ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 06.09.2011

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

Writ Petition No. 109 (S/B) of 2001

Dr. Anish Khanna ...Petitioner
Versus
The Chancellor, University of Lucknow & others ...Respondents

Constitution of India-Article 226 readwith Section 66 of State Universities Act-Constitution of selection committee-challenged by such candidate who participated and found not selected-without any protest-can not be allowed to turn round and question the formation of committee itself-even the nominee of Central as well as State Govt. not there-can not be fatal-order impugned Quashed.

Held: Para 19

This apart, the fact remains that the private respondent participated in the selection before the same very selection committee without any protest and when he remained unsuccessful, he preferred the said representation. The candidate who has chosen to take a chance of selection before the committee so constituted cannot be allowed to turn round and challenge the selection on the basis of the illegal formation of the committee simply because he could not be successful.

Case law discussed:
2002 (6) SCC 124

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

1. These are the three writ petitions filed by Dr. Anish Khanna, Lecturer, Dr. Jamal Masood, Assistant Professor and Dr. Sheetal Prasad Patel, Assistant Professor, challenging the same orders passed by the Chancellor dated 6th of January, 2001 by means of which their appointments on the post of Lecturer and Assistant Professor respectively in the Department of Social Medical & Preventive Medicines (hereinafter referred to as the 'Department of SPM') in the King George Medical College presently known as Chhatrapati Sahuji Maharaj Medical University, Lucknow have been cancelled.

2. Since common questions of law and fact are involved, therefore, we proceed to decide all the aforesaid writ petitions by a common order.

3. Heard Sri S.K. Kalia, learned Sr. Advocate appearing for the petitioners, Sri Alok Mathur appearing for the Chancellor and Sri Abhishek Yadav appearing for the private-respondent.

4. On 12th of January, 1998, the then King George Medical College a constituent college of the Lucknow University issued an advertisement inviting applications for appointment on six posts of Assistant Professor/Lecturer in the Department of SPM vide advertisement No. 98 of 2002. Out of Six posts, two posts were reserved for backward classes and one post was reserved for SC/ST category. Dr. Anish Khanna, Dr. Jamal Masood and Dr. Sheetal Prasad Patel, applied for being appointed on the posts so advertised.

5. Along with the petitioners, certain other persons, including the private respondent Dr. Ashok Kumar Yadav, also applied in pursuance of the advertisement.

6. The meeting of the selection committee was held on 7th of May, 1999 wherein the petitioners as well as the private respondent also appeared along with certain other candidates. As a result of the selection, the petitioners were declared successful but the private respondent, namely Dr. Ashok Kumar Yadav, could not compete in the selection with the petitioners. Consequence to their selection, the Executive Council of the University appointed the petitioners vide appointment order dated 16th of June, 1999 and separate appointment letters were also issued to them. They joined their respective post of Lecturer and Assistant Professors, respectively, on that very date i.e. on 16th of June, 1999.

7. It was after a lapse of about three months, the petitioners received a letter from the Chancellor of the University of Lucknow wherein they were informed that a representation under Section 68 of the State University Act has been preferred by Dr. Ashok Kumar Yadav on 1st of July, 1999 and the petitioners were required to submit their reply.

8. The main plea of the representationist, namely Dr. Ashok Kumar Yadav, was that the Department of SPM was an upgraded department, therefore, in terms of Section 31(4)(a)(iv) of the Act, the selection committee would be constituted including one nominee each from the Central Government and the State Government which was not done in the instant case and therefore, the selection itself was bad.

9. The petitioners submitted their reply refuting the aforesaid allegation saying that the Department of SPM was not an upgraded department and that it was a regular department of the King George Medical College therefore it was not necessary to constitute the selection committee in terms of the aforesaid provision of the statute.

10. The Lucknow University also submitted reply wherein it categorically refuted the aforesaid claim of the representationist and asserted that the Department of SPM is not an upgraded department nor the committee was required to be constituted in terms of the aforesaid statute.

11. The Chancellor, however, on the basis of a 'Forward' note prepared by one Sri K.P. Bhargava, in the souvenir of the University since has mentioned that the Department of SPM has been upgraded in the year 1972 up to Post Graduate classes, came to the conclusion that it was an upgraded department and therefore, the selection committee should have been comprised of one nominee each from the Central Government and the State Government.

12. After recording the aforesaid finding, the Chancellor has set aside the appointments of all the three petitioners vide impugned orders dated 6th of January, 2001, therefore, they have filed the writ petitions, separately.

13. Learned counsel for the petitioners has drawn the attention of the Court towards Section 66 of the State University Act which reads as under:

"66. No act or proceeding, of any authority or body of the committee of the University shall be invalid merely by reason of -

(a) any vacancy or defect in the constitution thereof, or

(b) some person having taken part in the proceedings who was not entitled to do so, or

(c) any defect in the election, nomination or appointment of a person acting as member thereof, or

(d) any irregularity in its procedure not affecting the merits of the case."

14. He says that any defect in the constitution of the selection committee would not make the selection invalid.

15. Relying upon the aforesaid provision, he has submitted that even assuming that it was necessary to include one nominee each of the Central Government and the State Government, though not accepted, still once the selection committee has deliberated upon and the result has been declared, the failure on the part of the University in getting the committee constituted in the like manner would stand protected under Section 66 of the Act.

16. He has further submitted that the private-respondent having participated in the selection before the same very selection committee without raising any objection/protest cannot be allowed to raise a grievance regarding the constitution of the committee merely because he remained unsuccessful in the selection. Pressing upon the two arguments, he has submitted that the Chancellor has erred, apparently, in interfering with the order of the appointments without dealing with the aforesaid points.

17. Sri Abhishek Yadav, who appears for the private respondent does not dispute that these pleas have not been considered by the Chancellor and also that Dr. Ashok Kumar Yadav had appeared before the same very selection committee and had taken chance of being appointed but he remained unsuccessful. His submission is that on coming to know, after the selection committee had met, that the selection committee was not properly constituted, he preferred a representation before the Chancellor.

18. Having considered the arguments advanced and after going through the orders passed by the Chancellor, it is clear that there was no material before the Chancellor worth being relying upon to come to the conclusion that the Department of SPM was an upgraded department. A forward note of the souvenir cannot be made the basis for deciding the issue of such a serious nature, more so, when it did not disclose the source from where the said information was given or mentioned in the said forward note. This becomes more important when the University itself had taken a clear stand before the Chancellor that it was not correct to say that the Department of SPM was an upgraded department. In the absence of any cogent and admissible evidence being brought on record, contrary to the statement made by the University, there was no occasion for the Chancellor to take a different view.

19. This apart, the fact remains that the private respondent participated in the selection before the same very selection committee without any protest and when he remained unsuccessful, he preferred the said representation. The candidate who has chosen to take a chance of

selection before the committee so constituted cannot be allowed to turn round and challenge the selection on the basis of the illegal formation of the committee simply because he could not be successful. In the case of ***Chandra Prakash Tiwari Vs. Shakuntala Shula*** reported in ***2002 (6) SCC 124***, the Apex Court has held as under:

"34. There is thus no doubt that while question of any estoppel by conduct would not arise in the contextual facts but the law seems to be well settled that in the event a candidate appears at the interview and participates therein, only because the result of the interview is not "palatable" to him, he cannot turn round and subsequently contend that the process of interview was unfair or there was some lacuna in the process."

20. Imagine a situation if the private respondent had been selected, he would not have challenged the constitution of the selection committee. Thus having taken chance before the selection committee without any protest about the constitution of the committee, it was not open for him to make a representation under Section 68 of the Act.

21. The petitioners have been allowed to continue in service in terms of the interim order passed by this Court and they are still working on the post of Lecturer/Assistant Professors on which they were appointed, we do not find any ground to uphold the orders passed by the Chancellor.

22. For reasons aforesaid, the impugned orders dated 06.01.2001 passed by the Chancellor are set aside and the writ petitions are allowed.

23. In case, the petitioners are entitled to any promotion or other consequential benefits for the period of their service which they have rendered that would also be considered by the University, expeditiously.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 14.09.2011

BEFORE
THE HON'BLE VINOD PRASAD, J.

Criminal Appeal No.109 of 2011

Smt. Tara Devi and another ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Petitioner:
Sri Arvind Srivastava

Counsel for the Respondents:
Sri Patanjali Mishra
A.G.A.

Code of Criminal Procedure-Section-389-grant of interim bail during pendency of final consideration of Bail Application-pending Criminal Appeal-held-inappropriate cases-even after addition of proviso-which is for final relief of Bail-Appellate court can grant interim Bail to a convicted accused-No embargo or fetters on its power.

Held: Para 32 and 33

In view of the above discussion, right of appellate court to consider interim bail prayer in appropriate case, pending consideration of final relief of bail is preserved even after addition of proviso. The rider provided by the proviso relates to final relief of bail and not interim bail prayer in appropriate cases. Reference to

sword "bail' under it denotes final bail and not interim bail.

Wrapping up the discussion on legal aspect I lean in favour of appellant's submission that pending consideration final relief of bail u/s 389 Cr.P.C. appellate court can grant interim bail to a convicted accused and there is no embargo or fetters on it's power.

Case law discussed:

2005 Cr.L.J. 755; (2009) SCC 437; (2000) 8 SCC 437; AIR 1944 PC 71; AIR 1961 SC 1596; AIR 1959 SC 713; AIR 1955 SC 765; (1977) 4 SCC 291; (1999) 4 SCC 421; AIR 2009 SC 1669; 1991 (Suppl) ACC 67; (2009) SCC 437

(Delivered by Hon'ble Vinod Prasad, J.)

1. Heard Sri Arvind Srivastava, learned counsel for the appellants and learned AGA in opposition in support and opposition of bail prayers of the two appellants, Smt. Tara Devi and her husband Shivdan Gaur, who were in-laws of the deceased Sona Devi, and who have been convicted for offences U/Ss 306, 498A,201 I.P.C., in S.T. No. 147 of 2008, State of U.P. versus Brajnandan and others, by Additional Session's Judge, Court No. 3 , Mau.

2. During course of argument the neat question of law which has been mooted for consideration and judicial determination by appellant's counsel is as to whether pending consideration of final relief of bail U/S 389 Cr.P.C., in short code, can an appellant be released on short term bail inspite of newly added proviso to the said section? Submission of appellant's counsel is that requirement of granting time to State counsel to file an objection on the bail prayer of an appellant, who has been convicted and sentenced to ten years or more of imprisonment is restricted only to grant of final relief for bail and not for granting interim bail pending consideration of final relief of bail. According to appellant's contention proviso attached to section 389 of the code does not curtail or abridge power of appellant court to grant interim bail pending consideration final relief of bail. Considered in right prospective said proviso cannot scuttle power of high court to grant interim bail nor it can put an embargo on such a power of this court to grant interim bail to deserving appellants submitted appellant counsel.

3. Before deliberating and dilating on the harangued question a brief resume of preceding facts are noted below.

4. Deceased Sona Devi, daughter of informant Keshav Prasad Gaur, a clerk in Life Insurance Corporation of India, Bokaro, Jharkhand, tied her nuptial knot with Brajnandan Prasad @ Lallan, son of appellants, on 4.2.2001, according to Hindu customs and rites. In the marriage dowry was offered according to fiscal and economic conditions by the informant but that had not satisfied the rapacious psyche of the bride groom, his parents and relatives, who were further demanding one and half lacs of rupees and a two wheeler. None fulfilment of dowry demand resulted in inflicting torture on the wife Sona Devi. On 30.12.2007 at 8.45.a.m. appellant Shivdan Gaur, father-in-law of Sona Devi, telephoned informant and told him that she is not keeping well. Ten minutes thereafter, one Mohammad Ali, husband of village Pradhan, made a second telephone call to the informant to intimate him that his daughter expired. Subsequently body of Sona Devi was also cremated without waiting for the informant. Since informant sensed that his daughter was poisoned to

death by her husband Brajnandan Prasad @ Lallan, father-in-law Shivdan Gaur and mother-in- law Smt. Tara Devi and without waiting for him they, to conceal their crime and obliterate evidences of murder, had cremated corpse of the deceased, that the informant scribed written FIR, Ext. Ka 1 and lodged it on 2.1.2008 at 12.30 p.m. at PS Mohammadabad Gohana, as Crime No.4 of 2008, U/Ss 498A, 304B, 201 IPC and 3/4 D.P. Act. vide Ext. Ka 5, the GD of registration of crime being Ext. ka 6.

5. PW7 Ram Bhawan Chaurasia, Circle Officer, commenced investigation into the crime and after conducting routine investigation and observing all the investigatory formalities, charge sheeted the accused for the aforesaid offences.

6. Committal Magistrate registered the case against the accused and summoned them to stand trial and finding their case triable by Session's Court committed it to Session's Court for trial where it was registered as S.T.No. 147 of 2008, State versus Brajnandan and others. Additional Session's Judge, Court NO. 3 Mau, who conducted the trial found the case of the prosecution established for offences U/Ss 306,498A, 201 I.P.C. only to the hilt and therefore convicted the accused for those offences and sentenced them to ten years R.I. with fine of Rs.5000/-, the default sentence being 1 year further imprisonment for the first charge, three years SI with fine of Rs. 2000/- the default sentence being six months additional imprisonment on the second count, and for the last offence one year SI with fine of Rs. 1000/-, the default sentence being additional one month imprisonment vide it's impugned judgement and order dated 23.12.2010. All the sentences were ordered to run concurrently.

7. Against the said conviction and sentence accused persons filed two separate appeals. Present appeal is by Smt. Tara devi and her husband Shivdan Gaur, mother-in-law and father-in-law, which has been admitted and now their interim and final bail prayer is being decided by this order. Since, during course of argument mooted question noted in the opening paragraph of this order has been harangued that it is now being decided.

8. Bail of a convicted accused and suspension of his sentence during pendency of appeal by that convicted accused is governed by section 389 of the code and consequently that section is reproduced below:-

"389.Suspension of sentence pending the appeal; release on appellant on bail.- ***(1)*** *Pending any appeal by a convicted person, the Appellant Court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended and, also, if he is in confinement, that he be released on bail, or on his own bond.*

(Provided that the Appellant Court shall, before releasing on bail or on his own bond a convicted person who is convicted of an offence punishable with death or imprisonment for life or imprisonment for a term of not less than ten years, shall give opportunity to the public prosecutor for showing cause in writing against such release:

Provided further that in cases where a convicted person is released on bail it shall be open to the Public Prosecutor to file an application for the cancellation of the bail.)

(2)The power conferred by this section on an Appellate Court may be exercised also by the High Court in the case of an appeal by a convicted person to a Court subordinate 0.00"thereto.

(3)Where the convicted person satisfied the Court by which he is convicted that he intends to present an appeal, the Court shall,-

(i)where such person, being on bail, is sentenced to imprisonment for a term not exceeding three years, or

(ii)where the offence of which such person has been convicted is a bailable one, and he is on bail, Order that the convicted person be released on bail, unless there are special reasons for refusing bail, for such period as will afford sufficient time to present the appeal and obtain the orders of the Appellate Court under sub-section (1), and the sentence of imprisonment shall, so long as he is so released on bail, be deemed to be suspended.

(4)When the appellant is ultimately sentenced to imprisonment for a term or to imprisonment for life, the time during which he is so released shall be excluded in computing the term for which he is so sentenced."

9. From a perusal of the aforesaid section it is evident that pending disposal of an appeal by a convicted accused, appellate court can suspend execution of his sentence or order under challenge and can release accused appellant on bail or on his own bond. By Amending Act of 2005, which came into force on 23.6.2006, now a proviso has been attached to the parent section in the following terms:

"Provided that the Appellant Court shall, before releasing on bail or on his own bond a convicted person who is convicted of an offence punishable with death or imprisonment for life or imprisonment for a term of not less than ten years, shall give opportunity to the public prosecutor for showing cause in writing against such release:

Provided further that in cases where a convicted person is released on bail it shall be open to the Public Prosecutor to file an application for the cancellation of the bail."

10. Perusal of this newly added proviso ordains that in those appeals where conviction of an accused is for death or life imprisonment or imprisonment for not less than ten years accused appellants shall not be released on bail or on his own bond unless public prosecutor is afforded an opportunity to show cause, in writing, against such release on bail or on bond. Aforesaid proviso further conferred power on public prosecutor to move for cancellation of bail granted to an accused convict. Now, the question to be determined is as to whether, pending consideration of final bail, ie: during period allowed to the public prosecutor to file written objection, can an appellant be released on interim bail?

11. On the aforesaid aspect it was submitted by appellant's counsel that Section 389 of the Code, being a beneficial legislation, favouring convicted accused to get bail pending disposal of his appeal, has to be interpreted beneficially in tune with legislative intent as said section anoint power on the appellate court to release convicted appellant on bail and suspend his sentence. Judging from aforesaid angle, power to grant interim bail, pending consideration of final bail, is inherent in appellate court and such a power cannot be curtailed or abridged nor any fetters can be put on court's power in that respect. Proviso attached to the main section cannot limit the scope of the parent section nor can curtail it's exercise and therefore should not be interpreted in a restricted manner and in support of this contention learned counsel relied upon **Smt. Amarawati and another versus State of U.P.: 2005 Cr.L.J. 755; Lal Kamlendra Pratap Singh versus State of U.P. and others: (2009) SCC 437; and Dadu @ Tulsi Das versus State of Maharastra: (2000) 8 SCC 437.** A court, which is conferred with power to grant final relief can always grant interim relief pending consideration of final relief and appellate court cannot be divested of such a power. Basic principle of interpretation of Statute countenances such a view. Like cardinal principle under General Clauses Act that if an authority has got a power to do a thing it also possesses power to undo it , similarly power to grant final relief inhibit power to grant interim relief. Elaborating further it was submitted that restrictions placed by the added proviso to section 389 of the code is limited in it's scope and application and that too only to grant final relief and not interim relief and it should not be taken to be an impediment on exercise of such a power by the appellate court. According to appellant's submission proviso has been added in the parent section 389 only to allay the fears that bail to a convict can be granted without hearing State counsel. Proviso does not enlarge scope of parent section nor is an independent proviso but it only makes observance of certain procedure mandatory in cases of grievous offences where sentence awarded to the convicted accused is ten years or more of imprisonment. It was further contended that word "bail' used in proviso is relatable only to "final bail' and not interim bail as during interim bail custody of convicted accused continues with the court. Next it was contended that proviso has to be read down to harmonise it with parent section in tune with interpretation of Principles of Interpretation Of Statutes. Curtailment of right to seek interim relief of a convict pending consideration of final relief sought by him will offend Article 21 of the Constitution Of India and therefore cannot be approved. Concluding his argument on legal aspect it was submitted that view expressed in aforementioned decisions of **Amarawati (Supra) and Lal Kamlendra Pratap Singh (Supra)** and the reasoning expressed in those decision be adopted and imported to bring forth appellate court's power to grant interim bail to the appellants in suitable appeals pending consideration his final relief.

12. On the merits of the appeal it was contended that there are no specific allegations against the appellants and only because of their relationship that they have been convicted by the trial court. Charge of dowry demand has been found to be false. It was further submitted that for offence U/S ¾ D.P.Act , both the

appellants have been acquitted and therefore charge of dowry demand fails. It was next submitted that mother of the deceased has testified favourably in favour of the appellants and therefore entire prosecution story is false and cooked up and on this contention learned counsel relied upon page 19 of impugned judgement. It was further submitted that charge for the offence U/S 304B was found to be disproved and both the appellants have been convicted only for offence U/S 306 IPC and for this submission learned counsel referred to pages 19 and 20 of the impugned judgement. It was next submitted that for offence U/s 498 A IPC maximum sentence is 3 years RI and there is no evidence on record to convict the appellants for the said charge nor there is reliable evidence to hold them guilty U/S 306 IPC as there is no evidence of abatement. It was also submitted that both the appellant's were on bail during trial which liberty they have not misused and their appeal is not likely to be heard in near future. It was also contended that trial court itself found at pages 19/20 of the impugned judgement that allegations of demand of dowry is false. Learned counsel further stated that accused examined three defence witnesses DW1 Mohd Ali, DW2 Dr. D.R.Rai, and DW3 Brijnandan Gaur to support his defence that deceased was being treated well and she was accused even attempted to give her further education through BTC course Learned counsel relied upon pages 3 and 4 of impugned judgement to support appellant's defence.

13. On the afore mentioned contentions it was argued that, on the facts of the present appeal, appellants should be allowed to be released on bail.

14. Per contra, learned AGA submitted that if the law enjoins filing of written objection prior to consideration of bail of a convict accused, then it also enjoins grant of time while considering interim bail. Learned AGA further submitted that if a thing is required to be done in a particular manner then either it should be done in that manner or not at all. He further submitted that amendment was brought by the legislature so that convicts of death sentence, life imprisonment or for a term of ten years, or more may not be released on bail easily without hearing public prosecutor. Learned AGA, therefore, submitted that no interim bail should be granted to the appellant without giving opportunity to the State counsel to file objection. On merits learned AGA, argued that conviction of the appellants is sustainable and trial court rightly held them guilty. He supported impugned judgement of conviction and sentence by contending that diary of the deceased indicate that she was maltreated with disrespect. He further submitted on the strength that mother did not support prosecution version as she was compelled for it to save Khedan Prasad from conviction , who was her relative. He further pointed out that PW4,5,and 6 have supported prosecution story and therefore evidence of PW3 does not damage prosecution case and for this he pointed out page 19.Ultimately it was argued that bail of the appellants be refused.

15. I have considered the contentions raised by rival sides.

16. For deciding the legal question debated by rival sides a glimpse of some of the judicial precedents relating to interpretation of Proviso attached with

parent section seems essential. On this aspect, it is to be noted, that normal function of a proviso is to provide for an exception or to qualify the parent section with something, which but for the proviso would be within the purview of the enactment, had the proviso not been there. Sometimes proviso is added to explain the scope and ambit of parent section or to allay fears in matter of scope and interpretation of main body of section to which it is attached. This aspect of the matter has been considered in various judicial pronouncements. In the words of **Hon. Lush J:-**

"When one finds a proviso to a section, the natural presumption is that, but for the proviso the enacting part of the section would have included the subject-matter of the proviso."

17. The same view has been expressed by **Lord Macmillan J.** in **Madras and Southern Maharastra Rly. Co. Ltd. Vs. Bezwada Municipality AIR 1944 PC 71** in the following words:-

" Proper function of a proviso is to except and to deal with a case which would otherwise fall within the general language of the main enactment and its effect is confined to that case."

18. The said aspect of the matter came up for consideration before Hon. Hidayatullah J, in **Shah Bhojraj Kuverji Oil Mills and Ginning Factory Vs. Subhash Chandra Yograj Sinha: AIR 1961 SC 1596** where His Lordship has been pleased to observe thus:-

" As general rule a proviso is added to an enactment to qualify or create an exception to what is in the enactment and ordinarily, a proviso is not interpreted as stating a general rule."

19. Hon.Kapoor,J in the decision of **CIT Mysore etc. Vs. Indo Mercantile Bank Ltd.: AIR 1959 SC 713,** decided the said question in following words:-

" The proper function of a proviso is that it qualifies the generality of the main enactment by providing an exception and taking out as it were, from the main enactment, a portion which, but for the proviso would fall within the main enactment. Ordinarily it is foreign to the proper function of proviso to read it as providing something by way of an addendum or dealing with a subject which is foreign to the main enactment."

20. From above judicial verdicts what is evident is that a proviso is not normally construed as nullifying the main enactment or taking away a right conferred by it. Further, that a proviso does not travel beyond the scope of main provision to which it is attached. This has so been held by the apex court in **Ram Narain Sons Ltd. V. Assistant Commissioner of Sales Tax: AIR 1955 SC 765,** where in Apex Court has held as under :-

" It is a cardinal rule of interpretation, that a proviso to a particular provision of a statute only embraces the field which is covered by the main provision. It carves out an exception to the main provision to which it has been enacted as a proviso and to no other."

21. Now analysing ambit and scope of the proviso attached to section 389 of the Code, it transpires that the said proviso relates to only to a procedure and

does not affect or curtail power of the appellate court in matter of grant of bail. It nowhere restricts or creates an embargo on such a power. What it provides is only a procedure to be observed while considering bail of a convicted accused sentenced with death, life imprisonment or imprisonment for ten years or more. Thus the legislative intent was never to curtail power of appellate court in matters of grant of bail but only to hear public prosecutor. Scope of such a proviso therefore cannot be stretched to scuttle power of the court to grant interim bail. It was rightly argued that a proviso may carve out an exception but cannot curtail limits of parent section. Further sentences of less than ten years of imprisonment is beyond the purview of said proviso, where it's observance of granting time to the public prosecutor, to file written objection can be eschewed, albeit hearing of public prosecutor may be strictly adhered to. Thus the proviso has been added as an abundant caution only, otherwise, normally, but for certain aberrations, no bail in appeal against conviction is considered without hearing public prosecutor. Mandatory character of granting time to file written objection and hearing public prosecutor has been enacted only to eschew aberrations and block loop holes of hearing State counsel in matters of grant of bail after conviction. It has always been the cardinal principle of law, imbibed in principles of natural justice, that no decision could be made without hearing adverse party to be affected by it.

22. Grant of bail after conviction has been subjected to many judicial decisions by the Apex Court where the subject has been dealt with comprehensively. Without being verbose and ostentatious, one of such decision is ***Kashmira Singh versus State of Punjab: (1977) 4 SCC 291*** where Apex Court has held as under :-

"Now, the practice in this Court as also in many of the High Court has been not to release on bail a person who has been sentenced to life imprisonment for an offence under S. 302 of the Indian Penal Code. The question is whether this practice should be departed from and if so, in what circumstances. It is obvious that no practice howsoever sanctified by usage and hallowed by time can be allowed to prevail if it operates to cause injustice. Every practice of the Court must find its ultimate justification in the interest of justice. The practice not to release on bail a person who has been sentenced to life imprisonment was evolved in the High Courts and in this Court on the basis that once a person has been found guilty and sentenced to life imprisonment, he should not be let loose, so long as his conviction and sentence are not set aside, but the underlying postulate of this practice was that the appeal of such person would be disposed of within a measurable distance of time, so that if he is ultimately found to be innocent, he would not have to remain in jail for an unduly long period. The rationale of this practice can have no application where the Court is not in a position to dispose of the appeal for five or six years. It would indeed be a travesty of justice to keep a person in jail for a period of five or six years for an offence which is ultimately found not to have been committed by him. Can the Court ever compensate him for his incarceration which is found to be unjustified? Would it be just at all for the Court to tell a person : 'We have admitted your appeal because we think you have a prima facie case, but unfortunately we

have no time to hear your appeal for quite a few years and, therefore, until we hear your appeal, you must remain in jail, even though you may be innocent?' What confidence would such administration of justice inspire in the mind of the public? It may quite conceivably happen, and it has in fact happened in a few cases in this Court, that a person may serve out his full term of imprisonment before his appeal is taken up for hearing. Would a Judge not to be overwhelmed with a feeling of contrition while acquitting such a person after hearing the appeal? Would it not be an affront to his sense of justice? Of what avail would the acquittal be to such a person who has already served out his term of imprisonment or at any rate a major part of it? It is, therefore, absolutely essential that the practice which this Court has been following in the past must be reconsidered and so long as this Court is not in a position to hear the appeal of an accused within a reasonable period of time, the Court should ordinarily unless there are cogent grounds for acting otherwise, release the accused on bail in cases where special leave has been granted to the accused to appeal against his conviction and sentence."

23. In **Bhagwan Rama Shinde Gosai v. State of Gujarat (1999) 4 SCC 421** it has been held by the apex court as under :-

"3. When a convicted person is sentenced to a fixed period of sentence and when he files an appeal under any statutory right, suspension of sentence can be considered by the appellate Court liberally unless there are exceptional circumstances. Of course if there is any statutory restriction against suspension of sentence it is a different matter. Similarly, when the sentence is life imprisonment the consideration for suspension of sentence could be of a different approach. But if for any reason the sentence of a limited duration cannot be suspended every endeavour should be made to dispose of the appeal on merits more so when a motion for expeditious hearing of the appeal is made in such cases. Otherwise the very valuable right of appeal would be an exercise in futility by efflux of time. When the appellate Court finds that due to practical reasons such appeals cannot be disposed of expeditiously the appellate Court must bestow special concern in the matter of suspending the sentence. So as to make the appeal right, meaningful and effective. Of course appellate Courts can impose similar conditions when bail is granted."

24. The above quoted two views have been affirmed by the apex court in one it's recent decisions in **Angana and others versus State of Rajasthan: AIR 2009 SC 1669.**

25. Above referred to decisions of the apex court indicate the guide line to be followed while considering bail of a convicted accused. Any curtailment of right of accused to be released on bail therefore has to be judged from a pragmatic angle looking to the nature of allegations and evidences brought forth to establish the same. Apex court has declared curtailment of right of accused to get bail by statutory enactment ultra vires. In **Dadu @ Tulsi Das (Supra)** it has been held by the apex court as under :-

"17. Not providing at least one right of appeal, would negate the due process of law in the matter of dispensation of

criminal justice. There is no doubt that the right of appeal is the creature of a statute and when conferred, a substantive right. Providing a right of appeal but totally disarming the Court from granting interim relief in the form of suspension of sentence would be unjust, unfair and violative of Art. 21 of the Constitution particularly when no mechanism is provided for early disposal of the appeal. The pendency of criminal litigation and the experience in dealing with pending matters indicate no possibility of early hearing of the appeal and its disposal on merits at least in many High Courts. As the present is not the occasion to dilate on the causes for such delay, we restrain ourselves from that exercise. In this view of the matter, the appellate powers of the Court cannot be denuded by Executive or judicial process.

.....

24. In Ram Charan v. Union of India, 1991 (9) LCD 160, the Allahabad High Court while dealing with the question of the constitutional validity of Section 32A found that as the Section leaves no discretion to the Court in the matter of deciding, as to whether, after conviction the sentence deserves to be suspended or not without providing any guidelines regarding the early disposal of the appeal within a specified period, it suffers from arbitrariness and thus violative of mandate of Articles 14 and 21 of the Constitution. In the absence of right of suspending a sentence, the right of appeal conferred upon accused was termed to be a right of infructuous appeal. However, Gujarat High Court in Ishwarsingh M. Rajput v. State of Gujarat, (1990) 2 Guj LR 1365 : 1991 (2) Crimes 160, while dealing with the case relating to grant of parole to a convict under the Act found that Section 32-A was Constitutionally valid. It was held :

"Further, the classification between the prisoners convicted under the Narcotics Act and the prisoners convicted under any other law, including the Indian Penal Code is reasonable one, it is with specific object to curb deterrently habit forming, booming and paying (beyond imagination) nefarious illegal activity in drug trafficking. Prisoners convicted under the Narcotics Act are class by themselves. Their activities affect the entire society and may, in some cases, be a death-blow to the persons, who become addicts. It is much more paying as it brings unimaginable easy riches. In this view of the matter, the temptation to the prisoner is too great to resist himself from indulging in same type of activity during the period, when he is temporarily released. In most of the cases, it would be difficult for him to leave that activity as it would not be easy for the prisoner to come out of the clutches of the gang, which operates in nefarious illegal activities. Hence, it cannot be said that Section 32-A violates Article 14 of the Constitution on the ground that it makes unreasonable distinction between a prisioner convicted under the Narcotics Act and a prisoner convicted for any other offences.

25. Judged from any angle the Section insofar as it completely debars the appellate Courts from the power to suspend the sentence awarded to a convict under the Act cannot stand the test of constitutionality. Thus Section 32-A insofar as it ousts the jurisdiction of the Court to suspend the sentence awarded to a convict under the Act is

unconstitutional. We are, therefore, of the opinion that Allahabad High Court in Ram Charan's case (supra) has correctly interpreted the law relating to the constitutional validity of the Section and the judgment of Gujarat High Court in Ishwarsingh M. Rajput's case cannot be held to be good law."

26. In my humble view the above decision by the apex court gives an answer to the question harangued by appellant's counsel. Divesting appellate court of it's power to grant interim relief pending consideration of final relief cannot be countenanced as it will be ultra vires to the constitution. No view curtailing power of the appellate court to grant interim relief can be upheld affecting right of an accused to seek such a remedy, albeit whether to grant such interim bail or refuse it will depend on the facts and circumstances of each case. It is always desirable to evolve a device which preserves powers of the courts as against shedding of it. This view finds support from a decision of this court in **Ram Charan Versus Union Of India: 1991 (Suppl) ACC 67,** where this court has struck down section 32-A of NDPS Act as it had taken away right to grant interim relief from this court. Aforesaid section (32-A) was held to offend Article 14 and 21 of the Constitution Of India. It was held therein as under :-

"We are of the view that there existed no rational or reasonable basis to deny the right of a person to claim suspension, commutation or remission of sentence or to be released on bail if the Court passes such an order, even after conviction while his appeal against the conviction has been pending or otherwise provided under law for the time being in force."

27. Adopting and applying above reasoning it is not difficult to hold that any attempt by legislature to curtail power of the courts to grant interim relief although it were anointed with the power to grant final relief has to be abhorred and must be struck down. Thus I find great force in appellant's contention that interim relief of bail can be granted pending consideration final relief of bail, U/S 389 of the code, to a convict accused appellant.

28. Judging from another angle, section 389 of the code relates to grant of bail pending appeal by a convict whereas sections 436 to 439 of chapter XXXIII of the code relates with grant of bail pending investigation and trial. There is not much of a difference between guidelines to be adopted by the courts on both the occasions to grant or refuse bail in offences punishable with imprisonment for life and therefore considerations to be kept in mind, on most of the aspects, are common. For a ready reference it is noted here that U/S 439 Cr.P.C. high court or court of session's has to give opportunity to public prosecutor before granting bail to an accused in all cases which are triable by court of Session's or which are punishable with imprisonment for life. Proviso attached with section 439 of the code is reproduced below:-

"Provided that the High Court or the Court of Session shall, before granting bail to a person who is accused of an offence which is triable exclusively by the Court of Session or which, though not so triable, is punishable with imprisonment for life, give notice of the application for bail to the Public Prosecutor unless it is, for reasons to be recorded in writing, of

opinion that it is not practicable to give such notice."

29. Perusal of above proviso makes it evident that in all cases which are triable by session's court or where punishment is life imprisonment, hearing of public prosecutor is sine qua non before granting bail to an accused. Most of the offences, where punishment is for life or ten years or upward of imprisonment are triable by session's court, which is well perceivable from The First Schedule attached with the code and therefore parameters to grant bail at both the occasions- pre conviction and post-conviction, does not have different scales in procedures to be observed in matter of bail applications. Otherwise also General Rules (Criminal), applicable to lower courts and High Court Rules, applicable to high court, both provide for giving of notice of the bail application to the public prosecutor and as a well ingrained practise hearing of public prosecutor in matter of consideration of bail applications has become the rule of law. Consequently the law relating to the procedure to be followed in matters of consideration of bail applications prior to conviction holds good for post-conviction bail applications also. In this respect a full bench of our court in **Smt.Amarawati's case(Supra)** has held that interim bail pending consideration of final bail is permissible. It has been held therein as under-

"40. We again make it clear that the learned Sessions Judge in his discretion can hear and decide the bail application under Section 439 on the same day of its filing provided notice is given to the Public Prosecutor, or he may not choose to do so. This is entirely a matter in the discretion of the learned Sessions Judge. There may also be cases where the learned Sessions Judge on the material available before him may decide to grant interim bail as he may feel that while he has sufficient material for giving interim bail he required further material for grant of final bail. In such cases also he can in his discretion, grant interim bail and he can hear the bail application finally after a few days. All these are matters which should ordinarily be left to his discretion."

30. The aforesaid opinion by this court got it's approval by the apex court in **Lal kamlendra Pratap Singh versus State of Uttar Pradesh And Others: (2009) SCC 437** wherein it has been held by the apex court as under:-

"Learned counsel for the appellant apprehends that the appellant will be arrested as there is no provision for anticipatory bail in the State of U.P. He placed reliance on a decision of the Allahabad High Court in Amarawati v. State of U.P. in which a seven-Judge Full Bench of the Allahabad High Court held that the court, if it deems fit in the facts and circumstances of the case, may grant interim bail pending final disposal of the bail application. The Full Bench also observed that arrest is not a must whenever an FIR of a cognizable offence is lodged. The Full Bench placed reliance on the decision of this Court in Joginder Kumar v. State of U.P.

We fully agree with the view of the High Court in Amarawati case and we direct that the said decision be followed

by all courts in U.P. in letter and spirit, particularly since the provision for anticipatory bail does not exist in U.P.

In appropriate cases interim bail should be granted pending disposal of the final bail application, since arrest and detention of a person can cause irreparable loss to a person's reputation, as held by this Court in Joginder Kumar Case. Also, arrest is not a must in all cases of cognizable offences, and in deciding whether to arrest or not the police officer must be guided and act according to the principles laid down in Joginder Kumar Case."

