Paedological Institute, Allahabad (CPI).

2. The judgment in Rajpati Pandey vs. State of UP and others in Civil Misc. Writ Petition No. 20756 of 1990 dated 2.5.1997, was not correctly decided;

3. The Division Bench judgment in Sarju Prasad vs. State of UP and others Civil Misc. Writ Petition No. 896 of 1967 decided on 14.03.1997, lays down the correct law;"

Case law discussed:
Civil Misc. Writ Petition No. 896 of 1967, Civil Misc. Writ Petition No. 20756 of 1990, AIR 1964 SC 600, AIR 1957 SC 892, AIR 1962 All 328 (FB), AIR 1973 SC 1252, AIR 1965 SC 1567, State Bank of Bikaner and Jaipur and others vs. Jag Mohan Lal 1989 Supp 1 SCC 221.

(Delivered by Hon'ble F.I. Rebello, C.J.)

1. Smt. Sumitra Dhuliya served on the post of Professor in Central Paedological Institute, Allahabad (in short, 'CPI, Allahabad), upto the age of 58 years, and retired on superannuation on 31.3.1996. She claimed benefit of Government Order dated 21.3.1984, providing that those teachers, who are engaged in teaching in Government institutions, will be entitled to continue till the end of the academic session i.e. 30th June of the year during which they are going to retire, if their date of birth falls between 2nd July and 29th June of the academic session. She was not given the

benefit of the extension of service provided by the Government Order dated 21.3.1984. She filed the writ petition praying for a writ of mandamus commanding the Director of Education (Madhyamik), U.P. Lucknow-respondent no.1, and the Additional Director of Education (Madhyamik), Education Directorate, UP Allahabad-respondent no. 2 to extend her services upto 30.6.1996. By an interim order dated 29.3.1996 she was permitted to continue to serve on the post, which she was holding. The Division Bench, at the time of hearing of the writ petition on 21.4.2009, noticed an apparent conflict in the view taken by the two Division Benches in the same year. It was found that in **Sarju Prasad vs. State of UP and others Civil Misc. Writ Petition No. 896 of 1967** decided on 14.3.1997 a Division Bench of this Court held that the Government Order is applicable only to the teachers, who are teaching in a particular session, and not to the training institutes. In a later Division Bench decision in the same year in **Rajpati Pandey vs. State of UP and others Civil Misc. Writ Petition No. 20756 of 1990** decided on 02.05.1997 a Division Bench held that the Government Order dated 21.3.1998 will also apply to Central Paedological Institute, Allahabad (CPI), as it is a Government institute and teaching takes place in the said institute. The matter was thus referred to a larger bench to resolve the conflict.

2. In our opinion, following questions arise for consideration by us:-

"1. Whether the Government Order dated 21.3.1984, providing for extension of service after superannuation to the Teachers, Headmasters and Principals of Government Schools and Colleges upto end of the academic session i.e. 30th June, following the date on which they attain the age of superannuation, with certain conditions, is applicable to the staff of the training institutes such as Central Paedological Institute, Allahabad (CPI)?

2. Whether the Division Bench judgment in Civil Misc. Writ Petition No. 20756 of 1990 (Rajpati Pandey vs. State of UP and others) decided on 2.5.1997 giving extension of service after 30th June next following the date of superannuation to the Professors of the Central Paedological Institute, Allahabad was correctly decided? and;

3. Whether the view taken by Division Bench in Civil Misc. Writ Petition No. 896 of 1967 (Sarju Prasad vs. State of UP and others) decided on 14.3.1997 lays down the correct law?"

3. Brief facts giving rise to the writ petition are that the petitioner was selected as LT grade teacher by UP Public Service Commission in the year 1962, and was appointed on a substantive post until she was selected in the grade of Lecturer by the Commission and appointed in substantive capacity as Lecturer in the year 1974. She was confirmed on the post of Lecturer on 4.3.1987. The date of birth of the petitioner is 11.3.1938. In the year 1996, in which she was to attain the age of superannuation, she was serving as Professor in CPI, Allahabad. In paragraph-4 of the writ petition, she claimed that she was serving as Professor, in Research-cum-Teaching Institute, and is taking classes and that she was also incharge of the Model School under the CPI, Allahabad. The CPI is involved in research activities, which include developments and modification of textbooks of students upto Intermediate level. It also imparts training

to make students, known as Licentiate of Teaching (L.T.). The activities of research and training are combined activities undertaken by the institute. As a teacher in the institute since 1988, it is alleged, the petitioner was doing both research and teaching work and as incharge of a Model School, a Junior High School, imparting education from Classes I to VIII, She was involved in day-to-day activities of the school including the syllabus, curriculum and overall teaching activities under her guidance. She therefore claimed to be entitled to be given the benefit of extension of services until the end of the academic session i.e. June 30, 1996.

4. The petitioner made a representation on 28.8.1996 to give her three months' extension of services upto June, 1996. In her representation she stated that she is regularly teaching in Government CPI and that in the previous session she was teaching the subject of Psychology to L.T. grade teachers. She has been incharge of the Model School attached to the CPI and has, for a period of one year, worked as Administrative Officer in the Government CPI. Her representation was forwarded by the Director of State Educational Research and Training Council, Lucknow to the Directorate of Education on 19.3.1996. The petitioner sent a reminder on 19.3.1996, and thereafter filed the writ petition.

5. In the counter affidavit of Smt. Prema Rai, Principal of CPI, Allahabad, it is stated that the petitioner was appointed as Assistant Mistress in L.T. Grade on 31.10.1961 in a temporary vacancy, and was confirmed in the said grade on 1.4.1970. She was selected on the post of Lecturer and was appointed on 26.6.1971. She was promoted on ad-hoc basis as Professor in the grade of Rs. 770-1670 and was posted in Government CPI, Allahabad on 19.12.1988. She had joined the institute on 20.12.1988, and since then she is working on the said post. The work in CPI, Allahabad, is to conduct research on various education systems and to develop education work. The main work assigned to the institute is to conduct research work and to impart training to teachers. The function of the post held by the petitioner is not to teach the students admitted in the institute for obtaining LT certificate. She is required to conduct educational research for re-orientation of educational system. The petitioner does not teach or impart education or take classes. In fact, she was working on the post doing research work and thus the conditions laid down in the Government Orders dated 21.3.1984 and 20.4.1995 for extension of term, until the completion of academic session, are not applicable to her. In paragraph-5 of the counter affidavit, it is stated that the petitioner was not doing teaching work or imparting education in the said institute. She was only doing research work. The Model School attached to CPI, Allahabad was being headed by a Headmaster and is engaged in imparting education to children from Classes-I to VIII. Only supervision work was entrusted by the then Principal of CPI Allahabad, and no teaching work was allotted to her. She was not teaching the students of the Model School. In para-10 of the counter affidavit, it is stated that the CPI Allahabad is a non-educational institution and is different from other Schools and Colleges. The CPI, in which the petitioner was posted on the post of Professor, does not have any academic session of its own, and like any other Government office, it is open throughout the year. The incumbents earn their leave of 31 days for rendering services

throughout the year, unlike the staff of the teaching institution, where earned leave is admissible only for one day in a month as vacations are availed by them.

6. In the rejoinder affidavit, the petitioner has stated that she has been engaged as a teacher from the date of her initial appointment. For 40 years she has been working as a teacher. The institute undertakes both research and teaching work. It revises syllabus from Class-I to Intermediate and makes suitable recommendation for its revision, conduct seminars, workshops and other research orientation work. Apart from these the institute also conducts LT training for male. The designation of all teachers of CPI is a Professor, which means a teacher of the highest grade. The work of revision of syllabus, introduction of new lessons etc. are only of peripheral nature. The petitioner is primarily a teacher. From the beginning of her association with the institute in the year 1988, she was teaching and was imparting teaching to LT students. The petitioner has annexed the time tables, curriculum of training, practicals, projects and publication to demonstrate that she was also doing teaching work.

7. A supplementary affidavit was filed by the petitioner reiterating that she was a teacher and that she had taught in Government Girls Inter College Lansedown, Pauri Garhwal; Government Girls Inter College, Dehradun; Government Girls School, Allahabad and is presently teaching in CPI, Allahabad. She teaches the subjects of Methodology, Education, Psychology amongst other subjects in the institute. In the similar circumstances, Shri U.D. Pandey a teacher in CPI was also given extension of service. He was allowed to teach upto 30th June, 1991.

8. In the supplementary counter affidavit, Shri Ram Dutt Tewari, Professor, Government, CPI, Allahabad has reiterated that the petitioner was not doing any teaching work. There is no session so far as the institution CPI Allahabad is concerned. It runs for whole of the year, and as such the petitioner is not entitled to sessions benefit. The State has relied upon judgment in **Saryu Prasad yadav s. State of UP and others** (supra) in which this Court had denied the sessions benefit to Professors of CPI.

9. Shri Shashi Kant Shukla, learned counsel appearing for the petitioner submits that the Division Bench in **Rajpati Pandey's** case(supra) has correctly given the benefit of extension of service to a Professor of CPI upto 30th June of the year in which he was retiring. The Division Bench found that he was originally appointed on the post of teacher in 1962, and had worked for substantial part of his service as a teacher. For a short period the petitioner was on a non-teaching post. When such teaching and non-teaching posts are such that an employee can be transferred from one post to another, the petitioner cannot be deprived with the benefit of the Government Order dated 21.3.1984, particularly when at the time of retirement he was holding a teaching post. The principle, on which the Government order was issued, as it appears from the Government order itself, does not justify the exclusion of the petitioner from the benefit. The only conditions, which have been prescribed in the Government Order dated 21.3.1984, are appearing from the same and no case was made out by the respondents that any of the conditions was lacking. The Division Bench thereafter

proceeded to observe that the CPI is a Government institute. The Government Order itself indicates that same applies to Government institutions in which teaching takes place. The post held by the petitioner upto his retirement was the post of Professor and thus he is entitled to the benefit of extension of service.

10. Shri Shukla submits that the Government Order dated 21.3.1984 was issued to give benefit to all the teachers teaching in educational institutions. All the conditions of the Government Order dated 21.3.1984 are applicable to the teachers of the CPI, Allahabad. He relies upon paragraphs 210, 211 and 226 of the Education Code which defines 'academic session' and which also includes academic session for training institutions under heading 'Training Sessions'. He has relied upon a long career of the petitioner as a teacher, her designation as a Professor, the curriculum, and the time table annexed to the rejoinder affidavit, and submits that the petitioner was a teacher, and was serving in a Government Training Institute for imparting training to the teachers. She was, therefore, entitled to the benefit of the Government Order dated 21.3.1984 for extension of service.

11. Shri M.C. Chaturvedi, Chief Standing Counsel appearing for the State, submits that the Government Order dated 21.3.1984 provides for the objects in which the extension of service as an exception to the general rule was given to the teachers of the Government educational institutions. In the Government Schools and Colleges the retirement of the teacher in the middle of the academic session disturbed the teaching work. The appointment of new teachers, or their transfers and promotions takes some time and that new teachers or transferred and promoted teachers take some time to start the teaching work with the same speed. The State Government in supercession of its earlier Government Orders dated 8.2.1970, 12.5.1977 and 6.2.1978, issued directions in public interest as an exception to the Fundamental Rule 56 (a) of Financial Handbook Vol.2 Part II to IV, to provide for extension of service of those Teachers, Headmasters and Principals, who retire in between the academic session (i.e., 1st July and before 30th June), and are attaining the age of 58 years upto the end of the academic session i.e. 30th June, subject to conditions (i) that their work and conduct during the period of service has been satisfactory; (ii) they are physically and mentally fit; (iii) they are teaching some subjects regularly in the school, and further subject to the conditions that in all such cases, it will be necessary for the competent authority to obtain order from the State Government. Paragraph-4 of the Government Order dated 21.3.1984 provides that those officers, who are not doing any teaching work, should not be assigned teaching work in the last year of their service to give them benefit of extension of service upto 30th June. Later on the demand of the Rajkiya Shikshak Sangh, on 20.4.1995 the Government Order dated 21.3.1984 was partly amended to give the benefit of extension upto the end of the academic session i.e. 30th June, without any specific order to that effect, unless the concerned Principal has brought to the notice of competent authority any adverse fact prior to their retirement. The Principal was made responsible to submit his report informing any such fact regarding the health of the government teachers, or the extent to which his work was unsatisfactory to deny to him the benefit of extension of service.

12. Learned Chief Standing Counsel submits that the Government Orders dated 21.3.1984 and 20.11.1995 were further amended by Government Order dated 31.7.1998 by providing that the sessions benefit will not be given automatically to the Headmaster/Principal unless they give written information/application one month prior to attaining the age of superannuation to the competent authority. He submits that the benefit of extension of service to teachers is co-related to the academic session. The exception to the statutory rules of superannuation, is primarily for the benefit of students and not for the teachers. Where in the government institutions there are no students and there is no academic session, nor the concerned teacher is teaching any subject regularly in such academic session, the benefit is not made applicable.

13. Shri Chaturvedi submits that in Sarju Prasad's case (supra) the Division Bench deciding the case of Professor of CPI Allahabad had dismissed the writ petition for giving benefit of extension of service on the ground that he was not doing any teaching work and further that there is no session so far as the Central Paedological Institute, Allahabad is concerned. The institution runs for the whole of the year. The petitioner earned leave and is not entitled for the benefit to continue upto the end of the academic session, applicable to the teachers engaged in teaching work for a particular session. The Division Bench did not find anything in Paragraphs 210, 211 and 226 of the Education Code to give benefit to the petitioner.

14. The service conditions of Professors working in the Government CPI, Allahabad are regulated by U.P. Educational Teaching (Subordinate Gazetted) Service Rules, 1993. The Rules do not provide for age of superannuation. Rule 17 of the Rules is in the nature of residuary clause, provides as follows:-

"17. **Regulation of other matters**.- In regard to the matters not specifically covered by these rules or by special order, persons appointed to the service shall be governed by the rules, regulations and orders applicable generally to Government servants serving in connection with the affairs of the State."

15. The age of superannuation of Government servants in UP is regulated by the Fundamental Rules 56 (a) falling under Chapter IX of the Financial Hand Book Vol. II, Parts II to IV. Rule 56 (1) provides as follows:-

"56 (a) Except as otherwise provided in this rule, every Government servant other than a Government servant in inferior service shall retire from service on the afternoon of the last day of the month in which he attains the age of fifty eight years. He may be retained in service after the date of compulsory retirement with the sanction of the Government on public grounds which must be recorded in writing, but he must not be retained after the age of 60 years except in very special circumstances."

16. The rules of superannuation prescribed in respect of public servants are based on consideration of life expectancy, and the capacity of the civil servant, having regard to the climatic conditions in which they work and the nature of work, they do. The rules do not involve the exercise of any discretion. They apply uniformally to all public servants, under

the category, in respect of which they are framed. In **Ram Deka vs. General Manager, North East Frontier Railway AIR 1964 SC 600** the Supreme Court said that the competent authority may frame rules under Article 309 of Constitution which corresponds to Section 124 of the Constitution for compulsory retirement of a government servant. All those rules as laid down in **State of Bombay v. Saubhag Chand M. Doshi AIR 1957 SC 892** will be valid provided they fix both the age of superannuation and an age of compulsory retirement and the services of permanent civil servants are terminated between these two points of time. In **Ram Autar Pandey v. State of Uttar Pradesh, AIR 1962 All 328 (FB)** a Full Bench of our Court observed:-

"The purpose of Fundamental R. 56 is not to confer upon Government servants any right to be retained in service up to a particular age, but to prescribe the age beyond which they may not be retained in service.

This shows the intention with which the rule was framed. What to say of a vested right, not even a right was intended to be conferred by R. 56. The petitioner could not, therefore, say that because at one stage 58 was the age of superannuation according to the rule a right was conferred upon him under which he could insist that he should be retained in service till that age and that the rule-making authority had lost its right to change the rule and to reduce the age of superannuation to a lower figure."

17. In this reference, we are concerned with extension of service as an exception to FR-56 (a), to the petitioner. Any exception to the rule of universal application, has to be strictly construed. In **State of Assam vs. Basanta Kumar Das AIR 1973 SC 1252** the Supreme Court held in a case of Professor and Head of Department of Physics in Government Cotton College, Guwahati that a government servant has no right to continue in service beyond the age of superannuation prescribed in the statutory rules. If he is retained beyond that age it is only in exercise of the discretion of the Government. In **B.N. Mishra vs. State of UP AIR 1965 SC 1567** it was held that the State Government was not obliged to retain the services of every public servant for the same length of time. The retention of public servants after the period of retirement depends upon their efficiency, and exigencies of public service. If the Government decides to retain the services of some government servants after the age of retirement, it must retain every government servant for the same length of time. The retention of public servants after the period of retirement depends upon their efficiency, and exigencies of public service. In **State Bank of Bikaner and Jaipur and others vs. Jag Mohan Lal 1989 Supp 1 SCC 221** the Supreme Court, considering the refusal of the bank to grant extension to the respondent upon his completion of 58 years, held that the retention beyond the age of superannuation is within the discretion of employer. There is no right to continue in service beyond the age of superannuation. The extension to some employees does not imply discrimination against those who were not given extension.

18. In order to meet the difficulties faced by the students on the change of a teacher in educational institutions in the middle of the academic session, the State Government decided by Government

Order dated 21.3.1984, to carve out an exception for giving benefit of extension of service to the teachers upto the end of the academic session, subject to the conditions that their work and conduct is satisfactory; they are fit both physically and mentally, and are teaching any subject regularly in the school. The Government Order provided for exemption of each case individually by the State Government, on presentation of such facts by the competent authorities. Later the Government Order dated 20.4.1995 removed the condition of consideration of each case individually and supplemented it with the condition that the extension will not be granted if any adverse fact is reported against the teacher. The Principals were made responsible to report at least one month before the superannuation, any adverse fact such as unsatisfactory work, or the unfitness of such teacher. The condition precedent of extension of service, namely employment of the teacher in a Government educational institution to be terminated by superannuation in the middle of the academic session, is thus to be strictly complied with.

19. We find substance in the contention of learned Chief Standing Counsel, on the averments in the counter affidavit and material placed on record that CPI, Allahabad, is primarily engaged in educational research work, for reorientation of educational system. The institute conducts research work in comparative analysis of educational standards, and facilities in rural and urban areas, the difficulties faced by under-privileged children in the schools; the recommendation for extra-curriculum activities such as debates, organizing special lecturers and seminars. The institute is also engaged in preparing curriculum and publishing of books relating to teaching. The training of LT grade teachers was also undertaken by the institute for some time. It was later on stopped. A Model School was being run in the premises of CPI, Allahabad in which the teaching of Classes-I to VIII was undertaken. The school had separate teachers with service conditions regulated by the rules framed by Basic Education Board and the regulations applicable to the teachers of the Board.

20. Smt. Prema Rai, Principal of the Government, CPI, Allahabad did not recommend for extension of service of the petitioner vide her letter dated 23.3.1996, to the Director of Education (Secondary) on the ground that the petitioner had not performed any regular teaching work and was engaged in the institute, in research work. The petitioner had orally informed her that she had taught Psychology, as a subject but that there is no proof of such teaching from the time table of the teachers training. In para-3 of her letter she has stated that there is no academic session in the institute. The teachers and Professors in the institute avail 31 days earned leave and also get the benefit of leave encashment. Smt. Dhulia-the petitioner also availed the benefit of earned leave.

21. The object of giving benefit of extension of service beyond the prescribed age of superannuation to the teachers upto end of the academic session i.e. 30th June uniformally, without any reference of individual case, except in case of unsatisfactory work and failing health, is to maintain the continuity in teaching work in educational institutions. In order to ensure that the students do not

suffer, on account of the change of teachers in the middle of the academic session, the teachers teaching regular subjects are given extension of service upto the end of academic session commonly known as sessions benefit. The teaching of any subject and the incomplete academic session, are the twin requirements for allowing the benefit of extension of service to such teachers. If any of these requirements are missing, the teacher is not getting the benefit of the policy, to continue beyond the age of superannuation.

22. The exceptions to the general rule have to be construed strictly in order to achieve the object for which such exceptions are made. The special benefit given to the teachers for avoiding any inconvenience to the students and to maintain the regularity of the academic session, can be availed by teachers only to extend their service after the age of their superannuation, only if they fulfill such conditions laid down in the Government order dated 21.3.1984. Smt. Sumitra Dhulia, the petitioner, was designated as Professor in C.P.I. Allahabad. She was not teaching any subject to the students regularly. The CPI also imparts training to the teachers. The teachers attend to the training sessions, mostly in the vacations. There is no academic session in the institute. The teachers in the institute as Government servants were required to work throughout the year and are entitled to earned leave and also encashment of earned leave, upto the maximum prescribed period of its accumulation. They are as such not entitled to the benefit of extension in service to continue upto 30th June, following the date of their superannuation.

23. The questions posed by us, arising out of two decisions with conflicting opinions, are thus answered as follows:-

"1. The Government Order dated 21.3.1984 granting extension of service to the Teachers, Headmasters and Principals of Government Colleges and Government Degree Colleges, till the end of the academic session i.e. 30th June of the year in which such Teacher, Headmaster or Principals retire, is not applicable to the employees including Professors working in Central Paedological Institute, Allahabad (CPI).

2. The judgment in **Rajpati Pandey vs. State of UP and others** in Civil Misc. Writ Petition No. 20756 of 1990 dated 2.5.1997, was not correctly decided;

3. The Division Bench judgment in **Sarju Prasad vs. State of UP and others Civil Misc. Writ Petition No. 896 of 1967** decided on 14.03.1997, lays down the correct law;"

24. We may observe that our opinion has been rendered in respect of the teachers, and Professors of the Central Paedological Institute, Allahabad, and not for the teachers of the Model School, running in the campus of the Institute, from Classes-I to VIII.

25. The record will be sent back to be listed before the concerned bench to finally decide the writ petition in accordance with the opinion, expressed as above.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.09.2010

BEFORE
THE HON'BLE ARUN TANDON, J.

Civil Misc. Writ Petition No. 12959 of 1988

Jag Mohan Singh ...Petitioner
Versus
State of U.P. and others ...Respondent

Counsel for the Petitioner:
Sri S.D.N. Singh
Sri R.S. Maurya
Sri S.K. Shukla
Sri V.S. Dwivedi

Counsel for the Respondent:
S.C.

U.P. Imposition of Ceiling on land Holdings (Amendment) Act 1972 Section 4-A-Declaration of Surplus Land-Without recording the finding regarding-irrigation facility as well as-growing two crops in that relevant year-Non consideration thereof-held-requirement of statutory provision not fulfilled-to order passed by both the authorities not sustainable.

Held: Para 7 & 8

Since under the impugned order only first part of the condition has not been recorded to have been satisfied inasmuch as there is no finding that any irrigation facility was made available by the State Irrigation Work after enforcement of the Uttar Pradesh Imposition of Ceiling on Land Holdings (Amendment) Act 1972. Requirements of Section 4-A cannot be said to have been satisfied.

The contentions raised on behalf of the petitioner appears to be correct and is well supported by the judgement of this Court in the case of Manmohan Singh vs. State of U.P. in Civil Misc. Writ Petition No. 12958 of 1988 decided on 8.5.2007.

For the reasons recorded above this writ petition is allowed. The orders dated 6.12.1985 & 15.4.1988 passed by the Prescribed Authority as well as by the Appellate Authority are hereby set aside.

Case law discussed:
Civil Misc. Writ Petition No. 12958 of 1988 decided on 8.5.2007

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

1. Proceeding under Section 29/30 read with Section 4-A of the U.P. Imposition of Ceiling on Land Holdings Act were initiated against the petitioner, under notice dated 18.10.1983. The petitioner filed his objections to the aforesaid notice and specifically stated that conditions required under Section 4-A of the Act were not satisfied and that the proceedings were without jurisdiction. It was contended that Gata Nos. 260 & 286 were wrongly shown have become irrigable and, therefore, the entire proceedings are bad. It was clarified that no source of irrigation through State Irrigation Work has come into operation subsequent to the enforcement of the Uttar Pradesh Imposition of Ceiling on Land Holdings (Amendment) Act 1972 and, therefore, merely because during relevant year two crops were grown, would not lead to conclusion that the land was irrigated. The prescribed authority under the order dated 6.12.1985 rejected the objections so raised and declared 2.30 of irrigated land as surplus.

2. Not being satisfied, the petitioner filed an appeal before the Commissioner, Jhansi Region, Jhansi being Appeal No. 4/55/12/38/46 of 1987-88. The appeal has been dismissed under the order dated 15.4.1988. Hence this petition.

3. On behalf of the petitioner, it is vehemently contended that both the authorities have recorded a finding that since

two crops were grown over the Plot Nos. 260 & 286 as per Aakar Patra-3 of 1389, 1390 & 1391 Fasli the land has to be treated as irrigated.

4. Counsel for the petitioner submits that such findings of the authority is based on misreading of Section 4-A (secondly) which reads as follows:

4-A. Determination of irrigated land*. The prescribed authority shall examine the relevant Khasras for the years 1378 Fasli, 1979 Fasli and 1380 Fasli, the latest village map and such other records as it may consider necessary, and may also make local inspection where it considers necessary and thereupon if the prescribed authority is of opinion :-*

firstly, (a) that, irrigation facility was available for any land in respect of any crop in any one of the aforesaid years; by -

(i) any canal included in Schedule No. 1 of irrigation rates notified in Notification No. 1579-W/XXIII-62-W-1946, dated March 31, 1953, as amended from time to time; or

(ii) any lift irrigation canal; or

(iii) any State tube-well or a private irrigation work; and

(b) that at least two crops were grown in such land in any one of the aforesaid years; or

Secondly, that irrigation facility became available to any land by a State Irrigation work coming into operation subsequent to the enforcement of the Uttar PradeshImposition of Ceiling on Land Holdings (Amendment) Act 1972, and at least two crops were grown in such land in any agricultural year between the date of such work coming into operation and the date of issue of notice under Section 10; or

5. He submits that not only it is to be established that two corps were grown in any agriculture year between relevant agricultural year. It has also to be established as to which State Irrigation Work came into operation providing for irrigation facilities for the land before the date of issuance of notice. He clarified that both the conditions must exist together.

6. I have heard learned counsel for the parties.

Section 4-A (secondly) consists of two parts:

(a) An irrigation facility must have been made available by the State Irrigation Work subsequent to the commencement of the U.P. Imposition of Ceiling on Land Holdings Act, 1972.

(b) Two crops must have been grown between the date of such work coming into operation and the date of issuance of notice in any one agricultural year. Both the conditions must be satisfied together for Section 4-A (secondly) being attracted.

7..Since under the impugned order only first part of the condition has not been recorded to have been satisfied inasmuch as there is no finding that any irrigation facility was made available by the State Irrigation Work after enforcement of the Uttar Pradesh Imposition of Ceiling on Land Holdings (Amendment) Act 1972. Requirements of Section 4-A cannot be said to have been satisfied.

8. The contentions raised on behalf of

the petitioner appears to be correct and is well supported by the judgement of this Court in the case of ***Manmohan Singh vs. State of U.P. in Civil Misc. Writ Petition No. 12958 of 1988 decided on 8.5.2007***. For the reasons recorded above this writ petition is allowed. The orders dated 6.12.1985 & 15.4.1988 passed by the Prescribed Authority as well as by the Appellate Authority are hereby set aside.

9. Let the Prescribed Authority re-examine the matter in right of the observation made afresh after affording opportunity of hearing to the petitioner preferably within 12 weeks from the date a certified copy of this order is filed before him.

Interim order is discharged.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.11.2010

BEFORE
THE HON'BLE SUDHIR AGARWAL, J,

Civil Misc. Writ Petition No. 15711 of 2007

Chandra Bhushan Pandey ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Mr. Rakesh Kr. Shukla
C.S.C.

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

<u>Fundamental Rule-56(C)</u> Voluntary Retirement-petitioner a Civil Police Canstable on 23.11.02 applied for voluntary retirement-authorities treating in service placed under suspension by order dated 24.6.06 on allegations of unauthorise absence- 'No' deniel of fact that request for voluntary retirement ever rejected before it became effective on 1.9.03-Subsequent proceeding by treating in service-wholly illegal not sustainable.

Held: Para 5

In my view, this defence of the respondents is wholly untenable. Fundamental Rule 56 (c) is very clear and confers a right upon an employee to take retirement prematurely after giving minimum three months' notice. The petitioner, in the case in hand, sought voluntarily retirement w.e.f. 1st September, 2003. It is not the case of the respondents that his application for voluntary retirement was ever rejected before it came into force, and, hence in my view it became effective on 01.09.2003. In the circumstances the petitioner was entitled to be deemed to have retired on 1st September, 2003. Any subsequent proceeding as well as action of the respondents treating the petitioner as continuing in service thereafter is wholly illegal and cannot be sustained.

<u>Case law discussed:</u>
State of U.P. & Ors. Vs. Krishna Chandra Agarwal 2007(2) ESC 760

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

1. Heard Sri Rakesh Kumar Shukla for the petitioner, learned Standing Counsel of the respondents and perused the record.

2. The petitioner petitioner was appointed as Constable in U.P. Police Force in 1974. On 23.11.2002 he applied for voluntary retirement w.e.f. 1st September, 2003. A copy of this application is on record as Annexure 1 to the writ petition. It was forwarded by the Superintendent of Police, Kaushambi on 23.11.2003 to higher authorities. Thereafter it appears that no decision was taken thereon though the

petitioner sent some further letters. The respondents instead of treating the petitioner having voluntary retired on 1st September, 2003, took him as if he has continued in service and by order dated 24th June, 2006 he was placed under suspension on the allegation that he was absent from duty w.e.f. 06.10.2004. A charge sheet was issued on 15th June, 2006 which culminated in an order of dismissal dated 15th February, 2007 passed by the Superintendent of Police, Kaushambi.

3. Learned counsel for the petitioner submits that having applied for voluntarily retirement w.e.f. 1st September, 2003 in accordance with Fundamental Rule 56(c), he ought to be deemed to have retired on that date and no proceedings thereafter could have continued. Hence the entire proceedings are illegal and void ab initio. Reliance is placed on a Division Bench decision in **State of U.P. & Ors. Vs. Krishna Chandra Agarwal 2007(2) ESC 760**. Considering similar provision therein this Court in para 5 to 7 of the judgment held as under:

"5. A careful reading of FR-56(c) makes it clear that a Government Servant can be retired by the employer prematurely without assigning any reason after he attains the age of fifty years by giving three months notice at any time. Similarly a Government Servant can also seek voluntarily retirement at any time after attaining the age of forty five years giving a similar three months notice. The proviso of FR-56 (c) further provides that the Government Servant may be retired by the employer giving a shorter notice or without any notice but in such a contingency, he be entitled to claim some amount for the period of notice by which such notice falls short of three months. Similarly, where the Government Servant tenders notice, it is open to the appointing authority to allow him to retire without any notice or for a shorter period of notice without incurring any liability to pay any penalty on account of such permission. It further provides where a disciplinary proceeding is pending or contemplated, the notice shall be effective only if it is accepted by the appointing authority, provided that in a case of contemplated enquiry, the government Servant is informed before expiry of period of notice that the same has not been accepted. Therefore, the proviso restrict the right of the Government Servant to retire by tendering three months notice, where a departmental enquiry is pending and in such a case, the voluntary retirement would be effective only after the said notice is accepted by the appointing authority, even if the period of notice is expired, but where enquiry is only contemplated, in such a case acceptance of notice would be necessary provided the Government Servant is informed by the employer before expiry of period of his notice that it has not been accepted. A somewhat similar provision contained in Rule 161 of Bombay Civil Service Rules came up for consideration before the Apex Court in B.J. Shelat Vs. State of Gujrat and others, (1978) 2 SCC 202. Rule 161 of the Bombay Civil Service Rules empowered the Government Servant to retire by giving a three months notice in writing after attaining the age of 55 years. However, proviso under Rule 161(2)(ii) restricted such right of the Government Servant where the departmental enquiry is pending or contemplated or the Government Servant is under suspension and the said proviso reads as under :

"Provided that it shall be open to the appointing authority to withhold permission to retire to a Government Servant who is

under suspension, or against whom departmental proceedings are pending or contemplated, and who seeks to retire under this sub-section."

6. It was held that but for the proviso, the Government Servant would be at liberty to retire by giving not less then three months notice to the appointing authority after attaining the prescribed age. However, though the proviso empowered the appointing authority to withhold permission to retire, yet the Court took the view that this proviso contemplate a positive action by the appointing authority. The Government has to communicate its intention of withholding of permission to the Government Servant. Where no such decision is taken and communicated to the Government Servant and the period of notice is allowed to expire, then it would result in allowing the Government Servant to retire without taking any action. In order to operate the proviso, it was thus necessary that the Government should not only take a decision but communicate it to the Government Servant. The Court further held where no such decision is taken and communicated to the Government Servant, after expiry of the period of notice, no disciplinary action can be taken against such Government Servant. The Court relied on an earlier three Judges Judgment of the Apex Court in ***Dinesh Chandra Sangma Vs. State of Assam and others, (1997) 4 SCC 441****, where it was held that for retiring voluntarily under FR-56(c), a Government Servant does not require any positive order of the appointing authority unless required by the Rules otherwise. Both the aforesaid judgments have been followed in* ***Union of India & others Vs. Sayed Muzaffar Mir, (1995) 1 UPLBEC 146 (SC),*** *while considering a pari materia provision under Article 1801(d) of Railways Establishment Code and in para-4 and 5 of the judgment, it was held :*

"4. There are two answers to this submission. The first is that both the provisions relied upon by the learned counsel would require, according to us, passing of appropriate order, when the Government servant is under suspension (as was the respondent), either of withholding permission to retire or retaining of the incumbent in service. It is an admitted fact that no such order had been passed in the present case. So, despite the right given to the appropriate/competent authority in this regard, the same is of no avail in the present case as the right had not come to be exercised. We do not know the reason(s) thereof. May be, for some reason the concerned authority thought that it would be better to see off the respondent by allowing him to retire.

