APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 13.01.2011

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

Special Appeal No. 17 of 2011

Chairman, Nagar Panchayat, Bhinga, District Shravasti and another ...Petitioner
Versus
Sri Guddu and other ...Respondent

High Court Rules-Chapter VIII Rule 5-Special Appeal-Single judge- set-a-side the order of dismissal passed-without holding disciplinary enquiry-on disproportionate excessive punishment-once the authorities did not choose to challenge within-statutory period-can not excave from compliance in garb of time barred appeal-appeal dismissed.

Held: Para 9

This Court has repeatedly pronounced that if the authority or any person, for that matter feels aggrieved by the orders of the Court, he has no option but to comply with the same, unless he challenges the said order in any superior forum and gets an interim order of stay against the said order. Authorities who are responsible and obliged to comply with the orders passed by the Court with all promptness, cannot save themselves by adopting delaying tactics and by approaching the Court by filing the special appeal when contempt proceedings are drawn.

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

1. Heard learned counsel for the appellants Sri O.P. Srivastava and Sri A.N. Srivastava for the respondents.

2. This special appeal against the order passed by the learned Single Judge dated 11.11.09 has been filed with delay of more than one year. Since the counsel for the respondents has no objection, we condone the delay.

3. This special appeal challenges the order passed by the learned Single Judge, allowing the writ petition and setting aside the order of punishment of dismissal from service, with consequential benefits. The respondents' father, who was a regular employee, while working as Sweeper at Nagar Panchayat, Bhinga, Shravasti was dismissed from service on certain charges.

4. The learned Single Judge found that the enquiry was not conducted at all and merely on the basis of the reply submitted, punishment of dismissal from service was awarded. He held that the punishment order was passed without holding any enquiry in accordance with law. The learned Single Judge also found that the punishment of dismissal from service was highly disproportionate and excessive to the charge leveled.

5. With the aforesaid finding, the writ petition was allowed, but finding that the respondents' father had already expired, the learned Single Judge provided that the consequential benefits be provided to his heirs with no further enquiry.

6. The appellants did not challenge the aforesaid order within limitation knowing fully well, the date of the order and the contents thereof, but it appears that when the contempt petition was filed for compliance of the order aforesaid, as

an afterthought, the present special appeal has been filed, after more than one year.

7. The tendency of the State Government, government departments, local bodies and authorities etc., not to comply with the order till the contempt petition is filed and notices are issued, even without filing any special appeal or challenging the order passed in the writ petition is spreading like an epidemic.

8. This Court takes notice of the said fact in the context of a litigant who comes to the Court, even after getting an order in his favour from the highest Court of the State, is not allowed to take the benefit of the same by such deliberate delaying tactics in complying with the Court's order by the authority concerned.

9. This Court has repeatedly pronounced that if the authority or any person, for that matter feels aggrieved by the orders of the Court, he has no option but to comply with the same, unless he challenges the said order in any superior forum and gets an interim order of stay against the said order. Authorities who are responsible and obliged to comply with the orders passed by the Court with all promptness, cannot save themselves by adopting delaying tactics and by approaching the Court by filing the special appeal when contempt proceedings are drawn.

10. Apart from this, instant is a case where no illegality could be pointed out or can be pointed out in the order passed by the learned Single Judge.

11. That being so, there was in fact, no occasion for the appellants to file the special appeal.

12. We, therefore, do not find any illegality in the order passed by the learned Single Judge.

13. The special appeal is dismissed.

REVISIONAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 06.01.2011

BEFORE
THE HON'BLE ANIL KUMAR, J.

Civil Revision No. 18 of 1988

Habib Ahmad Khan ...Petitioner
Versus
The U.P. Sunni Central of Waqfs and others ...Respondent

Counsel for the Petitioner:
M.A. Khan

Counsel for the Respondent:
Z. Zilani

Code of Civil Procedure-Section 115-Civil Revision-Trail court rejected delay condonation application-as provision of Section 5 of limitation Act not applicable consequently rejected the application for reference under section 33(2) of Muslim waqf Act 1960-held highly hipertechnical-if substantial justice and technicality pitted-court should choose Substantial justice-order set-a-side-direction for fresh decision given.

Held: Para 15

Needless to mention here that in respect to the matter relating to condonation of delay, it is settled proposition of law that liberal consideration shall be given in order to advance the substantial justice. If technical and substantial justice are pitted together, the way should be given to the substantial justice, and there is no need to explain day to day delay in filing an application for condonation of delay.

Accordingly, the impugned order dated 04.09.1987 passed by the Court below is arbitrary in nature and liable to be set aside.

Case law discussed:

AIR 1969 SC 575, AIR 1976 SC 237, AIR 1984 SC 1744, 1987(13) ALR 306 (SC), 1987 (Suppl.) SCC 338, (1998) 7 SCC 133, 2001 (44) ALR 577 (SC).

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

1. Heard Sri Mohd. Adil Khan holding brief of Sri Mohd. Arif Khan, Senior Advocate, learned counsel for the revisionist, Km. Rafat Farooqui holding brief of Sri Z. Zilani, learned counsel for the respondents and perused the record.

2. Facts of the present case are to the effect that initially in Suit No. 281 of 1982, a certificate of registration dated 01.02.1983 of the entire property left by one Sri Monday Khan was obtained which indicated that the entire property was registered as Waqf property and respondent no.4 was appointed as Mutawalli.

3. As per the version of the revisionist, thereafter he came to know the above said fact on 17.09.1983 and moved an application for reference under Section 33(2) and Section 29(8) read with Section 71 of U.P. Muslim Waqfs Act, 1960 on 17.12.1983 alongwith an application supported with an affidavit under Section 5 of the Limitation Act.

4. Application under Section 5 of the Limitation Act was rejected by the court below vide order dated 27.03.1984 on the ground that Section 5 of the Limitation Act was not applicable under the proceedings of U.P. Muslim Waqfs Act.

5. Aggrieved by the said order, revisionist had approach this Court by filing a Revision No. 59 of 1984 allowed by order dated 18.03.1986 with the direction that under the U.P. Muslim Waqfts Act, Limitation Act will apply, accordingly it was directed to decide the application under Section 5 of Limitation Act.

6. In view of the above said facts after remanded the matter in question came for consideration before the court below, registered as Misc. Suit No. 64 of 1983(Dr. Habib Ahmad Khan Vs. U.P. Sunni Central Board of Waqfs and others).

7. By order dated 04.09.1987, Civil Judge, Raebareily dismissed the application of the revisionist under Section 5 of the Limitation Act on the ground that there was no sufficient and good explanation and reason given by the revisionist for condonation of delay as well as he had failed to explain the day to day delay in the matter in question. Accordingly, court below came to the conclusion that the reference made by the revisionist was beyond to the statutory period of 90 days provided under the Act and passed the impugned order.

8. Aggrieved by the order dated 04.09.1987 passed by the Civil Judge, Raebareily, the present revision has been filed under Section 75 of the U.P. Muslim Waqf, 1960.

9. Learned counsel for the revisionist while assailing impugned order under challenge passed by the Civil Judge, Raebareily, submits that the same is illegal, arbitrary and contrary to the judgment passed by the Hon'ble Supreme Court and this Court that while deciding the application under Section 5 of the

Limitation Act, liberal consideration should be given in order to advance the substantial justice.

10. He further submits that now as per the settled proposition of law, there is no necessity whatsoever to explain day to day delay in moving the application under Section 5 of the Limitation Act, hence, the order dated 04.09.1987 passed by the Civil Judge, Rabareily is illegal and liable to be set aside.

11. Km. Rafat Farooqui holding brief of Sri Z. Zilani, learned counsel for the respondents submits that the order passed by the court below is perfectly valid and needs no interference as the revisionist failed to give sufficient reasons for condoning the delay while filing the application under Section 5 of Limitation Act.

12. I have heard learned counsel for the parties and gone through the record.

13. So far as the factual matrix of the present case, it is not disputed that the provisions of Section 5 of Limitation Act is applicable in the matter in question.

14. Further, in the present case, the revisionist moved an application under Section 33(2) and Section 29(8) read with Section 71 of U.P. Muslim Waqfs Act, 1960 alongwith an application for condonation of delay under Section 5 of the Limitation Act.

15. Needless to mention here that in respect to the matter relating to condonation of delay, it is settled proposition of law that liberal consideration shall be given in order to advance the substantial justice. If technical and substantial justice are pitted together, the way should be given to the substantial justice, and there is no need to explain day to day delay in filing an application for condonation of delay. Accordingly, the impugned order dated 04.09.1987 passed by the Court below is arbitrary in nature and liable to be set aside.

16. The Hon'ble Supreme Court in the case of ***Shakuntala Devi Jain Vs. Kuntal Kumari, AIR 1969 SC 575,*** the Hon'ble Supreme Court held that unless want bona fides of such inaction or negligence as would deprive a party of the protection of section 5 is proved, the application must not be thrown out of any delay cannot be refused to be condoned.

17. In ***New India Insurance Co. Ltd. Vs. Smt. Shanti Misra, AIR 1976 SC 237*** Hon'ble Supreme Court held that discretion given by section 5 should not be defined or crystallized so as to convert a discretionary matter into a rigid rule of law. The expression" sufficient cause" should receive a liberal construction.

18. In ***O.P. Kathpalia Vs Lakhmir Singh, AIR 1984 SC 1744*** the Hon'ble Supreme Court held that if the refusal to condone the delay results in grave miscarriage of justice, it would be a ground to condone the delay.

19. In the case of ***Collector Land Acquisition Vs. Mst. Kati Ji and others, 1987(13) ALR 306 (SC)*** Hon'ble Supreme Court held as follows:-

"The legislator has conferred the power to condone delay by enacting section 5 of the Limitation Act of 1963 in order to enable th Courts to do substantial justice to parties by disposing of matter on "merits". The expression "sufficient cause" employed

by the Legislature is adequately elastic to enable the Courts to apply the law in a meaningful manner which sub serves the ends of justice - that being the life - purpose of the existence of the institution of Courts. It is common knowledge that this Court has been making a justifiably liberal approach in matters instituted in this Court. But the message does not appear to have percolated down to all the other Courts in the hierarchy.

And such a liberal approach is adopted on principle as it is realized that:-

1. Ordinarily, a litigant does not stand to benefit by lodging an appeal late.

2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this; when delay is condoned, the highest that can happen is that a cause would he decided on merit after hearing the parties.

3. "Every" day's delay must be explained" does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational, common sense and pragmatic manner.

4. When substantial justice and technical considerations are pitted against each other, the cause of substantial justice deserves to be preferred, for the other side can not claim to have vested right in injustice being done because of a non-deliberate delay.

5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact, he runs a serious risk.

6. It must be grapped that the judiciary is respected not on account of its power to legalise injustice on technical grounds but because it is capable of removing injustice and is expected to do so."

20. *In* ***Smt. Prabha Vs. Ram Praskash Kalra, 1987 (Suppl.) SCC 338*** *the Supreme Court took the view that the Court should not adopt an injustice-oriented approach in rejecting the application for condonation of delay.*

21. In the case of ***N. Balakrishnan Vs.M.Krishnamurthy,(1998) 7 SCC 133*** the Apex Court explained the scope of limitation and condoning of delay, observing as under :-

"The primary function of a Court is to adjudicate the dispute between the parties and to advance substantial justice. The time- limit fixed for approaching the Court in different situations is not because on the expiry of such time a bad cause would transform into a good cause. Rules of limitation are not meant to destroy the rights of parties . They are meant to see that parties do not resort to dilatory tactics, but seek their remedy for the redress of the legal injury so suffered. The law of limitation is thus founded on public policy."

22. In the case of ***Vedabai alias Vaijayanatabai Baburao Patil Vs. Shantaram Baburao Patil and others, 2001 (44) ALR 577 (SC)*** the Apex Court made a distinction in delay and inordinate delay observing as under:-

"In exercising discretion under section 5 of the Limitation Act, the Courts

should adopt a pragmatic approach. A distinction must be made between a case where the delay is inordinate and a case where the delay is of a few days. Whereas in the former case the consideration of prejudice to the otherwise will be a relevant factor so the case calls for a more cautious approach."

23. For the foregoing reasons, the order dated 04.09.1987 passed by the court below is set aside. Revision is allowed. Matter is remanded back to the court below to decide afresh in accordance with law after giving opportunity of hearing to the parties concerned.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.01.2011

BEFORE
THE HON'BLE SANJAY MISRA, J.

Second Appeal No. - 26 of 2011

Sardar Surjeet Singh ...Appellant
Versus
Om Prakash ...Respondent

Counsel for the Petitioner:
Sri Divakar Rai Sharma

Counsel for the Respondent:
Sri Pankaj Agrawal

Code of Civil Procedure Section 100-readwith Transfer of Property Act, Section -106(1)-lease of open land-for four years to run saw mill-the tin shed erected-subsequently-whether such tin shed within the meaning of building-?-held-"No"-so far notice part is concern-lease for four years and not year to year-section 106(1) not attracted-six month notice held proper only the civil court has jurisdiction.

Held: Para 11 and 20

It is thus clear that the defendant-appellant could erect a tin shed for his necessity in running the saw mill. There was no tin shed that was let out by the plaintiff-respondent. The averments in paragraph 1 of the plaint do not indicate a contrary intention and it refers to the terms and conditions incorporated in the registered agreement dated 23.03.1979. The relationship of the parties are governed by the registered agreement hence only that agreement can be looked into to determine as to what was let out. It was definitely only the land. The tin shed was raised subsequent to the start of the lease period and it was made by the defendant-appellant. The tin shed so erected for running the saw mill, therefore, cannot be held to be accommodation or a building for the purposes of U.P. Act No.13 of 1972.

In the present case, admittedly the lease was given for running a saw mill over the land with a contemplation that tin shed could be erected. No part of the building was given on rent. When the lease was not month to month but it was for a period of four years, the notice of six months was a valid notice. It was a protected lease. The second part of section 106(1) of Transfer of Property Act was clearly not applicable in the facts and circumstances of the present case.

Case law discussed
2010(3) ARC 750; AIR 1995 SC 1401; AIR 1995 Supreme Court 2482; JT 1995(3) SC 329;

(Delivered by Hon'ble Sanjay Misra, J.)

1. Heard Sri Diwakar Rai Sharma, learned counsel for the defendant-appellant and Sri Pankaj Agarwal, learned counsel for the plaintiff-respondent.

2. This is a second appeal under Section 100 of the Code of Civil Procedure

filed against the judgment and decree dated 29.9.2010 passed in Civil Appeal No.65 of 2005 by Additional District Judge, Court No.11, Aligarh whereby the appeal of the plaintiff-respondent has been allowed and the suit for eviction has been decreed.

3. Sri Sharma has submitted that the land in question contained a tin shed. A tin shed would be covered in the definition of a building hence the land was appurtenant to a building and, therefore, the provisions of U.P.Act No.13 of 1972 (U.P.Urban Building Regulation of Letting, Rent and Eviction) Act, 1972) would apply and the trial court has rightly dismissed the suit of the plaintiff-respondent on that ground. He submits that the first appellate court has illegally held that the suit could be maintainable in the Civil Court and the provisions of U.P.Act No. 13 of 1972 would not apply in the case. His submission is that when there is a tin shed which is let out, it would be an accommodation and will be covered within the definition of 'building' as given in Section 3 of U.P.Act No. 13 of 1972. According to him, the tin shed along with land was let out to the defendant-appellant for running a saw mill.

4. The second submission is that six months' notice under section 106 of the Transfer of Property Act, 1882 given by the plaintiff-respondent was invalid inasmuch as it was a month to month tenancy and, therefore, six months' notice was not required but notice as provided in the second part of Section 106 (1) of Transfer of Property Act, 1882 could alone terminate the lease.

5. In favour of his first submission Sri Sharma has placed reliance on the decision of a learned single Judge of this court in the case of **Kali Ram vs. Mistri Udai reported in 2010(3) ARC 750** and has referred to paragraphs 23, 24 and 25 of the said decision. Paragraphs 23, 24 and 25 of the judgment are quoted below:-

*"23. Similarly, in the case of **Koti Saroj Anamma & Anr. V. Jonnalagada Malleswara Rao, AIR 1995 SC 1401: 1995 SCFBRC 379,** the Apex Court has held as follows:*

"7. Looking to the evidence, it is clear that the shed, which has a zinc sheet roof, was erected only to protect the Saw mill machinery. What was leased out to the respondent was substantially the Saw mill machinery for the purpose of carrying on timber/Saw mill business. The shed was merely erected to shelter the machinery. The dominant purpose of the lease was to lease out the Saw mill machinery. In order that the lease should be covered by the Andhra Pradesh Buildings (Lease, Rent and Eviction) Control Act, 1960, the lease should be of a building as defined in Section 2(iii). It should, therefore, be a lease of any house or a hut or a part of a house or a hut let for residential or non-residential purposes. It would include gardens, grounds, garages and outhouses appurtenant to such a house or a hut. In the present case, however, the lease is not of any house or a hut or part of a house or a hut. The lease is of a Saw mill machinery which is covered by a zinc sheet shed. The dominant purpose of the lease is to lease out the machinery. The shed is only an adjunct. It is also pointed out that a covering over the machinery in the shape of a structure consisting of zinc sheets supported on poles can hardly be called a house or even a hut. In any case, looking to the dominant purpose of the lease, the two courts below have rightly come to the

conclusion that the lease is not covered by the provisions of the Andhra Pradesh Buildings (Lease, Rent and Eviction) Control Act. 1960."

24. The proposition of law as laid down by the Apex Court, in my considered view, clinches the issue in favour of the plaintiff landlord. The pleadings in this regard, para-4 A of the plaint in particular has been mentioned in the earlier part of the judgment. The tenant D.W.-1 in his deposition has stated that he is carrying on business of repairing tractors and took the property in question for the said purpose. Further he is repairing the tractors on open piece of land. He states that the kothari is being used for the purpose of keeping tools. Thus, it is admitted case of the defendant tenant that he took the property in question for the purposes of repairing the tractors and keeping the tools in the kothari. It has also been noticed herein that the tin shed/kothari is in existence on one of the corners of the land in question having small dimensions 8 feet x 8 feet while the total dimension of the land in question is 52 feet x 42 feet.

25. As against above, learned counsel for the opposite party referred ***Ram Dularey v. D.D. Jain and others, 1965 ALR 722,*** *a case under the old Act with reference to the question as to whether jhopari with thatched roof is accommodation or not. Jhopari has been held to be a building. The said decision is distinguishable on fact as the question involved herein i.e. letting of a vacant piece of land having small roofed structure is not there. Obviously, if the roofed structure has been let out, it will be an accommodation. The said case is not much assistance to the defendant opposite party. Similarly* ***Om Prakash v. the III Additional District Judge, Meerut and other, 1981 ARC 278,*** *is also distinguishable on fact as it was with respect to a temporary wooden "Khoka" kept on the land in suit. It was held that the building may also include within its scope any structure which may not be a permanent structure. This case is also not of much help and is distinguishable on facts. For the same reason,* ***Anwar Ahmad v. IVth Additional District Judge, Saharanpur and others, 1981 ARC 654,*** *is also distinguishable. Lastly, reference was made to the Apex Court Judgment in* ***Harish Chandra and another vs. Mohd. Ismail and others, 1990(2) ARC 357,*** *in this case a piece of ground over which there is a tin shed was let out. The Apex Court has remanded the matter to find out whether the said construction was put up by the landlord or tenant first. There is no discussion on the issue presently involved in the case on hand and is therefore, not of much assistance. "*

6. Insofar as his second submission is concerned, he has placed reliance on the decision of the apex court in the case of **Shri Janki Devi Bhagat Ram Trust v. Ram Swarup Jain reported in AIR 1995 Supreme Court 2482.**

7. The sum and substance of the argument of Sri Sharma is, firstly, that the land and tin shed in question was covered under the provisions of U.P.Act No.13 of 1972 and his second submission is that the notice of six months was invalid in view of the second part of Section 106(1) of the Transfer of Property Act, 1882. He has emphasized that the lease was a month to month lease.

8. Having considered the submissions of learned counsel for the defendant-

appellant and perused the impugned order, it is clear that the trial court was of the view that the tin shed and the land in question would be covered under the definition of appurtenant land and building. Such a view of the trial court has been upset by the first appellate court and it was held that the land in question was let out for running a saw mill which is a manufacturing process. The lease deed has been filed as Annexure-3 to the affidavit supporting the Stay Application. A perusal of the lease deed indicates that the purpose of letting out the land was for running a saw mill. The period stipulated therein was four years. The condition was that rent shall be payable month to month.

9. So far as the submission of Sri Sharma that the land in question is appurtenant to the building and the tin shed is an accommodation is concerned, it is not denied that the plaintiff-respondent is the owner of the premises in question. It is also not denied that the defendant-appellant was leased out the premises in question for the purpose of running a saw mill wherein a tin shed was erected. In the conditions of the lease deed it was provided that a tin shed for the purposes of running the saw mill can be erected by the defendant-appellant. However, it appears that in paragraph 1 of the plaint it has been stated by the plaintiff-respondent that the tin shed and the land was let out. Such an averment does not, in any manner, negate the stipulation in the lease deed that the defendant-appellant could erect the tin shed for running a saw mill.

10. A perusal of the lease deed would, therefore, be necessary. It stipulates that the land would be let out for a period of four years on monthly rent. The lessee could vacate the land or the parties could, by mutual consent, enter into a lease for further period. In the event the lessee vacates the land he was to remove all his effects therefrom. The lease was entered into only for the purpose of running the saw mill. The lease permitted the defendant-appellant to raise a tin shed for running the saw mill, therefore, the dominant purpose was to let out the land on lease for running the saw mill. The dominant purpose of the lease was not to let out a tin shed. In case, there was a tin shed already existing and was let out then it would have found mention in the lease deed. On the contrary the lease deed in condition no.2 provides as quoted hereunder:-

"2. प्रथम पक्ष यदि चाहे तो खाली स्थान पर उपर छप्पर व टीन अपनी जरुरत के लिहाज से अपने खर्चे से डलवायें।"

11. It is thus clear that the defendant-appellant could erect a tin shed for his necessity in running the saw mill. There was no tin shed that was let out by the plaintiff-respondent. The averments in paragraph 1 of the plaint do not indicate a contrary intention and it refers to the terms and conditions incorporated in the registered agreement dated 23.03.1979. The relationship of the parties are governed by the registered agreement hence only that agreement can be looked into to determine as to what was let out. It was definitely only the land. The tin shed was raised subsequent to the start of the lease period and it was made by the defendant-appellant. The tin shed so erected for running the saw mill, therefore, cannot be held to be accommodation or a building for the purposes of U.P. Act No.13 of 1972.

12. It is also not disputed that no part of the neighbouring building is in the tenancy or lease of the defendant-appellant. Consequently the situation is that the land in question has been let out to the defendant-appellant for the purposes of running a saw mill. The provisions of Section 3 of U.P.Act No.13 of 1972 refer to a 'tenant' in relation to a building either for residential purpose or for non-residential purpose. It is 'tenant' which has been defined therein and the building includes any land including any garden, garages and out-houses appurtenant to such building. When the tenancy or lease was not of the building, the defendant-appellant cannot claim the benefit of Section 3 of U.P.Act No.13 of 1972 inasmuch as he was not a tenant of any building and, therefore, the land in question could not be brought within the ambit of appurtenant land to a 'building' of which the defendant-appellant was admittedly not a tenant.

13. Sri Pankaj Agarwal, learned counsel for the plaintiff-respondent has cited a decision of Supreme Court in the case of **Koti Sarroj Anamma & Another Versus Jonnalagada Malleswara Rao reported in JT 1995(3) SC 329** and has referred to paragraphs 9 and 10 thereof. Paragraphs 9 and 10 are quoted below:-

"9. Looking to this evidence, it is clear that the shed, which has a zinc sheet roof, was erected only to protect the Saw mill machinery. What was leased out to the respondent was substantially the Saw mill machinery for the purpose of carrying on timber/Saw mill business. The shed was merely erected to shelter the machinery. The dominant purpose of the lease was to lease out the Saw mill machinery. In order that the lease should be covered by the Andhra Pradesh Buildings (Lease, Rent and Eviction) Control Act, 1960, the lease should be of a building as defined in Section 2 (iii). It should, therefore, be lease of any house or a hut or a part of a house or a hut let for residential or non-residential purposes. It would include gardens, grounds, garages and out-houses appurtenant to such a house or a hut. In the present case, however, the lease is not of any house or a hut or part of a house or a hut. The lease is of Saw mill machinery which is covered by a zinc sheet shed. The dominant purpose of the lease is to lease out the machinery. The shed is only an adjunct. It is also pointed out that a covering over the machinery in the shape of a structure consisting of zinc sheets supported on poles can hardly be called a house or even a hut. In any case, looking to the dominant purpose of the lease, the two courts below have rightly come to the conclusion that the lease is not covered by the provisions of the Andhra Pradesh Buildings (Lease, Rent and Eviction) Control Act, 1960.

10. The respondent relied upon a decision of a Full Bench of the Andhra Pradesh High Court in the case of Mohammad Jaffar Ali v. S. Rajeswara Rao (1971) 1 Andhra Pradesh Weekly Reports 194). In that case, there was a lease of the cinema theatre. The Court held that the lease was essentially a demise of the building with accessories like furniture and machinery, the dominant purpose of the demise was to lease the cinema theatre building and hence, the provisions of the Andhra Pradesh Buildings (Lease, Rent and Eviction) Control Act, 1960 apply to such a lease. In the present case, the dominant purpose is clearly to lease out the Saw mill machinery. A zinc sheet shed which has been erected merely to cover the

machinery cannot be a pre-dominant reason for the lease. The High Court, therefore, was not right in coming to the conclusion that the lease was governed by the provisions of Andhra Pradesh Buildings (Lease, Rent and Eviction) Control Act, 1960."

14. From the aforesaid decision, it is quite clear that it has to be lease of a house or a hut or a part of a house or part of a hut let out for residential or non-residential purpose. If there is such a lease of a building then it will include appurtenant land, garden, garage and out-houses. But, if there is no lease of any house or a hut or a part of a house or part of a hut then the land which has been leased out would not be appurtenant land but it would be simply a land leased out. The submission made by Sri Sharma is, therefore, mis-conceived and cannot be accepted.

15. Consequently, insofar as the present lease is concerned, the provisions of first part of Section 106(1) of Transfer of Property Act would be clearly applicable even in the absence of a contract and in view of the registered lease dated 23.03.1979. Sub clause (1) of Section 106 is quoted below:-

"106. ***Duration of certain leases in absence of written contract or local usage.-***

(1) In the absence of a contract or local law or usage to the contrary, a lease of immovable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable, on the part of either lessor or lessee, by six months' notice; and a lease of immovable property for any other purpose shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by fifteen days' notice."

16. The aforesaid provision contemplates of two situations of a deemed lease. The first for agricultural or manufacturing purpose would be deemed to be a lease from year to year and terminable by six months' notice. The second part is that a lease of immovable property for any other purpose would be deemed to be a lease from month to month terminable by 15 days' notice.

17. In the present case, the lease deed is available on record. It contemplates a period of four years. It is not a case of absence of a contract. The relevant portion as contained in the recital part of the lease-deed and condition no.8 of the testatum component of the lease are quoted hereunder:-

"हम कि सरदार सुरजीत सिंह आत्मज सरदार जगत सिंह निवासी शाह कमाल रोड शहर अलीगढ प्रथम पक्ष व ओम प्रकाश आत्मज लाला लखमी चन्द्र निवासी मुहल्ला शाह कमाल शहर अलीगढ अलीगढ द्वितीय पक्ष है जो कि एक किता भूमि मय सायबान टीन सीमा निम्नलिखित स्थित मुहल्ला शाह कमाल शहर अलीगढ के स्वामी व अधिकारी द्वितीय पक्ष है अतः उपयुक्त जायदाद को 200/– दो सौ रूपया माहवार तारीख 1–8–79 से वास्ते चार साल प्रथम पक्ष ने द्वितीय पक्ष से किराये पर ली है जिसमें प्रथम पक्ष आरा मशीन का कारोवार आरा मशीन व बिजली प्रथम पक्ष अपने खर्चे से लगाले जिसे वह खाली करते समय उखाड कर ले जावेगा ।

8–उपर लिखी चार साल की मुददत खत्म होने पर प्रथम पक्ष विला हीला व हुज्जत व झगडा किये बगैर उपयुक्त स्थान को जिस शक्ल में किराये पर लिया है उसी शक्ल में खाली करके द्वितीय पक्ष के कब्जे में दे देगा और प्रथम पक्ष का कोई हक उपरोक्त स्थान पर नही रहेगा।"

18. The first appellate Court has recorded finding of fact that the purpose of the lease was for setting up a saw mill and

not for any other purpose. In paragraph 19 of the judgment it has been recorded that the lease is of open land and not of any permanent constructions which could, in any manner, be a building or an accommodation for any purpose. In a second appeal the evidence cannot be re-appreciated to record a finding of fact by substituting the view taken by the Court below. The Court has considered the lease deed and recorded its finding of fact. Such finding of fact cannot be held to be perverse in any manner.

19. The submission of Sri Sharma that this is a month to month lease is clearly mis-conceived and against the record. The lease was for four years on payment of monthly rent.

20. In the present case, admittedly the lease was given for running a saw mill over the land with a contemplation that tin shed could be erected. No part of the building was given on rent. When the lease was not month to month but it was for a period of four years, the notice of six months was a valid notice. It was a protected lease. The second part of section 106(1) of Transfer of Property Act was clearly not applicable in the facts and circumstances of the present case.

21. The findings given by the first appellate court cannot be said to suffer from any error of law. They are findings of fact based on evidence. No substantial question of law arises in this appeal. The appeal is accordingly dismissed.

No order is passed as to costs.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 06.01.2011

BEFORE
THE HON'BLE RAJ MANI CHAUHAN, J.

U/S 482/378/407 No. - 32 of 2011

Constable 763, Raj Kumar Gupta
...Petitioner
Versus
The State of U.P. and another
...Respondent

Counsel for the Petitioner:
Singh Vinod Kumar

Counsel for the Respondent:
Govt. Advocate

Code of Criminal Procedure-Section-482-Revision-against dismissal of complaint-without impleading the accused-held-bad in law-order passed by Revisional Court not sustainable direction issued to decide revision after hearing to accused also.

Held: Para 8

The impugned order passed by the learned Additional Sessions Judge in the absence of the petitioner was bad in the eyes of law and and liable to be quashed and the matter requires to be remanded back for afresh decision in accordance with law after directing the revisionist to implead the petitioner as party and affording him proper opportunity of hearing.

Case law discussed:
Raghu Raj Singh Rousha Vs Shivam Sundaram Promoters Private Limited and another in (2009) 2 Supreme Court Cases 363

(Delivered by Hon'ble Raj Mani Chauhan, J.)

1. Heard Sri Vinod Kumar Singh, learned counsel for the petitioner and Sri Rajendra Kumar Dwivedi, learned A.G.A

for the State as well as perused the documents available on record.

2. This petition under Section 482 Code of Criminal Procedure (hereinafter referred to as Code) has been filed by the petitioners for quashing the order dated 09.8.2010 passed by the learned Additional Sessions Judge, Court No. 9, District Faizabad in Criminal Revision No. 69/10 (Rajesh Tiwari Vs. State of U.P.) whereby the learned Additional Sessions Judge has allowed the revision and set aside the order passed by the Additional Chief Judicial Magistrate, IIIrd, Faizabad in Complaint Case No. 56/09 of 2009 and remanded the matter back to the court below with a direction to pass afresh order in the light of evidence available on record. The petitioner has also prayed for quashing the impugned summoning order dated 21.8.2010 passed by the learned Additional Chief Judicial Magistrate, IV, District Faizabad in Criminal Complaint Case No. 2810 of 09 (Rajesh Tripathi Vs. Mahraj Dutt and Others).

3. The only question involved for consideration before this court is the legality of the impugned order dated 09.8.2010 passed by the learned Additional Sessions Judge, Court No. 9, District Faizabad in Criminal Revision No. 69/10 (Rajesh Tiwari Vs. State of U.P.) whereby he has allowed the revision filed by the opposite party no. 2. Therefore, with the consent of learned counsel for the petitioner and learned Additional Government Advocate this petition is being disposed of finally without issuing notice to the Opposite Party No. 2 to curtail the delay in the proceeding pending against the accused before the learned Additional Chief Judicial Magistrate.

4. From a perusal of the record, it appears that the opposite party no. 2-Rajesh Tiwari filed a complaint against the accused before the learned Additional Chief Judicial Magistrate, IIIrd, Faizabad. The learned Additional Chief Judicial Magistrate recorded the statement of the complainant under Section 200 of the Code and the statement of witnesses under Section 202 of the Code. He on the basis of statements of the complainant and witnesses found that there was no sufficient ground to proceed against the accused consequently he vide order dated 08.4.2010 dismissed the complaint under Section 203 of the Code. The complainant being aggrieved by the impugned order passed by the learned Additional Chief Judicial Magistrate preferred criminal revision before the Sessions Judge, Faizabad which was transferred by the learned Sessions Judge to the learned Additional Sessions Judge, Court No. 9, Faizabad for disposal. The complainant did not implead the petitioner as a party in the revision. The learned Additional Sessions Judge after hearing learned counsel for the revisionist and learned A.P.O. found that the learned Additional Chief Judicial Magistrate, had not properly gone through the statements of complainant and witnesses recorded by him under Section 200 and 202 of the Code consequently he Vide order dated 09.8.2010 allowed the revision and remanded back the matter to the court below for passing afresh order which has given rise to the present petition.

5. The submission of learned counsel for the petitioner is that the complainant-opposite party no. 2 had not impleaded

the accused-petitioner as opposite party in the criminal revision while they were necessary party to the revision. Learned counsel submits that after dismissal of the complaint by the learned Magistrate under Section 203 of Code, a valuable right had accrued in favour of the accused. He was entitled to oppose the criminal revision, therefore, he was necessary party. Learned counsel in support of his argument has placed reliance on law laid down by the Hon'ble Apex Court in case of ***Raghu Raj Singh Rousha Vs Shivam Sundaram Promoters Private Limited and another; in (2009) 2 Supreme Court Cases 363.*** Learned counsel argued that since the complainant did not implead the accused-petitioner as party in the criminal revision, therefore, the impugned order passed by the learned Additional Sessions Judge in the criminal revision filed by the opposite party no. 2 is bad in the eyes of law and is liable to be quashed on this ground and the matter deserves to be remanded back to the learned Additional Sessions Judge to decide the criminal revision afresh after directing the revisionist to implead the petitioner as a opposite party and after serving the notice to the petitioner as well as allowing him proper opportunity of hearing. Consequently, the impugned summoning order dated 21.8.2010 passed by the learned Additional Chief Judicial Magistrate, IV, Faizabad is also illegal and liable to be quashed.

6. Sri Rajendra Kumar Dwivedi, learned A.G.A. although supported the impugned order passed by the learned Additional Sessions Judge but fairly accepts that the complainant without impleading the petitioner as opposite party in the criminal revision had filed criminal revision against the dismissal order of the complaint passed by the learned Magistrate under Section 203 of the Code while the petitioner was a necessary party to the criminal revision.

7. I have given thoughtful consideration to the submissions of learned counsel for the petitioners and learned A.G.A.

8. From a perusal of the records, it appears that the opposite party no. 2-complainant had filed the criminal revision against the dismissal order of his complaint passed by the learned Magistrate before the Sessions Judge, Faizabad without impleading the petitioner as opposite party. The criminal revision was transferred to the learned Additional Sessions Judge, Court No. 9, Faizabad for disposal. The learned Additional Sessions Judge allowed the revision. After dismissal of the complaint by the learned Magistrate under Section 203 of the Code, a valuable right had accrued in favour of the accused. He was necessary party to the revision who could oppose the revision and support the impugned order passed by the learned Magistrate. In case ***Raghu Raj Singh Rousha Vs Shivam Sundaram Promoters Private Limited and another (supra)*** the Hon'ble Apex Court held that where an application moved by the complainant under Section 156 (3) of the Code was dismissed by the learned Magistrate and the applicant being aggrieved by the order passed by the learned Magistrate filed revision before the Sessions Judge, the accused was necessary party to the revision as a valuable right accrued in favour of the accused to oppose the revision and support the order passsed by the learned Magistrate. In view of the law laid down

by the Hon'ble Apex Court in the case cited above, the petitioner was a necessary party to the revision filed by the complainant against the order passed by the learned Magistrate under Section 203 of the Code. The impugned order passed by the learned Additional Sessions Judge in the absence of the petitioner was bad in the eyes of law and liable to be quashed and the matter requires to be remanded back for afresh decision in accordance with law after directing the revisionist to implead the petitioner as party and affording him proper opportunity of hearing. Consequently, the impugned summoning order dated 21.8.2010 passed by the learned Additional Chief Judicial Magistrate, IV, Faizabad is also liable to be quashed.

9. The petition is, therefore, allowed. The impugned order dated 09.8.2010 passed by the learned Additional Sessions Judge, Court No. 9, District Faizabad in Criminal Revision No. 69/10 (Rajesh Tiwari Vs. State of U.P.) and the impugned summoning order dated 21.8.2010 passed by the learned Additional Chief Judicial Magistrate, IV, Faizabad in Criminal Complaint Case No. 2810/09 (Rajesh Tripathi Vs. Mahraj Dutt and Others), under Sections 323/504/506 IPC, P.S. Raunahi, District Faizabad are hereby set aside. The matter is remanded back to the learned Additional Sessions Judge with a direction that he shall direct the revisionist to implead the petitioner as party in the revision filed by him then he will dispose of the revision after serving notice to the petitioner and affording him proper opportunity of hearing.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 13.01.2011

BEFORE
THE HON'BLE DEVI PRASAD SINGH, J.
THE HON'BLE VIRENDRA KUMAR DIXIT, J.

Misc. Bench No. 77 of 2011

Raghuveer Bahadur Sinha ...Petitioner
Versus
District Magistrate Faizabad and another ...Respondent

Counsel for the Petitioner:
Karunakar Srivastava

Counsel for the Respondent:
C.S.C.

Constitution of India, Art-226-14, 19 (1) (g), 21-Status certificate-refusal on ground-petitioner residing in house of ancestor situated over abadi land-in case of default/or public loss-can not be recovered-held-illegal-amounts to restriction with regard to protection granted under article 19(1) (g)- it is for the corporation, department or establishment to provide necessary safeguard-and not for the Distt. Magistrate-who is bound to give income certificate-direction to Secretary, issued necessary guidelines to all the Distt. Magistrate for future action.

Held: Para 5

The reason assigned for refusal of status certificate seems to be not justified. Only because the person is residing in the village in his ancestral house along with other family members should not be deprived from status certificate. A person who is member of joint family is also entitled to enjoy quality, dignity and privacy of life protected by Article 21 of the Constitution of India. Non-issuance of status certificate to a person who is residing in village may be in ancestral

house situated over the abadi land shall affect the right guaranteed under Article 19 (1) (g) of the Constitution of India to carry on trade and profession coupled with Article 21 of the Constitution of India which protects right to livelihood. Absolute denial to issue status certificate merely on the ground that a person residing in his ancestral house situated over the abadi land of the village is highly arbitrary and have got no nexus with the object sought to achieve, hence, hit by Article 14 of the Constitution of India. Though State has got right to impose restriction with regard to right guaranteed under Article 19(1) (g) of the Constitution of India but that should be reasonable, just, fair and proper.

(Delivered by Hon'ble Devi Prasad Singh, J.)

1. Heard learned counsel for the petitioner and the learned Standing counsel.

2. The present writ petition under Article 226 of the Constitution of India has been filed on account of refusal of District Magistrate Faizabad to issue a status certificate to the petitioner to obtain contract from the government department. Certificate has been refused by the District Magistrate on the ground that petitioner resides in village, in a house constructed over the abadi land. In the said house, petitioner is residing along with other family members and being joint family in case status certificate is issued it shall not be easy to recover the dues and in the event of failure on the part of petitioner to pay the dues, recovery of the same by auctioning of the property. Tehsildar, Raunahi was appeared on earlier date and stated that the petitioner is residing in his own ancestral house along with other family members. It has been admitted by Tehsildar that in the village almost every house is situated in abadi land and is in occupation from one generation to other.

3. Accordingly the question cropped up as to whether only because a citizen is the member of joint family residing in ancestral house in a village the administration may refuse to issue status certificate? We have call the District Magistrate Faizabad to appear and assist the court. In consequence to which, the District Magistrate Faizabad Shri M.P. Agarwal is present in person. With the consent of parties' counsel we proceed to decide the writ petition finally.

4. Shri M.P. Agarawal, District Magistrate, Faizabad submits that ordinarily status certificate is not issued to the persons whose house is situated in abadi land of a village may be ancestral house. The reason assigned by the District Magistrate is that in the default of payment of dues it shall not be possible to recover the dues by auctioning the property. District Magistrate admitted that status certificate may be issued in case the person has purchased the house of the village through registered sale deed may be situated over the abadi land.

5. The reason assigned for refusal of status certificate seems to be not justified. Only because the person is residing in the village in his ancestral house along with other family members should not be deprived from status certificate. A person who is member of joint family is also entitled to enjoy quality, dignity and privacy of life protected by Article 21 of the Constitution of India. Non-issuance of

status certificate to a person who is residing in village may be in ancestral house situated over the abadi land shall affect the right guaranteed under Article 19 (1) (g) of the Constitution of India to carry on trade and profession coupled with Article 21 of the Constitution of India which protects right to livelihood. Absolute denial to issue status certificate merely on the ground that a person residing in his ancestral house situated over the abadi land of the village is highly arbitrary and have got no nexus with the object sought to achieve, hence, hit by Article 14 of the Constitution of India. Though State has got right to impose restriction with regard to right guaranteed under Article 19(1) (g) of the Constitution of India but that should be reasonable, just, fair and proper.

