APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 28.07.2011

BEFORE
THE HON'BLE DEVI PRASAD SINGH, J.
THE HON'BLE S.C. CHAURASIA, J.

First Appeal No. 77 of 2010

Ajay Lavania S/O Late Dr.Jagdish Prasad Lavania (At 2 P.M.) ...Petitioner
Versus
Smt. Shobhna Dubey D/O Dr. S.P. Dubey W/O Dr. Ajay Lavania ...Respondent

Counsel for the Petitioner:
Sri Sudeep Seth

Counsel for the Respondents:
Sri Pawan Kumar Pandey

Hindu Marriage Act-Section 13-Divorce-on ground of apprehension in mind resulting into harm or injury-held-apprehension should be resemble no material placed-only on liking or disliking-matrimonial life can not be thrown on flimsy ground.

Held: Para 65

Apprehension with regard to harm or injury should also be of such nature which may cause the other side irreparable loss or injury. Meaning thereby, the reasonable apprehension with regard to harm or injury should be such which may not be bearable to lead a normal life.

In the present case, there appears to be no material which may create a reasonable apprehension in the mind of the plaintiff appellant resulting into harm or injury in incident which may not be bearable or irreparable because of which the appellant cannot lead a matrimonial life along with the respondent. Liking or disliking shall not be a ground to decree a divorce.

Case law discussed:
(2003) 6 SCC 334; 2003(2) AWC 1665(SC); 2005(3) AWC 2093; AIR 2007 Andhra Pradesh 201; Civil Appeal Nos.8196-8197 of 2010 Sanjeeta Das versus Tapan Kumar Mohanty, another judgment dated 27.2.2009 delivered in Civil Appeal No.1330 of 2009 Vishnu Dutt Sharma versus Manju Sharma; (2004)7 SCC 747; [2002(46)ALR 465] ;(2001)4 SCC 250; AIR 2005 Bombay 278; AIR 1989 Delhi 121; AIR 1984 Allahabad 81; AIR 1964 MP 28; (2009)4 SCC 366 ; (2005)3 SCC 313 ; (2005)10 SCC 299; (1997)7 SCC 7

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

1. Present appeals under Section 19 of the Family Courts Act, read with Section 28 of the Hindu Marriage Act, 1955 have been preferred against the impugned judgment dated 27.8.2010, passed by Principal Judge, Family Court, Lucknow so far as it relates to decree of Regular Suit No.2077 of 2007 filed by the respondent under Section 9 of the Hindu Marriage Act. By the said judgment dated 27.8.2010, learned Family Court has also dismissed the suit of plaintiff/ appellant filed under Section 13 of the Hindu Marriage Act.

2. Since ages, solemnisation of marriage has been found to be best mode of life to save the human race from animal's living and consequential irreparable injury. The institution of marriage is not only based on thousand years of experience of human race but it is a time tested ceremony which has saved the human race since ages from desertion, prostitution and different forms of agony. Different religions have given importance to marriage in different way. Even, non-believers prefer marriage to save their children or coming generation to become street boy. Non-believers may enter into wedlock

under the law framed by the State. In India, particularly among Hindus, ceremony of marriage has been pious bond to unite men and women to work collectively not only for own interest but also for generations to come.

Marriage in Hindu Religion

3. Marriage and sonship constitute some of the unique chapters in the litera legis of ancient Hindu Law. As early as the time of Rig-Veda marriage had assumed the sacred character of sacrament and sanction of religion had heightened the character and importance of the institution of marriage. The Rig-Veda pronounces some impressive texts:

After completing the seventh step ***(Saptpadi)*** the bridegroom said: "with seven steps we have become friends ***(sakha).*** May I attain to friendship with thee: May I not be separated from thy friendship." Satpatha Brahamna speaks of the wife as the half of one's self- ***Ardho ha va esha atmano.***

4. The basal thought was that marriage was a prime necessity for that alone could enable a person to discharge properly his religious and secular obligations. The earliest records shows that rules of inheritance depended on the rules of marriage and it was obligatory on the father to give the daughter in marriage as gift are given. The Smiritis deals with the subject of marriage with meticulous care and make fascinating study. Apastamba has stated that from time of marriage the husband and wife were united in religious ceremonies and likewise in rewards of acts of spiritual merit.

5. **Marriage a Sacrament:** Marriage is necessarily the basis of social organization and foundation of some important legal rights and obligations. The importance and imperative character of the institution of marriage needs no comment. In Hindu Law marriage is treated as a samskara or a sacrament. It is the last of ten sacraments, enjoyed by the Hindu religion for regeneration of men and obligatory in case of every Hindu who does not desire to adopt the life of sanyasi. From the very commencement of Rig-Vedic age, marriage was a well established institution, and the Aryan ideal of marriage was very high. Monogamy was the rule and the approved rule, though polygamy existed to some extent. In Vedic period, the sacredness of the marriage tie was repeatedly declared; the family ideal was decidedly high and it was often realized.

The high value placed on marriage is shown by the long and striking hymn of **Rig-Veda, X, 85;** "Be, thou, mother of heroic children, devoted to the Gods, Be, thou, Queen in thy father -in -law's household. *May all the Gods unite the hearts of us two into one".*

The wife on her marriage was at once given an honoured position in the house. She was mistress in her husband's home and where she was the wife of the eldest son of the family, she exercised authority over her husband's brothers and his unmarried sisters. She was associated in all the religious offerings and rituals with her husband. As the old writers put it," a woman is half her husband and completes him".

Manu in impressive verses, exhorted men to honour and respect woman. Woman must be honoured and adorned by their fathers, brothers, husbands, and brothers- in-law who desire their own welfare. Where women are honoured, there gods are pleased; but where they are not honoured, no sacred rite yield rewards." The husband receives wife from gods, he must always support her while she is faithful". "Let mutual fidelity continue until death. This may be considered as the summary of the highest law for husband and wife."

Dispute between husband and wife not allowed to be litigated either in the customary tribunals or in the king's courts. Neither bailment nor contracting of debt, neither bearing testimony for one another nor partition of property was allowed between them.

6. According to Hinduism, marriage between two souls is a very sacred affair that stretches beyond one lifetime and may continue to at least seven lives. The relationship between the two does not necessarily have to begin only when they have attained birth as human beings. The gender of the two partners also does not have to the same in all the births. As the stories in purans confirm, two individual souls may come together any time during their existence upon earth, even when they assume a lower life from, such as that of any animal or bird, and carry forward their relationship further into higher life forms such as that of human beings. Once married, a couple is expected to uphold their family names by remaining faithful and truthful to each other and by enacting their respective roles as laid out in the Hindu law books.

As the epic Ramayana and Mahabharata illustrate, a couple ought to stick together through the ups and downs of life, however challenging and arduous the situation may be, taking care of each other and keeping in each other. According to beliefs of Hinduism, marriage is a sacred institution devised by gods for the welfare of human beings. Its primary purpose is procreation and continuation of life upon earth. Sexual union is intended solely for this purpose and should be used as such. Its secondary purpose is upholding of the social order and the Hindu dharma, while its ultimate aim is spiritual union with the inmost self, which is possible when a couple perform their obligatory duties and earn the grace of god through their good karma. A man and woman are believed to come together as husband and wife primarily for spiritual reasons rather than sexual or material, although they may not be mentally aware of the fact. Once married, the couple is expected to carry out their respective traditional duties as house holders and upholders of family traditions and work for the material and spiritual welfare of each other, the members of their family and also society.

7. The concept of divorce is alien to Hinduism, as marriages are meant to last for a life time. Neither men nor women can throw away their martial relationships on some flimsy or selfish or whimsical grounds. Remarriage is permitted only under exceptional circumstances. Polygamy to some extent also was the practice among the Hindus

just a few centuries ago. Presently, in India, the Hindu Marriage Act not only prohibits it but also makes it a punishable offense.

However, with the change of time, advent of western philosophy in India and having no research oriented work done at political and judicial forum, gradually the institution of marriage is diluting in this country also. Higher judiciary also in absence of any backup to find out the injury caused by western way of life approved to some extent the matrimonial life professed by western without thinking the consequences which nation may suffer in due course of time.

8. Now, it is well known that more than 50% wedlock breaks in United States of America and sometime divorce takes place in few months of solemnisation of marriage leaving the lady or man in solitary state or remarriage again. Change of wife and husband in substantial number is frequent because of "Cake Walks Law" pertained to divorce. The effect of breakage of the institution of marriage cannot be noticed in short span of time but it took centuries and when society awakes it becomes too late.

FACTS OF PRESENT CASE

9. It is unfortunate that present controversy relates to a couple both of whom belongs to intellectual class of the society, meant to serve the people. Both are doctors. The appellant Ajai Lavania is a Surgeon possessing M.S. Degree. The respondent Smt. Shobhna Dubey is Ophthalmology doctor.

10. The marriage of the appellant and respondent was solemnised at a very sacred place of the country, i.e. Brindavan, district Mathura on 1.12.2001. Both came known to each other through advertisement in the newspaper. At the time when marriage was solemnised, the appellant Ajai Lavania was pursuing his M.S. Course at Manipal, Karnataka and the respondent was doing her senior Residency at Meerut. After marriage they had gone for honeymoon to Goa for about two weeks. Then went back to their respective place at Meerut and Manipal. In July, 2002, the appellant had completed his M.S. Course whereas the respondent had completed her Senior Residency course. It is stated by the appellant that on persuasion of the respondent, the appellant joined a job at Bhairwa Medical College, Nepal where both used to enter into quarrel for small matters. Having no consensus to live together the respondent went to Meerut and joined Senior Residency again . In December, 2002, the appellant went to Manipal along with the respondent and lived there as husband and wife. There too, it is alleged that there was difference of opinion on small matters. The respondent joined Shanti Manglik Hospital Fateha Road, Agra in July, 2007 and started to live there along with the appellant. It is alleged that the respondent instructed the appellant not to bring his grand father and grand mother which has been denied by the respondent.

11. The cause of action arose on 26.9.2007 when it is alleged by the appellant that the respondent assaulted him, broken the furnitures and assaulted him with cutting his body with teeth.

The appellant got himself checked up in S.N. Medical College, Agra and informed the police and also lodged a First Information Report against the respondent. It is also alleged that the respondent was ousted from Shanti Manglic Hospital by the Committee of Management on account of her short temperament.

12. The appellant has joined Apolo Hospital, Delhi. There too, it has been alleged by the appellant that the respondent visited the hospital on 19.10.2007 and quarreled with the staff of the Apolo Hospital. From the material on record, it is admitted fact that the appellant had gone to attend an ENT conference on 28.9.2007 at Allahabad along with the respondent and while returning from the conference, it has been alleged by the respondent that the appellant left her at Lucknow with demand to pay Rs.4 lacs so that he may visit Canada. It has been stated by the respondent that the appellant has left her at Lucknow on 30.9.2007 merely in the cloth she was wearing stating that he sill not take her to Delhi unless her guardian pays Rs.4 lacs to enable him to visit Canada. Under the aforesaid backdrop, the respondent had filed a First Information Report under Crime No.135/2008 under Sections 498-A/506/507 IP.C read with Section ¾ Dowry Prohibition Act in which the appellant and his family members were convicted and later on released on bail by the appellate court. However, the respondent insisted that she want to live with the appellant and forgives him but it appears that the appellant did not agree with the respondent to live together under the garb of constant tussle between them and lodging of the criminal case from time to time against each other.

Subject to aforesaid backdrop, while asserting her right to live together, the respondent has filed a case under Section 9 of the Hindu Marriage Act at Lucknow, registered as Suit No.2077 of 2007. Thus, the suit was filed in the year 2007 by the respondent for restitution of conjugal rights.

13. On the other hand, the appellant has filed a suit No.669 of 2009 under Section 13 of the Hindu Marriage Act at Agra on 24.10.2007 for divorce which was transferred to Lucknow. The cause of action has been shown as on 26.9.2007, when he alleged to have suffered injury during quarrel and got himself treated at S.N. Medical College, Agra and lodged a First Information Report against the respondent wife. The Family Court, Lucknow clubbed both the suits having common facts and decided by the impugned judgment.

14. While decreeing the petition filed by the respondent under Section 9 of the Hindu Marriage Act and dismissing the suit filed by the appellant for divorce, learned Family Court took note of the fact that when the appellant visited Moti Lal Nehru Medical College, Allahabad to attend 20th National Conference on 29/30.9.2007, both stood together in conference and remained in the hospital as husband and wife. Accordingly, learned trial Court noted the incident of 26.9.2007 as false with finding that in case it would have been taken place, then there was no occasion for the appellant and respondent to attend the conference on

29./30.9.2007 at Allahabad, that too when a First Information Report was lodged by the appellant against the respondent. The trial court took note of the allegation levelled by the respondent that the appellant having illicit relationship with a lady Rashmi and he is a club visitor and habitual drinker and the effort made was to any how to break the marriage to continue with his living relationship. He further observed that it is not a case of cruelty but a case where a defence has been set up to obtain divorce on false ground. The Family Court further noted from the evidence that because of wedlock, the respondent was pregnant but on account of complicated Ectopic Pregnancy, the respondent suffered from abortion after about 8-9 months. Even after the abortion, they lived together with physical relationship. During the course of trial, in the suit No.2077 of 2007 for restitution of conjugal rights, following issues were framed :

1. Whether Ajay Lavania without any justified cause had deserted the plaintiff Smt. Shobhna Dubey. Hence, he is not discharging his family duty ?

2. Whether the plaintiff is entitled for any relief from the Court ?

15. In the suit No.669 of 2009 for divorce, the Family Court on 30.11.2009 had framed following issues :

1. Whether the plaintiff Ajay Lavania without any justifiable reason had deserted his wife Smt. Shobhna Dubey. In consequence thereof, he is failing his duty towards wife ?

2. Whether the respondent Smt. Shobhna Dubey has behaved cruelty with the plaintiff Ajay Lavania continuously since long time. In consequence thereof, the plaintiff has got reasonable reason to believe that it shall be harmful to live with the defendant as husband and wife.

3. Whether the plaintiff/defendant is entitled for any relief ?

4. Whether the defendant is entitled for any relief from the Court ?

16. Section 9 of the Hindu Marriage Act provides that when either the husband or the wife without any reasonable excuse withdrawn from the society of the other, the aggrieved party may apply for restitution of conjugal rights whereas Section 13 provides various grounds to a person in wedlock to approach the court for dissolution of marriage by decree of divorce. For convenience, Sections 9 and 13(as amended by Act No.68 of 1976) of the Hindu Marriage Act are reproduced as under :

"9. Restitution of conjugal rights.-

(1) When either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply, by petition to the district court, for restitution of conjugal rights and the court, on being satisfied of the truth of the statements made in such petition and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly.

[Explanation.- Where a question arises whether there has been reasonable excuse for withdrawal from the society, the burden of proving reasonable excuse shall be on the person who has withdrawn from the society.]

13. Divorce. (1) Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party-

(i) has, after the solemnisation of the marriage, had voluntary sexual intercourse with any person other than his or her spouse; or]

(i-a) has, after the solemnization of the marriage, treated the petitioner with cruelty; or

[(ib) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition; or]

(ii) has ceased to be a Hindu by conversion to another religion; or

(iii) has been incurably of unsound mind, or has been suffering continuous or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent.

Explanation.- In this clause,-

(a) the expression "mental disorder"" means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and includes schizophrenia;

(b) the expression "psychopathic disorder" means a persistent disorder or disability of mind (whether or not including subnormality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the other party and whether or not it requires or is susceptible to medical treatment; or]

(iv)has been suffering from a virulent and incurable form of leprosy; or

(v) has been suffering from veneral disease in a communicable form; or

(vi) has renounced the world by entering any religious order; or

(vii) has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of it, had that party been alive;

Explanation. In this sub section, the expression "desertion" means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and includes the willful neglect of the petitioner by the other party to the marriage, and its grammatical variations and cognate expression shall be construed accordingly.

(1A) Either party to a marriage, whether solemnized before or after the commencement of this Act, may also present a petition for the dissolution of

the marriage by a decree of divorce on the ground

(i) that there has been no resumption of cohabitation as between the parties to the marriage for a period of one year or upwards after the passing of a decree for judicial separation in a proceeding to which they were parties; or

(ii) that there has been no restitution of conjugal rights as between the parties to the marriage for a period of one year or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties.

(2) A wife may also present a petition for the dissolution of her marriage by a decree of divorce on the ground, -

(i) in the case of any marriage solemnized before the commencement of this Act, that the husband had married again before such commencement or that any other wife of the husband married before such commencement was alive at the time of the solemnization of the marriage of the petitioner:

Provided that in either case the other wife is alive at the time of the presentation of the petition; or

(ii) that the husband has, since the solemnization of the marriage, been guilty of rape, sodomy or bestiality.

(i) in the case of any marriage solemnized before the commencement of this Act, that the husband had married again before the commencement or that any other wife of the husband married before such commencement was alive at the time of the solemnization of the marriage of the petitioner:

Provided that in either case the other wife is alive at the time of the presentation of the petition;

(ii) that the husband has, since the solemnization of the marriage, been guilty of rape, sodomy or bestiality; or

(iii) that in a suit under Section 18 of the Hindu Adoptions and Maintenance Act, 1956(78 of 1956), or in a proceeding under Section 125 of the Code of Criminal Procedure, 1973, (Act 2 of 1974) or under corresponding Section 488 of the Code of Criminal Procedure, 1898 (5 of 1898), a decree or order, as the case may be, has been passed against the husband awarding maintenance to the wife notwithstanding that she was living apart and that since the passing of such decree or order, cohabitation between the parties has not been resumed for one year or upwards;or

(iv)that her marriage (whether consummated or not) was solemnized before she attained the age of fifteen years and she has repudiated the marriage after attaining that age but before attaining the age of eighteen years.

Explanation.- This clause applies whether the marriage was solemnised before or after the commencement of the Marriage Laws (Amendment) Act, 1976(68 of 1976)"

However, in the State of U.P., even prior to Amending Act No.68 of 1976, ground with regard to cruelty was incorporated by U.P. Act No.13 of 1962 which is reproduced as under :

"STATE AMENDMENTS

UTTAR PRADESH.- In its application to Hindus domiciled in U.P and also when either party to the marriage was at the time of marriage a Hindu domiciled in U.P., in Section 13-(added in Central Act by Amending Act No.68 of 1976)

(i) in sub-section(1), after clause (i) insert and deem always to have been inserted the following :

[(i-a) has persistently or repeatedly treated the petitioner with such cruelty as to cause a reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for the petitioner to live with the other party; or", and

(ii) for clause (viii)(since repealed) substituted and deem always to have been so substituted the following.

(viii) has not resumed cohabitation after the passing of a decree for judicial separation against that party, and-

(a) a period of two years has elapsed since the passing of such decree, or

(b) the case is one of exceptional hardship to the petitioner or of exceptional depravity on the part of other party, or"

17. Thus, under the Central Act, cruelty was added in the year 1976 but in U.P, the word, "persistently or repeatedly" was on the State book earlier to it.

A plain reading of Section 13(1) (ia), shows that a decree of divorce may be granted by the court in case either of the party, i.e. husband or wife has persistently or repeatedly treated the the other with cruelty causing a reasonable apprehension to the petitioner that it will be harmful or injurious for him to live with the other party. Under Section 13(1)(ib), a suit for divorce may also be filed on the ground that either side has deserted the petitioner for continuous period of not less than two years immediately preceding the presentation of the petition.

Thus, keeping in view the U.P. Amendment and intent of Legislature, cruelty means persistent or repeated ill treatment of a spouse to other which causes a reasonable apprehension in the mind of plaintiff with regard to harm or injury which may be caused while living with other party.

18. Mr. Sudeep Seth, learned counsel appearing for the appellant has vehemently argued that the respondent had treated the plaintiff appellant with cruelty. Hence he is entitled for divorce. He submits that the learned Family Court has not considered the material evidence on record led by the appellant and the impugned judgment suffers from surmises and conjectures. He further submits that because of subsequent conviction in criminal case, marriage is not revivable, hence divorce

is the only remedy to secure the ends of justice.

19. On the other hand, Smt. Shobhna Dubey, respondent appeared in person and argued the case stating that she is ready to live with her husband and also ready to forget whatever happened in the past. She also assures that she is not interested to persecute or prosecute the members of the appellant's family. She also stated that minor quarrels, fractions or disagreement between the husband and wife does not constitute cruelty. The Family Court has recorded the sound finding and the appeal is liable to be dismissed. She further submits that since an amendment application filed by the appellant was kept pending and not allowed by the Family Court, subsequent event could not be taken into account as it would amount to travel beyond the pleading.

20. Both sides submitted the written arguments as well as compilation of case laws to defend their cause.

21. Before the trial court, on behalf of the respondent plaintiff, in suit filed for restitution of conjugal rights, certain documentary evidence was filed. The complaint dated 26.9.2007 along with the applications C-38/95, C-38/96 and C-38/97 shows that while lodging a First Information Report with regard to assault, the appellant also prayed for police security keeping in view the alleged injury in terms of medical report of the same day obtained from Medical College. It was after the incident dated 26.9.2007, both husband and wife went to Allahabad to attend conference on 29/30.9.2007. The injury report prima facie does not reveal the injury caused by teeth bite. It has been observed in the judgment and order dated 31.5.2010 by Special Additional Chief Judicial Magistrate, C.B.I., Lucknow in case No.3674 of 2008, while convicting the appellant under Sections 498-A, 506, 507 I.P.C. read with Section ¾ Dowry Prohibition Act, that the incident dated 26.9.2007 was created to avail divorce (C-40/33 and C-60/33) in the case filed under Section 13 of the Hindu Marriage Act. An adverse comment has also been made by the Special Additional Chief Judicial Magistrate, C.B.I., Lucknow while convicting the appellant and other family members. Photographs have been filed with regard to honeymoon at Goa which prima facie shows intimacy between the appellant and the respondent. Emails sent by the appellant, copies of which have been filed in the trial court as C-52/3 to C-52/32 also reveals intimacy between the parties. Email of Shobhna Dubey on record also shows intimacy between them. During cross-examination, in the case under Section 9 of the Hindu Marriage Act, the appellant himself stated that he was having cordial relationship with Shobhna before pregnancy and even if all the complaints are taken back, the appellant is not ready to live with Shobhna Dubey. Attention has been invited to certain Email sent by lady Rashmi Rao filed as C-31/16, 17, 18 to establish living relationship between the appellant Ajay Lavania and Rashmi Rao. The appellant has filed copy of bill to show his financial prospects. The documentary evidence on record shows abortion because of complicated Ectopic Pregnancy. In his letter dated 29.4.2007, the appellant has consoled the

respondent to ignore the ill treatment imparted by Mrs. Archana Lavania and Mrs. Prabha Lavania. He ensured that he is with his wife against them.

22. Learned counsel for the appellant Shri Sudeep Seth submitted that the incident dated 26.9.2007 was an incident of cruelty. Coupled with the fact that the respondent had alleged extra marital affairs against the appellant with allegation of his being habitual drinker and lead club life and watching of blue films, the conviction in the criminal case creates a ground of irretrievable break down of marriage. He submits that the parties have reached to a situation where there is no chance of reunion. Learned counsel for the appellant has relied upon the cases reported in **(2003)6 SCC 334 Vijay Kumar Ramchandra Bhate versus Neela Vijaykumar Bhate, 2003(2) AWC 1665(SC) K.A. Abdul Jaleel versus T.A. Shahida, 2005(3) AWC 2093 Amar Nath Gupta versus State of U.P. and another and AIR 2007 Andhra Pradesh 201 Sardar Darshan Sngh and others versus Smt. Surjeeth Kaur.**

It is also stated that the respondent has tried to make out a case on the basis of false and fabricated document and the Evidence Act is not applicable strictly.

23. In the case of Vijay Kumar Ram Chandra Bhate (supra) while interpreting the word, "cruelty" under the Act, Hon'ble Supreme Court ruled that the character assassination in or during divorce proceedings amounts to cruelty and substantiate the wife's petition for divorce on the ground of cruelty. The allegation against the wife of unchastity, indecent familiarity with another person and extramarital relationship alleged in the written statement by the husband constitute a cruelty. However, the case in hand seems to be based on different facts and circumstances where the allegation of living relationship has been tried to establish on the basis of Emails and other surrounding facts with submission that the appellant had cooked up a false case to dissolve the marriage. It is not a case where character assassination has been made on false or concocted ground; rather facts have been tried to prove on the basis of documentary evidence which does not seem to have been categorically denied.

24. In the case of K.A. Abdul Jaleel (supra), Hon'ble Supreme Court held that the Family Court has jurisdiction to adjudicate the question relating to properties of divorced parties.

25. In the case of Jagannath (supra), a Single Judge of this Court held that while filing petition for maintenance against the husband, the Family court has right to take evidence from both side by consolidating two suits and give common judgment.

26. In the case of Sardar Darshan Singh(supra), Hon'ble Single Judge of Andhra Pradesh High Court opined that subsequent event shall be taken into consideration by way of rejoinder. However, rejoinder is impermissible if such subsequent pleadings sets up plea inconsistent with pleading in plaint.

27. The respondent relied upon a case decided on 22.9.2010 by Hon'ble

Supreme Court in **Civil Appeal Nos.8196-8197 of 2010 Sanjeeta Das versus Tapan Kumar Mohanty, another judgment dated 27.2.2009 delivered in Civil Appeal No.1330 of 2009 Vishnu Dutt Sharma versus Manju Sharma, (2004)7 SCC 747 Shyam Sunder Kohli versus Sushma Kohli alias Satya Devi, [2002(46)ALR 465] Savitri Pandey versus Prem Chandra Pandey, (2001)4 SCC 250 Chetan Dass versus Kamla Devi, AIR 2005 Bombay 278 Ajay Sayajirao Desai versus Mrs. Rajashree Ajay Desai, AIR 1989 Delhi 121 Ashok Kumar Bhatnagar versus Smt. Shabnam Bhatnagar, AIR 1984 Allahabad 81 Satya Pal Sethi versus Smt. Sushila Sethi, AIR 1964 MP 28 Narayan Prasad Choubey versus Smt. Prabhadevi, (2009)4 SCC 366 Sipra Bhattacharyya versus Dr. Apares Bhattacharyya, (2005)3 SCC 313 B.P. Achala Anand versus S. Appi Reddy and another, (2005)10 SCC 299 Naresh Chandra Singhania versus Deepika Alias Buby and (1997)7 SCC 7 Jasbir Kaur Sehgal(Smt) versus District Judge, Dehradun and others.**

28. In the case of Sanjeeta Das(supra), Hon'ble Supreme Court has set aside the Division Bench judgment of Orissa High Court holding that a Hindu marriage can be dissolved only on any of the grounds plainly and clearly enumerated under section 13 of Hindu Marriage Act. A decree of divorce cannot be granted with or without consent of either side for consideration. No court can assume jurisdiction to dissolve a Hindu marriage simply on the basis of the consent of the parties de hors the grounds enumerated under Section 13 of the Act unless of course the consenting parties proceed under section 13B of the Act.

29. In the case of Vishnu Dutt Sharma(supra), Hon'ble Supreme Court declined to interfere where the Delhi High Court had dismissed the appeal filed by the husband whereby the trial Court has declined to grant divorce on the ground of cruelty. Since the husband himself has imparted cruelty, it was not found to be good ground to grant divorce in the petition filed by the husband. Hon'ble Supreme court observed that the wife has successfully demonstrated that in fact, she suffered cruelty at the hands of husband appellant. In such a situation to grant divorce to the husband appellant only on the ground of irretrievable breakdown of marriage would not be proper.

30. In the case of Shyam Sunder Kohli (supra), their Lordships of Hon'ble Supreme Court held that it was the husband who had been at fault and had not allowed the marriage to break. Therefore, the marriage could not be dissolved on the ground of irretrievable break down. To reproduce relevant portion, to quote :-

"12. On the ground of irretrievable breakdown of marriage, the court must not lightly dissolve a marriage. It is only in extreme circumstances that the court may use this ground for dissolving a marriage. In this case, the respondent, at all stages and even before us, has been ready to go back to the appellant. It is the appellant who has refused to take the respondent back. The appellant has made baseless allegations against the respondent. He even went to the extent

of filing a complaint of bigamy, under Section 494 IPC against the respondent. That complaint came to be dismissed. As stated above, the evidence shows that the respondent was forced to leave the matrimonial home. It is the appellant who has been at fault. It can hardly be in the mouth of a party who has been at fault and who has not allowed the marriage to work to claim that the marriage should be dissolved on the ground of irretrievable breakdown. We, thus, see no substance in this contention."

31. In the case of Savitri Pandey (supra), Hon'ble Supreme Court held that cruelty means the acts which are dangerous to life, limb or health and should be distinguished from the ordinary wear and tear of family life. The sanctity of marriage cannot be left at the whims of one of the annoying spouses.

32. In the case of Chetan Dass(supra), Hon'ble Supreme Court held that the principle of irretrievable break down of marriage cannot be used as a formula to gain relief of divorce automatically. Hon'ble Supreme Court ruled that where party seeking divorce are found during the course of judicial proceeding to have committed matrimonial offence and has been unable to establish any allegation against the spouse, a decree of divorce on the ground of irretrievable breakdown of marriage cannot be granted. Erring party cannot be permitted to break the marital bond by taking advantage of his own wrong. It shall be appropriate to reproduce para 14 of the judgment which is as under :

"14. Matrimonial matters are matters of delicate human and emotional relationship. It demands mutual trust, regard, respect, love and affection with sufficient play for reasonable adjustments with the spouse. The relationship has to conform to the social norms as well. The matrimonial conduct has now come to be governed by statute framed, keeping in view such norms and changed social order. It is sought to be controlled in the interest of the individuals as well as in broader perspective, for regulating matrimonial norms for making of a well-knit, healthy and not a disturbed and porous society. The institution of marriage occupies an important place and role to play in the society, in general. Therefore, it would not be appropriate to apply any submission of "irretrievably broken marriage" as a straitjacket formula for grant of relief of divorce. This aspect has to be considered in the background of the other facts and circumstances of the case."

33. In the case of Ajay Sayajirao Desai(supra), Hon'ble Supreme Court held that where the wife at all stages has been ready to go back to husband and it is the husband who refused to take back wife on baseless allegation to the extent of filing false complaint against wife with intention to create evidence against wife, the marriage cannot be dissolved on the ground of irretrievable breakdown.

34. In the case of Ashok Kumar Bhatnagar(supra), a Division Bench of Delhi High Court held that where the husband is harassing his wife for dowry and abandoning her, he cannot be permitted to take benefit of his own

wrong and claim divorce on the ground of irretrievable break down of marriage.

35. In the case of Satya Pal Sethi(supra), Hon'ble Single Judge of Allahabad High Court has dismissed the divorce petition where the husband took the plea of cruelty and desertion, but, failed to prove charges against wife and on the other hand, the wife has proved that the husband was living in adultery.

36. In the case of Narayan Prasad Choubey (supra), a Division Bench of M.P. High Court held that no judicial separation can be granted against the wife on the ground of his irritating idiosyncrasies and because of allegation that the wife was frequently picking up petty domestic quarrels with her mother-in-law and thereby rendering the life unhappy for the husband.

37. In the case of Sipra Bhattacharyya(supra), Hon'ble Supreme Court has set aside the order of the High Court where the High Court has rejected the application for enhancement of maintenance keeping in view the facts and circumstances of the case.

38. In the case of B.P. Achala Anand(supra), Hon'ble Supreme court ruled that a divorced wife has right to stay in tenancy premises but it shall be dependent upon the terms and conditions in which the decree of divorce has been granted and the provision of maintenance has been made. Hon'ble supreme Court held that right to residence is part and partial of her right to maintenance.

39. In the case of Naresh Chandra Singhania(supra), Hon'ble Supreme Court ruled that in the event of enhancement or increase of husband's income, the maintenance may also be increased.

40. In the case of Jasbir Kaur Sehgal (smt), Hon'ble Supreme Court held that the maintenance pendent lite can be granted not only to wife but also to her dependants whom she is also maintaining under Section 24 of the Hindu Marriage Act.

41. In view of aforesaid case law, cited by other side, there appears to be no dispute over the proposition of law that in the event of cruelty, mental or physical caused by either side, a suit for divorce may be decreed. However, it should be proved with pleading and evidence on record.

42. In the present case, the suit was filed only on the ground of cruelty under Section 13(1)(ib) of the Hindu Marriage Act and not on the ground of irretrievable ground of marriage. On the basis of subsequent events, i.e. conviction in the criminal case, learned counsel for the appellant submitted that a divorce may be granted on the ground of irretrievable breakdown of marriage.

43. A perusal of the relief claimed in the suit filed by the appellant, it is evident that the suit was filed on the ground of cruelty and desertion by wife. In absence of specific relief claimed on the ground of irretrievable breakdown of marriage, the dissolution of marriage cannot be considered on this ground. Though subsequent events may be looked into but that too only keeping in view the original pleading on record. Subsequent events supplement the

original pleading to make out a case for decree of suit for divorce but it does not empower the courts to decide the suit totally on new ground beyond the issues framed by the trial court.

Otherwise also, from the facts, circumstances and evidence on record, there appears to be no over action on the part of the respondent creating a ground for irretrievable breakdown of marriage.

44. The legal conception of cruelty and the kind of degree of cruelty necessary to amount to a matrimonial offence has not been defined by the Hindu Marriage Act. No comprehensive definition can be given to cruelty as it may be fatal to the social structure based on institution of marriage. Prior to Amending Act of 1976, the only ground available for divorce was by way of judicial separation. By amendment, the word added is "treated the petitioner with cruelty". The object seems to give a definition exclusive or inclusive, which may amply meet every particular act or conduct and not fail in some circumstances. Legislature to their wisdom has left the cruelty to be determined by courts on the facts and circumstances of each case as to whether the conduct amounts to cruelty. It is also because since actions of men are so diverse and infinite that it is almost impossible to expect a general definition which could be exhaustive and not fail in some cases. However, it is true that there has been forward march towards liberalisation of the divorce on the ground of cruelty and the statutory limitations in old Section 10(1)(b).

45. Hon'ble Supreme Court in AIR 1975 SC 1534 Dastane versus Dastane, followed by a Full Bench of Bombay High Court in AIR 1984 Bom 413 Kesbavrao versus Nisba examined the matrimonial ground of cruelty in view of old section 10(1)(b) of the Act. It is held that the provision is to be considered as to whether the conduct charged as cruelty is of such a character as to cause in the mind of the petitioner a reasonable apprehension that it will be harmful or injurious for the petitioner to live with the respondent. It is also pointed out that it was not necessary under English Law that cruelty must be of such a character as to cause danger to life, limb or health, or as to give rise to a reasonable apprehension of such a danger though, of course, harm or injury to health, reputation, the working character or the like would be an important consideration in determining whether the conduct of the respondent amounts to cruelty or not. What is required is that the petitioner must prove that the respondent has treated the petitioner with such cruelty as to cause a reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for the petitioner to live with the respondent.

46. In Hindu Law, by Mulla after considering Indian and foreign judgments, cruelty has been dealt with as under :

"Though the clause does not in terms state so, it is abundantly clear that the application of the rule must depend on the circumstances of each case. Without attempting to define cruelty it may be said that 'cruelty' contemplated is conduct of such type that the

petitioner cannot reasonably be expected to live with the respondent. The treatment accorded to the petitioner must be such as to cause such apprehension in the mind of the petitioner that cohabitation will be so harmful or injurious that she or he cannot reasonably be expected to live with the respondent having regard to the circumstances of each case, keeping always in view the character and condition of the parties, their status, environments and social values, as also the customs and traditions governing them. The apprehension contemplated by the above conception is that further cohabitation will be harmful or injurious and not that the same or similar acts of cruelty will be repeated."

47. In a case reported in AIR 1988 SC 121 Sbobba Rani versus Madhukar Reddy, Hon'ble Supreme Court examined the sub-s 13(1)(ia) of the Hindu Marriage Act and held that there could be cases where the conduct complained of itself may be bad enough and per se unlawful or illegal. Then, in such a situation, the impact or the injurious effect on the other spouse need not enquire and cruelty shall be established if the conduct itself is proved or admitted.

However, in the present case, conduct of the respondent constituting cruelty does not seem to be proved or admitted. Mulla in Hindu Law has given a word of caution to follow blindly the western judgments or the cases decided keeping in view the facts and circumstances of a particular case. To quote :

"There has been such a marked change in the notions of matrimonial duties and obligations of husband and wife in the present generation in India that it will be incumbent on the court to be extremely careful in the matter of seeking assistance and guidance from decisions arrived at under any previous legislation in India or England, even when the rules may be similarly worded. Blind adherence to any of those decisions must be deprecated, particularly when they relate to persons whose customs, manners and mode of life may be different."

48. In **King versus King[1953]AC 124 page 130**, it has been held that the law has no standard by which to measure the nature and degree of cruel treatment that may satisfy the test. Physique, temperament, standard of living and culture of the spouses and the interaction between them in their daily life and all other relevant circumstances must have a bearing on the question whether the acts or conduct complained of amount to the matrimonial offence which entitles a spouse to relief under this clause.

49. The language of Section 13 is comprehensive enough to include cases of physical as well as mental cruelty and the cases where both the elements are present. Where physical violence is proved, the matter may not present any particular difficulty. Even a single act of violence may by itself be of such a grievous and inexcusable nature as to satisfy the test of cruelty. However, on the other hand, isolated acts of assaults committed on the spur of the moment and on some real or fancied provocation may not amount to cruel treatment. The

assault or assaults must not be viewed as isolated facts but in the proper setting, as an incident or incidents in a complicated series of marital relations. It would be relevant to have regard to any physical or mental strain under which the accused spouse may have been labouring. The minor acts of physical violence alleged by either side may not amount to cruelty but may be an incident of life which should be tolerated or adjusted by either side. The domestic life of spouse must be surveyed as a whole before recording a finding on cruelty keeping in view their possible future relations and the reasonableness or otherwise of the apprehension in the mind of the party.

50. The conduct consisting of number of acts should be judged in relation to its attendant circumstances, and the physical or mental condition or susceptibilities of the innocent spouse and the offender's knowledge of the actual or probable effect of his conduct on the other. The acts and incidents complained of along with conduct of the parties should be taken together to form a composite picture to ascertain cruelty.

51. Coming to present controversy in view of aforesaid principles, so far as incident of 26th September, 2007 is concerned, which has been vehemently relied upon by the appellant's counsel does not seem to constitute cruelty for the reason that after the said incident, both the appellant and the respondent attended a conference at Allahabad and the evidence on record shows that they remained at Allahabad for two days as husband and wife in the same room at the hospital. Thus, the incident of 26.9.2007, if assuming to be true, was an incident originated on the spur of moment and was not deliberate and intentional action on the part of the respondent to cause harm to the appellant.

52. Moreover, it was the appellant who had lodged a First Information Report against the respondent with regard to incident of 26.9.2007 and obtained medical certificate. Prima facie, the appellant seems to have created a ground and lodged the First Information Report against the respondent on the one hand and on the other hand, he attended the seminar at Allahabad keeping her in dark with regard to lodging of First Information Report and medical certificate obtained from the Medical College.

53. The statements of Ajay Lavania and Vinod Kumar Rathore also do not make out a case causing cruelty by the respondent. Only because the appellant does not want to live with the respondent for any reason whatsoever shall not be sufficient to constitute cruelty or create a ground for divorce under Section 13 of the Act. In his statement, the appellant stated that the respondent has got no complaint against the petitioner but he has got complaint or grievance against the respondent. No cogent evidence has been led or filed by the appellant before the trial court to make out a case of cruelty.

54. Specific allegation raised by the respondent that on account of living relationship with a lady, namely Rashmi Rao, the appellant wants divorce has not been rebutted by cogent and trustworthy evidence. Email of Rashmi Rao creates a reasonable doubt over the conduct of

the appellant. Stating correct fact without any concoction shall not create cruelty or ground to claim divorce.