5. The second aspect of the matter is that it has been held by a three Judges Bench of this Court in Dinesh Chandra Sangma V. State of Assam, 1977 (4) SCC 441, which has dealt with a pari materia provision finding place in Rule 56(c) of the Fundamental Rules, that where the Government servant seeks premature retirement the same does not require any acceptance and comes into effect on the completion of the notice period. This decision was followed by another three Judges Bench in B.J. Shelat V. State of Gujrat, 1978 (2) SCC 202."

7. While considering the provisions of FR 56 (c), a Division Bench of this Court in ***Surendra Narain Singh Vs. D.I.G, Special Appeal No. 649 of 1994 decided on 31st January 1995*** *took the same view. Learned standing counsel however sought to argue that a mischievous Government Servant*

should not be allowed to take the advantage of technicality otherwise the public interest would suffer adversely. The argument is to be noted only for rejection for the reason that even if after retirement, the order of punishment may not be passed under the U.P. Government Servant (Discipline and Appeal) Rules, 1999, yet the Government may proceed to pass appropriate order under Article 351A and 470 of Civil Service Regulations and can take steps for recovery of the amount, if any, which the Government has suffered on account of alleged misconduct of the Government Servant. The Hon'ble Single Judge has also taken the same view and we are in full agreement with the view taken in the judgment under appeal. "

4. Here also it is not case of the respondents that till 1st September 2003 any enquiry was pending or petitioner's application for voluntary retirement was rejected or was withheld otherwise by any positive act. In the counter affidavit the only defence taken is that since no sanction or approval was granted on the petitioner's request for voluntary retirement, hence he continued to be in service and since his absence was unauthorized from 28th December, 2003, hence the proceedings were initiated against him are correct.

5. In my view, this defence of the respondents is wholly untenable. Fundamental Rule 56 (c) is very clear and confers a right upon an employee to take retirement prematurely after giving minimum three months' notice. The petitioner, in the case in hand, sought voluntarily retirement w.e.f. 1st September, 2003. It is not the case of the respondents that his application for voluntary retirement was ever rejected before it came into force, and, hence in my view it became effective on 01.09.2003. In the circumstances the petitioner was entitled to be deemed to have retired on 1st September, 2003. Any subsequent proceeding as well as action of the respondents treating the petitioner as continuing in service thereafter is wholly illegal and cannot be sustained.

6. At this stage, learned Standing Counsel pointed out that since the respondents treated the petitioner in service beyond 1st September, 2003, therefore, the petitioner had also been paid fully salary for some period subsequent to 1st September, 2003 which otherwise he would not have been entitled had he been deemed to retired on 1st September, 2003.

7. Sri Rakesh Kumar Shukla, learned counsel for the petitioner, stated at the Bar and gave an undertaking that in case any amount beyond the pensionary amount, if any, has been paid to the petitioner, after 1st September, 2003, it would be open to the respondents to adjust such amount from the retiral benefits payable to the petitioner.

8. In view of above undertaking, the respondents are given liberty of adjustment of the amount, if any, paid to the petitioner over and above the retiral benefits and pension payable on 1st September, 2003.

9. In the result the writ petition is allowed. The impugned order of dismissal dated 15.02.2007 (Annexure 8 to the writ petition) is hereby quashed. The petitioner shall be deemed to have retired on 1st September, 2003 and shall be entitled for his retiral benefits accordingly, which shall be computed and determined by the respondents subject to adjustment as directed above within three months from the date of production of certified copy of this order and shall be paid accordingly within

two months thereafter.

10. No costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.11.2010

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 19956 of 2008

Jagdish Narain ...Petitioner
Versus
Union of India and others ...Respondents

Counsel for the Petitioner:
Sri S.C. Kushwaha
Sri Lal Mani Bind

Counsel for the Respondents:
Sri H.N. Pandey
S.C.

Constitution of India Art. 226-Writ Petition maintainiblity-petition filed by the teachers working in private institution-recognition of by CBSE Board for examination purpose-not receiving any financial aid either by central government or by Corporation-held-writ not maintainable.

Held: Para 8

In view of the Full Bench decision of this Court the petitioner working in a private institution, which is not a "State" with the meaning of Article 12 of the Constitution of India, I find no option but to hold that this writ petition is not maintainable. Admittedly the institution, in which the petitioner was employee, is a private institution and is not financed in any manner or otherwise is controlled by the Central Board of Secondary Education nor is receiving grant-in-aid from the State Government or Central government or the Government or its authority play any role except to the extent that recognition is being granted for holding examination of Secondary classes.

Case law discussed:
2005 (4) ESC 2265, Civil Appeal No. 339 of 2007, Writ Petition No.29743 of 2009, Special Appeal No.757 of 2001, Special Appeal No. 956 of 2006.

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

1. Heard Sri S.C.Kushwaha for the petitioner and Sri H.N.Pandey for the respondents and perused the record.

2. The petitioner is a teacher in a private institution namely Sarswati Vidya Mandir, Senior Secondary School, Etah which is affiliated to Central Board of Secondary Education and having been terminated by the Management of the Institution, has preferred the present writ petition.

3. Sri H.N.Pandey, learned counsel appearing for the respondents has raised preliminary objection that the writ petition is not maintainable and has placed reliance on a Full Bench decision in **M.K.Gandhi & others Vs. Director of Education (Secondary U.P., Lucknow & others 2005 (4) ESC 2265** as also the Apex Court decision in appeal taken up from that judgment as **Civil Appeal No. 339 of 2007 (Committee of Management, Delhi Public School & another Vs. M.K. Gandhi and others)** decided on 16th August, 2007 which both have been referred to in **Smt. (Dr.) Deepa Agarwal Vs. State of U.P. & others in Writ Petition No.29743 of 2009** decided on 11th June, 2009.

4. Learned counsel for the petitioner placed reliance on a Division Bench decision in **Sandeep Chauhan and others Vs. State of U.P. and others in Special**

Appeal No.757 of 2001 decided on 11th July, 2001. He also relied on another decision in **Sanjai Kumar Sharma Vs. Central Board of Secondary Education & Ors. Special Appeal No.956 of 2006** decided on 11th September, 2006 but a bare perusal thereof shows that in the aforesaid judgments, the decisions of Full Bench and Apex Court, noticed above, have not been noticed by the Division Bench and both the aforesaid decisions have been rendered without looking to the said two decisions which are binding on this Court being the judgments of not only the larger Bench but of the Apex Court also. Moreover, the facts in the aforesaid judgments would make it clear that the institution were not the private institution but it was an institution of the Air Force and this Court came to the conclusion that considering the facts and circumstances of such an institution, it cannot be held that such an institution is not a State under Article 12 of the Constitution of India which is not the case in hand.

5. In the case in hand, admittedly, the institution in which the petitioner was employee is a private institution which do not come within the ambit of 'State' under Article 12 of the Constitution of India. The following extract of the judgement in the case of **Sanjai Kumar Sharma (supra)** makes a difference between the institution involved in the case of **Sanjai Kumar Sharma (supra)** and the present one:

"The Education Code handed up to us, which has been framed by the Chairman of the Board of Governors of the Indian Air Force Education and Cultural Society, bears the emblem of the Indian Air Force on its top cover. Chapter 8 Rule 9 of the said book deals with how the finances are received, grant in aid as well as interconnection with other service institution funds, is mentioned."

6. So far as Division Bench decision in **Sandeep Chauhan (supra)** is concerned, since the matter is covered by the Full Bench decision as also Apex Court judgment dated 16th August, 2007, this Court is bound by the decision of the larger Bench as well as the Apex Court. It would be appropriate to quote para 2 of my judgment in **Smt. (Dr.) Deepa Agarwal (supra)** wherein the details of the decisions observed by the Apex Court has been quoted which reads:

*"In **M.K. Gandhi & others Vs. Director of Education (Secondary) U.P., Lucknow & others 2005 (4) ESC 2265,** it has been held that such a writ petition is not maintainable. In the **Civil Appeal No. 339 of 2007 (Committee of Management, Delhi Public School & another Vs. M.K. Gandhi and others)** preferred against the said judgment of this Court, the Apex Court in its judgment dated 16.8.2007, while confirming the view of this Court, has further held that no direction can be issued to C.B.S.E. interfering with the termination of Teachers and held as under:*

"When the Allahabad High Court has already held that the DPS School is not a State within the meaning of Article 12 of the Constitution of India and the writ petition is not maintainable, there was no necessity for giving a direction to the CBSE which virtually amounts to granting a declaration in favour of those teachers whose services have been terminated. We fail to appreciate the view taken by the Allahabad High Court by unnecessarily complicating the issue by involving the CBSE for a private dispute between the teachers and the DPS. The Allahabad High Court should have stop short of holding that the said DPS is a

private body and the writ is not maintainable. Hence, we are of the view that no writ is maintainable against a private school as it is not a 'State' within the meaning of Article 12 of the Constitution of India and no direction could have been given by the High Court to the CBSE for interfering with the termination of the teachers. The proper remedy for the teachers was to file a civil suit for damages, if there was any. Consequently, we allow this appeal and set aside the order passed by the Allahabad High Court to the extent of giving a direction to the Board. There will be no order as to cots."

7. So far as the decision in **Special Appeal No.611 of 2008, Union of India & others Vs. Somendra Gupta & others** relied by the learned counsel for the petitioner is concerned, therein in para 10 and 11 of the judgment, the Division Bench clearly has held as under:

"10. Learned Single Judge will therefore decide the question of maintainability of the petition as to whether the Society concerned is a State and whether the petition is maintainable, and if so maintainable, will decide as to whether on facts the respondent nos. 1 to 4 are entitled to the relief claimed for.

11. In view of the aforesaid facts and circumstances the appeal is allowed. The petition will go to the file of the Single Judge. We request him to decide it at the earliest. We make it clear that this Court has not given any finding one way or the other as to whether the Society is a State or it is not."

8. In view of the Full Bench decision of this Court the petitioner working in a private institution, which is not a "State" with the meaning of Article 12 of the Constitution of India, I find no option but to hold that this writ petition is not maintainable. Admittedly the institution, in which the petitioner was employee, is a private institution and is not financed in any manner or otherwise is controlled by the Central Board of Secondary Education nor is receiving grant-in-aid from the State Government or Central government or the Government or its authority play any role except to the extent that recognition is being granted for holding examination of Secondary classes.

9. The writ petition is accordingly dismissed as not maintainable.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.11.2010

BEFORE
THE HON'BLE ASHOK BHUSHAN, J.
THE HON'BLE VIRENDRA SINGH, J.

Civil Misc. Writ Petition No. 23624 of 2010

Smt.Mithilesh Kumari and others...Petitioner
Versus
State of U.P. and others ...Respondent

Counsel for the Petitioner:
Sri C.P.Gupta
Sri Keshri Nath Tripathi

Counsel for the Respondent:
C.S.C.
Sri Satish Mandhyan

Land Requisition Act 1894-Section 4(1) readwith section 17(4)-notification U/S 4 of the Act issued after 8 years-invoking dispensing enquiry under section 5-A-Notification under Section 4 (1) published on 20.05 09-deceleration under section 6(c) dated 27.01.10 published on 13.02.2010-plots in

question a grove land-no material produced before the court for forming any subjective satisfaction regarding invocation of section 17(i) and (ii) of the Act-except saying urgently needed-held both notification under section 4(i) evoking section 17(4) as well as deceleration under section 6 set-a-side

Held: Para 30,35,37,39

It is relevant to note that although in the writ petition there was specific pleading that there is no such urgency in the matter so as to invoke the power under Section 17(4) of the Act, in the counter affidavit neither any material has been brought nor any pleading has been made giving any specific reason for justifying the invocation of power under Section 17(4) of the Act except stating that the acquisition was urgently needed for construction of sub-market yard for which the District Magistrate was fully satisfied.

From the aforesaid, it is clear that there was no application of mind by the State with regard to invocation of power under Section 17(4) nor the records disclose that the aforesaid fact has been considered by the State Government before directing for dispensation of inquiry under Section 5A of the Act.

In view of the foregoing discussions, we are of the considered opinion that in the present case there was neither any material nor there was application of mind by the State with regard to invocation of power under Section 17(4) of the Act and the power under Section 17(4) of the Act was invoked by the State in a routine and mechanical manner which cannot be sustained. Thus the submission of counsel for the petitioners has substance that invocation of power under Section 17(4) of the Act is not in accordance with the provisions of the Act and the law laid down by the Apex Court as noted above.

We are cautious that construction of sub-market yard is urgent matter but, as observed above, mere urgency does not automatically lead to deny the land holders their right of filing objection under Section 5A. Thus the land acquisition proceedings initiated by issuing notification under Section 4(1) of the Act dated 20th May, 2009 is to be maintained. The invocation of power under Section 17(4) of the Act in the notification under Section 4 of the Act dated 20th May, 2009 has to be set-aside and consequently notification under Section 6 of the Act has also to be set-aside.

Case law discussed:

Writ Petition no. 18918 of 2006 (Ramesh and others vs. State of U.P. And others), Civil Appeal No. 2523 of 2008 (Anand Singh and another vs. State of U.P. And others, 1987 A.W.C.382, A.I.R. 1994 Allahabad 359, 1997 All.L.J. 1756, 2007(9) Additional District Judge 447, 2002(47) ALR 706, (2002) 4 S.C.C. 160, (1977) 1 S.C.C. 133, 1986 AIR 2025, (2004) 8 S.C.C. 14, (2004) 8 S.C.C. 453,

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

1. Heard Sri Keshri Nath Tripathi, Senior Advocate, assisted by Sri C.P. Gupta, Advocate for the petitioners in Writ Petition No.23624 of 2010, Sri Anil Kumar Tiwari, Advocate for the petitioner in Writ Petition No.41012 of 2010 and Sri B.D. Mandhyan, Senior Advocate, assisted by Sri Satish Mandhyan, Advocate for the respondents in both the writ petitions. Learned Standing Counsel has appeared for State-respondents.

2. These two writ petitions challenging same notifications have been heard together and are being disposed of by this common judgment. Pleadings in Writ Petition No.23624 of 2010 have been exchanged and it is sufficient to refer to pleadings of the said writ petition for deciding both the writ petitions.

Learned Standing Counsel has

produced the original records of the State Government pertaining to land acquisition in question, which has been perused by us.

Brief facts of the case, as emerge from pleadings of the parties, are; The petitioners claim to be bhumidhar of Plots No.391A and 391B measuring about 0.421 and 1.101 hectare respectively situated in village Islamganj, Pargana and Tehsil Jalalabad, district Saharanpur. Krishi Utpadan Mandi Samiti, Jalalabad, Saharanpur is a market area notified under Krishi Utpadan Mandi Samiti Adhiniyam, 1964. Allahganj is sub-market area of Krishi Utpadan Mandi Samiti, Jalalabad. Steps for construction of sub market yard were initiated by respondent No.3. The land selection committee of Krishi Utpadan Mandi Samiti, Jalalabad on 26th August, 1994 selected an area of 18.64 acres for sub-market area, Allahganj. The Board of Director, Mandi Parishad, Lucknow on 10th July, 1997 approved the proposal for acquisition of 10 acres of land. A letter dated 27th June, 2003 was written by the Regional Deputy Director (Administration), Mandi Parishad, Bareilly directing for making available proposal for land acquisition to Land Acquisition Directorate, Board of Revenue, Lucknow through the Collector for acquisition of 10 acres of land under Section 4/17 of the Land Acquisition Act, 1894 (hereinafter referred to as the Act). On 8th August, 2008 resolution was passed by the Krishi Utpadan Mandi Samiti, Jalalabad directing for acquisition. A meeting of the Zila Bhoomi Upyog Samiti headed by Collector was held which approved the proposal submitted by respondent No.3 for acquisition of 3.995 hectare of land. The Collector vide letter dated 25th October, 2008 forwarded the proposal of acquisition, as submitted by respondent No.3, to the Commissioner and Director, Land Acquisition Directorate, Board of Revenue, Lucknow. The Commissioner and Director vide letter dated 1st December, 2008 forwarded the proposal to the Secretary, Department of Agricultural Marketing and Agricultural Foreign Trade for issuing notification under Section 4(1)/17 of the Act. A note dated 2nd January, 2009 was submitted, which was approved by the Special Secretary on 5th January, 2009. The note was also recommended for obtaining proposal from Director, Mandi Parishad. The Director, Mandi Parishad wrote a letter on 27th February, 2009. The note was submitted on 3rd March, 2009 for approval of the proposal for acquisition of 3.995 hectare of land under Section 4(1)/17 of the Act, which was forwarded by the Special Secretary on 5th March, 2009 and approved by the Minister concerned on 6th March, 2009. The provisions of sub-section (1) of Section 17 and sub-section (4) of Section 17 of the Act were also invoked dispensing the inquiry under Section 5A of the Act. The notification under Section 4(1) of the Act was published in the Gazette on 20th May, 2009 and the substance of the notification was published in the Hindi Daily newspapers "Amar Ujala" and "Dainik Jagaran" on 14th October, 2009 and 15th October, 2009 respectively. A declaration under Section 6(1) of the Act dated 27th January, 2010 was issued, which was published in the Gazette on 27th January, 2010 itself and thereafter published in the Hindi Daily newspapers "Amar Ujala" and "Dainik Jagaran" on 13th February, 2010. Challenging the notifications issued under Section 4 read with Sections 17(1) and 17(4) of the Act and the declaration under Section 6(1) read with Section 17(4) these writ petitions have been filed. A writ of mandamus has also been prayed for restraining the respondents from dispossessing the petitioners from their

land.

3. The writ petition was entertained by Division Bench of this Court on 28th April, 2010. After filing of the counter affidavit and supplementary counter affidavit by respondents No.2 and 3 an interim order was passed on 3rd May, 2010 directing the parties to maintain status quo with regard to possession over the land in question. The State also filed its counter affidavit. The State Government was directed to produce the relevant records by order dated 30th September, 2010. The original records of the State Government being File No.600(293)/208 of the Department has been produced by learned Standing Counsel on the date of hearing.

4. Sri Keshri Nath Tripathi, Senior Advocate, appearing for the petitioners, challenging the impugned notifications, submits that steps for acquisition have been initiated in the year 1994 by Land Selection Committee which received approval of the Board of Director on 10th July, 1997 and thereafter after more than 10 years, respondent No.3 took a decision on 8th August, 2008 for proceeding with the land acquisition, which proposal was forwarded by the District Magistrate on 25th October, 2008 on the basis of which notification under Section 4 of the Act was issued on 20th May, 2009 and published in the newspapers on 14th and 15th October, 2009. The above facts indicate that there was no such urgency in the matter which may warrant dispensation of inquiry under Section 5A. It is submitted that even if it is assumed that construction of some market yard is urgent matter requiring invocation of Section 17(1) of the Act, there has to be exceptional reasons for dispensing with the inquiry under Section 5A of the Act. It is submitted that steps for construction of market yard having been initiated in the year 1994, which remained pending at the stage of respondent No.3 itself till 2008, there cannot be any sudden urgency for dispensing with the inquiry under Section 5A. He submits that in the plots in question there is a big grove of fruits bearing trees comprising of 110 tress of Mango, 52 trees of Sheesham, 2 trees of Popular, one big tree of Peepal and 2 trees of Neem which are about 40 years old. He submits that in accordance with the Government orders dated 20th August, 1969 and 5th February, 1993 as far as possible the cultivatory land should not be acquired for non cultivatory purpose. He submits that petitioners were entitled for an opportunity to file their objection, which has been denied without there being any valid ground. He submits that even after publication of notification under Section 4 of the Act on 20th May, 2009 the same was got published in the newspapers on 14th and 15th October, 2009, which fact itself indicates that there was no such urgency in the matter which warranted dispensation of inquiry. It is submitted that had the case being of such urgency, there was no occasion for publishing substance of notification under Section 4 of the Act after five months. Sri Tripathi further submitted that neither there was any material before the State Government forming any subjective satisfaction regarding invocation of Sections 17(1) and 17(4) of the Act nor the State Government applied its mind with regard to Sections 17(1) and 17(4) of the Act. It is submitted that sub-market yard at Allahganj has not been declared as required by Section 6(1) of the Krishi Utpadan Mandi Samiti Adhiniyam, 1964 and the gazette notification dated 29th October, 1996, which has been made available to the petitioners under the Right to Information Act, 2005, is a notification dividing existing

market area of Jalalabad into two distinct market yards i.e. Jalalabad and Allahganj and not with regard to creation of new market yard at Allahganj. He submits that there was no need or justification for acquisition of land in question for construction of sub-market yard. Sri Tripathi has placed reliance on a Division Bench judgment of this Court in Writ Petition No.18918 of 2006 ***(Ramesh and others vs. State of U.P. and others)*** decided on 18th December, 2007 and the judgment of the Supreme Court in Civil Appeal No.2523 of 2008 ***(Anand Singh and another vs. State of U.P. and others)*** decided on 28th July, 2010.

5. Sri B.D. Mandhyan, learned Senior Advocate, appearing for respondents No.2 and 3, refuting the submissions of counsel for the petitioners, submits that construction of market yard and sub-market yard are matter of national urgency. He submits that in several judgments of this Court as well as the Apex Court, it has been held that invocation of provisions of Sections 17(1) and 17(4) is fully justified in regard to cases for construction of sub-market yard. He submits that construction of sub-market yard brings relief to the agriculturists, which is of extreme urgency. Reliance has been placed by Sri Mandhyan on Division Bench judgments of this Court in the cases of ***Satyendra Prasad Jain and others vs. State of U.P. and others*** reported in 1987 A.W.C.382, ***Smt. Manorama Devi and others vs. State of U.P. and others*** reported in A.I.R. 1994 Allahabad 359, ***Ranjit Singh Chauhan and another vs. State of U.P. and another*** reported in 1997 All.L.J. 1756, ***Smt. Manju Lata Agrawal vs. State of U.P. and others*** reported in 2007(9) Additional District Judge 447, ***Mahendra Singh vs. State of U.P. and others,*** reported in 2002(47) ALR 706 and the judgments of the Apex Court in the cases of ***Bhagat Singh vs. State of U.P. and others*** reported in A.I.R. 1999 S.C. 436 and ***First Land Acquisition Collector and othes vs. Nirodhi Prakash Gangoli and another*** reported in (2002)4 S.C.C. 160. Sri Mandhyan further submits that the delay on the part of respondents No.2 and 3 or by the State prior to issue of the notification under Section 4(1) of the Act is not relevant nor the same vitiate the notifications. He further submits that even the delay which have been occurred after issue of notification under Section 4 of the Act does not vitiate the acquisition proceedings. Refuting the submission of learned counsel for the petitioners with regard to non declaration of sub market area in question, it is submitted that notification was issued declaring Allahganj sub market area on 11th February, 1976 under Section 7 of the Krishi Utpadan Mandi Samiti Adhiniyam, 1964 declaring sub market area as Gaon Sabha Allahganj. He submits that there is no requirement of issuing any notification under Section 8 of the Krishi Utpadan Mandi Samiti Adhiniyam, 1964. It is submitted that notification dated 29th October, 1996, which has been filed by the petitioners themselves is notification under Section 8(1) of the Krishi Utpadan Mandi Samiti Adhiniyam, 1964 dividing Jalalabad market area into Allahganj market area and Jalalabad market area and there was no lack of jurisdiction in the authorities to acquire the land for construction of sub market yard at Allahganj.

6. Sri Ram Krishna, learned Standing Counsel, appearing for the State Government, has submitted that the State Government has rightly issued notification under Section 4 read with Section 17(1) and 17(4) of the Act. He submits that suitability of land was judged after spot inspection and

the land in question was urgently required for construction of sub-market yard, therefore, provisions of Section 17(4) of the Act was rightly invoked. It is submitted that notice under Section 9(1) of the Act has been issued on 3rd March, 2010 in which petitioners have also filed their objection. It is further submitted that the State Government was fully satisfied with regard to acquiring of land and urgency for dispensing with the inquiry under Section 5A of the Act. Learned Standing Counsel referring to the original records, has submitted that all requisite certificates including certificate in PRAPATRA-10 for invoking section 17 was given by the Collector and there being materials on record, the State Government has rightly invoked Section 17(4) of the Act.

7. We have considered the submissions of learned counsel for the parties and perused the records including the record of the State Government produced by the learned Standing Counsel at the time of hearing.

8. The main issue, which has arisen for consideration in this writ petition, is with regard to invocation of Sections 17(1) and 17(4) of the Act. Section 17(1) and 17(4) of the Act are quoted below:-

" 17.Special powers in cases of urgency:- (1) In cases of urgency, whenever the appropriate Government so directs, the Collector, though no such award has been made, may, on the expiration of fifteen days from the publication of the notice mentioned in section 9, sub-section (1), take possession of any waste or arable land needed for public purposes or for a Company. Such land shall thereupon vest absolutely in the Government, free from all encumbrances.

(2) .....

(3) .....

[(4) In the case of any land to which, in the opinion of the appropriate Government, the provisions of sub-section (1) or sub-section (2) are applicable, the appropriate Government may direct that the provisions of section 5A shall not apply, and, if it does not so direct, a declaration may be made under section 6 in respect of the land at any time after the publication of the notification under section 4, sub-section (1).]"

9. Section 17(1) of the Act provides that in cases of urgency, whenever the appropriate Government so directs, the Collector, though no such award has been made, may, on the expiration of fifteen days from the publication of the notice mentioned in section 9, sub-section (1), take possession of any waste or arable land needed for public purposes. Sub-Section (4) of Section 17 provides that in case of any land to which, in the opinion of the appropriate Government, the provisions of sub-section (1) or sub-section (2) are applicable, the appropriate Government may direct that the provisions of section 5A shall not apply.

10. The acquisition in question has been made for public purpose, namely "Construction of Sub Market Yard, Allahganj of Krishi Utpadan Mandi Samiti, Jalalabad". It is not disputed that the purpose for which the land is being acquired is public purpose. It is also not disputed that construction of market yard and sub market yard are matters of urgency. The Division Bench judgment of this Court in ***Satyendra Prasad Jain's*** case (supra), which has been relied by Sri B.D. Mandhyan, has laid down

that farmers need protection against the exploiters, they need remunerative price for their produce, they should be provided all facilities for sale of their produce and, therefore, proper market yard is indispensable for them. It has further been held that their need is no less urgent than housing accommodation. Following was laid down in paragraphs 11 and 12 of the judgment:-

*"**11**. Looking at these conditions it cannot be said that there is no urgency in the matter of acquiring the land in question. It is an acknowledged fact that the farmers need protection against the exploiters. They need remunerative price for their produce. The proper market yard, is, therefore, indispensable for them. We should not look leisurely at everything. The need of the farmers requires everybody's concern and attention. Their need is no less urgent than housing accommodation. The Supreme Court in a recent decision pertaining to the case of Meerut Development Authority - State of U.P. v. Meerut Development Authority, Meerut, AIR 1986 SC 2025 has observed that acquisition proceedings for the housing scheme could be taken by dispensing with the compliance of Section 5-A of the Act. It was observed at page 2028:-*

"The provision of housing accommodation in these days has become a matter of national urgency. We may take judicial notice of this fact. Now it is difficult to hold that in the case of proceedings relating to acquisition of land for providing house sites it is unnecessary to invoke Section 17(1) of the Act and to dispense with the compliance of section 5-A of the Act."

***12.** These observations are equally applicable to acquisition for construction of market yards which are primarily for the benefit of agriculturists. They are the back bone of this country. It is not the case of the petitioners that the lands have been acquired with malafide intention. Their only case is that they have planted eucalyptus, but the law provides for adequate compensation even for that."*

11. The judgment of the Apex Court in ***Bhagat Singh's*** case (supra) was a case of construction of market yard at district Agra. The Apex Court in the said case has laid down that establishment of market yard is a matter of urgency.

12. Sri K.N. Tripathi has not seriously disputed the above said proposition. Thus the submission of Sri B.D. Mandhyan that the acquisition for construction of sub market yard was a matter of urgency, hence invocation of Section 17(1) of the Act cannot be faulted, is correct.

13. The submission, which has been emphatically pressed by the counsel for the petitioners is that there was no valid ground for invocation of Section 17(4) in facts of the present case. It is further submitted that neither there was any material to form any subjective satisfaction by the State that inquiry was liable to be dispensed with nor in fact the State applied its mind to the aforesaid.

14. Before we proceed to consider the facts of the present case and above submission of learned counsel for the petitioners, it is relevant to refer to certain decisions of this Court as well as the Apex Court, which had occasion to consider Section 17(4) of the Act.

15. A three Judges Bench of the Apex

Court in the case of ***Narayan Govind Gavate & others. vs. State of Maharashtra & others*** reported in (1977) 1 S.C.C. 133 had considered sub-section (4) of Section 17 of the Act. The Apex Court was considering the land acquisition proceeding for the purpose of development of an area for industrial and residential purposes. The Apex Court laid down that barring exceptional circumstances, as to make immediate possession, without holding even a summary enquiry under section 5A of the Act, is imperative. It was also held that if a challenge is made to the invocation of provisions of Section 17(4) of the Act, it is for the State to show that some exceptional circumstances existed which necessitated the elimination of inquiry under section 5A of the Act and the authority applied its mind to this essential question. Following was laid down in paragraphs 40, 41 and 42 of the said judgment:-

"40*. In the case before us, the public purpose indicated is the development of an area for industrial and residential purposes. .This in itself, on the face of it, does not call for any such action, barring exceptional circumstances, as to make immediate possession, without holding even a summary enquiry under section 5A of the Act, imperative. On the other hand, such schemes generally take sufficient period of time to enable at least summary inquiries under section 5A of the Act to be completed without any impediment whatsoever to the execution of the scheme. Therefore, the very statement of the public purpose for which .the land was to be 'acquired indicated the absence of such urgency, on the apparent facts of the case, as to require the elimination of an enquiry under 'section 5A of the Act.*

41. *Again, the uniform and set recital of a formula, like a ritual or mantara, apparently applied mechanically to every case, itself indicated that the mind of the Commissioner concerned was only applied to the question whether the land was waste or arable and whether its acquisition is urgently needed. Nothing beyond that seems to have been considered. The recital itself shows that the mind of the Commissioner was not applied at all to the question whether the urgency is of such a nature as to require elimination of the enquiry under section 5A.of the Act. If it was, at least the notifications gave no inkling of it at all. On the other hand, its literal meaning was that nothing beyond matters stated there were considered.*

42. *All schemes relating to development of industrial and residential areas must be urgent in the context of the country's need for increased production and more residential accommodation. Yet, the very nature of such schemes of development does not appear to demand such emergent action as to eliminate summary enquires under section 5A of the Act. There is no indication whatsoever in the affidavit filed on behalf of the State that the mind of the Commissioner was applied. at all to the question whether it was a case necessitating the elimination of the enquiry under section 5A of the Act. The recitals in the notifications, on the other hand, indicate that elimination of the enquiry under section 5A of the Act was treated as an automatic consequence of the opinion formed on other matters. The recital does not say at all that any opinion was formed on the need to dispense with the enquiry under section 5A of the Act. It is certainly a case in which' the recital was at least defective. The burden, therefore, rested upon the State to remove the defect, if possible, by evidence to show that some exceptional circumstances which*

necessitated the elimination of an enquiry under section 5A of the Act and that the mind of the Commissioner was applied to this essential question. It seems to us that the High Court correctly applied the provisions of section '106 of the Evidence Act to place the burden upon the State to prove those special circumstances. although it also; appears to us. that the High Court was not quite correct in stating its view in such a manner as to make it appear that some part of the initial burden of the petitioners under sections 101 and 102 of the Evidence Act had been displaced by the failure of the State, to discharge its duty under' section 106 of the Act. The correct way of putting it would have been to say that the failure of the State to produce the evidence of facts especially' within the knowledge of its officials, which rested upon it under section 106 of the Evidence Act, taken together with the attendant facts gnu circumstances, including the contents of recitals, had enabled the petitioners to discharge their burdens under sections 101 and 102 of the Evidence Act."

16. The Apex Court in the case of ***State of U.P. and others vs. Smt. Pista Devi*** reported in 1986 AIR 2025 1986 laid down that acquisition for the purpose of residence is a matter of national urgency.