6. Accordingly while affirming the state's right to impose reasonable restriction we are of the view that restriction should be reasonable and citizens must not be deprived from the "status certificate" only because he or she is residing in ancestral house of a village. Appropriate safeguard may be provided while issuing status certificate and while providing contractual assignment, for recovery of dues. Moreover, it is for the corporation, department or establishment to provide necessary safeguard while preparing the agreement for contractual assignment, not the District Magistrate. It shall always be obligatory on the part of the District Magistrate to provide income or status certificate to a citizen when he or she approach for the purpose. In case, it is joint family property then that aspect of the matter may be looked into and indicated in the status certificate so that while awarding contract and entering into agreement appropriate care may be taken by the department concerned.

7. It shall be appropriate for the District Magistrate as well as State Government to issue appropriate guidelines for issuance of status or income certificate to the members of joint family. Nothing should be done which may compel the members of joint family to disintegrate and live individual life. Since, ages Indians are residing jointly in the villages and while dealing with the matters with regard to members of joint Hindu family appropriate care should be taken to keep their jointness, instead creating such circumstances because of which members of joint family disintegrates. District Magistrate shall look into the matter and prepare appropriate guidelines and issue a fresh order with regard to status certificate to the petitioner.

8. At this stage, petitioner's counsel submits that his brother is ready to furnish "no objection" certificate with regard to issuance of status certificate. In case, it is so that aspect of the matter shall be looked into by the District Magistrate.

9. Subject to aforesaid observation, let the State Government also at its end take a decision and frame guidelines with regard to issuance of status certificate to the citizens. The guidelines or the circular prepared for the purpose may not affect the jointness of the families residing in the villages of the State. Rather the State Government should encourage and prepare guidelines in such a manner so the age

old joint family system still working satisfactorily in the villages may continue for all time to come. The denial of certificate solely on the ground that a person is residing in ancestral house constructed over the abadi land shall be violative of fundamental right as guaranteed under Article 19(1)(g) of the Constitution of India. Restrictions and conditions should be reasonable to meet out the requirement of Article 14 of the Constitution of India. No person should be deprived from his source of livelihood only because he or she is the members of the joint Hindu Family residing in his or her ancestral house. Guidelines may be framed in such a manner so that in the event of default, recovery may be made from the share of such persons-whether it is from agricultural land or portion of house but absolute denial shall be detrimental to joint families which is still continuing in the State of U.P. in the rural area.

10. A copy of the present order shall be sent to the Chief Secretary, State of U.P. to prepare guidelines with regard to issuance of status certificate by the District Magistrate and consequential circular so that persons residing in their ancestral house or who are members of joint families may not be deprived to carry on their profession or trade.

11. The District Magistrate shall take a fresh decision keeping in view the observations made hereinabove, expeditiously.

12. Subject to above, writ petition is disposed of finally.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 20.01.2011

BEFORE
THE HON'BLE SATYENDRA SINGH CHAUHAN, J.

U/S 482/378/407 No. - 267 of 2011

Sanjay Dutt ...Petitioner
Versus
The State of U.P and others...Respondent

Counsel for the Petitioner:
Sri Kunwar Siddharth Singh

Counsel for the Respondents:
Govt.Advocate

Code of Criminal Procedure Section 482-summoning order-offence U/S 294 for allegation repeating filmy dialogue-not amount-to offence alleged-operation of summoning order stayed.

Held: Para 12

He has merely repeated the dialogue of the film and repeating of dialogue of his film does not amount to coining some phrase or remark being obscene against any person. Gandhian theory as propounded by the petitioner was his prerogative, therefore, in the circumstances, it appears that process of law has been misused.

Case law discussed:
1956 S.C. 541 (S) AIR V 43 C 93 Aug.

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

1. Heard Sri I. B. Singh, Senior Advocate on behalf of petitioner assisted by Kunwar Siddharth Singh and the learned A.G.A.

2. Through this petition, the petitioner has challenged the charge sheet no. 36 of

2010 dated 6.2.2010 filed against him under Section 294 IPC .

3. The petitioner is alleged to have committed an offence punishable under Section 294 IPC during the course of a speech given for campaigning of a political party, namely 'Samajwadi party'. Such utterances and statement are said to have been made on the basis of a film namely ' Munna Bhai M.B.B.S.' whose hero was the petitioner. The film according to the public perception was widely appreciated as it was based on Mahatama Gandhi's ideology and also it was on the basis that every thing can be solved through love and affection instead of indulging into the act of violence. The petitioner while giving political speech at a meeting organized by the said party proceeded to give a statement to the effect that the public may approach the Chief Minister and give her ' Jadu Ki Jhappi' and ' Jadu Ki Pappi' for redressal of its grievances and thereafter problems will be solved and upon the said statement the State machinery i.e. certain officers of the district became over active and proceeded to lodge an FIR against the petitioner. After lodging of the FIR statement of witnesses were recorded and thereafter a charge sheet has been filed.

4. Submission of learned counsel for the petitioner is that ingredients of Section 294 as contemplated under the I.P.C.are not complete from the evidence which has been collected during the course of investigation. Therefore, the trial court can not proceed against the petitioner. It has also been submitted that there has been no offence and the public at large can not be said to be affected and annoyed on account of this statement but for the official who has lodged the FIR. The FIR was lodged with a view to please the Chief Minister and nothing more than that. He has relied upon Section 294 IPC which reads as under :-

5. **" 294-Obscene acts and songs -** Whoever, to the annoyance of others--

(a) does any obscene act in any public place, or

(b) sings, recites or utters any obscene song, ballad or words, in or near any public place,

shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both."

6. In support of his contention he has placed reliance upon the decision of the Madras High Court in the case of **K.Jayaramanuju Vs. Janakaraj and others**, 1997 CRI.L.J.1623 where in similar question of uttering of obscene words was involved and the Madras High Court while considering the question held that in order to prove the offence under Section 294 IPC mere utterance of obscene words are not sufficient but there must be a further proof to establish that it was to the annoyance of others. Since the said evidence was lacking in the said case the accused was acquitted.

7. The next case on which reliance has been placed is the case of **Kartar Singh and others Vs. The State of Punjab,** 1956 S.C. 541 (S) AIR V 43 C 93 Aug.) to give support to his argument that if any statement is made against a Minister then whether it amounts to disturbing the State security and whether that will amount to defamation.

8. Support has also been taken by the petitioner in regard to the fact that people in

public life in a democratic State are open to criticism and they should accept it open heart rather than taking it offensive. The vanity should not come in the mind of the people who are in public life and they should be open to criticism and they must ready to bear the criticism to that extent. In para 12 of the judgment it has been held as under :-

"These slogans were certainly defamatory of the Transport Minister and the Chief Minister of the Punjab Government but the redress of that grievance was personal to these individuals and the State authorities could not take the cudgels on their behalf by having recourse to section 9 of the Act unless and until the defamation of these individuals was prejudicial to the security of the State or the maintenance of public order.

So far as these individuals were concerned, they did not take any notice of these vulgar abuses and appeared to have considered the whole thing as beneath their notice. Their conduct in this behalf was consistent with the best traditions of democracy. "Those who fill a public position must not be too thin skinned in reference to comments made upon them. It would often happen that observations would be made upon public men which they know from the bottom of their hearts were undeserved and unjust yet they must bear with them and submit to the misunderstood for a time" (Per Cockburn, C.J. in Saymour v. Butterworth (1) and gee the dicta of the judges in R. V. Sir R. Carden (2). "Whoever fills a public position renders himself open thereto. He must accept an attack as a necessary, though unpleasant, appendage to his office" (Per Bramwell, B., in Kelley v. Sherlock (3). Public men in such positions may as well think it worth their while to ignore such vulgar criticisms and abuses hurled against them rather than give importance to the same by prosecuting the persons responsible for the same."

9. Learned AGA was asked to bring to the notice of the Court the clinching evidence, which may fasten the liability of criminal act punishable under Section 294 IPC in respect of the petitioner. The entire evidence which has been annexed along with the charge sheet is that of only government officials. The ingredients of Section 294 IPC go to indicate that it should be of annoyance to others. The word 'others' goes to indicate that it should be annoyance to the persons who are independent and who are neither party to any of the section of the society and it should be to the public.

10. Apart from the government official, no statement of any public person has been recorded to indicate that there was annoyance to others. Even if the argument of learned AGA is accepted, then the annoyance of person concerned against whom statement has been made is not explicit from the record.

11. In absence of clinching evidence, the charge sheet which has been filed, does not inspire confidence and the petitioner has every chance of success. The circumstances in which the statement has been made does not lead to inference from any corner that it was made with a view to make any obscene remark against the Chief Minister. It appears that it was made in respectful friendly atmosphere and in a lighter vein rather than in derogatory manner.

12. He has merely repeated the dialogue of the film and repeating of dialogue of his film does not amount to coining some phrase or remark being

obscene against any person. Gandhian theory as propounded by the petitioner was his prerogative, therefore, in the circumstances, it appears that process of law has been misused.

13. Since it is at the interim stage, I do not dwelve into that subject further.

14. Let learned AGA may file counter affidavit within four weeks and the thereafter the petitioner has two weeks to file rejoinder affidavit. List thereafter.

15. In the meantime the operation of the summoning order dated 2.4.2010 passed in Case No. 1107/2010 (State Vs. Sanjay Dutt) pending in the court of Chief Judicial Magistrate, Pratapgarh, shall remain stayed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 20.11.2010

BEFORE
THE HON'BLE DEVI PRASAD SINGH, J.
THE HON'BLE VEDPAL, J.

Service Bench No. 556 of 2009

Praveen Kumar Agarwal and others
...Petitioners
Versus
State of U.P.and another ...Respondent

Counsel for the Petitioner:
Asit Kumar Chaturvedi

Counsel for the Respondents:
C.S.C.

U.P. Development Authorities Centerlised Services Rules, 1985-Rule-34, 37 and 38-Post retiral benefits including regular pension-claimed by the employees Development Authorities-on background by statuary provision-when they got retirement benefits like other State Govt. employees up to 1999-by impugned circular it can not be denial-held-beneficial legislation dealing with human rights-should not be facial cosmetics-it can not be taken-away or with held while made available up to 1999-even on different mode of recruitment with different appointing authorities-they constitute one block and collectively carry out the statutory provisions can not be discriminated.

Held: Para 47 and 57

Provisions contained in Rule 34, 37 and Rule 38 (supra), are beneficial provisions and should be read collectively along with Section 24 and other related provisions. The beneficial legislation or statutory provisions dealing with the human rights or livelihood should be made functional and not facial cosmetics as held by Hon'ble Supreme court in AIR 1987 SC 1086: M.C. Mehta and another. Vs. Union of India and others. Their lordships in the said case has reiterated the constitutional spirits propounded in the case reported in Rammana Shett's case (AIR 1979 SC1628) and the Constitution Bench observed that functional realism should be looked into and not facial cosmetics.

In spite of repeated query made by this Court, learned standing counsel failed to bring on record any material which may justify the issuance of impugned order more so, when regular pension was paid in pursuance of earlier circular/orders of 1983 (supra) which are in consonance with the Statutory provisions (supra). The State Government seems to have acted arbitrarily in violation of statutory provisions. By executive instructions, the rights flowing from the statutory provisions, cannot be taken away or withheld more so, when it was made available upto 1999.

Case law discussed:
(2002) 4 SCC 297, (2003) 3 SCC 410, (2006) 5 SCC 745, (2007) 10 SCC 528, AIR 1954 SC

224, AIR 1964 SC 179, (1971) 2 SCC 188, (1974) 4 SCC 335, (1981) 4 SCC 335, (1989) Supp-1 SCC 116=AIR 1989 SC 307, (1978) 1 SCC 248, (2001) 1 SCC 442, (1971) 2 SCC 330, (1973) 1 SCC 120, (1983) 1 SCC 305,(1987) 2 SCC 179, AIR 1992 SC 767, AIR 1987 SC 1086, (1999) 3 Supreme Court 601, (2002) 8 Supreme Court Cases 400, (2003) 4 Supreme Court Cases 27, (2004) 5 Supreme Court Cases 385, AIR 1972 SC 1546, 1993 Supp (2) SCC 415, 2005 LCD 1696,

(Delivered by Hon'ble Devi Prasad Singh, J.)

1. Employees of Development Authorities through its Association and in personal capacity, who were holding various posts including Finance Advisor, Chief Engineer, Chief Town Planner, Executive Engineer, Assistant Engineer and Junior Engineer, etc., have approached this Court under Article 226 of the Constitution of India, thereby claiming post retiral benefits including regular pension at par with the Government employees. Some of the petitioners are employees of various departments of State of U.P., State owned Corporations, Public Undertakings, Municipalities etc., appointed in pursuance of provisions contained in sub-section 2 of Section 5 of U.P. Urban Planning and Development Act, 1973 (in short Act). Their services were later on, absorbed as the members of Centralised Services created under the U. P. Development Authorities Centralised Service Rules, 1985 (in short Centralised Service Rules) which came into force with effect from 25.6.1985 under Section 5(A) of the Act.

2. Under the Act, following categories of persons have been appointed in Development Authorities of the State namely:

1. Officers appointed under sub-section (1) of Section 5 of the Act on the post of Secretary and Chief Accounts Officer of the Development Authorities.

2. Officers/employees appointed under sub-section (2) of Section 5 of the Act by the Development authorities in required number and designation in appropriate grade.

3. The employees or officers initially appointed against pensionable post in various departments of State of U.P., State owned Corporation and Public Undertakings, having served as such for some period and later on, appointed as Officers in various Development Authorities under Section 5 (2) of the Act.

4. The employees and officers appointed under the Development Authorities later on, were absorbed in Centralised Service. Persons appointed under sub-section (3) and (4) of Section 59 of the Act.

3. Out of 4 categories, all employees and officers appointed in pursuance of sub-section (1) of Section 5, sub-section (3) and (4) of Section 59 of the Act, have been paid pension except the petitioners who fall within the second category i.e., appointed in pursuance of powers conferred by sub-section (2) of Section 5 of the Act.

4. Even some of the employees falling in the present categories, are being paid pension in pursuance of the orders passed by this Court.

Smt. Rita Bhatnagar wife of late Anil Bhatnagar is being paid pension in pursuance of the order dated 13.12.2001 passed in Civil Misc. Writ Petition No.42495 of 2001. Sri Girija Shanker Mishra from all Centrallised Service, is

being paid pension in pursuance of the Government order dated 12.9.2003. In pursuance of the Government order dated 29.9.1983, the all class-III and class-I employees of Development Authorities have been sanctioned pension by the respective Development Authorities.

5. It has been submitted by the petitioners' counsel that all those employees who retired upto 5.4.1999 belonging to petitioners category, have been paid pension without any break. Those, who were serving in erstwhile Municipal Board and joined the Development Authorities, have been paid regular pension. During the course of employment, provident fund was deducted from petitioners salary by respective Development Authorities in accordance with U.P. Palika Centrlaised Services Rules, 1966. Some of the petitioners were also permitted to withdraw advance from provident fund. The respective Development Authorities, have been contributing their shares in the form of pension fund or in the name of contributory provident fund. The contributed fund has been deposited in pension fund in accordance with the U.P. Palika Centralised Services Rules, 1966 or in the provident fund of the respective employees as the case may be. After creation of Development Authorities under 1973 Act, the Government order dated 17.3.1983 was issued providing therein that till model pension is framed by the Development Authorities, employees of Development Authorities would be entitled for pension in accordance with Uttar Pradesh Palika Centralised Services Retirement Benefit Rules, 1981.

6. Thereafter, another Government order dated 29.9.1983 was issued providing therein that pension to class-III and class-IV employees of Development Authorities, should be sanctioned and paid by Vice-Chairman of the respective Development Authorities whereas, with respect to the remaining i.e.,Class-II and Class-I officers, the sanction of pension shall be made by the State Government till finalisation of Development Authorities retirement benefits Rules.

7. A combined reading of Government order dated 17.3.1983 and 29.9.1983, shows that Government took decision for payment of pension to employees and officers of Development Authorities till formulation and enforcement of model pension regulations.

8. Model pension Rule was drafted and approved by the Finance Department. The Draft Rules namely, U. P. Urban Planning and Development Centralised Services, Service Retirement Rules, 1997, was placed before the Cabinet in the year 1997 and the Cabinet thereafter, constituted a Committee headed by Chief Secretary of U.P. Government to look into the matter. The petitioners' submitted that the Committee headed by the Chief Secretary has principally agreed for payment of pension but no Rules or Regulations have been framed till date. Instead of framing Rules or Regulations, by the impugned order dated 5.4.1999 (Annexurre No.7 to the writ petition), it has been clarified that with regard to employees of the Development Authorities, no decision has been taken for payment of pension and they are not entitled for payment of pension. The impugned order has been again supplemented by another Government order dated 5.5.1999 (Annexure No.8 to the writ petition). However, a perusal of the Government order dated 5.5.1999 shows that principally, the Government has been

agreed to pay pension to employees of Centralised Services appointed in pursuance of sub-section (2) of Section 5 of the Act.

9. On one hand, the Government principally agreed with regard to payment of pension to the petitioners and took a decision to frame Rules or Regulations for the purpose but on the other, the State Government has kept the matter pending since last 15 years. It may be noted that all the Development authorities had informed the Government that they possess sufficient fund to meet out the requirement with regard to payment of pension to the retired employees who were appointed in pursuance of sub-section (2) of Section 5 of the Act but even then no formal decision has been taken and communicated by the Government for framing appropriate Rules or Regulations to ensure payment of pension.

10. It has been vehemently argued by the petitioners' counsel that the petitioners are entitled for payment of pension in terms of Government order of the year 1983 (supra) ignoring the Government order dated 5.4.1999 as they are employees of Centralised Services.

Statutory Provisions

11. Section 5 of the Act empowers the State Government and Development Authorities to make appointment on the post falling within their jurisdiction. For convenience, Section 5 is reproduced as under:

"5. Staff of the Authority.--(1). The State Government may appoint two suitable persons respectively as the Secretary and the chief accounts officer of the Authority who shall exercise such powers and perform such duties as may be prescribed by regulations or delegated to them by the Authority or its Vice-Chairman.

(2) Subject to such control and restrictions as may be determined by general or special order of the State Government, the Authority may appoint such number of other officers and employees as may be necessary for the efficient performance of its functions and may determine their designations and grades.

(3) The Secretary, the Chief Accounts Officer and other officers and employees of the Authority shall be entitled to receive from the funds of the Authority such salaries and allowances and shall be governed by such other conditions of service as may be determined by regulations made in that behalf."

12. Section 5-A in the Act, was inserted by the Amending Act No.21 of 1985 with effect from 22.10.1984. Under Section 5-A, all persons working in the Development Authorities upon creation of Centralised Services, unless opt otherwise, shall be absorbed. Section 5-A of the Act is reproduced as under:

5-A. Creation of Centralised Services.---(1). Notwithstanding anything to the contrary contained in Section 5 or in any other law for the time being in force, the State Government may at any time, by notification, create one or more 'Development Authorities Centralised Services' for such posts, other than the posts mentioned in sub-section (4) of Section 59, as the State Government may deem fit, common to all the Development Authorities, and may prescribe the manner and conditions of recruitment to, and the

terms and conditions of service of persons appointed to such service.

(2) Upon creation of a Development Authorities Centralised Service, a person serving on the posts included in such service immediately before such creation, not being a person governed by the U.P. Palika (Centralised) Services Rules, 1966, or serving on deputation, shall, unless he opts otherwise, be absorbed I n such service,---

(a) finally, if he was already confirmed in his post, and

(b) provisionally, if he was holding temporary or officiating appointment.

(3) A person referred to in sub-section (2) may, within three months from the creation of such Development Authorities Centralised Service communicate to the Government in the Housing Department, his option not to be absorbed in such Centralised Service, failing which he shall be deemed to have opted for final or provisional, as the case may be, absorption in such Centralised Service.

(4) Suitability of a person absorbed provisionally, for final absorption in a Development Authorities Centralised Service, shall be examined in the manner prescribed and if found suitable he shall be absorbed finally.

(5) The services of an employee who opts against absorption or who is not found suitable for final absorption, shall stand determined and he shall, without prejudice to his claim to any leave, pension, provident fund or gratuity which he would have been entitled to, be entitled to receive as compensation from the Development authority concerned, an amount equal to---

(a) three months' salary, if he was a permanent employee;

b) one month's salary, if he was a temporary employee.

Explanation.---For the purpose of this sub-section the term 'salary' includes dearness allowance, personal pay and special pay, if any.

(6) It shall be lawful for the State Government or any officer authorised by it in this behalf, to transfer any person holding any post in a Development Authorities Centralised Service from one Development authority to another."

13. State Government issued Notification dated 22.10.1984 in pursuance of powers conferred under sub-section (1) of Section 5-A of the Act, creating Development Authorities Centralised Services for the post specified therein, common to all Development Authorities. Admittedly, the petitioners services have been absorbed and belong to Centralised Service. Section 24 of the Act deals with the payment of pension and provident fund. Section 24 of the Act provides that authority may constitute for the benefit of its whole-time paid members and of its officers and other employees in such manner and subject to such conditions, as the State Government may specify, such pension or provident funds as it may deem fit and in case it is done, the State Government shall declare that provision of the Provident Funds Act, 1925, shall apply. Statutory provisions contained in the Act reveals that for the benefit of serving employees, the provisions may be made for payment of pension and

provident fund as deemed fit by the State Government. For convenience Section 24 of the Act is reproduced as under:

"24. Pension and Provident fund.--(1) The Authority may constitute for the benefit of its whole-time paid members and of its officers and other employees in such manner and subject to such conditions, as the State Government may specify, such pension or provident funds as it may deem fit.

(2) Where any such pension or provident fund has been constituted, the State Government may declare that the provisions of the Provident Funds Act, 1925, shall apply to such fund as if it were a Government Provident Fund."

14. U. P. Development Authorities Centralised Service Rules, 1985 was notified on 25.6.1985 and according to it, State Government shall be the appointing authority and persons absorbed under Rule shall be the members of service. The cadre and strength of service has been given under Rule 3. The age of superannuation has been provided under Rule 34. Rule 37 provides that any matter not covered by these Rules or by special orders, the members of service, shall be governed by Rules, Regulations and orders applicable generally to the U.P. Government servants serving in connection with the affairs of the State. For convenience, Rule 34 and 37 is reproduced as under:

"34. (1) Subject to the provisions of Sub-rules (2) and (3), the age of retirement from service of all officers and other employees of the service shall be sixty years beyond which no one shall ordinarily be retained n the service.

(2) The appointing authority may, at any time, by three months notice in writing or three months pay in lieu thereof to any officer or other employees of the service (whether permanent or temporary) without assigning any reason, require him to retire in public interest after he attains the age of fifty years.

(3) An officer or other employee of the service may be three months notice to the appointing authority seek voluntary retirement at any time after attaining the age of fifty years provided he has completed qualifying service for twenty years. The retirement under the sub-rule shall take effect only after the appointing authority has allowed the officer or other employee of the service to retire.

Provided that it shall be open to the appointing authority to allow an officer or other employee of the service to retire without any notice or by a shorter notice.

(4) A retiring pension and/or other retirement benefits, if any, shall be available in accordance with and subject to the provisions of the relevant rules applicable to every officer or other employees who retires or is required or allowed to retire under this rule.

Explanation--(1) The decision of the appointing authority under sub-rule (2) to require the officer or other employee to retire as specified therein shall be taken if it appears to the appointing authority to be in public interest but nothing herein contained shall be construed to require any recital in the order of such decision having been taken in the public interest.

(2) Every such decision shall, unless the contrary is proved, be presumed to have been taken in the public interest."

"37. (1) If any dispute of difficulty arises regarding interpretation of any of the provisions of these rules, the same shall be referred to the Government whose decision shall be final.

(2) In regard to the matters not covered by these rules or by special orders, the members of service shall be governed by the rules, regulations and orders applicable general to U.P. Government servants serving in connection with the affairs of the State.

(3) Matters not covered by sub-rules (1) and (2) above shall be governed, by such orders as the Government may deem proper to issue."

15. Admittedly, all the employees who were working earlier in Nagar Palika, Nagar Nigam and later on, whose services were merged and absorbed with the Centralised Services, are being paid regular pension in pursuance of the provisions of Section 59 (3) and (4) of the Act. The benefit available to them, have not been withdrawn. It has also been admitted at bar that persons appointed in pursuance of sub-section (1) of Section 5 of the Act, have been paid regular pension. Services of persons working in the U.P. Palika Centralised Service under Section 66, have been absorbed under sub-section (2) of Section 5-A of the Act. Except the persons appointed in pursuance of the powers under sub-section (2) of Section 5 of the Act, all persons have been paid regular pension. It may be noted that Section 24 of the Act is equally applicable to all the incumbent appointed in Development Authorities including the petitioners or the persons absorbed from Palika Centralised Service. Even to petitioners cadre, regular pension was being paid upto 1999 in pursuance of the provisions contained in the Act, Rules (supra), and the two Government orders:One dated 17.3.1983 and other, dated 29.9.1983. It shall be appropriate to reproduce the above two Government orders dated 4.3.1983. The Government order dated 17.3.1983 is reproduced as under:

प्रेषक

श्री आनन्द स्वरूप वर्मा,
संयुक्त सचिव,
उत्तर प्रदेश शासन।

सेवा में,

उपाध्यक्ष,
समस्त विकस प्राधिकरण,
लखनऊ।

अनुभाग–२ लखनऊ दिनांक १७ मार्च, १९८३

विषयः–सेवा निवृत्त प्राधिकरण कर्मचारियों को पेंषन का भुगतान।

महोदय,

उपर्युक्त विषयक लखनऊ विकास प्राधिकरण के पत्रांक 112/सीएओ/पांच, दिनांक 11–10–1982 के संदर्भ में मुझे आपको ये सूचित करने का निर्देश हुआ है कि उत्तर प्रदेश नगर योजना और विकास अधिनियम 1973 की धारा 56(2) (ग) के अधीन प्रत्येक प्राधिकरण को अपने सेवा निवृत्त कर्मचारियों को पेंषन का भुगतान किये जाने हेतु षासन के पूर्वनुमोदन से विनियमावली बनानी है किन्तु अब तक किसी भी प्राधिकरण से, इस प्रयोजनार्थ आदर्ष विनियमावली बनाये जाने हेतु कोई प्रारूप प्राप्त नही हुए हैं। अतएव यह अनुरोध है कि आदर्ष विनियमावली बनाये जाने हेतु आवष्यक प्रारूप षासन को यथाषीघ्र उपलब्ध कराने का कष्ट करें।

2– यह भी सूचित करना है कि पैरा 1 में उल्लिखित आदर्ष विनियमावली में कुछ समय लगेगा अतएव षासन द्वारा यह भी निर्णय लिया गया है कि ऐसी विनियमावली बनने तक उक्त अधिनियम की धारा 59(3) के अनुसरण में स्थानीय महापालिका की पेंषन नियमावली में, सक्षम प्राधिकारी में आवष्यक संषोधन मानते हुए, संदर्भित नियमावली के प्राविधानों के अनुसार ही, सेवानिवृत्त अधिकारियों व कर्मचारियों को पेंषन स्वीकृत की जाय।

भवदीय,
अपठनीय
(आनन्द स्वरूव वर्मा)
संयुक्त सचिव।

संख्याः– ३७/३७, –२–१३३ डीए/१८,तद् दिनांक

प्रतिलिपि परीक्षक, स्थानीय निधि लेखा उत्तर प्रदेष इलाहाबाद का आवष्यक कार्यवाही हेतु प्रेड्डित।

आज्ञा से,
(आनंद स्वरूप वर्मा)
संयुक्त सचिव।"

16. The Government order dated 29.9.1983, which is a clarificatory order, is reproduced as under:

संख्या–६७७८/३७–२–१३३डीए/७

प्रेषक,
श्री आनन्द स्वरूप वर्मा,
संयुक्त सचिव,
उत्तर प्रदेश शासन,

सेवा में,
उपाध्यक्ष,
कानपुर विकस प्राधिकरण,
कानपुर।

अनुभाग–2 लखनऊ दिनांक 29 सितम्बर, 1983

विषयः–विकास प्राधिकरण कर्मचारियों की पेंषन स्वीकृति।

महोदय,
उपर्युक्त विषयक आपके पत्रांक 947/एल0डी0के0डी0ए0/दिनांक 30 अगस्त 1983 के संदर्भ में मुझे आपको यह सूचित करने का निर्देष हुआ है कि उक्त पत्र में वर्णित परिस्थितियों में षासनादेष संख्या 36/37–2–133डीए/78 दिनांक 17 मार्च 1983 के पैरा 2 में सूचित व्यवस्था के क्रम में यह निर्णय लिया गया है कि आदेष नियमावली बनने तक विकास प्राधिकरण के तृतीय एवं चतुर्थ श्रेणी के सेवानिवृत्त कर्मचारियों की पेंषन, परीक्षक स्थानीय निधि लेखा, (अथवा महालेखाकार, उत्तर प्रदेष) की संस्तुति के बजाय विकास प्राधिकरण में तैनात उत्तर प्रदेष वित्त एवं पेंषन सेवा के मुख्य लेखा अधिकारी की संस्तुति पर स्वयं उपाध्यक्ष, द्वारा स्वीकृत की जाए।

भवदीय,
(आनन्द स्वरूप वर्मा)
संयुक्त सचिव।

संख्याः– 677 (1) 7-2-133डीए/78 तद् दिनांक

प्रतिलिपि समस्त विकास प्राधिकरणों के उपाध्यक्षों को उपर्युक्त निर्णय के अनुसार पेंशन प्रकरणों में आवश्यक कार्यवाही हेतु।

आज्ञा से,
(आनन्द स्वरूप वर्मा)
संयुक्त सचिव।

संख्याः सा0/प्रा0 दिनांकः

प्रतिलिपि समस्त विभागाध्यक्षों को सूचनार्थ एवं आवष्यक कार्यवाही हेतु प्रेषित।

अनुसचिव।"

17. The important factor seems to lie in favour of the petitioners. Keeping in view Section 24 of the Act, the contributory provident fund were deducted during the entire service period. It has also not been disputed that the Development Authorities have informed the Government in writing that they have sufficient fund to meet out the expense with regard to payment of pension (around 50 crores). In such situation more so when the regular pension was paid upto 1999 to the persons appointed in pursuance of sub-section (2) of Section 5 of the Act and retired upto 1999, then no plausible and justified ground has been pointed out by the respondents with regard to denial of pension to the petitioners or employees who retired subsequently.

18. It is settled law that while considering the statutory provisions or intent of Legislature, each and every word, Act, or Rule, should be taken into account and be given meaning. The provision contained in the Act or Rules, should not be read in piecemeal. They should be given meaning by reading each section, para as well as the entire Act or Rule, vide **(2002) 4 SCC 297 Grasim Industries Limited v. Collector of Customs; (2003) 3 SCC 410 Easland**

Combines v. CCE; (2006) 5 SCC 745 A. N. Roy v. Suresh Sham Singh and (2007) 10 SCC 528 Deewan Singh v. Rajendra Prasad Ardevi and other.

19. In view of the above, once all persons have been given regular pension appointed in view of the same Act and rules and even the petitioners' cadre was also paid regular pension upto the year 1999, then there appears to be no embargo under the Act or Rule to stop the payment of pension to the petitioners' cadre who retired after 1999. The impugned order seems to be an instance of non-application of mind to the statutory provisions as well as Rules. Once the State Government exercised its discretion in pursuance of the power conferred by Section 24 of the Act for payment of pension to all the employees working in the Development Authorities including the petitioners cadre, the stoppage of payment of petition to petitioners at later stage, seems to be unjust, improper and discriminatory.

20. Hon'ble Supreme Court in the case reported in **AIR 1954 SC 224: M/s.Dwarka Prasad Laxmi Narain. Vs. State of Uttar Pradesh and others,** held that limitation imposed upon a person in enjoyment of a right should not be arbitrary or of an excessive nature beyond what is required in the interest of the public. A Legislation or order which is arbitrary or excessively invades the right, cannot be said to contain the quality of reasonableness unless it strikes a proper balance.

21. In the case reported in **AIR 1964 SC 179: T. Devadasan Vs. Union of India and another,** Hon'ble Supreme Court held that State shall not deny to any person the equality before law or equal protection before laws within the territory of India. The equality provided by Article 14 is equal among equals. The aim of Article 14 is to ensure that individual distinction or arbitrary discrimination shall not be made by the State between a citizen and a citizen who answer the same description and the differences which may obtain between them are of no relevance for the purpose of applying a particular law, reasonable classification is permissible.

22. In **(1971) 2 SCC 188: Mohd. Usman and others Vs. State of Andhra Pradesh,** their lordships held that equality is attracted not only when equals are treated as unequals but also where unequals are treated as equals. In case Statutes oblige every person extending certain benefit then one cannot be denied from the benefit available under the Statutes.

23. In **(1974) 4 SCC 3: E.P. Royappa. Vs. State of Tamil Nadu and another,** the everlasting observation of Hon'ble Supreme Court shall regulate the society for all times to come. The Hon'ble Supreme Court observed that Article 14 is the genus while Article 16 is a species. Equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment. It shall be appropriate to reproduce relevant portion from Royappa case (supra) as under:

"85. ... Art. 16 embodies the fundamental guarantee that Arts. 14 as there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. Though enacted as a distinct and independent fundamental right because of its great importance as a principle ensuring equality of opportunity in public employment which is so vital to the building up of the new classless egalitarian

society envisaged in the Constitution, Art. 16 is only an instance of the application of the concept of equality enshrined in Art. 14. In other words, Art. 14 is the genus while Art 16 is a species, Art. 16 gives effect to the doctrine of equality in all matters relating to public employment. The basic principle which, therefore, informs both Arts. 14 and 16 is equality and inhibition against discrimination. Now, what is the content and reach of this great equalising principle? It is a founding faith, to use the words of Bose J., "a way of life", and it must not be subjected to a narrow pedantic or lexicographic approach. We cannot countenance any; attempt to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be "cribbed cabined and confined" within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Art. 14, and if it affects any matter relating to public employment, it is also violative of Art. 16. Arts. 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment. They require that State action must be based on valid relevant principles applicable alike to all similarly situate and it must not be guided by any extraneous or irrelevant considerations because that would be denial of equality. Where the operative reason for State action, as distinguished from motive inducing from the antechamber of the mind, is not legitimate and relevant but is extraneous and outside the area of permissible considerations, it would :amount to mala fide exercise of power and that is hit by Arts.14 and 16. Mala fide exercise of Power and arbitrariness are different lethal radiations emanating from the same vice : in fact the matter comprehends the former. Both are inhibited by Arts. 14 and 16."

24. In **(1974) 4 SCC 335: The General Manager South Central Railway Secunderabad and another. Vs. A.V.R. Siddhantti and others,** Hon'ble Supreme Court reiterated the Royappa's case (supra) and held that fundamental right and equality means that persons in like situation under like circumstances, are entitled to be treated alike. So long as employees similarly circumstanced in the same class of service are treated alike, the question of hostile discrimination does not arise.

25. In **(1981) 4 SCC 335:Air India. Vs. Nergesh Meerza and others,** Hon'ble Supreme Court has summed up the equality clause as well as settled the law in para 39 thereof, as under:

"39. Thus, from a detailed analysis and close examination of the cases of this Court starting from 1952 till today, the following propositions emerge:

(1) In considering the fundamental right of equality of opportunity a technical, pedantic or doctrinaire approach should not be made and the doctrine should not be invoked even if different scales of pay, service terms, leave, etc., are introduced in different or dissimilar posts.

Thus, where the class or categories of service are essentially different in purport and spirit, Article 14 cannot be attracted.

(2) Article 14 forbids hostile discrimination but not reasonable classification. Thus, where persons belonging to a particular class in view of their special attributes, qualities, mode of recruitment and the like, are differently treated in public interest to advance and boost members belonging to backward classes, such a classification would not amount to discrimination having a close nexus with the objects sought to be achieved so that in such cases Article 14 will be completely out of the way.

(3) Article 14 certainly applies where equals are treated differently without any reasonable basis.

(4) Where equals and unequals are treated differently, Article 14 would have no application.

(5) Even if there be one class of service having several categories with different attributes and incidents, such a category becomes a separate class by itself and no difference or discrimination between such category and the general members of the other class would amount to any discrimination or to denial of equality of opportunity.

(6) In order to judge whether a separate category has been carved out of a class of service, the following circumstances have general to be examined:

(a) the nature, the mode and the manner of recruitment of a particular category from the very start,

(b) the classifications of the particular category,

(c) the terms and conditions of service of the members of the category,

(d) the nature and character of the posts and promotional avenues,

(e) the special attributes that the particular category possess which are not to be found in other classes, and the like."

26. In **(1989) Supp-1 SCC 116=AIR 1989 SC 307: Roop Chand Adlakha and others. Vs. Delhi Development Authority and others,** Hon'ble Supreme Court has observed that classification shall depend upon whether the differences are relevant to the goals sought to be reached by the law which seeks to classify. Overdo classification is to undo equality. Their lordships held that process of classification is in itself productive of inequality and in that sense antithetical of equality. However, the process of classification itself cannot be permitted to generate or aggravate inequality. Hon'ble Supreme Court cautioned that undisclosed or unknown reason for a classification rendering the precious guarantee of equality "a mere rope of sand". Relevant paragraphs from the case of Roop Chand Adlakha (supra) are reproduced as under:

"19. But then the process of classification is in itself productive of inequality and in that sense antithetical of equality. The process would be constitutionally valid if it recognises a pre-existing inequality and acts in aid of amelioration of the effects of such pre-existence inequality. But the process cannot in itself generate or aggravate the inequality. The process cannot merely blow up or magnify insubstantial or microscopic differences on merely meretricious or plausible differences. The overemphasis on

the doctrine of classification or any anxious and sustained attempts to discover some basis for classification may gradually and imperceptibly deprive the article of its precious content and end in replacing doctrine of equality by the doctrine of classification. The presumption of good faith in and of constitutionality of a classification cannot be pushed to the point of predicating some possible or hypothetical but undisclosed and unknown reason for a classification rendering the precious guarantee of equality "a mere rope of sand".

20. "To overdo classification is to undo equality." The idea of similarity or dissimilarity of situations of persons, to justify classification, cannot rest on merely differentia which may, by themselves be rational or logical, but depends on whether the differences are relevant to the goals sought to be reached by the law which seeks to classify. The justification of the classification must needs, therefore, to be sought beyond the classification. All marks of distinction do not necessarily justify classification irrespective of the relevance or nexus to objects sought to be achieved by the law imposing the classification."

27. In **(1978) 1 SCC 248: Msr. Maneka Gandhi. Vs. Union of India and another,** while reiterating the principle enunciated in Royappa's case (supra) and other cases, their lordships held that equality and arbitrariness both are sworn enemies. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14 which strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14.

28. In **(2001) 1 SCC 442: K. R. Lakshman and others. Vs. Karnataka Electricity Board and others,** their lordships reiterated that classification must satisfy two conditions namely, the classification to be founded on intelligible differentia which distinguishes persons or things that are grouped from others who are left out of the group and that the differentia must have a rational relation to the object sought to be achieved by the legislation. There must be a nexus between the basis of classification and the object of the legislation.

29. In the case reported in **(1971) 2 SCC 330: Deokinandan Prasad. Vs. The State of Bihar and others,** their lordship held that right to receive pension is property under Article 31 (1) and by a mere executive order the State had no powers to withhold the same. Hon'ble Supreme Court observed as under:

"27. The last question to be considered, is, whether right to receive pension by a Government servant is property, so as to attract Articles 19 (1 (f) and 31 (1) of the Constitution. This question falls to be decided in order to consider whether the writ petition is maintainable under Article 32. To this aspect, we have already adverted to earlier and we now proceed to consider the same.

28. According to the petitioner the right to receive pension is property and the respondents by an executive order, dated June 12, 1968, have wrongfully withheld his pension. That order affects his

fundamental rights under Articles 19 (1) (f) and 31 (1) of the Constitution...."

Hon'ble Supreme Court further observed that pension is not to be treated as bounty payable on sweet will and pleasure of the Government and the right to superannuation pension including its amount is a valuable right vesting in a Government servant.

30. In the case reported in **(1973) 1 SCC 120: State of Punjab. Vs. K.R. Erry and Sobhag Rai Mehta,** Hon'ble Supreme Court ruled that right of Government servant to receive pension is property under Article 31 (1) and by mere executive order the State Government did not have power to waive the same.

31. In the case reported in **(1983) 1 SCC 305: D.S. Nakara and others. Vs. Union of India,** the leading judgment of Hon'ble Supreme Court with regard to twin grounds for test of reasonable classification and rational principle corelated to the object sought to be achieved. The burden of proof lies on the State to establish that these twin tests have been satisfied. It can only be satisfied if the State establishes not only the rational principle on which classification is founded but correlate it to the objects sought to be achieved.