31. Thus from the above discussion the law has been crystallised that pending consideration of final bail prayer an accused can be granted interim bail and hence the answer to the mooted question is that the proviso to section 389 of the Code does put an embargo nor does it curtails power of appellate court to grant interim bail. A Proviso cannot take away right conferred by parent provision and has to be read down to harmonise it with the parent section. On this aspect support can be had from apex court decision in **Dadu alias Tulsidas(Supra)** wherein Apex Court has observed as under:-

"Providing a right of appeal but totally disarming the Court from granting interim relief in the form of suspension of sentence would be unjust, unfair and violative of Art. 21 of the Constitution particularly when no mechanism is provided for early disposal of the appeal. The pendency of criminal litigation and the experience in dealing with pending matters indicate no possibility of early hearing of the appeal and its disposal on merits at least in many High Courts. As the present is not the occasion to dilate on the causes for such delay, we restrain ourselves from that exercise. In this view of the matter, the appellate powers of the Court cannot be denuded by Executive or judicial process".

32. In view of the above discussion, right of appellate court to consider interim bail prayer in appropriate case, pending consideration of final relief of bail is preserved even after addition of proviso. The rider provided by the proviso relates to final relief of bail and not interim bail prayer in appropriate cases. Reference to word "bail' under it denotes final bail and not interim bail.

33. Wrapping up the discussion on legal aspect I lean in favour of appellant's submission that pending consideration final relief of bail u/s 389 Cr.P.C. appellate court can grant interim bail to a convicted accused and there is no embargo or fetters on it's power.

34. Now turning towards the question as to whether interim bail should be granted on not merits of the appeal indicate that so far as two appellants are concerned, they have been acquitted for the charge u/s 304-B IPC of causing dowry death. On the other hand they have been convicted u/s 306 IPC. The record further reveals that cause of suicide by the deceased was not dowry demand but demand for education and other activities. The said allegation does not bring the demand within the purview of dowry demand. Trial court further recorded a finding that offence u/s 4 of D. P. Act could not

have been established against the appellants. The record further indicate that conviction u/s 201 IPC is difficult to be sustained and the mother of the deceased turned hostile and did not support prosecution version. Impugned judgement further indicates that both the appellants were on bail during the trial which liberty they have not misused. It is further noted that there is no likelihood of the appeal being heard in near future and case of the appellants is distinguishable from the case of the husband Brajnandan Prasad alias Lallan. On an overall facts and circumstances, I consider it appropriate to release the appellants on interim bail for a period of two months, pending consideration of their final bail prayer.

35. Let the appellants Smt. Tara Devi and Shivdan Gaur be released on interim bail on their furnishing a personal bond of Rs. one lakh and two sureties each in the like amount to the satisfaction of trial court concerned in S.T. No. 147/08, State Vs. Brajnandan Prasad alias Lallan and others, u/s 498-A, 306, 201 IPC, P.S. Mohammadabad Gohana, district Mau, starting from 17.9.2011, on which date they shall be released from jail. Their interim bail shall lapse on 16.11.2011, on which date they shall surrender, unless meanwhile, their prayer for final release on bail is allowed or rejected by this court, and in that eventuality both the appellants shall be bound by that order. Further, office of this court is directed to get the record of trial court within three weeks. Learned AGA is allowed two weeks time to file objection on the bail prayer of the appellants. List this appeal at the top of the list for consideration of final bail prayer of the appellants on 10.10.2011.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.09.2011

BEFORE
THE HON'BLE SABHAJEET YADAV,J.

Civil Misc. Writ Petition No. 148 of 2008

Pramod Kumar Rajak ...Petitioner
Versus
Registrar General, High Court Allahabad and others ...Respondents

Counsel for the Petitioner:
Sri A.N. Srivastava
Sri Sandeep Kumar
Sri A.K. Singh

Counsel for the Respondent:
Sri Amit Sthalekar
Sri Rajeev Gupta
C.S.C.

U.P. Recruitment of Dependent of Govt. Servants Dying in Harness-Rules 1974-Rule-5-(1)-compassionate appointment-claimed by widow-within time-requesting her elder son (Petitioner) be appointed on attaining the age of majority few days after 5 years-again request made-rejection on ground of time barred without consideration of family crisis-held-not proper matter remitted back for fresh consideration within time bound period.

Held:Para 22

From a plain reading of the provisions of Rule 5 (1) of the Dying-in-Harness Rules, it is clear that in a case Government servant dies in harness after commencement of the said rules and the spouse of deceased government servant is not already employed under Central Government or a State Government or a Corporation owned or controlled by Central Government or a State Government one member of his

family, who is not already employed under the Central Government or a State Government or a Corporation owned or controlled by Central Government or State Government, shall be given suitable employment in government service on a post except the post which is within the purview of U.P. Public Service Commission in relaxation of the normal recruitment rules, if such person - (i) fulfils educational qualification prescribed for the purpose; (ii) is otherwise qualified for government service; and (iii) makes the application for employment within five years from the date of death of government servant. The proviso attached with the said rule further provides that where the State Government is satisfied that the time limit fixed for making application for employment causes undue hardship in any particular case, it may dispense with or relax the requirement as it may consider necessary for dealing with the case in a just and equitable manner. In other words where the State Government is satisfied that aforesaid time limit of 5 years fixed for making application for employment from the date of death of government servant causes undue hardship in any particular case it may dispense with or relax the requirement of said time limit of 5 years, as it may consider necessary for dealing with the case in a just and equitable manner. Thus, in my opinion, if the situation of any particular case so warrants, the period of 5 years limitation provided for making application for employment can be further extended beyond the said period.

Case law discussed:

AIR 1989 SC 1976; AIR 1991 SC 469; (1994) 4 S.C.C. 138; (2010) 11 SCC 661; 2010 (7) ADJ page 1; (2001) 2 U.P.L.B.E.C., 1597; 2003 (2) U.P.L.B.E.C. 1134

(Delivered by Hon'ble Sabhajeet Yadav, J.)

1. Heard Sri A.K. Singh, learned counsel for the petitioner and Sri Rajeev Gupta Advocate for the respondents.

2. By this petition, the petitioner has challenged the order dated 22.8.2007 passed by District Judge, Sonebhadra contained in Annexure-7 of the writ petition, whereby the claim of compassionate appointment of petitioner in Judgeship, Sonebhadra under the U.P. Recruitment of Dependents of Government Servants Dying-in-Harness Rules, 1974 hereinafter referred to as the Dying in Harness Rules has been rejected. A further writ in the nature of mandamus is sought for directing the respondent no.2 to appoint the petitioner on the post of peon under said rules in Judgeship Sonebhadra.

3. The brief facts leading to the case are that one Sri Gopi Chandra Rajak working as peon in the office of District Judge, Sonebhadra died on 1.6.2002 while in service, leaving behind him Smt. Munna Devi his widow, Smt. Anita Devi married daughter, Sri Pramod Kumar Rajak, Sri Rajesh Kumar Rajak and Sri Kamlesh Kumar Rajak minor sons. At the time of death of Gopi Chandra Rajak the petitioner was only 12 years 11 months and 6 days old and was not eligible to get appointment under Dying-in-Harness Rules, therefore, his mother Munna Devi moved an application on 31.7.2002 contained in Annexure-1 of the writ petition, whereby she had sought her compassionate appointment on a suitable post under Dying-in-Harness Rules. Thereupon on the basis of report of 1st Additional District Judge, the District Judge, Sonebhadra (respondent no.2) had passed an order on 9.12.2002, stating that under the recruitment rules educational qualification for Class 4th post is 8th class pass whereas Smt. Munna Devi has not at all received any education and under the provisions of Dying in Harness Rules, the educational qualification cannot be relaxed. It was also

stated that the elder son of Smt. Munna Devi namely Pramod Kumar Rajak (petitioner) is near about 14 years old and after 4 years he will be eligible for such appointment hence two options were given to Smt. Munna Devi; first was that if Smt. Munna Devi insists for her appointment then the permission shall be taken from the Hon'ble High Court and second was that if she will like her son namely Pramod Kumar Rajak to be appointed as dependent of her husband his claim can be considered after completion of 18 years of his age on the expiry of 4 years only, accordingly she was asked to give her consent within 15 days. True copy of the order of respondent no.2 dated 9.12.2002 is on record as Annexure-2 of the writ petition.

4. It is stated that in pursuant to the said order, Smt. Munna Devi moved an application before the respondent no.2 on 23.12.2002 requesting that if she is not eligible for appointment as dependent of her husband then she gives her consent to appoint her son Sri Pramod Kumar Rajak, after completion of his 18 years age. Thereafter Smt. Munna Devi moved another application on 21.3.2006 as per direction of respondent no.2 dated 9.12.2002 requesting to appoint her son (petitioner) as dependent of her husband when he would attain the age of majority i.e. 18 years by 5.6.2007. On 22.6.2006 the District Judge had passed an order on the said application directing to put up the same before him when the petitioner would attain the age of 18 years. A copy of said application moved by the mother of the petitioner bearing order dated 22.6.2006 passed by the District Judge, Sonebhadra is on record as Annexure-4 of the writ petition.

5. It is stated that on completion of his age of 18 years the petitioner has also moved an application on 3.7.2007 before the respondent no.2 for his appointment under Dying-in-Harness Rules, annexing his High School pass mark sheet and High School certificate and other certificates including no objection certificate of his mother. Thereupon on the same day the District Judge directed the Incharge Officer Nazarat Civil Judge (Senior Division), Sonebhadra to submit report and after going through the report dated 21.8.2007 submitted by Incharge Officer, Nazarat/Civil Judge (Senior Division), Sonebhadra, he has passed the impugned order dated 22.8.2007 served to the petitioner on 12.9.2007, rejecting the claim of compassionate appointment of the petitioner. True copy of application of the petitioner along with no objection certificate filed by his mother and true copy of the impugned order dated 22.8.2007 are on record as Annexures-5, 6 and 7 of the writ petition.

6. It is submitted that immediately after attaining the age of majority the petitioner filed his representation on 3.7.2007 only one month 2 days later on expiry of five years period of limitation provided under rule from the date of death of his father. Although the proviso of said rules further empowers the Government to consider the compassionate appointment even after expiry of said prescribed period of 5 years from the date of death of the deceased Government servant by relaxing the aforesaid time limit, but respondent did not consider the said proviso of rules and illegally and arbitrarily rejected the representation filed by the petitioner by impugned order dated 22.8.2007 holding that the same was not maintainable.

7. It is stated that the father of the petitioner died on 1.6.2002 leaving behind his widow, one daughter and three sons. All the three sons are unemployed and still unmarried, therefore, a lot of financial and social liability are lying upon the petitioner but for want of employment the petitioner is unable to bear the liability suddenly fell upon him. It is also stated that the mother of the petitioner Smt. Munna Devi is a patient of heart and diabetes and lot of money was spent in her treatment. Besides this, two other brothers of the petitioner namely Rajesh Kumar Rajak and Kamlesh Kumar Rajak are students of Class 11th and 8th respectively and there is no other source of income for survival of the family, therefore, the petitioner is entitled to get the compassionate appointment on the post of peon.

8. A detailed counter affidavit has been filed in writ petition on behalf of District Judge, Sonebhadra, whereby the action taken by the District Judge has been sought to be justified mainly on the ground that when the mother of the petitioner has moved representation for the compassionate appointment of the petitioner on the dates mentioned in the writ petition including on 21.3.2006 the petitioner was minor at that time and not eligible for appointment on the post in question and the petitioner has moved the application for his compassionate appointment first time on 3.7.2007 after expiry of five years period of limitation prescribed for appointment under Rule 5 of Dying in Harness Rules and power of relaxation after the aforesaid period lies with the State Government but the petitioner did not make any prayer for forwarding his application to the State Government, therefore, no appointment could be given to him under the said rules.

9. For ready reference the stand taken by the respondents in paragraphs 6, 7, 13 and 16 of the counter affidavit is disclosed as under:-

"6. That on the application of Shri Pramod Kumar Razak the then District Judge, called for the report from Officer In-Charge-Nazarat/Civil Judge (S.D.). Report was submitted by Officer In-Charge-Nazarat/Civil Judge (S.D.) on 21.8.2007. On the report of Officer In-Charge Nazarat/Civil Judge (S.D.) an order was passed by the then District Judge dated 22.8.2007, in which the then District Judge rejected the application of Shri Pramod Kumar Razak mainly on the ground that the applicant Pramod Kumar Razak did not attain the age of majority by 31.5.2007. It is relevant to mention here that the applicant's father Late Gopi Chand Razak died on 1.6.2002 and the applicant had to apply within the period of 5 years i.e. on or before 31.5.2007, but applicant moved an application on 3.7.2007. Thus, it is clear that the applicant moved the application in question after the expiry of limitation period.

7. That it is relevant to mention here that as per said Rules, only the Stage Government has power to relax the period of limitation. And it is still open for the petitioner to move an application before the State Government for relaxing the period of limitation as prescribed under above mentioned Rules.

13. That in reply to the contents of paragraph 12 of the writ petition, it is stated that it is correct to say that Smt. Munna Devi gave her consent on 23.12.2002 for her son's appointment. It is also true that Smt. Munna Devi filed an

application on 21.3.2006 for considering the appointment of her son. But on that date petitioner was minor. It is relevant to mention here that the father of the petitioner did on 1.6.2002 and the period of limitation to move an application under rule 5 of U.P. Dying in Harness Rules, 1974 (Anx. 9 to w.p.) was available to him till 31.5.2007 only. He attained the age of majority on 4.6.2007. Thus, before 31.5.2007 he was not eligible for said appointment as the petitioner was minor. Hence there is no illegality in the order passed by the then District Judge dated 22.8.2007. The true copy of the order passed by the then District Judge is being annexed herewith and marked as Annexure No.C.A.2 to this counter affidavit. The true copy of this order which has been filed as Annexure no.7 to writ petition is incomplete as two lines since 31.5.2007 to 31.5.2007 are missing in it.

16. That in reply to the contents of paragraph 16 of the writ petition, it is stated that the petitioner did not attain the age of majority as on 31.5.2007, but he attained the age of majority on 4.6.2007, which is also admitted by the petitioner's mother in her letter dated 3.7.2007. It is further stated that in application given by the petitioner on 3.7.2007, there was no prayer to forward the application to State Government for the purpose of relaxing the limitation period. It is pertinent to mention here that the petitioner still has right to move the application to the State Government as to relaxation of the limitation period."

10. In given facts and circumstances of the case, learned counsel for the petitioner has submitted that at any view of the matter the application moved by the petitioner and his mother could not be rejected by the District Judge, Sonebhadra on the ground that the same was not maintainable at all. At the most, when the last application dated 21.3.2006 moved by the mother of the petitioner was found to be incompetent on the said date on the ground that at that time the petitioner could not attain the age of majority i.e. 18 years/minimum age prescribed for Government employment, the appointing authority could have kept the aforesaid application of mother of the petitioner pending till he attains the age of majority i.e. till 4.6.2007 and thereafter would have considered the case of the petitioner on merit. It is no doubt true that by that time the application could be barred by time by 3-4 days after expiry of prescribed period of five years limitation from the date of death of father of the petitioner but having regard to the financial hardship of the family of the deceased employee the matter could be referred before the High Court for relaxing the period of limitation as provided under the proviso (1) of Rule 5 (1) of Dying in Harness Rules.

11. Learned counsel for the petitioner further submitted that while considering the financial condition of family of deceased Govt. servant for the purpose of compassionate appointment, payment of family pension, leave encashment, provident fund, insurance etc. to the widow of deceased Govt. servant should not be taken into account and may not be made ground for refusal of such appointment. In support of his aforesaid submissions, he has placed reliance upon the several decisions, which will be referred at relevant places hereinafter.

12. Thus, in view of rival submissions of the parties, first question arises for consideration is that as to

whether in given facts and circumstances of the case the District Judge, Sonebhadra was justified in rejecting the claim of compassionate appointment of the petitioner holding it to be not maintainable?

13. In order to answer this question, it is necessary to notice some case law and statutory provisions having material bearing on the question in controversy involved in the case. In **Sushma Gosain V. Union of India - AIR 1989 SC 1976,** the Apex Court held that *".....in all claims for appointment on compassionate grounds, there should not be any delay in appointment. The purpose of providing appointment on compassionate ground is to mitigate the hardship due to death of the bread earner in the family. Such appointment should, therefore, be provided immediately to redeem the family in distress. It is improper to keep such case pending for years. If there is no suitable post for appointment supernumerary post should be created to accommodate the applicant."*

[emphasis supplied]

14. The aforesaid decision was also followed in **Phoolwati Vs. Union of India-AIR 1991 SC 469** wherein it has been held that " the reason for making compassionate appointment, which is exceptional, is to provide immediate financial assistance to the family of a government servant who dies in harness, when there is no other earning member in the family.

15. In **Umesh Kumar Nagpal Vs. State of Haryana & others, (1994) 4 S.C.C. 138,** while dealing with the nature and object of the compassionate appointment, the posts against which, and period under which such appointment may be offered, in para 2, of the decision the Hon'ble Apex Court held that *the whole object of granting compassionate employment is thus to enable the family to tide over the sudden crisis. The object is not to give a member of such family a post much less a post for post held by the deceased. What is further, mere death of an employee in harness does not entitle his family to such source of livelihood. The Government or the public authority concerned has to examine the financial condition of the family of the deceased, and it is only if it is satisfied, that but for the provision of employment, the family will not be able to meet the crisis that a job is to be offered to the eligible member of the family. The posts in Classes III and IV are the lowest posts in non-manual and manual categories and hence they alone can be offered on compassionate ground, the object being to relieve the family, of the financial destitution and to help it get over the emergency. The provision of employment in such lowest posts by making an exception to the rule is justifiable and valid since it is not discriminatory. The favourable treatment given to such dependant of the deceased employee in such posts has a rational nexus with the object sought to be achieved, viz., relief against destitution. No other posts are expected or required to be given by the public authorities for the purpose. . . . . The exception to the rule made in favour of the family of the deceased employee is in consideration of the services rendered by him and the legitimate expectations, and the change in the status and affairs, of the family engendered by the erstwhile employment which are suddenly upturned."*

16. In para 6 of the said decision Hon'ble Apex Court, further held that; "For these very reasons, the compassionate employment cannot be granted after a lapse of a reasonable period which must be specified in the rules. The consideration for such employment is not a vested right which can be exercised at any time in future. The object being to enable the family to get over the financial crisis which it faces at the time of the death of the sole breadwinner, the compassionate employment cannot be claimed and offered whatever the lapse of time and after the crisis is over."

17. In **State Bank of India and another Vs. Raj Kumar (2010) 11 SCC 661**, the applicability of old scheme for compassionate appointment, vis-a-vis new substituted scheme for ex gratia payment, was under consideration before the Apex Court. While dealing with the nature and scope of compassionate appointment, and impact of new scheme for such appointment, in paragraphs 8 of the said decision the Apex Court held as under:

"8. . . . . .The claim for compassionate appointment is therefore traceable only to the scheme framed by the employer for such employment and there is no right whatsoever outside such scheme. An appointment under the scheme can be made only if the scheme is in force and not after it is abolished/withdrawn. It follows therefore that when a scheme is abolished, any pending application seeking appointment under the scheme will also cease to exist, unless saved. The mere fact that an application was made when the scheme was in force, will not by itself create a right in favour of the applicant.

18. Thus, in view of legal position stated by Hon'ble Apex Court it is necessary to examine the scheme of Dying in Harness Rules applicable to the Government employees and employees of Subordinate judiciary with necessary modifications.

19. Rule 5 of Dying in Harness Rules deals with eligibility criteria and time limit for making application for compassionate appointment of members of family of deceased Government servant. The same is quoted as under:-

"5. Recruitment of a member of the family of the deceased.- *(1) In case a Government servant dies in harness after the commencement of these rules and the spouse of the deceased Government servant is not already employed under the Central Government or a State Government or a Corporation owned or controlled by the Central Government or a State Government, one member of his family who is not already employed under the Central Government or a State Government or a Corporation owned or controlled by the Central Government or a State Government shall, on making an application for the purposes, be given a suitable employment in Government service on a post except the post which is within the purview of the Uttar Pradesh Public Service Commission, in relaxation of the normal recruitment rules if such person-*

(i) fulfils the educational qualifications prescribed for the post,

(ii) is otherwise qualified for Government service, and

(iii) makes the application for employment within five years from the date of the death of the Government servant:

Provided that where the State Government is satisfied that the time limit fixed for making the application for employment causes undue hardship in any particular case, it may dispense with or relax the requirement as it may consider necessary for dealing with the case in a just and equitable manner.

Provided further that for the purpose of the aforesaid proviso, the person concerned shall explain the reasons and give proper justification in writing regarding the delay caused in making the application for employment after the expiry of the time limit fixed for making the application for employment along with the necessary documents/proof in support of such delay and the Government shall, after taking into consideration all the facts leading to such delay take the appropriate decision.

(2) As far as possible, such an employment should be given in the same department in which the deceased Government servant was employed prior to his death.

(3) Every appointment made under sub-rule (1) shall be subject to the condition that the person appointed under sub-rule (1) shall maintain other members of the family of deceased Government servant, who were dependent on the deceased Government servant immediately before his death and are unable to maintain themselves.

(4) Where the person appointed under sub-rule (1) neglects or refuses to maintain a person to whom he is liable to maintain under sub-rule (3), his services may be terminated in accordance with the Uttar Pradesh Government Servant (Discipline and Appeal) Rules, 1999, as amended from time to time."

20. Rule 6 deals with the contents of application for employment as under:

6. Contents of application for employment.- An application for appointment under these rules shall be addressed to the appointing authority in respect of the post for which appointment is sought but it will be sent to the Head of Office where the deceased Government servant was serving prior to his death. The application shall, inter alia, contain the following information:

(a) the date of the death of the deceased Government servant; the department in which he was working and the post which he was holding prior to his death;

(b) names, age and other details pertaining to all the members of the family of the deceased, particularly about their marriage, employment and income.

(c) details of the financial condition of the family; and

(d) the educational and other qualifications, if any, of the applicant.

21. Rule 7 deals with procedure when more than one member of the family seeks employment. Rule 8 deals with relaxation from age and other procedural requirements. It would be useful to extract the provisions contained in Rule 8 of Dying in Harness Rules as under:-

"8. Relaxation from age and other requirements.- (1) The candidate seeking appointment under these rules must not be less than 18 years at the time of appointment.

(2) The procedural requirements for selection, such as written test or interview by a selection committee or any other authority, shall be dispensed with, but it shall be open to the appointing authority to interview the candidate in order to satisfy itself that the candidate will be able to maintain the minimum standards of work and efficiency expected on the post.

(3) An appointment under these rules shall be made against an existing vacancy only."

22. From a plain reading of the provisions of Rule 5 (1) of the Dying-in-Harness Rules, it is clear that in a case Government servant dies in harness after commencement of the said rules and the spouse of deceased government servant is not already employed under Central Government or a State Government or a Corporation owned or controlled by Central Government or a State Government one member of his family, who is not already employed under the Central Government or a State Government or a Corporation owned or controlled by Central Government or State Government, shall be given suitable employment in government service on a post except the post which is within the purview of U.P. Public Service Commission in relaxation of the normal recruitment rules, if such person - *(i) fulfils educational qualification prescribed for the purpose; (ii) is otherwise qualified for government service; and (iii) makes the application for employment within five years from the date of death of government servant.* The proviso attached with the said rule further provides that where the State Government is satisfied that the time limit fixed for making application for employment causes undue hardship in any particular case, it may dispense with or relax the requirement as it may consider necessary for dealing with the case in a just and equitable manner. In other words where the State Government is satisfied that aforesaid time limit of 5 years fixed for making application for employment from the date of death of government servant causes undue hardship in any particular case it may dispense with or relax the requirement of said time limit of 5 years, as it may consider necessary for dealing with the case in a just and equitable manner. Thus, in my opinion, if the situation of any particular case so warrants, the period of 5 years limitation provided for making application for employment can be further extended beyond the said period.

23. Rule-8 deals with the relaxation from age and other requirements, but it specifically stipulates that the candidate seeking appointment under these rules must not be less than 18 years at the time of appointment, which implies that minimum age limit of 18 years prescribed for Government employment cannot be relaxed by the authority, whereas upper age limit fixed for employment can be relaxed in suitable cases. Similarly in view of Rule-5 (1) of Dying-in-Harness Rules, the educational qualification prescribed for the posts can also not be relaxed by the authorities concerned. However, other procedural requirement for selection such as written test or interview by any selection committee or authority shall be dispensed with.

24. Thus, a harmonious construction of the aforestated rules, reveals that in case, a member of family of deceased Government servants makes an application under Dying in Harness before he attains the age of 18 years or an application is moved on his behalf before attaining his age of 18 years, although such candidate cannot be given appointment unless he attains the minimum prescribed age of Government employment i.e. 18 years, but his application should not be rejected outrightly, instead thereof the proper course of action would be that his application should be kept pending and be considered on merit only when he/she attains 18 years age, provided he attains the age of 18 years within a period of 5 years time limit fixed for making application for compassionate appointment from the date of death of government servant and if it is found that five years prescribed time limit for making application for employment from the date of death of government servant has expired prior to the date of attaining his 18 years age, **then the case of such applicant should be considered on attaining his age of majority i.e. on completion of his 18 years age under the proviso of Rule 5 (1) of Dying in Harness Rules only, which empowers the State Government to relax the aforesaid time limit of five years and for that purpose, in my opinion, it is to be seen that as to whether family of deceased Government servant still continues to suffer financial distress or hardship occasioned by death of bread earner so as to relax the period within which application for employment could be made and family can not be relieved from such financial crisis or distress unless compassionate appointment is given to a member of the family of deceased government servant. (Emphasis)**

25. While considering the content and import of proviso to Rule-5(1) of Dying-in-Harness Rules a Division Bench of this court in **Vivek Yadav Vs. State of U.P. and others, 2010 (7) ADJ page 1** in para 7 and 8 of the decision has observed as under:-

"7. ..... The proviso, in our opinion, which confers power to relax the delay in making an application within five years, also must be read to include consideration of an application even after expiry of 5 years if the applicant was a minor at the time of death of the deceased employee and makes an application within reasonable time of attaining majority.

8. The power to relax itself contemplates that in a particular case, the matter has to be dealt with in a just and equitable manner. In other words, the test to be applied is does the family of the deceased continue to suffer financial distress and hardship occasioned by the death of the breadwinner so as to relax the period within which the application could be made. These are matters of fact, which the competent authority would have to consider. In the instant case, what we find is that the application was rejected merely because it was beyond the time prescribed."

26. Now next question arises for consideration is that as to whether while examining the financial stringency or hardship of the family of deceased government servant for the purpose of compassionate appointment, the payment of terminal dues like family pension, gratuity, leave encashment, provident fund,

general insurance to the family of deceased government servant can be taken into account or can be made ground for refusal of such employment to a member of the family of deceased government servant?

27. This question has directly come under consideration of this court earlier at several occasions. In **State Bank of India and others Vs. Ram Piyarey and others, (2001) 2 U.P.L.B.E.C. 1597,** a Division Bench of this court in paras 8 and 11 of the decision observed as under:-

"8. It is well settled that the Government or the public authority concerned has to examine the financial condition of the family of the deceased and it is only if it is satisfied, that but for the provision of employment, the family will not be able to meet the crisis that a job is to be offered to the eligible member of the family.

11. In our opinion, the learned Single Judge was correct in holding that the receipt of family pension by the widow and a sum of Rs. 1.42 lacs paid to widow after deducting the loan cannot be taken to be a good ground for rejecting the case for appointment on compassionate ground. It is common knowledge that the widow is entitled to family pension and other benefits in the event her husband dies in harness. If the plea of the Bank is accepted then no appointment can be made on compassionate ground and the scheme of the Bank shall have no meaning. We are of the view that the learned Single Judge was quite justified in allowing the writ petition.

28. The aforesaid decision has been followed by this court in **Sharda Devi (Smt.) Vs. District Magistrate/Collector, Ghaziabad and others, 2003 (2) U.P.L.B.E.C. 1134** and these decisions are binding upon this court, therefore, this court can not take different view in the matter.

29. Thus, in view of afore-stated legal position, it is clear that while considering the case of compassionate appointment of dependent of government servant, question of financial hardship or stringency, which the family of deceased government servant faces, has to be considered and while doing so, it is to be seen that whether the family of deceased government servant suffers financial distress or hardship occasioned by death of bread earner and family cannot be relieved from such financial crisis without giving compassionate appointment to any member of the family of deceased Government servant. However, while considering the financial stringency it is not open for the appointing authority to take into account the terminal dues of deceased government servant payable to his family for the refusal of compassionate appointment to a member of his family, otherwise the provisions of Dying in Harness Rules would be rendered meaningless for the reason that widow of deceased Government servant always receives family pension and other service benefits like gratuity, leave encashment, G.P.F. and other terminal dues on account of death of Government servant. It is no doubt true that while ascertaining the financial condition of the family of deceased government servant the current income of the family accrued from different sources should be ascertained and be taken into account, thereupon, if it is found that said income is not sufficient to maintain and to tied over financial crisis of the family caused on account of sudden death of employee, in such situation, in my

considered opinion, it is not open for the appointing authority to refuse compassionate appointment to a member of family of deceased government servant on that count, if the dependent of the government servant is otherwise eligible and qualified for the post.

30. At this juncture it is also to be noted that while applying the Dying-in-Harness Rules to the employees of High Court and Sub-ordinate courts, the provisions of said Rules should be applied with necessary modification. Thus, in case of compassionate appointment in Sub-ordinate courts, the power to relax the rules, in my opinion, shall lie with the High Court instead of State Government for the reason that sub-ordinate courts are under direct control and supervision of High Court and not the State Government.

31. Now applying the aforesaid legal proposition in given facts and circumstances of the case, I find that it is not in dispute that on the date of death of Sri Gopi Chandra Rajak on 1.6.2002, the petitioner was only 12 years 11 months and 6 days old and was not eligible to get appointment under Dying-in-Harness Rules, therefore, his mother Munna Devi moved an application on 31.7.2002 seeking her appointment on compassionate basis on a suitable post but since she was not qualified for any post in the District Judgeship, therefore, an option was given to her to seek compassionate appointment of his elder son (petitioner) as dependent of her husband on completion of his 18 years age on expiry of four years. Accordingly, she has given her consent for compassionate appointment of his son (petitioner) vide applications dated 23.12.2002 and 21.3.2006. On the said application dated 21.3.2006 District Judge, Sonebhadra had passed an order on 22.6.2006 directing to put up the same before him when the petitioner would attain the age of 18 years. But on completion of his age of 18 years the application of petitioner for compassionate appointment dated 3.7.2007 was rejected by the District Judge vide impugned order dated 22.8.2007 on the ground that the same was not maintainable.

32. It is not in dispute that period of limitation for making an application for compassionate appointment under rule 5(1) of Dying-in-Harness Rules is prescribed as five years from the date of death of government servant. The aforesaid period of limitation from the date of death of Gopi Chandra Rajak expired on 31.5.2007. The petitioner has attained the age of majority i.e. 18 years of his age on 4.6.2007 only after four days later on expiry of the aforesaid period of 5 years limitation. Thus, the application for compassionate appointment of the petitioner moved by his mother on 21.3.2006 could be considered by the appointing authority on 4.6.2007 when he attained the age of 18 years by treating the same to be beyond time by four days only or the application for compassionate appointment moved by the petitioner on 3.7.2007 could be considered to be barred by time by one month and 3 days only, but the aforesaid applications moved by the petitioner and his mother could not be rejected on the ground that they were not maintainable at all, instead thereof, in my considered opinion, the proper course of action was that the District Judge, Sonebhadra should have referred the matter before High Court in its administrative side under the proviso of Rule-5(1) of Dying-in-Harness Rules for relaxation of 5 years period of limitation by stating the financial condition of family

of deceased employee and in such situation the High Court in administrative side could examine that as to whether in given facts and circumstances of the case, the petitioner was justified in making such belated application for compassionate appointment beyond period of five years from the date of death of his father and five years time limit fixed for making such application causes undue hardship in dealing with the case of the petitioner in just and equitable manner and that the time limit fixed for making application for compassionate appointment should be relaxed in exercise of the power under the proviso of Rule 5(1) of Dying-in-Harness Rules. But the aforesaid course of action was not adopted by the District Judge, Sonebhadra and rejected the application of compassionate appointment of petitioner, therefore, in my opinion, the impugned action taken by the District Judge cannot be held to be justified.

33. Thus, further question arises for consideration of this court is that as to whether in given facts and circumstances of the case, the matter should be remitted back to the District Judge, Sonebhadra for referring the same before this court in administrative side for relaxation of the time limit provided for making application for compassionate appointment under the proviso of Rule 5(1) of Dying-in-Harness Rules, or not? In this connection, it is to be noted that since from the date of death of Government servant a period of more than 9 years have already passed and the petitioner has also attained the age of 18 years much before on 4.6.2007 i.e. more than 4 years ago and there are sufficient material on record on the basis of which his case can be decided on merit and remitting the matter back either before the District Judge or to the administrative side of this court, would further cause considerable delay in disposal of the matter, therefore, in order to cut short, and to provide immediate financial assistance to the family of deceased employee, it would be appropriate to decide the case of the petitioner on merit, instead of remitting the matter back to the District Judge.

34. Thus, on the basis of material available on record, I find that it is not in dispute that Gopi Chandra Rajak while working as peon in the office of District Judge, Sonebhadra died leaving behind him Smt. Munna Devi his widow, Smt. Aneeta Devi married daughter, Sri Pramod Kumar Rajak (petitioner), Sri Rajesh Kumar Rajak and Sri Kamlesh Kumar Rajak sons. It is further not in dispute that all the three sons of deceased Gopi Chandra Rajak are still unemployed and unmarried and his widow Smt. Munna Devi is also patient of heart and diabetes causing huge financial loss. It is also not in dispute that two brothers of petitioner namely Rajesh Kumar Rajak and Sri Kamlesh Kumar Rajak are students and there is no other source of income for survival of the family of deceased government servant. In my opinion, a meagre amount of payment of family pension and/or other service benefits to widow of deceased employee would not relieve the family from financial distress or stringency occasioned by sudden death of Gopi Chandra Rajak, thus I am of the opinion that the family of deceased government servant is still facing financial distress or hardship and cannot be relieved from such financial distress unless the compassionate appointment is given to the petitioner. In this backdrop of the case, since the petitioner has attained 18 years of his age after expiry of 5 years limitation from the date of death of his father,

therefore, in my opinion, he could not move application for compassionate appointment before attaining his age of majority or the application moved by the mother of petitioner on 21.3.2006 for his compassionate appointment could not be considered on merit earlier to the date of completion of 18 years of his age. Accordingly, the aforesaid application moved by petitioner for compassionate appointment on 3.7.2007 is treated to be within time and the application is liable to be considered on merit. In this connection, it is to be further noted that the petitioner undisputedly has passed High School, therefore, he has educational qualification for appointment on the post of peon i.e. class IV post in District Judgeship, Sonebhadra. Therefore, the District Judge, Sonebhadra is directed to consider the claim of compassionate appointment of the petitioner and appoint him on a class IV post in the judgeship by satisfying himself about his character and medical fitness after verification of his original records of educational qualification within four weeks from the date of production of certified copy of this order before him. In case, there exists no vacancy against class IV post in judgeship, the District Judge is directed to make appointment of the petitioner on a supernumerary post of peon in District Judgeship.

35. With the aforesaid observation and direction, writ petition succeeds and is allowed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 16.09.2011

BEFORE
THE HON'BLE UMA NATH SINGH,J.
THE HON'BLE ANIL KUMAR,J.

Special Appeal Defective No. - 770 of 2010

State of U.P. Thru Secretary Animal Husbandry and others ...Petitioners
Versus
Sunil Kumar Soni S/O Chhotey Lal and another (S/S 2435/2010) ...Respondents

Counsel for the Petitioner:
Standing Counsel

Counsel for the Respondents:
Sri R.C. Saxena
Sri Mahesh Chandra

Constitution of India Article 226- Cancellation of entire selection-on ground-one Mr. 'A' has filed forged certificate-who neither participated in written examination nor in interview-apart from no illegality shown-Single Judge rightly Quashed the cancellation order-although it is settled law that selected candidate got no right to claim appointment-but in fact and circumstances of the case order passed by Single Judge-justified.

Held: Para 20

In the instant case, from the material on record, it clearly established that Dy. Director Animal Husbandry, Circle Faizabad, District Faizabad without waiting for the outcome of the enquiry report, passed the order dated 29.11.1999 in utter haste without ascertaining whether the irregularities regarding submission of forged game certificates were identifiable or not. Further, the impugned order is of a prior dated i.e. 29.11.1999 whereas the enquiry report is of subsequent date i.e.