17. The Apex Court in ***Bhagat Singh's*** case (supra), which has been relied by the learned counsel for the respondents, has laid down following in paragraphs 9, 10 and 11:-

"9. *On the question of urgency, the following facts and contentions emerge from the Counter affidavits. The establishment of a Market Yard is not merely one of mere urgency but one which makes it necessary to dispense with inquiry under section 5-A. The existing market yard is situated in a very congested locality having no scope for expansion and the place where the Market is now located is not sufficient to cater to the growing needs of its constituents. There is no adequate space for free movement and parking of trucks/bullock carts etc. nor for providing necessary shelter for those who come to the market. The existing market is also devoid of any amenities necessary for hundreds of people who visit the market every day or for the bullocks which are being used to draw the carts. During rainy season it becomes well-nigh impossible to find out suitable shelters for the farmers and producers of vegetables. It has become necessary to provide amenities and also construct roads in a planned manner.*

10. *In our view, the subjective satisfaction for dispensing with inquiry under Section 5-A is based on sufficient material and cannot be faulted. The photographs as to the filthy state of the present Mandi with garbage and stray cattle and pigs show that the place is so loathsome that it will be precarious and perhaps hazardous to store vegetables or foodgrains in the existing market. We are, therefore, of the view that the urgency clause was rightly invoked by the government. There are also enough precedents in connection with acquisition of land for markets where Section 5-A has been dispensed with and such action was upheld.*

11. *In connection with a similar acquisition for a market yard, when Section 5- A inquiry was dispensed with on the ground of urgency, the Allahabad High Court in Satyendra Prasad Jain (S.P. Jain) and others, v. State of U.P., [1987] A.W.C. 382 observed :*

"The question herein is whether the

State was justified in dispensing the requirements of enquiry contemplated under Section 5-A. It could be taken judicial notice of, that in regard to agricultural produce there were no proper market facilities. There were innumerable charges, levies and exactions which the agriculturists were required to pay without having any say in the proper utilisation of the amount paid by them. The Government of India and the various committees and commissions appointed to study the condition of agricultural markets in the country had stress to need to provide proper market yards for the sale and purchase of agricultural produce. The Planning Commission also stressed long ago in this regard. The Uttar Pradesh Krishi Utpadan Mandi Adhiniyam, 1964 has been enacted to provide for the regulation of sale and purchase of agricultural produce and for the establishment, superintendence and control of markets therefore, in Uttar Pradesh. The proposed construction of market and market yard by the Mandi Samiti is, therefore, a step forward to ameliorate the conditions of producers with due representation to them in the Mandi Samities for the fair settlement of disputes relating to their transactions. It is a long felt need which is said to have been included in the planned Development Scheme."

It was further stated (P.3 & 4) as follows :

"It cannot be said that there is no urgency in matter of acquiring the land in question."

18. The above observations of the Apex Court that establishment of market yard is not merely one of mere urgency but one which makes it necessary to dispense with inquiry under Section 5A were made on the basis that there was sufficient materials on the record for forming subjective satisfaction for dispensation of inquiry. Specific reasons, which led the authority to dispense with the inquiry, has been made in paragraphs 9 and 10 of the said judgment, as quoted above.

19. In ***First Land Acquisition Collector's*** case (supra), the Apex Court laid down following in paragraph 5:-

"5. *The question of urgency of an acquisition under Section 17(1) and (4) of the Act is a matter of subjective satisfaction of the Government and ordinarily it is not open to the Court to make a scrutiny of the propriety of that satisfaction on an objective appraisal of facts. In this view of the matter when the Government takes a decision, taking all relevant considerations into account and is satisfied that there exists emergency for invoking powers under Section 17 (1) and (4) of the Act, and issues Notification accordingly, the same should not be interfered with by the Court unless the Court comes to the conclusion that the appropriate authority had not applied its mind to the relevant factors or that the decision has been taken by the appropriate authority mala fide. Whether in a given situation there existed urgency or not is left to the discretion and decision of the concerned authorities. If an order invoking power under Section 17(4) is assailed, the Courts may enquire whether the appropriate authority had all the relevant materials before it or whether the order has been passed by non-application of mind. Any post Notification delay subsequent to the decision of the State Government dispensing with an enquiry under Section 5(A) by invoking powers under Section 17(1) of the Act would not invalidate the decision itself specially when no mala fides*

on the part of the government or its officers are alleged. Opinion of the State Government can be challenged in a Court of law if it could be shown that the State Government never applied its mind to the matter or that action of the State Government is mala fide. Though the satisfaction under Section 17(4) is a subjective one and is not open to challenge before a Court of law, except for the grounds already indicated, but the said satisfaction must be of the Appropriate Government and that the satisfaction must be, as to the existence of an urgency....."

20. The Apex Court in the above case has laid down that if an order invoking power under Section 17(4) is assailed, the courts may enquire whether the appropriate authority had all the relevant materials before it or whether the order has been passed by non application of mind. It was also laid down that any post notification delay subsequent to the decision of the State Government dispensing with the inquiry under Section 5A would not invalidate the decision itself.

21. A three Judges Bench of the Apex Court in the case of **Union of India and others vs. Mukesh Hans** reported in (2004)8 S.C.C. 14 had occasion to consider Section 17(5) and 5A of the Act and after considering several earlier judgments, following propositions were laid down in paragraphs 31, 32 and 33 of the said judgment:-

"31. *Section 17 (4) as noticed above provides that in cases where the appropriate Government has come to the conclusion that there exists an urgency or unforeseen emergency as required under sub-sections (1) or (2) of Section 17 it may direct that the provisions of Section 5A shall not apply and if such direction is given then 5A inquiry can be dispensed with and a declaration may be made under Section 6 on publication of 4(1) notification possession can be made.*

32. *A careful perusal of this provision which is an exception to the normal mode of acquisition contemplated under the Act shows mere existence of urgency or unforeseen emergency though is a condition precedent for invoking Section 17(4) that by itself is not sufficient to direct the dispensation of 5A inquiry. It requires an opinion to be formed by the concerned government that along with the existence of such urgency or unforeseen emergency there is also a need for dispensing with 5A inquiry which indicates that the Legislature intended that the appropriate government to apply its mind before dispensing with 5A inquiry. It also indicates the mere existence of an urgency under Section 17 (1) or unforeseen emergency under Section 17 (2) would not by themselves be sufficient for dispensing with 5A inquiry. If that was not the intention of the Legislature then the latter part of sub-section (4) of Section 17 would not have been necessary and the Legislature in Section 17 (1) and (2) itself could have incorporated that in such situation of existence of urgency or unforeseen emergency automatically 5A inquiry will be dispensed with. But then that is not language of the Section which in our opinion requires the appropriate Government to further consider the need for dispensing with 5A inquiry in spite of the existence of unforeseen emergency. This understanding of ours as to the requirement of an application of mind by the appropriate Government while dispensing with 5A inquiry does not mean that in and every case when there is an urgency contemplated under Section 17 (1) and unforeseen*

emergency contemplated under Section 17 (2) exists that by itself would not contain the need for dispensing with 5A inquiry. It is possible in a given case the urgency noticed by the appropriate Government under Section 17(1) or the unforeseen emergency under Section 17(2) itself may be of such degree that it could require the appropriate Government on that very basis to dispense with the inquiry under Section 5A but then there is a need for application of mind by the appropriate Government that such an urgency for dispensation of the 5A inquiry is inherent in the two types of urgencies contemplated under Section 17 (1) and (2) of the Act.

33. *An argument was sought to be advanced on behalf of the appellants that once the appropriate Government comes to the conclusion that there is an urgency or unforeseen emergency under Section 17(1) and (2), the dispensation of enquiry under Section 5A becomes automatic and the same can be done by a composite order meaning thereby that there no need for the appropriate Government to separately apply its mind for any further emergency for dispensation with an inquiry under Section 5A. We are unable to agree with the above argument because sub- section (4) of Section 17 itself indicates that the "government may direct that provisions of Section 5A shall not apply" which makes it clear that not in every case where the appropriate Government has come to the conclusion that there is urgency and under sub- section (1) or unforeseen emergency under sub-section (2) of Section 17 the Government will ipso facto have to direct the dispensation of inquiry. For this we do find support from a judgment of this Court in the case of Nandeshwar Prasad & Anr. vs. The State of U.P. & Ors. {1964 (3) SCR 425) wherein considering the language of Section 17 of the Act which was then referable to waste or arable land and the U.P.Amendment to the said section held thus :*

"It will be seen that s. 17(1) gives power to the Government to direct the Collector, though no award has been made under s. 11, to take possession of any waste or arable land needed for public purpose and such land thereupon vests absolutely in the Government free from all encumbrances. If action is taken under s. 17(1), taking possession and vesting which are provided in s. 16 after the award under s. 11 are accelerated and can take place fifteen days after the publication of the notice under s. 9. Then comes s.17(4) which provides that in case of any land to which the provisions of sub-s. (1) are applicable, the Government may direct that the provisions of s. 5-A shall not apply and if it does so direct, a declaration may be made under s. 6 in respect of the land at any time after the publication of the notification under s. 4(1). It will be seen that it is not necessary even where the Government makes a direction under s. 17(1) that it should also make a direction under s. 17(4). If the Government makes a direction only under s. 17(1) the procedure under s. 5-A would still have to be followed before a notification under s. 6 is issued, though after that procedure has been followed and a notification under s. 6 is issued the Collector gets the power to take possession of the land after the notice under s. 9 without waiting for the award and on such taking possession the land shall vest absolutely in Government free from all encumbrances. It is only when the Government also makes a declaration under s. 17(4) that it becomes unnecessary to take action under s. 5-A and make a report thereunder. It may be that generally

where an order is made under s. 17(1), an order under s. 17(4) is also passed; but in law it is not necessary that this should be so. It will also be seen that under the Land Acquisition Act an order under s. 17(1) or s. 17(4) can only be passed with respect to waste or arable land and it cannot be passed with respect to land which is not waste or arable and on which buildings stand."

22. In the above case, the Apex Court had laid down that even if the appropriate Government comes to the conclusion that there is an urgency under Section 17(1) of the Act, the dispensation of inquiry under Section 5A of the Act is not automatic. It was also held that even in cases the matter is of urgency, the appropriate Government has to separately apply its mind as to whether inquiry under Section 5A of the Act is to be dispensed with or not.

23. The judgment of the Apex Court in ***Union of India and others vs. Krishan Lal Arneja and others*** reported in (2004)8 S.C.C. 453, laid down the same proposition. Paragraph 16 of the said judgment is quoted below:-

"16. *Section 17 confers extraordinary powers on the authorities under which it can dispense with the normal procedure laid down under Section 5A of the Act in exceptional case of urgency. Such powers cannot be lightly resorted to except in case of real urgency enabling the Government to take immediate possession of the land proposed to be acquired for public purpose. A public purpose, however, laudable it may be, by itself is not sufficient to take aid of Section 17 to use this extraordinary power as use of such power deprives a land owner of his right in relation to immoveable property to file objections for the proposed acquisition and it also dispenses with the inquiry under Section 5A of the Act. The Authority must have subjective satisfaction of the need for invoking urgency clause under Section 17 keeping in mind the nature of the public purpose, real urgency that the situation demands and the time factor i.e. whether taking possession of the property can wait for a minimum period within which the objections could be received from the land owners and the inquiry under Section 5A of the Act could be completed. In other words, if power under Section 17 is not exercised, the very purpose for which the land is being acquired urgently would be frustrated or defeated. Normally urgency to acquire a land for public purpose does not arise suddenly or overnight but sometimes such urgency may arise unexpectedly, exceptionally or extraordinarily depending on situations such as due to earthquake, flood or some specific time-bound project where the delay is likely to render the purpose nugatory or infructuous. A citizen's property can be acquired in accordance with law but in the absence of real and genuine urgency, it may not be appropriate to deprive an aggrieved party of a fair and just opportunity of putting forth its objections for due consideration of the acquiring authority. While applying the urgency clause, the State should indeed act with due care and responsibility. Invoking urgency clause cannot be a substitute or support for the laxity, lethargy or lack of care on the part of the State Administration."*

24. The Division Bench judgment in Mahendra Singh's case (supra), relied by Sri M.D. Mandhyan, learned counsel for the respondents, laid down the same proposition in paragraphs 6 and 9 of the judgment:-

*"**6.** It is, therefore, well settled that the question of urgency is a matter for subjective satisfaction of the appropriate Government and it is not open to the Courts to examine the propriety or correctness of the satisfaction on an objective consideration of facts. The opinion can be challenged in a Court of law only if it can be shown that the Government never applied its mind to the matter or that the action of the Government is mala fide."*

***9.** There are several decisions of our Court, where after noticing the law laid down by the Hon'ble Supreme Court in Narain's case (supra), it was held that the question of urgency is a matter for the subjective satisfaction of the Government and it is not open to the Courts to examine the propriety and the correctness of the satisfaction on subjective appraisal of facts. The opinion can be challenged in a Court of law only if it can be shown that the Government never applied its mind to the matter or its action was mala fide. Reference in this connection may be made to Raj Bali v. State of U.P., Trilochan v. State, Mohd. Hanif v. State, Gayatri Nagar Sahkari Avas Samiti Ltd. v. State, Kunwar Lal v. State, and Satbir Singh v. State."*

25. Another Division Bench of this Court in ***Smt. Manju Lata Agrawal's*** case (supra) after considering almost all earlier judgments of the Apex Court, laid down following in paragraphs 43 and 71 of the judgment:-

*"**43.** The question whether inquiry under Section 5-A of the Act is necessary or not is a question of fact and it requires to be determined by the Government in the facts and circumstances of each case for the reason that no straight jacket formula can be evolved as under what circumstances the urgency clause should be invoked. The role of the Court is very limited and it can only see as to whether there was any material to form an opinion about invoking the urgency clause or whether the Government exercised the power in a malafide manner. The question as to whether urgency exists or not, is primarily a matter for determination of the Government subject to the scope of judicial review by the courts of law."*

***71.** ..... In exceptional circumstances where there is a grave urgency or unforeseen emergency, the Government is competent to invoke the urgency powers contained under Sections 17 of the Act and take possession before making the Award. In a case of urgency or emergency Government is also competent to take a decision that in order to avoid further delay, the enquiry envisaged under Section 5-A of the Act be dispensed with, but for taking such a decision, there must be existing and relevant material before the Government and it must apply its mind as to whether the urgency is such that persons interested are to be deprived of their right to file objections under Section 5-A of the Act. Invoking the provisions under Sections 17 (1) or 17 (2) of the Act would not automatically dispenses with the inquiry under Section 5-A. There has to be an independent decision by the State Government for such dispensation. Section 17 (4) itself indicates that the "Government may direct that the provisions of Section 5-A shall not apply." The recital of such an opinion in the order or in notification is not necessary. Nor reasons have to be recorded in this regard in the official records. It is a case of subjective satisfaction of the Government and once the Government forms the opinion and dispenses with the enquiry under Section 5-A of the Act, the*

Court, in its limited jurisdiction of judicial review, cannot declare the acquisition proceedings bad. Pre or post notification delay or lethargy on the part of the officials of the State Government is not fatal to acquisition proceedings....."

26. The Division Bench judgment relied by learned counsel for the petitioner in ***Ramesh's*** case (supra) was again a case of acquisition for construction of sub-market yard. The Division Bench after considering the materials on record of the said case laid down that there was no materials on record which could justify invocation of power under Section 17(4) of the Act. Following was laid down by the Division Bench in the said judgment:-

"From a perusal of the pleadings on record and also from a perusal of the record of the State Government we do not find any material on record which would justify invoking the power under Section 17(4) of the Act, dispensing with hearing of objection and enquiry. We also do not find any express satisfaction recorded by the State Government for invoking the provisions of Section 17(4) of the Act. From a perusal of the record it appears that power under Section 17(4) of the Act were invoked merely because the acquisition was for construction of sub-market yard by Mandi Samiti, and such acquisition being for public purpose.

We may record here that under the Act, Section 17 provides for special powers in case of urgency. Sub-section (1) of Section-17 of the Act lays down that in cases of urgency the appropriate Government may direct, in the absence of any award having been made the Collector to take possession of any land needed for a public purpose on the expiration of 15 days from the publication of notice mentioned in Section 9(1) of the Act. Upon such possession being taken the land shall vest absolutely in the Government free from all encumbrances. Sub-section (1) of Section 17 of the Act empowers the Collector to take possession of certain classes of land. Sub-section (3) of Section 17 of the Act provides that where possession is being taken, if there are any standing crop or tree the Collector will offer compensation. Sub-section (3-A) and (3-B) of Section 17 of the Act provides certain pre-conditions to be observed by the Collector, with regard to payment of compensation before taking possession under sub-section (1) or sub-section (2) of the Act. Sub-section (4) of Section 17 of the Act provides that if any land to which sub-section (1) and (2) apply a declaration may be made if in the opinion of the appropriate Government the provisions of Section 5A of the Act may be dispensed with. According to the proviso of the said sub-section the declaration may be made either simultaneously or at any time after the publication of the Notification under Section 4(1) of the Act. In the present case the declaration to dispense with enquiry under Section 5A of the Act has been made simultaneously with the publication of the Notification under Section 4(1) of the Act.

From a perusal of the scheme of Section 17 of the Act regarding the urgency power, it appears that holding any acquisition to be for public purpose is one aspect of the matter and making a declaration for dispensing with the enquiry under Section 5A of the Act would be a different matter. These are two separate aspects. There has to be separate application of mind by the Government based upon separate material on record with regard to holding of acquisition being for public purpose and for dispensing with

the enquiry under section 5A of the Act.

On the record of the State Government, what is available is the proposal sent by the Mandi Samiti. Learned Standing Counsel was not able to point out any material available on record of the State Government to justify its decision to dispense with the enquiry under Section5-A of the Act. We do not find any opinion also on the record recorded by the State Government as to why and what were the factors which compelled it to form opinion of dispensing with hearing of objection and enquiry under Section 5A of the Act. In the absence of any such material and also in the absence of any opinion of the State Government based upon reasons, it is difficult to hold that dispensation of enquiry under Section 5A of the Act was justified...."

27. The latest judgment of the Apex Court in ***Anand Singh's*** case (supra), relied by the counsel for the petitioners, has again elaborately considered almost all earlier cases on the subject. Paragraphs 30 and 31 of the said judgment, which are useful for the purpose, are quoted below:-

"30. *The power of eminent domain, being inherent in the government, is exercisable in the public interest, general welfare and for public purpose. Acquisition of private property by the State in the public interest or for public purpose is nothing but an enforcement of the right of eminent domain. In India, the Act provides directly for acquisition of particular property for public purpose. Though right to property is no longer fundamental right but Article 300A of the Constitution mandates that no person shall be deprived of his property save by authority of law. That Section 5A of the Act confers a valuable right to an individual is beyond any doubt. As a matter of fact, this Court has time and again reiterated that Section 5A confers an important right in favour of a person whose land is sought to be acquired. When the government proceeds for compulsory acquisition of particular property for public purpose, the only right that the owner or the person interested in the property has, is to submit his objections within the prescribed time under Section 5A of the Act and persuade the State authorities to drop the acquisition of that particular land by setting forth the reasons such as the unsuitability of the land for the stated public purpose; the grave hardship that may be caused to him by such expropriation, availability of alternative land for achieving public purpose etc. Moreover, right conferred on the owner or person interested to file objections to the proposed acquisition is not only an important and valuable right but also makes the provision for compulsory acquisition just and in conformity with the fundamental principles of natural justice. The exceptional and extraordinary power of doing away with an enquiry under Section 5A in a case where possession of the land is required urgently or in unforeseen emergency is provided in Section 17 of the Act. Such power is not a routine power and save circumstances warranting immediate possession it should not be lightly invoked. The guideline is inbuilt in Section 17 itself for exercise of the exceptional power in dispensing with enquiry under Section 5A. Exceptional the power, the more circumspect the government must be in its exercise....."*

31. *In a country as big as ours, the roof over head is a distant dream for large number of people. The urban development continues to be haphazard. There is no doubt that planned development and housing are matters of priority in*

developing nation. The question is as to whether in all cases of planned development of the city' or `for the development of residential area', the power of urgency may be invoked by the government and even where such power is invoked, should the enquiry contemplated under Section 5A be dispensed with invariably. We do not think so. Whether `planned development of city' or `development of residential area' cannot brook delay of few months to complete the enquiry under Section 5A? In our opinion, ordinarily it can. The government must,0.79" therefore, do a balancing act and resort to the special power of urgency under Section 17 in the matters of acquisition of land for the public purpose viz.; `planned development of city' or `for development of residential area' in exceptional situation. Use of the power by the government under Section 17 for `planned development of the city' or `the development of residential area' or for `housing' must not be as a rule but by way of an exception. Such exceptional situation may be for the public purpose viz., rehabilitation of natural calamity affected persons; rehabilitation of persons uprooted due to commissioning of dam or housing for lower strata of the society urgently; rehabilitation of persons affected by time bound projects, etc. The list is only illustrative and not exhaustive. In any case, sans real urgency and need for immediate possession of the land for carrying out the stated purpose, heavy onus lies on the government to justify exercise of such power. It must, therefore, be held that the use of the power of urgency and dispensation of enquiry under Section 5A by the government in a routine manner for the `planned development of city' or `development of residential area' and thereby depriving the owner or person interested a very valuable right under Section 5A may not meet the statutory test nor could be readily sustained."

28. From the proposition as laid down in the abovenoted cases, following principles can be culled for invocation of power by the State under Section 17(4) of the Act:-

(i)For exercising power under Section 17(4) of the Act condition precedent is urgency as contemplated under Section 17(1) and 17(2) of the Act but the mere fact that there is urgency in the matter shall not automatically lead to exercise of power under Section 17(4) of the Act.

(ii)Exercise of power under Section 17(4) of the Act has to be in exceptional circumstances where looking to the purpose for which the land is being acquired giving of opportunity under Section 5A shall frustrate the purpose and the case is one which cannot admit any delay.

(iii)For exercise of power under Section 17(4) of the Act there has to be material on the record on the basis of which the State can form subjective satisfaction for invoking the power under Section 17(4) of the Act.

(iv)The State has to apply its mind specifically as to whether the case is one which require dispensation of inquiry under Section 5A of the Act and the power cannot be exercise in a routine manner or mechanically.

29. Now we come to the facts and materials which are on the record of the present case for finding out as to whether invocation of power under Section 17(4) of the Act, in facts and circumstances of the present case, is justified.

30. It is relevant to note that although in the writ petition there was specific pleading that there is no such urgency in the matter so as to invoke the power under Section 17(4) of the Act, in the counter affidavit neither any material has been brought nor any pleading has been made giving any specific reason for justifying the invocation of power under Section 17(4) of the Act except stating that the acquisition was urgently needed for construction of sub-market yard for which the District Magistrate was fully satisfied.

31. As noticed above, the acquisition of sub-market yard may be urgent but for invocation of power under Section 17(4) of the Act there has to be some material on which subjective satisfaction can be arrived at by the State. In the counter affidavit and supplementary counter affidavit filed by respondents No.2 and 3 no material has been brought on the record in this regard. In the supplementary counter affidavit copy of resolution dated 8th August, 2008 of the Krishi Utpadan Mandi Samiti, Jalalabad has been brought on the record which is the resolution by which acquisition was directed to be initiated. The said proposal refers to selection of the land by the Land Selection Committee on 26th August, 1994 thereafter approval by the Board of Directors on 10th July, 1997 and letter dated 27th June, 2003 of Regional Deputy Director (Administration), Mandi Parishad, Bareilly for taking steps for acquisition of 10 acres of land through Collector. The said resolution does not say anything for any special urgency or exceptional circumstances for urgent acquisition. In the counter affidavit no materials have been brought on the record nor any pleading giving any specific reason for invocation of Section 17(4) of the Act has been made. Even if the pre-notification delay, i.e. April, 1994 to 19th May, 2009 may not be treated to vitiate the acquisition proceeding, the said long period is relevant for considering the question as to whether there was any exceptional case for invocation of Section 17(4) of the Act.

32. The original record, which has been placed by learned Standing Counsel for our perusal, has been perused by us, a brief reference to which is necessary. The original records contains the proposal submitted by the Collector along with the relevant PRAPATRS as per land acquisition manual, which were forwarded by the Commissioner and Director to Secretary of the Government vide letter dated 1st December, 2008. The letter dated 1st December, 2008 of the Commissioner and Director only mentions that notification under Section 4(1)/17 of the Act be directed to be issued. Along with the said proposal the proceeding of the meeting dated 19th September, 2008 of the Zila Bhoomi Upyog Samiti has been enclosed which does not mention anything about the urgency. The resolution dated 8th August, 2008 of the Krishi Utpadan Mandi Samiti, Jalalabad was also enclosed which does not say anything about urgency or invocation of Section 17(4) of the Act.

33. Learned Standing Counsel has referred to PRAPATRA-10 which is a format for applying Section 17 of the Act in the notification under Section 4 of the Act.

34. The said certificate mentions that for immediate completion of the project, it is necessary to take possession

of the land. It further states that when Section 17 of the Act is invoked provisions of Section 5A of the Act automatically comes to an end and he agrees with dispensation of hearing to the land owners. Apart from above certificate in PRAPATRA-10, there is no other correspondence or material on the record giving any reason for invocation of Section 17(4) of the Act or even specifically recommending for invocation of Section 17(4) of the Act. The letter of the Director and Commissioner dated 1st December, 2008 was considered by the department of Agricultural Marketing and Agricultural Foreign Trade on 2nd January, 2009 when a note was put up before the Special Secretary. The note does not even refer to any urgency for invocation of Section 17(4) of the Act nor even recommends for invocation of Section 17(4). The note was approved on 3rd March, 2009. The said note also refers to draft notification under Section 4(1)/17 of the Act and recommends that proposal of Commissioner and Director dated 1st December, 2008 be placed before the Secretary/Hon'ble Minister which was approved by the Special Secretary on 5th March, 2009 and by Hon'ble Minister on 6th March, 2009. The said note dated 3rd March, 2009 does not refer to invocation of Section 17(4) of the Act or any specific urgency for dispensation of inquiry. The note only refers to proposal submitted by the Commissioner and Director, Land Acquisition Directorate (letter dated 1st December, 2008). Before the State Government there were thus only two notes submitted by the Department of Agricultural Marketing and Agricultural Foreign Trade dated 2nd January, 2009 and 3rd March, 2009. They do not refer to any fact regarding urgency. It has already been noticed that proposal of the Commissioner and Director, Land Acquisition Directorate dated 1st December, 2008 did not refer to any urgency or invocation of Section 17(4) of the Act specifically. Thus neither the proposal submitted by Commissioner and Director dated 1st December, 2008 nor the above two notes, which were submitted by the department of Agricultural Marketing and Agricultural Foreign Trade, made mention of Section 17(4) of the Act.

35. From the aforesaid, it is clear that there was no application of mind by the State with regard to invocation of power under Section 17(4) nor the records disclose that the aforesaid fact has been considered by the State Government before directing for dispensation of inquiry under Section 5A of the Act.

36. Except the certificate issued by the Collector in PRAPATRA-10, as extracted above, no materials have been brought along with the counter affidavit filed by respondents No.2 and 3 or along with the counter affidavit filed by the State to prove that there was any material before the State for forming subjective satisfaction for invocation of power under Section 17(4) of the Act. The PRAPATRA-10, as submitted by the Collector and noticed above, indicates that Collector having come to conclusion that project is required to be urgently completed, has assumed that inquiry under Section 5-A has to be automatically dispensed with. The said is not the legal position, as noticed above.

37. In view of the foregoing discussions, we are of the considered opinion that in the present case there was neither any material nor there was

application of mind by the State with regard to invocation of power under Section 17(4) of the Act and the power under Section 17(4) of the Act was invoked by the State in a routine and mechanical manner which cannot be sustained. Thus the submission of counsel for the petitioners has substance that invocation of power under Section 17(4) of the Act is not in accordance with the provisions of the Act and the law laid down by the Apex Court as noted above.

38. Insofar as the second argument of Sri Tripathi that there being no declaration of sub-market area by appropriate notification, no land acquisition proceeding could be initiated for acquisition of land for construction of sub market yard is concerned, suffice it to say that appropriate notification under Section 7 Krishi Utpadan Mandi Samiti Adhiniyam, 1964 has already been referred to in which sub-market area has been declared and further notification under Section 8(1) Krishi Utpadan Mandi Samiti Adhiniyam, 1964 has been brought on the record by the petitioners themselves in their supplementary affidavit by which the market area of Jalalabad has been divided into two market areas, hence there was no legal impediment in proceeding with the land acquisition for acquisition of land for construction of sub-market yard. There is no substance in the second submission of the learned counsel for the petitioners.

39. We are cautious that construction of sub-market yard is urgent matter but, as observed above, mere urgency does not automatically lead to deny the land holders their right of filing objection under Section 5A. Thus the land acquisition proceedings initiated by issuing notification under Section 4(1) of the Act dated 20th May, 2009 is to be maintained. The invocation of power under Section 17(4) of the Act in the notification under Section 4 of the Act dated 20th May, 2009 has to be set-aside and consequently notification under Section 6 of the Act has also to be set-aside.

40. In the result, both the writ petitions are partly allowed by issuing following directions:-

(i) The notification dated 20th May, 2009 insofar as following part, both in English and Hindi, is concerned "and that in view of the pressing urgency it is as well necessary to eliminate the delay likely to be caused by an enquiry under section 5-A of the said Act, the Governor is further pleased to direct under sub-section (4) of section 17 of the said Act that the provisions of section 5-A of the Act shall not apply", is quashed by maintaining rest of the part and the declaration under Section 6 dated 27th January, 2010 is also quashed.

(ii) The petitioners and other tenure holders, whose land is sought to be acquired, are entitled to file their objection under Section 5A(1) of the Act. Necessary corrigendum (newspaper publication giving opportunity to the petitioners and other tenure holders to file their objection) be issued within 30 days from today and thereafter further proceedings may take place in accordance with the provisions of the Act.

41. Parties shall bear their own costs.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 10.11.2010

BEFORE
THE HON'BLE SHRI KANT TRIPATHI, J.

Criminal Misc. Application No. 30421 of 2010

Smt. Lata ...Petitioner
Versus
State of U.P.and another ...Respondent

Counsel for the Petitioner:
Sri Manu Khare

Counsel for the Respondent:
A.G.A.

Immoral Traffic(Prevention) Act 1956-Section 3/4/5/6-charge sheet challenged on ground the FIR lodged by private person in civil Police station and not by special Police officer-can not be basis for Trail-held-misconceived in absence of procedure for lodging F.R. And ITP Act, provision of section 154 Cr. P.C. Fully applicable-moreover if the informant tries to get special Police officer appointed-every possibility of moving the accused and girls to unknown place-can not denied once cognizable offence disclosed from FIR locustandi of informant immaterial-'No' interference called for.

Held: Para 6 & 7

The ITP Act is silent as to how the FIR is to be lodged. It has nowhere provided in the ITP Act that FIR must be lodged by the Special Police Officer. In absence of specific provisions in this regard in the said Act, it can be safely held with the aid of section 5 of the Code that the provisions of section 154 of the Code in regard to lodging of the FIR regarding commission of an offence under the ITP Act are fully applicable. It is also well settled that any person can lodge the FIR regarding commission of a cognizable offence whether he has any interest in the matter or not. The question of locus in such matters does not arise. However, if the relevant law requires lodging of an FIR by a particular person, then and then alone, the question of locus has a relevancy otherwise not. As the ITP Act is silent as to how the FIR is to be lodged, the FIR lodged by a private person, namely, Smt. Atul Sharma cannot be treated as not maintainable, and as such the proceedings held in pursuance thereof are not in any way without jurisdiction.

The present case, according to the FIR, is that the complainant got an information that one person along with three minor girls was present at the Bus Stand for taking the girls to some unknown place. The complainant then went to the Bus Stand and found that in the waiting hall three minor girls and one male person had been indulged in gossip. It is also alleged that the minor girls were to be taken to New Delhi for prostitution and this fact was stated by all the minor girls on interrogation. In case, the informant, instead of lodging the FIR, had tried to contact Special Police Officer for lodging the FIR, there was every possibility of moving the accused and girls from the place of occurrence to some unknown place and in that situation no action could be taken against them. In this view of the matter, lodging of the FIR by the complainant was not, in any way, against the law.

Case law discussed:
AIR 1962 SC 63:(1962) 1 Cr LJ 106

(Delivered by Hon'ble Shri Kant Tripathi, J.)

1. Heard Mr. Manu Khare for the applicant and the learned AGA for respondent no. 1 and perused the record.

2. This is a petition under section 482 of the Code of Criminal Procedure (in short "the Code") for quashing the charge sheet filed in Case Crime No. 206 of 2010 under sections 3/4/5/6 of the Immoral Traffic

(Prevention) Act, 1956 (in short "the ITP Act"), P.S. Sadar Bazar, District Meerut as well as the order dated 11.06.2010 whereby the learned Special Chief Judicial Magistrate, Meerut took cognizance of the offences.

3. Mr. Manu Khare submitted that the FIR lodged by Smt. Atul Sharma, Secretary, Sankalp (a social organization) was not maintainable in view of the fact that only the Special Police Officer had the power to deal with the matter under the Act and it was the Special Police Officer, who could lodge the FIR, therefore, the FIR lodged by a private person was not maintainable and as such the entire investigation undertaken in pursuance of that FIR was a futile exercise, therefore, the charge sheet as well as the proceeding of the criminal case initiated in pursuance of the charge sheet are liable to be quashed.