32. Hon'ble Supreme Court relying upon the Deokinandan Prasad (supra) and State of Punjab (supra) observed that antequated notion of pension being a bounty, a gratuitous payment depending upon sweet will or grace of employer has been swept under the carpet by the decision of Constitution Bench in Deokinandan Prasad (supra). It shall be appropriate to reproduce relevant portion of para 20 and 22 from the judgment of D.S. Nakara (supra), as under:

"20. The antequated notion of pension being a bounty, a gratuitous payment depending upon the sweet will or grace of the employer not claimable as a right and, therefore, no right to pension can be enforced through Court has been swept under the carpet by the decision of the Constitution Bench in *Deokinandan Prasad v. State of Bihar: 1971 (Supp) SCR 634: (AIR 1971 SC 1409)* wherein this Court authoritatively ruled that pension is a right and the payment of it does not depend upon the discretion of the Government but is governed by the rules and a government servant coming within those rules is entitled to claim pension. It was further held that the grant of pension does not depend upon anyone's discretion. It is only for the purpose of quantifying the amount having regard to service and other allied matters that it may be necessary for the authority to pass an order to that effect but the right ot receive pension flows to the officer not because of any such order but by virtue of the rules. This view was reaffirmed in *State of Punjab v. Iqbal Singh, (1976) 3 SCR 360: (AIR 1976 SC 667).*

22. In the course of transformation of society from feudal to welfare and as socialistic thinking acquired respectability, State obligation to provide security in old age, an escape from undeserved want was recognised and as a first step pension was treated not only as a reward for past service but with a view to helping the employee to avoid destitution in old age. The quid pro quo was that when the employee was physically and mentally alert, he rendered unto master the best, expecting him to look after him in the fall of life. A retirement system therefore, exists solely for the

purpose of providing benefits. In most of the plans of retirement benefits, everyone who qualifies for normal retirement receives the same amount (see *Retirement Systems for Public Employees* by Bleakney, p 33)."

33. In D.S. Nakara (supra) their lordships further observed that in welfare State, its political society introduces a welfare measure where retiral pension is grounded on considerations of State obligation to its citizens who having rendered service during the useful span of life must not be left to penury in their old age, but the evolving concept of social security is a later day development. The term pension is applied to periodic payment of money to a person who retires at a certain age, considered age of disability and the payment usually continues for the rest of the natural life of the recipient. The reason for underlying the grant of pension vary from country. Pension is a measure of socio-economic justice which inheres economic security in the fall of life when physical and mental prowess is ebbing corresponding to ageing process and, therefore, one is required to fall back on savings. Hon'ble Supreme Court further reiterated that the pension is not a bounty or gracious payment and it does not depend upon the discretion of the Government and the person entitled for pension under statute, may claim it as a matter of right.

34. In the case reported in **(1987) 2 SCC 179: State of Uttar Pradesh. Vs. Brahm Datt Sharma and another,** while reiterating the aforesaid well settled proposition of law with regard to pension, Hon'ble Supreme Court observed that pension is right of property earned by Government servant on his rendering satisfactory service to the State. These principles have been reiterated in the case reported in **1992 Supple SCC 664: (AIR 1992 SC 767) All India Reserve Bank Retired Officers Association and others. Vs. Union f India and another.**

35. Coming to the present dispute, Section 24 of the Act applies equally, to all categories of employees working in the Development Authorities with regard to payment of pension. The petitioners appointed under Section 2 and 5, were paid pension upto the year 1999. The employees absorbed in the Development authorities under Section 59 (3) and (4), are being pension, then their appears to be no rational behind the passing of the impugned order thereby stopping the pension of the employees retired after 1999. There is no nexus with the object sought to achieve more so, when the State Government admitted with regard to petitioners' entitlement of pension and also the availability of fund. Since 1999, only assurance has been given that the matter is under consideration. Right flowing from the Act and the Rules (supra), has been miserably skulked down. In a very high handedness and arbitrariness manner, the Government has stopped the facility of pension to the petitioners cadre after 1999 without any reasonable cause. The clarificatory order of the year 1983, seems to have been issued in letter and spirit keeping in view the statutory provisions but the impugned order seems to be an instance of non-application of mind suffering from vice of arbitrariness and without taking into account the fact that the pensionary benefits are the fundamental right protected by Article 31 (1) of the Constitution.

36. The burden was on State Government to establish the nexus of the

object sought to be achieved and rational behind the impugned order. Except the argument on behalf of the State that under the rules and statutory provisions, the petitioners are not entitled for payment of pension, the State has not brought on record any material which may justify the issuance of the impugned order superseding the earlier two Government orders issued in the year 1983.

37. How and in what circumstances the State has taken different view while stopping the pension to the employees and the petitioners, is not borne out either from the record or from the argument advanced by the learned State counsel. The command of Section 24 of the Act is equally applicable to all category of employees working in the Development authorities collectively discharging their obligations under the Act. They cannot be treated differently with regard to payment of pension and more so when as held by Hon'ble Supreme Court, the pension is not a bounty but it is a property protected by Article 31 (1) of Constitution. Keeping in view the dictum of D.S. Nakara (supra), the State has failed to discharge its burden to prove the justification or rational in passing the impugned order.

38. Submission of the petitioners counsel that the impugned order is an incident of hostile discrimination as well as the arbitrary exercise of power, seems to be correct and is in right perspective. The State Government has failed to establish the rational behind passing the impugned order and stopping the pension after 1999 more so when the fund is available and principally being agreed with regard to payment of pension earlier in the year 1983, decision was taken to pay pension and the same was paid upto 1999.

39. The plain reading of Section 5 (A) read with Section 24 of the Act, makes out a case for petitioners entitlement for receiving pension from the respondents.

40. There is one other aspect of the matter. Rule 34 of the Rules, covers all the employees of the Development Authorities with regard to retiral pension and other retiral benefits. Rule 37 categorically provides that matter not covered under Sub-Rule (1) and (2), shall be governed by all such orders as the State Government may deem proper. Sub-Rule (3) of Rule 37 has been meant to fill up vacuum. Sub-rule (2) specifically provides that matters not covered by these Rules or by special orders, the members of service shall be governed by the Rules, Regulations and Orders applicable generally, to U.P. Government Servant serving in connection with the affairs of the State.

41. The two Government orders dated 4.3.1983 and 17.3.1983 seem to have been issued to clarify the position keeping in view the Sub-Rule (2) of Rule 37. Admittedly, employees of State Government are being paid pension in pursuance of provisions contained in Financial Handbook and Civil Services Regulations. Accordingly, unless the separate provision is made, the petitioners case shall be governed by Sub-rule (2) of Rule 37 of 1985 rules.

42. Right of State Government to regulate pension in pursuance of power conferred by Sub-rule (3) of Rule 37, ordinarily, shall be available only in case,

there would have been no rule regulating pension of the State Government employees. Accordingly, while issuing the Government order or circulars, the State Government could not have stopped the payment of pension as has been done by the impugned order. It shall amount to curtail statutory right of the petitioners flowing from Section 24 read with Rule 37 (2) of the Act.

43. The impugned order virtually, overrides and violates the petitioners statutory rights avilable under Rule 37 (2) of the Rules read with Section 24 of the Act. Hence the impugned order seems to be arbitrary and hit by Article 14 of the Constitution.

44. We may not miss out sight to provision contained in Rule 38 of the Rules which is reproduced as under:

"38. Where the Government is satisfied that the operation of any rule regulating the conditions of service of the member of service causes undue hardship in any particular case, it may, notwithstanding anything contained in the rules applicable to the case by order, dispense with or relax the requirement of that rule to such extent and subject to such conditions as it may consider necessary for dealing with the case in a just and equitable manner."

45. A plain reading of Rule 38 shows that power conferred with the State Government is to remove difficulties in extension of benefits available under the Act or Rules itself. It is not meant to deprive the employees from the statutory benefits like pension or other alike matters. The Government by its orders or circulars, may add the benefit but cannot take away keeping in view the letter and spirit of Rule 38 of the Rules and any decision taken by the Government through Government order or circular without amending Rules or statutory provisions with regard to payment of pension, shall be violative of not only sub-rule (2) of Rule 37 but also Rule 38 of the Rules read with Section 24 of the Act.

46. The provisions with regard to payment of pension contained in the Act and rules are welfare legislation and proper meaning should be given to statutory provisions to meet requirement or object. There cannot be narrow interpretation of Rules which may deprive the employees of the payment of pension.

47. Provisions contained in Rule 34, 37 and Rule 38 (supra), are beneficial provisions and should be read collectively along with Section 24 and other related provisions. The beneficial legislation or statutory provisions dealing with the human rights or livelihood should be made functional and not facial cosmetics as held by Hon'ble Supreme court in **AIR 1987 SC 1086: M.C. Mehta and another. Vs. Union of India and others.** Their lordships in the said case has reiterated the constitutional spirits propounded in the case reported in **Rammana Shett's case (AIR 1979 SC1628)** and the Constitution Bench observed that functional realism should be looked into and not facial cosmetics. To reproduce relevant portion of para 17 of Rammana Shett's case as under:

"17. The criteria evolved by this Court in Ramana Shett's case (AIR 1979 SC 1628) (supra) were applied by this Court in Ajay Sasia v. Khalid Mujib,

(1981) 2 SCR 79: (AIR 1981 SC 487 at pages 492, 493, 494), where it was further emphasised that :

Where constitutional fundamentals vital to the maintenance of human rights are at stake, functional realism and not facial cosmetics must be the diagnostic tool for constitutional law must seek the substance and not the form. Now it is obvious that the Government may act through the instrumentality or agency of natural persons or it may employ the instrumentality or agency of judicial persons to carry out its function..... It is really the Government which acts through the instrumentality or agency of the corporation and the juristic veil of corporate personality work for the purpose of convenience of management and administration cannot be allowed to obliterate the true nature of the reality behind which is the Government..... for it the Government acting through its officers is subject to certain constitutional limitations it must follow a fortiori that the Government acting through the instrumentality or agency of a corporation should be equally subject to the same limitations.

On the canon of construction to be adopted for interpreting constitutional guarantees the Court pointed out:

.....Constitutional guarantees.... should not be allowed to be emasculated in their application by a narrow and constricted judicial interpretation. The Courts should be anxious to enlarge the scope and width of the fundamental rights by bringing within their sweep every authority which is an instrumentality or agency of the Government or through the corporate personality of which the Government is acting, so as to subject the Government in all its myriad activities, whether through natural persons or through corporate entities to the basic obligation of the fundamental rights."

48. In **(1999) 3 Supreme Court Cases 601; Secretary, H.S.E.B. v. Suresh and others,** the Hon'ble Supreme Court while dealing with labour welfare legislation ruled that beneficent construction of the statutory provision must be given keeping the public interest at large and courts must decide while interpreting the statutory provisions keeping in view the interest of the public inspired by principles of justice, equity and good conscience. (para 14, 17 and 18).

49. In the case reported in **(2002) 8 Supreme Court Cases 400; Essen Deinki Vs. Rajiv Kumar,** the Hon'ble Supreme Court held that when the question arises with regard to the interpretation of welfare legislation, it is the duty of the courts to give broad interpretation keeping in view the purpose of such legislation of preventing arbitrary action though the statutory requirements cannot be ignored.

50. In the case reported in **(2003) 4 Supreme Court Cases 27; S.M. Nilajkar and others vs. Telecom District Manager, Karnataka,** the Hon'ble Supreme Court has held that while interpreting the welfare legislation in case of doubt or two possible views, the interpretation should be done in favour of beneficiaries.

51. In the case reported in **(2004) 5 Supreme Court Cases 385; Deepal Girishbhai Soni and others Vs. United**

India Insurance Co. Ltd. Baroda, the Hon'ble Supreme Court again reiterated that beneficial legislation should be interpreted liberally keeping in view the purpose of enactment and reading entire statute in its totality. The purport and object of the Act must be given its full effect by applying the principles of purposive construction (para 56).

52. In view of the above, being beneficial provisions, in case Rule 34, 37 and 38 read with Section 24 are taken into account, and read collectively, it shall make out a case for payment of pension to the employees appointed in pursuance of Sub-section (2) of Section 5 of the Act which has been stopped by the impugned order of 1999. The impugned order seems to have been passed mechanically, without application of mind and violative of letter and spirit of Rule 34, 37 and 38 read with Section 24 of the Act.

53. There is another aspect of the matter. As observed hereinabove, a combined reading of statutory provisions as well as Rules (supra) reveals that the Legislature to their wisdom, intends to pay pension to the employees of Development Authorities. Accordingly, while taking any decision or passing any administrative order and/or executive instructions, the State Government does not have got right either to delay or prohibit the payment of pension. Any administrative order, and/or executive instruction should be issued in consonance with the statutory provisions and since the statutory provisions (supra) provide that pension shall be payable to the employees of the Development Authorities subject to orders passed by the State Government. State Government while issuing circular dated 17.3.1983 followed by another circular dated 29.9.1983, has rightly directed for payment of pension to the employees of the Development Authorities in accordance with Rules applicable to Government employees till special regulatory provisions are framed by the State and Development Authorities in consonance with Rules.

54. It is settled law that executive instructions and the Government orders cannot override the statutory provisions. In **AIR 1972 SC 1546, State of Haryana Vs. Shamsher Jang,** Hon'ble Supreme Court held that the qualification or service condition prescribed by the Rules can not be altered by executive instructions. Government is not competent to alter rules by administrative instruction more so, when the rules can be implemented without any difficulty.

In one another case reported in **1993 Supp (2) SCC 415, Himachal Pradesh State of Electricity Board Vs. Somdutt Uppal and another** their Lordships of Hon'ble Supreme Court while reiterating the above principle held that by internal communications, regulations framed under statute can not be override.

It is settled law that Government orders or circulars cannot override the statutes, rules and regulations vide, **2005 LCD 1696 Vijai Singh and others Vs. State of U.P.**

55. Once, the Legislature to their wisdom, intends to pay regular pension to the petitioners, then the State Government lacks jurisdiction to pass impugned circular/orders stopping payment of pension which was being paid to the employees of the Development

Authorities till 1999. The impugned circular which is an administrative order or executive instruction, has been issued in contravention of statutory right flowing from the provision contained in the Act as well as Rules (supra).

56. The provisions contained in the Act and Rules (supra) are enabling provisions to pay pension and in absence of any statutory provision, the Rules applicable to State Government employees has been made applicable. Perhaps being conscious with the statutory provisions, while issuing impugned order, the State Government has not denied the petitioners right with regard to pension but only rider is that the same is under consideration that too, since last 11 years. Why matter has been kept pending, is not borne out either from the record or argument advanced by the learned counsel for the State Government. Why this "waiting period" not came to end even after eleven years ?

57. In spite of repeated query made by this Court, learned standing counsel failed to bring on record any material which may justify the issuance of impugned order more so, when regular pension was paid in pursuance of earlier circular/orders of 1983 (supra) which are in consonance with the Statutory provisions (supra). The State Government seems to have acted arbitrarily in violation of statutory provisions. By executive instructions, the rights flowing from the statutory provisions, cannot be taken away or withheld more so, when it was made available upto 1999.

58. The fund with regard to CPF, GPF were deducted. Once the contribution was provided by the employees and the petitioners with regard to pension fund, then the State Government does not seem to justify by withholding pension and prolonging the decision since last 11 years, though in pursuance of the orders of the year 1983 (supra), the pension was made available upto 1999. The observations made in the impugned order seems to be an act of non-application of mind. Till the Government frames Rules or Regulations, the petitioners shall be entitled for payment of regular pension as it was made available upto 1999 in pursuance of the earlier clarificatory orders of 1983 (supra) at par with the Government employees in view of Rule 37 (2).

59. It may be noted that initially, the Government order was for erstwhile employees of local bodies/Nagar Mahapalika who retired upto 1999 and by the impugned circular all of sudden without any justifiable cause, regular pension has been stopped though, it was paid till issuance of the impugned Government order. Though the source of recruitment may be different, the appointing authority may be different but all the employees of the development authorities, constitute one block and collectively carry out the statutory provisions under the Act to serve the people. Accordingly, rightly by two circulars of 1983, all the employees including the petitioners cadre, were ensured for payment of pension which was paid to them upto 1999. In view of the above, the writ petitions deserve to be allowed.

60. Accordingly, the writ petitions are allowed. A writ in the nature of certiorari is issued quashing the impugned order dated 5.4.1999 and 9.11.2004 with consequential benefits. A writ in the nature of mandamus is issued commanding the opposite parties to ensure the payment of regular pension to

the petitioners and other similarly situated employees forthwith in accordance with Rules applicable to Government employees. Let decision be taken in pursuance of the observations made in the body of the present judgment expeditiously say, within three months from the date of receipt of a certified copy of this order. Respondents shall also ensure the payment of arrears of salary expeditiously say, within six months.

Costs made easy.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 13.12.2010

BEFORE
THE HON'BLE DEVI PRASAD SINGH, J.
THE HON'BLE VIRENDRA KUMAR DIXIT, J.

Special Appeal No. 655 of 2006

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

Counsel for the Petitioner:
Standing Counsel

Counsel for the Respondent:
V.K. Srivastava

U.P. Recruitment of Dependents of Govt. Servant Dying in Harness Rule 1974-Rule-5-Compassionate appointment-dependents of part time tube well operator-not entitled for compassionate appointment.

Held: Para 9

Keeping in view the fact that learned Single Judge had not considered the judgment of Phoola Devi (supra) where a Division Bench of this court held that part time tube-well operator shall not be entitled for compassionate appointment, the impugned judgement and order does not seem to survive. Respondents petitioner does not seem to be entitled for appointment on compassionate ground under the Rules. Accordingly, present appeal deserves to be allowed.

Case law discussed:
Civil Misc. Writ Petition No. 15505 of 2005 decided on 22.9.2010, 2003 (5) SCC 448, (1991) 4 SCC 139, AIR 1975 SC 907, 2005 (1) SCC 608, 1999 (3) SCC 112, AIR 1988 SC 1531, 1999 (5) SCC 638, 2004 (4) SCC 590.

(Delivered by Hon'ble Devi Prasad Singh, J.)

1. Heard learned counsel for the parties and perused the record.

2. The present appeal has been preferred under Chapter VIII Rule 5 of the Rules of the Court against the impugned judgement and order dated 2.5.2006 passed by Hon'ble Single Judge in Writ Petition no. 3608(SS) of 2006. Respondents petitioner being aggrieved with an order dated 7.3.2006 whereby his request for appointment under *Uttar Pradesh Recruitment of Dependents of Government Servants Dying in Harness Rules, 1974* (in short hereinafter referred as the Rule) was rejected by Executive Engineer, Tube-well Division II, district Sultanpur on the ground that his father was appointed on 3.10.1991 as part time tube-well operator and thereafter died on 28.11.2004, hence, the dependents are not entitled for appointment on compassionate ground.

3. Before Hon'ble Single Judge the respondents had relied upon a judgement of this Court in Writ petition no. 51469 of 2005, Vijay Kumar Yadav Vs. State of U.P. dated 25th July, 2005 in which it was held that dependent of part time tube-well operator shall be entitled for appointment on compassionate ground. Learned Single

Judge held that since tube-well operator are government servant hence they are entitled for appointment on compassionate ground under rules in question.

4. Learned counsel for the appellant had invited attention towards a Division Bench judgement of this Court passed in Special Appeal No. 117 of 2004 , State of U.P. and others Vs. Smt. Phoola Devi decided on 14.7.2000 whereby it has been held that dependent of part time tube-well operator shall not be entitled for appointment on compassionate ground.

5. It appears that during the course of hearing the Division Bench judgement of this court in the case of Smt. Phoola Devi (supra) was not cited or referred before Hon'ble Single Judge. While considering Rule 5 of the Rule with regard to tube-well operator the Division Bench held as under:-

"Rule 5 of the U.P. Requirement of Dependents of Government Servants Dying in Harness Rules, 1974 provides that in case a Government servant died in harness, one member of his family shall be given suitable employment in Government Service which is not within the purview of the Pubic Service Commission in relaxation of normal recruitment rules, provided such member fulfills the educational qualification prescribed for the post and is also otherwise qualified for Government Service. The U.P. Government had sent a communication to the Engineer-in-Chief of Irrigation Department on Oct. 16,1996 that there was no provision for giving employment to the dependents of part-time tube-well operators were appointed to a particular tube-well and were to get a fixed remuneration in the appointment order of Chandra Pal Singh (husband of writ petition) it was mentioned that he was being appointed on Tube-well No. 30 of Village Dwdhara and in the even0.00"t of failure of tube well his service will be terminated. They had to be resident of the same village or command area where the tube-well was situated. Their working hours were two and a half hours only and thereafter they were free to carry on their own occupation. It is obvious that their position was not that of a full-time Government Servant. Such part-time tube-well Operators were not dependent for their livelihood on the remuneration which they got as the said amount was very small. The appointment order itself stated that they could carry on their own occupation in the non-duty hours and he duty hours were much smaller as compared to other Government Servant. A government servant is normally a whole-time servant and is not entitled to carry on any other occupation. He is normally dependent for his livelihood upon the salary which he gets, such is not the case of a part-time tube-well operators, the 1974 Rules have been made to mitigate the hardship of the family of a deceased Government servant where on account of death of the sole bread winner their position becomes precarious. In view of the difference in nature of appointment nature of duties an the emoluments received by them, a part-time tube-well operator could not be put at part with a regular government servant. Consequently, the Government certified that such category of persons will not be entitle to the benefit of 1974 rules in view of the Government order dated Oct. 26, 1998 and in view of the substantial difference in the nature of the employment of a Part-time tube-well operator and a regular government servant, the provisions of 1974

rules can have no application in such a case. In State of Manipur Versus Thingurjan Brojen Meerut. AIR 1996 SC 2124, it was held that family members of a confirmed work charged employee cannot get the benefit of dying in harness Scheme framed by Government of Manipur. The writ petition, therefore, could not claim compassionate appointment on the ground that she was widow of a Part-time tube-well operator who died in harness."

6. Attention of this court has been invited towards a Full Bench Judgement of this court decided on 22.9.2010 passed in Civil Misc Writ Petition No. 15505 of 2005, Pawan Kumar Yadav Vs. State of U.P. and others where the controversy with regard to work charge employees was considered for the entitlement under the Rules. Full Bench held that the dependent of work charge employee shall not be entitled for appointment on compassionate ground. More or less the controversy with regard to appointment on compassionate ground seems to be similar as those of the work charge employee and the present one i.e. part time tube-well operators. Hence also the respondents petitioner does not seems to be entitled of compassionate appointment. Relevant portion from the judgment of Pawan Kumar Yadav (supra) is reproduced as under:-

"20. In respect of the employees the State Government in Irrigation Department, Public Works Department, Minor Irrigation, Rural Engineering Services, Grounds Water Department has provided for employment the regular establishment and work-charge establishment. The person appointed in regular establishment are appointed against a post, after following due procedure prescribed under the rules. In work-charge establishment the employees are not appointed by following any procedure or looking into their qualification. They do not work against any post or regular vacancy. They only get consolidated salary under the limits of sanction provided by Government Order dated 6th April, 1929. The conditions of their employment is provided in paragraphs 667, 668 and 669 of Chapter XXI under the Head of Establishment in Financial Hand Book Volume IV. Their payments are provided to be made in same Financial Hand Book Volume IV in Paragraph Nos.458, 459, 460, 461, 462 and 463.

23. The regular need of work, of which presumption has been set to arise after working for long number of years and the principles of legitimate expectations, would not mean that there was a regular vacancy. The word 'regular' vacancy has not been defined but that a distinction must be made between a need of regular employees, and the existence of regular vacancies. In Uttaranchal Jal Sansthan Vs. Laxmi Devi (Supra) the Supreme Court said; 'indisputably the services of the deceased had not been regularised. in both the cases the writ petitions were filed but no effective relief thereto had been granted. In the case of late Leeladhar Pandy, allegedly he was drawing salary on regular scale of pay. that may be so but the same would not mean that there existed a regular vacancy".

25. In General Manager, Uttaranchal Jal Sansthan Vs. Laxmi Devi (Supra) the Supreme Court considered and interpreted the expression 'regular vacancy' in respect of same Rules namely U.P. Recruitment of Dependants of Government Servant (Dying in Harness) Rules, 1974. The judgement of the Apex Court interpreting

the same Rules and deciding the questions posed before us squarely covers question No.1, in favour of the State and is0.00" binding on the High Court."

7. Thus law with regard to entitlement of part-time tube-well operator was settled earlier to judgement delivered by learned Single Judge in Vijay Kumar Yadav (supra) with declaration that tube-well operator shall not be entitled for compassionate appointment. The impugned judgment and order passed by learned single judge of this court seems to be per incurrium to law laid down by this Court in the case of Phoola devi (supra).

8. Per incurrium means in ignorance of or without taking note of some statutory provisions or the judgement of Hon'ble Supreme Court or the larger Bench, vide; **2003 (5) SCC 448, State of Bihar Vs. Kalika Singh and others (1991) 4 SCC 139 State of U.P and another Vs. Synthetics and chemicals Ltd. And another, AIR 1975 SC 907 Mamleshwar Prasad and others Vs. Kanhaiya Lal, 2005 (1)SCC 608, Sunita Devi Vs. State of Bihar, 1999 (3) SCC 112; Ram Gopal Baheti Vs. Giridharilal Soni and others, AIR 1988 SC 1531; Municipal Corporation of Delhi VS. Gurnam Kaur, 1999 (5) SCC 638; Sarnam Singh Vs. dy. Director of Consolidation and others, 2004 (4) SCC 590 State Vs. Ratan Lal Arora.**

9. Keeping in view the fact that learned Single Judge had not considered the judgment of Phoola Devi (supra) where a Division Bench of this court held that part time tube-well operator shall not be entitled for compassionate appointment, the impugned judgement and order does not seem to survive. Respondents petitioner does not seem to be entitled for appointment on compassionate ground under the Rules. Accordingly, present appeal deserves to be allowed.

10. Appeal is allowed. The judgement and order dated 2.5.2006 passed by learned Single Judge is set aside. The writ petition is also dismissed being devoid of merit. Cost made easy.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.01.2011

BEFORE
THE HON'BLE SUNIL AMBWANI, J.
THE HON'BLE MRS. JAYASHREE TIWARI, J.

Civil Misc. Writ Petition No.793 of 2009

Udai Ram ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Ranjeet Saxena
Sri Amit Kumar Mishra

Counsel for the Respondents:
Sri V.P.Varshney
Sri Pankaj Khare
Sri Shashi Bhushan
Sri Pushpendra Singh
C.S.C.

U.P. Govt. Servant (criterion) for Recruitment by Promotion Rules, 1994 Rule-4-Promotions on Post of A.R.T.O.-seniority list petitioner placed at Serial No. 6-where respondents at serial no. 8 and 9-from 2001 to 2004-integrity of petitioner certified-assessed as "outstanding"-petitioner's entire entry during these period not placed-direction with time bond consideration issued.

Held: para 12

The petitioner has relied upon seniority list dated 18th September, 2001 in which he is placed as senior to Shri Ashok Kuamr and Shri Munshi Lal. The petitioner was placed at Sl.No.6, whereas Shri Ashok Kumar and Shri Munshi Lal at Sl.Nos.8 and 9. The petitioner was thus entitled to be considered for promotion ahead of respondent Nos.8 and 9. The U.P. Public Service Commission has not given any such material on the basis of which it can be said that the petitioner was unfit for promotion. Along with rejoinder affidavit the petitioner has annexed the entries given to him for the years 2001-02 (Annexure R.A.7); 2002-03 (Annexure R.A.8) and 2003-04 (Annexure R.A.6). In all the three entries the petitioner's integrity has been certified and his work and conduct has been assessed to be 'outstanding'. The petitioner was thus arbitrarily denied of promotion as compared to his juniors both by applying the Rules of 1970, in which merit was assessed as criteria for promotion, as well as the General Rules applicable for promotion namely U.P. Government Servants Criteria for Recruitment by Promotion Rules, 1994, which provides for seniority, 'subject to rejection of unfit', as criteria for promotion. The petitioner's entries for the relevant year were also not taken into consideration for promotion.

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

1. We have heard Shri Ranjeet Saxena, learned counsel for the petitioner. Learned Standing Counsel appears for the State respondents. Shri V.P. Varshney appears for the Commission. The respondent Nos.4, 5 and 6 are represented by Shri Pankaj Khare and Shri Shashi Bhushan and have filed their reply.

2. The petitioner was appointed as Regional Inspector (Technical) under the Regional Transport Officer, Jhansi on 21.9.2001. By this writ petition he has prayed for directions to quash the Government Order dated 31.12.2008 only in respect of respondent Nos.4, 5 and 6 issued by the Special Secretary, Transport, Government of U.P. promoting them as Asstt. Road Transport Officer (ARTO), which is a Class-II post. He has also prayed for direction to permit the petitioner on the post of ARTO in the Transport Department of the Government of U.P.

3. The factual matrix of the case is that the petitioner was appointed as Regional Inspector (Technical) under RTO Jhansi on 21.9.2001. His service conditions including promotions are governed by the U.P. Parivahan Sewa Niyamawali, 1990 (in short the Rules of 1990). The promotions under the Rules to the post of ARTO is regulated by Rule 16 of the Rules of 1990, which provides:-

"16. Procedure for recruitment by promotion to the post of Assistant Regional Transport Officer:- Recruitment by promotion shall be made on the basis of merit in accordance with the Uttar Pradesh Promotion by selection in consultation with the Public Service Commission (Procedure) Rules, 1970 as amended from time to time."

4. In the order of appointment by which the petitioner and other Regional Inspector (Technical) were appointed in pursuance to the recommendations by the U.P. Public Service Commission dated 13.6.2001 vide order dated 18.9.2001 on temporary basis, the petitioner Shri Udai Ram was placed at Sl.No.6, whereas respondent No.5 Shri Ashok Kumar and

respondent No.6 Shri Munshi Lal were placed at Sl.Nos.8 and 9 respectively. On 19.10.2006 the seniority list was prepared in which the petitioner was placed at Sl.No.16, Shri Ashok Kumar at Sl.No.14, Shri Munshi Lal at Sl.No.15, Shri Rajesh Kardam (respondent No.4) at Sl.No.16 and Shri Ram Lal at Sl.No.18. The Transport Commissioner issued an order on 11.12.2006 confirming the petitioner and treating him as senior to Shri Rajesh Kardam.

5. It is alleged that several entries were not given in the case of the petitioner, as also in the case of respondent Nos.4, 5 and 6, delaying their promotions. As far as Shri Rajesh Kardam is concerned, he was also not given complete entries by the Transport Commissioner. Inspite of the fact that the petitioner was seniormost and that District Road Transport Officer, Buland Sahar had given very good entry to him for the year 2001-02, the petitioner's case was ignored and the respondent Nos.4, 5 and 6 were promoted on 31.12.2008.

6. Shri Ranjit Saxena submits that the respondent No.4 was recommended for promotion though he was involved in criminal case and FIR was lodged against him on 27.11.2008. On 15.11.2008 the Speaker of the Assembly wrote a letter to Shri Anil Kumar, Joint Secretary, Transport Department that MLA Shri Imran Masood was beaten up by Shri Rajesh Kardam. Even then he was promoted as ARTO. He then submits that the petitioner and respondent Nos.4, 5 and 6, belong to Scheduled Castes. With regard to promotion of SC, all the Rules and Regulations of the Government of U.P. are not applicable. For promotion of SC only those persons, who are unfit have to be left out for promotion. There are 39 posts of R.I. in which 20 posts of R.I. are meant for direct recruitment and 19 to be filled up by promotion. Three posts of R.I. have been filled up by appointing Shri Munshi Lal, Shir Rajesh Kardam and Shri Shyam Lal arbitrarily excluding the petitioner.

7. Shri Ranjeet Saxena submits that in the 3 DPC meeting held in the year 1999, 2001 and 2003 the seniority alone was considering as criteria for promotion. For the first time on 17.12.2008, the DPC adopted the criteria of merit. He submits that in Hargovind Yadav Vs. Rewasidhi Gramin Bank & Ors., (2006) 6 SCC 145 and B.V. Sivaiah & Ors. Vs. K. Addanki Baba & Ors., (1998) 6 SCC 720 the Supreme Court held that criteria of seniority-cum-merit means that where the policy does not prescribe minimum standard for assessing merit, and the promotions are held on the basis of comparative merit, the principle of seniority-cum-merit is not served. The petitioner has put in more than 16 years of service and has been illegally denied promotions.

8. Shri V.P. Varshney appearing for the U.P. Public Service Commission had relied upon the counter affidavit of Shri A.C. Sahu, Under Secretary of the Commission. He submits that the U.P. Transport Service Rules, 1990 provide for recruitment by promotion to the post of Asstt. Regional Transport Officer in accordance with the U.P. Promotion by Selection in Consultation with Public Service Commission (Procedure) Rules, 1970. The promotion has to be made on the basis of merits and not on the basis of seniority. In the eligibility list of the selection year 2007-08 the name of the petitioner was at Sl.No.7, and that of

respondent Nos.4, 5 and 6 was at Sl.No.8, 9 and 10. After assessment of service records and other documents presented by the State Government and Transport Department the petitioner was not found suitable by the Commission and therefore his name was not recommended for promotion. He submits that in the matter of selection on the basis of merit, the Government Order dated 20.11.1993 is applicable and which provides for eligibility list to be prepared under Para 10. The persons selected are considered by classifying them in the categories of very good, good and unsuitable. Where the post in general category are to be filled up without giving any reservation, the persons included in the category of 'very good', are considered at first, and that requirement of considering the candidates in 'good' category is only if candidates of the category of 'very good' are not available. The selection committee, however, makes recommendations for promotion in accordance with the interse seniority. Para 11 provides that if there are vacancies in the reserved categories, candidates classified as 'good' should be considered for selection even if candidates classified as 'very good' in unreserved are not selected. The candidates upto the category of unsuitable may be selected in the reserved category. Shri Varshney submits that selections were made from amongst the persons recommended in accordance with the aforesaid assessment, which is in consonance with the Rules of 1970. In para 10 of the affidavit it is submitted that mode of promotion, which was adopted in the year 1999, 2001 and 2003 was also applied in the DPC held on 17.12.2008.

9. In the counter affidavit of respondent Nos.4, 5 and 6 it is stated that the date of confirmation is hardly relevant for the purposes of seniority, as under the U.P. Government Servant Seniority Rules, 1991, the date of confirmation has no relevance for determining seniority. The seniority has to be determined in accordance with the merit position in which the U.P. Public Service Commission has recommended them for appointment. In the present case the seniority as given in the eligibility list was prepared and the persons coming in the eligibility list were assessed and accordingly marks were given to them. Whoever scored higher marks was promoted subject to availability of the seats. All the relevant entries were considered by the U.P. Public Service Commission in making recommendations for appointment.

10. The respondent No.4, Shri Rajesh Kardam has stated in para 12 of his affidavit that the FIR against him was on bogus allegations. It was challenged by him in the High Court, which has by its order dated 12.12.2008 stayed the arrest of the petitioner. The FIR related to an incident in which the respondent No.4 had in exercise of his authority stopped the illegal movement of the vehicles, on which Shri Masood, M.L.A. appeared and threatened the petitioner. He tried to exercise his influence for releasing the vehicles, which were moving illegally without the valid documents. The FIR in any case could not be a ground to stop consideration of promotion unless departmental enquiry was initiated. It is submitted that no departmental enquiry has been initiated against him and that he was considered and recommended for promotion by the Commission.

11. During the course of argument, learned counsel for the petitioner relied upon U.P. Government Servant

Promotion Rules, which provides for criteria of seniority subject to rejection of unfit in all cases except post of Head of the Department or post carrying minimum in the pay scale of Rs.18600/- and above. We have examined the U.P. Transport Service Rules, 1990. The U.P. Government Servants Criteria for Recruitment by Promotion Rules, 1994 are special rules governing the field, and clearly override Rule 16, which provides for criteria of merit for promotion on the post of ARTO. The promotions should have to be considered in accordance with the criteria of seniority subject to rejection of unfit. The Rules of 1994, provide as follows:-

"GOVERNMENT OF UTTAR PRADESH KARMIK ANUGHAB-I NOTIFICATION
Miscellaneous
No.13/34/90-ka-1/1994
Dated:Lucknow:October 10, 1994

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

THE UTTAR PRADESH GOVERNMENT SERVANTS CRITERION FOR RECRUITMENT BY PROMOTION RULES, 1994

1. Short title, commencement and application- (1) These rules may be called the Uttar Pradesh, Government Servants Criterion for Recruitment by Promotion Rules, 1994.

(2) They shall come into force atonce.

(3) They shall apply to a recruitment by promotion to a post or service for which no consultation with the Public Service Commission is required on the principles to be followed in making promotions under the Uttar Pradesh Public Service Commission (Limitation of Functions) Regulations, 1954, as amended from time to time.

2. Overriding effect- These rules shall have effect notwithstanding anything to the contrary contained in any other service rules made by the Governor under the proviso to Article 309 of the Constitution, or order, for the time being in force.

3. Definitions-Unless there is anything repugnant in the subject or context-

(a) 'Constitution' means the Constitution of India;

(b) 'Governor' means the Governor of Uttar Pradesh;

(c) 'Post' or 'Service' means a post of service under the rule making power of the Governor under the proviso to Article 309 of the Constitution.

4. Criterion for recruitment by promotion- Recruitment by promotion to the post of Head of Department, to a post just one rank below the Head of Department and to a post in any service carrying the pay scale the maximum of which is Rs.18,300 or above, shall be made on the basis of merit, and to rest of the posts in all services to be filled by promotion, including a post where promotion is made from a non-gazetted post to a gazetted post or from one service

to another service, shall be made on the basis of seniority subject to the rejection of the unfit.

By order,
(R.B. Bhaskar)
Secretary"

12. The petitioner has relied upon seniority list dated 18th September, 2001 in which he is placed as senior to Shri Ashok Kuamr and Shri Munshi Lal. The petitioner was placed at Sl.No.6, whereas Shri Ashok Kumar and Shri Munshi Lal at Sl.Nos.8 and 9. The petitioner was thus entitled to be considered for promotion ahead of respondent Nos.8 and 9. The U.P. Public Service Commission has not given any such material on the basis of which it can be said that the petitioner was unfit for promotion. Along with rejoinder affidavit the petitioner has annexed the entries given to him for the years 2001-02 (Annexure R.A.7); 2002-03 (Annexure R.A.8) and 2003-04 (Annexure R.A.6). In all the three entries the petitioner's integrity has been certified and his work and conduct has been assessed to be 'outstanding'. The petitioner was thus arbitrarily denied of promotion as compared to his juniors both by applying the Rules of 1970, in which merit was assessed as criteria for promotion, as well as the General Rules applicable for promotion namely U.P. Government Servants Criteria for Recruitment by Promotion Rules, 1994, which provides for seniority, 'subject to rejection of unfit', as criteria for promotion. The petitioner's entries for the relevant year were also not taken into consideration for promotion.

13. For the aforesaid reasons, we **allow** the writ petition and direct the respondents to reconsider the petitioner's case for promotion taking into account the criteria of 'seniority subject to rejection of unfit', as the criteria for promotion to the post of ARTO, and after taking into consideration the entries awarded to him for the relevant years. The required consideration shall be made within a period of two months from the date a certified copy of this order is produced by the petitioner before the State Government and the U.P. Public Service Commission. In case the petitioner is found entitled for promotion, he will be given promotion with effect from the date, his juniors were given promotion as ARTO and that his seniority shall be refixed accordingly.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 10.01.2011

BEFORE
THE HON'BLE SUNIL AMBWANI, J.
THE HON'BLE DILIP GUPTA, J.

First Appeal From Order No. 896 of 2005

Smt. Alimunnishan and others ...Petitioner
Versus
Om Prakash and another ...Respondent

Motor Vehicle Act-Section-140-No fault liability-deceased travelling with truck-due to broke down of Kamani of Vehicle-lost balance and over turned killing the deceased-Tribunal treating No fault liability-awarded Rs.50,000/-but refused to consider the merit-held-illegal-in spite of No fault liability-claim for compensation could here been considered.

Held: Para 11

In the present case also, as in S. Kaushnuma Begum (supra), the Tribunal has only awarded Rs. 50,000/- as compensation under the 'No Fault Liability Clause' under Section 140 of the Act but has denied compensation as there was no rash or negligent driving by

the driver of the truck. The claim of compensation is, therefore, required to be determined in the light of the observations made by the Supreme Court in S. Kaushnuma Begum (supra). The matter, therefore, needs to go back to the Tribunal for giving fresh award.

Case law discussed:

AIR 2001 SC 485.

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

1. The First Appeal From Order arises out of Claim Petition No. 33 of 2002 (Smt. Alimunnishan & 8 Ors. Vs. Om Prakash & Anr.) filed on account of death of Naqvi Ahmad in the accident that had taken place on 17th November, 2001 with Truck No. U.P.44-A/2098 owned by Om Prakash Singh.

2. The said Claim Petition No. 33 of 2002 was filed by Smt. Alimunnishan & 8 Ors. under Section 166 of the Motor Vehicles Act, 1988 with the averments that the deceased Naqvi Ahmad was the sole bread earner of the family; on 17th November, 2001 he went to Sultanpur for business purposes but Truck bearing No. U.P.44-A/2098 which was being negligently driven by the driver hit the husband of Smt. Alimunnishan as a result of which he and many others died and many were injured; the husband of the petitioner No. 1 used to earn Rs. 5,000/- per month from the business; First Information Report could not be lodged in time since medical treatment was immediately required to be provided to the injured and, therefore, as the bread earner had succumbed to the injuries, the claimants suffered irreparable injury and appropriate compensation should be awarded to them.

3. A reply was filed to the claim petition. Opposite Party No. 1 Om Prakash Singh stated that he was the owner of the truck bearing No. U.P.44-A/2098; truck was insured with the National Insurance Company Branch Rai Bareilly upto 18th December, 2001; truck was being driven by Taufeeq Ahmad Khan, who had a valid and effective driving license; truck was carrying cement from Tikeriya Industrial Area to Faizabad when the 'Kamani' of the truck broke down as a result of which the truck lost balance and over turned killing two persons and inuring three; the injured were taken to the hospital by the police; passengers were not sitting in the truck at the time of accident and the owner had also given instructions to the driver not to permit any person to sit in the truck and assurance had also taken from the driver to this effect; the driver had informed the owner that Naqvi Ahmad was not sitting in the truck at the time of accident; that there was no violation of the terms and conditions contained in the Insurance policy; that the accident was not caused due to rash and negligent driving and that the owner was not responsible for payment of any compensation.