55. The respondent consistently pleaded and asserted that she wants to live with the appellant and she is still ready to forget all previous incidents and also ready to excuse and take appropriate step for the appellant's acquittal in the appellant's pending appeal seems to be bona fide action of the respondent. In case they unite together, keeping in view the statement given before this Court, the appellate court shall take lenient view and if parties agree, then permit to enter into compromise.

56. From the material and evidence on record, there appears to be no doubt that there has been quarrel between the appellant and the respondent during short span of matrimonial life on trivial issues and either side may be at fault but does not seem to create a ground under Section 13(i)(ib) of the Act to decree the suit for divorce on the ground of cruelty.

57. A decree of divorce under the statutory provision should not be granted merely on the ground of wrongful conduct of spouse or minor incident or incident of violence having taken place at the whisper of moment or either side does not want to live with each other for any reason whatsoever. Irretrievable breakdown of marriage cannot be a ground to decree a divorce suit unless specifically pleaded showing the instances enumerating the grounds making out a case beyond the reasonable doubt. Continuing of minor incidents or quarrel during matrimonial life in today's atmosphere when everyone is facing complex problem in day to day life from office to house or in the street shall not constitute cruelty for statutory divorce. Only a violence which is deliberate, planned and intentional to harm the other side for some extraneous reasons or may be because of some illicit relationship may constitute cruelty and warrant divorce.

58. In the present case, there appears to be no evidence which may establish that the quarrel between the appellant and the respondent on some of the dates were outcome of deliberate, planned and intentional decision to harm the appellant; rather the appellant himself has lodged a First Information report against the respondent and thereafter both sides entered into litigation and registration of the criminal cases on one or other ground. Once the appellant himself initiated the criminal proceeding and allegation is against him with regard to demand of dowry, then it shall not constitute cruelty to make out a case for divorce.

59. Before parting with the case, it shall be appropriate to observe that a decree of divorce is an exception and a thing which is an exception should not be granted lightly by courts. The institution of marriage in a civilized society not only amongst Hindus but others also has been established since ages to regulate the society and save the humanity from rule of jungle(forest). It is the matrimonial institution which differentiate a man from beast, meant to transfer its knowledge and culture to posterity. Grant of divorce by the courts leisurely or merely on asking or with the consent of parties or because one does

not like, other shall spoil the whole social set up in due course of time.

60. While narrating the importance of marriage and family values, a three times U.S. Republican Senator from Missouri, John Danforth in his book, "Faith and Politics" (page 112) observed as under :

"Genesis tells us that a man leaves his father and mother and "cleaves" to his wife. The dictionary definition of cleave is "to adhere to firmly and closely or loyally and unwaveringly." My own mental image of cleaving is the bonding together of two objects, say the gluing of two pieces of wood so that they are as one. All the instructions I have seen on the subject say that it is important to clean the surfaces of the two objects before applying the glue so that external matter does not interfere with the bonding. For me, this is a metaphor for marriage because all sorts of external influences, people as well as interests, interpose themselves between the marital partners. That is the case for every married couple. The external influence may be, as the verse in Genesis suggests, the claims on a husband or wife by demanding parents, or it may be the responsibilities of raising children, or the hours and energy devoted to one's job. The challenge for every married couple is to cleave together and not allow the external influences that insert themselves into the marriage to break the bond between them."

Learned author(supra) expresses his sorrow with regard to divorce rate in U.S.A. (page 66-67), in the following words :

"I think the reason behind this fervor is an understandable concern about the state of values in our society. When the divorce rate is 50 percent and unwed teen pregnancies are 34 percent, when it seems that family entertainment is impossible to find among the obscene, when children have access to drugs, then there is little wonder that many Americans are desperate to restore some measure of decency to our common life, to return to a world which, at least in our memories, was better than what we have today-a world in which religion seemed to have more force in influencing how people live their lives."

61. Because of soft provisions for divorce, the western countries and U.S.A. are facing acute problem. Easy divorce break the families, and in case spouse has children, they are the ultimate sufferer. In young age, ordinarily the temptation for extramarital relationship is high and in case courts are lenient, then there shall always be cause to approach for divorce in the persons of easy virtue. Law is not for those who meditate and lead a spiritual, honest and fair life, but it is to regulate the commoners who become victim of circumstances easily.

62. Moreover, in Hindus, marriage, as observed (supra), is sacred character of sacrament. Statutory provision for divorce is the enabling provision and is an exception, not to be exercised in a routine manner or lightly. Marriage provides hereditary right to a spouse in the event of death of either of them and heredity rights to the coming generation born from the wedlock and collective social security to spouse and children. It is the marriage which differentiate

between a civilized and uncivilized society. Keeping in view the magnitude of benefit and social security available to a spouse, no matter there are some differences and wrangles in a matrimonial life. George Bernard Shaw said, "Marriage is popular because it combines the maximum of temptation with maximum of opportunity". (In Man and Superman).

Horald Nicolson advised, to quote, : "The great secret of successful marriage is to treat all disasters as incidents and none of the incidents as disasters".

62. As observed (supra), continuance of marriage is 'rule' and divorce is an exception. Exception cannot become rule by liberal approach. Section 13 of Hindu Marriage Act is enabling provision and enabling provision deal with disability or contingencies in special circumstances but it does not confer power to invoke the provision with regard to divorce as a matter of right. The courts should be conscious to ensure that the statutory provision with regard to divorce or maintenance is not abused by either of the spouse for extraneous reasons or as an instrument to wreak vengeance.

63. Courts have to ensure that the matrimonial life continue to its entirety and the duo husband and wife may consume their natural life, as far as possible. It shall be necessary for the plaintiff/ petitioner who approached the Court under Section 13 of the Act to establish that he or she has not been at fault and possess impeccable character and made all efforts for continuance of matrimonial life. There shall be dual burden on the plaintiff, first to prove his or her own impeccable character and efforts made for continuity for matrimonial life and secondly, it shall be necessary to establish that the conduct of other side is so impractical and serious that it shall cause irreparable loss and injury warranting dissolution of marriage. Keeping in view the provision contained in Sections 102 and 103 of the Evidence Act, burden to prove the grounds with regard to divorce shall be on the plaintiff to establish the facts.

There may be situation when both side does not possess impeccable character or both are flirt or have been indulged in unethical practice, then in such situation, it is for the court to decide the issue in a just and proper manner to secure the interest of both sides. In case, the defendant in a divorce suit possess impeccable character and discharge her/his obligation in the manner which is expected from a person of common prudence or except some minor violence or incidence at the spur of moment, then in such situation, it shall not be proper for the Court to decree a divorce suit.

64. The case laws referred by other side deals with original provision contained in Section 13 of the Act with regard to cruelty. While interpreting the provision with regard to divorce, every word should be given its meaning. The legislatures were conscious by making U.P. Amendment to check the abuse of process of law keeping in view falling standard of life. That is why, they have used the words, "persistently or repeatedly", coupled with reasonable apprehension in the mind of the plaintiff

with regard to harm or injury which may sustain while living with other party. Reasonableness should not be based on trivial grounds. It must be based on well founded material and reasoning.

65. Apprehension with regard to harm or injury should also be of such nature which may cause the other side irreparable loss or injury. Meaning thereby, the reasonable apprehension with regard to harm or injury should be such which may not be bearable to lead a normal life.

In the present case, there appears to be no material which may create a reasonable apprehension in the mind of the plaintiff appellant resulting into harm or injury in incident which may not be bearable or irreparable because of which the appellant cannot lead a matrimonial life along with the respondent. Liking or disliking shall not be a ground to decree a divorce.

66. Thus to sum up, the allegations on record are all of trivial nature and does not constitute cruelty. Subject to observation made in the body of present judgment, appeals lack merit. Hence dismissed.

No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 05.05.2011

BEFORE
THE HON'BLE ANIL KUMAR,J.

Rent Control No. - 136 of 2009

Mohd. Zafar Khan and others ...Petitioners
Versus
District Judge Hardoi and others ...Respondents

Counsel for the Petitioner:
Sri Sanjay Kumar

Counsel for the Respondents:
Sri Anurag Narain
C.S.C.

U.P. Urban Building Regulation of Letting Rent and Control Act 1972-Section 16(1)(d)-comparative hardship-Release application-bonafide need-landlord being unemployed desired to settle his business on shop in question-during long period of litigation landlord running his business on rented shop-tenant enjoying without making any positive effort of alternative accommodation-prescribed authority rejected-Appellant court allowed the appeal on ground no bonafide effort made by tenant-argument before Writ Court regarding non consideration of partial-release-held-misconceived-commercial shop there is no provision of part release-such question held well settled-no question of making reference larger bench-petition dismissed.

Held: Para 30, 59,and 80

Since there is no provision under the Act or the rule of passing an order of partial release in respect to non residential accommodation the provision of Rule 16(1)(d) could not be made applicable in respect to release of a non residential accommodation and the law as laid down

in this regard by Apex Court as well as by this Court should be applied. In the case of non residential building the provisions of Rule 16(1)(d) of Rules for partial release not applicable, as per the law as laid down by Full Bench Judgment of this Court in the case of Ganga Saran Vs. Civil Judge, Hapur, Ghaziabad and others, 1991 (9) LCD 149 and Sumtibai & others Vs. Paras Finance Co. Mankanwar W/o Parasmal Chordia (D) & Ors. 2008 (1) ARC 504

Thus, from the perusal of said Rule, it is clear that while come into operation only if an application is being moved by a landlord in respect to release of a residential premises under Section 21(1)(a) of Act. But not in case where a release application is moved for a non residential premises, let out for business purpose and if an application for release is moved in respect to a building let out. for business purpose Rule which governs the filed is Rule 16(2) and in the said rule there is no provisions provided by the legislature in respect to part release of the premises, which is let out for commercial purpose, and that is the sole intention and object of the legislature while framing the Rule 16(2) while considering an application for release under Clause (a) of Sub-Section 1 of Section 21 of U.P. Act 13 of 1972 in respect to a building let out for the purpose of commercial /business purpose.

As per admitted facts of the present case, petitioners/tenants are enjoying comforts of a rented shop while the landlord/respondent is doing his business from another rented shop and in this regard, appellate court after appreciacing facts of the present case stated to the effect that after filing of release application tenant had not made any sincere effort to find out alternate accommodation. So as per settled provision of law that when a release application is filed before the prescribed authority, tenant must find out suitable accommodation, he cannot force landlord to allow him to run his business from a shop rented to him.

Case law discussed:

1980 ARC 311; 2005(23) LCD 989; 2005(2) ARC 243; 2006 (3) ARC 614; 2005(3) LCD 1115; Nathu Ram Vs. VIIth Addl. District Judge, Varanasi and others; Civil Appeal No. 4244 of 2006 Dinesh Kumar Vs. Yusuf Ali; (2003) 3 SCC 433; 1988 (2) ARC 385; 1984 (2) ARC 651; 1992 (2) ARC 27; 1999 (2) ARC 80; 1992 (1) ARC 473; 1997 (1) ARC 80; AIR 2003 Supreme Court 2713; 2006 (I) ARC 142; 2002 (7) SCC 273; 1995 Supp (1) SCC 192; (2007) 6 SCC 143; (2007) 5 SCC 447; 1991 (9) LCD 149; 2008 (1) ARC 504; (1989) 2 SCC 754; (1998) 5 SCC 637; 2000 (18) LCD 886; AIR 1992 SC 63; (2003) 5 SCC 480; 2010 (28) LCD 1688; (2011) 2 SCC 94; (2005) 2 SCC 673; (1995) 2 SCC 129; (1998) 2 SCC 516; (2008) 15 SCC 464; 1987 RD 308; 2010 (110) RD 584; 1987 (4) SCC 238; 2008(2) ARC 584; 2004 (2) ARC 365; 1999 (2) ARC 80; 1992 (1) ARC 473; 1957 (1) All ER (HL); 2002 (4) All ER 654; AIR 1992 SC 1; AIR SC 96; (1998) 3 SCC 237; (2004) 5 SCC 518; (2003) 5 SCC 590; AIR 2003 SC 511; (2003) 5 SCC 134; (2002) 7 SCC 273; (2007) 6 SCC 143; (2007) 5 SCC 447; 2008 (1) ARC 504; (1987) 1 SCC 213; (2003) 2 SCC 111; AIR 2004 SC 4778 : 2004 SCFBRC 454; 1951 AC 737 at P. 761; (1970) (2) All ER 294; (2003) 4 SCC 753; 1991 (9) LCD 149; 2005 (2) ARC 899; 2006 (1) ARC 588; 2005 (3) ARC 417; 2007 (2) ARC 62; 2009 (2) ARC 715; 2009 (2) ARC 740; 2009 (3) ARC 269;

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

1. Heard Sri Shafiq Mirza, learned counsel for petitioners, Sri Mohd. Arif Khan, Senior Advocate, assisted by Mohd. Adil Khan, counsel for respondents.

2. By means of present writ petition, petitioners have challenged order dated 03.09.2009 passed by District Judge, Harodi in Rent Appeal No. 2 of 2008, Mohd. Waris Khan Vs. Mohd. Zafar thereby allowing appeal of the landlord in respect to release of a shop.

3. Factual matrix of the present case are that Mod. Waris Khan/landlord moved an application for release under Section 21(1)(a) of U.P. Act 13 of 1972 inter alia stating therein that he is owner/landlord of shop situated at Mohalla Vehra Saudagar West, Bara Chauraha, Pargana Bangar, Tehsil and District Hardoi, purchased from its previous owner Rahul Asthana and Kapil Asthana by registered sale deed 05.07.1997, petitioner are tenant in the said shop on a monthly rent of Rs. 120/-.

4. In the release application, landlord/respondent pleaded that his family is consisting of himself and two children. He failed to get any employment, so the shop in question purchased by him thereafter, gave notice to tenant/petitioner through his counsel Sri Shiv Sahai Misra on 14.03.2000 served upon them but they did not vacate the shop.

5. It is further pleaded in release application that landlord also apprised tenants the shops are available at Shankar Market near Arya Kanya Pathshala, Hardoi but no heed has been paid by tenants in this regard finally they refused to vacate the shop in question which is bona fidely required by him in order to run his business to earn livelihood of his family, so release application filed.

6. Petitioner/tenant contested release application by filing written statement denying the need of the landlord, however admitted that he is owner of the shop in question. In the written statement, it has been pleaded on behalf of petitioner that they filed suit for permanent injunction (suit No. 276 of 1997, Shoib Khan Vs. Kapil Asthana and others) in which temporary injunction granted by court concerned on 21.05.1997 served on the landlord/respondent on 24.05.1997. In spite of knowing the said fact landlord purchased the shop in question with ulterior motive to evict them, further if the landlord has genuine need of shop he should not purchase the shop in question which is under dispute subject to litigation rather purchase a vacant shop which is itself goes to show that the need of the landlord is neither genuine nor bona fide.

7. In written statement, it has been further pleaded that the said injunction suit (Suit No. 276 of 1997) decreed in their favour thereafter release application filed, and the landlord is carrying out his business of repair Torch, Pressure Cooker, Stove etc. in a shop which is nearby situated to disputed shop under the tenancy of his father Sri Saukat Ali Zamal. Further during the pendency of release application Sri Saukat Ali Zamal died, as such by way of amendment it was brought on record by the petitioner, now landlord/respondent become tenant of the shop initially under the tenancy of his father, as his other brothers are doing separate business. So, there is no bona fide need exist on the part of landlord to get shop in dispute release in his favour.

8. In addition to abovesaid facts, it was also brought on record by tenants that they had searched for alternate accommodation/shop in Shanker Market where they are doing business of General Merchant from the shop in dispute in the name and style of Roshan Store which is only source of income of their family but they are unable to get the same.

9. After exchange of pleadings, evidences etc. the Prescribed Authority in order to decide P.A. Case No. 16 of 2001, framed three issued, namely"-

(1) Kya Prarthi ki prashangat dukan kis aawashyakta hai?

(2) Kya Prarthi ki ukt aawashyakta hai?

(3) Prashngat dukan ke babat tulnatmak kathinai kis paksh ko adhik gohi.

Prescribed Authority on the basis of material on record in respect to issue No. 1 held that applicant/landlord is need of shop in question. However, whether the need of the said shop is bona fide or not shall be decided while deciding the other issues.

10. So far as issue No. 2 is concerned, the Prescribed Authority had come to the conclusion that as per the pleadings of landlord he is an unemployed youth and if he is in need to get shop in question to establish his business, then that in circumstances he should have purchased a vacant shop and not a shop in dispute in respect to which Civil Court passed an decree in Suit No. 276 of 1997. Accordingly, Prescribed Authority held that need of the landlord/respondent is not bona fide and genuine.

11. So far as issue No. 3 is concerned, Prescribed Authority had come to the conclusion on the basis of material on record that if need of landlord is a bona fide and genuine in order to carry out livelihood then in that circumstances he should have purchase an undisputed vacant shop in Shanker Market not shop in dispute. Further Prescribed Authority also given a finding that tenants, during the pendency of the release matter made an effort to search out an alternate accommodation and in this regard they filed an affidavit (paper No. 63Ga) but unable to search any alternate accommodation. So the comparative need of the tenant is more genuine and bona fide in comparison to landlord and by order dated 29.04.2008 dismissed release application, moved by landlord/respondent.

12. Aggrieved by the same, Modh. Waris Khan/landlord filed rent appeal (Rent Appeal No. 2 of 2008) by order dated 03.09.2009, the District Judge/Appellate Authority allowed appeal. While allowing the same, findings given by appellate authority are summarized as under:-.

(a) "For the purpose of release of an accommodation under Section 21(1)(a) of the Act, the landlord has not only to prove that he has a need of the tenanted accommodation but he must also prove that his need is bonafide and genuine. A mere desire to have an accommodation which is under the occupation of a tenant, is not sufficient.

(b) It has been held that occupancy of landlord in the capacity of tenant is itself sufficient indicative of the fact that landlord needs additional accommodation to run his business because existing accommodation which does not fulfill the requirement of the landlord cannot be said to be alternative accommodation. The respondents have drawn the attention of this court towards the admission of the appellant in which he has admitted that his brothers have independent business and he looks after the business of his father. Even if this admission of the appellant is taken into consideration, his need for the disputed shop would not be held to be malafide in view of the law laid down by the Hon'ble High Court.

(c) The learned Prescribed Authority while deciding issue of comparative hardship, has held that the respondents shall suffer greater hardship as compared to the appellant in case the release application is allowed. This finding has been arrived at on the ground that the respondents shall suffer more hardship as they had been carrying on business since 1963, they had no alternative accommodation to shift their business and they could not get any other shop on rent in spite of efforts made by them. This finding is again contrary to the facts and law both. There is no evidence to prove that the respondents actually made any effort to search any other shop on rent. They have failed to show as to what efforts were made by them since they got the notice to vacate the shop. It is also important to mention here that the respondents suggested several shops for purchase by the appellant but did not themselves purchase any shop for their business. It is also noteworthy that whenever a tenant is asked to vacate the tenanted premises, he suffers some hardship but if the release application is decided keeping in view this hardship, no application for release of any landlord can ever be allowed.

(d) Proceedings of release are going on since the year 1997 and appeal from 2001 and after a gap of about seven years, from the date of filing of appeal no efforts made by tenant to search alternate accommodation. Only on allotment moved, that too without mentioning the details of the property.

(e) Having gone through the pleadings, evidence of the parties and various pronouncements on the subject, I am of the considered opinion that the appellant has been able to prove his bonafide need for the shop in dispute and the appellant shall suffer greater hardship as compared to the respondents if application for release is rejected."

13. Aggrieved by order dated 03.09.2009 passed by Appellate Authority/District Judge, Hardoi in Rent Appeal No. 2 of 2008 (Md. Waris Vs. Mohd. Zafar and others) petitioners filed the present writ petition before this Court.

14. Sri Shafiq Mirza, learned counsel for petitioner while assailing impugned order submits that the landlord/respondent has no need of the shop in question from which petitioners are doing their business in case if he has any genuine and bona fide need then he should not purchase the shop in question in respect to which orders passed in Regular Suit No 276 of 1997 but ought to have purchased a vacant shop in the same market where the shop in question is situated hence need of the tenants are is more genuine and bona fide in comparison to the landlord rightly held by the Prescribed Authority but on wrong assumption and presumption set aside by appellate authority.

15. It is also submitted by Sri Shafiq Mirza, counsel for petitioner that landlord respondent after death of his fatherdoing business of repairing of Torch, Pressure Cooker, Stove etc. from shop situated at a very short distance to disputed shop originally under tenancy of his father and after his death neither any brother of landlord come forward with a plea that they also need shop in dispute to do business nor any eviction proceeding initiated by owner of said shop, as such need of tenant to retain shop in question from which they are doing their business since the year 1963 is more genuine and

bona fide if evicted they will suffer greater hardship in comparison to landlord/respondent.

16. Next submission made by learned counsel for petitioner is that appellate court while passing impugned judgment reversed finding recorded by trial court without discussing any material evidence etc. available on record with respect to bona fide and comparative hardship between parties thus the same is illegal arbitrary and against settled proposition of law "live and let live".

17. Lastly, it has been argued by Sri Shafiq Mirza, learned counsel for petitioner that neither Prescribed Authority nor appellate authority considered regarding "Part Release" of accommodation in question and if said factor is taken into consideration and part of the accommodation in possession of petitioner is released as per provisions as provided under Rule 16(1)(d) read with Rule 16(2) of the Rules framed under U.P. Act XIII of 1992, the same shall satisfy alleged need of landlord and in this regard he placed reliance on following judgments:-

1.Smt. Raj Rani Mehratra Vs. IInd Addl. District Judge and others, 1980 ARC 311.

2.Badrinath Chunnilal Mutata 2005 (23) LCD 989

3.Pratap Narain Tandon Vs. Abdul Mudkar, 2005 (2) ARC 243

4.Swarj Kumar (Sir) Vs. Arvind Kumar, 2006 (3) ARC 614

5.Nand Kishore Awasthi Vs. Addl. District Judge, Court No. 3, kanpur Nagar and others 2005 (3) LCD 1115

6.Nathu Ram Vs. VIIth Addl.District Judge, Varanasi and others.

7.Unreported judgment dated 6th May, 2010 passed by Apex Court in Civil Appeal No. 4244 of 2006 Dinesh Kumar Vs. Yusuf Ali.

18. On the basis of abovesaid fact, Sri Shafiq Mirza, counsel for petitioner submits that order passed by appellate court illegal, arbitrary, liable to be set aside.

19. Sri Modh. Arif Khan, Senior Advocate, appearing on behalf of landlord/respondent submits that in the instant case, landlord respondent admittedly doing a business from a shop initially under tenancy of his father now under his tenancy so his need is bona fide and genuine to get shop in question release in his favour.

20. Sri Mohd. Arif Khan, further submits that Prescribed Authority although come to the conclusion that there is a need of landlord to get shop in question but thereafter on misinterpretation of facts and document on record held that need of landlord/respondent is not genuine and bona fide because he purchased shop in dispute under litigation and not purchased vacant shop to carry out livelihood of his family, the said finding are wrong and incorrect cannot sustain.

21. Moreover, the finding given by Prescribed Authority that tenant made an effort to search an alternate

accommodation but no shop is available to them is also not correct fact because no genuine and bona fide effort have been made by the tenant to search an alternate accommodation since the release application is moved and once there is no bona fide effort made by tenant to search an alternate accommodation after moving of release application their comparative hardship and need cannot be considered in comparison to need of the landlord/respondent. So the judgement passed by Prescribed Authority is contrary to law and rightly set aside by appellate court holding.

22. Sri Mohd. Arif Khan, Senior Advocate further submits that finding given by appellate court that once it is established that the landlord is doing his business from a tenanted shop and tenant has not made any effort to search for an alternate accommodation he cannot dictate terms to the landlord to carryout his business in a tenanted shop or to take any accommodation on rent and in the present case, appellate court has also given a finding that proceeding release are going on since the year 1997, no genuine effort is made by tenant to search alternate accommodation only an allotment application moved that too without mentioning the details of property, so the same is futile exercise on the part of tenants they cannot derive any benefit from the said act.

23. Accordingly, order passed by appellate court on the basis of said material on record that need of landlord in comparison to tenant is more genuine and bona fide is perfectly valid and need no interference by this Court while exercising power of judicial review under Article 226 of the Constitution of India.

24. Sri Mohd. Arif Khan, further submits that so far as argument advanced by Sri Shafiq Mirza, learned counsel for petitioner that while considering the application for release moved by a landlord under Section 21(1)(a) in respect to a commercial space authorities under Rent Control Act are bound to consider the matter in respect to partial release is wholly incorrect and wrong argument because the provisions of Rule 16 (1) (d) of Uttar Pradesh Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972 (hereinafter referred to as the rules) applies only in respect to residential buildings and the Rule 16(1)(d) does not deal with an accommodation let out for commercial purpose but Rule 16(2) of the Rules deals in respect to commercial building there is no provisions in the said rule, for partial release of the premises.

25. In so far as the arguments advanced by the counsel for the petitioners that the opposite party No. 1, while allowing appeal has to considered whether the partial release of the shop will not meet the requirement of the landlord (respondent No. 2) is concerned, there is no pleadings or basis for the same and more over, the width of the shop facing road is 12 feet and depth is 21 feet and appellate authority taking into account the totality of the facts and circumstances of the case, after holding that the need of landlord for the **shop in dispute** bona fide, allowed the appeal the said action is in accordance to the law as laid down in the following judgments:-

1. Balwant Singh & others Vs. Anand Kumar Sharma and others, (2003) 3 SCC 433.

2. Vishwanath Mehta & Others Vs. District Judge, Varanasi and others, 1988 (2) ARC 385.

3. Smt. Chandra Devi and others Vs. IIIrd ADJ, Nainital & others , 1984 (2) ARC 651

4. Mangna Nand Bhat Vs. Additional District Judge, Dehradun and others 1992 (2) ARC 27.

5. Kirshana Murari Lal Vs. IIIrd ADJ, Badaun & others, 1999 (2) ARC 80.

6. Ramji Lal Vs. 1st Addl. District Judge, Muzaffarnagar and others, 1992 (1) ARC 473.

7. Lalta Prasad Vs. District Judge, Etah and others, 1997 (1) ARC 80

26. He further submits that arguments advanced by the counsel for the petitioners that by applying the principles of **live and let live,** is in correct in view of the law as held by the apex court in the case of **Badri Narayan Chunni Lal Bhutada Vs. Govind Ram, Ram Gopal Mundada in AIR 2003 Supreme Court 2713** and by this Court in the case of **Hira Lal Vs. Vith Additional District Judge, Bareilly & others reported in 2006 (I) ARC 142,** wherein it was held that if the petitioner failed to show whether he has made any effort to look for an alternative accommodation during the pendency of the proceedings then he has no right to plead hardship, and the balance of comparative hardship goes in favour of the landlord.

27. Sri Mohd. Arif Khan, further submits that Rule 16(1) (d) applies to residential accommodation where the question of part release can be considered while comparing respective hardship of the parties but the said provision does not find mention in Rule 16(2) of the Rules. So as per basic rule for interpretation of the words and phrases as propounded by the Apex Court in the case of **Union of India and another Vs. Hansoli Devi and another, 2002 (7) SCC 273,** the cardinal principle of construction of statute is that when the language of statue is plain and unambiguous then the court must give effect to the words used in the statute and it would not be open to the court to adopt a hypothetical construction on the ground that such construction is more consistent with the alleged object and the policy of the Act, as per law laid down by the Apex Court in the case of **Dr. Ganga Prasad Verma Vs. State of Bihar and others, 1995 Supp (1) SCC 192** and in the case of **Promoters & Builders Assn. Of Pune Vs. Pune Municipal Corpn. and others, (2007) 6 SCC 143** that while interpreting a statute, efforts should be made to give effect to each and every word used by the legislature, courts always presume that the legislature - inserted every part of a statute for a purpose and the legislative intention is that every part of the statute should have effect if the language of the Act is clear and explicit, could have give effect to it, whatever may be the consequences for in that case the words of the statute speak the intention of the legislature.

28. It is further submitted on behalf of the landlord that by applying the doctrine of harmonious construction the entire statute must be first read as a whole then Section by Section, Clause by Clause, Phrase by Phrase and word by word. The relevant provision of the statute, must, thus, be read harmoniously.

29. It is also well settled that the role of the court is not to legislate but to interpret the provisions of the statue and to iron out the crease the departure from the literal rule should only be done in very rare cases. Recourse can not be had to principle of interpretation other than literal rule where words of statute are clear and unambiguous. In support of said argument, reliance placed on the judgment by the Apex Court in the case of **Southern Petrochemical Industries Co. Ltd., Vs. Electricity Inspector & ETIO and others (2007) 5 SCC 447,** that a court would so interpret a provision as would help sustaining the validity of law by applying the doctrine of reasonable construction rather than making it vulnerable and unconstitutional by adopting rule of litralegis.

30. Since there is no provision under the Act or the rule of passing an order of partial release in respect to non residential accommodation the provision of Rule 16(1)(d) could not be made applicable in respect to release of a non residential accommodation and the law as laid down in this regard by Apex Court as well as by this Court should be applied. In the case of non residential building the provisions of Rule 16(1)(d) of Rules for partial release not applicable, as per the law as laid down by Full Bench Judgment of this Court in the case of **Ganga Saran Vs. Civil Judge, Hapur, Ghaziabad and others, 1991 (9) LCD 149 and Sumtibai & others Vs. Paras Finance Co. Mankanwar W/o Parasmal Chordia (D) & Ors. 2008 (1) ARC 504**

31. Sri Shafiq Mirza, learned counsel for petitioner in rebuttal submits that in view of the authorities cited by him of the Hon'ble Apex Court as well of this Court no doubt when an application for release moved in respect to commercial/business space let out by a landlord/owner the rule which governs filed while adjudicating the said application is Rule 16(2) of Rules, however even if there is no of the said provisions in respect to partial release of commercial/business space let out, but as per the law which are referred by him it does not affect the power of authorities vested under Section 21 of the Act to order partial eviction of a tenant from the portion of non-residential premises in appropriate circumstances of the case and interest of justice will sub-serve by such an order. So this Court cannot take a different view and should consider that matter in regard to partial release of the shop in dispute in the instant case. In support of the said argument Sri Shafiq Mirza, counsel for petitioner placed reliance on the following judgment:-

Apex Court in the case of **Union of India and another Vs. Raghubir Singh (Dead) by LRS. Etc. (1989) 2 SCC 754,** in para No. 27 and 28 (relevant portion quoted) held as under:-

"It is in order to guard against the possibility of inconsistent decisions on points of law by different Division Benches that the rule has been evolved, in order to promote consistency and certainty in the development of the law and its contemporary status, that the statement of the law by a Division Bench is considered binding on a Division Bench of the same or lesser number of Judges. This principle has been followed in India by several generations of Judges.

We are of opinion that a pronouncement of law by a Division Bench of this Court is binding on a Division

Bench of the same or a smaller number of Judges, and in order that such decision be binding, it is not necessary that it should be a decision rendered by the Full Court or a Constitution Bench of the Court."

In the case of **State of Tripura Vs. Tripura Bar Association and others, (1998) 5 SCC 637,** it is held that as under:-

"We are of the view that the Division Bench of the High Court which has delivered the impugned judgment being a coordinate Bench could not have taken a view different from that taken by the earlier Division Bench of the High Court in the case of Durgadas Purkayastha. If the latter Bench wanted to take a view different than that taken by the earlier Bench, the proper course for them would have been to refer the matter to a larger bench."

In the case of **Brijendra Kumar Gupta and others Vs. State of U.P. and others, 2000 (18) LCD 886,** in para Nos. 8.6 and 8.8 (relevant portion quoted) held as under:-

8.6. We remind ourselves of the following observations made by a 5 Judges Constitution Bench of the Supreme Court in **Sub-Committee of Judicial Accountability v. Union of India and others : AIR 1992 SC 63 :**

".....Indeed, no coordinate bench of this Court can even comment upon, let one sit in judgment over, the discretion exercised or judgment rendered in a cause or matter before another co-ordinate bench..... Judicial propriety and discipline as well as what flows from the circumstances that each Division Bench of this Court functions as the Court itself renders any interference by one bench with a Judicial matter before another lacking as much in propriety as in jurisdiction."

The principle enunciated aforementioned equally applies to a High Court as it exercises its judicial functions through its different Benches--Single or Division Bench or Full Bench or Special Bench and while doing so each Bench constitutes the High Court itself.

***8.8** The principle laid down by the Apex Court was also held to be applicable to the High Courts as well as by the Apex Court itself in **Sri Venkateswara Rice, Ginning and Groundnut Oil Mill Contractors Co. etc. v. State of Andhra Pradesh and others, : AIR 1972 SC 51.** in following words :*

"It is strange that a coordinate Bench of the same High Court should have tried to sit on judgment over a decision of another Bench of that Court. It is regrettable that the learned Judges who decided the latter case overlooked the fact that they were bound by the earlier decision. If they wanted that the earlier decision should be reconsidered, they should have referred to the question in issue to a larger Bench and not to ignore the earlier decision."

In the case of **Rajasthan Public Service Commission and another Vs. Harish Kumar Purohit and others, (2003) 5 SCC 480,** Hon'ble Supreme Court in para Nos. 12 and 13 (relevant portion quoted) held as under:-

Para No. 12 - *Unfortunately, the Division Bench hearing the subsequent applications did not even refer to the conclusions arrived at by the earlier*

Division Bench. The earlier decision of the Division Bench is binding on a Bench of coordinate strength. If the Bench hearing matters subsequently entertains any doubt about the correctness of the earlier decision, the only course open to it is to refer the matter to a larger Bench.

Para No. 13 - *If the latter Bench wanted to take a view different than that taken by the earlier Bench, the proper course for them would have been to refer the matter to a larger Bench. We have perused the reasons given by the learned Judges for not referring the matter to a larger Bench. We are not satisfied that the said reasons justified their deciding the matter and not referring it to the larger Bench.*

In the case of **Sant Lal Gupta and others Vs. Modrn Co-operative Group Housing Society Ltd. and others, 2010 (28) LCD 1688,** in para No. 19, it is held as under:-

Para 19- *The earlier decision of the coordinate bench is binding upon any latter coordinate bench deciding the same or similar issues. If the latter bench wants to take a different view than that taken by the earlier bench, the proper course is for it to refer the matter to a larger bench.*

In the case of **Safia Bee Vs. Mohd. Vajahath Hussain alias Fasi, (2011) 2 SCC 94,** in para Nos. 27 and 29 (relevant portion quoted) held as under:-

Para No. 27 - The learned Judges were not right in over-ruling the statement of the law by a Co-ordinate Bench of equal strength. It is an accepted rule or principle that the statement of the law by a Bench is considered binding on a Bench of the same or lesser number of Judges. In case of doubt or disagreement about the decision of the earlier Bench, the well accepted and desirable practice is that the later Bench would refer the case to a larger Bench.

Para No. 29 - *In* ***Central Board of Dawoodi Bohra Community and Anr. v. State of Maharashtra and Anr.: (2005) 2 SCC 673,*** *(para 12), a Constitution Bench of this Court summed up the legal position in the following terms:*

(1) The law laid down by this Court in a decision delivered by a Bench of larger strength is binding on any subsequent Bench of lesser or co-equal strength.

(2) A Bench of lesser quorum cannot disagree or dissent from the view of the law taken by a Bench of larger quorum. In case of doubt all that the Bench of lesser quorum can do is to invite the attention of the Chief Justice and request for the matter being placed for hearing before a Bench of larger quorum than the Bench whose decision has come up for consideration. It will be open only for a Bench of co-equal strength to express an opinion doubting the correctness of the view taken by the earlier Bench of co-equal strength, whereupon the matter may be placed for hearing before a Bench consisting of a quorum larger than the one which pronounced the decision laying down the law the correctness of which is doubted.

32. Sri Shafiq Mirza, learned counsel for petitioner further submits that in view of the authorities, as well as mention hereinbelow, this Court has no option but to take the view taken by a coordinate bench in the matter in question and is to be held that while deciding an application for release under Section 21(1)(a), the

authorities under Rent Contro Act have power for partial release of the accommodation let out for non residential purposes and in case if this Court defers from the said authority then in that circumstances the only course open is to refer the matter to larger bench as held in the case of **Rajesh Kumar Verma Vs. State of M.P. And others, (1995) 2 SCC 129,** in para No. 5 (relevant portion) quoted as under:-

"Para No. 5 - *In the group of Writ Petitions which came up for decision before the Division Bench of the High Court, the High Court placing special reliance on this Court's decision in* ***Director General Telecommunication and Anr. v. T.N. Peethambaram: (1987)ILLJ438SC ,*** *came to the conclusion that it was not open to the State Government to reduce the minimum qualifying marks in General English and the seats made available to SC/ST candidates by virtue of the said relaxation would revert to the General category students. It may here be mentioned that in taking this view the Division Bench departed from the view taken by another Division Bench of the same High Court in M.P. No. 3164/92 (Amrit Bajpai and Anr. v. State of M.P. and Ors.) dated 15th December, 1992, which judgment is produced as Annexure HI at page 42 of the paper book. This decision was brushed aside on the plea that it had not taken into consideration the decision rendered by this Court in Peethambaram's case. Needless to say that in such a situation the proper course is to refer the matter to a larger bench, a course which the subsequent Division Bench did not follow.*

In the case of **State of A.P. Vs. V.C. Subbarayudu and others, (1998) 2 SCC 516,** in para No. 10 (relevant portion) quoted as under:-

Para 10 - *affirmed in appeal earlier by Division Bench, the second Division Bench could not have dismissed the writ petitions and set aside the judgment and order of the learned single judge. We are not going into the validity of the orders passed by the two Division Benches as SAS Accountants did not come up in appeal in this Court against the order of the Division Bench subsequently made dismissing the writ petitions. We would, however, only like to say the second Division Bench if it was of the opinion that it had to take a different view than that taken by the first Division Bench the matter should as a matter of propriety have been referred to a larger bench. It is certainly a question of self-discipline which court should observe.*

In the case of **Lilawati Agarwal (Dead) by LRS and others Vs. State of Jharkhand, (2008) 15 SCC 464,** wherein it is held that if a coordinate bench disagree with a law already held by a coordinate bench then the only course is open is to refers to a large bench and the proposition.

In the case of **Nihal Singh Vs. Board of Revenue, 1987 RD 308**, where it a Division Bench of this Court held that if a court of concurrent strength takes a contrary view as laid down by earlier bench of same strength then the only course open is to refer the matter to a larger bench. Again reiterated by a Division Bench of this Court in the case of **Deena Nath and others Vs. Deputy Director of Consolidation, Ballia and others, 2010 (110) RD 584,**

33. I have heard counsel for parties and gone through record.

Rent Control Legislations are heavily loaded in favour of the tenants treating them as weaker sections of the society requiring legislative protection against exploitation and unscrupulous devices of greedy landlords. The Legislative intent has to be respected by the Courts while interpreting the laws. But it is being uncharitable to Legislatures if they are attributed with an intention that they lean only in favour of the tenants and while being fair to the tenants go to the extent of being unfair to the landlords. The Legislature is fair to the tenants and to the landlords - both. The Courts have to adopt a reasonable and balanced approach while interpreting Rent Control Legislations starting with an assumption that an equal treatment has been meted out to both the sections of the society. In spite of the overall balance tilting in favour of the tenants, while interpreting such of the provisions as take care of the interest of landlord the Court should not hesitate in leaning in favour of the landlords. Such provisions are engrafted in rent control legislations to take care of those situations where the landlord too are week and feeble and feel humble, as held by Hon'ble Mr. Justice Sabyasachi Mukharji, J. in the case of **Prabhakaran nair Vs. State of Tamil Nadu, 1987 (4) SCC 238,** under:-

"tenants are in all cases not the weaker sections. There are those who are weak both among the landlords as well as the tenants".