4.12.1999. In the inquiry also, the Inquiry Officer did not find any irregularity or any favoritism etc. and he could only point out that one candidate Inderjeet had attached some forged certificate regarding sports. However, the facts still remain that the above Inderjeet neither appeared in the written test nor in the interview and he has also not been selected. The above alleged irregularity in any way cannot be held to be a valid ground for cancelling of the selection in question that too from the stage of interview and directing to hold a fresh interview.

Case law discussed:

(2010) 7 SCC 678; 1995 SCC (L & S) page 791 para 10; AIR 1984 SC 1850; 1993 (1) SCC 1; 2000 SCC (L&S) 1098; 1971 (1) AIIER 1148; 1974 (4) IRC 120 (NIRC)

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

1. Heard Sri Sourabh Lavania, learned Standing Counsel and Sri R.C. Saxena, learned counsel on behalf of respondents and perused the record.

2. By means of present special appeal, appellants have challenged the order dated 19.03.2010 passed in Writ Petition No. 2435 (SS) of 2000 (Sunil Kumar Soni and another Vs. State of U.P. and others).

3. In brief, the facts of the present case are that respondents/writ petitioners, Sri Sunil Kumar Soni and Rakesh Kumar approached this Court by filing Writ Petition No. 2435 (SS) of 2000, Sunil Kumar Soni and another Vs. State of U.P. and others, on the fact that Dy. Director, Animal Husbandry, Circle, District Faizabad published advertizement dated 10.08.1998 thereby calling applications for appointment on the post of Veternary Pharmacists in the pay scale of Rs. 2610-3540, and also 20 posts in Devi Patan Circle. Qualification for the appointment on the said post was Intermediate with Biology or with Agriculture.

4. The case of the writ petitioners/respondents was that they belong to backward class, they fulfilled all the relevant and essential qualifications, and accordingly they submitted their candidature in response to the advertizement dated 10.08.1998 for appointment on the post of Veternary Pharmacists, on 13.12.1998 appeared in the written test with Roll No. 000042 and 000222 respectively.

5. On 18.02.1999, in daily Newspaper "Dainik Jagran" result was published by the official respondents and writ petitioners/respondents were declared successful. Accordingly, call letters were issued to them to appear for viva Voce Test on 25.02.1999 by Dy. Director, Animal Husbandry, Circle, District Faizabad, appeared in the said test and on 27.02.1999 final selection of backward caste candidate for appointment on the post in question has been notified and names of the petitioners find place in the said list at serial Nos. 3 and 6.

6. However, in spite of the said facts, the appointment orders were not issued to them, hence for redressal of their grievances they approached this Court (before Hon'ble the Single Judge) by filing Writ Petition No. 2435 (SS) of 2000.

7. In the said writ petition, on behalf of appellants who were respondents therein counter affidavit was filed. The stand taken is to the effect that in the selection in question a complaint has been made, accordingly, an inquiry was

initiated by the Commissioner, Faizabad Division, Faizabad and on the basis of the inquiry report vide order dated 29.11.1999, the said authority had taken a decision that not to cancel the entire process of selection rather only the interview shall be cancelled, since the commission of irregularities were found to be proved in the said interview and accordingly it was requested to the State Government to fix some other date for holding interview with a view to make fair, proper and impartial selection without any favoritism/nepotism.

8. Further, the said writ petition along with other matters, namely, Writ Petition No. 2843 (SS) of 2000, Writ Petition No. 3182 (SS) of 2001, Writ Petition No. 172 (SS) of 2003, Writ Petition No. 5754 (SS) of 1999 and Writ Petition No. 562 (SS) of 2005, in which controversy involved are identical in nature were connected together, heard by learned Single Judge and by a common judgment dated 19.03.2010, the order dated 29.11.1999 passed by Commissioner, Faizabad Division, Faizabad has been quashed. And above noted writ petitions are allowed except Writ Petition No. 562 (SS) of 2005 (Mahesh Babu Vs. State of U.P.). The finding given by learned Single Judge while allowing the said writ petitions is reproduced hereinbelow:-

"It is not disputed that the selection/interview held on 25.2.1999 was cancelled by the Commissioner, Faizabad Division, Faizabad, on the basis of enquiry held by him in pursuance of the directions of the State Government. It is also not disputed that in the said enquiry, it was found that one Indrajeet, one of the candidates, had attached forged sports certificate alongwith his application form. The case of the petitioners is that neither he participated in the examination nor in the interview and as such cancellation on this ground alone is not tenable in the eyes of law. The respondents have failed to show that apart from Indrajeet, forged certificates were found of the candidates, who were selected and their name find place in the select list. There is also no specific denial that name of said Indrajeet was included in the merit list of successful candidates.

It is true that the State is under no legal duty to fill up all or any of the vacancies. It is also true that the successful candidates do not acquire any indefeasible right to be appointed against the existing vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not fill up the vacancies has to be taken bona fide for appropriate reasons. In the case of Asha Kaul (Mrs) and another vs. State of Jammu & Kashmir and others; 1993 SCC (L&S) 637 the Apex Court held that mere inclusion in the select list does not confer upon the candidates included therein an indefeasible right to appointment but that is only one aspect of the matter. The other aspect is the obligation of the Government to act fairly. The whole exercise cannot be reduced to a farce.

In Jai Narain Ram vs. State of U.P. and others; AIR 1996 SC 703, the Hon'ble Supreme Court has held that right to seek appointment to a post under Article 14 read with Article 16(1) and (4) is a constitutional right to equality. In another decision rendered in the case of R.S.Mittal v. Union of India 1995 Supp(2)SCC page 230, the Hon'ble

Supreme Court pointed out that it is" no doubt correct that a person on the select panel has not vested right to be appointed to the post for which he has been selected. He has right to be considered for appointment. But at the same time, the appointment authority cannot ignore the select panel or decline to make the appointment on its whims."

On a careful considerations of the contentions on either side in the light of the material brought on record including the enquiry report constituted for the purpose of inquiring into the irregularities, if any, in the selection of candidates, there seems to be no serious grievance of any malpractices as such in the process of the written examination- either by the candidates or by those who actually conducted them. There is no justifiable reason for cancellation of the selection of the petitioners, which has already been finalised on 26.2.1999 and the final select list of the candidates having been notified on 27.2.1999 after. Only irregularity, which has been found by the Inquiry Officer is that one Inderjeet attached forged games certificate. No other irregularity of any kind in respect of any selected candidate was found in the inquiry.

It is significant to mention that the State Government while passing the impugned order of cancelling the examination has also failed to consider the law laid down by the Hon'ble Apex Court in the case of Union of India and others v. Rajesh P. U. Puthuvalnikathu and another [(2003) 7 Supreme Court Cases 285] wherein it has been observed that where from out of selectees, it was possible to read out the beneficiaries of the irregularities or illegalities there was no justification in law to deny appointment to the selected candidates whose selection was not found to be, in any manner, vitiated for anyone or the other reasons. The en bloc cancellation is not permissible.

What transpires from the conduct of the respondents is that they have nothing on record to show the Court that the order of cancellation of selection list of the post in question was based on sound reasons and it was so done after enquiry. The competent authority must be satisfied after due enquiry that the selection has been vitiated on account of violation of rules or for the reason that it smacks of corruption, favourtism, nepotism or the alike but for doing this it must record the reasons. In the impugned order, no reasons have been assigned for cancellation of the selection and in view of the aforesaid discussion, it is not legally tenable.

For the reasons aforesaid, all the aforementioned writ petitions except writ petition no. 562[SS]2005; Mahesh Babu vs. State of U.P. and others are hereby allowed and the impugned order dated 29.11.1999, passed by the Commissioner, Faizabad Division, Faizabad. The writ petition no. 562[SS of 2005 stands disposed of for the reasons indicated hereinabove. "

9. Sri Sourabh Lavania, learned State Counsel while assailing the order dated 29.11.2011 submits that Hon'ble Single Judge while observing that the competent authority must be satisfied after due enquiry that the selection has been vitiated on account of violation of rules or for the reason that it smacks of corruption, favoritism, nepotism of the

alike, completely failed to appreciate that there were serious complaints regarding the irregularities in the process of selection and on the basis of the complaints, due appropriate enquiry was got conducted through Deputy Development Commissioner, and on the basis of the findings given in the enquiry report with detailed reasons, the order dated 29.11.1999 was issued to cancelled the interview only and not the entire selection process, as such the learned Single Judge while quashing the order dated 29.11.1999, has committed manifest error of both fact and law.

10. He further submits that Hon'ble Single Judge has not given any reason for quashing of the order dated 29.11.1999, and further he failed to appreciate that the said order was issued on the basis of the illegalities reported and found to be established in the Enquiry Report of the Deputy Development Commissioner and to assign reasons in the order dated 29.11.1999 for cancellation of interview was not at all necessary. Further any selectee who has not been issued the appointment order, merely on the basis that his name has been included in the select list, cannot claim his appointment. In support of his argument, he placed reliance on the judgment of Hon'ble the Apex Court in the case of **East Coast Railway and another Vs. Mahadev Appa Rao and others (2010) 7 SCC 678.** Accordingly submitted by the Standing Counsel that present appeal be allowed.

11. Sri R.C. Saxena, learned counsel appearing on behalf of writ petitioners/respondents defend the order dated 19.03.2010 submits that both the petitioners who belong to Backward caste and being fully eligible and qualified, have been duly selected for the post of Veternary Pharmacist and their roll numbers also appear in the final select list of Backward caste candidates at serial no. 3 and 6, further the schedule which has taken place as well as the merit list published on the basis of the same does not suffer with any illegality, so justification on the part of official respondents/appellants to cancel the selection or the select list, the said action is in contravention of the law as laid down by Hon'ble the Apex Court in the case of **R.S. Mittal Versus Union of India, reported in 1995 SCC (L & S) page 791 para 10** wherein it has been clearly held that it is no doubt that a person on the select panel has no vested right to be appointed to the post for which he has been selected but at the same time the appointing authority cannot ignore the select panel or decline to make the appointment on its whims and Hon'ble Supreme Court further held that when a person has been selected by the selection board and there is a vacancy which can be offered to him, keeping in view his merit position, then, ordinarily, there is no justification to ignore him for appointment. There has to be a justifiable reason to decline to appoint a person who is on the select panel, so, present special appeal is liable to be dismissed.

12. Selection has always been considered as an administrative function and the administrative authority is regarded as the best judge for it. It is the administrative authority that carries out the policy of the State. Public appointments are made to suit the administrator's purpose by appointing those he considers the best among the available candidates. As long as the function of such authority is within the

law, courts will be slow to interfere; rather it has no business to interfere. Court also does not function as an appellate forum in selection matters.

13. It is settled law that by such selection, an empanelled candidate does not acquire any right of appointment to a post. The administration is free either to accept or reject the recommendations of Service Commissions. A select-list does not, thus, give right to selectees to appointment. It is, in fact, a list of candidates who could be immediately appointed. Selection, therefore, does not ensure appointment as there may be unpredictable happenings, one such is imposition of an economic ban in recruitments, other is abolition of a vacancy, another is return of a deputationist, and so on.

14. Although mere inclusion of a person's name in the select list does not confer any right on him to get appointment and therefore no mandamus would lie in his favor, but still a candidate have the right to challenge administrative orders and, if administrative authority takes a decision and the reasons for such decision are erroneous then such a decision can be interfered with by a court of law and if any State action was not above broad, the Courts did not hesitate to interfere and placed the administration on the right keel.

15. In the case of **Jatinder Kumar Vs. State of Punjab, AIR 1984 SC 1850** Hon'ble the Supreme Court held as under:-

"Government must except recommendation of the Commission. If, however, the vacancy is to be filled in, the Government has to make appointment strictly according to the order of merit as recommended by the Public Service Commission. It cannot disturb the order of merit according to its own sweet-will except for other good reasons, viz., bad conduct or character. The Government cannot appoint a person whose name does not appear in the list. However, it is open to the Government to decide how many appointments will be made. The process for selection for the purpose of recruitment against anticipated vacancies does not create a right to be appointed to the post which can be enforced by a Mandamus."

16. In **Union Territory of Chandigarh Vs. Dilbag Singh, 1993 (1) SCC 1 "**when a select list is cancelled the selectees are not entitled to an opportunity of hearing before cancellation. The Court though accepted that the selected candidates have a "legitimate expectation", it held that they have no idefeasible right to be appointed in absence of any rule to that effect. But, the decision/action by executives must be non-arbitrary and bona fide. The cancellation of the select list by the administration, on finding the list to be dubious, having been prepared in unfair and injudicous manner, was held bona fide and made for valid reasons".

17. Hon'ble the Supreme Court in the case of **Munna Roy Vs. Union of India, 2000 SCC (L&S) 1098,** denied administration the power to cancel the panel and ordered appointment of the applicant. In that case, the appellant applied for the advertised post as she had the requisite qualification. She became successful in the written test as well as in viva voce. The list of successful

candidates included her name. However, the select list was cancelled without even informing the appellant on the ground that though the minimum qualification required was matriculate, she was a graduate; and thus dubious method was adopted for being selected. The cancellation was challenged before the Tribunal which allowed the petition. The High Court however held in favor of the appellant Union of India. When the matter reached the Supreme Court, the Apex Court observed :

"We really fail to understand that if a candidate possess a qualification higher than the required qualification and the advertisement itself had prescribed the same then how can the authority came to the conclusion that selection has been made by adopting a dubious method."

18. The Apex Court held that the reasons for cancellation of the select panel was not germane and ordered, that the Tribunal order granting the benefit be implemented.

19. In the case of **East Coast Railway and another Vs. Mahadev Appa Rao and others (2010) 7 SCC 678,** Hon'ble the Supreme Court in respect to cancellation of recruitment process and the power of judicial review on the ground of arbitrariness after taking into various judgments as rendered by Ho'ble the Apex Court earlier held as under (relevant portion reproduced):-

Para No. 26 - If a test is cancelled just because some complaints against the same have been made howsoever frivolous, it may lead to a situation where no selection process can be finalized as those who fail to qualify can always make a grievance against the test or its fairness. What is important is that once a complaint or representation is received the competent authority applies its mind to the same and records reasons why in its opinion it is necessary to cancel the examination in the interest of purity of the selection process or with a view to preventing injustice or prejudice to those who have appeared in the same. *That is precisely what had happened in Dilbagh Singh's case (supra). The examination was cancelled upon an inquiry into the allegations of unjust, arbitrary and dubious selection list prepared by the Selection Board in which the allegations were found to be correct.*

Para No. 28 - *That is not, however, the position in the instant case. The order of cancellation passed by the competent authority was not preceded even by a prima facie satisfaction about the correctness of the allegations made by the unsuccessful candidates leave alone an inquiry into the same. The minimum that was expected of the authority was a due and proper application of mind to the allegations made before it and formulation and recording of reasons in support of the view that the competent authority was taking.*

Para No. 29 - *There may be cases where an enquiry may be called for into the allegations, but there may also be cases, where even on admitted facts or facts verified from record or an enquiry howsoever summary the same maybe, it is possible for the competent authority to take a decision, that there are good reasons for making the order which the authority eventually makes. But we find it difficult to sustain an order that is neither based on an enquiry nor even a prima*

facie view taken upon a due and proper application of mind to the relevant facts. Judged by that standard the order of cancellation passed by the competent authority falls short of the legal requirements and was rightly quashed by the High Court.

Para No. 30 - *We may hasten to add that while application of mind to the material available to the competent authority is an essential pre-requisite for the making of a valid order, that requirement should not be confused with the sufficiency of such material to support any such order. Whether or not the material placed before the competent authority was in the instant case sufficient to justify the decision taken by it, is not in issue before us. That aspect may have assumed importance only if the competent authority was shown to have applied its mind to whatever material was available to it before cancelling the examination. Since application of mind as a thresh-hold requirement for a valid order is conspicuous by its absence the question whether the decision was reasonable having regard to the material before the authority is rendered academic. Sufficiency or otherwise of the material and so also its admissibility to support a decision the validity whereof is being judicially reviewed may even otherwise depend upon the facts and circumstances of each case. No hard and fast rule can be formulated in that regard nor do we propose to do so in this case."*

20. In the instant case, from the material on record, it clearly established that Dy. Director Animal Husbandry, Circle Faizabad, District Faizabad without waiting for the outcome of the enquiry report, passed the order dated 29.11.1999 in utter haste without ascertaining whether the irregularities regarding submission of forged game certificates were identifiable or not. Further, the impugned order is of a prior dated i.e. 29.11.1999 whereas the enquiry report is of subsequent date i.e. 4.12.1999. In the inquiry also, the Inquiry Officer did not find any irregularity or any favoritism etc. and he could only point out that one candidate Inderjeet had attached some forged certificate regarding sports. However, the facts still remain that the above Inderjeet neither appeared in the written test nor in the interview and he has also not been selected. The above alleged irregularity in any way cannot be held to be a valid ground for cancelling of the selection in question that too from the stage of interview and directing to hold a fresh interview.

21. Further, from the perusal of the order dated 29.11.1999 passed by Commissioner, Faizabad Division, Faizabad which is annexed as Annexure No. 4 to the special appeal reveals that the same is a non-speaking order, no reason whatsoever has been assigned by the said authority to cancel the interview which has been already held and directed for holding a fresh interview for the purpose of appointment on the post in question is anorder which is arbitrary in nature, thus violative of Article 14 of the Constitution of India as well as to the principle of Natural Justice in Breen Vs. Amalgamated Engg. Union, reported in 1971(1) AIIER 1148, it was held that the giving of reasons is one of the fundamentals of good administration. In Alexander Machinery (Dudley) Ltd.Vs. Crabtress, reported in 1974(4) IRC 120 (NIRC) it was observed that "failure to give reasons amounts to denial of justice.

Reasons are live links between the mind of the decision taker to the controversy in question and the decision or conclusion arrived at".

22. Reasons substitute subjectivity by objectivity. The emphasis on recording reasons is that if the decision reveals the 'inscrutable face of the sphinx', it can be its silence, render it virtually impossible for the Courts to perform their appellate function or exercise the power of judicial review in adjudging the validity of the decision. Right to reason is an indispensable part of a sound judicial system, reasons at least sufficient to indicate an application of mind of the later before the Court. Another rationale is that the affected party can know why the decision has gone against him. One of the salutary requirements of natural justice is spelling out reasons for the order made. In other worlds, a speaking out, the inscrutable face of the sphinx' is ordinarily incongruous with a judicial or quasi-judicial performance.

23. For the foregoing reasons, we are of the considered opinion that there is neither illegality nor infirmity in the impugned order dated 19.03.2010 passed by learned Single Judge.

24. Thus, present appeal lacks merit and is dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.09.2011

BEFORE
THE HON'BLE PANKAJ MITHAL,J.

Second Appeal No. - 781 of 2011

Nagar Palika Parishad ...Petitioner
Versus
Tehsildar, Thakurdwar, Moradabad ...Respondent

Counsel for the Petitioner:
Sri J.K. Khanna

Counsel for the Respondents:
Sri Kshitij Shailendra

Code of Civil Procedure-Section-102-Second Appeal-suit for injunction-from realization of Property Tax-to the tone of Rs. 11006.07/-decreed by first Appellate Court-No Second Appeal for valuation of Rs. 25000/-lie-held-Second Appeal barred by Section 102-not maintainable.

Held: Para 11

Accordingly, I am of the opinion that the present second appeal arises out of a suit concerning recovery of money of value less than Rs.25,000/- and as such it is barred by Section 102 C.P.C.

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

1. Heard Sri J.K. Khanna, learned counsel for the defendant-appellant and Sri Kshitij Shailendra, learned counsel appearing for plaintiff-respondents No.1 to 3.

2. Plaintiffs instituted Original Suit No. 13 of 1994 for permanent injunction against the defendant Nagar Palika Parishad and the Tehsildar restraining them by a decree of permanent injunction

not to recover property tax of Rs.6760/- and a further some of Rs.4,246.07/- on the ground that the plaintiffs are already paying property tax in respect of the property in question to some other local authority i.e. Zila Panchayat.

3. The suit was dismissed vide judgment and order dated 18.1.08.

4. Aggrieved plaintiffs filed Civil Appeal No.30 of 2008. The appeal has been allowed vide judgment and order dated 19.7.11. The judgment and order of the court of first instance has been set aside and the suit has been decreed.

5. It is against the decree of the lower appellate court that the defendant has filed this Second Appeal under Section 100 C.P.C.

6. The valuation of the suit as well as the appeal is Rs.11006.07. The aforesaid valuation has been disclosed by taking the total of the two amounts sought to be recovered from the plaintiffs.

7. In substance the subject matter of the original suit happens to be concerning recovery of money not exceeding 25,000/- rupees, though the relief claimed may have been cough in a different way by asking for a decree for permanent prohibitory injunction.

8. Section 102 C.P.C. specifically provides that no second appeal shall lie from any decree, when the subject matter of the original suit for recovery of money does not exceed twenty-five thousand rupees. The purpose of barring second appeals in matters arising from suit for recovery of money not exceeding twenty-five thousand rupees is to minimize litigation on trivial matters.

9. The suit for recovery of money or for not recovering it are both in the nature of recovery of money.

10. The suit for permanent injunction restraining the defendant from realizing a particular amount may be in the nature of injunction but nonetheless it is a suit relating to recovery of money.

11. Accordingly, I am of the opinion that the present second appeal arises out of a suit concerning recovery of money of value less than Rs.25,000/- and as such it is barred by Section 102 C.P.C.

12. In view of above, this appeal is dismissed as barred by Section 102 C.P.C.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 22.09.2011

BEFORE
THE HON'BLE DEVI PRASAD SINGH,J.
THE HON'BLE DR. SATISH CHANDRA,J.

First Appeal From Order No. - 801 of 2011

Raj Kishore Vaish ...Appellant
Versus
The State Of U.P. Through Its Chief Secy., Vidhan Bhwan Lucknow ...Respondent

Code of Civil Procedure-Order 33 rule-2-exemption from-court fee-suit for damage of Rs. 2537 lakhs filed-on ground-against wrong exclusion of Sale tax under Section 4-A-writ petition-dismissed-review rejected by High Court-SLP also rejected-serious allegation against High Court as well as Supreme Court made-amounts to Criminal Contempt-petitioner running factory possessing more than 1000/-

worth property can not be treated indigent person-trail Court rightly rejected the application.

Held: Para 15 and 16

Order 33 Rule 1A empowers the Court to hold an enquiry. It appears that since the plaintiff-appellant had not filed a schedule of movable or immovable property belonging to him, with the estimated value thereof, the trial court opined that application is not in required format, hence not maintainable. The finding recorded by the trial court does not seem to suffer from any illegality and impropriety.

The trial court further observed that no cause of action is made out for issuance of notice to the defendants. The finding recorded by the trial court again seems to be correct keeping in view of the fact that no suit or petition lies against the President of India for any action of the State or Central Government. The suit may be filed against the authority concerned. The suit against the President of India or Governor of the State is not maintainable.

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

1. Appellant appeared in person.

2. This is an appeal under Order 43 Rule 1 of the Code of Civil Procedure (for short "C.P.C.") against the impugned order dated 30.05.2011, passed by Civil Judge (Senior Division), Sitapur whereby application under Order 33 Rule 2 of C.P.C. moved by the appellant in a pending suit has been rejected.

3. While assailing the impugned order, the appellant, in person, submits that the Civil Judge (Senior Division) had rejected the application on unfounded ground. It could not have been rejected under Order 33 Rule 2 C.P.C.

4. It shall be appropriate to give brief facts, pleaded before the trial court as borne out from the record.

5. The plaintiff-appellant claims to have established an industry in the name of M/s. Laxmi Rubber and Chemical Industries, Sitapur and registered with the Sales Tax Department controlled by the defendant No. 1 i.e. State of U.P. According to the appellant, registration was done from 06.02.1986 having registration certificate No. S.T.0053971. However, the appellant could not do the business due to alleged high handedness on the part of the Sales Tax Department. The different applications submitted by the appellant claiming exemption under Section 4A of the Sales Tax Act could not fetch favour from the Sales Tax Department. It has been stated that on account of inaction on the part of the Sales Tax Department, the appellant suffered loss of more than Rs. 69 lacs within a period of 23 years. The submission of the appellant is that the machinery of the State Government dealing with the sales tax and other related matters is highly corrupt hence they have not discharged their statutory obligation to grant exemption under Section 4A of the Sales Tax Act. It has been pleaded that due to corruption at the level of the defendant no.1 i.e., State of U.P., the appellant could not run the business and accordingly failed to serve their children and parents. In sum and substance, the argument advanced by the appellant is that because of the rampart corruption in the state machinery, the appellant could not run the business and

has suffered loss of social status, mental pain and agony.

6. The appellant further states that against the order passed by the Sales Tax Department, he filed a Writ Petition No.3055 (M/B) of 1989, which was dismissed by this Court on 14.08.1997. According to the pleadings on record as contained in paras-12, 13 and 14 of the plaint, the dismissal of the writ petition, filed by the appellant, in this Court is incident of arbitrary exercise of power. Review petition filed against the said order too was dismissed by the High court. It has further been stated that another writ petition, bearing No.2255 (M/B) of 1994 was filed in this Court, which was also dismissed by the order dated 04.08.1994, against which a Review Petition No.109 (w) of 1994 was preferred, which is allegedly pending.

7. The appellant has used derogatory words in the plaint raising allegation against the functioning of High Court and also stated that because of corruption, the writ petition was dismissed.

8. In Para-14 of the plaint, it has been stated that the appellant has suffered estimated loss of Rs. 2537 lacs. The appellant further pleaded in the plaint that he approached the Hon'ble Supreme Court where his prayer for contempt was rejected. He submits that against the order passed by this Court, he approached before the Hon'ble Supreme Court levelling serious allegation against the authorities concerned.

9. A perusal of the record shows that one Pankaj Kalra,Advocate appeared before the Hon'ble Supreme Court on behalf of the appellant Raj Kishore Vaish and Hon'ble Supreme Court while passing an order on 27.03.1995 in Contempt Petition No. 1200 of 1995, observed that the petitioner was not properly advised. Sri Pankaj Kalra had assured the Hon'ble Supreme Court to tender proper advice and record further shows that latter on, the matter was dismissed by the Hon'ble Supreme court to approach appropriate forum.

10. It appears that thereafter the appellant filed a suit for damages along with an application under Order 33, Rule 2 C.P.C. A perusal of the pleadings of the suit clearly shows that serious allegations were raised against the system right from the Government to higher judiciary. However, total compensation claimed by the appellant in terms of Para 24 in the suit seems to be Rs. 11042 lacs with interest @ 15%.

11. Application moved under Order 33 Rule 2 of the C.P.C. has been rejected by the trial court. The trial Court observed that the application moved by the plaintiff-appellant is not in accordance with Order 32 Rule 2 C.P.C. and further the trial court held that according to the pleadings on record, no cause of action has been shown by the plaintiff while preferring the suit.

12. Order 33 Rule 1 provides that a suit may be instituted by the 'indigent person'. 'Indigent' has been defined under Explanation I. For convenience, Order 33 Rule 1 is reproduced as under:-

"Order 33 Rule 1 Suit may be instituted in forma pauperis.-*Subject to the following provisions, any suit may be instituted by an [indigent person].*

Explanation I. A person is an indigent person-

(a) If he is not possessed of sufficient means (other than property exempt from attachment in execution of a decree and the subject-matter of the suit) to enable him to pay the fee prescribed by law for the plaint in such suit, or

(b) where no such fee is prescribed, if he is not entitled to property worth one thousand rupees other than the property exempt from attachment in execution of a decree, and the subject-matter of the suit.

Explanation II.-Any property which is acquired by a person after the presentation of his application for permission to sue as an indigent person, and before the decision of the application, shall be taken into account in considering the question whether or not the applicant is an indigent person.

Explanation III.-Where the plaintiff sues in a representative capacity, the question whether he is an indigent person shall be determined with reference to the means possessed by him in such capacity."

13. The definition shows that a person shall be indigent who does not possess sufficient means other than property exempt from attachment in execution of a decree and the subject-matter of the suit to enable him to pay the fee prescribed by law; while where no such fee is prescribed if he is not entitled to property worth one thousand rupees other than the property exempt from attachment in execution of a decree.

Order 33 Rule 2 C.P.C. is reproduced as under :-

"Order 33 Rule 2. Contents of application.-*Every application for permission to sue as [an indigent person] shall contain the particulars required in regard to plaints in suits; a schedule of any movable or immovable property belonging to the applicant, with the estimated value thereof, shall be annexed thereto; and it shall be signed and verified in the manner prescribed for the signing and verification of pleadings.*

14. The above provision shows that any application for permission to sue as an indigent person shall contain the particulars required in regard to plaint in suits; a schedule of movable or immovable property belonging to the applicant, with the estimated value thereof, shall be annexed thereto; and it shall be signed and verified in the manner prescribed for the signing and verification of pleadings.

15. Order 33 Rule 1A empowers the Court to hold an enquiry. It appears that since the plaintiff-appellant had not filed a schedule of movable or immovable property belonging to him, with the estimated value thereof, the trial court opined that application is not in required format, hence not maintainable. The finding recorded by the trial court does not seem to suffer from any illegality and impropriety.

16. The trial court further observed that no cause of action is made out for issuance of notice to the defendants. The finding recorded by the trial court again seems to be correct keeping in view of the fact that no suit or petition lies against the

President of India for any action of the State or Central Government. The suit may be filed against the authority concerned. The suit against the President of India or Governor of the State is not maintainable.

17. Apart from above, the appellant, who appeared in person, has raised serious allegations against the alleged corruption not only against the Government but also against the highest Court of this country. Dismissal of the petition by this Court or by the Hon'ble Supreme Court does not give liberty to the appellant to raise frivolous allegation. In case his counsel has not properly advised or not argued the case in proper manner or not assisted the Court properly, remedy shall be available to the appellant to approach the State Bar Council against the conduct of the counsel but this does not make out a case of levelling frivolous charge against the higher judiciary where the matter is decided or adjudicated on merit.

18. The appellant may have suffered because of alleged corruption in the State of U.P. or due to non-exemption under Section 4A of the Sales Tax Act but that is different aspect of the matter and for that the appellant earlier approached this Court as well as Hon'ble Supreme Court but he failed to get any relief. After failing from the highest Court of the land, no allegation should have been raised by the appellant for damages on account of dismissal of writ petition by this Court or special leave petition by the Hon'ble Supreme Court. The allegation and averments made in the present appeal or in the plaint prima facie makes out a case of "criminal contempt" as it amounts to interference in the administration of justice. The trial court has rightly rejected the application holding that no cause of action arose to interfere in the suit in question. The serious allegation raised by the appellant-plaintiff against the highest court of land is enough for dismissal of the present appeal.

19. Law is very well settled that no suit for damages can be filed against the High Court or Hon'ble Supreme Court or the President of India who discharges its obligation in accordance to law to hold a citizen's right under the Constitution of India and statutory provisions. Judgment and order may be correct or incorrect, but it does not permit to claim damages from the count. Mere permitting the appellant to approach the proper forum while declining to interfere with the matter does not mean that whatever the appellant wants, he may plead i.e. frivolous allegation while filing the suit.

20. In view of above, it is a fit case to proceed against the appellant for the criminal contempt which, prima-facie, seems to be made out under Section 2(C) of the Contempt of Courts Act, but keeping in view the plight with which the appellant suffered with regard to tax exemption to run the industry at the behest of state machinery, we merely warn the appellant not to raise such frivolous and serious allegation against the higher judiciary.

21. In view of above, the appeal is dismissed. Record of the trial court be sent back to the court concerned forthwith.

No cost

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 22.09.2011

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Service Single No. - 1516 of 2000

Chhatthu Narain Vishwakarma
...Petitioner
Versus
State of U.P. Through Secy. Revenue Dept. and another ...Respondents

Counsel for the Petitioner:
Sri A.K. Dixit

Counsel for the Respondents:
C.S.C.

Constitution of India article 226 Fundamental Rule-56(II)-retirement age-consolidation Lekhpal-challenge the retirement notice at the age of 58 years-on ground belongs to inferior service-prior to 1965 inferior service are those who getting salary of Rs. 22.27, 27.32 and 32.37-does not mean all class 4th employee shall retire at the age of 60 years-statutory Rule can not be amended by exercising rule framing power-no interference called for-petition dismissed.

Held: Para 15

Fundamental Rule 56 only talks of the age of retirement at 60 years of an "inferior service" and not Group 'D' employee. The petitioner nowhere claim that he was a member of "inferior service". Therefore, he was rightly retired on attaining the age of 58 years.

Case law discussed:
2005 (1) UPLBEC 474; AIR 2004 SC 2317; 2006 (3) AWC 2243; Civil Misc. Writ Petition No. 47754 of 2005 (M/s J.K. Construction Engineers and others Vs. Union of India and others) decided on 28.02.2006; 2006 (2) ESC 1017; 2006 (5) AWC 5306

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

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

2. The petitioner filed this writ petition challenging notice dated 14th October, 1999 whereby he was informed of his retirement w.e.f. 31st January, 2000 on attaining the age of 58 years under fundamental rule 56.

3. The contention of the petitioner was that he is Consolidation Lekhpal, which is a Group 'D' post. In view of Government Order dated 28th July, 1987 he is liable to retire on attaining the age of 60 years.

4. However, I find no force in the submission. Fundamental Rule 56(a) and (b) as substituted w.e.f. 1st April, 1975 reads as under:

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

(b) A Government servant in inferior service shall retire from service on the after of the last day of the month in which he attains the age of sixty years. He must not be retained in service after that date,

except in very special circumstances and with sanction of the Government."

5. A perusal thereof shows that age of retirement for every Government servant other than a Government servant in "inferior service" is 58 year. Only in respect to a Government servant who is in "inferior service", the age of retirement is 60 years. "Inferior service" does not mean the entire Group 'D' employees but amongst Group D employees those who are governed by inferior service constitute a small section.

6. Prior to 1st April, 1965 only those employees of State Government who were getting salary of Rs.22.27, 27.32 and 32.37 were members of "inferior service". Pursuant to the pay scales revised w.e.f. 1st April, 1965 the aforesaid three pay scales were revised to Rs.55.57 or Rs.60.80. Later on w.e.f. 1st August, 1972 and 1st July, 1979 new pay scales were implemented whereby inferior service scales ceased. It is in this context, clarification was made by Government Order dated 5th November, 1985 but it did not result in actual amendment in Fundamental Rule 56 (a) and (b) having the effect of deleting provision of age of retirement for members of inferior service and therefore the result is that these provisions continued. Though some amendment has been made in Fundamental Rule 56 by notification dated 27th June, 2002 but it is a matter of great concern that the said amendment has been made in exercise of power under proviso to Rule 309 ignoring the fact that Fundamental Rule 56 was made by a legislative Act in 1975 and onwards. A legislative Act cannot be amended by exercising Rule framing power.

7. Be that as it may, for the purpose of present case the fact remains that petitioner has nowhere claimed to qualify for "inferior service" and therefore cannot claim to continue beyond the age of 58 years. The decision cited by learned counsel for the petitioner has not considered the relevant statutory provision namely Fundamental Rule 56 and has proceeded on the assumption as if all Group "D" employees are entitled to continue till the age of 60 years and therefore the judgment is apparently per incurium and not binding on this Court.

8. What constitute "per incurium" need not detain my attention, since time and again it has been explained by the Apex Court. A Full Bench of this Court in **Farhat Hussain Azad Vs. State of U.P. and others, 2005 (1) UPLBEC 474** after referring to the law with respect to *"per incurium"* laid down by the Apex Court in catena of decisions, has observed:-

"The concept of "per in curium" has been considered by the Apex Court time and again explaining that the expression means through inadvertence or a point of law is not consciously determined. If an issue is neither raised, nor argued, a decision by the Court after pondering over the issue in depth would not be precedent binding on the Courts. Per incurium are decisions given in ignorance or forgetfulness of some statutory provisions or where the Court omits to consider a binding precedent of the same Court or the superior Court rendered on the same issue or where Court presumes something contrary to the facts of the case. (Vide Mamleshwar Prasad & Anr. Vs. Kanahaiya Lal (Dead), (1975) 2 SCC 232; Rajpur Ruda Meha & Ors. Vs. State of Gujrat, AIR 1980 SC 1707; A.R. Antule

Vs. R.S. Nayak, AIR 1988 SC 1531; Municipal Corporation of Delhi Vs. Gurnam Kaur, AIR 1989 SC 38; Punjab Land Development and Reclamation Corporation Ltd., Chandigarh Vs. Presiding Officer, Labour Court, Chandigarh & Ors., (1990) 3 SCC 682; State of West Bengal Vs. Synthetics and Chemicals Ltd., (1991) 1 SCC 139; Maharashtra State Cooperative Cotton Growers Marketing Federation Ltd & Anr. Vs. Employees' Union & Anr., 1994 Supp (3) SCC 385; Pawan Alloys & Casting Pvt Ltd, Meerut Vs. U.P. State Electricity Board & Ors., (1997) 7 SCC 251; Ram Gopal Baheti Vs. Girdharilal Soni & Ors., (1999) 3 SCC 112; Sarnam Singh Vs. Dy. Director of Consolidation & Ors., (1999) 5 SCC 638; Govt. of Andhra Pradesh Vs. B. Satyanarayana Rao, AIR 2000 SC 1729; Arnit Das Vs. State of Bihar (2000) 5 SCC 488; M/s. Fuerst Day Lawson Ltd. Vs. Jindal Exports Ltd., AIR 2001 SC 2293; A-One Granites Vs. State of U.P. & Ors., (2001) 3 SCC 537; Suganthi Suresh Kumar Vs. Jagdeeshan, AIR 2002 SC 681; Director of Settlements A.P. & Ors. Vs. M.R. Apparao & Anr., (2002) 4 SCC 638; S. Shanmugavel Nadar Vs. State of T.N & Anr.., (2002) 8 SCC 361; State of Bihar Vs. Kalika Kuer Kalika Singh & Ors., AIR 2003 SC 2443; and Manda Jaganath Vs. K.S. Rathnam & Ors., (2004) 7 SCC 492).

