APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.05.2012

BEFORE
THE HON'BLE SIBGHAT ULLAH KHAN, J.

First Appeal Defective No. - 116 of 1995

State of U.P. ...Petitioner
Versus
Sri Ram ...Respondents

Counsel for the Petitioner:
Sri C.K. Rai
S.C.

Counsel for the Respondents:
.....

Limitation Act-Section-5-Delay of 465 days in filing-land acquisition appeal-affidavit filed in support of application-not explaining the cause of delay but utter negligence on part of officials-causing not only financial loss but also loss of credibility to Govt.-deserve strong departmental action-Appeal dismissed on ground of laches-so far recovery of excess amount of compensation-can not be recorded already withdrawn by claimant long - long ago.

Held: Para 8

Moreover, the enhanced amount as awarded by the impugned judgment must have been realised by the claimant respondent long before. Supreme Court in Stanes Higher Secondary School Vs. SpecialTehsildar (L.A). A.I.R. 2010 SC 1323 has held that if the amount as awarded by the reference court has been withdrawn by the landowner then even if High Court reduces the said amount, it would be quite unjust to direct return of the said amount (para 12). In this regard reference may also be made to Fida Husain Vs. M.D.A. A.I.R. 2011 S.C. 3001 (para 28)

Case law discussed:
J.T. 2012 (2) S.C. 483; A.I.R. 2011 S.C. 3001 (para 28)

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

Heard learned standing counsel for the applicant appellant.

2. This first appeal is directed against award dated 25.5.1993 given by 5th A.D.J., Ghaziabad, in L.A. Reference no.85 of 1982. The appeal has been filed on 1.3.1995 with the delay of 465 days (458+7). The reason of delay given in the accompanying affidavit of Satyaveer Singh Arya A.D.M. (L.A.) Irrigation, Ghaziabad is as follows:

3. The D.G.C. Applied for certified copy of the award dated 25.5.1993 on 10.9.1993 (para 2). This delay of three and half month has not been explained.

4. Acquiring body gave its consent on 29.10.1993, letter addressed to the State Government for seeking permission to file appeal was drafted/prepared on 10.11.1993, however, Collector Ghaziabad put his signatures on the said letter on 10.12.1993 (para 4). This delay of one month is wholly unexplained.

5. State Government granted permission on 18.2.1994 but collector Ghaziabad did not get that. On 11.5.1994 an official was sent to the office of C.S.C. High Court Allahabad but he was told that without permission appeal could not be filed. It has not been explained that why without permission official was sent to the High Court for filing appeal. Thereafter, it is mentioned that on 26.6.1994 reminder was sent to the Government demanding/requiring the G.O. dated

18.2.1994 granting the permission but no response was given by the State Government. Thereafter, two reminders were sent in July and August 1994 and ultimately on 27.8.1994 special messanger was sent and thereupon permission dated 18.2.1994 was made available to him on 1.9.1994 (para 8). This delay of six and a half months has been caused due to pure negligence. Thereafter in para 9 it is mentioned that thereafter acquiring body was requested to make available necessary expenses, reminder was also sent and ultimately on 27.9.1994 acquiring body sent the necessary expenses which were received on 3.12.1994 (para 9). It is startling to note that expenses remitted on 27.9.1994 reached the Collector after more than two months i.e. on 3.12.1994. Moreover if expenses had not been sent by the acquiring body how official was sent to file appeal in May 1994 as stated in para 7. Thereafter, in para 10 it is mentioned that from 5.12.1994 till 25.1.1994 Government employee were on strike.

6. The averments made in the accompanying affidavit are not explanation of delay but details of utter negligence on the part of officers/officials. Such officials/officers who are responsible for such utter negligence causing not only financial loss but also loss of credibility to the State Government deserve to be suspended and departmental proceedings for stern action deserve to be taken against them.

7. In office of the **Chief Post Master General Vs. Living Media J.T. 2012(2) S.C.483** Supreme Court refused to condone the inordinate delay (of 427 days) in filing S.L.P. paras 12 and 13 of the said judgment are quoted below:-

12) It is not in dispute that the person(s) concerned were well aware or conversant with the issues involved including the prescribed period of limitation for taking up the matter by way of filing a special leave petition in this Court. They cannot claim that they have a separate period of limitation when the Department was possessed with competent persons familiar with court proceedings. In the absence of plausible and acceptable explanation, we are posing a question why the delay is to be condoned mechanically merely because the Government or a wing of the Government is a party before us. Though we are conscious of the fact that in a matter of condonation of delay when there was no gross negligence or deliberate inaction or lack of bonafide, a liberal concession has to be adopted to advance substantial justice, we are of the view that in the facts and circumstances, the Department cannot take advantage of various earlier decisions. The claim on account of impersonal machinery and inherited 6 bureaucratic methodology of making several notes cannot be accepted in view of the modern technologies being used and available. The law of limitation undoubtedly binds everybody including the Government.

13) In our view, it is the right time to inform all the government bodies, their agencies and instrumentalities that unless they have reasonable and acceptable explanation for the delay and there was bonafide effort, there is no need to accept the usual explanation that the file was kept pending for several months/years due to considerable degree of procedural redtape in the process. The government departments are under a special obligation to ensure that they perform their duties with diligence and commitment.

Condonation of delay is an exception and should not be used as an anticipated benefit for government departments. The law shelters everyone under the same light and should not be swirled for the benefit of a few. Considering the fact that there was no proper explanation offered by the Department for the delay except mentioning of various dates, according to us, the Department has miserably failed to give any acceptable and cogent reasons sufficient to condone such a huge delay. Accordingly, the appeals are liable to be dismissed on the ground of delay."

8. Moreover, the enhanced amount as awarded by the impugned judgment must have been realised by the claimant respondent long before. Supreme Court in Stanes Higher Secondary School Vs. SpecialTehsildar (L.A). A.I.R. 2010 SC 1323 has held that if the amount as awarded by the reference court has been withdrawn by the landowner then even if High Court reduces the said amount, it would be quite unjust to direct return of the said amount (para 12). In this regard reference may also be made to **Fida Husain Vs. M.D.A. A.I.R. 2011 S.C. 3001 (para 28)**

9. In State of Punjab Vs. Harchal Singh AIR 2006 SC 2122 the Court has taken into consideration the "Laws Delay" which may not be attributable to anyone in the land acquisition matters. In the instant case also the matter has become almost 20 years old since the date on which amount was enhanced by the reference court.

10. Accordingly, I do not find any merit, hence delay condonation application is dismissed.

11. Office is directed to supply a copy of this order free of cost to Sri Shrish Chandra, learned standing counsel for sending the same immediately to Secretary and Principal Secretary Irrigation Department. In some future case it may be enquired that what action was taken pursuant to this order.

REVISIONAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.05.2012

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Revision No. - 182 of 2012

Amit Garg and another
...Plaintiffs-Revisionist
Versus
Smt. Tabassum and others
...Defendant-Respondents

Counsel for the Revisionists:
Sri Ajit Kumar
Sri Manu Saxena

Counsel for the Opposite Parties:
Sri Ajay K. Singh
Sri Ashish Kr. Singh
Sri Krishna Shukla
S.C.

C.P.C.-Section 115-Civil revision-against application-proposed amendment-would not change nature of suit or claim barred by limitation-can not be rejected on ground of prolong delay-amendment of plaint can be made and allowed at any stage.

Held: Para 14

A careful reading of entire amendment, which the plaintiffs/revisionists has sought also does not show that it would change the nature of the suit or something which can be said to be barred by limitation ex facie. The well

established principles for denying an amendment I do not find exist in the present case and learned Counsel for the respondents have also failed to demonstrate the same. The Court below has therefore erred in law in rejecting application of plaintiffs-revisionists seeking amendment in the plaint.

Case law discussed"

AIR 2008 SC 2139; 2009 (11) SCC 308; 2009 (10) SCC 434; AIR 2005 SC 3353

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

1. Heard Sri Ajit Kumar, Advocate assisted by Sri Manu Saxena, learned counsels for the petitioners, Ari Ajay Kumar Singh and Sri Ashish Kumar Singh, learned counsels for contesting respondent No.1 and Sri Krishna Shukla, who has put in appearance on behalf of respondents No.2 to 4 and learned Standing Counsel for respondents No.5 & 6.

2. The petitioner's application seeking amendment/impleadment in original suit no.2004/2004 has been rejected by Court below i.e. the Court of Addl. District Judge, Court No.14, Allahabad by order dated 23.3.2012 and this revision has been preferred assailing the said order. This case has come up before this Court by nomination of Hon'ble the Chief Justice by His Lordship's order dated 19.4.2012.

3. The original suit, admittedly, has been filed by the revisionists themselves impleading the following:

''1. श्रीमती तबस्सुम पत्नी श्री आई0अहमद, निवासिनी, जी0टी0बी0 नगर करेली, इलाहाबाद।

2. जावेद हैदर

3. तनवीर हैदर

4. नावेद हैदर

पुत्रगण सैय्यद शौकत अब्बास, निवासी वजीरगंज, लखनऊ, उ0प्र0।

5. अपर जिलाधिकारी नजूल, इलाहाबाद।

6. सरकार, उ0प्र0, बजरिये कलेक्टर, इलाहाबाद।'

4. The relief sought by the revisionists in the above suit are as under:

''यह कि वादीगण निम्नलिखित अनुतोष की याचना करते हैं:–

अ) यह कि जरिये आज्ञप्ति घोषणा कथित फ्री होल्ड डीड दिनांक 29.3.2004 जिसको प्रतिवादीगण 2 लगायत 4 के नामिनेशन पर प्रतिवादिनी के हक में अपर जिलाधिकारी नजूल, इलाहाबाद, सरकार, उत्तर प्रदेश बजरिये कलेक्टर, इलाहाबाद प्रतिवादी संख्या 5 द्वारा निष्पादित किया गया है और जिसकी रजिस्ट्री दिनांक 29.3.2004 को पुस्तक संख्या–1 खण्ड संख्या 4419 के पृष्ठ संख्या 127/160 के क्रम संख्या 3956 को सब रजिस्टरार सदर, इलाहाबाद के यहां हुई है, को शून्य एवं क्षेत्राधिकारी के परे घोषित किया जावे और उसके घोषणा की सूचना सब रजिस्टरार सदर, इलाहाबाद को भेजी जावे।

ब) यह कि वाद व्यय वादीगण को प्रतिवादीगण से दिलाया जावे।

स) यह कि अन्य दादरसी न्यायालय की राय में जो उचित हो बहक वादीगण विरूद्ध प्रतिवादीगण दिलाया जावे।''

5. For the purpose of considering validity of impugned order though the parties have sought to demonstrate that there is chequered history but, in my view, suffice it to mention that an amendment sought in the plaint by plaintiffs can be rejected on the well established principles only. Normal principle is that an amendment can be made and allowed at any stage unless the principles negativing such amendment are applicable.

6. The law in respect to amendment of pleadings is a bit liberal. The mere fact that application for amendment has been filed after a prolong delay would not justify its rejection where neither it changes the nature of the suit nor intends to add a claim which is barred by limitation nor takes away the claim of the other party nor amounts to a fresh cause of action nor otherwise prejudice the other side. Instead of adding several authorities on this aspect, I intend to refer to the decision of Apex Court in **North Eastern Railway Administration, Gorakhpur Vs. Bhagwan Das (D) by Lrs. AIR 2008 SC 2139** where the Court held:

"Insofar as the principles which govern the question of granting or disallowing amendments under Order 6 Rule 17 C.P.C. (as it stood at the relevant time) are concerned, these are also well settled. Order 6 Rule 17 C.P.C. postulates amendment of pleadings at any stage of the proceedings. In ***Pirgonda Hongonda Patil v. Kalgonda Shidgonda Patil and Ors.*** *1957 (1) SCR 595 which still holds the field, it was held that all amendments ought to be allowed which satisfy the two conditions: (a) of not working injustice to the other side, and (b) of being necessary for the purpose of determining the real questions in controversy between the parties. Amendments should be refused only where the other party cannot be placed in the same position as if the pleading had been originally correct, but the amendment would cause him an injury which could not be compensated in costs. [Also see: Gajanan Jaikishan Joshi v. Prabhakar Mohanlal Kalwar (1990)1 SCC 166]"*

7. This has been followed in **Peethani Suryanarayana and Anr. v. Repaka Venkata Ramana Kishore and Ors. 2009 (11) SCC 308**. To the same effect is the view taken in **Sushil Kumar Jain v. Manoj Kumar and Anr. 2009 (10) SCC 434.**

8. The revisionists, who are also plaintiffs, filed amendment application stating that they have come across certain act of fraud and misrepresentation and collusion of the parties necessitating amendment in the pleadings so as to bring those factual pleadings on record. Also since the plea of *mala fide* has been raised against State Government officials, they are to be impleaded *eo nomini.* The amendment application is on record as Annexure 10 to the writ petition.

9. Sri Ajit Kumar, learned counsel for the revisionists submitted that the Court below has tried to mislead itself by referring to the orders of this Court whereby directions have been issued for expeditious disposal of suit and contended that such direction would not negate rights of the parties regarding amendment etc., if otherwise they are within their rights for making such request. He further contended that Court below has misdirected itself by referring to various proceedings here and there and to suggest that several amendments were already moved and therefore, the present amendment ought not be allowed without considering the fact that amendment sought by revisionists did not meet any of the contingency or principles on which an amendment can be disallowed and since it was the suit of the revisionists themselves, there cannot be any presumption that revisionists would be interested in delaying its disposal and therefore, the Court below wholly illegally has failed to consider the matter and

committed material illegality in passing the impugned order.

10. On the contrary Sri Singh, learned counsel for respondents submitted that amendment in question is nothing but an attempt to delay the proceedings in final disposal of suit and even otherwise it has rightly been rejected by the Court below. He also placed reliance on Apex Court decision in **Salem Advocate Bar Association, Tamil Nadu Vs. Union of India, AIR 2005 SC 3353.**

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

12. A perusal of amendment application would show that it is directly connected with the issue raised by the plaintiffs in original suit and in fact it intend to add certain paragraphs and grounds which are discernable from the facts stated in the amendment application, which if proved, may entitle the plaintiffs/revisionists grant of relief as sought in the original suit.

13. Learned counsel for the respondents could not dispute that these facts are not already on record or part of proceedings and are in the kind of repetition. The officials of Government were not already party to the suit in their individual capacity. They were not impleaded *eo nomini* and therefore, for the first time are sought to be so impleaded in view of the well established law that a plea of *mala fide* shall not be entertained and heard by the Court unless the person against whom *mala fide* is alleged is impleaded by name i.e. *eo nomini.*

14. A careful reading of entire amendment, which the plaintiffs/ revisionists has sought also does not show that it would change the nature of the suit or something which can be said to be barred by limitation ex facie. The well established principles for denying an amendment I do not find exist in the present case and learned Counsel for the respondents have also failed to demonstrate the same. The Court below has therefore erred in law in rejecting application of plaintiffs-revisionists seeking amendment in the plaint.

15. Some other arguments have also been advanced by counsel for the parties on merits of the suit but I find that any discussion and observation by this Court at this stage would prejudice the original suit itself, which is pending since the Court below may find difficulty to form an opinion otherwise than the observation made by this Court and learned counsel for the parties fairly agree thereto. In these circumstances the issues raised otherwise on merits of the original suit ought not be discussed hereat. I proceed to do so.

16. In the result the impugned order in my view cannot sustain. The revision is allowed. The impugned order dated 23.3.2012 passed by Addl. District Judge, Court No.14, Allahabad is hereby quashed. The amendment application of the plaintiffs/revisionists stands allowed. The necessary amendment shall be made in the plaint within 30 days from today. An opportunity shall also be granted by the Court below to the opposite parties to file written statement/additional written statement, if any, in order to reply amended part of the plaint and thereafter it shall endeavour to decide the suit expeditiously, in accordance with law.

17. There shall be no order as to costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.05.2012

BEFORE
THE HON'BLE MANOJ MISRA, J.

Second Appeal No. - 193 of 2005

Union of India & others ...Appellants
Versus
Indrajit Tewari ...Respondents

Counsel for the Appellants
Sri U.N. Sharma
C.S.C.
Sri S.K. Rai

Counsel for the Respondents:
Sri I. N. Singh
Sri Ajai Yadav
Sri Raj Nath Pandey

Constitution of India, Article 311 (2)-Dismissal order-member of Border Security Force-suit for declaration seeking dismissal as nullity-as no opportunity of hearing as provided in Article 311 (2) given that no charge sheet-no inquiry conducted-Trail Court Decreed the suit-1st Appellate Court dismissed suit as protection of Article 311 (1) not available-Second Appeal partly allowed-as plaintiff/Respondents not holding Civil Post-no question of protection of Article 311 (2)-remanded back before Appellate Court to adjudge the validity of dismissal order under BSF rule.

Held: Para 19

In view of the answers to questions 1 and 2, the decision of the trial court on issue no.1, that the order of termination, apart from other provisions, was in violation of the provisions of Article 311 (1) and (2), requires reconsideration. However, considering the dicta of the Apex Court in the case of Union of India versus Ram Phal (supra), it still has to be seen whether the termination was in accordance with the provisions of the BSF Rules or not. As no finding has been recorded on that score by the appellate court, I consider it appropriate to remand the matter to the lower appellate court to test the validity of the order of termination in accordance with the law.

Case law discussed:
(1981) 2 SCC 103 (Paragraph no. 6); 1996 AIR SC 2881 (paragraph No. 5); 1995 Supp (4) SCC 286(paragraph No. 59); 1981 (3) SLR page 686; AIR 1971 SC 2111; (1996) 7 SCC 546; (1979) 2 SCC 463; 1971 Supreme Court 2111

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

1. This is defendants' appeal against the judgment and decree dated 29.11.1995 passed by the Civil Judge (Senior Division), Ballia in Civil Appeal No. 35 of 1994 arising out of an Original Suit No. 453 of 1985.

2. Original Suit No. 453 of 1985 was instituted by the plaintiff-respondent for declaration that the order dated 13.03.1985 passed by the Commandant, 56th Battalion, Border Security Force is non-est and non-existent in the eye of law and that the plaintiff continues to serve as Constable of the Border Security Force as well as to allow the plaintiff to resume his duties as Constable, and further for a mandatory injunction thereby directing the defendants to make payment of arrears of salary to the plaintiff-respondent as also the regular payment of the monthly salary.

3. Plaint case, in short, was that the plaintiff was appointed on 19.08.1970 as Constable (Motor Driver) and, at the relevant time, was posted at 56th Battalion,

B.S.F at Attarai, District West Durgapur (West Bengal). It was claimed that the Commandant of the said Battalion (the defendant No.3) without jurisdiction, on 13.03.1985, passed an order of dismissal, which was null and void as the right to dismiss the plaintiff was vested in the Inspector General of Border Security Force (the defendant No.2). It was, thus, claimed that the defendant No.3 being an authority subordinate to the defendant No.2 had no jurisdiction to pass the order of dismissal and, as such, the order was contrary to the provisions of Article 311(1) of the Constitution of India. It was further claimed that no disciplinary proceeding was initiated, no charge-sheet was issued and no enquiry was conducted, therefore, the dismissal was also in violation of the provisions of Article 311(2) of the Constitution of India. It was further pleaded that no show cause notice was given to the plaintiff and he was also not informed of the charges. It was claimed that the ground of dismissal i. e. the plaintiff was unauthorisedly absent, was not correct inasmuch as the plaintiff had submitted an application for leave, the rejection of which, if any, was not informed to the plaintiff. Thus, in nutshell, the plaintiff had challenged the order of dismissal on the ground of lack of authority as also for violation of principles of natural justice.

4. Defendants contested the suit by filing written statement thereby claiming, inter-alia, that the Commandant was authorized under Section 11(2) of Border Security Force Act (hereinafter referred to as B.S.F. Act) read with Rule 177 of Border Security Force Rules (hereinafter referred to as B.S.F. Rules) to dismiss or remove a person of the rank of a Constable, as was the plaintiff. It was claimed that the plaintiff had remained unauthorisedly absent for which a show cause notice dated 10.11.1984 was served on the plaintiff. It was claimed that the provisions of Article 311(1) as also the provisions of Article 311(2) of the Constitution of India were not applicable to B.S.F as it is one of the Armed Forces under Union of India and that the power of dismissal was exercised in accordance with the provisions of the B.S.F Act and the rules framed thereunder. It was further claimed that the suit was bad for want of a valid notice under Section 80 C.P.C and was also barred under Section 34 of the Specific Relief Act.

5. On the pleadings of the parties, six issues were framed, which are as under:-

(i) Whether the order passed by the defendant No.3, as against the plaintiff, on 13.03.1985, was illegal?

(ii) Whether the suit was maintainable?

(iii) Whether the suit was properly valued and court fees sufficiently paid?

(iv) Whether the notice under Section 80 C.P.C was valid ?

(v) Whether the suit was barred under Section 34 of the Specific Relief Act ?

(vi) To what relief the plaintiff was entitled ?

6. The trial court by its judgment and decree dated 31.07.1987 dismissed the suit on the ground that the notice under Section 80 C.P.C was not given. However, with respect to all other issues, finding was recorded in favour of the plaintiff.

7. Aggrieved by the decision of the trial court, the plaintiff went up in appeal, whereby the judgment and decree of the trial court was set aside by judgment and order dated 3.9.1990 passed by 2nd Additional District Judge, Ballia in Civil Appeal No.162 of 1987 and the matter was remanded back to the trial court in the following terms:-

" आदेश

अपील आंशिक रूप से स्वीकार की जाती है। प्रश्नगत निर्णय एवं आदेश निरस्त किया जाता है, और मामले को विधि अनुसार एवं निर्णय में दी गई टिप्पणीयों के प्रकाश में पुनः निस्तारण हेतु अधीनस्थ न्यायालय को रिमाण्ड किया जाता है। मामले की परिस्थियों में उभय पक्ष अपना वाद व्यय स्वयं वहन करेगे।

पत्रावली अग्रीम कार्यवाही हेतु अधीनस्थ न्यायालय के पास वापस भेजी जाये। पक्षकारों को निर्देशित किया जाता है कि वे अधीनस्थ न्यायालय के समक्ष दिनांक 15.10.90 को उपस्थित होगें।

ह0 अपठनीय

(अकीलुददीन खॉ)

द्वितीय अपर जनपद न्यायाधीश

बलिया।"

8. Upon remand, the trial court after hearing the parties decided all the issues afresh and in favour of the plaintiff. The suit of the plaintiff was decreed by holding that the order dated 13.03.1985 was illegal, null and void with a direction to treat the plaintiff in service and to pay all the arrears payable to him. While decreeing the suit of the plaintiff, the trial court found that the plaintiff was entitled to the protection under Article 311(1) and (2) of the Constitution of India. It further found that no notice was given to the plaintiff as was required by Rule 20(2) of the B.S.F Rules. The trial court further found that a valid notice under Section 80 C.P.C was given. However, while deciding the issue No.1, the trial court held that the Commandant had power to dismiss a person of the rank of Constable in exercise of his power under Section 11 (2) of the B.S.F Act read with Rule 177 of the B.S.F Rules.