34. In the case of ***Malpe Vishwanath Acharya and Ors. v. State of Maharashtra and Anr. - : AIR1998 SC 60,*** Hon'ble Supreme Court emphasized the need of social legislation like the Rent Control Act striking a balance between rival interests so as to be just to law. "The law ought not to be unjust to one and give a disproportionate benefit or protection to another section of the society". While the shortage of accommodation makes it necessary to protect the tenants to save them from exploitation but at the same time the need to protect tenants is coupled with an obligation to ensure that the tenants are not conferred with a benefit disproportionately larger than the one needed. Socially progressive legislation must have a holistic perception and not a shortsighted parochial approach. Power to legislate socially progressive legislations is coupled with a responsibility to avoid arbitrariness and unreasonability. A legislation impregnated with tendency to give undue preference to one section, at the cost of constraints by placing shackles on the other section, not only entails miscarriage of just (SIC) but may also result in constitutional invalidity.

35. Hon'ble Apex Court in the case of ***Arjun Khiamal Makhijani v. Jamnadas C. Tuli and Ors. - (1989)4SCC612,*** dealing with Rent Control Legislation observed that provisions contained in such legislations are capable of being categorized into two : those beneficial to the tenants and those beneficial to the landlord. As to a legislative provision beneficial to landlord, an assertion that even with regard to such provision an effort should be made to interpret it in favour of the tenant is a negation of the very principle of interpretation of a beneficial legislation.

36. Now reverting to the facts of present case, it is not disputed between parties that shop in question purchased by

landlord from its erstwhile owner Sri Rahul Asthana and Kapil Asthana situated in a complex known as Shanker Market from which tenants/petitioners are doing General Merchant business in the name and stile of Roshan Store and also that the landlord/respondent is doing a business of repairing Torch, Pressure Cooker, Stove etc. from a shop which is very near to disputed shop initially under the tenancy of his father late Sri S. Z. Khan and after his death came under his tenancy along with other legal heirs of deceased, original tenant as per the provisions as provided under Section 3(A) (2) of U.P. Act 13 of 1972.

37. Now, first question which is to be decided in the present case is whether the need of the landlord respondent is bona fide or not.

38. In order to decide the abovesaid facts, core question is to be considered whether the need of landlord is bona fide as per the provision of Section 21(1)(a) of U.P. Act 13 of 1972 in which he moved an application for release the word *"bonafide" has been interpreted by the Hon'ble Supreme Court in the case* ***Shiv Sarup Gupta V. Dr. Mahesh Chand Gupta (1999) 6 SCC 222 : 1999 SCFBRC 330,*** *as under:-*

"The term bonafide or genuinely refers to a state or mind. Requirement is not mere desire. The degree of intensity contemplated by "required bona fide" is suggestive of legislative intent that a mere desire which is the outcome of whim or fancy is not taken note of by the rent control legislation. A requirement in the absence of felt need which is an outcome of sincere,honest desire, in contradistinction with a mere pretence or pretext to evict a tenant, on the part of the landlord claiming to occupy the premises for himself or for any member of the family would entitle him to seek ejectment of the tenant. Looked at from this angle, any setting of the facts and circumstances protruding the need of the landlord and its bona fides would be capable of successfully withstanding the test of objective determination by the Court. The judge of facts should place himself in the arm chair of the landlord and then ask the question to himself-whether in the given facts substantiated by the landlord the need to occupy the premises can be said to be natural, real, sincere, honest. If the answer be in the positive, the need is bonafide. The failure on the part of the landlord to substantiate the pleaded need, or, in a given case, positive material brought on record by the tenant enabling the court drawing an inference that the reality was to the contrary and the landlord was merely attempting at finding out a pretence or pretext for getting rid of the tenant, would be enough to persuade the Court certainly to deny its judicial assistance to the landlord."

This Court in the case of ***Pramod Kumar Vs. VI Additional District Judge, Bijnor and others, 2000(1) ARC 185****, has defined 'bona fide need' on the basis of decisions of the Hon'ble Supreme Court rendered in* ***Muttu Lal Vs. Radhey Lal, AIR 1974 SC 1596 and Bega Begum Vs. Abdul Ahad Khan, AIR 1979 SC 272 : 1986 SCFBRC 346,*** *as under :-*

"The word 'bona fide' means genuinely and sincerely i.e. in good faith in contradiction to mala fide. The requirement of an accommodation is not bona fide if it is sought for ulterior purpose but once it is established that the landlord

requires the accommodation for the purpose which he alleges there is of ulterior motive to evict the tenant that requirement should be bona fide"

In the same manner the word "bonafide" has been interpreted in the case of ***Jagdish Chandra Vs. District Judge, Kanpur Nagar and others 2008 2 ARC 756 and 2009 (2) ARC 802 Hariom Vs. Additional District Judge and others.***

The Apex Court in the case of ***Sarla Ahuja. Vs. United India Insurance Company Ltd.,(1996) 5 SCC 353****, held as under :-*

"The rent controller should not proceed on the assumption that the landlord's requirement is not bona fide. When the landlord shows a prima facie case a presumption that the requirement of the landlord is bonafide is liable to be drawn. It is not for the tenant to dictate terms to the landlord as to how else he can adjust himself without giving possession of the tenanted premises. While deciding the question of bona fides of the requirement of the landlords, it is quite unnecessary to make an endeavour as to how else the landlord could have adjusted himself."

39. In the case of **B.Balaiah V. Lachaiah, AIR 1965 AP 435** it was held that the words "for his own use" must receive a wide, liberal and useful meaning rather than a strict or narrow construction . It has been further held that while casting its judicial verdict , the Court shall adopt a practical and meaningful approach guided by the realities of life."

40. Further, the word 'reasonable requirement' has interpreted by the Hon'ble Apex Court in the case of **Mst. Bega Begum and others Vs. Abdul Ahad Khan and others , (1979) 1 SCC 275** that the words ' reasonable requirement' undoubtedly postulates that there must be an element of need as opposed to mere desire or wish. The distinction between 'desire' and 'need' should be kept in mind but not so as to make the genuine need as a mere desire.

41. Moreover, the Apex Court in the case of **Mst. Bega Begum (Supra)** has held that it is not doubt true that the tenant will have to be ousted from the house if a decree of eviction is passed but such an event would happen eventually whenever a decree for eviction is passed and merely because the tenant will be ousted from the premises where he was running his activity cannot be itself be considered to be a hardship and be availed ground for refusing the landlord a decree for eviction.

42. In the case of **Atma S. Berar Vs. Mukhtiar Singh, 2003 (2) SCC 3,** after placing reliance on the earlier judgment given by the Apex Court in the case of **Pravita Devi Vs. T.V. Krishnan 1996 (5) SCC 353** held as under:-

"The landlord is the best judge of his residential requirement. He has a compete freedom in the matter. It is no concern of the courts to dictate for him a residential standard of their own."

The High Court need not be solicitous and venture in suggesting what would be more appropriate for the landlord to do.

That was the lookout of the appellant and not of the High Court. The gratuitous advice given by the High Court was uncalled for..... There is no law which

deprives the landlord of the beneficial enjoyment of his property."

43. In the instant case, both the courts below had come to the conclusion that there is a need of landlord for shop in question but Prescribed Authority negate the need of landlord/respondent on the ground that if he has actual need if a shop then he could have purchase a vacant shop available in the Market instead of purchasing disputed shop, in respect to which judgment and decree passed in Regular Suit No. 276 of 1997, is wholly incorrect and wrong finding because nobody can be compel to purchase a shop in a particular manner rather it is the choice of a person purchasing the same in what manner he purchase, further in the instant case the tenants/petitioners did not make any effort to search for alternate accommodation, cannot dictate terms to landlord to carry on his business in a tenanted shop. It is not intention of the legislature that the tenant should enjoy the property and landlord be asked to carry on a business in a tenanted shop or compel to take another accommodation to satisfy his need. So, in view of the said facts and on the basis of documents and material on record, the need of the landlord/respondent to get the shop disputed is bona fide and genuine rightly held by appellate court.

44. Next and foremost question which is to be decided in the present case is whether while deciding an application under Section 21(1)(a) of U.P. Act 13 of 1972 in respect to release of a commercial/business purpose, let out by a landlord for his personal use, the theory of **partial release** as provided under Rule 16(1)(d) of Rules framed under U.P. Act 13 of 1972, the authorities/courts under the Rent Control Act can borrow the same or not?, In the interest of justice, when such provision does not exist under Rule 16(2) of the Rules which lays down the parameters/guidelines, to be taken into consideration while deciding a release application under Clause (a) of sub-section 1 of Section 21 of U.P. Act 13 of 1972 in respect to a building let out for a commercial/business purpose.

45. Further, as per the law as cited by learned counsel for parties in the the instant matter in respect to fact that if an application under Section 21(1)(a) of Act a release application has been moved by a landlord/owner for non residential building, two views are there as follow:-

(a) The courts has held no doubt a similar provision is not found in sub-rule (2) of Rule 16 but it does not affect the power of authority vested under Section 21 of the Act to order eviction of the tenant from a non-residential premises in appropriate cases if the authorities satisfied when on the facts and circumstances of the case, the interest of justice will sub-serve by passing such an order.

(b) On the other hand, the Court in other judgments taking into consideration the law laid down by the Apex Court in the case of **Bhagwan Das (Supra)** held that the provisions of Rule 16(1) (d) of the Rules framed under the Rules could not be applicable when the release is sought for accommodation let out for business purpose.

46. In view of the abovesaid facts, points in issue in nut shell can be summarized as under:-

Set (A) Where the courts has held that while deciding a release application in

respect to a commercial building moved by landlord under Section 21(1)(a), the provisions as provided under Rule 16(1)(d) of the Rules can be borrowed in the interest of justice in respect to partial release of building as held n the case of **Smt. Raj Rani Mehratra Vs. IInd Addl. District Judge and others, 1980 ARC 311,** as under:-

"We have heard counsel for the parties. On going through the judgments of the lower authorities also of the High Court we are satisfied that the issue arising under Rule 16(1)(d) of the rules framed under the U.P. Urban Buildings (Regulations of Letting, Rent and Eviction), Rules 1972, as to whether the landlord's need could have been satisfied by releasing only a part of the premises have not been gone into or considered by any of them. When the plea under the said rule was passed on behalf of the tenant in the High Court."

47. Thereafter, this Court on the basis of aforesaid judgment in the case of **(a) Pratap Narain Tandon Vs. Abdul Mudkar, 2005 (2) ARC 243, (b) Swaraj Kumar Vs. Arvind Kumar, 2006 (3) ARC 614 (c) Nand Kishore Awasthi Vs. Addl. District Judge, Court No. 3, Kanpur Nagar and others 2005 (3) LCD 1115 (d) Smt. Saroj Mishra and others Vs. Smt. Chandrakanti Sinha and others, 2009 (27) LCD 874,** held that no doubt a similar provisions is not found in Sub-rule 2 in Rule 16 Rules but it does not affect the power of authority vested under Section 21 of the Act to order eviction of the tenant from a portion of non-residential premises in appropriate case if authority satisfy when on the facts and circumstances of the case the interest of justice will serve by passing such an order.

48. Thereafter, Apex Court vide judgement and order dated 26th of May, 2010 passed in **Special Appeal No. 4244 of 2006 Dinesh Kumar Vs. Yusuf Ali** held as under:-

" However, in the facts and circumstances of the case, the High Court did not consider the relevant factors i.e. as what would be the magnitude of his business, and whether partial eviction of the appellant could serve the purpose of both the parties."

Set (B)- The provisions of Rule 16(1)(d) of the Rules whether relates in respect to release of residential buildings, cannot be taken into aid while deciding an application for release of a commercial premises as there is no provisions under rule 16(2) for release of commercial/business as held by the Hon'ble the Supreme court in the case of **Bhagwan Das Vs. Smt. Jiley Kuar and others , 1999 (1) ARC 377,** in paragraph No. 6 as under:-

"While dealing with the question of comparative hardship learned Counsel for the appellant placed reliance on certain decisions dealing with Rule 16(1) of the Rules. We do not, however, find it necessary to consider them inasmuch as the said sub-rule does not deal with an accommodation let out for purposes of business but deals with an accommodation let out for residential purposes, which in the instant case is not relevant."

Further, in **Bhagwan Das (Supra),** Hon'ble Apex Court distinguishing the earlier decision in the case of **Bishan Chand vs. Vth Addl. District Judge, Bulandshahr [(1982) 1 SCC 626]** stated the law in the following terms:

"It was also pointed out in this case that the provisions of Rule 16(2) of the Act (sic for Rules) had not been considered at all. In our opinion, the said decision is clearly distinguishable. Firstly, the instant case was one where there was an outweighing circumstance in favour of the landlord namely that two of her sons after completing their education were unemployed and wanted to carry on business for self-employment. Secondly, as already seen above, it was not a case where the provisions of Rule 16(2) can be said to have been ignored by the District Judge. Thirdly, it was a case where there was even this additional circumstance that the appellant had brought no material on record to indicate that at any time during the pendency of this long drawn out litigation he made any attempt to seek an alternative accommodation and was unable to get it."

49. This Court in the case of **Mangna Nand Bhat Vs. Additional District Judge, Dehradun and others 1992 (2) ARC 27,** in paragraph No. 14 has held as under:-

"the learned Counsel for the petitioner lastly contended that the Courts below did not consider that the need of the respondents would be satisfied by part accommodation. In my opinion, the learned Counsel for the respondents is correct in his submission that the provisions of Rule 16(1)(d) of the Rules framed under the Act would not be applicable when the release is sought for business purpose. (Refer ***Bhagwan Das Vs. Smt. Jiley Kaur and others, 1991 (1) ARC 377 (SC).*** *The petitioner never raised this plea before the Courts below to enable them to consider the feasibility of apportionment of the accommodation and to assess the requirement of the respondents which could be met by part release of the accommodation. There is no material on record at this stage to consider this plea and I am not inclined to consider this aspect of the matter for the first time in proceedings under Article 226 of the Constitution before this Court. A suggestion was made by me to the learned Counsel for the parties to adjust amongst themselves some solution in this regard but no agreed solution be arrived at and even though both the parties brought on record offers and counter offers for adjustment of the accommodation between the parties.*

50. Again this Court in the case of **Lalta Prasad Vs. District Judge, Etah and others , 1997 (1) ARC 80,** in paragraph Nos. 13 and 16 has held as under:-

"**Para 13** *-In* ***Bhagwan Das v. Smt. Ziley Kaur and Ors.*** *their Lordships of Hon'ble Supreme Court while dealing with Sub-rule (1) of Rule 16 were pleased to hold as under:*

"While dealing with the question of comparative hardship, learned Counsel for the Appellants placed reliance on certain decisions dealing with Rule 16 (1) of the Rules, we do not, however, find it necessary to consider them inasmuch as the said Sub-rule does not deal with an accommodation let out for purposes of business but deals with an accommodation let out for residential purposes, which in the instant case is not relevant."

Para - 16- *Although, there seems to be a conflict of opinion between the Hon'ble single Judges on the applicability of Sub-rule (1) of Rule 16 to the commercial buildings but, after the*

decision of Supreme Court in the case of Bhagwan Das (supra), there was no scope of conflict, therefore, I do not consider it necessary to make a recommendation to the Hon'ble Chief Justice to refer the matter to a larger Bench in the present case, and rely upon the said decision and further even in the case of Rama Shanker Rastogi. It was held that the Prescribed Authority could release only a part of the building, if such a plea is raised by the tenant and the tenant had adduced evidence In support of this case before authorities below."

51. In the case of **Ganga Devi Vs. District Judge, Nainital and others 2008 (2) ARC 584,** Hon'ble the Supreme Court has held as under:-

"We are, however, not oblivious of the fact that with the said rejoinder a sketch map has been annexed to show that it measured 13 ft. x 20 ft. We are, however, of the opinion that such disputed questions of fact cannot be gone into by this Court for the first time." taken into the said fact Hon'ble Apex Court further held that comparative hardship, undisputably, is a relevant factor for determining the question as to whether the requirement of the landlord is bona fide or not within the meaning of the provisions of the said Act and the Rules. It is essentially a question of fact. Such a question of fact, however, is to be determined on the touchstone of the statutory provisions as contained in Section 21(1)(a) and Rules 16(2)(c) of the Rules.

52. Rule 16 provides for some factors which are required to be taken into consideration for the purpose of determining the comparative hardship. Respondent No. 3 in this case does not have any business. If he has no business, the question of application of the factors as envisaged in the first part of clause (c) of Sub-Rule (2) of Rule 16 will not arise. On the findings of the Appellate Authority, no accommodation is available with him. The question of thus any premises being let out in favour of 1st appellant also does not arise.

53. There is also nothing on record to show that for the last so many years the appellant had made any effort to find out a tenanted premises for herself so that she can continue with her business. No such material at least has been brought on record. Any subsequent event as regards thereto has neither been pleaded nor proved.

54. The provisions of the statutory rules must be interpreted so as to give effect to the object and purport of the Act. It cannot be applied in a vacuum, as the statute requires comparison of the hardship of both the tenant as also the landlord. It is, therefore, not a case where Rule 16 has any application.

55. The court would not determine a question only on the basis of sympathy or sentiment. Stricto sensu equity as such may not have any role to play.

56. In the case of **Kewal Chandra and others Vs. Additional District Judge and others, 2004 (2) ARC 365,** in para No. 29 (relevant portion) quoted as under:-

"Admittedly, the Courts below have not considered this aspect of the matter. This Court directed the parties to compromise the matter and explore the possibilities as to whether a portion of the premises in question could be released. The petitioners agreed to vacate a portion

of the premises, was, however, not agreeable to by the landlord who submitted that he required the entire premises in order to set up the business for both his brothers and, therefore, releasing only a portion of the premises would not be sufficient for both the brothers. Consequently, the effort of a compromise failed and the matter was dealt on merit. I find, that there is some strength in the contention raised by the landlord. In the first place, the application for release is to settle the two brothers. The landlord has come out with a clear case that after demolition he would make a new construction on the ground floor as well as on the first floor in order to settle his two brothers. Therefore, the bonafide need of the landlord to settle his two brothers. Further Rule 16(1)(d) of the Rules contemplates consideration of a partial release of the premises in question where the premises is required for residential purposes. This provisions will not apply to a building which is being released for a commercial purposes. I am of the view that Rule 16(1) (D) is not applicable to the present premises and is only applicable to a building which is being released for residential purpose. Thus, I find no merit in the argument raised by the learned Counsel for the petitioners."

In the case of **Krishna Murari Lal Vs. IIIrd Additional District Judge, Badaun and others,** ***1999 (2) ARC 80,*** in para Nos. 5, 6 & 7 (relevant portion) quoted as under:-

Para No. 5 - *Rule 16 (1) (d) does not apply to commercial buildings. The prescribed authority is under a duty to consider under Rule 16 (1) (d) whether releasing a part of the disputed building will suffice the need of the landlord but similar provision has not been made under sub-rule (2) of Rule 16 which lays down the guidelines in respect of a building let out for the purposes of business. In Smt. Chanda Devi and another v. XIIth Additional District Judge, Kanpur and others. , Hon'ble R. M. Sahai, J. (as he then was) held that Rule 16 (1) (d) does not apply to non-residential buildings let out for the purposes of any business and repelled the contention raised on behalf of the petitioner that the guidelines laid down under Rule 16 (1) (d) should also be taken into account while considering the guidelines laid down in sub-rule (2) of Rule 16. The Hon'ble Supreme Court in Bhagwan Das v. Smt. Jiley Kaur and others, , held Rule 16 (1) of the rules cannot be placed reliance in respect of an accommodation let out for the purposes of business as sub-rule (1) of Rule 16 only deals with an accommodation let out for residential purposes and such rule is not relevant for non-residential accommodations. This view has been followed by this Court in Niranjan Prasad v. District Judge, Dehradun and others , wherein it was contended that the High Court must examine whether a part of the building can be released for business purposes placing reliance upon the decision of Smt. Raj Rant (supra) but it was held that in respect of non-residential building the sub-rule 16 (1) (d) being not applicable. If the plea that a part of the accommodation will suffice the need of landlord, is not raised, the Court is not required to record any finding itself. In Ramji Lal v. 1st Additional District Judge. Muzaffarnagar and others , the Court repelled the contention of the petitioner to consider the plea regarding release of a part of non-residential building. This Court did not permit to raise the plea for the first time in the High Court regarding*

release of a part of non-residential accommodation if the plea was not raised before the authorities below and no material evidence was placed vide Magnanand Bhatt v. Additional District Judge, Dehradun and others ; Oil and Oil Seeds . Exchange, Kanpur v. XIIth Additional District Judge, Kanpur Nagar and others ; M/s. Carona Ltd., Kanpur Nagar v. Ist Additional District Judge, Kanpur Nagar and others .

Para No. 6 - *Learned counsel for the petitioner submitted that even if Rule 16 (1) (d) is not applicable in respect of non-residential building, still the Prescribed Authority is not bound to release the entire building under Section 21 (1) (a) of the Act. He placed reliance upon the decision Firm M/s. Shankar Lal Durga Prasad v. IVth Additional District Judge, Meerut and others , wherein the lower authorities had released only a part of the non-residential accommodation. The landlord contended that Rule 16 (1) (d) was not applicable in respect of non-residential building and, therefore, the entire accommodation should have been released. The Court repelled the contention holding that there is no prohibition under the Act that a part of the accommodation cannot be released in respect of requirement for business. In this case, the appellate authority had released only a part of the accommodation on the basis of material evidence on the record which was upheld by this Court.*

Para No. 7 - *Similarly in Jal Devi and others v. IVth Additional District Judge, Etawah and others. , the Court held that Rule 16 (1) (d) of the Rules is not applicable in respect of non-residential building but at the same time Section 21 (1) of the Act confers plenary power on the prescribed authority to release any building under the tenancy or any specified part but in that respect there must be pleading and evidence. The Court observed as under :*

"Thus from the aforesaid legal provisions it is clear that while considering the release application with regard to residential accommodation, the prescribed authority is under the legal obligation to have regard to the provisions contained under Rule 16 (1) (d) of the rules. However, same cannot be said in respect of the non-residential building then it would be left for the parties to plead and set up a case that for specified need of the landlord, release of only part of the building is necessary and the whole building is not required by him. If such a plea is raised then only the prescribed authority and the appellate authority may be required to consider for release of the part of the commercial accommodation."

In the case of **Ramji Lal Vs. 1st Addl. District Judge, Muzaffarnagar and others, 1992 (1) ARC 473**, in paragraph Nos. 17 & 18 held as under:-

Para No. 17 *- The next submission raised by the learned Counsel for the petitioner was that Rule 16(1)(d) hs not been considered. This submission is misconceived. This Rule applies only in a case of a residential accommodation and not for an accommodation for business purposes. He has relied upon a decision reported in* ***Pushottam and other Vs. Additional District Judge, jaunpur and others, 1982 (1) ARC 279.*** *In that case it was held that Rule 16(1) (D) was attracted for the premises which was occasionally used for the residential purposes. In that case a part of the disputed premises was used for residential purposes whereas in*

the instant case there is no such plea or finding.

Para No. 18 *- In another case reproted in M/s. Ram Nath Export Private Ltd., Agra Vs. Additional District Judge, Agra and others, 1984 ALR 716, the accommodation let out was for business purposes but the landlord required the same for residential purposes. The Court held that Rule 16(1) (d) was applicable. In the instant case the accommodation was let out for business purposes and the release is also for that purpose. These cases have no relevance to the facts of the present case.*

57. Now the question, in view of the abovesaid facts and judgments arises for consideration before this Court is to the effect that when two sets of different views exists then which view is to be followed or as argued by Sri Shafiq Mirza, learned counsel for the petitioner that **"a co-ordinate bench could not have taken a different view that have take by co-ordinate bench of the High Court."** So the matter be referred to a larger bench.

58. In order to decide the abovesaid controversy, I feel appropriate to have a glance to the relevant provisions as provided under Rule 16 of the Rules framed under U.P. Act 13 of 1972:-

"Rule 16 - *Application for release on the g round of personal requirement [Sections 21(1)(a) and 35(8)] - In considering the requirements of personal occupation for purposes of residence by the landlord or any member of his family, the prescribed authority shall, also have regard to such factors as the following:-*

(a) Where the landlord already has adequate and reasonably suitable accommodation having regard to the number of members of his family and their respective ages and his means and social status, his claim for additional requirements and be construed strictly;

(b) Where a residential building was let out at the time when the sons of the landlord were minors and subsequently one or more of them has married, the additional requirement of accommodation for the landlord's sons shall be given due consideration.

(c) Where the tenant has, apart from the building under tenancy, other adequate accommodation, whether owned by him or held as tenant of any public premises, having regard to the number of members of his family and their respective ages and his social status, the landlord's claim for additional requirements shall be construed liberally;

(d) Where the tenant's needs would be adequately met by leaving with him a part of the building under tenancy and the landlord's needs would be served by releasing the other part, the prescribed authority shall release only the other part of the building;

Rule 16(2) *- While considering an application for release under Clause (a) of sub-section (1) of Section 21 in respect of building let out fro purposes of any business the prescribed authority shall also have regard to such facts as the following:-*

(a) The greater the period since when the tenant opposite-party, or the original tenant whose heir the opposite party is, has been carrying on his business in that

building, the less justification for allowing the application;

(b) Where the tenant has available with him, suitable accommodation to which he can shift his business without substantial loss there shall be greater justification for allowing the application."

Provisions as provided under Rule 16(1)(d) inter alia stated that the position is that *Where the tenant's needs would be adequately met by leaving with him a part of the building under tenancy and the landlord's needs would be served by releasing the other part, the prescribed authority shall release only the other part of the building;"*

59. Thus, from the perusal of said Rule, it is clear that while come into operation only if an application is being moved by a landlord in respect to release of a residential premises under Section 21(1)(a) of Act. But not in case where a release application is moved for a non residential premises, let out for business purpose and if an application for release is moved in respect to a building let out. for business purpose Rule which governs the filed is Rule 16(2) and in the said rule there is no provisions provided by the legislature in respect to part release of the premises, which is let out for commercial purpose, and that is the sole intention and object of the legislature while framing the Rule 16(2) while considering an application for release under Clause (a) of Sub-Section 1 of Section 21 of U.P. Act 13 of 1972 in respect to a building let out for the purpose of commercial /business purpose.

60. It is settled law that every word of statute should be given a meaning. While interpreting a statutory provision the entire section or whole of the statute, as the case may be, should be considered. According to **Maxwell on the Interpretation of Statutes** (12th edition page 36) any construction which may leave without affecting any part of the language of a statute should ordinarily be rejected.

Relevant portion from **Maxwell on the Interpretation of Statutes (12th edition page 36)** is reproduced as under:

"A construction which would leave without effect any part of the language of a statute will normally be rejected. Thus, where an Act plainly gave an appeal from one quarter sessions to another, it was observed that such a provision, though extraordinary and perhaps an oversight, could not be eliminated."

61. In view of above, the court should always avoid interpretation, which would leave any part of the provision to be interpreted without effect. While doing so every clause of a statute is to be construed with reference to the context and other clauses of the Act to make a consistent enactment of the whole statute-According to Maxwell (supra at page 47), statutory language should not be read in isolation but in its context.

62. While referring a decision of House of Lord reported in **AG v. HRH Prince Ernest Augustus** 1957 (1) All ER 49 (HL) in a famous treatise Principles of Statutory Interpretation by Justice G.P. Singh, the views of Lord Tucker has been discussed with approval as under (9th Edition page 34):

"In an appeal before the House of Lords, where the question was of the true import of a statute, the Attorney-General

wanted to call in aid the preamble in support of the meaning which he contended should be given to the enacting part, but in doing so was met by the argument on behalf of the respondent that where the enacting part of a statute is clear and unambiguous, it cannot be controlled by the preamble which cannot be read. The House of Lords rejected the objection to the reading of the preamble,. Although, ultimately it came to the conclusion that the enacting part was clear and unambiguous. VISCOUNT SIMONDS (LORD TUCKER agreeing) in that connection said: "I conceive it to be my right and duty to examine every word of a statute in its context, and I use context in its widest sense as including not only other enacting provisions of the same statute, but its preamble, the existing state of the law, other statutes in pari materia, and the mischief which I can, by those and other legitimate means, discern that the statute was intended to remedy."

63. Learned author (supra) again proceeded to consider the judgement of Australian High Court and views of Lord Steyn in a case reported in . **R v. National Asylum Support Service, 2002 (4) All ER 654** (page 35) is as under:

"As rightly pointed out by the High Court of Australia, "the modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses context in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means-one may discern the statute was intended to remedy. LORD STEYN recently expressed the same view as follows: "The starting point is that language in all legal texts conveys meaning according to the circumstance is which it was used, it follows that context must always be identified and considered before the process of construction or during it. It is therefor wrong to say that the court may only resort to evidence of the contextual scene when an ambiguity has arisen."

64. Thus, the exposition 'ex visceribus actus' is a long recognised rule of construction. Words in a statute often take their meaning from the context of the statute as a whole. They are, therefore, not to be considered in isolation. Hon'ble Supreme Court in a case reported in, " : **AIR1992SC1** , ***Mohan Kumar Singhania v. Union of India"*** has proceeded to hold as under:

"However, it is suffice to say that while interpreting a statute the consideration of inconvenience and hardships should be avoided and that when the language is clear and explicit and the words used are plain and unambiguous, were are bound to construe them in their ordinary sense with reference to other clauses of the Act or Rules as the case may be, so far as possible, to make a consistent enactment of the whole statute or series of statute/Rules/regulations relating to the subject matter. Added to this, in construing statute, the court has to ascertain the intention of the law making authority in the backdrop of the dominant purpose and underlying intendment of the said statute and that every statute is to be interpreted about any violence to its language and applied as far as its explicit language admits consistent with the established rules of interpretation."

65. The aforesaid settled rule on interpretation has been further affirmed by Apex Court holding that court cannot legislate. But to invoke judicial activism to set at naught legislative judgment is sub serve of the constitutional harmony and comity of instrum entalities in the following cases:-

(i) Union of India and another V. Deoki Nandan Agarwal, AIR SC 96

(ii) All India Radio V Santosh Kumar and another (1998) 3 SCC 237.

(iii) Sakshi V. Union of India and others,(2004) 5 SCC 518

(iv) Pandian Chemicals Ltd. V. CIT (2003) 5 SCC 590

(v) Bhavnagar University Vs. palitana Sugar Mills (P) and others, AIR 2003 SC 511.

(VI) J.P. Bansal V. State of Rajasthan, (2003) 5 SCC 134.

66. In the case of **Ganga Prasad (Supra)** the Apex Court in paragraph No. 5 has held as under:-

"Where the language of the Act is clear that explicit, the Court must give effect to it, whatever may be the consequences, for in that case the words of the statute speak the intention of the legislature. The interjection of the preposition 'or' at the underlined place amounts to judicial legislation or supplying omission which is impermissible in the process of construction of the Regulation. So we cannot read the Regulation in the matter suggested by the counsel.

67. In the case of **Union of India Vs. Harsoli Devi and others, (2002) 7 SCC 273,** Apex Court in para No. 9 has held as under:-

***"Para No. 9** - Before we embark upon an inquiry as to what would be the correct interpretation of Section 28-A, we think it appropriate to bear in mind certain basic principles of interpretation of statute. The rule stated by **Tindal, CJ in Sussex Peerage case, (1844) 11 Cl & F.85,** still holds the field. The aforesaid rule is to the effect:*

"If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves do alone in such cases best declare the intent of the lawgiver."

*It is a cardinal principle of construction of statute that when language of the statute is plain and unambiguous, then the court must give effect to the words used in the statute and it would not be open to the courts to adopt a hypothetical construction on the ground that such construction is more consistent with the alleged object and policy of the Act. In **Kirkness v. John Hudson & Co. Ltd, [1955] 2 All ER 345,** Lord Reid pointed out as to what is the meaning of "ambiguous' and held that*

"A provision is not ambiguous merely because it contains a word which in different context is capable of different meanings and it would be hard to find anywhere a sentence of any length which does not contain such a word. A provision is, in my judgment, ambiguous only if it contains a word or phrase which in that

particular context is capable of having more than one meaning."

It is no doubt true that if on going through the plain meaning of the language of statutes, it leads to anomalies, injustices and absurdities, then the court may look into the purpose for which the statute has been brought and would try to give a meaning, which would adhere to the purpose of the statute. Patanjali Sastri, CJ in the case of ***Aswini Kumar Ghose v. Arabinda Bose, [1953] SCR 1,*** *had held that it is not a sound principle of construction to brush aside words in a statute as being inapposite surplusage, if they can have appropriate application in circumstances conceivably within the contemplation of the statute. In* ***Quebec Railway, Light Heat and Power Co. v. Vandray, AIR (1920) PC 181,*** *it had been observed that the Legislature is deemed not to waste its words or to say anything in vain and a construction which attributes redundancy to the legislature will not be accepted except for compelling reasons. Similarly, it is not permissible to add words to a statute which are not there unless on a literal construction being given a part of the statute becomes meaningless. But before any words are read to repair an omission in the Act, it should be possible to state with certainty that these words would have been inserted by the draftsman and approved by the legislature had their attention been drawn to the omission before the Bill had passed into a law. At times, the intention of the legislature is found to be clear but the unskilfulness of the draftsman in introducing certain words in the statute results in apparent ineffectiveness of the language and in such a situation, it may be permissible for the court to reject the surplus words, so as to make the statute effective. Bearing in mind the aforesaid principle, let us now examine the provisions of the Section 28-A of the Act, to answer the questions referred to us by the Bench of the two learned Judges. It is no doubt true that the object of Section 28-A of the Act was to confer a right of making a reference, who might have not made a reference earlier under Section 18 and, therefore, ordinarily when a person makes a reference under Section 18 but that was dismissed on the ground of delay, he would not get the right of Section 28-A of the Land Acquisition Act when some other person makes a reference and the reference is answered. But the Parliament having enacted Section 28-A, as a beneficial provision, it would cause great injustice if a literal interpretation is given to the expression "had not made an application to the Collector under Section 18" in Section 28-A of the Act. The aforesaid expression would mean that if the land-owner has made an application for reference under Section 18 and that reference is entertained and answered. In other words, it may not be permissible for a land owner to make a reference and get it answered and then subsequently make another application when some other person gets the reference answered and obtains a higher amount. In fact in Pradeep Kumari's case the three learned Judges, while enumerating the conditions to be satisfied, whereafter an application under Section 28-A can be moved, had categorically stated -"the person moving the application did not make an application to the Collector under Section 18". The expression "did not make an application", as observed by this Court, would mean, did not make an effective application which had been entertained by making the reference and the reference was answered. When an application under Section 18 is not entertained on the ground*

of limitation, the same not fructifying into any reference, then that would not tantamount to an effective application and consequently the rights of such applicant emanating from some other reference being answered to move an application under Section 28-A cannot be denied. We, accordingly answer question No. l(a) by holding that the dismissal of an application seeking reference under Section 18 on the ground of delay would tantamount to not filing an application within the meaning of Section 28-A of the Land Acquisition Act, 1894."

68. In the case of **Promoters & Builders Assn. Of Pune Vs. Pune Municipal Corpn. and others, (2007) 6 SCC 143**, Hon'ble the Supreme Court after placing reliance in the case of **Harsoli Devi(Supra)** held in paragraph No. 11, relevant portion is as under:-

" that it is a cardinal principle of construction of a statute that when the language of the statute is plain and unambiguous, then the Court must give effect to the words used in the statute and it would not be open to the court to adopt a hypothetical construction on the ground that such construction is more consistent with the alleged object and the policy of the Act"

69. In the case of **Southern Petrochemical Industries Co. Ltd., Vs. Electricity Inspector & ETIO and others (2007) 5 SCC 447,** the Apex Court in paragraph No. 78 and 92 has held as under:-

Para No. 78 *- It is one thing to say that where the words or expressions in a statute are plainly taken from an earlier statute in pari materia, which have received judicial interpretation, it must be presumed that the Parliament was aware thereof and intended to be followed in latter enactment. But, it is another thing to say that it is necessary or proper to resort to or consider the earlier legislations on the subject only because the consolidating Act re-enacts in an orderly form the various statutes embodying the law on the subject.*

Para No. 92 *- **The intention of the legislature** must be, as is well known, gathered from the words used in the statute at the first instance and only when such a rule would give rise to anomalous situation, the court may take recourse to purposive construction. It is also a well settled principles of law that casus omissus cannot be supplied.*

70. In view of the abovesaid facts, the principle of law which emerged out is to the effect that:-

"If the language of the Act is clear and explicit, the Court must give effect to it, whatever may be the consequences, for in that case the words of the statute speak the intention of the legislature.

71. In the case of **Sumtibai & others Vs. Paras Finance Co. Mankanwar W/o Parasmal Chordia (D) & Ors. 2008 (1) ARC 504,** Hon'ble Apex Court held as under:-

"As observed by this Court in **State of Orissa v. Sudhansu Sekhar Misra, (AIR 1968 SC 647 vide para 13) :-**

"A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what

logically follows from the various observations made in it. On this topic this is what Earl of Halsbury, LC said in ***Quinn v. Leathem, 1901 AC 495:***

"Now before discussing the case of ***Allen v. Flood, (1898)AC 1*** *and what was decided therein, there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical Code, whereas every lawyer must acknowledge that the law is not always logical at all."*

11. In ***Ambica Quarry Works*** *v.* ***State of Gujarat and Ors., (1987) 1 SCC 213*** *(vide para 18) this Court observed:*

"The ratio of any decision must be understood in the background of the facts of that case. It has been said long time ago that a case is only an authority for what it actually decides, and not what logically follows from it."

12. In ***Bhavnagar University*** *v.* ***Palitana Sugar Mills Pvt. Ltd, (2003) 2 SCC 111*** *(vide para 59), this Court observed:*

"It is well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision."

13. As held in ***Bharat Petroleum Corporation Ltd. and Anr.*** *v.* ***N.R.Vairamani and Anr., AIR 2004 SC 4778 : 2004 SCFBRC 454,*** *a decision cannot be relied on without disclosing the factual situation. In the same Judgment this Court also observed:*

"Court should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of Courts are neither to be read as Euclid's theorems nor as provisions of the statute and that too taken out of the context. These observations must be read in the context in which they appear to have been stated. Judgments of Courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes.

In ***London Graving dock co. Ltd. v. Horton, 1951 AC 737 at P. 761),*** *Lord Mac Dermot observed:*

"The matter cannot, of course, be settled merely by treating the ipsissima ventral of Willes, J. as though they were part of an Act of Parliament and applying the rules of interpretation appropriate thereto. This is not to detract from the great weight to be given to the language

actually used by that most distinguished judge.

*In **Home Office** v. **Dorset Yacht Co., (1970) (2) All ER 294)** Lord Reid said, Lord Atkin`s speech...is not to be treated as if it was a statute definition it will require qualification in new circumstances. Megarry, J. in observed: One must not, of course, construe even a reserved judgment of Russell L. J. **(1971) 1 WLR 1062** as if it were an Act of Parliament. And, in **Herrington v. British Railways Board (1972 (2) ELR 537)** Lord Morris said:*

"There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case."

Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper.

The following words of Lord Denning in the matter of applying precedents have become locus classicus:

"Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect, in deciding such cases, one should avoid the temptation to decide cases (as said by Cardozo, J.) by matching the colour of one case against the colour of another. To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive."

*** *** ***

"Precedent should be followed only so far as it marks the path of justice, but you must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches. My plea is to keep the path of justice clear of obstructions which could impede it."

72. Further, in the case of **Nasiruddin V. Sita Ram Agarwal,(2003) 4 SCC 753,** the Supreme Court has held that the Court can iron out of the creases but cannot change the texture of the fabric. It cannot enlarge the scope of legislation or intention when the language of provision is plain, unambiguous . It cannot add or subtract words to statute or read something into in which is not there. It cannot rewrite or recast the legislation.