4. In this connection Mr. Khare referred to the provisions of Sections 13, 14, 15 and 16 of the Act and contended that various provisions of the Act is a complete Code with respect to the offences punishable under the ITP Act. Mr. Khare further submitted that section 5 of the Code of Criminal Procedure (in short "the Code") provides that all the offences under the Indian Penal Code as well as under any other law are to be investigated, inquired into, tried and otherwise dealt with according to the provisions of the Code but the position would be different, if the local or special law has specific provisions providing as to how the offences under the concerned law are to be investigated, inquired into, tried or otherwise dealt with and in that situation the matter has to be dealt with according to that law. Mr. Khare next submitted that in view of the fact that the ITP Act provides as to how the investigations, inquiries, trials or other matters are dealt with, the provisions of the Code are not applicable. In support of this submission Mr. Khare placed reliance on **Delhi Administration v Ram Singh (1962) 2 SCR 694: AIR 1962 SC 63:(1962) 1 Cr LJ 106.** In that case the majority view was expressed in paragraphs 19, 22 and 24 as follows:

"19. According to section 13 of the Act, 'there shall be, for each area to be specified by the State Government, a special police officer appointed by or on behalf of that Government for dealing with offences under the Act in that area'. The expression 'dealing with offences' is of wide import and will include any act which the police has to do in connection with the offences under the Act. In this connection, we have been referred to the provisions of section 5 of the Criminal Procedure Code, which reads:

(1) "All offences under the Indian Penal Code shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions hereinafter contained.

2) All offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences."

It is submitted that the expression 'dealt with' must mean something which is not included in investigation, inquiry or trial. This does not necessarily follow from the provisions of this section. The word ,otherwise' points to the fact that the expression 'dealt with' is all comprehensive, and that investigation, inquiry and trial were some aspects of 'dealing with' the offences. Further, according to sub-section. (3) of section 13, the special police officer is to be

assisted, for the efficient discharge of his functions in relation to offences under this Act, by a number of subordinate police officers and will be advised by a non-official advisory body. The expression 'functions in relation to offences' do include his functions connected with the investigation of the offences. There is no reason to exclude such functions from the functions contemplated by sub-section. (3).

.....

22. If the power of the special police officer to deal with the offences under the Act, and therefore to investigate into the offences, be not held exclusive, there can be then two investigations carried on by two different agencies, one by the special police officer and the other by the ordinary police. It is easy to imagine the difficulties which such duplication of proceedings can lead to. There is nothing in the Act to co-ordinate the activities of the regular police with respect to cognizable offences under the Act and those of the special police officer.

.....

24. We are therefore of opinion that the special police officer is competent to investigate and that he and his assistant police officers are the only persons competent to investigate offences under the Act and that police officers not specially appointed as special police officers cannot investigate the offences under the Act even though they are cognizable offences. The result is that this appeal by the Delhi Administration fails and is hereby dismissed."

5. In the aforesaid case, the Apex Court considered the question whether a police officer, who is neither a special police officer under the ITP Act, nor a police officer subordinate to a special police officer, can validly investigate the offences under the aforesaid Act and held that only the Special Police Officer appointed under the ITP Act has power to hold investigation in regard to an offence punishable under the aforesaid Act. Therefore, a police officer who has not been appointed as special police officer, cannot investigate the offence under the ITP Act, even though the offences are cognizable offences. However, according to section 13(3)(a) of the Act, the State Government has power to depute a subordinate police officer, in such number as may be considered fit, for assisting the special police officer and such subordinate police officer may include even woman police officers. But taking of assistance from a subordinate police officer does not in any way affect such powers of the special police officer. In the aforesaid case, the point as to who is competent to lodge the FIR in regard to an offence punishable under the ITP Act was not involved nor answered. According to the scheme of the ITP Act, the main function of the Special Police Officer is to hold the investigation and to carry out searches and seizures etc. and other incidental proceedings. Therefore, the submission that only the Special Police Officer had locus to lodge the FIR, does not appear to be tenable in law.

6. The ITP Act is silent as to how the FIR is to be lodged. It has nowhere provided in the ITP Act that FIR must be lodged by the Special Police Officer. In absence of specific provisions in this regard in the said Act, it can be safely held with the aid of section 5 of the Code that the provisions of section 154 of the Code in regard to lodging of the FIR regarding commission of an offence under the ITP Act are fully applicable. It is also well settled that any person can lodge the

FIR regarding commission of a cognizable offence whether he has any interest in the matter or not. The question of locus in such matters does not arise. However, if the relevant law requires lodging of an FIR by a particular person, then and then alone, the question of locus has a relevancy otherwise not. As the ITP Act is silent as to how the FIR is to be lodged, the FIR lodged by a private person, namely, Smt. Atul Sharma cannot be treated as not maintainable, and as such the proceedings held in pursuance thereof are not in any way without jurisdiction.

7. The present case, according to the FIR, is that the complainant got an information that one person along with three minor girls was present at the Bus Stand for taking the girls to some unknown place. The complainant then went to the Bus Stand and found that in the waiting hall three minor girls and one male person had been indulged in gossip. It is also alleged that the minor girls were to be taken to New Delhi for prostitution and this fact was stated by all the minor girls on interrogation. In case, the informant, instead of lodging the FIR, had tried to contact Special Police Officer for lodging the FIR, there was every possibility of moving the accused and girls from the place of occurrence to some unknown place and in that situation no action could be taken against them. In this view of the matter, lodging of the FIR by the complainant was not, in any way, against the law.

8. In my opinion, the charge sheet cannot be quashed only on the ground that the FIR was lodged by a private person.

9. In this case, the investigation was done by a Special Police Officer and the charge sheet has been filed by him, on the basis of the materials collected during the investigation, and from such materials, a prima facie case is made out against the applicant, therefore, I do not consider it proper to interfere with the charge sheet and the proceeding of the criminal case.

10. The petition has no merit and is, accordingly, dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.09.2010

BEFORE
THE HON'BLE F.I. REBELLO, C.J.
THE HON'BLE V.K. SHUKLA, J.
THE HON'BLE A.P. SAHI, J.

Civil Misc. Writ Petition No. 34179 of 2010

Smt. Maya Dixit and others ...Petitioners
Versus
The State of U.P. and others ...Respondents

Counsel for the Petitioners:
Shri S.P. Singh, Sr. Advocate
Shri Sandeep Kumar Srivastava
Shri Mukesh Prasad
Shri Arvind Srivastava
Shri Sanjeev Singh

Counsel for the Respondents:
Shri S.G. Hasnain
Addl. Advocate General
Shri Alok Kumar Singh
Standing Counsel

Constitution of India Art.226-practiced Procedure-writ jurisdiction-reference made by judge exceeding power of the Bench of PIL-against the verdict of Apex Court-on basis of interim order-without hearing both parties-the G.O. Prohibiting use of machine in mining operations-in compliance of interim order-itself under challenge before Apex Court-held-reference itself not maintainable-require no further discussion.

Held: Para 20 and 21

We are surprised at the stage at which the reference was made. Normally a reference is made after hearing the parties on merits and the learned Bench arrived at a conclusion that it does not agree with the view taken by another coordinate Bench, which has earlier decided the law. In this case, a strange procedure has been followed. Interim relief was first granted, the matter was not finally heard, and without considering the merits of the matter, a reference has been made. In our opinion, this was a strange procedure. We express, therefore, our anguish at the manner in which this reference is made. We may also note that the interim order dated 06.03.2009 passed in Noor Mohammad (supra), was the subject matter of special leave petition to the Supreme Court. The learned Court did not interfere with that order. The special leave petition was dismissed on 06.04.2009 and further clarification was issued on 28.08.2009. The effect was that use of heavy machinary was banned. In spite of that the interim relief was granted without considering the normal tests for granting an injunction.

The learned counsel has sought to take us through the merits of the matter. In view of the fact that the reference itself is not maintainable, we do not propose to examine the matter on merit and leave it to the parties to take appropriate steps which in law they may be entitled to.

Case law discussed:

AIR 2006 SC 1489, 2001 (4) AWC 2688, AIR 1982 SC 1198, AIR 1990 Cal. 168, (1996) 6 SCC 587, 1996 AWC 644, (1998) 1 SCC 1, (2000) 2 SCC 391, (2006) 8 SCC 294, Special Appeal No. 578 of 2010, AIR 1981 SC 606, 2008 (1) AWC 673, [2008 (2) ADJ 397 (DB)], AIR 2006 SC 2190.

(Delivered by: Justice F.I. Rebello, C.J.)

1. A learned Division Bench of this Court, hearing the above writ petitions, during the summer vacation, filed for quashing the Government Order dated 31st May, 2010, by which the lease holders of leases for excavating sand have been restrained from using machines for the purposes of excavating sand, and after noting that the impugned Government Order dated 31st May, 2010 was issued in furtherance of an interim order passed by the Lucknow Bench of this Court on 27th May, 2010 in Writ Petition No. 3879 (M/B) of 2010, Pradeep Chaudhary Vs. State of U.P. & Ors., and after considering some other aspects, was pleased to make a reference by order dated 14.06.2010 in respect of the following three questions for consideration by a larger Bench:-

"(1) Whether such a blanket Government Order, prohibiting use of machinery, which is against the spirit of Statutory Rules and the final and binding judgments rendered by the Division Benches of this Court at Allahabad, can be issued on the basis of an interim order passed by a Division Bench of Lucknow Bench of this Court at Lucknow, when there are already three binding, final and unchallenged judgments of the Division Benches and a judgment of learned Single Judge of this Court of Principal Seat at Allahabad on the subject?

(2) Whether the interim order dated 27.5.2010, passed by the Lucknow Bench of this Court, not exercising P.I.L. Jurisdiction, and other interim orders on the basis of which Government Order dated 31.5.2010, imposing complete ban on use of machinery in mining operations on the riverbeds or nearby areas could be issued, when the Division Benches and the learned Single Judge of this Court at Allahabad have not ordered

for total prohibition on the use of machines for excavation of sand?

(3) Whether such interim order, which was passed without taking into account a settled legal position and not laying down any law, would be per incuriam where the controversy raised has already been settled by various judicial pronouncements of this Court at Principal Seat of the High Court at Allahabad?"

Accordingly, the reference so made has been heard by this Bench.

2. Insofar as the first question is concerned, an order has already been issued by the State Government, in exercise of its powers of subordinate legislation. After such an exercise, whether earlier any learned Bench had passed an order directing such legislation is irrelevant. The exercise of subordinate legislation is an act independent of the judicial direction. A Court in matters pertaining to legislation, whether primary or subordinate, based on material before it, directs an authority to consider the issue as it feels the need for legislation in that area. It is for those entrusted with the duty of enacting legislation under the Constitution or the delegate of the legislature, to exercise their legislative power and undergo that legislative exercise. Once the legislative body proceeds to enact legislation, whether primary or secondary, it is immaterial as to why it enacted the legislation. The legislative body may act in public interest, based on public opinion, the felt need by pressure groups calling on the Government for a need to enact legislation or on observation by a Court, finding a vacuum in a particular area of legislation. This exercise is by the legislative body, in the plenary exercise of its powers. The Courts also, at times, in the area of environment and ecology and other matters involving Article 21 of the Constitution, considering U.N. Conventions, Directive Principles and Fundamental Duties, if can be read into Article 21, also issue directions in the absence of legislation.

We are concerned here with a case where the Government, in exercise of its delegated powers of legislation, has issued the Government Order. In the Order because it has been stated that pursuant to the interim order passed by the Court, the Government has issued the Government Order, is immaterial and irrelevant. The statement would be in the nature of a preamble, as to why legislation has to be enacted. Once that be the case, the issue whether the delegate proceeded to enact subordinate legislation pursuant to an interim order, would be immaterial. All that the Court in such a case can do is to examine the validity of subordinate legislation on tests as laid down by the Supreme Court in **Bombay Dyeing and Mfg. Co. Ltd. Vs. Bombay Environmental Action Group and Ors., AIR 2006 SC 1489.** In our opinion, therefore, the first question, as referred, could not be the subject matter of reference to a larger Bench.

3. The next question is, whether a Bench conferred/assigned a particular work in terms of Chapter V of the Allahabad High Court Rules, can hear matters assigned to another Bench?

Rule 1 of Chapter V of the Allahabad High Court Rules, reads as under:-

"1. Constitution of Benches.- Judges shall sit alone or in such Division Courts as may be constituted from time to time and do such work as may be allotted to them by order of the Chief Justice or in accordance with his directions."

4. The issue, whether a Bench allotted a particular assignment can hear matters allotted to another Bench, in our opinion, need not be gone into at length, as the same has been extensively covered by a judgment of a learned Division Bench of this Court in **Prof. Y.C. Simhadri, Vice Chancellor, B.H.U. & Ors. Vs. Deen Bandhu Pathak, Student, 2001 (4) AWC 2688.** We may gainfully reproduce paragraphs 16, 17 and 18 which read as under:-

"16. Thus, the following principles emerge from the foregoing discussions :

(1) The administrative control of the High Court vests in the Chief Justice alone and it is his prerogative to distribute business of the High Court both judicial and administrative.

(2) The Chief Justice alone has the right and power to decide how the Benches of the High Court are to be constituted : which Judge is to sit alone and which cases he can and is required to hear as also which Judges shall constitute a Division Bench and what work those Benches shall do.

(3) The puisne Judges can only do that work which is allotted to them by the Chief Justice or under his directions. No Judge or a Bench of Judges can assume jurisdiction in a case pending in the High Court unless the case is allotted to him or them by the Chief Justice.

(4) Any order which a Bench or a single Judge may choose to make a case that is not placed before them or him by the Chief Justice or in accordance with his direction is an order without jurisdiction and void.

(5) Contempt jurisdiction is an independent jurisdiction of original nature whether emanating from the Contempt of Courts Act or under Article 215 of the Constitution of India.

(6) For exercising the jurisdiction under Article 215 of the Constitution of India, the procedure prescribed by law has to be followed.

17. It appears that on 26.3.2001, when the learned Judge passed the said order, he was allotted and assigned the determination with regard to the following matters by the Chief Justice as appears from the printed cause list:

"Fresh writs in educational matters (except service writs) for orders, admission and hearing and all single Judge writ-C for order, admission and hearing including bunch cases".

The learned Judge on the face of the record, therefore, had no determination assigned to him by the Chief Justice with regard to the matters relating to contempt and the said jurisdiction had been assigned to another Hon'ble single Judge.

18. In view of the rule as already noted that the power to constitute Benches and allotment of work to the learned Judges vests absolutely in the Chief Justice and the Rules 1, 6 and 17

of Chapter V and Rule 2 of Chapter VIII of the Allahabad High Court Rules also clearly provide for the same. In that view of the matter, the order passed by the learned single Judge in the instant case appears to us to be without jurisdiction and void."

We may also reproduce the following two paragraphs : -

"24. In the instant case, admittedly, the question of jurisdiction is involved and, as such, the order falls within the meaning of 'judgment' under the relevant clause of Rule 5 of Chapter VIII of the High Court Rules and accordingly appears to us to be appealable.

25. In the instant case, since the order passed by the learned single Judge was beyond his competence or Jurisdiction to pass such order, it is void and non-est and is accordingly appealable. The appellant being Vice Chancellor of the Banaras Hindu University, who is holding a responsible position, issue of notice by the order impugned, which is without jurisdiction, has adversely affected his rights and the rights of the appellant having been adversely affected, the appeal appears to be maintainable."

We approve the law laid down in Prof. Y.C. Simhadri (Supra).

5. Let us also look at some other aspects, as in spite of above and several other judgments, the issues have been raised once again. The issue of tied up and part-heard cases had come up for consideration, before a learned Division Bench of this Court in the case of **Ram Prasad & Anr. Vs. State of U.P. & Ors., Civil Misc. Writ Petition No. 50748 of 2007** wherein, the learned Bench was considering a letter written by the then Chief Justice, and not an order by the Chief Justice in exercise of his powers of constituting Bench. The learned Bench, by its order dated 02.11.2007, however, was pleased to refer seven questions to be heard by a larger Bench. The matter, it appears, was placed before the learned Chief Justice. The questions referred for consideration were:-

1. Whether the matters, which have been nominated by Hon'ble the Chief Justice, are to be heard by a Bench presided by a particular Hon'ble Judge will be heard by that Hon'ble Judge till he sits in that jurisdiction and thereafter he has to release the matter or he shall continue to hear the matter, irrespective of change of the roster?

2. Whether any matter, which is assigned to a Bench, shall continue with the same Bench till the stage of admission of the matter irrespective of the change in the roster?

3. Whether any matter, which is assigned, nominated or otherwise is heard substantially by a Bench at the admission stage, the matter would be heard by the same Bench, which has heard it substantially, or, after the change in the roster, the matter has to be released by the Bench to be heard by the Bench having jurisdiction as per the changed roster?

4. Whether, where the matter is nominated or assigned to a Bench, the Bench can simply say that the matter may be listed before another Bench and such matter would be heard by another

Bench or the Bench shall have to send the matter to Hon'ble the Chief Justice for fresh nomination of a Bench?

5. Whether instructions contained in the aforementioned letter dated 24.10.2007 to the effect that "one can understand retaining of a matter, which is admitted, is being heard finally and has been substantially heard and would be concluded in a hearing or two" applies only to 'admitted cases' which are being heard finally by the Bench or it also applies to hearing of a matte where affidavits have been exchanged at the 'admission stage', the matter is being finally heard by the Bench, as the prevailing practice in Allahabad High Court is that the cases are being decided finally at the 'admission stage itself'. Whether the Bench hearing matters at the 'admission stage' finally even where substantial hearing has taken place has to release the matter after the change of the roster or it is to be heard by the same Bench?

6. Whether the provisions contained in Chapter VI Rules 13 & 14 and Chapter VI Rule 7 of the Allahabad High Court Rules, 1952 have to be followed by the Benches?

Rule 6 of Chapter V of the Allahabad High Court Rules is the Rule pertaining to reference to a larger Bench, which reads as under:-

"6. Reference to a larger Bench.- The Chief Justice may constitute a Bench of two or more Judges to decide a case or any question of law formulated by a Bench hearing a case. In the latter event the decision of such Bench on the question so formulated shall be returned to the Bench hearing the case and that Bench shall follow that decision on such question and dispose of the case after deciding the remaining questions, if any, arising therein."

The matter, it appears, was considered on the administrative side by the learned Chief Justice. The learned Chief Justice on the administrative side considered the following judgments:-

(i) State of Maharashtra Vs. Narayan, AIR 1982 SC 1198;

(ii)Sohan Lal Vs. State, AIR 1990 Cal. 168;

(iii)Inder Mani Vs. Matheshwari Prasad, (1996) 6 SCC 587;

(iv) Sanjay Kumar Srivastava Vs. Acting Chief Justice & Ors., 1996 AWC 644;

(v) State of Rajasthan Vs. Prakash Chand & Ors., (1998) 1 SCC 1;

(vi) R. Rathinam Vs. State By DSP, District Crime Branch, Madurai District, Madurai & Anr., (2000) 2 SCC 391; and

(vii) Jasbir Singh Vs. State of Punjab, (2006) 8 SCC 294.

6. We may gainfully refer to these judgments to understand the correct position in law. In **State of Maharashtra Vs. Narayan (supra),** the Supreme Court held as follows:-

"The Chief Justice is the master of the roster. He has full power, authority and jurisdiction in the matter of

allocation of business of the High Court which flows not only from the provisions contained in sub-section (3) of Section 51 of the Act, but inheres in him in the very nature of things."

6.A. In **Sohan Lal (supra)**, the Calcutta High Court on a review of the constitutional and statutory provisions held as follows:-

"...The power and jurisdiction to take cognizance of and to hear specified categories or classes of cases and to adjudicate and exercise any judicial power in respect of them is derived only from the determination made by the Chief Justice in exercise of his constitutional, statutory and inherent powers and from no other source..."

7. In **Inder Mani Vs. Matheshwari Prasad (supra)**, a learned Judge of this Court who was to sit in a Division Bench, sat singly and disposed of a writ petition. The Apex Court noted the Registrar's Affidavit and then observed as under:-

"... It was most improper on his part to disregard the administrative directions given by the Chief Justice of the High Court and to sit singly to take up matters that he thought he should take up. Even if he was originally shown as sitting singly on 22.12.1995, when the Bench was reconstituted and he was so informed, he was required to sit in a Division Bench on that day and was bound to carry out this direction. If there was any difficulty, it was his duty to go to the Chief Justice and explain the situation so that the Chief Justice could then give appropriate directions in that connection. But he could not have, on his own, disregarded the directions given by the Chief Justice and chosen to sit singly. We deprecate this behaviour which totally undermines judicial discipline and proper functioning of the High Court."

8. In **Sanjay Kumar Srivastava Vs. Acting Chief Justice (supra),** a writ petition was pending before a Division Bench of this Court for admission. The matter had been adjourned for about seven dates. An interim order had been passed and an application to vacate the interim order was rejected by that Division Bench. On an application being made on behalf of the State, the then Acting Chief Justice withdrew that petition from the said Division Bench and referred it to a Larger Bench. That order of the Acting Chief Justice was challenged by the petitioner. This second petition was placed before a Bench consisting of three Judges. This Larger Bench upheld the decision of the Acting Chief Justice. Amongst others, it was submitted before the Full Bench that the earlier writ petition had become part heard before that Bench and it was not permissible to the Acting Chief Justice to withdraw the same and to refer it to another Bench.

The Full Bench went through the relevant provisions of the Constitution of India compared it with the earlier provisions of Government of India Act, 1935 and also looked into the Government of India Act of 1915, as well as the relevant provisions of the Allahabad High Court Rules, 1952 and the earlier judgments of the Supreme Court as well as of this Court. In paragraph 19 of the judgment, the Court specifically referred to and quoted Rule 1 of Chapter V of the High Court Rules,

which reads as follows:-

"Constitution of Benches.- Judges shall sit alone or in such Division Courts as may be constituted from time to time and do such work as may be allotted to them by order of the Chief Justice or in accordance with his directions."

The Court proceeded to observe as under in paragraph 24:-

"24. In view of the above, it is clear that the Chief Justice enjoys a special status not only under Constitution but also under Rules of Court, 1952 made in exercise of powers conferred by Article 225 of the Constitution. The Chief Justice alone can determine jurisdiction of various Judges of the Court. He alone can assign work to a Judge sitting alone and to the Judges sitting in Division Bench or to Judges sitting in Full Bench. He alone has the jurisdiction to decide which case will be heard by a Judge sitting alone or which case will be heard by two or more Judges.

The conferment of this power exclusively on the Chief Justice is necessary so that various courts comprising of the Judges sitting alone or in Division Bench, etcetra, work in a co-ordinated manner and the jurisdiction of one court is not over-lapped by other court. If the Judges were free to choose their jurisdiction or any choice was given to them to do whatever case they may like to hear and decide, the machinery of the Court would collapse and the judicial functioning of the Court would cease by generation of internal strife on account of hankering for a particular jurisdiction or a particular case. The nucleus for proper functioning of the Court is the "self" and "judicial" discipline of Judges which is sought to be achieved by Rules of Court by placing in the hands of the Chief Justice full authority and power to distribute work to the Judges and to regulate their jurisdiction and sittings."

It was canvassed before the Full Bench that the earlier petition had become part heard before the earlier Division Bench and that it was not open to the Chief Justice to refer it to a Larger Bench. The Court went into the question as to whether the earlier writ petition had ever become part heard. On the facts of the case, having gone through the order sheet of various dates, the Court held that the writ petition was not part heard and legally also the case did not become part heard or tied-up matter of that Bench.

The Court then went into the question as to when matters become part heard and whether even a supposedly part heard matter could be withdrawn by the Chief Justice. In paragraph 34 of the judgment, the Court specifically quoted Rule 14 of Chapter V, which is on tied-up cases and which reads as follows:-

"14. **Tied up cases. -** (1) A case partly heard by a Bench shall ordinarily be laid before the same Bench for disposal. A case in which a Bench has merely directed notice to issue to the opposite party or passed an ex parte order shall not be deemed to be a case partly heard by such Bench.

(2) When a criminal revision has been admitted on the question of severity of sentence only, it shall ordinarily be heard by the Bench admitting it."

Thereafter the Court observed:-

"The provision of sub-rule (1) would indicate that even a case which is partly heard by a Division Bench is not necessarily to be laid before that Bench. The use of word "ordinarily" itself indicates that there can be a departure from the normal practice of listing a part-heard case before the same Bench. The word "ordinarily" means in a large majority of cases but not "invariably".

In paragraph 35 of the judgment, the Court observed as under:-

"The word "ordinarily" is utilized to indicate that although in normal course a thing will be done in a particular manner, in special circumstances a departure from normal course of action is permissible under law. Normally, therefore, a case which has been partly heard by a Bench shall be laid before that Bench but in special circumstances, the Chief Justice who, as pointed out above, has exclusive jurisdiction of distributing work to Judges, can depart from the normal course and list the case before some other Judge ..."

Going into the question as to whether a pre-admission matter can be said to have become part heard, in paragraph 36 of the judgment, the Court held as follows:-

"36. The other part of sub-rule (1) lays down in clear terms that the case in which the Bench has merely issued notice to the opposite party or had passed an *ex parte* order shall not be deemed to be a case partly heard by that Bench. This provision has been made to specify that a case does not become part heard merely by passing of interim order. It also lays down that if notices are directed to be issued to the opposite party, the case does not become part heard case of that Bench. The consequences are obvious. If the Division Bench which has merely passed an ex parte order or directed notice to be issued to the opposite party locate it as a part heard case or passes an order that it will come up before that Bench for "further hearing" or as a "part heard" or as a "tied-up" case, the order would be in violation of the Rules of Court and, therefore, a nullity. Such an order would be without jurisdiction and would not confer any jurisdiction on the Bench concerned to proceed with that case unless the case is listed before them again under the orders of the Chief Justice. In a situation where any order has been passed indicating such a case on the order-sheet or on the main writ petition to be a part heard or tied up case, the Chief Justice in spite of that order would retain his jurisdiction to list it before the appropriate Bench for hearing as the order limiting the case to be a part heard or tied up would be in violation of the Rules of Court and would not bind the hands of the Chief Justice from listing that case as a "seen" case before any other Bench rather than as a "tied up" case before that very Bench."

9. In State of **Rajasthan Vs. Prakash Chand (supra)**, a matter earlier heard by a Single Judge was subsequently placed before a Division Bench under the order of the Chief Justice of the Rajasthan High Court. The Division Bench disposed of that petition as it had become infructuous when it was placed before it. The Single Judge then directed the Registry to place that petition before him and subsequently issued a notice of contempt to the Chief

Justice of that Court since he had earlier withdrawn the matter from his Bench. This was allegedly on the ground that it had become part heard before him and the withdrawal constituted contempt of Court. This order was carried to the Supreme Court. The Supreme Court referred to Rule 54 of Chapter V of the High Court Judicature at Rajasthan Rules, 1952. This Rule is identical to Rule 1 of Chapter V of the Allahabad High Court Rules. After a careful reading of the said Rule, the Court observed in paragraph 10 as follows:-

"10. A careful reading of the aforesaid provisions of the Ordinance and Rule 54 (supra) shows that the administrative control of the High Court vests in the Chief Justice of the High Court alone and that it is his prerogative to distribute business of the High Court both judicial and administrative. He alone, has the right and power to decide how the Benches of the High Court are to be constituted : which Judge is to sit alone and which cases he can and is required to hear as also as to which Judges shall constitute a Division Bench and what work those Benches shall do. In other words the Judges of the High Court can sit alone or in Division Benches and do such work only as may be allotted to them by an order of or in accordance with the directions of the Chief Justice. That necessarily means that it is not within the competence or domain of any Single or Division Bench of the Court to give any direction to the Registry in that behalf which will run contrary to the directions of the Chief Justice."

The Supreme Court then referred to the judgments of various High Courts and of the Supreme Court with approval. In paragraph 12 of the judgment, the Supreme Court quoted with approval the following observations of a Division Bench of this Court (Per: Mukerji, J.) in **State** Vs. **Devi Dayal**, AIR 1959 All. 421:-

"It is clear to me, on a careful consideration of the constitutional position, that it is only the Chief Justice who has the right and the power to decide which Judge is to sit alone and which cases such Judge can decide; further it is again for the Chief Justice to determine which Judges shall constitute Division Benches and what work those Benches shall do. Under the rules of this Court, the rule that I have quoted above, i*t is for the Chief Justice to allot work to Judges and Judges can do only such work as is allotted to them*..."

It also quoted with approval the concurring opinion of *H.P. Asthana, J.* in that matter to the following effect:-

"Rule 1, Chapter V, of the Rules of this Court, provides that Judges shall sit alone or in such Division Courts as may be constituted from time to time and do such work as may be allotted to them by order of the Chief Justice or in accordance with his directions.

It will appear from a perusal of the above provisions that the High Court as a whole consisting of the Chief Justice and his companion Judges has got the jurisdiction to entertain any case either on the original or on the appellate or on the revisional side for decision and that the other Judges can hear only those matters which have been allotted to them by the Chief Justice or under his

directions. It, therefore, follows that the Judges do not have any general jurisdiction over all the cases which the High Court as a whole is competent to hear and that *their jurisdiction is limited only to such cases as are allotted to them by the Chief Justice or under his directions."*

In paragraph 13, the Supreme Court quoted with approval the following observations of a Full Bench of Rajasthan High Court in **Niranjan Singh** Vs. **State of Rajasthan**, AIR 1974 Raj. 171:-

"It is therefore the responsibility of the Chief Justice to constitute the Division Courts of Benches. The Judges are required to sit alone or in the Division Benches and, in either case, do such work as may be allotted to them by order of the Chief Justice or in accordance with his direction. This power to allot the work to the Judges cannot be taken away, in face of the clear provision of Rule 54, merely because a date of hearing has been fixed in a case by a particular Bench."

"...There is nothing in the rule to justify the argument that such a case should always be treated as 'tied up' with a Bench simply because it has once fixed the date of its hearing or that with the exception of a case in which a Bench has directed the issue of notice to the opposite party or passed an *ex parte* order all other cases should be deemed to be part heard. *On the other hand, the use of the word 'ordinarily' goes to show that if there are extraordinary reasons, even a part heard case may not be laid before the same Bench for disposal.* So far as the second sentence of Rule 66 (1) is concerned, it is really in the nature of an illustration or an explanation."

In paragraph 16 of the judgment, it referred to a judgment of the Supreme Court in Inder Mani Vs. Matheshwari Prasad (supra), in which the Supreme Court has held as follows:-

"It is the prerogative of the Chief Justice to constitute benches of his High Court and to allocate work to such benches. *Judicial discipline requires that the puisne Judges of the High Court comply with directions given in this regard by their Chief Justice. In fact it is their duty to do so. Individual puisne Judges cannot pick and choose the matters they will hear or decide nor can they decide whether to sit singly or in a Division Bench...*"

In paragraph 18, the Supreme Court noted and quoted Rule 66 of the Rajasthan High Court Rules, which is on tied-up cases, which is identical to Rule 14 of Chapter V of the Allahabad High Court Rules on tied-up cases. It also quoted Rule 74 of the Rajasthan High Court Rules on part heard cases, which is identical to Rule 7 of Chapter VI of the Allahabad High Court Rules on part heard cases. It held in paragraph 19 as follows:-

"Under Rule 74 *(supra)* a case which remains part heard at the end of the day, is *ordinarily* required to be heard by the Judge concerned or the Judges sitting next and is to be placed first after miscellaneous cases in the next list but that does not imply that the Chief Justice does not have the power or jurisdiction to transfer even a part heard case, in the peculiar facts and circumstances of a

case, from a single Judge to a Division Bench in exercise of the jurisdiction vested in the Chief Justice under proviso *(a)* to Rule 55 *(xi) (supra)*."

The Supreme Court then referred to paras 21 and 22 of the judgment of the Full Bench of this Court in the case of Sanjay Kumar Srivastava (supra). It specifically quoted with approval the above quoted paragraph 24 from the judgment in Sanjay Kumar Srivastava (supra) and then held in paragraph 23 as follows:-

"23. The above opinion appeals to us and we agree with it. Therefore, from a review of the statutory provisions and the cases on the subject as rightly decided by various High Courts, to which reference has been made by us, it follows that no Judge or a Bench of Judges can assume jurisdiction in a case pending in the High Court unless the case is allotted to him or them by the Chief Justice. Strict adherence of this procedure is essential for maintaining judicial discipline and proper functioning of the Court. No departure from it can be permitted. If every Judge of a High Court starts picking and choosing cases for disposal by him, the discipline in the High Court would be the casualty and the administration of justice would suffer. No legal system can permit machinery of the Court to collapse. The Chief Justice has the authority and the jurisdiction to refer even a part heard case to a Division Bench for its disposal in accordance with law where the Rules so demand. It is a complete fallacy to assume that a part heard case can under no circumstances be withdrawn from the Bench and referred to a larger Bench, even where the Rules make it essential for such a case to be heard by a larger Bench."

10. In R. Rathinam Vs. State (supra) also, the Supreme Court considered the powers of the Chief Justice and in paragraph 10 reiterated the proposition in State of Rajasthan Vs. Prakash Chand (supra) to the following effect:-

"The Chief Justice is the master of the roster. He *alone* has the right and the power to decide how the Benches of the High Court are to be constituted; which Judge is to sit alone and which cases he can and is required to hear and also as which Judges shall constitute a Division Bench and what work those Benches shall do."