4. The National Insurance Company also filed a reply to the claim petition. It was stated that the driver did not have a valid and effective license at the time of accident and so the Insurance Company was not liable to pay any compensation; the truck owner did not inform the Insurance Company of the accident; the accident was caused on account of rash and negligent driving by the truck driver and so the Insurance Company was not liable to pay any compensation; the truck was being driven contrary to the terms and conditions of the Motor Vehicles Act since passengers were being carried for which no premium had been paid; the insured had not followed the provisions of Section 64 of the

Motor Vehicles Act and in any case the claimants were not dependent on the deceased.

The following issues were framed:-

(1) Whether the death of Naqvi Ahmad had occurred on account of rash and negligent driving by the driver of the truck No. U.P.44-A/2098.

(2) Whether on the date of accident, the driver of the truck had a valid and effective driving license.

(3) Whether the truck was insured and whether it was being used in accordance with the terms and conditions stipulated in the insurance policy.

(4) Whether the claimants were entitled to compensation and if so then from which opposite party and to what extent.

5. In support of the claim petition, documentary evidence in the form of postmortem report was filed and three witnesses P.W.1, Safeeq Ahmad son of Kasim Ali gave the evidence. On behalf of the owner of the truck, driving license, payment of deposit of tax, registration papers, insurance cover, copy of judgment dated 18th October, 2004, copy of order dated 8th April, 2005 were filed. D.W. 1 Alimunnishan gave oral evidence.

6. While deciding Issue no.1, the Tribunal held that the version of the driver of the truck should be believed and the owner of the truck and the Insurance Company could not prove that the death occurred due to rash and negligent driving. The Tribunal also found that the Insurance Company could not establish that the deceased Naqvi Ahmad was travelling in the truck. Issue no. 2 was decided by the Tribunal holding that at the time of accident the driver of the truck had a valid and effective driving license. Issue no.3 was decided by the Tribunal holding that the truck was being driven in accordance with the terms and conditions stipulated in the insurance policy. Issue no. 4 was decided holding that there was no negligence on the part of the driver of the truck and the accident had occurred on account of the breakage of 'Kamani' and that the deceased and his friends were not sitting in the truck at the time of the accident and was walking on the left path side of the road. The death occurred because the truck overturned and so the Insurance Company under the 'No fault liability' clause should pay Rs. 50,000/- with simple interest of 5%.

7. Learned counsel for the appellants submitted that even if there was no negligence or rashness on the part of the driver of the truck, then too the owner should be made liable for the damages to the persons who suffers on account of such accident. This has been disputed by learned counsel for the respondents.

8. This issue was examined by the Supreme Court in **S. Kaushnuma Begum & Ors., Vs. The New India Assurance Co. Ltd. & Ors. AIR 2001 SC 485.** The accident which gave rise to the claim occurred at about 7.00 P.M. on 20.3.1986. The vehicle involved in the accident was a jeep. It capsized while it was in motion. The cause of the capsize was attributed to bursting of the front tyre of the jeep. In the process of capsizing the vehicle hit against one Haji Mohammad Hanif who was walking on the road at that ill-fated moment and consequently that pedestrian was crushed and subsequently succumbed to the injuries sustained in that accident. The widow and children filed a Claim Petition

before the Tribunal. The Tribunal dismissed the claim for compensation holding that rash and negligence of the jeep was not established but directed the Insurance Company to pay Rs. 50,000/- to the claimants by way of 'No fault liability' under Section 140 of the Motors Vehicles Act, 1988 (hereinafter referred to as the 'Act'). Aggrieved by the said rejection of the claim the claimants moved the High Court. On 28.4.1999, a Division Bench of the High Court dismissed the appeal and the order reads thus:

"Heard learned counsel for the appellant.

Finding has been recorded that the tempo overturned and there was no negligence or rashness of the driver. Hence Rs.50,000/- has been awarded as compensation which is the minimum amount. There is no error in the order. Dismissed."

9. The widow and the children thereafter filed an appeal before the Supreme Court which observed as follows:-

"It must be noted that the jurisdiction of the Tribunal is not restricted to decide claims arising out of negligence in the use of motor vehicles. Negligence is only one of the species of the causes of action for making a claim for compensation in respect of accidents arising out of the use of motor vehicles. There are other premises for such cause of action.

Even if there is no negligence on the part of the driver or owner of the motor vehicle, but accident happens while the vehicle was in use, should not the owner be made liable for damages to the person who suffered on account of such accident? This question depends upon how far the Rule in Rylands vs. Fletcher (1861-73 All ER (Reprint) 1) (supra) can apply in motor accident cases. The said Rule is summarised by Blackburn, J, thus:

"The true rule of law is that the person who, for his own purposes, brings on his land, and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and, if he does not do so, he is prima facie answerable for all the damage which is the naturalconsequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default, or, perhaps, that the escape was the consequence of vis major, or the act of God; but, as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient."

The House of Lords considered it and upheld the ratio with the following dictum:

"We think that the true rule of law is that the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, he is prima facie answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiffs default, or, perhaps, that the escape was the consequences of vis major or the act of God; but, as nothing of this sort exists, here, it is unnecessary to inquire what excuse would be sufficient.

The above Rule eventually gained approval in a large number of decisions rendered by Courts in England and abroad. Winfield on Tort has brought out even a chapter on the "Rule in Rylands v. Fletcher". At page 543 of the 15th Edn. of the

calibrated work the learned author has pointed out that "over the years Rylands v. Fletcher has been applied to a remarkable variety of things: fire, gas, explosions, electricity, oil, noxious fumes, colliery spoil, rusty wire from a decayed fence, vibrations, poisonous vegetation....." He has elaborated seven defences recognised in common law against action brought on the strength of the rule in Rylands vs. Fletcher. They are: (1) Consent of the plaintiff i.e. volenti non fit injuria. (2) Common benefit i.e. where the source of the danger is maintained for the common benefit of the plaintiff and the defendant, the defendant is not liable for its escape. (3) Act of stranger i.e. if the escape was caused by the unforeseeable act of a stranger, the rule does not apply. (4) Exercise of statutory authority i.e. the rule will stand excluded either when the act was done under a statutory duty or when a statute provides otherwise. (5) Act of God or vis major i.e. circumstances which no human foresight can provide against and of which human prudence is not bound to recognise the possibility. (6) Default of the plaintiff i.e. if the damage is caused solely by the act or default of the plaintiff himself, the rule will not apply. (7) Remoteness of consequences i.e. the rule cannot be applied ad infinitum, because even according to the formulation of the rule made by Blackburn, J., the defendant is answerable only for all the damage "which is the natural consequence of its escape."

The Rule in Rylands vs. Fletcher has been referred to by this Court in a number of decisions. While dealing with the liability of industries engaged in hazardous or dangerous activities P.N. Bhagwati, CJ, speaking for the Constitution Bench in M.C. Mehta vs. Union of India and ors. (1987 (1) SCC 395): (AIR 1987 SC 1086), expressed the view that there is no necessity to bank on the Rule in Rylands vs. Fletcher. What the learned Judge observed is this:

"We have to evolve new principles and lay down new norms which would adequately deal with the new problems which arise in a highly industrialised economy. We cannot allow our judicial thinking to be constricted by reference to the law as it prevails in England or for the matter of that in any other foreign country. We no longer need the crutches of a foreign legal order."

It is pertinent to point out that the Constitution Bench did not disapprove the Rule. On the contrary, learned judges further said that "we are certainly prepared to receive light from whatever source it comes." It means that the Constitution Bench did not foreclose the application of the Rule as a legal proposition.

In Charan Lal Sahu vs. Union of India {1990 (1)SCC 613):(AIR 1990 SC 1480) another Constitution Bench of this Court while dealing with Bhopal gas leak disaster cases, made a reference to the earlier decisions in M.C. Mehta (supra) but did not take the same view. The rule of0.79" strict liability was found favour with. Yet another Constitution Bench in Union Carbide Corporation vs. Union of India {1991(4)SCC 584 (AIR 1992 SC 248) referred to M.C. Mehtas decision but did not detract from the Rule in Rylands vs. Fletcher (1861-73 All ER 1).

In Gujarat State Road Transport Corporation, Ahmedabad vs. Ramanbhai Prabhatbhai {1987 (3) SCC 234} the question considered was regarding the application of the Rule in cases arising out of motor accidents. The observation made by

E.S. Venkataramiah, J. (as he then was) can profitably be extracted here:

"Today, thanks to the modern civilization, thousands of motor vehicles are put on the road and the largest number of injuries and deaths are taking place on the roads on account of the motor vehicles accidents. In view of the fast and constantly increasing volume of traffic, the motor vehicles upon the roads may be regarded to some extent as coming within the principle of liability defined in Rylands v. Fletcher. From the point of view of the pedestrian the roads of this country have been rendered by the use of the motor vehicles highly dangerous. 'Hit and run' cases where the drivers of the motor vehicles who have caused the accidents are not known are increasing in number. Where a pedestrian without negligence on his part is injured or killed by a motorist whether negligently or not, he or his legal representatives as the case may be should be entitled to recover damages if the principle of social justice should have any meaning at all. In order to meet to some extent the responsibility of the society to the deaths and injuries caused in road accidents there has been a continuous agitation throughout the world to make the liability for damages arising out of motor vehicles accidents as a liability without fault."

Like any other common law principle, which is acceptable to our jurisprudence, the Rule in Rylands vs. Fletcher can be followed at least until any other new principle which excels the former can be evolved, or until legislation provides differently. Hence, we are disposed to adopt the Rule in claims for compensation made in respect of motor accidents.

"No Fault Liability" envisaged in Section 140 of the MV Act is distinguishable from the rule of strict liability. In the former the compensation amount is fixed and is payable even if any one of the exceptions to the Rule can be applied. It is a statutory liability created without which the claimant should not get any amount under that count. Compensation on account of accident arising from the use of motor vehicles can be claimed under the common law even without the aid of a statute. The provisions of the MV Act permits that compensation paid under 'no fault liability' can be deducted from the final amount awarded by the Tribunal. Therefore, these two are resting on two different premises. We are, therefore, of the opinion that even apart from Section 140 of the MV Act, a victim in an accident which occurred while using a motor vehicle, is entitled to get compensation from a Tribunal unless any one of the exceptions would apply. The Tribunal and the High Court have, therefore, gone into error in divesting the claimants of the compensation payable to them."

(emphasis supplied)

10. Thus, in view of the aforesaid decision of the Supreme Court, it has to be held that even apart from Section 140 of the Act, compensation can be claimed from a Tribunal unless any one of the exceptions laid down in Rylands vs. Fletcher applies.

11. In the present case also, as in S. Kaushnuma Begum (supra), the Tribunal has only awarded Rs. 50,000/- as compensation under the 'No Fault Liability Clause' under Section 140 of the Act but has denied compensation as there was no rash or negligent driving by the driver of the truck. The claim of compensation is, therefore,

required to be determined in the light of the observations made by the Supreme Court in S. Kaushnuma Begum (supra). The matter, therefore, needs to go back to the Tribunal for giving fresh award.

12. The judgment given by the Tribunal in so far as it rejects the claim is, accordingly, set aside. The Tribunal shall give a fresh award as expeditiously as is possible.

13. The First Appeal From Order is allowed to the extent indicated above.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 25.01.2011

BEFORE
THE HON'BLE DEVI PRASAD SINGH, J.
THE HON'BLE ANIL KUMAR, J.

Service Bench No. 1608 of 2009

Dharam Raj Singh ...Petitioner
Versus
State of U.P. and others ...Respondent

Counsel for the Petitioner:
S.C. Yadav,
Vishal Kumar Upadhyay

Counsel for the Respondent:
C.S.C.,
Sudeep Seth

U.P. Cooperative Society Employees Centerlised Services Regulations 1978- Regulation-61 (a)- Dismissal from service-Petitioner working as Dy.General Manager in Cooperative Bank-facing disciplinary proceeding-after receiving charge sheet-repeatedly demand copies of supporting document-request for oral evidence to cross examine the witnesses by indicating place, time and date-order passed merely after receiving explanation in pursuance of enquiry report-held-not only principle of Natural justice but statutory provisions regulating disciplinary proceeding violated dismissal set-a-side with all consequential benefits.

Held: Para 27 & 29

Accordingly, it shall not be open to the respondents to proceed in a manner different than what has been provided in regulation 61 of the Regulations provided for the disciplinary proceedings.

In all, what has been stated herein above, the impugned order seems to be violative of not only principle of natural justice but also statutory provisions (supra) regulating the disciplinary proceedings.

Case law discussed:
JT 2010 (1) SC 618; 1990 LCD 486; 1998 LCD 199; 1980 Vol. 3 SCC 459; 1998 (6) SCC 651; 1998 SC 117; 1985 SC 1121; (2009) 2 SCC 570; (2010) 2 SCC 772; AIR 1936 PC 253;AIR 1961 SC 1527; AIR 1963 Sc 1077; AIR 1964 SC 358; AIR 1967 SC 295; 1999 (8) SCC 266; 2000 (7) SCC 296; AIR 2001 SC 1512; 2002 (1) SCC 633; AIR 2004 SC 1657; (1876) 1 Ch.D. 426; AIR 1972 SC 2077; AIR 1975 SC 915; AIR 1979 SC 1573; AIR 1980 SC 326; AIR 1986 SC 3160; 1995 (1) SCC 156; 2008 (9) SCC 31; 2010 (5) SCC 349.

(Delivered by Hon'ble Devi Prasad Singh, J.)

1. Heard Sri S.C. Yadav, learned counsel appearing for the petitioner and Sri Sudeep Seth, learned counsel for the respondents and perused the record.

2. Affidavits have been exchanged between the parties.

With the consent of the parties' counsel, the writ petition is finally heard and is being decided at admission stage.

3. The petitioner who was a Dy. General Manager in respondent Cooperative Bank has approached this Court under Article 226 of the Constitution of India, being aggrieved of the impugned order dated 24.08.2009 (Annexure-1) by which the petitioner has been dismissed from service after disciplinary proceedings.

4. While serving as Dy. General Manger in the respondent Bank at Banda the petitioner was served with a charge-sheet dated 12th February, 2008, a copy of which has been filed as Annexure No. 10 to the writ petition. While serving the chargesheet, 9 charges relating to slackness and misconduct were levelled against the petitioner. After receipt of the chargesheet, the petitioner vide letter dated 22th February, 2008, demanded certain documents relating to allegation on record. The Inquiry Officer, by his letter dated 13.03.2008 wrote to the Secretary/General Manager, District Cooperative Bank Ltd. Pratapgarh to provide the relevant documents relating to the charges. However, a plea was taken by the petitioner that complete documents or order were not supplied to him. While taking such plea the petitioner has also submitted reply dated 27th March, 2008 with a request to the Inquiry Officer to provide a copy of the complaint but the same was not provided to him. However, according to the petitioner's counsel, the alleged complaint was the very foundation to proceed against the petitioner. The petitioner also denied the charges levelled against him and stated that he has performed his duties up to mark and no irregularity or illegality has been committed by him.

5. After receipt of reply to the chargesheet dated 12th February, 2008, the Inquiry Officer conducted inquiry and submitted a report to the disciplinary authority and in consequence thereof, the disciplinary authority by the impugned order dismissed the petitioner from services.

6. After submission of reply dated 27th March, 2008, the petitioner has sent a letter dated 03th February, 2009 to the Member Secretary, Cadre Authority, Cooperative Bank, Centralised Services, Lucknow mentioning therein that the petitioner has made a request to the Inquiry Officer for fixing date, time and place to record evidence, coupled with the prayer to provide opportunity of personal hearing but the same has not been allowed to the petitioner. Accordingly, it was stated by the petitioner before Member Secretary, Cadre Authority, Cooperative Bank, Centralised Services, Lucknow that inquiry seems to be continuing against him ex-parte and as such the report submitted by the Inquiry Officer cannot be allowed to be believed. The Member Secretary, Cadre Authority, Cooperative Bank, Centralised Services, Lucknow instead of taking a decision on the letter submitted by petitioner on 03rd February, 2009 issued a Show Cause Notice dated 16th April, 2009 to the petitioner calling his explanation with regard to the report submitted by the Inquiry Officer. In response to it, the petitioner submitted a reply dated 24th April, 2009 to the Cadre Authority mentioning therein that inquiry report submitted by the Inquiry Officer is violative of principle of natural justice as no reasonable opportunity was given to him to defend his cause and no date, time and place was fixed by the Inquiry Officer while proceeding with the inquiry.

7. Thereafter, by letter dated 12th May, 2009, the Additional Secretary of Cadre Authority, Cooperative Bank, Centralised Services, U.P., Lucknow has

written a letter, granting a month's time to submit explanation. On 20th May, 2009, the petitioner written letter to the Additional Secretary of Cadre Authority, Cooperative Bank, Centralised Services, U.P., Lucknow requesting time up to 30th June, 2009 which was granted to him. The petitioner has submitted his explanation dated 22.07.2009 denying all the charges levelled against him and requested to provide relevant documents and opportunity to cross examine the witnesses in his defence. After receipt of reply from petitioner, the petitioner was dismissed from the service by the impugned order dated 24th of August, 2009.

8. At the face of record, it appears that in spite of repeated requests made by the petitioner, the respondents have not given reasonable opportunity to the petitioner to defend his cause. The petitioner made categorical request that some date, time and place be fixed by the Inquiry Officer. He also requested to give an opportunity to cross examine the witnesses and lead evidence in defence.

9. According to the petitioner's counsel, even opportunity of hearing was not given to the petitioner in spite of demand raised in writing. These facts have not been denied by respondents' counsel.

10. Now, it is well settled proposition of law that regular inquiry means after serving the chargesheet and receipt of reply to the chargesheet, oral evidence should be recorded with opportunity to cross-examine the witnesses. Thereafter, the delinquent employee has a right to lead evidence in defene and opportunity of personal hearing should be given by the inquiry officer. Even if the government employee does not cooperate with the enquiry proceedings, it shall not give escape to the enquiry officer from concluding the enquiry in accordance with law. It shall always be incumbent upon the enquiry officer to record finding, may be by ex parte proceeding and thereafter submit a report to the disciplinary authority. It is also necessary that the documents relied upon by the prosecution should be proved vide **JT 2010 (1) SC 618 State of U.P. and others Vs. Saroj Kumar Sinha, 1990 LCD 486 Jagdish Prasad Singh Vs. State of U.P., 1998 LCD 199 Avatar Singh Vs. State of U.P., 1979 VI. I SCC 60 Town Area Committee, Jalalabad Vs. Jagdish Prasad, 1980 Vol. 3 SCC 459 Managing Director, U.P. Welfare Housing Corporation Vs. Vijay Narain Bajpai, 1998 (6) SCC 651 State of U.P. Vs. Shatrughan Lal, 1998 SC 117 Chandrama Tewari Vs. Union of India and others, 1985 SC 1121 Anil Kumar Vs. Presiding Officer and others, (2009) 2 SCC 570 Roop Singh Negi Vs. Punjab National Bank and others and (2010) 2 SCC 772 State of U.P. and others Vs. Saroj Kumar Sinha.**

11. In case for any reason, it is not feasible or possible to provide the copy of documents, then opportunity should be given to inspect the records.

12. In the present case, it appears that such opportunity has not been provided to the petitioner. After receipt of reply to chargesheet, it was incumbent on the Inquiry Officer to adduce evidence to substantiate the charges and prove the document like other evidence so that the delinquent employee may cross examine the witnesses with regard to authenticity of documents. Of course, there may be a situation where documents are admitted by the delinquent employee under his own signature, then in such situation, it may not

be necessary to prove such documents but so far as allegations contained in the chargesheet are confined, it should be proved like other evidence. After recording the evidence, it shall be incumbent on the Inquiry Officer to give an opportunity to delinquent employee to lead evidence in defence and if necessary may produce its own witness to assail the charges, Inquiry Officer should also afford opportunity of personal hearing with regard to evidence collected during the course of inquiry from over either side. Thereafter he or she may submit the report to the disciplinary authority.

13. Attention has been invited to recent judgment of Hon'ble Supreme Court in the case of **State of Uttar Pradesh and others Vs. Saroj Kumr Sinha 2010 (2) SCC 772.** The aforesaid proposition of law has been reiterated by Hon'ble the Supreme Court. For convenience, the relevant portion from the judgment of Saroj Kumar Sinha (Supra) is reproduced hereunder:-

"The proposition of law that a government employee facing a department enquiry is entitled to all the relevant statement, documents and other materials to enable him to have a reasonable opportunity to defend himself in the department enquiry against the charges is too well established to need any further reiteration. Nevertheless given the facts of this case we may re-emphasise the law as stated by this Court in the case of State of Punjab vs. Bhagat Ram (1975) 1 SCC 155:

"The State contended that the respondent was not entitled to get copies of statements. The reasoning of the State was that the respondent was given the opportunity to cross-examine the witnesses and during the cross-examination the respondent would have the opportunity of confronting the witnesses with the statements. It is contended that the synopsis was adequate to acquaint the respondent with the gist of the evidence.

The meaning of a reasonable opportunity of showing cause against the action proposed to be taken is that the government servant is afforded a reasonable opportunity to defend himself against the charges on which inquiry is held. The government servant should be given an opportunity to deny his guilt and establish his innocence. He can do so when he is told what the charges against him are. He can do so by cross-examining the witnesses produced against him. The object of supplying statements is that the government servant will be able to refer to the previous statements of the witnesses proposed to be examined against the government servant. Unless the statements are given to the government servant he will not be able to have an effective and usefulcross-examination.

It is unjust and unfair to deny the government servant copies of statements of witnesses examined during investigation and produced at the inquiry in support of the charges levelled against the government servant. A synopsis does not satisfy the requirements of giving the government servant a reasonable opportunity of showing cause against the action proposed to be taken."

We may also notice here that the counsel for the appellant sought to argue that respondent had even failed to give reply to the show cause notice, issued under Rule 9. The removal order, according to him, was therefore justified. We are unable to accept the aforesaid submission. The first

enquiry report dated 3.8.2001, is clearly vitiated, for the reasons stated earlier. The second enquiry report can not legally be termed as an enquiry report as it is a reiteration of the earlier, enquiry report. Asking the respondent to give reply to the enquiry report without supply of the documents is to add insult to injury.

In our opinion the appellants have deliberately misconstrued the directions issued by the High Court in Writ Petition 937/2003. In terms of the aforesaid order the respondents was required to submit a reply to the charge sheet upon supply of the necessary document by the appellant. It is for this reason that the High Court subsequently while passing an interim order on 7.6.2004 in Writ Petition No. 793/2004 directed the appellant to ensure compliance of the order passed by the Division Bench on 23.7.2003. In our opinion the actions of the enquiry officers in preparing the reports ex-parte without supplying the relevant documents has resulted in miscarriage of justice to the respondent. The conclusion is irresistible that the respondent has been denied a reasonable opportunity to defend himself in the enquiry proceedings."

14. Taking into aforesaid proposition of law in the present context, there appears to be no justification on the part of the respondents not to record oral evidence and provide the copy of relevant documents which has got bearing with the controversy in question.

15. Sri Sudeep Seth, learned counsel for the respondents submits that the allegation against the petitioner relates to infringement of trust deposed upon him by the bank and being serious one, no liberal view should be taken by the court.

16. Submission of respondent's counsel seems to be not correct. The gravity of offence or misconduct may have got bearing with the quantum of punishment but so far as procedural law is concerned, that should be enforced in its letter and spirit.

17. Article 14 is the pulse beat of the Constitution of India and in the democratic polity governed by rule of law, the procedure prescribed by the law must be followed in letter and spirit without being influenced by gravity of offence. Gravity of offence does not give an option to the employer to proceed in its own very manner and arbitrarily. It has been consistent view of the courts right from the Privy Council that in a civilized society, every person is entitled for equal protection.

18. It is settled law that in case the authorities want to do certain things, then that should be done in the manner provided in the Act or statutory provisions and not otherwise vide **Nazir Ahmed Vs. King Emperor, AIR 1936 PC 253; Deep Chand Versus State of Rajasthan, AIR 1961 SC 1527, Patna Improvement Trust Vs. Smt. Lakshmi Devi and others, AIR 1963 Sc 1077; State of U.P. Vs. Singhara Singh and other, AIR 1964 SC 358; Barium Chemicals Ltd. Vs. Company Law Board AIR 1967 SC 295, (Para 34) Chandra Kishore Jha Vs. Mahavir Prsad and others 1999 (8) SCC 266; Delhi Administration Vs. Gurdip Singh Uban and others, 2000 (7) SCC 296; Dhanajay Reddy Vs. State of Karnataka, AIR 2001 SC 1512, Commissioner of Income Tax, Mumbai Vs. Anjum M.H. Ghaswala and others, 2002 (1) SCC 633; Prabha Shankar Dubey Vs. State of M.P., AIR 2004 SC 1657, Taylor Vs. Taylor, (1876) 1 Ch.D. 426; Nika Ram Vs. State of Himachal Pradesh, AIR 1972 SC 2077;**

Ramchandra Keshav Adke Vs. Govind Joti Chavare and others, AIR 1975 SC 915; Chettiam Veettil Ammad and another Vs. Taluk Land Board and others, AIR 1979 SC 1573; State of Bihar and others Vs. J.A.C. Saldanna and others, AIR 1980 SC 326, A.K. Roy and another Vs. State of Punjab and others; AIR 1986 SC 3160; State of Mizoram Vs. Biakchhawna, 1995 (1) SCC 156.

19. Hence petitioner cannot divested from due compliance of principle of natural justice only because allegation on record are serious.

20. The respondents' counsel has relied upon a case reported in **2008 (9) SCC 31 Haryana Financial Corporation and another Vs. Kailash Chandra Ahuja.**

21. In the case of Kailash Chandra Ahuja (Supra) their Lordships of Hon'ble Supreme Court observed that in case, violation of principle of natural justice has not caused prejudice to the petitioner concerned, then it shall not create a ground to assail the orders passed by authority. The case of Kailash Chandra Ahuja (Supra) is not applicable to the facts and circumstances of the case for two reasons viz. Firstly, it has been delivered by a Bench of Hon'ble two Judges and the case relied upon by petitioner's counsel i.e. Saroj Kumar Sinha (supra) is also by Hon'ble two Judges which is a latter decision and under the law of precedence in case there is conflict between two judgments of coordinate bench, the latter should be followed.

22. The second reason is that in the present case, the repeated requests made by petitioner pointing out the illegality and prejudice which may be caused due to non-furnishing of documents and recording of evidence were not considered by the respondents. Once the delinquent employee himself well in time raised a plea that he shall be prejudiced in case he is not provided an opportunity to cross examine the evidence or lead evidence in defence, then in such situation, the denial of principle of natural justice shall cause prejudice and cannot be defended under the colour of principle of no prejudice.

23. The other judgment relied upon by the respondents' counsel is reported in **2010 (5) SCC 349, Union of India Vs. Alok Kumar**. In case of Alok Kumar (Supra) while reiterating the aforesaid principle of no prejudice, their Lordships held that in case de facto prejudcie caused to the employees, then in such situation, if necessary, court can interfere with the departmental inquiry but for that employee must show that prejudice has been caused to him. The 'Judicia Posteriora sunt' in lege fortiora requires to show that de facto prejudice has been caused.

24. In the present case, the petitioner from the very beginning submitted that de facto prejudice has been caused. Even before passing of the impugned order or during continuance of inquiry by submitting a representation to the Cadre Authority (supra) the petitioner made representation that some date, time and place be fixed by the Inquiry Officer and the documents be provided, otherwise, he may be prejudiced. Vide letter dated 11th April, 2008, the petitioner has dismissed one Sri Daya Ram in accordance with rules while discharging his obligation. All these aspect of the matter and none supply of material document, shows that in case the petitioner would have been given opportunity to cross examine the evidence, he would have pleaded better to

defend his cause. Accordingly, because of non-compliance of principle of natural justice the petitioner has suffered a set back.

25. Apart from above, under regulation 61 of the Regulations, quoted in para 14 of the writ petition, it was incumbent on the Inquiry Officer to produce the evidence with opportunity to cross examine the witness after serving chargesheet. Opportunity should have also been given to the petitioner to adduce his own evidence with liberty to the Presenting Officer to cross examine the witnesses. For convenience Regulation 61(a), quoted in para 14 of the writ petition is reproduced as under :-

"Para 14 - That regulation 61 speaks about Disciplinary proceedings which is quoted herein under:-

Disciplinary Proceedings:

61. (a) The disciplinary proceedings against a member shall be conducted by the Inquiry Officer (referred to in clause (d) below with due observances of the principles of natural justice for which it shall be necessary that:

(i) the member shall be served with a charge sheet duly approved by the member secretary containing specific charges and mention of evidence in support of each charge and he shall be required to submit explanation in respect of the charge within reasonable time which shall not be less than fifteen days:

(ii) such a member shall also be given an opportunity to produce at his own cost or to cross-examine witnesses in his defence and shall also be given an opportunity of being heard in person, if he so desires:

(iii) if no explanation in respect of charge sheet is received or the explanation submitted is unsatisfactory the competent authority may award appropriate punishment considered necessary.

(b)(i) Where the member is dismissed or removed from service on the ground of conduct which has led to his conviction on a criminal charge: or

(ii) Where the member refuses or fails without sufficient cause to appeal before the Inquiry Officer which specifically called upon in writing to appear: or

(iii) Where a member has absconded and his whereabout are not know to authority for more than three months: or

(iv) Where it is otherwise (for reasons to be recorded) not possible to communicate with him, the competent authority may award appropriate punishment without taking or continuing disciplinary proceedings.

(c) Disciplinary proceedings shall be taken by the appointing authority against the member either sue motto or on a report made to this effect by an inspecting Authority or the Chairman of the bank under whose control the member is working or may have worked.

(d) The Inquiring Officer shall be appointed by the Member Secretary."

26. Once the statute itself provides certain procedure with regard to disciplinary proceeding, then it shall be incumbent on the Inquiry Officer to adhere to the procedure. It is well settled law that a thing should be done in the manner as provided in the statute and not otherwise (supra). Thus

so far as present case is concerned, petitioner's right for compliance of natural justice is statutory as well constitutional.

27. Accordingly, it shall not be open to the respondents to proceed in a manner different than what has been provided in regulation 61 of the Regulations provided for the disciplinary proceedings.

28. The principle of 'judicia Posteriora sunt' in lege fortiora i.e. requirement to show de facto prejudice shall not be applicable when the statute itself provides certain procedures regulating the disciplinary proceeding, Rules, regulations and mode of disciplinary proceeding provided under the statute should be followed in true sense. Hence, the submission made by Sri Sudeep Seth, learned counsel for the respondent seems to be not correct.

29. In all, what has been stated herein above, the impugned order seems to be violative of not only principle of natural justice but also statutory provisions (supra) regulating the disciplinary proceedings.

30. The writ petition is liable to be and is hereby allowed. A writ in the nature of certiorari is issued quashing the impugned order dated 24th August, 2009, as contained in Annexure-1 to the writ petition with consequential benefit. The petitioner will be restored in service and be paid salary forthwith. However we agree with the submission made by the respondents' counsel and provide that it shall be open for the respondents to take work or not, from the petitioner but he be paid salary. So far as the back wages is concerned, it shall be subject to fresh inquiry, if any, conducted by the respondents. In case the respondents take a decision to hold fresh inquiry, then that shall be held expeditiously and preferably within a period of six months from today. Parties to communicate judgment forthwith.

31. Writ petition is allowed accordingly.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 29.01.2011

BEFORE
THE HON'BLE ANIL KUMAR, J.

Contempt No. 1777 of 2010

Kalloo and others ...Petitioner
Versus
Satti Din ...Respondent

Counsel for the Petitioner:
P.V. Chaudhary

Counsel for the Respondent:
.....

Contempts of Courts Act 1972- Section 12-status Quo order-passed in second appeal-under order 39 Rule 1 complete procedure and consequences provided under order XXXIX R.2-itself-contempt alleging violation of status quo order-held-not maintainable legal aspect dismissed.

Held: Para 15

For the foregoing reasons, the present contempt petition filed by the applicants under Section 12 of the Contempt Court's Act for alleged non-compliance of the interim order/injunction order granted by this Court in pending second appeal is not maintainable and liable to be dismissed.

Case law discussed:
1987, AWC, 506,1984, AWC, 567, 2003(1) ARC 545.

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

1. Present contempt petition has been filed under Section 12 of the Contempt Court Act for the alleged non-compliance of the order dated 03.09.2002 passed in Second Appeal No. 5 of 1995 (Satti Din Vs. Kallo and others).

2. Facts in brief are that in the year 1987, a Suit for permanent injunction has been filed by the plaintiff-respondent praying therein that the appellants-defendants may be permanently restrained from interfering in their peaceful possession over the land in dispute which is a 'Sahan'(registered as Civil Suit No. 463 of 1987, Satti Din Vs. kallu and others). Second Additional Munsif Magistrate, Sitapur by judgment and order dated 10.09.1992 dismissed the Suit.

3. Aggrieved by the same, an appeal was filed, dismissed by judgment and decree dated 23.09.1994 passed by 5th Additional District Judge, Sitapur. Thereafter, second appeal under Section 100 C.P.C. has been filed before this Court (registered as Second Appeal no. 5 of 1995, Satti Din Vs. Kallu etc.).

4. On 03.09.2002, an interim injunction has been granted on the application under Order XXXIX Rule 1 C.P.C., the relevant portion of the same is quoted as under :-

"Till the next date of listing parties shall maintain status quo, as it exists today, with reference to subject matter in dispute.

5. As per the version of the appellant-defendants, the respondent tried to construct a Nali over the land in dispute and collected material on spot for that purpose. On getting the information, the applicants pursued the matter with the Police authorities, but no heed has been paid as the police is in collusion with the respondent.

6. It is further pleaded on behalf of the applicants that on 26.07.2010, an application was moved under Section 151 C.P.C. in Civil Case No. 594 of 1995, Kallu etc. Vs. Satti Din, pending in the court of 4th Additional Civil Judge(J.D.), Sitapur in which the land in question as well as some other land involved, but nothing has been paid in the said matter.

7. Further, on 27/28.07.2010, the respondent constructed the Nali over the land in dispute with the help of musclemen and on resistance given by the applicant no.1, he threatened him with dire consequences and completely changed the situation of the land in dispute affecting the Sahan of the applicants to a great detriment.

8. In view of the above factual backgrounds, the present contempt petition has been filed on the ground that the respondent-plaintiff has violated the order dated 03.09.2002 passed by this Court in Second Appeal no. 5 of 1995, Satti Din Vs. Kallu and others, so he is liable to be punished.

9. Heard Sri P.V. Chaudhary, learned counsel for the applicants and perused the record.

10. It is late in a day to quarrel that in a second appeal, an interim order/injunction order is granted by Court in view of the provisions as provided under order XXXIX Rule 10 C.P.C. In case, if there is any breach or disobedience of the said order passed by Court, for disobedience of the same, the procedure is provided under Order XXXIX Rule 2(a) C.P.C. which is as under :-

"2-A. Consequence of disobedience or breach of injunction - (1) In the case of disobedience of any injunction granted or other order made under Rule I or Rule 2 or breach of any of the terms on which the injunction was granted or the order made, of the Court granting the injunction or making the order, or any court to which the suit or proceeding is transferred, may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in the civil prison for a term not exceeding three months unless in the meantime the court directs his release."

11. Accordingly, in view of the above said facts, the question which rises for consideration in the instant case that in case if an alternative remedy under Order XXXIX Rule 2-A C.P.C. is available to the appellants for breach of the order dated 03.09.2002 passed in pending second appeal, then in that circumstances, whether the present contempt petition filed by him is maintainable or not. The answer to the above said question lies in the following judgments.

12. In the case of ***S.G. Pagaree Vs. Zonal Manager, Food Coropration of India, New Delhi and others reported in 1987, AWC, 506,*** it is held by this Court that where alternative remedy under Order XXXIX Rule 2-A C.P.C. is available, proceeding under the contempt Courts Act should not be taken.

13. In the case of ***Pratap Narain Vs. Smt. Nomita Roy and others, reported in 1984, AWC, 567,*** the similar view was also expressed and it was held that remedy under Order XXXIX Rule 2-A C.P.C. is far more adequate and satisfactory remedy as disobedience of an injunction order of the Court below is involved.

14. In the case of ***Savitri Devi(Smt.) Vs. Civil Judge(J.D.), Gorakhpur and others, 2003(1) ARC 545,*** it is held that in view of the above discussion, once reaches the inescapable conclusion that proceedings under Order XXXIX Rule 2-A are quashi-criminal in nature and are meant to maintain the dignity of the Court in the eyes of the people so that the supremacy of law may prevail and to deter the people for mustering the courage to disobey the interim injunction passed by the Court.

15. For the foregoing reasons, the present contempt petition filed by the applicants under Section 12 of the Contempt Court's Act for alleged non-compliance of the interim order/injunction order granted by this Court in pending second appeal is not maintainable and liable to be dismissed.

16. Accordingly, the same is dismissed.

17. No order as to costs.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 06.01.2011

BEFORE
THE HON'BLE AHSOK SRIVASTAVA, J.

Criminal Revision No. 2146 of 2002

Dr. Jagdish Prasad Gaur ...Revisionist
Versus
State of U.P. and others ...Opp. Parties

Counsel for the Revisionist:
Sri Saurabh Gaur
Sri A.B.L. Gaur,
Sri V.P. Mishra,
Sri P.K. Singh

Counsel for the Opposite Party:
Sri Nitin Srivastava,
Sri Sunil Chandra Srivastava,
A.G.A.

Criminal Revision-Session Judge Quashed the summoning order-offence under section 323, 342, 504, 506 I.P.C.-applicant while in Que before counter No. 541 for getting reservation ticket-Noticed serious illegal activities on protest-called in side the counter ofter closing door assaulted and misbehaved-handed over to the constable who also misuse his power and post-on complaint all the accused persons summoned by magistrate-astonishing the session judge by misinterpreting the provision of section 197 Crpc. Set-a-side summoning order-in view of Bhgwan P.D. Srivastava case which still hold good filed-for misuse of power or doing the things not permitted under law- can not claim protection of Section 197- order passed by session judge wholly illegal and perverse-quashed Opposite Parties directed to appear before magistrate-in case of default-NBW be issued.

Held: Para 11 & 12

A police constable, who is detaining a person in custody, cannot be permitted to assault or slap him while taking him from a place to the police station concerned. Similarly no Reservation Clerk or Supervisor of a railway reservation counter can be said to be discharging their official duties while they are abusing, confining and assaulting a passenger who had gone to the counter to purchase a ticket or demanded the complaint book to lodge the protest.

On the basis of the above discussion I am of the view that the judgment and order passed by the learned Sessions Judge is totally illegal and perverse and liable to be quashed.

Case law discussed:
AIR 1967 Supreme Court 1331 (V 54 C 278); (2009) 3 Supreme Court Cases 398.

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

1. This criminal revision has been preferred by the revisionist feeling aggrieved by the judgment and order dated 3.12.2002 passed by the learned Sessions Judge, Ghaziabad in Criminal Revision No. 582 of 2002.

2. The brief facts of this case are that the revisionist Dr. Jagdish Prasad Gaur is a retired Reader and Head of Department of I.P. (P.G.) College, Bulandshahr and after his retirement he settled down in the city of Ghaziabad. On 12.5.1998 at about 8.00 A.M. he went to railway station, Ghaziabad and stood in the que before counter No. 541. He was there for reservation of a railway ticket for one Smt. Shobha Narayan. After a while the revisionist and other persons who were standing in the que noticed that the reservation officials were committing

irregularities. They were accepting money and reservation forms from certain travel agents bypassing the que. Such travel agents and middlemen were getting reservation tickets premptorily and without standing in the que which was against the prescribed rules. The revisionist could not digest the irregularities and he went straight away to opposite party no. 3, Shivdan Singh, who was sitting on the counter and issuing reservation tickets. Opposite party no. 2, Ram Gopal Sharma was occupying the reservation counter no. 542 which was adjacent to counter no. 541. The revisionist lodged his protest against the abovementioned irregularities being committed by them upon which opposite party nos. 2 and 3 started misbehaving with the revisionist. The revisionist went to Shift Supervisor R.K. Meena, opposite party no. 4, and demanded from him the complaint book. The opposite party no. 4 refused to give the complaint book to the revisionist. Thereafter the revisionist and other persons forming the que pressed their demand for the complaint book and to write their complaint therein. Seeing the mounting pressure by the public, the opposite party nos. 2, 3 and 4 asked the revisionist to come inside the reservation room. In good faith the revisionist went inside where, after bolting the door from inside, the opposite party nos. 2, 3 and 4 abused and assaulted him. Thereafter they handed him over to opposite party no. 5 Jai Kumar who was a constable at G.R.P., Ghaziabad. The opposite party no. 5 also assaulted the revisionist and took him to the G.R.P. Police Station and throughout the way he kept on slapping him. A false report was lodged against the revisionist and he was detained at the police station and produced before the court of the Magistrate concerned at 4.30 P.M. wherefrom he was released on bail. Thereafter the revisionist went to the Government Hospital where he was medically examined and a medical report was prepared. The revisionist tried to lodge an F.I.R. with the G.R.P. Ghaziabad but in vain; so he moved an application before the court of learned Magistrate under Section 156(3) Cr.P.C. but the same was rejected. Thereafter he filed a complaint against all the four opposite parties placed at Sl. Nos. 2 to 5 of the memo of revision. In the complaint case which was under Section 323/342/504 I.P.C. the learned Magistrate directed them to appear before the court on 7.2.2000. Feeling aggrieved by the summoning order, the opposite party nos. 2, 3 and 4 preferred a criminal revision before the learned Sessions Judge, Ghaziabad which was registered there as Criminal Revision No. 582 of 2002. It should be mentioned here that opposite party no. 5, Constable Jai Kumar, posted in G.R.P. Railway Station, Ghaziabad has not filed any revision.