In B. Shyama Rao Vs. Union Territory of Pondichery & Ors., AIR 1967 SC 1480, the Constitution Bench of the Supreme Court observed as under:-

"It is trite to say that a decision is binding not because of its conclusions but in regard to its ratio and the principles, laid down therein."

In State of U.P. & Anr. Vs. Synthetics & Chemicals Ltd. & Anr. (1991) 4 SCC 139, the Apex Court followed the aforesaid judgment in B. Shyama Rao and held as under:-

"Any declaration or conclusion arrived without application of mind or proceeded without any reason cannot be deemed to be declaration of law or authority of a general nature binding as a precedent.....A conclusion without reference to relevant provision of law is weaker than even casual observation."

Similar view has been reiterated in Divisional Controller, KSRTC Vs. Mahadeva Shetty & Anr., (2003) 7 SCC 197, observing that casual expressions in a judgment carry no weight at all, nor every passing remark, however eminent, can be treated as an ex-cathedra statement having the weight of authority."

9. In **N. Bhargavan Pillai Vs. State of Kerala, AIR 2004 SC 2317** (para 14) the Apex Court said, if a view has been expressed without analysing the statutory provision, it cannot be treated as a binding precedent and at the most is to be considered as having been rendered per incuriam. The same law has been reiterated in **Faujdar Vs. Deputy Director of Education and others, 2006 (3) AWC 2243.**

10. In **Civil Misc. Writ Petition No. 47754 of 2005 (M/s J.K. Construction Engineers and others Vs. Union of India and others)** decided on 28.02.2006, a Division Bench of this Court held:-

"The doctrine of per incuriam is applicable where by inadvertence a binding precedent or relevant provisions

of the Statute have not been noticed by the Court."...(Para 106)

11. Similar view has been taken by another Division Bench in **Brahma Prakash Vs. State of U.P. & other- 2006 (2) ESC 1017.** In para 40 of the judgment this Court held as under-

"Thus in view of aforesaid discussion, it is clear that while rendering the decision in Radha Krishna Gupta's case earlier Division Bench of this Court with all respect did neither ascertain the ratio of decisions referred in the judgment, nor discussed, as to how the factual situation fits in with the fact and situation of the decision on which reliance was placed. Contrary to it the decision of Hon'ble Apex Court which requires consideration of various factors in this regard, referred herein before in our judgment has been completely ignored by the Division Bench, therefore, being a decision given per incuriam, cannot be held to be binding authority under law."

12. In the judgements referred to above, the aforesaid doctrine of *per incuriam* has been discussed in detail and it has been held that a judgment *per incuriam* does not lay down a binding precedent.

13. Learned counsel for the petitioner drew attention of this Court to a decision of Hon'ble Single Judge of Writ Petition No.1507 (S/S) of 2001 connected with writ petition No.3538 (S/S) of 2000 and writ petition No.2557 (S/S) of 2000 decided on 22.8.2008 wherein this Court observed that fundamental rule 56(a) provides that employee belonging to Group D shall retire at the age of 60 years and also that Rule 2 of U.P. Consolidation Lekhpal Service Rules, 1978 provides age of retirement of Consolidation Lekhpal as 60 years and said that in view of the aforesaid decision, the petitioner is entitled to retire on attaining the age of 60 years.

14. I do not go into the question as to whether Consolidation Lekhpal become a Group C employees though earlier it was Group D employees. Even if the petitioner is considered to be a Group D employee, Fundamental Rule 56 (a) and (b) nowhere contemplate that all Group D employees shall retire on attaining the age of 60 years but it talks of "inferior service". Reference has been made to the Government Order dated 28th July 1987 which reads a Group D service for all purposes attracting the provision retiring the person at the age of 60 years. Suffice it to mention that Fundamental Rule 56 has been inserted by U.P. Legislature Enactment i.e. U.P. Act No. 24 of 1975 and therefore cannot be altered, amended or changed by executive order.

15. Fundamental Rule 56 only talks of the age of retirement at 60 years of an "inferior service" and not Group 'D' employee. The petitioner nowhere claim that he was a member of "inferior service". Therefore, he was rightly retired on attaining the age of 58 years.

16. So far as U.P. Consolidation Lekhpal Service Rules, 1978 is concerned the learned counsel could not show any provision therein laying down a particular age of retirement of Consolidation Lekhpal. Rule 2 of 1978 Rules declares Consolidation Lekhpal Service comprising Group D posts. It does not talk of age of retirement. Apparently

reference to 1978 Rules for this purpose also is erroneous and is per incurium.

17. So far as Government Order dated 28th July, 1987 is concerned, suffice it to mention that no such amendment as a matter of fact was made under Fundamental Rule 56 since by legislative enactment it came into existence i.e. by U.P. Act No.24 of 1975 and therefore under proviso to Article 309 the same could not have been amended. Moreover, this question has also been considered and decided by Full Bench in **Surya Deo Mishra Vs. The State of U.P. & Anr., 2006(5) AWC 5306** and the court in para 21 said:

"learned Additional Advocate General for the State respondent has urged that the two cases of Shubh Nath Dubey and Srikant Shukla (Supra) were not correctly decided. He has urged that the age of superannuation for Government servants is provided under Rule 56(3) of the Fundamental Rules Chapter II part 2 to 4. The age of superannuation of all the Government servants of inferior category was 60 years. .... A perusal of the decisions in Shubh Nath Dubey and Srikant Shukla (Supra) shows that the provision relating to higher pay scale and treating drivers as 'technical employees' were neither brought to the notice of the Court nor were considered. .... In Our opinion, the aforesaid two decisions have not been correctly decided and as such they are hereby over-ruled."

18. In view of the aforesaid, since very foundation of the writ petition is *nonest* hence no relief can be granted to the petitioner.

19. At this stage, learned counsel for the petitioner submitted that the petitioner ought to have been provided all retiral benefits treating to have retired on attaining the age of 58 years. but the said benefits have not been paid so far.

20. Suffice it to mention that in case retiral benefits have not been paid to the petitioner treating to have retired on attaining the age of 58 years, the same shall be paid to him expeditiously and in any case within three months from the date of production of a certified copy of this order.

21. With the aforesaid direction the writ petition is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 23.09.2011

BEFORE
THE HON'BLE S.K. SINGH, J.
THE HON'BLE SUDHIR AGARWAL,J.

Service Bench No. - 1565 of 1998

Ram Kripal Srivastava ...Petitioner
Versus
U.P.P.S.T. Lucknow ...Respondent

Counsel for the Petitioner:
Sri P.N. Singh

Counsel for the Respondents:
C.S.C.

U.P. Fundamental Rule -54-B (3) and (5)-Reinstatement with punishment of denial of full salary during suspension period-except the subsistence allowance-authority concern bound to give notice in writing prior to proposed punishment-no notice opportunity given-which entails civil consequences-held-not sustainable.

Held: Para 25

Here also, admittedly, the procedure prescribed in Fundamental Rule 54-B has not been followed. Denial of full salary vide impugned order is without affording any opportunity to the petitioner by way of issuing a show cause notice. The impugned order in so far as it denies full salary during the period of suspension without any notice to the petitioner is thus illegal and liable to be set-aside.

Case law discussed:

1999 (3) SCC 679; JT 2005 (8) SC 425; JT 2006 (1) SC 444; AIR 2007 SC 199; 2008 (4) SCC 1; JT 2008 (4) SC 577; JT 2007 (2) SC 620; AIR 2008 SC 553; Shant Deo Tripathi Vs. State of U.P. and others (Writ A-1019 of 2002 decided on 16.9.2011); (1993) 4 SCC 727; (1991 SCC (1) 588 =JT 1990 (4) 456); 2008 (8) ADJ 243=2008 (4) ESC 2679; Uma Shankar Purwar Vs. The Principal Secretary, Food and Civil Supplies, Government of U.P., Lucknow and others (Writ Petition No.9519 of 2007, decided on 14.9.2009) in para 7

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

1. This writ petition is directed against the judgment dated 18.5.1998 of U.P. Public Services Tribunal (hereinafter referred to as the Tribunal) in Claim Petition NO.477/1/90 whereby it has dismissed the claim petition of petitioner with cost of Rs. 500.

2. The aforesaid claim petition was filed challenging the order of punishment i.e. dismissal dated 22.5.1979 whereby the petitioner was dismissed from the post of Collection Amin as a result of departmental inquiry in which certain charges were found proved against him.

3. The facts in brief giving rise to the present dispute are as under:

4. The petitioner was appointed as Collection Amin in 1952. He was placed under suspension on 26.7.1978 and a charge sheet was issued on 26.12.1978. The petitioner submitted reply dated 5.3.1979 denying all the charges. Thereafter oral inquiry was held. Inquiry Officer submitted report on 6.5.1979 whereafter order of punishment was passed on 22.5.1979 by District Magistrate, Shahjahanpur, dismissing the petitioner from service and confining his salary to the extent of subsistence allowance paid during the period of suspension.

5. Learned counsel for the petitioner submitted that a criminal investigation was initiated against him pursuant to an FIR lodged on 3.12.1978 under Section 409 IPC and during pendency of criminal Investigation/Trial, for the same charge, no departmental inquiry could have been conducted, hence the entire proceedings is vitiated in law. He further submitted that relevant documents were not supplied to him and copy of inquiry report was also not supplied before passing order of punishment. Hence, disciplinary proceedings had been conducted in utter violation of principles of natural justice. Lastly it was contended that in criminal proceedings he was already acquitted and, therefore, in the departmental inquiry based on same transaction, no punishment could have been imposed. The learned Tribunal has erred in law in dismissing the claim petition and sustaining the order of dismissal.

6. We have heard learned counsel for the parties and perused the record.

7. A criminal case against an employee does not bar the employer from initiating disciplinary proceedings in respect to charge of misconduct. In

criminal matter it is the allegation of committing an offence under a statute while in the disciplinary proceedings it is the conduct of Government employee which is under investigation. The nature of proceedings, procedure , level of standard of proof etc. are different and distinct in two kinds of proceedings.

8. It is now well settled that departmental proceedings can proceed simultaneously with criminal proceedings and there is no bar as such therein as held in **Capt. M. Paul Anthony Vs. Bharat Gold Mines Ltd. & Another 1999 (3) SCC 679.** It has been held that departmental as well as criminal, both the proceedings, can go on simultaneously as there is no bar in their being conducted simultaneously. The question whether during pendency of criminal proceeding, the departmental proceeding should be stayed depends upon the facts and circumstances of individual case.

9. In **Ajit Kumar Nag Vs. General Manager I.O.C. JT 2005 (8) SC 425**, the Apex Court said that the procedure followed in both the cases as well as subject matter of departmental enquiry and criminal proceeding has different scope and it cannot not be said, when a criminal proceeding is going on in a particular criminal charge, in that regard, the departmental proceeding cannot be allowed to proceed.

10. Same view has been reiterated subsequently, in Chairman/ Managing Director TNCS **Corporation Ltd. & others Vs. K. Meerabai JT 2006 (1) SC 444, Suresh Pathrella Vs. Oriental Bank of Commerce AIR 2007 SC 199 and Union of India & others Vs. Naman Singh Shekhawat 2008 (4) SCC 1.**

11. Referring to **Capt. M. Paul Anthony (supra), the Apex Court in Managing Director, State Bank of Hyderabad & another Vs. P. Kata Rao JT 2008 (4) SC 577** observed that legal principle enunciated to the effect that on the same set of facts, the delinquent shall not be proceeded in a departmental proceedings and in a criminal case simultaneously, has, however, been deviated from. It it also said that the dicta laid down by the Apex Court in Capt. M. Paul Anthony (supra), though has remained unshaken but its applicability depend on the facts and situations obtained in each case.

12. Similarly, in **Noida Entrepreneurs Assn. Vs. NOIDS & others JT 2007 (2) SC 620,** the Court has summarised following conclusions deducible from various judgments, namely:

"(i) Departmental proceedings and proceedings in a criminal case can proceed simultaneously as there is no bar in their being conducted simultaneously, though separately.

(ii) If the departmental proceedings and the criminal case are based on identical and similar set of facts and the charge in the criminal case against the delinquent employee is of a grave nature, which involved complicated questions of law and fact, it would be desirable to stay the departmental proceedings till the conclusion of the criminal case.

(iii) Whether the nature of a charge in a criminal case is grave and whether

complicated questions of fact and law are involved in that case, will depend upon the nature of offence, the nature of the case launched against the employee on the basis of evidence and material collected against him during investigation or as reflected in the charge-sheet.

(iv) The factors mentioned at (ii) and (iii) above cannot be considered in isolation to stay the departmental proceedings but due regard has to be given to the fact that the departmental proceedings cannot be unduly delayed.

(v) If the criminal case does not proceed or its disposal is being unduly delayed, the departmental proceedings, even if they were stayed on account of the pendency of the criminal case, can be resumed and proceeded with so as to conclude them at an early date, so that if the employee is found not guilty his honour may be vindicated and in case he is found guilty, the administration may get rid of him at the earliest."

13. A similar view has also been taken in **Indian Overseas Bank Vs. P. Ganesan & others AIR 2008 SC 553.** Following the above exposition of law laid down by Apex Court, this Court in **Priti Chauhan Vs. State of U.P. and others 2008(9) ADJ 388** and **Shant Deo Tripathi Vs. State of U.P. and others (Writ A-1019 of 2002 decided on 16.9.2011)** has taken the same view.

14. There appears to be four charges levelled against the petitioner. Charge no.1 relates to realisation of certain amount of arrears from an individual but not deposited in Government revenue. The said misappropriation of money amounts to embezzlement but simultaneously it also constitute a conduct unbecoming of a Government Servant and for the purpose of departmental inquiry it is the latter aspect which has to be seen. Similarly, charge no.2 relates to removal of certain documents from official record and temporary embezzlement of public revenue. Charge no.3 relates to tampering and forgery and charge no.4 relates to violation of Para 133 of Collection Manual in respect to maintenance of record so that collection of revenue and its deposit in the treasury could have been verified and checked. It thus cannot be said that the aforesaid charges would have barred departmental inquiry in its entirety after acquittal of petitioner in criminal proceedings or that no departmental inquiry could have been initiated or proceeded during the pendency of criminal proceedings.

15. In the light of above authorities and looking to the facts of the case, the argument of learned counsel for the petitioner that during pendency of criminal case, for the same charge, no departmental inquiry could have been conducted, shatters down and is rejected.

16. Since the punishment has been imposed pursuant to departmental enquiry, mere acquittal in criminal case would have no consequence.

17. The next submission is regarding non supply of documents. Despite repeated query, learned counsel for the petitioner could not demonstrate as to which documents were not supplied to the petitioner and in what manner the same has prejudiced him.

18. The third submission that a copy of inquiry report was not supplied and the

proceeding is vitiated on that account has also no legs to stand. The petitioner has relied upon the Apex Court's decision in **Managing Director EICL Vs. B. Karunakar (1993) 4 SCC 727.** However, we find that in this very judgment the Apex Court has held that the orders of punishment which were passed before 20.11.1990 i.e., the date on which **Union of India and others Vs. Ramzan Khan (1991 SCC (1) 588 =JT 1990 (4) 456)** was decided, shall not be vitiated for non-supply of inquiry report and this law shall be operative in respect to orders of punishment passed on or after 20.11.1990. In the instant case, impugned order of punishment having been passed on 22.5.1979, mere non supply of inquiry report will not vitiate the departmental proceedings.

19. Lastly, it is contended that denial of full salary during suspension is not one of the punishment provided in the Civil Services (Classification,Control and Appeal) Rules, 1930 as applicable in U.P. (hereinafter referred to as CCA Rules) which were the Rules applicable at the relevant time when the disciplinary proceedings were conducted against the petitioner and as such, full salary could have been denied only in accordance with the procedure prescribed in Fundamental Rule 54-B after following the procedure laid down therein. No show cause notice under Fundamental Rule 54-B was issued and the procedure laid down therein was not followed. Hence, it is contended that the order of punishment insofar as it denies full salary during the period of suspension by forfeiting the same imposing it as a punishment on the petitioner is wholly illegal and without jurisdiction.

20. This submission in our view has substance and deserves sustenance.

21. Fundamental Rule 54-B contemplates a show cause notice separately where disciplinary authority is of the view that the delinquent employee should not be paid full salary for the period he was under suspension. The Fundamental Rule 54-B, relevant extract, reads as under:-

"54-B. (1) When a Government servant who has been suspended is reinstated or would have been so reinstated but for his retirement on superannuation while under suspension, the authority competent to order reinstatement shall consider and make a specific order-

(a) regarding the pay and allowance to be paid to the Government servant or the period of suspension ending with reinstatement or the date of his reinstatement on superannuation as the case may be; and

(b) whether or not the said period shall be treated as a period spent on duty.

. . . . . .

(3) Where the authority competent to order reinstatement is of the opinion that the suspension was wholly unjustified, the Government servant shall, subject to the provisions of sub-rule(8), to be paid the full pay and allowances to which he would have been entitled, had he not been suspended:

. . . . . .

(4) In a case falling under sub-rule (3) the period of suspension shall be treated as a period spent on duty for all purposes.

(5) In cases other than those falling under sub-rules (2) and (3), the Government servant shall subject to the provisions of sub-rules(8) and (9), be paid such amount (not being the whole) of the pay and allowances to which he would have been entitled had he not been suspended, as the competent authority may determine, ***after giving notice to the Government servant of the quantum proposed and after considering the representation, if any,*** *submitted by him in that connection within such period (which in no case shall exceed sixty days from the date on which the notice has been served) as may be specified in the notice.*

. . . . . .

22. A perusal of Sub-rules (3) and (5) of Fundamental Rule 54-B shows that the competent authority shall take a decision about the amount to be paid to the Government Servant during the period of suspension (not less than the subsistence allowance already received by him) after giving notice to him with respect to quantum proposed and after considering the representation, if any, made by him. The scope of the aforesaid decision is entirely different. The question as to whether full salary should be paid to the Government Servant or not, is not a kind of punishment provided under CCA Rules, 1930 as applicable in Uttar Pradesh but it is other than the punishment enumerated therein. However, it cannot be doubted that when disciplinary authority thinks that entire salary should not be paid to Government Servant for the period of suspension, such an order entails into civil consequences to the delinquent employee. Therefore consistent with the principles of natural justice, Fundamental Rule 54-B, Sub Rules (3) and (5), contemplate issuance of a show cause notice and thereafter an order needs be passed by the competent authority after considering representation, if any, of the delinquent employee. It is thus evident that along with order of punishment no decision can be taken by a competent authority to deny full salary to delinquent employee unless procedure prescribed under Fundamental Rule 54-B is observed.

23. It is well settled, when law requires something to be done in a particular way, it has to be done in that manner alone and not otherwise. This Court considered Fundamental Rule 54-B in **Akhilesh Kumar Awasthi Vs. State of U.P. and others, 2008(8) ADJ 243=2008(4) ESC 2679** and said as under:

"A bare perusal of the aforesaid provision makes it clear that before passing an order depriving the Government servant of full salary for the period of suspension or when he was out of employment, a show cause notice has to be issued to the concerned Government servant and only thereafter, the competent authority may pass appropriate order considering various aspects.

Admittedly, no such procedure has been followed, therefore, the impugned order, to the extent the petitioner has been denied arrears of salary for the period of suspension as well as during the period he was out of employment pursuant to the

dismissal order, which was modified by the revisional order, is set aside. The writ petition is, accordingly, allowed partly. . . . . ."

24. Following **Akhilesh Kumar Awasthi (Supra) this Court in Uma Shankar Purwar Vs. The Principal Secretary, Food and Civil Supplies, Government of U.P., Lucknow and others** (Writ Petition No.9519 of 2007, decided on 14.9.2009) in para 7 held as under:

"7. Admittedly, no such procedure has been followed by the respondents in the case in hand and on the contrary treating as if withholding a salary for the period of suspension can also be imposed as a punishment under the rules though the same is not one of the punishment prescribed under the rules. As a result of departmental inquiry, the authority concerned is empowered to deny full salary during the period of suspension as a consequence of reinstatement but final order can be passed after deciding whether the period of suspension was wholly unjustified or not and then the quantum of amount."

25. Here also, admittedly, the procedure prescribed in Fundamental Rule 54-B has not been followed. Denial of full salary vide impugned order is without affording any opportunity to the petitioner by way of issuing a show cause notice. The impugned order in so far as it denies full salary during the period of suspension without any notice to the petitioner is thus illegal and liable to be set-aside.

26. In the result, the writ petition partly succeeds. The impugned order dated 18.5.1998 imposing punishment is set aside only to the extent it denies full salary to the petitioner for the period of suspension. The order of the Tribunal shall stand modified to this extent. The matter is remanded to the respondent competent authority to take a fresh decision on this aspect of the matter in accordance with the procedure prescribed under Fundamental Rule 54-B and the observations made hereinabove.

27. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 08.09.2011

BEFORE
THE HON'BLE RAJIV SHARMA, J.
THE HON'BLE DR. SATISH CHANDRA, J.

Writ Petition No. 3314 (SS) of 2009

Diploma Engineers Sangh PWD and others ...Petitioners
Versus
State of U.P. and others ...Opp. Parties

Counsel for the Petitioner:
Sri Sameer Kalia

Counsel for the Respondent:
C.S.C.
Sri Rajnish Kumar
Sri Sidharth Dhaon

P.W.D. U.P. Subordinate Engineer Services Rules, 1951-Rule-19, 20, 23 readdress U.P. Services of Engineers (Building of Road Branch) Class II Rules 1936-rule-12-Promotion on Post of Asst. Engineers-Anjani Kumar Mishra case-Apex Court determined promotion Quota 41-66% on occurred vacancy-petitioners having 20 years long period of service as Juniors Engineers-obtained Decree pursuant to judgment-qualifying examination held in August 2007-those

junior Engineers obtained Decree prior to date of examination-admittedly from 1997-Rule 12 of 1936 provides for promotion-seniority cum suitability-wrongly denied from consideration of promotion-when no examination held in every calender year-the day on which screening test-held-petitioners are eligible for consideration-order quashed followed with consequential direction.

Held: Para 41, 47, 48

We are of the considered opinion, the vacancies existing in promotional quota as on 30.6.2004 are to be filled in accordance with provisions contained in United provinces Service of Engineers (Buildings and Roads Branch) Class-II Rules, 1936 in view of the judgment and order passed by this Court in the case of Anjani Kumar Mishra, which has been approved by the Apex Court.

In these circumstances, there was no justification to exclude the petitioners from the recruitment exercise. There was also no justification for excluding the petitioners from the impugned eligibility list because the petitioners had obtained their technical qualification prior to 30.6.2008 and as per provisions of '1970 Rules' they fall within the zone of eligibility.

It is an admitted position that the first eligibility was prepared on 26.10.2007 after the declaration of qualifying examination result, as such, the date of eligibility, as per provisions of Rule 3 (i) Rules, 1969 would be the 31st December, 2007. Therefore, non-inclusion of the names of Junior Engineers, who possessed the technical degree, prior to 31.12.2007 is wholly unjustified as these Junior Engineers were having technical degree prior to the preparation of the eligibility list for promotion, i.e. 26.10.2007.

Case law discussed:

(2007) 1 UPLBEC 260; Writ petition no. 9127 of 2003, Vijay Kumar & others vs. State of U.P. and others; AIR 1981 SC 41; Writ petition no. 3428 (SS) of 2001, Diploma Engineers Sangh, Public Work department vs. State of U.P. And others

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

1. Heard Sri S. K. Kalia, Senior Advocate assisted by S/Sri Sameer Kalia, M.D. Singh Sekhar, Senior Advocate, C. B. Pandey, Dr. L.P. Misra, I.P.Singh, Deepak Srivatava, Vikas Budhwar, Rohit Tripathi, Arun Kumar Shukla, Rajeev Singh, S.K.Yadav Warsi, S.P.Singh, K. S. Pawar, Harshvardhan Singh, Ms.Madhumita Bose for the petitioners and S/Sri Prashant Chandra, Sri Kapil Deo, Senior Advocates, J. N. Mathur, Additional Advocate General assisted by Sri H. P. Srivastava, Additional Chief Standing Counsel, Siddarth Dhaon, Rajnish Kumar, Anupam Mehrotra etc. for the opposite parties.

2. The aforesaid bunch of writ petitions relates to promotion from the post of Junior Engineer to the post of Assistant Engineer in the Public Works Department. Promotion to the post of Assistant Engineer has long checkered history. In the past, the matter went upto Hon'ble Apex Court on a number of occasions and in spite of decisions rendered in the cases of Diploma Engineers' Sangh, P.D. Agrawal and Anjani Kumar Misra, the matter could not be settled and now again the controversy relating to promotion has arisen.

3. In all these writ petitions, the dispute revolves amongst the Junior Engineers Degree Holders with Diploma holders (who subsequently obtained the degree) with regard to promotion on the vacancies pertaining to the year 1997-98 till selection year 2003-04.

4. Petitioners were appointed as Junior Engineers in the Public Works Department in the State of Uttar Pradesh in accordance with the United Provinces Service of Engineers (Buildings and Roads) Branch Class-II, Rules, 1936 (hereinafter called the '1936 Rules'). At the time of appointment, the petitioners were possessing only Diploma in Civil Engineering. However, it is stated that subsequently, the petitioners have also obtained Bachelors Degree in Civil Engineering.

5. Rule (iv) of the aforesaid 1936 Rules provides that for the post of Assistant Engineers, the recruitment can be made by direct recruitment as well as by promotion. As regard recruitment by promotion, Rule 5 (iv) specifically provides that the recruitment on the post of Assistant Engineer may be made by promotion from the members of United Provinces Subordinate Engineer Service or Upper Subordinates in the Public Works Department (Building and Roads Branch) which have shown exceptional merit. Further, Rule 9 (2) of the said Rules provides that for promotion under Rule 5 (iv) the qualifying examination has to be passed. Rule 9 (2) was amended vide United Provinces Service of Engineers (Buildings and Roads Branch) (Class-II) (Amendment) Rules, 1966 whereby under amended rule, Rule 5 (iv) the incumbent should either pass qualifying examination or hold technical qualification as prescribed in Clause (I) of the Rules meaning thereby he may hold the Degree in Engineering. Rule 12 as amended by U.P. Service of Engineers (Buildings and Roads Branch) (Class-II) (Second Amendment) Rules, 1992 provided that recruitment by promotion to the post of Assistant Engineer shall be made on the basis of "seniority subject to the rejection of unfit" in accordance with U.P. promotion by Selection in Consultation with Public Service Commission (Procedure) Rules, 1970 as amended from time to time.

6. It has been urged that the department did not hold qualifying examination after the year 1970. Though initially no quota has been fixed for recruitment on the post of Assistant Engineers through promotion, but latter quota was fixed for recruitment on the post of Assistant Engineers through promotion and, therefore, the vacancies which were falling within the promotion quota were to be filled up only by way of promotion but the same could not be filled as the department did not hold qualifying examinations after the year 1970. The Rules referred to above, were subjected to various amendments and the department was helpless to cope up with the amended rules for the purposes of making promotion on the post of Assistant Engineers and this situation generated the litigation and after a long drawn litigation,ultimately the controversy was set at rest, on 3.11.2006, in ***Anjani Kumar Misra's vs. State of U.P. and others*** (2007)1 UPLBEC 260 case and the High Court has determined the vacancies of promotion quota from the year 1997-98 till selection year 2003-04. Of late, the qualifying examination was held and the result was declared on 24.10.2007.

7. The grievance of the petitioners in nutshell is that they were fully eligible for promotion on the post of Assistant Engineer as they were having Degree in Engineering on the date when the eligibility list was prepared but they were

denied promotions solely on the ground that the petitioners did not possess Degree in Engineering on 1st July, 2003 and the private respondents were promoted on the post of Assistant Engineer. According to the petitioners, the posts were lying vacant and the petitioners having completed 7 years of satisfactory service on the post of Junior Engineer ought to have been promoted but on account of hostile treatment they were denied their legitimate claim.

8. Sri M.D. Singh Sekhar , Senior Advocate appearing on behalf of the some of the petitioners submitted that Rule 19 of The Overseer/Junior Engineer Service Rules, 1951, talks about the probation period of two years. Rule 22 talks about the departmental examination which is required to be passed within the prescribed period with condition that if any candidate does not pass the departmental examination within the said period the increment in pay shall be withheld. Rule 23 talks about the confirmation by clearly stating therein that the confirmation after completing a probation period would be subject to passing the departmental examination.

9. Another set of rules in the name and style of **"Qualifying Examination Rules for Promotion in Class-II Engineering Service"** were enacted. In the said rules in the heading of eligibility ;(पात्रता) contemplates a provision that all the Junior Engineers and Junior Engineers (Technical) shall be eligible for promotion on the post of Assistant Engineer after confirmation and completion of seven years service as Junior Engineer. Rule 6 of Appendix 25 in the head of eligibility makes a provision that those Junior Engineers who have passed AMIE Examination (Part 'A' and Part 'B') or passed B.E./B. Tech. Examination will be considered for their promotion on the post of Assistant Engineer and there would be no rider for rendering seven years of service as Junior Engineer.

10. Clarifying the position, it has been submitted that from the Rules, referred to above, it is clear that no Junior Engineer could be promoted on the post of Assistant Engineer until or unless he passed the Qualifying Examination or passed AMIE Examination (Part 'A' and Part 'B') or passed B.E./B.Tech. examination. The combined reading of Appendix 25 of Qualifying Examination Rules for promotion on Class-II Engineering Services reveals that no Junior Engineer could be promoted on the post of Assistant Engineer until or unless he is confirmed on the post of Junior Engineer and had not passed either the Qualifying Examination, AMIE Examination (Part 'A' and Part 'B') or passed B.E./B. Tech. examination subject to relaxation of service of seven years as a Junior Engineer provided to the Junior Engineers who passed the AMIE Examination (Part 'A' and Part 'B') and B.E./B. Tech. Examination.

11. From the aforesaid Rules, it is further evident that even the Degree Holders who had been appointed as Junior Engineers until or unless they are confirmed on the said post of Junior Engineer, they cannot be promoted. Whereas in the present case, the incumbents who were not confirmed on 01.07.2003 and were not having the minimum criteria for promotion on the post of Assistant Engineer but de hors to the provisions of Act and Rules by the

promotion order dated 2.08.2008, the appointees between the period August, 2001 to June, 2003 were promoted on the post of Assistant Engineer even prior to their completion of probation period and confirmation.

12. It has also been pointed out that some of the Junior Engineers who were appointed in April, 2003 and completed the probation period in the year, 2005 they have also been promoted on the post of Assistant Engineer treating them eligible for promotion on 1.7.2003 de hors to the provisions of Act and Rules by two promotion lists dated 2.8.2008 and 3.7.2009.

13. Replying to the argument raised by some of the respondents that for promotion on the post of Assistant Engineer, only appointment on the post of Junior Engineer on a substantive vacancy is sufficient, it has been argued on behalf of the petitioners that such an argument is absolutely contrary to the provisions of Rules contained in **"Public Works Department, Uttar Pradesh Subordinate Engineering Service Rules, 1951"** The relevant part of Rules 1951, Rule 3 (g) which defines Member of Service is as follows:-

"Rules, 1951 Part I Rule 3 (g) 'Member of the Service' means a person appointed in substantive capacity under the provisions of these rules or of rules enforced previous to the introduction of these rules of rules to a post in the cadre of the service. As such a member will be designated as an 'Overseer'. "

14. From the combined reading of Public Works Department, Uttar Pradesh Subordinate Engineering Service Rules, 1951 [in short referred to as **'1951 Rules'**], particularly, Rules 3(g),19,20 and 23, it is absolutely clear that Rule 3(g) talks about the substantive capacity, and not about the appointment on substantive capacity and any Junior Engineer appointed under the Rules, 1951 to gain substantive capacity for being member of the cadre of service required to fulfill the conditions as envisaged under the provisions of Rule 19, Rule 22 and Rule 23, i.e. any appointee on the post of Junior Engineer under the Rules, 1951 until or unless had not completed two years probation period and passed the departmental examination and had not been confirmed, will be deemed to continue as a probationer Overseer or Junior Engineer. Only after confirmation, any probationer could be said to be a member of service as defined in sub rule 3(g) of '1951 Rules'.

15. It has also been urged that if the arguments as advanced by the private respondents are accepted that the Diploma Holder Junior Engineer until or unless does not complete seven years service as a Junior Engineer would not be eligible for promotion on the post of Assistant Engineer then it will create an awkward situation, but in practice, the Diploma Holder Junior Engineers are always being permitted to appear in the Qualifying Examination for promotion after completion of three years service and in the case, any such Diploma Holder Junior Engineer passed the Qualifying Examination, but he would not be considered for promotion on the post of Assistant Engineer until or unless he completed the seven years service as Junior Engineer. It is only on account of the prevailing practice and interpretation of the provisions of Appendix 25, the

Diploma Holder Junior Engineers who have been appointed during the period August, 2001 to June, 2003 have not been permitted to appear in the Qualifying Examination, 2007 on the pretext that they have not completed three years service on 1.7.2003. On the similar anomaly, the recruited Degree Holders on or against substantive vacancy are not eligible without there being confirmation for promotion on the post of Assistant Engineer.

16. It has also been asserted on behalf of the petitioners that in utter disregard of the statutory provisions of the Act and Rules, the Engineer-in-Chief (Head of the Department of P.W.D.) after the Qualifying Examination, 2007 prepared the eligibility list on 26.10.2007 wherein the names of the Degree Holder Junior Engineers appointed during the period August, 2001 to June, 2003 their names had not been included in the said list on the criteria of eligibility contemplated in the Manual and meaning of 'member of service' defined in Rules, 1951 (Part I) 3 (g). Surprisingly, later on, de hors to the provisions of Act and Rules the Degree Holder Junior Engineers appointed during the period August, 2001 to June, 2003 were promoted vide promotion list dated 2.8.2008 from serial no. 13 to serial no. 51. Further, twenty seven Degree Holder Junior Engineers appointed during the period August, 2001 to June, 2003 have been accorded promotion by order dated 3.7.2009.

17. It is an admitted position that Qualifying Examination as per Rules for Promotion in Class-II Engineering Services was held in the year, 2007 and the first eligibility list was prepared on 26.10.2007, and as per the direction of the Hon'ble Supreme Court in para 14 given in the ***Diploma Engineers Sangh's case*** (2007 (5) ADJ 63 SC), a list of all candidates in the feeder post mandatorily required to be prepared in order of seniority and, thereafter, the suitability for promotion of the candidate is required to be adjudged.

18. Inviting our attention towards the decision rendered by the Apex Court in ***Diploma Engineers' Sangh*** [supra] decided on 20.03.2007 (Civil Appeal No.3228 of 2005) and reported in 2007 (5) ADJ 63 (S.C.), it was urged that the question had already attained finality between the parties with regard to the promotion on the vacancies for the post of Assistant Engineer prior to 30.6.2004 and as per the order of Hon'ble Supreme Court, the date of eligibility for promotion, as per the Qualifying Examination Rule, 2007 is required to be seen on the day of preparation of the eligibility list i.e. on 26.10.2007, but surprisingly, the opposite party had discriminated and excluded the names of all those Junior Engineers, who passed the technical degree prior to the day of preparation of the eligibility list for promotion i.e. on 26.10.2007 and as such, it has been vehemently argued that the promotion accorded to the Degree Holder Junior Engineers who have been recruited during the period August, 2001 to 30th June, 2003 are liable to be set aside and the Junior Engineers who obtained the technical degree prior to the date of first eligibility list prepared on 26.10.2007 (after holding the Qualifying Examination and declaration of result by U.P.P.S.C. in pursuance of the direction of Hon'ble Supreme Court dated 20.03.2007) they are entitled to be considered for

promotion on the post of Assistant Engineer in accordance with law.