9. Aggrieved by the judgment and decree of the trial court, the defendants went up in appeal, which was dismissed by judgment and decree dated 29.11.1995. While dismissing the appeal, the appellate court confined the hearing of the appeal only to the validity of the notice under Section 80 C.P.C on the ground that no cross objection was filed by the defendants to the findings recorded by the trial court in its judgment and decree dated 31.07.1987, on a0.00"n appeal preferred by the plaintiff, therefore, the said findings had become final between the parties. Aggrieved by the judgment and decree of the lower appellate court, the present second appeal has been filed, which was admitted on 18.05.2010 on the following substantial questions of law:-

"1. Whether the power of the prescribed authority under Section 11(2)& (4) of the Border Security Force Act read with rule 177 of the Border Security Force Rules is absolute and independent or dependent upon rule 20 of the B.S.F. Rules and prior to exercise of that power an inquiry under Rule 20 is a must?

2. Whether the protection granted to a civil servant under Article 311(2) of the Constitution of India is available to personnel of the Border Security Force the same being a part of the Armed Forces under the Union of India ?"

10. I have heard Sri S.K. Rai, learned counsel for the appellants and Sri Raj Nath Pandey, learned counsel for the respondent and have perused the record.

11. At the outset, it may be mentioned that during the course of arguments, on 09.05.2012, the counsel for the appellants submitted that a vital substantial question of law, which was involved, and proposed in the memo of appeal, could not be framed. Accordingly, by order dated 09.05.2012, an additional substantial question of law no.3 was framed, as under:-

"3. Whether the appellate court while dismissing the appeal was justified in confining itself to issue No. 4 alone when the appellate court while remanding the case back to the trial court for decision afresh had set aside the judgment and order dated 31.07.1987 and after remand, the trial court had decided all the issues afresh in accordance with law and the defendant-appellants in appeal had challenged the entire judgment of the trial court?"

12. Consequently, the hearing of the appeal was adjourned to the next date i. e. 10.5.2012, and on 10.05.2012, the counsel for the parties were heard again on all the three questions that were framed.

13. The submission of the counsel for the appellants is that the appellate court committed manifest error of law by confining the hearing of Civil Appeal only to the validity of the notice under Section 80 C.P.C. It was submitted that the trial court's entire judgment and decree dated 31.07.1987 was set aside and the matter was remanded back for a fresh decision. Accordingly, any finding that might have been recorded by the trial court in favour of the plaintiff in the judgment dated 31.7.1987 stood wiped off. Moreover as the trial court proceeded to record fresh findings on all issues, therefore, the appellate court ought to have addressed itself to the correctness of the decision on all issues and not confined itself on issue no.4, which related to the validity of the notice. It was further submitted that in the remand order the appellate court had not even touched, much less approved, the findings of the trial court on issues other than issue no.4, therefore, it was open for the appellate court to adjudicate on all issues after the trial court had passed a fresh judgment and decree, which covered all the issues. In support of his contention, the counsel for the defendant-appellant cited Apex Court decisions in **Kshitish Chandra Bose v. Commissioner of Ranchi reported in (1981) 2 SCC 103 (paragraph No.6); Preetam Singh v. Assistant Director of Consolidation reported in 1996 AIR SC 2881 (paragraph no.5) and Most Rev. P.M.A. Metropolitan And Others versus Moran mar marhotma and Another reported in 1995 Supp (4) SCC 286 (paragraph 59).**

14. The counsel for the appellant further submitted that the provisions of Articles 311 (1) & (2) were not attracted to defence personnel including members of B.S.F., as they do not hold "Civil Post" under the Union. It was contended that members of B.S.F. are governed by BSF Act and the Rules framed there under. He placed reliance on a decision of Punjab & Haryana High Court in the case of **Bhagat Ram versus Union of India & others 1981 (3) SLR page 686.** In this case, the Court, relying on the Apex Court's decision in the case of **Lekh Raj Khurana versus The Union of India reported in**

AIR 1971 SC 2111, held that member of BSF cannot claim protection of the provisions of Article 311(1) & (2) of the Constitution of India, as they do not hold "Civil Post" under the Union. Counsel for the appellant also placed reliance on two Apex court's decisions i.e. **Gauranga Chakraborty versus State of Tripura (1989) 3 SCC 314 and Union of India & others versus Ramphal (1996) 7 SCC 546.**

15. Per Contra, the learned counsel for the plaintiff-respondent submitted that the lower appellate court rightly denied the opportunity to the defendants to challenge the findings on issues other than the validity of the notice under Section 80 C.P.C., as the defendants could have, but they did not, challenge the adverse findings recorded by the trial Court in its judgment dated 31.03.1987, by exercising their right under Order 41 Rule 22 C.P.C. It was further contended that even if the provisions of Article 311(1) & (2) of the Constitution of India were not attracted, the principles of natural justice, as embodied in Sub Rule (2) of Rule 20 of the BSF Rules were required to be complied with and since the trial court's finding was there that giving of such notice was not proved, the decree of the trial court could not be faulted.

16. Having considered the rival submissions of the learned counsel for the parties I'm of the view that once the entire judgment and decree of the trial court dated 31.3.1987 was set aside by the appellate court without specifically approving the findings recorded by the trial court and the trial court was required to decide the suit afresh, which it did by deciding all the issues, the findings, if any, recorded in the judgment dated 31.3.1987 did not survive even though no appeal or cross-objection was preferred by the defendants against those findings. More so, there was no question for the defendants to have filed an appeal against the findings inasmuch as the decree was in their favour and they were not aggrieved with any part of the decree. Even otherwise, from the decisions cited by the learned counsel for the appellant, as also from paragraph no.6 of the Apex Court's decision in the case of **Sukhrani V. Hari Shanker reported in (1979) 2 SCC 463** it is clear that though a decision given at an earlier stage of suit will bind the parties at later stages of the same suit, but it is equally well settled that because a matter has been decided at an earlier stage by an interlocutory order and no appeal has been taken therefrom or no appeal did lie, a higher court is not precluded from considering the matter again at a later stage of the same litigation. Accordingly, in any view of the matter this court is not precluded from examining the correctness of the decision of the courts below on all issues. I, therefore, answer question no.3 in favour of the defendant-appellant and against the plaintiff-respondent.

17. So far as question no.1 is concerned it is no longer res integra consequent to the decision of the apex court in the case of **Union of India & Others versus Ram Phal (supra),** as would be evident from paragraphs 6, 7 and 8 of the judgment, which are being reproduced herein below:

"6. In Gouranga Chakraborty Vs. State of Tripura and Another [1989 (3) SCC 314], this Court has held that the services of the enrolled persons under the BSF Act are governed by the provisions of the Act as well as the rules framed

thereunder and that the power under Section 11(2) of the Act empowering the prescribed authority, i.e. the Commandant to dismiss or remove from service any person under his command other than an officer or a subordinate officer read with Rule 177 of the said Rules is an independent power which can be validly exercised by the Commandant as a prescribed officer and it has nothing to do with the power of the Security Force Court for dealing with the offences such as absence from duty without leave or overstaying leave granted to a member of the Force without sufficient cause and to award punishment for the same. Though in the order of dismissal it was not stated under which provision of law it was passed, the appellant had disclosed in the written statement that it was passed under Section 11(2) of the Act. Therefore, the view taken by the courts below that the order of dismissal could not have been passed without first holding an enquiry by the Security Force Court and that the Commandant had no authority to pass such an order under Section 11(2) of the Act is clearly erroneous.

7.We are, however, not able to agree with the contention raised by the learned Additional Solicitor General that for exercising power under Section 11(2) of the Act no enquiry is required to be held and considering the nature of the Force and the utmost necessity of maintaining discipline giving a show cause notice should be regarded as sufficient compliance with the principles of natural justice. Section 11 is silent in this behalf and it appears that earlier there was no Rule indicating the circumstances and the manner in which that power was to be exercised. But now we find that the Rules contain such a provision. Rule 20 provides for termination of service for misconduct. The relevant part of the rule reads as under:

"(1) Where in the opinion of the Director General a person subject to the Act has conducted himself in such manner whether or not such conduct amounts to an offence, as would render his retention in service undesirable and his trial by Security Force Court inexpedient, the Director-General may inform the person concerned accordingly.

(2) The Director General shall further inform the person concerned that it is proposed to terminate his services either by way of dismissal or removal (S.11)

(3) The Director General shall furnish the particulars of allegations and the report of investigation (including the statement of witnesses, if any, recorded and copies of documents, if any intended to be used against him) in cases where allegations have been investigated:

Provided that where the allegations have not been investigated, the Director-General shall furnish to the person concerned the names of witnesses with a brief summary of the evidence and copies of documents, if any, in support of the allegations.

*(4)-(5) * * **

(6) The person concerned shall within seven days from the receipt of information furnished to him under sub-rule (3) inform, in writing, the Director-General :

(a) his acceptance or denial of the allegations;

(b) any material or evidence he wishes to be considered in his defence;

(c) names of witnesses whom he wishes to cross examine; and

(d) names of witnesses whom he wishes to examine in his defence.

(7) Where the person concerned has expressed a wish to cross-examine any witness or to produce witnesses in defence, the Director General shall appoint an enquiry officer who shall be an officer superior to the person against whom it is proposed to take action and had not taken any part previously in the investigation into the matter."

Rule 21 provides for appointment of an enquiry officer and the procedure to be followed by him. Rule 22 provides for imposition of penalty. Sub Section 4 of Section 11 makes the exercise of any power under that section subject to the provision of the Act and also the Rules. Therefore, after introduction of Rule 20 in the Rules it cannot be validly contended that no enquiry need be held while exercising the power under Section 11(2). We will now examine if the prescribed procedure was followed in this case. The show cause notice clearly appears to have been issued in terms of sub-rule 1 of Rule 20. It reads as under :

"You have been absent without leave with effect from 21st Dec.,83. I am of the opinion that because of this absence without leave for such a long period. Your further retention in service is undesirable. I, therefore, tentatively propose to terminate your service by way of dismissal. If you have anything to urge in your defence or against the proposed action, you may do so before 4.5.84. In case no reply is received by that date, it will be inferred that you have no defence to put forward."

8. The first sentence in the notice that "You have been absent without leave with effect from 21st Dec.,83" satisfied the requirement of sub-rule (3). When it further stated that "I am of the opinion that because of this absence without leave for such a long period, your further retention in service is undesirable it complied with the requirement of sub-rule (1) and as required by sub-rule (2) it was further stated therein that "I therefore, tentatively propose to terminate your service by way of dismissal". The respondent was called upon to show cause within seven days as required by sub-rule 6. No further inquiry was held; but we find that nothing further was required to be done in this case. The respondent did not reply to the notice. There was no denial of the allegations and no request to hold an enquiry. Therefore, it was not incumbent upon the Director General to appoint an enquiry officer to conduct an enquiry in the manner prescribed by Rule 21. Thus the prescribed procedure was followed before passing the dismissal order. The courts below have failed to appreciate the correct position of law and the facts. It was therefore wrongly held that the order of dismissal was illegal as it was not in accordance with the provisions of the Act and the Rules."

18. As regards question no.2, the decision of the Punjab & Haryana High Court in the case of **Bhagat Ram (supra) i**s well considered and I'm in respectful agreement with the same. The learned counsel for the plaintiff respondent could not produce any authority to show that the law laid down in Bhagat Ram's case

(supra) was not good law for any reason whatsoever. Paragraph no.8 of the decision in Bhagat Ram's case is being reproduced below:

"8. The first and foremost question as raised by the learned counsel for the petitioner in both cases was that the impugned action and orders were violative of Article 311 of the Constitution. There is no gainsaying the fact that Article 311 of the Constitution provides for guarantees with regard to dismissal, removal or reduction in rank of persons employed in civil capacities under the Union of State. Article has obvious reference to civil service. Under Entry 2 of List 1 of the Seventh Schedule to the constitution, the Parliament has been given the power to make laws with regard to the naval, military and air force as also to any other armed forces of the Union. In other words, besides the regular naval, military and armed forces, the Parliament can authorise the raising of any other kind of armed forces of the Union. Deriving power from that source in the constitution of India, the Parliament had enacted the Border Security Force Act, 1968 which provides for the Constitution and regulation of an armed force of the Union for ensuring the security of the borders of India and for matters connected therewith. Under section 3 of the said Act, all officers, subordinate officers, under-officers and other officers enrolled under the Act are put as subject to the Act, wherever they may be, and all those persons are required to remain so subject until retired, discharged, released, removed from the force in accordance with the provisions of this Act and the Rules. Section 4 provides for the constitution of the force and section 6 provides for the enrollment to the force. Section 6(2) provides that notwithstanding anything contained in the Act and the Rules, every person who has for a continuous period of three months been in receipt of pay as a person enrolled under the Act and borne on the rolls of the Force shall be deemed to have been duly enrolled. Thus a complete enclosure is provided to preserve the force's sensitivity and integrity. There is no escape from the conclusion that officers, subordinate officers, under-officers and other persons enrolled under the Act remain subject to the Act so long as they remain in service. The petitioner of either case being a Sub-Inspector was concededly a subordinate officer under rule 14(1)(b) of the B.S.F. Rules, 1969 framed under the Act. There is also no manner of doubt that the B.S.F. being part of the Armed Forces of the Union and hence part of the defence services bears an apparent distinction from civil services of the Union and this distinction takes the defence service out of the ambit of Article 311 of the Constitution. And if that is so, neither of the petitioner is entitled to invoke even principles of natural justice under the general law of master and servant. The principle is well settled in ***Lekh Raj Khuran v. The Union of India, 1971 Supreme Court 2111,*** *a judgment rendered in appeal arising from a decision of this Court. Thus neither Article 311 of the Constitution nor breach of the alleged principles of natural justice can be invoked by the petitioners in the instant cases and on that score their contentions stand repelled."*

Accordingly, question no.2 is answered in favour of the appellant and it is held that the protection under Article 311(2) of the Constitution is not available to a personnel of the Border Security

Force, as he does not hold a "Civil Post" under the Union or a State.

19. In view of the answers to questions 1 and 2, the decision of the trial court on issue no.1, that the order of termination, apart from other provisions, was in violation of the provisions of Article 311 (1) and (2), requires reconsideration. However, considering the dicta of the Apex Court in the case of Union of India versus Ram Phal (supra), it still has to be seen whether the termination was in accordance with the provisions of the BSF Rules or not. As no finding has been recorded on that score by the appellate court, I consider it appropriate to remand the matter to the lower appellate court to test the validity of the order of termination in accordance with the law.

20. As there is no challenge to the finding recorded by the courts below on Issues No.2, 3, 4 and 5, the same shall be treated to have been settled between the parties.

21. For the reasons aforesaid, the appeal is **partly allowed**. The judgment and decree dated 29.11.1995 passed by the Civil Judge (Senior Division), Ballia in Civil Appeal No. 35 of 1994 is hereby set aside. The matter is remanded back to the lower appellate court to decide the appeal afresh, in the light of the observations made herein above. The hearing of the appeal shall be confined to Issues no.1 and 6 only, all the other issues shall be treated as having become final between the parties. Since the matter is very old, I direct the Registry to forth with send back the record of the court below. The court concerned shall endeavour to decide the appeal of the defendant-appellant in an expeditious manner, preferably within a period of three months from the date of receipt of the record or from the date of production of certified copy of this order, whichever is later. There is no order as to costs.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.05.2012

BEFORE
THE HON'BLE MANOJ MISRA, J.

SECOND APPEAL No. - 500 of 2012

Chaudhary ...Petitioner
Versus
Smt. Prabhawati ...Respondent

Counsel for the Petitioner
Sri Rajesh Kumar Chitragupt
Sri Siddhartha Srivastava

Counsel for the Respondent:
Sri Rakesh Kr. Tripathi
Sri Sharad Chandra Singh

Code of Civil Procedure-Section 100-Second Appeal-cancellation of gift deed-dismissed by Courts below-questioned on ground in gift deed valuation of property shown Rs. 40,000/-hence a sale transaction-that the donor even after gift remained in possession-concurrent finding of fact recorded by Court below-mere showing valuation of property not sale transaction-gift deed acted upon-name of donor mutated in revenue record-continuation of possession having relation of father-daughter-permissible in eye of law-no substantial question of law involve-appeal dismissed.

Held: Para 10 and 15

So far as the first point is concerned, I have perused the gift-deed, which has been brought on record by means of an affidavit in support of the stay application. From a perusal of the

photocopy version of the gift deed, as the typed copy contains many typing errors, it appears that bhumidhari land was gifted whereas Rs.40,000/- has been mentioned as the valuation of the property donated and not as consideration. The valuation has been mentioned, obviously, for the purpose of payment of stamp duty. Accordingly, the first contention of the learned counsel for the appellant is not acceptable and is hereby rejected. It is noteworthy that similar contention was made before the lower appellate court. The lower appellate in paragraph 15 of its judgment rejected this contention and came to the conclusion that a composite reading of the deed clearly disclosed that it was a gift of immovable property and not a sale. I' am in agreement with the finding recorded by the lower appellate court.

In the instant case, the counsel for the appellant has not been able to point out any material to show that the gift was repudiated by the donee or her natural guardian, or that she disapproved of it. Thus, from the discussion made above, the third contention also, as raised by the learned counsel for the appellant, cannot be accepted. No other point was pressed.

Case law discussed:

AIR 1995 Madras 415 (para 21); (2004) 1 SCC 581

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

1. Heard Sri Siddhartha Srivastava, learned counsel for the appellant and Sri Sharad Chandra Singh holding brief of Sri Rakesh Kumar Tripathi, learned counsel for the respondent.

2. This is plaintiff's appeal against the judgment and decree dated 28.02.2012 passed by the Additional District Judge, Court No.1, Siddhartha Nagar in Civil Appeal No.7 of 2009 arising out of Original Suit No.164 of 1997.

3. Original Suit No.164 of 1997 was instituted for cancellation of the gift-deed dated 21.07.1991/24.07.1991 executed by Mohan of his bhumidhari land in favour of the defendant, Smt. Prabhawati.

4. The plaint case, in short, was that the plaintiff was the brother of Mohan. Mohan neither had a son nor a daughter and that during his life time his wife Smt. Tirthi had died. It was alleged that the defendant got a gift-deed executed through an imposter of Mohan, which was liable to be cancelled on the grounds: that Mohan did not at all execute the gift-deed; that the statement in the gift-deed that the defendant was daughter of Mohan was incorrect; that the gift deed was executed without a mental act of the donor; that there was no valid acceptance of the gift; that the defendant did not enter into possession of the property; and that even if the defendant is found to be daughter of Mohan, she does not have any such relationship as she herself is married and mother of many children.

5. The defendant contested the suit by denying the plaint allegations and claiming that she was the only daughter of Mohan and that Mohan had no son or other issue. It was claimed that the gift was voluntarily executed by Mohan, which was duly attested by the witnesses and registered in accordance with law of registration; and that the gift was duly accepted by her and that her name was duly recorded in the revenue records pursuant to the gift-deed. It was also claimed that the suit was barred by limitation as also by principles of estoppel and acquiescence.

6. The Trial Court framed various issues and came to the conclusion that the gift-deed was validly executed, the execution of which was proved by its attesting witness - Gokaran, who was examined as D.W.2; that the defendant was the daughter of Mohan, which fact was duly proved by oral evidence as well as from the extract of the Parivar Register; that the death certificate produced by the plaintiff to the effect that Mohan died on 25.05.1991, that is prior to the execution of the gift-deed, was not reliable whereas from the evidence led by the defendant it was clear that Mohan had died on 10.08.1991; and that the name of the defendant was also mutated in the revenue records. With the aforesaid findings the suit was dismissed.

7. Aggrieved by the judgment and decree of the Trial Court the plaintiff went up in appeal and the Appellate Court dismissed the appeal and affirmed the findings of the Trial Court. Challenging the judgment and decree of the courts below present second appeal has been filed.

8. Learned counsel for the appellant has raised three points for consideration in this appeal. The first is to the effect that in the gift-deed there is a recital that the donor has made a gift of the value of Rs.40,000/- in favour of the donee. He, therefore, contends that Rs.40,000/- was its consideration, accordingly, it was not a gift, but a sale and, as such, would be void, as sale consideration never passed. The second is that the courts below wrongly discarded Paper No.44-Ga (death certificate of Mohan), which indicated that Mohan had died on 25.05.1991 i.e. before the date of execution of the gift-deed. The third and the last is that from the statement of the defendant, made during her oral testimony, it appears that she was a minor at the time when the gift-deed was executed, therefore, in absence of any acceptance on behalf of the minor, the gift was void.

9. It is noteworthy that the finding recorded by the courts below that Prabhawati was the daughter of Mohan has not been subjected to challenge.

10. So far as the first point is concerned, I have perused the gift-deed, which has been brought on record by means of an affidavit in support of the stay application. From a perusal of the photocopy version of the gift deed, as the typed copy contains many typing errors, it appears that bhumidhari land was gifted whereas Rs.40,000/- has been mentioned as the valuation of the property donated and not as consideration. The valuation has been mentioned, obviously, for the purpose of payment of stamp duty. Accordingly, the first contention of the learned counsel for the appellant is not acceptable and is hereby rejected. It is noteworthy that similar contention was made before the lower appellate court. The lower appellate in paragraph 15 of its judgment rejected this contention and came to the conclusion that a composite reading of the deed clearly disclosed that it was a gift of immovable property and not a sale. I' am in agreement with the finding recorded by the lower appellate court.

11. As regards the second contention, that is with regards to the reliability of Paper No.44-Ga, the Trial Court has considered the reliability of the document and came to a conclusion that the said death certificate was obtained in the year 2005 and the entry therein, with respect to the date of death of Mohan, was made with

reference to the Parivar Register, but the Parivar Register did not disclose the date of death of Mohan as 25.5.1991. Accordingly, the correctness of the entry with regard to the date of death of Mohan, in Paper No.44-Ga, was disbelieved. The Trial Court also took notice of the fact that the gift-deed had the photograph of Mohan pasted on it, which was not disputed by any of the witnesses including the plaintiff. Accordingly, the Trial Court disbelieved the evidence led by the plaintiff to the effect that Mohan had died on 25.05.1991. The finding of the trial court was affirmed by the lower appellate court. Even otherwise, from the averments made in the plaint, which has been brought on record as an Annexure to the affidavit in support of the stay application, I do not find that there is any averment to the effect that Mohan had died on 25.5.1991 or that he was not alive on the date of execution of the gift-deed. For this reason also, the second contention of the learned counsel for the appellant cannot be accepted.

12. On the question of valid acceptance of the gift, the learned counsel for the appellant contended that since from the testimony of Prabhawati (defendant-respondent), as also from the entry of her date of birth in the Parivar Register, it appeared that she was a minor on the date of the execution of gift deed, therefore, in absence of any proof of valid acceptance by a guardian or next friend on her behalf, the gift would not be complete. In reply to the aforesaid contention, the learned counsel for the respondent pointed out that in the title of the plaint of the Original Suit No.164 of 1997, which was instituted in the year 1997, the age of the defendant, Smt. Prabhawati, was mentioned as 28 years. This means that in the year 1991, as per the description given by the plaintiff, Smt. Prabhawati would be aged about 21 years and, as such, not a minor on the date of execution of the gift deed. Learned counsel for the respondent also pointed out that in the plaint there is no averment with regards to the minority of the defendant on the date of execution of the gift-deed.