3. After hearing both the parties, the learned Sessions Judge allowed the revision vide his order dated 3.12.2002 quashing and setting aside the summoning order dated 6.1.2000 passed by the learned Magistrate. Feeling aggrieved by the order of the learned Sessions Judge, the present revision has been filed before this Court.

4. This revision was listed for hearing on 26.11.2010. On that date the learned counsel for the revisionist, learned counsel for opposite party nos. 2 to 4 and learned A.G.A. were pressed. No one was present on behalf of opposite party no. 5 despite the fact that he has been served with the notice issued by this Court.

5. I have heard learned counsel for the revisionist, learned counsel for

opposite party nos. 2 to 4 and learned A.G.A. and perused the lower court records which are tagged with this file.

6. From the perusal of the judgment impugned, it is evident that the learned Sessions Judge had passed an order which is quite unusual. He has given protection of Section 197 of Cr.P.C. to all the three revisionists before him. He has exceeded his domain and stepped outrageously beyond the limits permitted under various provisions relating to criminal revision and considered certain facts consideration of which is permitted only by the High Court under Section 482 Cr.P.C. It appears that the learned Sessions Judge was under the impression that he has inherent power under Section 482 Cr.P.C. also. His judgment runs in some $3^{1/2}$ pages. In major part of it he has mentioned the facts and the arguments as advanced by the learned counsel for the parties before him. The relevant portion through which he has arrived at the decision to allow the revision is as follows :

"Having considered these arguments when we go through the record of Criminal Case No. 2067/99 of the trial court, we find that actually the entire incident alleged in the complaint took place in connection with reservation of Smt. Shobha Narayan and Counter no. 541 is said to be meant only for senior citizens and freedom-fighters, the complainant has not shown anything to attract the benefit of his being senior citizen or freedom-fighter. Even he has not brought any record to show that Smt. Shobha Narayan for whom he was at the counter was either freedom-fighter or senior citizen. The act of the accused persons in connection with reservation got into in the form of alleged incident and this discharge of official duty of reservation of accused persons cannot be separated from the work of reservation. Under these circumstances for want of sanction when the revisionists are government servants, the complaint cannot be taken to be maintainable. Further if at all the complainant had been challaned, it can be inferred that the complainant with a view to have the case in peshbandi against the revisionists has come forward with the complaint. In these circumstances, the impugned order has to be set aside and the revision has to be allowed."

7. From perusal of this part of the judgment it appears that the learned Sessions Judge was of the opinion that it was lawful for a Reservation Clerk and Reservation Supervisor to abuse, assault and confine a person, who had gone to a railway reservation counter to purchase a ticket, while vending tickets to the railway passengers. From the perusal of the complaint under Section 200 Cr.P.C., the statements of the witnesses and the order of the learned Magistrate, it is evident that when the revisionist had protested vending of reservation tickets in an illegal manner by opposite party nos. 2 to 4, they got irritated, called him inside the reservation room on the pretext of giving him the complaint book and thereafter the revisionist was abused and assaulted by them. By no stretch of imagination, one can presume what the opposite party nos. 2 to 4 had allegedly done was done in discharge of their official duties pertaining to vending of reservation tickets to the passengers. It is really surprising that such a senior District & Sessions Judge can misinterpret the law in such a reckless and improper manner. He has also considered various facts which were definitely not

under his domain while hearing the revision. He has mentioned in his order impugned that it has not been said before the learned Magistrate, during the course of inquiry of the complaint case, whether the revisionist was a senior citizen or freedom fighter or Smt. Shobha Narayan for whom he had gone to get the ticket reserved was a senior or a freedom fighter. It was not a matter in dispute but the dispute before the learned Magistrate was that whether the revisionist was confined, abused and assaulted or not. It was only a piece of evidence relating to facts which could have been seen at the time of trial of the case. It is really astonishing to see that the learned Sessions Judge has written in his judgment that the duty of reservation cannot be separated from the work which the opposite party nos. 2 to 4 had allegedly done against the revisionist.

8. In **AIR 1967 Supreme Court 1331 (V 54 C 278), K.N. Shukla Vs. Naynit Lal Manilal Bhatt and another** the Apex Court has said that *"Railway Officer officiating in Class I of the Transportation (Traffic and Commercial) Department is not an officer under Central Government but is under Railway Board. Therefore, prosecution can be instituted without the sanction of the Central Government."* The Apex Court has specifically said that in this judgment that "railway officials is an employee of the Railway Board and not the employees under Central Government." Therefore, in the case before the learned Magistrate, no sanction was at all required to prosecute opposite party nos. 2 to 5.

9. In **(2009) 3 Supreme Court Cases 398, Choudhury Praveen Sultana Vs. State of West Bengal and another** the Apex Court in paragraph no. 18 has said the following :

"18. The direction which had been given by this Court, as far back as in 1971 in Bhagwan Prasad Srivastava case holds good even today. All acts done by a public servant in the purported discharge of his official duties cannot as a matter of course be brought under the protective umbrella of Section 197 CrPC On the other hand, there can be cases of misuse and/or abuse of powers vested in public servant which can never be said to be a part of the official duties required to be performed by him. As mentioned in Bhagwan Prasad Srivastava case the underlying object of Section 197 CrPC is to enable the authorities to scrutinise the allegations made against a public servant to shield him/her against frivolous, vexatious or false prosecution initiated with the main object of causing embarrassment and harassment to the said official. However, as indicated hereinabove, if the authority vested in a public servant is misused for doing things which are not otherwise permitted under the law, such acts cannot claim the protection of Section 197 CrPC and have to be considered dehors the duties which a public servant is required to discharge or perform. Hence in respect of prosecution for such excesses or misuse of authority, no protection can be demanded by the public servant concerned.

10. The law as laiddown in this case is squarely applicable in the case in hand before me.

11. A police constable, who is detaining a person in custody, cannot be permitted to assault or slap him while taking him from a place to the police station concerned. Similarly no

Reservation Clerk or Supervisor of a railway reservation counter can be said to be discharging their official duties while they are abusing, confining and assaulting a passenger who had gone to the counter to purchase a ticket or demanded the complaint book to lodge the protest.

12. On the basis of the above discussion I am of the view that the judgment and order passed by the learned Sessions Judge is totally illegal and perverse and liable to be quashed.

13. The revision is allowed. The impugned judgment and order dated 3.12.2002 is quashed and set aside.

14. Let the complete Lower Court Records be sent back to the learned Sessions Judge, Ghaziabad for its onward transmission to the court concerned. Learned Magistrate is directed to proceed with the case in accordance with law. The matter is very old. Therefore, expeditious disposal of the case is directed. Opposite party no. 2, Ram Gopal Sharma, opposite party no. 3 Shivdan Singh and opposite party no. 4 R.K. Meena are directed to appear before the court of learned Magistrate on 7.2.2011.

15. Opposite party no. 5, Constable Jai Kumar, posted at the G.R.P. Railway Station, Ghaziabad at the relevant time is also directed to appear before the learned Magistrate on the above-mentioned date.

16. The learned Magistrate is directed to issue non-bailable warrant of arrest against opposite party nos. 2 to 5, if they fail to appear before it on the date fixed by this Court. If the opposite parties move bail application before the learned Magistrate, he will dispose of the same in accordance with law.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 27.01.2011

BEFORE
THE HON'BLE AMAR SARAN, J
THE HON'BLE NAHEED ARA MOONIS, J

Criminal Appeal No. 4606 of 2008

Dilip and others ...Appellants
Versus
State of U.P. ...Opposite Party

Counsel for the Appellants:
Sri Ravi Sahu
Sri Ahmad Saeed
Sri Ali Hasan
Sri Ghan Shyam Joshi
Sri M.Islam
Sri Sanjay Srivastava

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

Criminal Procedure Code Bail during Pendency of Appeal-Conviction for offence under section 302 IPC-Submission that on basis of same evidence with similar role has been acquitted-appellant in Jail for last 9 years-con not be ground for bail-case of 302/34 IPC-wrong acquittal-by Trial court can be converted in conviction by High Court- No Case for Bail-Hearing itself expedited.

Held: Para 9

Considering the aforesaid submissions and without expressing any opinion on the merits of the case and looking to the gravity of the matter, even though the principal appellant Dilip has undergone 9 years in jail, we are not inclined to grant

bail to the appellants. Prayer for bail of the accused appellants is rejected.

Case law discussed:

JIC 545 (SC); AIR 1971; AIR 1976 SC,294; AIR 2001 SC, 330; AIR 1963 SC, 1413: Cri. L.J., 465 (SC); AIR SCW, 4300 (SC); Cri. L.J., 126 (SC); Cri.L.J. 1748 (SC); (2004) 5 SCC, 334; Cri. L.J, 4498 (SC).

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

1. We have heard learned counsel for the appellants and the learned A.G.A. for the State.

2. The prosecution case, which was mentioned in the F.I.R. lodged by the informant Ashok Kumar P.W. 1 on 13.7.2003 at 9.15 p.m. at P.S. Bajariya, Kanpur Nagar, was that on the same day at 3 p.m., there was a quarrel between the deceased Sushil Kumar, brother of the informant after he intervened in a quarrel between one of the appellants Dilip and two other persons Rohit and Rajan. Consequent to this dispute, on the same night at 8 p.m., Sushil, P.W. 5 Jitoo, Vijay Kumar Yadav and P.W. 3 Ram Lakhan Yadav had gathered out side House No. 104/62 Seesamau, for going to a *Grih Pravesh* ceremony in that house, at that time, the three appellants Dilip, Arjun Pal alias Palauli, Akhtar Karim alias Achchhe Kariya and one Ankur, (who had been acquitted) came there armed with country made pistols and abused the deceased saying that he was acting as a big neta. They all fired causing injuries to Sushil, who fell at the spot. Other persons who were sitting on cots in the lane, ran away on the firing. The accused persons then left threatening any one in the neighbourhood not to depose in the case. When the deceased was being carried to Hallet Hospital, he died on the way.

3. It was submitted by the learned counsel for the appellants that in the F.I.R., the informant P.W. 1 Ashok Kumar does not describe himself as an eye witness and therefore, his testimony in the Court, where he described himself as an eye witness should be excluded. P.W. 3 Ram Lakhan Yadav and P.W. 5 Jitoo are the only two other witnesses, who have been produced. P.W. 3 has failed to support the prosecution case in Court and has been declared hostile. P.W. 5 Jitoo supported the prosecution case in his examination-in-chief., but in his cross examination, he has turned hostile. The appellant Dilip has been in jail for about 8 years as he was not granted bail during trial.

4. It was also argued that as the charge in this case was framed under section 302 read with section 34 IPC, the conviction of the appellants under section 302 simplicitor was illegal. Reliance for this contention was placed on *Atmaram Zingaraji Vs. State of Maharashtra, decided on 13.8.1997* and *Subran @ Subramanian & others Versus State of Kerala, 1993 JIC 545 (SC)* and *Sohan Lal and others v. The State of U.P., AIR 1971 Supreme Court 2064*. He also contended that on the same evidence one of the participants Ankur had been acquitted by the Trial Judge.

5. Learned A.G.A., on the other hand, argued that in this incident, the report was promptly lodged, in which all the three appellants were named. The incident took place in the heart of Kanpur town in a "gali" where witnesses were present. It is not fatal for the prosecution, if the informant fails to describe himself as an eye witness in the First Information Report, if he did not consider it fit to describe himself as an eye witness in the F.I.R. on account of some circumstances, as in his cross examination he has denied not being an eye witness,

therefore, his evidence ought not to be excluded.

6. It was further submitted that even if due to the terror of the accused persons, looking to the criminal nature of the act, or due to some inducement, one of the witnesses Ram Lakhan Yadav has turned hostile. Even if the other witness Jitoo had been won over during his cross examination, there was little reason to doubt the veracity of the version given by Jitoo in his examination-in-chief which was consistent with the F.I.R. version. In the decisions in *Satpal Vs. Delhi Administration, AIR 1976 SC, 294* and *Gura Singh Vs. State of Rajasthan, AIR 2001 SC, 330*, it has clearly been spelt out that merely because a witness becomes hostile, his entire testimony is not washed of. It is for the Court to consider, whether it can rely on any part of his testimony and that in this case, the testimony of the witness P.W. 5 Jitoo in his examination in - chief ought to have been relied on.

7. Simply because one accused Ankur has been acquitted in the case, rightly or wrongly, it can provide no ground for not relying on the testimony of P.W. 5 Jitoo.

8. The cases relied on by the counsel for the appellants mostly referred to the situation, where there were a number of accused persons, who had been charged under Section 302 read with Section 34 or 149 IPC. In *Atmaram Zingaraji's case (supra), Krishna Vs. State of Maharashtra, AIR 1963 SC, 1413* was relied on. In this case, four persons had been charged under section 302 IPC read with the aid of section 34 IPC. Three persons had been acquitted. In such circumstances, the Court observed that the fourth accused could not be convicted under section 302 IPC with the aid of section 34 IPC. Likewise in *Subran @ Subramanian's case (supra),* where four of the accused persons had been acquitted, the remaining two persons could not be convicted under Section 302 IPC read with Section 149 IPC, as a minimum number of 5 accused persons are required for convicting an accused with the aid of Section Section 149 IPC. Contrary to this, there are many decisions of the Apex Court viz. *Radha Mohan Singh @ Lal Sahab Vs. State of U.P., 2006, Allahabad Criminal Law Reports-0-214 (SC), Lallan Rai Vs. State of Bihar, 2003, Cri.L.J., 465 (SC), Ram Ji Singh Vs. State of Bihar, AIR SCW, 4300 (SC), Gurupreet Singh Vs. State of Punjab, 2006 Cri.L.J., 126 (SC), Mangu Khan and others vs. State of Rajasthan, 2005 Cri.LJ. 1748 (SC), Dalbir Singh Vs. State of U.P., (2004) 5 SCC, 334, Niranjan Sheel Vs. State of Tripura, 1999 Cri.LJ, 4498 (SC),* where it has been held that even if an accused is charged under section 302 IPC, he can always be convicted even under Section 302 IPC with the aid of Section 34 IPC, if the allegations disclosed that the accused shared a common intention to commit the crime. The contrary position would obviously apply, where a charge has been framed under Section 302 read with Section 34 IPC. The Court was not barred from reaching the conclusion that the accused persons had an intention to commit the murder and convicting them under section 302 IPC, if the three persons have been convicted by the Trial Court only under section 302 IPC, but the High Court during final hearing was of the view that accused persons could be convicted under section 302 read with section 34 IPC. In view of the decision of the Apex Court in *Nalla Bothu Venkaiah Vs. State of Andhra Pradesh, 2002 Cri.LJ, 4081 (SC), paragraph 23,* it is clear that even if an accused can be convicted simplicitor under

section 302 IPC, if the fatal injury can be attributed to the accused. Wrongful acquittal by the Trial Court, even if it stood, it would not impede the conviction of the appellants under section 302 read with section 149 IPC where there is a charge under section 302 with the aid of Section 149 IPC. The conviction could also be recorded under Section 302 read with Section 34 IPC in place of Section 302 read with 149 IPC, if a finding was reached that the criminal act was committed by several persons less than 5 in numbers in furtherance of their common intention.

9. Considering the aforesaid submissions and without expressing any opinion on the merits of the case and looking to the gravity of the matter, even though the principal appellant Dilip has undergone 9 years in jail, we are not inclined to grant bail to the appellants. Prayer for bail of the accused appellants is rejected.

10. However, hearing of the appeal is expedited.

Office is directed to prepare the paper books preferably within three months and to

list the appeal for hearing thereafter.

We also leave it open for the State or complainant to file an appeal to challenge the non conviction of the appellants under Section 302 read with Section 34 IPC and their conviction only under Section 302 IPC.

Let a copy of this order be given to the Sri M.P. Yadav, learned A.G.A. within a week for necessary action.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: 09.12.2010

BEFORE
THE HON'BLE SHABIHUL HASNAIN, J.

Writ Petition No. 6938 of 2008

Vijay Shankar Shukla ...Petitioner
Versus
State of U.P. and others ...Respondent

Constitution of India-Art 226- Repatriation Petitioners working for last 25 years with State Urban and Development Agency-an autonomous body-on equity and humanitarian grand seeking protection-either their parent department sick or closed-initially they were send for 2.5 years-with further extension of another 2.5 years-but manage to work long spell of times of 25 years-decision takes by SUDA based upon direction of state govt who is the only authority to consider in accordance with G.O. for appointing the surplus employee-petition dismissed.

Held: Para 45

However, grievance of those petitioners, whose parent departments are either sick or are not in existence, is genuine. This Court feels that it is State Government, which directed SUDA to engage the petitioners on deputation, fixed the maximum period of deputation as five years and directed not to absorb any deputationist permanently. The decision taken by SUDA is mostly on the direction of the State Government. Hence it is a fit case where the State Government should direct its departments to take the affected petitioners either on deputation or on contract. In this regard, the State Government will be well advised to refer to Govt. Orders No. 20/1/91-Ka-2/2008 dated 22.9.2008, 20/1/91/Ka-2/2008 dated 20.10.2008 and 20/1/91/Ka-2-2008 dated 9.6.2009. All these Govt.

Orders have been issued by the Principal Secretary, regarding the appointments of surplus staff. In these Govt. Orders directions have been issued to absorb/ appoint the surplus staff in different departments.

Case law discussed:

2006 (4) SCC-page-1, 2000 (5) SCC-362, 2001 (10) SCC-520, 2006 (4) SCC-page-1, 2007 (14) SCC-498, 1994 (3) SCC 316, (1991) 1 SCC-212, (199 (Supp) 2 SCC-1421).

(Delivered by Hon'ble Shabihul Hasnain, J.)

1. This is a bunch of seventy seven writ petitions. The binding thread running through all these writ petitions, is the subject matter of repatriation of the petitioners from the borrowing department/ Agency. All the petitioners are at present working in the State Urban Development Agency (hereinafter called as 'SUDA'). Orders have been passed by SUDA directing the petitioners to return to their parent department. In one form or the other, all the petitioners have challenged the orders of their repatriation from SUDA. Before venturing into the merits of the case and the claim of the petitioners, it will be necessary to know what SUDA actually stands for.

2. It has been informed that SUDA is an agency/ autonomous body, registered under the Societies Registration Act, 1960. It has temporary establishment in the State till the scheme lasts. SUDA is being run with the temporary grant, sanction of which are given on year to year basis from the Government of U.P. The administrative expenditure is meted out from the grant by the Government of India/ State Government for the schemes related to the upliftment of the weaker section of urban areas. SUDA has no permanent establishment, it is an autonomous body and the powers vest in the governing body of the Society, and dependent upon the financial sanction by the State, Government. Temporary staff on deputation basis or on contract basis, are being deputed in SUDA.

3. As has been indicated above, all the petitioners have challenged their repatriation from SUDA to their parent department. Since common question of law and facts are involved, it will be proper that all the writ petitions may be decided by a common order.

4. The petitioners have come to SUDA from various Departments/ Corporation/ Govt. Companies and other instrumentalities of the State. The petitioners, who are working in SUDA can be classified in various categories but for purposes of these petitions, they can be classified mainly in two groups. The first category consists of such employees, whose parent department are still existing and functioning; the second category consists of those employees, whose parent department have either become sick or are not existing today.

5. Some of the petitioners are on deputation, while some of them are on contract basis. The main question for consideration before this Court is whether the petitioners have any right under the law to continue in service of SUDA? On the other hand, can SUDA, order for en masse repatriation of all its employees ? Further question is, whether SUDA is repatriating those employees also whose parent department do not exist any more. Can SUDA be allowed to pass and execute such repatriation orders, wherein repatriation order may take form of termination order. Can termination/ retrenchment of the employees be allowed

to stand in the garb of repatriation. These are some of the questions, which have been argued forcefully, strongly, passionately and compassionately before this Court. Legal arguments have been advanced, at the same time, human considerations have also been directed to visit the conscience of this Court.

6. In almost all the writ petitions, stay order has been granted and the petitioners are working with the opposite party on the strength of such stay orders.

7. The petitioner in W.P. No. 6938 (SS) 2008, has challenged the order of the Director, dated 19.9. 2008, which is contained in annexure no. 1 to the writ petition. This order is of repatriation of the petitioner to the parent department i.e. U.P. Sahkari Chini Mill Limited, on the ground that he has completed five years of his deputation with the SUDA. Simultaneously, the petitioners have challenged the Government Order dated November 15, 2003 issued by the Principal Secretary, Shahari Rozgar Evam Garibi Unmoolan Karyakram Anubhag, as contained in Annexure No.3 to this writ petition, addressed to the Director, SUDA. The subject matter of this order is repatriation of the employees in SUDA. By this order, the earlier government order dated 1487/69-1-2002, 24/Sa/90, dt. 29.5.2002 has been cancelled with immediate effect and it has been directed that all the employees who are on deputation and have completed five years should be repatriated back to their parent department. In this regard, it becomes imperative that G.O. dated 29.5.2002 may also be seen.

8. The G.O. dated 29.5.2002 has been annexed as Annexure-3, a perusal of which, shows that it was in the nature of a query. The process of repatriation which was being undertaken by SUDA, was temporarily stopped by this order. It was also mentioned that this order has been passed in order to gain time and for information so that a more informed and comprehensive decision could be taken with regard to policy of repatriation.

9. In this context, its cancellation by subsequent G.O. of November 15, 2003 becomes more relevant. Put in simple manner, the G.O. dated 29.5.2002 merges with the G.O. dated November 15, 2003 and looses its significance.

10. The different grounds have been taken in different writ petitions against repatriation. More or less, the grounds can be summarized as below:

1. That the work and conduct of the petitioner has been above the board and there has been no complaint about it by the authorities of SUDA. In such circumstances, why the petitioners are being repatriated to be replaced by fresh employees ?

2. That the petitioners have gained experience of the working of SUDA and since SUDA is not incurring any financial or loss of prestige, then the repatriation is not justified.

3. That the work and project are available with the SUDA hence repatriation is not justified.

4. That some of the employees belong to such units where their parent department is non-existing today, the repatriation of whom would mean, the loss of job. The

repatriation will become a measure of punishment.

5. That the State Government does not have any right to issue the G.O. giving directions to SUDA to repatriate the petitioners because the SUDA is an autonomous body and the powers vest in the governing body of the SUDA.

6. That in all cases when the petitioners approached the High Court stay was granted meaning thereby that the petitioners were able to prove a prima-facie satisfaction of the Court in their favour.

11. Counter affidavit has been filed on behalf of SUDA in all the writ petitions while the same has been filed by the State only in two writ petitions viz W.P. No.6938(SS) 2008 and W.P. No.3224 (SS) 2004.

Sri Vivek Raj Singh has raised objections to the effect that the writ petition, itself is not maintainable. The petitioners were given appointment in SUDA, on the basis of order, which was in the form of agreement and the deputation was made in terms of the contract. Since repatriation is being made; in terms of the contract, hence no writ petition will lie. It has been argued that when a person has got substantive right in his favour, and the said right is being legally fixed, only then a writ petition would be maintainable. At the very out set, the para- 45 of the judgment of Hon'ble Supreme Court in ***Secretary State of Karnataka and others vs. Uma Devi (3) and others reported in 2006(4) SCC- page- 1***, was placed before this Court. Same is being quoted below:-

"When the Court is approached for relief by way of a writ, the Court has necessarily to ask, itself, whether the person before it had any legal right to be enforced."

12. It has been further submitted that initially every incumbent before joining SUDA is required to enter into an agreement in which the period of continuance in SUDA is for two and a half years. This may be extended for another period of two and half years. As such after completion of the aforesaid period of five years, incumbent is repatriated to his parent department, which has been done in the cases before the Court.

13. The judgment of ***Kunal Nanda vs. Union of India and another, reported in 2000(5)SCC- 362,*** has been placed by Mr. Vivek Raj Singh, counsel for the opposite parties. In para-6, their Lordships have held;

"On the legal submissions also made there are no merits whatsoever. It is well settled that unless the claim of the deputationist for a permanent absorption in the department where he works on deputation is based upon any statutory rule, regulation or order having the force of law, a deputationist cannot assert and succeed in any such claim for absorption. The basic principle underlying deputation itself is that the person concerned, can always and at any time be repatriated to his parent department to serve in his substantive position."

14. In another case of ***Union of India vs. S.N. Palekar 2001 (10) SCC- 520***, it has been held in para- 2 that no direction could have been given by the Central Administrative Tribunal to the Union of

India to absorb the respondent with effect from the date on the post of Deputy Director, who was on deputation; meaning thereby that the deputationist cannot claim either a right to or can he claim absorption on permanent basis to the post in question.

15. The most deadly weapon used by Sri Vivek Raj Singh against the petitioner comes from the armory of the judgment in case of ***Secretary State of Karnataka vs. Uma Devi (III) and others reported in 2006(4) SCC- page-1,*** commonly known as Uma Devi's case. It is interesting to note that this judgment was not only used for attacking the contention of the petitioner but came as a shield against some of the passionate argument raised by the learned counsel for the petitioner. In para- 12 and 13, Hon'ble Supreme Court has tried to put a word of caution for its subordinate courts in the following manner.

".....Once this right of the Government is recognized and the mandate of the constitutional requirement for public employment is respected, there cannot be much difficulty in coming to the conclusion that it is ordinarily not proper for courts whether acting under Article 226 of the Constitution or under Article 32 of the Constitution, to direct absorption in permanent employment of those who have been engaged without following a due process of selection as envisaged by the constitutional scheme."

".....It cannot also be forgotten that it is not the role of courts to ignore, encourage or approve appointments made or engagements given outside the constitutional scheme. In effect, orders based on such sentiments or approach would result in perpetuating illegalities and in the jettisoning of the scheme of public employment adopted by us while adopting the Constitution. The approving of such acts also results in depriving many of their opportunity to compete for public employment. We have, therefore, to consider the question objectively and based on the constitutional and statutory provisions. In this context, we have also to bear in mind the exposition of law by a Constitution Bench in *State of Punjab* v. *Jagdip Singh and Ors*. (SCR pp. 971-72). It was held therein,

"In our opinion, where a Government servant has no right to a post or to a particular status, though an authority under the Government acting beyond its competence had purported to give that person a status which it was not entitled to give, he will not in law be deemed to have been validly appointed to the post or given the particular status."

16. Again in para- 35, Hon'ble Supreme Court has warned against misplaced sympathy of the Court to the petitioner and has observed, which is quoted below :-

Incidentally, the Bench also referred to the nature of the orders to be passed in exercise of this Court's jurisdiction under Article 142 of the Constitution. This Court stated that jurisdiction under Article 142 of the Constitution could not be exercised on misplaced sympathy. This Court quoted with approval the observations of Farewell, L.J. in **Latham** v. **Richard Johnson & Nephew Ltd.** 1913 (1) KB 398"

"We must be very careful not to allow our sympathy with the infant plaintiff to affect our judgment. Sentiment is a dangerous will o' the wisp to take as a guide in the search for legal principles."

Further in para- 43, it has been stated below :-

".....If it is a contractual appointment, the appointment comes to an end at the end of the contract, if it were an engagement or appointment on daily wages or casual basis, the same would come to an end when it is discontinued".

".....The High Courts acting under Article 226 of the Constitution of India, should not ordinarily issue directions for absorption, regularization, or permanent continuance unless the recruitment itself was made regularly and in terms of the constitutional scheme. Merely because, an employee had continued under cover of an order of Court, which we have described as "litigious employment" in the earlier part of the judgment, he would not be entitled to any right to be absorbed or made permanent in the service. In fact, in such cases, the High Court may not be justified in issuing interim directions, since, after all, if ultimately the employee approaching it is found entitled to relief, it may be possible for it to mould the relief in such a manner that ultimately no prejudice will be caused to him, whereas an interim direction to continue his employment would hold up the regular procedure for selection or impose on the State the burden of paying an employee who is really not required. The courts must be careful in ensuring that they do not interfere unduly with the economic arrangement of its affairs by the State or its instrumentalities or lend themselves the instruments to facilitate the bypassing of the constitutional and statutory mandates."

In para- 45, it has been held as under:-

"It is not as if the person who accepts an engagement either temporary or casual in nature, is not aware of the nature of his employment. He accepts the employment with eyes open. It may be true that he is not in a position to bargain -- not at arms length -- since he might have been searching for some employment so as to eke out his livelihood and accepts whatever he gets. But on that ground alone, it would not be appropriate to jettison the constitutional scheme of appointment and to take the view that a person who has temporarily or casually got employed should be directed to be continued permanently. By doing so, it will be creating another mode of public appointment which is not permissible. If the court were to void a contractual employment of this nature on the ground that the parties were not having equal bargaining power, that too would not enable the court to grant any relief to that employee....."

"It is in that context that one has to proceed on the basis that the employment was accepted fully knowing the nature of it and the consequences flowing from it. ....."

17. In para- 47, the theory of legitimate expectation has also been considered by their Lordships and has been formulated, which is quoted below.

"When a person enters a temporary employment or gets engagement as a contractual or casual worker and the engagement is not based on a proper selection as recognized by the relevant rules or procedure, he is aware of the consequences of the appointment being temporary, casual or contractual in nature. Such a person cannot invoke the theory of

legitimate expectation for being confirmed in the post when an appointment to the post could be made only by following a proper procedure for selection and in concerned cases, in consultation with the Public Service Commission. Therefore, the theory of legitimate expectation cannot be successfully advanced by temporary, contractual or casual employees. It cannot also be held that the State has held out any promise while engaging these persons either to continue them where they are or to make them permanent. The State cannot constitutionally make such a promise. It is also obvious that the theory cannot be invoked to seek a positive relief of being made permanent in the post."

18. One of the latest judgment of ***Managing Director, U.P. Rajkiya Nirman Nigam vs. P.K. Bhatnagar and others*** 2007(14) SCC- 498, has been placed. In para- 11, while dismissing claim of the petitioner to be regularized, the Court has held that if the State Government desires to take any other stand at this stage, that would have to be decided in the proceedings other than these. For the purposes of this case we have no hesitation in holding that Respondent 1 was the State Government's employee and was sent on deputation to the appellant. Now that the repatriation order has been passed by the State Government, Respondent 1 cannot claim to be in service with the appellant.

19. In addition to all these Supreme Court's judgment, reliance has also been placed on the decision of this Court in W.P. No. 1419(SB) 2006, of a bench, headed by the then Chief Justice H.L. Gokhale. The writ petition was filed by the present counsel for the petitioners against repatriation. The petition was dismissed as withdrawn.

20. Mr.Vivek Raj Singh, used this judgment to argue that the Division Bench was not convinced by the arguments of the petitioner. At the same time, learned counsel for the petitioner Mr. Mohd. Mansoor has also referred to a Division Bench decision of this Court passed in W.P. No. 97(SB) 2009, wherein the aforesaid judgment in 1419(SB)2006 has been mentioned and interim order has been passed. This order was passed on 23.1. 2009 and has been annexed with the Supplementary Affidavit filed by the petitioner as S.A.-4.

21. One more argument raised by opposite parties is to the effect that SUDA is not a permanent body, the life span and the post created under the scheme of this, spans only for year to year. The government orders are issued on year to year basis for extension/continuity of the post. In this regard, he has brought on record, the G.O., dated 12.4.2006 by virtue of which the continuance of total 858 temporary posts was extended till 28.2.2007. Similarly, vide G.O. dated 29.3.2007 it was extended till 29.2.2008. Again government order was issued on 11.4.2008 and extension was granted till 28.2.2009. The Government Orders were issued on 22.3.2009 extending the term till 28.2.2010 and finally the G.O. dated 26.2.2010 extending the term till 28.2.2011 were issued. One more common, refrain factors in all these common orders is that all these Government Orders have been passed in terms of the conditions laid down in G.O. No.1019/69-1-03-75 (sa)/97, dt. 02.05.2003.

22. Learned counsel for the opposite parties has, painstakingly, tried to demonstrate that the department itself is not permanent, hence the services of the

petitioners can neither be made permanent nor it can be absorbed. The employees of SUDA have to necessarily work on temporary post or on contractual appointments. Long continuation in SUDA beyond the period of deputation raises problems for the administrator of the agency. The employees belong to their parent department, yet they are working within the administrative control of SUDA and for any disciplinary action against the employees, the SUDA has to depend on the wisdom and efficiency of the parent department. The disciplinary authority remains with the parent department and the liability with the SUDA. It is because of this reason that SUDA wants to repatriate the petitioners. He emphasies that even if SUDA wants to absorb services of its employees, it is not within the capacity and control of SUDA because of its annual renewal. When the department itself is dependent on the sanction and grant of the Central/State Government then it can not create any permanent liability in the form of absorption of the petitioners.

23. Sri Prashant Chandra, Senior Advocate assisted by Sri Anurag Verma for some petition and Sri Mohd. Mansoor for rest of the petition have argued that the action of the opposite parties in passing the order of repatriation is arbitrary, he would argue that there is no apparent decipherable reason for which repatriation is being made. He says that the work and conduct of the petitioners has been satisfactory. The agency is not running in loss. It is in fact, getting more and more projects. It is likely to last for another 25 years. In such circumstances, the experienced hands should not be sent out of the department. Any such action can only be termed as arbitrary, unreasonable and whimsical. In this regard, he has relied upon the judgment of ***A.L.Kalra Vs. Projecdt and Equiipment Corporation of India, 1994 (3) SCC 316.*** While referring to para 19 he says that every arbitrary executive action effecting the public employment is violative of Article 14 and 16 of the Constitution whether under taken by the State itself or by the instrumentalities.

"The scope and ambit of Article 14 have been the subject matter of a catena of decisions. One facet of Article 14 which has been noticed in E.P. Royappa v. State of Tamilnadu deserves special mention because that effectively answers the contention of Mr. Sinha. The Constitution Bench speaking through Bhagwati, J. in a concurring judgment in Royappa's case observed as under:

The basic principle which, therefore, informs both Articles 14 and 16 is equality and inhibition against discrimination. Now what is the content and reach of this great equalising principle ? It is a founding faith, to use the words of pedantic or lexicographic approach. We cannot countenance any attempt to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be "cribbed, cabined and confined" within traditional and doctrinaire limits. From a positivistic point of view equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies ; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14, and if it affects any matter

relating to public employment, it is also violative of Article 16. Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment.

This view was approved by the Constitution Bench in Ajay Hasia case It thus appears well settled that Article 14 strikes at arbitrariness in executive/administrative action because any action that is arbitrary must necessarily involve the negation of equality. One need not confine the denial of equality to a comparative evaluation between two persons to arrive at a conclusion of discriminatory treatment. An action per se arbitrary itself denies equal of protection by law. The Constitution Bench pertinently observed in Ajay Hasia's case and put the nuttier beyond controversy when it said 'wherever therefore, there is arbitrariness in State action whether it be of the legislature or of the executive or of an "authority" under Article 12, Article 14 immediately springs into action and strikes down such State action. This view was further elaborated and affirmed in D.S. Nakara v. Union of India. In Maneka Gandhi v. Union of India it was observed that Article 14 strikes at arbitrariness in State action and ensure fairness and equality of treatment. It is thus too late in the day to contend that an executive action shown to be arbitrary is not either judicially reviewable or within the reach of Article 14. The contention as formulated by Mr. Sinha must accordingly be negatived.

23. It must be conceded in fairness to Mr. Sinha that he is right in submitting that even if the respondent-Corporation is an instrumentality of the State as comprehended in Article 12, yet the employees of the Corporation are not governed by Part XIV of the Constitution. Could it however be said that a protection conferred by Part III on public servant is comparatively less effective than the one conferred by Part XIV ? This aspect was examined by this Court in Managing Director, Uttar Pradesh Warehousing Corporation and Anr. v. Vinay Narayan Vajpayee where O. Chinnappa Reddy, J. in a concurring judgment has spoken so eloquently about it that it deserves quotation:

I find it very hard indeed to discover any distinction, on principle, between a person directly under the employment of the Government and a person under the employment of an agency or instrumentality of the Government or a Corporation, set up under a statute or incorporated but wholly owned by the Government. It is self evident and trite to say that the function of the State has long since ceased to be confined to the preservation of the public peace, the exaction of taxes arid the defence of its frontiers. It now the function of the State to secure 'social, economic and political justice', to preserve 'liberty of thought, expression, belief, faith and worship', and to ensure 'equality of status and of opportunity'. That is the proclamation of the people in the preamble to the Constitution. The desire to attain these objectives has necessarily resulted in intense Governmental activity in manifold ways. Legislative and executivity have reached very far and have touched very many aspects of a citizen's life. The Government, directly or through the Corporations, set up by it or owned by it, now owns or manages, a large number of industries and institutions. It is the biggest builder in the country. Mammoth and minor irrigation projects, heavy and light engineering projects, projects of various

kinds are undertaken by the Government. The Government is also the biggest trader in the country. The State and the multitudinous agencies and Corporations set up by it are the principal purchasers of the produce and the products of our country and they control a vast and complex machinery of distribution. The Government, its agencies and instrumentalities, Corporations, set up by the Government under statutes and Corporations incorporated under the Companies Act but owned by the Government have thus become the biggest employers in the country. There is no good reason why, if Government is bound to observe the equality clauses of the Constitution in the matter of employment and in its dealings with the employees, the Corporations set up or owned by the Government should not be equally bound and why, instead, such Corporations could become citadels of patronage and arbitrary action. In a country like ours which teems with population, where the State, its agencies, its instrumentalities and its Corporations are the biggest employers and where millions seek employment and security, to confirm the applicability of the equality clauses of the constitution, in relation to matters of employment, strictly to direct employment under the Government is perhaps to mock at the Constitution and the people. Some element of public employment is all that is necessary to take the employee beyond the reach of the rule which denies him access to a Court to enforce a contract of employment and denies him the protection of Articles 14 and 16 of the Constitution. After all employment in the public sector has grown to vast dimensions and employees in the public sector often discharge as onerous duties as civil servants and participate in activities vital to our country's economy. In growing realization of the importance of employment in the public sector, Parliament and the Legislatures of the States have declared persons in the service of local authorities, Government companies and statutory corporations as public servants and extended to them by express enactment the protection usually extended to civil servants from suits and prosecution. It is, therefore, but right that the independence and integrity of those employed in the public sector should be secured as much as the independence and integrity of civil servants.

There fore the distinction sought to be drawn between protection of part XIV of the Constitution and Part III has no significance.

24. The main emphasis as is received from the aforesaid observations of their Lordship is on fair deal by the State towards its employees in a welfare State. The petitioners had tried to engage this course in testing the validity of repatriation order on the preamble of Article 14 of the Constitution of India, they would argue that action of the instrumentalities of the State in this particular case is arbitrary to the extent that it has no nexus, with any lofty objective to be achieved by the Agency. The SUDA has measurably failed to give out any reasonable explanation for its order of repatriation.

25. Further citing the case of ***Kumari Shrilekha Vidyarthi and others vs. State of U.P. and others*** (1991) 1 SCC- 212, attempt has been made by the petitioners to establish that the action of the SUDA was amenable to judicial review by this Court.

26. In para- 24 and 25, their Lordships have deprecated the role of the State action, itself in split personality of Dr. Jakan and Mr. Hide in the contractual field, elaborating their views, their Lordship has held in para 24 and 25, as follows :-

24. The State cannot be attributed the split personality of Dr. Jekyll and Mr. Hyde in the contractual field so as to impress on it all the characteristics of the State at the threshold while making a contract requiring it to fulfil the obligation of Article 14 of the Constitution and thereafter permitting it to cast off its garb of State to adorn the new robe of a private body during the subsistence of the contract enabling it to act arbitrarily subject only to the contractual obligations and remedies flowing from it. It is really the nature of its personality as State which is significant and must characterize all its actions, in whatever field, and not the nature of function, contractual or otherwise, which is decisive of the nature of scrutiny permitted for examining the validity of its act. The requirement of Article 14 being the duty to act fairly, justly and reasonably, there is nothing which militates against the concept of requiring the State always to so act, even in contractual matters. There is a basic difference between the acts of the State which must invariably be in public interest and those of a private individual, engaged in similar activities, being primarily for personal gain, which may or may not promote public interest. Viewed in this manner, in which we find no conceptual difficulty or anachronism, we find no reason why the requirement of Article 14 should not extend even in the sphere of contractual matters for regulating the conduct of the State activity.

25. In Wade's Administrative Law, 6th Ed., after indicating that 'the powers of public authorities are essentially different from those of private persons', it has been succinctly stated at pp. 400-401 as under:

...The whole conception of unfettered discretion is inappropriate to a public authority, which possesses powers solely in order that it may use them for the public good.

There is nothing paradoxical in the imposition of such legal limits. It would indeed be paradoxical if they were not imposed. Nor is this principle an oddity of British or American law : it is equally prominent in French law. Nor is it a special restriction which fetters only local authorities : it applies no less to ministers of the Crown. Nor is it confined to the sphere of administration : it operates wherever discretion is given for some public purpose, for example, where a judge has a discretion to order jury trial. It is only where powers are given for the personal benefit of the person empowered that the discretion is absolute. Plainly this can have no application in public law.

For the same reasons there should in principle be no such thing as unreviewable administrative discretion, which should be just as much a contradiction in terms as unfettered discretion. The question which has to be asked is what is the scope of judicial review, and in a few special cases the scope for the review of discretionary decisions may be minimal. It remains axiomatic that all discretion is capable of abuse, and that legal limits to every power are to be found somewhere.

(Emphasis supplied)

The view, we are taking, is, therefore, in consonance with the current thought in this field. We have no doubt that the scope of judicial review may vary with reference to the type of matter involved, but the fact that the action is reviewable, irrespective of the sphere in which it is exercised, cannot be doubted.