11. The question again came up before the Supreme Court in Jasbir Singh Vs. State of Punjab (supra). In paragraph 19, the Court held as follows:-

" ...It may also be remembered that normally a High Court Judge passes orders on matters assigned by the Chief Justice and this Court in State of Rajasthan Vs. Prakash Chand (supra) deprecated the practice of the Single Judge directing the listing of certain part heard cases before him without there being any orders of the Hon'ble the Chief Justice of the High Court. It is the prerogative of the Chief Justice to assign business of the High Court both on judicial and administrative sides. The Chief Justice alone has the power to decide as to how the Benches of the High Court are to be constituted. That necessarily means that it is not within the competence of any Single or Division Bench of the High Court to give any direction to the Registry in that behalf

which will run contrary to the directions of the Chief Justice."

Considering that the issues are answered by the Full Bench or Division Bench judgments of this Court and of the Supreme Court and as all the questions referred for consideration are answered by the judgments, the learned Chief Justice apparently declined to make a reference.

12. Our attention has been drawn to another judgment of this Court in the case of **Rajesh Chandra Gupta & Ors. Vs. State of U.P. & Anr., Special Appeal No. 578 of 2010**, decided 29.04.2010, wherein, considering Rules 12 and 13 of Chapter V, and Rule 7 of Chapter VI in the matter of part-heard cases, the learned Division Bench was pleased to hold that the learned Judge who had heard the application for restoration could not have heard the matter, on the ground that the learned Judge who had passed the order was not available. We make it clear that Rule 12 of Chapter V confers the power of substantive review and not procedural review as the power of procedural review is inherent in every Court or Tribunal, whereas substantive review has to be conferred. **(See Grindlays Bank Ltd. Vs. The Central Government Industrial Tribunal & Ors., AIR 1981 SC 606).**

Rule 7 of Chapter VI of the Allahabad High Court Rules speaks about a matter being part-heard. The proviso thereto provides that for some reason, if a part-heard case cannot be heard for more than two months on account of the absence of any Judge or Judges constituting the Bench, the Chief Justice may order such part-heard case to be laid before any other Judge or Judges to be heard afresh. A careful reading of the rule will show that to be during the assignment. No doubt, this rule would indicate that the part-heard matters be heard by the same Bench or Benches, which had heard the matter, but that can only be if that Bench is available. Once the Bench is 'broken up' it cannot assemble to hear a matter, with which it is not assigned work, unless the Chief Justice by a special order or general order, by an order directs that such matters may be heard by a Bench or the High Court rules so provide.

13. The issue pertaining to tied-up and part-heard cases was also considered by another Division Bench of this Court in the case of **Awadh Naresh Sharma Vs. State of U.P. & Ors., 2008 (1) AWC 673,** wherein the learned Division Bench presided over by the then Chief Justice in paragraph 17, observed as under:-

"**17**. In this paragraph the Apex Court has clearly held that no Judge or Bench can assume jurisdiction in 0.00"a case pending in the High Court unless the case is allotted to him or them by the Chief Justice. Strict adherence of this procedure is essential for maintaining judicial discipline and proper functioning of the Court. No departure from it can be permitted."

14. Similar view seems to be reflected in the case of **Sanjay Mohan Vs. State of U.P. & Ors., [2008 (2) ADJ 397 (DB)],** wherein similar observations were made, as reflected in paragraph 17, which reads as under:-

"17.The law laid down in these

judgments clearly establishes that the learned Single Judge could not have directed the Registry to continue the matter to be placed before him as the roster had been changed. Even if he was to say that the matter was part heard, in view of the law laid down by the Full Bench which is affirmed by the Apex Court: such a direction or order would be in violation of the Rules of Court and, therefore, nullity. Any case at pre-admission stage cannot be treated as part heard or tied up and such a direction contrary to the roster is not within the competence of any Single or Division Bench of the High Court as has also been held in the case of Jasbir Singh (supra)."

15. It is, thus, true that there appears to be some conflict in the view taken in Rajesh Chandra Gupta (supra) and Awadh Naresh Sharma (supra) on one side and Sanjay Mohan (supra) on the other, but considering the Full Bench judgment in Sanjay Kumar Srivastava (supra) and the judgment of the Supreme Court earlier noted, the judgment in Rajesh Chandra Gupta (supra), did not reflect the correct law, which has been properly stated in Awadh Naresh Sharma (supra) and Sanjay Mohan (supra). Apart from that, what the learned Bench in Rajesh Chandra Gupta (supra) was considering, was the dismissal of a restoration application for non-prosecution, in other words, procedural review. That was, therefore, not a case of substantive review, for the learned Judges to have taken the view, which has been taken. That it was substantive review becomes clear from Rule 12 which refers to Rule 5 of Order XLVII of the Code of Civil Procedure. A Judge exercising civil jurisdiction has the inherent power to exercise the power of procedural review, which will include the power to recall an order dismissing the matter for default. In fact the Explanation to Rule 12 makes it clear that procedural review can be exercised by another Judge in a case covered by Rule 17, which includes a Judge sitting at Allahabad or Lucknow or vice-versa.

16. We may now refer to some of the judgments, which were pending before the learned Division Bench. We have not checked the records to find out whether the P.I.L. work was assigned to that Bench, if the direction can be treated as P.I.L. In **Writ Petition No. 1580 (M/B) of 2009, Noor Mohammad Vs. State of U.P. & Ors.**, the learned Division Bench noted photographic evidence placed before it, which indicated use of heavy machines for excavation of sand on the river bank being done to a depth of more than three meters, which was prohibited by the Government Circulars. When the matter next came up on 06.03.2009, the learned Bench was pleased to observe as under:-

"During the course of hearing, attention of this Court has been invited towards certain photographs filed with the writ petition. A supplementary affidavit was also filed to bring on record some recent photographs, which indicates that heavy machines have been used and excavation has been done to the depth of more than three meters, which have been prohibited by government circulars. Accordingly, on 3.3.2009, we proceeded to frame the following questions for adjudication of the controversy keeping in view the public interest, which are as under:-

(1)Whether all over the State heavy

machines have been used during mining operation or for excavation of sand by the contractors and whether using of heavy machines including JVC Machines have been prohibited by law?

(2)Whether the State Government and the Contractors involved in the mining work by using the heavy machines have violated any judgements of this Court as well as Hon'ble the Supreme Court coupled with circulars, orders and statutory provisions and on account of such violation this Court may pass appropriate orders to secure the ecological balance as well as to enforce some punitive measures?

(3)Whether on account of use of heavy machines during mining operation, damage has been caused to the rivers of the State including Ganga, Yamuna and Gomit as well as other places where the mining operations have been carried out? In case yes, then what remedial measure should be adopted to check such damages to maintain the ecological balance and environment?

After framing of the aforesaid questions, we impleaded the various authorities of the Union of India related with the mining works as well as other State authorities as respondent nos. 9 to 14 in the instant writ petition."

It was also brought to the attention of the learned Bench that on the report being submitted by the Mining Officer, in order to maintain ecological balance and protection of the environment, action was being taken.

The attention of the learned Bench was also invited to an order passed by a learned Single Judge in **Writ Petition No. 5361 (M/S) of 2008,** whereby a Committee was constituted and the Committee had submitted a report in respect of district Bijnor. The learned Division Bench, while proceeding to appoint a Committee placed reliance upon another Division Bench judgment, and found that the State Government has failed to discharge its statutory as well as constitutional obligation to protect the environment by regulating mining operation like in Bijnor and, accordingly, appointed the Committee.

Earlier, another Division Bench in respect of the same subject matter, i.e. Writ Petition No. 1580 (M/B) of 2009, had noted the pleas by the respondents that the mining operations are being carried on by using JCB machines by the intervener in the petition. Thereafter, in another writ petition, being **Writ Petition 3879 of 2010, Pradeep Chaudhary & Anr. Vs. State of U.P. through its Principal Secretary, Geology & Mining,** the Court noted the report of district Saharanpur, which indicated the damage caused to the river course and, consequently, damage to environment which would disturb the ecological balance. The Court also noted that there is an option to the State Government to stop the use of heavy machines but that has not been done. The Court, then, noting the order passed in Writ Petition No. 1580 (M/B) of 2009, directed the State Government to ensure that in the State of U.P. no heavy machine is used by the lessees involved in the mining work at river bed for excavation of sand/morang till the matter is finally adjudicated by this Court.

17. From the law as earlier quoted,

it would be clear that the Division Bench assigned with a particular work can only do the work assigned and cannot do the work assigned to another Division Bench even in respect of earlier matter which it was hearing when the Chief Justice had assigned work to that Bench to take up the matter. After the assignment has changed, unless specifically ordered the previous Bench cannot hear the matter. Even in respect of tied up matters, in terms of the rule quoted above, the matter may ordinarily be laid before the same Bench for disposal. The expression "ordinarily" would mean that the authority empowered to assigning matters must exercise that power to place the matter before the Bench, which earlier had heard the matter. This can be done in individual cases or by a general order. This rule is based on the principle that a Bench having substantially heard the matter and spent valuable judicial time, must be allowed to ordinarily hear and dispose of the matter. This power, therefore, could only be exercised by the Chief Justice who constitutes the Benches and not by the Registry of the Court, nor can a Bench hold that it can proceed with the matter as a part heard matter.

17.A. The order of the learned Bench in Noor Mohammad (supra) dated 06.03.2009 was the subject matter of an SLP, which was disposed of on 06.04.2009 and a further clarification was issued on 28.08.2009, which reads as under:-

"An application has been filed seeking clarification of our order dated 6.4.2009. By the said order the SLP filed by the petitioner was dismissed. While dismissing the SLP, we did not hold that the matter before the High Court was a PIL. We only stated that if the writ petition had been converted into a PIL by the impugned order, the Registry will do the needful by placing the matter before appropriate Bench dealing with PILs as per rules and guidelines. If the order of the High Court did not convert the writ petition into a PIL then obviously the said observation will not apply. If there was any doubt regarding posting, the matter ought to be placed before learned Chief Justice of the High Court. With the said observation, I.A. No.3 is disposed of."

Thus, this would make it clear that even if a Bench was hearing a matter assigned to it as per the assignment and if in the course of hearing it proceeds to consider reliefs not sought in the petition, but which will fall within the PIL jurisdiction, then the Bench is bound to direct the Registry to place the matter before the learned Chief Justice for appropriate directions or before the appropriate P.I.L Bench. In other words, if that Bench is not assigned PIL work, it cannot proceed to hear the matter.

18. The question, therefore, would be whether the Bench which earlier heard the matter had jurisdiction to hear the matter. This cannot be the subject matter of a reference considering the judgment of this Court, which has already decided the controversy and in respect of which a dispute does not arise. The remedy for a person aggrieved by such an order, if any, is to prefer an appeal. Such an appeal would be maintainable by applying the law declared by the Supreme Court in the case of **Midnapore Peoples' Co-op. Bank Ltd. & Ors. Vs. Chunilal Nanda**

& Ors., AIR 2006 SC 2190 and as explained in **Special Appeal No. 1395 of 2010, The ING Vysya Bank Ltd. Vs. Shamken Spinners Ltd. & Ors., decided on 8th September, 2010.** In our opinion, therefore, the reference on the second question is also not maintainable.

19. Insofar as the 3rd question is concerned, it is now settled law that an interim order does not decide the issue in the petition finally. Interim orders are normally based on a prima facie finding. No ratio decidendi can be culled out from an interim order. An issue of a conflict between two judgments of coordinate Benches can only arise if there is a conflict in the ratio decidendi of judgments of the coordinate Benches. If a learned Bench has passed an interim order which, according to the party, could not have been passed, the remedy for such a party would be to take recourse to the remedy of law which it may have. The issue whether the same has been settled by a Bench of the Court sitting at Lucknow or the principal seat at Allahabad is immaterial. A learned Bench can only refer a matter if it finds that there is a conflict between the ratio of judgments by two Benches of coordinate jurisdiction or if it finds that it cannot agree with the view taken by another Coordinate Bench. In our opinion, therefore, the third question as raised also could not have been referred.

20. We are surprised at the stage at which the reference was made. Normally a reference is made after hearing the parties on merits and the learned Bench arrived at a conclusion that it does not agree with the view taken by another coordinate Bench, which has earlier decided the law. In this case, a strange procedure has been followed. Interim relief was first granted, the matter was not finally heard, and without considering the merits of the matter, a reference has been made. In our opinion, this was a strange procedure. We express, therefore, our anguish at the manner in which this reference is made. We may also note that the interim order dated 06.03.2009 passed in Noor Mohammad (supra), was the subject matter of special leave petition to the Supreme Court. The learned Court did not interfere with that order. The special leave petition was dismissed on 06.04.2009 and further clarification was issued on 28.08.2009. The effect was that use of heavy machinary was banned. In spite of that the interim relief was granted without considering the normal tests for granting an injunction.

21. The learned counsel has sought to take us through the merits of the matter. In view of the fact that the reference itself is not maintainable, we do not propose to examine the matter on merit and leave it to the parties to take appropriate steps which in law they may be entitled to.

22. Considering the importance of the issue on environment and ecology, though the challenge is to a Government Order, we request the learned Bench assigned to hear the matter to dispose the same at the earliest, more so when interim orders have been granted in favour of the petitioners without striking down the subordinate legislation, if it could be struck down.

23. Reference is disposed of accordingly.

24. Registry to place the petitions before the appropriate Bench.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.11.2010

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 53950 of 2008

Rajesh Prasad Mishra ...Petitioner
Versus
The Commissioner Jhansi Division, Jhansi and others ...Respondents

Counsel for the Petitioner:
Sri N.L. Srivastava

Counsel for the Respondents:
C.S.C.

Civil Services (Classification control and Appeal) Rules, 1930-Rule 55-Dismissal-without holding enquiry-without indicating place and time of enquiry-after having explanation-order passed without giving the enquiry report-even on demand-despite of direction of court the disciplinary authority deliberately given to all procedure prescribed under rule given with cost of 10000/ dismissal order set-a-side.

Held: Para 14

It is not in dispute that at the time when the proceedings in question were initiated, the matter was governed by CCA Rules, 1930 since the new Rules came in 1999. As the procedure prescribed under the Rules of 1930 has not been followed, the impugned order cannot sustain and the writ petition deserves to be allowed.

Case Law Discussed:
AIR 1972 SC 330, 1997 (1) LLJ 831, 2000 (1) U.P.L.B.E.C. 541, 2008(3) ESC 1667

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

1. Heard Sri N.L. Srivastava, learned counsel for the petitioner and learned Standing Counsel for the respondents.

2. Learned counsel for the petitioner prays for and is allowed to implead the respondent-State of U.P. as respondent no. 5 in the array of parties. Since all the respondents are the authorities of the State of U.P. and the newly impleaded respondents is also represented by learned Standing Counsel who has already filed counter affidavit, therefore, with the consent of learned counsel for the parties this Court proceed to here this matter finally under the Rules of the Court at this stage since pleadings are complete.

3. Against the order of termination passed by the District Magistrate, Hamirpur on 25.05.1996 and the appellate order dated 24.05.2008 passed by the Commissioner, Jhansi rejecting petitioner's appeal on the ground of delay and laches, the present writ petition has been filed seeking a writ of certiorari for quashing the aforesaid orders.

4. Sri Srivastava, learned counsel for the petitioner contended that the entire proceedings are illegal and void ab initio being in utter violation of principles of natural justice and the statutory provisions contained in Civil Services (Classification, Control and Appeal) Rules, 1930 *(hereinafter referred to as "CCA Rules")* as applicable in State of U.P. inasmuch as no oral inquiry was ever conducted against the petitioner.

5. The petitioner was initially placed under suspension on 08.09.1994/16.12.1994. A charge sheet was issued to him on 21.12.1994 which was

replied by him on 14.08.1995. Inquiry officer after receiving reply did not fix any date for oral inquiry and instead submitted report holding the charges proved against the petitioner. A show cause notice was issued to the petitioner on 30.03.1996. Since the copy of the inquiry report was not appended thereto, the petitioner sought copy of the inquiry report by his letter dated 13.04.1996 but the same was not furnished. Thereafter the respondent no. 2 passed order dated 25.05.1996 terminating petitioner from service by way of punishment on the ground of misconduct holding that all the charges levelled against him stand proved. The petitioner preferred appeal on 02.01.1997 which was dismissed on 02.04.1997 on the ground of delay whereagainst he approached this Court in Writ Petition No. 22348 of 1997 which was decided on 08.04.2008 directing appellate authority to reconsider petitioner's appeal alongwith delay condonation application. However, by means of the impugned order the appellate authority has again dismissed the appeal.

6. In para 16 and 17 of the writ petition the petitioner has specifically stated that no oral inquiry was ever conducted in the matter though it is so prescribed under the rules and was mandatory.

7. The respondents have filed counter affidavit. The other facts are admitted. In respect to the question of holding oral inquiry, in para 14 of the counter affidavit while replying para 16 of 17 of the writ petition the respondents have said:

"14. That the contents of paragraph Nos. 16 to 20 of the writ petition are not admitted. The charge sheet/show cause notice dated 21.12.1994 was given to the petitioner thereby he was required to submit reply stating whether he desires to cross examine any witness mentioned in the charge sheet and whether he desires to give or produce evidence in his support. The petitioner in pursuance of the said show cause notice/charge sheet submitted his reply dated 14.08.1995 and therein, on such request for cross examine any witness or personal hearing was made. This fact is evident from the petitioner's reply dated 14.08.1995 which is already on record as Annexure CA- 4 to this counter affidavit. Further, Rule VII of U.P. Government Servant Disciplinary Appeal Rules, 1999 clearly states that a charged Govt. Servant when denies the charges, the Enquiry Officer shall proceed to call witness proposed in the charge sheet and record their oral evidence in presence of the charged Govt. Servant. From bare perusal of the charge sheet, it is clear that none of the charges were proposed to be proved by the oral statement of any witness. It is relevant to mention here that Enquiry Officer has enquired the matter considering the reply and evidence submitted by the petitioner in respect of the charges levelled against him in accordance with law and there is no illegality in the same. Further, the Enquiry Officer after considering the charges and evidence and reply of the petitioner submitted in pursuance of the charge sheet has submitted its report dated 17.10.1995 before the respondent No. 2. Further, the Enquiry Officer has conducted the enquiry in accordance with law and submitted its report after considering all the documents placed before him and found the charges levelled against the petitioner to be proved."

8. It is evident from the above and other paragraphs of the counter affidavit that no oral inquiry whatsoever was conducted against the petitioner. Before

coming to the question as to whether non-holding of oral inquiry is fatal in the matter, I also looked the nature of the charges whether they are such as would not attract oral statement and stood proved only on the basis of the documents.

9. There are five charges. Charges no. 4 and 5 alleges that the petitioner was guilty of committing theft of a type writer and selling it to one Sri Ram Babu Gupta who admitted that the same was sold by petitioner. The statement of Sri Ram Babu Gupta is one of the document relied on in support of charge no. 4. Besides, report of one Sri Vinod Kumar Dixit is also relied on in support of charge no. 5. Admittedly, the authors of the two documents were never examined. The contents of statement given by someone is herese evidence and cannot be relied on even in departmental inquiry unless its author is examined. It is settled that unless contents of a document which is disputed, are proved by the author, who is examined before the inquiry officer and is available for cross examination by the delinquent employee, such document cannot be deemed to be proved and therefore such document cannot be relied to hold a delinquent employee guilty and to impose punishment upon him. I am fortified in taking this view by the Apex Court's judgment in **M/s Bareilly Electricity Supply Co. Ltd., Vs. The Workmen and others, AIR 1972 SC 330** where the Apex Court in para 14 of the judgment observed as under:

"But the application of principle of natural justice does not imply that what is not evidence can be acted upon. On the other hand what it means is that no materials can be relied upon to establish a contested fact which are not spoken to by persons who are competent to speak about them and are subjected to cross-examination by the party against whom they are sought to be used. When a document is produced in a Court or a Tribunal the question that naturally arises is, is it a genuine document, what are its contents and are the statements contained therein true. When the Appellant produced the balance-sheet and profit and loss account of the Company, it does not by its mere production amount to a proof of it or of the truth of the entries therein. If these entries are challenged the Appellant must prove each of such entries by producing the books and speaking from the entries made therein. If a letter or other document is produced to establish some fact which is relevant to the enquiry the writer must be produced or his affidavit in respect thereof be filed and opportunity afforded to the opposite party who challenges this fact. This is both in accord with principles of natural justice as also according to the procedure under Order XIX Civil Procedure Code and the Evidence Act both of which incorporate these general principles. Even if all technicalities of the Evidence Act are not strictly applicable except in so far as Section 11 of the Industrial Disputes Act, 1947 and the rules prescribed therein permit it, it is inconceivable that the Tribunal can act on what is not evidence such as hearsay, nor can it justify the Tribunal in basing its award on copies of documents when the originals which are in existence are not produced and proved by one of the methods either by affidavit or by witness who have executed them, if they are alive and can be produced. Again if a party wants an inspection, it is incumbent on the Tribunal to give inspection in so far as that is relevant to the enquiry. The applicability of these principles are well recognised and admit of no doubt." (para-14)

10. Thus the defence taken in para 14 of the counter affidavit that the charges are not so serious which require any oral inquiry, is not accepted.

11. Now coming to the question, what is the effect of non-holding of oral inquiry, I find that, in a case where the inquiry officer is appointed, oral inquiry is mandatory. The charges are not deemed to be proved suo motu merely on account of levelling them by means of the charge sheet unless the same are proved by the department before the inquiry officer and only thereafter it is the turn of delinquent employee to place his defence. Holding oral enquiry is mandatory before imposing a major penalty, as held by Apex Court in **State of U.P. & another Vs. T.P.Lal Srivastava, 1997 (1) LLJ 831** as well as by a Division Bench of this Court in **Subhash Chandra Sharma Vs. Managing Director & another, 2000 (1) U.P.L.B.E.C. 541.**

12. The question as to whether non holding of oral inquiry can vitiate the entire proceeding or not has also been considered in detail by a Division Bench of this Court (in which I was also a member) in the case of **Salahuddin Ansari Vs. State of U.P. and others, 2008(3) ESC 1667** and the Court has clearly held that non holding of oral inquiry is a serious flaw which vitiates the entire disciplinary proceeding including the order of punishment. This Court has said in paras 10 and 11 of the judgement as under:

"10. ---------- Non holding of oral inquiry in such a case is a serious matter and goes to the root of the case.

11. A Division Bench of this Court in Subhash Chandra Sharma Vs. Managing Director & another, 2000 (1) U.P.L.B.E.C. 541, considering the question as to whether holding of an oral inquiry is necessary or not, held that if no oral inquiry is held, it amounts to denial of principles of natural justice to the delinquent employee. The aforesaid view was reiterated in Subhash Chandra Sharma Vs. U.P. Cooperative Spinning Mills & others, 2001 (2) UPLBEC 1475 and Laturi Singh Vs. U.P. Public Service Tribunal & others, Writ Petition No. 12939 of 2001, decided on 06.05.2005."

13. The procedure for holding oral inquiry is also prescribed in Rule 55 of of CCA Rules, as substituted by Civil Services (C.C.A.) (U.P. Amendment) Rules, 1975 published in U.P. Gazette dated 22.3.1975 which is reproduced as under:

"55. (1) Without prejudice to the provisions of the public Servant Inquiries Act, 1850 an order (other than an order based on facts which had led to his conviction in a criminal court or by a court material) of dismissal, removal or reduction in rank (which includes reduction to a lower post or time scale, or to a lower stage in a time scale but excludes the reversion to a lower post of a person who is officiating in a higher post) shall be passed on a person who is a member of a Civil Service, or holds a civil post under the State unless he has been informed in writing of the ground on which it is proposed to take action and has been afforded an adequate opportunity of defending himself. The Grounds on which it is proposed to take action shall be reduced in the form of a definite charge or charges which shall be communicated to the person charged and which shall be so clear and precise as to give sufficient indication to the charged Government servant of the facts and circumstances against him. He shall be required, within a reasonable time to put in a written statement of his defence and to

state whether he desires to be heard in person. If he so desires, or if the authority concerned so directs, an oral inquiry shall be held in respect of such of the allegation as are not admitted. At that inquiry such oral evidence will be heard as the inquiring officer considered necessary. The person charged shall be entitled to cross examine the witnesses, to give evidence in person and to have such witnesses called as he may wish, provided that the officer conducting the inquiry may for sufficient reason to be recorded in writing refuse to call a witness. The proceedings shall contain a sufficient record of the evidence and statement of the findings and the ground thereof. The officer conducting the inquiry may also separately from these proceedings make his own recommendation regarding the punishment to be imposed on the charged Government servant.

(2) Where the punishing authority itself inquires into any charge or appoints an inquiring officer for holding an inquiry into such charge, the punishing authority, if it considered it necessary to do so, may, by an order, appoint a Government servant or a legal practitioner, to be known as "Presenting Officer" to present on its behalf the case in support of the charge.

(3) The Government servant may take the assistance of any other Government servant to present the case on his behalf, but not engage a legal practitioner for the purpose unless the presenting officer appointed by the punishing authority is a legal practitioner or the punishing authority having regard to the circumstances of the case, so permits.

(4) This rule shall not apply where the person concerned has absconded or where it is for other reasons impracticable to communicate with him. All or any of the provisions of the rule may for sufficient reasons to be recorded in writing be waived, where there is difficulty in observing exactly the requirements of the rule those requirements can in the opinion of the inquiring officer be waived without injustice to person charged.

(5) This rule shall also not apply where it is proposed to terminate the employment of either a temporary Government servant or of a probationer whether during or at the end of the period of probation. In such cases a simple notice of termination, which in the case of a temporary Government servant must conform to the conditions of his service, will be sufficient."

14. It is not in dispute that at the time when the proceedings in question were initiated, the matter was governed by CCA Rules, 1930 since the new Rules came in 1999. As the procedure prescribed under the Rules of 1930 has not been followed, the impugned order cannot sustain and the writ petition deserves to be allowed.

15. In the result, the writ petition is allowed. The impugned orders dated 25.05.1996 (Annexure-6 to the writ petition), 02.04.1997 and 24.05.2008 (Annexures- 8 and 11 respectively) are hereby quashed. The petitioner also be entitled to all consequential benefits.

16. Since in the case in hand the respondents have acted in exceptionally negligent and careless manner and it appears that they have deliberately given a go bye to the procedure prescribed in the Rules, in my view, this case deserved to be allowed with costs. The petitioner, therefore, shall also entitled to costs which is quantified to Rs. 10,000/-.

17. Liberty is granted to respondent no. 5 to recover the aforesaid amount from the then officer who passed the impugned order without caring to the question as to whether the proceedings have been conducted in accordance with law, after making such inquiry as prescribed in law.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.10.2010
BEFORE
THE HON'BLE SUNIL AMBWANI, J.
THE HON'BLE KASHI NATH PANDEY, J.

Civil Misc. Writ Petition No, 57930 of 2009

Nand Kishor ...Petitioner
Versus
Collector, Rampur and others...Respondents

Counsel for the petitioner:
Sri Madhur Prakash

Counsel for the Respondents:
Sri Satendra Kumar Pandey
S.C.

U.P. Zamindari Abolition and Land Reforms Act, 1950-Section 279, 280 readwith U.P. Municipality Act 1916, Section-166 and 173-Recovery of Rent by Municipal Board-as arrear of land revenue by evoking power under section 279 and 280 of Zamindari Act- saying goodby to the method prescribed under section 166 and 173 of Municipalities Act-held-without Jurisdiction arrear of next can not be recovered as arrear of Land Revenues.

Held: Para 17

We are thus of the opinion, that the arrears of rent, or the unpaid rent due, cannot be recovered by the Municipal Corporation from the petitioners as arrears of land revenue by adopting a process of recovery under the UPZA & LR Act, 1950 and the Rules framed thereunder.

Case law discussed:
2003 (5) AWC 3479, 1998 (89) R.D. 513, 2006 (9) ADJ 66 (All), 2007 (2) ADJ 143 (DB).

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

1. We have heard Shri Madhur Prakash, learned counsel for the petitioner. Learned Standing Counsel appears for the respondents. Shri Satendra Kumar Pandey appears for Nagar Palika Parishad, Rampur.

2. In these writ petitions the petitioners have challenged the notices issued on 3.11.2009 and the recovery proceedings of the rent of the shops owned by Nagar Palika Parishad and allotted to the petitioner, as arrears of land revenue. By an interim order dated 3.11.2009 the recovery proceedings in view of the judgment of this Court in Titu Singh Vs. District Magistrate/ Collector, Mathura & Ors., 2003 (5) AWC 3479 were stayed.

3. The respondents have not filed counter affidavit. Learned counsel for Nagar Palika Parishad prays for some more time to file counter affidavit. Since the petitioners have not disputed the amount, which is due from them and have only challenged the method of recovery of the amount as arrears of land revenue by issuing recovery certificate/ citation dated 14.9.2009 (as arrears of land revenue), we do not propose to adjourn the matter. We have heard the counsels appearing for the parties, on legal issues.

4. The Nagar Palika Parishad, Swar, Distt. Rampur constructed 28 shops and proposed to allow them by auction.

5. The petitioners were highest bidders in the auction held on 10.11.1998, of the respective shops, for allotment on rent ranging between the maximum amount of Rs.2150/- to the minimum of Rs.725/-. The shops were allotted to them, as tenants on rent w.e.f. July, 1999.

6. The petitioners, thereafter, took a stand that the amount of bids was very high, and filed civil suits before entering into agreement and taking possession of the shops. The civil suits were dismissed. The petitioners have not brought on record the judgments of the civil suits. The petitioners, thereafter, entered into agreement and affirmed affidavits accepting the tenancy and rate of rent before taking possession, and are paying rent regularly w.e.f. 17.11.2006. The matter in issue relates only to the arrears of rent from July 1999 to 17.11.2006.

7. In the letter of the District Magistrate dated 8.1.2008 sent to the Executive Officer, Nagar Palika Parishad, Swar annexed as Annexure No.3 to the writ petition it is mentioned that suits filed by the petitioners in respect of shop Nos.1, 15 and 16 have been dismissed, in favour of Nagar Palika Parishad; and that the representation made by the petitioners forwarded by the Nagar Palika Board on 19.5.2001, and 12.8.2004, have been rejected by the State Government. The rent for the period from July 1999 to 16.11.2006 is due and should be recovered from the tenants.

8. On the receipt of the letter of the District Magistrate dated 8.1.2008, the Executive Officer, Nagar Palika Parishad, Swar issued notices of demand to the petitioners of the agreed amount for each of the shop. The petitioners were required to deposit the entire amount in seven days, failing which their shops will be locked, and the amount will be recovered as arrears of land revenue. A citation was, thereafter, issued by the Tehsidlar, Swar on 14.9.2009 under Rule 236 of the U.P. Zamindari Abolition and Land Reforms Act to recover the amount giving rise to the writ petition.

Shri Madhur Prakash, learned counsel for the petitioner has relied upon the opinion of this Court in the judgment in **Titu Singh Vs. District Magistrate, 2003 (5) AWC 3479** in which it was held while interpreting the provisions of Section 173 (A) of U.P. Municipalities Act, 1916, applicable to the petitioners that the sums due to the Municipal Corporation payable a contractor in pursuance to theka money due under a contract cannot be recovered under Section 173-A.

Section 173A is quoted as below:-

"173-A. Recovery of taxes as arrears of land revenue- (1) Where any sum is due on account of a tax, other than [any tax] payable upon immediate demand, from a person to a [Municipality], the [Municipality] may without prejudice to any other mode of recovery apply to the Collector to recover such sum together with costs of the proceedings as if it were an arrear of a land revenue.

(2) The Collector on being satisfied that the sum is due shall proceed to recover it is an arrear of land revenue."

The provisions of Section 173A and Section 176 came up for consideration of this Court for recovery of Teh Bazari dues

in **Ram Bilas Tibriwai Vs. Chairman, Municipal Board, Titri Bazar, Siddarthnagar & Ors., 1998 (89) R.D. 513; Mohammad Umar Vs. Collector/ District Magistrate, Moradabad & Ors., 2006 (9) ADJ 66 (All);** and **Iliyas Vs. State of U.P. & Ors., 2007 (2) ADJ 143 (DB)**. In all these decisions the Court held that the provisions of Section 173A, cannot be applied for recovering Teh Bazari dues as Teh Bazari dues are not tax, which can be recovered as arrears of land revenue.

The U.P. Zamindari Abolition and Land Reforms Act, 1950, provides under Section 279 the procedure for recovery as arrears of land revenue. The provisions include serving a writ of demand, arrest and detention of the persons, attachment and sale of his movable property including the agricultural produce; attachment of the holding in respect of which the arrear is due; attachment and sale of other immovable property of the defaulter, and also by appointing a receiver of any property, movable or immovable, of the defaulter. The costs of any of the processes mentioned in sub-section (1) shall be added to and be recoverable in the same manner as the arrear of land revenue.

9. Wherever the State has provided for recovering the amount as arrears of land revenue, specific provision is made by the legislature for adopting the procedure of recovery provided under the UPZA & LR Act, 1950 and the Rules.

10. In the year 1972 the State of U.P. enacted U.P. Public Moneys (Recovery of Dues) Act, 1972 for the following purposes:-

"An Act to provide, with retrospective effect, for the speedy recovery of certain classes of dues payable to the State Government or to the Uttar Pradesh Financial Corporation or any other Corporation notified by the State government in that behalf or to any nationalised or other Scheduled Bank or to a Government Company, and to validate certain acts done and proceedings taken in the past, and to provide for matters connected therewith."