13. I have carefully perused the plaint, which has been annexed as Annexure No.1 to the affidavit in support of the stay application. A perusal of the array of the parties in the plaint goes to show that the age of Smt. Prabhawati has been disclosed as 28 years, which translates to 21 years on the date of execution of the gift-deed. There is also no averment in the plaint to the effect that Smt. Prabhawati was a minor on the date of execution of the gift. In the plaint, however, it has been mentioned that from the impugned deed, acceptance is not established. Accordingly, I have perused gift deed, which is on record as Annexure No.3 to the affidavit in support of stay application. In the gift deed there is a clear recital that the donor was transferring his possession over his bhumidhari land and that the gift has been accepted by the donee i.e. Prabhawati. It has also been stated that from now onwards Prabhawati is entitled to get her name mutated in the revenue records. This recital in the gift deed raises a presumption about the acceptance of the gift by the donee. The trial court while deciding issue no.1 has taken note of the statement of Prabhawati, who had appeared as D.W.1. In her statement Prabhawati stated that on the same day she entered into possession of the land and continues to remain in possession. Thus, it cannot be said that there was no acceptance of the gift. Even otherwise, assuming that actual physical possession remained with the father then

also the gift could not have been invalidated considering the relationship of father and daughter. In the case of **Kamakshi Ammal V. Rajalaksmi & others AIR 1995 Madras 415 (para 21)** it was held that where a father made a gift to his daughter and on its acceptance by her, she allows her father to enjoy the income from the properties settled in view of the relationship of father and daughter between the donor and donee, it could not be said that there was no acceptance of gift by the donee even assuming that the donor continued to be in possession and enjoyment of the property gifted.

14. Likewise, even if it is assumed that the defendant was minor on the date of execution of the gift deed, the gift would not be invalidated for lack of acceptance by another guardian or next friend, as acceptance can be implied by the conduct of the donee. In the case of **K Balakrishnan V. K. Kamalam (2004) 1 SCC 581**, the apex court after noticing a number of authorities, in paragraph 30 of its judgment, held as under: *"As seen above, in the case of a minor donee receiving a gift from her parents, no express acceptance can be expected and is possible, and acceptance can be implied even by mere silence or such conduct of the minor donee and his other natural guardian as not to indicate any disapproval or repudiation of it."*

15. In the instant case, the counsel for the appellant has not been able to point out any material to show that the gift was repudiated by the donee or her natural guardian, or that she disapproved of it. Thus, from the discussion made above, the third contention also, as raised by the learned counsel for the appellant, cannot be accepted. No other point was pressed.

16. In view of the aforesaid discussion, I find that the matter is concluded by concurrent findings of fact recorded by the courts below, which do not suffer from any legal infirmity and, as such, no substantial question of law arises for consideration in this appeal. Consequently, the appeal is dismissed summarily.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.05.2012

BEFORE
THE HON'BLE MANOJ MISRA, J.

SECOND APPEAL No. - 539 of 1985

Mahavir ...Petitioner
Versus
Smt. Phool Wati ...Respondent

Counsel for the Petitioner:
Ravi Prakash Srivastava
Ashish Srivastava
H.N. Pandey
H.P.Pandey
Prakesh Srivastava
Tarun Agarwal

Counsel for the Respondents:
H.N. Pandey
H.N. Dubey
H.P. Pandey
J.P.Pandey
S.C

U.P.Z.A. &L.R. Act-Section-157-sale transaction by member of Scheduled cost on 23.03.1974-while amended prohibition came in existence on 28.01.1977 having no retrospective effect-even if sale executed by court in pursuance of Decree of specific performance suit-restriction against S.T. Can not be applicable upon S.C.-both court below rightly discreed the suit-Second Appeal dismissed-as the

substantial question of law remained academic discussion-dismissed.

Held: Para 22

Coming to the facts of the present case, it is undisputed that the sale-deed was executed by the Court on 23.03.1974 pursuant to a decree passed in a suit for specific performance. It is also undisputed that the predecessor-in-interest of the defendant-appellants was not a member of Scheduled Tribe, but was a member of Scheduled Caste, on whom there was no restriction in the statute book for effecting transfer of land. Accordingly, on the date, when the sale-deed dated 23.03.1974 was executed by the Court, there being no restriction on transfer by a member of a Scheduled Caste, there could be no such restriction on the Court for executing sale deed in favour of the plaintiff pursuant to a decree for specific performance. Thus, even if it is assumed that the statutory bar applies to a Court that executes a sale deed pursuant to a decree for specific performance, that bar did not apply to the Court that executed sale deed in favour of the plaintiff inasmuch as on 23.03.1974, that is, when the sale deed was executed, there was no restriction in the statute book on transfer by a member of a Scheduled Caste.

Case law discussed:

1981 ALJ 794; 1981 R.D.Page 29; 1993 AWC Page 1; (2001) 8 SCC 24; (1995) 6 SCC 545

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

1. I have heard Sri Ashish Srivastava along with Sri Ravi Prakash, learned counsels for the appellant and Sri H.N. Pandey, learned counsel for the respondent and have perused the record.

2. This is a defendant's appeal against the judgment and decree dated 17.12.1984 passed by the Special Judge /Additional District Judge, Aligarh in Civil Appeal No. 91 of 1982 arising out of Suit No. 55 of 1980 between Smt. Phoolwati (plaintiff) and Sri Mahavir and another (defendants).

3. The Original Suit No. 55 of 1980 was instituted by Phoolwati Devi (the plaintiff-respondent herein), who is now represented through her heir, for permanent prohibitory injunction restraining the defendants from interfering in her peaceful possession over Bhumidhari Plot Nos. 44A @ 19 Biswa; 26 @ 15 Biswa, 3 Biswansi; and 44-B @ 3 Bigha, 4 Biswa that is, three plots having a total area of 4 Bigha, 12 Biswa, 3 Biswansi situated at village Nagla Nattha, Pargana Chandaus, Tehsil Khair, District Aligarh. In short the plaint case was that the plaintiff was bhumidhar in possession of the disputed land on the basis of a sale-deed dated 23.03.1974, which was executed by the 1st Additional Civil Judge, Aligarh in execution of a decree for specific performance passed in Original Suit No. 23 of 1971. It was claimed that the defendants, without right, title or interest, were seeking to dispossess her as well as to cut away her standing crop, hence, she was constrained to institute the suit. During the pendency of the suit, by way of amendment, she sought for damages to the tune of Rs.3000/- for the loss to the standing crop caused by the defendants.

4. The defendants contested the suit by claiming that the sale-deed dated 23.03.1974 was a void and ineffective instrument, which conferred no right, title or interest on the plaintiff. It was claimed that the father of the defendants was bhumidhar of the land in suit and the bhumidhari rights were inherited by the defendants. It was claimed that though the court had executed the sale deed in execution of the decree for specific performance against the father of

the defendants, but the sale-deed dated 23.03.1974 was void being hit by section 157-A of the UPZA & LR Act. It was claimed that the defendants were members of scheduled caste whereas the plaintiff was not. Accordingly, prior permission for sale was required under section 157-A, which was not obtained. It was further claimed that the defendants continued to remain in possession even after the execution of the sale-deed and that they were never dispossessed. The defendants also claimed that the sale-deed dated 23.03.1974 was cancelled by a decree dated 10.02.1978 passed in Original Suit No. 364 of 1977, which was instituted by the defendants.

5. On the pleadings of the parties, the trial Court framed as many as five issues, which are as follows:-

(a) Whether the sale-deed dated 23.03.1974 is barred by Section 157-A of the U.P.Z.A. & L.R., Act. If so, its effect?

(b) Whether the plaintiff is the owner in possession?

(c) Whether the plaintiff has a right to maintain the suit after cancellation of the sale-deed?

(d) To what relief, if any, is the plaintiff entitled to?

(e) Whether the plaintiff is entitled to Rs. 3,000/- as damages for loss of crop?

6. The trial court, on issue No. 1, recorded a finding that the bar under Section 157-A of the U.P.Z.A. & L.R., Act applies only on voluntary sale and it did not apply to a sale conducted through Court. While holding as above, the trial court placed reliance on judgment of this Court in the case of **Ram Saran v. 1st Additional District Judge, Rampur** reported in **1981 ALJ 794.** On issue No. 3, the trial Court held that the ex-parte decree in Original Suit No. 364 of 1977 was set aside, as evidenced by Exhibit No.6, therefore, the plaintiff had a right to maintain the suit. On issue No.2, the trial court, relying upon Exhibit Nos. 1 and 2, came to the conclusion that the Additional Civil Judge had executed the sale-deed in favour of the plaintiff, in execution of the decree passed in Original Suit No. 23 of 1971. From Exhibit No.3 (Khasra) and from Exhibit No.4 (Khatauni) the trial court concluded that the name of the plaintiff was recorded in the revenue records pursuant to the execution of the sale deed. Thereafter, by relying on the oral as well as documentary evidence, the trial court found the plaintiff to be owner in possession of the land in suit and on the findings so recorded it decreed the suit for permanent injunction, although the relief for damages, for loss of crops, was denied.

7. The defendants, aggrieved by the judgment and decree of the trial court, filed Civil Appeal No. 91 of 1982, which was dismissed by the Special Judge /Additional District Judge, Aligarh vide his judgment and decree dated 17.12.1984. The appellate court affirmed the judgment of the trial court and adopted the reasoning of the trial court.

8. Aggrieved by the judgment and decree of the courts below, the present second appeal has been filed by the defendant-appellants. This appeal was admitted, and the following substantial question of law was framed for hearing of the appeal:-

" Whether the bar under Section 157-A of the U.P.Z.A. & L.R. Act 1 of 1951 applies

to the execution of a sale-deed by a Court in compliance of a decree for specific performance of an agreement of sale? If so, its effect."

9. The counsel for the appellant submitted that the undisputed facts of the case are that the predecessor-in-interest of the defendant-appellants was a member of the scheduled caste whereas the plaintiff respondent was not a member of scheduled caste. On 26.12.1969 the predecessor in interest of the defendant- appellants entered into an agreement to sell the land in question with the plaintiff-respondent. The plaintiff-respondent had instituted Suit No. 23 of 1971 for specific performance of the agreement to sell dated 26.12.1969, which was decreed on 14.12.1972. In execution of the decree, the court executed sale-deed in favour of the plaintiff-respondent on 23.03.1974 without obtaining prior permission of the Collector. Seeking cancellation of the sale deed dated 23.03.1974 an original suit no.364 of 1977 was instituted by the defendant-appellants, which was decreed ex parte on 10.2.1978. Later, on an application for setting aside the ex-parte decree, on 05.01.1981, the ex-parte decree was set aside, and since then proceedings of suit No. 364 of 1977 are lying stayed.

10. It was submitted on behalf of the appellant that section 157-A of the U.P.Z.A. & L.R., Act places a restriction to the effect that no bhumidhar belonging to a Scheduled Caste shall have a right to transfer any land by way of sale, gift, mortgage or lease to a person not belonging to a Scheduled Caste, except with the previous approval of the Collector. It was submitted that when a sale-deed is executed by Court, pursuant to a decree for specific performance, it is on behalf of judgment-debtor, therefore, any statutory bar that is applicable to a judgment-debtor would be equally applicable on the Court and, as such, the sale-deed executed by the Court would be hit by the provisions of Section 157-A of the U.P.Z.A. & L.R. Act and, as such, would be void. In support of his contention, reliance was placed on a decision of this Court in the case of **Dal Chand v. IIIrd Additional District Judge, Aligarh** reported in **1981 R.D. Page 29.** The relevant portion, on which reliance was placed, is being reproduced below:-

"From the above discussion, it emerged that the consensus of judicial opinion is that a decree for specific performance merely declares the right of the plaintiff vis a vis the agreement of sale and does not by itself create title in the plaintiff. In order to obtain title to the property the Court has further to get the sale-deed executed in execution of the decree either from the judgment-debtor himself and if he fails to do so then to execute the sale-deed itself as a statutory agent of the judgment-debtor. It is only when a sale-deed has been executed that the title to the property passes to the decree-holder. It also emerges from the above discussion that if there was any statutory bar in execution of the sale-deed by the judgment-debtor then the said bar would be equally applicable against the Court and the petitioner executing the sale-deed. Therefore it will have to be seen that the statutory bar is removed either by any of the parties taking steps or the Court itself doing it."

11. Relying on the aforesaid decision, the counsel for the appellant submitted that since the sale-deed was void, there was no transfer of interest in the property, hence, the defendants, who were the successor-in-

interest of the original bhumidhar, continued to remain owners and, as such, no injunction could be granted against a true owner.

12. Per contra, the counsel for the respondent submitted that the bar under Section 157-A of the U.P.Z.A. & L.R. Act would not be applicable to a sale conducted by the Court pursuant to a decree for specific performance of a contract, as it applies only to voluntary sale by act of parties. He has placed reliance on two Single Judge decisions of this Court, namely, **Ram Saran v. Ist Additional District Judge, Rampur (supra)** and **Harmal v. Special/A.D.J,** Saharanpur reported in **1993 AWC Page 1.** He further contended that section 157-A of the U.P.Z.A.& L.R., Act was inserted with effect from 03.06.1981, whereas, the sale deed was executed on 23.3.1974. Therefore, he submits, the substantial question framed for adjudication is purely of academic interest and its answer either way would not determine the rights of the parties to the suit.

13. Before considering the respective merit of the submissions of the learned counsel for the parties, it would be useful to trace out the legislative history of the provision of section 157-A of the U.P.Z.A.& L.R, Act. Section 157-A of the U.P.Z.A. & L.R. Act was introduced in the Statute Book for the first time by U.P. Land Laws (Amendment) Act, 1969 (UP Act No. IV of 1969), which was published in the U.P. Gazette, Extraordinary, dated 1st September, 1969. The prefatory note to the Bill, which was ultimately enacted as U.P. Act No. IV of 1969, with regard to Clauses 9 to 11 reads as under (sourced from 1969 LLT Part IV pages 19 to 24):-

"Clause 9 to 11 of the Bill (corresponding to sections 5 to 7 of the U.P. Ordinance No. III of 1969), make provision for binding transfer by way of sale, gift, mortgage or lease or bequest of any land by a person belonging to Scheduled Tribe to a person not belonging to any such Tribe, without obtaining the previous approval of the Collector for the same. This provision has been considered necessary for their protection from exploitation."

Section 9 of U.P. Land Laws (Amendment) Act, 1969, by which section 157-A was inserted in U.P. Act No. 1 of 1951, reads as follows (sourced from 1969 LLT Part IV pages 19 to 24):-

"9. Insertion of new Section 157-A.-- *After Section 157 of the principal Act, the following section shall be inserted, namely:-*

"157-A. Restrictions on transfer of land by members of Scheduled Tribes.- *(1) Without prejudice to the restrictions contained in Sections 153 to 157, no bhumidhar, sirdar, or asami belonging to a Scheduled Tribe shall have the right to transfer by way of sale, gift, mortgage or lease any land to a person not belonging to a Scheduled Tribe except with the previous approval of the Collector.*

(2) On an application being given in that behalf in the prescribed manner, the Collector shall make such inquiries as may be prescribed.

Explanation.--- *In this Chapter, the expression "Scheduled Tribe," means a Scheduled Tribe specified in an order made by President under clause (1) of Article 342 of the Constitution."*

Later, by U.P. Land Laws (Amendment), Act, 1974 (U.P. Act No. 34 of 1974), which was published in U.P. Gazette, Extraordinary dated 07th December, 1974, section 157-A was further amended by Section 7 thereof. Section 7 of U.P. Act No. 34 of 1974 reads as under (sourced from 1975 LLT Part IV pages 1 to 4):-

"Section7. Amendment of Section 157-A-- *In Section 157-A of the principal Act,--*

(i) in the marginal heading, for the words "Scheduled Tribes", the words "Scheduled Castes and Scheduled Tribes" shall be substituted;

(ii) in sub- section (1), for the words "Scheduled Tribe", wherever occurring, the words "Scheduled Caste or Scheduled Tribe" shall be substituted;

(iii)after sub-section (1), the following proviso thereto shall be inserted, namely:

"Provided that a bhumidhar, sirdar or asami belonging to a Scheduled Caste or Scheduled Tribe may, without such approval, transfer by way of mortgage without possession, his interest in any holding as security for a loan taken by way of financial assistance for agricultural purposes (as defined in Uttar Pradesh Agricultural Credit Act, 1973) from the State Government by way of Taqavi, or form a co-operative land development bank, or from the State bank of India or from any other bank which is a Scheduled Bank within the meaning of clause (e) of Section 2 of the Reserve Bank of India Act, 1934, or from the U.P. State Agro-Industrial Corporation Limited."

(iv) for the Explanation thereto, the following Explanation shall be substituted, namely:

"Explanation.--In this Chapter, the expressions "Scheduled Castes" and "Scheduled Tribes" respectively mean the Scheduled Castes and Scheduled Tribes specified in relation to Uttar Pradesh under Articles 341 and 342 of the Constitution."

Thereafter by U.P. Act No. 8 of 1977, which was published in the U.P. Gazette Extraordinary dated 24th July, 1977, and came into force with effect from January 28, 1977, section 157-A was further amended by section 15 thereof, which reads as under (sourced from 1977 LLT Part IV page 227 to 230):-

"15. Amendment of Section 157-A:- *In Section 157-A of the principal Act, -----*

(a) the word "sirdar" where it occurs for the first time shall be omitted.

(b) in the proviso, for the words "bhumidhar, sirdar or asami" the words "bhumidhar with transferable rights or asami" shall be substituted.

Finally, by U.P. Land Laws (Amendment) Act, 1982, (U.P. Act No. 20 of 1982), which was published in U.P. Gazette Extraordinary dated 20th August, 1982, section 157-A was substituted and sections 157-B and 157-C were inserted by sections 3 and 4 thereof, with effect from 03.06.1981, which reads as under (sourced from 1982 LLT Part IV pages 196 to 200):-

"3. Substitution of Section 157-A-- *For Section 157-A of the principal Act, the following section shall be substituted, namely:-*

"157-A. Restrictions on transfer of land by members of Scheduled Castes.--

(1) Without prejudice to the restrictions contained in Sections 153 to 157, no bhumidhar or asami belonging to a Scheduled Caste shall have the right to transfer any land by way of sale, gift, mortgage or lease to a person not belonging to a Scheduled Caste, except with the previous approval of the Collector:

"Provided that no such approval shall be given by the Collector in case where the land held in Uttar Pradesh by the transferor on the date of application under this section is less than 1.26 hectares or where the area of land so held in Uttar Pradesh by the transferor on the said date is after such transfer, likely to be reduced to less than 1.26 hectares.

(2) The Collector shall, on an application made in that behalf in the prescribed manner, make such inquiry as may be prescribed."

4. Insertions--Sections 157-B and 157-C.--- *After Section 157-A of the principal Act, the following sections shall be inserted, namely:*

"157-B. Restrictions on transfer of land by members of Scheduled Tribe.-- (1) Without prejudice to the restrictions contained in Sections 153 to 157, no bhumidhar or asami belonging to a Scheduled Tribe shall have the right to transfer any land by way of sale, gift, mortgage or lease to a person not belonging to a Scheduled Tribe.

157-C. Mortgage of holdings by members of Scheduled Caste or Scheduled Tribe in certain circumstances.-- Notwithstanding anything contained in Sections 157-A and 157-B, a bhumidhar or asami belonging to a Scheduled Caste or Scheduled Tribe may mortgage without possession his holding or part thereof in the circumstances specified in sub-section (3) of Section 152.

"Explanation.--In this Chapter, the expressions "Scheduled Castes" and "Scheduled Tribes" shall mean respectively the Scheduled Castes and Scheduled Tribes specified in relation to Uttar Pradesh under Articles 341 and 342 of the Constitution."

14. From the legislative history of section 157-A of the U.P.Z.A. & L.R., Act, as traced out above, it becomes clear that in the year 1969 the restriction under Section 157-A applied only to members of "Scheduled Tribe". The restriction on members of "Scheduled Caste" became applicable on publication of U.P. Land Laws (Amendment), Act, 1974, which was published in the Official Gazette on 07th December, 1974. Thereafter, with effect from 03.06.1981, section 157-A was substituted so much so that section 157-A related only to the members of Scheduled Caste whereas new sections 157-B and 157-C were inserted. Section 157-B was with respect to restriction on transfer of land by members of Scheduled Tribe.

15. After having noticed the legislative history of section 157-A of the U.P.Z.A. & L.R. Act, a question that now arises for consideration is whether the provisions of Section 157-A, including its amendments, would be retrospective so as to annul transactions that have taken place prior to its insertion / substitution/ amendment in the Statute Book.

16. Section 5 of the U.P. General Clauses Act, 1904 provides that where any United Provinces Act is not expressed to come into operation on a particular day, then in the case of Uttar Pradesh Act made after the commencement of the Constitution it shall come into operation on the day on which the assent thereto of the Governor or the President, as the case may require, is first published in the Official Gazette. It further provides that unless the contrary is expressed, an Uttar Pradesh Act shall be construed as coming into operation immediately on the expiration of the day preceding its commencement.

17. In the instant case , I find that there was no restriction on transfers by a member of Scheduled Caste till the amendment of Section 157-A brought about by U.P. Act No.34 of 1974. The U.P. Land Laws (Amendment) Act, 1974 (U.P. Act No. 34 of 1974) does not provide for any particular day for its commencement. Accordingly, the U.P. Act No. 34 of 1974 would be deemed to have come into operation on the day that it was published in the Official Gazette. From 1975 LLT Part IV page 1, it appears that the said Act was published in U.P. Gazette, Extraordinary, on 07th December, 1974. Therefore the U.P. Act No. 34 of 1974 came into operation with effect from 07th December, 1974. Accordingly, prior to 07th December, 1974, section 157-A did not have the words "Scheduled Caste" and it related to members of "Scheduled Tribe" only.