19. On behalf of the private respondents, it has been submitted that the backlog vacancies existing in the promotional quota as on 30.6.2004 and are to be filled up in accordance with provisions contained in 1936 Rules as well as per provisions of U.P. Promotion by Selection in Consultation with Public Service Commission (Procedure) Rules, 1970, which are also applicable to the U.P. Public Works Department, the promotion to the post of Assistant Engineer (Civil) is to be made after consultation with the Public Service Commission. In compliance of the order dated 20.3.2007 passed in the case of Diploma Engineer Sangh vs. State of U.P. and others (supra), qualifying examinations were held by the Public Service Commission from 12.8.2007 to 18.8.2007.

20. According to private respondents, the petitioners have no *locus standi* to maintain the writ petition as, admittedly, the petitioners have obtained degree in Civil Engineering in the year 2006-2007 and as such they cannot be considered for promotion against the backlog vacancies existing in quota of promotion for the year 2003-04. It is well settled principle of law that writ petition at the instance of persons, who on the cut-off date were not holding necessary qualification, is not maintainable.

21. Clarifying the position, it has been submitted that the eligibility list dated 21.1.2009 was prepared in accordance with the provisions of the U.P. Promotion By Selection in Consultation with Public Service Commission (Procedure) Rules, 1970, and the names of private respondents were incorporated in the said eligibility list as they were having requisite qualification of degree in Civil Engineering prior to 1.7.2003, which is the cut off date for having the requisite qualification for the purpose of being considered for promotion to the post of Assistant Engineer (Civil) against the backlog vacancies existing in the quota of promotion for the year 2003-04. On the other hand, some of the petitioners did not possess the degree in Civil Engineering on the cut off date and subsequently acquired degrees in the year 2007 and also because the petitioners could not pass the qualifying examination held by the department, therefore, their names were not incorporated in the eligibility list dated 21.1.2009. As the petitioners were not having requisite qualification on the cut off date, they were not considered for promotion against the 33 backlog vacancies existing in the quota of promotion for the year 2003-04, whereas the private respondents, who were fully eligible prior to cut off date in terms of Rule 9 of 1936 Rules, were promoted vide order dated 3.7.2009 and there is nothing wrong in it.

22. It has been next contended that the assertion of the petitioners that they were eligible for promotion and the impugned orders promoting the private respondents is invalid, is wholly incorrect as for the purpose of being considered for promotion to the post of Assistant Engineer (Civil), a Junior Engineer (Civil) is required to pass qualifying examination held by the department or to obtain degree in Civil Engineering from recognized institute in accordance with Rule 9(i) of 1936 Rules.

23. Elaborating further, it has been argued that the post of Assistant Engineer (Civil) in the Public Works Department is a selection post and as such seniority alone is not the criteria for promotion. The seniority of a candidate will be of relevance only once the candidate is having a degree in Civil Engineering in terms of Rule 9(i) of 1936 Rules read with Rule 4 and Rule 6 of U.P. Promotion By Selection in Consultation with Public Service Commission (Procedure) Rules, 1970. For the back vacancies existing in quota of promotion for the year 2003-04 the cut off date was 1.7.2003 and as on the said date, none of the petitioners possessed the minimum qualification and as such merely on the basis of seniority, they could not have been considered for promotion to the post of Assistant Engineer (Civil) and, therefore, their names were rightly not incorporated in the eligibility list on the claim raised by them on the basis of seniority.

24. As regard to the applicability of the judgment rendered in ***Diploma Engineers Sangh vs. State of U.P. and others***(supra) decided on 20.3.2007, it has been argued that the issue decided by the Apex Court that qualifying examination would mean written examination. Therefore, it has no concern with the controversy involved in the present writ petitions and has nothing to do with the promotion of the private respondents as Assistant Engineer as they were fully eligible as per rules for promotion on higher post being degree holders before the cut-off date. Further, the assertion of the petitioners that in the said judgment direction given for filling up the vacancies is wholly incorrect. As a matter of fact, the direction for filling of backlog vacancies in quota of promotion was allegedly issued in ***Anjani Kumar Mishra vs. State of U.P. others*** (supra).

25. On behalf of the State Government, it has been stated that as per directions of the Hon'ble Supreme Court under 41.66% promotional quota the year wise vacancies of the selection year 1997-98 to selection year 2003-04 were calculated, which came to 186 and intimation was sent to the State Government by the Engineer-in-Chief, PWD, Lucknow. It has also been pointed out that this Court vide judgment and order dated 3.11.2006 passed in Writ Petition No. 2750 (SS) of 2004 and other connected writ petitions, had cancelled the promotions of the persons promoted on the post of Assistant Engineer pertaining to selection years 1997-98 (9 vacancies), 1998-99 (32 vacancies), 199-2000 (21 vacancies) and 2000-2001 (11 vacancies). Junior Engineers, who were promoted being aggrieved by the aforesaid judgment and order dated 3.11.2006 preferred Special Leave petitions and the Apex Court had granted stay orders, therefore, excluding 73 posts out of total 186 vacancies, selection was held to fill up 113 vacancies under the provisions of Rules of 1936. Consequently, 95 selected candidates were promoted vide order dated 2.8.2008.

26. It has been vehemently argued that there is no irregularity in the process of selection in making these promotions. The letter dated 27.2.2009 sent by the Engineer-in-Chief is perfectly legal and justified. It is also wrong to allege that the petitioners were not afforded opportunity to appear in the Test. In fact, members of the Sangh had deliberately not participated in the qualifying examination. Promotions of 33

candidates, whose names find place in the list appended to the letter dated 27.2.2009 were eligible and possess prescribed eligibility qualification.

27. Promotion to the post of Assistant Engineers in the Department of Public Works was governed by the U.P. Service of Engineers (Building and Road Branch) Rules, 1936 [in short referred to as 1936 Rules]. Later on the said 1936 Rules were superseded by U.P. Public Works Department Group-B Civil Engineering Service Rules, 2004 (in short referred to as '1936 Rules). The said 1936 Rules were amended vide notification dated 4.8.1987 prescribing the promotion quota. This Rule again went under alteration vide notification dated 25.9.1997 modifying the promotion quota of Degree holder junior Engineers and Diploma holder Junior Engineers. Both the aforesaid notifications were quashed by this Court vide its judgment and order dated 22.3.2002.

28. Later on, the State Government issued a Government Order dated 11.2.2003 whereby the provisions were made for holding interview examination for the purposes of eligibility test of Junior Engineers, who were not covered under the provisions of Rule 9(1). Validity of the aforesaid government order dated 11.2.2003 was again questioned before this Court in writ petition no. 9127 of 2003; ***Vijay Kumar & others vs. State of U.P. and others*** and vide judgment and order dated 16.7.2004 this Court set-aside the Government Order dated 11.2.2003 and provided that promotions shall be made strictly in accordance with the '1936 Rules' at the earliest.

29. Against the above said judgment and order of the High Court, Diploma Holder Engineers' Sangh filed Special Leave Petition No. CC 8440 of 2007, before the Apex Court, which was converted into Civil Appeal No. 3228 of 2005. Initially, an interim order was granted by the Hon'ble Supreme Court providing that any promotion made would be subject to the outcome of the Special Leave Petition. But this SLP which was converted into Civil Appeal filed before the Hon'ble Supreme Court was, however, finally, dismissed vide judgment and order dated 20/3/2007 by upholding the judgment of the Division Bench of this High Court with a further direction to the State Government to hold the qualifying examination qua diploma holders Junior Engineers within a period of four months. It was further provided that any Junior Engineer who has been promoted in pursuance of the interim order granted by the Hon'ble Supreme Court referred to above would continue on the promoted post on ad hoc basis only subject to his being regularly promoted in accordance with the Rules, 1936 and in case they fail to clear the qualifying examination such persons shall stand reverted to the original post of Junior Engineers.

30. After the dismissal of the aforesaid Civil Appeal, one Lakhan Lal has approached this Court at Allahabad seeking promotion on the post of Assistant Engineer in terms of the Government Order dated 24/9/2007 and judicial verdicts in this regard. Total 84 vacancies were required to be filled up by promotion in accordance with the Rules, 1936, and, therefore, required the Chief Engineer, Administration 'K', P.W.D. Lucknow to forward the list of suitable candidates category wise so that further

action may be taken. The State Government also refers to writ petition filed before this Court by one Shri Anjani Kumar Mishra, being Writ Petition No. 2750 of 2004 wherein the High Court vide judgment and order dated 03/11/2006 cancelled the promotion granted in respect of the 32 vacancies of the year 1998-99, 21 vacancies of the year 1999-2000; and 11 vacancies of the year 2000-2001. This led to filing of Special Leave to Appeal No. 8786 of 2006 before the Hon'ble Supreme Court, namely, ***Atibal Singh & Ors Vs. State of U.P.*** and Special Leave to Appeal No. 19037 of 2006, ***Jang Bahadur Singh & Ors Vs. B.D. Tripathi & Ors.*** The Hon'ble Supreme Court vide order dated 10/8/2007 has directed status quo to be maintained in respect of the aforesaid appellants.

31. Before proceeding further, it would be apt to reproduce various provisions of Service Rules governing the recruitment, confirmation etc.

32. Rule 5 of the '1936 Rules' deals with the source of recruitment to the post of Assistant Engineer and it reads as under:-

"5. Recruitment to the service shall be made by the Government :-

(i)by direct appointment from amongst engineer students who have passed out of the Thomson Civil Engineering College, Roorkee and who have completed a course of training the in the Buildings and Roads Branch as engineer students after consulting a permanent Board of Selection.;

(ii)by direct appointment after advertisement and after consulting a permanent Board of Selection;

(iii)by the appointment of officers in the temporary service of the United Provinces Public Works Department, Building and Roads Branch, after consulting a permanent Board of Selection;

(iv)by promotion of members of the united Provinces Subordinate Engineering Service or of Upper Subordinates in the Public Works Department, Buildings and Roads Branch, who have shown exceptional merit."

Rule-9 deals with the possession of qualification by a person for being considered for promotion on the post of Assistant Engineer and says as under:-

"9. (i) No person shall be recruited to the service under the provisions of rule 5 (i), 5 (ii) or 5 (iii) unless :-

(a) he holds the Engineering Certificate of the Thomson College, or

(b) he has passed the examination for, and is qualified by age for election to the Associate Membership of the Institution of Engineer (India), or

(c) he has obtained an Engineering degree of one of the universities mentioned in the appendix under the conditions prescribed therein, or

(d) he has passed sections A and B of the Associate Membership Examination of the Institution of civil Engineers; or

(e) he has passed the Associate-ship Examination of the City and Guilas Institute (Imperial College of Science and Technology, South Kersington) in Civil Engineering; and

(f) he has, if recruited under the provisions of rule 5 (ii), had at least two years' practical experience on important works connected with roads and buildings.

(ii) No officer shall be promoted to the service under rules 5 (iv) unless he has passed such qualifying examination which the Governor may prescribe."

33. By a notification dated 1.10.1966, Rule-9 of the '1936 Rules' which prescribed Technical Qualification for recruitment and promotion of Assistant Engineers was amended as under:-

"No officer shall be promoted to the Service (Under Rule 5 (a)(iii) and 5(b) (ii) unless he has passed such qualifying examination as the Governor may prescribed or unless he possesses any of the technical qualifications prescribed in clause (1) of this Rule."

34. Later on, the '1936 Rules' were amended from time to time fixing quota for direct recruits and promotion quota etc. which had been the subject matter in earlier writ petitions filed either by the Sangh or private individuals, a bird's eye view of which has been given in preceding paragraphs.

35. At this juncture it would be relevant to point out that determining the eligibility for the post of Junior Engineer is governed by Uttar Pradesh Public Works Department Subordinate Engineering Services, 1951 (in short referred as '1951 Rules'). Rule 3(g) defines 'Member of the Service' and it means a person appointed in substantive capacity under the provisions of these rules or of rules in force previous to the introduction of these rules. **Rule 19** talks about the probation period of two years. **Rule 22** provides about the departmental examination which is required to be passed within the prescribed period with condition that if any candidate does not pass the departmental examination within the said period the increment in pay shall be withheld. **Rule 23** deals with confirmation and provides that the confirmation after completing a probation period would be subject to passing the departmental examination. Relevant rules reads as under:-

"19. Probation:- *A person on appointment in or against a substantive vacancy shall be placed on probation for a period of two years.*

Provided that officiating and temporary service, is it is continuous, shall count towards the period of probation to the maximum extent of one year.

*22.**Department examination-** (1) All temporary and officiating overseers must pass the department examination prescribed in the Manual of Orders, Public Works Department, Volume I, within three years of jointing their appointment. If they fail to pass the above examination within the prescribed period their increment in pay shall be withheld. Subject to the orders of the Chief Engineer a stopped increment may be allowed to be drawn when the overseer*

has passed the examination, with effect from the first day of the month following that in which the examination, with effect from the first day of the month following that in which the examination is held, and the period during which the increment was withheld may also be allowed to be counted for purposes of further the increment in the time-scale. Arrears of increments may also be granted in special cases where failure to pass the examination was due to circumstances beyond the overseer's control.

(2)Candidate appointed to a substantive vacancy shall be required to pass the examination during the period of probation, if they have not already done so.

*23.**Confirmation**- Subject to the provisions of rule, 22 a probationer shall be confirmed in his appointment at the end of his period of probation, or extended period of probation, if the Chief Engineer considers him fit for confirmation and his integrity is certified."*

36. Thus, a person becomes a member of service when he is appointed in substantive capacity. For being substantively appointed, an incumbent has to at least complete the period of probation and a person who is not substantively appointed cannot be treated to be a member of service. This aspect of the matter has been considered by the Apex Court in **Baleshwar Das and others etc. v. State of U.P. and others,** AIR 1981 SC 41 on which reliance has been placed by the petitioners' Counsel. In paragraph 26 and 33 of the report, the Apex Court held as under:

"26. .... it falls that merely because the person is a temporary appointee, it cannot be said that he is not substantively appointed if he fulfills the necessary conditions for regular appointment such as probation and consultation with Public Service Commission etc. From this stand of the State Government if falls that temporary appointees, whose appointments have received the approval of the Public Service Commission and who have run out the two years of probation, must be deemed to be appointed in a substantive capacity.

33.Once we understand 'substantive capacity' in the above sense we may be able to rationalize the situation, if the appointment is to a post and the capacity in which the appointment is made is of indefinite probation, if the Public Service Commission has been consulted and has approved, if the tests prescribed have been taken and opposed, if probation has been prescribed and has been approved, one may well say that post was held by the incumbent in a substantial capacity."

37. As per Rules of Qualifying examination an eligible person can qualify the same in three years and the said examination be conducted each year. It is not in dispute that no qualifying examination was conducted since 1972 and for the first time it was conducted pursuant to the notification dated 3.8.1987.

38. At this juncture, it is pertinent to mention that in ***Anjani Kumar Mishra and others vs. State of U.P. and others*** [(2007) 1 UPLBEC 260], this Court disapproved the allocation of vacancies in the quota of promotion for the recruitment years 1997-98 to 2003-04 and directed for

allocation of vacancies in accordance with quota as provided in the G.O. dated 20.2.2003, which prescribed 41.66% quota for promotion and 58.34% quota for direct recruitment and ultimately calculated the number of vacancies in the quota of promotion as 186. Paragraphs 117 to 120, which are relevant in the present context are reproduced herein:-

"117. In view of the aforesaid settled legal position we further hold that there exists no statutory rule 5 and 6 in old 1936 rules with regard to the allocation of quota of direct recruitment and promotees and in our considered opinion the field is occupied and supplemented by executive order issued by the Government in this regard on 20.2.2003, as contained in Annexure 7 of Writ Petition No. 53133 of 2004 Pramod Shanker, which provides 58.34% quota for direct recruitment and 41.66% quota for promotees without demarcation of any separate quota for graduate and non-graduate incumbents of feeder cadre within the quota of promotion. It appears that the aforesaid Government order has been issued in compliance of direction of this Court contained in the decision of Aruvendra Kumar Garg's case, thus the vacancies falling in the quota of promotion were intended to be filled by the incumbents of feeder cadre without allocating any separate quota for promotion for graduate and non-graduate incumbents. The aforesaid Government order dated 20.2.2003 was still in force prior to commencement of new 2004 Rules as there is no material on record to show that the said Government order has ever been modified or superseded till 3.1.2004 by the Government itself. Therefore it is necessary to examine the determination of vacancies in the quota of promotion under old existing law occupying the field.

118. From the perusal of supplementary counter affidavit sworn by Sri Tribhuwan Ram, Engineer-in-Chief, Government of U.P. on 25.7.2006 on behalf of State-respondents filed in the writ petition No.53133 of 2004. Pramod Shanker Upadhyay and others Vs. State of U.P. and others, it indicates that break up of year-wise vacancies on the post of Assistant Engineer in question has been given in chart enclosed as Annexure S.C.A-I and S.C.A.II which demonstrates that w.e.f. 1.7.1997 to 30.6.2004, total 446 vacancies have occurred on the post in question. Out of which total 316 vacancies are allocated in the quota of direct recruitment and only 130 vacancies are allocated in the quota of promotion for feeder cadre. Against 316 vacancies falling in the quota of direct recruitment 62 vacancies have been filled up by regularisation and remaining 254 vacancies are left for selection through Commission, whereas against total 130 vacancies falling in the quota of promotion only 102 vacancies are shown as filled up while 28 vacancies are still remaining to be filled up. From perusal of Annexure S.C.A.III enclosed with the aforesaid supplementary counter affidavit, it transpires that in respect of total vacancies occurred for the year 1997-98, 66.67% vacancies allocated in the quota of direct recruitment, 33.33% vacancies in quota for promotion, whereas in respect of vacancies occurred during the year 1998-2003, 75% vacancies allocated in the quota of direct recruitment and remaining 25% vacancies in the quota of promotion. Thereafter for year 2003-2004, total vacancies are divided and split into two parts, first part for the period

w.e.f.1.7.2003 to 2.1.2004 and out of total vacancies occurred during this period, 75% vacancies are allocated in the quota of direct recruitment, whereas 25% vacancies are allocated in the quota of promotion. However the vacancies occurred w.e.f. 3.1.2004 to 30.6.2004, 50% are allocated in the quota of direct recruitment and 50% vacancies in the quota of promotion.

119. Thus there appears no legal basis for such determination and computation of vacancies. We have already held that on declaration of rule 5 and 6 of old 1936 rules as *ultra-vires* of the provisions of Articles 14 and 16 of Constitution of India by Hon'ble Apex Court in P.D. Agrawal's case as brought about by 1969 amendment rules there exist no statutory rules under aforesaid 1936 rules for allocation of different quota for different sources of recruitment. Rule 5 and 6 of old 1936 Rules as stood while 1969 amendment rules came into force could not be revived automatically without their fresh enactment for the purpose of determination of rights and obligations arise therefrom, as the substituted rules were declared ultra-vires after their substitution for the aforesaid rules, therefore, aforesaid earlier rules could not be treated to be revived as existing before their substitution without fresh enactment. Similarly, Rule 5 (iii) brought about by1987 and 1997 was also declared ultra-vires of the Part III of the Constitution in Aruvendra Kumar Garg's case, thus no rights and obligations arise therefrom. Therefore, prescription of quota for direct recruitments and promotees existing in the rules 5 and 6 of old 1936 Rules prior to the aforesaid amendments for substituting the said rules cannot be revived for the same reasons. Thus, the approach of Government while computing and determining the vacancies in question and in doing so taking assistance from rule 5 and 6 of old 1936 rules as stood at the time of amendment of rules by amending rule 1969 palpably incorrect and demonstrably wrong, therefore, cannot be sustained. Thus, in view of the aforesaid discussion, we are of the considered opinion that except the Government order dated 20.2.2003 there existed no statutory rule or Government order during 1997 to 2004 for determination and allocation of the aforesaid vacancies in the quota of promotion and direct recruitment. By the aforesaid Government Order, the Government has intended to fill up vacuum in existing statutory rules and the existing vacancies in the said quota, we are of the further opinion that all the vacancies in the quota for promotion from year 1997 to 30.6.2004 are liable to be filled up according to the quota prescribed under Government order dated 20.2.2003. As we have already held that vacancies falling in the quota of promotion earlier and also w.e.f. 3.1.2004 to 30.6.2004 are also liable to be filled up under old law occupying the field, thus, according to the Government order dated 20.2.2003.

120. Applying the aforesaid Government order in respect of prescription of different quota for direct recruitment and promotion out of total 446 vacancies of Assistant Engineers occurred during the aforesaid period, 58.34% quota for direct recruitment and 41.66% quota for promotion, the total number of vacancies would come to 260 in the quota of direct recruitment and 186 in the quota of promotion. Since 62 vacancies in the quota of direct recruitment have already been filled by

regularisation as shown in the chart contained in Annexure S.C.A. -II of the Supplementary Counter Affidavit. Thus only (260-62) = 198 vacancies are still remaining to be filled in the quota of direct recruitment and total 186 vacancies in the quota of promotion are liable to be filled up according to the G. O. dated 20.2.2003 and rule 12, of rules 1936 prescribing criterion seniority subject to rejection of unfit as amended by U.P. Service of Engineers (B. and R.B.) class II (Amendment Rules) 1992. Therefore, determination of vacancies in the quota of direct recruitment and promotion is wholly erroneous and illegal, thus cannot be sustained, consequently requisition dated 2.2.2006 sent by the Government to the Commission for holding selection on the posts of Assistant Engineers through direct recruitment and pursuant advertisement published in daily newspaper Amar Ujala dated 5.9.2006 so far as it pertains to the aforesaid posts are hereby quashed. The State Government is directed to undertake re-exercise of determination of vacancies under quota of direct recruitment and promotion both according to the observations made herein before and take further steps to hold selection for direct recruitment and promotion as indicated herein before."

39. In paragraph 171 of the report rendered in ***Anjani Kumar Mishra's*** case [supra] this Court held as under:-

"171. In view of foregoing discussions and observations our conclusions are summarized as under:

(1) The provisions of Rule 5(ii) and Rule 16 of new 2004 Rules are held to be valid.

(2) Although, the provisions of new 2004 Rules are prospective in operation and shall apply w.e.f. 3.1.2004 but the vacancies occurred on or after 1.7.2004 only shall be filled up under new 2004 Rules and vacancies occurred prior to 30.6.2004 in the quota of promotion shall be filled up under old 1936 Rules. However, the existing vacancies prior to 30.6.2004 in the quota of direct recruitment shall be filled up as backlog vacancies under new 2004 Rules as the process of selection for direct recruitment were not initiated prior to commencement of new 2004 Rules, but without any further allocation of vacancies in the quota for promotion for period in question.

(3) There exists no statutory rule for prescription of quota for direct recruitment and promotion after decision of Hon'ble Apex Court in P.D. Agrawal's case and this court in Aruvendra Kumar Garg's case under old 1936 Rules. However, in order to fill up vacuum and supplement the remaining existing provisions of old 1936 Rules, the G.O. dated 20.2.2003 has been issued to fill up the remaining existing vacancies available at relevant time by prescribing 41.66% quota for promotion which shall be applicable to fill up the existing vacancies alone not covered by new 2004 Rules as indicated in judgement.

(4) The respondent-State authorities are directed to redetermine the vacancies for years 1997-1998 to 2003-2004 according to G.O. dated 20.2.2003 and take further steps within a month from the date of production of certified copy of the order passed by this court before Secretary, P.W.D., Government of U.P.

(5) While undertaking re-exercise for determination of remaining vacancies for year 1997-98, the promotions made at Sl. No. 32 to 40 by G.O. No. 4023/23-4-98 N.G./97 T.C. Lucknow dated 30th June 1998 shall be ignored. Similarly 53 promotions made vide G.O. No. 2220/23-4-2002-24 N.G./2002 Lucknow dated 2.5.2002 in respect of vacancies of years 1998-99 to 2000-2001, 10 promotions made vide G.O. No.8651/23-4-2002-24 N.G./02 dated 6.12.2004 pertaining to vacancies of year 1998-99 and 1999-2000 and one promotion made vide G.O. No. 8021/23-4-05-24 N.G./02 dated 25.5.2005 shall also be ignored.

(6) As a result of striking down the promotions made on the post in question from Sl. No. 32-40 contained in G.O. dated 30.6.1998, G.O. dated 2.5.2005, G.O. dated 6.12.2004 and G.O. dated 25.5.2005 the degree holder junior engineers who were promoted by the aforesaid Government orders shall not be reverted at once to their original posts until the vacancies against which they were promoted shall be filled up according to rule-12 of old 1936 Rules by incumbents of feeder posts irrespective of their having diploma or degree in engineering.

(7) Against total remaining vacancies falling in the quota of promotion for year 1997 and for year 1998-2004 as indicated herein above, separate year wise eligibility and select list shall be prepared in respect of vacancies of each recruitment year.

(8) While preparing year wise eligibility list, the persons whose promotion have been quashed, shall also be considered and placed in the eligibility lists if fall within zone of consideration according to their seniority position in the seniority list irrespective of their having degree in engineering or equivalent qualification and while considering their case the period of services rendered by them on higher post shall be taken into account while computing their seniority on feeder cadre and their Annual Confidential Reports and other service records shall also be taken into account on notional basis on feeder cadre.

(9) However it is made further clear that rejection of relief to the petitioners in separate quota for promotion for degree holders on alleged ground of discrimination would not disentitle them to be considered for promotion provided they are otherwise found eligible for consideration for promotion according to their seniority position under rule 12 of old 1936 Rules, in that event of the matter they will also be considered alongwith other eligible candidates irrespective of their degree in engineering or equivalent qualification.

(10) The respondents-State authorities are directed to undertake aforementioned exercise and complete it within a period of three months from the date of production of certified copy of order passed by this court before Secretary of concern department of the Government.

(11) After aforesaid exercise is over, if the claim of promotions of degree holder junior engineers whose promotions have been quashed, are found not acceptable either because of their lower seniority position or found otherwise not suitable according to the rules of promotion, they shall be reverted to their

original posts forthwith on completion of aforesaid exercise."

40. As regard the vacancies, the consistent stand of the State Government, as comes out from various affidavits and letters including the letter dated 22.4.2009, is that there were only 186 vacancies in the quota of promotion for the period 1997-98 to 2003-04. In the case of ***Anjani Kumar Mishra,*** the Court has determined the total vacancies to be 186. It is admitted fact that the State Government has promoted 29 persons vide order dated 30.6.1998, 1 by order dated 20.8.2007, 95 by the order dated 2.8.2008, 1 by the order dated 3.2.2009 and 27 persons were lastly promoted by the order dated 30.7.2009. It is also not in dispute that 73 persons are working under the Court's Order. It may also be pointed out that 21 vacancies were carried forward by the authorities. Thus, in all, 249 promotions have already been made. Therefore, there was no justifiable and valid reason for the authorities to act when the Court in the case of Anjani Kumar had already adjudicated the vacancies.

41. We are of the considered opinion, the vacancies existing in promotional quota as on 30.6.2004 are to be filled in accordance with provisions contained in United provinces Service of Engineers (Buildings and Roads Branch) Class-II Rules, 1936 in view of the judgment and order passed by this Court in the case of Anjani Kumar Mishra, which has been approved by the Apex Court.

42. Even at the cost of repetition, it may be stated that once the determination of vacancies, i.e. 186 after the judgment in Anjani Kumar Mishra's case had attained finality, which was determined applying the quota of 41-66% on the occurred vacancies during the period. There was no occasion or valid reason for the Government to make selection in excess of the determination. Moreover, it is not open for us to re-determine the vacancies as it would amount to review of the aforesaid final judgment.

43. It may be clarified that '2004 Rules' do not prescribe any qualifying examination as condition precedent for being eligible for considered for promotion, but as indicated above the said Rules are prospective in nature as such the vacancies occurring prior to that year are to be filled in by old Rules. The State government while making promotion under Old Rules have considered only degree holder Junior Engineers for promotion to the vacancies existing prior to 30.6.2004.

44. As per Rule 12 of the '1936 Rules' as amended in the year 1992, recruitment by promotion to the post of Assistant Engineer shall be made on the basis of "seniority subject to rejection of unfit" in accordance with U. P. Promotion by Selection in Consultation with Public Service Commission (Procedure) Rules, 1970. As per Rule-6 of the '1970 Rules' a person who is being subjected to selection for a particular recruitment year has to fulfill the condition of eligibility on the first day of commencement of the year of recruitment. Rule 4(f) of the said Rules defines ' year of recruitment' as the period of 12 months beginning from first day of July of calendar years. As per Rule 19 of the 'Service Rules 1951' a person upon being appointed under the

Rules has to be placed on probation for a period of two years and thereafter under Rule 22, he is required to undergo a departmental examination and only thereafter under Rule 23 he can be confirmed on the expiry of period of probation or to extend period of probation, which may further be for a period of one year. Rule 22 of '1951 rules' provides that a person recruited as a Junior Engineer under the Rules is required to undergo a departmental examination and without passing the same, he is not entitled for an increment.

45. It is not in dispute that the petitioners are the Junior Engineers and have acquired B.E./B.Tech./AMIE degree during the course of service. A reading of the provisions of Service Rules makes it clear that promotion on the post of Assistant Engineer shall be made on the basis of seniority, subject to rejection of unfit. As averred above, it is also not in dispute that from 1997-98 to 2003-04, no qualifying examination was held and as such, no promotion on the basis of qualifying examination could be made. The qualifying examination was held in August, 2007 pursuant to the judgment dated 20.3.2007 of the Apex Court in Appeal (Civil) No. 3228 of 2005, ***Diploma Engineers Sangh v. State of U.P. and others.*** In the said judgment, it was clearly provided that while conducting the exercise for promotion, list of all candidates of the Feeder Post should be prepared in order of seniority and each candidate as per rank in seniority is to be considered on merit. To judge the suitability, candidate can be required to undergo qualifying examination.

46. In the Public Works Department, Schedule - 25 of the U. P. Manual of Public Works Department Rules provides that qualifying examination for promotion should be held in the month of October/November of every year and Junior Engineers having completed three years continuous service are eligible for appearing in the examination. To the detriment of the petitioners, the examination was not conducted for number of years.

47. Petitioners' claim for promotion was rejected merely on the ground that the vacancies are related to the recruitment years 1997-98 to 2003-04 and as the petitioners have obtained their degrees in the years 2004-07 and as such, they were not eligible for being considered for promotion. This approach of the State Government was contrary to the dictum of the order passed by this Court in Writ Petition No. 4640 (SS) of 2009 whereby the eligibility was to be considered in the concerned recruitment year. The year of recruitment will not be the year in which the vacancies had accrued but in the year, when process for recruitment is started, as would be evident from Rule 6 of U. P. Selection by Promotion in Consultation with the U. P. Public Service Commission (Procedure) Rules, 1970. There is no provision either in '1936 Rules' or in '1970 Rules', referred to above, which provide that eligibility of a candidate has to be seen with reference to the year of vacancy. In these circumstances, there was no justification to exclude the petitioners from the recruitment exercise. There was also no justification for excluding the petitioners from the impugned eligibility list because the petitioners had obtained their technical qualification prior to

30.6.2008 and as per provisions of '1970 Rules' they fall within the zone of eligibility.

48. It is an admitted position that the first eligibility was prepared on 26.10.2007 after the declaration of qualifying examination result, as such, the date of eligibility, as per provisions of Rule 3 (i) Rules, 1969 would be the 31st December, 2007. Therefore, non-inclusion of the names of Junior Engineers, who possessed the technical degree, prior to 31.12.2007 is wholly unjustified as these Junior Engineers were having technical degree prior to the preparation of the eligibility list for promotion, i.e. 26.10.2007.

49. It may be stated that it is not the case of private respondents that they acquired degree during the course of service. Therefore, the State government fell into error in judging the suitability or merit on the basis of possession of degree. In any circumstance, persons appointed later on, cannot steal march over the incumbents, i.e. Junior Engineer having acquired degree during the course of service in the matter of consideration of promotion. It is not in dispute that the petitioners have put in 15-20 years of service as Junior Engineer but their claim of promotion has unlawfully been denied. Similar view has been taken by a learned Single Judge of this Court, on 1.8.2001, in a Writ Petition No. 3428 (SS) of 2001 ***Diploma Engineers Sangh, Public Works Department Versus State of U.P. and others,*** wherein it has been observed that persons who have been appointed at a later point of time irrespective of their qualification of Degree in Engineering cannot be promoted before considering the case of such Junior Engineers, who have acquired the necessary Degree in Engineering during the course of employment. It may be pointed out that the said judgment is still intact. Relevant paragraphs read as under:-

(i) a Junior Engineer so long as he does not enhance his qualification of acquiring a Degree in Engineering or complete the course of AMIE cannot become eligible for promotion on the post of Assistant Engineer in the prescribed quota of 8.33% and therefore, such Junior Engineers cannot have any grudge or complaint against the promotion of any Junior Engineer, who either secured a Degree in Engineering or pursued his course of AMIE during the course of employment or such Junior Engineers who are already possessing the Degree in Engineering.

(ii) In case the Junior Engineers possessing the Diploma acquired necessary qualification of Degree in Engineering or AMIE, they would become entitled for consideration to the next higher post of Assistant Engineer under 8.33% quota and in that event, these Diploma Engineers being senior to the new incumbent or persons who have been appointed at a later point of time irrespective of their qualification of Degree in Engineering cannot be promoted before considering the case of such Junior Engineers who have acquired the necessary Degree in Engineering during the course of employment.

50. In the instant case, perusal of eligibility list dated 9.4.2008 reveals that names of certain persons were included, who, undoubtedly, at the relevant time were working on probation and have not

become members of service. We are unable to accept the assertion of the private respondents that all the persons who have been appointed against substantive vacancy were fully eligible for promotion even without being confirmed on the post.

51. Before parting, it is relevant to point out that the petitioners have also asserted that the qualifying examination was not conducted properly with due notice to all concerned. It is not in dispute that after the judgment and order dated 16.7.2004 in the case of ***Vijay Kumar vs. State of U.P. and others,*** the Engineer-in-Chief on 15.5.2007, issued a letter notifying that qualifying examination would be conducted by the U.P. Technical Board of Education. Subsequently, the examinations were held on 18 and 19.7.2007 at the U.P.S.C. Centre, Lucknow. Later on, due to some discrepancies, the examination held on 18 & 19.7.2007 was cancelled by the State Government vide order dated 30.7.2007. Consequently, a notice was published on 3.8.2007 that the examination would be held on 12,14 and 16th August, 2007. In the notice, it was also provided that the admit card which was issued at the time of qualifying examination by the U.P. Technical Board would be treated to be valid and no separate admit card would be required. As the candidates are posted in the remote areas of the State of U.P., they were not aware with the date of examination as no proper communication was made by the concerned authorities of Department and as such large number of candidates could not participate in the examination. It has been asserted by the petitioners that in the absence of proper information, only one candidate was able to appear in the first paper in forenoon and two others joined in the second paper in the afternoon. Similarly, on 13.8.2007, only 9 candidates appeared in the first session and 11 in the second session. It has also been pointed out that the Department has provided that the admit card issued earlier will be treated as valid wherein the centre of examination was mentioned as U.P.S.C. Lucknow but the examination was held at Allahabad. Thus all these happening deprived/prevented the bonafide and eligible candidates to participate in the examination. Therefore, in the fitness of things, it is imperative that the qualifying examination will have to be conducted again within a period of four months so that the incumbents, who are eligible may appear in the examination and their candidature may be considered for promotion.

52. In view of the aforesaid discussions and legal position, the impugned government orders dated 3.7.2009 and 5.2.2010 and the consequential orders for promotion and posting as Assistant Engineers of private respondents are not sustainable, which are hereby quashed. State Authorities are directed to strictly act in accordance with the Service Rules relating to promotion on the post of Assistant Engineer and as per wish mentioned in the earlier judgments and particularly the directions given by the Apex Court, contained in the order dated 20.3.2007. It may be added that the Junior Engineers who acquired Degree during the course of service and have put in more than 20 years of service, without a single promotion and now they are at the fag end of their service and as such, ends of justice would be served, if the State Government conducts the exercise for

promotion afresh as per provisions of law as was in force upto the recruitment year 2003-04 with utmost expedition.

53. With the aforesaid observations and directions all the writ petitions stands disposed of finally

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APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 21.09.2011

BEFORE
THE HON'BLE SHRI KANT TRIPATHI,J.

Criminal Appeal u/s 374 Cr.P.C. No. - 4962 of 2006

Anil @ Bablu Srivastava ...Petitioner
Versus
State of U.P. ...Respondent

Counsel for the Petitioner:
Sri M.P. Singh Gaur
Sri Gajraj Singh Pal

Counsel for the Respondents:
A.G.A.