73. It is also settled proposition of law as laid down by Hon'ble Supreme Court in the case of **State of U.P. V. Singhepa Singh, reported in AIR 1964 Supreme Court** 358 as well as by Privy Council in the case of **Nazir Ahmad V. King Emperor, reported in AIR 1936 Privy Council 253** that when the law prescribes a certain mode or specific mode of or for doing a thing or certain mode of exercising certain power of authority or right or for performing certain act then that act or thing has got to be done in that manner alone & not otherwise. Other modes in respect thereof are necessarily and by necessary implication taken to have been forbidden & closed.

74. A Full Bench of this Court in the case of **Ganga Saran Vs. Civil Judge, Hapur, Ghaziabad and others, 1991 (9) LCD 149,** held as under:-

"Similar situation arose before a Full Bench of Punjab and Haryana High Court in the case of ***M/s Indo Swiss Time Limited, Dundahera v. Umrao. AIR 1981 P and H 213****. What the Full Bench in the said case held is extracted below:*

"Now the contention that the latest judgment of a co-ordinate Bench is to be mechanically followed and must have pre-eminence irrespective of any other consideration does not commend itself to me. When judgments of the superior Court are of co-equal Benches and therefore, of matching authority then their weight inevitably must be considered by the rationale and the logic thereof and not by the mere fortuitous circumstances of the time and date on which they were rendered. It is manifest that when two directly conflicting judgments of the superior Court and of equal authority are extant then both of them cannot be binding on the courts below. Inevitably a choice, though a difficult one, has to be made in such a situation. On principle it appears to me that the High Court must follow the judgment which appears to it to lay down the law more elaborately and accurately. The mere incidence of time whether the judgments of coequal Benches of the Superior Court are earlier later is a consideration which appears to me as hardly relevant."

This decision was followed by the Bombay High Court in the case of ***Special Land Acquisition Officer v. Municipal Corporation, AIR 1988 Bombay 9.*** *The majority of Judges in the Full Bench held that if there was a conflict between the two decisions of equal benches which cannot possibly reconcile, the courts must follow the judgment which appear to them to state the law accurately and elaborately.*

Moreover, in the case of **Lalta Prasad (Supra)**, this Court in para Nos 16 and 17 held as under:-

Para - 16- *Although, there seems to be a conflict of opinion between the Hon'ble single Judges on the applicability of Sub-rule (1) of Rule 16 to the commercial buildings but, after the decision of Supreme Court in the case of Bhagwan Das (supra), there was no scope of conflict, therefore, I do not consider it necessary to make a recommendation to the Hon'ble Chief Justice to refer the matter to a larger Bench in the present case, and rely upon the said decision and further even in the case of Rama Shanker Rastogi. It was held that the Prescribed Authority could release only a part of the building, if such a plea is raised by the tenant and the tenant had adduced evidence In support of this case before authorities below."*

Para - 17- *In the present case, the learned Counsel for the Petitioner searched for the said plea being taken before the authorities below but in vain. He ultimately had to concede that in the written statement, no such plea was taken. He simply asserted that at appellate stage, a written argument was filed in which the argument for consideration of the plea of partial release was raised. He has also filed in support of his submission a supplementary affidavit annexing therewith the copy of the written argument. On the other hand, learned Counsel for the Respondent emphatically refuted the said fact and submitted that no written argument was ever filed before the Appellate Authority and further submitted that even assuming without admitting that any written argument was placed on the record, the same was never pressed.*

Consequently, the appellate authority did not take note of it. Under the said facts and circumstances, there is no difficulty in holding that the plea regarding applicability of Clause (d) of Sub-rule (1) of Rule 16 was not taken in the written statement/objection filed in reply to the release application or In the memo of appeal filed before appellate authority nor the same was pressed before appellate authority. Therefore, there arose no occasion for the authorities to take note the said plea in their orders.

And in the case of **Ramji Lal Vs. 1st Addl. District Judge, Muzaffarnagar and others, 1992 (1) ARC 473,** in paragraph No. 19 has held as under:-

"Para No. 19- *There is no dispute that if the provision of Rule 16(1) (d) have not been considered by the Appellate Authority the same can be considered by the High Court. Reference may be made to the case reported in Smt. Raj Rani Vs. IInd Additional District Judge, 1980 ARC 311 (SC). But since this Rule is not attracted in the present case, there was no question of it being considered.*

75. In the light of abovesaid facts, the position which emerged out is to the effect that the **only interpretation of Rule 16(1)(d) of Rules framed under U.P. Act 13 of 1972 is that the same has no application to a non-residential building as the said sub-rule does not deal with an accommodation let out for commercial/business purpose but deals with an accommodation let out for residential purpose, thus the Prescribed Authority or Appellate Authority in the aid of Rule 16(1)(d) cannot consider theory of partial release of a commercial/business space in respect to which release application moved by the landlord under Section 21(1)(a) of U.P. Act 13 of 1972 and the same is to be decided as per provisions as provided under Rule 16(2) of the Rules.**

76. Accordingly, in view of the abovesaid facts, the submission as made by Sri Shafiq Mirza, learned counsel for petitioner that this Court should refer the matter to a larger bench, has no force and accordingly rejected.

77. Further, in the instant case, release application has been moved on 12.12.2001 and since then no effort has been made by the tenant petitioner to search for an alternate accommodation and only the plea taken by him that he has made a search for alternate accommodation and an affidavit filed to the effect that he has made a search for alternate accommodation but the same is not available does not support the said plea taken by tenants as appellate court had given a finding to the effect in the present case it is established on the basis of material on record that an allotment application moved by tenant/petitioner but without mentioning details of the property in respect to same, the said fact is also admitted by Sri Shafiq Mirza, learned counsel for petitioner that no details in respect to the property has been mentioned by his clients in the allotment application. So the said allotment application is meaningless as per the relevant provisions as provided for allotment of a premises under the Rent Control Act and on the basis of the same it cannot be said that tenant/petitioner made any sincere effort to search an alternate accommodation in the matter in question.

78. Thus, in the instant case on the basis of material on record, it is established that the tenant did not make any effort to search an alternative accommodation immediately, the filing of the release application and even thereafter, so the said facts are sufficient to tilt the balance of comparative hardship against the tenant as held by the Apex Court in the case of **Bhutada V. G.R. Mundada 2003 Supreme Court 2713; 2005(2) ARC 899** , the said authority has been followed by this Court in **Salim Khan V. Ivth Additional District Judge, Jhanshi and others , 2006(1) ARC 588** wherein it is held is under:-

" in respect of comparative hardship , tenant did not show what efforts they made to search alternative accommodation after filing of release application . This case sufficient to tilt the balance of hardship against them Vide ***Bhutada V. G.R. Mundada 2003 Supreme Court 2713; 2005(2) ARC 899.*** *Moreover, rent of Rs. 6/- per month which the tenants are paying is virtually as well as actually no rent. By paying such insignificant rent they must have saved a lot of money. Money saved is money earned. They must , therefore, be in a position to take another house on good rent. Further, they did not file any allotment application for allotment of another house. Under Rule 10(3) of the Rules framed under the Act, a tenant, against whom release application has been filed, is entitled to apply for allotment of another house immediately. Naturally such person is to be given preference in the matter of allotment. Respondents did not file any such allotment application. Thus, the question of comparative hardship has also to be decided against the tenants."*

79. The said view has been further reiterated by this Court in the following cases:-

(1) Jai Raj Agarwal Vs. Bhola Nath kapoor and others , 2005(3) ARC 417.

(2) Rulemuddin and others Vs. Abdul Nadeem ,2007(2) ARC 62.

(3) Mohabbey Ali Vs Taj Bahadur and other, 2009 (2) ARC 715.

(4) Raj Kumar Vs. Lal Khan, 2009 (2) ARC 740

(5) Ashis Sonar and other Vs. Prescribed Authority and others 2009 (3) ARC 269 .

80. As per admitted facts of the present case, petitioners/tenants are enjoying comforts of a rented shop while the landlord/respondent is doing his business from another rented shop and in this regard, appellate court after appreciacing facts of the present case stated to the effect that after filing of release application tenant had not made any sincere effort to find out alternate accommodation. So as per settled provision of law that when a release application is filed before the prescribed authority, tenant must find out suitable accommodation, he cannot force landlord to allow him to run his business from a shop rented to him.

81. Further, on the basis of the material documents on record it clearly established that tenants/petitioners failed to prove that he had moved any application under Rule 10 of the Rules framed under U.P. Act, 13 of 1972 for

allotment of another accommodation to run his business but he simply filed an affidavit before court below indicating therein that he had moved an application for allotment that too indicating therein the shop/building in respect to which allotment application has been moved. In view of the said facts, I am of the opinion that the said act on the part of tenant/petitioner cannot said to be a a sincere effort made by him to search for an alternate accommodation since the date of moving of release application by landlord/respondent. Coupled with the fact in the present era in every City several commercial complex/shops are built and soft loans are also provided by banks to aspirants and in case if petitioner/tenant has made an effort in this regard then he might have get a shop to run his business which he running from the shop in dispute.

82. In view of the abovesaid facts, I do not find any illegality or irregularity in the judgment and order passed by appellate court.

83. For the foregoing reasons, writ petition lacks merit and is dismissed.

No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 22.07.2011

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

Writ Petition No. 671 (SB) of 2008

Mahesh Kumar ...Petitioner
Versus
U.P. Power Corporation Ltd. ...Respondent

Constitution of India-Article 226-Compulsory Retirement-petition being senior Asst. Engineer had worked as officiating Ex Engineer-Screening committee on 25.01.2008 decided to retire those who get 100 or more than hundred marks in their service performance-petitioner got only 30 marks-held-decision of compulsory retirement declaring petitioner as dead word based on no consideration-if petitioner could not get regular promotion on post of Executive Engineer-can not be made basis for such undesired decision-as the petitioner already achieve the age of superannuation-direction to treat the petitioner in continuous in service-arrears of salary and other consequential benefits be given within 3 month.

Held: Para 25

Such a criterion itself was wholly unjustifiable and unreasonable, and merely because the screening committee had included such a criterion in its resolution, it will not give a right to the Corporation to compulsorily retire an officer on a ground which does not get support from sub-regulations 2(b) and 2(c) of Regulation 1 of the U.P. State Electricity Board (Retirement of Employees) Regulations, 1975.

Case law discussed:
[2007(25) LCD 910]; [2007(25) LCD 1299]

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

1. Heard the learned counsel for the petitioner Sri Pankaj Nath and Sri Sanchit S. Asthana for the respondent Corporation.

2. The petitioner challenges the order of his compulsory retirement dated 25.3.08 passed by the Managing Director, U.P. Power Corporation Ltd.

3. The petitioner joined the services of the then U.P. State Electricity Board, now U.P. Power Corporation Ltd. (hereinafter referred to as the 'Corporation') on 30.1.73 as Assistant Engineer in the Electrical and Mechanical cadre. While working as such, he was allowed to work as temporary Executive Engineer in officiating capacity on 22.10.88. Thereafter he was designated as Senior Assistant Engineer (Special Grade) on completion of 14 years of service on 7.12.88. Later on, he was given the pay scale of Superintending Engineer on 26.9.98.

4. The Corporation decided to weed out the dead woods and, therefore, it constituted a screening committee for considering the case of such officers, who fell within the mischief of the rule of compulsory retirement, which was governed by the rules known as U.P. State Electricity Board (Retirement of Employees) Regulations, 1975.

5. The petitioner's specific case is that there was no adverse material again him, on which any opinion could have been formed objectively that the petitioner has become dead wood or that his integrity was doubtful or he was not fit for being retained in service but even then on consideration, which cannot be said to be relevant, the order of compulsory retirement has been passed.

6. Elaborating the aforesaid argument, learned counsel for the petitioner has submitted that there were no adverse entries against the petitioner, barring adverse entries of the year 1982-83, 1983-84 (for a period of six months) and 1989-90. So far the entry of the year 1982-83 is concerned, that has been expunged and against the adverse entries of the years 1983-84 and 1989-90, representations are still pending which have not been decided.

7. Apart from the plea that there was no material for compulsory retiring the petitioner, the learned counsel has also submitted that the very criteria adopted by the Corporation for retiring an officer compulsorily was per se illegal, bad and arbitrary and that even according to the said criteria, the petitioner did not fall within the mischief of the said criteria, so as to be considered for compulsory retirement.

8. The criteria which was adopted by the screening committee was that marks be awarded for every warning, adverse entry, supersession etc. and if such marks, in total, are 100 or more than 100, then such an officer would be considered for compulsory retirement, whereas the petitioner was awarded only 30 marks under the said criteria but even then his case was considered for compulsory retirement.

9. Alternative argument is that mere supersession of the petitioner at three occasions for being regularly promoted

on the post of Superintending Engineer would not constitute a ground for compulsory retirement, as he was already given the pay scale of Superintending Engineer though was working on the substantive post of Executive Engineer, therefore, his work and conduct as Executive Engineer was to be seen and the result of the selection for the next higher post could not have been made the basis for compulsory retirement.

Sri Sanchit S. Asthana appearing for the Corporation has defended the order vehemently and has produced the record.

10. From the record it is clear that the screening committee decided the procedure and criteria to be adopted in its meeting held on 25.1.08, wherein it was decided that the punishments which have been awarded to an officer during his entire service period would be valued in accordance with the criteria given therein and thereafter on the basis of the marks obtained, coupled with the service record and his health and also if he has made pretexts for not going on transfer for which he has put pressure, the matter regarding compulsory retirement be considered alongwith annual entries of past ten years.

11. The marks which were to be assigned to various punishments were as under:

(1) For every warning - 5 marks

(2) For every censure entry - 10 marks

(3) For every increment withheld with non-cumulative effect - 10 marks

(4) For every increment withheld with cumulative effect - 20 marks

(5) For every doubtful integrity - 50 marks

(6) For every adverse entry - 20 marks

(7) For every supersession in promotion - 10 marks

(8) For sanction of criminal prosecution - 20 marks

(9) For medical unfitness - 20 to 50 marks

(10) Apart from above, for every minor punishment like stoppage of efficiency bar, recovery of financial loss, partly or fully from salary etc. - 10 marks

(11) For every major punishment like reversion on lower post or grade or time bound scale or lower stage of time bound scale etc. - 40 marks.

12. In the meeting dated 5.3.08, the screening committee was constituted and it was provided that the service record of all the Executive Engineers be scrutinized and those officers who are awarded 100 or more than 100 marks on the criteria as discussed above, be considered for compulsory retirement. Compulsory retirement was also directed to be considered with respect to those officers for whom the Managing Director had made any such recommendation or such a recommendation has been made from the higher level. The term 'higher level' has not been defined nor explained in the said meeting but presumably, it may relate to the recommendation, if at

all made by the officer superior than the Managing Director.

13. The relevant portion of the minutes of meeting dated 5.3.08 reads as under:

"Samiti ki dwitiye baithak dinank 05.03.2008 ko sampann hui jisme nimn adhikariyon dwara bhaag liya gaya :-

(1) Sri Avnish Kumar Awasthi, Prabandh Nideshak, U.P. Power Corporation Ltd., Shakti Bhawan, Lucknow.

(2) Sri Harishchandra Singh, Nideshak (ka.Prab. evam Prasha. evam vitt), U.P. Power Corporation Ltd. Shakti Bhawan, Lucknow.

(3) Sri Arun, Nideshak (virtan), U.P. Power Corporation Ltd., Shakti Bhawan, Lucknow.

Baithak mein samiti ke samaksh 20 varsh ki aharkari sewa poorn evam 50 varsh ki aayu prapt kar chuke adhishasi abhiyantaon ki soochi pradatt dandon ke aadhar par arjit ankon ke vivran ke saath prastut ki gayi.

Samiti dwara is soochi ka avlokan karne ke uprant un sabhi adhishasi abhiyantaon ke abhilekhon ki gahan samiksha/adhyayan kiya gaya jinko 100 athwa 100 se adhik ank prapt hain athwa anivarya sewanivratti ki sanstuti prabandh nideshak/uchh star se ki gayi hai."

14. The minutes of the committee aforesaid as well as the resolution passed on 25.1.08 clearly show that only those Executive Engineers/officers could have been considered for compulsory retirement, who had to their credit or so to say, discredit, 100 or more marks. Admittedly, the petitioner was awarded only 30 marks and, therefore, on the aforesaid criteria, his case could not have been considered for compulsory retirement.

15. There is nothing on record nor anything has been placed before us to show that there was any recommendation made by the Managing Director or from higher level for compulsorily retiring the petitioner. The petitioner thus, not falling under any of the aforesaid two criteria, was not liable to be considered for compulsory retirement, in the wake of its own criteria as determined by the Corporation in its various meetings.

16. This apart, the supersession of the petitioner three times for regular promotion to the post of Superintending Engineer in itself could not be a ground for compulsory retirement.

17. There is nothing on record nor it has been urged by the respondent that the petitioner's work as Executive Engineer was not satisfactory or that he lacked in any respect in performing his duties as Executive Engineer. May be, that he was not found fit for being regularly promoted on the post of Superintending Engineer but that would not be a ground for ousting him from service from a post where his work has not been questioned and he has not been apprised of any shortcoming in performance of his duties.

18. When compulsory retirement of an officer is considered, his work and conduct on the post on which he is

working and from where he is to retire, has to be considered. Future promotions or his being unsuccessful in getting promotion to the higher post would not be a relevant consideration for compulsorily retiring an officer, as it would amount to curtailment of his tenure of the post on which there is no grievance about his working.

19. Why the petitioner was not promoted or could not be promoted on the post of Executive Engineer and the criteria of promotion being seniority subject to rejection of unfit since are the questions which are not before us, therefore, we need not enter into these questions.

20. The screening committee report has been produced before us, which shows that, in fact, there was no adverse entry against the petitioner for the last ten years and, therefore, rightly, no adverse entry was shown against his name nor was considered by the Committee. The shortcomings which have been shown are that (i) he was awarded 30 marks because of supersession; and (ii) he has made requests consistently for not being posted out of Lucknow.

21. The report says that out of his 34 years of service, he has remained in Lucknow for 20 years barring his posting at Panki (Kanpur), Varanasi and Faizabad at different intervals. Whenever he was posted out of Lucknow, he had given reasons of his health and other reasons for staying at Lucknow. After making the aforesaid recital, the committee has taken into consideration the letter dated 15.10.03 by means of which he has given an excuse for being posted at Agra and likewise the letters dated 10.12.04, 7.12.05, 17.2.06, 19.6.06, 26.12.06 and 16.6.07.

22. True, that the petitioner had made requests on one ground or the other for retaining him at Lucknow but it was the discretion of the Corporation either to accept his request or to reject the same. Once the Corporation accepted his request on reasons given by the petitioner and allowed him to stay at Lucknow, it is presumed that the reasons given by him appealed to the conscience of the Corporation and, therefore, the Corporation cannot take advantage of its own act nor the petitioner can be punished for that. In fact, ordering compulsory retirement because of the petitioner's various requests to stay at Lucknow would amount to punishing him for making such requests.

23. Compulsory retirement cannot be ordered by way of punishment and, therefore, the order also becomes punitive, which is not permissible under law.

24. We also take note of the fact that the criteria determined by the screening committee in its meeting dated 25.1.08, wherein the act of an officer in getting over the transfer orders was made a basis for his compulsory retirement, appears to have been deliberately provided only for getting rid of the petitioner, as counsel for the Corporation Sri Sanchit S. Asthana after looking to the record, very fairly stated that there was no other officer whose case fell under the said category. It was only the petitioner who consistently made requests for staying at Lucknow.

25. Such a criterion itself was wholly unjustifiable and unreasonable, and merely because the screening committee had included such a criterion in its resolution, it will not give a right to the Corporation to compulsorily retire an officer on a ground which does not get support from sub-regulations 2(b) and 2(c) of Regulation 1 of the U.P. State Electricity Board (Retirement of Employees) Regulations, 1975.

26. It is also to be noticed that every officer/employee has a right to make a representation against his transfer to his superior authority, namely, the transferring authority or appointing authority and it is the discretion of such authority to accept the representation or not. By merely making a request that the officer be not transferred out of Lucknow or to say, from his present place of posting, he does not commit any misconduct nor it adversely affects the functioning of his office, unless, of course, such a request has been rejected or even if not rejected, it is not accepted and the officer continues without any authority at his original place of posting.

27. The Corporation in its wisdom accepted the request of the petitioner, whenever it was made and, therefore, no ill motive can be attributed to the petitioner nor he can be subjected to any punishment for making such a request, which the Corporation had itself accepted.

28. The report also says that the annual entries for the last ten years show that his work was satisfactory but again on some information received from the Chief Engineer (Distribution), Faizabad Region, Faizabad vide letter dated 1.1.207, it has been said that because of his illness, he is not regularly present at Faizabad and, therefore, he is not in a position to discharge his functions properly as he goes to his permanent residence very frequently.

29. Learned counsel for the petitioner has submitted that so far the aforesaid observation in the report is concerned, that is not the whole version of the Chief Engineer. In fact, the petitioner was issued a show cause notice for termination on 16.6.07 on the same very ground to which the petitioner replied and thereafter the Chief Engineer forwarded the same and recommended that he may be transferred to Lucknow but that portion of the recommendations of the Chief Engineer has not been considered and obviously has not been quoted by the screening committee in its report, though there is no reason that when the letter of the Chief Engineer was before the Committee, then why the whole contents thereof were not noted by the Committee.

30. In case an officer is found guilty of some misconduct, he can be subjected to disciplinary proceedings and for that matter he can be suspended also, but compulsory retirement on the aforesaid facts and circumstances, could not have been ordered. The order of compulsory retirement of the petitioner thus, to sum up, is per se bad, illegal and without authority for the reason (i) he did not fall within the criteria of consideration of compulsory retirement as per the criteria determined by the screening committee itself, he having secured only 30 marks, whereas he should have been awarded at least 100 marks for such a consideration; (ii) there

was no adverse material against him in regard to his functioning and working on the post of Executive Engineer; (iii) there was no adverse entry, as has also been found by the Committee itself, for the last ten years; (iv) his work was found satisfactory; (v) mere non-promotion to the next higher post of Superintending Engineer would not make him a dead wood for a post on which he was working substantively, unless, of course, there were reports of inefficiency and doubtful integrity against him; (vi) making request for allowing him to stay at Lucknow at times when transfer orders were passed in itself alone could not have been a ground for compulsory retirement, moreso, when such requests were accepted by the Corporation itself; (vii) the letter of the Chief Engineer was not seen in toto and a portion of the same was placed for making out a case for compulsory retirement, so as to give an impression that the petitioner was a habitual absentee at Faizabad and, therefore, he can be retired compulsorily; and (viii) the conclusion drawn by the screening committee that efficiency and performance of the petitioner was below standard and his services would not be of any use to the department, cannot be said to be based on any material, much less any relevant material.

31. Counsel for the petitioner has also argued that the very basis of award of marks for determining as to whether an officer should be compulsorily retired or not, was per se illegal, for which he placed reliance on the cases of ***Ram Vidyarthi vs. Chairman, U.P. Jal Nigam, Lucknow [2007(25) LCD 910],*** **Ram Bharat Verma vs. State of U.P. and others** ***[2007(25) LCD 1299] and Dev Dutt vs. Union of India and others (2008) 8 SCC 725.***

32. Sri Sanchit S. Asthana, in response, submitted that the aforesaid criterion is not under challenge and, therefore, it is not open for the petitioner to raise such an issue.

33. We also feel that the criteria for compulsory retirement not being under challenge, we need not interfere with the same and, therefore, we leave this issue open.

34. For the reasons aforesaid, the order of compulsory retirement of the petitioner dated 25.3.08 is set aside. Since the petitioner has already crossed the age of superannuation, therefore, he shall be deemed to have been in continuous service till the date of his retirement and shall be given all consequential benefits of salary etc. accordingly. The amount of arrears of salary and other dues shall be paid to the petitioner within a maximum period of three months from the date of receipt of a certified copy of this order.

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

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 12.07.2011

BEFORE
THE HON'BLE RAJIV SHARMA, J.
THE HON'BLE S.C. CHAURASIA, J.

Criminal Appeal No. - 836 of 2006

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

Counsel for the Petitioner:
Sri Nagendra Mohan

Counsel for the Respondent:
Govt. Advocate
Sri Rajesh Pandey

Code of Criminal Procedure-Section-389-suspension of conviction-on ground compassionate appointment denied-because of conviction-although appeal against conviction-although appeal against conviction U/S 302/32 IPC already admitted and bail granted-held there can be automatic suspension of conviction on grant of bail unless soundful reason recorded-case of Navjot Siddhu Singh case quite distinguishable-no good ground for suspension made out.

Held: Para 11

There is a distinction between bail and suspension of sentence. One of the essential ingredients of Section 389 is the requirement for the appellate Court to record reasons in writing for ordering suspension of execution of the sentence or order appealed. If he is in confinement, the said court can direct that he be released on bail or on his own bond. The requirement of recording reasons in writing clearly indicates that there has to be careful consideration of the relevant aspects and the order directing suspension of sentence and grant of bail should not be passed as a matter of routine.

Case law discussed:
[2007 Crl.L.J. 1427]; [2009 (2) SCC (Cri.) 920]; [(2001) 6 SCC 584]; [(2004) 6 SCC 175]

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

1. Heard Mr.R.N.S. Chauhan, learned Counsel for the applicant and Mr. Umesh Verma, learned Additional Government Advocate.

2. The applicant-appellant has been convicted under Sections 302/34 IPC and sentenced to imprisonment for life and a fine of Rs.10,000/- vide judgment and order dated 29.4.2006. A default stipulation has also been mentioned therein.

3. On an appeal being preferred, under Section 374 (2) CrPC, an application for releasing the appellant, during the pendency of appeal, on bail was filed. The said application for grant of bail was considered and the bail was granted and in pursuance of the said order dated 3.5.2006, the appellant was released on furnishing bail bonds as directed by this Court.

4. Subsequently, the appellant's father while, working in the Prayogshala Sahayak (Prani Vigynan Vibhag) at MLK (PG) College, Balrampur, died on 15.2.2010 and as such, he moved an application for appointment under the provisions of Dying-in-Harness Rules, 1974 on 6.4.2010, on which the mother and younger brother of appellant endorsed that they have no objection in case the appellant is appointed in place of his father under the aforesaid Rules. The said application was considered by the Appointing Authority, i.e. Principal of the

College and he was not offered appointment inter alia on the ground that he was convicted in Sessions Trial against which an appeal is pending adjudication in this Court and as such, the instant application has been preferred by him for suspending the conviction and sentence under Section 389 CrPc.

5. Mr. R.N.S.Chauhan, learned counsel for the applicant submits that after the death of his father, there is no one in the family to earn livelihood which comprises himself, his younger brother and mother and as such, he prays that the conviction and sentence, during pendency of appeal, may be suspended. In support of his submissions, learned counsel has relied upon the judgment of Hon'ble Apex Court in the case of ***Navjot Singh Sidhu v. State of Punjab and another [2007 Crl.L.J. 1427],*** whereby the Apex Court has suspended the conviction of the appellant.

6. With regard to suspension of conviction, Mr. Umesh Verma, learned Additional Government Advocate states that it is in the rarest of rare cases, conviction can be suspended, if there is any perversity recorded in the judgment of the Sessions Court while trying the said trial and passing the conviction order.

7. The only ground as shown by the appellant does not appeal to us as the appellant himself stated that in the family, there is widowed mother and the younger brother. That being so, they can claim appointment and the appellant cannot insist that he alone can be considered for appointment under the Dying-in-Harness Rules.

8. In case, the appellant could not be appointed in place of his father, due to some legal impediment, his younger brother can be considered, if he is otherwise eligible for appointment under Dying-in-Harness Rules and as such, the ground for suspending the conviction is not satisfactory. Even otherwise, on perusal of the provisions of 389 CrPC it reveals that if any person has been released on bail, sentence automatically remains suspended, as there is a mandatory provision to the said effect.

9. As regards the applicability of the Navjot Singh Sidhu's case, we may observe that the facts of the present case are clearly distinguishable as in that case the trial Court has acquitted the accused and the High Court, in reversal, found the accused guilty. It was in those circumstances that the Apex Court granted the stay of order of conviction and sentence in that case.

10. In ***Sanjay Dutt v. State of Maharasthra [2009 (2) SCC (Cri.) 920],*** the Apex Court held that the power of the Court under Section 389 CrPC shall be exercised only under exceptional circumstances.

In ***K.C. Sareen v. CBI Chandigarh [(2001) 6 SCC 584],*** the Apex Court noted as under:-

"11. The legal position, therefore, is this: though the power to suspend an order of conviction, apart from the order of sentence, is not alien to Section 389 (1) of the Code, its exercise should be limited to very exceptional cases. Merely because the convicted person files an appeal in challenge of the conviction the court should not suspend the operation of the

order of conviction. The court has a duty to look at all aspects including the ramifications of keeping such conviction in abeyance. It is in the light of the above legal position that we have to examine the question as to what should be the position when a public servant is convicted of an offence under the PC Act. No doubt when the appellate Court admits the appeal filed in challenge of the conviction and sentence for the offence under the PC Act, the superior court should normally suspend the sentence of imprisonment until disposal of the appeal, because refusal thereof would render the very appeal otiose unless such appeal could be heard soon after the filing of the appeal. But suspension of conviction of the offence under the PC Act, dehors the sentence of imprisonment as a sequel thereto, is a different matter."

11. In the case of ***State of Haryana v. Hasmat [(2004) 6 SCC 175],*** the Apex Court observed that Section 389 of the Code deals with suspension of execution of sentence pending the appeal and release of the appellant on bail. There is a distinction between bail and suspension of sentence. One of the essential ingredients of Section 389 is the requirement for the appellate Court to record reasons in writing for ordering suspension of execution of the sentence or order appealed. If he is in confinement, the said court can direct that he be released on bail or on his own bond. The requirement of recording reasons in writing clearly indicates that there has to be careful consideration of the relevant aspects and the order directing suspension of sentence and grant of bail should not be passed as a matter of routine.

12. Above being propositions, we find no good ground to suspend/stay the conviction of the appellant. The application is hereby rejected.

13. As the appeal is of 2006, Registry is directed to prepare the paperbook within six months, if the same has not yet been prepared.

14. List the appeal in the first half of next year.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.07.2011

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

Civil Misc. Writ Petition No. 1417 of 2006

Union of India and others ...Petitioners
Versus
Avanindra Kumar Tiwari and another ...Respondents

Counsel for the Petitioner:
Sri K.C. Sinha (Asst. Solicitor General of India)
Sri Rakesh Sinha (for Union of India)

Counsel for the Respondents:
Sri B.P. Srivastava,
Sri K.P. Agarwal
Ms. Ghazalala Bano Quadri
C.S.C.

Constitution of India-Article 226- Criminal and departmental proceedings on same allegation initiated-fair acquittal in criminal case-can not be basis to dropped the disciplinary proceeding-dismissal order set-a-side by Tribunal on grounds-No second Show Cause Notice as well as without consideration-in Capt. M. Paul Anthony

and G.M. Tank-committed manifest error-accordingly set-a-side.

Held: Para 29 and 30

The tribunal took no care to examine as to whether the above two charges were also the subject matter of trial in the criminal case on the basis of same evidence.

Thus, the tribunal without appreciating and considering the legal position as laid down in *C*apt. M. Paul Anthony (supra) and reiterated even in G.M.Tank (Supra) mechanically held that as respondent no.1 has been acquitted in the criminal case, there is no justification for inflicting any punishment upon him in the departmental proceedings. Accordingly, it ordered for setting aside of the punishment and reinstatement of respondent No.1.

Case law discussed:

AIR 1991 SC 471:(1991) 1 SCC 588; JT 1992 (5) SC 511; JT 2006 (4) SC 328; JT 1995 (8) SC 65; JT 2006 (2) SC 307; (2007) 13 SCC 251; (2008) 12 SCC 522; (2009) 9 SCC 24; AIR 1999 SC 1416; (2008) 15 SCC 657; AIR 2006 SC 2129

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

1. Union of India through Secretary, Ministry of Communication, Director of Postal Services, Kanpur Region, Kanpur and Senior Superintendent of Post Offices, Fatehpur have jointly filed this writ petition against the order of Central Administrative Tribunal, Allahabad dated 8.8.2005 allowing Original Application No.1536 of 2001 of respondent No.1 and directing for his re-instatement in service after setting aside the order 26.10.1995 dismissing him from service as also the appellate and revisional orders thereof.

2. Respondent No.1 was working as a Post Master at Bhurkhan Post Office, Fatehpur. A disciplinary enquiry was initiated against him and he was charge sheeted on 29.12.1994. He submitted his reply on 1.3.1995 and the enquiry report was filed on 18.9.1995. The disciplinary authority issued a show-cause notice dated 22.9.1998 enclosing the enquiry report. Respondent No.1 denied receiving the show cause notice. However, an order of dismissal from service was passed against him on 26.10.1995. Against the said order he preferred a departmental appeal which was dismissed on 3.11.1999 and revision thereto also came to be dismissed on 8.2.2001.

3. On the same allegations/charges respondent No.1 was also prosecuted under Section 419/420/467/468 and 318 IPC in case crime No.12 of 1995 registered as Crime Case No.2187 of 1995 State Vs. Avnindra Kumar. The said trial ended into his acquittal vide judgment and order dated 12.5.1999. It is said that the said acquittal became final and conclusive.

4. Aggrieved by his dismissal from service and the decision of the appellate and revisional authorities respondent No.1 filed Original Application No.1536 of 2001 before the Central Administrative Tribunal.

5. The Tribunal by the impugned order dated 8.8.2005 allowed the application and quashed the orders 26.10.1995, 3.11.2009 and 8.2.2010 passed by the disciplinary, appellate and the revisional authorities, respectively. At the same time, respondent No.1 was directed to be reinstated in service within six months and to be paid entire up to date arrears and allowances admissible to him

6. The Tribunal held that the order of punishment passed against the petitioner stands vitiated in law for non-supply of the enquiry report as the show-cause notice was returned undelivered. It further held that as the criminal trial had resulted in honourable acquittal of the petitioner the order of punishment on the same charges cannot be sustained.

7. We have heard Sri Rakesh Sinha, learned counsel for Union of India and Sri K.P.Agarwal, Senior Counsel assisted by Ms. Ghazlala Bano Quadri, learned counsel for respondent No.1.

8. Sri Sinha has submitted that respondent No.1 deliberately avoided receiving of show cause notice and, as such, he cannot say that he was not accorded proper opportunity to defend himself for want of supply of the enquiry report. Secondly, the departmental proceedings and the criminal trial are independent to one another and mere acquittal of respondent No.1 in the criminal trial would not necessarily affect the outcome of the disciplinary proceedings.

9. In reply, the submission of Sri Agarwal is that respondent No.1 was not actually served with the copy of the enquiry report. Therefore, the order of punishment is ex-parte and is in violation of the principles of natural justice. He further submits that when respondent No.1 had been acquitted in criminal case involving the same incident, and this fact was brought to the notice of the appellate and revisional authorities it ought to have been considered and due weightage should have been given to it. He however, accepts that criminal proceedings and departmental proceedings can continue simultaneously but submits that it was incumbent upon the tribunal to have considered the impact of the acquittal of respondent No.1 in the criminal case.

10. In connection with the second submission both the parties have relied upon certain authorities.

11. In view of ***Union of India Vs. Mohd. Ramzan Khan AIR 1991 SC 471: (1991) 1 SCC 588*** there is no two opinion that a delinquent employee is entitled to a copy of the enquiry report.

12. In the instant case, respondent No.1 had participated in the enquiry and had filed his reply to the charges on 1.3.1995 whereupon an inquiry report dated 18.9.1995 was submitted. A show cause notice dated 22.9.1998 was sent to the petitioner by registered post along with the copy of the enquiry report. The said notice was not actually served upon respondent No.1. A photocopy of the envelope of the aforesaid registered post has been enclosed as Annexure - 4 to the writ petition. It shows that it could not be served upon the respondent No.1 on 23.9.1995 and 25.9.1995 as he was reported to have gone out. However, the subsequent endorsement records that he refused to accept the said notice and the refusal was recorded on 26.9.1995 in the presence of a witness Ram Shanker.

13. It was not that only one attempt was made to serve the notice upon respondent No.1.

14. In view of such refusal the aforesaid notice shall be deemed to have been served upon respondent No.1 as per the provisions of Section 27 of the General Clauses Act. Accordingly, when the notice

is deemed to have been served upon respondent No.1 by refusal, he cannot be permitted to allege that he was denied opportunity of hearing by non-supply of the enquiry report. Respondent No.1 refused to take the notice at his own risk for which no one, except him can be blamed. Even the rule audi alteram partem does not require that the authority is bound to give an opportunity to be heard even when the party does not want it and is prepared to waive it. The principle of waiver is fully applicable to such a situation when the party has refused service of the show cause notice.

15. The Tribunal, as such, manifestly erred in holding that the order of punishment stands vitiated for non-supply of the enquiry report.

16. In respect of the second submission, a three Judges Bench of the Supreme Court as far back as in the year 1992 in the case of ***Nelson Motis Vs. Union of India and another JT 1992 (5) SC 511*** held that the nature and scope of criminal case is different from that of departmental disciplinary proceedings and order of acquittal in a criminal case would not bring to an end the departmental proceedings. In the aforesaid case the Supreme Court has held as under:

"So far the first point is concerned, namely whether the disciplinary proceeding could have been continued in the face of the acquittal of the appellant in the criminal case, the plea has no substance whatsoever and does not merit a detailed consideration. The nature and scope of a criminal case are very different from those of a departmental disciplinary proceeding and an order of acquittal, therefore, cannot conclude the departmental proceeding."

17. It leaves no doubt that criminal proceedings and departmental proceedings are independent to one another and operate in different fields. The standard of proof required in a criminal case is quite different than the degree of proof required to be established in a department proceedings. In a criminal trial the charge has to be proved beyond reasonable doubt whereas in a department proceedings even preponderance of the probabilities is sufficient to indict the employee.

18. It may be noted that as the standard of proof in a criminal case and in a departmental enquiry vary, the decision of a criminal case would not necessarily be binding upon the departmental proceedings though it may carry weight. One of the reasons for it is that the provisions of the Evidence Act which are applicable to criminal trials for the purposes of proving guilt of the accused are not applicable to departmental proceedings vide ***JT 2006(4) SC 328 Commissioner of Police, New Delhi Vs. Narender Singh.***

19. In ***B.C. Chaturvedi Vs. Union of India and others JT 1995 (8) SC 65*** it has been laid down that in a departmental proceeding neither the technical rules of Evidence Act nor strict proof of fact are applicable.

20. The decision in the case of ***Nelson Motis (supra)*** was followed by the Supreme Court in the case of ***South Bengal State Transport Corporation Vs. Swapan Kumar Mitra and others JT 2006(2) SC 307*** and it was held that in a criminal case the charge has to be proved beyond reasonable doubt while in the departmental proceedings the standard of proof is mere preponderance of probabilities. Therefore, inspite of acquittal

in the criminal case an order of dismissal emanating from departmental proceedings can very well be passed.

21. The Supreme Court in the case of ***General Manager, UCO Bank and another Vs. M. Venu Ranganath (2007) 13 SCC 251*** held that acquittal of an employee in a criminal trial is no embargo on his being departmentally proceeded with as the two operate in different fields.

22. The same principle was reiterated by the Supreme Court in the ***State of Punjab and others Vs. Prem Sarup (2008) 12 SCC 522*** and it was observed that that there is no bar in initiation of disciplinary proceedings against an employee after he has been acquitted in a criminal case.