18. It is cardinal principle of construction that every Statute is prima facie prospective unless it is especially or by necessary implication made to have retrospective operation. Unless there are words in the Statute sufficient to show the intention of the Legislature to affect existing rights, it is deemed to be prospective only - *'nova constitutio, futuris formam imponere debet, non praeteritis' (A new law ought to regulate what is to follow, not the past).*

19. The Apex Court in the case of **Dy. Collector and another v. S. Venkata Ramanaiah and another** reported in **(1995) 6 SCC 545,** was required to decide whether A. P. Scheduled Areas Land Transfer (Amendment) Regulation, 1959 (Regulation 1 of 1959) and the subsequent Regulation No.2 of 1963 and Regulation No.1 of 1970 have retrospective effect and can affect transfers made prior to the coming into force of the said Regulations. While holding that the provisions were not retrospective, the Apex Court, in paragraph Nos. 23 and 24 of the report, observed as follows:-

"23.....It is obvious that transactions which have taken place years back prior to the very parent Regulation No.I of 1959 seeing the light of the day, and which had created vested rights in favour of the transferees could not be adversely affected by the sweep of Section 3(1). It cannot be said to have any implied retrospective effect which would nullify and confiscate pre-existing vested rights in favour of the concerned transferees, transfers in whose favour had become final and binding and were not hit by the then existing provisions of any nullifying statutes. In this connection we may usefully refer to Francis Bennion's Statutory Interpretation, Second Edition at page 214 wherein the learned author, in Section 97, deals with retrospective operation of Acts. The learned author has commented on this aspect as under:

"The essential idea of a legal system is that current law should govern current activities. Elsewhere in this work a

particular Act is likened to a floodlight switched on or off, and the general body of law to the circumambient air. Clumsy though these images are, they show the inappropriateness of retrospective laws. If we do something today, we feel that the law applying to it should be the law in force today, not tomorrow's backward adjustment of it. Such, we believe, is the nature of law. Dislike of ex post facto law is enshrined in the United States Constitution and in the constitutions of many American states, which forbid it. The true principle is that lex prospicit non respicit (law looks forward not back). As Willes J said, retrospective legislation is `contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law.'

Retrospectivity is artificial, deeming a thing to be what it was not. Artificiality and make-believe are generally repugnant to law as the servant of human welfare. So it follows that the courts apply the general presumption that an enactment is not intended to have retrospective effect. As always, the power of Parliament to produce such an effect where it wishes to do so is nevertheless undoubted. The general presumption, which therefore applies only unless the contrary intention appears, is stated in Maxwell on the Interpretation of Statutes in the following emphatic terms: `It is a fundamental rule of English law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication.'

Maxwell's statement has received frequent judicial approval. It is however too dogmatically framed, and describes as a rule what (for reasons stated in Code 180) is really no more than a presumption which, in the instant case, may be outweighed by other factors. Where, on a weighing of the factors, it seems that some retrospective effect was intended, the general presumption against retrospectivity indicates that this should be kept to as narrow a compass as will accord with the legislative intention."

24. Mr. Bobde, learned counsel appearing for the respondents as amicus curiae at our request, invited our attention to a decision of this Court in the case of R. Rajagopal Reddy (Dead) by LRs. and Others v. Padmini Chandrasekharan (Dead) by LRs. (1995 (2) SCC 630) wherein one of us (Majmudar, J.) speaking for a Three Judge Bench on the question of retrospective effect of a statutory provision observed as under : (SCC p. 645, paras 14 and 15)

"... Even otherwise, it is now well settled that where a statutory provision which is not expressly made retrospective by the legislature seeks to affect vested rights and corresponding obligations of parties, such provision cannot be said to have any retrospective effect by necessary implication. In Maxwell on the Interpretatin of Statutes, 12th Edn. (1969), the learned author has made the following observations based on various decisions of different courts, specially in Re: Athlumney, (1898)2 Q.B. at pp. 551, 552 :

`Perhaps no rule of construction is more firmly established than this - that a

retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matters of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only.' The rule has, in fact, two aspects, for it, `involves another and subordinate rule, to the effect that a statute is not to be construed so as to have a greater retrospective operation than its language renders necessary."

In the case of Garikapati Veeraya v. N. Subbiah Choudhry (AIR 1937 SC 540 at p.553, para 25) Chief Justice S.R. Das speaking for this Court has made the following pertinent observations in this connection :

`The golden rule of construction is that, in the absence of anything in the enactment to show that it is to have retrospective operation, it cannot be so construed as to have the effect of altering the law applicable to a claim in litigation at the time when the Act was passed.' "

Therefore, we agree with the submission of Mr Bobde, learned counsel for respondents, that the provisions of Section 3(1) of the Regulation are purely prospective in nature and do not affect past transactions of transfers effected between tribals and non-tribals or between non-tribals and non- tribals themselves in the Agency Tracts at a time when neither Regulation I of 1959 nor Regulation II of 1963 or Regulation I of 1970 was in force. Such past transactions remained untouched by the sweep of the aforesaid subsequently enacted Regulations."

20. The principles enunciated above, were reiterated by a Constitution Bench decision of the Apex Court in the case of **Shyam Sunder and others v. Ram Kumar and another** reported in **(2001) 8 SCC 24.**

21. Applying the aforesaid principles to assess whether the provisions of section 157-A of the UPZA & LR Act affect past completed transfers, I do not find any provision that may suggest that section 157-A of the U.P.Z.A. & L.R. Act including its amendments would affect past completed transfers. Section 157-A, which was substituted by U.P. Act No.20 of 1982, was made effective from 03.06.1981 whereas all the other previous amendments, except that was made by UP Act No.8 of 1977, were prospective i.e. operative from the date of their publication in the official gazette. So far as the amendment brought by UP Act No.8 of 1977 is concerned that was made operative with effect from 28.01.1977.

22. Coming to the facts of the present case, it is undisputed that the sale-deed was executed by the Court on 23.03.1974 pursuant to a decree passed in a suit for specific performance. It is also undisputed that the predecessor-in-interest of the defendant-appellants was not a member of Scheduled Tribe, but was a member of Scheduled Caste, on whom there was no restriction in the statute book for effecting transfer of land. Accordingly, on the date, when the sale-deed dated 23.03.1974 was executed by the Court, there being no restriction on transfer by a member of a Scheduled

Caste, there could be no such restriction on the Court for executing sale deed in favour of the plaintiff pursuant to a decree for specific performance. Thus, even if it is assumed that the statutory bar applies to a Court that executes a sale deed pursuant to a decree for specific performance, that bar did not apply to the Court that executed sale deed in favour of the plaintiff inasmuch as on 23.03.1974, that is, when the sale deed was executed, there was no restriction in the statute book on transfer by a member of a Scheduled Caste.

23. In view of the aforesaid discussion, the substantial question of law, as framed, for hearing of this appeal, is purely academic in nature and is not required to be decided for determining the rights of the parties to the suit. The judgment relied upon by the counsel for the appellant does not go to show that the provisions of Section 157-A of the U.P.Z.A. & L.R., Act would affect transfers carried out before insertion of the statutory bar.

24. In the instant appeal there is no challenge to the finding recorded by both the courts below that the plaintiff is in possession of the land in suit and that her name is recorded in the revenue records. In this view of the matter, the plaintiff-respondent being owner in possession is entitled to decree of her suit for permanent prohibitory injunction as against the defendant-appellants. For the reasons noted above, I'm of the considered view that the courts below were legally justified in decreeing the suit of the plaintiff and that the judgment and decree passed by the courts below does not suffer from any legal infirmity. The appeal, therefore, lacks merit and is hereby **dismissed with costs.**

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 09.05.2012

BEFORE
THE HON'BLE DHARNIDHAR JHA, J.
THE HON'BLE RAMESH SINHA, J.

Government Appeal Defective No. - 122 of 2006

State of U.P. ...Petitioner
Versus
Ram Sajeevan @ Gunda ...Respondents

Counsel for the Petitioner
Govt Advocate

Counsel for the Respondents:
.....

Government Appeal-against acquittal-offence under Section 436 IPC alongwith Section 3 (2) (4) of S.T/S.C. Act-inspite of 4 years opportunity prosecution fail to produce any witness- while primary duty of officer incharge of Police Station was to obtain bond under Section 170 (2) Cr.P.C. From the person acquainted with incident-exercise of Trail Judge to examine accused person under Section 313 wholly un-warranted-in absence of prosecution witness-major difference between FIR and evidence-appeal by Government with Section 5 Application-completely unnecessary exercise-amounts to wastage of Public time-Appeal dismissed.

Held: Para 5 and 6

We have already pointed out that no witness was present. As such, there was no evidence and there could not have been any other result as was recorded by the learned Trial Judge. We do not find any merit in the application filed under

Section 5 of the Indian Limitation Act and in the present appeal. The two are dismissed.

Before we part with the judgment, we feel that it was completely an unnecessary exercise by the State of U.P. to process the appeal for being presented before this Court as it has not only wasted public time in the law department or other sections of the Government, it also wasted public time of this court also. We desire such frivolous appeals should not be filed by the Government and for that purpose, we direct that a copy of the present judgement be sent to the Principal Secretary (Law), Government of U.P.

Case law discussed:

AIR 2000 SC 274

(Delivered by Hon'ble Dharnidhar Jha, J.)

1. The State of U.P. has filed the present appeal against the judgment of acquittal dated 07.09.2005 passed by Sri Sudhir Kumar-I, the learned Sessions Judge, Bhadohi at Gyanpur in Session Trial No. 34 of 2001.

2. The charges were framed on 30th of June, 2004 in a case under Section 436 etc. I.P.C. and Section 3 (2) (4) S.C./ S.T. (Prevention of Atrocities) Act but in spite of having availed of as many as four years the State of U.P. did not produce its witnesses as such the learned trial judge was forced to shut out the prosecution evidence to acquit the accused. Before acquitting the accused persons, the learned trial judge had recorded the statements of accused persons under Section 313 Cr.P.C.

3. We want, firstly, to point out by referring to Section 170 (2) Cr.P.C. that it is the duty of the officer in charge of the police station by which the case has been investigated into to obtain bonds from persons who are acquainted with the facts and circumstances of the case of an undertaking that they shall appear before the court to support the charges. Thus, the primary duty of production of a witness lies with the police. It is invariably being seen that the above statutory function of the police is being flaunted with impunity. This section might not have been referred to by the Supreme Court in ***Shailendra Kumar Vs. State of Biha***r reported in ***AIR 2000 SC 274.***, when their Lordships was pointing out the above proposition of law that it was the duty of the officer-in-charge of the police station by which the case had been investigated into, to remain present before the Court of Sessions with witnesses on day to day basis during hearing of such cases of serious charges which ordinary go to the court of Sessions and the prosecution evidence must not to be shut out in want of production of witnesses. We are of the opinion that here in the present case it could not be said that the learned trial judge was acting in haste. The learned judge was giving sufficient opportunity to the State of U.P. for producing the witnesses, but finding that no witness was produced, he was finally shutting out the prosecution case.

4. What we further find is that the learned trial judge has not examined any witness. As such, there was no requirement under law to examine the accused persons under Section 313 of the Cr.P.C. The provision of Section 313 Cr.P.C. requires the explanation of the accused persons to be obtained through their examination only when the evidence indicates certain circumstances appearing against them towards their

culpability. If there was no evidence then there could not be any circumstance appearing from evidence against any of the accused and as such there could not be any legal requirement for any court to examine an accused under Section 313 Cr.P.C. We are saddened to find that the highest court of the District was acting mechanically to observe the formality of law as it was never required to be observed in absence of any evidence. The F.I.R. is not the evidence. It might be a document value thereof has repeatedly been pointed out of as being a mere statement which could be used for corroborating or contradicting of the maker of document. The contents of such a document could not be utilised to infer the circumstances appearing against the accused from evidence, because a mere statement and evidence are two different things as per the simple definition of the terms. Evidence is defined by section 3 of the Indian Evidence Act. We, as such, find that that particular exercise of the learned Sessions Judge was not required to be made by law.

5. We have already pointed out that no witness was present. As such, there was no evidence and there could not have been any other result as was recorded by the learned Trial Judge. We do not find any merit in the application filed under Section 5 of the Indian Limitation Act and in the present appeal. The two are dismissed.

6. Before we part with the judgment, we feel that it was completely an unnecessary exercise by the State of U.P. to process the appeal for being presented before this Court as it has not only wasted public time in the law department or other sections of the Government, it also wasted public time of this court also. We desire such frivolous appeals should not be filed by the Government and for that purpose, we direct that a copy of the present judgement be sent to the Principal Secretary (Law), Government of U.P.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.05.2012

BEFORE
THE HON'BLE RAJES KUMAR, J.
THE HON'BLE ANIL KUMAR SHARMA, J.

First Appeal From Order Defective No. - 673 of 2012

Ramji Singh ...Petitioner
Versus
Anuj Kumar Singh ...Respondents

Counsel for the Petitioner:
Sri Sankatha Rai
Dr. Vinod Kumar Rai
Sri Vijay Kumar Rai

Counsel for the Respondent
.....

C.P.C.-order XXXIII, Rule I-first appeal from order-against order passed under order 39 rule 3A-on ground Trail Court failed to finally pass order within 30 days-from order sheet within 30 days objection filed and on subsequent date with consent of both parties adjournment granted-as such there is no fault on part of presiding Judge-no doubt the provision of order 39-Rule-3-A are mandatory-but in present case neither any omission on part of Trail Judge found-not appeal maintainable-Registrar General to conscious to all Judicial Office regarding grant of ex-parte interim order and mandatory provisions.

Held: Para 10 and 11

The result of the foregoing discussion is that no interference in the impugned order is required by this Court in the instant appeal, which is also not maintainable, as there was no inaction by the Judicial Officer in expeditiously hearing/disposing of the application for ad interim injunction. We were informed that the trial Court had fixed 7.5.2012 for hearing/disposal of ad interim injunction application in the case, we hope that by now the said application should have been heard and decided. However, if it has not been done, we direct the trial Court to positively dispose of the application within three weeks from receipt of this order. In this event, we direct the appellant to file the certified copy of this order before the trial Court within three days from today. With the above observation, the appeal is dismissed.

Before parting with the case, we would like to remind the Judicial Officers of the State to sensitize themselves in following the mandate of provisions of Order XXXIX Rule 3 and 3-A CPC in letter and spirit whenever they intend to pass exparte ad interim injunction order without giving notice to the defendant. Let a copy of the order be placed before Hon'ble Chief Justice by the Registrar General for circulating it among all the Judicial Officers for future guidance.

Case law discussed:

(2007) 7 Supreme Court Cases 695; 2006 (3) AWC 2573; 2003 (1) ARC 35; 1999 (36) ALR 198; AIR 1990 Allahabad 134; JT 1993 (3) SC 238; 2007 (3) AWC 3036

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

1. The defendant of O.S. No. 170 of 2012 Anuj Kumar Singh Vs. Ram Ji Singh pending in the Court of Civil Judge (SD), Ballia has approached this Court by way of instant appeal for setting aside exparte ad interim injunction order passed by the learned trial Court on 28.2.2012.

2. The Stamp Reporter of the Court has noted that the instant first appeal from order is not maintainable.

3. We have heard the learned counsel for the appellant at length and perused the impugned order and other papers filed along with memo of appeal as well as the law cited at the Bar.

4. The plaintiff-respondent has filed suit (O. S. No. 170/12) in the Court of Civil Judge (Sr.Div.), Ballia for permanent injunction restraining the defendant from carrying on business of brick-klin in the year 2012 without paying his share in profits amounting to Rs. 10.5 lakhs for the year-2011, from selling 2.5 lakhs baked bricks and 4.0 lakhs raw bricks; from using 15 tons coal lying at the brick klin and interfering in plaintiff's egress and ingress in the brick-klin bounded at the foot of the plaint. The plaintiff relied upon an unregistered partnership-deed dated 15.1.2011 executed between him and the defendant for running brick-klin in the name and style of 'M/s Yuva Shakti Eint Bhatta', and its registration certificate with the Commercial Tax Department. Ballia. Along with the suit the plaintiff filed application for ad interim injunction 6-C/2 supported with affidavit. The learned trial Court after hearing plaintiff's counsel through impugned order dated 28.2.2012 granted interim relief restraining the defendant from running the brick-klin in the year 2012 without paying Rs. 10.5 lakhs to the plaintiff and further restrained him from selling the baked and raw bricks, using 15 tons coal and from plaintiff's visit in the brick-klin bounded at the foot of the plaint.

5. Learned counsel for the appellant has vehemently argued that the learned trial Court has not followed the mandate of Rule 3 and 3-A of Order XXXIX Code of Civil Procedure in as much as no reasons have been recorded in the impugned order, so it is bad in law and since the application for ad interim injunction application has not been disposed of within 30 days, the exparte ad interim injunction order has become final, so the instant appeal is maintainable. He has placed reliance on the following cases:

1. A. Venkatasubbiah Naidu Vs. S. Chellappan and others (2000) 7 Supreme Court Cases 695;

2. Ashok Prakashan (Regd.) and another Versus Sunil Kumar and others 2006 (3) AWC 2573;

3. American Institute of English Language Pvt. Ltd. Versus Nitin Saraswat and another 2003 (1) ARC 35;

4. Laxmi Narain and another Versus The District Judge, Lalitpur and another 1999 (36) ALR 198;

5. Road Flying Carrier and another Versus The General Electric Company of India Ltd. AIR 1990 Allaha bad 134; and

6. Shiv Kumar Chadha Versus Municipal Corporation of Delhi and others JT 1993 (3) SC 238.

6. In the facts of the case of A. Venkatasubbiah Naidu (supra) the trial Court has granted exparte ad interim injunction straight away for two months violating the provisions of Rule 3-A of Order 39 of the Code, which provides that where an injunction has been granted without giving notice to the opposite party, the Court shall make an endeavour to finally dispose of the application within thirty days from the date on which the injunction was granted and where it is unable to do so, it shall record its reasons for such inability. The defendants challenged this order before High Court by way of revision under Article 227 of the Constitution. The learned single Judge setting aside the order observed that the trial Court ought not have granted an order of injunction at the first stage itself which could operate beyond thirty days as the court had then no occasion to know of what the affected party has to say about it. Such a course is impermissible under Order 39 Rule 3-A of the Code. On these facts, the Apex Court in para-21 of the report observed as under :

"21. It is the acknowledged position of law that no party can be forced to suffer for the inaction of the court or its omissions to act according to the procedure established by law. Under the normal circumstances the aggrieved party can prefer an appeal only against an order passed under Rules 1, 2, 2-A, 4 or 10 of Order 39 of the Code in terms of Order 43 Rule 1 of the Code. In such circumstances the party which does not get justice due to the inaction of the court in following the mandate of law must have a remedy. So we are of the view that in a case where the mandate of Order 39 Rule 3-A of the Code if flouted, the aggrieved party, shall be entitled to the right of appeal notwithstanding the pendency of the application for grant of vacation of a temporary injunction, against the order remaining in force. In such appeal, if preferred, the appellate court shall be obliged to entertain the appeal and further to take note of the omission of the subordinate court in complying with the provisions of Rule 3-A. In appropriate cases

the appellate court, apart from granting or vacating or modifying the order of such injunction, may suggest suitable action against the erring judicial officer, including recommendation to take steps for making adverse entry in his ACRs. Failure to decide the application or vacate the ex parte temporary injunction shall, for the purposes of the appeal, be deemed to be final order passed on the application of temporary injunction, on the date of expiry of thirty days mentioned in the Rule."

In para-22 of the report it was further observed by the Apex Court -

"Now what remains is the question whether the High Court should have entertained the petition under Article 227 of the Constitution when the party has two other alternative remedies. Though no hurdle can be put against the exercise of the constitutional powers of the High Court it is a well-recognized principle which gained judicial recognition that the High Court should direct the party to avail himself of such remedies one or the other before he resorts to a constitutional remedy. Learned Single Judge need not have entertained the revision petition at all and the party affected by the interim exparte order should have been directed to resort to one of the other remedies. Be that as it may, now it is idle to embark on that aspect as the High Court had chosen to entertain the revision petition."

7. In Shiv Kumar Chadha's case (supra), the Hon'ble Supreme Court has held as under:

"The imperative nature of the proviso has to be judged in the context of Rule 3 of Order 39 of the Code. Before the proviso aforesaid was introduced, Rule 3 said 'the Court shall in all cases, except where it appears that the object of granting the injunction would be defeated by the delay, before granting an injunction, direct notice of the application for the same to be given to the opposite party'. The proviso was introduced to provide a condition, where Court proposes to grant an injunction without giving notice of the application to the opposite party, being of the opinion that the object of granting injunction itself shall be defeated by delay. The condition so introduced is that the Court 'shall record the reasons' why an ex parte order of injunction was being passed in the facts and circumstances of a particular case. In this background, the requirement for recording the reasons for grant of ex parte injunction, cannot be held to be a mere formality. This requirement is consistent with the principle, that a party to a suit, who is being restrained from exercising a right which such party claims to exercise either under a statute or under the common law, must be informed why instead of following the requirement of Rule 3, the procedure prescribed under the proviso has been followed. The party which invokes the jurisdiction of the Court for grant of an order of restraint against a party, without affording an opportunity to him of being heard, must satisfy the Court about the gravity of the situation and Court has to consider briefly these factors in the ex parte order. We are quite conscious of the fact that there are other statutes which contain similar provisions requiring the Court or the authority concerned to record reasons before exercising power vested in them. In respect of some of such provisions it has been held that they are required to be complied with but non-compliance therewith will not vitiate the order so passed. But same cannot be said in respect of the proviso to Rule 3 of Order 39. The

Parliament has prescribed a particular procedure for passing of an order of injunction without notice to the other side, under exceptional circumstances. Such ex parte orders have far-reaching effect, as such a condition has been imposed that Court must record reasons before passing such order. If it is held that the compliance with the proviso aforesaid is optional and not obligatory, then the introduction of the proviso by the Parliament shall be a futile exercise and that part of Rule 3 will be a surplusage for all practical purposes. Proviso to Rule 3 of Order 39 of the Code, attracts the principle, that if a statute requires a thing to be done in a particular manner, it should be done in that manner or not all. This principle was approved and accepted in well known cases of Taylor Vs. Taylor ((1875) 1 Ch D 426 : 45 LJ Ch 373) and Nazir Ahmed Vs. Emperor (AIR 1936 PC 253 (2) : 63 IA 372 : 36 Crl.L.J. 897). This Court has also expressed the same view in respect of procedural requirement of the Bombay Tenancy and Agricultural Lands Act in the case of Ramchandra Keshav Adke Vs. Govind Joti Chavare ((1975) 1 SCC 915 : AIR 1975 SC 915). As such, whenever a Court considers it necessary in the facts and circumstances of a particular case to pass an order of injunction without notice to other side, it must record the reasons for doing so and should take into consideration, while passing an order of injunction, all relevant factors, including as to how the object of granting injunction itself shall be defeated if an ex parte order is not passed. But any such ex parte order should be in force up to a particular date before which the plaintiff should be required to serve the notice on the defendant concerned. In the Supreme Court Practice 1993, Vol.1 at page 514, reference has been made to the views of the English Courts saying : 'Ex parte injunctions are for cases of real urgency where there has been a true impossibility of giving notice of motion....

An ex parte injunction should generally be until a certain day, usually the next motion day...."

8. In view of this legal preposition, it need no emphasis that provisions of Rule 3 and 3-A of Order XXXIX of the Code of Civil Procedure are mandatory in nature. However, the factual position of the instant case is some what different. Here the learned trial Court fixing date of hearing within thirty days in its impugned order has discussed the facts of the case in brief and has also noted the evidence filed by the respondent in support of his contention and has indicated the reasons for granting exparte ad interim injunction order. It has observed that as the partnership has not been dissolved, so prima facie case in favour of the plaintiff is found. No doubt in so many words it has not been stated that the object of granting the injunction would be defeated by the delay, but in the facts and circumstances of this case, we find that the provisions of Rule 3 have been substantially followed. In these circumstances, the cases of *Ashok Prakashan (Regd.), American Institute of English Language Pvt. Ltd., Laxmi Narain and Road Flying Carrier* (supra) are not helpful to the appellant as in all these cases no reasons were given by the trial Court in the impugned orders while granting exparte ad interim injunction orders.