Criminal Appeal-conviction of 10 years rigorous imprisonment with fine of Rs. 50,000/-for offence U/S 412-from discussion of evidence and considering the roll of appellant maximum offence under Section 411 proved-which provides maximum punishment of 3 years rigorous imprisonment-which appellant already under gone more than 7 years-due to mistake on part of Trail Court-Appeal allowed-comviction of 3 years with fine of Rs. 10,000/-modified.

Held: Para 16

In my opinion, only the change under section 411 I.P.C. is proved beyond all reasonable doubts against the appellants, therefore, they are liable to be convicted and sentenced under section 411 I.P.C. in place of section 412 I.P.C.

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

1. Heard Mr. Gaj Raj Singh Pal for the appellants Anil @ Bablu Srivastava and Mohd. Jama @ Salim and learned AGA for the State and perused the record.

2. These two appeals relate to the same incident, hence they are disposed of by this common order.

3. The appellants Anil @ Bablu Srivastava and Mohd. Jama @ Salim have preferred these appeals against the judgment and order dated 30.06.2006 rendered by Sri D. K. Srivastava, the then Additional Sessions Judge / Special Judge (Dacoity Affected Area), Court No. 3, Budaun in Special Sessions Trials No. 2 of 2003 and 118 of 2003, whereby the learned Special Judge has convicted and sentenced each of the appellants under section 412 I.P.C. to undergo rigorous imprisonment of ten years and to pay a fine of Rs. 50,000/- and in default of payment of fine to undergo additional imprisonment of three years.

4. The prosecution story leading to this appeal in nutshell is that on 19.04.2002 Mr. Pramod Kumar Agrawal, Assistant Administrative Officer, Life Insurance Corporation of India, branch Budaun, went to the Oriental Bank of Commerce, branch Indrachowk, Budaun on his car to deposit Rs. 3,69,073/- along with the Life Insurance Corporation of India's officials Saligram and Ram Prakash. The aforesaid amount had been kept in a locked iron box. He reached the bank at about 1.15 P.M. When he came out of the car, one miscreant shot at the

aforesaid official Saligram and snatched away the entire cash amount of Rs. 3,69,073/-. The miscreant after snatching away the cash amount moved towards an already started motorcycle lying near the car under the control of another person who had been waiting for the miscreant who robbed the case box, and, thereafter, both of them fled away on that motorcycle towards Indrachowk. There were two other miscreants on a different motorcyle, who also fled away following the first motorcyclists. It further appears that all the miscreants had prior information regarding the aforesaid cash amount and had arrived in the bank in advance to commit the robbery. The Assistant Administrative Officer, Mr. Pramod Kumar Agrawal, lodged the F.I.R. Ext.Ka-1. on the same day at about 14.15 hrs. at the Police Station-Civil Lines, Budaun, on which basis the police registered the case vide crime no. 339 of 2002 under sections 394/397 I.P.C. and proceeded to hold the investigation. The appellants Anil @ Bablu Srivastava and Mohd. Jama @ Salim were arrested by the police of police station-Rajepur, District-Farrukhabad in another case and on their arrest, they informed the police of police station-Rajepur that they were involved in committing the aforesaid robbery.

5. On 24.07.2002, PW-7, Omveer Singh, the Investigating Officer received information regarding the arrests and the confessional statements of the appellants and then he went Farrukhabad and recorded their statements on 24.07.2002 . The Investigating Officer took the appellants on police remand on 13.08.2002 and recovered Rs. 14,000/- on their pointing and after concluding the investigation found a prima facie case against the appellants and accordingly filed a charge-sheet against them.

6. The co-accused persons, namely, Ahmad Raja and Fareedul have already been acquitted, therefore, it is not necessary to refer to the facts relating to the said co-accused persons.

7. The learned trial court framed the charges under sections 394, 397 and 412 I.P.C. against the appellants who denied the charges and claimed to be tried.

8. The prosecution examined as many as seven witnesses to prove the aforesaid charges. PW-1, Pramod Kumar Agrawal is the complainant, who has proved the F.I.R. Ext. Ka-1 and the story of the robbery. PW-2, Saligram and PW-3, Ram Prakash, who were Life Insurance Corporation of India's officials, have also supported the prosecution story of robbery. PW-4, Fateh Singh, Sub-inspector, and PW-7, Omveer Singh, the Investigating Officer, who made the recovery at the instance of the appellants, have proved the recovery of the cash amount of Rs. 14,000/-. PW-5 Jamil Ahmad has proved the chick report and other formal papers. PW-6 Yashveer Singh and PW-7, Omveer Singh had investigated the matter, who have proved the charge-sheet and other formal papers.

9. The learned trial court examined the appellants under section 313 I.P.C. They denied the charges and stated that they have been falsely implicated on account of a political rivalry.

10. The learned trial court has held that the charges under sections 394/397 were not proved beyond all reasonable doubts against the appellants and

accordingly acquitted them of the charges under sections 394/397 I.P.C. The learned trial court, however, believed the story relating to the recovery of Rs. 14,000/- at the instance of both the appellants and found that they had the recovered money in their possession knowing well that the same was a robbed property, therefore, according to the learned trial court the charge under section 412 I.P.C. was proved beyond all reasonable doubts against the appellants. The learned trial court accordingly convicted and sentenced them as aforesaid.

11. Mr. Gaj Raj Singh Pal, learned counsel for the appellants submitted that he would not press the appeal on merit as he has nothing to contend against the finding of the learned trial court that the recovery of Rs. 14,000/- was made not only the basis of the informations furnished by the appellants to the police but also on their pointing and the same was the money which had been robbed in the manner alleged by the prosecution.

12. Mr. Gaj Raj Singh Pal further submitted that according to the allegations made in the F.I.R., it was an incident of robbery, therefore, the conviction of the appellants under section 412 I.P.C. was not proper. According to the learned counsel only the offence under section 411 I.P.C. was made out but the learned trial court ignored this material aspect of the matter and wrongly arrived at the conclusion that the offence under section 412 I.P.C. was made out.

13. In view of the fact that the learned counsel for the appellants did not dispute the factum of recovery at the instance of the appellants, the recovery, which has been fully proved by PW-4, Fateh Singh and PW-7, Omveer Singh, appears to be believable. PW-4, Fateh Singh, was posted as a Sub-Inspector at the Police Station-Civil Lines, District-Budaun at the time of recovery. PW-7, Omveer Singh, was the Station Officer, Police Station-Civil Lines, District-Budaun and had also investigated the matter. These two witnesses have categorically deposed that on 24.07.2002 they received an information regarding arrests of the appellants by the police of Police Station Rajepur, District-Farrukhabad and also regarding their confessional statements that they had been involved in committing the aforesaid robbery. On receiving this information, PW-7, Omveer Singh went to Farrukhabad jail on 24.07.2002 itself and recorded the confessional statements of the appellants and on the basis of their statements took both of them on remand to police custody and again interrogated them, who made the statements that they had kept the robbed box containing Rs. 14,000/- in the field of appellant Mohd. Jama @ Salim situating in village Khaspura, Police Station Kunwar Gaon. Thereafter, both the appellants took PW-4, Fateh Singh and PW-7, Omveer Singh to the field of the appellant Mohd. Jama @ Salim and got recovered a tin box containing cash amount of Rs. 14,000/- which had been embedded in the earth. There were 44 currency notes of the denomination of Rs. 100/-, 92 currency notes of the denomination of Rs. 50/- and four packets each of 100 currency notes of Rs. 10/- denomination. Each packets of the currency notes of Rs. 10/- denomination had seal of the Life Insurance Corporation. PW-4, Fateh Singh and PW-7, Omveer Singh sealed the recovered articles on the spot and prepared the recovery memo Ext. Ka-2

and obtained signatures of the appellants thereon. It may also mentioned that the prosecution produced the recovered currency notes and the tin box in the court during the trial, which were proved by the aforesaid witnesses and are on record as material Ext. 1 to 8. The learned counsel for the appellants have cross examined the witnesses PW-4, Fateh Singh and PW-7, Omveer Singh at length but nothing material could be brought on record to discredit their testimonies. In my opinion, the learned trial court has rightly believed the prosecution case that the robbed currency notes of Rs. 14,000/- were recovered on the basis of the disclosure made by the appellants to the police and also on their pointing, therefore, the prosecution has succeeded in proving that the appellants were found in possession of the currency notes of Rs. 14,000/- which had been robbed in the aforesaid incident. It is, thus, abundantly clear that the place of concealment of the tin box containing the aforesaid cash amount of Rs. 14,000/- was peculiarly within the knowledge of the appellants, therefore, they must be held to be in conscious and exclusive possession of the robbed amount of Rs. 14,000/- along with the tin box. Where the place of concealment of robbed or stolen property is peculiarly within the knowledge of the accused and that property is recovered as a result of the information given by the accused or on his producing the property from the place of concealment, the only conclusion that can be inferred from such circumstance is that the accused was in conscious and exclusive possession of the property. Another important aspect of the matter is that the packets of the currency notes of the denomination of Rs. 10/- recovered as aforesaid had seal of the Life Insurance Corporation, therefore, it can be also inferred that the appellants had knowledge or reason to believe that the currency notes were stolen properties. To this extent the finding of the learned trial court which is based on relevant materials and has also not been disputed by the learned counsel for the appellants, seems to be perfectly correct and is accordingly affirmed.

14. The contention of the learned counsel for the appellants that the offence under section 412 I.P.C. was not made out has sufficient merit. Section 412 I.P.C. provides for the punishment of dishonestly receiving any property stolen in the commission of a dacoity. Therefore, for constituting the offence under section 412 I.P.C. one of the essential elements to be proved by the prosecution is that the property recovered from the possession of the accused had been stolen in a dacoity. If no offence of dacoity has been committed with regard to the recovered property, the question of convicting the accused under section 412 I.P.C. does not arise. In order to establish the charge under section 412 I.P.C. the other element to be proved by the prosecution is the knowledge of the accused that the recovered property was stolen in a dacoity. In other words, if the accused while possessing a property being the subject matter of a dacoity, did not know, nor had any reason to believe, that the property was stolen in a dacoity, his conviction under section 412 I.P.C. cannot be upheld. On the other hand, section 411 I.P.C. provides for the punishment of dishonestly receiving or retaining stolen property. Section 410 I.P.C. defines "stolen property" according to which, the property whose possession is transferred by the robbery is also stolen property, therefore, if any robbery is

committed in respect of any property and any person dishonestly receives or retains that property knowing or having reason to believe the same to be stolen, he will be guilty of the offence under section 411 I.P.C. and not under section 412 I.P.C.

15. The present case needs to be examined in the back drop of the aforesaid principle. Admittedly, the miscreants who had snatched away the box containing Rs. 3,69,073/- were only four in number and there is no allegations or evidence that the number of the accused persons were five or more. To constitute the offence of dacoity, the number of accused must be five or more. If the number of the accused is less than five, the offence will be robbery and not the dacoity. In other words, an offence of robbery becomes the offence of dacoity when it is committed by five or more persons conjointly. Since, in the present case, only four persons are alleged to have committed the robbery, therefore, it was not a case of the commission of the offence of dacoity. In this view of the matter, the learned trial court has committed material illegality in arriving at the conclusion that the offence under section 412 I.P.C. was made out. To this extent the finding of the learned court below, being perverse and illegal, cannot be upheld.

16. In my opinion, only the change under section 411 I.P.C. is proved beyond all reasonable doubts against the appellants, therefore, they are liable to be convicted and sentenced under section 411 I.P.C. in place of section 412 I.P.C.

17. The maximum sentence of imprisonment provided for the section 411 I.P.C. is of three years only, therefore, the sentence of ten years rigorous imprisonment and a fine of Rs. 50,000/- and in default of payment of fine additional rigorous imprisonment of three years passed against each of the appellants cannot be uphled. The learned counsel for the appellants informed that the appellants are in custody in the present matter from April, 2002, therefore, they are in prison since last more than seven years and five month against the maximum sentence of three years only due to the glaring error attributable on the part of the learned Special Judge. In this view of the matter, the further detention of the appellants in custody seems to be wholly unjust.

18. Both the appeals are therefore partly allowed. Each of the appellants Anil @ Babloo Srivastava and Mohd. Jama @ Salim is convicted and sentenced under section 411 I.P.C. in place of section 412 I.P.C. to undergo rigorous imprisonment of three years and also to pay a fine of rupees ten thousand and in default of payment of fine to undergo additional rigorous imprisonment of one year. The sentence passed by the learned trial court stands modified accordingly. If the appellants have already served out the sentence passed by this Court, they shall be set at liberty forthwith if not already in custody in some other case.

19. The period during which the appellants remained in custody as under trials shall be given due adjustment under section 428 of Code of Criminal Procedure while calculating the period of sentence.

20. Let a copy of this judgment along with the lower court record be

transmitted forthwith to the learned trial court for immediate compliance.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 16.09.2011

BEFORE
THE HON'BLE UMA NATH SINGH, J.
THE HON'BLE ANIL KUMAR, J.

Writ Petition No.8763 (MB) of 2011

Jag Prasad ...Petitioner
Versus
Deputy District Magistrate and others ... Opp. Parties

Constitution of India, Article 226-order passed by Sub Divisional Magistrate-for enforcement of order passed by D.D.C.-held without jurisdiction-a state or its officer can not be allowed to effect the right of citizen-unless such act supported by statutory provision.

Held: Para 5

On due consideration of rival submissions, we are of the view that the Sub Divisional Magistrate could not have passed the impugned order as it is not evident from the records that there was the institution of any proceeding by way of complaint under Sections 144, 145 or 146 Cr.P.C. which was pending with him. Moreover, it also does not appear that there was any law and order problem which could have necessitated passing of such an order as impugned and moreover, such orders should always be based on the report submitted by the Police Officer, which is conspicuous by absence in this case.

Case law discussed:

All CJ 2002, 1110 (State of West Bengal vs. Vishnunarayan & Associates (P) Ltd.); 1995 (13) LCD 519; 2001 (Suppl.) R.D. 68

(Delivered by Hon'ble Uma Nath Singh,J.)

1. Heard Shri M.A.Siddiqui, learned counsel for petitioner, learned Chief Standing Counsel for opposite parties 1 to 3, Shri Balram Yadav, learned counsel appearing for opposite party no.4 and perused the pleadings of writ petition.

2. Learned counsel for petitioner submitted that towards the implementation of order passed by Deputy Director of Consolidation in a proceeding under Section 48 of U.P. Consolidation of Holdings Act (For short 'The Consolidation Act'), the Sub Divisional Magistrate concerned has passed the impugned order which is not sustainable as it is not supported by any authority of law, in particular, under Sections 145,146,147 and 148 of the Code of Criminal Procedure.

3. On the other hand, learned counsel for private opposite party no.4 contended that the Sub Divisional Magistrate being the Executive Magistrate is also an executing authority, therefore, he has ample powers to ensure the compliance of any order passed in civil litigation by exercising the powers under Cr.P.C. Moreover since, the Sub Divisional Magistrate has also the powers to maintain law and order, on having received a complaint towards the enforcement of order passed in a civil litigation, he can see as to whether there is a law and order problem, and may even also verify the status of possession of property. Thus the order like the one impugned herein, has been correctly passed.

4. In support of his submission, learned counsel for private respondents referred to a judgment of learned Single Judge of this Court reported in ***1995 (13) LCD 519 (Harpal vs. State of U.P. &***

Others). Learned counsel also referred to a judgment of Calcutta High Court reported in ***2001(Suppl.) R.D. 68 (Nanturam Naskar & Others vs. Ajit Kumar Mondal).*** In Harpal's case (supra), learned Single Judge deciding the matter has held that in the parallel proceedings, civil as well as criminal, if the Civil Court has not passed any order on the question of possession, in such a case, it will be open for the Executive Magistrate to proceed under Section 145(1) Cr.P.C. and pass order of attachment under Section 146(1) Cr.P.C., although this order will be subject to the order passed by the Civil Court at later stage deciding the question of possession. Similarly in the case of Nanturam Naskar (supra), it has been held that it is within the competence of Executive Magistrate to exercise powers under Sections 144 and 145 Cr.P.C. and to appoint a Receiver for taking into custody, and to dispose the standing crop. Further, in exercising such powers, the prime consideration before the Magistrate would be to assess as to whether there is a likelihood of breach of peace, and further a direction of maintenance of status quo passed by Civil Court would not be a bar to orders passed by the Executive Magistrate.

5. On due consideration of rival submissions, we are of the view that the Sub Divisional Magistrate could not have passed the impugned order as it is not evident from the records that there was the institution of any proceeding by way of complaint under Sections 144, 145 or 146 Cr.P.C. which was pending with him. Moreover, it also does not appear that there was any law and order problem which could have necessitated passing of such an order as impugned and moreover, such orders should always be based on the report submitted by the Police Officer, which is conspicuous by absence in this case.

6. Moreover, in the judgment rendered by Hon'ble the Apex Court, reported in ***All CJ 2002, 1110 (State of West Bengal vs. Vishnunarayan & Associates (P) Ltd.),*** it has been held that the State or its Officers cannot interfere with the rights of citizens except where their actions are authorized by any specific provision of law.

7. In the instant case, there was no sanction whatsoever behind the passing of impugned order by the Sub Divisional Magistrate. Thus, the act is not authorized by the provisions of law. Hence, the impugned order dated 10/11.08.2011 is hereby set aside and the writ petition is allowed and disposed of accordingly.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 28.09.2011

BEFORE
THE HON'BLE DEVI PRASAD SINGH,J.
THE HON'BLE DR. SATISH CHANDRA,J.

Misc. Bench No. - 9623 of 2011

M/S Gulshan Rai Jain Ii, Through Its Partners and ors. ...Petitioners
Versus
Debts Recovery Appellate Tribunal Allahabad and ors. ...Respondents

Counsel for the Petitioner:
Sri Prashant Kumar

Counsel for the Respondents:
Sri Prashant Srivastava

<u>Security Interest Act, 2002-Section-18</u>- appeal pending before the Appellate authority since long-Tribunal without deciding the case on merit kept the matter pending by passing interim orders-one after another-Appellate Tribunal also failed to consider this aspect-Court expressed its great concern-to achieve the ambit of

enactment of Act-every authority bound to discharge their duty within such statutory period-order impugned Quashed with direction to appellate authority to decide appeal within specific period-for period of two month recovery kept suspended

Held: Para 14

Needless to mention that in case the appeal filed under Section 17 of the Act before the Debts Recovery Tribunal or in appeal before the Appellate Tribunal are not decided within the statutory period provided under the Act, then it shall frustrate the very object and purpose of the Act in question. The Presiding Officers of the Tribunal are directed to ensure that appeal filed before it are decided as far as possible within the statutory period provided under the Act and appeals are not kept pending only by safeguarding the interest of the parties by passing repeated interim orders from time to time. Ordinarily, the interim orders should be passed to secure the interest of the parties at the time of institution of the appeal before the Appellate Tribunal or the Debts Recovery Tribunal, as the case may be and thereafter, the Tribunal or the Appellate Tribunal must proceed to decide the issue before it on merit expeditiously within the statutory period, provided under the Act. Failure on the part of the Appellate Tribunal or the Debts Recovery Tribunal to decide the issue within the statutory period shows inaction or incompetency on the part of the Presiding Officer of the Tribunals.

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

1. Heard learned counsel for the petitioner and Sri Agesh Anand, learned counsel for the respondent-Bank of Baroda.

2. With the consent of parties' counsel, we proceed to decide the writ petition finally at the admission stage.

3. Present petition under Article 226 of the Constitution of India has been preferred against the impugned order dated 15.09.2011 contained as annexure nos. A-5 to the writ petition and the order passed by the appellate authority dated 23.03.2010.

4. The petitioner has taken commercial loan from the respondent-bank. On account of default of payment of dues, recovery proceeding was initiated against the petitioner, in consequence thereof, the petitioner has approached the Debts Recovery Tribunal. It has been submitted that while deciding the application, the Tribunal from time to time passed the interim orders directing the petitioner to pay the dues in question in installment. However, finally, by the impugned order, the Tribunal provided that in case the highest bid of secured assets comes to Rs.8.00 crores and above, then respondent-bank may proceed with the auction and sale of the property in question. The operative portion of the order passed by the Debts Recovery Tribunal is reproduced as under:

"That the respondent bank shall not sell the secured assets for a price of less than Rs.8.00 crores.

It is further clarified that respondent bank can conduct the sale of the secured assets if the highest bid comes for Rs.8.00 crores and above. If the applicants are having some buyer for more than the above mentioned sum he may be directed to participate in the auction. In case, the bid is less than that of Rs.8.00 crores, the respondent bank shall not to proceed in the matter.

Fix 09.04.10 before the Ld. Registrar for filing objection, if any by the respondent bank.

Let copies of this order be supplied to the parties immediately as per rules."

5. Feeling aggrieved, with the impugned order passed by the Tribunal, the petitioner has preferred an appeal under Section 18 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 before the appellate authority. The appellate authority had observed that the respondent-bank had taken symbolic possession and may proceed with the auction and sale subject to condition that in case the petitioner pay the entire dues, option is open to the petitioner. Operative portion of the order passed by the appellate authority is reproduced as under:

"However, this Tribunal has also directed the Bank to release the property, which is Plot No.40, Sector 14 Kausambi, District Ghaziabad. If the amount is deposited by the appellant by tomorrow as directed today, the, on production of receipt of such deposit, the Bank shall release the said property. So far as another property is concerned, the District Magistrate/Collector Ghaziabad shall assist the Bank to take physical possession of the property, description of which is Plot No.518, G.T. Road, Near Pawan Cinema, District Ghaziabad and as directed by this Tribunal by an order dated 05.05.2011, the appellant will not raise any objection with regard to auction of the second property. Shri Gulshan Rai, Sri Manoj Jain and Smt. Suman Jain will not create any obstacle to the Bank either to take physical possession or to proceed with the auction of the second property. However, it is open for the appellant to satisfy all the dues of the Bank before the auction takes place of the second property. Accordingly, the application for extension of time is disposed of.

In view of the orders passed by this Tribunal on 05.05.2011, 20.07.2011 and the order passed today, nothing survives to be adjudicated upon in the present appeal and accordingly, the appeal also stands disposed of."

6. Thus, it appears that instead of deciding the issue with regards to question involved therein, the original authority as well as the appellate authority has permitted the respondent-bank to proceed with the auction and sale of the property in question. However, the appellate authority had make it open to the petitioner-appellant to satisfy all the dues of the Bank before auction takes place of the second property.

7. The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (in short Act) was enacted by the Parliament with intention to make it convenient for the bank and financial institutions to recover its dues without facing the technicalities, which they were facing before the civil court in the recovery suits under the Act, option has been given to the Bank or borrower to approach the Tribunal to ventilate their grievance. The provision contained in the Act are the substituted provisions in place of regular suits. Meaning thereby, whenever aggrieved party approach the Tribunal, constituted under the Act, then Tribunal may pass appropriate interim order to safeguard the rights of the parties

and also proceed to decide the question raised by the parties in accordance to law expeditiously.

8. Section 13 of the Act empowers the Bank to take action and proceed with the auction and sale of the property and action taken thereon, shall be appealable under Section 17 of the Act before the Tribunal. The order passed by the Debts Recovery Tribunal is appealable to the Appellate Tribunal under Section 18 of the Act.

9. Section 17 deals with the procedure which should be followed by the Debts Recovery Tribunal while dealing with the petition filed before it by the aggrieved party, which includes financial institution as well as borrower. Sub-section (5) of Section 17 of the Act provides that an application made under sub-section (1) shall be dealt with by the Debts Recovery Tribunal as expeditiously as possible and disposed of within sixty days from the date of such application. In case, application is not disposed of within the period provided under sub-section (5) of Section 17, any party to the application may make an application, in such form as may be prescribed, to the Appellate Tribunal for directing the Debts Recovery Tribunal for expeditious disposal of the application pending before the Debts Recovery Tribunal. For convenience, Section 17 of the Act is reproduced as under:

"17. Right to Appeal

(1)Any person (including borrower), aggrieved by any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor or his authorised officer under this Chapter,[may make an application along with such fee, as may be prescribed,] to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measure had been taken.

"Provided that different fees may be prescribed for making the application by the borrower and the person other than the borrower.

Explanation- For the removal of doubts, it is hereby declared that the communication of reasons to the borrower by the secured creditor for not having accepted his representation or objection or the likely action of the secured creditor at the stage of communication of reasons to the borrower shall not entitle the person (including borrower) to make an application to the Debts Recovery Tribunal under this sub-section.]

[(2) The Debts Recovery Tribunal shall consider whether any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor for enforcement of security are in accordance with the provisions of this Act and the rules made thereunder.

(3) If, the Debts Recovery Tribunal, after examining the facts and circumstances of the case and evidence produced by the parties, comes to the conclusion that any of the measures referred to in sub-section (4) of section 13, taken by the secured creditor are not in accordance with the provisions of this Act and the rules made thereunder, and require restoration of the management of the business of the borrower or restoration of possession of the secured assets to the borrower, it may by order,

declare the recourse to any one or more measures referred to in sub-section (4) of section 13 taken by the secured creditors as invalid and restore the possession of the secured assets to the borrower or restore the management of the business to the borrower, as the case may be, and pass such order as it may consider appropriate and necessary in relation to any of the recourse taken by the secured creditor under sub-section (4) of section 13.

(4) If, the Debts Recovery Tribunal declares the recourse taken by a secured creditor under sub-section (4) of section 13, is in accordance with the provisions of this Act and the rules made thereunder, then, notwithstanding anything contained in any other law for the time being in force, the secured creditor shall be entitled to take recourse to one or more of the measures specified under sub-section (4) of section 13 to recover his secured debt.

(5) Any application made under sub-section (1) shall be dealt with by the Debts Recovery Tribunal as expeditiously as possible and disposed of within sixty days from the date of such application:

Provided that the Debts Recovery Tribunal may, from time to time, extend the said period for reasons to be recorded in writing, so, however, that the total period of pendency of the application with the Debts Recovery Tribunal, shall not exceed four months from the date of making such application made under sub-section (1).

(6) If the application is not disposed of by the Debts Recovery Tribunal within the period of four months as specified in sub-section (5), any party to the application may make an application, in such form as may be prescribed, to the Appellate Tribunal for directing the Debts Recovery Tribunal for expeditious disposal of the application pending before the Debts Recovery Tribunal and the Appellate Tribunal and the Appellate Tribunal may, on such application, make an order for expeditious disposal of the pending application by the Debts Recovery Tribunal.

(7) Save as otherwise provided in this Act, the Debts Recovery Tribunal shall, as far as may be, dispose of the application in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and the rules made thereunder.".]

10. A plain reading of Section 17 of the Act, shows that it shall be obligatory on the part of the Debts Recovery Tribunal to decide the application filed before it under Section 17 of the Act as early as possible preferably say within sixty days.

11. Needless to say that in the present case, application was moved in the year 2010 and the Tribunal kept the matter pending only by passing interim orders from time to time to give liberty to the petitioner to pay the dues in question. The power conferred on the Tribunal under Section 17 of the Act, is not to keep the matter pending under the garb of the interim orders. In case any interim order is not complied with, then it was incumbent on the Tribunal to vacate the interim order and decide the appeal filed before it under Section 17 of the Act on merit with due opportunity of hearing to the parties.

12. Section 17 of the Act does not empower the Tribunal to keep the matter pending for indefinite period without adjudicating the same on merit. Sub-section (6) of Section 17 of the Act provides that power conferred on the Appellate Tribunal to issue direction to the Debts Recovery Tribunal to decide the appeal within the specified period.

13. In the present case, unfortunately the Appellate Tribunal also acted in a mechanical way and instead of directing the Debts Recovery Tribunal to decide the pending appeal filed under Section 17 of the Act on an early date, may be within a specified period, had disposed of the pending appeal filed under Section 18 of the Act permitting the respondents to proceed with the auction and sale with liberty to the appellant-petitioner to pay all the dues to the Bank before auction takes place. The Appellate Authority as well as the Appellate Tribunal have been failed to discharge their statutory duties conferred by Sections 17 & 18 of the Act.

14. Needless to mention that in case the appeal filed under Section 17 of the Act before the Debts Recovery Tribunal or in appeal before the Appellate Tribunal are not decided within the statutory period provided under the Act, then it shall frustrate the very object and purpose of the Act in question. The Presiding Officers of the Tribunal are directed to ensure that appeal filed before it are decided as far as possible within the statutory period provided under the Act and appeals are not kept pending only by safeguarding the interest of the parties by passing repeated interim orders from time to time. Ordinarily, the interim orders should be passed to secure the interest of the parties at the time of institution of the appeal before the Appellate Tribunal or the Debts Recovery Tribunal, as the case may be and thereafter, the Tribunal or the Appellate Tribunal must proceed to decide the issue before it on merit expeditiously within the statutory period, provided under the Act. Failure on the part of the Appellate Tribunal or the Debts Recovery Tribunal to decide the issue within the statutory period shows inaction or incompetency on the part of the Presiding Officer of the Tribunals.

15. In view of above, the appeal is allowed. The impugned order dated 15.09.2011 passed by the Appellate Tribunal, contained as Annexure no. 5 to the writ petition is set aside. The Debts Recovery Tribunal is directed to decide the appeal under Section 17 of the Act expeditiously say within a period of two months from the date of receipt of a certified copy of the present order, after providing due opportunity of hearing to the parties. For a period of two months, the further recovery proceedings shall remain suspended subject to condition the petitioner deposits an amount of Rs.1.00 crore within a period of one month from today.

16. Let a copy of this order be send to the Chairman, Debts Recovery Tribunal, who shall circulate the same to the Presiding Officers of the Appellate Tribunal as well as Debts Recovery Tribunal immediately for compliance.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.09.2011

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

Criminal Misc. Writ Petition No. - 15145 of 2011

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

Counsel for the Petitioner:
Sri R.K. Shahi

Counsel for the Respondents:
A.G.A.

Code of Criminal Procedure-156(3)- Power of Magistrate-complainant filed affidavit before C.J.M. Requesting for direction to Investigation Officer To record the statement of complainant and her witnesses-rejection thereof-not proper-after issuing direction for registration and investigation-its but is not came to an end-duty bound to ensure fair investigation-consequential directions issued.

Held: Para 6

In view of the aforesaid decision of the Apex Court, it is obvious that it is a duty of the Magistrate to ensure that investigation is done impartially and in a fair manner. When the complainant alleged that the statements of the complainant and the witnesses have not been recorded by the Investigating Officer, the Magistrate could have forwarded the affidavits filed on behalf of the revisionist to the Investigating Officer. The Magistrate cannot wash his hands of the case after passing an order under Section 156 (3) Cr.P.C.

Case law discussed:
2008 (60) ACC 689

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

1. Heard learned counsel for the petitioner and learned AGA for the State.

2. This writ petition has been filed with a prayer to issue a writ, order or direction in the nature of certiorari to quash the order dated 1.6.2011 passed by the Chief Judicial Magistrate, Court No. 17, Deoria in Case No. 214 of 2011, Raj Kumar Vs. Samodh & others, under Section 304B, 201 IPC, P.S. Rudrapur, District- Deoria and also to issue a writ, order or direction in the nature of mandamus commanding and directing the respondents to act in accordance with law as settled by the Apex Court in the case of Sakiri Vasu Vs. State of U.P. & others, 2008 (60) ACC 689.

3. The petitioner is the complainant in Crime No. 314 of 2011, under Sections 498A, 304B, 201 IPC and D.P. Act, P.S. Rudrapur, District-Deoria.

4. The grievance of the petitioner is that the case is not being investigated by the police in a fair manner and still the statements of the complainant and the witnesses have not been recorded by the Investigating Officer. The affidavits of the complainant and the witnesses were filed before the C.J.M., Deoria with a prayer to forward the same to the Investigating Officer but the prayer has been rejected vide order dated 1.6.2011 passed by the C.J.M. Deoria on the ground that the complainant himself may produce his affidavit before the competent authority.

5. Learned counsel for the petitioner has relied on the decision of the Apex Court in **Sakiri Vasu Vs. State of U.P. & others, 2008 (60) ACC 689,** wherein in para no. 24, the following has been observed :-

"In view of the abovementioned legal position, we are of the view that although section 156(3) Cr.P.C. is very briefly worded, there is an implied power in the Magistrate under Section 156 (3) Cr.P.C. to order registration of a criminal offence and/or to direct the officer-in-charge of the concerned police station to hold a proper investigation and take all such necessary steps that may be necessary for ensuring a proper investigation including monitoring the same. Even though these powers have not been expressly mentioned in section 156 (3) Cr.P.C., we are of the opinion that they are implied in the above provision".

6. In view of the aforesaid decision of the Apex Court, it is obvious that it is a duty of the Magistrate to ensure that investigation is done impartially and in a fair manner. When the complainant alleged that the statements of the complainant and the witnesses have not been recorded by the Investigating Officer, the Magistrate could have forwarded the affidavits filed on behalf of the revisionist to the Investigating Officer. The Magistrate cannot wash his hands of the case after passing an order under Section 156 (3) Cr.P.C.

7. In these circumstances, the order dated 1.6.2011 passed by the C.J.M., Deoria is quashed. Learned Magistrate is directed to forward the affidavits filed by the petitioner to the Investigating Officer and to ensure fair investigation. The petitioner may also approach the Higher Police Authorities for redressal of his grievance.

8. With these directions, the writ petition is disposed of.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.09.2011

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

Criminal Misc. Writ Petition No. - 17483 of 2011

Rakesh and others ...Petitioners
Versus
State of U.P. and another ...Respondents

Counsel for the Petitioner:
Sri G.S. Karatiya

Counsel for the Respondents:
A.G.A.

Code of Criminal Procedure-190 (1) (b)- cognizance taken-on affidavit filed by complainants-composite consideration of case diary as well as affidavits filed by complainant-held-not proper-could have consider the statements of complainants and witnesses under Section 200 and 202-summoning order-illegal-quashed

Held: Para 9

The Magistrate has not adopted any of the courses mentioned above but has adopted the novel method by combining the material available in the case diary as well as affidavits submitted by the complainant, which was not permissible. Therefore, the impugned orders cannot be sustained. Learned Incharge Sessions Judge has also not considered this aspect of the case. Therefore, both the impugned orders are liable to be quashed.

Case law discussed:
2001 (43) ACC 1096

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

1. Heard learned counsel for the petitioners and learned AGA for the State.

2. No notice is issued to private respondent in view of the order proposed to be passed today, however, liberty is reserved for private respondent to apply for variation or modification of this order if he feels so aggrieved.

3. This writ petition has been filed with a prayer to quash the order dated 16.7.2011 passed by Addl. Chief Judicial Magistrate, Court No. 5, Moradabad in Case No. 27/12/11, Km. Suman Vs. Rakesh and order dated 9.8.2011 passed by learned Sessions Judge in Criminal Revision No. Nil of 2011, Rakesh & others vs. Km. Suman and State of U.P., P.S. Baniather, District- Moradabad.

4. In crime no. 196 of 2010, under Section 376 (g) IPC, P.S. baniyather, police submitted final report. The complainant filed protest petition. Learned A.C.J.M. Court No. 5, Moradabad, after considering the material available on record in the case diary and also on the basis of affidavits of witnesses submitted by the complainant, took cognizance and summoned the petitioners to face trial under Section 376 (g) IPC.

5. Learned counsel for the petitioners submitted that while taking cognizance under Section 190 (1) (b), the Magistrate could not have taken into consideration the affidavits filed by the complainant.

6. I agree with the submissions advanced by learned counsel for the petitioners.

7. The Division Bench of this Court in **Pakhando & others Vs. State of U.P. & another, 2001 (43) ACC 1096** has held that :-

(1) he may agreeing with the conclusions arrived at by the police, accept the report and drop the proceedings. But before so doing, he shall give an opportunity of hearing to the complainant ; or

(2) he may take cognizance under Section 190 (1) (b) and issue process straightway to the accused without being bound by the conclusions of the investigating agency, where he is satisfied that upon the facts discovered or unearthed by the police, there is sufficient ground to proceed ; or

(3) he may order further investigation, if he is satisfied that the investigation was made in a perfunctory manner ; or

(4) he may, without issuing process or dropping the proceedings decide to take cognizance under Section 190 (1) (a) upon the original complaint or pretest petition treating the same as complaint and proceed to act under Sections 200 and 202 Cr.P.C. and thereafter decide whether complaint should be dismissed or process should be issued.