27. The petitioners have also touched the human factors involved in these writ petitions. It has been passionately argued by the petitioner that they are a bunch of unfortunate employees, who were earlier abandoned by their parent department, when they became sick or were closed down. After undergoing the vagaries of retrenchment/ termination and the security of the job, the petitioners were given protection and shelter in SUDA. The State Government had tried to rehabilitate the petitioners in this agency and they were given to understand that their services will be absorbed or regularized here. The Court should consider their cases with human angle. In this regard, they have also referred to the case *of* ***H.C. Puttaswamy and others vs. The Hon'ble Chief Justice of Karnataka High Court, Bangalore and others*** (1991 (Supp) 2 SCC- 1421), referring to para- 12 and part of para- 13 is being quoted below :-

"12. Having reached the conclusion about the invalidity of the impugned appointments made by the Chief Justice, we cannot, however, refuse to recognise the consequence that involves on uprooting the appellants. Mr. Gopala Subramanayam, counsel for the appellants while highlighting the human problems involved in the case pleaded for sympathetic approach and made an impassioned appeal for allowing the appellants to continue in their respective posts. He has also referred to us several decisions of this Court where equitable directions were issued in the interests of justice even though the selection and appointments of candidates were held to be illegal and unsupportable.

"13.....One could only imagine their untold miseries and of their family if they are left at the midstream. Indeed, it would be an act of cruelty at this stage to ask them to appear for written test and viva voce to be conducted by the Public Service Commission for fresh selection (See: Lila Dhar v. State of Rajasthan)

28. Sri Vivek Raj Singh, learned counsel for the opposite party has taken a strong defence that the equity cannot prevail over specific law. He has maintained that the petitioners do not have any right and he even put question on the maintainability of the writ petitions.

29. It has been argued on behalf of the petitioners that even the Chief Minister at one point of time, had made a statement at the floor of the House that the case of the petitioner shall be considered for absorption.

30. Two short counter- affidavits have been filed on behalf of two Principal Secretaries, namely Principal Secretary, Nagriya Rojgar Evam Garibi Unmulan Karyakram Vibhag, Govt. of U.P.- opposite party no. 1 and Principal Secretary, Nagar Vikas, Govt. of U.P. opposite party no. 2. In essence, both these counter- affidavits deny the right of the petitioners more or less on the same line of argument, yet we will discuss both the counter- affidavits for the differences, if any.

31. Short counter- affidavit on behalf of opposite party no. 1, has been filed by one Mahendra Kumar, Joint Secretary in the office of Nagriya Rozgar Evam Garibi Unmulan Karyakaram Department, Govt. of U.P.

32. Before giving para-wise reply, counter- affidavits speak about very creation of the Agency of SUDA. In para-3 of the counter- affidavit of Mahendra Kumar, Joint Secretary, Nagriya Rozgar evam Garibi Unmoolan Karyakaram Department, Govt. of U.P., it has been stated that certain funds were being provided under particular scheme in order to achieve objective of the said scheme. Through the funds provided for such scheme, agency was constituted. Later on, it got registered under the provisions of societies registration Act, 1860 and is a registered body. However, very life of the body depended on the fund provided for fulfillment of given scheme. In case funds were not being provided, even the agency could come to end without completing the scheme and after completion of the scheme, there is no chance of its continuance. As such appointment of the staff on behalf of the agency, itself, is absolutely with alien, to the concept of the Agency. For this reason, from the beginning principles of borrowing the staff or engaging the person on contract basis has been adopted and in that regard, Govt. orders and the provision contained in Financial Handbook are to be followed and the State answering respondents being, itself, providing statutory as well as other terms and condition of borrowing the staff from other different bodies and there is definite policy that no borrowed person can be continued beyond the limit of five years. Strictly, such directions are to be followed by the agency, itself and the answering respondents. The answering respondents have taken care that the policy regarding borrowed staff is strictly followed and such claim on behalf of the petitioners or anybody else, for regular absorption in the agency, is absolutely untenable because the life of the agency does not have any permanency. In this regard, opposite party no. 1 refers to the impugned G.O. dated November 15, 2003. The G.O. was issued by Sri Khanjan Lal, the then Principal Secretary. The said G.O. cancels earlier G.O. dated May 29, 2003 and declares that all the employees working on deputation in SUDA may be repatriated to their parent department. An Office Memorandum dated 14.12. 1982 has been issued by the Finance Department. In this G.O., reference has been made to the Govt. Order issued by the finance department on 14.12.1982. This office order, has been issued by Sri J.L. Bajaj, the then Finance Secretary.

33. In this Govt. order, six guidelines have been given after careful consideration of the matter. In any eventuality, the period of five years cannot be extended except with the prior permission of the State Government. The repatriation after five years was made a rule and extension after five years was rare exception.

34. A similar Office Memorandum further strengthening the maximum period of deputation as five years was issued by one Sri Shiv Prakash, the then Joint Secretary of the Finance Department on 16.3.1999.

35. Principle of sending back the deputationist, to their parent department, strictly after five years, was again

emphasized, by another order issued by the Principal Secretary, on 24.6.2002. The continuous stand with regard to repatriation of the deputationist was punctuated vide G.O. dated 26.5. 2003, issued by Sri D.S. Bagga, Chief Secretary, wherein it was stated that deputationist will not be sent back before completing three years, in the borrowing department but the bottom line, to the effect that the deputation was not to be extended beyond five years in any conditions, still remained the same. Setting all the controversy at rest, G.O. dated 4.3. 2004, was issued by the Principal Secretary, Sri Khanjan Lal, which says that it has been decided after careful consideration by the State Government that no deputationist was to be absorbed in the services of SUDA. It was also decided that all such applications and representations were to be rejected, in terms of this resolve by the State Government. There was direction to inform all concerned, about the rejection of their representations and applications, for absorption in SUDA.

36. Learned standing counsel says that this order stands final because it has not been challenged in any of the writ petitions. Reference to this G.O. has been made in para- 11 of the counter- affidavit. It has further been stated that the said decision was taken in view of the temporary nature of the establishment of SUDA, which is based on different scheme. Scheme in the name of National Slums Development Programme, Valmiki Ambedkar Malin Basti Avas Yojna are hundred percent financed by the Central Government and the Scheme in the name of Swarn Jyanti Shahri Rojgar Yojna is financed in the ratio of 75% and 25% by the Central Government and the State Government, respectively.

37. In para- 12 it has been stated that the sanction for continuance is given by the department on year to year basis.

38. In para- 13 of the counter-affidavit, Memorandum of Association of SUDA has been described. The governing body of the Society consist of Secretary, Urban Employment and Poverty Alleviation Programme Department, as Chairman; Secretary of Finance, Planning, Institutional Finance, Housing, Social Welfare of the State Government, Director, Local Bodies U.P., Regional Chief, HUDCO, Lucknow. Chief Town and Country Planner, Lucknow, U.P., as its members. The Director, SUDA, U.P. Lucknow is the Executive Secretary. Secretary, Medical, Health, Adult Education, Women Welfare, Labour Department, Sport Department, Urban Development, are also members and there are three non official members nominated by the State Government.

39. This goes to show that SUDA though called an autonomous body, still remained a Govt. Agency for the purposes of policy of employment. Autonomy was only with regard to its day to day working. The contracts and their completion was largely independent of any governmental interference but so far service condition of the staff is concerned, the Govt. was having a firm grip on SUDA.

40. In reply to the petitioners' argument, that the concerning Minister had made statement in their favour, on the floor of the House, while replying to question no. 103, it has been stated in para-18 of the counter- affidavit that the answer was regarding created post of SUDA/ DUDA. Against twenty one posts,

employees of the Miniral Corporation and against forty four posts, employees of UPTRON India Limited, have been appointed in accordance with their suitability and utility. It does not mean that they have been appointed against any permanent post on regular basis but have been appointed against temporary post on the sanction of year to year basis.

41. Further the Govt. Order dated 15.11. 2003 has already been adopted by the Governing body of SUDA in its meeting dated 27.1.2004. Therefore, G.O. dated 24.2.2004 is absolutely valid. It has also been clarified that in para-19 of the counter- affidavit that G.O. dated 17.12. 2002 has been issued by the Secretary, I.T. & Electronics Department of the State Government, but G.O. dated 15.11.2003 has been issued by opposite party no. 1, which is concerning with the department of SUDA. The G.O. dated 17.12. 2002 thus, has no relevance regarding affairs of SUDA. Further G.O. dated 15.11.2003 speaks about repatriation of such employees from SUDA who have completed five years continuance service, while G.O. dated 17.12.2002 is in respect of appointment of Govt. employees of Govt. Department, in the offices of autonomous bodies/ Corporation/ Undertaking on contract/ Body shopping basis. Both the Govt. orders cannot be equated with each other. In any view of the matter, G.O. dated 17.12.2002 shall not apply to SUDA, which is a society registered under Societies Registration Act.

42. A charge of discrimination has also been levelled against the opposite parties. This has always been a favourite argument of the petitioners' counsels because it puts the opposite parties on defensive. In the present case, the petitioners have not been able to prove it through examples. Example of one Mr. Kannaujia has also been successfully answered by the opposite parties. The absorption order of Mr. Indrapal Kannaujia dated 4.3.2005 was cancelled by an office order dated 13.5.2005 issued by Sri R. Ramani, Principal Secretary. Thus, the argument draws a flak from the other side and is rejected by this Court.

43. One more argument has been made that en masse repatriation smells of malafide intention of fresh recruitment by the opposite parties. This has also not been substantiated, rather it is more illusory than real. In fact repatriation orders have been issued from time to time. Stay orders were granted in different writ petitions at different date. Today, when all the petitions are being taken up together, it looks as if all the repatriation orders are being passed en masse. Moreover, there has not been any fresh advertisement by the opposite parties. All repatriation orders are based on one single preposition that the maximum limit of five years has to be adhered to and SUDA does not have a permanent status. The argument is thus, misconceived and rejected.

44. On the basis of aforesaid discussions, this Court comes to the conclusion that SUDA is well within its right to repatriate the petitioners, whose period of deputation have expired. Petitioners cannot insist to remain on deputation in SUDA beyond a period of five years. SUDA being a Society, whose existence run on year to year basis, cannot be forced to absorb any deputationist.

45. However, grievance of those petitioners, whose parent departments are either sick or are not in existence, is genuine. This Court feels that it is State Government, which directed SUDA to engage the petitioners on deputation, fixed the maximum period of deputation as five years and directed not to absorb any deputationist permanently. The decision taken by SUDA is mostly on the direction of the State Government. Hence it is a fit case where the State Government should direct its departments to take the affected petitioners either on deputation or on contract. In this regard, the State Government will be well advised to refer to Govt. Orders No. 20/1/91-Ka-2/2008 dated 22.9.2008, 20/1/91/Ka-2/2008 dated 20.10.2008 and 20/1/91/Ka-2-2008 dated 9.6.2009. All these Govt. Orders have been issued by the Principal Secretary, regarding the appointments of surplus staff. In these Govt. Orders directions have been issued to absorb/ appoint the surplus staff in different departments.

46. Accordingly, all the petitions are dismissed and the interim orders are discharged.

47. However, it is provided that the State Government shall look into the matter of those petitioners, whose parent departments are either sick or are not in existence. The State Government shall take a decision in this regard, within a period of two months from today.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 03.01.2011

BEFORE
THE HON'BLE SHRI NARAYAN SHUKLA, J.

Writ Petition No. 7256 of 2010

Rameshwar Singh and another
...Petitioner
Versus
District Judge, Faizabad and others
...Opposite parties

Code of Civil Procedure-Order 2 Rule 2-bar of subsequent Suit-rejected by court below-earlier suit for declaration of Sarvakar got finality up to second Appeal stage-objection that at the time of filing earlier Suit-Respondent was well aware about sole Transaction but not taken any plea-can not be allowed by subsequent suit-held-misconceived-unless declared as sarvakar had no locustandi to question the sale deed-orders by court below perfectly justified-warrant no interference.

Held: Para 15

After being successful in the suit the respondents filed the subsequent suit before the Civil Court for declaration of sale deed as void. Though the earlier dispute is still pending before this court in the second appeal, but the decree passed by the trial court as well as the appellate court has not been interfered with till date, therefore, under the strength of the said decree having been attained the locus to challenge the sale deed, the respondents filed the suit, which cannot be rejected merely on the basis of a technical plea raised by the petitioners. The cause of action of the present suit is the illegal transaction of sale, which is altogether different to the earlier cause of action of suit No.324 of 1987, therefore, in the light of the observations of the Constitution Bench of the Hon'ble Supreme Court in the case

of Gurbux Singh v. Bhooralal (Supra), I am of the considered opinion that the suit is not barred by Order 2 Rule 2 CPC. Therefore, the writ petition is dismissed.

Case law discussed:

2003 (21) LCD 977; (2008) 11 Supreme Court cases 753; JT 1996 (1) SC 156; AIR 1964 SC 1810; (2000) 6 Supreme Court Cases 735.

(Delivered by Hon'ble Shri Narayan Shukla, J.)

1. Heard Mr.D.C.Mukherjee, learned counsel for the petitioners as well as Mr.R.S.Pandey, learned counsel for the opposite parties.

2. The petitioners have challenged the order dated 20th of July, 2010, passed by the Additional Civil Judge (Senior Division) Faizabad in Original Suit No.241 of 2004 as also the order dated 10th of November, 2010, passed by the District Judge, Faizabad in Civil Revision No.215 of 2010.

3. Before the trial court the issue for decision was; Whether the suit is barred by Order 2 Rule 2 C.P.C.?

4. Before making any discussion on the facts and circumstances of the case in order to appreciate the correct interpretation of Order 2 Rule 2 of the Civil Procedure Code, the same is extracted here-in-below:-

"Order 2 Rule 2:-

(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but if a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any court.

(2) Relinquishment of part of claim-where a plaintiff omits to sue in respect of or intentionally relinquishes, any portion of his claim, he shall not after wards sue in respect of the portion so omitted or relinquishment.

(3) Omission to sue for one of several reliefs-A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such relief, but he omits except with the leave of the court, to sue for all such relief he shall not afterward sue for any relief so omitted.

5. Mr.Mukherjee, learned counsel for the petitioners submits that basically the dispute between the parties is for the propriety of Sarvarahkar of Thakur Vijay Raghav Bhagwan Virajman Ranopali, Faizabad, which is pending consideration at the stage of second appeal being second appeal No.461 of 2006 before this court arising out of orders passed in the Appeal as well as in suit No.324 of 1987, filed by one Mr.Rajveer Singh, in which the petitioners as well as present respondents 3 and 4 are the respondents. In 2004, the respondent No.3 Mahant Ramesh Das and Rajdeo Das @ Rajveer claiming themselves as Sarvarahkar of Thakur Vijay Raghav Bhagwan Virajman Ranopali filed a suit being suit No.141 of 2004 for permanent injunction, against the petitioners, which is pending consideration. Subsequently they also filed a suit being suit No.241 of 2004 in the court of Civil Judge (Senior Division), Faizabad seeking a decree for declaration of a sale deed executed in favour of the petitioners as void. The petitioners raised objection against the maintainability of the suit on the ground that suit is barred by Order 2 Rule 2 C.P.C. They submitted that when in 1987 they filed the suit bearing Suit No.324 of 1987 raising the dispute of Sarvarahkar, in paragraph 6 of the plaint they alleged that they had already instituted a suit for declaration of sale deed as illegal,

which indicates that they were aware with the sale deed executed in favour of the petitioners at that very time and being aware with the said facts, they could have sought the relief for cancellation of sale deed, but they relinquished their claim and now in the light of the provisions of Order 2 Rule 2 C.P.C., it is not open for them to sue the petitioners for such a relief, which they have already omitted.

6. In support of his submissions learned counsel for the petitioners Mr.Mukherjee cited several cases, decided by this court as well as by the Hon'ble Supreme Court, some of them are cited hereunder:-

(1) **Ganpat Lal Gupta and others versus 5th Additional District Judge, Deoria and others, reported in 2003 (21) LCD 977,** relevant paragraphs 30, 31 and 32 of the same are quoted here-in-below:-

"30.The learned revisional court has set aside the order of the trial court allowing the amendment on the basis of the provisions of Order 2, Rule 2 CPC which provides that if a party could seek a particular relief at the time of the institution of the plaint and does not ask for the said relief, it would amount to waiver, relinquishment of such right and subsequent suit shall be barred for grant of such relief. In Mohammad Khalil Khan & ors. v. Mahbub Ali Mian & ors., AIR 1949 PC 78 the scope of application of the provisions of Order 2, Rule 2 CPC was considered by the Privy Council. The Court held that if the occasion for a particular lis arises subsequent to the institution of the suit, it cannot be barred by the provisions of Order 2, Rule 2 CPC and in order to determine as to whether the said provisions are attracted or not, the court has to consider as what was the cause of action in the earlier suit on which the plaintiffs founded their claim and whether they included all the claims which they were entitled to make in respect of that cause of action in that suit, or if they failed to include all the claims then by force of Order 2, Rule 2 CPC they are precluded to include the same by bringing the subsequent suit. The court placed reliance upon its earlier judgment in Moonshee Buzloor Ruheem v. Shumsunnissa Begum (1887) 11 MIA 551, wherein it has been held as under:-

"The correct test in all cases of this kind is whether the claim in the new suit which in fact founded on a cause of action distinct from that which was the foundation of the foremost suit."

31. In State of Rajasthan and another v. Nav Bharat Construction Co., (2002) 1 SCC 659 the Hon'ble Supreme Court held that in respect of dispute regarding subsequent claims arisen after the first reference cannot be held to be barred by the provisions of Order 2 Rule 2 CPC for the reason that subsequent claim may be founded on a different cause of action. Similar view has been reiterated by the Apex Court in Commissioner of Income Tax, Bombay v. T.P.Kumaran, (1996) 10 SCC 561; 1996 (11) SCC 112:Ladu Ram v. Ganesh Lal, (1999) 7 SCC 50; and Maharashtra Vikrikar Karmchari Sangathan v. State of Maharashtra, AIR 2000 SC 622.

32. Thus, the settled legal proposition in respect of the provisions of Order 2, Rule 2 CPC emerges is that if a party does not ask for a relief for which he was entitled to at the time of the institution of the suit it would amount to waiver of that right and cannot be claimed later in a subsequent suit."

(2) **Dadu Dayalu Mahasabha, Jaipur (Trust) versus Mahant Ram Niwas and another, reported in (2008) 11 Supreme Court cases 753,** relevant paragraph 28 of which is quoted here-in-below:-

"28.Similarly the provisions of Order 2 Rule 2 bars the jurisdiction of the court in entertaining a second suit where the plaintiff could have but failed to claim the entire relief in the first one. We need not go into the legal philosophy underlying the said principle as we are concerned with the applicability thereof."

7. Under the strength of the aforesaid observations of the court, it is stated that since the issue in question was involved substantially or incidentally in the earlier suit and respondents failed to claim said relief at that time, the present suit is barred by Order 2 Rule 2 CPC.

8. On the other hand the learned counsel for the opposite parties Mr.R.S.Pandey submitted that the aforesaid principle shall apply only when the cause of action is the same, but since in both the suits the cause of action is different, it is open for the respondents to sue the relief for declaration of sale deed as void in the subsequent suit. He also cited a case of **State of Maharashtra and another versus M/s.National Constuction Company, Bombay and others reported in JT 1996 (1) SC 156,** in which the Hon'ble Supreme Court has referred its earlier decision rendered in the case of Sidramappa v.Rajashetty 1970 (1) SCC 186. In the aforesaid case the Hon'ble Supreme Court held that where the cause of action on the basis of which the previous suit was brought, does not form the foundation of the subsequent suit, and in the earlier suit, the plaintiff could not have claimed the relief which is sought in the subsequent suit, the plaintiff's subsequent suit is not barred by Order 2 Rule 2 CPC.

9. After hearing the learned counsels for the parties as well as upon perusal of the record, I find that the dispute in Suit No.324 of 1987 relates to the Propriety of Sarvarahkar. Since the respondents/plaintiffs filed the suit to declare them as Sarvarahkar even being fully aware with the sale deed executed by the petitioners, unless they are declared as Sarvarahkar, there had no locus to challenge the sale deed executed by the petitioners being null and void.

10. In the suit No.324 of 1987 they succeeded to get declared themselves as Sarvarahkar by means of judgment and decree dated 6th of May, 2003. Subsequently they instituted suit No.241 of 2004 seeking the decree for declaration of the sale deed as void as by that time being declared as Sarvarahkar they have achieved the locus to challenge the sale deed, therefore, in the light of the aforesaid facts I am of the view that at the time of institution of Suit No.241 of 2004, the cause of action was illegal transaction of sale done by the petitioners, thus it is all together different from the cause of action of Suit No.324 of 1987.

11. In the case of **Gurbux Singh v. Bhooralal, reported in AIR 1964 SC 1810,** the Constitution Bench of the Hon'ble Supreme Court held that for the success of the plea of a bar under Order 2 Rule 2(3) the defendant raising the plea must make out (i) that the second suit was in respect of the same cause of action as that on which the previous suit was based; (ii) that in respect of that cause of action the plaintiff was entitled to more than one relief; (iii) that

being thus entitled to more than one relief the plaintiff, without leave obtained from the Court, omitted to sue for the relief for which the second suit had been filed. Unless there is identity between the cause of action on which the earlier suit was filed and that on which the claim in the later suit is based there would be no scope for the application of the bar. No doubt, a relief which is sought in a plaint could ordinarily be traceable to a particular cause of action but this might, by no means, be the universal rule. As the plea is a technical bar it has to be established satisfactorily and cannot be presumed merely on basis of inferential reasoning.

12. In the case of **Marwari Kumhar and others versus Bhagwanpuri Guru Ganeshpuri and another reported in (2000) 6 Supreme Court Cases 735,** firstly the Marwari Kumhar community filed a suit for declaration of their title against the son and wife of Pujari of Temple, who started claiming ownership to the property. The suit was decreed in favour of community. The respondents were held merely Pujaries. The respondents filed the appeal which was allowed, but the second appeal filed by the community was again allowed in favour of the community, thus the decree of the trial court was restored by the High Court. Thereafter the Pujaries again started asserting their title, therefore, the suit for possession of the property was filed by the community. The heirs of the Pujari contended that their father was the owner of the property and claimed the title as his heirs. They also contended that their father as well as they themselves, had been in open hostile and adverse possession for a very long time and had acquired title on that basis. They also contended that the suit was barred under Order 2 Rule 2 CPC, as the relief of possession had not been claimed. The trial court decreed the suit relying upon the earlier judgment and held that title in property vested with the community and the suit was not barred by Order 2 Rule 2 CPC. The defendants filed appeals, which were allowed holding therein that the defendants had been able to prove that they had been in possession for a long period of time and that they perfected the titled by adverse possession. In this manner the appellate court dismissed the suit. The Plaintiff filed the second appeal, which was dismissed by holding therein that the defendants have acquired title by adverse possession. The matter reached the Hon'ble Supreme Court. The Hon'ble Supreme Court held that both the courts below erred in law and facts in coming to the conclusion. The Hon'ble Supreme Court held that the respondents were parties to the earlier proceeding. The earlier judgment was, therefore, binding on both the respondents, in which it had clearly been held that the title to the property vested in the appellants and the respondents were declared merely Pujaries, thus they were in possession merely as Pujaries. Their claim to title had been negated by the competent court. That finding was binding on the respondents. Both the First Appellate Court and the Second Appellate Court failed to appreciate that on principles of resjudicata the respondents were precluded from denying the appellant's title to the suit property. Accordingly the suit was maintained and decreed.

13. Keeping in view the facts of the present case, it is obvious that the proprietorship of Sarvarahkar of the petitioners was disputed nevertheless the other claimants (respondents) of suit No.324 of 1987 executed sale deed in favour of the petitioners. The Sarvarahkar always keeps the status of Trustee and it is the Deity who is beneficiary of the offerings

as well as the property attached thereto, therefore, being Trustee, the Sarvarahkar has had no right to transfer the property.

14. Upon perusal of the contents of the paragraph 6 of the plaint of suit No.324 of 1987, it appears that it was stated that one suit for declaration of the sale deed as unauthorized and to declare the tenure holder of the land was instituted by Mahant Bhagwan Das before the Revenue court, which was pending consideration at that very time, the present position of the suit is not disclosed, however, I am of the view that for declaration of any document as void, it is only the civil court, who is competent not the revenue court.

15. After being successful in the suit the respondents filed the subsequent suit before the Civil Court for declaration of sale deed as void. Though the earlier dispute is still pending before this court in the second appeal, but the decree passed by the trial court as well as the appellate court has not been interfered with till date, therefore, under the strength of the said decree having been attained the locus to challenge the sale deed, the respondents filed the suit, which cannot be rejected merely on the basis of a technical plea raised by the petitioners. The cause of action of the present suit is the illegal transaction of sale, which is altogether different to the earlier cause of action of suit No.324 of 1987, therefore, in the light of the observations of the Constitution Bench of the Hon'ble Supreme Court in the case of **Gurbux Singh v. Bhooralal (Supra),** I am of the considered opinion that the suit is not barred by Order 2 Rule 2 CPC. Therefore, the writ petition is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.01.2011

BEFORE
THE HON'BLE SATYA POOT MEHROTRA, J.
THE HON'BLE PANKAJ MITHAL, J.

Civil Misc. Writ Petition No. 23592 of 2006

Ram Chandra Gupta ...Petitioner
Versus
Union of India and others ...Respondents

Counsel for the Petitioners:
Sri Namwar Singh
Sri Sanjiv Singh

Counsel for the Respondents:
Sri K.C. Sinha (A.S.G.I.)
Sri N.P. Shukla
C.S.C.

Civil Services Classification Control of Appeal Rules 1965-Rule 68 (1), 69 (1) (c)-claim of interest delay in payment-amount of gratuity withheld during pendancy of disciplinary proceeding-petitioner retired in Sept. 95-amount paid July 1996-can not be learned as inordinate delay-moreover interest not claimed in original application can not be allowed to before writ court.

Held: Para 24 & 34

The delay between 25th June, 1998 and 23rd March, 1999 cannot be said to be inordinate delay having regard to the facts and circumstances of the case, particularly the fact that the disciplinary proceedings came to an end on 25th June, 1998, and thereafter, time was taken for finalizing the payment of gratuity to the petitioner. Therefore, the payment of interest in respect of the delayed payment of gratuity has been rightly denied to the petitioner by the Tribunal in the impugned Judgment and Order.

As no relief for payment of interest in respect of commuted amount of pension was claimed by the petitioner before the Tribunal in his Original Application, the petitioner cannot make such claim before this Court in the Writ Petition directed against the Judgement and Order of the Tribunal.

Case law discussed:

AIR 2000 SC 1918

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

1. The present Writ Petition has been filed by the petitioner under Article 226 of the Constitution of India making the following prayers:

"a. Issue a writ, order or direction in the nature of certiorari calling for the records of the case and quashing the impugned orders dated 7.12.2004 passed by Hon'ble Central Administrative Tribunal, Allahabad Bench, Allahabad (Annexure No. 12 to this writ petition).

b. Issue a writ, order or direction in the nature of mandamus commanding the respondents to pay leave encashment along with interest @ 18% per annum since 30.9.1995 till the date of actual payment.

c.Issue a writ, order or direction in the nature of mandamus commanding the respondents to pay interest @ 18% per annum on C.G.E.I.S (since 30.1.1995 to August 1996), on security deposits, on the amount of back wages for suspension period (i.e. 30.5.1995 to 13.3.1999) and 18% interest per annum on gratuity.

d. Issue a writ, order or direction in the nature of mandamus commanding the respondents to calculate the commutation value on the basis of age factor on 30.9.1995.

e. Issue any other suitable writ, order or direction, as this Hon'ble Court may deem fit and proper in the circumstances of the case;

f. Award cost of this petition to the petitioner."

2. It appears that the petitioner was working on the post of Store Superintendent (Civilian Group 'C' Post) in Ordnance Depot, Fort, Allahabad. The petitioner was suspended on 24th June, 1994 by the Order dated 24th June, 1994 (Annexure 1 to the Writ Petition) with effect from 20th May, 1994. The suspension of the petitioner was revoked by the Order dated 6.5.1995 (Annexure 3 to the Writ Petition). On 30th September, 1995, the petitioner retired from service on attaining the age of superannuation. During the service period, disciplinary proceedings were initiated against the petitioner under Rule 14 of the Central Civil Services (Classification, Control and Appeal) Rules, 1965 [in short "the CCS (CC & A) Rules, 1965"] by issuing a Charge-Sheet by Charge Memo dated 1st August, 1995. The inquiry was conducted against the petitioner. The Inquiry Officer submitted his report that charge levelled against the petitioner was not proved. Copy of the Inquiry Report was forwarded to the petitioner to make any representation or submission, if he so wished in writing to the Disciplinary Authority. The petitioner submitted his Representation dated 12th January, 1998 wherein he prayed for dropping the charge against him. The Disciplinary Authority by the Order dated 25th June, 1998 after considering the Inquiry Report and relevant records agreed with the findings of the Inquiry Officer and held the petitioner 'not

guilty' of the charge levelled against the petitioner.

3. Accordingly, the Disciplinary Authority ordered that the charge levelled against the petitioner be dropped. Copy of the said Order dated 25th June, 1998 has been filed as Annexure 5 to the Writ Petition.

4. The petitioner thereafter made a Representation dated 27th July, 1998, inter-alia, praying for final settlement of his retiral dues. Copy of the said Representation dated 27th July, 1998 has been filed as Annexure 6 to the Writ Petition.

5. It further transpires from a perusal of paragraph 14 of the Writ Petition that various payments in respect of retiral dues were made to the petitioner in the year 1999. Even though in paragraph 11 of the Counter Affidavit filed on behalf of the respondents, there is general denial of the averments made in paragraph 14 of the Writ Petition, a perusal of paragraph 16 of the Counter Affidavit shows that the details given in paragraph 14 of the Writ Petition have not been disputed by the respondents.

6. As per the averments made in the said paragraph 14 of the Writ Petition, payment of C.G.E.I.S. was made to the petitioner on 26th July, 1996 while the payment of leave encashment was made to the petitioner on 4th April, 2000.

7. In the mean-time, the petitioner filed an Original Application being Original Application No. 124 of 2000 before the Central Administrative Tribunal (in short "the Tribunal") seeking the following reliefs:

"i. to issue writ order or direction in the nature of mandamus commanding the respondents to pay leave encashment along with penal interest at the rate of 18% per annum since 30.9.1995 till the payment is made.

ii. to issue writ, order or direction in the nature of mandamus commanding the respondents to pay penal interest at the rate of 18% per annum on C.G.E.I.S. (since 30.9.1995 to August, 1996) on security deposits, on the amount of back wages for suspension period 30.5.95 to 13.3.99 and 18% per annum penal interest on gratuity.

iii. issue writ, order or direction in the nature of mandamus commanding the respondents to calculate the commutation value on the basis of age factor on 30.9.1995."

8. The Tribunal by its Judgment and Order dated 7th December, 2004 dismissed the said Original Application filed by the petitioner. The petitioner, thereupon, filed the present Writ Petition seeking the reliefs as mentioned in the earlier part of this judgment.

9. We have heard Shri Sanjiv Singh, learned counsel for the petitioner and Shri N.P. Shukla, learned counsel for the respondent nos. 1 to 4, and perused the record.

10. Shri Sanjiv Singh, learned counsel for the petitioner submits that the petitioner was exonerated of the charge levelled against him, and the disciplinary proceedings against the petitioner were dropped by the Order dated 25th June, 1998, and as such, the withholding of retiral benefits payable to the petitioner was not justified, and the petitioner was entitled to get interest on the delayed payment of retiral benefits.

11. Shri Sanjiv Singh, learned counsel for the petitioner submits that the petitioner would be entitled to payment of such interest in respect of gratuity, commuted amount of pension, leave encashment and C.G.E.I.S.

12. As regards the relief (iii) claimed in the Original Application filed before the Tribunal, and the prayer (d) made in the Writ Petition, Shri Sanjiv Singh, learned counsel for the petitioner states that the said relief/prayer is not being pressed by the petitioner, and therefore, the Writ Petition may be considered in regard to the claim of interest in respect of gratuity, commutation value, leave encashment and C.G.E.I.S.

13. Shri Sanjiv Singh has placed reliance on the following decisions of Supreme Court:

(1)Vijay L. Mehrotra Vs. State of U.P. and Others, 2002 SCC (L & S) 278.

(2) Dr. Uma Agrawal Vs. State of U.P. and Another, AIR 1999 SC 1212.

14. *In reply,* Shri N.P. Shukla, learned counsel for the respondent nos. 1 to 4 has referred to the provisions contained in Rule 68 (1) and Rule 69 (1) (c) of the Central Civil Services (Pension) Rules, 1972 [in short "the CCS (Pension) Rules, 1972"].

15. Shri N.P. Shukla submits that in view of the provisions contained in sub-rule (1) of Rule 68, interest in respect of gratuity is to be paid when the delay in payment was attributable to administrative lapses.

16. In the present case, the payment of gratuity was not made in view of the pendency of disciplinary proceedings against the petitioner, as in such circumstances, the payment of gratuity was required to be withheld by the respondent nos. 1 to 4 in view of the provisions contained in Rule 69 (1) (c) of the aforesaid Rules.

Shri Shukla has placed reliance on a decision of the Supreme Court in ***R. Veerabhadram Vs. Government of Andhra Pradesh, AIR 2000 SC 1918.***

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

Rule 68 of the CCS (Pension) Rules, 1972 lays down as under:

"68. Interest on delayed payment of gratuity

(1) If the payment of gratuity has been authorized later than the date when its payment becomes due, and it is clearly established that the delay in payment was attributable to administrative lapses, interest shall be paid at such rate as may be prescribed and in accordance with the instructions issued from time to time:

Provided that the delay in payment was not caused on account of failure on the part of the Government servant to comply with the procedure laid down by the Government for processing his pension papers.

(2) Every case of delayed payment of gratuity shall be considered by the Secretary of the Administrative Ministry or the Department in respect of its employees and the employees of its attached and subordinate offices and where the Secretary of the Ministry or the Department is satisfied that the delay in the payment of gratuity was caused on account of

administrative lapse, the Secretary of the Ministry or the Department shall sanction payment of interest.

(3) The Administrative Ministry or the Department shall issue Presidential sanction for the payment of interest after the Secretary has sanctioned the payment of interest under sub-rule (2).

(4) In all cases where the payment of interest has been sanctioned by the Secretary of the Administrative Ministry or the Department, such Ministry or the Department shall fix the responsibility and take disciplinary action against the Government servant or servants who are found responsible for the delay in the payment of gratuity."

Rule 69 of the aforesaid Rules provides as follows:

" 69. Provisional pension where departmental or judicial proceedings may be pending.- (1) (a) *In respect of a Government servant referred to in sub-rule (4) of Rule 9, the Accounts Officer shall authorize the provisional pension equal to the maximum pension which would have been admissible on the basis of qualifying service up to the date of retirement of the Government servant, or if he was under suspension on the date of retirement up to the date immediately preceding the date on which he was placed under suspension.*

(b) The provisional pension shall be authorized by the Accounts Officer during the period commencing from the date of retirement up to and including the date on which, after the conclusion of departmental or judicial proceedings, final orders are passed by the competent authority.

(c) No gratuity shall be paid to the Government servant until the conclusion of the departmental or judicial proceedings and issue of final order thereon:

Provided that where departmental proceedings have been instituted under Rule 16 of the Central Civil Services (Classification, Control and Appeal) Rules, 1965, for imposing any of the penalties specified in Clauses (i), (ii) and (iv) of Rule 11 of the said Rules, the payment of gratuity shall be authorized to be paid to the Government servant:

(2) Payment of provisions pension by made under sub-rule (2) shall be adjusted against final retirement benefits sanctioned to such Government servant upon conclusion of such proceedings but no recovery shall be made where the pension finally sanctioned is less than the provisional pension or the pension is reduced or withheld either permanently or for a specified period."

18. It will thus be noticed that sub-rule (1) of Rule 68 lays down that if the payment of gratuity has been authorized later than the date when its payment becomes due, and it is clearly established that the delay in payment was attributable to administrative lapses, interest shall be paid at such rate as may be prescribed and in accordance with the instructions issued from time to time.

19. Thus, this provision lays down that in case the delay in payment of gratuity can be attributed to administrative lapses, interest would be payable on account of the delay in payment of gratuity.

20. Clause (c) of sub-rule (1) of Rule 69 lays down that no gratuity shall be paid to the Government servant until the

conclusion of the departmental or judicial proceedings and issue of final order thereon. Thus, this rule prohibits the payment of gratuity to the Government servant until conclusion of the departmental proceedings and issue of final order in such departmental proceedings.

21. Reading the aforesaid two provisions together, it follows that in case the payment of gratuity has not been made on account of pendency of departmental proceedings, the delay in payment of gratuity cannot be attributed to administrative lapses so as to entitle the Government servant for payment of interest in respect of the delayed payment of gratuity.

22. In the present case, as noted above, the departmental proceedings were going on when the petitioner retired on 30th September, 1995. The proceedings concluded on 25th June, 1998 when the order was passed by the Disciplinary Authority dropping the charge against the petitioner. The payment of gratuity was thereafter made to the petitioner, as per the averments made in paragraph 14 of the Writ Petition, on 23rd March, 1999.

23. In our view, no fault can be attributed to the respondent nos. 1 to 4 for the delay in payment of gratuity. The payment of gratuity could not be made to the petitioner till the conclusion of the disciplinary proceedings against him. After the conclusion of the disciplinary proceedings on 25th June, 1998, the payment of gratuity was made to the petitioner on 23rd March, 1999.

24. The delay between 25th June, 1998 and 23rd March, 1999 cannot be said to be inordinate delay having regard to the facts and circumstances of the case, particularly the fact that the disciplinary proceedings came to an end on 25th June, 1998, and thereafter, time was taken for finalizing the payment of gratuity to the petitioner. Therefore, the payment of interest in respect of the delayed payment of gratuity has been rightly denied to the petitioner by the Tribunal in the impugned Judgment and Order.

25. In ***R. Veerabhadram case (supra),*** relied upon by Shri N.P. Shukla, learned counsel for the respondent nos. 1 to 4, their Lordships of the Supreme Court held as follows (paragraph 7 of the said AIR):

"(7) The payment of gratuity was withheld, in the present case, since the criminal prosecution was pending against the appellant when he retired. Rule 52 (c) of the A.P. Revised Pension Rules, 1980 expressly permits the State to withhold gratuity during the pendency of any judicial proceedings against the employee. In the present case, apart from Rule 52 (c), there was also an express order of the Tribunal which was binding on the appellant and the respondent under which the Tribunal had directed that death-cum-retirement gratuity was not to be paid to the appellant till the judicial proceedings were concluded and final orders were passed thereon. In view of this order as well as in view of Rule 52 (c), it cannot be said that there was any illegal withholding of gratuity by the respondent in the case of the appellant. We, therefore, do not see any reason to order payment of any interest on the amount of gratuity so withheld."

(Emphasis supplied)

26. The above decision thus support the conclusion mentioned above.

In ***Vijay L. Mehrotra case (supra)***, there was delay in payment of retiral benefits. However, the said delay was not made on account of any disciplinary proceedings pending against the employee concerned. There was no reason or justification given for the delay in payment of retiral benefits. In the circumstances, payment of interest was directed by the Supreme Court.

27. Thus, the facts of ***Vijay L. Mehrotra case*** are distinguishable from those of the present case where disciplinary proceedings were pending against the petitioner, and the same continued for about 3 years after his retirement.

28. In ***Dr. Uma Agrawal case (supra),*** there was delay in payment of retiral benefits. Their Lordships of the Supreme Court referred to the various Rules/instructions which ought to be followed in the matter of payment of pension and other retiral benefits, and held as under (paragraphs 5, 6 and 7 of the said AIR):

"5. We have referred in sufficient detail to the Rules and instructions which prescribe the time-schedule for the various steps to be taken in regard to the payment of pension and other retiral benefits. This we have done to remind the various governmental departments of their duties in initiating various steps at least two years in advance of the date of retirement. If the rules/instructions are followed strictly much of the litigation can be avoided and retired Government servants will not feel harassed because after all, grant of pension is not a bounty but a right of the Government servant. Government is obliged to follow the Rules mentioned in the earlier part of this order in letter and in spirit. Delay in settlement of retiral benefits is frustrating and must be avoided at all costs. Such delays are occurring even in regard to family pensions for which too there is a prescribed procedure. This is indeed unfortunate. In cases where a retired Government servant claims interest for delayed payment, the Court can certainly keep in mind the time-schedule prescribed in the rules/instructions apart from other relevant factors applicable to each case.

6. The case before us is a clear example of departmental delay which is not excusable. The petitioner retired on 30.4.1993 and it was only after 12.2.1996 when an interim order was passed in this writ petition that the respondents woke up and started work by sending a special messenger to various places where the petitioner had worked. Such an exercise should have started at least in 1991, two years before retirement. The amounts due to the petitioner were computed and the payments were made only during 1997-98. The petitioner was a cancer patient and was indeed put to great hardship. Even assuming that some letters were sent to the petitioner after her retirement on 30.3.1993 seeking information from her, an allegation which is denied by the petitioner, that cannot be an excuse for the lethargy of the department inasmuch as the rules and instructions require these actions to be taken long before retirement. The exercise which was to be completed long before retirement was in fact started long after the petitioner's retirement.

7. Therefore, this is a fit case for awarding interest to the petitioner. We do not think that for the purpose of the computation of interest, the matter should go back. Instead, on the facts of this case, we quantify the interest payable at Rs. 1

lakh and direct that the same shall be paid to the petitioner within two months from today."

(Emphasis supplied)

29. It will be noticed that the facts of ***Dr. Uma Agrawal case (supra)*** were different from those of the present case.

30. In ***Dr. Uma Agrawal case (supra)***, there were no departmental proceedings pending against the petitioner at the time of her retirement. There was failure on the part of the authorities in complying with the various Rules/instructions to be followed in the matter of payment of pension and other retiral benefits resulting in delay in making such payments. In the circumstances, the payment of interest was directed by the Supreme Court.