9. The interim order in the instant case has been granted up to 25.3.2012 directing the plaintiff to ensure compliance of Rule 3 of Order XXXIX of the Code, which was also made. The defendant has filed objections along with his affidavit against

plaintiff's application aforesaid on 23.3.2012 i.e. before the date fixed for hearing the ad interim injunction application, but the trial Court has wrongly fixed 22.4.2012 for hearing, as already 25.3.2012 was fixed for the purpose. As 25.3.2012 was Sunday, so the case was taken up on 26.3.2012 and on that day with the consent of the parties the hearing was preponed for 2.4.2012. Along with the memo of appeal the appellant has filed certified copy of the order sheet of the case as Annexure-11, but it does not contain orders passed between 10.4.2012 and 18.4.2012. It was holiday on 2.4.2012, so the case was put before the trial Court on 3.4.2012 and on that day 5.4.2012 was fixed for hearing of the application. The order-sheet further indicates that on 5.4.2012 time was not left with the trial court, so the hearing was adjourned to 6.4.2012 and on this day arguments in part were heard and for rest arguments 9.4.2012 was fixed. The plaintiff filed certain papers on 9.4.2012, so 10.4.2012 was fixed for plaintiff's rest arguments. Learned counsel for the appellant has supplied the uncertified copy of the order sheet of the case, which also contains orders passed by the learned trial Court between 10.4.2012 and 18.4.2012. The order sheet of 10.4.2012 shows that arguments of defendant were heard, however, plaintiff moved application for adjournment. The learned trial Court fixed 13.4.2012 for orders directing the plaintiff to address the Court positively on 11.4.2012 and on this day arguments were concluded. On 13.4.2012, the plaintiff sought adjournment for a week seeking time to file case-laws and the trial Court adjourned the case to 18.4.2012 observing that if the case-law is not filed, then vacation of exparte order would be considered. In this context it is noteworthy that this year the annual transfers in the subordinate judiciary were effective on 16.4.2012 and all the Judicial Officers in the State who were under transfer were directed to hand over charge on 16.4.2012 (after-noon). On our query, the Registry has informed that till 16.4.2012 Sri N. K. Singh was presiding the Court of Civil Judge (SD), Ballia and thereafter his jurisdiction was changed and Smt. Sarla Dutta took over the charge of that Court, although this change was within the district. Experience shows that whenever an officer is under transfer out of station or his jurisdiction is changed within the district, his mind is diverted to the future change and the Bar also (particularly one of the party) is not interested in having verdict from the officer whose is being shifted. The history of this case supports our view. As noted above, this year in annual transfers of Judicial Officers in the State, all the officers under transfer were directed to be ready for handing over charge in the after-noon of 16.4.2012 vide Officer Memorandum of this Court dated 30.3.2012. The Presiding Officer of the trial Court hearing the case was likely to be shifted locally to another Court and actually his jurisdiction was changed in the after-noon of 16.4.2012 as he became Chief Judicial Magistrate, Ballia. In this back ground it cannot be held that there was any inaction on the part of the concerned Judicial Officer to expeditiously decide the ad interim injunction application filed in the case. The reasons for delay could not be mentioned in the order-sheet of the case due to change of Presiding Officer of the Court as was required per Rule 3-A of Order XXXIX CPC. Thus when the appellant has already filed objections as are required under Rule 4 of the above Order of the Code, and the learned trial Court had concluded hearing, the instant appeal filed on 30.4.2012 should not be entertained by this Court. In the case of *GAIL (India) Ltd. Vs. Advance Lamps Component &*

Tablewares (P) Ltd., Firozabad 2007 (3) AWC 3036 a division bench of this Court in similar fact situation has observed that when application under Rule 4 Order XXXIX CPC has already been moved by the defendant-appellant in the Court below, two simultaneous proceedings, i.e. (i) application and (ii) appeal cannot be allowed to go on. Application for discharge/set aside/variation will be heard first. The Apex Court has also highlighted this legal position in para-22 of the report of *A. Venkatasubbiah Naidu's* case (supra).

10. The result of the foregoing discussion is that no interference in the impugned order is required by this Court in the instant appeal, which is also not maintainable, as there was no inaction by the Judicial Officer in expeditiously hearing/disposing of the application for ad interim injunction. We were informed that the trial Court had fixed 7.5.2012 for hearing/disposal of ad interim injunction application in the case, we hope that by now the said application should have been heard and decided. However, if it has not been done, we direct the trial Court to positively dispose of the application within three weeks from receipt of this order. In this event, we direct the appellant to file the certified copy of this order before the trial Court within three days from today. With the above observation, the appeal is dismissed.

11. Before parting with the case, we would like to remind the Judicial Officers of the State to sensitize themselves in following the mandate of provisions of Order XXXIX Rule 3 and 3-A CPC in letter and spirit whenever they intend to pass exparte ad interim injunction order without giving notice to the defendant. Let a copy of the order be placed before Hon'ble Chief Justice by the Registrar General for circulating it among all the Judicial Officers for future guidance.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.05.2012

BEFORE
THE HON'BLE RAJES KUMAR, J.

Civil Misc. Substitution Application N0. 262104 of 2010
IN
Second Appeal N0. 1162 of 2006

Hari Lal Chaurasia (Dead) and others
...Plaintiff/Appellants
Versus
Smt. Krishna Devi and others
...Defendants/Respondents.

Counsel for the Appellants:
Sri A.K. Srivastava
Sri Sumit Srivastava

Counsel for the Respondents:
Smt. Kamla Mishra

Code of Civil Procedure-Order XXII, Rule 10 A-Abatement-Respondents No. 1 died during pendency of 1st Appeal-Defendant by no point of time either before court below or before this Hon'ble Court given information-legal hair already on record-liberal view should be taken-substitution allowed.

Held: Para 9

It appears that during the pendency of 1st suit, Munni Lal died and his daughter Smt. Krishna Devi and son Sri Bhagwati Prasad were substituted. In the appeal also, they were made party. On the facts and circumstances, the Court is of the view that if respondent no. 1 died in the year 2004, the pleader of respondent no. 1 should have informed the Court about her death but it is not the case of any

party that the pleader has informed about the death of respondent no. 1. In the circumstances, there was no occasion with the appellants to know about the death of respondent no. 1 and to move the substitution application. During the pendency of the present appeal, when the appellants came to know through counsel of respondents that respondent no. 1 has died, steps have been taken and the substitution application has been filed. The Court is of the view that at the stage of second appeal also, the heirs of the party who died during the pendency of suit or appeal can be made as party and their names can also be substituted. It is settled law that in the cases of substitution and in setting aside the abatement, a liberal view should be taken to avoid the defeat of justice.

Case law discussed:

AIR 1996 SC 1984; J.T. 2009 (3) SC 196

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

1. It appears that respondent no. 1 died on 10.4.2004 during the pendency of the 1st appeal. Since no substitution application was filed and dead person was made party an application for abatement of the appeal against the legal heirs of respondent no. 1 has been filed. Later on, appellants filed the substitution application on 3.9.2010 on which the Court has issued notices to the proposed legal representatives of the deceased on 18.11.2011. The notices were sent by ordinary post as well as by registered post and an application for setting aside the abatement application has also been filed on 7.4.2011. In paragraph-3 of the substitution application, it is stated that the counsel for the respondents did not inform the factum of death to the Court as required under Order 22 Rule 10A of the Code of Civil Procedure (hereinafter referred to as "C.P.C.") and as such the appellants could not know about the death of respondent no. 1. Learned counsel for the respondents informed the deponent about the death of respondent no. 1 on 31.8.2010 and then the deponent enquired about the legal heirs of respondent no. 1 and then filed the substitution application. It is stated that the application is in time, however, if there is any delay, the same may be condoned.

2. Counter affidavit has been filed by the respondents. In paragraph-3 of the counter affidavit, it is stated that respondent no. 1 has died on 10.4.2004 and not during the pendency of the second appeal. She died before the order has been passed in Civil Appeal No. 232 of 1998 on 6.9.2006 as such the present second appeal has been preferred against the dead person as such the substitution application is not maintainable.

3. Rejoinder affidavit has been filed. In paragraph-4 of the rejoinder affidavit, the factum of date of death mentioned in the counter affidavit has not been disputed. It is stated that the fact was never brought to the notice of the lower court nor the counsel for the respondents ever informed the lower appellate court about the death of late Smt. Krishna Devi; the respondent no. 1 who according to respondent no. 2 died on 10.4.2004 during the pendency of Civil Appeal No. 232 of 1998. Information, as required under Order 22 Rule 10A of C.P.C. was not given and as such the appellants could not know about the death of respondent no. 1. Ms. Kamla Misra, learned counsel for the respondents in the present second appeal informed the deponent about the death of respondent no. 1 on 31.8.2010 and then the deponent enquired about the legal heirs of respondent no. 1 and as such the present substitution application has been filed and the same is maintainable.

4. Sri A.K. Srivastava, learned counsel for the appellants submitted that Order 22 Rule 10A of C.P.C. provides that whenever a pleader appearing for a party to the suit comes to know of the death of that party, he shall inform the Court about it, and the Court shall thereupon give notice of such death to the other party. In the present case, the pleader has not informed about the death of respondent no. 1 before the first appellate court therefore no steps have been taken to substitute the heirs. He further submitted that Smt. Krishna Devi was daughter of late Munni Lal, who was the defendant in the suit. Sri Bhagwati Prasad, son of late Munni Lal, is arrayed as respondent no. 2. He is still alive. Therefore, having regard to the nature of the suit and the issue involved, the abatement of the appeal against the heirs of respondent no. 1 will have no ultimate effect. He submitted that a liberal view should be taken in setting aside the abatement. Reliance is placed on the decision of the Apex Court in the case of ***State of Madhya Pradesh vs. S.S. Akolkar, reported in AIR 1996 SC 1984.***

5. Sri Arvind Kumar Shukla, learned counsel for the respondents submitted that the appeal has been filed against the dead person, therefore Order 22 Rule 10A of C.P.C. does not apply in the present case and the appeal stands abated against the legal heirs of respondent no. 1. He placed reliance on the decision of the Apex Court in the case of ***T. Gnanavel Vs. T.S. Kanagaraj and another, reported in J.T. 2009 (3) SC 196.***

6. I have considered the rival submissions.

7. The suit has been filed against Munni Lal for permanent injunction restraining him to raise any construction over the suit property and in the peaceful possession of the plaintiff.

8. The claim of the plaintiff was that he had purchased plot no. 794/1 in Mauja Chakka, Pargana Arail, District Allahabad measuring Rakba 3 Bishwa 12 Dhoor from Sri Sangam Lal and Sri Ribai against the registered sale deed dated 27.10.1959. The said property has been mutated in the name of the plaintiff and his name has been recorded in Plot no. 794/1, 1368 fasli. The said plot lateron, numbered as 794/2, 1370 fasli in the revenue record. The case of the defendant is that he was owner of Plot no. 793, which was purchased by him from Sri Ibrar Hussain, son of Sri Niyat Hussain, vide registered sale deed dated 20.5.1957 and in the year 1958 over the said plot he had constructed two rooms. He has not disputed the ownership and possession of the plaintiff over plot no. 794/1, new number 794/2. The Trial court recorded the finding that the plaintiff failed to prove that the disputed plot is part of plot no. 794/2. This finding has been upheld by the appellate court.

9. It appears that during the pendency of 1st suit, Munni Lal died and his daughter Smt. Krishna Devi and son Sri Bhagwati Prasad were substituted. In the appeal also, they were made party. On the facts and circumstances, the Court is of the view that if respondent no. 1 died in the year 2004, the pleader of respondent no. 1 should have informed the Court about her death but it is not the case of any party that the pleader has informed about the death of respondent no. 1. In the circumstances, there was no occasion with the appellants to know about the death of respondent no. 1 and to move the substitution application. During the pendency of the present appeal, when the appellants came to know through counsel of

respondents that respondent no. 1 has died, steps have been taken and the substitution application has been filed. The Court is of the view that at the stage of second appeal also, the heirs of the party who died during the pendency of suit or appeal can be made as party and their names can also be substituted. It is settled law that in the cases of substitution and in setting aside the abatement, a liberal view should be taken to avoid the defeat of justice.

10. In the circumstances, the substitution application is allowed. The appellants may substitute the heirs of respondent no. 1.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 23.05.2012

BEFORE
THE HON'BLE DEVENDRA KUMAR ARORA, J.

Contempt No. - 1170 of 2012

Dr. Nutan Thakur ...Petitioner
Versus
Sri Uday Kumar Verma. Secy., Ministry of Information and others ...Respondents

Counsel for the Petitioner:
Sri Dr.Nutan Thakur(Inperson)

<u>Contempt of Court Act, 1971-Section 12</u>-willful 'disobedience-allegation that inspite of clear stay regarding publication of news items, electronic media about movement of Army Troops-the chairman P.T.I. Made statement against the validity of direction as not 'correct'-but inspite of repeated opportunity no material produced by which it can be presume that after stay order any manner Press Council published any news item relating to movements of Army Troops-contempt petition nothing except to came in lime light-application rejected with cost of Rs. One Lakh.

Held: Para 38

Thus, petition lacks bona fides and is an abuse of the process of the Court. It appears that the petitioner has filed this petition just to come in limelight and nothing else, which waisted time of the Court. The time of Court is precious for the reason that it is publics time and must be utilised for adjudicating the matters which have substance and need to be decided at the earliest. If the time of the Court is consumed, that too, a lion's share, by frivolous and bogus litigations which is bound to take away the time which could have been utilised for needy litigants.

(Delivered by Hon'ble Devendra Kumar Arora, J.)

The applicant/ petitioner who claims herself a Journalist, preferred a writ petition in the nature of Public Interest Litigation (PIL) (W.P. No. 2685 (MB) of 2012) before this Court seeking a writ of mandamus directing the respondents viz Union of India through Principal Secretary, Prime Minister's Office, New Delhi to conduct an enquiry (preferably an enquiry by an Independent Judicial Commission) with respect to the news article dated 4.4.2012, published in ?The Indian Express? newspaper (Annexure No. 1 to the Writ Petition) and another news item published in ?The Sunday Guardian? newspaper (Annexure No. 5 to the Writ Petition) and take legal action against such persons as per the provisions of law. A Division Bench of this Court dismissed the writ petition vide order dated 10.4.2012 with the direction to the Secretary, Home Affairs, the Secretary, Information & Broadcasting, Government of India and the

Principal Secretary, (Home), Government of U.P. to ensure that there is no reporting/release of any news item by the Print as well as Electronics Media relating to subject matter, namely, the movement of troops as contained in the accompanying annexures enclosed therein. It would be useful to reproduce the final order dated 10.4.2012, which reads as under:

"Hon'ble Uma Nath Singh, J.

Hon'ble Virendra Kumar Dixit, J.

Order (Oral)

We have heard petitioner in person and learned Assistant Solicitor General of India, Sri I.H. Farooqi, for Union of India.

The issue of movement of Army troops is not a matter of the kind which should require public discussion at the cost of defence official secrecy and the security of country. Petitioner, a social activist and freelance journalist, in her submissions expressed her grave concern over the media reportings on this subject which, if permitted to continue, may seriously interfere with the handling of security matters by Army, particularly the movements of troops from the strategic point of view in the field as well as peace areas. Thus, without interfering with the independence of media and keeping in view the fact that the news items relating to movements of troops have already engaged the attention at the highest level in the defence as well as in the Government, we think it appropriate to direct the Secretary, Home Affairs, and the Secretary, Information & Broadcasting, Government of India and the Principal Secretary (Home), Government of U.P., to ensure that there is no reporting/release of any news item by the Print as well as Electronic Media relating to the subject matter, namely, the movement of troops as contained in the accompanying annexures..

Writ petition is dismissed at this stage with aforesaid directions.

Let a copy of this order issue today to the officials concerned as well as to learned Additional Solicitor General of India/Assistant Solicitor General of India and learned Chief Standing Counsel for immediate compliance."

2. From perusal of record of the contempt petition, it reveals that after passing of the order by the Writ Court, the applicant has not approached the authorities concerned, apparently, because Writ Court had directed for issuance of the copy of the order to the concerned officials, mentioned in the aforesaid order.

3. In Para 4 of the petition, it has been stated by the applicant that she heard through the Media Reports that Chairman of the Press Council of India termed the order of Writ Court as 'not correct' and said that the Council will challenge the same before the Hon'ble Supreme Court. The applicant/ petitioner sent a caveat notice before the Hon'ble Supreme Court of India on 16.4.2012 and in its response, a copy of Special Leave Petition No. 9411 of 2012, filed by the Press Council of India was sent to her. It has been further stated that Annexure No. P-5 of Special Leave Petition consists of a letter dated 11.4.2012 sent by the Ministry of Information and Broadcasting, Government of India to the Contemnor No. 2, Ms. Vibha Bhargava, Secretary, Press Council of India, New Delhi. In the said letter, it has been mentioned that *' Please refer to our*

telephonic discussions regarding directions issued by the Lucknow Bench of Allahabad High Court on 10th April, 2012, in respect of reporting by the print and electronic media about the movement of troops in the country. A copy of the said order is enclosed. In order to implement the directions of High Court the Ministry requested Press Council of India to consider initiating appropriate action. We would also appreciate if the action taken in this regard is kindly intimated to us.'

4. The submission of the applicant is that in pursuance of the aforesaid letter sent by the Ministry of Information and Broadcasting, Government of India to Ms. Vibha Bhargava, Secretary, Press Council of India, New Delhi, the Press Council of India was supposed to comply with the order of this Court immediately but instead of complying the orders, the Chairman of the Press Council of India passed order dated 12.4.2012. In the said order, among many other things, it was written that ' With great respect to the High Court, I am of the opinion that the order of the High Court is not correct.' It also said ' The Press Council of India will be challenging the order of the Allahabad High Court in the Supreme Court of India very shortly.' It is further submitted that the applicant on obtaining a copy of the Special Leave Petition No. 9411 of 2012, came to know that the observation made by opposite party no. 4 with regard to order of the writ court as 'not correct', was not in his individual capacity while making an independent assessment of a legal decision as a legal expert but this was being done in his official capacity as the Chairman of the Press Council of India, whereas Ministry of Information and Broadcasting directed for execution of Hon'ble High Court's order.

5. It is also stated that Ministry of Information & Broadcasting and Press Council of India have to implement the order of this Court and if they are aggrieved by the said order, they had every right to seek a legal remedy by filing a Special Leave Petition or by taking any other appropriate legal measure. It is prima facie obvious that as an implementing authority, in compliance of the order of this Court dated 10.4.2012, the Ministry of Information and Broadcasting, the Press Council of India and the Chairman of Press Council of India did not have a legal authority to sit upon the order of this Court and comment upon by terming it ?not correct? and by deciding for themselves that they would not comply with the order of this Court.

6. Further submission is that the only appropriate legal measure available to the Ministry of Information and Broadcasting, Government of India and the Press Council of India was to comply with the order of this Court dated 10.4.2012, but instead of doing so, the opposite parties no. 4 & 5 tried to put themselves in the role of the Judge looking into merit of the order passed by writ court. In this background, the submission of the applicant is that the act of the Ministry of Information and Broadcasting, Press Council of India, the opposite party no. 4 as its Chairman and the opposite party no. 5 as its Secretary is nothing short of contempt of this Court, where they did not implement the order of this Court through a self drawn assessment of the correctness of the decision and where they declared the decision to be 'not correct' and decided that it would not be implemented.

7. It has been contended by the applicant that mere filing of Special Leave

Petition before Hon'ble Supreme Court, challenging the order of this Court, does not abrogate and relieve the contemnors from their act of contempt. Terming an order of this Court as 'not correct' and not implementing it on the basis of one's own assessment and decision, are two entirely different things.

8. It is also submitted that the applicant does not have the exact information regarding compliance made by the Ministry of Home Affairs, Government of India and Department of Home, Government of Uttar Pradesh to whom this Court had also issued directions on 10.4.2012, but possibly they have also not complied the order. The applicant feels that it would be imperative to ascertain this fact from the Secretary, Ministry of Home Affairs, Government of India and Principal Secretary, Department of Home, Government of Uttar pradesh and if the order has not been complied with at their levels as well, then to launch contempt proceedings against these two respondents as well. The applicant also submits that the cause of action started on and after 12.4.2012, when the Chairman, Press Council of India became the self appointed evaluator of the correctness of the decision of this Court and declaring the same as 'not correct' and decided not to implement the same.

9. In this background, the applicant has prayed for initiating contempt proceedings against the respondents as per law and to nail them under section 12 of the Contempt of Courts Act, 1971 for the willful disobedience of the order of this Court dated 10.4.2012, passed in W.P. No. 2685 of 2012 (PIL-Civil) after summoning them in person.

10. In the Supplementary Affidavit, it has been stated that what it required was an immediate compliance of the order of this Court, which would have been possible only by issuing certain appropriate directions to Print as well as Electronic Media directing them that there must be no reporting/ release of any news item by the Print as well as Electronic Media relating to the subject matter, namely, the movement of troops as contained in the accompanying annexures in the writ petition. But, this was not ensured by the opposite parties. The fact remains that the Ministry of Information and Broadcasting vide letter dated 11.4.2012 directed the Press Council of India to ensure compliance of the order of this court and to intimate it of the action so taken.

11. The Supplementary Affidavit further states that from perusal of the order dated 12.4.2012, it is evident that Press Council did not find it appropriate to ensure compliance of the order of this Court dated 10.4.2012 and willfully and deliberately ignored the compliance and termed the order as 'not correct' and did not issue suitable directives. Since the Media never got any suitable direction/ order from the respondents, hence, it remained free to publish whatever it felt like, in complete transgression of this Court's order dated 10.4.2012.

12. In an attempt to show as to how the order was flagrantly violated, the applicant has annexed copies of four articles published in various newspapers like 'The Times of India', 'The Indian Express',' The Tribune 'and 'The Sunday Indian along with Supplementary Counter Affidavit. The applicant also expressed her bel ieves that there would be many more such news items published by different

Media on different other dates and, thus, despite orders of this Court that there would be no reporting about the Army Movement, even prominent newspapers were openly violating this Court's order simply because probably they had no directions issued on that behalf, as the Ministry of Information and Broadcasting passed over its responsibility to the Press Council of India and the Press Council suo moto decided that the order was not correct and it need not be complied with. What was hugely bewildering was that after having sent the letter dated 11.4.2012, the Ministry of Information and Broadcasting and the other two respondents did nothing to get this order implemented, resulting in this order getting openly violated.

13. It is also stated by the applicant that the complicity of the respondents gets doubly verified from the fact that even when such news articles actually got published after the order of this Court, the respondents took no steps/actions in this regard, which resulted in flagrant violation of this Court's order. Hence, these acts of the respondents fall in the category of 'civil contempt'.