8. It is, therefore, clear that the Magistrate could have taken cognizance under Section 190 (1) (b) Cr.P.C. if there was sufficient material in the case diary but affidavits of the witnesses filed by the complainant cannot be considered at this stage. Learned Magistrate has also found that the Investigating Officer has not recorded the statements of the witnesses

mentioned by the complainant. If the Magistrate was of the opinion that investigation was not done in a proper manner, then the Magistrate could have directed the Investigating Officer to conduct the further investigation or the Magistrate could have treated the protest petition as a complaint and after recording the statements of complainant and the witnesses under Sections 200 and 202 Cr.P.C., the Magistrate could have taken cognizance under Section 190 (1) (a) Cr.P.C.

9. The Magistrate has not adopted any of the courses mentioned above but has adopted the novel method by combining the material available in the case diary as well as affidavits submitted by the complainant, which was not permissible. Therefore, the impugned orders cannot be sustained. Learned Incharge Sessions Judge has also not considered this aspect of the case. Therefore, both the impugned orders are liable to be quashed.

10. The writ petition is allowed. The impugned orders dated 16.7.2011 and 9.8.2011 are quashed. The matter is remanded to the Magistrate concerned to take afresh decision in light of decision in the case of Pakhandu (Supra) after giving an opportunity of hearing to the complainant.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 15.09.2011

BEFORE
THE HON'BLE RAVINDRA SINGH, J.

Criminal Misc. Bail Application No. 20472 of 2011

Kalla @ Jitendra ...Petitioner
Versus
State of U.P. ...Respondents

Counsel for the Petitioner:
Sri V.P. Srivastava
Sri Bharat Bhushan Paul

Counsel for the Respondents:
Sri Satish Mishra
Sri Anil Kumar Shukla
A.G.A.

Code of Criminal Procedure-Section 439-Bail Application offence under section 363, 366, 302, 504, 506 IPC-deceased 15 years old girl residing at house of applicant-killed by applicant and co-accused-to give color of suicide hanged with scarf-in postmortem-four anti mortem injury found-considering gravity of case not entitled for bail.

Held: Para 6

Considering facts and circumstances of the case submission made by the learned counsel for the applicants, learned A.G.A., counsel for the complainant and from the perusal of the record, it appears that the F.I.R. under Sections 363, 366 IPC were lodged against the applicant and other co-accused persons. The deceased was aged about 15 or 16 year old, she was kidnapped, she was residing at the house of the applicant but she has been killed by the applicant and co-accused. According to post mortem examination report, she had sustained four ante mortem injuries. The cause of death was due to strangulation. To give the colour of suicide, her dead body was

hanged by a scarf (dupatta). The dead body was found inside the house of Surendra Singh, the father of the applicant, where she was residing. According to her statement, she had performed the marriage with the accused Yatendra @ Bhura, she was residing in his house but accused Kalla @ Jitendra, elder brother of the accused Yatendra @ Bhura were extended the threat of committing her murder. The gravity of the offence is too much and without expressing any opinion on the merits of the case, the applicant is not entitled for bail, therefore, the prayer for bail is refused.

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

1. Heard Shri V.P. Srivastava, Senior Advocate assisted by Sri Bharat Bhushan Paul, learned counsel for the applicants, learned A.G.A. for the State of U.P. and Sri Satish Mishra and Sri Anil Kumar Shukla, learned counsel for the complainant and perused the case diary.

2. This bail application has been moved by Kalla @ Jitendra with a prayer that the applicant may be released on bail in case crime no. 161 of 2010, under Sections 363, 366, 302, 504, 506 IPC, P.S. Eka, district-Firozabad.

3. The facts, in brief, of this case are that the F.I.R. has been lodged by Arvind Sharma on 29.6.2010 at about 7.30 a.m. in respect of the incident allegedly occurred on 17.6.2010 at about 7.15 p.m. or thereafter. The F.I.R. was lodged under Sections 363, 366 IPC against the accused Yatendra, Kalla @ Jitendra, Surendra, Gujji wife of Kalla, Suraj Mukhi wife of Surendra Singh and Rishi Babu alleging therein that Km. Lalita aged about 15 years, the daughter of the first informant was enticed and taken away by them. Thereafter, the dead body of the deceased was found on 19.8.2010. On the same day, the inquest report was prepared. In the house of the accused Surendra in a hanged condition. According to post mortem examination report, dated 20.8.2010, the deceased has sustained four ante mortem injuries, in which injury No. 1 was ligature mark all around neck, injury No. 2 was over elue, injury No. 3 was lacerated wound on right side of the head, back portion 8 c.m. behind right ear and injury No. 4 was contusion on right side face. The cause of death was as a result of ante mortem strangulation. The applicant applied for bail before the learned Sessions Judge, Firozabad, who rejected the same on 17.1.2011.

4. It is contended by the learned counsel for the applicants that the deceased Km. Lalita was having the love with the accused Yatendra @ Bhura, who was serving at tower, she has gone in the company of the accused Yatendra @ Bhura with her free will and consent on 17.6.2010. But the F.I.R. has been lodged on 29.6.2010. The first informant stated under Section 161 Cr.P.C. that she was kidnapped only by the accused Yatendra @ Bhura and Kalla @ Jitendra, she was not kidnapped by other co-accused persons named in the F.I.R. he did not want to proceed further against them. The statement of Km. Lalita Devi was also recorded under Section 161 Cr.P.C. she categorically stated that she had decided to perform the marriage with the accused Yatendra @ Bhura, she had gone in his company with her free will and consent, she was kept by him at the

house of his relatives, they performed the court marriage, they obtained order not to make their arrest by the police in Criminal Misc. Writ Petition No. 12425 of 2010, she was living at the house of the co-accused Yatendra @ Bhura in village Nagala Dhansingh. But his elder brother, accused Kalla @ Jitendra was extended the threat to commit her murder. Ultimately, she was killed by way of strangulation. But there is no evidence to show that the applicant has committed the alleged offence. The deceased was living separately along with her husband. Except the statement of the deceased recorded under Section 161 Cr.P.C. in which she stated that accused Kalla @ Jitendra was extended the threat to commit her murder, there is no other evidence against the applicant. The dead body of the deceased was not found inside the house of Surendra Singh, father of the applicant in which the applicant was also residing. The applicant has been falsely implicated only on the basis of doubt and suspicion. The applicant is having no criminal antecedents. He may be released on bail.

5. In reply of the above contention, it is submitted by the learned A.G.A. and learned counsel for the complainant that the deceased has passed the high school examination in the year 2010. The date of birth was 1.10.1995, she was a minor girl, she was kidnapped by the applicant and another co-accused persons and thereafter, she was killed by way of strangulation. The dead body of the deceased was found in the house of the applicant. After committing the murder her dead body was hanged to show that she herself committed suicide. The gravity of the offence is too much. The applicant and his brother committed the murder of the deceased. The applicant may not be released on bail.

6. Considering facts and circumstances of the case submission made by the learned counsel for the applicants, learned A.G.A., counsel for the complainant and from the perusal of the record, it appears that the F.I.R. under Sections 363, 366 IPC were lodged against the applicant and other co-accused persons. The deceased was aged about 15 or 16 year old, she was kidnapped, she was residing at the house of the applicant but she has been killed by the applicant and co-accused. According to post mortem examination report, she had sustained four ante mortem injuries. The cause of death was due to strangulation. To give the colour of suicide, her dead body was hanged by a scarf (dupatta). The dead body was found inside the house of Surendra Singh, the father of the applicant, where she was residing. According to her statement, she had performed the marriage with the accused Yatendra @ Bhura, she was residing in his house but accused Kalla @ Jitendra, elder brother of the accused Yatendra @ Bhura were extended the threat of committing her murder. The gravity of the offence is too much and without expressing any opinion on the merits of the case, the applicant is not entitled for bail, therefore, the prayer for bail is refused.

7. Accordingly, this bail application is rejected.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 19.09.2011

BEFORE
THE HON'BLE SIBGHAT ULLAH KHAN,J.

Civil Misc. Writ Petition No. 29913 of 2003

Ram Lal and others ... Petitioner
Versus
Addl. Commissioner and others ... Respondents

Counsel for the Petitioner:
Sri Ram Kishor Gupta

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

U.P.Z.A. & L.R. Act, Section198 (4)- cancellation of Patta-on ground-non residing inf village in question-Patta granted in 1959-after 45 years-No provision of cancellation on this ground-nor any statutory prohibition from shifting any where else-for either lease holder or their heir-held-cancellation order set-a-side.

Held: Para 5

What has been done in the instant case is pure massacre of justice. Allotment has been cancelled in the proceedings initiated after thirty five to forty years. There is no such requirement that after allotment neither the allottee nor his subsequent generations can shift his (their) residence to another village and if they do so allotment would be liable to be cancelled.

(Delivered by Hon'ble Sibghat Ullah Khan,J.)

1. Heard learned counsel for the petitioner and learned standing counsel for respondents 1 to 3. Inspite of sufficient service no one has appeared on behalf of respondents 4 to 26, the complainants.

2. The first order challenged through this writ petition is contained in Annexure-1 to the writ petition passed in case no.182 of 1999 under Section 198(4) of U.P. Zamindari Abolition and Land Reforms Act - Hari Kishore and others vs. Ramrati and others. The order has been passed by Dr. Rakesh Kumar, District Magistrate, Mahoba on 23.7.1999. Pattas granted to the ancestors of the petitioners have been cancelled on the ground that on personal inspection by the D.M. and on inquiry from the villagers it was found that the allottees were not residing in the village concerned i.e. Bilrahi.

3. It is shocking to note that in the impugned order even date of allotment has not been given. Such an order has been passed by District Magistrate who holds a Doctorate degree. Against the order passed by the D.M. dated 23.7.1999 revision no.20/382 of 1998-99 was filed by the petitioners. Additional Commissioner, Chitrakoot Dham, Mandal Banda dismissed the revision on 24.6.2003 hence this writ petition.

4. Before the District Magistrate none of the petitioners had appeared. The D.M. in his order mentioned that notices sent to the petitioners returned with the endorsement that they were not residents of the village. No further attempt was made to serve the notices upon them. In the judgment of the Additional Commissioner it is mentioned that petitioners asserted that pattas were granted in the year 1372 fasli (1964-65 A.D). In para-4 of the

writ petition it has been mentioned that pattas were granted in July, 1959. In grounds of Revision filed before the Additional Commissioner it was stated that pattas were granted in 1957. Revision was dismissed on 24.6.2003. However, one revision i.e. revision no.197 of 1998-99 filed by one of the allottees i.e. Smt. Ram Rati against the same order of the D.M. was allowed by Additional Commissioner, Administration, Chitrakoot Dham, Mandal Banda on 22.9.1999 copy of which is Annexure-5 to the writ petition. In the said order it was held that complaint was filed beyond time.

5. What has been done in the instant case is pure massacre of justice. Allotment has been cancelled in the proceedings initiated after thirty five to forty years. There is no such requirement that after allotment neither the allottee nor his subsequent generations can shift his (their) residence to another village and if they do so allotment would be liable to be cancelled.

6. Writ petition is accordingly allowed. Impugned orders are set aside.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED:ALLAHABAD 03.09.2011

BEFORE
THE HON'BLE SUDHIR AGARWAL,J.

Civil Misc Writ Petition No. 33829 of 1997

State of U.P. and another ...Petitioner
Versus
Sri S.M. Sagar and another
...Respondents

Counsel for the Petitioner:
S.C.

Counsel for the Respondents:
C.S.C.

Constitution of India Article 226-practice of filling fribulus petitions-State Law Officer performing an mechanical consideration by permitting to file Writ Petition-which resulted unnecessary burden upon High Court-engagement of large strength of State Law Officers and Special Counsel-public funds can not be allowed to misused.

Held: Para 9

Such a huge team of Law Officers is headed by learned Advocate General. Monthly revenue towards fees of this magnitude of State Law Officers, only in the High Court is quite heavy. This Court have experienced that not only this but almost in a routine manner, State is also engaging several private counsels as Special Counsel, paying them a huge amount. With this quantum of assistance of legal brains, still the Government, if not able to control frivolous and vexatious cases, it is a matter, not only of serious concern, but condemnation. There is something basically wrong which needs be analysed and rectified at the earliest. The State cannot forget that being custodian of public funds which belong to tax payers (people of this

State), it cannot plunder with it in such reckless and negligent manner. Everybody has to be accountable for spending even a single shell from public funds. Anybody responsible for wastage must be required to explain and bear it. Public funds cannot be allowed to be thrown and misused in such a manner.

Case law discussed:

Writ Petition No. 474 (SB) of 2011 (State of U.P and another Vs. Brij Bhushan Sharma); Writ Petition No. 473 (SB) of 2011 (State of U.P through Principal Secretary Appointment Deparmtnet Vs. Vishnu Swarup Mishra and another), decided on 17.03.2011

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

1. The order impugned in the writ petition is dated 4th October, 1994 passed by District Judge, Agra. While allowing the appeal and remanding the matter to the authority below, District Judge directed that the authority shall have a glance of Supreme Court judgment and make it a part of record and thereafter pass order in the light of directions given by the Apex Court.

2. This Court really failed to understand what was the occasion for the petitioners to file the present writ petition instead of obtaining copy of the order of Supreme Court, which they claim to have been passed by it. The learned Standing Counsel in fact could not explain any reason or justification in filing this case.

3. Faced with these circumstances, I intend to place on record my deep dissatisfaction in the manner, the officials in Law Department are functioning. Why this case was advised to be filed must have been scrutinised by Law Department. It appears they have passed order mechanically. Error of judgment can be excused but surrender or non-application of mind cannot. The Judicial Officers are sent on deputation to the Law Department of Government with an objective that they constitute an independent cadre, hence without being influenced by executive, shall advise it impartially, objectively and fairly. If this does not happen, the very purpose in sending Judicial Officers on deputation with Government will frustrate. On the one hand from regular work these officers are taken out and sent on deputation to work like a Consultant but if their advise and opinion is not independent and impartial, it shall loose its gravity and frustrate the purpose. The officials in the Law Department, therefore, have to work with great caution, care and independence.

4. It is a matter of common knowledge that before the superior courts, like High Court and Supreme Court, State (Provincial or Central, as the case may be) is the biggest litigant. In fact in writ jurisdiction, almost in all the cases, State, in one or other manner, is a party.

5. This Court is presently reeling under huge pendency of more than 9.5 lacs cases (more than 7 lacs at Allahabad and more than 2.5 lacs at Lucknow). Innumerable seminars, conferences, meetings, discussions etc. are being held at every level to find out ways and means for expeditious disposal of matters so that access to justice should be quicker and prompt to the people. All out attempt is being made for quick justice since justice delayed is justice denied. We are trying our best so that litigating people should get decision/adjudication of their rights within a reasonable time. To achieve this goal, role of Executive cannot be ignored. On the contrary, being one of the biggest litigant, the Executive has all the more responsibility to behave in a reasonable

manner which is consistent with law so that occasion to approach Courts for protection of rights by people may be minimised.

6. Under Article 226 of the Constitution, writ petitions are mostly filed when the Executive behave arbitrarily, oppressively and in defiance of statutes, Constitutional and otherwise. When a common man comes to Court against such action of Executive, it cannot be said that he is unnecessarily burdening the system of administration of justice. The situation, however would be much different when a Court of law has given a verdict. Once such a decision is taken, unless a glaring legal error or otherwise travesty of justice has resulted from such a decision, atleast the State must be slow in continuing to engage in further litigation by filing a writ petition in the High Court under Article 226 and to take up the matter further.

7. I am not suggesting that the judgment of subordinate Courts should not be challenged at all but my endeavour is to stress upon a more serious scrutiny at the level of department itself, whether there is such a glaring error in the judgment so as to take up the matter further or not. Most of the departments of Government have their own legal experts and consultants. At the Secretariat level a full fledged cadre of such Experts is available in Law Department. I am told that presently the office of Legal Remembrancer and Secretary, Law, includes more than two dozens of Judicial Officers at the level of Deputy Legal Remembrancer, Joint Legal Remembrancer and Additional Legal Remembrancer headed by a Legal Remembrancer. They are the officers belong to Judicial Service of State, whereof senior posts like Joint Legal Remembrancer, Additional Legal Remembrancer and Legal Remembrancer are manned by members of Higher Judicial Service. Heavy responsibility lie upon these officers also to analyse the judgments in the context of facts, statutory provisions and decisions of High Courts and Supreme Court on the subject and thereafter to find out whether there is any such glaring error which justify further litigation in High Court or not. The approach should not be one to grant approval automatically and mechanically. There must be and there has to be a serious application of mind at the level of authorities who are responsible to tender legal opinion to take up the matters further.

8. I may point out at this stage that in case of any doubt or clarity on the subject, the officers of Government including those from Law Department can also seek opinion from Law Officers of State who represent them in High Court including the learned Advocate General and Additional Advocate Generals. It would not be out of place to mention that number of State Law Officers empanelled by State in the High Court, i.e., at Lucknow and Allahabad consists of more than a few hundreds Advocates.

9. Such a huge team of Law Officers is headed by learned Advocate General. Monthly revenue towards fees of this magnitude of State Law Officers, only in the High Court is quite heavy. This Court have experienced that not only this but almost in a routine manner, State is also engaging several private counsels as Special Counsel, paying them a huge amount. With this quantum of assistance of legal brains, still the Government, if not able to control frivolous and vexatious cases, it is a matter, not only of serious

concern, but condemnation. There is something basically wrong which needs be analysed and rectified at the earliest. The State cannot forget that being custodian of public funds which belong to tax payers (people of this State), it cannot plunder with it in such reckless and negligent manner. Everybody has to be accountable for spending even a single shell from public funds. Anybody responsible for wastage must be required to explain and bear it. Public funds cannot be allowed to be thrown and misused in such a manner.

10. Time and again, the Apex Court and this Court have repeatedly said that State should refrain from filing frivolous petitions, wasting precious time of Court so that other substantial matters may be taken up and decided.

11. Recently in **Writ Petition No. 474 (SB) of 2011 (State of U.P and another Vs. Brij Bhushan Sharma),** decided on 17.03.2011, a Division Bench, has deprecated such practice of State of filing frivolous writ petitions :

"We deprecate such practice on the part of the State. . . ."

12. In another matter, i.e., **Writ Petition No. 473 (SB) of 2011 (State of U.P through Principal Secretary Appointment Deparmtnet Vs. Vishnu Swarup Mishra and another),** decided on 17.03.2011 while dismissing writ petition, the Court said:

"We direct the Chief Secretary of State to formulate a policy in the matter of filing such petitions which are causing unnecessary burden for disposal, on this Court."

13. In view of the above, this writ petition is dismissed with cost of Rs.10,000/- against the petitioners.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.09.2011

BEFORE
THE HON'BLE ASHOK BHUSHAN,J.
THE HON'BLE BHARATI SAPRU,J.

Civil Misc. Writ Petition No. 45362 of 2011

Sardar Javed Khan ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Shashi Nandan
Sri Udayan Nandan
Sri Prem Chand

Counsel for the Respondents:
Sri S.G. Hasnain(A.A.G.)
Sri Syed Fahim Ahmed
Sri Anurag Kumar
Sri Manoj Mishra
C.S.C.

U.P. Municipalities Act, 1916-Section 48(2)-cessation of Administrative and Financial Power of Chairman Nagar Palika-on report submitted by District Magistrate-subjective satisfaction recorded by the Government can not be without material-nor faulty mean because of elapsed of one and half years time-held order impugned warrant no interference.

Held: Para 32

In the present case, when the State Government has recorded its objective satisfaction that the charges are not groundless and the President is prima-facie guilty of the charges, it cannot be said that the cessation of financial and administrative powers of the petitioner

is illegal merely because more than one and a half year has elapsed from the submission of the report by the District Magistrate. The consequence as contemplated under Section 48(2) of the Act, 1916 shall ensue as and when the power is exercised under Section 48(2) of the Act, 1916 and the mere fact that certain time has elapsed and the State Government did not promptly take action in any manner vitiates the proceeding in exercise of power under Section 48(2) of the Act, 1916.

Case law discussed:

2011 (3) ADJ 502; Writ Petition No. 16029/2011, Sanjeev Agarwal Vs. State of U.P. & others

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

1. Heard Shri Shashi Nandan, learned Senior Advocate assisted by Shri Prem Chand and Udayan Nandan for the petitioner, Shri S.G. Hasnain, Additional Advocate General for the respondents and Shri Anurag Khanna for the applicant i.e. Roop Singh who has sought impleadment in the writ petition.

2. By this petition, the petitioner has prayed for quashing the order dated 25/7/2011, passed by he State Government issuing show cause notice to the petitioner, the President Nagar Palika Parishad, Rampur to show cause as to why he be not removed from the office of President on the charges as mentioned in the notice issued under Section 48(2) of the U.P. Municipalities Act, 1916 hereinafter referred to as the "Act 1916". The State Government also while issuing the show cause notice directed that the charges being serious in nature the petitioner's financial and administrative powers shall remain ceased till he is exonerated from the charges.

3. The petitioner was elected as the President Nagar Palika Parishad, Rampur in October, 2006. Twenty Two temporary posts of drivers were created in Nagar Palika Parishad, Rampur by order dated 28/8/2006. Nagar Palika Parishad, Rampur issued an advertisement on 30/12/2006, inviting applications for appointment on 22 posts of drivers from the candidates having Driving Licence with an ability to read and write Hindi. 143 applications were received in response to the aforesaid advertisement. A Selection Committee consisting of the President (Petitioner), Executive Officer, Senior Health Officer, Executive Engineer, Assistant Tax Superintendent and Accounts Officer was constituted by the Chairman and the selection took place on 21/4/2008 and 22 persons were given appointment.

4. The State Government has extended the appointment of the 22 selected candidates on temporary posts which extension is up to 28/2/2012. A complaint was submitted by one Dinesh Sharma on 07/7/2008 and one by Ritu Joshi on 04/8/2008 to the office of Hon'ble The Chief Minister making allegations against the recruitment of 22 drivers. Several Corporators of the Nagar Palika Parishad also submitted complaints to the Minister, Nagar Vikas in December, 2008 on which an order was passed by the minister concerned to the Principal Secretary, Nagar Vikas to enquire into the matter and submit a report. The State Government by the letter dated 18/2/2009, wrote to the District Magistrate to submit a report on a complaint submitted by Uma Sharma, Corporator and others. Another letter dated 18/11/2009 was issued by the Special Secretary, State Government

referring to complaint submitted by one Girish Chand, M.L.A. directing the District Magistrate to submit a report after giving opportunity of hearing to the petitioner and also following the procedure prescribed in the Government Order dated 04/2/2003. The District Magistrate wrote to the petitioner on 04/11/2009, to submit his explanation on the complaint submitted by the Corporators. The petitioner asked for the report and copy of the complaint which was provided to the petitioner by letter dated 13/11/2009. The petitioner was asked to submit his reply by 05/12/2009. The petitioner submitted his reply dated 05/12/2009 which was received on 07/12/2009. The District Magistrate after considering the reply of the petitioner submitted a detail report to the State Government by letter dated 09/12/2009, recommending for taking action against the President and the Executive Officer of the Municipal Board. After receiving the report of the District Magistrate, a notice has been issued on 25/7/2011 by the State Government under Section 48 (2) of the Act, 1916 with an order that the petitioner shall cease to exercise financial and administrative powers.

5. Learned counsel for the petitioner challenging the order dated 25/7/2011, submitted that the report of the District Magistrate dated 09/12/2009, could not have been relied by the State Government since the report has not been submitted in accordance with the procedure prescribed by the Government Order dated 04/2/2003. He submits that the Government Order dated 04/2/2003, provides for the procedure of enquiry on a complaint against the President of Nagar Palika Parishad and it states that enquiry be held only when the complaint is accompanied by an affidavit. He submits that no affidavits were filed by the complainant, hence no enquiry ought to have been taken and the report of the District Magistrate 09/12/2009, could not form any basis for issuing any show cause notice under Section 48 (2) of the Act, 1916. It is further submitted by the learned counsel for the petitioner that there was no occasion of ceasing financial and administrative powers of the petitioner after a lapse of 3 years from making appointment of 22 drivers. He submits that the appointment of 22 drivers were made in the Nagar Palika Parishad, Rampur in accordance with the Government Order dated 17/3/1952 copy of which is filed as (Annexure-9) to the writ petition and the provisions of Uttar Pradesh Procedure for Direct Recruitment for Group-C Posts (Outside the purview of Uttar Pradesh Public Service Commission) Rules, 2001 hereinafter called the "Rules,2001" are not applicable with regard to appointment of drivers to be made in the Nagar Palika Parishad. He submits that the charges levelled against the petitioner on the provisions of the aforesaid Rules, 2001 are misconceived and unfounded. He submits that the appointment of 22 drivers were made in accordance with the Government Order dated 17/3/1952 as applicable in the Municipal Board. He further submits that minor discrepancies and the mistake pointed out in the report of the District Magistrate dated 09/12/2009, are not sufficient for initiating proceedings against the petitioner under Section 48 (2) of the Act, 1916 or to cease financial and administrative powers. He submits that the report of the District Magistrate was submitted on 09/12/2009, but no action was taken till 25/7/2011, which clearly indicates that there was no urgency in the

matter and at this late stage the cessation of financial and administrative powers is illegal. He further submits that it is not necessary for proceeding under Section 48 (2) of the Act, 1916 to cease financial and administrative powers of a President. He has placed reliance on a Full Bench judgment of this Court in **Hafiz Ataullah Ansari** Vs. State of U.P. & Ors, 2011 (3) ADJ 502.

6. Shri S.G. Hasnain, Additional Advocate General appearing for the respondents refuting the submission of the learned counsel for the petitioner contended that the charges levelled against the petitioner are serious in nature. The appointments of 22 drivers made in the Nagar Palika Parishad, Rampur was not made in accordance with law. He submits that although it was claimed that 143 candidates appeared, but in the attendance sheet there was signature of 34 persons only. He submits that one Shri Rashid Ali was not a candidate nor he appeared in the interview but his name was included in the select list.

7. Shri S.G. Hasnain, Additional Advocate General appearing for the respondents submits that the Rules, 2001 are applicable for the recruitment of drivers in the Nagar Palika Parishad and neither the selection committee was constituted properly nor any driving test was taken of the drivers and the recruitment of 22 drivers being wholly illegal, the State Government has rightly issued show cause notice to the petitioner under Section 48(2) of the Act, 1916. He submits that the cessation of administrative and financial powers are consequent to the fact that the charges against the petitioner are serious and the State Government has initiated proceedings under Section 48(2) of the Act, 1916 for the removal of the petitioner.

8. Shri Anurag Khanna appearing for the applicant i.e. Roop Singh submitted that the petitioner has already submitted his reply to the State Government on 11/8/2011, hence the petition has become infructuous. He further submits that there were other serious misconducts committed by the petitioner including the misconduct of financial impropriety which regard to which the District Magistrate has already sent his report to the State Government on 18/3/2010, 08/1/2010, 01/11/2010 and 06/3/2010. He submits that there being serious allegations against the petitioner, petitioner is not a fit person in whose favour this Court may exercise its discretion under Article 226 of the Constitution of India.

9. We have heard learned counsel for the parties and have perused the record.

10. The order impugned has been issued by the State Government in exercise of power issued under Section 48(2) of the Act, 1916.

Section 48(2) of the Act, 1916 along with the proviso is quoted below:

"48. Removal of President.- (1) [omitted]

(2) Where the State Government has, at any time, reason to believe that -

(a) there has been a failure on the part of the President in performing his duties, or

(b) the President has -

(i) incurred any of the disqualifications mentioned in Sections 12-D and 43-AA; or

(ii) within the meaning of Section 82 knowingly acquired or continued to have, directly or indirectly, or by a partner, any share or interest, whether pecuniary or of any other nature, in any contract or employment with, by or on behalf of the Municipality; or

(iii) knowingly acted as a President or as a member in a matter other than a matter referred to in clauses (a) to (g) of sub-section (2) of Section 32, in which he has, directly or indirectly, or by a partner, any share or interest, whether pecuniary or of any other nature, or in which he was professionally interested on behalf of a client, principal or other person; or

(iv) being a legal practitioner acted or appeared in any suit or other proceeding on behalf of any person against the Municipality or against the State Government in respect of nazul land entrusted to the management of the municipality, or acted or appeared for or on behalf of any person against whom a criminal proceeding has been instituted by or on behalf of the municipality; or

(v) abandoned his ordinary place of residence in the municipal area concerned; or

(vi) been guilty of misconduct in the discharge of his duties; or

(vii) during the current or the last preceding term of the Municipality, acting as President or Vice- President, or as Chairman of a Committee, or as member or in any other capacity whatever, whether before or after the commencement of the Uttar Padesh Urban Local Self Government Laws (Amendment) Act, 1976 so flagrantly abused his position or so wilfully contravened any of the provisions of the Act or any rule, regulation or bye-law, or caused such loss or damage to the fund or property of the Municipality as to render him unfit to continue to be President; or

(viii) been guilty of any other misconduct whether committed before or after the commencement of the Uttar Pradesh Urban Local Self Government Laws (Amendment) Act, 1976 whether as President or as Vice-President, exercising the powers of President or as Vice-President,or as member; or

[(ix) caused loss or damage to any property of the Municipality; or;

(x)misappropriated or misused of Municipal fund; or

(xi)acted against the interest of the Municipality; or

(xii)contravened the provisions of this Act or the Rules made thereunder; or

(xiii)created an obstacle in a meeting of the Municipality in such manner that it becomes impossible for the Municipality to conduct its business in the meeting or instigated someone to do so; or

(xiv)wilfully contravened any order or direction of the State Government given under this Act; or

(xv)misbehaved without any lawful justification with the officers or employees of the Municipality; or

(xvi)disposed of any property belonging to the Municipality at a price less than its market value; or

(xvii)encroached, or assisted or instigated any other person to encroach upon the land, building or any other immovable property of the Municipality,]

it may call upon him to show cause within the time to be specified in the notice why he should not be removed from office]:

[Provided that where the State Government has reason to believe that the allegations do not appear to be groundless and the President is prima-facie guilty on any of the grounds of this sub-section resulting in the issuance of the show cause notice and proceedings under this sub-section he shall, from the date of issuance of the show cause notice containing charges, cease to exercise, perform and discharge the financial and administrative powers, functions and duties of the President until he is exonerated of the charges mentioned in the show cause notice issued to him under this sub-section and finalization of the proceedings under sub-section (2-A) and the said powers, functions and duties of the President during the period of such ceasing, shall be exercised, performed and discharged by the District Magistrate or an officer nominated by him not below the rank of Deputy Collector.]

11. The first submission of the learned counsel for the petitioner is that the report submitted by the District Magistrate not being in accordance with the Government Order 04/2/2003, said report could not have been the basis for taking any action against the petitioner. Copy of the Government Order dated 04/2/2003 is filed as Annexure-7 to the writ petition. The said Government Order has been addressed to all the Divisional Commissioners and the District Magistrates on the subject of disposal of complaints received against the Presidents and Corporators of Nagar Palika Parishad/Nagar Panchayat. The said Government Order provides that the complaints received against the said office bearers will be entertained only when the complainant had submitted his own affidavit and affidavit of those persons from whom he has obtained the information regarding the allegations and submit relevant documents. The said Government Order has been issued with an object to ward off the District Magistrate and the Divisional Commissioner to entertain frivolous complaints which were not supported by any affidavit and which have no substance. There cannot be any dispute that the District Magistrate and the Commissioner had to consider the complaints received by them as per the procedure prescribed by the Government Order dated 04/2/2003, but present is a case where the State Government has initiated proceeding under Section 48(2) of the Act, 1916 after receiving the complaints directly from the Corporators and other persons.

12. Section 48(2) of the Act, 1916 begins with the words "Where the State Government has, at any time, reason to believe that-."

13. A Division Bench of this Court in which one of us (Ashok Bhushan,J) was a member in Writ Petition No.16029/2011, **Sanjeev Agarwal Vs. State of U.P. & Ors,** decided on 25/8/2011, while considering the scope of Section 48(2) of the Act, 1916 has laid down following:

"Section 48 sub-section (2) of the U.P. Municipalities Act, 1916 provides, "Where the State Government has, at any time, reason to believe that ..... it may call for upon him to show cause within the time to be specified in the notice why he should not be removed from office." The power under Section 48 thus can be exercised by the State Government on its subjective satisfaction. The words "reasons to believe" clothe the State Government jurisdiction to initiate proceedings under Section 48(2). The initiation of proceedings under Section 48(2) thus can be on the basis of any material. The State Government can suo-motu under Section 48(2) take cognizance on any complaint submitted by an individual or any information received from the District Magistrate or the Divisional Commissioner or any other officer of the State. The power of the State Government to initiate proceedings under Section 48(2) is not hedged by any precondition. The letter written by the District Magistrate dated 8th June, 2009 and the letter of the Divisional Commissioner dated 12th August, 2009 cannot be said to be materials which were irrelevant for initiating proceedings under Section 48(2) of the U.P. Municipalities Act, 1916. Thus the first submission of learned counsel for the petitioner that the State Government could not have issued show cause notice dated 7th September, 2009 on the basis of the aforesaid two letters, cannot be accepted."

14. The present is not a case where the District Magistrate after receiving the complaints of his own has submitted a report on 09/12/2009. The District Magistrate has submitted his report in pursuance of the direction issued by the State Government.

15. In the counter affidavit filed by the State Government, letter dated 18/2/2009 has been brought on record as Annexure-3 by which the State Government has directed the District Magistrate to submit his report on the complaint of Uma Sharma and other Corporators. The District Magistrate was obliged to submit his report in pursuance of the direction of the State Government dated 18/2/2009. Although, another letter dated 18/11/2009, was sent by the State Government forwarding the complaint of one Girish Chandra, M.L.A. in which the District Magistrate was directed to obtain affidavit of complainant after giving opportunity to the delinquent to submit a report but from the report of the District Magistrate dated 09/12/2009, which has been annexed as Annexure-10 to the writ petition, it appears that even before the letter dated 18/11/2009, was received, District Magistrate had proceeded to obtain the reply of the petitioner on the complaints which was received from the Corporators. The petitioner was informed by letter dated 04/11/2009 to submit his reply. Thus, the proceeding for preliminary inquiry which was initiated in pursuance of the direction of the State Government dated 18/2/2009, was already in progress and the mere fact that the affidavits were not obtained from the complainants in pursuance of letter dated

18/11/2009, cannot be said to be a ground to make the report of the District Magistrate irrelevant.

16. Present is not a case where the District Magistrate of his own has submitted a report after receiving the complaints which were not supported by affidavits, rather present is a case where the District Magistrate has submitted his report under the directions of the State Government, thus the report of the District Magistrate dated 09/12/2009 cannot be said to be irrelevant for exercising power under Section 48(2) of the Act, 1916, thus the submission of the learned counsel for the petitioner that the report of the District Magistrate dated 09/12/2009 cannot be the basis for taking action against the petitioner cannot be accepted.

17. The next submission of the learned counsel for the petitioner is that the charges have been levelled against the petitioner on the basis of 2001 Rules, which has no application on the recruitment undertaken by the Nagar Palika Parishad on the post of 22 drivers. He submits that the Rules, 2001 have been framed under the proviso to Article 309 of the Constitution of India and is applicable on the employees of the State Government and the entire allegations made against the petitioner in the charge-sheet regarding non-compliance of the procedure for recruitment is unfounded.

18. The submission of the learned counsel for the petitioner is that the Nagar Palika Parishad proceeded to fill up the vacancies of drivers in pursuance of the Government Order dated 17/3/1952, Annexure-9 to the writ petition which itself provides for method of recruitment and qualification.

19. At the first blush, the submission made by the learned counsel for the petitioner that the Nagar Palika Parishad is free to make recruitment on the post of drivers and is not regulated by the Rules, 2001 appears to be attractive, but when the matter has been pondered by us, the issue is not free from doubt and needs further scrutiny.

20. Learned counsel for the petitioner has relied on the Government Order dated 17/3/1952, Annexure-9 to the writ petition. By the said Government Order, paragraph 6 in the earlier Government Order dated 10/4/1950 was substituted which is to the following effect:

"6. When direct recruitment to any post specified in the annexure has to be made it will be governed by the educational qualifications shown therein. Recruitments to posts from outside should, however, be made through the Employment Exchange; and the system of filling up vacancies under Government Departments should be adopted by local bodies as already instructed in G.O. No.3306/IX-156-47 dated June 2, 1948. Local Bodies may also form a Committee consisting of the Chairman or the President, the Executive Officer of the Secretary, as the case may be and the principal administrative officer of the department concerned, to make a selection from amongst the candidates suggested by the Employment Exchange, for a vacant post, by interviewing them after a competitive test, if necessary. The actual appointment will, however, be made by the competent authority."

21. The important direction in the above paragraph 6 which is relevant is to the following effect:

"And the system of filling up vacancies under Government Departments should be adopted by local bodies as already instructed in G.O. No.3306/IX-156-47 dated June 2, 1948".