31. In the present case, the delay has occurred on account of pendency of departmental proceedings. Thus, the decision in ***Dr. Uma Agrawal case (supra)*** is not applicable to the facts of the present case.

32. As regards the claim of interest on commuted amount of pension, it is noteworthy that no such relief was sought by the petitioner before the Tribunal. The relief sought before the Tribunal was that the respondents be directed to calculate the commutation value on the basis of age factor on 30th September, 1995.

33. As noted above, Shri Sanjiv Singh, learned counsel for the petitioner has stated that the said relief/prayer is not being pressed by the petitioner.

34. As no relief for payment of interest in respect of commuted amount of pension was claimed by the petitioner before the Tribunal in his Original Application, the petitioner cannot make such claim before this Court in the Writ Petition directed against the Judgement and Order of the Tribunal.

35. As regards the claim for interest in respect of payment of leave encashment, the Tribunal has held that encashment of leave is a benefit granted under the leave rules, and the same is not a pensionary benefit, as such, no interest could be awarded to the petitioner in regard to the same.

36. We do not find any illegality or infirmity in the said conclusion drawn by the Tribunal.

37. As regards the claim of interest in respect of the payment of C.G.E.I.S., it appears that even though the relief in this regard was sought by the petitioner before the Tribunal in the Original Application, the same was not pressed during the arguments before the Tribunal, and therefore, the Tribunal has not dealt with the said aspect.

38. Even otherwise, it will be noticed that the payment of C.G.E.I.S. was made to the petitioner, as per the averments made in paragraph 14 of the Writ Petition, on 26th July, 1996 while the petitioner retired from service on 30th September, 1995. The delay in payment of C.G.E.I.S. cannot, therefore, be said to be inordinate on the facts and in the circumstances of the present case, so as to entitle the petitioner to payment of interest.

39. In view of the above discussion, we are of the opinion that the present Writ Petition lacks merits, and the same is liable to be dismissed.

40. The Writ Petition is accordingly dismissed.

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

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.01.2011

BEFORE
THE HON'BLE SUNIL AMBWANI, J.
THE HON'BLE MRS. JAYASHREE TIWARI, J.

Civil Misc. Writ Petition No. 24627 of 2009

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

Counsel for the Petitioner:
Sri Shailendra
Sri Seemant Singh

Counsel for the Respondents:
Sri Sunita Agarwal
Sri B.D. Mandhyan
Sri Satish Mandhyan
C.S.C.

Constitution of India Art. 226 readwith U.P. State Universities Act 1973-Section 68-In alternation Remedy-Petitioner working as coordinator of B.Ed Examination- serious allegation of corrupt practices-pursuant to preliminary enquiry suspended-petitioner not availed alternative statutory remedy-Petition not maintainable.

Held: Para 17, 18 & 19

In each case the High Court has to satisfy itself before entertaining the writ petition, whether in a given case if any alternative remedy exists, it is equally efficient and adequate. The petitioner must satisfy the Court that the case on its fact falls within any of the exceptions detailed as above to grant relief. In the present case, we do not find that the petitioner has been able to make out any exception to circumvent the alternative remedy, which is efficacious and speedy.

In the above circumstances, it cannot be said that the order was not passed by the competent authority, or that the principle of natural justice were violated. Further at this stage we are not satisfied from the averments and material produced on record that the order has been passed in malafide exercise of powers.

For the aforesaid reasons, we relegate the petitioner to the statutory remedies of filing representation before the Chancellor under Section 68 of the U.P. State Universities Act, 1973. If such a representation is filed, the Chancellor may consider the same on merits and decide the representation as expeditiously as possible. We make it clear that we have not examined the merits of the charges. The discussion of facts in the judgment is only to find out whether any case of interference, without exhausting alternative remedies has been made out

Case law discussed:
(1985) 1 SCC 260; (2001) 10 SCC 491; (1979) 4 SCC 22; AIR 1965 SC 132; AIR 1955 SC 661; AIR 1987 SC 2186; AIR 1970 SC 894; AIR 1969 SC 1320; AIR 2003 SC 3032.

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

1. We have heard Shri Shailendra, learned counsel for the petitioner. Learned Standing Counsel appears for the State respondents. Shri B.D. Mandhyan, Sr. Advocate assisted by Shri Satish Mandhyan appears for the University.

2. The petitioner is serving as Professor in the Department of Commerce, Deen Dayal Upadhyay, Gorakhpur University, Gorakhpur. He was appointed as Coordinator of B.Ed. Examination by the University for the period upto 17.5.2008.

By this writ petition he has prayed for directions to set aside the exparte enquiry report dated 12.12.2007 and suspension order dated 26.4.2009. He has also prayed for a writ of mandamus directing the respondents to complete the enquiry under Section 8 (1) of the U.P. State Universities Act, 1973, and to proceed for enquiry under Section 8 (4) only, if anything is found against him. He has also made prayer to direct the respondents to verify whether any complaint in the form of affidavit exists and whether any prima facie case exists with regard to irregularities in B.Ed. examination.

3. The writ petition was filed on 8th May, 2009. The matter was heard and was directed to be put up for further arguments on 30.6.2009 and was adjourned on 3.7.2009. In the meantime, the Executive Council by its recommendations dated 28.6.2009 communicated to the petitioner by order dated 30.6.2009, decided to dismiss the petitioner from service. The Vice Chancellor by his order dated 30.6.2009 has dismissed the petitioner from service.

4. The petitioner filed an amendment application on 8.7.2009 challenging the order of the Executive Council dismissing him from service and the order of the Vice Chancellor of the University. The amendment application was allowed on 8.10.2009.

5. Shri B.D. Mandhyan has raised objections to the amendment application on various grounds, including the alternative remedy available to the petitioner against the order of the Vice Chancellor dismissing the petitioner from service, by making a representation to the Chancellor under Section 68 of the U.P. State Universities Act, 1973.

6. Shri Shailendra, learned counsel for the petitioner submits that the impugned order was passed, when the petitioner was working on the post of Professor in the Department of Commerce. He had initially challenged the disciplinary proceedings initiated against him on an exparte fact finding enquiry and on which he was suspended on 26.4.2009. A first information report was lodged against him on 24.5.2009 and charge sheet was filed on 22.4.2009 by relying upon same preliminary enquiry report. After exchange of affidavits in the writ petition challenging the suspension order, the Court had fixed 30.6.2009 for further hearing. Shri Shailendra submits that taking advantage of the vacations of the Court the Acting Vice Chancellor (the Commissioner of the Division) completed all the proceedings within three or four days, as claimed. The disciplinary enquiry proceeded exparte on 26.6.2009, and on which an exparte report dated 27.6.2009 was submitted. The meeting of the Executive Council was convened on 28.6.2009 in which six new members inducted on 27.6.2009, participated. The agenda of the meeting was not circulated and on the same day on 28.6.2009 the Executive Council considered the report of the Disciplinary Committee, to remove the petitioner, and passed a resolution to dismiss the petitioner. The Vice Chancellor passed the order of dismissal on the third day on 30.6.2009.

7. The petitioner was the Coordinator of B.Ed. Examination. A complaint was made by one Shri Durga Prasad, the Ex-President, Bahujan Samaj Party, Gorakhpur in respect of large scale irregularities of the conduct of the B.Ed. Examination in the

affiliated colleges. The petitioner had worked as Coordinator, a post on which he was appointed, on temporary arrangement upto 17.5.2008. It was alleged in the complaint addressed to the Chief Minister that in respect of admissions of B.Ed. course of the years 2005-06 and 2006-07 the High Court has given an eye opening judgment. The Examination Controller had got all the answer books of the B.Ed. Examination of the colleges running self-finance course, from only two examiners and in which they had taken Rs.25-30 lacs for giving good marks to the students. 81% students passed in First Class, whereas the students of self-finance courses are not as meritorious, as the students of the University and aided colleges, admitted on merit. The then Vice Chancellor and the Examination Controller earned crores of rupees in the examinations in which the University has given overdraft of Rs.6 crores. In the scrutiny of marks the Examination Controller, with the Coordinator in the year 2005-06 increased the marks of 1500 students and at some place 6 marks given to the students, were made 66. The students were required to shelve out Rs.10,000/- each for increase of marks and in this manner they earned lacs of rupees. They had, thereafter, got the answer books burnt, whereas the answer books with increased marks in scrutiny are preserved for atleast two years. In the year 2006-07 the racket reached to its zenith in which the number of marks of 4000 students were increased by accepting money.

8. The examinations were subjected to judicial scrutiny of the Court. In Writ Petition No.14587 of 2007, Pradeep Kumar Tripathi Vs. State of U.P. & Ors., Hon'ble Mr. Justice Arun Tandon by his judgment dated 23.5.2007 passed a detailed order as follows:-

"The facts of the present case depicts that a mockery has been made of the statutory provisions applicable by the Vice Chancellor, Controller of the Examinations as well as by the institutions while granting admissions to the students much in excess of the permissible intake permitted under the order of recognition issued by the National Council for Teacher Education in accordance with the provisions of the National Council for Teacher Education Act, 1993 as well as in the appearance in the University examinations and qua declaration of their results.

From Annexure-2 of the affidavit filed by the Vice Chancellor of the University it is admitted that six degree colleges affiliated to the said University, which had the recognition for an intake of 100 students only from National Council for Teacher Education, had granted admissions to the students in the B. Ed. Course much in excess of the permitted intake. The document records that Vidyarthi Degree College, Kushinagar has admitted 159 students, Veer Bahadur Singh Mahavidyalaya, Gorakhpur has admitted 149 students, Prabha Devi Mahavidyalaya, Sant Kabirnagar has admitted 217 students, Chaudhary Mahavir Prasad Memorial Mahavidyalaya, Siddharthnagar has admitted 277 students, Kisan Mahavidyalaya, Kushinagar has admitted 107 students and Sant Andrews College, Gorakhpur has admitted 146 students (while stand of the college is that it has admitted 126 students).

Various interim orders have been obtained from this Court where under the students admitted in the course were

permitted to appear in the examinations to be conducted by the Gorakhpur University on writ petition filed by the management of the institutions.

It is admitted to the counsel for the University that out of number of students, who had appeared as regular students in the B. Ed. Course from the aforesaid colleges, result of 100 students each have been declared in respect of Vidyarthi Degree College, Veer Bahadur Singh Mahavidyalaya, Gorakhpur and Kisan Mahavidyalaya, Kushinagar, while in respect of Prabha Devi Degree College result of 144 students has been declared. While in respect of Sant Andews College, Gorakhpur it has been stated that result of 126 students has been declared. Qua Chaudhary Mahavir Prasad Memorial Degree College it is stated that result of 102 students have been declared (100 regular and 2 Ex-students).

There is also a dispute with regard to number of candidates whose result have been declared in respect of ***Veer Bahadur Singh Purvanchal University,*** *Jaunpur which according to the counsel for the petitioner is 101 in place of 100 as stated by the Vice Chancellor.*

Following issues arise for consideration before this Court.

(a) Whether any college having been permitted an intake of 100 students by National Council for Teacher Education can admit students beyond the intake permitted.

(b) Whether the University in the facts of the case had colluded with the institutions in violating the law with impunitive by creating a situation where under the institutions have admitted the students much in excess of their sanctioned strength.

(c) Whether the University is legally competent to hold examinations of students admitted in various institutions in excess of the sanctioned strength.

d) How the students admitted in excess of the sanctioned strength are to be compensated for the fraud which has been played by the University and the colleges.

(e) What action is required to be taken by the State Authorities against the officers of the University as well against the management of the institutions, who have created such a mistake.

So far as the first issue is concerned, the National Council for Teacher Education Act, 1993 has been framed for regulating and monitoring the teachers education through out the country. It is an Act of Parliament. The Hon'ble Supreme Court of India in the case of ***State of Maharashtra vs. Sant Dhyaneshwar Shikshan Shstra Mahvidyalaya****; reported in JT 2006 (4) S.C. 201 has clarified that the law of the Parliament is all persuasive and any State Act contrary will have to give way to the said Act of Parliament.*

It is not in dispute that the National Council for Teacher Education not only grants recognition to the institutions, it also lays down the maximum number of intake of students to which a particular institution is entitled.

It is not in dispute that under the letters of recognition granted by the National Council for Teacher Education in favour of these institutions it is specifically mentioned

that an intake of 100 students would be permissible. It is on this letter of recognition that the University, which is the examining body, has to grant affiliation to the degree colleges within its jurisdiction. Reference Section 14 read with Section 15 of the National Council for Teacher Education Act, 1993.

From the aforesaid statutory provisions only one logical consequence follows i. e. no excess student beyond the permitted intake can be admitted by any college recognized by the National Council for Teacher Education. Admission beyond the permitted intake would be void and such students cannot appear in the University examinations nor their results can be declared.

It is, therefore, held that in no case the colleges could have admitted students in excess of the permitted intake of 100 and therefore the college as well as the University, which has permitted such excess intake, are equally to be blamed.

So far as the students, who have been admitted in excess of the strength permitted by the National Council for Teacher Education are concerned, they have no legal authority to appear in any University examinations in respect of the said course. Their admissions are void abinitio, inasmuch as the institutions do not have the permission to admit any student beyond the permitted intake of 100. The Hon'ble Supreme Court in the case of ***C.B.S.E. and another vs. P. Sunil Kumar & Others etc****., reported in AIR 1998 SC 2235 and in the case of* ***Minor Sunil Oraon Tr. Guardian & Ors.*** *vs. C.B.S.E. & Others, reported in JT 2006 (10) SC 375 has clarified that any sympathy shown to such students, admitted illegally, would be totally misplaced as would result in adversely affecting the entire academic of the University as well as the rules laid down for regulating the same.*

In these circumstances this Court can have no sympathy with the students, who have been illegally admitted in excess of the sanctioned strength of 100.

This Court holds that such students, who have appeared in the University examination beyond the sanctioned strength of 100, are not entitled to any relief under Article 226 of the Constitution of India nor their result in respect of the said examination are required to be declared.

This Court may further record that the declaration of the result by the University of students in excess of the permitted intake qua Sant Andrews Degree College, Chaudhary Mahavir Prasad Memorial Degree College and Prabha Devi Degree College and any other institution would also be a nullity and the University shall take all appropriate action to cancel the result of the students so declared passed, after affording opportunity of hearing to them, preferably within four weeks from today.

The last two issues, which remain for consideration, are as to how students, who have been so arbitrarily admitted by the institutions in collusion with the University should be compensated for the loss of their academic session and as to what action should betaken against the University as well as management in respect of the fraud which they had played with the career of the students while directing admission beyond the permitted intake and while holding examination of such students.

In the opinion of the Court so far as these students are concerned, it would be fair to direct that the institutions shall refund the total fee realized from the students so admitted beyond the sanctioned strength along with interest at the rate of 10% per annum from the date the fee was realized till the date of actual payment. Such refund of the fee must be made within one month from today to the students concerned through bank draft drawn from a nationalized bank.

Over and above the same students shall also be entitled for a some of Rs. 25,000/- (Twenty Five Thousand) each for the loss of one academic year because of such illegal act of the college as well as University. 50% of this amount shall be paid by the University and the other 50% by the college concerned from their own sources within one month through Account Payee Cheque drawn in favour of the students concerned.

So far as the management of the institution and the officers of the University including the Vice Chancellor, the Registrar as well as controller of Examination are concerned, let records of the writ petition along with the order passed to day be placed before the Secretary, Higher Education U.P., Lucknow. The Secretary shall conduct a detail enquiry into the entire episode. The Secretary will ensure that all disciplinary action necessary in the facts of the case is taken and if there are other facts, which may result in criminal liability, suitable action in that regard may also be initiated in that regard. The Secretary shall recommend appropriate action against all found responsible to the authority concerned, competent to take the action."

9. The special appeal No.530 of 2007 against the order was disposed of on 4.12.2010. The Division Bench did not interfere with the judgment and only gave directions to hear and decide the matter expeditiously. In pursuance to the order of learned Single Judge dated 23.5.2007 the University had to pay Rs.47 lacs as compensation to the students. The bank drafts were deposited by the University.

10. The Executive Council by its resolution dated 17.5.2008 constituted disciplinary committee of Mr. Justice Giridhar Malviya; Mr. Justice A.L.B. Srivastava and the Acting Vice Chancellor. A High Power Committee was also constituted with five members to fix the criminal liability. It is alleged that the petitioner requested to the Registrar to provide documents on the basis of which the enquiries were initiated. His requests did not result into giving him the documents on the basis of which first information report was lodged against the petitioner, Professor Ajay Kumar Srivastava, the Examination Controller as well as Shri Satrughan Singh, the Asstt. Registrar. A charge sheet was filed on 22.4.2009. A Writ Petition No.46007 of 2008 was disposed of with the directions that the departmental enquiry be proceeded in accordance with law before passing any order contrary to the interest of the petitioner. The Executive Council by its decision dated 26.4.2009 suspended the petitioner. The suspension order was challenged in this writ petition.

11. The disciplinary committee was reconstituted by the Acting Vice Chancellor as its Chairman with Shri Vikas Verma, IAS, and Hon'ble Mr. Justicke K.D. Sahi (retired) as its members. It is alleged that the petitioner was neither given the documents nor permission to inspect them. He was not

allowed to cross-examine all the witnesses. He could cross-examine only three witnesses. This writ petition against the suspension order was fixed for hearing on 30.6.2009, and in the meantime the disciplinary committee submitted report on 27.6.2009 on which the resolution was passed by the Executive Council on 28.6.2009 accepting the exparte report and the petitioner was dismissed by the order of the Vice Chancellor dated 30.6.2009.

12. Shri Shailendra submits that the entire enquiry was held in contravention to the Rules for holding departmental enquiry. He has alleged malafides against the acting Vice Chancellor and has raised number of grounds including the violation of principal of natural justice.

13. Shri B.D. Mandhyan, Sr. Advocate on the other hand submits that large scale fraud was detected by the Court in which University deposited Rs.47 lacs as compensation to the students. The Examination Controller was given the charge to conduct examinations. A large number of students (81%) were given First Class marks for which money was taken for awarding higher marks in scrutiny and the copies were destroyed. The petitioner was not cooperating in the enquiry. He submits that the petitioner was suspended and enquiry was held. The petitioner had participated in the enquiry. He filed reply to the charge sheet, and cross-examined three witnesses. His defence was considered in the enquiry by the disciplinary committee including a retired judge of this Court. The Executive Council considering the gravity of the matter decided to dismiss the petitioner. The Vice Chancellor has passed a detailed reasoned order. The petitioner, therefore, should avail the remedy of approaching the Chancellor under Section 68 of the U.P. State Universities Act, 1973 before availing the extraordinary remedies of writ jurisdiction.

14. In the present case the admitted facts are that large scale irregularities were detected by the Court in which admissions beyond permissible strength were made and that a large number of students were given first class marks purportedly to secure employment on the basis of quality point marks in B.Ed. Examination. The answer books were subjected to scrutiny, in which the marks were further enhanced. The answer books were quickly destroyed. Prima facie we find that the University proceeded cautiously in first making preliminary enquiry on the complaint and thereafter in constituting a High Level Committee. The Disciplinary Committee including an IAS Officer and retired Judge of this Court gave opportunity to the petitioner to defend himself. He gave reply to the charges and cross-examined some of the witnesses. The enquiry report was submitted and considered by the Executive Committee. The petitioner was dismissed from service on the recommendations of the Executive Council, by the Vice Chancellor.

15. Article 226 is not intended, as it was held in **Assistant Collector of Central Excise vs. Dunlop India Limited (1985) 1 SCC 260** to circumvent statutory procedures. Where statutory remedies are available or statutory tribunals have been set up, the High Court does not entertain a writ petition. It was held that there are well-known exceptions to entertain petitions under Article 226 of Constitution of India directly without exhausting alternative remedies, namely where the very vires of the statute is in question; or where private or public wrongs are so inextricably mixed up and the prevention of public injuries and the

violation of public justice require with recourse may be had to Article 226. **(Modern Industry vs. State of UP (2001) 10 SCC 491)** or where the alternative remedy is not effective or adequate.

16. The Courts in India have also developed a principle that an alternative remedy is not an absolute bar to the relief under Article 226. There may be circumstances such as the authority, passing the orders sought to be quashed, had no powers and that the orders are wholly without jurisdiction and where there has been gross violation of principle of natural justice in making an order which affects the civil rights of the parties. The other well-known exceptions are where alternative remedy is too dilatory or difficult for quick relief. (**Assistant Collector of Central Excise vs. Johnson Hosiery Industry (1979) 4 SCC 22;** where any mandatory provision of Constitution has been violated such as Article 265 (**Municipal Council vs. Kamal Kumar, AIR 1965 SC 132)**; where the Act which provides alternative remedy is itself unconstitutional or ultra vires for want of legislative competence **(Bengal Immunity Company Ltd. vs. State of Bihar AIR 1955 SC 661)**; where the order is nullity for some defect going to the root of the jurisdiction of the authority (**Kuntesh Gupta vs. Management of Hindu Kanya Mahavidyalaya AIR 1987 SC 2186**; where the authority imposing an ultire vire condition (**Tilok Moti Chand vs. H.B. Munshi AIR 1970 SC 894** or where the alternative forum is not competent to grant the relief (**Deccan Merchants Cooperative Bank vs. Duli Chand Jugiraj Jain AIR 1969 SC 1320)** or even in a case where it is likely that the alternative forum would not be in a position to render justice to the cause **(D.K. Rangarajan vs. Government of Tamilnadu AIR 2003 SC 3032).**

17. In each case the High Court has to satisfy itself before entertaining the writ petition, whether in a given case if any alternative remedy exists, it is equally efficient and adequate. The petitioner must satisfy the Court that the case on its fact falls within any of the exceptions detailed as above to grant relief. In the present case, we do not find that the petitioner has been able to make out any exception to circumvent the alternative remedy, which is efficacious and speedy.

18. In the above circumstances, it cannot be said that the order was not passed by the competent authority, or that the principle of natural justice were violated. Further at this stage we are not satisfied from the averments and material produced on record that the order has been passed in malafide exercise of powers.

19. For the aforesaid reasons, we relegate the petitioner to the statutory remedies of filing representation before the Chancellor under Section 68 of the U.P. State Universities Act, 1973. If such a representation is filed, the Chancellor may consider the same on merits and decide the representation as expeditiously as possible. We make it clear that we have not examined the merits of the charges. The discussion of facts in the judgment is only to find out whether any case of interference, without exhausting alternative remedies has been made out.

20. The writ petition is **disposed** of accordingly.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.01.2011

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 28935 of 2007

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

Counsel for the Petitioner:
Sri Anwar Mehndi Zaidi,
Sri A.C. Pandey

Counsel for the Respondent:
Sri Anil Tiwari,
C.S.C.

U.P. Nagar Mahapalika Sewa Niymawali 1962-Rule-27-Dismissal-whether can be passed against dead employee-held-'No' disciplinary authority including enquiry officer-shows height ignorance of the Principle of Service Law-word used in Section is employee and not the family members-forfeiture of Gratuity pension etc. beyond jurisdiction-court expressed great displeasure-exemplary cost of Rs. 10,000/- imposed-with direction to pay all amount within specified period, with 10% interest thereon.

Held: Para 7

The punishment provided in Rule 27, therefore, can be imposed upon the "servant" of Mahapalika and not on the family members of the "servants" of Mahapalika. As soon as an incumbent who was an employee of Nagar Mahapalika dies, for the purpose Rule 27 of 1962 Rules, he ceases to be a "servant of Nagar Mahapalika" as a result whereof no penalty under Rule 27 could be imposed upon him. That being so, the question of passing an order, which may have the effect of punishing legal heirs of the deceased employee would not arise. No such power has been conferred upon any authority of Nagar Nigam, Bareilly or else to pass any such order. Moreover, punishments which have been imposed, i.e. withholding of all retiral benefits including provided fund and non consideration of legal heir for compassionate appointment are also not provided as a punishment under Rule 27. It is well settled that a punishment not prescribed under the rules, as a result of disciplinary proceedings, cannot be awarded even to the employee what to say of others. The Court feel pity on the officers of Nagar Nigam, Bareilly in continuing with the departmental enquiry against a person who was already died and this information of death was well communicated to the enquiry officer as well as disciplinary authority. They proceeded with enquiry and passed impugned orders against a dead person. This is really height of ignorance of principles of service laws and shows total ignorance on the part of the officers of Nagar Nigam in respect to the disciplinary matters. This Court expresses its displeasure with such state of affairs and such a level of unawareness on the part of the respondents who are responsible in establishment matters. They have to be condemned in strong words for their total lack of knowledge of such administrative matters on account whereof legal heirs of poor deceased employee have suffered.

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

1. This is really a strange kind of case. One Sri Ghasi Ram working as *Mali* in Nagar Nigam Bareilly, was placed under suspension on 21.7.2005 and a charge sheet was issued to him from the office of Nagar Nigam on 26.7.2005. The delinquent employee Ghasi Ram died on 31.7.2005/1.8.2005 and this information was received in the office of Nagar Nigam on 2.8.2005. Despite, the enquiry officer

submitted report on 5.10.2005 stating that he gave opportunity to the delinquent employee which he did not avail and, thereafter, held all the charges proved against the dead employee.

2. The disciplinary authority, having noticed the fact that Ghasi Ram has died while in suspension, agreed with the enquiry report holding that the charges stand proved and the deceased employee was guilty of the misconduct. He also held that had he been alive, a major penalty would have been awarded but after his death, penalty of dismissal is not possible, hence as a measure of penalty, all the retiral dues including provident fund etc. shall not be paid to his legal heirs and they shall also not be considered for compassionate appointment.

3. A representation was made by the petitioner; the widow of the deceased employee, that no enquiry proceeding could have continued after death of the deceased employee concerned, hence, continuance of proceedings and impugned order of punishment are illegal. Further that there is no provision authorizing the punishing authority to withhold as penalty, the retiral benefits including the provident fund of the deceased employee, which is a right of the legal heirs after death of the employee concerned. Thirdly, she also represented that right of compassionate appointment also cannot be denied since it is not prescribed as one of the punishment under the Rules. She also pointed out that in fact till the death of the employee concerned, even the alleged charge sheet was not served upon him. She, therefore, requested not only for payment of all dues, after the death of the employee concerned, but also to provide compassionate appointment to one of the member of family. This representation has been rejected by order dated 26.3.2007 (Annexure 9 to the writ petition) by Nagar Ayukt, Nagar Nigam, Bareilly.

4. Learned counsel for the petitioner submitted that there is no provision authorizing the respondent- Nagar Nigam to continue with the departmental enquiry after death of the employee concerned. In respect to the Government servants, it is provided that on the death of the Government servant, the disciplinary proceeding, if pending, shall stand abated. He submits that the same would apply to the case of petitioner's husband also. It is contended that punishments which have been imposed upon the heirs of deceased employee are not provided in the rules. Moreover, punishments are not imposed on the deceased employee, but in fact have fallen on the legal heirs of deceased employee which is not permissible in law since the respondent-Nagar Nigam had no authority to deprive any benefit accruing to legal heirs of a deceased employee, by means of an order of punishment which would fall upon the legal heirs. Lastly, it is contended that the enquiry officer says that the notice of oral hearing was issued to the delinquent employee by pasting notice at his residence though it is also mentioned in the enquiry report that even before that, the employee concerned had died, meaning thereby the entire proceedings are nothing but a farce and a nullity in the eyes of law.

5. Sri Anil Tiwari, learned counsel appearing for the Nagar Nigam contended that the employee having died after issuance of the charge sheet, it will not affect pendency of enquiry which is bound to culminate in a final order which has been passed in the case in hand by the competent authority and it does not warrant

interference. He also submitted that petitioner's husband was guilty of a serious misconduct of selling Nigam's house allotted to him and hence Nigam has no option but to pass the impugned orders.

6. Holding of departmental enquiry and imposition of punishment contemplates a pre-requisite condition that the employee concerned, who is to be proceeded against and is to be punished, is continuing an employee, meaning thereby is alive. As soon as a person dies, he breaks all his connection with the worldly affairs. It cannot be said that the chain of employment would still continue to enable employer to pass an order, punitive in nature, against the dead employee. All the punishments contemplated under the rules are such which can be imposed on a person who is still continuing to be an employee. Sri Anil Tiwari, learned counsel appearing for respondent-Nagar Nigam, on repeated query did not controvert the fact that as soon as an employee dies, his relationship of employer and employee comes to an end. This would automatically result in cessation of proceedings including departmental proceedings pending against him. Moreover, what penalty can be imposed on an employee of Nagar Nigam is provided in Rule 27 of U.P. Nagar Mahapalika Sewa Niyamawali, 1962 (hereinafter referred to as "1962 Rules") which reads as under:

"27. Punishment - Subject to the provisions of section 110 of the Act the following penalties may for good and sufficient reasons and as hereinafter provided be imposed upon the servants of the Mahapalika by the authority which is competent to make such appointments under section 107 of the Act, notwithstanding that such an appointment in any particular case may have been made under section 577 (f) (2) of the Act, namely-

(I) fine in case of servants belonging to the inferior service only: Provided that the total amount of fine shall not ordinarily exceed half month's pay of the servant concerned and it shall be deducted from his pay in instalments not exceeding one quarter of his monthly salary;

(ii) censure;

(iii) withholding of increments including its stoppage at an efficiency bar;

(iv) recovery from pay of the whole or part of any pecuniary loss caused to the Mahapalika by negligence or breach of orders;

(v) Suspension,

(vi) reduction to a lower post or time-scale, or to lower stage in a time-scale,

(vii) removal from the service of the Mahapalika which does not disqualify from future employment,

(viii) dismissal from the service of the Mahapalika which ordinarily disqualifies from future employment.

Explanation-The discharge-

(a) of a person appointed on probation, during or at the end of the period of probation; or

(b) of a person appointed otherwise than under contract to hold a temporary appointment on the expiration of the period of the appointment or at any time in

accordance with the terms of appointment ; or

(c) of a person engaged under contract in accordance with the terms of his contract; does not amount to removal or dismissal within the meaning of this rule."

7. The punishment provided in Rule 27, therefore, can be imposed upon the "servant" of Mahapalika and not on the family members of the "servants" of Mahapalika. As soon as an incumbent who was an employee of Nagar Mahapalika dies, for the purpose Rule 27 of 1962 Rules, he ceases to be a "servant of Nagar Mahapalika" as a result whereof no penalty under Rule 27 could be imposed upon him. That being so, the question of passing an order, which may have the effect of punishing legal heirs of the deceased employee would not arise. No such power has been conferred upon any authority of Nagar Nigam, Bareilly or else to pass any such order. Moreover, punishments which have been imposed, i.e. withholding of all retiral benefits including provided fund and non consideration of legal heir for compassionate appointment are also not provided as a punishment under Rule 27. It is well settled that a punishment not prescribed under the rules, as a result of disciplinary proceedings, cannot be awarded even to the employee what to say of others. The Court feel pity on the officers of Nagar Nigam, Bareilly in continuing with the departmental enquiry against a person who was already died and this information of death was well communicated to the enquiry officer as well as disciplinary authority. They proceeded with enquiry and passed impugned orders against a dead person. This is really height of ignorance of principles of service laws and shows total ignorance on the part of the officers of Nagar Nigam in respect to the disciplinary matters. This Court expresses its displeasure with such state of affairs and such a level of unawareness on the part of the respondents who are responsible in establishment matters. They have to be condemned in strong words for their total lack of knowledge of such administrative matters on account whereof legal heirs of poor deceased employee have suffered.

8. This writ petition, therefore, deserves to be allowed. Besides, in my view, here is a fit case where an exemplary cost ought to be imposed against Nagar Nigam, Bareilly for such a mindless illegal act on their part. Sri Anil Tiwari, learned counsel for the Corporation, however, very fairly said that authorities may have committed a serious error in passing orders despite death of the employee concerned, but had no mala fide on their part, therefore, this Court may show its leniency in the matter of imposing heavy cost.

9. Considering the facts and circumstances as discussed above, the writ petition is allowed. The impugned orders dated 8.11.2005 (Annexure 5 to the writ petition) and 26.3.2007 (Annexure 9 to the writ petition) are hereby quashed. The respondents shall pay forthwith all dues to the legal heirs of the deceased employee Ghasi Ram as a result of his death on 31.7.2005/1.8.2005 treating the disciplinary proceeding against him having abated on that date. The amount payable, as above, shall be determined within one month from the date of production of certified copy of this order before the competent authority and shall be paid within 15 days thereafter. The respondent-Nagar Nigam shall also pay interest on the aforesaid amount at the

rate of 10% p.a. commencing from the date of death of petitioner's husband till actual payment.

10. If the petitioner or any other legal heir apply for compassionate appointment in accordance with law, the same may also be accordingly considered as per the rules.

11. The petitioner shall also be entitled to cost which is quantified to Rs. 10,000/- (Rupees ten thousand).

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 06.01.2011

BEFORE
THE HON'BLE SATYA POOT MEHROTRA, J.
THE HON'BLE PANKAJ MITHAL, J.

Civil Misc Writ Petition No. 37121 of 2001

Pawan Kumar ...Petitioner
Versus
Union of India and other ...Respondents

Counsel for the Petitioner:
Sri Ashok Khare
Sri Aditya Kumar Singh
Sri Adarsh Bhushan
Sri Vishnu Shanker Gupta

Counsel for the Respondents:
Sri S.N. Srivastava (S.S.C.)
C.S.C.

U.P. Reorganization Act 2000-Section 76-Petitioner working as sil conservation officer-opted and always remained posted in Hill area-after existence of new state of Uttarakhand-representated on ground of heart trouble to remain in state of U.P. The Committee took policy decision to post those who were already working in Hill District-which resulted rejection-held-No prejudice caused-dismissed.

Held: Para 18 & 19

The option of the petitioner to be posted in State of U.P. was thus considered and disposed of as aforesaid and no other representation in this regard remained pending. There is nothing on record to indicate the developments after 2001 and the petitioner who admittedly belong to the Hill Sub-cadre as per the Uttar Pradesh Hill Sub-cadre Rules 1992 as such continued to remain posted in the State of Uttrakhand even after the devision of the erstwhile State of Uttar Pradesh.

In view of the aforesaid facts and circumstances, as the petitioner admittedly belong to the Hill-Sub-cadre and had always remained posted in the hilly region of the State of U.P. which now constitutes the State of Uttrakhand, no prejudice has been caused to him by the final allocation of the State of Uttrakhand.

Case law discussed:
2004 (1) UPLBEC 547:2004(55) ALR 28,2006 (9) SCC 458,2007(7) SCC 250, 2009 (8) ADJ 49.

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

1. Petitioner was appointed as an Agronomist/Soil Conservation Officer in the year 1981 on selection by the U.P. Public Service Commission, Allahabad through the Combined State Services Examination 1979. He was promoted and posted as Project Officer (Agriculture) Nainital w.e.f. 1.1.2000. During his service, he opted for the Hill Sub-cadre constituted for the agriculture department in pursuance to the Government Order dated 23.3.1982.

2. In accordance with the U.P. Reorganization Act, 2000 (hereinafter

referred as Act) a new State Uttrakhand (previously Uttaranchal) was constituted comprising 13 districts of the erstwhile State of of U.P. On the creation of the new State of Uttrakhand options were invited from the employees of the State of U.P. as to whether they would like to remain in service in the State of U.P. or would prefer services in the new State of Uttrakhand. The petitioner submitted option on 8.10.2000 for remaining in the State of U.P. on account of his heart ailment. A fresh option on demand, to the same effect was submitted by him on 2.11.2000. However, the Reorganization Commissioner, Uttrakhand vide orders dated 4.4.01 and 5.5.2001 notified that the State Advisory Committee has recommended that all the employees working in the Hill Sub-cadre be allocated the services of new State of Uttrakhand. It was followed by a similar order dated 10.5.01 and on that basis Additional Director Agriculture and Soil Conservation, Government of Uttrakhand issued an order dated 21.5.01 to the effect that the options of the employees of the Hill sub-cadre, who have opted to remain in the State of U.P. have been rejected. These orders have been impugned by the petitioner in the present writ petition with the further prayer that a suitable direction be issued to the respondents to absorb him as a Class-1 employee in the Agriculture Department of the State of U.P.

3. It is not disputed that the petitioner had previously opted for the U.P. Hill sub-cadre and he had remained posted in the hill area. Even today he is posted and working in the State of Uttrakhand.

4. We have heard Sri Adarsh Bhushan holding brief of Sri Aditya Kumar Singh, learned counsel for the petitioner and learned Standing Counsel appearing for the respondent Nos. 2, 3, 6 and 9. We have also perused the record of the writ petition. There is no counter affidavit on record and in view of the fact that the petition is pending since 2001 and sufficient time was earlier allowed to the Standing Counsel to file counter affidavit, we propose to dispose of the writ petition in the absence of the counter affidavit.

5. The submission of learned counsel for the petitioner is that petitioner is admittedly a heart patient and is not suited to serve in the hill area. On the creation of the State of Uttrakhand, he had opted for the State of U.P. The said option has not been considered individually. It cannot be rejected on a general ground merely for the reason that he had earlier opted for Hill sub-cadre.

6. On the other hand, learned Standing counsel has submitted that the rejection is on the basis of the advice of the State Advisory Committee constituted by the Central Government and therefore there is no scope for any interference in the said decision in exercise of powers under Article 226 of the Constitution of India.

7. In deciding the controversy at hand, it would be appropriate to deal in brief with the scheme of U.P. Reorganization Act 2000 viz-a-viz creation of the new State of Uttrakhand out of the 13 hill districts of the erstwhile State of U.P. and the allocation of the State of Uttrakhand to the employees of the State Government.

8. Section 73(1) of the Act provides that every person serving in connection with the affairs of the existing State of Uttar Pradesh before the appointed date, shall on or before that day continue to serve in the State of Uttar Pradesh provisionally unless

he is required by general or special order of the State Government to serve in connection with the affairs of the State of Uttrakhand provisionally.

9. Section 73(2) of the Act empowers the Central Government to determine by general or special order the successor State in reference to every person referred to in Sub-section (1) of Section 73 of the Act for final allotment. In other words the power of final allocation of a successor State to an employee vest with the Central Government.

10. Further Section 76 of the Act empowers the Central Government to appoint Advisory Committee for assisting it in discharging its functions, ensuring fair and equitable treatment to all persons likely to be affected and for proper consideration of representation of such persons. Central Government is also authorized to give direction to the State Government as may be necessary for giving effect to the provisions of part VIII of the Act. In exercise of the above powers Central Government constituted a State Advisory Committee for the purposes of bifurcation of the cadres and allocation of the successor State to the employees. The State Advisory Committee so constituted consisting of senior and experienced civil servants, on 2.7.2002 finalized the norms and criteria for allocation of the successor State to the employees. A revised government order dated 15.7.2002 regarding final allocation on the basis of norms/criteria so laid down by the State Advisory Committee was issued incorporating the following principles:-

(1) The first of be allotted will be optees to Uttranchal.

(2) Those whose home district as declared in service records lies within Uttaranchal, will be allotted to that State.

(3) If vacancies persist, the junior most as on the appointed day in the desired pay scale would be allotted.

(4) While carrying out the exercise care would be taken to observe the criteria regarding reservation of SCs/STs/OBCs and others. Care would also be taken to allocate personnel pro rata according to the total strength of the batch, as far as possible.

(5) If both husband and wife are in service, allotment would be in accordance with the option of the senior with reference to the pay scale. In case of officers finally allotted to Uttaranchal vide Government of India's order dated 11.9.2001, the spouse would be allotted Uttaranchal only and not Uttar Pradesh.

(6) Female employees would be allocated according to their options, subject to the condition that those whose spouses are covered by Point 2 or Point 3 would be allotted Uttaranchal only and not Uttar Pradesh.

(7) Those employees who are due to retire within two years will be allotted as per their option.

(8) Handicapped employees, if not finally allotted to Uttaranchal vide orders dated 11.9.2001 issued by Government of India would be allotted as per their options.

11. A Division Bench of this court in **Pushpak Jyoti vs. State of U.P. and others 2004 (1) UPLBEC 547** : 2004(55) ALR 28 observed that the aforesaid norms/criteria laid down by the State

Advisory Committee are objective in nature and have been designed to avoid arbitrary action in the matter of allocation of State to the employees. The said norms/criteria were held to be fair and reasonable. It was further held that the aforesaid norms/criteria laid down by the State Advisory Committee will be deemed to be guidelines of the Central Government since it was set up by the Central Government and was required to assist it in the matter of allocation of the successor State to the employees.

12. The aforesaid norms/criteria were however subject to genuine and extreme hardship of individual employee to be considered and decided at the discretion of the State Advisory Committee. Thus it was envisaged that on the consideration of the above norms/criteria, the State Advisory Committee would issue a tentative final allocation list whereupon employees affected by such tentative allocation would be entitle to make representation regarding their personal difficulties and hardships; whereupon on consideration of individual representations central government would finalise the allocation of the State to each employee.

13. In the case of **Purushottam Kumar Jha Vs. State of Jharkhand and others 2006 (9) SCC 458** an employee of the Bihar was provisionally allocated the State of Jharkhand under the Bihar Reorganization Act, 2000. He was provisionally transferred to the State of Jharkhand. It was held that such transfer was not in contravention of any provision of the Act and as such requires no interference of the court.

14. In the case of **Indradeo Paswan Vs. Union of India and others 2007(7) SCC 250 the Supreme Court** held that the matter of allocation of the State to the employees under the Reorganization Act would not require any interference unless a clear illegality or wednesbury unreasonableness is shown.

15. A Division Bench of this Court in the case **of Sanjay Kumar Singh and another vs. State of U.P. and others 2009 (8) ADJ 49** held that the norms/criteria laid down by the State Advisory Committee are neither unreasonable or irrational. Therefore, where the objections of each Officer were considered before making allocation, there is no violation of the principles of natural justice and such allocation cannot said to be arbitrary or whimsical warranting interference by the High Court.