23. In ***(2009) 9 SCC 24 Southern Railway Officers Association Vs. Union of India*** the Apex Court observed as under:

"It is now a well-settled principle of law that the order of dismissal can be passed even if the delinquent official had been acquitted of the criminal charge."

24. It is only in exceptional circumstances where the charges against an employee in a criminal trial and that in the departmental enquiry are one and the same and where evidence in both the proceedings is common, the acquittal of the employee in criminal trial may conclude even the departmental proceedings. In such circumstances, it would not be justified to impose an order of punishment. In the case of ***Capt. M. Paul Anthony Vs. Bharat Gold Mines Ltd. and another AIR 1999 SC 1416*** the employee who was an accused in a criminal case was exonerated on merits by a judicial pronouncement. The charges in the departmental proceedings were same and were sought to be proved on the basis of the same set of evidence as was adduced in the criminal case wherein the accused-employee was discharged. The Court held that the acquittal in criminal trial concludes the departmental proceedings and the order of dismissal of the employee, if any passed is liable to be set- aside.

25. The Apex Court in the case of ***State Bank of Hyderabad and another Vs. P. Kata Rao (2008) 15 SCC 657*** approving the principle laid down in the case of ***Capt. M. Paul Anthony (supra)*** reiterated that acquittal of delinquent employee facing a criminal charge would not debar the disciplinary authority from proceeding with the departmental enquiry or in initiating a fresh departmental proceeding and since the dicta of the Court in Capt. M. Paul Anthony remains unshaken the applicability thereof would depend upon the factual situation of each case.

In sum and substance the principles that emerge from the above authorities are that:

1. a delinquent employee can be proceeded with departmentally as well as with criminal case simultaneously on the same charges;

2. acquittal of the delinquent employee in criminal trial may not debar the disciplinary authority either to initiate departmental proceedings against him or to continue with departmental proceedings already initiated;

3. acquittal in criminal trial would not ipso facto result in conclusion of the departmental proceedings; and

4. it is only in the factual situation of each case where the charges and the evidence in the criminal case as well as in the departmental proceedings are one and the same the disciplinary authority may not be justified in imposing punishment when the delinquent employee has already been acquitted in the criminal trial.

26. Sri K.P.Agarwal, Senior Counsel appearing on behalf of respondent no.1 has placed reliance upon a decision of the Supreme Court reported in ***AIR 2006 SC 2129 G.M.Tank Vs. State of Gujarat and another.*** The aforesaid decision lays down that where departmental proceedings are based on identical and similar set of facts and evidence and where same witnesses were examined in criminal case resulting in acquittal of the delinquent employee, no contrary finding can be recorded in departmental proceedings as the same would amount to be unfair and oppressive.

27. The principle laid down in the above case is one and the same as has been enshrined in the case of ***Capt. M. Paul Anthony (supra)*** that normally where the accused is acquitted honourably and is completely exonerated of all the charges in a criminal trial, it would not be expedient to continue departmental inquiry on the same very charges or grounds or evidence.

28. Now reverting to the facts of the present case so as to apply the principles carved out from the above decisions, we find that respondent no.1 was charge sheeted on two counts in the departmental proceedings, namely (i) on 15/16.7.1994 instead of showing deposit of Rs.15,000/- in five years fixed deposit account of Smt. Phoola Devi wife of Baldeo Prasad Dwivedi, he manipulated to show the amount of Rs.1500/- only which amounted to gross misconduct within the meaning of Rule 17 of Additional Departmental Agent (Conduct and Service) Rules, 1964 and Rule 125 and 129 of Branch Post Office Rules; and (ii) on 13.1.1994, 22.2.1994 and 14.6.1994 respectively, he failed to deposit the necessary amount entrusted to him for being deposited in recurring deposit accounts No.93, 98 and 96 which also amounted to misconduct on his part. In respect of aforesaid charges six witnesses were named. He was found guilty on both the counts.

29. The tribunal took no care to examine as to whether the above two charges were also the subject matter of trial in the criminal case on the basis of same evidence.

30. Thus, the tribunal without appreciating and considering the legal position as laid down in ***Capt. M. Paul Anthony (supra)*** and reiterated even in ***G.M.Tank (Supra)*** mechanically held that as respondent no.1 has been acquitted in the criminal case, there is no justification for inflicting any punishment upon him in the departmental proceedings. Accordingly, it ordered for setting aside of the punishment and reinstatement of respondent No.1.

31. In our view, the tribunal manifestly erred in passing the impugned order without adverting to the facts and circumstances of the case, as enumerated above, and without correctly applying the legal principles as enunciated above in the right perspective.

32. Accordingly, the writ petition is allowed and the judgment and order dated 8.8.2005 passed by the Central Administrative Tribunal, Allahabad

(Annexure - 11) is quashed with leave to the tribunal to re-examine the matter in the light of the observations made above. A writ of certiorari as well as that of mandamus are directed to be issued accordingly.

No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.07.2011

BEFORE
THE HON'BLE PANKAJ MITHAL, J.

Matters Under Article 227 No. - 1539 of 2011

Suresh Pal ...Petitioner
Versus
Tek Chand ...Respondent

Counsel for the Petitioner:
Sri 0Rajeev Sharma

Counsel for the Respondents:

.....

Constitution of India, Article 226 readwith-General Rules Civil, 1957-Rule 162-Execution Proceedings Pendency since 2005-delay in disposal amount to denial of decree-anthesis to justice-direction issued to conclude proceeding within 3 month and to inform the High Court also.

Held: Para 13 and 14

The delay in executing the decree amounts to deny the decree holder the benefit of the decree which is anthesis to justice.

In view of above facts and circumstances, the writ petition is disposed of finally at this stage with a direction Civil Judge (Senior Division), Hapur, Ghaziabad to decide execution case No. 22 of 2005 Suresh Pal vs. Tek Chand as expeditiously as possible preferably within a period of three months from the date of production of certified copy of this order.

Case law discussed:
AIR 1979 S.C. 1360; 1997 AWC (Supplement) 525

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

1. Heard Sri Rajeev Sharma, learned counsel for the petitioner.

2. An agreement to sell plot No.484 measuring 100 sq. yards situate in Mohalla-Rajeev Bihar, Hapur, District Ghaziabad, was executed in favour of the petitioner on 17.7.91. Petitioner's Suit No.86 of 92 for specific performance of the said agreement was decreed on 24.4.96. The said decree is said to have attained finality. Petitioner moved application for the execution of the above decree which has been registered as execution case No.22 of 2005.

3. The grievance of the petitioner in the present writ petition is that in the above execution the parties are represented but the execution is not being decided. He has prayed for direction for time bound decision of the aforesaid execution proceedings.

4. The execution was filed as for back as in the year 2005. The order sheet reveals that the execution has been adjourned for one reason or the other. The petitioner does not appear to be responsible for any delay.

5. The Apex Court in **Hussainara Khatoon and others vs. State of Bihar AIR 1979 S.C. 1360** held that any

procedure which does not ensure a reasonable quick trial cannot be regarded as fair and just and it would fall foul of Article 21 of the Constitution of India. Therefore, speedy trial which mean reasonable expeditious trial is an integral and essential part of the fundamental right to life and liberty enshrined in Article 21 of the Constitution of India.

6. General Rules (Civil)1957 which have been framed in exercise of powers under Section 122 C.P.C. vide Rule 162 contained in Chapter VI provides that execution cases are not to be neglected and prolonged. The relevant part of the aforesaid Rule 162 of General Rule (Civil) is quoted below:-

"Every presiding Judge shall see that execution cases are not neglected or needlessly prolonged, but disposed of with the same care and regularly as original suits. ----------"

7. It has always been an endeavour of this court to ensure that old and execution cases be decided expeditiously for which purpose specific directions to the subordinate courts have also been issued.

8. The High Court vide G.L. No.3020/19-O-20 dated 4th September, 1920 had directed District Judges to devote special attention to execution cases and to place them before the Presiding Judge in open court daily.

9. The relevant extract of the aforesaid circular is quoted below:-

"District Judges should devote special attention to execution cases pending in the courts directly subordinate to them and take steps to ensure rigid compliance with the rules. Execution cases should be placed before the presiding judge in open court daily in the same manner as suits and other causes as they are the most important part of civil proceedings."

Another Circular C.L.No.39/98: Dated 20th August, 1998 was issued taking cognizance of necessity of early disposal of execution cases and it was observed that pendency of execution cases for a very long time not only causes hardship to the decree-holder but also creates unnecessary litigation therefore, effort should be made for early disposal of execution cases.

The relevant part of the above circular reads as under:-

"It has come to the notice of the Court that interest in the disposal of execution cases is not being taken by the judicial officers. Pendency of execution cases for a very long time not only results in hardship to the decree-holder but also creates unnecessary litigation. The Court has taken a decision that by giving due regards to the existing laws and the provisions efforts should be made for early disposal of execution cases."

10. The court is at a loss to understand as to despite general directions of the court to complete execution proceedings at the earliest why the above execution is not being finally decided. There appears to be no legal impediment or any stay from superior court with regard to above execution proceedings.

11. A Division Bench of this court in **Manoj Kumar and others vs. Civil**

Judge (Junior Division) Deoria and others while dealing with the delay in disposal of execution was shocked to note that the execution was being adjourned for the last 7 years and thus expressing displeasure directed for its disposal within two months from the date of presentation of the order before the court concerned.

12. Their Lordships of the Allahabad High Court in **Ayodhya Sahai vs. District Judge, Jaunpur and another 1997 AWC (Supplement) 525** issued a general mandamus to all subordinate courts and tribunals to decide suits, criminal trials, labour disputes, rent control cases on the basis of time bound programme and to award adverse entries to the defaulting judicial officers.

13. The delay in executing the decree amounts to deny the decree holder the benefit of the decree which is anthesis to justice.

14. In view of above facts and circumstances, the writ petition is disposed of finally at this stage with a direction Civil Judge (Senior Division), Hapur, Ghaziabad to decide execution case No. 22 of 2005 Suresh Pal vs. Tek Chand as expeditiously as possible preferably within a period of three months from the date of production of certified copy of this order.

15. A copy of this order may be sent to the District Judge, Ghaziabad, who will ensure that all execution cases included the above one is decided expeditiously as directed and to inform about its decision to High Court.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 05.07.2011

BEFORE
THE HON'BLE RAJIV SHARMA, J.

Writ Petition No. 2069 OF 1994(MS)

Naseemullah ...Petitioner
Versus
State of U.P. and others ...Opp. parties

Mohammedan Law-Section 138 readwith Section 129-oral gift by Mohammedan-whether stamp duty payable? Held-"No" as per law laid down by Apex Court Gift Deed is not an instrument-but mere piece of evidence-neither stamp duty nor penalty can be imposed-impugned order quashed

Held: Para 20

In view of the above, the assertion of the respondents that the application for mutation given by the petitioner is an instrument is wholly misconceived. Respondents have also failed to show any document that infact the property was purchased by the petitioner. The question of paying the stamp duty does not arise in the present case because Section 33 of the Indian Stamp Act, 1899 provides that stamp duty shall be recoverable only in case of a registered instrument as deed. Since the transfer of immovable property in the present case, was made by way of an oral gift and no deed or instrument in writing was executed, Section 33 of the Act, will not be attracted. Moreover, the application of the petitioner for mutation, as averred above, cannot be treated as instrument or deed.

Case law discussed:
2011 (5) SCC 654; AIR 1927 Cal 197; AIR 1984 Gauhati 41

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

1. In the instant writ petition the petitioner has questioned the validity and correctness of the order dated 30.6.1994 passed by the Sub Divisional Officer, Mohammadi, District Lakhimpur Kheri as contained in Annexure-1 to the writ petition and has also prayed for a direction to the respondents not to recover the amount indicated in the impugned order.

2. It has been submitted by the Counsel for the petitioner that in the year 1979, one Ikhlas Ahmad resident of Town Mohammadi, Kheri had orally gifted a plot of 1170 sq. feet, situated in town Mohammadi, Kheri in favour of the petitioner and thereafter, the petitioner constructed his residential house over the said plot and is residing since then. It has also been submitted that there is neither any deed nor any instrument executed or in writing entered into between the parties, regarding transfer of the said plot. Subsequently, on an application by the petitioner, the Municipal Board mutated the name of the petitioner in place of Ikhlas Ahmad. Later on, respondent no.2 issued a notice on 10.8.1993 asking the petitioner to show cause as to why the requisite stamp duty and ten time penalty be not imposed and recovered from him.

3. Petitioner, in his reply, stated that there was neither any occasion nor any question to pay the stamp duty as the transfer of immovable property in the present case is by way of an order gift, which is in consonance with provisions of Mohammedan Law. Giving reference to a judgment of the High Court, petitioner also indicated in his reply that no stamp duty is payable on such type of transaction/gift.

4. The Sub Divisional Officer/Stamp Collector being not satisfied with the reply so tendered by the petitioner passed the impugned order and held that in order to avoid stamp duty, documents for registration has not been presented though the property has been purchased.

Hence this writ petition.

5. Counsel for the petitioner has argued that in view of the provisions of S. 129 of the Transfer of Property Act, the provisions of the said Act are not applicable in respect of a Gift made by a Muslim. There is nothing on record to establish that there was sale transaction in favour of the petitioner. Therefore, the impugned order dated 30.6.1994 is wholly erroneous and unwarranted and the petitioner is not liable to pay the stamp duty as required because the land was gifted to the petitioner by Mohd Ikhlas Ahmad.

6. State Counsel while justifying the order passed by Stamp Collector stated that the application in writing filed by the petitioner for mutation before the Municipal Authority has been treated to be an instrument of gift supporting original gift in his favour and as such it will make the petitioner liable to pay stamp duty. He further added that the stamp duty is due not under the provisions of Transfer of Property Act but under the Registration Ac, the same is liable to be paid. Further, an oral gift as soon as recorded or stated or declared in writing becomes chargeable under the Stamp Act.

7. The first question which is to be considered by this Court is whether there is a valid gift and if yes, whether the stamp duty is payable or not.

8. Chapter XI of Mulla's Principles of Mohammedan Law deals with the Gifts. Section 138 defines Hiba or Gift and said that a hiba or gift is "a transfer of property, made, immediately, and without any exchange by one person to another; and accepted by or on behalf of the latter".

9. 'Hiba' in its literal sense signifies the donation of a thing from which the donee may derive a benefit. In short, a gift may be made of anything which comes within the definition of the word "mal" that is property, including actionable claims.

10. Under Mohammedan Law writing is not essential for the validity of a gift either of movable or immovable property. There are three essential ingredients of a gift under Mohammedan Law, namely (I) a declaration of gift by the donor; (ii) an acceptance of the gift express, express or implied, by or on behalf of the donee and (iii) delivery of possession of the subject of the gift by the donor to the donee. The deed of gift is immaterial for creation of gift under the Mohammedan Law. A Gift under the Mohammedan Law is not valid, if the above mentioned ingredients are not fulfilled, even if there be a deed of gift or even a registered deed of gift.

11. Section 122-129 (Chapter VII) of the Transfer of Property Act deals with gifts. By Section 123 of the Act, it has been provided that a gift of immovable property must be effected by a registered instrument signed by the donor and attested by at least two witnesses, and that a gift of movable property may be effected either by a registered instrument signed as aforesaid or by delivery. But the provisions of Section 123 of the Act do not apply to Mohammedan Law. It is settled by law that the rules of Mohammedan Law regarding gifts are based on reasonable classification and S. 129 of the Transfer of Property Act exempting Mohammedans from certain provisions of T.P. Act is not hit by Article 14 of the Constitution.

In **Hafeeza Bibi vs. Shaikh Farid** (dead); 2011(5) SCC 654, the Apex Court in paragraph 29 of the report held as under:-

"29. In our opinion, merely because the gift is reduce to writing by a Mohammedan instead of it having made orally, such writing does not become a formal document or instrument of gift. When a gift could be made by Mohammedan orally, its nature and character is not changed because of it having been made by a written document. What is important for a valid gift under Mohammedan law is that three essential requisites must be fulfilled. The form is immaterial. If all the three essential requisites are satisfied constituting valid gift, the transaction of gift would not be rendered invalid because it has been written on a plain piece of paper. The distinction that if a written deed of gift recites the factum of prior gift then such deed is not required to be registered but when the writing is contemporaneous with the making of the gift, it must be registered, is inappropriate and does not seem to us to be in conformity with the rule of gifts in Mohammedan Law."

13. In view of the above, in the instant case, the gift of a piece of land was made by the donor out of his own free will and affection, which was accepted by the petitioner and delivery of possession was also given, hence it is a valid gift.

14. Before proceeding further, it would be apt to refer the relevant provisions of Transfer of Property Act and Indian Stamp Act.

15. Section 123 of the Transfer of Property Act, 1882 lays down the manner in which gift of immovable property may be effected. It reads thus:

S. 123. Transfer how effected:- For the purpose of making a gift of immovable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor , and attested by at least two witnesses. For the purpose of making a gift of movable property, the transfer may be effected either by a registered instrument signed as aforesaid or by delivery.. Such delivery may be made in the same way as goods sold may be delivered."

In Section 129 of the T.P.Act, an exception has been carved out with regard to the gifts by a Mohammedan. It reads as follows:-

S. 129. Saving of donations mortis causa and Mohammedan Law:- Nothing in this chapter relates to gifts of movable property made in contemplation of death, or shall be deemed to affect any rule of Mohammadan law."

16. Section 17 of the Registration Act, 1908 which makes registration of certain documents compulsory, reads as follows:-

(1) The following documents shall be registered, if the property to which they relate is situated in a district in which, and if they have been executed on or after the date on which Act No. XVI of 1864, or the Indian Registration Act, 1866 or the Indian Registration Act, 1871, or the Indian Registration Act, 1877, or this Act came or comes into force, namely:-

(a) instruments of gift of immovable property:-

(b)...

(c)...

Section 49 of the Registration Act deals with the effect of non-registration of documents required to be registered. It reads thus:-

" S. 49 Effect of non-registration of documents required to be registered:- No document required by Section 17 or by any provision of the Transfer of Property Act, 1882 (4 of 1882), to be registered shall -(a) affect any immovable property comprised therein or (b) confer any power to adopt, or (C) be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered: provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882 (4 of 1882), to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877 (3 of 1877), or as evidence of any collateral transaction

not required to be effected by registered instrument."

17. In the case of ***Nasib Ali vs. Wajid Ali*** AIR 1927 Cal 197, the contention raised before the Division Bench of the Calcutta High Court was that the deed of gift, not being registered under the Registration Act, is not admissible in evidence. The Calcutta High Court held that a deed of gift by a Mohammedan is not an instrument effecting, creating or making of the gift but a mere piece of evidence.

18. In the case of ***Md. Hesabuddin and others v. Md. Hesaruddin and others*** AIR 1984 Gauhati 41, the question with regard to gift of immovable property written on ordinary unstamped paper arose before the Gauhati High Court. That was a case where a Mohammedan mother made a gift of land in favour of her son by a gift deed written on ordinary unstamped paper. The Gauhati High Court held that it cannot be taken as sine qua non in all cases that wherever there is a writing about a Mohammedan gift of immovable property, there must be registration thereof.

19. Aforesaid views of the Calcutta High Court and Gauhati High Court have been approved by the Apex Court recently in ***Hafeeza Bibi vs. Shaikh Farid*** **(dead);** 2011 (5) SCC 654 and it was held that a deed of gift execute by Mohammedan is not the instrument effecting, creating or making of the gift but a mere piece of evidence, such writing is not a document of title but a piece of evidence. The Apex Court further observed that Section 129 of the T.P. Act preserves the rule of Mohammedan Law and excludes the applicability of Section 123 of the T.P. Act to a gift of an immovable property by a Mohammedan.

20. In view of the above, the assertion of the respondents that the application for mutation given by the petitioner is an instrument is wholly misconceived. Respondents have also failed to show any document that infact the property was purchased by the petitioner. The question of paying the stamp duty does not arise in the present case because Section 33 of the Indian Stamp Act, 1899 provides that stamp duty shall be recoverable only in case of a registered instrument as deed. Since the transfer of immovable property in the present case, was made by way of an oral gift and no deed or instrument in writing was executed, Section 33 of the Act, will not be attracted. Moreover, the application of the petitioner for mutation, as averred above, cannot be treated as instrument or deed.

21. For the reasons aforesaid, the impugned order dated 30.6.1994 passed by the Sub Divisional Officer/Stamp Collector, Mohammadi-Kheri contained in Annexure-1 to the writ petition cannot be sustained and is hereby set-aside. Consequent to the quashing of the order dated 30.6.1994, any subsequent proceedings arising out of the said order shall also stand quashed.

22. Writ Petition stands allowed in above terms.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 25.07.2011

BEFORE
THE HON'BLE S. S.CHAUHAN, J.

U/S 482/378/407 No. - 3268 of 2011

Surjeet Singh and others ...Petitioners
Versus
The State of U.P. and another ...Respondents

Counsel for the Petitioner:
Sri Jagjeet Singh
Sri Pratima Srivastava

Counsel for the Respondents:
Sri S.N.Pandey
Govt. Advocate

Criminal Procedure Code-Section 482-Quashing Criminal Proceedings in terms of compromise-offence under Section 498-A/323/342/504/506 IPC and ¾ D.P.Act-held in view of B.S.Joshi case-no useful purpose to prolong the Criminal Proceeding any further-proceeding quashed.

Case law discussed:
2003 AIR 1386

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

1. Heard learned counsel for the petitioners and learned counsel for the opposite party no.2 as well as learned AGA.

2. Counter affidavit filed today on behalf of opposite party no.2 is taken on record.

3. In the counter affidavit it has been stated that the parties have entered into compromise. A certified copy of the said compromise arrived at between the parties under Section 13 of the Hindu Marriage Act has been placed on record.

4. Counsel for the parties state that in the compromise both the parties have agreed that they will not pursue the criminal cases as well as other cases pending in different courts. The said compromise also indicates that criminal case pending here is also governed by the said compromise.

5. Since there is admission and both the parties in dispute are agree that the matter may be decided in terms of the compromise, therefore, the charge sheet against the petitioners under Sections 498-A/323/342/504/506 IPC and 3/4 D.P. Act is liable to be quashed. Law in this regard has been settled by the apex Court in the case of **B.S.Joshi and others vs. State of Haryana and another,** 2003 AIR 1386 and no useful purpose would be served in prolonging the criminal proceedings any further when the parties have entered into compromise.

6. The petition is allowed in terms of the compromise. The charge sheet No. 27 of 2009 relating to case Crime No. 73 of 2008 under Sections 498-A/323/342/504/506 IPC and 3/4 D.P. Act of P.S. Mahila Thana Hazratganj, District Lucknow is hereby quashed including consequential proceedings.

7. The compromise shall form part of this order.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 25.07.2011

BEFORE
THE HON'BLE SHRI NARAYAN SHUKLA, J.

Criminal Misc. Application No. 3812 of 2010

Neeraj Goswami and others
...Petitioners
Versus
The State of U.P. and another
...Opposite Parties

Criminal Procedure Code-Section 482-Criminal Proceeding pending before C.J.M. Lucknow-challenged on ground of territorial jurisdiction-all the allegations of F.I.R. disclosed the happenings at Gurgaon (Haryana)-hence any exercise by C.J.M. Lucknow without jurisdiction-held-misconceived-question of jurisdiction can be raised only after Post-cognizance and not prior to cognizance

Held: Para 14

With the aforesaid observations the Hon'ble Supreme court ultimately held that the jurisdictional aspect becomes relevant only when the question of enquiry or trial arises. It is therefore, fallacious thinking that only a Magistrate having jurisdiction to try the case has the power to take cognizance of the offence. If he is a Magistrate of the First Class his power to take cognizance of the offence is not impaired by territorial restrictions. After taking cognizance he may have to decide as to the court which has jurisdiction to enquire into or try the offence and that situation would reach only during the post-cognizance stage and not earlier.

Case law discussed:
2004 (II) UP Cr.R Page 315; 2007 (1) UPCr. R Page 282; 2008 (61) ACC 668; 1998 (37) ACC page 860; 2009 (1) JIC 600 (All); 2000 JIC 1 (SC); 2007 (3) JIC 258 (SC); 1999 (8) SCC 686

(Delivered by Hon'ble S.N.Shukla,J.)

1. Heard Mr.Vijay Prakash, learned Advocate alongwith Mr.Girish Chandra, learned counsel for the petitioners and Mr.Suresh Chandra Shukla, learned counsel for the respondent No.2 as well as Mr.Rajendra Kumar Dwivedi, learned Additional Government Advocate for the State.

2. The petitioners have challenged the proceedings of Case No.11032 of 2010, pending before the court of Chief Judicial Magistrate, Lucknow, arising out of case Crime No.72 of 2010, under Sections 498-A, 313, 323,406 and 506 IPC and ¾ Dowry Prohibition Act, Police Station Mahila Thana, Lucknow, inter alia on the ground of jurisdiction of the trial court.

3. The learned counsel for the petitioners drew the attention of this court towards the contents of the First Information Report and submitted that all the incidents, which have been alleged to have taken place at Gurgaon, State of Haryana, therefore, the learned Chief Judicial Magistrate sitting at Lucknow has no jurisdiction to take cognizance and proceed with the case.

4. In support of his submission he cited several decisions, which are being discussed here-in-below:-

5. **Y. Abraham Ajith and others versus Inspector of Police, Chennai and another, reported in 2004(II), UPCr.R, page 315.** In the aforesaid case the Hon'ble Supreme Court discussed the scope of Section 178 of the Code of Criminal Procedure and held that there is not even a whisper of allegations about

any demand of dowry or commission of any act constituting an offence much less at Chennai. That being so, the logic of Section 178(c) of the Code relating to continuance of the offences cannot applied. In a sense it is a cause of action for initiation of proceeding against the accused, which consists of bundle of facts, which give cause to enforce the legal inquiry for redress in a court of law.

6. In the case of **Manish Ratan and others versus Sate of M.P.and another, reported in 2007 (1) UP Cr.R page 282,** the Hon'ble Supreme Court has again discussed the scope of Section 178 of the Criminal Procedure Code. The core question was whether the allegations made in the petition would constitute a continuing offence. In this case the father-in-law lodged the complaint with the Police Station Jabalpur alleging that the appellants have been ill treating his daughter and demanded dowry. The wife allegedly lodged another first information report against the appellants at the Police Station Datia. In the said complaint the place of incident was said to have taken place at Jabalpur. Subsequently, she was ill treated by her husband, father-in-law and mother-in-law and sister-in-law. So much that she left her house and saved her life by some means and reached in her Mama's house at Bhopal and from there she reached her house and since then she has been staying with her father. In the complaint there was nothing to show that any ill treatment was given to the complainant at Datia. Therefore, the Hon'ble Supreme court held that in case of this nature an offence cannot be held to be a continuing one, only because the complainant is forced to leave her matrimonial home.

7. In the case of **Bhura Ram and others versus State of Rajasthan and another, reported in 2008 (61) ACC page 668,** the Hon'ble Supreme Court held that the facts stated in the complaint discloses that the complainant left the place where she was residing with her husband and in-laws and came to the city of Sri Ganganagar, State of Rajasthan, and that all the alleged acts as per the complaint had taken place in the State of Punjab. Therefore, the court at Rajasthan does not have the jurisdiction to deal with the matter as no part of cause of action arose in Rajasthan.

8. In defence the learned counsel for the complainant (respondent No.2) also cited some decisions, which are referred here-in-below:-

9. In the case of **Prabhat Ranjan Pandey and others versus State of U.P. And others, reported in 1998 (37) ACC page 860,** the Division Bench of this court held that in a case for an offence under Section 498-A IPC and ¾ Dowry Prohibition Act complaint can be filed at any place where the cause of action arose or continued, where the consequences ensued and if harassment and cruelty was continued from the house of her in-laws to the house of her parents, then the complaint can be filed at any of the two places at the sweet-will of the complainant.

10. In the case of **Deepak Joshi and others versus State of U.P. And another, reported in 2009 (1) JIC 600 (All),** this court has held that the offence under Section 498-A IPC is a continuing offence. Wife can file complaint either at the place where dowry was demanded or where cruelty was committed and also at

place where aggrieved wife was forced to live.

11. In the case of **Satvinder Kaur versus State (Govt. of NCT of Delhi) and another, reported in 2000 (1) JIC 1 (SC),** the Hon'ble Supreme Court discussed the scope of Section 177 and 178 of the Code of Criminal Procedure. The relevant paragraphs 11 and 12 are reproduced hereunder:-

"11.Chapter XIII of the Code provides for "jurisdiction of the Criminal Courts in inquiries and trial." It is to be stated that under the said Chapter there are various provisions which empowers the Court for inquiry or trial of a criminal case and that there is no absolute prohibition that the offence committed beyond the local territorial jurisdiction cannot be investigated, inquired or tried. This would be clear by referring to Sections 177 and 188. For our purpose, it would be suffice to refer only to Sections 177 to 178 which are as under:

"177. *Ordinary place of inquiry and trial*- Every offence shall ordinarily be inquired into and tried by a Court within whose local jurisdiction it was committed.

"178. *Place of inquiry or trial.*-(a) When it is uncertain in which of several local areas an offence was committed, or

(b) where an offence is committed partly in one local area and partly in another, or

(c) where an offence is continuing one, and continues to be committed in more local areas than one, or

(d) where it consists of several acts done in different local areas,

it may be inquired into or tried by a Court having jurisdiction over any of such local areas."

12. A reading of the aforesaid sections would make it clear that Section 177 provides for "ordinary" place of inquiry in trial. Section 178 inter alia provides for place of inquiry or trial when it is uncertain in which of several local areas an offence was committed or where the offence was committed partly in one local area and partly in other and where it consisted of several acts done in different local areas, it could be inquired into or tried by a Court having jurisdiction over any of such local areas. Hence, at the stage of investigation, it cannot be held that SHO does not have territorial jurisdiction to investigate the crime.

The Hon'ble Supreme Court also held in paragraph 14 that "the legal position is well settled that if an offence is disclosed the Court will not normally interfere with an investigation into the case and will permit investigation into the offence alleged to be completed."

12. In the case of **Asit Bhattacharjee versus M/s.Hanuman Prasad Ojha and others, reported in 2007 (3) JIC 258 (SC),** the Hon'ble Supreme court in paragraph 22 of the judgment has discussed the necessary ingredients for proving a criminal offence. Relevant part of paragraph 22 is quoted here-in-below:-

"22. The necessary ingredients for proving a criminal offence must exist in a complaint petition. Such ingredients of

offence must be referable to the places where the cause of action in regard to commission of offence has arisen. A cause of action as understood in its ordinary parlance may be relevant for exercise of jurisdiction under clause (2) of Article 226 of the Constitution of India but its definition stricto sensu may not be applicable for the purpose of bringing home a charge of criminal offence. The application filed by the appellant under Section 156(3) of the Code of Criminal Procedure disclosed commission of a large number of offences. The fact that major part of the offences took place outside the jurisdiction of the Chief Metropolitan Magistrate, Calcutta is not in dispute. But, even if a part of the offence committed by the respondents related to the appellant-Company was committed within the jurisdiction of the said Court, the High Court of Allahabad should not have interfered in the matter....."

13. In addition to the aforesaid plea of the respondents the learned Additional Government Advocate Mr.Rajendra Kumar Dwivedi, cited a case decided by the Hon'ble Supreme Court i.e. **Trisuns Chemical Industry versus Rajesh Agarwal and others reported in 1999 (8) SCC 686.** In this case the Hon'ble Supreme Court held that it is an erroneous view that the Magistrate taking cognizance of an offence must necessarily have territorial jurisdiction to try the case as well. The relevant paragraphs 11, 12 and 13 are reproduced hereunder:-

"11.It is an erroneous view that the Magistrate taking cognizance of an offence must necessarily have territorial jurisdiction to try the case as well. Chapter XIII of the code relates to jurisdiction of the criminal courts "in enquiries and trials". That chapter contains provisions regarding the place where the enquiry and trial are to take place. Section 177 says that:

"177.Every offence shall ordinarily be enquired into and tried by a court within whose local jurisdiction it was committed." But Section 179 says that when an act is an offence by reason of anything which has been done and of a consequence which has ensued, the place of enquiry and trial can as well be in a court "within whose local jurisdiction such thing has been done or such consequence has ensued". It cannot be overlooked that the said provisions do not trammel the powers of any court to take cognizance of the offence. The power of the court to take cognizance of the offence is laid in Section 190 of the Code. Sub-sections (1) and (2) read thus:

"190.(1) Subject to the provisions of this chapter, any Magistrate of the First Class, and any Magistrate of the Second Class specially empowered in this behalf under sub-section (2), may take cognizance of any offence-

(a) upon receiving a complaint of facts which constitute such offence;

(b) upon a police report of such facts;

(c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

(2) The Chief Judicial Magistrate may empower any Magistrate of the Second Class to take cognizance under sub-section (1) of such offences as are

within his competence to enquire into or try."

12. Section 193 imposes a restriction on the Court of Session to take cognizance of any offence as a court of original jurisdiction. But "any" Magistrate of the First Class has the power to take cognizance of any offence, no matter that the offence was committed within his jurisdiction or not.

13. The only restriction contained in Section 190 is that the power to take cognizance is "subject to the provisions of this chapter". There are 9 sections in Chapter XIV most of which contain one or other restriction imposed on the power of a First Class Magistrate in taking cognizance of an offence. But none of them incorporates any curtailment on such powers in relation to territorial barrier. In the corresponding provision in the old Code of Criminal Procedure (1898) the commencing words were like these: "Except as hereinafter provided....." Those words are now replaced by "Subject to the provisions of this chapter...." Therefore, when there is nothing in Chapter XIV of the Code to impair the power of a Judicial Magistrate of the First Class taking cognizance of the offence on the strength of any territorial reason it is impermissible to deprive such a Magistrate of the power to take cognizance of an offence- of course, in certain special enactments special provisions are incorporated for restricting the power of taking cognizance of offences falling under such acts. But such provisions are protected by non obstante clauses. Anyway that is a different matter."

14. With the aforesaid observations the Hon'ble Supreme court ultimately held that the jurisdictional aspect becomes relevant only when the question of enquiry or trial arises. It is therefore, fallacious thinking that only a Magistrate having jurisdiction to try the case has the power to take cognizance of the offence. If he is a Magistrate of the First Class his power to take cognizance of the offence is not impaired by territorial restrictions. After taking cognizance he may have to decide as to the court which has jurisdiction to enquire into or try the offence and that situation would reach only during the post-cognizance stage and not earlier.

15. In light of the aforesaid dictum of the Hon'ble Supreme Court I do not need to discuss the factual aspect of the matter for the reason that the case in hand is at the stage of post cognizance. The Investigating Officer has already submitted the police report and the learned Chief Judicial Magistrate has taken cognizance, therefore, at this stage only on the factual aspect that the offence did not take place within the territorial jurisdiction of the Chief Judicial Magistrate, Lucknow, I do not feel it appropriate to interfere in the proceedings of the court below. Therefore, the petition is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 19.07.2011

BEFORE
THE HON'BLE DEVI PRASAD SINGH, J.

Misc. Single no. - 4070 of 2011

Anand College of Edu., 19. K.M Mile Stone Agra ...Petitioner
Versus
The State of U.P Thru Secy., Deptt., of Higher Edu., and others ...Respondents

Counsel for the Petitioner:
Sri Amit Jaiswal

Counsel for the Respondents:
C.S.C
Sri Anurag Verma
Sri Kuldeep Pati Tripathi

Uttar Pradesh State Universities Act 1973-Section-37 (a)-De-affiliation of Degree College-without notice opportunity-universities send for approval-held-wholly misconceived and illegal-surprised enough if de-affiliation already approved without enquiry-after that entire exercise remains wholly worthless-order impugned can not sustain-consequential direction given.

Held: Para 10

In view of the above, keeping in view the fact that before sending the matter to the State Government, the respondent University has not held any inquiry after due compliance of principle of natural justice and providing opportunity to the petitioners to defend their cause, the impugned order passed by the State Government seems to be not sustainable and is violative of Article 14 of the Constitution of India. The writ petitions deserve to be allowed.

(Delivered by Hon'ble D.P.Singh,J.)

1 .In these bunch of fresh writ petitions under Article 226 of the Constitution of India, common questions of law are involved hence the writ petitions are decided by the present common judgment. Learned counsel for the parties are agree that the petitions be decided at the admission stage. Sri J.N. Mathur, learned Senior Counsel and Additional Advocate General, appeared for respondent University and submits that the petitions be decided on substantial question of law involved in these writ petitions and it is not necessary to file response to the allegations on record, which may be looked into by the respondent University at the time of holding inquiry.

2. While assailing the impugned orders dated 14.7.2011, petitioners counsel submit that the respondent University has taken a decision to de-affiliate the petitioners for extraneous reasons. It is also alleged that the Deputy Registrar is holding the charge of the Office and he is managing the affairs of the respondent University for extraneous consideration and reasons. However, without entering into the mala fide and other factual averments contained in the writ petitions, I leave it open to the petitioners to raise at appropriate forum in future, as the writ petitions are decided on the pure question of law.

3. While assailing the impugned orders, it has been submitted by the petitioners counsel that no opportunity of hearing was provided to the petitioners. No any material or document was supplied giving opportunity to rebut those evidence which are the foundation for

referring the matter to the State Government for approval to de-affiliate the colleges.

4. Attention has been invited to sub-section (8) and (9) of Section 37 of Uttar Pradesh State Universities Act, 1973, which is reproduced as under:

"37. Affiliated Colleges.--(8) The privileges of affiliation of a college which fails to comply with any direction of the Executive Council under sub-section (7) or to fulfil the conditions of affiliation may, after obtaining a report from the Management of the college and with the previous sanction of the [State Government], be withdrawn or curtailed by the Executive Council in accordance with the provisions of the Statutes.

(9) Notwithstanding anything contained in sub-sections (2) and (8), if the Management of an affiliated colleges has failed to fulfil the conditions of affiliation, the [State Government] may, after obtaining a report from the Management and the Vice-Chancellor, withdraw or curtail the privileges of affiliation.]"

5. It has been submitted by the learned counsel for the petitioners that the order has been passed under sub-section (9) of Section 37 of the Act without providing opportunity of hearing or inquiry. Hence the order is not sustainable. On the other hand, Sri J.N. Mathur, learned Senior Counsel and Additional Advocate General, submits that the order has been passed in pursuance of powers conferred under sub-section (8) of Section 37 of the Act and the State Government had granted approval and now, the University shall take decision with regard to petitioner's fate after holding due inquiry. Submission of Sri J.N. Mathur is that inquiry shall be held in accordance with law with due opportunity to the petitioner. It has been submitted that after grant of approval by the State Government, an inquiry may be held by the respondent University.

6. On the other hand, Sri I. B. Singh, learned Senior Advocate, raises two-fold arguments. Firstly, that the order has been passed by the State Government under sub-section (9) of Section 37 of the Act and secondly, the inquiry should be held before sending the matter to the State Government. Sri Manish Kumar learned counsel raises same plea as raised by Sri I. B. Singh learned Senior Advocate.

7. After considering the arguments, I am of the opinion that sub-section (8) of Section 37 of the Act empowered to take action against the Committee of Management with regard to affiliation. In case it is found by the Executive Council that there is violation of terms and conditions with regard to affiliation, then after due approval from the State Government, the colleges may be de-affiliated. However, while sending the matter to the State Government under sub-section (8) of Section 37 of the Act, the letter and spirit of the provisions is to hold an inquiry with due compliance of principle of natural justice and record finding. Only thereafter, the matter may be sent to the State Government for approval. The purpose of sending the matter to State Government is two fold. Firstly, the entire material and finding recorded against the Management, must be before the State Government so that the State Government may either approve or disapprove the proposal of the University. In case the State Government approves, then the only

course with the University is to pass the order with regard to de-affiliation. The submission of Sri J.N. Mathur, seems to be not correct that the University may hold inquiry after receipt of approval from the State Government. In case the argument of Sri J. N. Mathur is accepted, then it shall amount to violation not only of the principles of natural justice, but it shall deprive the State Government to have a look with regard to the material calling for de-affiliation of the Committee of Management. The State Government must be informed with all the material with regard to proposal sent by the University for de-affiliation of a college. The University while sending the proposal, shall also record its own finding against the Committee of Management. The purpose of the sub-section (8) of Section 37 is to check the arbitrary use of power by the University. Of course, in case the decision taken by the State Government is not in accordance with law or is an incident of arbitrary exercise of power, then it is open for the University to approach the higher judiciary for judicial review against the action of the State Government.