11. The Act provides for recovering certain sums as arrears of land revenue. Section 3 of the Act provides:-

"3. Recovery of certain dues as arrears of land revenue.(1) Where any person is party-

(a) to any agreement relating to a loan, advance or grant given to him or relating to credit in respect of, or relating to hire- purchase of goods sold to him by the State Government or the Corporation, by way of financial assistance; or

(b) to any agreement relating to a loan, advance or grant given to him or relating to credit in respect of, or relating to hire- purchase of goods sold to him, by a banking company or a Government company, as the case may be, under a State-sponsored scheme; or

(c) to any agreement relating to a guarantee given by the State Government or the Corporation in respect of a loan raised by an industrial concern; or

(d) to any agreement providing that any money payable thereunder to the State Government shall be recoverable as arrears of land revenue; and such person-

(i) makes any default in repayment of

the loan or advance or any instalment thereof; or

(ii) having become liable under the conditions of the grant to refund the grant or any portion thereof, makes any default in the refund of such grant or portion or any instalment thereof; or

(iii) otherwise fails to comply with the terms of the agreement.

Chapter VI of the U.P. Municipalities Act, 1916 provides for recovery of certain municipal claims. A bill is required to be presented under Section 166, where:

(a) any sum on account of tax, other than [any tax] payable upon immediate demand, or

(b) any sum payable under clause (c) of Section 196 or Section 229 or Section 230 in respect of the supply of water, or payable in respect of any other municipal service or undertaking, or

(c) any other sum declared by this Act or by rule (or bye-law) to be recoverable in the manner provided by the chapter, the [Municipality] shall, with all convenient speed cause a bill to be prescribed to the persons so liable.

12. Sub-section (2) of Section 166 of the U.P. Municipalities Act, 1916 provides that a person shall be deemed to become liable for the payment of every tax and licence fee upon the commencement of the period in respect of which such tax or fee is payable. The contents of bill, on notice of demand is provided under Section 167; the notice of demand is provided under Section 168; issue of warrant is provided under Section 169 and forcible entry and manner of executing warrant is provided under Section 170 and 171 of the Act. Section 172 provides for sale of goods under warrant and application of proceeds, and Section 173 provides for procedure in case of execution against property outside the municipal area.

13. In the present case it is not denied in the writ petition that the amount of rent towards shop is due from the period July 1999 to 16.11.2006. The question of the rate of rent has also been concluded by the decisions in the three suits filed by the petitioners or similarly situate persons, and their representation for reducing the arrears of land have been rejected. The question whether the rent was payable after agreement and the possession was given is no longer open to be considered by the Court. The petitioners have not set up any such case that the shop was in use by any other person from the date of allotment to the date, when the possession was given. The delay, if any, in taking possession was wholly attributable on account of petitioners, for which the municipal property was held up for its use. The petitioners, therefore, cannot escape the liability to pay the rent for the period from July 1999 to 16.11.2006.

14. We, however, find substance in the contention of learned counsel for the petitioners that the amount of past arrears of rent cannot be recovered as arrears of land revenue. There were no provisions for recovery of municipal tax as arrears of land revenue, which did not fall due on immediate demand. Section 173A was inserted in U.P. Municipalities Act, 1916, by U.P. Act No.26 of 1964 to recover municipal tax, other than tax payable on

immediate demand, by persons to the municipality without prejudice to any other mode of recovery as special measure for expeditiously recovery of municipal tax.

15. Learned counsel for the petitioner submits that the method of recovery in respect of rent of immovable property falls under Section 292 under heading rent and charges. Section 291, 292 and 293 of the U.P. Municipalities Act, 1916 are quoted as below:-

"291. Recovery of rent on land- (1) Where any sum is due on account of rent from a person to a [Municipality] in respect of land vested in, or entrusted to the management of the [Municipality], the [Municipality] may apply to the Collector to recover any arrear of such rent as if it were an arrear of land revenue.

(2) The Collector on being satisfied that the sum is due shall proceed to recover it as an arrear of land revenue.

292. Recovery of rent of other immovable property- Any arrears due on account of rent from a person to the [Municipality] in respect of immovable property other than land vested in or entrusted to the management of the [Municipality] shall be recovered in the manner prescribed by Chapter VI.

293. Fees for use, otherwise than under a lease of municipal property.- (1) The [Municipality] may charge fees to be fixed by bye-law or by public auction or by agreement, for the use or occupation (otherwise than under a lease) of any immovable property vested in, or entrusted to the management of the [Municipality] including any public street or place of which it allows the use or occupation whether by allowing a projection thereon or otherwise.

(2) Such fees may either be levied along with the fee charged under Section 294 for the sanction, licence or permission or may be recovered in the manner provided by Chapter VI."

16. Section 292 clearly provided that in case of rent of immovable property, the recovery shall be made in the manner prescribed by Chapter VI of the Act.

17. We are thus of the opinion, that the arrears of rent, or the unpaid rent due, cannot be recovered by the Municipal Corporation from the petitioners as arrears of land revenue by adopting a process of recovery under the UPZA & LR Act, 1950 and the Rules framed thereunder.

18. The writ petitions are **allowed** only to the extent that the amount of rent, which is otherwise due to be paid by the petitioners from July 1999 to 16.11.2006, shall not be recovered from them as arrears of land revenue in accordance with the procedure prescribed under Section 279 and 280 of the UPZA & LR Act, 1950. The citations dated 14.9.2009 issued by the Tehsildar, Swar is accordingly quashed. This judgment, however, shall not restrict the authority or come in the way of the Municipal Corporation, from realising the arrears of rent as aforesaid by the method prescribed from Section 166 and 173 of the Municipalities Act, 1916 or any other method, which may be open to it in law.

ORIGINAL JURISDICITON
CIVIL SIDE]
DATED: ALLAHABAD 11.11.2010

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

Civil Misc. Writ Petition No. 63201 of 2010

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

Counsel for the Petitioner:
Sri Ashok Mehta

Counsel for the Respondents:
Sri Sunil Kumar Srivastava
C.S.C.

U.P. Intermediate Education Act 1921-Section-7-A-Power of committee management placing the part time teachers, Head of Institution under supervision-institution not within grant-in-aid-whether management empowered to suspend ? Held-"Yes", view taken by DIOS not proper to this extent-so for entitlement of salary as per direction of DIOS-affirmed-direction to conclude disciplinary proceeding withtin time.bound period-issued.

Held: Para 15, 21, and 22.

Once this is accepted position that the appointment of Hari Prakash Tiwari had been made after following the procedure as provided for under the Government order meant for part time teachers and part-time instructors, then in such a situation and in this background, the protection as is envisaged under Section 16G of U.P. Act No. 2 of 1921 is available or not, is the core issue.

Legal position on the subject is thus, clear that even in reference to part-time teachers, though it is not provided in the Government Order dated 10.08.2001, as the Committee of Management is vested with the authority to take disciplinary proceedings, and during this interregnum period till said proceedings are not finalised, the Committee of Management in exercise of its authority vested under Section 16 of the U.P. General Clauses Act is empowered to pass order of suspension. The authority of the Committee of Management of the institution in reference to part time teachers to pass order of suspension cannot be doubted on any score. Hon'ble Apex Court in the case of L.K. Verma vs. HMT Ltd., !IR 2006 SC 975, has taken the view that there are three kinds of suspension; (I) suspension may be passed by way of punishment in terms of Conduct Rules; (ii) suspension can be passed in exercise of inherent power, in the sense that work may not be taken from the delinquent official, but in that event salary has to be paid; and (iii) suspension order can be passed if there exist provisions in the Rules laying down that in place of full salary the delinquent would be entitled to subsistence allowance only.

In such a situation and in this background, once the Committee of Management of the institution happens to be the employer qua part time teachers, then to say and suggest that it has got no authority to place an incumbent under suspension or undertake disciplinary proceedings, cannot be accepted by any stretch of imagination, as an employer, it has inherent power to place an employee under suspension, and in the absence of Rules providing that in place of full salary the part time teacher would be entitled to subsistence allowance. Part time teacher would be temporarily prevented from discharging duty, but salary would be ensured to him.

Case law discussed:

(1999) 1 UPLBEC 1, 2000 (4) AWC 2767, 2000 (1) UPLBEC 2327, 2000 (4) ESC 2828, 2001 (1) UPLBEC 701, Writ Petition No. 1070 of 2001, 2003 (3) ESC 1388, Writ Petition No. 58230 of 2005,AIR 2006 SC 975

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

1. The Committee of Management of Acharya Raghubir Inter College, Kanpur Nagar through its manager, Dr. Arvind Dixit, has approached this Court, questioning the validity of decision dated 30.08.2010 taken by the District Inspector of Schools, Kanpur, proceeding to disapprove the suspension of Hari Prakash Tiwari as Principal of the said College, with a further direction to ensure payment of entire remuneration.

2. Brief background of the case, as disclosed from the record, is that in the district of Kanpur Nagar, there is a recognized institution known as Acharya Raghubir Inter College, Kanpur Nagar. Affairs of the said institution are being run and managed as per provisions of U.P. Act No. 2 of 1921. Said institution in question is not at all on grant-in-aid list of the State Government, as such provisions of U.P. Act No. 24 of 1971 are not at all applicable to the said institution. The institution in question has been accorded VITT VIHIN recognition in terms of Section 7A of U.P. Act No. 2 of 1921. In the said institution Hari Prakash Tiwari was appointed as its Principal in the year 1990; he has been functioning in the said capacity and salary was being ensured to him from the resources generated by the Committee of Management of the institution. The Committee of Management took over the charge in the year 2008; allegation of the Committee of Management was that the Principal of the institution at no point of time had been cooperating and at all point of time he flouted the directives issued by the Committee of Management. In such a situation and in this background, the Committee of Management resolved to place Hari Prakash Tiwari under suspension on 25.05.2009. Charge sheet dated 08.06.2009 was served on Hari Prakash Tiwari, reply to which was submitted by him on 27.07.2009. It appears that, as nothing was being done by the Committee of Management after placing him under suspension, Hari Prakash Tiwari preferred writ petition No.67648 of 2009. This Court on 11.12.2009 asked the District Inspector of Schools to look into the matter and take appropriate decision. The District Inspector of Schools, thereafter, took the proceedings and on 30.08.2010 proceeded to pass order revoking the suspension on the ground of lack of authority to pass the order of suspension and further directed for ensuring payment of salary. At this juncture, present writ petition has been filed by the Committee of Management.

3. Sri Ashok Khare, Senior Advocate, assisted by Sri Sunil Kumar Srivastava, Advocate, appearing for Hari Prakash Tiwari, at the very outset, contended that his client does not intend to file any counter affidavit and on the basis of arguments advanced, writ petition be heard and disposed of, as issue involved involved in present case is one of the jurisdiction, which requires no pleadings, whatsoever. In such a situation and in this background, present writ petition is being finally heard and disposed of with the consent of parties. Learned standing counsel also consented to this proposal.

4. Sri Ashok Mehta, Advocate contended with vehemence that appointment of Hari Prakash Tiwari had been made following the provisions as contained under Section 7AA of U.P. Act No. 2 of 1921, in such a situation and in

this background, the Committee of Management of the institution in question had got absolute authority to place the incumbent under suspension, and the District Inspector of Schools has got no authority to set aside the aforementioned order on the ground that under the Government Order dated 10.08.2001 there is no authority to place the incumbent under suspension, as such writ petition deserves to be allowed.

5. Sri Ashok Khare, Senior Advocate, countered the said submission by contending that the provisions of Section 16G (7) of U.P. Act No. 2 of 1921 are fully applicable and as suspension order has not been approved within sixty days, as such by operation of law, said suspension order became non-existent; in such a situation and in this background, the order which has been passed, requires no interference by this Court. Coupled with this, it has also been sought to be contended that the power of suspension has been misused in the present case as even the amount due has not been paid, and further even after submission of reply to the charge sheet not even a single step has been taken up to conclude the disciplinary proceedings and to bring the same to its logical end, as such writ petition, in the facts of the case, deserves to be dismissed.

6. Learned standing counsel contended before this Court that since both the contesting parties have argued the matter, the issue being legal one, same be answered accordingly.

7. In order to appreciate the respective arguments advanced on behalf of the parties, the relevant provisions, which deal with the recognition and employment of part time teachers or part time instructor, are being looked into.

8. For Vitt Vihin recognition and appointment of part-time teachers/instructors, the provision has been introduced, the State Government issued an Order dated 14.10.1986 followed by another Government Order dated 03.08.1987. Relevant extract of the said Government Orders are being excerpted below:

''इण्टरमीडियट शिक्षा संशोधन अध्यादेश 1986

संख्याः 1826/सत्रह–वि–1–2 (क) 10/1986

लखनऊःदिनांक 14 अक्टुबर, 1986

अधिनियम 1921 का अग्रेतर संशोधन करने के लिए अध्यादेश

नाम–1–यह अध्यादेश इण्टरमीडियएट शिक्षा (संशोधन) अध्यादेश 1986 कहा

–किसी नए विषय में या किसी उच्च कक्षा के लिए किसी संस्था को के खण्ड (4) मे किसी बात के होते हुए भी–

(क) बोर्ड, राज्य सरकार के पूर्वानुमोदन से, किसी संस्था को किसी नए विषय या विषयों के में या किसी उच्च कक्षा के लिए मान्यता दे सकता है,

(ख) निरीक्षक किसी संस्था को वर्तमान कक्षा के नया अनुभाग खोलने को अनुज्ञा दे सकता है।

धारा–7कक अंशकालिक अध्यापकों / अंशकालिक अनुदेशकों का समायोजन– इस अधिनियम में किसी बात के होते हुए भी, किसी संस्था का प्रबन्धाधिकरण,

(एक) अंशकालिक अध्यापक को, धारा 7कक के अधीन जिस विषय या विषयों के वर्ग या उच्च कक्षा के लिए मान्यता दी गई है, उसमें या वर्तमान कक्षा के अनुभाग के लिए अनुज्ञा दी गई है, उसमें शिक्षा देने के लिए,

(दो) अंशकालिक अनुदेशक को, नैतिक शिक्षा या सामाजिक दृष्टि से उपयोगी उत्पादन कार्य के लिए मान्यता दी गई है, उसमें या वर्तमान कक्षा के लिए अनुभाग के लिए अनुज्ञा दी गई है, उसमें शिक्षा देने के लिए,

अपने स्रोतों से समायोजित कर सकता है।

2— धारा 7क के अधीन कोई मान्यता और कोई अनुज्ञा तब तक नहीं दी जाएगी जब तक कि प्रबन्ध समिति निरीक्षक को नकद या बैंक प्रत्याभूति के रूप में ऐसी प्रतिभूति न दे जैसी राज्य सरकार के द्वारा समय समय पर विनिर्दिष्ट की जाय।

3— किसी संस्था में किसी अंशकालिक अध्यापक को तब तक शर्तों का जैसी राज्य सरकार द्वारा जिस निमित्त आदेश द्वारा विनिर्दिष्ट की जाय, अनुपालन किया जाएं

4— कोई अंशकालिक अध्यापक या अंशकालिक अनुदेशक तब तक सेवायोजित नहीं किया जायेगा जब तक कि वह ऐसी न्यूनतम अर्हताएं, जैसी विहित की जाए, न रखता हो।

5— किसी अंशकालिक अध्यापक या अंशकालिक अनुदेशक को ऐसा मानदेय दिया जायेगा जैसा राज्य सरकार द्वारा इस निमित्त सामान्य या विशेष आदेश द्वारा निर्धारित किया जाय।

6— इस अधिनियम की कोई बात किसी संस्था में अध्यापके के रूप में पहले से कार्यरत व्यक्ति को धारा 7कक के अधीन अंशकालिक अध्यापक या अंशकालिक अनुदेश के रूप में सेवायोजित किये जाने से प्रवारित नहीं करेगी।

राज्यपाल उत्तर प्रदेश

षवित्तविहीन मान्यता

संख्याः4166 / 15—8—3065 / 85

प्रेषक,

श्री जगदीश चन्द्र गुप्त,
प्रमुख सचिव,
उत्तर प्रदेश शासन।
शिक्षा (8) अनुभाग

सेवा में,

1. शिक्षा निदेशक, उ0प्र0, लखनऊ / इलाहाबाद।
2. शिक्षा निदेशक एवं सभापति, मा0 शि0प0, उ0प्र0, इलाहाबाद / लखनऊ ।

लखनऊः दिनांक 3 अगस्त, 1987

विषयः— इण्टरमीडियट शिक्षा (संशोधन) अधिनियम, 1987 (उत्तर प्रदेश अधिनियम संख्या 18 सन् 1987 के अन्तर्गत मान्यता एवं अंशकालिक अध्यापकों / अनुदेशकों की व्यवस्था।

महोदय,

शिक्षा के क्षेत्र में शिक्षण के विभिन्न विषयों में यथा कला, व्यवसाय एवं अन्य विषयों में स्वैच्छिक आधार पर स्थानीय प्रतिभा एवं विशेषज्ञों की सेवा उपयुक्त मानदेय पर सुलभ करने, कार्यानुभव अथवा समाजोपयोगी, उत्पादक काग्र एवं व्यवसायिक धारा में शिक्षण की लचीली व्यवस्था सुनिश्चित कराने और एतदर्थ स्थानीय समुदाय की सहभागिता प्राप्त करने और उसे संसाधन जुटाने हेतु प्रोत्साहित करने की दृष्टि से इण्टरमीडिएट शिक्षा (संशोधन) अधिनियम, 1987 दिनांक 30.7.87 बनाया गया है।

2. इस (संशोधन) अधिनियम की धारा 7क (क) के अन्तर्गत माध्यमिक शिक्षा परिषद, राज्य सरकार के पूर्वानुमोदन से किसी संस्था को किसी नये विषय में या विषयों में वर्ग में या किसी उच्च कक्षा के लिये मान्यता दे सकती है और धारा 7क (ख) के अन्तर्गत निरीक्षक किसी संस्था को किसी वर्तमान कक्षा में नया अनुभाग खोलने की अनुज्ञा दे सकता है। धारा 7क (1) के अन्तर्गत किसी संस्था का प्रबन्धाधिकरण (एक) आन्तरिक व्यवस्था के रूप में अंशकालिक अध्यापक को, धारा 7क के अधीन जिस विषय या विषयों के वर्ग या उच्च कक्षा के लिए मान्यता दी गयी है उसमें, या वर्तमान कक्षा के जिस अनुभाग के लिए अनुज्ञा दी गई है उसमें शिक्षा देने के लिए, (दो) अंशकालिक अनुदेशकों को, नैतिक शिक्षा या सामाजिक दृष्टि से उपयोगी (समाजोपयोगी) उत्पादक काग्र के लिये किसी व्यापार या शिलप या व्यवसायिक पाठ्यक्रम में अनुदेश देने के लिए अपने स्रोत से सेवायोजित कर सकता है।

3. इस संबंध में यह स्पष्ट किया जाता है कि इण्टरमीडियट शिक्षा (संशोधन) अधिनियम 1987 द्वारा अंशकालिक अध्यापकों को नियोजित करने विषयक यह अन्तरिम व्यवस्था है। अग्रेतर यह भी स्पष्ट किया जाता है कि इस (संशोधन) अधिनियम के परिप्रेक्ष्य में सम्प्रति

साहित्यिक वर्ग, गणित, विज्ञान (जिसमें गृह विज्ञान सम्मिलित है) वाणिज्य (कामर्स) तथा कृषि से सम्बन्धित विषयों की ही मान्यता दिये जाने की व्यवस्था है।

4. अंशकालिक सेवायोजन प्रबन्धतन्त्र के निजी स्रोतों पर अवलम्बित है। इस हेतु औपचारिक पद सृजन की अपेक्षा नहीं है परन्तु ऐसा सेवायोजन भी अधिनियम की धारा 7क के प्रावधान से नियन्त्रित रहेगा।

5. 7कक (2) के अन्तर्गत धारा 7 क के अधीन किसी मान्यता और अनुज्ञा को नकद या बैंक प्रत्याभूति के रूप में ऐसी प्रतिभूति से प्रतिबन्धित है जो समय□ पर विर्दिनिष्ट करें। इस धारा के अधीन प्रतिभूति देयता निम्नवत् हैः–

(क) हाईस्कूल की नवीन मान्यता अर्थात प्रथम बार हाईस्कूल की मान्यता दिये जाने पर जो सुरक्षित कोष, प्राभूत आदि की शर्ते माध्यमिक शिक्षा परिषद द्वारा मान्यता के मानकों के अन्तर्गत निर्धारित है, पर्याप्त मानी जायेगी और इस अधिनियम की धारा 7कक (2) के अन्तर्गत कोई अतिरिक्त प्रतिभूति देय न होगी।

(ख) इण्टरमीडियट की नवीन मान्यता अर्थात प्रथम बार हाईस्कूल से इण्टर स्तर पर उच्चीकृत होने पर माध्यमिक शिक्षा परिषद द्वारा निर्धारित सुरक्षित कोष, प्राभूत आदि के अलावा धारा 7कक (2) के अन्तर्गत प्रत्येक वर्ग (साहित्यिक, वैज्ञानिक, गृहविज्ञान, सहित कृषि एवं कामर्स) के लिये रू0 5000/– (रूपये पॉच हजार) की प्रतिभूति अतिरिक्त देय होगी। इण्टर स्तर पर अतिरिक्त वर्ग के लिये भी रू0 5000/– (रूपये पॉच हजार) की प्रतिभूति देय होगी।

(ग) (हाईस्कूल) और इण्टर स्तर पर प्रत्येक अतिरिक्त विषय (साहित्यिक, विज्ञान, गृह विज्ञान सहित, गणित, कृषि और कामर्स से सम्बन्धित) के लिये धारा 7कक (2) के अन्तर्गत रू0 3000/– (रूपये तीन हजार) की प्रतिभूति देय होगी।

(घ) निरीक्षक द्वारा किसी वर्तमान कक्षा में अतिरिक्त अनुभाग खोले जाने की अनुमति देने पर सामान्यतया कोई प्रतिभूति देय न होगी परन्तु यदि अतिरिक्त अनुभाग खोले जाने के फलस्वरूप अंशकालिक अध्यापकों का सेवायोजन भी अभीष्ट हो तो रू0 3000/– (रूपये तीन हजार) की प्रतिभूति देय होगी।

6. इस (संशोधन) अधिनियम की धारा 7कक (4) में यह प्रावधान है कि कोई अंशकालिक अध्यापक तथा अंशकालिक अनुदेशक तब तक सेवायोजित नहीं किया जायेगा तब तक कि वह ऐसी न्यूनतम अर्हतायें, जैसी विहीत की जाय, न रखता हो। इस सम्बन्ध में यह स्पष्ट किया जाता है कि अंशकालिक अध्यापकों के लिये भी वही न्यूनतम अर्हताएं लागू होगी जो माध्यमिक शिक्षा परिषद के नियम संग्रह के अध्याय 2 के परिशिष्ट ''क'' में निर्धारित है। जहां तक अंशकालिक अनुदेशकों के लिये न्यूनतम अर्हता विहित करने का प्रश्न है यह स्पष्ट करना है कि इन अनुदेशकों का सेवायोजन केवल नैतिक शिक्षा पर समाजोपयोगी उत्पादक कार्य / कार्यानुभव या व्यवसायिक पाठ्यक्रम या शिल्प में अनुदेश देने के लिये किया जायेगा और इस हेतु प्रबन्ध तंत्र को यह छूट रहेगी कि वे सम्बन्धित शिल्प आदि के योग्यता एवं पर्याप्त अनुभव रखने वाले स्थानीय विशेषज्ञ को अनुदेशक के रूप में स्वविवेक से सेवायोजित करें।

7. 7कक (5) में यह प्रावधान है कि किसी अंशकालिक अध्यापक या अंशकालिक अनुदेशक को ऐसा मानदेय दिया जायेगा जैसा राज्य सरकार द्वारा निमित्त सामान्य या विशेष आदेश द्वारा निर्धारित किया जाय। इन सम्बन्ध में सम्प्रति स्थिति निम्नवत् है–

(क) प्रत्येक अंशकालिक अध्यापक के यह अपेक्षा होगी कि वह सप्ताह में न्यूनतम 12 और 18 वादनों का अध्यापन करें।

(ख) अंशकालिक अध्यापकों को मानदेय दिये जाने की दर कक्षा 9 और 10 में प्रतिवादन रू0 6.50 और 11–12 में प्रतिवादन रू0 10.00 होगी। प्रत्येक वादन में किये जाने वाले अध्यापन कार्य में लिखित कार्य की जांच का कार्य भी सम्मिलित है। कार्यरत अध्यापक अथवा अन्य कार्मिक को अंशकालिक अध्यापन का कार्य भी दिये जाने की स्थिति में उन्हें मानदेय की धनराशि सामन्य से आधी होगी। कार्यरत अध्यापक अथवा अन्य कार्मिक को सेवायोजित करने के पूर्व सम्बन्धित प्रधानाचार्य अथवा सेवायोजक द्वारा यह प्रमाण पत्र दिया जाना आवश्यक होगा कि उसके द्वारा किये जाने वाले अंशकालीन अध्यापन से विद्यालय का उसका पूर्णकालिक अध्यापन कार्य अथवा सामान्य कार्य प्रभावित नहीं होगा। कार्यरत अध्यापक के सम्बन्ध में यह प्रमाण पत्र उस संस्था के प्रधानाचार्य द्वारा दिया जायेगा जहॉ अध्यापक कार्यरत है। इसी प्रकार अन्य कार्मिक के सम्बन्ध में उस सेवायोजक द्वारा दिया जायेगा जिसके अधीन कार्मिक कार्यरत है।

(ग) विभिन्न शिल्पों या समाजोपयोगी उत्पादक कार्यो / कार्यानुभव या व्यवसायिक पाठ्यक्रमों या

नैतिक शिक्षा में प्रति सप्ताह पढ़ाये जाने वाले न्यूनतम वादनों की संख्या और भी कम हो सकती है अतः अंशकालिक अनुदेशकों के सम्बन्ध में प्रबन्ध तंत्र को यह छूट रहेगी कि वे पारस्परिक सहमति से मानदेय की उचित दर निर्धारित कर लें। परन्तु किसी एक अनुदेशक को प्रतिमाह देय मानदेय की धनराशि रू0 350.00 से अधिक नहीं होगी।

(घ) यदि कोई अंशकालिक अध्यापक 11 से कम वादनों का अध्यापन कार्य करता है तो उसे वास्तविक रूप में किये गये अध्यापन कार्य के वादनों का मानदेय देय होगा परन्तु 18 से अधिक वादनों का अध्यापन कार्य न तो कराया जायेगा और न ही इस हेतु कोई अधिक धनराशि देय होगी।

(ड) अंशकालीन अध्यापक का प्रत्येक माह 15 तारीख तक उनके पिछले माह की देय धनराशि का भुगतान कर दिया जायेगा।

(च) अंशकालीन अध्यापकों के लिये अधिकतम आयु सीमा का कोई बन्धन नहीं होगा और सेवानिवृत्ति व्यक्ति भी सेवायोजित किये जा सकेंगे।

8. अंशकालिक अध्यापकों का सेवायोजन कोई अस्थाई व्यवस्था नहीं है, तथापि एक समिति या अल्प अवधि के लिये भी उन्हें सेवायोजित करने के पूर्ण यह आवश्यक है कि अंशकालिक अध्यापक के रूप में उपयुक्त ओर योग्य अभ्यर्थी मिल सकें। अतः इस (संशोधन) अधिनियम की धारा 7 कक (3) के अन्तर्गत निम्नांकित व्यवस्था निर्धारित की जाती है–

(1) अंशकालिक अध्यापकों को सेवायोजित करने हेतु सम्बन्धित विषय/ विषयों में वांछित अभ्यर्थियों के लिये विज्ञापन कम से कम ऐसे दो समाचार पत्रों में करना आवश्यक होगा जिनका उस क्षेत्र में जिसमें संस्था स्थित हो, व्यापक परिचालन हो। विज्ञापन का प्रारूप (संलग्नक–1) में दिया गया है।

(2) समाचार पत्रों में विज्ञापन के पश्चात् यह भी आवश्यक होगा कि उपयुक्त अभ्यर्थी के चयन के लिये प्रत्येक विद्यालय में एक चयन समिति गठित की जाय। इस समिति का गठन निम्नवत् होगा–

1) प्रबन्ध तंत्र द्वारा नामित एक प्रतिनिधि (जो समिति का अध्यक्ष होगा)

(2) विद्यालय का प्रधानाचार्य / प्रधानाचार्या।

(3) समीपवर्ती राजकीय या अशासकीय उच्चतर माध्यमिक विद्यालय का उस विषय का वरिष्ठतम शिक्षक (जिसका नामांकन उसी संस्था का प्रधानाचार्य/ प्रधानाचार्या करेगा/करेगी।)

9. यदि समिति विद्यालय की आवश्यकताओं के सन्दर्भ में किसी एक विषय/विषयों में अपेक्षित संख्या में अंशकालिक अध्यापकों को सेवायोजित करने हेतु अपनी संस्तुति प्रबन्धतंत्र को देगी और उसकी संस्तुति के अनुसार ही अंशकालिक अध्यापक / अध्यापकों को सेवायोजित करेगा। सेवायोजन का प्रारूप (संलग्नक–2) में दिया गया है।

10. अंशकालिक अध्यापक / अनुदेशकों का एक पृथक उपस्थिति रजिस्टर रखा जायेगा जिसमें प्रत्येक अंशकालिक अध्यापक / अनुदेशक द्वारा प्रत्येक दिन वास्तव में किये गये वादनवार अध्यापन कार्य हेतु उपस्थिति का हस्ताक्षर किया जायेगा और प्रधानाचार्य / प्रधानाचार्या प्रति हस्ताक्षरित करेंगे / करेंगी प्रत्येक अंशकालिक अध्यापक / अनुदेश के लिए पृथक–पृथक पृष्ठ रखे जायेंगे।

11.चूंकि उक्त अंशकालिक व्यवस्था प्रबन्ध तन्त्र के निजी स्रोतों पर अवलम्बित है। अतः इण्टरमीडियट शिक्षा अधिनियम की धारा 7 (ड़) के अन्तर्गत प्रबन्धतंत्र इस हेतु दान स्वीकार कर सकेंगे, जिसका लेखा–जोखा पृथक से रखा जायेगा। परन्तु इस व्यय को वहन करने हेतु कोई अतिरिक्त शुल्क विद्यार्थियों से नहीं लिया जायेगा।

इण्टरमीडियट शिक्षा (संशोधन) अधिनियम, 1987 की 10 प्रतियॉ संलग्न है।

जगदीश चन्द्र पन्त (प्रमुख सचिव)ष

9. In this context the provisions of Sections 7 (4), 7A , 7AA, 7AB of U.P. Act No. 2 of 1921 after being introduced and made part of the Statute are being quoted below:

"Section 7 (4): to recognize institution for the purposes of this its examination.

"7-A. Recognition of an institution in any new subject or for a higher class.--- Not withstanding anything contained in

clause (4) of Section 7 ---

(a) the Board may, with the prior approval of the State Government, recognize an institution in any new subject or group of subjects or for a higher class.

(b) The Inspector may permit an Institution to open a new section in an existing class.

7AA. Employment of part time teachers or part time instructors.- (1) Notwithstanding anything contained ion this Act, the management of an institution may, from its own resources, employ-

(i)as an interim measure part time teachers for imparting instructions in any subject or group of subjects or for a higher class for which recognition is given or in any Section of an existing class for which permission is granted under Section 7A;

(ii)part-time instructors to impart instructions in moral education or any trade or craft under socially useful productive work or vocational course.

(2) No recognition shall be given and no permission shall be granted under Section 7A, unless the Committee of Management furnishes such scrutiny in case or by way of Bank Guarantee to the Inspector as may be specified by the State Government from time to time.

(3) No part time teacher shall be employed in an institution unless such conditions may be specified by the State Government by order in this behalf are complied with.

(4) No part time teacher or part-time instructor shall be employed unless he possesse. The view taken by the District Inspector of Schools is correct view and warrants no interference.s such minimum qualifications as may be prescribed.

(5) A part-time teacher or a part-time instructor shall be paid such honorarium as may be fixed by the State Government by general or special order in this behalf.

(6) Nothing in this Act shall preclude a person already serving as a teacher in an institution from being employed as a part time teacher or part-time instructor under Section 7AA.

7AB. Exemption. Nothing in the Uttar Pradesh High School and Intermediate Colleges (Payment of Salaries of Teachers and other Employees) Act, 1971 (U.P. Act No. 24 of 1971) or the Uttar Pradesh Secondary Education Services Selection Boards Act, 1982 (U.P. Act No. 5 of 1982) shall apply in relation to part time teacher and part-time instructor employed in an institution under Section 7AA."