16. In the present case, petitioner was allocated the State of Uttrakhand vide order dated 4.4.2001 annexure-9 to the Writ Petition. In the joint meeting of the Central Government and the two States held on 4.4.2001, it was decided as a policy that all employees of the Hill Sub-cadre would remain posted in Uttrakhand as would be evident from the communication dated 5th May, 2001 annexure-12 to the Writ Petition. The State Advisory Committee thereafter in its meeting held on 16.5.2001 recommended for the rejection of all options of the employees of the Hill Sub-cadre for the allocation of the State of Uttar Pradesh. This decision was communicated vide order dated 21st May, 2001 annexure-14 to the Writ Petition. Finally, the Central Government in exercise of powers under Section 73(2) of the U.P. Reorganization Act vide order dated 11.9.01 annexure-15 to the Writ Petition in accordance with the aforesaid policy took a decision that all employees belonging to the Hill Sub-cadre as on the appointed date i.e. 9.11.2000

would remain in Uttrakhand and as such all options/representations for serving in the State of U.P. would stand disposed of.

17. Such decision of allocation of the State of Uttrakhand to the petitioner on the basis of the above policy decision is not shown to be suffering from any arbitrariness or wednesbury unreasonableness.

18. The option of the petitioner to be posted in State of U.P. was thus considered and disposed of as aforesaid and no other representation in this regard remained pending. There is nothing on record to indicate the developments after 2001 and the petitioner who admittedly belong to the Hill Sub-cadre as per the Uttar Pradesh Hill Sub-cadre Rules 1992 as such continued to remain posted in the State of Uttrakhand even after the devision of the erstwhile State of Uttar Pradesh.

19. In view of the aforesaid facts and circumstances, as the petitioner admittedly belong to the Hill-Sub-cadre and had always remained posted in the hilly region of the State of U.P. which now constitutes the State of Uttrakhand, no prejudice has been caused to him by the final allocation of the State of Uttrakhand.

20. Accordingly, we are of the opinion that the petitioner has failed to make out a case for interference with the impugned orders in exercise of the extra-ordinary jurisdiction under Article 226 of the Constitution of India.

21. Writ Petition as such lacks merit and is accordingly dismissed but with no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.01.2011

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 41701 of 2008

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

Counsel for the Petitioner:
Sri R.P.S. Chauhan
Sri Durga Singh
Sri Sandeep Srivastava

Counsel for the Respondents:
Sri D.S. Srivastava
Sri Kshetresh Chandra Shukla
C.S.C.

U.P. Govt. Servant Seniority Rules 1991-Rule 5-readwith Food Inspectors Service Rules 1992, Rule 20-claim of seniority-on basis of fortuitous date of joining-ignoring substantive date of selection-held-misconceived-there are so many unforeseen reasons for late joining-cannot be basis to ignore the placement of merit list-if late joining for valid reason, candidate not to suffer-petition dismissed with cost of 20,000/-

Held: Para 36

Answer to this submission is that Rule 5 takes care of such circumstances. It says that if a late joining is for valid reason, the candidate would not suffer. The decision in this regard is to be taken by the appointing authority whose decision has been declared final. No such decision in respect of any individual case has been challenged before this Court on the ground that such discretion has been exercised by appointing authority in reference to any individual candidate arbitrarily or illegally. In absence of any such challenge, if for valid reasons, the

appointing authority has allowed a candidate, higher in merit, to join later, may be after a few years, in absence of any challenge thereto, I do not find any reason to interfere in such individual case. The petitioner though has not impleaded Sri Narendra Pratap Singh whose case in this regard has been referred to in para 29 of the writ petition but as I have already mentioned, Sri Narendra Pratap Singh represented before the appointing authority that he did not receive appointment letter dated 09.11.1998 as a result whereof he could not join. This claim of Sri Narendra Pratap Singh having not been found untrue, the appointing authority accepted his representation and allowed him to join in 2005. In absence of any challenge to such decision of appointing authority, no observation can be made by this Court adverse to Sri Naredra Pratat Singh. Learned counsel for the petitioner even otherwise could not point out any inherent fallacy or illegality therein.

Case law discussed:

1991 (1) ESC 851, AIR 1991 SC 1202

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

1. The petitioner, Pankaj Kumar, working as a Food Inspector, has come to this Court under Article 226 of the Constitution of India aggrieved by the seniority list dated 17.06.2008 (Annexure-1 to the writ petition) issued by the State Government determining inter se seniority of Chief Food Inspectors/Food Inspectors in accordance with U.P. Government Servant Seniority Rules, 1991 *(hereinafter referred to as the "Seniority Rules, 1991")* read with U.P. Food Inspector (Medical Health and Family Welfare Department) Service Rules, 1992 *(hereinafter referred to as the "Food Inspectors Service Rules, 1992")* wherein the petitioner has been shown at Serial No. 216. He has also challenged the promotion letter dated 19.04.2010 (Annexure-19 to the writ petition) whereby promotions from the post of Food Inspectors to the post of Chief Food Inspector have been made. A perusal of the aforesaid order shows that 51 persons have been promoted to the posts of Chief Food Inspector in the scale of Rs. 9300-34800.

2. The facts, in brief, giving rise to the present dispute are as under.

3. The necessity of appointing Food Inspectors said to have arisen by virtue of Section 9 of Prevention of Food Adulteration Act, 1954 (*hereinafter referred to as the "1954 Act")* which empowers the Central Government or the State Government to appoint such persons as it thinks fit having prescribed qualification to be the "Food Inspector" for such local arias as may be assigned to them by the concerned Government. The Food Inspectors, so appointed are assigned several duties under the provisions of 1954 Act and the rules framed thereunder.

4. Till 1992 no separate rules governing recruitment and conditions of service of Food Inspectors were framed. It was governed by the general rules applicable to the Government employees of equivalent rank and status. For the first time, the statutory rules namely, Food Inspectors Service Rules, 1992 were framed and published in the gazette dated 24.04.1993. The service consists of Food Inspectors, Medical Health and Family Welfare Department. It has two cadres namely, Food Inspector and Chief Food Inspector. Source of recruitment for the post of Food Inspector is 100% by direct recruitment through U.P. Subordinate Services Selection Commission *(hereinafter referred to as the*

"Commission"). The post of Chief Food Inspector is to be filled in by promotion from amongst substantively appointed Food Inspectors. The criteria for promotion is seniority subject to rejection of unfit through a selection committee constituted as per "U.P. Constitution of Departmental Promotion Committee for Post Outside the Purview of Service Commission Rules, 1992".

5. In 1996, Commission advertised certain posts of Food Inspectors for direct recruitment. 506 candidates were declared successful. The petitioner is said to be at Serial No. 174 in the merit list of general candidates published by the Commission. Consequent to the aforesaid selection, appointment letters were issued to the petitioner and others on 09.11.1998. The petitioner joined on the post of Food Inspector on 18.11.1998 in District Badaun. Vide order dated 15.06.2005 the petitioner and a number of Food Inspectors were confirmed.

6. It is said that the letter of appointment issued to petitioner and other selected candidates require them to join by 10.12.1998 failing which their candidature was likely to be cancelled treating as if they are unwilling to join on the post of Food Inspector. Para 8 of the appointment letter also states that the seniority of selected candidates shall be determined later on according to the merit list received from the Commission. The appointments were made on a probation of two years and subject to result of Writ Petition No. 1663 of 1983, U.P. Health Inspectors Association Vs. State of U.P., Writ Petition No. 9809 of 1997, Dhanesh Dube Vs. State of U.P. and Writ Petition No. 27853 of 1997, Om Prakash Singh Vs. State of U.P. and others.

7. Some of the candidates, it is said, did not join within the time prescribed in the letters of appointment dated 09.11.1998, i.e., by 10.12.1998. One Narendra Pratap Singh who was selected alongwith petitioner and was issued letter of appointment on 09.11.1998 posting him in District Badaun was later on appointed vide order dated 29.07.2005. A copy of said order has been placed on record as Annexure-8 to the writ petition. It shows that Narendra Pratap Singh made a representation on 02.01.2004 stating that he did not receive any letter of appointment hence could not join. His request for appointment was accepted by the Government and non-joining was treated for valid reasons. Hence the letter of appointment was issued again on 29.07.2005.

8. Some more Food Inspectors, including respondent no. 5 confirmed vide order dated 25.07.2007 (Annexure-9 to the writ petition). It shows that 82 Food Inspectors appointed in 1998 and onwards, pursuant to the same selection of 1998 in which the petitioner was selected, were confirmed from various dates commencing from the year 2000 and onwards. The petitioner has said in para 29 of the writ petition about the confirmation of Narendra Pratap Singh but the said order dated 20.07.2007 in fact does not contain name of Sri Narendra Pratap Singh.

9. During the course of arguments learned counsel for petitioner, however, referred the name of Jay Pratap Singh, respondent no. 5, mentioned at serial No. 80 in the confirmation letter showing his date of appointment as 01.07.2003 and date of confirmation as 01.07.2005. Another order of confirmation of five persons dated 14.07.2008 is on page 117 of

the writ petition confirming Sri Jawahar Lal, Sri Ratnakar Pandey, Sri Rakesh Kumar Shukla, Sri Swami Nath and Sri Manoj Kumar Tomar w.e.f. various dates in 2000 and 2001 respectively.

10. It appears that a tentative seniority list of Food Inspectors/Chief Food Inspectors was published on 18.05.2000. The same having not been finalised, Writ Petition No. 5817(SS) of 2006, Sunil Kumar and others Vs. State of U.P. and others was filed in Lucknow Bench of this Court. Vide order dated 10.07.2006 the Court directed the respondents to finalise the seniority list of Food Inspectors of 1998 batch. Consequently a fresh tentative seniority list was published on 26.02.2007. It mentions that since the Commission did not forward any composite seniority list of various categories, namely, general, other backward class, scheduled caste and scheduled tribe hence for the purpose of seniority list the general candidates have been placed at top, whereafter Other Backward Class and the Scheduled Castes candidates were placed. No representation against the tentative seniority list was made by the petitioner. The inter se seniority of 1998 batch given in the tentative seniority list thus was treated final. Some individual representations were considered and disposed of regarding correction of names, date of birth etc. A final seniority list was consequently published on 14.09.2007 (Annexure-11 to the writ petition). The name of petitioner in the aforesaid seniority list was shown at serial No. 234 while the respondents no. 5 and 6 were shown at serial No. 124 and 129 respectively.

11. Later on amendment was made in respect to reserve category candidates by inserting Rule 8A in the Seniority Rules, 1991 vide U.P. Government Servant Seniority (3rd Amendment) Rules, 2007 *(hereinafter referred to as the "3rd Amendment, 2007").* In order to give effect thereto, a tentative seniority list in continuation of earlier final seniority list dated 14.09.2007 was issued on 15.04.2008. After receiving some objections raised therein, the final seniority list was published on 17.06.2008. No objection this time also was made by the petitioner. A comparison of seniority list dated 14.09.2007 and 17.06.2008 would show that about 13 candidates, above the petitioner's name, who retired by 17.06.2008, did not find mention in the later seniority list which obviously resulted in upward movement of petitioner in the later seniority list. So far as inter-se seniority of petitioner and respondents no. 5 and 6 is concerned it remain unchanged. The respondent no. 5 is at Serial No. 108 and respondent no. 6 is at Serial No. 113 in the seniority list dated 17.06.2008.

12. The petitioner claims that out of 506 candidates selected in 1998 for the post of Food Inspector, only 353 joined till the date of filing of the writ petition. He further states that the seniority list dated 14.09.2007 was a tentative seniority list and was not circulated (served) upon the concerned officials including the petitioner.

13. There are certain other facts pleaded in the writ petition relating to the matter of promotion to the post of Chief Food Inspector but during the course of arguments, learned counsel for the petitioner has confined his submissions only on the question of correctness of seniority list dated 17.06.2008 and has not said anything about the matter of

promotion hence I do not find it necessary either to refer pleadings in this regard or to consider validity of promotion list dated 19.04.2010.

14. Three counter affidavits have been filed on behalf of respondents. The respondents no. 1 to 4 have filed counter affidavit through learned Standing Counsel and is sworn by Dr. P.K. Sinha, the then Chief Medical Officer, Allahabad. The respondents no. 5 and 6 have filed separate counter affidavits and are represented by Sri K.C. Shukla and Sri D.S. Srivastava, Advocates, respectively.

15. The official respondents, i.e., respondents no. 1 to 4 have said that seniority list has been prepared in accordance with the Rules, i.e., Rule 5 of Seniority Rules, 1991. Some of the candidates who were allowed to join later, on showing valid grounds, have been allowed to retain seniority after the appointing authority got satisfied about the validity of reasons of late joining as provided in proviso to Rule 5 of Seniority Rules, 1991. It is also stated that against tentative seniority list circulated to all the concerned persons including the petitioner, no objection was received from the petitioner and thereafter the seniority list was finalised. It is also said that seniority list was finalised in 2007 so far as the petitioner's seniority qua respondents no. 5 and 6 was concerned. The same neither was objected nor challenged by petitioner, hence he has no occasion to challenge later seniority list dated 17.06.2008 which is only consequential and in order to comply Rule 8A of Seniority Rules, 1991 as inserted by 3rd Amendment Rule of 2007.

16. The respondent no. 5 in para 7 of counter affidavit has stated that he was at Serial No. 17 in the appointment letter dated 09.11.1998 and joined his duties on 05.12.1998. His merit position was also 17 in the general category candidates' list. A charge certificate showing his joining in the office of Chief Medical Officer, Etah dated 05.12.1998 has been filed as Annexure-CA-2 to the counter affidavit. He has also filed a photocopy of his service book showing his joining on 05.12.1998. He has also raised a preliminary objection that against the seniority list the petitioner has a statutory alternative remedy of approaching Tribunal under Section 4 of U.P. Public Service Tribunal Act, hence the writ petition deserved to be dismissed on this score.

17. The respondent no. 6 in para 4 of his counter affidavit has said that he was at Serial No. 24 in the merit list and joined on 04.12.1998 in the office of Chief Medical Officer, Khiri. He has said that his seniority has rightly been assigned over the petitioner and he is also rightly promoted as Chief Food Inspector being senior to petitioner.

18. Learned counsel for the petitioner while assailing the seniority list dated 17.06.2008 contended that it ought not to have been prepared on the basis of the merit list prepared by the Commission but from the "date of joining". He drew my attention to the order of confirmation showing the date of appointment of respondent no. 5 as 01.07.2003 and submitted that respondent no. 5 having joined after almost four and half years could not have been placed above the petitioner. No other discrepancy or error he could point out in the impugned seniority list except of his bare submission that the seniority ought to have been determined on

the basis of date of joining and not the merit list. In this regard he placed reliance on a five Judges Full Bench decision of this Court in **K.N. Singh Vs. State of U.P. and others, 1999(1) ESC 851.**

19. Learned Standing Counsel on the contrary raised certain preliminary objections about the maintainability of writ petition besides making submissions on merits. It is contended that seniority of petitioner qua respondents no. 5 and 6 was already determined finally on 14.09.2007. The same having not been challenged, the writ petition is liable to be dismissed since the subsequent seniority list is nothing but a consequential updating in view of later amendment in Rule 8A of Seniority Rules, 1991 but it does not affect seniority of petitioner qua respondents no. 5 and 6 in any manner. He further submits that the persons whose promotion is under challenge are not party to the writ petition, hence the relief sought against promotion list cannot be granted. He contends that persons with whom the petitioner feels aggrieved, whose names have been mentioned in para 29 of the writ petition are not party to the writ petition, and in their absence their seniority or promotion cannot be affected otherwise. For this reason also the writ petition is liable to be dismissed. On merits he submitted that admittedly the seniority has been determined in accordance with Rule 5 of Seniority Rules, 1991. The validity of Rule 5 is not under challenge. In the circumstances, the contention of petitioner that seniority ought to have been determined from date of joining, which is not the reckoning point of seniority provided in the rules, cannot be accepted.

20. Sri K.C. Shukla, Advocate adopting the argument of learned Standing Counsel stated that the date of appointment mentioned in the confirmation order in regard to respondent no. 5 appears to be some typographical error. He has placed on record the charge certificate as also photocopy of his service book which could not be controverted by petitioner by placing any relevant material on record, hence no valid objection can be taken regarding his seniority qua petitioner.

21. Having heard learned counsel for the parties and perusing the record I have no hesitation in observing that this writ petition is thoroughly misconceived and ill-advised.

22. The petitioner has claimed that the seniority list dated 14.09.2007 was tentative and not circulated hence he could not file his objections. However, a perusal of seniority list dated 14.09.2007 makes it clear that it is a final seniority list and had been published in furtherance of earlier tentative seniority lists dated 18.05.2000 and 26.02.2007. The petitioner has nowhere stated that the tentative seniority list dated 18.05.2000 or 26.02.2007 were never circulated or served upon him. It is also not his case that he filed any objection against the earlier tentative seniority lists. The seniority, therefore, having been determined finally on 14.09.2007 and the same having not been challenged by petitioner, either within a reasonable time after issuance of the said list or even in the present writ petition, this Court finds no occasion for petitioner to challenge the subsequent seniority list which is in substance nothing but a reiteration of the earlier seniority list. The only difference it has made is certain updating and corrections in the light of the Rule 8A of Seniority Rules, 1991 (vide 3rd Amendment of 2007). This amendment

does not affect the petitioner's seniority qua respondents no. 5 and 6.

23. Next obstruction in the way of petitioner is non impleadment of necessary parties. In para 29 of the writ petition the petitioner has mentioned names of 16 persons including the respondent no. 5. No person except respondent no. 5 has been impleaded. In case the petitioner's submission that the persons whose names are mentioned in para 29 of the writ petition since joined late, i.e., after the joining of petitioner, or the date prescribed in appointment letter and hence ought to be placed below petitioner, it was incumbent upon him to implead all those persons. They are necessary parties since any order passed as desired by petitioner against these 15 persons would obviously be adverse to them and in their absence no such adverse order can be passed. So far as respondent no. 5 is concerned, he has already shown to have joined in December, 1998. The two documents, namely, his charge certificate and photocopy of the service book could not have been controverted by petitioner by placing relevant material on record. In the circumstances, regarding the date of joining of respondent no. 5, this Court has no reason to discard the material placed on record by him and hold that he having joined on the post of Food Inspector on 05.12.1998 cannot be said to have joined in 2003 and if there is some discrepancy in the letter of confirmation that would not make no difference in seniority.

24. It is also admitted that validity of rule laying down the principle of determining seniority is not under challenge. Food Inspectors Service Rules, 1992 provides the manner in which seniority is to be determined vide Rule 20, which reads as under:

***"20. Seniority**:-The seniority of persons substantively appointed in any category of posts shall be determined in accordance with the Uttar Pradesh Government Servants Seniority Rules, 1991, as amended from time to time."*

25. This Rule 20 takes us to Seniority Rules, 1991. Rule 5 of Seniority Rules, 1991 which is admittedly applicable in the case in hand, reads as under:

***"5. Seniority where appointments by direct recruitment only.--**Where according to the service rules appointments are to be made only by the Direct recruitment the seniority inter se of the persons appointed on the result of anyone selection, shall be the same as it is shown in the merit list prepared by the Commission or the Committee, as the case may be:*

Provided that a candidiate recruited directly may lose his seniority, if he fails to join without valid reasons when vacancy is offered to him, the decision of the appointing authority as to the validity of reasons, shall be final:

Provided further that the persons appointed on the result of a subsequent selection shall be junior to the persons appointed on the result of a previous selection.

Explanation--Where in the same year separate selections for regular and emergency recruitment are made, the selection for regular recruitment shall be deemed to be the previous selection."

26. At this stage, Rule 8A as was inserted by 3rd Amendment Rules, 2007 may also be reproduced as under:

*"**8A. Entitlement of consequential seniority to a person belonging to Scheduled Castes or Scheduled Tribes.--** Notwithstanding anything contained in Rules, 6, 7 or 8 of these rules, a persons belonging to the Scheduled castes or Scheduled Tribes shall, on his promotion by virtue of rules of reservation/roster, be entitled to consequential seniority also."*

27. Rule 8A, therefore, would have been relevant in the seniority list in dispute so far as it relates to determining seniority of Chief Food Inspectors. Since the post of Food Inspector is 100% by direct recruitment it is governed by Rule 5 only which provides principle for seniority, the order of selection, i.e., the merit list prepared by the Commission. It also says that if a person fails to join without valid reason, when vacancy is offered to him, only then he may loose his seniority, and not otherwise. In this regard decision of appointing authority as to the validity of reasons shall be final.

28. It is not the case of petitioner that seniority list of Food Inspectors has not been prepared according to the order of merit prepared by the Commission. On this aspect the petitioner has no grievance at all.

29. His sheet anchor is the decision of this Court in **K.N. Singh (supra)** which provides seniority from the "date of joining" in respect to direct recruits. In this regard learned counsel for the petitioner placed reliance on para 10 of the judgment, relevant extract whereof is as under:

". . . . and the Supreme Court further held that for determining the seniority of the direct recruits the only date for consideration was the date of joining the service."

30. I am constrained to observe that reference and reliance on the aforesaid judgment is thoroughly misconceived. Learned counsel for the petitioner without looking into the relevant service rules and the matter which was considered by the Court, in a blindfold manner has placed reliance on certain observations which are nothing but reiteration of the relevant service rules applicable in that case. This writ petition appears to have been filed only on the basis thereof and this itself is a sufficient reason for dismissal of the present writ petition. **K.N. Singh (supra)** was a decision relating to the dispute of seniority in U.P. Higher Judicial Service. It is admitted that U.P. Higher Judicial Service is governed by separate set of rules namely, U.P. Higher Judicial Service Rules, 1975. Rule 26 thereof lays down the principle of seniority in U.P. Higher Judicial Service, and that which came up for consideration before this Court in **K.N. Singh (supra)**, reads as under:

***"26. Seniority--**(1) Except as provided in sub-rule (2), seniority of members of the service shall be determined as follows:*

(a) Seniority of the officers promoted from the Nyayik Sewa vis-a-vis the officers recruited from the Bar shall be determined from the date of continuous officiation in the service in the case of promoted officers and from the date of their joining the service in the case of direct recruits. Where the date of continuous officiation in the case of an officers promoted from the Nyayik Sewa and the date of joining the service in

the case of a direct recruit is the same, the promoted officer shall be treated as senior;

Provided that in the case of promoted officer the maximum period of continuous officiation in the service shall not, for the purpose of determining seniority exceed three years immediately preceding the date of confirmation."

31. Since Rule 26 itself provides different reckoning point of seniority for promotees and direct recruits in U.P. Higher Judicial Services, the Apex Court considered the aforesaid provision in **O.P. Garg and others Vs. State of U.P. and others, AIR 1991 SC 1202** and held that seniority of promotees shall be determined from the date of continuous officiation against the vacancy in their quota while seniority of direct recruits would be determined from the date of their joining service and none else. This was only a reiteration of what was provided in Rule 26(2) as it stood at that time which was up for consideration before Apex Court in **O.P. Garg (supra).** Same was followed by this Court in **K.N. Singh (supra).**

32. A judgment in the matter of seniority based on a precise and specific service rule applicable to the particular service cannot be relied on or made a foundation for advancing arguments in respect to a different service governed by different set of service rules having different principles for determination of seniority. Rule 26 of U.P. Higher Judicial Service Rules 1975 was totally differently worded than Rule 5 of Seniority Rules, 1991 which is applicable in the present case. Therefore decision in **K.N. Singh (supra)** involving a different set of service rule and different service, relied on by learned counsel for the petitioner is wholly inapplicable. That would not carry his case further to support him at all.

33. Various decisions in matter of seniority, relating to different services and different service rules, cannot be relied on interchangeably unless it is shown that the rules are pari materia in all respects, bereft of relevant facts. The five Judges Bench of this Court in **K.N. Singh (supra)** has also led stress on this aspect, in para 9 of the judgement, which reads as under:

"The learned counsel no doubt made reference to various case-laws on the question of inter se seniority between promotee officers and directly recruited officers in different service. All these cases dealt with the particular rules applicable to the service in question in those cases and the Courts had given interpretations of those Rules. . . . . "

34. It is thus evident that question of applying date of joining for the purpose of seniority in the present case does not arise. Even otherwise, normally the date of joining bereft of natural expediency and contingencies has never been accepted as a valid reckoning point of seniority. I take up an illustration in this regard though there may be many of such kind. Appointment letters are issued at Lucknow appointing 100 candidates throughout the State. It may happen that all the individual letters are dispatched by the office concerned on the same date or it may take two or more days. The candidates residing in the nearby area of Lucknow or in the same city may receive letters of appointment in one or two days while those residing at different corners of the State, namely, Gorakhpur, Saharanpur, Lalitpur etc. may take much

more time. Then the place of their joining and its distance would also be a relevant aspect. A person residing at Lalitpur, if is required to join at Gorakhpur or Kushinagar may take a longer time than a candidiate residing at Rai Bareilly or Sitapur if required to join at Lucknow or in the nearby districts. Then some credit has been given to the postal delay also inasmuch as there may be some reason for the postal department in delivering the letters of appointment to the candidates across the State. These considerations and similar others may result in delay in joining the service by the candidates irrespective of their position in merit list and the order of appointment. If the accidental date of joining in such circumstances is taken to be the reckoning point of seniority which is quite fortuitous by very nature, given some of the illustrations above, in my view, this would itself vitiate such provision which may provide for date of joining as reckoning point for seniority unless a fixed reckoning point which has no fortuitous aspect in its application is provided. Rule 5 of Seniority Rules, 1991 has been couched with the words that it is the merit prepared by the Commission which will govern inter se seniority of all direct recruits. This excludes the scope of arbitrariness or fortuitous circumstances which may affect inter se seniority of the candidates selected in the same selection. The rule framing authority in its wisdom has recognised this principle, which is not challenged before this Court in the present writ petition. I, therefore, have no reason to look into another aspect of the matter except what has been prescribed in the rules, applicable in the present case.

35. Learned counsel for the petitioner however submits that some candidates were allowed to join after several years and to allow them to retain seniority also is not only extremely harsh and unjust but travels in the realm of arbitrariness.

36. Answer to this submission is that Rule 5 takes care of such circumstances. It says that if a late joining is for valid reason, the candidiate would not suffer. The decision in this regard is to be taken by the appointing authority whose decision has been declared final. No such decision in respect of any individual case has been challenged before this Court on the ground that such discretion has been exercised by appointing authority in reference to any individual candidiate arbitrarily or illegally. In absence of any such challenge, if for valid reaons, the appointing authority has allowed a candidiate, higher in merit, to join later, may be after a few years, in absence of any challenge thereto, I do not find any reason to interfere in such individual case. The petitioner though has not impleaded Sri Narendra Pratap Singh whose case in this regard has been referred to in para 29 of the writ petition but as I have already mentioned, Sri Narendra Pratap Singh represented before the appointing authority that he did not receive appointment letter dated 09.11.1998 as a result whereof he could not join. This claim of Sri Narendra Pratap Singh having not been found untrue, the appointing authority accepted his representation and allowed him to join in 2005. In absence of any challenge to such decision of appointing authority, no observation can be made by this Court adverse to Sri Naredra Pratat Singh. Learned counsel for the petitioner even otherwise could not point out any inherent fallacy or illegality therein.

37. the above discussion leads me to no other inference but to dismiss this writ petition being wholly devoid of merit.

38. In the result, the writ petition is dismissed with costs which is quantified to Rs. 20,000/-.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.01.2011

BEFORE
THE HON'BLE SHASHI KANT GUPTA, J.

Civil Misc. Writ Petition No. 75307 of 2010

Thakur Prasad Madhesiya ...Petitioner
Versus
The State of U.P. and another ...Respondents

Counsel for the Petitioner:
Sri Syed Mahmood

Counsel for the Respondents:
Sri Amitabh Agrawal
Sri Saurabh Jain
C.S.C.

U.P. Urban Building Regulation (of Letting and Rent) Act 1972-Section 21 C-Ejectment Application-technical plea by tenant regarding maintainability of application-as the tenant inducted by land lord in un-authorise manner-relationship of land lord-tenant accepted-held-in view of Nutan Kumar case-application for ejectment of tenant-maintainable.

Held: Para 18

In view of the aforesaid discussions, with utmost humility, I respectfully differ with the decision of this Court in the case of Nand Lal Chaurasia (supra). I do not seen any reason to uphold the contention of the petitioner that the application under Section 21 of the Act is not maintainable against a tenant inducted by the landlord without any allotment order. I am of the considered opinion that the application under Section 21 of the Act is fully maintainable in view of the decisions in the cases of Nutan Kumar's and Nanakram's (supra).

Case law discussed:
2003 (6) AWC 5288; 2002 (2) ARC 645; AIR 1986 SC 1194; 2008 (3) ARC 772; 2005 (1) ARC 144; 2006 (1) AWC 349.

(Delivered by Hon'ble Shashi Kant Gupta, J.)

1. This writ petition is directed against the judgment and order dated 19.11.2010 passed by the learned Additional District Judge, Deoria upholding the order dated 8.4.2010 passed by the Prescribed Authority, Deoria, District Deoria whereby the application filed by the landlord under Section 21 (1)(a) of the UP Act No. 13 of 1972 (in short "the Act") has been allowed.

2. The brief facts of the case are as follows;

3. An application for release of the disputed shop was filed by the landlord under Section 21 of the Act for settling his son in the business. The application was allowed. Aggrieved and dissatisfied with the said order, the petitioner filed an appeal which was dismissed by the appellate authority by order dated 19.11.2010 holding the need of the landlord to be genuine and bonafide and also held that the comparative hardship tilts in favour of the landlord.

4. The only point raised by the learned counsel for the petitioner is that the application filed under Section 21 of the Act against the petitioner is not maintainable since he is not a tenant within the meaning of the Act but merely an unauthorized occupant

inducted by the landlord without any allotment order in contravention of the Act.

5. He further submitted that the application under Section 21 of the Act can be filed only against a person having a allotment order in his favour. The petitioner cannot be said to be "tenant" as he was inducted without any allotment order in contravention of the Act. In support of his contention, the learned counsel for the petitioner has relied upon the decision of this Court in the case of ***Nand Lal Chaurasia Vs. VIth Additional District Judge, Pratapgarh and others 2003 (6) AWC 5288*** wherein it has been held that the landlord leasing out shops in question to the petitioner (of that writ petition) under written agreement in contravention of provisions of Section 11, 13 and 16 (without allotment order), cannot be said to be 'tenant' within the meaning of the Act. Hence, the application for release under Section 21 (1)(a) of the Act is not maintainable.

6. Per contra, learned counsel for the respondent No. 2 has submitted that in view of the decisions of Supreme Court in the cases of ***Nutan Kumar and others Vs. IInd Additional District Judge and others 2002 (2) ARC 645 and Nanakram Vs. Kundalrai, AIR 1986 SC 1194,*** the law laid down in the case of Nand Lal Chaurasia (supra) cannot be said to be a good law.

7. Heard the learned counsel for the petitioner and Mr. P. K. Jain, learned Senior Counsel assisted by learned counsel, Mr. Saurav Jain appearing on behalf of the Respondents No. 2.

8. The only question to be adjudicated upon by this Court as to whether the application under Section 21 of the Act is maintainable against the petitioner who was inducted without an allotment order.

9. A bare perusal of the impugned judgment would indicate that the court below has recorded a very categorical finding that parties are having landlord and tenant relationship. The relationship of landlord-tenant has also been admitted by the petitioner in paragraph 3 of his written statement.

10. Apex Court in the case of the ***Nutan Kumar and others*** (supra) while following the decision of Bench of three judges in the case of ***Nanak Chandra*** (supra) in paragraphs 7 and 12 has held as follows;

7. In the case of Nanakram v. Kundalrai reported in (1986) 3 SCC 83 the question was whether a lease in violation of statutory provisions was void. It was held that in the absence of any mandatory provision obliging eviction in case of contravention of the provisions of the Act the lease would not be void and the parties would be bound, as between themselves, to observe the conditions of lease. It was held that neither of them could assail the lease in a proceeding between themselves. This authority was in respect of the Central Provinces and Berar Letting of Houses and Rent Control Order, 1949, whereunder also the landlord was obliged to intimate a vacancy to the Deputy Commissioner of the District and the Deputy Commissioner could allot or direct the landlord to let the house to any person. The provisions were more or less identical to the provisions of the said Act. This authority has directly dealt with the questions under consideration and answered them. The majority Judgment takes note of this authority and holds as follows:

"With utmost humility and reverence it is stated that above observations are not compatible with provisions of Section 10 and 23 of the Contract Act. Otherwise also, it is most respectfully pointed that the statement of law contained in the said observation is, perhaps, in conflict with the law declared in the decisions of the Hon'ble Suprme Court in Waman Shriniwas Kini v. Rati Lal Bhagwan Das & Co., Shrikrishna Khanna V. Additional District Matgistrate, Kanpur and others, and Manna Lal Khetan V. Kedar Nath Khetan."

Thus it is to be seen that the majority Judgment, with a pretence of humility and reverence refuse to follow a binding authority of this Court. It was not open for the Full Bench to comment that the authority was not compatible with provisions of Sections 10 and 23 of the Contract Act. The Full Bench also realised that there are no conflicting authorities. They therefore say that this authority is "perhaps in conflict with" the decisions in Waman Shriniwas Kini, Shrikrishna Khanna and Manna Lal Khetan. One must therefore see whether there is any conflict of decisions. If there is no conflict then judicial discipline and propriety required that the majority of the Full

Bench followed the binding authority of this Court.

12. As Nanakram's case was decided by three Hon'ble Judges of this Court, it would also be binding on us. We are therefore not going into the question of correctness or otherwise of such a view. We may however mention that the impugned Judgment dated 20th May, 1993, of the Full Bench, is not correct for another reason also. Section 13 of the said Act specifically provides that a person who occupies, without an allotment order in his favour, shall be deemed to be an unauthorised occupant of such premises. As he is in auauthorised occupation he is like a trespasser. A suit for ejectment of a trespasser to get back possession from a trespasser could always be filed. Such a Suit would not be on the contract/agreement between the parties and would thus not be hit by principles of public policy also."

11. Thus, it was held that unless the statute specifically provides, lease in violation to the statutory provision would not be void and the parties would be bound as between themselves to observe the conditions of lease.

12. Learned counsel for the petitioner has vehemently argued that although the suit filed for arrears of rent and ejectment under Section 20 of the Act is maintainable against the person occupying the premises without allotment order but an application under Section 21 of the Act is not maintainable for release of the premises. Learned counsel for the petitioner further submitted that ***Nutan Kumar's (supra***) case is not applicable since in the said case the issue was only with regard to the maintainability of the suit filed under Section 20 of the Act against the person occupying the premises without allotment order and the Apex Court in the said case never held that the application under Section 21 of the Act would also be maintainable against a person inducted by the landlord without an allotment order.

13. The argument of the learned counsel for the petitioner is wholly misconceived and is untenable. The suit for arrears of rent and ejectment under Section 20 of the Act and an application under Section 21 of the Act are maintainable only against the tenant. In both the provisions it is

necessary that the defendant should be a tenant. There is no specific provision in the Act to debar the landlord from filing an application under Section 21 of the Act for release of the premises in favour of the landlord against the tenant occupying the premises without any allotment order. The law laid down by the Supreme Court in the cases of **Nutan Kumar (supra)** and **Nanak Chand (supra)** shall also apply with full force qua the maintainability of the application filed under Section 21 against the tenant occupying the premises without allotment order.

14. I am also fortified in my opinion by following decisions of this Court which I wish to refer briefly;

(1). Munna Lal Vs. IInd Additional District Judge/Fast Track Court and others 2008 (3) ARC 772,

(2). Munna Lal Agarwal Vs. Rent Control and Eviction Officer/City Magistrate reported in 2005 (1) ARC 144,

(3). Pavitra Kumar Garg Vs. Addl. District Judge reported in 2006 (1) AWC 349.

15. This Court in the case of ***Munna Lal Vs. IInd Additional District Judge/Fast Track Court and others 2008 (3) ARC 772,*** interalia, held as follows;

"13. On the parameters set out, the facts of present case is being dealt with. Once it has been held by the Hon'ble Apex Court in the case of Nanakram v. Kundalraj, 1986 (3) SCC 83, that inter se parties contract, even if, it is if against the provisions of law is binding and ejectment proceedings therein have been held to be maintainable. Thus as far as Madan Lal respondent is concerned once he had entered into an agreement of tenancy which fact has been admitted by him in his written statement, then vis-a-vis petitioner-landlord he cannot come forward and say that he is unauthorized occupant and as such proceeding under Section 21(1)(a) of U.P. Act No. 13 of 1972 is not maintainable. Vis-a-vis landlord, his status is that of tenant, as tenant in relation to building means a person by whom rent is payable. In term of Section 13, without an order of allotment, tenant's status under deeming provision is that of an unauthorized occupant and that of trespasser and suit for getting back possession from trespasser can always be filed. In such a situation as far as landlord is concerned, it would be case of election of remedies for him. It is for the landlord to chose, the forum provided for. Tenant cannot gain any advantage or benefit out of the said situation. Inter se parties who have entered contract of tenancy and have developed landlord tenant relationship though contrary to law quo the same, landlord has got right to enforce his right on the basis of aforementioned contract which is inclusive of his right of eviction. Said contract of tenancy is not binding of Rent Control and Eviction Officer and even on prospective allottee,and the machinery for declaring vacancy can always be set in motion and on vacancy being declared landlord has every right to file release application under Section 16(1)(b) of U.P. Act No. XIII of 1972. Proceedings under Section 21(1)(a) of U.P. Act No. 13 of 1972 deals with situation when landlord requires premises in question for bona fide need of the landlord vis-a-vis tenant. Madan Lal had entered into agreement as tenant and has paid rent also, in this background it does not lie in the mouth of Madan Lal to say that by operation of law as his status is that of unauthorized occupant, as such proceedings are not competent and

maintainable. This plea is totally in breach of rights settled in the case of Nanakram (supra), which still holds the field. This Court even before reversal of Nutan Kumar v IInd A.D.J. 1993 (2) ARC 204 (FB), took the view in the case of Brij Nandan Sahai Hajela v. IIIrd A.D.J., Shahjahanpur, 1996(1) ARC 165, wherein it was held that if tenant has not raised this plea when an application under Section 21 was filed and accepted himself as tenant, such question cannot be raised subsequently. Said Judgment has been followed by this Court, in the case of Shaliq Ahmad v. A.D.J., 1999 (1) ARC 321, as follows. "The petitioner in the present case having never raised the question that he is unauthorized occupant, it is not now open to him to urge that the application under Section 21(1)(a) of the Act is not maintainable. In case petitioner had alleged that he was in unauthorized occupation, it was open to landlord-respondent to file application for release under Section 16(1)(b) of the Act." The view has again reiterated in the case of Kailash Chandra Gaur v. Raj Kumar Sharma, 1999 (1) ARC 333. The issue, which is sought to be raised by the petitioner after reversal of the Full Bench judgment by Hon'ble Apex Court has already been answered by this Court in the case of Munna Lal Agarwal v. Rent Control and Eviction Officer/City Magistrate, Mathura and others, 2005 (1) ARC 144, as the agreement of letting is binding in between the landlord and tenant, hence landlord is fully entitiled to file release application under Section 21 of the Act. Relevant paras 8 and 9 is being extracted below:

8. In my opinion during the currency of Full Bench judgment of the Nootan Kumar landlord could be permitted to file release application under Section 16 of the Act on the ground that even though he himself let out the building to the tenant still as it was done without allotment order, hence legally building was vacant. The reason is that in view of the Full Bench landlord had been left with no other option. He could not file release application under Section 21 of the Act where need of the landlord might be contested by tenant and tenant could asserts his hardship. By virtue of the Full Bench judgment even suit on the grounds of default etc. as mentioned under Section 20 (2) of the Act could not be filed if the landlord had let out the building after July 1976 without allotment order,

9. However, reversal of the Full Bench judgment by the Supreme Court has changed the entire scenario. Now the agreement is binding in between landlord and tenant and landlord can file suit for eviction on the grounds mentioned under Section 20 (2) of the Act and also release application under Section 21 of the Act on the ground of bonafide need. I am, therefore, of the opinion that if landlord lets out building on which U.P.R.C. Act is applicable without allotment then he himself can not file release application on the ground of deemed vacancy under Section 12/16 of the Act. In release proceedings under Section 16 of the Act tenant/unauthorized occupant can not participate and he can not assert that need of the landlord is not bonafide. As the agreement of letting is binding in between landlord and tenant hence landlord is fully entitled to file release application under Section 21 of the Act."

16. In ***Munna Lal Agarwal Vs. Rent Control and Eviction Officer/City Magistrate reported in 2005 (1) ARC 144,*** also this Court has held that the agreement is binding between the landlord and tenant if

building is covered by the Rent Control Act and in case the tenant has been inducted without allotment order, the landlord can file release application under Section 21 of the Act.

17. In the case of ***Pavitra Kumar Garg Vs. Addl. District Judge reported in 2006 (1) AWC 349,*** this Court has reiterated that the release application under Section 21 (1)(a) of the Act is maintainable against the person occupying the premises without any allotment order.

18. In view of the aforesaid discussions, with utmost humility, I respectfully differ with the decision of this Court in the case of Nand Lal Chaurasia (supra). I do not seen any reason to uphold the contention of the petitioner that the application under Section 21 of the Act is not maintainable against a tenant inducted by the landlord without any allotment order. I am of the considered opinion that the application under Section 21 of the Act is fully maintainable in view of the decisions in the cases of ***Nutan Kumar's and Nanakram's (supra).***

19. No other point has been pressed.

20. In view of the above, I do not find any illegality or infirmity in the orders passed by the court below.

21. In the result, the writ petition is dismissed.