14. I have considered the submissions of the applicant appearing in person and gone through the record.

15. The record of writ petition shows that Public Interest Litigation (PIL) was filed against the Union of India through Principal Secretary, Prime Minister's Office, New Delhi and the said PIL was dismissed with the directions to the Secretary, Home Affairs and Secretary Information & Broadcasting, Government of India and the Principal Secretary, (Home), Government of U.P. to ensure that there is no reporting/ release of any news item by the Print as well as Electronic Media relating to subject matter, namely, the movement of troops as contained in the accompanying annexures of the Writ Petition.

16. The applicant earlier filed Contempt Petition (Civil) No. 1097 of 2012 which was dismissed as not pressed with liberty to file afresh as the applicant had not arrayed the authorities as parties to whom directions were issued by the writ court.

17. On perusal of the present contempt petition, it reveals that the applicant has no where alleged/ averred that after passing of the order dated 10.4.2012 by the Writ Court, any news item was published/released ever in any of the Print as well as Electronic Media on the subject matter, namely, movement of troops and when the applicant failed to demonstrate as to how the order of the Writ Court has been violated by the opposite parties, the applicant prayed for and granted 24 hours' time to enable her to prepare the case.

18. Today, i.e. 23.05.2012, the applicant filed a supplementary affidavit annexing therewith four news items published on 26/27.04.2012 in the newspapers namely, ?The Times of India?, ?Indian Express?, ?The Tribune? and ?Sunday India?. The perusal of said news items reveal that the same refers to the statement given by Defence Minister in Rajya Sabha regarding the movements of Army Units in the night of January 16/17, 2012 only and the said report does not contain any report regarding fresh movements of Army Units after passing of the order dated 10.04.2012 of the Writ Court. It appears that all these reports have

been filed by the applicant just in order to satisfy the query, which was put to her on 22.05.2012, as to how order of the Writ Court has been violated by the opposite parties. This Court has no hesitation in observing that the applicant by annexing newspapers' report, containing the statement of Defence Minister in the Rajya Sabha, has made an unsuccessful attempt to mislead this Court.

19. The sum and substance of the submissions of the applicant is that in compliance of the directions of the writ court no directives have been issued to Print/ Electronics Media regarding non-reporting / release of news items on the subject matter namely, 'the movement of troops' and the Chairman of the Press Council of India termed the order of writ court as 'not correct.'

20. On examining the order of Writ Court, this Court finds that directions were issued only to the Secretary, Home Affairs and the Secretary, Information & Broadcasting, Government of India and to the Principal Secretary, (Home), Government of U.P. to ensure that there is no reporting/ release of any news item by the Print as well as Electronic Media relating to subject matter, namely, the movement of troops as contained in the accompanying annexures of the writ petition. The applicant has brought nothing on record, which shows any such reporting either by Print or Electronic Media after passing of order dated 10.4.2012 by the Writ Court, hence, this Court comes to the conclusion that allegation of the applicant to that effect are misconceived, unfounded and self imagination.

21. Now, before coming to the observation of the Chairman, Press Council of India on the order of Writ Court, this Court feels it appropriate to examine the judicial pronouncements on the issue of fair criticism of the judicial act and judgments.

22. The right of speech and expression has always been considered as the most cherished right of every human being. In a civilized society, the courts have exhibited high degree of tolerance and accepted adverse comments and criticism of their order/judgments even though, at times, such criticism is totally off the mark and the language used is inappropriate. The right of a member of the public to criticize the functioning of a judicial institution has been beautifully described by the Privy Council in *Ambard Vs. Attorney General for Trinidad and Tobago, 1936 AC 322 : AIR 1936 PC 14,* in following words :-

".... no wrong is committed by any member of the public who exercises the ordinary right of criticizing in good faith in private or public the public act done in the seat of justice. The path of criticism is a public way: the wrongheaded are permitted to err therein: provided that members of the public abstain from inputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue : she must be allowed to suffer the0.80" scrutiny and respectful even though outspoken comments of ordinary men."

23. In *R. Vs. Commr. Of Police of the Metropolis, ex p Blackburn (No.2), (1968)*

2 QB 150 : (1968) 2 WLR 1204, Lord Denning observed :

"Let me say at once that we will never use this jurisdiction as a means to uphold our own dignity. That must rest on surer foundations. Nor will we use it to suppress those who speak against us. We do not fear criticism, nor do we resent it. For there is something far more important at stake. It is no less than freedom of speech itself.

It is the right of every man, in Parliament or out of it, in the press or over the broadcast, to make fair comment, even outspoken comment, on matters of public interest. Those who comment can deal faithfully with all that is done in a court of justice. They can say that we are mistaken, and our decisions erroneous, whether they are subject to appeal or not. All we would ask is that those who criticize us will remember that, from the nature of our office, we cannot reply to their criticisms. We cannot enter into public controversy. Still less into political controversy. We must rely on our conduct itself to be its own vindication.

Exposed as we are to the winds of criticism, nothing which is said by this person or that, nothing which is written by this pen or that, will deter us from doing what we believe is right; nor, I would add, from saying what the occasion requires, provided that it is pertinent to the matter in hand. Silence is not an option when things are ill done."

24. In *Aswini Kumar Ghose Vs. Arabinda Bose, AIR 1953 SC 75,* the Apex Court observed that the Supreme Court is never oversensitive to public criticism; but when there is danger of grave mischief being done in the matter of administration of justice, the animadversion cannot be ignored and viewed with placid equanimity.

25. In *Perspective Publications (P) Ltd. Vs. State of Maharashtra, AIR 1971 SC 221,* a Bench of three Judges after referring to the leading cases on the subject held that :

(1) "The summary jurisdiction by way of contempt must be exercised with great care and caution and only when its exercise is necessary for the proper administration of law and justice.

(2) It is open to anyone to express fair, reasonable and legitimate criticism of any act or conduct of a judge in his judicial capacity or even to make a proper and fair comment on any decision given by him because "justice is not a cloistered virtue and she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men".

(3) A distinction must be made between a mere libel or defamation of a judge and what amounts to a contempt of the court. The test in each case would be whether the impugned publication is a mere defamatory attack on the judge or whether it is calculated to interfere with the due course of justice or the proper administration of law by his court. It is only in the latter case that it will be punishable as Contempt. Alternatively the test will be whether the wrong is done to the judge personally or it is done to the public... the publication of a disparaging statement will be an injury to the public if it tends to create an apprehension in the minds of the people regarding the integrity, ability or fairness of the judge or to deter actual and prospective litigants from

placing complete reliance upon the court's administration of justice or if it is likely to cause embarrassment in the mind of the judge himself in the discharge of his judicial duties.

26. In *P. N. Duda v. P. Shiv Shanker & Ors., [(1988) 3 SCC 167],* it has been held that administration of justice and Judges are open to public criticism and public scrutiny. Judges have their accountability to the society and their accountability must be judged by the conscience and oath to their office i.e. to defend and uphold the Constitution and the laws without fear and favour. Any criticism about the judicial system or the Judges which hampers the administration of justice or which erodes the faith in the objective approach of the Judges and brings administration of justice to ridicule must be prevented. The contempt of court proceedings arise out of that attempt. Judgments can be criticized, motives to the Judges need not be attributed, it brings the administration of justice into deep disrepute. Faith in the administration of justice is one of the pillars on which democratic institution functions and sustains. In the free market place of ideas criticism about the judicial system or Judges should be welcome so long as such criticism does not impair or hamper the administration of justice. In a democracy Judges and courts alike are, therefore, subject to criticism and if reasonable argument or criticism in respectful language and tempered with moderation is offered against any judicial act as contrary to law or public good, no court would treat criticism as a contempt of court.

27. Reiterating the earlier stand, three Judges Bench of the Apex Court in the case of *Roshan Lal Ahuja [1993 Supp.(4) SCC 446],* observed that Judgments of the court are open to criticism. Judges and courts are not unduly sensitive or touchy to fair and reasonable criticism of their judgments. Fair comments, even if, outspoken, but made without any malice or attempting to impair the administration of justice and made in good faith in proper language don't attract any punishment for contempt of court.

28. Freedom of criticism was again scrutinised by the Apex Court in the case of *Dr. D.C. Saxena Vs. Chief Justice of India, (1996) 5 SCC 216, and it observed as under:*

"Law is not in any doubt that in a free democracy every body is entitled to express his honest opinion about the correctness or legality of a judgment or sentence or an order of a court but he should not overstep the bounds. Though he is entitled to express that criticism objectively and with detachment in a dignified language and respectful tone with moderation, the liberty of expression should not be a licence to violently make personal attack on a judge. Subject to that, an honest criticism of the administration of justice is welcome since justice is not a cloistered virtue and is entitled to respectful scrutiny. Any citizen is entitled to express his honest opinion about the language pointing out the error or defect or illegality in the judgment, order of sentence. That is after the event as postmortem."

29. In the case of *Arundhati Roy [(2002) 3 SCC 343],* the court held, fair criticism of the conduct of a Judge, the institution of the judiciary and its functioning may not amount to contempt if it is made in good faith and in public

interest. To ascertain the good faith and the public interest, the courts have to see all the surrounding circumstances including the person responsible for comments, his knowledge in the field regarding which the comments are made and the intended purpose sought to be achieved. All citizens cannot be permitted to comment upon the conduct of the courts in the name of fair criticism which, if not checked, would destroy the institution itself. Litigant losing in the court would be the first to impute motives to the Judges and the institution in the name of fair criticism, which cannot be allowed for preserving the public faith in an important pillar of democratic set-up i.e. judiciary.

30. In a recent decision rendered in *Indirect Tax Practitioners' Association Vs. R.K. Jain, (2010) 8 SCC 281,* the Hon. Supreme Court went on to say as under :-

"In the land of Gautam Buddha, Mahavir and Mahatma Gandhi, The freedom of speech and expression and freedom to speak one's mind have always been respected. After Independence, the courts have zealously guarded this most precious freedom of every human being. Fair criticism of the system of administration of justice or functioning of institutions or authorities entrusted with the task of deciding rights of the parties gives an opportunity to the operators of the system/institution to remedy the wrong and also bring about improvements. Such criticism cannot be castigated as an attempt to scandalize or lower the authority of the court or other judicial institutions or as an attempt to interfere with the administration of justice except when such criticism is ill-motivated or is construed as a deliberate attempt to run down the institution or an individual Judge is targeted for extraneous reasons.

Ordinarily, the court would not use the power to punish for contempt for curbing the right of freedom of speech and expression, which is guaranteed under Article 19(1)(a) of the Constitution. Only when the criticism of judicial institutions transgresses all limits of decency and fairness or there is total lack of objectivity or there is deliberate attempt to denigrate the institution then the court would use this power."

31. This Court after analyzing the aforesaid pronouncements comes to the conclusion that the judgments of courts are public documents and can be commented upon, analyzed and criticized, but it has to be in fair and healthy manner without attributing motives. Before placing before public, whether on print or electronic media, all concerned have to see whether any such criticism has crossed the limits as aforesaid and if it has, then resist every temptation to make it public.

32. As for as submission of the applicant that in compliance of the directions of the Writ Court no directions have been issued to the Print/ Electronic Media regarding non-reporting/ release of the news item on the subject matter by the Press Council of India is concerned, this Court finds that firstly, the Press Council of India was not a party in the writ petition, secondly, no directions were issued by the Writ Court to the Press Council of India and, thirdly the applicant cannot take any advantage of the internal correspondence made between the Ministry of Information & Broadcasting, Government of India and the Press Council of India, which she came to know through copy of Special Leave

Petition filed by the Press Council of India before the Hon'ble Supreme Court for pressing the contempt proceedings against the functionaries of the Press Council of India.

33. Further, Press Council of India is a statutory body and apart from performing the functions under section 13 of the Press Council Act, 1978 also performs the quasi judicial functions and examines the complaints in respect of newspapers , news agency, editor or other working journalist under section 14(1) of the Act, as per the provisions prescribed in the Press Council (Procedure For Inquiry) Regulations, 1979. The insistence of the applicant that the act of Press Council of India of not issuing any directions in pursuance to the request of the Ministry of Information and Broadcasting for compliance of the directions of Writ Court falls within the definition of Civil Contempt, is misconceived, as it was Secretary, Home Affairs, the Secretary, Information & Broadcasting, Government of India and the Principal Secretary, (Home), Government of U.P. were required to ensure that there is no reporting/ release of any news items by the Print as well as Electronic Media relating to the subject matter, namely, the movement of troops and the fact remains that no reporting was done by either of the two after the directions of the Writ Court. In this background, no case for willful disobedience of the order of Writ Court on the part of functionaries of the Press Council of India is made out.

34. Now, coming to the observation of the Chairman, Press Council of India on the order of Writ Court, this Court finds that the Chairman, Press Council of India after giving reasons, expressed his opinion with great respect to High Court. This Court is of the considered view that observation of terming the order of the Writ Court as 'not correct' is just an opinion of the Chairman of Press Council of India, who has every right of fair and healthy criticism of the judgment.

35. The order of Writ Court has also been challenged by the Press Council of India before the Hon'ble Apex Court by means of Special Leave Petition No. 9411 of 2012, which is pending consideration before the Hon'ble Supreme Court of India.

36. At this stage, it would also be appropriate to mention herein that Section 5 of the Contempt of Courts Act, 1971 provides that a person shall not be guilty of contempt for publishing any fair comment on the merits of any case which has been finally decided.

37. Further, from the perusal of record, this Court comes to the conclusion that the applicant has made an unsuccessful attempt to make out the case, out of nothing, but just for the sake of sensationalism whereas the applicant failed to bring on record any news item published/ released in any of the Print as well as Electronic Media on the subject matter i.e. Movement of Troops , after passing of the order dated 10.4.2012 by the Writ Court.

38. Thus, petition lacks bona fides and is an abuse of the process of the Court. It appears that the petitioner has filed this petition just to come in limelight and nothing else, which waisted time of the Court. The time of Court is precious for the reason that it is publics time and must be utilised for adjudicating the matters which have substance and need to be decided at the earliest. If the time of the Court is

consumed, that too, a lion's share, by frivolous and bogus litigations which is bound to take away the time which could have been utilised for needy litigants.

39. In the result, the petition is dismissed. The applicant/ petitioner is saddled with costs of Rupees One Lakh (Rs.1,00,000/-) for filing a frivolous petition. The cost shall be deposited by the applicant/petitioner within a month from today before the Registrar of the Court. The Registry shall transmit Rs. 50,000/- to the Mediation and Conciliation Center of this Court and the remaining amount of Rs. 50,000/- will go to the Library of Oudh Bar Association for purchase of Books. If the cost is not deposited by the applicant within the aforesaid period, the Registrar of this Court will proceed to get the same recovered as arrears of land revenue from the applicant/petitioner.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.05.2012

BEFORE
THE HON'BLE SHEO KUMAR SINGH, J.
THE HON'BLE RAM SURAT RAM (MAURYA), J.

First Appeal From Order No. 1312 of 2012

Subhash Verma ...Petitioner
Versus
Narendra Kumar and others ...Respondents

Counsel for the Appellant:
Sri Mohan Srivastava

Counsel for the Respondent:
Sri Ashish Kumar Singh

Code of Civil Procedure, Order XXXIX Rule-I-Grant of temporary Injunction-suit based upon un registered deed of agreement to sale-even in plaint no specific portion of property claimed-dispossession-held-suit based upon unregistered agreement itself not maintainable-in absence of these three ingrediance-injunction rightly refused.

Held: Para 22

Since admittedly, the property in dispute was a joint property in which there were various co sharers, it was not possible for respondents-1 and 2 to give possession to the plaintiff over any specific portion of the property. Neither in the alleged deed dated 15.11.2009, nor in the plaint, any specific portion of the property has been shown, over which the possession of the plaintiff is being claimed. In the plaint, the plaintiff claimed 1/3rd western portion, while share of defendants-1 and 2 is less than 1/3rd as such, they were not able to hand over possession of 1/3rd share. In view of the aforesaid discussion, the suit of the appellant being based upon an unregistered document, is not maintainable. The plaintiff has no prima facie case and accordingly not entitled for interim injunction. The order of the trial court does not suffer from any illegality. The appeal has no merit and is accordingly dismissed.

(Delivered by Hon'ble. Ram Surat Ram (Maurya), J.)

1. Heard Sri Mohan Srivastava, counsel for the appellant and Sri Ashish Kumar Singh for the respondents.

2. This appeal has been filed from the order of Civil Judge, (Senior Division), Hapur, Ghaziabad dated 28.1.2012, passed in Suit No. 89 of 2011, by which the application for interim injunction filed by the appellant has been rejected.

3. The appellant filed a suit (registered as O.S. No. 89 of 2011) for

permanent injunction restraining the respondents from interfering with his possession and ejecting him from the land in dispute and transferring it to any other person. It has been stated in the plaint that Narendra Kumar (defendant-1) has 6.25% share and Pawan Kumar (defendant-2) has 12.5% share in the land of which total area was 2,700 sq. yard, situated in mohalla Feezganj Road, Hapur, district Ghaziabad. On 12.6.2009, defendant-1 took Rs. 10,000/- in cash and a cheque of Rs. 50,000/- and executed an agreement in favour of the plaintiff for selling his share in the aforesaid land for sale consideration of Rs. 8,50,000/- He agreed to execute the sale deed before 11.9.2009. Defendant-2 also took Rs. 10,000/- in cash and a cheque of Rs. 50,000/- and agreed to sell his 12.5% share for Rs. 17 lakhs before 11.9.2009 and executed an agreement to sell dated 12.6.2009 in favour of the plaintiff. Defendants-1 and 2 have not executed the sale deed within the aforesaid period in compliance of the agreement dated 12.6.2009. The plaintiff therefore sent a notice dated 29.10.2009 through post office under certificate of posting. On service of the aforesaid notice, defendants-1 and 2 informed that since a dispute between the co sharers was going on, as such, it was not possible for them to execute the sale deeds. Accordingly, defendants-1 and 2 executed a receipt dated 15.11.2009 acknowledging the agreement dated 12.6.2009 and further taking of earnest money of Rs. 2,40,000/- and Rs. 4,40,000/-, respectively and time for executing the sale deed was extended up to 14.10.2010 and the plaintiff was given possession over the property to be transferred. The dispute between the co-sharers of defendants-1 and 2 has been settled through family settlement dated 4.8.2010, but defendants-1 and 2 have not turned up for executing the sale deed. Therefore, the plaintiff gave a notice dated 27.9.2010 to defendants-1 and 2 for executing the sale deed. The plaintiffs came to know that Narendra Kumar (defendant-1) and his family members, executed an agreement to sell dated 4.9.2010 in favour of Ajay Goyal (defendant-3). Pawan Kumar (defendant-2), his brother Praveen Kumar and his mother Smt Nirmala Devi, executed an agreement dated 6.9.2010 in respect of their share in the property in dispute in favour of defendant-3. On coming to know about the aforesaid agreements, the plaintiff served another notice dated 20.11.2010 for getting the aforesaid agreement canceled. In spite of service of notice, defendants-1 and 2 have not taken any step for cancellation of the agreements executed in favour of defendant-3. The plaintiff came to know that in the meantime, Narendra Kumar (defendant-1) has executed a sale deed dated 25.9.2010 in respect of his share in favour of defendant-3. The defendants are trying to dispossess the plaintiff from the property in dispute. The plaintiff is ready and willing to perform his obligations under the agreements dated 12.6.2009 and 15.11.2009 and get the sale deed executed in his favour. As such, he is entitled to protect his possession over the property in dispute. On these allegations, the suit for permanent injunction has been filed.

4. Along with the plaint, the plaintiff has also filed an application for interim injunction restraining the defendants from taking forcible possession over the property in dispute during the pendency of the suit.

5. The trial court issued notices in the application for temporary injunction and summons in the suit. On service of the summons and notices, the defendants appeared and filed their written statement in the suit as well as objection and counter affidavit in the application for temporary injunction. In the joint written statement filed on behalf of the defendants, they have admitted execution of the deed dated 12.6.2009 and taking Rs. 60,000/- each as earnest money. But they have stated that defendant-1 has 1/80 share while defendant-2 has 1/24 share in the property in dispute. Since the dispute between the co sharers was going on, as such, it was not possible to execute the sale deed by them in favour of the plaintiff. Accordingly after the notice dated 29.10.2009, there was a settlement between the parties before the Panches on 10.8.2010, in which earnest money received by defendants-1 and 2 had been returned to the plaintiff. However, the plaintiff did not return the deeds dated 12.6.2009 executed by defendants-1 and 2 on the pretext that these documents were not brought by them at that time. He assured that it would be returned later on as at that time, these documents were not with the plaintiff. The defendants have stated that the alleged documents dated 15.11.2009 are forged document. Neither the amount mentioned in this document has been paid to the defendants, nor they gave possession to the plaintiff over the property of their share. Since the property was joint and their share was not partitioned, as such, it was not possible to give possession to the plaintiff over the property of their share. As the contract between the parties has already been broken before the Panches on 10.8.2010 and earnest money has been returned, as such, the plaintiff has no right to file any suit and the suit is misconceived and is liable to be dismissed.

6. The application for interim injunction was heard by Civil Judge, (Senior Division), Hapur who by order dated 28.1.2012 held that in the alleged agreement dated 12.6.2009, no identifiable land has been mentioned. However, in the suit, the plaintiff has mentioned his possession over 1/3rd share towards west side of the land in dispute which is also not identifiable. Accordingly, prima facie, title and possession of the plaintiff is not proved. On these finding, the application for interim injunction has been rejected. Hence, the present appeal has been filed by the plaintiff.

7. The counsel for the appellant submits that defendants-1 and 2 have entered into a written contract dated 12.6.2009 by which they have agreed to sell their share to the plaintiff. At that time, they also took an earnest money of Rs. 60,000/- each. Later on, they executed another deed dated 15.11.2009 by which they further took Rs. 2,40,000/- and Rs. 4,40,000/- respectively and extended the time for executing the sale deed up to 14.10.2010 and simultaneously they handed over possession over the property in dispute. As in part performance of the contract, the plaintiff was put in possession over the property in dispute and the plaintiff is ready to perform his obligations under the contract, for that purpose, he has also given several notices to the defendants for getting the sale deed executed, but the defendants have not turned up, therefore, the plaintiff is entitled to

protect his possession under Section 53-A of Transfer of Property Act. In support of his contentions, he has placed reliance on the judgments passed by Hon'ble Supreme Court in the case of Hamzabi vs. Syed Karimuddin, reported in 2000 LAWS (SC) Pg. 114 and Nathulal vs. Phoolchand, reported in AIR 1970 SC 546. He submits that the language of Section 53-A of Transfer of Property Act is mandatory, and if the conditions are fulfilled, then "notwithstanding that the contract, though required to be registered, has not been registered, or, where there is an instrument of transfer and that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him is debarred from enforcing any right in respect of the property of which, the transferee has taken or continued in possession, against the transferee, other than a right expressly provided by the terms of the contract". He further submits that at the stage of grant of interim injunction, prima facie case is required to be examined. The court below has illegally gone in to title at this stage and held that title of the plaintiff is not proved over the property in dispute. The court below has illegally confused with 'prima facie case' as 'prima facie title'. He relied upon the judgment of Hon'ble Supreme Court in the case of Dalpat Kumar and Another vs. Prahlad Singh and Others, reported in RD 1991 Pg. 210, in which it has been held that 'prima facie case' is not to be confused with 'prima facie title', which has to be established on the evidence at trial and not at the time of grant of interim injunction.