10. Section 7A was substituted in the Statute by an amendment with effect from 14.10.1986 by means of U.P. Act No. 18 of 1987 and same provided for that not withstanding anything contained in sub-sections (4) of Section 7; (a) the Board may, with the prior approval of the State Government, recognize an institution in any new subject or group of subjects or for a higher class; (b) the Inspector may permit an Institution to open a new section in an existing class. Section 7 enumerates the power of the Board and in sub-section (4) thereof one of the powers vested in the Board is to recognize the institutions for the purposes

of its examinations. Section 7AA, inserted by U.P. Act No. 18 of 1987 makes provisions for employment of part-time teachers or part-time instructors also. It provides inter alia that notwithstanding anything contained in this Act, the Management of an institution may, from its own resources, employ- (i) as an interim measure part-time teachers for imparting instructions in any subject or group of subjects or for a higher class for which recognition is given or in any Section of an existing class for which permission is granted under Section 7A; (ii) part-time instructors to impart instructions in moral education or any trade or craft under socially useful productive work or vocational course. Sub-sections (3) to (5) of Section 7AA lay down pre-conditions for appointment of part-time teachers. Sub-section (6) of Section 7-AA provides that nothing in the Act shall preclude a person already serving as a teacher in an institution from being employed as a part-time teacher or part-time instructor under Section 7AA of the Act.

11. As the arrangement to be made for employment of part-time teacher or part-time instructor was not saddling the State Government with any financial liability and entire expenditure on the said score was to be arranged by the Committee of Management of the institution from its own resources, the position was made more clear under U.P. Act No. 18 of 1987 that in relation to part-time teacher and part-time instructor employed in the institution under Section 7AA, the provisions of U.P. Act No. 24 of 1971 and U.P. Act No. 5 of 1982 will not be applicable. This specific provision clearly intended to make the position clear that by acquiring the status of part-time teacher or part-time instructor, an incumbent would ipso fact not be entitled to any payment under U.P. Act No. 24 of 1971, and further as no creation of post is involved, as such there is no occasion for making any selection and appointment under the provisions of U.P. Act No. 5 of 1982, and thus giving a free hand to the Management to make selection and appointment of part-time teacher and part-time instructor from their own personal resources, ignoring the provisions of U.P. Act No. 5 of 1982, inasmuch as Section 16 of U.P. Act No. 5 of 1982 clearly provides that appointment of any incumbent as mentioned in the Schedule without the recommendation of the Board would be void and illegal.

12. This is not disputed that the institution in question has been accorded recognition in terms of the provisions of Section 7A of U.P. Act No.2 of 1921. When recognition was accorded to the said institution by U.P. Madhyamik Shiksha Parishad, at the said point of time this fact is also not disputed that selection and appointment of part-time teacher and part-time instructor was to be made strictly in consonance with the provisions as contained in Government Order dated 14.10.1986 read with Government Order dated 03.08.1987 and the selection proceedings had been undertaken also as per Government Order holding the filed and at no point of time any proceeding had been undertaken for making selection and appointment on the post of Head Master and Principal as is enumerated either under U.P. Act No. 2 of 1921 or U.P. Act No. 5 of 1982.

13. Under U.P. Act No. 2 of of 1921 and the Regulations framed thereunder for making selection and appointment of

Principal/Teacher, Selection Committee has to be constituted in terms of Section 16F and procedure provided for under Chapter II Regulations 10 to 15 has to be adhered to and before said appointment is to be finalized by issuance of appointment letter, the District Inspector of Schools has to examine the validity of said appointment. Similarly, under U.P. Act No. 5 of 1982 read with Rules, altogether a different procedure has been provided for in the matter of selection and appointment of Principal and Teacher. Accepted position is that at no point of time while making selection and appointment of petitioner as Principal, either the provisions as contained and noted above under U.P. Act No. 2 of of 1921 or U.P. Act No. 5 of of 1982 had ever been followed, rather petitioner's selection and appointment has been made in consonance with the two Government Orders quoted above, namely, Government Orders dated 14.10.1986 and 03.08.1987.

14. The provisions in reference to payment of salary to part-time teachers and part-time instructors, qua their rights, has been subject matter of consideration before Full Bench of this Court in the case of ***Gopal Dubey Versus District Inspector of Schools, Maharajganj and another, (1999) 1 UPLBEC 1.*** The Court held as under:

"14. Section 7 of the said Act, enumerates power of the Board. In sub-section. (4) thereof one of the powers vested in the Board is to recognise institutions for the purposes of its examinations.

15. In Section 7A, which was substituted in the statute by amendment with effect from 14.10.1986 by U. P. Act No. XVIII of 1987, it is laid down that notwithstanding anything contained In clause (4) of Section 7, (a) the Board may, with the prior approval of the State Government, recognise an institution in any new subject or group of subjects or for a higher class ; (b) the Inspector may permit an Institution to open a new section in an existing class.

16. Section 7AA, which was inserted by U. P. Act XVIII of 1987 makes provision for employment of part time teachers or part lime instructors. It provides, infer alia, that notwithstanding anything contained in this Act the management of an institution may from its own resources employ : (i) as an interim measure part time teachers for Imparting instructions in any subject or group of subjects or for a higher class for which recognition is given or in any section of an existing class for which permission is granted under Section 7A ; (ii) part time instructors to impart instructions in moral education or any trade or craft under socially or useful productive work or vocational course. Sub-sections (2) to (5) lay down preconditions for appointment of a part time teacher. In sub-section (6) of Section 7AA it is provided that nothing in the Act shall preclude a person already serving as a teacher in an institution from being employed as a part time teacher or a part time instructor under Section 7AA. In this connection a provision in the Regulations framed under the Intermediate Education Act is relevant. In Regulation 19 under Chapter II of the Regulations, it is laid down that where any person is appointed as, or any promotion is made on any post of head of Institution or teacher in contravention of the provisions of this

Chapter or against any post other than a sanctioned post, the Inspector shall decline to pay salary and other allowances, if any, to such person where the Institution is covered by the provisions of the U. P. High Schools and Intermediate Colleges (Payment of Salaries of Teachers and other Employees) Act. 1971 and in other case shall decline to give grant for the salary and allowance in respect of such person."

15. In the present case, accepted position is that as far as Hari Prakash Tiwari is concerned, his selection and appointment at no point of time had been made as per provisions contained under Sections 16E and 16F of U.P. Act No. 2 of 1921 read with Chapter II Regulations 10 to 16 of the Regulations framed thereunder nor under the provisions of U.P. Act No. 5 of 1982 and Rules framed thereunder. Once this is accepted position that the appointment of Hari Prakash Tiwari had been made after following the procedure as provided for under the Government order meant for part time teachers and part-time instructors, then in such a situation and in this background, the protection as is envisaged under Section 16G of U.P. Act No. 2 of 1921 is available or not, is the core issue. This Court in the case of ***Dharmendra Pal Dwivedi vs. District Inspector of Schools, 2000 (4) AWC 2767,*** took the view that on institution being recognized, consequences flowing from recognition would flow and consequently regulations governing condition of service would apply. This Court in the case of ***Shashi Kala Singh vs. District Inspector of Schools, Maharajganj, 2000 (1) UPLBEC 2327,*** decided on 30.08.2000 took the view that the provisions of Section 16G (3) of U.P. Act No. 2 of 1921 are applicable and attracted in the facts of the case. Relevant portion of the judgment is being quoted below:

".....Appointment of a part time teacher under Section 7AA in an Institution, which has been given Vitta Vihin recognition, is not required to be made in the manner prescribed by Section 16-F of the Act and the Regulations made thereunder. But that by itself does not lend support to the interpretation that the part-time teachers appointed under Section 7-AA of the Act could be given tertiary treatment and dealt with in arbitrary fashion by the Management. An element of public interest is involved both in the appointment and termination of services of such teachers in that the duties and functions of such teachers have the complexion of public nature. No person having requisite qualification prescribed in Appendix A to Regulation of Chapter II of the Act can be appointed as part time teacher under Section 7AA of the Act and once a teacher is appointed under Section 7-AA, he acquires a right to be dealt with reasonably by the management. The principle contained in Section 16-G (3) (a) of Chapter III of the Regulations made under the Act, being of regulatory nature, would be attracted even in relation to part-time teacher appointed under Section 7AA of the Act and by this reckoning, obligation is cast upon the District Inspector of Schools to ensure that such teachers are not dealt with by the Management in antagonism of the principle of natural justice. It would be contrary to public policy and public interest to clothe the Management of an institution with unfettered power to terminate the services of part-time teachers who perform as much public function as regularly appointed teachers.

Even the District Inspector of Schools was of the view that the Management could not terminate the services of part-time teachers arbitrarily and in breach of the canon of natural justice but he failed to examine whether in the present case, the Management acted arbitrarily and in violation of rules of natural justice which are embodied in Regulations 36 and 37 of Chapter III of the Regulations made under the Act. The non-obstinate clause 'notwithstanding' in Section 7-AA overrides the provisions of the Act in so far as method of appointment of part time teachers and instructors is concerned. In my opinion, it does not exclude the applicability of Section 16-G of the Act and related provisions of the Regulations. Section 16-E (10) of the Act will also be attracted in appropriate cases e. g. where the appointee does not possess the requisite qualification, the appointment will be liable to be cancelled by competent authority. Though there is no need for creation of posts of part time teachers, employment of part time teachers too is 'Niyamit' (regular) subject to certain conditions as visualized by condition No.4 of the G.O. darted 15.10.1986. Since prior approval of District Inspector of Schools as visualized by Section 16-G (3) of the Act has not been obtained, and the validity of the decision of the Management has not been examined on the anvil of canons of justice and fair play, the order impugned herein cannot be sustained.

6. Before parting with the case, I would like to observe that the question whether the post of Principal will also come under the provisions of Section 7-AA of the Act is left open to be decided by District Inspector of Schools and the parties are given liberty to have their say on the point before the District Inspector of Schools, who will examine the question keeping in mind clause 5 of the recognition order dated 16.1.1997. Appointment in the instant case was made not on a fixed honourarium but in a given scale of pay i.e. 2000-3500. In case, it is found that the post of Principal would be deemed to have been created in view of clause 5 of the recognition order, whole complexion of appointment would be changed. The post of Principal in that event would go out of the purview of Section 7AA of the Act and will have to be filled in accordance with the provisions of the U.P. Secondary Education Service Selection Board Act, 1982."

16. Subsequently the judgment of Shashi Kala Singh (supra) was disapproved by this Court in the case of Smt. Suman Lata Sharma vs. Regional Joint Director of Education, 2000 (4) ESC 2828. Relevant paragraphs 4 to 7 are being extracted below:

"4. Sri S.P. Pandey the learned standing counsel has urged that the petitioner was not working against any sanctioned post, therefore, she was not entitled for any salary. He urged that the petitioner was not entitled to claim regularization of service and the provisions of U.P. Act No. 5 of 1982 is not applicable to a part time teacher or a teacher who is worming on a post which has neither been created nor sanctioned under the Salaries Act. He urged that in view of the Full Bench decision of this Court in ***Gopal Dubey v. District Inspector of Schools*** 1999 (1) ESC 168 (All) (F.B.), the petitioner is not entitled for any relief.

5. From the facts stated above it is

clear that even though the permission to teach science subjects was granted in 1982 but when the petitioner was appointed in July, 1989 in pursuance of advertisement dated 28.6.1989 Section 7A had been substituted and Section 7AA had been inserted on 14.10.1986 by U.P. Act No. 18 of 1987. Since the permission granted by the authorities was 'Vitta vihin' that is unaided, and no post was sanctioned or created, the appointment of the petitioner could be part time or honorarium. In the first appointment letter she was appointed on a salary of Rs.450/- per month. The second letter filed as Annexure-3 to the petition appointing her in 1995 shows that she was appointed as part-time assistant teacher on a salary of Rs.550/- per month. The allegation in the counter affidavit filed in earlier writ petition shows that she used to be engaged for nine or ten months in a year. The petitioner does not claim that the statement of fact in the counter affidavit is incorrect. Her entire claim is based on length of period she has been serving and applicability of U.P. Act No. 5 of 1982. It is true that the petitioner appears to have worked for more than ten years on a meagre salary. She is M. Sc. B. Ed. She might have accepted the appointment in the hope that sooner or later she would be absorbed as a regular teacher. But the expectations did not materialize. She had to approach this Court thrice. It is unfortunate. But no amount of sympathy or compassion can overcome the law. The petitioner can succeed only if she can be held to have some right either for regularization or salary. This Court in Full Bench decision in ***Gopal Dubey*** (supra) has held that if permission to teach a subject has been granted but the post has not been created or sanctioned under the Salaries Act then no salary could be paid to the teacher from the grant-in-aid received from the Government. The learned counsel for the petitioner urged that in view of the decision of Apex Court in ***Chandigarh Administration*** (supra) the respondents cannot refuse payment of salary to the petitioner who is teaching science subject in High School classes. And non-payment of salary amounted to discrimination as other teachers working in the institutions are being paid salary from the grant-in-aid received from the Government. This argument is devoid of any merit. This Court in Civil Misc. Writ Petition No.29097 of 1998 ***Mohammad Fuzall Ansari v. State of U.P. and others*** decided on 30.11.2000, reported in 2000 (4) ESC 2843 (All) has held that the decision of Apex Court could not help a teacher who has been appointed on a post which has not been created or sanctioned.

6. Shri Khare urged that Section 7A and Section 7AA of Act came into force with effect from 14.10.1986 but since recognition for teaching science subject having been granted on 31.08.1982 with effect from 1984 High School Examination, the amended provisions did not apply and the petitioner could not be treated to be a part-time teacher. The argument is devoid of any substance. The petitioner can claim right on the law prevalent on the date of her appointment and not on the law as it was when permission was granted. And in 1989 the date of her first appointment, Sections 7A and 7AA had come into force, therefore, she could be treated either a part-time teacher or honorary assistant teacher. The recognition granted in 1982 was of no consequence. If the argument of the learned counsel for the petitioner is accepted it would be in contrary to statutory provisions. The nature of

petitioner's appointment has been explained in the counter affidavit filed by the principal of the institution in Civil Misc. Writ Petition No.38018 of 2000. It shows that the petitioner was never appointed as a regular teacher in the institution. And since she did not accept the appointment made by the management on 1.7.2000 as a part time teacher the petitioner cannot claim that she has acquired any right to continue as a teacher in the institution. Even if the petitioner had worked for short period in the institution from time to time for more than ten years, it would not confer any right on her to claim a regular appointment or claim that she be regularized in the institution. The claim that one lady teacher Smt. Krishna Mukherjee was appointed in 1991 for teaching Biology to High School classes and she has been granted approval and her salary is being paid by D.I.O.S. cannot be accepted as the learned counsel for the petitioner has not filed the order of the D.I.O.S. by which salary is being paid to Smt. Krishna Mukherjee. Further it was not raised before the D.I.O.S. In absence of any material to support the assertion made in paragraph 14 of writ petition, it cannot be accepted that Smt. Krishna Mukherjee is being paid salary against a post which is not created or sanctioned under the Salaries Act.

"7. The petitioner having been appointed in 1989 against a post which was neither sanctioned nor created but to teach a subject for which permission was granted, her appointment could be deemed to be under Section 7AA only. A Full Bench of this Court in ***Radha Raizada and others vs. Committee of Management, Vidyawati Darbari Girls Inter College and others, 1994 (2) ESC 345 (All) (F.B.)*** had considered the question of ad-hoc short term appointment on a post of teacher which has occurred and remained unfilled due to non-appointment of a regular teacher selected by Commission under U.P. Act No. 5 of 1982. In his separate but concurring judgment Hon'ble G.P. Mathur, J. in paragraph 72 has observed that the management could make arrangement during the interregnum by appointing suitable persons and pay them salary out of its own resources. And it was not repugnant to any statutory provision or scheme of the Act. The management could appoint or employ qualified persons who may be even retired teachers under Section 7AA of the Act as part-time teachers for the period of interregnum. In another Division Bench judgment of this Court in ***Tulsi Ram and others vs. State of U.P. and others, 1998 (3) ESC 1617*** it had been held that the part-time teachers appointed under Section 7AA are not regularly appointed teachers. They are engaged for imparting instructions on the part-time basis for which the Board has granted permission under Section 7A of the Act. The provisions of Salaries Act and U.P. Act No. 5 of 1982 are not applicable in relation to part-time teachers and part-time instructors employed in the institution under Section 7AA of the Act. The Bench held that three years' teaching experience of part-time teachers working in any recognized institution cannot be deemed to be equivalent to three years teaching experience of regularly selected teachers according to Rules. It is, thus clear that a part-time assistant teacher or a teacher engaged on honourarium is not a regular teacher . The U.P. Act No. 18 of 1987 in the Act inserted Section 7A and 7AA. The objective of these provisions is that studies of the students may not suffer

due to non-availability of the regularly selected teachers. They are engaged by the management on part-time basis, without obtaining the approval of the District Inspector of Schools and they can be disengaged by the management either at the end of the session or when the necessity to continue such teachers comes to an end. There is no bar or restriction against such disengagement. Thus, part-time teachers cannot be deemed to be a teacher as mentioned in Section 16G of the Act and Regulations framed thereunder. The decision of this Court in the case of ***Shashi Kala Singh*** (supra) is of no help to the petitioner as in this decision the Court was not concerned with regularization or payment of salary. Further this decision was obtained on incorrect facts. The Hon'ble Judge was led to believe that the employment of even part-time teacher was "Niyamit". The actual word in the Government Order is "Niyantrit". But in the photocopy attached with the supplementary affidavit to the writ petition of ***Shashi Kala Singh*** (supra) only the first three letters Niyamiti were legible and the learned Judge reading it as "Niyamit" held that appointment of part-time teacher being "Niyamit" (regular) his services could not be terminated without complying Section 16G of the Act. But with the word "Niyantrit" the entire meaning changes. The petitioner was a part-time teacher or honorary teacher therefore, could not claim payment of salary under the Salaries Act as Section 7AB inserted by U.P. Act No.18 of 1987 exempts applicability of Act to part-time teachers. The decision in ***Dharmendra Pal Dwivedi*** (supra) is also of no help. It was concerned with Regulation 29. The Court was not concerned with nature of appointment, as an assistant teacher under Section 7AA of the Act."

17. Judgment quoted above has been followed in the case of ***Rajendra Singh vs. District Inspector of Schools, 2001 (1) UPLBEC 701 decided on 11.12.2000,*** clearly taking the view that part time teachers cannot be kept at par with regular teachers appointed under U.P. Act No. 2 of 1921, and in such a situation the Committee of Management has got unfettered right in such matters. Relevant paragraphs 3 and 4 of the said judgment are being quoted below:

"3. On the other hand, Sri K.K. Chand, the learned Standing Counsel, has urged that decision of this Court in Civil Misc. Writ Petition No.51940 of 2000, Smt. Suman Lata Sharma v. Regional Joint Director of Education, Meerut and others, decided on 4.12.2000 [2000 (4) ESC 2828 (All), it has been held that a part-time teacher appointed under Section 7AA of the U.P. Intermediate Education Act, 1921 (in brief Act) is not a teacher as envisaged under Section 16G of the Act. The service conditions of such teachers are to be governed by the Government Order dated 15.10.1986. The Government Order dated 15.10.1986 provided that the scheme of engaging part-time teachers is being made on experimental basis for imparting education in the interest of students and the payment was to be made from the own funds of the management. The Government Order further provided that there was no age limit for appointing any person as part time teacher and even a retired person could be appointed as part-time teacher.

4. A teacher working in a recognised unaided institution could not be said to be a regular teacher as envisaged by Section

16G of the Act. He can only be a part-time teacher or an honorary teacher. He could be engaged or disengaged by the management, which pays honorarium from its own resources. The controversy involved in the case is covered by the decision of this Court in Suman Lata (supra)."

18. In the case of ***Smt. Shashi Kala Singh vs. District Inspector of Schools, Maharajganj, Civil Misc. Writ Petition NO.1070 of 2001***, decided on 05.02.2001, in the second round of litigation, this Court found earlier decision interse parties binding, the District Inspector of Schools was obliged to consider the matter as to whether the order passed terminating the services of Shashi Kala Singh should be approved or not. Qua applicability of Section 16G of U.P. Act No.2 of 1921, no independent adjudication has been done, and on the premises of earlier judgment being there interse parties, said view has been taken.

19. As there has been conflicting view, the State Government in its wisdom on 10.08.2001 proceeded to fix and prescribe the terms and conditions of teachers, who have been appointed in exercise of authority vested under Section 7AA of U.P. Act No. 2 of 1921. Relevant portion of the Government Order dated 10.08.2001 is being quoted below:

ष्अनुशासनिक कार्यवाहीः– प्रबन्ध समिति निम्नलिखित कारणों से किसी भी अंशकालिक अध्यापक के विरुद्ध अनुशासनिक कार्यवाही कर सकती हैः–

क) विद्यालय के नियमों का उल्लंघन करना तथा आज्ञा न मानना।

(ख) सौंपे गए दायित्वों के निर्वाह में जापरवाही करना।

(ग) विद्यालय के अभिलेख नष्ट करना अथवा क्षति पहूँचाना।

(घ) विद्यालय की सम्पत्ति अथवा धन का दुरुपयोग करना।

(च) विद्यालय में अस्त्र–शस्त्र लाना अथवा उनका प्रयोग करना अथवा धमकी देना।

(छ) परीक्षा कार्य नियमानुसार न करना अथवा किसी अनुचित साधन हेतु प्रोत्साहन अथवा उसमें संलग्न होना।

(ज) विद्यालय की गोपनीय पत्रावली, वस्तु अथवा अभिलेख की गोपनीयता भंग करना।

(झ) कक्षा कार्य अथवा गृह कार्य में लापरवाही करना।

9. सेवा समाप्ति : यदि प्रबन्ध तंत्र को यह समाधान हो जाए कि कोई भी अंशकालिक अध्यापक धारा 9 में वर्णित अथवा किसी नैतिक अधमता के अपराध में किसी सक्षम न्यायालय द्वारा दोषी सिद्ध कर दिया गया हो, तो वह इन अंशकालिक अध्यापकों की सेवाऍं समाप्त कर सकता है।

(क) किसी भी अंशकालिक अध्यापक की सेवाऍं समाप्त करने के पूर्व प्रबन्धतंत्र द्वारा आरोपी के विरुद्ध लगाये गये आरोपों की जॉच, जॉच अधिकारी से कराई जायेगी।

(ख) जॉच अधिकारी का तात्पर्य प्रबन्धतंत्र द्वारा नियुक्त अंशकालिक प्रधानाचार्य या किसी वरिष्ठ अंशकालिक अध्यापक से होगा।

(ग) जॉच अधिकारी को जॉच आख्या संस्तुति पर प्रबन्ध तंत्र निर्णय लेगा। निर्णय के पूर्व प्रबन्ध तंत्र द्वारा संबंधित अंशकालिक अध्यापक को सुनवाई का एक अवसर दिया जाएगा और इसके उपरान्त ही निर्णय लिया जायेगा।

(घ) जिला विद्यालय निरीक्षक द्वारा दिए गए निर्णय का पालन प्रबन्ध तंत्र करेगा। प्रबन्ध तंत्र द्वारा जिला विद्यालय निरीक्षक द्वारा लिए गए निर्णय का पालन नहीं किया जाता है, तो प्रबन्ध तंत्र के विरुद्ध उत्तर प्रदेश माध्यमिक शिक्षा अधिनियम 1921 से सुसंगत प्राविधानों के तहत कार्यवाही की जा सके।

10. त्यागपत्र/ पद समाप्तिः (क) यदि कोई अंशकालिक अध्यापक किसी कारणवश विद्यालय से अलग होना चाहता है, तो वह एक माह की पूर्व सूचना अथवा उसके बदले में एक माह की परिलब्धियों को जमा करके त्यागपत्र दे सकता है।

(ख) माध्यमिक शिक्षा परिषद द्वारा विद्यालय या उसके किसी विषय की मान्यता को समाप्त करने,

किसी अनुभाग को समाप्त करने अथवा किसी अन्य कारणवश, किसी अंशकालिक अध्यापक का पद समाप्त किया जा सकता है, तो प्रबन्ध तंत्र द्वारा सम्बन्धित अंशकालिक अध्यापक को एक माह पूर्व सूचना या उसके बदले में एक माह की पारिलब्धियॉ देकर सेवाऍ समाप्त की जा सकेंगी।

शासनादेश निर्गत होने की तिथि से उक्त सेवा शर्तें प्रभावी होंगी।

भवदीय,
(नीरा यादव)
प्रमुख सचिव''

20. Division Bench of this Court in the case of ***Committee of Management vs. District Inspector of Schools, Shahjahanpur, 2003 (3) ESC 1388***, has also taken the view that service conditions of part-time teachers are to be governed by the Rules made in this regard. In the case of ***Dr. Bhimrao Ambedkar Shiksha Samiti vs. State of U.P. and others,*** writ petition No.58230 of 2005, decided on 05.09.2005 this Court took the view that in respect of part-time teachers though not provided in the Government Order 10.08.2001, in view of the provisions of Section 16 of the U.P. General Clauses Act, 1897, Committee of Management of the institution has the authority to pass order of suspension. Paragraphs 9 to 16 of the said judgment being relevant are being quoted below:

"9. The District Inspector of Schools records that since there is no provision for suspending a Teacher under the Government Order dated 10.8.2001, therefore, the Committee of Management could have only proceeded to seek approval with regard to termination of the services of Respondent Nos. 4 and 5. In essence, the action of the Committee of Management in suspending the Respondent Nos. 4 and 5 was presumed to be without authority in law on the aforesaid basis by the District Inspector of Schools. Even assuming for the sake of argument that the Respondent Nos. 4 and 5 enjoyed the status of a part time Teacher, the aforesaid presumption of the District Inspector of Schools that the Committee did not have any power to suspend them from their services is unsustainable in law for the following reasons:-

10. The Apex Court on the aforesaid issue had the occasion to pronounce upon such a situation by referring to Section 16 of The Uttar Pradesh General Clauses Act, 1897 quoted herein below:

"16. Power to appoint to include power to suspend, dismiss or otherwise terminate the tenure of office.- Where, by any Uttar Pradesh Act, a power to make any appointment is conferred then, unless a different intention appears, the authority having for the time being power to make the appointment shall also have the power to suspend, dismiss, remove or otherwise terminate the tenure of office of any person appointed, whether by itself or any other authority, in exercise of that power."

11. In the case of R.P. Kapoor v. Union of India and Ors. , (para 11) had to state as under:-

"11. The general principle therefore is that an employer can suspend an employee pending an enquiry into his conduct and the only question that can arise on such suspension will relate to the payment during the period of such suspension. If there is no express term in the contract relating to suspension and payment during such suspension or if there is no statutory provision in any law

or rule, the employee is entitled to his full remuneration for the period of his interim suspension; on the other hand if there is a term in this respect in the contract or there is a provision in the statute or the rules framed thereunder providing for the scale of payment during suspension, the payment would be in accordance therewith. These general principles in our opinion apply with equal force in a case where the government is the employer and a public servant is the employee with this modification that in view of the peculiar structural hierarchy of Government, the employer in the case of government, must be held to be the authority which has the power to appoint a public servant. On general principles therefore the authority entitled to appoint a public servant would be entitled to suspend him pending a departmental enquiry into his conduct or pending a criminal proceeding, which may eventually result in a departmental enquiry against him. This general principle is illustrated by the provision in Section 16 of the General Clauses Act, No. X of 1897, which lays down that where any Central Act or Regulation gives power of appointment that includes the power to suspend or dismiss unless a different intention appears. Though this provision does not directly apply in the present case, it is in consonance with the general law of master and servant. But what amount should be paid to the public servant during such suspension will depend upon the provisions of the statute or rule in that connection. If there is such a provision the payment during suspension will be in accordance therewith. But if there is no such provision, the public servant will be entitled to his full emoluments during the period of suspension. This suspension must be distinguished from suspension as a punishment which is a different matter altogether depending upon the rules in that behalf. On general principles therefore the government, like any other employer, would have a right to suspend a public servant in one of two ways. It may suspend any public servant pending departmental enquiry or pending criminal proceedings; this may be called interim suspension. Or the Government may proceed to hold a departmental enquiry and after his being found guilty order suspension as a punishment if the rules so permit. This will be suspension as a penalty. These general principles will apply to all public servants but they will naturally be subject to the provisions of Article 314 and this brings us to an investigation of what was the right of a member of the former Secretary of State's Services in the matter of suspension, whether as a penalty or otherwise."

12. The same view was reiterated by the Apex Court in the case of B.R. Patel v. State of Maharastra,

13. The view that the power to terminate the services is a necessary adjunct of the power of appointment and also includes the power of suspension was re-affirmed by the Apex Court in the case of Heckett Engineering Company v. Workmen, (para 14). This view was again quoted with the approval by the Apex Court in the case of Scientific Advisory to the Ministry of Defence and Ors. v. S. Daniel and Ors. , 1990 (suppl.) SCC 374 par 9 (c).

14. A perusal of the Government Order dated 10.8.2001 indicates that the Management has been given the power to terminate the services of a part time

Teacher in accordance with the aforesaid Rules. Applying the principles stated herein above, the power to suspend a part time Teacher can safely be read to be available to the management for proper and efficient administration of disciplinary proceedings. The Rules clearly contemplate the holding of an inquiry and, as such, the power to suspend could be exercised in contemplation of an inquiry. The District Inspector of Schools has been unable to appreciate the existence of such a power for the effective discharge of the duties of the Committee of Management and, as such, the conclusion drawn by the District Inspector of Schools is untenable. The power to suspend is clearly implied and is available to the Committee of Management in respect of part time Teacher as well.

15. This Court has had the occasion to consider the status of a part-time Teacher. A reference to Section 7AB would indicate that the Teachers appointed under Section 7AA are exempted from the applicability of the Payment of Salary Act and the Selection Board Act, 1982. No other provision of the U.P. Intermediate Education Act has been made inapplicable by the aforesaid provision. However, this Court in the case of Shashi Kala Singh v. District Inspector of Schools, 2000 (3) UPLBEC 2327, held that the regulations framed under Section 16-G of the U.P. Intermediate Education Act to the extent that they are regulatory in nature can be made applicable in the case of part time Teachers. However, the aforesaid view taken by this Court met with disapproval in the case of Rajendra Singh v. District Inspector of Schools, reported in 2001 (1) UPLBEC 701. Later on this Court in the Division Bench judgment relied by the learned counsel for the petitioner in Committee of Management v. District Inspector of Schools, Shahjahanpur, 2003 (3) ESC 1388, has held that the conditions of service of part time Teachers are to be governed by the Rules made in this regard. The Rules have now been framed by the State Government vide Government Order dated 10.8.2001 referred to herein above. In these circumstances, the services of part time teachers are being regulated under the aforesaid Government Order and, as such, compliance thereof has to be ensured.

16. Sri Khare has urged that there is absolutely no requirement of any approval from the District Inspector of Schools in respect of suspension as the Government Order does not make any such provision and to substantiate his plea he has relied on the Full Bench decision of this Court in the case of Smt. Shyama Verma v. Basic Education Board, U.P. Allahabad and Ors., (1995) 2 UPLBEC 779. In the aforesaid decision, the power for granting approval to the suspension of a Teacher in an institution governed by the Basic Education Act was under consideration. It was held that the order of suspension pending or in contemplation of inquiry is not a punishment and referring to Rule 4 of the Basic Education (Staff) Rules, the Full Bench concluded that no prior approval of the Basic Education Officer is required before suspending a Teacher. In the instant case, the Government order dated 10.8.2001 does not require any prior approval for suspending a part time Teacher. However, the question as to what would be the renumeration payable to such a suspended part time Teacher has yet to be decided. Clause 6 of the said Government Order makes provisions for

the payment of part time Teachers. The question as to what emolument would be payable to such a Teacher during the period of suspension has also to be taken into consideration and, as such, to that extent in the event there is a violation of the government Order dated 10.8.2001, the District Inspector of Schools can be stated to have powers to examine such an issue. However, since the aforesaid controversy is yet to be decided in an appropriate case, the said question is left open for being adjudicated at the appropriate time."

21. Legal position on the subject is thus, clear that even in reference to part-time teachers, though it is not provided in the Government Order dated 10.08.2001, as the Committee of Management is vested with the authority to take disciplinary proceedings, and during this interregnum period till said proceedings are not finalised, the Committee of Management in exercise of its authority vested under Section 16 of the U.P. General Clauses Act is empowered to pass order of suspension. The authority of the Committee of Management of the institution in reference to part time teachers to pass order of suspension cannot be doubted on any score. Hon'ble Apex Court in the case of ***L.K. Verma vs. HMT Ltd., !IR 2006 SC 975***, has taken the view that there are three kinds of suspension; (I) suspension may be passed by way of punishment in terms of Conduct Rules; (ii) suspension can be passed in exercise of inherent power, in the sense that work may not be taken from the delinquent official, but in that event salary has to be paid; and (iii) suspension order can be passed if there exist provisions in the Rules laying down that in place of full salary the delinquent would be entitled to subsistence allowance only.

22. In such a situation and in this background, once the Committee of Management of the institution happens to be the employer qua part time teachers, then to say and suggest that it has got no authority to place an incumbent under suspension or undertake disciplinary proceedings, cannot be accepted by any stretch of imagination, as an employer, it has inherent power to place an employee under suspension, and in the absence of Rules providing that in place of full salary the part time teacher would be entitled to subsistence allowance. Part time teacher would be temporarily prevented from discharging duty, but salary would be ensured to him.