22. The next sentence in the Government Order was that the Local Bodies may also form a Committee consisting of the Chairman or the President, the Executive Officer of the Secretary, as the case may be and the principal administrative officer of the department concerned. It is relevant to note that the said Government Order was issued on March,17,1952 and after the said Government Order, several Government Orders have been issued and an Act namely; The Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes & Other Backward Classes) Act, 1994 has been enacted providing for reservation in posts in a Local Authority which is being followed by the Nagar Palika Parishad for the selection in the posts under Nagar Palika Parishad. There are Government Orders and Rules regarding constitution of the selection committee having representatives from Reserved Category. When the Government Order dated 17/3/1952 provides for system of filling of vacancies under Government Department the same should be adopted by the local bodies. It does not appeal to reason that the Nagar Palika Parishad is completely free to adopt its procedure for carrying out the selection and recruitment. It has been submitted by the learned counsel for the respondents that the driving test has been introduced in the recruitment of drivers in the Government Department and the selection committee in the Government Department consists of representative of the District Magistrate and the candidate belonging to the reserved category candidates, the question need to be thoroughly considered as to whether the local bodies are not obliged to constitute selection committee accordingly.

23. We, however, hasten to add that we are not expressing any concluded opinion in the above regard since the State Government has yet to take a decision after considering the reply submitted by the petitioner to the show cause notice dated 25/7/2011. Present is not a stage, where this Court may express any concluded opinion on the aforesaid issue. Suffice it to say, that the charges which have been levelled against the petitioner in the show cause notice cannot be brushed aside without there being thorough examination and deliberation in the matter.

24. We, are thus of the view that the show cause under Section 48 (2) of the Act, 1916 for removal of the petitioner cannot be quashed in this writ petition at this stage.

25. The question which now needs to be considered is as to whether while issuing the show cause notice to the petitioner under Section 48(2) of the Act, the State Government was justified in ceasing the financial and administrative powers of the petitioner.

26. Learned counsel for the petitioner has placed reliance on the Full Bench judgment of this Court in **Hafiz**

Ataullah Ansari (supra). The Full Bench of this Court had an occasion to consider the issues in paragraph 40. The issues which were considered by the Full Bench of this Court have been noted which is to the following effect:

40. The division bench has referred three questions. They are mentioned under the heading 'QUESTIONS REFERRED'. For convenience, we have reformulated them into the following points for determination and have added preliminary objection of the respondent as the first point.

(i) Whether the reference should be sent back unanswered;

(ii) Can there be proceeding for removal of a president under section 48(2) of the Municipalities Act, without ceasing his financial and administrative powers;

(iii) Whether any separate or specific order is required under proviso to section 48(2) of the Municipalities Act for ceasing financial and administrative power.

(iv) If the notice purported be given under proviso to Section 48(2) of the Municipalities Act does not comply with it then what is the consequence;

(v) What are the condition precedent (other than mentioned in the next point) for ceasing financial and administrative powers under proviso to section 48(2) of the Municipalities Act;

(vi) Whether any opportunity is also required to be afforded before ceasing financial and administrative powers;

(vii) In case opportunity is required to be afforded then what is its extent;"

27. The Full Bench in the case of **Hafizataullah Ansari (supra)** laid down following in paragraphs 59,60,61,79 and 84 which are quoted below:

"59. The president ceases to exercise the financial and administrative powers as soon as a show cause notice under section 48(2) satisfying the conditions of the proviso to section 48(2) or a valid show cause notice under proviso to section 48(2)of the Municipalities Act is issued. The cessation of power is automatic: it is so contemplated in the proviso itself.

60. Once, a valid notice under proviso to section 48(2) of the Municipalities Act is issued, then even if it is not mentioned that the financial and administrative powers of the president have ceased, it does not mean that he can still exercise them. The cessation of the president's power is automatic and necessary consequence of issuance of the valid notice complying with the conditions under the proviso.

61. In view of above, it is not necessary that order ceasing the right to exercise financial and administrative powers should be mentioned in the separate order or in the show cause notice itself but what is necessary is that the notice should be valid; it should comply with the conditions of the proviso to section 48(2) of the Municipalities Act.

79. The notice that results in ceasing the financial and administrative powers under the proviso to section 48(2) of the Municipalities Act is not a simple show cause notice--it must contain the charges

as well. It is only when the show cause notice contains the charges that the cessation of the financial and administrative power takes place.

84. In our opinion, the cessation of financial and administrative power can take place only if the power under the proviso to section 48(2) of the Municipalities Act is rightly exercised. It is rightly exercised only if at least the following conditions are satisfied in the notice/ order:

(i) There should be objective satisfaction of the State government that:

The allegations do not appear to be groundless; and

The president is prima facie guilty of the ground that have to be indicated under section 48(2) of the Municipalities Act.

(ii) The show cause notice should contain the charges;

(iii) The show cause notice should not only indicates the material on which the reason to believe or objective satisfaction is based, but the evidence by which charges are to be proved should also mentioned. However, in most of the cases they might be the same and there would not be any point in repeating them."

28. Ultimately, the Full Bench in the case of **Hafizataullah Ansari (supra)** in paragraph 133 recorded its conclusion which is quoted below:

"133. Our conclusions are as follows:

(a) There can be proceeding for removal of president under section 48(2) of the Municipalities Act without ceasing his financial and administrative power under its proviso;

(b) The following conditions must be satisfied before cessation of financial and administrative powers of a president of a Municipality can take place:

(i)The explanation or point of view or the version of the affected president should be obtained regarding charges and should be considered before recording satisfaction and issuing notice/ order under proviso to section 48(2) of the Municipalities Act;

(ii) The State government should be objectively satisfied on the basis of relevant material that:

The allegations do not appear to be groundless; and

The president is prima facie guilty of any of the grounds under section 48(2) of the Municipalities Act.

(iii)The show cause notice must contain the charges against the president;

(iv)The show cause notice should also indicate the material on which the objective satisfaction for reason to believe is based as well as the evidence by which charges against the president are to be proved. Though in most of the cases they may be the same;

(c) It is not necessary to pass separate order under proviso to section 48(2) of the Municipalities Act. It could be included in the notice satisfying the

other conditions under proviso to section 48(2). In fact it is not even necessary. It comes into operation by the Statute itself on issuance of a valid notice under proviso to Section 48(2) of the Municipalities Act.

(d) .....

(e) .....

(f)....."

29. From the above pronouncement made, it is clear that the cessation of financial and administrative powers can take place after fulfilment of the condition and there should be objective satisfaction of the State Government that allegations do not appear to be groundless and the President is prima-facie guilty of the grounds as indicated in the show cause notice issued under Section 48(2) of the Act, 1916, that it should contain the charges as well as the evidence by which charges are to be proved.

30. Learned counsel for the petitioner contended that there was no occasion to cease the financial and administrative powers of the petitioner after more than one and a half year from sending the report by the District Magistrate when the State Government did not take any action immediately. The proviso to Section 48(2) as quoted above indicate that the cessation of financial and administrative powers follow when the State Government has reasons to believe that the allegations appear not to be groundless and the President is prima-facie guilty on any of the grounds. The words "he shall, from the date of issuance of the show cause notice containing charges, cease to exercise, perform and discharge the financial and administrative powers, functions and duties of the President until he is exonerated of the charges..... clearly spells out the above intent."

31. As noted above, the Full Bench of this Court in **Hafiz Ataullah Ansari** (Supra) has held that there is no necessity of issuing a separate order for ceasing the financial and administrative powers of the petitioner and if the State Government is satisfied that the charges do not appear to be ground less and the President is prima-facie guilty of any of the charges, the cessation of financial and administrative power takes place automatically.

32. In the present case, when the State Government has recorded its objective satisfaction that the charges are not groundless and the President is prima-facie guilty of the charges, it cannot be said that the cessation of financial and administrative powers of the petitioner is illegal merely because more than one and a half year has elapsed from the submission of the report by the District Magistrate. The consequence as contemplated under Section 48(2) of the Act, 1916 shall ensue as and when the power is exercised under Section 48(2) of the Act, 1916 and the mere fact that certain time has elapsed and the State Government did not promptly take action in any manner vitiates the proceeding in exercise of power under Section 48(2) of the Act, 1916.

33. We are, therefore, of the considered opinion that the financial and administrative powers of the petitioner have rightly been ceased consequent to issuance of notice under Section 48(2) of the Act, 1916. None of the submissions

made by the learned counsel for the petitioner makes out any ground for quashing the order of the State Government dated 25/7/2011.

34. We, however, observe that the State Government while passing the final order under Section 48 (2) of the Act, shall not be influenced by any of the observations made by us in this order which observations have been made only for examining the issue of issuing notice under Section 48(2) of the Act, 1916 and cessation of financial and administrative powers.

35. The writ petition is dismissed subject to observations as made above.

36. No order as to cost.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 14.09.2011

BEFORE
THE HON'BLE ARUN TANDON,J.

Civil Misc. Writ Petition No. 51649 of 2011

C/M Seth Basudeo Sahai Inter College,Kannauj ...Petitioner

Versus

State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri K. Shahi

Counsel for the Respondents:
Sri Mohammad Shariq
C.S.C

U.P. Intermediate Education Act 1921-chapter III Regulation 101 to 106-power of DIOS to appointment on compassionate ground-R-4-recommended for appointment on compassionate ground by the regional committee-DIOS to ensure the appointment and functioning of compassionate appointee passed impugned direction-challenged by management-held-although DIOS can not visit in institution to ensure joining of such appointee-but in furtherance for enforcement of lawful order-any interference by writ court amounts to perpetuating illegal action of management-petition dismissed.

Held: Para 10

So far as the insistence of the District Inspector of Schools to ensure joining of the compassionate appointee is concerned, this Court is of the considered opinion that the District Inspector of Schools may not have acted strictly in accordance with law even then the action taken is in furtherance of interest of justice and for enforcing lawful orders. Any interference with the order of the District Inspector of Schools will amount to perpetuating an illegal action of the management. Power under Article 226 of the Constitution of India is not to be exercised in favour of the Committee of Management, which want to act illegally and insists that other courses open to law should have been adopted with sole purpose to delay the joining of the lawfully appointed candidate.

Case law discussed:
(2003) SCC 669; AIR 2008 SC 1272; AIR 1977 SC 1720; (1998) 2 UPLBEC 1310

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

1. Petitioner before this Court is the Committee of Management of Seth Basudeo Sahai Inter College, Kannauj. The Committee of Management is aggrieved by the order of the District Inspector of Schools, Kannauj dated 05.08.2011.

2. Respondent no. 4 was recommended for appointment in the petitioner's institution on compassionate ground under an order dated 09.12.2010. Since the direction so issued was not being complied with, the District Inspector of Schools, after issuing two notices to the Committee of Management, himself proceeded to the institution to ensure the joining of the candidate so recommended and has further issued order dated 05.08.2011 to the Principal of the institution to ensure that the appointed candidate is permitted to work and to sign the attendance register and that there should be no interference in that regard. Hence this petition.

3. The order of the District Inspector of Schools dated 09.12.2010, appointing the respondent no. 4 in the petitioner's institution on compassionate ground, is not under challenge in this petition. It is, therefore, clear that only the consequential action, which is being taken, is under challenge.

4. The Hon'ble Supreme Court of India in the case of ***Government of Maharastra v. Deokar's Distillery,*** reported in ***(2003) SCC 669, Barkat Ali v. Badri Narain,*** reported in ***AIR 2008 SC 1272*** and ***P. Chithranja Menon v. A. Balakrishnan,*** reported in b has held that if the basic order is not under challenge, consequential order cannot be subjected to challenge. For this ground alone the writ petition is liable to be dismissed.

5. Even otherwise this Court may record that Regulation 101 to 106 of Chapter III of the regulations framed under the Intermediate Education Act, 1921 confer a power upon the District Inspector of Schools to appoint on compassionate ground a dependent of a deceased employee against an available vacancy in any institution in the District subject however to the condition that suitable vacancy is not available in the institution where the deceased employee was himself/herself was working.

6. In the facts of the present case it is not disputed by the petitioner that the mother of respondent no. 4 was employed in a recognized Intermediate College. She expired during harness and that there is no vacancy available in the said institution where she was working qua the post on which the respondent no. 4 has been recommended by the Regional Level Committee for compassionate appointment. The right of compassionate appointment in favour of respondent no. 4 is, therefore, not under cloud.

7. What is being contended before this Court is that in the petitioner's institution there are five posts of the Clerk duly created, three of them falls within the quota for promotion and two for direct recruitment. It is stated that one post for direct recruitment has already been filled by the compassionate appointee, therefore, second post within the quota for direct recruitment may not be filled by the other compassionate appointment, as it will amount to 100% reservation in favour of compassionate appointees. For the proposition the petitioner has placed reliance upon the judgment of the Hon'ble Apex Court in the case of **Director of Education (Secondary) and another vs. Pushpendra Kumar and others etc.** reported in **(1998) 2 UPLBEC, 1310.** It has been contended that the District Inspector of Schools should not have approached the institution for joining of the employee concerned, he should have proceeded

against the management of the institution under the Intermediate Education Act.

8. At the very outset it may be recorded that power of District Inspector of Schools to appoint a person on compassionate ground, against the vacancy available in the petitioner's institution, under Regulations 101 to 106 of Chapter III of the Regulations framed under the Intermediate Education Act, which is within the quota for direct recruitment, cannot be questioned. Therefore, the recommendation made for appointment of respondent no. 4 in the petitioner's institution on compassionate ground against the vacancy available for direct recruitment is held to be legal and valid.

9. The conclusion that if the second post within the quota for direct recruitment is filled by compassionate appointment, it would amount to 100% reservation is concerned, this Court finds that the provisions of Regulations 101 to 106 of Chapter-III of the Regulations framed under the Intermediate Education Act do not carve out any such prohibition. The statutory provisions have not been challenged in this petition.

10. So far as the insistence of the District Inspector of Schools to ensure joining of the compassionate appointee is concerned, this Court is of the considered opinion that the District Inspector of Schools may not have acted strictly in accordance with law even then the action taken is in furtherance of interest of justice and for enforcing lawful orders. Any interference with the order of the District Inspector of Schools will amount to perpetuating an illegal action of the management. Power under Article 226 of the Constitution of India is not to be exercised in favour of the Committee of Management, which want to act illegally and insists that other courses open to law should have been adopted with sole purpose to delay the joining of the lawfully appointed candidate.

11. In the facts and circumstances of the case, this Court refuses to exercise its discretion under Article 226 of the Constitution of India.

12. Writ petition is **dismissed.**

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 27.09.2011

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc Writ Petition No. 55931 of 2009

Rakesh Bhusan Mishra ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri J.K. Sharma
Sri Shish Pal
Sri Shesh Kumar

Counsel for the Respondents:
C.S.C.

U.P. Govt. Servants (Disciplined and Appeal) Rules 1999-Rule-4-suspension without chargesheet-no progress in disciplinary proceedings-prolong suspension without chargesheet-cannot be appreciated-suspension order quashed with liberty to fresh enquiry if desired-cost of Rs. 20000/-recovered from erring officer.

Held: Para 5

This is also a fact that the counter affidavit though was sworn on

13.5.2011, but there is nothing on record to show that any charge sheet was issued to the petitioner or any departmental inquiry commenced except of issuance of suspension order 27.8.2009 though this Court while staying the order of suspension permitted the respondents to continue with the departmental enquiry.

Case law discussed:

2009 (1) AWC 691

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

1. This is a case which demonstrates how the power of suspension conferred under the rules can be misused by the nefarious and notorious Officers or those who do not understand their responsibility and statutory obligations.

2. Petitioner was appointed as Gram Vikas Adhikari on 1.4.1989. It is not in dispute that the appointing authority of Gram Vikas Adhikari is District Panchayat Raj Officer (hereinafter referred to as "DPRO"). Initially on the allegation that petitioner had not completed certain construction work, he was placed under suspension on 12.1.2009. The said order of suspension was revoked and the petitioner was reinstated by order dated 23.1.2009. The reinstatement order said that departmental enquiry shall continue. The said enquiry ultimately culminated in an order of exoneration as is evident from the order of January 2010 (Annexure 10 to the counter affidavit). In the meantime petitioner was again placed under suspension by order dated 9.2.2009 which was revoked on 3.3.2009 holding that petitioner has completed all the construction work and nothing wrong was found on his part. He was allowed the entire arrears of salary. Then a third order of suspension was passed on 27.8.2009 referring to the show cause notice dated 13.7.2009 observing, besides others, as under:

''श्री राकेश भूषण मिश्रा, ग्राम पंचायत अधिकारी, ग्राम पंचायत–सिहौली, भासौन, विकास खण्ड–औरैया को राष्ट्रीय रोजगार गारन्टी योजना के कार्यो में रूचि न लेने, श्रमिकों के जाब कार्ड बनवाने व बने जॉबकार्डों को अपने पास रख धन वसूलने, ग्राम पंचायत–भासौन की खुली बैठक हेतु निर्धारित तिथि दिनांक 09.06.2009 को खुली बैठक न कराने, ग्राम पंचायत भौतापुर के 45 मजदूरों को भुगतान न करने, शौचालय निर्माण की गलत सूचना प्रस्तुत करने, निरीक्षण में आवंटित 200 शौचालयों के सापेक्ष मात्र 123 शौचालय बने पाये जाने आदि के लिए कार्यालय पत्र संख्या 432 दिनांक 13.07.2009 द्वारा निर्गत अन्तिम कारण बताओं नोटिस का स्पष्टीकरण 3 दिन के अन्दर प्रस्तुत करने के निर्देशों के विपरीत दिनांक 28.08.2009 तक स्पष्टीकरण प्रस्तुत न करने आदि आरोपों में तत्काल प्रभाव से निलम्बित किया जाता है।''

3. Respondents have filed their counter affidavit wherein the copy of show cause notice dated 13.7.2009 referred to in the impugned order of suspension, has been filed as CA-9, and it reads as under:

''अपर मुख्य अधिकारी, जिला पंचायत ने अपने पत्र संख्या मीमों/दिनांक 12.06.2009 द्वारा अवगत कराया है कि आप द्वारा ग्रा0 पं0 सिहौली में विभिन्न योजनाओं के तहत निर्धारित लक्ष्य की जानकारी उपलब्ध नहीं कराई गई तथा नरेगा के अर्न्तगत कराये गये कार्य में जाब कार्ड धारकों को मजदूरी न देकर जाब कार्ड अपने पास रखने की शिकायत की गई है ठीक इसी प्रकार खण्ड विकास अधिकारी, औरैया ने अपने पत्र संख्या 441 दिनांक 11.06.2009 द्वारा अवगत कराया है कि आप द्वारा ग्राम पंचायत–भासौन की खुली बैठकों हेतु निर्धारित तिथि दिनांक 09.06.2009 को खुली बैठक नहीं कराई गई और न ही उक्त दिनांक की अनुपस्थिति के सम्बन्ध में कोई स्पष्टीकरण दिया गया, इसी प्रकार ग्राम पंचायत भौतापुर के 40–50 मजदूर मुख्य विकास अधिकारी, महोदय से मिले और आप द्वारा भुगतान आदि न करने की शिकायत की गई।

अतः आपकों इस अन्तिम कारण बताओं नोटिस के माध्यम से निर्देशित किया जाता है कि आप

उपरोक्त के सम्बन्ध अपना स्पष्टीकरण दिनांक 18.07.2009 तक प्रत्येक दशा में उपलब्ध करायें, साथ ही आप द्वारा अपनी तैनाती की पंचायतों में जो शौचायल अब तक पूर्ण नहीं कराये गये हैं ओर उन्हें आपने अपने गलत स्पष्टीकरण में पूर्ण दर्शाया है जबकि जिला विकास अधिकारी महोदय, ने अपने निरीक्षण में आवंटित 200 शौचायलों के सापेक्ष मात्र 123 शौचालय बने पाये हैं के सम्बन्ध में भी शौचालय 3 दिन के अन्दर पूर्ण कराते हुए स्पष्टीकरण उपलब्ध कराये। आपका स्पष्टीकरण निर्धारित अवधि में प्राप्त न होने की स्थिति में आपको निलम्बित कर अनिवार्य सेवानिवृत्ति की कार्यवाही प्रारम्भ कर दी जायेगी। जिसके लिए आप स्वयं व्यक्तिगत रूप से पूर्ण उत्तरदाई होंगे।''

4. Learned Standing Counsel submitted that petitioner has not been placed under suspension without any reason. There are certain acts and omissions constituting misconduct on account whereof he has been placed under suspension.

5. This is also a fact that the counter affidavit though was sworn on 13.5.2011, but there is nothing on record to show that any charge sheet was issued to the petitioner or any departmental inquiry commenced except of issuance of suspension order 27.8.2009 though this Court while staying the order of suspension permitted the respondents to continue with the departmental enquiry.

6. In the rejoinder affidavit, in para 9, petitioner has said that there is no progress in enquiry.

7. The order of suspension can be passed only when prima facie an employee is found to have committed some act or omission constituting misconduct which may result in imposition of major penalty as provided under Rule 4 of U.P. Government Servants Discipline and Appeal) Rules, 1999 (hereinafter referred to as "1999 Rules"), relevant part whereof is as under:

"Provided that suspension should not be resorted to unless the allegations against the Government servant are so serious that in the event of their being established may ordinarily warrant major penalty."

8. In the present case, notice dated 13.7.2009 issued to petitioner mentioned that in case petitioner does not get the construction work completed and submit his reply, he shall be placed under suspension and proceeding for his compulsory retirement would be initiated. Meaning thereby that the competent authority was clear in his mind that no major penalty can be imposed upon the petitioner and at the best he can be considered for compulsory retirement under Fundamental Rule 56. It is well settled that compulsory retirement under Fundamental Rule 56 is not a punishment and the Rule does not contemplate any punishment like compulsory retirement.

9. Moreover, non issuance of any charge sheet to petitioner so far fortify and justify an inference to be drawn by this Court that the order of suspension passed in this case is stigmatic, arbitrary and even otherwise illegal and also gross abuse of the power conferred upon the appointing authority regarding suspension.

10. Moreover, such a prolonged suspension can not be held valid and justified and the respondents can not be allowed to keep an employee under suspension for an indefinite period as held by this Court in **Smt. Anshu Bharti Vs. State of U.P. and others, 2009(1) AWC**

691 where in paras 9, 10, 11, 12 and 13 this Court has observed as under:

"9. . . . . The prolonged suspension of the petitioner is clearly unjust and unwarranted. The question deals with the prolonged agony and mental torture of a suspended employee where inquiry either has not commenced or proceed with snail pace. Though suspension in a contemplated or pending inquiry is not a punishment but this is a different angle of the matter, which is equally important and needs careful consideration. A suspension during contemplation of departmental inquiry or pendency thereof by itself is not a punishment if resorted to by the competent authority to enquire into the allegations levelled against the employee giving him an opportunity of participation to find out whether the allegations are correct or not with due diligence and within a reasonable time. In case, allegations are not found correct, the employee is reinstated without any loss towards salary, etc., and in case the charges are proved, the disciplinary authority passes such order as provided under law. However, keeping an employee under suspension, either without holding any enquiry, or in a prolonged enquiry is unreasonable. It is neither just nor in larger public interest. A prolonged suspension by itself is penal. Similarly an order of suspension at the initial stage may be valid fulfilling all the requirements of law but may become penal or unlawful with the passage of time, if the disciplinary inquiry is unreasonably prolonged or no inquiry is initiated at all without there being any fault or obstruction on the part of the delinquent employee. No person can be kept under suspension for indefinite period since during the period of suspension he is not paid full salary. He is also denied the enjoyment of status and therefore admittedly it has some adverse effect in respect of his status, life style and reputation in society. A person under suspension is looked with suspicion in the society by the persons with whom he meets in his normal discharge of function.

10. A Division Bench of this Court in Gajendra Singh Vs. High Court of Judicature at Allahabad 2004 (3) UPLBEC 2934 observed as under :

"We need not forget that when a Government officer is placed under suspension, he is looked with suspicious eyes not only by his collogues and friends but by public at large too."

11. Disapproving unreasonable prolonged suspension, the Apex Court in Public Service Tribunal Bar Association Vs. State of U.P. & others 2003 (1) UPLBEC 780 (SC) observed as under :

"If a suspension continues for indefinite period or the order of suspension passed is malafide, then it would be open to the employee to challenge the same by approaching the High Court under Article 226 of the Constitution.....(Para 26)

12. The statutory power conferred upon the disciplinary authority to keep an employee under suspension during contemplated or pending disciplinary enquiry cannot thus be interpreted in a manner so as to confer an arbitrary, unguided an absolute power to keep an employee under suspension without enquiry for unlimited period or by prolonging enquiry unreasonably, particularly when the delinquent

employee is not responsible for such delay. Therefore, I am clearly of the opinion that a suspension, if prolonged unreasonably without holding any enquiry or by prolonging the enquiry itself, is penal in nature and cannot be sustained.

13. The view I have taken is supported from another Judgment of this Court in Ayodhya Rai & others Vs. State of U.P. & others 2006 (3) ESC 1755."

11. In view of above discussion, writ petition is allowed. Impugned order dated 27.8.2008 (Annexure 5 to the writ petition) passed by respondent no. 3 is hereby quashed.

12. It is, however, made clear that this order shall not preclude the respondents from completing departmental enquiry, if any, against the petitioner.

13. Petitioner shall also be entitled to cost which I quantify to Rs. 20,000/- against respondent no. 3 which, at the first instance, shall be paid by the respondent no. 1 but it would have liberty to recover the said amount from the official concerned who is/was responsible for passing order impugned in this writ petition at the relevant time; after making such enquiry as permissible in law.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.09.2011

BEFORE
THE HON'BLE KRISHNA MURARI, J.

Civil Misc. Writ Petition No. 57580 of 2007

Santosh Singh ...Petitioner
Versus
State of U.P. and another ...Respondents

Counsel for the Petitioner:
Sri Atul Kumar
Sri Vijay Gautam
Sri R.S. Yadav
Sri Ajeet Kumar Yadav

Counsel for the Respondents:
C.S.C.

U.P. Police officers of subordinates Ranks (Punishment and Appeal) Rules 1999-Rule 8 (2) (b)-dismissal from service-dispensing with formal enquiry-no reasons recorded of satisfaction for not practicable to held enquiry-order not sustainable-direction for reinstatement with all consequential benefits given.

Held: Para 17

A bare perusal of the impugned order goes to show that no reason has been recorded by the authority for invoking the power conferred by Rule 8 (2) (b) of 1991 Rules and to dispense with the regular departmental enquiry. Even in the counter affidavit filed on behalf of the respondents, no such material has been brought on record on the basis of which, it could be said that the authority was satisfied that it was not reasonably practicable to hold a regular departmental enquiry.

Case law discussed:
AIR 1985 SC 1416; (1991) 1 SCC 362; (2005) 11 SCC 525; Special Appeal No. 1122 of 2001, State of U.P. And others Vs. Chandrika Prasad; Special

Appeal No. (647) of 2009, State of U.P. & Ors. Vs. Santosh Kumar Gupta

(Delivered by Hon'ble Krishna Murari, J.)

1. Heard Sri Vijay Gautam, learned counsel for the petitioner and learned Standing Counsel for the State-respondents.

2. By means of this petition filed under Article 226 of the Constitution of India, the petitioner has challenged the order dated 13.09.2007 passed by the Superintendent of Police, Ballia dismissing him from service in exercise of powers conferred by Rule 8 (2) (b) of the U. P. Police Officers of Subordinate Ranks (Punishment and Appeal) Rules, 1991 (hereinafter referred to as 1991 Rules) without holding a regular departmental enquiry on the allegation that has obtained appointment by making forgery in his date of birth.

3. Facts, in short, giving rise to the dispute are as under.

4. Petitioner was selected and appointment on the post of Constable in Police Department on 26.6.2005. At the time of appointment, he submitted his High School Certificate issued by the U. P. Board of High School and Intermediate which recorded his date of birth as 01.06.1986.

5. The Director General of Police, U. P., Lucknow vide confidential letter dated 26.09.2007 issued directions for reviewing the entire selection made in the years 2004, 2005 and 2006 on some alleged irregularities being detected in holding the said selection. In compliance of the aforesaid direction entire selection with respect to the recruits appointed in the said years and physical verification, educational qualification, date of birth, health certificate and caste certificate etc. were re-examined and reverified. On reverification from the Regional Office, Varanasi of U. P. Board of High School and Intermediate it was revealed that actual date of birth of petitioner was 10.06.1087. This alleged act of the petitioner was taken as furnishing a forged certificate at the time of recruitment. The Superintendent of Police found that in such a situation, it was not in public interest to allow the petitioner to continue in service. He further observed in the order that the petitioner had filled-in the form in his own writing and has also undertaken that any information given in the application form is incorrect then his selection may be cancelled and whatever legal action can be taken would be taken for which he has no objection. An affidavit was also filed by him to the effect that if any information was found incorrect after his selection, the same may be cancelled.

6. The Superintendent of Police in his wisdom thought that it was not reasonably practicable to hold the enquiry and, therefore, invoking the provisions of Rule 8 (2) (b) of the 1991 Rules dismissed the petitioner from service without giving him any opportunity of hearing and without holding any enquiry.

7. It is submitted by the learned counsel for the petitioner that the correct date of birth of the petitioner is 01.01.1986 and was recorded as such in the record of Dev Saran Purva Madhyamik Vidhyalaya, Barahara (Turna), District Ghazipur. Reference has been made to Annexure SA '1', the transfer certificate issued by the institution which records his date of birth as 01.01.1986. However, in the High School Certificate his date of birth was wrongly recorded as 10.06.1987 and when the fact

came to the knowledge of the petitioner in the year 2004 he applied for its correction before the Additional Secretary, Madhyamik Shiksha Parishad, U. P. and necessary corrections were made in the date of birth vide order dated 14.06.2004. Reference by the learned counsel for the petitioner has also been made to the corrected copy of the mark-sheet and certificate issued by the U. P. Board of High School and Intermediate on 09.07.2004 filed as Annexure SA '2' which records his date of birth as 01.01.1986.

8. In the counter affidavit, it has only been stated that on enquiry from the U. P. Board of High School and Intermediate it was verified that the date of birth of the petitioner was 10th June, 1987 and thus, the appointment was obtained by furnishing a forged document and the same has rightly been cancelled.

9. It is to be taken note of that specific averments made by the petitioner in his pleadings that after noticing that date of birth was wrongly mentioned in the High School Certificate, on an application it was corrected vide order dated 14.06.2004 have not been denied by the respondents and thus, the same are unrebutted. In case, the petitioner would have been afforded an opportunity, the fact would have come on record.

10. The question which arises for consideration is whether in such a situation the provisions of Rule 8 (2) (b) of 1991 Rules would have been invoked by the authorities dismissing the petitioner from service dispensing the regular departmental enquiry and whether the impugned order of dismissal fulfils the conditions precedent prescribed under the 1991 Rules for exercise of the said power.

Rule 8 (2) (b) of 1991 Rules reads as under :

"8. (2) (b). Where the authority empowered to dismiss or remove a person or to reduce him in rank is satisfied that for some reason to be recorded by that authority in writing, it is not reasonably practicable to hold such inquiry."

The language of the aforesaid Rules is almost similar to 2nd proviso to Article 311 of the Constitution of India. Interpreting the provision of Article 311 of the Constitution, Hon'ble Apex Court in the case of ***Union of India & Anr. Vs. Tulsiram Patel, AIR 1985 SC 1416*** has observed as under :

"The condition precedent for the application of clause (b) is the satisfaction of the disciplinary authority that "it is not reasonably practicable to hold" the inquiry contemplated by clause (2) of Article 311.....

".....Thus, whether it was practicable to hold the inquiry or not must be judged in the context of whether it was reasonably practicable to do so. It is not a total or absolute impracticability which is required by clause (b). What is requisite is that the holding of the inquiry is not practicable in the opinion of a reasonably man taking a reasonably view of the prevailing situation."

11. It has further been held that a disciplinary authority is not expected to dispense with a disciplinary inquiry lightly or arbitrarily or out of ulterior motives or merely in order to avoid the holding of an inquiry or because the Department's case against the Government servant is weak and must fail.

"The second condition necessary for the valid application of clause (b) of the second proviso is that the disciplinary authority should record in writing its reason for its satisfaction that it was not reasonably practicable to hold the inquiry contemplated by Article 311 (2). This is a constitutional obligation and if such reason is not recorded in writing, the order dispensing with the inquiry and the order of penalty following thereupon would both be void and unconstitutional.

It is obvious that the recording in writing of the reason for dispensing with the inquiry must proceed the order imposting the penalty."

"If the court finds that the reasons are irrelevant, then the recording of its satisfaction by the disciplinary authority would be an abuse of power conferred upon it by clause (b) and would take the case out of the purview of that clause and the impugned order of penalty would stand invalidated."

12. In ***Jaswant Singh V. State of Punjab & others, (1991) 1 SCC 362,*** it has been held as under :

".....It was incumbent on the respondents to disclose to the court the material in existence at the date of the passing of the impugned order in support of the subjective satisfaction recorded by respondent no. 3 in the impugned order. Clause (b) of the second proviso to Article 311 (2) can be invoked only when the authority is satisfied from the material placed before him that it is not reasonably practicable to hold a departmental enquiry. This is clear from the following observation at page 270 of Tulsiram case (SCC P. 504, para 130).

"A disciplinary authority is not expected to dispense with a disciplinary enquiry lightly or arbitrarily or out of ulterior motives or merely in order to avoid the holding of an enquiry or because the department's case against the Government servant is weak and must fail.

The decision to dispense with the departmental enquiry cannot, therefore, be rested solely on the ipse dixit of the concerned authority. When the satisfaction of the concerned authority is questioned in a court of law, it is incumbent on those who support the order to show that the satisfaction is based on certain objective facts and is not the outcome of the whim or caprice of the concerned officer."

13. In ***Sudesh Kumar Vs. State of Haryana & Ors., (2005) 11 SCC 525,*** the Hon'ble Apex Court has observed as under :

"It is now establish principle of law that an enquiry under Article 311 (2) is a rule and dispensing with the enquiry under Article 311 (2) (b) must satisfy for reasons to be recorded that it is not reasonably practicable to hold an enquiry. A reading of the termination order by invoking Article 311 (2) (b), as extracted above, would clearly show that no reasons whatsoever have been assigned as to why it is not reasonably practicable to hold an enquiry. The reasons disclosed in the termination order are that the complainant refused to name the accused out of fear of harassment; the complainant, being a foreign national, is likely to leave the country and once he left the country, it may not be reasonably practicable to bring him to the enquiry. This is no ground for dispensing with the enquiry. On the other hand, it is not disputed that, by order dated 23.12.1999, the visa of the complainant was extended up

to 22.12.2000. Therefore, there was no difficulty in securing the presence of Mr. Kenichi Tanaka in the enquiry.

A reasonable opportunity of hearing in Article 311 (2) of the Constitution would include an opportunity to defent himself and establish his innocence by cross-examining the prosecution witnesses produced against him and by examining the defence witnesses in his favour, if any,. This he can do only if enquiry is held where he has been informed of the charges leveled against him. In the instant case, the mandate of Article 311 (2) of the Constitution has been violated depriving reasonable opportunity of being heard to the appellant."

14. Same view has been taken by this Court in ***Special Appeal No. 1122 of 2001, State of U. P. and others Vs. Chandrika Prasad,*** decided on 19th October, 2005 as well as in ***Special Appeal No. (647) of 2009, State of U. P. & Ors. Vs. Santosh Kumar Gupta.***

15. The law, thus, stands settled that it is only on a subjective satisfaction based on material on record, the authority after recording reason why it is not practicable to hold the disciplinary enquiry, can invoke the powers conferred by Rule 8 (2) (b) of the 1991 Rules and dispense with the regular departmental enquiry.

16. Learned Standing Counsel could not dispute the settled proposition of law by the aforesaid pronouncements.

17. A bare perusal of the impugned order goes to show that no reason has been recorded by the authority for invoking the power conferred by Rule 8 (2) (b) of 1991 Rules and to dispense with the regular departmental enquiry. Even in the counter affidavit filed on behalf of the respondents, no such material has been brought on record on the basis of which, it could be said that the authority was satisfied that it was not reasonably practicable to hold a regular departmental enquiry.

18. The charges leveled in the impugned order may form the basis for dispensing the services of the petitioner but only in case the same are established in a regular departmental enquiry held in accordance with the procedure prescribed under the Rules. A mere charge against the petitioner that he obtained appointment on the basis of forged and fabricated date of birth itself cannot constitute a reason for dispensing with the regular departmental enquiry.

19. In view of the aforesaid facts and the settled legal position, I am of the considered view that order of dismissal passed against the petitioner does not fulfill the requirement of Rule 8 (2) (b) of 1991 Rules and, therefore, cannot be sustained and is hereby quashed.

20. Writ petition stands allowed. The petitioner shall be reinstated back in service with all consequential benefits.

21. However, in the facts and circumstances, there shall be no order as to costs.