8. In reply to the aforesaid arguments, the counsel for the respondent submits that under the law, an agreement to sell can only be executed through a registered document. Since the alleged agreements dated 12.6.2009 and 15.11.2009 are unregistered documents, these documents are not admissible in evidence. Apart from these documents there is no evidence regarding possession of the plaintiff. The land in dispute was in joint possession of several co sharers, therefore, without partition, it was not possible to hand over possession over any specific portion to the plaintiff. The subsequent document dated 15.11.2009 are forged documents and has been denied by the defendants. Therefore, the plaintiff has neither a prima facie case nor balance of convenience is in his favour. The trial court has rightly rejected his application for interim injunction. Counsel for the respondents relied upon judgment of Division Bench of this Court in Vijay Kumar Sharma Vs. Devesh Behari Saxena, 2008 (1) AWC 664.

9. In view of the aforesaid arguments, the points arise for consideration are (i) whether any unregistered agreement can be made basis for a claim under Section 53-A of the Transfer of Property Act? (ii) In order to decide prima facie case, what exercise is required to be done by the court?

10. In U.P., U.P. Civil Laws (Reforms and Amendment) Act, 1976, (U.P. Act No. 57 of 1976) has been enforced, w.e.f. 1.1.1977. By virtue of Section 30 of this Act, Section 54 of Transfer of Property Act has been amended as follows:

30. Amendment of Section 54 of Act 4 of 1882 - In Section 54 of the Transfer of Property Act, 1882, hereinafter in this Chapter referred to as the principal Act, -

(a) In the second paragraph, the words "of the value of one hundred rupees and upwards" shall be omitted;

(b) the third and fourth paragraphs shall be omitted;

(c) after the last paragraph, the following paragraph shall be inserted, namely: -

"Such contract can be made only by a registered instrument."

11. Similarly, by Section 32 of this Act, Section 17 of the Registration Act has been amended and Clause (f) has been inserted in it.

32. Amendment of Section 17 of Act 16 of 1908 - In Section 17 of the Registration Act, 1908, hereinafter in this Chapter referred to as the principal Act -

(a) In Sub Section (1) -

(i) In clause (b) the words "of the value of one hundred rupees and upwards", shall be omitted;

(ii) In clause (e) the words "of the value of one hundred rupees and upwards", shall be omitted;

(iii)after clause (e), the following clause shall be inserted, namely:

(f) any other instrument required by any law for the time being in force, to be registered."

12. By virtue of the aforesaid amendments w.e.f. 1.1.1977, an agreement to sell of the immovable property is a compulsorily registrable document in U.P. and no un-registered agreement to sell can be executed nor it can be taken in evidence in view of Section 49 of the Registration Act.

13. Similarly, Parliament passed the Registration and Other Related Laws Amendment Act, 2001 (Act No. 48 of 2001), which has come into force on 24.9.2001. By Section 3 of this Act, Section 17 of the Registration Act has been amended as follows: -

3. Amendment of Section 17-In Section 17 of the Registration Act-

(a) after sub-section (1), the following sub-section shall be inserted, namely: -

"(1-A) The documents containing contracts to transfer for consideration, any immovable property for the purpose of Section 53-A of the Transfer of Property Act, 1882 (4 of 1882) shall be registered if they have been executed on or after the commencement of the Registration and Other Related Laws (Amendment) Act, 2001 and if such documents are not registered on or after such commencement, then, they shall have no effect for the purpose of the said Section 53-A",

(b) In sub-section (2), in clause (v), for the opening words "any document", the words, brackets, figure and letter

"any document other than the documents specified in sub-section (1-A)" shall be substituted.

14. By Section 6 of this Act, Section 49 of the Registration Act has been amended as follows: -

6. Amendment of Section 49 - In Section 49 of the Registration Act, in the proviso, the words, figures and letter "or as evidence of part performance of a contract for the purposes of Section 53-A of the Transfer of Property Act, 1882 (4 of 1882)," shall be omitted.

15. By Section 10 of this amending Act, Section 53-A of Transfer of Property Act has been amended as follows: -

10. Amendment of Section 53-A of Act 4 of 1882 - In Section 53-A of the Transfer of Property Act, 1882, the words "the contract, though required to be registered, has not been registered, or," shall be omitted.

16. Thus, w.e.f. 24.9.2001, even for the purposes of claiming right under Section 53-A of the Transfer of Property Act, an agreement to sell is required to be a registered. Documents being un-registered are not admissible in evidence in view of Section 49 of the Registration Act. As in this case documents were allegedly executed on 12.06.2009 and 15.11.2009, therefore, the case laws relied upon by the counsel for the appellant are not applicable in this case.

17. Order 39 Rule 1 (c) provides that temporary injunction may be granted where, in any suit, it is proved by the affidavit or otherwise, that the defendant threatens to dispossess the plaintiff or otherwise cause injury to the plaintiff in the suit to any property in dispute. The court may by an order grant a temporary injunction to restrain such act or make such other order for the purpose of staying and preventing injury or dispossession of the plaintiff or otherwise causing injury to the plaintiff in relation to any property in dispute as the court thinks fit until the disposal of the suit or until further orders. Pursuant to the recommendation of the Law Commission clause (c) was brought on statute by Section 88 (i) (c) of the Amending Act 104 of 1976 with effect from 1.2.77. Earlier there was no express power except the inherent power under Section 151 C.P.C. to grant ad-interim injunction against dispossession. Rule 1 primarily concerns with the preservation of the property in dispute till legal rights are adjudicated. Injunction is a judicial process by which a party is required to do or refrain from doing any particular act. It is in the nature of preventive relief to a litigant to prevent future possible injury. In other words, the court, on exercise of the power of granting ad interim injunction, is to preserve the subject matter of the suit in the status quo for the time being. It is settled law that the grant of injunction is a discretionary relief.

18. Order 39 Rule 3 C.P.C. requires to issue notice to the defendant and hear him before passing any order of interim injunction except in cases of urgency where reasons are required to be recorded for passing exparte injunction. Purpose of issuing notice to the other party is to examine relative strength of the cases of the both the parties. The word 'prima facie' means 'at first sight'.

The existence of the right of the plaintiff is be adjudicated on the first sight on comparative consideration of pleadings and evidence of the parties. The Court has to form his opinion as to who has a better case. If the defendant has better case and evidence in his favour then the Court cannot ignore it only on the basis of good drafting of the plaint. It is in this view it has been held that 'prima facie case' and not 'prima facie title' has to be examined at the time of granting interim injunction.

19. Even if, the plaintiff may not have title of the property in dispute at the time of filing of the suit but from the rival contention of the parties, the court is satisfied that the plaintiff is on better footing, and on trial relief may be granted to him in all probabilities. Then it can be said that prima facie case of the plaintiff has been established. It is in this context, it has been held that prima facie case shall not mean frima facie title. Thus finding in respect of the 'prima facie case' is not required to be recorded only by examining a good drafting of the plaint but by examining rival contention of the parties and their supporting evidence.

20. The exercise to be done by the court grant of interim injunction to record satisfaction that (i) there is a serious disputed question to be tried in the suit and there is probability of the plaintiff being entitled to the relief asked in the suit; (ii) the court's interference is necessary to protect the party from the species of injury. In other words, irreparable injury or damage would ensue, before the legal right would be established at trial; and (iii) that the comparative hardship or mischief or inconvenience which is likely to occur from withholding the injunction will be greater than that would be likely to arise from granting it.

21. The word 'prima facie case' has been interpreted time to time by the courts. Hon'ble Apex Court, in United Commercial Bank Vs. Bank of India, AIR 1981 S.C. 1426 held that 'prima facie case' means in the facts and circumstances of the case, there is a bonafide contention between the parties and a serious question is to be decided. This court in the case of National Textiles Corporation (U.P.) Ltd. Vs. Swadeshi Cotton Mills, 1987 A L J 1266 (D.B.) held that in order to pass an interim order, the Court is to take immediate decision, estimating relative strength of the each parties case. If the plaintiff has a week case or is meat by a strong defense the Court may refuse an injunction. In that case, it was found that the plaintiff has frivolous, vexatious and not even stateable case, the Court therefore rejected the injunction application.

22. Since admittedly, the property in dispute was a joint property in which there were various co sharers, it was not possible for respondents-1 and 2 to give possession to the plaintiff over any specific portion of the property. Neither in the alleged deed dated 15.11.2009, nor in the plaint, any specific portion of the property has been shown, over which the possession of the plaintiff is being claimed. In the plaint, the plaintiff claimed 1/3rd western portion, while share of defendants-1 and 2 is less than 1/3rd as such, they were not able to hand over possession of 1/3rd share. In view of the aforesaid discussion, the suit of the

appellant being based upon an unregistered document, is not maintainable. The plaintiff has no prima facie case and accordingly not entitled for interim injunction. The order of the trial court does not suffer from any illegality. The appeal has no merit and is accordingly dismissed.

23. However, it is made clear that the various observations and findings in this order were made only for deciding the application for interim injunction. The trial court will not be prejudiced while deciding the suit on merit by the findings and observations made by this court or in the impugned order.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 25.05.2012

BEFORE
THE HON'BLE RAJES KUMAR, J.
THE HON'BLE ANIL KUMAR SHARMA, J.

First Appeal From Order No. - 2147 of 2012

United India Insurance Co. Ltd.
...Petitioner
Versus
Smt. Geeta Devi and others
...Respondents

Counsel for the Petitioner:
Sri Saurabh Srivastava

Counsel for the Respondents:
.....

Motor Vehicle Act-Section 173-Insurer Appeal-at the time of accident deceased was 45 years old-addition of 30% compensation-for future prospect of deceased-not excessive-nor the income of salary of compassionate appointee, and pension etc.-shall be taken into consideration-while awarding compensation-Appeal dismissed.

Held: Para 7

As regards the addition of 30 percent for future prospects of the deceased the Tribunal has placed reliance on the case of Sunil Sharma (supra). Learned counsel for the appellant has tried to distinguish this case on the premise that in the case before the Apex Court the deceased was aged about 45 years and was a Class-III employee, so there is no parity of this case with the instant one. No doubt in the present case the deceased was Khalasi (Class-IV employee of N.E. Railway Gorakhpur) and was aged between 45-50 years but in our opinion the addition of 30 percent pay for calculating the amount of compensation as future prospects of the deceased is not excessive at all. The deceased was having 12 years of service and during this period his pay would have revised at least once apart from hike in D.A. every year which on average is 10 percent or more. It is noteworthy that in the case of Sarla Verma vs. Delhi Road Transport Corporation, reported in 2009(2)TAC 699 (SC) the Apex Court has laid down as a 'rule of thumb' with respect to addition in income due to future prospects observing that addition should be only 30 percent if the age of the deceased was 40-50 years. As such we find that learned Tribunal has not committed any illegality in adding 30 percent in income due to future prospects of the deceased for calculating just and reasonable compensation.

Case law discussed:
2008 (3) TAC 661 (SC); 2011 (3) TAC 629 (SC); (2002) (6) SCC 281; 1962 (1) S.C.R. 929; 2009 (7) ADJ 575 (DB); AIR 1983 Punjab & Haryana 94; AIR 1983 Madhya Pradesh 24; 1998 (1) TAC 14 (Karnataka); 2009 (2) TAC 699 (SC)

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

1. This is an insurer appeal challenging the award dated 31.01.2012

passed by M.A.C.T./Additional District Judge, Court No.3, Gorakhpur in M.A.C. no. 625 of 2009, whereby the compensation of Rs. 15,50,670/- have been awarded to Respondent Nos. 1 to 5 on account of death of 42 years' old railway-man Moti Lal.

2. It appears that on 10.10.2009 deceased Moti Lal was going from his house to attend his railway duty in Gorakhpur by Tempo UP-58T/1008 and when the Tempo reached Barhua at about 6.30 A.M. it turtled on account of rash and negligent driving of its driver. Several passengers including the Moti Lal sustained grievous injuries. They were taken to hospital Gorakhpur by the local police but Moti Lal succumbed to the injuries during transit. The claimants alleged that deceased Moti Lal was a Class-IV employee in railway and his monthly pay was Rs. 15,000/-. The claimants being the widow and children of the deceased filed claim petition for an award of Rs. 47.7 Lakhs. The FIR of the accident was lodged by the son of the deceased in P.S. Sahjanwa on 11.10.2009 against the driver of the aforesaid Tempo and the police after investigation submitted charge sheet against him. In support of the claim the claimants examined claimant no.1 Smt. Geeta Devi as PW-1, eye witnesses Krishna Nand Tiwari as PW-2, Mahendra Pratap Yadav as PW-3 and Rajeev Goyal as PW-4 to prove employment and income of the deceased and also filed several police papers, photo copy of the service book and pay slip of the deceased. The driver of the Tempo Sudhakar Bharti examined himself as DW-1.

3. We have heard learned counsel for the appellant at length and perused the impugned award and also the document filed by the appellant in support of appeal.

4. Learned counsel for the appellant has challenged the findings of the Tribunal with regard to quantum of compensation awarded by the Tribunal to Respondent Nos. 1 to 5. He has submitted that widow of the deceased is getting family pension; that son of the deceased has been given compassionate appointment under Dying-in-Harness Rules and the learned Tribunal has erroneously added 30 percent in the annual income of the deceased for future prospects. He has relied upon the cases of ***Bhakra Beas Management Board vs. Kanta Agarwal and others, 2008 (3) TAC 661 (SC)*** and ***Sunil Sharma and others vs. Bachitar Singh and others, 2011 (3) TAC 629 (SC).***

5. In the facts of the case of ***Bhakra Beas Management Board*** (supra) the widow of the deceased got compassionate appointment on monthly salary of Rs. 4700/- and was also provided residence immediately after the accident. The Tribunal awarded compensation of Rs. 8,48,160/-, which was not disturbed by the High Court. In appeal before Supreme Court under its direction the employer deposited Rs. 5,00,000/-. On these facts the Hon'ble Court making reference to the cases of ***United India Insurance Company Ltd. and others vs. Patricia Jean Mahajan and others, (2002) (6) SCC 281, Gobald Motors Service Limited and others vs. R.M.K. Veluswami and others, 1962 (1) S.C.R. 929 an0.00''d Helen C. Rebello vs. Maharashtra S.R.T.C., 1999 (1) SCC 90*** has observed that High Court lost sight of the fact that the benefit which on

account of death or injury have to be duly considered while fixing the compensation. In the background facts of the case the Hon'ble Court found it just and proper that sum of Rs. 5 lakhs already deposited shall be permitted to be withdrawn by the claimants in full and final settlement of the claim relatable to the death of the deceased. In the facts of the case the Hon'ble Court has only directed that the benefits being received by the claimant on account of death or injury should be duly considered. In the instant case it has come in the statement of PW-4 that the son of the deceased had been given compassionate appointment in the railway. The salary being drawn by the son of the deceased is only due to his services rendered to the department. Had the railway not given such appointment to him, he would have served anywhere else and this cannot be termed as a benefit arising out of the death of his father. However, in the facts of the instant case we find that the learned Tribunal has considered the above facts regarding employment of deceased's son on compassionate grounds, as it has lowered the multiplier for computing the compensation. The deceased was between age group above 45-50 years and for this age group multiplier of '13' had been prescribed in the 2nd Schedule of Motor Vehicles Act, but the Tribunal taking multiplier of '10' has carved out the amount of compensation payable to the claimants.

6. In the instant case undoubtedly the widow of the deceased is getting family pension. In this connection, it is important to note the observations of the Apex Court given in the case of ***Helen C. Rebello*** (supra). In para-36 the Hon'ble Court has observed that *'family pension is also earned by an employee for the benefit of his family in the form of his contribution in service in terms of the service conditions receivable by the heirs after his death. The heirs receive family pension even otherwise than the accidental death. No co-relation between the two.'* It is further held that though it is pecuniary advantage receivable by the heirs on account of one's death but it has no co-relation with the amount receivable under the statute occasioned only on account of accidental death. Such an amount cannot come within periphery of the Motor Vehicles Act to be termed as 'pecuniary advantage' liable to deduct. Similarly in the case of ***Smt. Sarla Dixit and another vs. Balwant Yadav and others*** (Civil Appeal No. 5157/1992 decided on February 29, 1996 the Apex Court did not aprrove the deduction on account of family pension in working out compensation. A division bench of this Court in the case of ***Reliance General Insurance Company Ltd. vs. Smt. Urmila Devi and others,*** **2009(7) ADJ 575 (DB)** repelling the argument advanced on behalf of the appellant did not give any benefit to the insurance company about family pension and engagement of the wife of the deceased in employment. Moreover the full Benches of Punjab and Haryana High Court in the case of ***Bhagat Singh Sohan Singh vs. Smt. Om Sharma and others,*** **AIR 1983 Punjab & Haryana 94**, the Madhya Pradesh High Court (Indore Bench) in the case of ***Smt. Kashmiran Mathur and others vs. Sardar Rajendra Singh and another,*** **AIR 1983 Madhya Pradesh 24** and Karnataka High Court in the case of ***Smt. Parwati @ Baby and others vs. Hollur Hallappa and others,*** **1998 (1) TAC 14 (Karnataka)** have taken similar view.

Thus in our opinion the family pension being drawn by the widow of the deceased is not liable to be deducted from the amount of compensation awarded to the claimants.

7. As regards the addition of 30 percent for future prospects of the deceased the Tribunal has placed reliance on the case of **Sunil Sharma** (supra). Learned counsel for the appellant has tried to distinguish this case on the premise that in the case before the Apex Court the deceased was aged about 45 years and was a Class-III employee, so there is no parity of this case with the instant one. No doubt in the present case the deceased was Khalasi (Class-IV employee of N.E. Railway Gorakhpur) and was aged between 45-50 years but in our opinion the addition of 30 percent pay for calculating the amount of compensation as future prospects of the deceased is not excessive at all. The deceased was having 12 years of service and during this period his pay would have revised at least once apart from hike in D.A. every year which on average is 10 percent or more. It is noteworthy that in the case of ***Sarla Verma vs. Delhi Road Transport Corporation,*** reported in **2009(2)TAC 699 (SC)** the Apex Court has laid down as a 'rule of thumb' with respect to addition in income due to future prospects observing that addition should be only 30 percent if the age of the deceased was 40-50 years. As such we find that learned Tribunal has not committed any illegality in adding 30 percent in income due to future prospects of the deceased for calculating just and reasonable compensation.

8. In view of what has been said and done above, we do not find any merit in the appeal which is accordingly dismissed. The statutory deposit of Rs. 25,000/- made before this Court be remitted back to the concerned Tribunal as expeditiously as possible.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.05.2012

BEFORE
THE HON'BLE SIBGHAT ULLAH KHAN, J.

Second Appeal No. - 2206 of 1985

Hardwari Lal and others ...Petitioner
Versus
Dal Singh and others ...Respondents

Counsel for the Petitioner:
Sri R.K. Jain
Sri R.G. Prasad

Counsel for the Respondents:
Sri S.R. Singh
Sri Ram Avtar Verma

<u>Code of Civil Procedure-Section 100</u>-Second Appeal-suit dismissed by courty below as plot not identified-Lower Appellate Court rejected the application for Survey Commissioner being highly belated stage-whether Appellate Court right in rejecting such application-held-'No' even Supreme Court had allowed such application -High Court cannot ignore the same-Appeal allowed matter remanded back for fresh decision by identifying the plot in question through Survey Commissioner.

Held: Para 10

Accordingly, second appeal is allowed. Substantial question of law is decided in favour of the appellants. Judgment and decree passed by the lower appellate court is set aside. Matter is remanded to the lower appellate court to decide the appeal afresh after providing opportunity

to the plaintiffs appellants to get the property surveyed through survey commissioner. Both the parties are directed to appear before the lower appellate court on 18.07.2012.

Case law discussed:

AIR 1975 All 406; JT 2000 (7) SC 379

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

1. Heard learned counsel for the parties.

2. This second appeal was admitted on 13.12.1985 by the following order:

"Admit. Issue notice.

The only substantial question which arises for consideration in this appeal is whether the lower appellate court has declined to issue a Survey Commission sought by the appellants by means of an application dated September 5, 1985 (Paper No.30C) on legally permissible grounds."

3. This is plaintiffs' second appeal arising out of O.S. No.34 of 1981, which was dismissed on 24.08.1982 by Munsif, Court No.7, Shahjahanpur. Against the said decree, plaintiffs filed Civil Appeal No.106 of 1982, which was dismissed by IV A.D.J., Shahjahanpur on 10.09.1985, hence this second appeal.

4. Defendant respondent No.4, Abhivaran Singh was owner/ bhoomidhar of some land. First, he sold a part of his land to the plaintiffs on 09.05.1978, which was comprised in Plot No.272, area 0.35 acres. Thereafter he sold some property on 21.08.1979 to defendants No.1 to 3, which according to the plaintiffs included part of the land which had earlier been sold to the plaintiffs and which was comprised in Plot No.272.

5. The trial court held that the plaintiffs could not prove that land purchased by defendants No.1 to 3 was part of Plot No.272, which had been sold to them.

6. The lower appellate court held that the trial court was wrong in holding that the suit was barred by Section 34 of Specific Relief Act as prayer for possession in the alternative had also been made in the plaint. However, lower appellate court held that on the said basis the decree of the trial court could not be reversed.

7. Before the lower appellate court plaintiffs appellants filed an application on 05.09.1985 for survey of the property in dispute through a Survey Commissioner. Lower appellate court in its judgment held that the said prayer could not accepted as it was made at a very late stage.

8. Lower appellate court held that plaintiffs did not file their sale deed. However, plaintiffs' sale deed was not questioned by any one. They had asserted that they purchased property of Plot No.272. Defendants No.1 to 3 categorically stated that the property which they purchased in 1979 did not include any part of Plot No.272. Accordingly, the only dispute in between the parties was as to whether property in dispute was part of Plot No.272 or not? As far as the question of delay in applying for getting the property surveyed is concerned, in this

regard learned counsel for the appellants has cited an authority of this court reported in **Gajraj and others Vs. Ramadhar and others, AIR 1975 All 406** and an authority of the Supreme Court reported in **Sripat Vs. Rajendra Prasad, JT 2000 (7) SC 379.** In the latter authority, Supreme Court held that trial court should have got the property surveyed when the dispute was regarding identity of the property. Supreme Court allowed the appeal, set aside the decrees and orders passed by trial court, lower appellate court as well as High Court and remanded the matter to the trial court.

9. In the High Court authority it has been held that appellate court can also issue Commission for survey.

10. Accordingly, second appeal is allowed. Substantial question of law is decided in favour of the appellants. Judgment and decree passed by the lower appellate court is set aside. Matter is remanded to the lower appellate court to decide the appeal afresh after providing opportunity to the plaintiffs appellants to get the property surveyed through survey commissioner. Both the parties are directed to appear before the lower appellate court on 18.07.2012.