8. Now, coming to sub-section (9) Section of Section 37 of the Act. The sub-section (9) starts with the word, "Notwithstanding anything contained in sub-sections (2) and (8)", meaning thereby, the power conferred on the State Government to consider for de-affiliation of Management is independent than the power of the University. The Government may take action in case the Management of an affiliated college has failed to fulfil the condition of affiliation and in such situation, after obtaining report from the Management and the Vice-chancellor, withdraw or curtail the privilege of affiliation. Here the decision of the State Government is also subject to material supplied by the vice-Chancellor of the University concerned and explanation given by the Committee of Management. While exercising power under sub-section (9) of Section 37 of the Act, it shall always be obligatory on the part of the State Government to obtain explanation from the Committee of Management and also obtained a report from the Vice-Chancellor. In case the report submitted by the Vice-Chancellor satisfies the State Government, that sufficient material exists with regard to withdraw or curtail the privilege of affiliation, then the State Government may pass appropriate order. The power of the State Government under sub-section (9) of Section 37 of the Act, is independent than the power conferred on the University under sub-section (8) of Section 37 of the Act, subject to compliance of principle of natural justice.

9. The impugned order at the face of record say that it has been passed on the basis of letter sent by the University dated 12.7.2011 and in the concluding portion, the State Government directed to take further action against the Committee of management. In case the action would have been taken under sub-section (9) of Section 37 of the Act, then there was no occasion for the State Government to direct the respondent University to take further action in the matter keeping in view the approval granted by the Government. The Government was competent to withdraw or curtail the privilege of affiliation under sub-section (9) of Section 37 of the Act. Accordingly, the argument advanced by the learned counsel for the petitioner to this extent seems to be misconceived and not sustainable.

10. In view of the above, keeping in view the fact that before sending the matter to the State Government, the respondent University has not held any inquiry after due compliance of principle of natural justice and providing opportunity to the petitioners to defend their cause, the impugned order passed by the State Government seems to be not sustainable and is violative of Article 14 of the Constitution of India. The writ petitions deserve to be allowed.

11. The writ petitions are accordingly allowed. A writ in the nature of certiorari is issued quashing the impugned order dated 14.7.2011 contained in Annexure No.1 to the writ petitions with all consequential benefits. Keeping in view the seriousness of the allegations on record, the respondent University is directed to hold inquiry in accordance with law keeping in view the observations made hereinabove expeditiously say within two weeks from today. Sri J. N. Mathur is agree that the inquiry shall be concluded within two weeks.

12. During the course of hearing I have been informed that in the respondent University, since one and half year, there is no regular Registrar. It has been submitted by the respondents counsel that the Registrar has already been appointed. In case the Registrar has not been appointed, the respondents shall ensure the appointment of Regular Registrar in accordance with Rules within a month.

The writ petition is allowed accordingly.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.07.2011

BEFORE
THE HON'BLE VINEET SARAN,J.
THE HON,BLE RAN VIJAI SINGH,J.

Civil Misc. Writ Petition No. 6827 of 2010

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

Counsel for the Petitioner:
Sri Jamal Ali
Sri Adil Jamal
Sri Satish Chandra Mishra

Counsel for the Respondents:
C.S.C.

Constitution of India, Article 226-Promotion-Disciplinary Proceedings-Petitioner working as Junior Engineer-eligible for promotion-Departmental Promotional Committee-considering disciplinary proceedings kept decision under seal cover-in the year 2008-2009-06.04.09 inquiry officer exhonerated from all charges-duly accepted by Govt. on 16.04.2009-commission refuse to open the seal on ground fresh inquiry set up held-unless charge sheet submitted seal cover procedure can not be restored-consequential directions given.

Held: Para 9

In the aforesaid facts, in our view, the writ petition deserves to be allowed and it is accordingly allowed. The respondent no.3 is directed to open the sealed cover with regard to the promotion of the petitioner and implement the recommendation of the Departmental Promotional Committee within a period of two weeks from the date of receipt of certified copy of this order. The petitioner shall also be entitled all consequential benefits, including payment of arrears of salary, if any, to which he may

be found entitled if the recommendation made by the D.P.C. is in favour of his promotion.

Case law discussed:

1991 (4) SCC 109

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

1. The petitioner is Junior Engineer (Civil) in the Irrigation Department of the State Government, who was eligible for promotion to the post of Assistant Engineer. His case was considered for such promotion. However, since there was a departmental inquiry pending against the petitioner, the Departmental Promotional Committee (hereinafter referred to D.P.C.) vide its decision dated 11.02.2009 declared the results of other candidates, but the decision in the case of the petitioner was kept in a sealed cover.

2. The case of the petitioner is that though in the inquiry the petitioner has been exonerated of all the charges vide inquiry report dated 06.04.2009, regarding which office memorandum was issued and communicated to the petitioner on 16.04.2009, but still respondents did not open the decision kept in sealed cover with regard to the promotion of the petitioner despite repeated representations made by the petitioner. The petitioner has thus filed this writ petition with the prayer to open the sealed cover at an early date, and if the department has recommended the case of the petitioner for promotion, then petitioner be given notional promotion from the date his next juniors have been given promotion. Prayer has also been made for a direction to the respondents to pay arrears of salary along with interest and cost.

3. We have heard Sri Satish Chandra Mishra learned counsel appearing for the petitioner as well as Sri Pankaj Saxena, learned Standing Counsel appearing for the State respondent and Sri P.S.Baghel, learned Senior Counsel, assisted by Sri Gautam Baghel appearing for the U.P. Public Service Commission, Allahabad and have perused the record. Pleadings have been exchanged and with the consent of the learned counsel for the parties, this petition is disposed of finally at this stage.

4. It is not in dispute that the petitioner was exonerated of the charges vide inquiry report dated 06.04.2009, which report has been accepted by the State Government and communicated to the petitioner on 16.04.2009. The submission of learned counsel for the petitioner has force that immediately after the exoneration in the inquiry proceeding, the sealed cover ought to have been opened and promotion granted to the petitioner, if it has been so recommended by the D.P.C.

5. In the counter affidavit filed by the Commission, it is stated that the Commission had sent letter on 29.07.2009 stating that they have considered the case of the petitioner and deferred the matter on the ground that there is a fresh inquiry initiated against the petitioner and the decision shall be taken after finalization of such inquiry. In the counter affidavit filed on behalf of the Irrigation Department, it has been stated that after the completion of the inquiry and final order passed on 16.04.2009, in which the petitioner was exonerated of the charges, the disciplinary proceeding had come to an end and thereafter, Government had written letter to the Public Service Commission on 22.07.2009 to open the sealed envelop of the selection year 2008-2009 pertaining to petitioner's promotion on the post of Assistant Engineer. In the said counter affidavit, there is no mention of any

fresh inquiry having been initiated against the petitioner.

6. In the counter affidavit of the State Government, it has been stated in paragraph 4 that a fresh charge sheet has been issued to the petitioner with regard to some other matter on 24.5.2010. It is however, not disputed that as on the date of passing of the order by the Commission on 29.07.2009, there was no inquiry pending against the petitioner.

7. It is not understood as to on what basis the Commission did not open the sealed cover by merely stating that some fresh inquiry is going on, whereas on the record as well as counter affidavits filed, no evidence of any such inquiry is there of which the Commission has mentioned in its communication dated 29.07.2009.

8. The Hon'ble Apex Court in the case of **Union of India vs K.V. Jankiraman**, 1991 (4) SCC 109 has held that the sealed cover procedure is to be resorted to only after the charge-memo/ charge-sheet is issued. In the present case, once the petitioner had been exonerated of all the charges in the departmental inquiry, which had been accepted by the State Government, after the acceptance of the report, it was incumbent upon the Commission to open the sealed cover with regard to the promotion of the petitioner, which has wrongly not been done under the garb of a fresh inquiry having been started, which is totally incorrect. The charge memo/charge sheet in the subsequent inquiry was issued after about a year. As such, there was no basis for the Commission to deny the petitioner the benefit of opening the decision regarding his promotion kept in sealed cover on the ground of pending inquiry.

9. In the aforesaid facts, in our view, the writ petition deserves to be allowed and it is accordingly allowed. The respondent no.3 is directed to open the sealed cover with regard to the promotion of the petitioner and implement the recommendation of the Departmental Promotional Committee within a period of two weeks from the date of receipt of certified copy of this order. The petitioner shall also be entitled all consequential benefits, including payment of arrears of salary, if any, to which he may be found entitled if the recommendation made by the D.P.C. is in favour of his promotion.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.05.2011

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

Civil Misc. Writ Petition No. 16718 of 2010

Dr. Nupur Singh ...Petitioner
Versus
State of U.P. Thru. P.S. Medical Education & others. ...Respondent

Counsel for the Petitioner:
Sri Pradeep Kumar
Sri Praveen Kumar
Sri Prem Kumar

Counsel for the Respondents:
Sri ,Mahendra Pratap
C.S.C.

Constitution of India, Article 14-whether provision of clause 8(h) of notification dated 09.10.2010 as amended by notification Dt. 08.07.1996 restricting admission of Diploma Course in Degree Course in different tread without completing said Diploma or refunding

entire amount of stipend on the date of entrance Test?-are ultra-virus hit by Article 14?-held-'No'-clauses 3(iv) of brochure are in accordance with G.O. Issued under 28(5) of the State Universities Act, 1973-view taken in Dr. Rajesh Arora case-does not lay down correct law while Dr. Sanjay Sharma case hold good field of law.

Held: Para 12 and 31

From the Government order issued under Section 28(5) of the U.P. State Universities Act, 1973, it is clear that Clause 3(iv) of the brochure is in accordance with the aforesaid Government order. A perusal of the aforesaid restriction imposed by Clause 8(h) indicates that the general restriction which has been imposed is that a candidate who is pursuing post graduate diploma or degree course in Government Medical Colleges or K.G. Medical College, Lucknow, shall be ineligible for appearing at the subsequent entrance examination for admission until the course in which he has been admitted is completed and he is not declared successful. The said general rule is subject to two exceptions, (a) if the resignation of the candidate is accepted by Principal of the College before the date of notification of the examination and he has refunded the full amount of salary/stipend received by him during the said course; and (b) he can apply for post-graduate degree course in the subject in which he or she is pursuing post-graduate diploma course.

It is true that judgment in Dr. Sanjay Sharma's case (supra) did not notice the earlier judgment in Dr. Rajesh Arora's case (supra) and due to that reason the said judgment cannot be said to be binding authority but in view of the fact that we have taken a view disapproving the view expressed by the Hon'ble Single Judge in Dr. Rajesh Arora's case (supra), the view expressed by the Hon'ble Single Judge in Dr. Sanjay Sharma's case (supra) has to be approved.

Case law discussed:

Writ Petition No.286 of 1991 (Rajesh Arora and another vs. State of U.P. and others) decided on 21st October, 1991; 2010(1) S.C.C. 477; A.I.R. 1994 S.C. 1506; 1996(28) ALR 522

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

1. These writ petitions have been placed before this Bench under the orders of Hon'ble the Chief Justice dated 18th May, 2010 for answering the following two questions as framed by the Hon'ble Single Judge vide his order dated 17th May, 2010:-

"(1) Which of the two decisions namely Writ Petition No.286 of 1991 (supra) decided on 21st October, 1991 and Dr. Sanjay Sharma (supra) lays down the correct law?

(2) Whether Clause 8(h) of the Notification dated 9th October, 1990, as amended by the Notification dated 8th July, 1996, which restricts candidates admitted to the Diploma Course from seeking admission in the same speciality in the Degree Course in the subsequent year to the exclusion of all other Degree or the Diploma Courses is violative of Article 14 of the Constitution?"

2. Writ Petition No.16718 of 2010 (Dr. Nupur Singh vs. State of U.P. and another) is being treated as leading writ petition since in the aforesaid writ petition counter affidavit and two supplementary counter affidavits have been filed. Reference of the facts of the aforesaid writ petition shall suffice for answering the questions referred.

3. Dr. Nupur Singh, the petitioner, appeared in the U.P. Post Graduate Medical Entrance Examination-2009 and on the basis of her rank in general category she appeared in the counselling and got admission in diploma in Gynaecology and Obstetrics in Rani Laxmiby Medical College, Jhansi where she joined and was pursuing her diploma course. The petitioner appeared in U.P. Post Graduate Medical Entrance Examination-2010 as advertised on 8th January, 2010. The petitioner appeared in the examination and secured 183 rank in the result against general category. In the prospectus of the Examination-2010 there was condition in Clause (iv)(b), which provides as under:-

"(iv)(b). he/she is presently pursuing P.G. Diploma course in any subject, with the condition that he/she will be considered for the Postgraduate Degree course in that subject only."

4. The petitioner has filed this writ petition praying for quashing Condition No.(iv)(b) of the Information Brochure of U.P. Post Graduate Medical Entrance Examination-2010 and further for a writ of mandamus commanding the respondents to permit the petitioner to appear in all subjects available at the time of counselling as per her merit and not to compel the petitioner to get admission only in degree course of Gynaecology and Obstetrics. The writ petition was filed on 26th March, 2010 whereas counselling was to start from 11th April, 2010. The Hon'ble Single Judge by order dated 9th April, 2010 permitted the petitioner to participate in the counselling in accordance with Condition 3(iv)(b) of the conditions mentioned in the Brochure which was made subject to decision of the writ petition. The writ petition was subsequently permitted to be amended permitting the petitioner to challenge Clause 8(e) of the Notification dated 9th October, 1990 as amended by notification dated 30th March, 1994 and 8th July, 1996 as ultra vires to the Constitution of India.

5. Learned counsel for the petitioner, in support of the writ petition, has contended that Clause 8(e) of the notification dated 9th October, 1990 issued by the State Government in exercise of power under sub-section (5) of Section 28 of the U.P. State Universities Act, 1973 is violaitve of Article 14 of the Constitution since it restricts a candidate pursuing a post-graduate diploma course in a particular subject from appearing in other specialities in the subsequent U.P. Post Graduate Medical Entrance Examination. It is contended that petitioner, who is pursuing a diploma course, has every right to obtain admission in different specialities according to merit and option as exercised in the subsequent entrance examination. It is submitted that a candidate who is pursuing diploma course in Medical Colleges in other States selected on the basis of All India Post Graduate Medical Entrance Examination is not subjected to such condition and he is free to appear in the U.P. Post Graduate Medical Entrance Examination for different specialities and join a different speciality. Such facility is not permissible to students of State Medical Colleges as per Clause 8(e) and Brochure 3(iv)(b) which is arbitrary and violative of Article 14 of the Constitution of India. Reliance has been placed by learned counsel for the petitioner on a judgment of Hon'ble Single Judge in Writ Petition No.286 of 1991 ***(Rajesh Arora***

and another vs. State of U.P. and others) decided on 21st October, 1991 by which order Clause 8(e) of the notification dated 9th October, 1990 as was existing at the relevant time was quashed and a direction was issued to the respondents to give admission to the petitioners of the aforesaid writ petition according to merit-cum-option on the basis of result of competitive entrance examination 1991.

6. Sri Mahendra Pratap, learned counsel for the respondents, refuting the submissions of learned counsel for the petitioner, has contended that Clause 8(e) as amended by notification dated 30th March, 1994 and 8th July, 1996 does not violate Article 14 of the Constitution of India and the restriction imposed by the said clause is fully justified. He submits that permitting a candidate pursuing diploma course in a subject to change her or his speciality on the basis of next examination not only causes financial loss, it would also be against the public interest. Permitting post graduate diploma students to change the course midway will keep large number of seats of diploma unfilled causing setback to the public interest and setback to the medical education. It is submitted that insofar as the State of U.P. is concerned, the restriction applies both on the students admitted in the medical colleges of the State and on the students admitted in private recognised medical colleges through State entrance examination as well as All India entrance examination. He submits that even according to admission criteria of All India Entrance Examination if according to the regulations of the University the candidates, who are already pursuing the post-graduate course in their University, are not eligible for admission till they complete the course and admission is denied there shall be no responsibility of the Admission Agency. He submits that even if the candidates, who have been admitted on the basis of All India Entrance Examination in other States and they subsequently get admission on the basis of U.P. Post Graduate Medical Entrance Examination in the State of U.P., they form a different class since they get admission in other State on the basis of All India quota, in respect of which rules and regulations of such admission the State of U.P. has no control. It is submitted that benefit which has been extended to the candidates, who are pursuing postgraduate diploma course in Medical Colleges outside the State to take admission in the same speciality in the degree course in the State of U.P. in pursuance to subsequent examination, the said benefit does not lead to any arbitrariness or inequality.

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

8. The admission in postgraduate medical course in State medical colleges and the private recognised medical colleges within the State of U.P. is governed by the Junior Residency Scheme as notified by the State Government order dated 9th October, 1990 in exercise of power under sub-section (5) of Section 28 of the U.P. State Universities Act, 1973. Sub-section (5) of Section 28 clause (b) of the U.P. State Universities Act, 1973 is as follows:-

"28(5)(b). *admission to medical and engineering colleges and to courses of instruction for degrees in education and Ayurvedic or Unani systems of medicine*

(including the number of students to be admitted), shall subject to clause (a), be regulated by such orders (which if necessary) may be with retrospective effect, but not effective prior to January 1, 1979) as the State Govt. may by notification, make in that behalf:

Provided that no order regulating admission under this clause shall be inconsistent with the rights of minorities in the matter of establishing and administering educational institutions of their choice:"

9. The Government order dated 9th October, 1990 contained a condition in Clause 8(e), which is as under:-

***"8(e).** A candidate if admitted to any speciality in post graduate diploma or degree course, he shall not be eligible for admission to any other speciality in post graduate diploma or degree course. For removal of doubts it is hereby clarified that if any candidate has been admitted to any speciality in post-graduate diploma course, he may be allowed to be admitted in the same speciality in the post graduate degree course."*

10. After the clause 8(e) was struck down vide judgment of the Hon'ble Single Judge in ***Dr. Rajesh Arora's*** case (supra), Clause 8(e) was deleted and substituted by Clause 8(h) by Government order dated 30th March, 1994, which is to the following effect:-

***"8(h).** A candidate who is admitted to any speciality in a post-graduate diploma or degree course shall be ineligible for appearing at the subsequent entrance examination for admission to a different speciality until the course in which he has been admitted is completed. Nothing in this sub-section shall apply to a candidate who does not join the course to which he is admitted."*

Further amendment in Clause 8(h) was made by Government order dated 8th July, 1996 deleting earlier Clause 8(h) and substituting following Clause 8(h):-

***"8(h).** A candidate who is admitted in any speciality in a post-graduate diploma or degree course in Government Medical Colleges or K.G. Medical College, Lucknow shall be ineligible for appearing at the subsequent entrance examination for admission to a different speciality until the course in which he has been admitted is completed and he is not declared successful but he will be eligible if his resignation is accepted by the Principal of the College before the date of notification of the examination and has refunded the full amount of salary/stipend received by him during the said Course. However, nothing in this sub-section shall apply to a candidate who does not join the course to which he is admitted."*

11. The brochure issued for U.P. Post Graduate Medical Entrance Examination-2010 lays down conditions for admission to Post-graduate courses; Clause 3 provides for "Eligibility for Admission". Clause 3(iv), which has been challenged in the writ petition, is to the following effect:-

"3(iv) A candidate who has already taken admission on the basis of earlier U.P.P.G.M.E.E./ A.I.P.G.E.E. is not eligible to appear in the examination until he/she completes and passes the course where he/she is presently admitted.

However, such a candidate shall be eligible if-

(a) he/she has resigned from the said course, his/her resignation has been accepted by the Principal of the Medical/Dental college or the Vice Chancellor in the case of candidates of CSM Medical University and he/she has refunded the full amount of salary/stipend received by him/her during the said course, before the date of notification of this examination, i.e. 1.1.2010.

(b) he/she is presently pursuing P.G. Diploma course in any subject, with the condition that he/she will be considered for the Postgraduate Degree course in that subject only."

12. From the Government order issued under Section 28(5) of the U.P. State Universities Act, 1973, it is clear that Clause 3(iv) of the brochure is in accordance with the aforesaid Government order. A perusal of the aforesaid restriction imposed by Clause 8(h) indicates that the general restriction which has been imposed is that a candidate who is pursuing post graduate diploma or degree course in Government Medical Colleges or K.G. Medical College, Lucknow, shall be ineligible for appearing at the subsequent entrance examination for admission until the course in which he has been admitted is completed and he is not declared successful. The said general rule is subject to two exceptions, (a) if the resignation of the candidate is accepted by Principal of the College before the date of notification of the examination and he has refunded the full amount of salary/stipend received by him during the said course; and (b) he can apply for post-graduate degree course in the subject in which he or she is pursuing post-graduate diploma course.

13. The petitioner in this writ petition has come up with the prayer that above restriction being violative of Article 14 of the Constitution of India be struck down and she be permitted to take admission in any other speciality apart from one in which she is pursuing her diploma course on the basis of her merit and option exercised in the subsequent entrance examination.

14. The question for consideration is as to whether the restriction is violative of any rights of the petitioner of equality as guaranteed under Article 14 of the Constitution of India. The reasons, which has been given by the State for imposing the aforesaid condition, have been explained in paragraph 15 of the supplementary counter affidavit of Dr. K.C. Rastogi, Additional Director of Medical Education dated 14th April, 2010. In paragraph 15 of the supplementary counter affidavit following reasons have been given:-

"15. *That, the prohibition contained in the brochure is in consonance with the notification dated 9.9.1990 as amended on 30.3.1994 & 8.7.1996. The amended notification has been brought on the basis of the experience gained and the direction of this Hon'ble Court and also requests made by the students. The prohibition has been created to curb an unfair practice of leaving a course of one speciality mid-way and joining another speciality on the basis of the subsequent Entrance Examination. The State Govt. found that this practice has resulted in serious financial loss to the Govt. and also*

resulted in unfairness and disadvantage to those who could not join the course as the candidate who secured better merit opted to join. Such practice has also not been found in public interest and only to curb this practice, prohibition has been provided in the Brochure on the basis of the notification mentioned above. It is also pointed out that bar is also not absolute, it only regulates and compels the candidates to complete the course which he joined on the basis of the option exercised by him. Such terms and conditions which are regulatory in nature cannot be termed to violative of article 14 & 21 of the Constitution of India. If petitioner wants to improve his merit for purpose of joining another speciality, the opportunity may be availed after completing the course. The Medical Colleges are run and maintained at the public expense. The prime object is the public service. If this kind of migration from one course to another course is allowed to be resorted to appearing in further examination, it shall highly prejudicial to the medical eduction. If a candidate allowed to leave the course mid way, the seat on which he was allowed admission on the basis of the earlier examination shall remain vacant for remaining period of the course as no admission can be granted at that advance stage of the course. The principal object behind the prohibition is that candidate joined a particular speciality must complete that course. There is no violation of the Article 14 of the Constitution of India."

15. The State Government as per statutory power given under Section 28(5) of the U.P. State Universities Act, 1973 is entitled to regulate the terms and conditions of admission to post-graduate medical course. The restriction, which has been imposed, is due to valid reasons as explained in paragraph 15 of the supplementary counter affidavit 14th April, 2010, as quoted above.

16. Every speciality in a medical discipline has its own importance and is relevant for health of a person. Having skilled persons in every discipline in medical science is in the interest of general public. The seats in post-graduate diploma courses and degree courses in medical colleges are limited. The teacher taught ratio as per regulation of the Medical Council of India for post-graduate courses is 1:1. For running post-graduate medical courses, the State also provides stipend to all the students. It is in the interest of the State that all candidates who takes admission in diploma course should complete the course, permitting the students pursuing diploma courses to leave diploma courses in midway shall affect both State exchequer as well as interest of the medical colleges where they are pursuing the course and the general interest of the public. The seats which are vacated in midway cannot be filled and shall remain unfilled which is not in public interest looking to the need and scarcity of qualified post-graduate doctors. Leaving the seats in midway shall also affect the rights of candidates who could not get admission and were next lower in merit. Thus the restriction imposed by the State cannot be said to be arbitrary or violative of rights guaranteed under Article 14 of the Constitution of India.

17. It is to be noted that there is no complete prohibition in doing the post graduate course in another speciality. A candidate after completing the course can

very well compete for different speciality and take admission. Learned counsel for the petitioner sought to contend that two exceptions, which have been created in the aforesaid general restriction frustrate the object since in case of acceptance of resignation as well as in permitting the degree course in the same speciality for a diploma student, the result is the same, i.e. leaving the diploma seat midway. The exceptions which have been created by the State are to give limited benefit to the students and are in the interest of the student. The exceptions are permitted only in few cases where the conditions are fulfilled and the exception does not completely annihilate the general restrictions and may form only a small percentage. Moreso, the petitioner has principally come up in the writ petition praying for quashing the restriction in taking admission in different speciality.

18. Learned counsel for the petitioner has laid much emphasis on the fact that hostile discrimination in violation of Article 14 of the Constitution of India takes place since the students who have passed M.B.B.S. from State Medical Colleges and have taken admission on the basis of All India Post Graduate Medical Entrance Examination in different States are not bound by such restriction of taking admission in same speciality on the basis of subsequent U.P. Post-graduate Medical Entrance Examination. It is relevant to note that students pursuing the course in another State after taking admission through All India Post-graduate Medical Entrance Examination are governed by different set of rules framed by the Government of India and the respective State where such institutions are situate. As far as State of U.P. is concerned, the restriction applies to the students pursuing their courses in the State Medical Colleges after obtaining admission both on the basis of U.P. Post Graduate Medical Entrance Examination as well as All India Entrance Examination.

19. The Government order issued by the State of U.P. in exercise of power under Section 28(5) of the U.P. State Universities Act, 1973 and the brochure of admission issued accordingly regulate admission to post-graduate courses in the State Medical Colleges and the Private Recognised Medical Colleges in the State of U.P. These rules do not regulate admission of the students in other States on the basis of All India Entrance Examination. The students, who have taken admission on the basis of All India Entrance Examination and have joined other States form a different class. The classification is founded on an intelligible differentia and the differentia is in relation to the object sought to be achieved. The State of U.P. which has control over admission to be made in the Medical Colleges in the State of U.P. with the object, as noted above, has put reasonable restriction in the matter of admission. It is also relevant to note that even in All India Post-graduate Medical Entrance Examination-2010 the eligibility criteria as contained in Clause 4(i), is to the following effect:-

"4. ELIGIBILITY CRITEIRA

.....

.....

(i) Some of the Universities are having regulations that candidates who are already pursuing the PG Course in

their University or in another University are not eligible for admission till they complete the course. The candidates who are already pursuing PG Courses either through All India Quota or State Quota and are applying for a seat under All India Quota may confirm the eligibility conditions of that University in this regard. Dte. GHS shall not be responsible if such candidates are refused admission. Such candidates may opt for the subject and the college at their own risk and cost."

20. The above clause of the eligibility criteria of All India Entrance Examination also recognises restriction in admission regarding students who are pursuing a post-graduate course. All India eligibility criteria recognises that if in the concerned University there is any restriction qua the student to complete the diploma course before admission to any other speciality, he maynot be admitted in different speciality. The denial on the said ground cannot be complained. Thus even All India Entrance Examination recognises the restriction which has been substantially imposed by the State of U.P.

21. In the counter affidavit it has also been mentioned that in some other States there are also restrictions with regard to admission in different subjects in the post-graduate courses on the basis of subsequent examination. In paragraph 16 of the counter affidavit reference has been specifically made to the Post Graduate Medical Entrance Examination-2010 of Gujarat and Punjab Universities. In Gujarat University restriction is to the effect that a candidate who is currently engaged in post-graduate medical studies is not eligible before completion of the course to admission in any speciality. The conditions as referred, are quoted below:-

"A candidate who is currently engaged in P.G. medical studies in Gujarat University or any other University or equivalent body is not eligible. On completion of the course that is after passing the University exam for that course, he/she becomes eligible for another P.G. medical course. A candidate, who, in the past, selected and admitted to any P.G. medical course of this or any other University or any equivalent body and did not complete that course that is, if the candidate has not cleared the University examination of that course, is not eligible."

22. Insofar as Punjab University is concerned, there is more stringent clause i.e. if a candidate is admitted to the Post-graduate Medical Course and leaves before completion of full period, he shall be debarred for next three years from admission to any post-graduate course. The conditions as referred, reads as under:-

***"Important notes:** If a candidate admitted to the course, leaves before completion of full period he/she shall be debarred for next 3 years from applying for admission to any PG course in GMCH. Candidates in employment of govt./semi govt./autonomous bodies/corporation must submit their application form through their employer or produce no objection certificate from/through their employer on or before the last date of receipt of application forms."*

23. Thus the conditions, which have been imposed in the State of U.P. as

compared to the above conditions is not that strict.

24. It is relevant to notice a recent judgment of the Apex Court in the case of ***Gulshan Prakash (Dr.) and others vs. State of Haryana and others*** reported in (2010)1 S.C.C. 477. In the said case the State of Haryana did not provide for reservation in post-graduate courses of MD/MS/PG diploma and MDS. Writ petitions were filed under Article 32 of the Constitution of India before the Apex Court challenging the said order. It was contended that in the in the All India Entrance examination reservation has been provided for same courses, hence the State of Haryana be also commanded to provide reservation. Repelling the aforesaid contention, following was laid down in paragraphs 23 and 24 of the said judgment:-

"23. *Learned counsel for the appellants next contended that, inasmuch as even in All-India Entrance Examination for Post-Graduate Courses, the Government of India itself has made a provision for reservation for SC/ST candidates, the State of Haryana is bound to follow the same and issue appropriate orders/directions providing reservation in the Post-Graduate Courses. He further contended that the prospectus de hors any provision for reservation is bad and is liable to be quashed.*

24. *In our view, this contention is also liable to be rejected. It is true that Government of India itself has made a provision for reservation of SC/ST categories. This was a decision by the Government of India and it is applicable in respect of All-India Entrance Examination for MD/MS/PG Diploma and MDS Courses, and reservation for SC/ST candidates in All-India quota for PG seats. However, the same cannot automatically be applied in other selections where State Governments have power to regulate."*

25. It is clear from the above pronouncement that the condition of admission where the State has power to regulate has to be examined on the basis of the regulations of the State and any other condition for admission provided in the All India Medical Entrance Examination shall not be automatically attracted.

26. The Apex Court had the occasion to consider restrictions as contained in Civil Services Examination Rules, 1990 with regard to candidates who had already been selected qua appearance in the next examination or to opt for other service in the case of ***Arti K. Chhabra and others vs. Union of India and others*** reported in A.I.R. 1994 S.C. 1506. Before the Apex Court the validity of proviso to Rule 17 of the Civil Services Examination Rules, 1990 was challenged on the ground that it violates Article 14 of the Constitution of India. The said proviso contained certain restrictions with regard to candidates' right to appear in the next examination and change to other service as compared to one in which they have already been selected. It is useful to quote paragraphs 7, 8 and 9 of the said judgment whereby the Apex Court repelled the contentions that restrictions being violative of Article 14 of the Constitution of India, are discriminatory in nature. The relevant paragraphs of the judgment read as follows:-

*"**7.** The attack against the second proviso to Rule 17 of the 1990 Rules is based, as we have pointed out above, on two grounds. The first is that the restriction on the horizontal mobility from one service of Group 'A' to another service in the said Group, by itself is unreasonable and arbitrary. Secondly, while it permits those who are selected for I.P.S. to move to any Service in Group 'A', those who are selected in any Service in Group 'A' are prevented from doing so. Hence, there is a discrimination between the candidates selected for I.P.S. and those selected for any of the Group 'A' Services.*

***8.** We are not impressed by either of the said contentions. As regards the first contention, the restriction is eminently justified since, as has been pointed out on behalf of the respondents, all Services in Group 'A' stand at par with each other. Hence, there is no question of bettering prospects or seeking an upward mobility when a candidate wants to move from one service in Group 'A' to another service in that Group. Further, if those who are appointed to any of the Group 'A' Services which are as many as 45, are allowed the mobility, a large number of posts would remain unfilled at any particular point of time resulting in a chaos in the administration. The contention that this will be the case even when the candidates appear for the next examination for upward mobility loses sight of the fact that the posts in I.A.S., I.F.S. and I.P.S. are limited in number compared to those in Group 'A' services and those selected for the I.A.S., I.F.S. and I.P.S. are few. The dislocation on that account is thus marginal if any. What is more, there is no absolute restriction on a candidate selected to any of the services in Group 'A' from moving to any other service in the same Group. The only condition is that if he does so, he has to resign from that Service before he appears in the next examination. For these reasons, we are of the view that the restriction placed on the said mobility cannot be said to be either unreasonable or arbitrary.*

***9.** As regards the discrimination between the candidates appointed to I.P.S. and those appointed to any of the Group 'A' Services, it must be remembered that from the very inception the Services were classified into following three categories:*

Category I - I.A.S. and I.F.S. Category II - I.P.S. and Class II Police Service s Category III - Central Civil Services, Class I and Class II [now Group 'A' & ' B']

According to the Examination Scheme in force prior to 1979, a candidate who opted for I.A.S./I.F.S. was required to appear in two additional optional subjects of Master's Degree standard in addition to three optional subjects and the compulsory subjects of General English, Essay and General Knowledge. The candidates opting for Central Services [Category III above] were not required to appear in the additional optional subjects; they were required to appear only in three optional subjects in addition to the compulsory subjects. The candidates competing for the I.P.S. were required to appear in two optional subjects only in addition to the compulsory subjects. Apart from the two additional subjects, higher marks were prescribed in the viva-voce examination for candidates competing for I.A.S. and I.F.S. The maximum marks prescribed for

candidates competing for I.A.S. and I.F.S. were 400 whereas the maximum marks for viva-voce in the case of candidates competing for other services were only 300. There was a single unified examination for recruitment to different services. In the case of candidates allocated to the I.P.S., they were and are allotted to particular States and they have to spend their entire career in the State to which they are allotted except when they are on deputation to the Government of India. As far as other Services are concerned including Industrial Security Force and Railway Protection Force, being Central Services, the candidates appointed to them get transferred/posted anywhere in the country. It is, therefore, felt necessary to give an option to those who are selected for I.P.S. to consider the conditions in the State to which they are allocated, and not only to move upward but also to any Service in Group 'A' and have an opportunity to be a member of a Central Service, if so desired. It is also possible that the I.P.S. candidate may not like the State-cadre which is allotted to him in which case, unless he is provided with the mobility as is done by the proviso to the impugned Rule 17, he would remain vegetating. That would affect the efficiency of administration. Further, the I.P.S. has very little in common with the other services and they stand on different footing. It is for this reason that he is not only given upward mobility but also mobility towards the less favoured services when he can opt for the Category III service which compared to I.A.S., I.F.S. and I.P.S. is certainly less prized."

27. We may now consider the judgment of this Court in the case of ***Rajesh Arora*** (supra) which had struck down Clause 8(e) as it existed at the relevant time. In ***Rajesh Arora's*** case (supra) following was laid down in paragraph 9:-

"9. *From a perusal of the Government notification dated October 9, 1990 which has statutory base under Section 23(5), empowering the State Government to regulate admission, it will appear that it satisfied the test that equal opportunity should be provided to all concerned seeking admission to post-graduate medical degree and diploma courses by enabling them to appear in the competitive entrance examination which may be held for the purpose. It also provides that admission to the medical colleges shall be made according to merit-cum-option on the basis of the result of such examination. But this provision has been made in regard to some of the candidates and those who have appeared in any previous examination and have already been admitted in any speciality have been put in a different class and have been denied the benefit of that provision. It has been declared that a candidate, if admitted to any speciality in post-graduate diploma or degree course shall not be eligible for admission to any other speciality in post-graduate diploma or degree course. This cuts at the root of the right of such candidates to equal opportunity in the matter of appearing in the entrance examination and getting admission on the basis of merit-cum-option. If this was the real intention of the State Government, then there was no use permitting the candidate to appear in the subsequent entrance examination. The bar should have been clearly laid down. By allowing him to appear in the examination and then denying him the right to enjoy the fruit of the examination are some thing*

inconsistent with each other. The provision in substance and effect is that a person who has already been admitted to any speciality should not take chance in the subsequent examination and even if he appears he will not be given admission in any other speciality according to merit-cum-option on the basis of the result of the examination. The second test that the most meritorious students should be given admission in the medical colleges has not been satisfied. The impugned provisions of clause 8(e) have no nexus with the object of the statutory scheme. They are, therefore, clearly unreasonable and violative of Article 14 of the Constitution."

28. The Hon'ble Single Judge in the aforesaid judgment took the view that the candidates who appeared in earlier entrance examination and had taken a course were discriminated with those students who had failed in the earlier examination and had appeared in subsequent examination. The Hon'ble Single Judge has held that this cuts at the root of the right of such candidates to equal opportunity of appearing in the entrance examination and getting admission on the basis of merit-cum-option. The Hon'ble Single Judge has failed to consider that candidates who were declared successful in the entrance and are pursuing a course are in different class with those students who had appeared but failed and could not get admission. The persons who are pursuing a course can be subjected to different restrictions in the matter of future admission. They form a separate class vis-a-vis those candidates who fail and seek admission afresh by appearing in the subsequent entrance examination. We do not subscribe to the view taken by the Hon'ble Single Judge in ***Rajesh Arora's*** case (supra).

29. After the aforesaid judgment Clause 8(e) was amended and substituted by 1994 and 1996 amendments.

30. In the case of ***Dr. Sanjay Sharma vs. Director General, Medical Education*** reported in 1996(28) ALR 522, the writ petition was filed by certain students who have appeared in the U.P. Post Graduate Entrance Examination 1996 who were aggrieved by Class-(iii) in the brochure which contained a prohibition as brought by Clause 8(h) of the notification issued by the State. The Hon'ble Single Judge in the said judgment upheld the said clause. While considering the Clause 8(e) as amended by notification of the year 1993 and 1994 following was laid down by the Hon'ble Single Judge in the said judgment:-

"From a perusal of the aforesaid clause (e) it is clear that the prohibition was against admission in any other speciality. The fact that this bar was not advertised or was not mentioned in the advertisements or Brochure of U.P.P.G.M.E.E. of 1993 does not make any different as the admissions to the Post Graduate Diploma and Degree Course are governed by the aforesaid Government Order. The Entrance Examination is conducted for admission to Post Graduate Diploma or Degree course. This prohibition has been amended and modified by the Government orders dated 30.6.1993 and 30.3.1994. Clause (h), as it now stands, has already been reproduced in the earlier part of this judgment. In my opinion, the prohibition is not complete and it is only regulatory. A candidate on the basis of the merit

secured in the Entrance Examination exercises his option to join a particular speciality and once it has been done, he should stick to that. It cannot be denied that a lot of money is spend in maintaining these courses and the candidates who join such courses are paid handsome salary. In counter affidavit it has been stated that such candidates are paid Rs.6000/- per month as salary besides other expenses. They are provided facility of residence and studies etc. If the candidate is allowed to leave the course midway, certainly it shall be against the public interest. Further, speciality in medical science, whether it is clinical or non-clinical, plays an important role in maintaining the health and preserving the life of human being. So far as society is concerned, every speciality has the same value. The candidates may have likings or disliking for different specialities but their importance cannot be minimised on the basis of their likings which are mainly based on the prospects for future life. The medical colleges are run and maintained at the public expense. The prime object is the public service. If this kind of jumping from any one course to another course is allowed to be resorted to by appearing in further examination, it shall be highly prejudicial to the medical education. The disadvantage may be considered from another angle also. If a candidate is allowed to lave the course midway, the seat on which he was allowed admission on the basis of the earlier Entrance Examination shall remain vacant for remaining period of the course as no admission can be granted at that advanced stage of the course. Such a practice, if allowed to be pursued, will not be of any advantage to any body. In my opinion, the prohibition contained is regulatory and does not in any way violate the provisions contained in Articles 14 and 21 of the Constitution of India."