23. Section 16G of U.P. Act No. 2 of 1921 deals with conditions of service of Head of Institution, teachers and other employees, and in mandatory terms Section 16G (1) provides that every person employed in recognized institution shall be governed by such conditions of service as may be prescribed by Regulations. Section 16G (2) provides for the field to be covered under Regulations, covering conditions of service. Section 16G (3) clearly provides for approval in case of discharge, removal, dismissal from service, reduction in rank, diminution in emoluments and termination of service. Sub-Sections (5), (6), (7) and (8) of Section 16G deal with authority of suspension vested in the Managing Committee in given set of circumstances, and to ensure that Management does no act in high handedness while suspending Head of Institution or teacher, said suspension if not approved within sixty days, to become

inoperative and after approval, in the event of delay in concluding the enquiry to revoke the same after providing opportunity of hearing to the Managing Committee. The question is as to whether the provisions of Section 16G are applicable vis-a-vis part-time teachers also, and after expiry of the period of sixty days in absence of approval of said suspension by District Inspector of Schools, same becomes inoperative by operation of law. Provisions of Section 16G of U.P. Act No. 2 of 1921 would apply, as per scheme of the things provided for, wherein appointment on the post of Head of Institution or teacher is made following the provisions of Section 16E, 16F, 16FF of U.P. Act No. 2 of 1921 and after enforcement of U.P. Act No. 5 of 1982 as per the provisions provided therein and not qua the appointments made contrary to aforementioned provisions. Part time teachers constitute a separate class for themselves and cannot be equated with Head Master and teachers. Mode of selection and appointment, terms and conditions of service of part-time teachers is qualitatively different vis-a-vis appointments to be made as per Section 16E, 16F and 16FF or under the provisions of U.P. Act No. 5 pf 1982.

24. The view which has been taken by this Court in the case of Shashi Kala Singh (Supra) cannot be approved of after 10.08.2001, inasmuch as, thereafter specific terms and conditions of service have been framed for part-time teachers and the same holds the field for selection and appointment of part-time teachers as well as dispensation of service including remedy of appeal before the District Inspector of Schools against the punishment order qua them, then the provisions of Section 16G of U.P. Act No. 2 of 1921 cannot be pressed into service and made applicable to those teaching staff of the institution whose appointment has not been made after following the procedure as contained under Sections 16E, 16F and Chapter II Regulations 10 to 16 and 18 of the Regulations framed under U.P. Act No. 2 of 1921 or under U.P. Act No.5 of 1982, and in every case where appointment has been made following the aforesaid provisions, then the provisions of Section 16G can be permitted to be invoked. Section 16G of U.P. act No. 2 of 1921 is not be read in isolation, and entire scheme of thing has to be kept in mind, including the class for whose benefit said provision has been introduced. Full fledged procedure has been provided for making selection and appointment of teachers, and once appointment itself has not been made after following the procedure as contained under Sections 16E, 16F and Chapter II Regulations 10 to 17 and 18 of U.P. Act No. 2 of 1921, and U.P. Act No. 5 of 1982, then in such a situation and in this background, the provisions of Section 16G of the Act would not be applicable or attracted qua part time teachers who constitute separate class by themselves. Thus, the Committee of Management was not obliged to take approval from the District Inspector of Schools to the resolution of suspension, which had been passed by it, as provisions of Section 16G (5) deals with teacher and Head of the Institution and Section 16G (7) provides that such suspension by Inspector shall not remain in force unless approved, for more than sixty days, said provision is in reference of suspension of teachers and Head of Institution, and not at all in reference of part time teachers.

25. Order impugned in the present case has been perused. It proceeds to mention that under the Government order dated 10.08.2001, there is no authority to place an incumbent under suspension, and as such the action of the Committee of Management is altogether void and without jurisdiction; on this presumption order impugned has been passed. The view taken by the District Inspector of Schools runs counter to the view taken in the case of Dr. Bhimrao Ambedkar Shiksha Samiti vs. State of U.P. and others (supra); and in such a situation and in this background the order which has been passed saying that the Committee of Management had no authority to place Hari Prakash Tiwari under suspension is not at all being approved of and the same deserves to be quashed and set aside.

26. Government Order dated 10.08.2001 deals with the terms and conditions of service, sane does not lay down any specific power to place a part-time teacher under suspension, but under inherent power as well as under the authority vested under Section 16 of U.P. General Clauses Act, 1897, the Committee of Management is entitled to place a part-time teacher under suspension. The power of suspension is, thus, being exercised, in exercise of inherent powers and the powers vested in the Committee of Management in view of the provisions of General Clauses Act, once Rules are not at all there in this direction, then net effect of the same would be that the Committee of Management of the institution has authority to place a teacher under suspension, but in that event the incumbent would be entitled to full salary. Once the provisions of Section 16G of U.P. Act No. 2 of 1921 have been held to be not applicable vis-a-vis part time teachers and there being nothing contrary in the Government Order dated 10.08.2001, then the Committee of Management of the institution would have the authority to place an incumbent under suspension, but in that event the delinquent would be entitled to full salary and no deduction can be made on the said score.

27. This much has also been stated that in the present case power of suspension has been misused and has been colourably exercised, as after the reply had been submitted, not a single step has been taken in the direction of concluding the disciplinary proceedings; in such a situation and in this background, Hari Prakash Tiwari cannot be left to be placed under suspension for all the times to come.

28. Consequently, in the facts of the case, present writ petition is allowed partly. The order dated 30.08.2010 passed by the District Inspector of Schools, to the extent it sets aside the order of suspension and restores functioning of Hari Prakash Tiwari as Principal, is hereby quashed and set aside, but so far as directives issued by District Inspector of Schools to the extent it ensures payment of entire remuneration to him is concerned, same is maintained, and it is hereby directed that entire amount of arrears of remuneration be ensured to Hari Prakash Tiwari within a period of two months from the date of receipt of certified copy of the judgment along with current remuneration. Further the Committee of Management is directed to conclude the disciplinary proceedings in accordance with law, keeping in view the Government Order dated 10.08.2001 within three months from the date of

receipt of certified copy of the judgment. It is expected that Hari Prakash Tiwari will extend all possible cooperation in conclusion of the aforesaid enquiry.

29. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.11.2010

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

Civil Misc. Writ Petition No. 66226 of 2010

Committee of Management, Inter College Sarsena and another ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitiner:
Sri Ashok Khare
Sri S.K. Singh Paliwal

Counsel for the Respondent:
Sri Siddharth Verma
Sri G.S. Mishra
C.S.C.

U.P. Intermediate Education Act 1921- Section 16 A (7) Power of DIOS order of Single Operation-under impression the management is not validly elected-No such scope under payment of salary Act-held-Order totally without jurisdiction-except regional Committee (in view of G.O. 19.12.2000)-DIOS has no role to play.

Held: Para 8

So far as the reason for passing of the order of single operation accounts is concerned, the same appears to be under the impression that there are no valid elections and the petitioner - Committee is not entitled to function. The aforesaid exercise by the District Inspector of Schools has been done in a manner as if the District Inspector of Schools was authorized to decide the question of validity of elections as claimed by the petitioner or otherwise. The continuance of a Committee of Management either under a valid election or even otherwise vis-a-vis its effective control can be gone into only under the provisions of Section 16 (A) (7) of the U.P. Intermediate Education Act, 1921 after recording findings with regard to effective control. This power is to be exercised by the Joint Director of Education and now under the Government Order dated 19.12.2000 such disputes have to be processed through the Regional Level Committee. To that extent, the District Inspector of Schools appears to have exceeded in his jurisdiction and the learned counsel for the respondents, therefore, concede on this count that the matter ought to have been referred to the Regional Level Committee in stead of the District Inspector of Schools himself taking a decision.

Case law discussed:
1993 ALJ 318.

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

1. This petition has been preferred by the Committee of Management through Rajendra Singh as Manager of Inter College Sarsena, Sachuee, District Mau, assailing an order dated 18.10.2010 whereby the District Inspector of Schools has proceeded to revoke the proposal of suspension of Respondent No.5 - Shiv Sahai Singh claiming himself to be the Head of the Institution. The District Inspector of Schools has simultaneously imposed an order of single operation of accounts under Section 3 (3) of the U.P. Act No.24 of 1971 Act.

2. The petition has been heard with the assistance of Sri Siddharth Verma for the respondent No.5 and learned Standing

Counsel for Respondent Nos. 1 to 4, who have stated at the Bar that they do not propose to file a counter-affidavit in view of the nature of the order that is proposed to be passed.

3. Sri Khare, at the very out set on instructions received, contends that the present writ petition is confined to a challenge to the order imposing the single operation of accounts under Section 3 (3) of the U.P. Act No.24 of 1971 Act. The petitioner proposes to challenge the other part relating to the matter of suspension before the appropriate Bench. Accordingly, this writ petition is confined only to the extent of the order being impugned in relation to the single operation of accounts.

4. Sri Khare submits that the signatures of the petitioner were attested and countersigned by the District Inspector of Schools in 2008. The respondents dispute this position and contend that no such signatures have been attested pursuant to any election held in the year 2008.

5. After having heard learned counsel for the parties and in view of the submission advanced, it is evident that earlier also the District Inspector of Schools invoked the powers under Section 5 (1) of the U.P. Act No.24 of 2971 Act on 9.3.2010 to impose single operation of accounts. The same was assailed in Writ Petition No.14201 of 2010 and it was allowed on the ground that the order had been passed without giving any notice or opportunity. Subsequently, the District Inspector of Schools again repeated his performance by passing an order on 12.7.2010 and the underlying theme of both the orders were that the petitioner is not the validly elected and recognized Committee of Management. On the second occasion also, this Court passed an interim order on 21.7.2010 in Writ Petition No.42061 of 2010 which is still in operation.

6. This is the third occasion when the District Inspector of Schools has resorted to Section 3 (3) of U.P. Act No.24 of 1971 in order to impose single operation of accounts. Sri Khare submits that the aforesaid action of the District Inspector of Schools clearly amounts to malice in law inasmuch as once the earlier order founded on the same cause under Section 5 (1) of the U.P. Act No.24 of 1971 Act had been stayed by this Court then there was no occasion for the District Inspector of Schools to have resorted to a similar action in order to impose Section 3 (3) of the 1971 Act.

7. The aforesaid argument appears to be correct. Learned counsel for the respondents has been unable to indicate any justification for passing of the said order in the manner in which it has been done by the District Inspector of Schools. The scope and powers to be exercised by the authorities is to be strictly within the four corners of default of the management in relation to payment of salary only. For reference, see Committee of Management, Sahid Sansmaran Inter College, Sherpur and another Vs. Deputy Director of Education, Varanasi and another, 1993 ALJ 318.

8. So far as the reason for passing of the order of single operation accounts is concerned, the same appears to be under the impression that there are no valid elections and the petitioner - Committee is not entitled to function. The aforesaid exercise by the District Inspector of Schools has been done in a manner as if the District Inspector of Schools was authorized to decide the question of validity of elections as claimed by the petitioner or otherwise. The continuance of a Committee of

Management either under a valid election or even otherwise vis-a-vis its effective control can be gone into only under the provisions of Section 16 (A) (7) of the U.P. Intermediate Education Act, 1921 after recording findings with regard to effective control. This power is to be exercised by the Joint Director of Education and now under the Government Order dated 19.12.2000 such disputes have to be processed through the Regional Level Committee. To that extent, the District Inspector of Schools appears to have exceeded in his jurisdiction and the learned counsel for the respondents, therefore, concede on this count that the matter ought to have been referred to the Regional Level Committee in stead of the District Inspector of Schools himself taking a decision.

9. I have perused the order of the District Inspector of Schools, who has proceeded to assess the validity of the elections. The finding is that no permission was taken from the District Inspector of Schools for holding of the alleged elections as claimed by the petitioner. It is, therefore, clear that the District Inspector of Schools while proceeding to pass an order has entered into the question of validity of the election set up by the petitioner. Accordingly, the order impugned dated 18.10.2010 insofar as it relates to the single operation of accounts under Section 3 (3) of the U.P. Act No.24 of 1972 Act is concerned, is unsustainable. It is hereby quashed leaving it open to the District Inspector of Schools to refer the matter to the Regional Level Committee for decision afresh in the light of the observations made herein above.

10. In case such a request is made by the District Inspector of Schools, the Regional Level Committee shall proceed to resolve the dispute as expeditiously as possible but not later than 3 months from the date of production of a certified copy of this order before it.

The writ petition is, accordingly, allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.11.2010

BEFORE
THE HON'BLE SUNIL AMBWANI, J.
THE HON'BLE MRS. JAYASHREE TIWARI, J.

Civil Misc. Writ Petition No. 66949 of 2010

Shri Ram Narayan Pandey ...Petition
Versus
State of U.P. and others ...Respondent

Counsel for the Petitioner:
Sri M.K. Upadhyay
Sri Piyush Kumar Pandey

Counsel for the Respondents:
C.S.C.

Constitution of India Art. 226-Revision of Subsistence allowance-petitioner-after conviction under 7/3 prevention of corruption Act-during pendency of appeal-granted bail-unless conviction set-a-side not entitled for relief claimed.

Held: Para 8

In our opinion, a person convicted on charges of corruption should not be allowed to continue in service until his conviction is set aside by appellate court. The High Court in appeal has not stayed the conviction of the petitioner.

Case law discussed:
[2007 SCC 574], [(2001) 6 SCC 594], [(2001) 7 SCC 231], [(2007) 1 SCC 673].

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

1. We have head Sri M.K. Upadhyay, for the petitioner. Learned standing counsel appears for the respondents.

2. By this writ petition, the petitioner has prayed for increase in the subsistence allowance in accordance with law, and to decide his representation, which is recommended by the Additional Director, Treasuries and Pension, Allahabad.

3. The petitioner was serving as Accounts Officer in the Office of the District Basic Shiksha Adhikari, Fatehpur. On 6.5.1995, he was caught red handed in a trap case by the Vigilance and Anti Corruption Department, and was placed under suspension. A criminal case was registered against him under Section7/13(2) of the Prevent of Corruption Act. He is continuing under suspension for last 15 years.

4. The petitioner was convicted and sentenced by judgment and order dated 28.11.2006 in Special Case No. 110 of 1997. The judgment dated 28.11.2006, convicting him of the offence under Section 7/13 (2) of the Prevention of Corruption Act, and sentencing him for 2 years rigorous imprisonment, and Rs.5,000/- fine have been challenged by him in Criminal Appeal No.7725 of 2006. By an order dated 14.12.2006, the learned judge hearing Criminal Appeal has passed an order directing the appellant be released on bail, on his furnishing personal bond with two sureties each of the like amount to the satisfaction of the court below, and the execution of the sentence has been stayed, during pendency of the appeal.

5. The petitioner is entitled for revision of the rates of subsistence allowance, which he was getting, recommended by the Sixth Pay Commission. In the present case, however, the petitioner was convicted by the competent court vide judgment dated 28.11.2006 (before the revision of pay and allowances by the Sixth Pay Commission). A Government servant convicted on a criminal charge, involving moral turpitude, such as corruption, is not entitled to continue in service. The procedure for imposing major penalties, under Rule 7 of the U.P. Government Servant (Discipline and Appeal) Rules 1999 is not applicable where the major penalty is imposed on a person on the ground of conduct, which has led to his conviction on a criminal charge. Proviso (i) to clause (xii) of Rule 7 authorizes the disciplinary authority, to impose major penalty on corruption.

6. The order dated 14.12.2006 in Criminal Appeal No. 7725 of 2006 does not stay the conviction of the petitioner. The High Court has only stayed the sentence, and has directed the petitioner to be released on bail. The petitioner is not allowed to take the benefit of the order dated 14.12.2006, to avoid major penalty.

7. In **Navjot Singh Sidhu Vs. State of U.P. and others** [2007 SCC 574], following **K.C. Sarin Vs. CBI** [(2001) 6 SCC 594]; **B.R. Kapur Vs. State of T.N.** [(2001) 7 SCC 231]; and **Ravikant S Patil Vs. Sarvabhouma S. Bagali** [(2007) 1 SCC 673], the Supreme Court held as follows:-

"... when conviction is on a corruption charge, it would be a sublime public policy that the convicted person is kept under disability of the conviction instead of keeping the sentence of the imprisonment in abeyance till the disposal of the appeal. In such cases, it is obvious that it would be highly improper to suspend the order of

conviction of a public servant, which would enable him to occupy the same office which he misused."

8. In our opinion, a person convicted on charges of corruption should not be allowed to continue in service until his conviction is set aside by appellate court. The High Court in appeal has not stayed the conviction of the petitioner.

9. After close of arguments, the petitioner wanted to withdraw the writ petition. We decline to grant the prayer.

10. The writ petition is **dismissed.**

11. Let a copy of this order be given to the standing counsel for necessary directions.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 02.11.2010

BEFORE
THE HON'BLE FERDINO I. REBELLO, C.J.
THE HON'BLE SHABIHUL HASNAIN, J.

Special Appeal No.549 of 2007

State of U.P. and others ...Petitioners
Versus
Smt. Munni Devi ...Respondent

Constitution of India Art. 226- Compassionate appointment-dependent of work charge employer-not entitled to claim benefit under Dying in harness Rules-Hon'ble Single Judge Quashed the G.O. Dated 29.01.2003 by which the benefit of compassionate appointment to the dependent of work charge employees withdrawn-without disclosing any reason-held-not sustainable in view of Full Bench decision judgement by Single Judge set-a-side

Held: Para 7

Though, it earlier had made a provision extending certain benefits in favour of dependants of persons working on daily wage/muster roll basis, it also had right to withdraw the same. It cannot be said that merely because the State has withdrawn the benefit which was earlier extended, the same has resulted in any arbitrariness or in violation of any constitutional provision. The judgment of the learned Single Judge, therefore, suffers from an error of law inasmuch as no reason has been assigned for quashing the Government Order dated 29.01.2003 withdrawing certain benefit extended under Dying in Harness Rules.

Case law discussed:
[(2002) 1 UPLBEC 337], Civil Misc.Petition No. 15505 of 2005,(2009) 2 SCC (L&S) 304

(Delivered by Hon'ble F.I. Rebello, C.J.)

1. The State and its functionaries have preferred this appeal against the judgment and order dated 17.09.2004, by which the learned Single Judge has allowed the writ petition filed by the writ petitioner-respondent (hereinafter referred to as the "respondent'), and directed them to consider her case for appointment on compassionate ground.

2. The husband of the respondent had joined as daily wager in Public Works Department in the year 1983. From the year 1998, he worked on work charged basis till his death on 2nd May, 2003. After his death, the respondent applied for appointment on compassionate ground on 24th July, 2003 under the U.P. Recruitment of Dependants of Government Servant (Dying in Harness) Rules, 1974 (hereinafter referred to as the "Dying in Harness Rules'). Her claim was rejected on the ground that the employees working on work charged basis are not

entitled for appointment on compassionate ground.

3. The learned Single Judge, in the impugned judgment, has noted the judgment of this Court in **Santosh Kumar Mishra Vs. State of U.P. & Ors., [(2002) 1 UPLBEC 337],** wherein the learned Bench had taken the view that the dependants of work charge employees are entitled for appointment on compassionate ground under Dying in Harness Rules. The learned Judge then held that since the husband of the respondent had worked for about 20 years on temporary basis, the authorities have got no right to adopt different standards for the purpose of making appointment under Dying in Harness Rules and, accordingly, directed that the respondent be appointed on compassionate basis under Dying in Harness Rules. The learned Judge also quashed the Government Order dated 29.01.2003, by which the State had withdrawn certain benefits extended to the dependants of daily wagers/work charge employees for appointment on compassionate ground under Dying in Harness Rules, without assigning any reason.

4. In the appeal preferred by the State, it was pointed out that a person working on work charged basis is not holder of a civil post. Though, earlier the Government had granted certain relaxation in strict requirement of Dying in Harness Rules to cover even the cases of muster roll and work charged employees, the same was withdrawn by Government Order dated 29.01.2003. It was further pointed out that the question of recruitment and appointment is a policy decision, which has to be decided by the State Government and its right to create post and recruit people emanates from the statute or statutory rules and/or rules framed under the proviso to Article 309 of the Constitution of India. It has also been submitted on behalf of the State that reliance placed by the learned Judge on the judgment in Santosh Kumar Mishra (supra) was misplaced.

5. At the hearing of this appeal, though notice was given to the learned counsel for the respondent, but none appeared on her behalf.

6. In the first instance, we may point out that a Full Bench of this Court in **Civil Misc. Writ Petition No. 15505 of 2005, Pawan Kumar Yadav Vs. State of U.P. & Ors., decided on 22.09.2010,** has overruled the judgment, amongst others, in Santosh Kumar Mishra (supra). Once that be the case, the impugned judgment of the learned Single Judge cannot be sustained and is liable to be set aside on that ground alone. We may quote paragraph 26 of the said judgment, which reads as under:-

"26. On the aforesaid discussion, and in view of the law laid down in General Manager, Uttaranchal Jal Sansthan Vs. Laxmi Devi (supra), we answer the questions posed as follows:-

"1. A daily wager and work charge employee employed in connection with the affairs of the Uttar Pradesh, who is not holding any post, whether substantive or temporary, and is not appointed in any regular vacancy, even if he was working for more than 3 years, is not a "Government servant' within the meaning of Rule 2(a) of U.P. Recruitment of Dependants of Government Servant (Dying in Harness) Rules, 1974, and thus

his dependants on his death in harness are not entitled to compassionate appointment under these Rules."

7. The larger question, however, is whether the decision of the learned Single Judge to quash the circular withdrawing benefit of Dying in Harness Rules extended to the dependants of daily wage/muster roll employees is supported by law? As noted earlier, no reasons have been given by the learned Single Judge to quash the Government Order dated 29.01.2003 withdrawing the benefit of Dying in Harness Rules to the dependants of daily wage/muster roll employees. The said Government Order was issued in exercise of State's power in the absence of any rule made under Article 309 of the Constitution of India. Though, the ground to challenge may not be similar to what are available to challenge to a subordinate legislation, nonetheless the test of administrative review of an administrative action will have to be met. The learned Judge has not given any reason as to why the action of the State is arbitrary and violative of Article 14 of the Constitution of India. It may also be noted that the Supreme Court in the case of **General Manager, Uttaranchal Jal Sansthan Vs. Laxmi Devi & Ors., (2009) 2 SCC (L&S) 304** has held that the daily rated and work charge employees are not holding any civil post under the State. Once that be the case, the question of extending any largesse by the State to persons appointed on daily wage/work charge basis would not arise as they are not holders of civil post. The State, in its sovereign power to mitigate hardship of family members of a deceased holding civil post has made provision for appointment on compassionate basis. It would thus be impermissible for the State to create any right in favour of dependants of persons employed on daily wage/muster roll/work charged basis to be considered for appointment on compassionate basis merely because they have been engaged by the State on daily wage/muster roll/work charge basis. Even assuming that the State may take a decision to provide certain benefits to daily rated and work charge employees, that surely cannot be on regular basis as that would amount to giving a benefit which even the deceased was not entitled to. Secondly, it is for the State to decide whether to extend or not to extend its largesse in favour of persons working on work charge and daily wage basis. Though, it earlier had made a provision extending certain benefits in favour of dependants of persons working on daily wage/muster roll basis, it also had right to withdraw the same. It cannot be said that merely because the State has withdrawn the benefit which was earlier extended, the same has resulted in any arbitrariness or in violation of any constitutional provision. The judgment of the learned Single Judge, therefore, suffers from an error of law inasmuch as no reason has been assigned for quashing the Government Order dated 29.01.2003 withdrawing certain benefit extended under Dying in Harness Rules.

8. In the instant case, no appointment was given to the respondent and, hence, the question of considering protect her appointment would not arise.

9. In the light of above, the appeal deserves to be allowed and is, accordingly, allowed. The judgment and order of the learned Single Judge dated 17.09.2004 passed in Writ Petition No. 5289 (S/S) of 2004 is set aside.

10. In the circumstances of the case, there shall be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 09.11.2010

BEFORE
THE HON'BLE PRADEEP KANT, J.
THE HON'BLE RITU RAJ AWASTHI, J

Special Appeal No. 207 of 2007

State of U.P. and others ...Petitioners
Versus
Chandrika Prasad ...Respondent

Constitution of India-Art.-226-Parity of Pay Scale-petition working as laboratory Assistant in Govt. Homeopathic College-claimed the benefit of G.O. 19.09.1979-denial by the authorities even of the direction given by the Director-learned Single judge allow the petition with direction to given same benefit-as being given to Mr. 'A' and 'B' similarly situated employees-highly time barred appeal-Court expressed its great concern regarding practice of filing Special Appeal without considering the bonafide merit of cases0poor Respondent died without getting fruit of judgment-such practice not appreciated-appeal dismissed with cost of Rs.10000.

Held: Para 18

The State Government ought to have been careful while filing the special appeal as we notice that the special appeals are filed without even considering as to whether appeal at all would be successful or not and whether there is any ground for appeal against the order passed by the learned Single Judge. What is happening is that almost against every order, which is passed by the learned Single Judge, may be interlocutory or final, a challenge is made in the special appeal, and many a time at a belated stage namely, when contempt petitions are filed for non-compliance of the order, usually at the sweet will or whims of the department concerned. The forum of special appeal is not meant for such persons including the State Government, who does not take the orders passed by the learned Single Judge in the correct perspective and avoid implementation of these orders, under the pretext of filing the special appeals.

(Delivered by Hon'ble Pradeep Kant, J.)

1. Heard learned counsel for the appellants Sri A.K. Bhatnagar. None appeared for the respondent nor there is any request to adjourn or pass over the case.

2. This special appeal has been filed with delay of more than eight months and twenty six days. It has been noticed that the affidavit filed along with the application for condonation of delay not only contains vague and bald explanation, but also incorrect dates. Time was granted to the State to file better affidavit, but the so called affidavit does not explain anything for not filing the special appeal within time.

3. However, since the matter relates to the financial burden upon the State Government, we have considered the special appeal on merits.

4. The facts of the case are that the respondent was appointed on 4.12.1958, as Laboratory Assistant in the pay scale of Rs. 45-100. Later on the State Government took over the National Homoeopathic Medical College and the pay of the respondent was fixed in the pay scale of Rs. 100-160 from January, 1972, which was later on revised in the pay scale of Rs. 200-320.

5. The State Government vide its order dated 19.9.1979, fixed the pay scale of Rs. 230-385 w.e.f. 1.10.1975, to all such Laboratory Assistants, who had passed High School or matric and had experience of more than seven years, but the respondent was placed in the pay scale of Rs. 200-320, despite the fact that he was possessing the High School qualification and was having experience to his credit of more than seven years. Thereafter the pay scale of Rs. 200-320 was revised to Rs. 354-550 and the pay scale of Rs.230-385 was revised to Rs. 400-615. Since the respondent was kept in the pay scale of Rs.200-320, hence his pay scale was revised only to Rs. 354-550 instead of 400-615. The respondent was granted accordingly selection grade of Rs. 454-600, though he was entitled for selection grade of Rs.470-735 in the light of the Government Order dated 19.9.1979. Again as per the recommendation of the Samta Samiti, the pay scale of Rs. 354-550 was revised to Rs. 950-1500 and the pay scale of Rs. 400-615 was revised to Rs. 1320-2040.

6. When the respondent was not given the later pay scale, he moved a representation on 9.3.1989, before the Director, Homoeopathic, U.P. , who wrote a letter to the Principal, National Homoeopathic Medical College and Hospital, Lucknow, for giving the benefit of the Government Order dated 19.9.1979 and other consequential benefits, but despite the reminders being sent time and again the grievance of the respondent remained unattended, which compelled him to file a writ petition.

7. The record reveals that even in the year 1972, when the respondent was given the pay scale of Rs. 100-160, he approached the Public Services Tribunal, Lucknow, claiming the pay scale of Rs. 200-320. The claim petition preferred by the respondent was partly allowed, allowing the pay scale of Rs. 200-320 w.e.f. 1.8.1972. This order was passed on 14.10.1983. It was thereafter that the matter regarding fixation of pay scale was again considered in the year 1979, but the respondent was not placed in the pay scale to which he was entitled, namely, Rs. 230-385 w.e.f. 1.10.1975, but was given the pay scale of Rs. 200-320, as a result of which the respondent was being placed in the lower pay scale. By subsequent revision in the pay scale also, he was kept in the reduced pay scale including the grant of selection grade which was awarded to the respondent.

8. Learned counsel for the appellants first tried to impress upon the Court that the claim of the respondent for the aforesaid revised pay scale from 1975 already stands adjudicated upon by the Tribunal in the claim petition preferred by the respondent himself where his claim has been rejected and, therefore, he is not entitled to any such enhanced pay scale, but on being confronted with the aforesaid judgment, he conceded that it was a case where the claim by the respondent was made with respect to the fixation of pay in the year 1972 i.e. when he was placed in the pay scale of Rs. 100-160 instead of Rs. 200-320. Thus, the judgment passed by the Public Services Tribunal, Lucknow in the year 1983, is not at all relevant for the revision of the pay scale done in pursuance of the Government Order dated 19.9.1979 w.e.f. 1.10.1975.

9. The learned State counsel, therefore, next pleaded that the respondent was since working in

Government Homoeopathic College not in a Allopathic Medical College to which the government order applies, therefore, the judgment passed by the learned Single Judge can not be sustained.

10. The aforesaid plea firstly does not flow from the Government Order dated 19.9.1979, and secondly the own conduct of the State Government (appellants) in granting the aforesaid pay scale to other similarly situated persons and denying the same to the respondent, is hostile discrimination and can not be allowed to subsist.

11. The plea of Sri A.K. Bhatnagar that the benefit of the pay scale of Rs. 230-385 w.e.f. 1.10.1975 in pursuance of the order passed by the State Government on 19.9.1979, was only available to the Laboratory Assistants of Allopathic Medical Colleges, is not correct. It is simply a misreading of the aforesaid order.

12. The aforesaid order which has been brought on record only says that in all State medical colleges and affiliated hospitals and in all the Government hospitals, all such Laboratory Assistants who have passed, (1) Intermediate (Science) and possess diploma, (2) who have passed Intermediate (Science) and having experience of 3 years, (3) who have passed High School (Science) and are in possession of diploma and experience of 2 years or, (4) who have passed High School or Matric with an experience of 7 years or more, be given the pay scale of Rs. 230-385.

13. The aforesaid Government Order does not clarify or classify the said pay scale for Laboratory Assistants, only for Government Allopathic Hospitals and Colleges. In fact, it covers all the State Medical Colleges with their associated hospitals and all other Government Hospitals.

14. Sri A.K. Bhatnagar, does not dispute that National Homoeopathic Medical College is a Government College with the associated hospital. He also does not dispute that the respondent was High School pass and was having experience of more than 7 years to his credit. Since all the conditions of the Government Order dated 19.9.1979, stood fulfilled by the respondent, denial to him the pay scale as aforesaid can not be sustained.

15. Apart from this the learned Single Judge has taken note of the fact that the respondent's two other colleagues, namely, Sri Parmanand Mishra and Shri M.S. Siddiqui, who were similarly situated, were provided the pay scale of Rs. 400-615 w.e.f. 1.7.1979, which was later on revised to Rs. 1320-2040 w.e.f. 1.1.1986, but the respondent was denied the said pay scale.

16. We are, thus, satisfied that the order passed by the learned Single Judge does not call for any interference. The respondent who was denied the desired pay scale for so many long years for no valid reason and the said illegal action of the appellants compelled him to approach the Tribunal first in the year 1979, where he continued his fight upto 1983, for getting the pay scale of Rs. 200-320 instead of 100-160 and thereafter again he was denied the pay scale of Rs. 230-385 w.e.f. 1.10.1975 and when he was placed in the lower pay scale, it again compelled him to file the present writ petition in the year 1999, which could be decided only

on 3.7.2006 but, the State Government instead of complying with the aforesaid order, preferred to file a highly time barred special appeal that too with no proper explanation for delay, and thus delayed the compliance of the order passed by the learned Single Judge. Unfortunately the benefit of the same was not given to the respondent during his life time, due to pendency of this litigation.

17. The substitution application filed by the legal heirs of the respondent has been allowed by us.

18. The State Government ought to have been careful while filing the special appeal as we notice that the special appeals are filed without even considering as to whether appeal at all would be successful or not and whether there is any ground for appeal against the order passed by the learned Single Judge. What is happening is that almost against every order, which is passed by the learned Single Judge, may be interlocutory or final, a challenge is made in the special appeal, and many a time at a belated stage namely, when contempt petitions are filed for non-compliance of the order, usually at the sweet will or whims of the department concerned. The forum of special appeal is not meant for such persons including the State Government, who does not take the orders passed by the learned Single Judge in the correct perspective and avoid implementation of these orders, under the pretext of filing the special appeals.

19. In the instant case, a person appointed in the year 1958, has been continuously fighting for the pay scale to which he was legally entitled but was arbitrarily denied, and despite the orders passed by the Court, he could not get the advantage of the orders passed in his favour, as he died during pendency of the litigation at one stage.

20. This practice can not be appreciated. Principal Secretary (Judicial)/Legal Remembrance, is supposed to properly advise the Government in matters of filing the special appeals, as filing of uncalled for appeals not only adversely affect the interest of the parties/litigants, but also increases the pendency in the Court.

21. We, therefore, dismiss the special appeal with a cost of Rs. 10,000/-.