31. It is true that judgment in ***Dr. Sanjay Sharma's*** case (supra) did not notice the earlier judgment in ***Dr. Rajesh Arora's*** case (supra) and due to that reason the said judgment cannot be said to be binding authority but in view of the fact that we have taken a view disapproving the view expressed by the Hon'ble Single Judge in ***Dr. Rajesh Arora's*** case (supra), the view expressed by the Hon'ble Single Judge in ***Dr. Sanjay Sharma's*** case (supra) has to be approved.

32. Learned counsel for the petitioner also tried to contend that there is discrimination since the bar does not apply to students who are pursuing their course in private medical colleges. A categorical stand has been taken by the learned counsel for the respondents that bar clearly applies to both categories of students who are pursing their courses in State Medical Colleges and those admitted in recognised private institutions. He submits that in the Government order mention of private institutions was not made since at the relevant time there was no recognised private medical colleges in the State of U.P. In view of the categorical stand taken by the learned counsel for the respondents, it is held that restriction applies to both the categories of students i.e. those pursuing their course in Government medical colleges as well as students pursuing their course in recognised private medical colleges.

33. On submission being made by learned counsel for the petitioner that State should either come up with total restriction prohibiting any diploma students to take subsequent examination for admission to post-graduate courses or may altogether remove such restriction, learned counsel for the State has submitted that State shall consider this aspect and if necessary the conditions shall be suitably amended. It is always open for the State to amend the conditions for regulating the admission to post graduate medical courses in colleges and issue suitable amendments as required from time to time. No direction is needed in that regard.

In view of the foregoing discussions, we answer the referred questions as under:-

(1) The decision of Hon'ble Single Judge in ***Dr. Rajesh Arora's*** case (supra) does not lay down the correct law whereas the judgment of Hon'ble Single Judge in ***Dr. Sanjay Sharma's*** case (supra) lays down the correct law.

(2) Clause 8(h) of the notification dated 9th October, 1990 as amended by notification dated 8th July, 1996 restricting candidates admitted to the diploma courses from seeking admission in the same speciality in the degree course in the subsequent year to the exclusion of all other degree or the diploma courses is not violative of Article 14 of the Constitution of India.

34. Let the writ petition be listed before the Hon'ble Single Judge for final decision.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.07.2011

BEFORE
THE HON'BLE SIBGHAT ULLAH KHAN, J.

Civil Misc. Writ Petition No. 18427 of 2008

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

Counsel for the Petitioner:
Sri P.R. Maurya

Counsel for the Respondents:
Sri Anuj Kumar (S.C.-Gaon Sabha)
Sri G.K. Malviya
Sri N.P. Pandey
C.S.C.

Constitution of India, Article 226- Settlement of Fisheries Right over pond-area 3.0480 Hectare-petitioner being highest bidder deposited Rs. 73000/- cancellation without disclosing any reason and settlement in favour of respondent No. 6 (Society) for nominal amount of Rs. 31000/-amount to joint loot by SDO (along with its subordinate staff and the society)-direction issued for remaining 4 years lease shall be settled with petitioner at the rate of 73000/-per year basis -for loss of 5 years of Rs. 3,65000/-half of amount be paid by society and out of remaining half the SDO and Tehsildaar shall deposit with equal amount-direction for entry of adverse entry in their Service Book given.

Held: Para 9

Accordingly, Rs.36,500/- more shall be deposited by the petitioner for the said period forthwith. Fresh lease for four years shall be granted to the petitioner at the rate of Rs. 73,000/- per year. Half of total rent (1,46,000/-) must be deposited by the petitioner forthwith and for the rest period of two years equal amount of

rent shall be deposited by 31.12.2012. Since June 2006 till date five years have passed. For this period of five years an amount of Rs. 3,65,000/- is due. Half of the amount shall be paid by the respondent society (after deducting any amount which may have already been paid by it). Half of rest half amount shall be deducted from the salary of Vinod Singh Chaudhary, who was Deputy Collector of Tehsil Budhana, District Muzaffarnagar from 02.07.2005 to 25.5.2007 and the remaining half of half amount shall be recovered from the Tehsildar on whose report three words order "approved as proposed" was passed by the S.D.M. in June 2006. Adverse entries shall also be made in the service records of the S.D.O. and the Tehsildar. The amount which is to be recovered from respondent no.5 shall be recovered like arrears of land revenue. Compliance report shall be filed within two months and the matter must be listed for perusal of the compliance report at the top of the list on 21.09.2011.

Case law discussed:

2004(97) R.D. 675; 2006 (101) RD 245; 2009 (107) RD 557; 2005 (99) RD 823

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

1. Heard learned counsel for the parties.

In this case on 11.05.2011, 20.05.2011, 23.05.2011 and 30.05.2011 following orders were passed.

11.05.2011

"It is shocking to know that a pond of more than three hectares which was let out to petitioner for Rs.73,000/- per year has been let out by the Deputy Collector Tehsil Budhana, District Muzaffarnagar to respondent no.5 Ishaq Ahmad claiming to be a member of Muzaffarnagar Matsyajeevi Sahakari Samiti Ltd. for only Rs. 3,100/- per year. Respondent no.5 and the Deputy Collector are equal partners in loot of the Government property to the extent of Rs.70,000/- per year. The Deputy Collector who passed the order shall immediately file his personal affidavit to show cause as to why recommendation for initiating disciplinary proceedings against him after suspending him shall not be made and why he shall not be liable to reimburse to the Government 50% of the amount embezzled by him in collusion with respondent no.5.

2. List peremptorily at the top of the list on 20.05.2011. Till 20.05.2011, the deputy Collector concerned, where ever at present he may be is restrained from discharging any important function apart from routine work.

3. Learned Chief Standing counsel is directed to ensure compliance of this order.

Office is directed to supply a copy of this order free of cost to Learned Chief Standing counsel today."

20.05.2011

"Put up on 23.5.2011.

After hearing learned counsel for the parties, if it is considered appropriate to auction the pond, between the petitioner and the respondent no.5, then the auction would be held on that date in the Court."

23.05.2011

"Learned counsel for the petitioner states that even though on 11.04.2008 he gave a statement that petitioner was no more interested in taking fisheries lease of the pond in dispute, however, now the

petitioner is ready to take the fisheries lease.

Learned counsel for the respondent no. 5 states that due to the statement of the petitioner as recorded in the order dated 11.04.2008, he could not file counter affidavit on behalf of the respondent no. 5. Accordingly, let the counter affidavit be filed within three days.

Put up on 27.05.2011. On no future date Deputy Collector need be present in Court unless specific order in that regard is passed."

30.05.2011

"Rejoinder affidavit has been filed. Learned counsel for the respondent no5 states that earlier patta was granted to the Society and copy of the same has been annexed as Annexure C.A.-1. However, learned counsel for respondent no.5 has categorically stated that his client is not interested in participating in the bid. However, learned counsel for respondent no.5 states that respondent no.5 is ready to take the fisheries lease at Rs.10,000/- per hectare per year.

Judgment reserved."

4. The matter pertains to grant of 10 years fisheries lease in respect of pond comprised in plot No.251 M area 3.0480 hectare situate in Gram Panchayat Habibpur Sikari, Tehsil Budhana, District Muzaffarnagar. The lease was initially settled in favour of the petitioner through public auction on 07.01.2005. Petitioner's bid of Rs.73,000/- per year was highest. The S.D.O./Deputy Collector through five words order cancelled the auction on 07.07.2006. Thereafter, it appears that some recommendation was made for allotment of the pond in favour of a society by the name of the Matsyajeevi Sahkari Samiti Limited, Muzaffarnagar of which respondent no.5 is a member. The S.D.O./ Deputy Collector through three word order "approved as proposed" granted the lease to the respondent no.5 society on 06.12.2006. The lease was granted for Rs.3100/- per year which is only 4% of Rs.73,000/-, the yearly rent for which lease was granted to petitioner. In this manner the S.D.O. (along with is subordinate staff) and the society jointly looted Government/ Gaon Sabha property.

5. An amount of Rs.73,000/- had already been deposited by the petitioner. Petitioner filed an application on which through order dated 23.07.2007 Additional Collector (Administration) Muzaffarnagar directed Deputy Collector /S.D.O. Budhana, District Muzaffarnagar to enquire into the matter. The respondent no.2 reported that petitioner had not deposited any other amount except Rs.73,000/- and he was of Saini caste while according to Government order only people of Dhimar (Mallah) caste can be allotted fisheries lease. The report was given on 18.08.2007. Petitioner again gave a notice / representation to the Collector that either he must be permitted to do fisheries work in pond in dispute or amount deposited by the petitioner should be returned to him. It has been stated in para 12 of the writ petition and admitted by the respondents that it was allotted to the respondent No.5. Respondent no.5 has filed counter affidavit annexing therewith as Annexure C.A.-1, copy of the lease deed executed on 23.12.2006 in favour of the Muzaffarnagar Matsyajeevi Sahkari Samiti Limited, Muzaffarnagar in respect of pond in dispute.

6. It is admitted to the respondent no.5 that no advertisement in newspaper was issued before granting lease to it. It is also admitted that in the auction held in January 2005 respondent no.5 Co-operative Society did not participate. In para 7 it has been admitted that against the allotment order dated 06.12.2006 petitioner had filed representation no.9 of 2007-08 which was rejected by the Collector Muzaffarnagar on 24.01.2008. Annexure C.A.-5 is copy of the order dated 05.07.2010 passed by the Collector withdrawing the notice which had been given to the co-operative society on 05.11.2008 and restoring the patta granted to it and further directing that the annual rent would be Rs. 30,000/- in accordance with the judgment of this Court reported in **Babban Vs. State 2004(97) R.D. 675** (holding that fisheries lease shall not be settled for less than Rs.10,000/- per hectare per year). However, in respect of payment of lease amount contained in the said order, respondent no.5 filed revision being revision no.8 of 2008-09. Commissioner Saharanpur Division Saharanpur allowed the revision on 05.07.2010 (very promptly) and set aside direction of payment of rent at the rate of Rs. 10,000/- per hectare per year passed by Collector, Muzaffarnagar on 05.07.2010.

7. I have discussed all these aspect in detail in the authorities reported in **Satya Vrat Singh Vs. State, 2006 (101) RD 245** and **Ram Kumar Vs. State, 2009 (107) RD 557.** The full bench authority reported in **Ram Kumar Vs. State, 2005 (99) RD 823** was thoroughly discussed, examined and followed in these authorities. Para-5 of my judgment in **Ram Kumar Vs. State, 2009 (107) RD 557** is quoted below:

*"In the judgment reported in **Satya Vrat Singh Vs. State, 2006 (5) ALJ 549,** I summarised the effect of the Full Bench. Wrongly interpreting the said Full Bench, Government had issued an order on 23.02.2006 mentioning that the Full Bench had held that State Government had got a right to settle the fisheries lease on the basis of priorities instead of public auction. I therefore directed that the said Government Order shall not be given effect to. Paragraphs No.5, 6 & 11 of Satya Vrat Singh authority are quoted below:*

"5. In the aforesaid Full Bench authority in para 29 it has clearly been held that fisheries lease shall be settled through auction after due advertisement in news paper. It has also been held in the said authority that no renewal must be granted. The Government Order dated 17.10.1995 dealing with manner of settlement of fisheries lease and preferece for such settlement with certain castes / communities has been approved subject to these two exceptions. The said Government Order has been upheld by the Full Bench in respect of priorities to members belonging to such casts, who are traditionally carrying on the fisheries business. Para 29 of Ram Kumar's Full Bench decision is quoted below:

"29.The settlement of fishery according to the directions under section 126 of 1950 Act is settlement of property vested in the Gaon Sabha which should be done in a prescribed manner giving opportunity to all eligible persons to participate. The Revenue Officers, who are entrusted with duty, shall ensure proper advertisement of the date of settlement so that all persons who are eligible to participate have sufficient notice of the proposed settlement. The Government

order itself contemplates "wide publicity". The Sub -Divisional Officer himself should see that wide publicity is made. Now a days newspapers having wide circulation in the area is surest mode to publish a proposed settlement. As a general rule the sub-Divisional Officer should publish in a newspaper having wide circulation of the settlement of fishing right to enable all concerned to participate. As observed above, in the event there are more than one person in one particular category of preference, the Sub-Divisional Officer is not prohibited to award the said fishing right by inviting bids b y tender or auction."

6. However, if no person belonging to the preferential category as mentioned in the Government order dated 17.10.1995 is interested in taking the lease then the pond can not be left vacant. It will have to be given to any other person who is interested in taking the fisheries lease and is highest bidder in the open auction. According to the Full Bench even if in the preferential category more than one person are interested, then the lease shall be settled through auction.

11. Before parting with the case it is essential to notice the Government Order dated 23.2.2006, shown by the learned Standing Counsel. The said Government Order was issued after the aforesaid Full Bench decision of Ram Kumar. In the said Government Order it has been mentioned that Full Bench authority of Allahabad High Court in its judgement dated 29.9.2005 in Writ Petition of Ram Kumar vs. State has held that State Government has got a right to settle the fisheries lease on the basis of priorities in stead of public auction. The Full Bench in para 29, which has been quoted above, has clearly held that fisheries lease should be settled through public auction so that every person belonging to the preferential category may know about it and in case more than one person belonging to preferential category are interested in taking the lease, then it shall be settled through auction. The Government Order dated 23,2,2006 is clearly based upon wrong interpretation of the Full Bench Authority. Hence it shall not be given effect to. Fisheries lease shall be settled strictly in accordance with Full Bench authority which clearly mandates that a date for public auction shall be advertised in news paper. It is needless to add that the advertisement must appear at least about a week before the date of auction. However, in case only one person belonging to preferential category comes forward on the advertised date, then fisheries lease shall be settled in his favour. In case more than one person belonging to preferential category as provided in the Government Order dated 17.10.1995 intend to take the fisheries lease, then it shall be settled through auction amongst them. In case no person belonging to preferential category is present on the date of auction then general auction amongst all the participants shall take place."

8. As the respondent no.5 co-operative society had neither participated in the auction in which lease was granted to petitioner nor any advertisement was issued in newspaper before granting the subsequent lease to respondent no.5 and the lease has been granted virtually for no amount hence the lease granted in favour of respondent no.5 co-operative society is set aside. More than six years have already passed hence it is directed that immediately lease of the pond in dispute

shall be executed in favour of the petitioner for four years. In the affidavit of compliance filed by Sri Vinor Singh Choudhary, who was the Deputy Collector of Tehsil Budhana from 02.07.2005 to 25.-5.2007 in para 6 it has been stated that since 07.01.2005 till till 17.06.2006 petitioner used the pond in dispute for fisheries purpose.

9. Accordingly, Rs.36,500/- more shall be deposited by the petitioner for the said period forthwith. Fresh lease for four years shall be granted to the petitioner at the rate of Rs. 73,000/- per year. Half of total rent (1,46,000/-) must be deposited by the petitioner forthwith and for the rest period of two years equal amount of rent shall be deposited by 31.12.2012. Since June 2006 till date five years have passed. For this period of five years an amount of Rs. 3,65,000/- is due. Half of the amount shall be paid by the respondent society (after deducting any amount which may have already been paid by it). Half of rest half amount shall be deducted from the salary of Vinod Singh Chaudhary, who was Deputy Collector of Tehsil Budhana, District Muzaffarnagar from 02.07.2005 to 25.5.2007 and the remaining half of half amount shall be recovered from the Tehsildar on whose report three words order "approved as proposed" was passed by the S.D.M. in June 2006. Adverse entries shall also be made in the service records of the S.D.O. and the Tehsildar. The amount which is to be recovered from respondent no.5 shall be recovered like arrears of land revenue. Compliance report shall be filed within two months and the matter must be listed for perusal of the compliance report at the top of the list on 21.09.2011.

10. Writ petition is allowed as above.

11. Office is directed to supply copy of this order free of cost to learned Chief Standing Counsel within three days.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.07.2011

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 32196 of 2011

Reliance General Insurance Company Ltd. ...Petitioner
Versus
Smt. Geeta and others ...Respondent

Counsel for the Petitioner:
Sri S.K. Mehrotra

Counsel for the Respondents:
Sri Jai Prakash Prasad

Code of Civil Procedure-Order 9 Rule 7- Application to recall ex-parte proceeding order-rejected by placing wrong applicability of law-by misreading the same-consequent to ex-parte order only one witness examined-held-application under Order 9 Rule 7 maintainability-direction issued accordingly.

Held: Para 5

The decision in Arjun Singh (supra) has also been wrongly referred and this Court is surprised to see how the District Judge, Ghaziabad, being a Higher Judicial Officer, has so misread the judgment. I am constrained to observe that the judgment in question raises a question upon the competence and understanding of such a high Judicial Officer.

Case law discussed:
2004 (3) CCC Allahabad=2004 ALL.L.J. 3499; AIR 1964 SC 993

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

1. Heard Sri S.K. Mehrotra for the petitioner and Sri Jai Prakash Prasad for contesting respondents 1 to 3.

2. Having heard learned counsel for parties, I proceed to decide the matter at this stage under the Rules of Court.

3. It appears that respondents 1 to 3 filed a Motor Accident Claim Petition No. 55 of 2009. Petitioner failed to appear before the Tribunal on 6.9.2010 whereupon it directed to proceed ex parte against petitioner. Thereafter, the evidence of plaintiff started and one of the witness statement was recorded on 29.3.2011. Petitioner, at this stage, appeared before the Tribunal and moved an application requesting to recall ex parte order and accept written statement. Learned District Judge Ghaziabad by means of impugned order dated 13.4.2011 rejected the said application of the petitioner on the ground that the application is not maintainable in view of law laid down by this Court in **Kailash Nath and others Vs. Rajeev Ratan 2004 (3) CCC Allahabad=2004 ALL.L.J. 3499** and Apex Court in **Arjun Singh Vs. Mahendra Kumar AIR 1964 SC 993.**

4. Having gone through the decision of this Court in **Kailash Nath (supra)**, it is evident that District Judge has misdirected himself and misread the aforesaid judgment. Instead of saying that application under Order 9 Rule 7 was not maintainable, the Court, on the contrary, had said that such an application was maintainable at any stage unless the date fixed for delivery of judgment or when the judgment has been delivered. Though in that case, the stage has come when only the judgment was to be delivered and yet Court uphel0.00"d maintainability of an application under order 9 Rule 7 for recalling the ex part order. Para 10, 11 and 12 of the said judgment may be reproduced as under:

"10. *From the aforesaid, it is clear that on the date fixed, if the defendant does not appear, the Court may proceed in his absence, but it does not stop the defendant from not appearing subsequently. If the defendant appears subsequently after passing of the ex parte order and shows sufficient cause for his previous non-appearance, the Court can hear the defendant and permit him to appear.*

11. *In the present case, the Court passed an order to proceed ex part against the defendant, but before the judgment could be delivered, the defendant appeared and moved an application, which was maintainable and was rightly allowed by the Court below.*

12. *The contention of the learned counsel for plaintiff that the application was not maintainable and the application could only be moved under Order 9, Rule 13, CPC after the decree was passed is incorrect. In the event, the Court after proceeding ex parte against the defendant had delivered the judgment or fixed a date for delivery of judgment, in that case, and in that eventuality, the provisions of Order 9 Rule 13 CPC would come into play and the provisions of Order 9, Rule 7 C.P.C. would not be attracted. The decision cited by the learned counsel in Arjun Singh case (AIR 1964 SC 993) (supra) is not attracted to the present facts. In Arjun Singh case, the Court proceeded ex parte against the defendant*

and fixed a date for delivery of judgment. Subsequently, the defendant moved an application for recall of the ex parte order. The Supreme Court held that the provisions of Order 9 Rule 7, CPC was not attracted to a date fixed for delivery of judgment and it was not a case of adjourned hearing. In the present case no date was fixed for delivery of judgment. In fact after passing of the ex parte order and before delivery of judgment, the defendant appeared on the same date and moved an application. Such application was clearly maintainable even under Order 9, Rule 7 CPC."

5. The decision in **Arjun Singh (supra)** has also been wrongly referred and this Court is surprised to see how the District Judge, Ghaziabad, being a Higher Judicial Officer, has so misread the judgment. I am constrained to observe that the judgment in question raises a question upon the competence and understanding of such a high Judicial Officer.

6. Be that as it may, the order impugned in this writ petition apparently cannot sustain. Learned counsel appearing for respondents no. 1 and 2 also fairly stated that the order impugned in this writ petition cannot be defended but requested that since his claim is pending for the last two years, the Tribunal may be directed to decide the same expeditiously.

7. In view of above discussion, writ petition is allowed. Impugned order dated 13.4.2011 (Annexure 4 to writ petition) is hereby quashed.

8. Tribunal is directed to consider petitioner's application under order 9 Rule 7 CPC and pass appropriate order in accordance with law expeditiously.

9. Registry is directed to place a copy of this order before Hon'ble Administrative Judge, Ghaziabad for His Lordship's kind perusal.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.07.2011

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

Civil Misc. Writ Petition No. 36268 of 2011

Kainash Ram Kochar ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Uma Nath Pandey

Counsel for the Respondents:
Sri Ramendra Pratap Singh
C.S.C.

Land Acquisition Act-Section-18-Reference-Petitioner received compensation under Section 11(2) by executing agreement-disclose willingness of petitioner-subsequently can not be allowed to take recourse of reference for enhancement of amount-held-misconceived-not maintainable.

Held: Para 15 and 24

The statute when expressly debars a person who has received the amount of compensation without any protest in pursuance of an award made under section 11, there is no reason for not debarring a person from making an application under section 18 who has accepted the compensation under section 11(2) under an agreement.

The submission of learned Counsel for the petitioner that since they have not received notice under section 12 they are entitled to file application under section 18 is also misconceived. Compensation having been received in pursuance of an agreement, there is no question of making an application under section 18.

Case law discussed:

AIR 1966 Allahabad 84; 2010 (1) ADJ 685; (2005) 4 Supreme Court Cases 264; 2003 (6) awc 5222; 1998 (1) AWC 399; (1994) 4 Supreme Court Cases 67; (1997) 9 Supreme Court Cases 710; 2003 (6) AWC 522; (1995) 5 Supreme Court Cases 746; (2005) 4 Supreme Court Cases 264; ILR (1883)5 All. 163; AIR 1966 All 84

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

1. Heard Sri Uma Nath Pandey, learned counsel for the petitioner and Sri Ramendra Pratap Singh learned counsel for the respondent no. 3 as well as learned Standing Counsel for the respondents No. 1 and 2.

2. By this writ petition the petitioner has prayed for quashing the order dated 11.5.2011, passed by the Additional District Magistrate (Land Acquisition), Gautam Buddha Nagar rejecting the application submitted by the petitioner for making a reference under section 18 of the Land Acquisition Act for enhancement of compensation. A mandamus has also been sought directing the respondent authorities to send the reference before the District Judge, Gautam Buddha Nagar.

3. Brief facts of the case as emerged from the writ petition are; the petitioner's Khata No. 11 Gata 5M area 0.2020 hectare situate in village Khanpur, Pargana Dankaur, Tahsil Sadar was acquired under the provisions of the Land Acquisition Act. The compensation for the land was determined in accordance with the provisions of the U.P. Land Acquisition Act (Determination of compensation and Declaration of Award by Agreement) Rules, 1997 and was paid to the petitioner by voucher No. 089730 dated 18.11.2008 to the extent of Rs. 1492780/- which was received by the petitioner. After more than two years from receiving the compensation, the petitioner moved an application before the Additional District Magistrate (Land Acquisition) on 16.3.2011 for making a reference under section 18 of the Land Acquisition Act claiming compensation at the rate of Rs. 50,000/- per square meter along with interest and solatium thereon. The said application has been rejected by the Additional District Magistrate (Land Acquisition) by the impugned order dated 11.5.2011 on the ground that the petitioner having received the compensation under an agreement according to 1997 Rules, his application for making reference is not maintainable. It has also been held by the Additional District Magistrate that in the agreement entered by the petitioner, there is specific clause that the petitioner shall not make a claim for any other amount except the amount agreed upon. The Petitioner's case in the writ petition is that the award of acquired land has been made in accordance with 1997 Rules but up till now no notice under section 12 of the Land Acquisition Act has been received by the petitioner. It is further alleged that the compensation prepared was accepted under protest as the petitioner was not satisfied with the rate. It is further stated that the petitioner came to know about the rate of surrounding area hence he made request for payment of compensation at the rate of Rs. 50,000/- per square meter.

It is further pleaded that under section 18 of the Act, any tenure holder can make the reference within six weeks from the date of receiving the notice under section 12.

4. Learned counsel for the petitioner in support of the writ petition contended that the mere fact that the petitioner received the compensation under an agreement does not preclude him from making an application for reference under section 18 since the petitioner never received notice under section 12. He further submits that the provisions of Section 18 can be invoked both by persons, who has received compensation under agreement as well as by person who has received compensation under an award made under section 11 of the Land Acquisition Act. He submits that Additional District Magistrate (Land Acquisition) committed error in rejecting the application of the petitioner for making a reference. Learned Counsel for the petitioner further submitted that merely because the petitioner has entered into an agreement under 1997 Rules, reference under section 18 of the Act is not prohibited. It is submitted that every procedure is to understood as permissible till it is shown to be prohibited by the law. In support of his submissions, learned counsel for the petitioner placed reliance on the judgment of the apex Court in (2011) 2 Supreme Court Cases 705 **Rajendra Prasad Gupta Vs. Prakash Chandra Mishra and others,** AIR 1966 Allahabad 84 **Raj Narain Saxena Vs. Bhim Sen and others** and Division Bench judgment of this Court reported in 2010 (1) ADJ 685 **Preetam Singh Vs. State of U.P. and others.**

5. Sri Ramendra Pratap Singh, learned counsel for the respondent No. 3, refuting the submissions of learned counsel for the petitioner contended that section 18 of the Land Acquisition Act was not attracted in the present case since the petitioner received the compensation under an agreement with a condition that he shall not claim any further amount except the agreed amount. It is submitted that application for reference can be moved by only that person who has not accepted the award. He submits that for those persons who have received compensation under an agreement, the provisions of section 18 are not attracted. He submits that the petitioner accepted the amount without any protest under an agreement by voucher dated 18.11.2008 and the application filed by the petitioner after more than two years cannot be entertained and has rightly been rejected by the Additional District Magistrate (Land Acquisition). Reliance has been placed by learned counsel for the respondent on the judgment of the apex Court in the cases of **Rajendra Prasad Gupta Vs. Prakash Chandra Mishra and others,** reported in (2005) 4 Supreme Court Cases 264, **State of Karnataka & Anr Vs. Sangappa Dyavappa Biradar & Ors,** a Division Bench judgment of this Court reported in 2003 (6) AWC 5222, **Ram Chander & Ors. Vs. The Collector/Special Land Acquisition Officer, Varanasi & Ors.,** as well as 1998 (1) AWC 399 **Land Acquisition Officer vs Shivbai And Others.**

6. We have considered the submissions of learned Counsel for the parties and have perused the record. Before we proceed to consider the respective submissions of learned counsel for the parties, it is useful to look into the

statutory scheme as delineated by the provisions of the Land Acquisition Act and the Rules framed thereunder.

7. Section 11 of the Act provides for inquiry and award by the Collector. Section 11 Sub-sections (1) and (2) which are relevant are quoted as below:

"11. Enquiry and award by Collector. - *(1) On the day so fixed, or on any other day to which the enquiry has been adjourned, the Collector shall proceed to enquire into the objection (if any) which any person interested has stated pursuant to a notice given under section 9 to the measurements made under section 8, and into the value of the land at the date of the publication of the notification under section 4, sub-section (1), and into the respective interests of the persons claiming the compensation and shall make an award under his hand of-*

(i) the true area of the land;

(ii) the compensation which in his opinion should be allowed for the land; and

(iii) the apportionment of the said compensation among all the persons known or believed to be interested in the land, or whom, or of whose claims, he has information, whether or not they have respectively appeared before him :

Provided that no award shall be made by the Collector under this sub-section without the previous approval of the appropriate Government or of such officer as the appropriate Government may authorize in this behalf:

Provided further that it shall be competent for the appropriate Government to direct that the Collector may make such award without such approval in such class of cases as the appropriate Government may specify in this behalf.

(2) Notwithstanding anything contained in sub-section (1), if at any stage of the proceedings, the Collector is satisfied that all the persons interested in the land who appeared before him have agreed in writing on the matters to be included in the award of the Collector in the form prescribed by rules made by the appropriate Government, he may, without making further enquiry, make an award according to the terms of such agreement."

8. The State of U.P. has framed Rules in exercise of power under section 55 read with Sub-section (2) of Section 11 of the Land Acquisition Act namely; U.P. Land Acquisition (Determination of Compensation and Declaration of Award by Agreement) Rules, 1997. Sub-section (2) of Section 11 starts with non-obstante clause i.e. *"Notwithstanding anything contained in sub-section (1), if at any stage of the proceedings, the Collector is satisfied that all the persons interested in the land who appeared before him have agreed in writing"*. Thus Sub-section (2) of Section 11 of the Land Acquisition Act empowers the Collector to make an award according to the terms of agreement as agreed upon notwithstanding anything contained in Sub-section (1) of Section 11. 1997 Rules have been framed to give effect to the provisions of Section 11 Sub-section (2). Rules 3 and 4 of 1997 Rules which are relevant are quoted below:

"3. The Collector may, after hearing the parties, and upon being satisfied that the persons interested in the land are ready and willing to execute the agreement, grant the permission unless, for reasons to be recorded in writing he decides to refuse it.

4. (i) The Collector shall, where he grants the permission inform the persons interested in the land by registered post, about date, time and place for the execution of the agreement.

(ii) The agreement shall be executed in the form appended to these rules, with necessary details as to whether possession has, or has not, been taken before the award.

(iii) If the persons so informed fail to turn up and execute the agreement on such date, time and place or the extended date, as the case may be, the Collector shall proceed to make enquiry under Section-11 from the stage, at which the application under Rule 2 was made."

9. The scheme of 1997 Rules as quoted above clearly indicates that agreement is to be executed only when Collector is satisfied that persons interested are ready and willing and they appear for execution of the agreement on the date and time fixed by the Collector. Sub clauses (ii) and (iii) of Rule 4 of 1997 Rules clearly provide that in case person interested fail to appear and execute the agreement, the Collector shall make enquiry under section 11 from the stage at which application under rule 2 was made. Thus, execution of agreement is possible only when person interested is agreeable and execute the agreement. There is element of willingness on the part of interested person in execution of the agreement. The form of agreement which is referred to under rule 4(ii) is also part of the Rules. It is useful to quote conditions No. (1),(2) and (3) of the terms of agreement as contained in prescribed proforma of agreement:

"(1) that the Land Acquisition Officer .....shall be competent to declare the award as per term of this agreement without any further enquiry which is required to be held under the provisions of the Land Acquisition Act, 1894.

(2) If the Government deems it necessary to take immediate possession of the land under acquisition even though there is a standing crop on it the Government will be entitled to do so provided that compensation for the standing crop as shown in as per the award is paid;

(3) that the owner/owners and interested party/parties shall not claim any amount in addition to the amount agreed upon as aforesaid as compensation and accept it without any protest."

10. Further more, following part of the proforma agreement is also relevant which is quoted below:

"And whereas the owner/owners and/or the interested party/ parties agrees/ agree to refer the matter to the reference of the Collector or..... and to accept the award to be made thereon as compensation payable under Section 23 of the Land Acquisition Act, 1894 including additional amount @ 12% under sub-section (1-A), solatium @ 30%

under sub-section (2) thereof for the said land/lands and also agrees/agree to apportion the same between themselves as stated in detail at the end;

11. Thus, compensation which is paid under the agreement is determined as per Sections 3 and 23 including additional amount at the rate of 12% under Sub-section (1-A), solatium @ 30% . From the above, it is clear that receiving compensation under the agreement in accordance with Section 11(2) read with 1997 Rules clearly indicates acceptance of compensation by the tenure holder under an agreement and consent.

12. Sub-sections (1) and (2) of Section 18 of the Land Acquisition Act which provide for reference and are relevant for the present case are quoted below:

"18. Reference to Court. - (1) Any person interested who has not accepted the award may, by written application to the Collector, require that the matter be referred by the Collector for the determination of the Court, whether his objection be to the measurement of the land, the amount of the compensation, the person to whom it is payable, or the apportionment of the compensation among the persons interested.

(2) The application shall state the grounds on which objection to the award is taken:

Provided that every such application shall be made-

(a) if the person making it was present or represented before the Collector at the time when he made his award, within six weeks from the date of the Collector's award;

(b) in other cases, within six weeks of the receipt of the notice from the Collector under section 12, sub-section (2), or within six months from the date of the Collector's award, whichever period shall first expire."

13. Sub-section (1) of Section 18 begins with a condition of reference i.e. *"Any person interested who has not accepted the award may, by written application to the Collector,"* thus application for reference can be made by person interested only on the condition when "he has not accepted the award". The person who has accepted the compensation under an agreement under section 11(2) read with 1997 Rules cannot be said to be a person who has not accepted the award.

14. Even in a case, where award is made under section 11 and a person accepting the compensation without protest is also debarred from making an application under section 18, which is clearly spelled out from specific provisions of Section 31(2), second proviso. Section 31(1) (2) is quoted below:

"31. Payment of compensation or deposit of same in Court. - *(1) On making an award under section 11, the Collector shall tender payment of the compensation awarded by him to the persons interested entitled thereto according to the award and shall pay it to them unless prevented by some one or more of the contingencies mentioned in the next sub-section.*

(2) If they shall not consent to receive it, or if there be no person

competent to alienate the land, or if there be any dispute as to the title to receive the compensation or as to the apportionment of it, the Collector shall deposit the amount of the compensation in the Court to which a reference under section 18 would be submitted:

Provided that any person admitted to be interested may receive such payment under protest as to the sufficiency of the amount:

Provided also that no person who has received the amount otherwise than under protest shall be entitled to make any application under section 18:

Provided also that nothing herein contained shall affect the liability of any person, who may receive the whole or any part of any compensation awarded under this Act, to pay the same to the person lawfully entitled thereto."

15. The statute when expressly debars a person who has received the amount of compensation without any protest in pursuance of an award made under section 11, there is no reason for not debarring a person from making an application under section 18 who has accepted the compensation under section 11(2) under an agreement.

16. The above view of ours' is also fully supported by various decisions of this Court as well as of the apex Court. The first case which needs consideration is the apex Court's judgment in **Ajit Singh and others Vs. State of Punjab and others** (1994) 4 Supreme Court Cases 67. In the said case award was made under section 11 and some persons accepted the award under protest and some accepted without protest. The apex Court made following observations in paragraph 5:

"....Inasmuch as the appellants have filed an application for reference under section 18 of the Act that wil manifest their intention. Therefore, the protest against the award of the Collector is implied notwithstanding the acceptance of compensation. The District Judge and the High Court, therefore, fell into patent error in denying the enhanced compensation to the appellants."

17. The said case laid down that protest against the award of the Collector is implied when an application is made under section 18. The present is a case where compensation has been accepted under an agreement under section 11(2) of the Land Acquisition Act and the above observation of the apex Court are not attracted in the present case which is clearly distinguishable.

18. It is further useful to note another judgment of the apex Court reported in (1997) 9 Supreme Court Cases 710 **Land Acquisition Officer vs Shivbai And Others,** in which the apex Court has taken the view that claimants who received compensation under protest and who made application under Section 18(1) alone are entitled to seek reference. Following was laid down by the apex Court in paragraphs 7 and 9.

***"7.** Thus it could be seen that when the parties were present at the time when the award came to be made, the notice under Clause (b) of proviso to Sub-section (2) of Section 18 was not necessary. As a consequence, within six weeks from the date of the award an application is*

required to be made for reference under Section 18. If the amount is received without protest, by operation of second proviso to Sub-section (2) of Section 31, such person who has received the amount without protest is not entitled to seek a reference under Section 18.

9. *No doubt they had filed the writ petition in the High Court for seeking reference. But the High Court's order was only for making reference on verification and to find out correct factual position. The officer himself was in collusion with the claimants and without making any enquiry he made the reference. Subsequently, some persons were impleaded to the reference. That itself indicates that all was not going well. It is now settled position in law that the claimants who receive the compensation under protest and who make application under Section 18(1), alone are entitled to seek a reference; third parties, who have been impleaded, have no right to claim higher compensation by circumventing the process of reference under Section 18. Under these circumstances, the reference itself is without any jurisdiction and barred by limitation. Thereby, the award of the reference court is clearly illegal. On appeal, the High Court has not considered all these perspectives and found it convenient to rely on another judgment to uphold the award of the civil court."*

19. The Division Bench of this Court in 2003(6) AWC 522 **Ram Chander & Ors. v. The Collector/Special Land Acquisition Officer, Varanasi & Ors** noticed both the above cases and followed the subsequent judgment of the apex Court in **Land Acquisition Officer vs Shivbai And Others** (supra) and **Ajit Singh and others Vs. State of Punjab and others** (supra). The Division Bench judgment in **Ram Chander's** case (supra) was also a case of award under section 11. The present case is on a better footing since in the present case compensation has been received under section 11 (2).

20. The apex Court had occasion to consider the question of applicability of Section 18 in a case of consent award in (1995) 5 Supreme Court Cases 746 State of Gujrat and others Vs. Day Shamji Bhai and others. In the said case land holders gave their consent in writing agreeing to accept the compensation determined by the Land Acquisition Officer. They were paid compensation as per consent agreement signed by them. Subsequently reference was sought under section 18. Following was laid down in paragraphs 6 and 9.

"6. *In view of the above agreement and in view of the discussion made by the Land Acquisition Officer in the award and working details given in the annexures made therein, it is clear that the parties having contracted to receive compensation the question emerges whether they are entitled to seek a reference. On making an award under Section 11 and issuance of the notice under Section 12 of the Act, the Collector is enjoined under Section 31 (1) to tender payment of the compensation awarded by him to the interested persons entitled thereto to receive the compensation according to the terms of the award. Under the second proviso to sub- section (2) of Section 31 "no person who has received the amount otherwise than under protest shall be entitled to make any application under Section 18". The*

entitlement to make reference to civil court under Section 18 (1) and within the period prescribed under sub-section (2) is conditioned upon non-acceptance of the award. Sub-section (1) of Section 18 makes the matter clear thus:

"Any person interested who has not accepted the award may, by written application to the Collector, require that the matter be referred by the Collector for the determination of the Court regarding his objection, be it to the measurement of the land, the amount of the compensation, the persons to whom it is payable, or the apportionment of the compensation among the persons interested."

The right and entitlement to seek reference would, therefore, arise when the amount of compensation was received under protest in writing which would manifest the intention of the owner of non-acceptance of the award. Section 11 (2) opens with an non-obstante clause "notwithstanding anything contained in sub-section (1)" and provides that "if at any stage of the proceedings, the Collector is satisfied that all the persons interested in the land who appeared before him have agreed in writing on the matters to be included in the award of the Collector in the form prescribed by rules made by the appropriate Government, he may, without making further enquiry, make an award according to the terms of such agreement. By virtue of sub-section (4), "notwithstanding anything contained in the Registration Act, 1908, no agreement made under sub-section (2) shall be liable to registration under that Act". The award made under Section 11 (2) in terms of the agreement is, therefore, an award with consent obviating the necessity of reference under Section 18.

***9.** By operation of Section 11(4), the need for registration of the agreement is obviated. As seen in the contract, the respondents have forgone their right of seeking reference in lieu of 25% more than the compensation determined by the Collector under Section 11(2) of the Act. In fact, 25 per cent in addition to the market value determined by the Collector in his award under Section 11(1) had been paid as the consideration to forgo reference. Even otherwise, once an agreement was entered by the parties, the question of objection to receive compensation under protest does not arise. So, they have no right to seek a reference to the civil court under Section 18 of the Act."*

21. The above case clearly lays down that once an agreement was entered by the parties, the question of objection to receive compensation does not arise and they have no right to make a reference under section 18. The judgment of the apex Court in (2005) 4 Supreme Court Cases 264 **State of Karnataka & Anr Vs. Sangappa Dyavappa Biradar & Ors** was also a case of consent award. It is useful to quote paragraphs 3,12,14 and 18:

***"3.** Keeping in view the point involved in these appeals, it is not necessary to state the fact of the matter in great details. Suffice it to point out that for the purpose of submergence and construction of canal for the Upper Krishna Project, the Appellant State intended to acquire some lands including the lands belonging to the Respondents herein. The parties entered into negotiations as regard the price of the lands; pursuant whereto and in*

furtherance whereof consent awards were passed by the Special Land Acquisition Officer. The amount of compensation awarded in terms of the consent award was also received by the Respondents in full satisfaction of their claim. The Respondents, however, filed applications for reference to the Civil Court in terms of Section 18 of the Land Acquisition Act, 1894 (hereinafter referred to as "the Act") claiming enhanced compensation. The said prayer was rejected by the Collector by an order dated 23.8.1999. The Respondents thereafter filed writ petitions before the High Court which were marked as Writ Petition Nos. 41354, 36840 and 36748 of 1999 praying therein for quashing of the said order as also for a direction upon the Respondent No.2 to refer the applications filed by them to the Civil Court for determining the amount of compensation in respect of the acquired lands.

12. *A right of a landholder to obtain an order of reference would arise only when he has not accepted the award. Once such award is accepted, no legal right in him survives for claiming a reference to the Civil Court. An agreement between the parties as regard the value of the lands acquired by the State is binding on the parties. So long as such agreement and consequently the consent awards are not set aside in an appropriate proceeding by a court of law having jurisdiction in relation thereto, the same remain binding. It is one thing to say that agreements are void or voidable in terms of the provisions of the Indian Contract Act having been obtained by fraud, collusion, etc, or are against public policy but it is another thing to say that without questioning the validity thereof, the Respondents could have maintained their writ petitions. We have noticed hereinbefore that even in the writ petitions, the prayers made by the Respondents were for quashing the order dated 23.8.1999 passed by the Special Land Acquisition Officer and for issuance of a direction upon him to refer the matter to the Civil Court. The High Court while exercising its jurisdiction under Article 226 of the Constitution of India, thus, could not have substituted the award passed by the Land Acquisition Officer by reason of the impugned judgment. Furthermore, the question as regard the validity of the agreements had not been raised before the High Court. As indicated hereinbefore, the Division Bench of the High Court had also rejected the contention raised on behalf of the Respondents herein to the effect that the agreements did not conform to the requirements of Article 299 of the Constitution of India or had not been drawn up in the prescribed proforma.*

14. *An award under the Act is passed either on consent of the parties or on adjudication of rival claims. For the purpose of passing a consent award, it was not necessary to comply with the provisions of Article 299 of the Constitution of India. An agreement between the parties need not furthermore be strictly in terms of a prescribed format.*

18. *Keeping in view the fact that the condition precedent for maintaining application for reference under Section 18 is non-acceptance of the award by the awardee, in our considered opinion, the Division Bench acted illegally and without jurisdiction in passing the impugned judgment. The learned Single Judge was right in concluding that the writ petitions were not maintainable."*

22. Learned counsel for the petitioner has submitted that since there is no express prohibition under the Act from making an application under section 18 by a person who has received compensation under an agreement, the application under section 18 cannot be rejected. Reliance has been placed on a judgment of the apex Court **Rajendra Prasad Gupta Vs. Prakash Chandra Mishra and others** (supra). In the aforesaid case, the issue was as to whether once an application for withdrawal of a suit is filed, suit stands dismissed as withdrawn even without any order or whether second application for withdrawal of the withdrawal application is maintainable. In the above context the apex court relying on a Division Bench judgment in **Narsingh Das. Vs. Mangal Dubey,** ILR (1883) 5 All. 163 and **Raj Narain Saxena Vs. Bhim Sen** AIR 1966 All 84, laid down following in paragraphs 3,4,5 and 6 :

*"**3.** The High Court was of the view that once the application for withdrawal of the suit is filed the suit stands dismissed as withdrawn even without any order on the withdrawal application. Hence, the second application was not maintainable.*

***4.** We do not agree. Rules of procedure are handmaids of justice. Section 151 of the Code of Civil Procedure gives inherent powers to the court to do justice. That provision has to be interpreted to mean that every procedure is permitted to the court for doing justice unless expressly prohibited, and not that every procedure is prohibited unless expressly permitted. There is no express bar in filing an application for withdrawal of the withdrawal application.*

***5.** In Narsingh Das v. Mangal Dubey, Mahmood, the celebrated Judge of the Allahabad High Court, observed :-*

"Courts are not to act upon the principle that every procedure it is to be taken as prohibited unless it is provided for by the Code, but on the converse principle that every procedure is to be understood as permissible till it is shown to be prohibited by the law. As a matter of general principle prohibition cannot be presumed."

***6.** The above view was followed by a Full Bench of the Allahabad High Court in Raj Narain Saxena Vs. Bhim Sen and we agree with this view. Accordingly, we are of the opinion that the application praying for withdrawal of the withdrawal application was maintainable. We order accordingly."*

23. The apex Court laid down that every procedure is permitted to the Court for doing justice unless expressly prohibited. There cannot be any dispute to the proposition as laid down by the apex Court in the cases of **Rajendra Prasad Gupta** and of this Court in **Raj Narain Saxena** (supra). In the present case the application under section 18 is subject to the conditions as laid down in Section 18(1) itself that any person who has not accepted the award may by written application require the matte to be referred. Thus, the section clearly contemplate that a person, who has accepted the award cannot make an application for reference under section 18. The same result also flows from Section Section 31(2) second proviso as quoted above. Thus, the above judgments relied by the petitioner do not help the petitioner in the present case. The case of

Preetam Singh (supra) relied by learned counsel for the petitioner, although was considering a case where compensation was paid on the basis of agreement under section 11(2) of the Act but the question considered and decided was that whether a person is entitled for payment of interest in the event a part of compensation has not been paid and paid with delay. The Court in **Preetam Singh** (supra) was not considering the question as to whether application under section 18 can be made by a person who has accepted the compensation under an agreement. Thus, the said judgment does not help the petitioner to support his contention that application under section 18 can be filed even though a person has received compensation under an agreement. Even in **Preetam Singh** case (supra), the court has laid down the proposition only to the effect that if certain part of the compensation is not paid on the date of agreement, the interest cannot be deprived to the person. However, it was clearly laid down that the petitioners, who had obtained compensation under agreement, are not entitled to any amount other than agreed amount. Following was laid down in paragraphs 22 and 25:

*"**22.** The petitioners are not entitled to any amount other than agreed amount, from any time prior to the date of agreement but there is nothing to prevent to apply Section 31 (1) and Section 34, if a part of the amount under agreement has not been paid for the reasons, which are not attributable to them. In this case we find that 20% compensation was not deposited by the acquiring body on the date of agreement. The parties were fully aware that full amount will not be paid on the date of agreement. They, however, did not provide for any interest in the agreement. But that should not be a ground to deprive the persons, who lost their lands, if the payment of a part of the amount was delayed for years altogether.*

***25.** Even if the agreed compensation was paid in the year 2000, the award under Section 11 (2) of the Act was not made until 9.1.2009 and thus we find that the petitioners are entitled to interest, which should be calculated at the same rate at which the interest is payable, for compulsory acquisition of land under Section 34 of the Act. The writ petitions are allowed to the extent that all the petitioners, who have not been paid 20% compensation, shall get 20% compensation with 9% interest from 30.10.2000 to 29.10.2001 and thereafter at the rate of 15% upto the date of this judgment i.e. 18.12.2009 within a period of one month from the date, when they apply. The interest shall be paid to them without the benefit of compounding. "*

24. The submission of learned Counsel for the petitioner that since they have not received notice under section 12 they are entitled to file application under section 18 is also misconceived. Compensation having been received in pursuance of an agreement, there is no question of making an application under section 18.

25. In view of the foregoing discussions, we are of the view that the application filed by the petitioners for making a reference dated 16.3.2011 has rightly been rejected by Additional District Magistrate (Land Acquisition) by his order dated 11.5.2011. The petitioner is not entitled for any relief in

this writ petition. The writ petition lacks merit and is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.07.2011

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

Civil Misc. Writ Petition No. 37564 of 2011

Balvir Singh ...Petitioner
Versus
Vijay Pal and others ...Respondents

Counsel for the Petitioner:
Sri Pankaj Agrawal

Counsel for the Respondents:
Sri Anil Singh Jadaun
Dr. G.S.D. Mishra

Code of Civil Procedure-Order XLI Rule 3 A-Appeal-without application to condone the delay of 16 days with affidavit field-learned judge not only entertain the appeal but passed interim order admitting-without consideration of the provisions of Order XLI Rule 3 A-held-not sustainable.

Held: Para 8

What follows from the reading of Order XLI Rule 3A is that when an appeal is presented after the expiry of the limitation, it shall be accompanied by an application supported by an affidavit stating the facts on which the appellant relies to satisfy the court that there was sufficient cause for not preferring the appeal within the said period. Unless and until the said application is allowed no competent appeal can be said to be pending before the concerned appellate court and till the delay in filing the appeal is condoned the appellate court has no power to make an order for staying the execution of the decree which is appealed against.

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

1. Heard learned counsel for the petitioner and Dr. G.S.D. Mishra for the contesting respondents.

2. Since the facts of the case are not in dispute, this writ petition is finally disposed of at this stage without calling of any counter affidavit.

3. The brief facts of the case are that the petitioner filed Original Suit No.362 of 2008 in the court of Civil Judge (Junior Division) against the defendant-respondent nos.6 to 9 for cancellation of will dated 27.11.1982 allegedly executed by one Late Roop Singh in favour of defendant-respondent nos.6 to 9. The said suit was decreed by learned Civil Judge (Junior Division) by his judgment and decree dated 8.2.2000. It appears that against the judgment and decree passed by the trial court the respondent nos.1 to 5 filed an appeal under Section 96 of Code of Civil Procedure before the District Judge, Aligarh on 26.3.2010 which was reported to be beyond time by 16 days on 26.3.2010. It is not disputed that the memorandum of appeal was not accompanied by any application under Section 5 of the Limitation Act for condonation of delay yet the learned District Judge by his impugned order dated 6.5.2011 not only admitted the aforesaid appeal but also passed an interim order in favour of respondent nos.1 to 5 on the same day staying the execution of the impugned decree.

4. Learned counsel for the petitioner submitted that impugned order is clearly hit by the provisions of Order XLI Rule 3A of Code of Civil Procedure. He further submitted that since the appeal against the judgment and decree of the trial court was

filed by the respondent nos.1 to 5 after the expiry of prescribed period of limitation, the respondent nos.1 to 5 were required to file an application for condonation of delay and unless the delay in filing the appeal was condoned the appellate court had no power to stay the execution of the decree against which the appeal had been preferred.

5. Learned counsel for the respondent nos.1 to 5 made his submissions in support of the impugned order.

6. After having considered the submissions made by the learned counsel for the parties present and perused the impugned order as well as other materials brought on record, I find that there is force in the submissions made by learned counsel for the petitioner and the same are liable to be accepted.

7. There is no dispute about the fact that Civil Appeal No.79 of 2011 which was filed by the respondent nos.1 to 5 against the judgment and decree of the trial court dated 8.2.2010 on 26.3.2010 was reported to be beyond time by sixteen days on the said date. There is also no dispute about the fact that memorandum of appeal was not accompanied by any application for condoantion of delay. Order XLI Rul0.79"e 3A of C.P.C. which is relevant for the purpose reads as under:-

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

(2) If the Court sees no reason to reject the application without the issue of a notice to the respondent, notice thereof shall be issued to the respondent and the matter shall be finally decided by the Court before it proceeds to deal with the appeal under rule 11 or rule 13, as the case may be.

(3) Where an application has been made under sub-rule (1), the Court shall not make an order for the stay of execution of the decree against which the appeal is proposed to be filed so long as the Court does not, after hearing under rule 11, decide to hear the appeal."

8. What follows from the reading of Order XLI Rule 3A is that when an appeal is presented after the expiry of the limitation, it shall be accompanied by an application supported by an affidavit stating the facts on which the appellant relies to satisfy the court that there was sufficient cause for not preferring the appeal within the said period. Unless and until the said application is allowed no competent appeal can be said to be pending before the concerned appellate court and till the delay in filing the appeal is condoned the appellate court has no power to make an order for staying the execution of the decree which is appealed against.

9. Learned District Judge in the present case has very strangely by the impugned order not only admitted the defective appeal filed by the respondent nos.1 to 5 before him but he also passed an interim order in their favour staying the execution of the judgment and decree which was impugned before him.

10. In this view of the matter the impugned order can not be sustained and is liable to be set-aside. The writ petition is

allowed. The order dated 6.5.2011 passed by District Judge, Aligarh in Civil Appeal No.79 of 2011 (Annexure No.5 to the writ petition) is hereby quashed.

11. This order will not preclude the respondent nos.1 to 5 from filing an application for condonation of delay in the appeal which has been preferred by them before the District Judge against the judgment and decree 8.2.2010 and in case any delay condonation application is filed the same shall be dealt with by the court concerned in accordance with law.

12. Copy of this order shall be supplied to learned counsel for the petitioner within three days on payment of usual charges.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.07.2011

BEFORE
THE HON'BLE VINEET SARAN,J.
THE HON'BLE RAN VIJAI SINGH,J.

Civil Misc. Writ Petition No. 39628 of 2011

Om Prakash Mishra ...Petitioner
Versus
Union of India Thru G.M.,N.Railway,New Delhi and others ... Respondents

Counsel for the Petitioner:
Sri Santosh Mishra

Counsel for the Resapondents:
Sri Sudhir Bharti (S.C. -N.R.)
C.S.C.

Constitution of India-Article 226- Restoration Application along with delay condonation Application rejected by Tribunal-on pertext no ground for interference made out-held Court or Tribunal are known for imparting justice and not to shut the door of Justice on technicality-Tribunal committed great error by ignoring the guide line issued by the Apex Court-reason for non appearance disclosed-could not mark-cause shown sufficient-delay condoned-restoration allowed-direction to decide the original application on merit.

Held: Para 10

Looking into the object of the establishment of the courts/tribunals which are meant and known for imparting substantial justice to the parties,we find that the cause shown for non appearance was sufficient to condone the delay in filing the restoration application as well as to recall the order dated 10.03.2008 and the Tribunal in not doing so has failed to consider the very purpose of the establishment of the court/tribunal and by passing the impugned order has shut down the door of justice on technicalities, therefore, we cannot approve such an order.

Case law discussed:
(JT 1987 (1) SC 537=1987 (2) SCR 387; 1978 ARC 496; JT 2000 (5) 389

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

1. Heard counsel for the petitioner as well as Sri Sudhir Bharti learned counsel for all the respondents. With the consent of learned counsel for the parties, this petition is being finally disposed of at this stage without calling for counter affidavit.

2. The case of the petitioner is that O.A.No. 557 of 2004 was pending before the Central Administrative Tribunal. On 10.03.2008 the said O.A. was dismissed in default as the counsel for the petitioner could not appear. The petitioner thereafter filed an application for recalling of the said order on 02.03.2011 along with an application for condonation of delay

which was supported by an affidavit. In the said application as well as affidavit, it has been stated that as the case could not be marked by the clerk of the counsel for the petitioner, therefore counsel could not appear on the date fixed and the case was dismissed for non prosecution. It is also stated in the affidavit that when the petitioner inspected the file on 25.01.2011 this fact came to the notice of the petitioner and immediately after coming to know about the same he filed restoration application along with an application for condonation of delay.

3. By the impugned order dated 07.04.2011 both the applications, i.e,delay condonation application as well as restoration application have been rejected by observing that no good ground for condonation of delay is made out.

4. The law relating to the delay condonation has been dealt with by the Apex Court in numerous cases. The Apex Court in the case of ***Collector, Land Acquisition, Anantnag & Anr. Vs. Mst. Katiji & Ors. (JT 1987 (1) SC 537 = 1987 (2) SCR 387)*** has given following guidelines while dealing with the delay condonation application :-

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 be decided on merits 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 pragmatic manner.

4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot 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 grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so."

5. In the case of ***Ramji Dass and others Vs Mohan Singh 1978 ARC 496*** the Apex Court has held that *" we are inclined to the view that, as far as possible, Courts' discretion should be exercised in favour of hearing and not to shut out hearing."*

6. Again the Apex Court in the case of **State of Bihar and others Vs. Kameshwar Singh and others** reported in JT 2000 (5) 389 after considering various cases of the Apex Court on condonation of delay application has held :

Para 12..... " The expression 'sufficient cause' should, therefore, be considered with pragmatism in justice-oriented process approach rather than the technical detention of sufficient case for explaining every day's delay. The factors which are peculiar to and characteristic of the functioning of pragmatic approach in justice -oriented process. The court should decide the matters on merits unless the case is hopelessly without merit. No separate standards to determine the cause laid by the State vis-a-vis private litigant could be laid to prove strict standards of sufficient cause".

Para 13..... " It is axiomatic that condonation of delay is a matter of discretion of the court. Section 5 of the Limitation Act does not say that such discretion can be exercised only if the delay is within a certain limit. Length of delay is no matter,acceptability of the explanation is the only criterion. Sometimes delay of the shortest range may be uncondonable due to want of acceptable explanation whereas in certain other cases, delay of a very long range can be condoned as the explanation thereof is satisfactory".

7. This view has further been affirmed by the Apex Court in the case of Gangadeep Pratisthan Private Ltd. and others Vs. Messrs. Mechano and others reported in A.I.R. 2005 Supreme Court Page 1958.

8. In view of the decision of the Apex Court it is abundantly clear that while considering the delay condonation application the court has to see the merit of the case also as the law of limitation is not meant to take away the right of Appeal. The courts are known for imparting justice and not to scuttle the process of justice on technicalities.

9. Here in this case as we have already noticed that it is not a case where no reason for non appearance was given by the counsel, but it is a case where the specific ground has been taken in the delay condonation application that because of the non marking of the case by the clerk of the counsel, the counsel could not appear before the court and the case was dismissed for want of prosecution. It is only when the file was inspected the factum of dismissing of the same has came into the notice of the applicant/petitioner and consequently he filed the restoration application.

10. Looking into the object of the establishment of the courts/tribunals which are meant and known for imparting substantial justice to the parties,we find that the cause shown for non appearance was sufficient to condone the delay in filing the restoration application as well as to recall the order dated 10.03.2008 and the Tribunal in not doing so has failed to consider the very purpose of the establishment of the court/tribunal and by passing the impugned order has shut down the door of justice on technicalities, therefore, we cannot approve such an order.

11. In view of the observation made herein above and law laid down by the Apex Court in delay condonation matter, we allow the writ petition and quash the impugned orders dated 07.04.2011 and 10.03.2008 and condone the delay in filing the restoration application and restore the original application on its original number with the direction to the

Tribunal to hear the case on merit and decided the same in accordance with law.

12. There shall be no order as to cost.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.07.2011

BEFORE
THE HON'BLE SUDHIR AGARWAL,J.

Civil Misc. Writ Petition No. 41342 of 2011

Smt. Kalawati ...Petitioner
Versus
State of U.P. and others ...Respondent

Counsel for the Petitioner:
Sri Vishwa Pratap Singh

Counsel for the Respondents:
C.S.C.

Constitution of India Article 226- cancellation of Fair Price Shop licence- appeal admitte4d but 'Stay Rejected'- petition filed on apprehension-if not interim protection given-third party right shall be created-held misconceived- public distribution system shall not suffer-subsequent allottee has no right to continue on revocation of cancellation-petition dismissed.

Held: Para 5

Thus third party, who is allotted the distribution, do not have any individual right but its rights are subject to the decision in appeal and therefore a fair price dealer, whose matter is pending in appeal, does not suffer in any manner.

Case law discussed:
Civil Misc. Writ Petition No. 10539 of 2007 (Smt. Vimla Devi and another Vs. State of U.P. and others); Kanoria Chemicals & Industries Ltd. Vs. U.P State Electricity Board, AIR 1994 Allahabad 273 (para 10)

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

1. The petitioner's fair price agreement having been cancelled by order dated 24th June, 2011, the petitioner preferred an appeal which has been admitted by the Deputy Commissioner vide order dated 5th July, 2011 but he has declined to grant any interim order. Hence this writ petition.

2. In my view, it is wholly misconceived and not entertainable writ petition. Mere admission of an appeal, which is provided in the statute, does not entitle a person to get an interim order as a matter of routine. Learned counsel for the petitioner could not point out any error apparent on the face of record in the impugned order warranting interference.

3. Learned counsel for the petitioner relied on certain decisions of this Court requesting that till his appeal is decided, no third party right will be created.

4. The public distribution system is not meant for providing source of livelihood to a dealer and those who execute agreement but they are only part of the system to achieve the real objective of the same i.e. providing subsidized essential commodities to poor. Where the agreement of a particular dealer has been cancelled and the matter is pending in appeal, distribution has to be maintained and therefore so long as the matter of cancellation of agreement of a dealer is pending for consideration in appeal before the authority concerned, they are to continue with the system so that distribution may not hamper. Thus for this reason and to maintain public distribution system, as an interim measure somebody has to be appointed. This Court in **Civil**

Misc. Writ Petition No. 10539 of 2007 (Smt. Vimla Devi and another Vs. State of U.P. and others), decided on 13.03.2007 has held that subsequent allottee has no right to continue with the fair price agreement, if the predecessor comes back due to revocation of his cancellation order.

5. Thus third party, who is allotted the distribution, do not have any individual right but its rights are subject to the decision in appeal and therefore a fair price dealer, whose matter is pending in appeal, does not suffer in any manner.

6. In the circumstances, I do not find any reason for directing the respondents not to make any arrangement for maintaining distribution to the beneficiaries as a matter of fact. Moreover, nothing has been discussed in the judgment cited by the learned counsel for the petitioner as to how petitioner, as a matter of right, can request for not creating third party right in the meantime. Therefore, the judgment to this extent are not a binding precedent. In order to constitute binding precedent a judgment must show that the issue was raised, argued and decided and only then the law laid down therein would be binding on the coordinate Bench. **[See Kanoria Chemicals & Industries Ltd. Vs. U.P State Electricity Board, AIR 1994 Allahabad 273 (para 10)]**

7. The writ petition therefore lacks merit. Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.07.2011

BEFORE
THE HON'BLE SUDHIR AGARWAL,J.

Civil Misc. Writ Petition No. 41618 of 2010

Rakshapal Singh ...Petitioner
Versus
State of U.P. Thru' Principal Secy. Home U.P. Govt. & others. ...Respondents

Counsel for the Petitioner:
Sri Digvijay Tiwari

Counsel for the Respondents:
C.S.C.

Constitution of India Article 226-cancellation of Fire Arm License-on ground the petitioner involved in criminal case-and fail to produce his fire arm-cancellation based upon Police report-during pendency of appeal-petitioner not only got fair acquittal but also recommended for prosecution U/S 182 Cr.P.C.-No reason disclosed-for ignoring the judgment of Criminal Court-Held-possession of fire arm in fact fundamental right-caused senior prejudice on unsustainable reasons-petition allowed with cost of Rs. 25000/.

Held Para 12

Unfortunately, that is not so. The matter of firearm is being dealt with by respondents in a very fanciful and strange manner having no reasonable nexus with the purpose sought to be achieved. I really failed to understand as to why the Commissioner could not consider the matter in correct perspective while deciding appeal of the petitioner after decision of Court in criminal case no.849 of 2008 (Case Crime No.400/07). This has caused serious prejudice to the petitioner, inasmuch as, he has been put in a

serious peril and his life have been endangered by depriving him of possession of a firearm on unsustainable reasons.

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

1. The petitioner possess a firearm license No.8816 whereupon an entry of Gun No.S.B.B.L.10718 exist. It has been alleged that a criminal case being Case Crime No.400/07 under Section 307/504 I.P.C. was registered against the petitioner. The aforesaid license was suspended on 31st July, 2007. The order of suspension besides mentioning the factum of registration of the aforesaid criminal case further stated that petitioner used aforesaid gun in the crime which was recovered by the local police and the petitioner could not show his gun, when required. Hence another case No.401 of 2007 under Section 25/30 Arms Act was also registered. On the recommendation of the Station Incharge, which was approved by Senior Superintendent of Police, Aligarh, Additional District Magistrate suspended arm license vide order dated 31st July, 2007 and thereafter passed final order on 8th July, 2008 cancelling the said license. The petitioner preferred an appeal under Section 18 of Arms Act on 8th August, 2008 which has been rejected on 05.05.2010.

2. During pendency of the appeal, criminal case under Section 307/504 I.P.C. was decided vide judgment dated 17th June, 2009 wherein the petitioner was not only acquitted but the trial Court also directed for registration of a case under Section 182 I.P.C. against Bani Singh PW-2 for lodging a false report against the petitioner.

3. This fact was brought to the notice of Commissioner, Aligarh but ignoring the same, observing that license was cancelled in order to maintain law and order on the recommendation of Senior Superintendent of Police, Commissioner rejected the appeal by order dated 5th May, 2010 and confirmed order of cancellation.

4. Learned counsel for the petitioner submitted that the appellate order is clearly arbitrary, based on conjecture and surmises and therefore deserve to be set aside.

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

6. Initially the case of respondents appears to be that the petitioner had used the aforesaid licensed gun in a crime pertaining whereto case crime no.400 of 2007 under Section 307/504 IPC was registered on 23.5.2007. The use of gun in the aforesaid crime is said to be proved by alleging that the firearm was recovered by local police. Thereafter the respondents proceeded further to allege that petitioner was required to show his gun but failed hence another case No.401/2007 under Section 25/30 Arms Act was registered. On account of these two matters, the Station Incharge appears to have submitted a report recommending cancellation of arm license of the petitioner, which was approved by Senior Superintendent of Police, Aligarh and the two orders impugned in this writ petition were passed.

7. The criminal case has not only resulted in honourable acquittal of petitioner but the trial Court has recorded a finding of fact that report was lodged

falsely against petitioner and thus proceedings under Section 182 IPC should be initiated against the complainant.

8. That being so, in absence of any order setting aside the above findings recorded by trial Court, this Court has no reason to disbelieve that the aforesaid entire criminal proceedings initiated against petitioner were fictitious and had no substance at all. This also belied the allegation contained in the suspension order that the firearm was recovered by local police though this fact has not been proved or found correct by the trial Court.

9. Learned Standing Counsel also could not tell, when the firearm was already recovered by the police, as mentioned in the order of suspension, then where was an occasion to the petitioner thereafter to show his firearm to the police on demand and how proceedings under Section 25/30 Arms Act could be made out. It appears that Commissioner in deciding the appeal though confronted with the judgment of trial Court but chose to proceed with the report of Senior Superintendent of Police recommending cancellation of firearm without applying his mind that the basis of this report has disappeared and there remains nothing and no material at all to form even a subjective satisfaction that firearm of the petitioner ought to be cancelled. The impugned order of appeal, therefore, clearly based on certain facts and findings, which did not exist at all and at least none has been shown based on some material in the counter affidavit.

10. It is true that in the matter of question of firearm license responsibility of district administration is quite onerous. The District Magistrate and local police is responsible for maintaining law and order and public tranquillity in the district for the area of their jurisdiction, are liable to keep a close watch over the activities of the persons residing within that area and in case any person is found to have some criminal background or is involved in unlawful, unsocial activities, it is open to the competent authority to form opinion as to whether such persons should be allowed to keep firearm within him or not. But this opinion cannot be founded arbitrarily. There has to be some material for formation of such opinion. It cannot be fanciful or imaginary. A report submitted by police officials by itself may not form foundation unless such report is based on some material. Where the basic foundation of report submitted by police disappear, it would result in vanishing the legal value of such report in regard to the recommendation it has made and therefore, any mechanical acceptance and action thereon also would get be vitiated in law.

11. Possession of a firearm for the purpose of personal safety is a facet of fundamental right of life and liberty under Article 226 of the Constitution. It cannot be denied on fanciful, conjectural reasons. One cannot lose sight of the fact that law and order maintaining machinery in the State is highly inadequate and the people are heavily supposed to take steps for their personal safety on their own. A judicial notice can be taken of the fact that for the total population of the State being more than about 19.95 crores, the number of police personnel in all the wings available in the State is near about 2 lacs. Per capita the availability of police personnel is almost negligible. In these circumstances, allowing the people to

have effective means of their personal safety is of utmost importance. Possession of firearm, therefore, should be a normal condition unless shown otherwise. This ought to be the approach of competent authority under Arms Act while granting license for firearm or renewing or allowing it to continue.

12. Unfortunately, that is not so. The matter of firearm is being dealt with by respondents in a very fanciful and strange manner having no reasonable nexus with the purpose sought to be achieved. I really failed to understand as to why the Commissioner could not consider the matter in correct perspective while deciding appeal of the petitioner after decision of Court in criminal case no.849 of 2008 (Case Crime No.400/07). This has caused serious prejudice to the petitioner, inasmuch as, he has been put in a serious peril and his life have been endangered by depriving him of possession of a firearm on unsustainable reasons.

13. The writ petition, in view of above discussion, is allowed. The impugned orders dated 08.07.2008 passed by Addl. District Magistrate (Administration), Aligarh and 05.05.2010 passed by Commissioner, Aligarh Division, Aligarh (Annexures No.2 and 5 to the writ petition) are hereby quashed. The petitioner shall be entitled to cost which is quantified to Rs.25,000/-.

14. However, the State of U.P. shall be at liberty to recover the amount of cost from the official(s) concerned, who had passed the impugned orders without application of mind; after making such enquiry, as is permissible in law.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.07.2011

BEFORE
THE HON'BLE BALA KRISHNA NARAYANA, J.

Civil Misc. Writ Petition No. 63419 of 2011

Deena Nath Pandey ...Petitioner
Versus
State of U.P. Thru' Secy. Home and others ...Respondents

Counsel for the Petitioner:
Sri Narendra Deo Upadhyay

Counsel for the Respondents:
C.S.C.

Arms Act, 1959-Section-14-Rejection of application for non prohibited fire arm-on ground name of enemy not shown-such ground not available under statutory provision under Section 14-order can not survive

Held: Para 8

The reasons given in the impugned order for refusing the licence to the petitioner are not covered by any of the grounds given in section 14 of the Act on which the licence may be refused. In my opinion the respondent no. 2 failed to consider and decide the petitioner's application for grant of fire arm licence keeping in view the provisions of Section 14 of the Act and rejected the petitioner's application arbitrarily which has rendered his order totally unsustainable.

Case law discussed:
AIR 1982 All. 283

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

1. Heard learned counsel for the petitioner and learned standing counsel for the respondents.

2. This writ petition has been filed by the petitioner for issuing a writ, order or direction in the nature of certiorari quashing the impugned orders dated 20.8.2008 (annexure no. 7 to the writ petition) passed by the respondent no. 4, Commissioner, Varanasi Region, Varanasi and 28.8.2007 (annexure no. 5 to the writ petition) passed by the respondent no. 2, District Magistrate, Ghazipur.

3. Learned counsel for petitioner submitted that that the petitioner applied for grant of firearm license under the Arms Act 1959 (hereinafter referred to as the Act) before the respondent no. 2 in the year 2005. On receipt of the petitioner's application the licensing authority called for the report of officer-in-charge of the police station Kotwali Saidpur. The officer-in-charge submitted his report before the respondent no. 2 recommended against grant of licence to the petitioner. The respondent no. 2 vide impugned order dated 28.8.2007 rejected the petitioner's application for grant of fire arm licence on the grounds inter-alia that he had no enemies, there was no special requirement of the petitioner to possess a firearm licence and that his need was not genuine.

4. Learned counsel for the petitioner submitted that the grounds on which the licensing authority can refuse to grant licence have been laid down in Section 14 of the Arms Act and the licensing authority refusing the licence is bound to give reasons which in view of Section 14 of the Arms Act could only be any one or more of those enumerated in that section and since respondent no. 2 has refused to grant fire arm licence to the petitioner on grounds which are not enumerated in Section 14 of the Act, the order rejecting the petitioner's application for grant of licence is not sustainable at all. In support of his submissions the learned counsel for the petitioner has relied upon the decision of this Court in the case of ***Ram Khelawan Vs. State reported in AIR 1982 All. 283.***

5. He further submitted that the failure of the respondent no. 4 to redeem the illegality committed by the respondent no. 2 in dismissing the appeal preferred by the petitioner against the order of the respondent no. 2 has vitiated his order as well.

6. Learned standing counsel appearing for the respondents submitted that the respondent no. 2 has given cogent reasons for rejecting the petitioner's application for grant of fire arm licence and the impugned orders do not suffer from any illegality or infirmity warranting any interference by this Court under Article 226 of he Constitution of India.

7. I have examined the submissions made by the learned counsel for the parties and have also perused the record.

Section 14 of the Arms Act which enumerates the grounds on which the licensing authority can refuse the grant of licence reads as under:-

(1) Notwithstanding anything in section 13, the licensing authority shall refuse to grant-

(a) a licence under section 3, section 4 or section 5 where such licence is required in respect of any prohibited arms or prohibited ammunition;

(b) a licence in any other case under Chapter II,-

(i) where such licence is required by a person whom the licensing authority has reason to believe-

(1) to be prohibited by this Act or by any other law for the time being in force from acquiring, having in his possession or carrying any arms or ammunition, or

(2) to be of unsound mind, or

(3) to be for any reason unfit for a licence under this Act; or

(ii) where the licensing authority deems it necessary for the security of the public peace or for public safety to refuse to grant such licence.

(2) The licensing authority shall not refuse to grant any licence to any person merely on the ground that such person does not own or possess sufficient property.

(3) Where the licensing authority refuses to grant a licence to any person it shall record in writing the reasons for such refusal and furnish to that person on demand a brief statement of the same unless in any case the licensing authority is of the opinion that it will not be in the public interest to furnish such statement.

8. This Court in the case of ***Ram Khelawan Misra (Supra)*** considered the grounds on which the licensing authority could refuse the licence under the Arms Act and held as under:-

"A rifle not being a smooth bore gun when a person seeks a licence for the former the licensing authority has to be satisfied that he has a good reason to obtain it. Section 14 lays down grounds for refusal of the licence. The licensing authority refusing the licence is bound to give reasons, which in view of Sec. 14, could only be any one or more of those enumerated in that section. Refusal on a ground not found in that provision would be illegal."

A perusal of the order of respondent no. 2 shows that the grounds on which he refused the licence to the petitioner are that he had no enemies, that there was no special requirement of petitioner to possess a fire arm licence and that his need was not genuine. The reasons given in the impugned order for refusing the licence to the petitioner are not covered by any of the grounds given in section 14 of the Act on which the licence may be refused. I0.00"n my opinion the respondent no. 2 failed to consider and decide the petitioner's application for grant of fire arm licence keeping in view the provisions of Section 14 of the Act and rejected the petitioner's application arbitrarily which has rendered his order totally unsustainable.

9. Since the respondent no. 4 also fell into the same error in dismissing the petitioner's appeal preferred by him against the order of the respondent no. 2, his order also cannot be sustained.

10. For the aforesaid reasons the impugned orders dated 28.8.2007 and 20.8.2008 passed by the respondent nos. 2 and 4 respectively (annexure nos. 5 and 7 to the writ petition) are hereby quashed. The writ petition succeeds and is allowed.

11. Respondent no. 2, District Magistrate, Ghazipur is directed to re-consider and decide the petitioner's application for grant of fire arm licence strictly in accordance with law keeping the

view of provisions of Section 14 of the Arms Act by a speaking and reasoned order as expeditiously as possible preferably within a period of two months from the date of the production of the certified copy of this order before him.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.07.2011

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 55366 of 2009

Deepa Ram ...Petitioner
Versus
State of U.P. & others ...Respondents

Counsel for the Petitioner:
Sri O. P. Singh

Counsel for the Respondents:
C.S.C.

Constitution of India, Article 226-Pension-Petitioner working as Seasonal Collection Peon-substantively appointed on 29.11.96-after retirement on 31.12.2007-claimed his initial appointment of seasonal be also counted for Qualifying period of pension-held-can not be accepted.

Held: Para 4

In the circumstances, the claim of petitioner to count his service as Seasonal Collection Peon towards pension cannot be accepted since it is de-hors the rules.

Case law discussed:
2006(1) ESC 611; Civil Misc. Writ Petition No. 14286 of 2008 (Smt. Ramwati Vs. State of U.P. and others) decided on 26.11.2010; 2006 (8) ADJ 371; 1989 ACJ 337

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

1. List revised. None appeared. I have perused the record.

2. Petitioner was working as Seasonal Collection Peon. He was made substantive on 29.11.1996 and retired on attaining the age of superannuation on 31.12.2007. The case of the petitioner is that service rendered by him as seasonal Collection Amin since 20.11.1981 should be treated as qualifying service for the purpose of pension and other retiral benefits. Reliance is placed on Division Bench judgment of this Court in **Board of Revenue & ors Vs. Prasidh Narain Upadhyay 2006 (1) ESC 611.**

3. In my view, the submission is thoroughly misconceived. The service rendered as Seasonal Collection Peon does not qualify for pension. No provision has been shown in this regard. In **Prasidh Narain Upadhyay (supra)**, the Division Bench has recorded a clear and categorical finding rejecting the contention of State Government that incumbent was working as Seasonal Collection Peon and on the contrary this Court held that he was actually appointed as Collection Peon on temporary basis. A temporary appointment followed by substantive (permanent) appointment qualify for pension. That was not a case where incumbent was working as Seasonal Collection Peon. This was the case set up by State Government but not accepted by this Court. This distinction has been pointed out by this Court later on in **Civil Misc. Writ Petition No. 14286 of 2008 (Smt. Ramwati Vs. State of U.P. and others)** decided on 26.11.2010, wherein this Court said as under:

"Learned counsel for the petitioner while assailing the impugned order denying pension on the ground of non-completion of 10 years service placed reliance on a decision of this Court in ***Babu Singh Vs. State of U.P. and others, 2006(8) ADJ 371.***

However that was a case where the incumbent was appointed on temporary basis and was regularised on 02.05.1995. The department intended to ignore the temporary service rendered by the employee concerned before period of regularisation for the purpose of qualifying service and this Court relying on the Division Bench decision of this Court in ***Dr. Hari Shankar Ashopa Vs. State of U.P. and others, 1989 ACJ 337 and Board of Revenue and others Vs. Prasidh Narain UPadhyay, 2006(1)ESC 611*** *held that Fundamental Rule 56 as amended in 1975 provides retiring pension to a temporary employee also. Meaning thereby the services rendered as a temporary employee will qualify for pension. The aforesaid judgment is not applicable to a case where the incumbent has worked not as a temporary employee but as a seasonal employee, since the service rendered by a seasonal employee is intermitent and cannot be equated with a temporary employee."*

4. In the circumstances, the claim of petitioner to count his service as Seasonal Collection Peon towards pension cannot be accepted since it is de-hors the rules.

5. The writ petition lacks merit. Dismissed.