ORIGINAL JURISDICTION
SIDE SIDE
DATED: LUCKNOW 03.05.2012

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

SERVICE SINGLE No. - 2450 of 2009

Sabhapati Pathak S/O Late Indar Pal Pathak ...Petitioner
Versus
State of U.P. Thru Prin. Secy. Irrigation and others ...Respondents

Counsel for the Petitioner:
Sri S.C. Yadava
Sri Vishal Kumar Upadhyay

Counsel for the Respondent:
C.S.C.

Constitution of India, Article 226- transfer by way of punishment-based upon inquiry report-allegation of misleading higher authorities failed to discharge his duties-held-illegal quashed.

Held: Para 8

The impugned order, in this case, clearly show that after receiving enquiry report and founded thereon the petitioner is being transferred. Thus the power of transfer has not been exercised by the transferring authority independently by his own application of mind but the impugned order of transfer is founded on the enquiry report. Fortunately, the enquiry report is part of the record which shows that enquiry officer has made recommendation for transfer besides above. The apex court while repeatedly observing that normally interference in an order of transfer should not be made but simultaneously it has also said that if an order of transfer is made as a punishment, the same cannot sustain unless permitted under the Rules. The reference is made to the Apex Court

decision in Somesh Tiwari Vs. Union of India & Ors. JT 2009 (1) SC 96.

Case law discussed:

JT 2009 (1) SC 96

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

1. Heard Sri Vishal Kumar Upadhyay, learned counsel for the petitioner, learned Standing Counsel for the respondents and perused the record.

2. The writ petition is directed against order of transfer dated 29th December, 2008 (Annexure No.1 to the writ petition) passed by respondent No.2 whereby the Chief Engineer, (Project and Planning), Irrigation Department, U.P. Lucknow has transferred the petitioner having found guilty of dereliction of duty pursuant to enquiry report submitted by enquiry authority to this effect.

3. It is contended that transfer by way of punishment is not permissible and therefore, the impugned order of transfer is liable to be set aside.

4. A counter affidavit has been filed by the respondents stating that impugned order of transfer has been passed on administrative grounds. However, it is not disputed that since the petitioner failed to discharge his responsibility and duties to the post and he has been found to mislead his higher officers, therefore he has been transferred. It is also admitted in para 9 of the counter affidavit that impugned order of transfer has been passed after making enquiry and receiving report of enquiry against the petitioner finding him guilty of certain acts and omission on the part of petitioner constituting misconduct.

5. The question up for consideration before this Court whether here is an order of transfer by way of punishment or it can be construed as a transfer made in exigency of service on administrative grounds.

6. The order of transfer impugned in this writ petition read as under:

"शासन के पत्र संख्या 6956/08–27–सिं–7–15(24)/08, दिनांक 14.11.2008 द्वारा अवगत कराया गया है कि श्री राकेश सिंह विसेन, वरिष्ठ लिपिक बाढ़ कार्य खण्ड गोण्डा के विरूद्ध शिकायतों की जॉच आख्या के आधार पर श्री सभापति पाठक, वरिष्ठ लिपिक (कार्यवाहक मुख्य लिपिक) को अपने पद का दायित्व भलीभॉति निर्वहन न करने एवं उच्चाधिकारियों को गुमराह कर स्थानान्तरण हेतु पत्र लिखाने के लिए दोषी पाये जाने के फलस्वरूप प्रशासनिक आधार पर खण्ड से बाहर स्थानान्तरण हेतु निर्णय लिया गय है।

अतः श्री सभापति पाठक, वरिष्ठ लिपिक, बाढ़ कार्य खण्ड गोण्डा को उनके वर्तमान तैनाती स्थान से प्रशासनिक आधार पर स्थानान्तरित करते हुए नलकूप खण्ड गोण्डा में एतद्द्वारा पदस्थापित किया जाता है।

उपरोक्त आदेश तात्कालिक प्रभाव से लागू होगें।"

7. Ex facie it does not show that it is a transfer not a consequence of departmental enquiry but something for other reasons. In fact the counter affidavit of respondent No.3 corroborate this fact that after receiving enquiry report and considering the recommendation of the enquiry officer the petitioner has been transferred. A transfer on administrative ground for various reasons is permissible and normally is not interfered by the Court. The term administrative ground/ exigency includes within its purview transfer to avoid shuffle between two employees at a particular place or to make an atmosphere more conducive which is being poisoned by both the employees and sometime not to allow an employee to do something wrong at a particular place.

But then the order of transfer must show that the power of transfer has been exercised for administrative reasons without making the order of transfer a penalty.

8. The impugned order, in this case, clearly show that after receiving enquiry report and founded thereon the petitioner is being transferred. Thus the power of transfer has not been exercised by the transferring authority independently by his own application of mind but the impugned order of transfer is founded on the enquiry report. Fortunately, the enquiry report is part of the record which shows that enquiry officer has made recommendation for transfer besides above. The apex court while repeatedly observing that normally interference in an order of transfer should not be made but simultaneously it has also said that if an order of transfer is made as a punishment, the same cannot sustain unless permitted under the Rules. The reference is made to the Apex Court decision in **Somesh Tiwari Vs. Union of India & Ors. JT 2009 (1) SC 96.**

9. In view of the above, the impugned order of transfer cannot sustain. The writ petition is allowed. The order dated 29th December, 2008 is hereby quashed.

10. However, it is made clear that since three years have passed, this order shall not preclude the respondents from passing a fresh order as and when the circumstances required in accordance with law since it cannot be said that the petitioner has any vested right to continue at a particular place according to his own choice but privilege is that of competent transferring authority to pass appropriate authority in accordance with law in his own wisdom.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 04.05.2012

BEFORE
THE HON'BLE ANIL KUMAR, J.

Service Single No. - 3181 of 1993

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

Counsel for the Petitioner:
Sri R.J. Trivedi

Counsel for the Respondents:
C.S.C.

Constitution of India , Article 226- Termination order-putting stigma- without show cause notice without following principle of Natural Justice- order not sustainable.

Held: Para 20

Now reverting to the facts of the present case as stated herein above, the services of the petitioner were terminated on the ground of alleged misconduct in respect of which a show cause notice was issued to him to which he submitted his reply and in this regard averments has been made by the official respondents in para nos. 11 and 13 of the counter affidavit , so in view of the said fact , the position which emerge out is to the effect that the allegation of irregularities and misconduct committed by the petitioner while discharging his duty is the foundation for passing of the impugned order against the petitioner, hence before passing the same it is incumbent upon the respondents to afford an opportunity of hearing to the petitioner by issuing show cause notice and cannot

pass by invoking the provisions as provided under Rules 1975.

Case law discussed:

(1999) 4 SCC 189; (2008) 1 UPLBEC 177; (1999) 3 SCC 60; (2000) 5 SCC 152; (2000) 3 SCC 239; (2000) 3 SCC 588; (2006) 9 SCC 167; (2005) 6 SCC 135; 2005 (23) LCD 436; (2009) 1 UPLBEC 894

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

1. Heard Sri R.J. Trivedi, learned counsel for the petitioner, learned Standing Counsel and perused the record.

2. By means of present writ petition, petitioner has challenged the impugned order of termination dated 1.6.1992 (Annexure no.5) passed by opposite party no.2 as well as the order dated 18.1.1993(Anexure no.7) by which the petitioner's representation was rejected by opposite party no.2./ Commandant , Kendriya Nagrik Suraksha prishikshan Sanstahan, Lucknow which comes under under U.P. Civil Defence Services .

3. Learned counsel for the petitoiner submits that the petitoner was initially engaged on ad-hoc basis as Sweeper on 13.12.1985. Subsequently, the vacancy occurred in the Sansthan, the names were called from Employment Exchange by opposite party no.2 . In pursuance of of the same, petitioner submitted his candidature and was called for interview and by order dated 9.8.1990 (Annexure non.3) he was appointed on temporary basis on the post of Sweeper under opposite party no.3. In pursuance of the said order , petitioner joined his duty on 7.9.1990. While he was working and discharging his duties , by means of impugned order dated 1.6.1992 (Annexure no.5) passed by opposite party no.2, the services of the petitioner has been terminated by invoking the provisions as provided under U.P. Temporary Government Servants Rules(termination of service), 1975 (herein after referred to as Rules, 1975) .

4. Aggrieved by the said facts, petitioner submitted a representation, rejected by order dated 18.1.1993 (Annexure no.7) hence the present writ petition has been filed.

5. Learned counsel for the petitioner while challenging the impugned orders submits that in the present case , the services of the petitioner has been terminated on account of misconduct ,therefore before passing the impugned order an opportunity of hearing should be given to the petitioner, as such the action on the part of the respondent no.2 thereby terminating the services of the petitioner by invoking the provisions as provided under Rules , 1975 is illegal, arbitrary in nature and in contravention of Article 14 of the Constitution of India as well as principles of natural justice as the Rules 1975 have no application to the facts and circumstances of the present case , so liable to be set aside.

6. On the other hand , learned State Counsel while defending the impugned orders which are under challenge in the present writ petition submits that the petitioner was a temporary employee in the Sansthan, as such his services were terminated by invoking the provisions of Rules 1975, hence there is neither any illegality or infirmity in the impugned orders which are under challenge in the present writ petition , so the petition filed by the petitioner liable to be dismissed.

7. I have heard the learned counsel for the parties and going through the record.

8. The undisputed facts of the present case are that the petitioner was working on the post of Sweeper as temporary employee and his services were terminated on 1.6.1992 (Annexure no.5) by invoking the provisions as provided under Rules 1975 . Thereafter his representation was also rejected. Further in para nos 11 and 13 of the counter affidavit filed on behalf of official respondents it has been stated that petitioner was absent from duty without any prior information or leave and ' Anushashanheen Acharan ka Aadi Tha' as such a complaint has been made against the petitioner and in response to the same a show cause notice has been issued to him, thereafter reminders have been given to which petitioner submitted his reply and admitted his guilt and also stated that he will not repeat such mistake in future , so keeping in view the said fact as well as dereliction of duties and undisciplined behavior while performing his duties, his services were terminated by invoking the provisions as provided under Rules 1975.

9. The provision of U.P. Temporary Government Service (termination of service) Rules,1975 would not apply where a temporary Government Servant is sought to be removed by way of punishment. If there is a termination simplicitor, which is intended to be ordered in respect of a Government Servant, Rule 3 of the Rules can be invoked. But if a government servant, who is governed by these rules is sought to be removed on the ground of misconduct, embezzlement or lack of integrity, something more is required to be done before the termination of which Government servant is ordered. Something more must be consistent with the constitutional provisions and with the principles of natural justice. At least a hearing is to be given to such Government employee to explain his misconduct, lack of integrity and negligence of duty.

10. In the case of ***State of U.P. and another Vs. Prem Lata Misra (Km) and others (1994) 4 SCC 189*** Hon'ble the Supreme Court has held that it is settled law that the court can lift the veil of the innocuous order to find whether it is the foundation or motive to pass the offending order. If misconduct is the foundation to pas the order then an enquiry into misconduct should be conducted and an action according to law should follow. But if it is motive, it is not incumbent upon the competent officer to have the enquiry conducted and the service of a temporary employee could be terminated, in terms of the order of appointment or rules giving one month's notice or pay/ salary in lieu thereof .Even if an enquiry was initiated could be dropped midway and action could be taken in terms of the rules of order of appointment.

11. In the case of ***Radhey Shyam Shukla Vs. State of U.P. and others (2008) 1 UPLBEC 177*** Hon'ble the Supreme Court after considering the various case laws has held in the cases of *Triveni Shanker Saxena V. State of U.P. 1992 SCC(L&S) 440 and State of U.P. V. Prem Lata Misra (1994) 4 SCC 189* has held that in the former case, the termination order was simple order which did not cast any stigma and there were several adverse entries in the confidential reports. The termination was as per rules.

In the letter case, the employees superiors complained that the employee was not regular in her work and was in the habit of leaving office during office hours. A simple order of termination was passed in terms of the order of her temporary appointment. There was no prior enquiry. In both these cases, the termination orders were upheld.

12. In ***Dipti Prakash Banerjee Vs. Satyendra Nath Bose National Center for Basic Sciences, Calcutta and others, reported in (1999) 3 SCC,60,*** the Hon'ble Supreme Court in paragraph 21 of the report observed as under:-

"If findings were arrived at in an enquiry to misconduct, behind the back of the officer or without a regular departmental enquiry, the simple order of termination is to be treated as " founded" on the allegations and will be bad. But if the enquiry was not held, no findings were arrived at and the employer was not inclined to conduct an enquiry but, as the same time, he did not want to continue the employee against whom there were complaints, if would only be a case of motive and the order would not be bad. Similarly is the position if the employer did not want to enquiry into the truth of the allegation because of delay in regular departmental proceedings or he was doubtful about securing adequate evidence. In such a circumstance, the allegation would be a motive and not the foundation and the simple order of termination would be valid."

13. A perusal the above, clearly shows that if an enquiry was conducted as to misconduct, behind the back of the officer or without a regular departmental enquiry, the simple termination is to be treated as 'founded' on the allegations and will be bad.

14. Similarly in **Chandra Prakash Shahi Vs. State of U.P. and others, (2000)5 SCC 152**, the Hon'ble Supreme Court articulated that if for determination of suitability for the post or for his further retention in service or for confirmation, an inquiry is held and it is on the basis of that inquiry that a decision is taken to terminate the services, the order will not be punitive in nature. But , if there are some allegations of misconduct and an inquiry is held to find out the trust of that misconduct and thereafter the order of termination is passed, the order would be punitive in nature . In **V.P. Ahuja v. State of Punjab,(2000) 3SCC 239,** the Apex Court reiterated that services of temporary servant and even of probationer cannot be terminated arbitrarily, or can those services be terminated in a punitive manner without complying with the principles of natural justice as they are also entitled to certain protection.

15. In the case of ***Nar Singh Pal Vs. Union of India and others(2000) 3 SCC 588***, Hon'ble Supreme Court has held that the reasoning of the Tribunal is fallacious. If an order had been passed by way of punishment and was punitive in nature, it was the duty of the respondents to hold a regular departmental enquiry and they could not have terminated the services of the appellant arbitrarily by paying him the retrenchment compensation. The observation of the Tribunal that the respondent had a choice either to hold a regular departmental enquiry or to terminate the services by payment of retrenchment compensation is wholly incorrect.

16. In the case of ***Hari Ram Maurya Vs. Union of India and others (2006) 9 SCC 167,*** Hon'ble Supreme Court has held that from the order of termination Annexure P-7, it appears that the same refers to the show- cause notice dated 20.8.2002 which is to be found at Annexure P-5 . It is stated therein that the appellant demanded kickback with a view to help the complaint to get a favorable order in the pension matter. That being so, there was a clear charge of bribery levelled against the appellant. No doubt, the appellant was a temporary employee, but if he is sought to be removed on the ground that he was guilty of the charge of bribery, it becomes necessary for the respondent Union of India to hold an inquiry and thereafter to act in accordance with law. In this case, admittedly, no inquiry was conducted , and that is obvious even from Annexure P-7 , the latter described as disengagement of casual labour. We, therefore, allow this appeal and set aside the order of the High Court as also the order of termination Annexure P-& dated 30.9.2002. This, however, will not prevent the respondents from taking action in accordance with law.

17. In the case of ***State of U.P. and others Vs. Vijay Shanker Tripathi (2005) 6 SCC 135*** Hon'ble Supreme Court has held that from a long line of decisions it appears to us that whether an order of termination is simpliciter or punitive has ultimately to be decided having due regard to the facts and circumstances of each case. Many a times the distinction between the foundation and motive in relation to an order of termination either thin or overlapping. It may be difficult either to categories or classify strictly orders of termination simpliciter falling in one or the other category, based on misconduct as foundation for passing the order of termination simpliciter or to motive on the ground of unsuitability to continue in service.

18. A Division Bench of this Court in the case of ***Kailash Bharti Vs. State of U.P. and others 2005 (23) LCD 436*** has held that the factual situation indicates that had there been no allegation of drunkenness there would have been no order of termination. The papers and affidavits show this and those are all matters of record. The whole thing having come to the notice of the Writ Court it cannot now say that the Court and everybody else will now only look at the faceless, or the unreasoned; letter of termination, but it will show its eyes to the history of its genesis. This type of self-imposed partial blindness is not permitted to the Writ Court. As such the order of termination brought into existence, because an allegation of drunkenness against the writ petitioner was found without any hearing to be true, has to be set aside.

19. Further in the case of ***Usha Khare (Km.) Vs. State of U.P. and others (2009) 1 UPLBEC 894*** , a Division Bench of this Court has held :-

"Considering the facts of the present case in the light of the aforesaid exposition of law we find that the petitioner has been terminated observing that she is guilty of committing several irregularities and misuse of Pushtahar and being not original resident of village Ninora. The allegations of irregularities and misuse of public funds constitute serious stigma and therefore, by no stretch of imagination it can be said that

the impugned order is non-stigmatic. Before castigating the appellant for her alleged involvement in our view it was incumbent upon the respondents to afford an opportunity to appellant by issuing show cause notice and , therefore, the impugned order is in utter violation of principles of natural justice ."

20. Now reverting to the facts of the present case as stated herein above, the services of the petitioner were terminated on the ground of alleged misconduct in respect of which a show cause notice was issued to him to which he submitted his reply and in this regard averments has been made by the official respondents in para nos. 11 and 13 of the counter affidavit , so in view of the said fact , the position which emerge out is to the effect that the allegation of irregularities and misconduct committed by the petitioner while discharging his duty is the foundation for passing of the impugned order against the petitioner, hence before passing the same it is incumbent upon the respondents to afford an opportunity of hearing to the petitioner by issuing show cause notice and cannot pass by invoking the provisions as provided under Rules 1975.

21. In the result, the impugned order of termination dated 1.6.1992 (Annexure no.5) and the order dated 18.1.1993 (Anexure no.7) passed by opposite party no.2/Commandant , Kendriya Nagrik Suraksha Prishikshan Sanstahan, Lucknow are set aside.

22. Further, opposite parties are directed to reinstate the petitioner in service but the petitioner will not be entitled for any salary for the intervening period in view of the principle ' no work no pay' but the same shall be counted for other service benefits.

23. With the above observations, writ petition is allowed.

24. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 09.05.2012

BEFORE
THE HON'BLE RAN VIJAI SINGH, J.

Civil Misc. Writ Petition No. 21574 of 2012

Rambali and others ...Petitioners
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioners
Sri Harindra Prasad
Sri P.K.S.Paliwal

Counsel for the Respondents
C.S.C.
Sri Mahesh Narain Singh
Sri Rajesh Kumar

Constitution of India, Article 226-Writ of mandamus-petitioner seeking direction to the S.D.O. To decide application for exchange of plot-a complete procedure provided in U.P.Z.A. & L.R. Act and rules-unless joint application by both Bhumidhar with valuation report moved-S.D.O. No role to pay-statute provides for doing any act in certain manner-should be done-only with such manner-merely on basis of convenience on unilateral basis such application not maintainable-held-no mandamus can be issued unless statutory legal/right of petitioner is there.

Held: Para 15

Here in this case, a writ of mandamus has been sought for by the petitioner,

which cannot be issued against the statutory provision directing the authority concerned to perform his duty which he is not legally obliged to perform. It is well settled that for issuing a writ of mandamus, there must be a statutory duty imposed upon the authority concerned and there is failure on the part of that authority to discharge that statutory obligation. Further, the person seeking writ of mandamus must show that he has a legal right to the performance of a legal duty by the party, against whom mandamus is sought. Reference may be given to the judgment of the Apex Court in State of M.P. Vs. G.C.Mandawar, AIR 1954 SC 493 and Lekhraj Sathramdas Lalvani Vs. N.M.Shah, Deputy Custodian Cum Managing Officer, Bombay & Ors. AIR 1966 SC 333.

Case law discussed:

(1876) 1 Ch.D. 426; AIR 1936 PC 253; AIR 1961 SC 1527; (2000) 6 SCC 179; (2001) 4 SCC 9; (2002) 1 SCC 633; AIR 1954 SC 493; AIR 1966 SC 333

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

1. Heard Sri P.K.S.Paliwal along with Sri Harindra Prasad learned counsel for the petitioners and Sri Rajesh Kumar, learned Standing Counsel appearing for the State respondents.

2. Through this writ petition, the petitioners have prayed for issuing a writ of mandamus directing the Sub-Divisional Officer Sagri District Azamgarh to decide the application dated 25.11.2011 (annexure 3 to the writ petition). The aforesaid application appears to have been filed under Section 161 of U.P. Zamindari Abolition and Land Reforms Act, 1950 (herein after referred to as the Act) for exchange of Plot No. 311 area 0.020 hectare Khata No. 538 situated in village and post Bankatia, tehsil Sagri District Azamgarh which is recorded as manure pit with Plot No. 289 Khata No. 79.

3. Sri P.K.S.Paliwal, learned counsel for the petitioners contends that the Sub-Divisional Officer is statutorily bound to decide his application for exchange of the land with the Gaon Sabh in view of the provisions contained under Section 161 of the Act read with Rules 144 and 145 of the U.P. Zamindari Abolition and Land Reforms Rules, 1952 (herein after referred to as the Rules).

4. For appreciating the controversy involved in this case, the provisions relating to exchange of land belonging to a bhumidhar from another bhumidhar, as contained under Section 161 of the Act, as well as the Rules 144, 145, 146 and 147, of U. P. Zamindari Abolition and Land Reforms Rules, 1952 would be necessary to be looked into, which are reproduced hereinunder :-

Section 161 Exchange: - A bhumidhar (omitted by U.P. Act No. 8 of 1977 (w.e.f. 28.01.1977)) may exchange with -

(a) any other bhumidhar (omitted by U.P. Act No. 8 of 1977 (w.e.f.28.01.1977 land held by him; or

(b) any (Gaon Sabha) or local authority, lands for the time being vested in it under Section 117 (The words and figure " or 117-A" deleted by U.P. Act No. 12 of 1965.)

Provided that no exchange shall be made except with the permission of an Assistant Collector who shall refuse permission if the difference between the rental value of land given in exchange and of land received in exchange calculated at hereditary rates is more than 10 per cent of the lower rental value.

(1-A) Where the Assistant Collector permits exchange he shall also order the relevant annual registers to be corrected accordingly.

(2) On exchange made in accordance with sub-section (1) they shall have the same rights in the land so received in exchange as they had in the land given exchange.

Relevant rules of the Rules :-

"144. An application (for permission to make an) exchange shall contain the following particulars and be accompanied by the following documents :-

(1) The khasra number of the plots-

(a) (Deleted by ibid) which the applicant wishes to receive and of the plots which he offers in exchange of,

(b) (Ibid)

(2) certified copies of the khataunis relating to the khatas in which all such plots are included;

(3) (Ibid)

(4) a statement showing the details of any valid deeds mortgage or other encumbrances with which the lands to be exchanged may be burdened, together with the names and addresses of lessees, mortgagees or holders of other encumbrances.

145. On receipt of an application for (permission to make an) exchange of land the Assistant Collector (shall cause to be calculated the rental value of the land proposed to be given in exchange and of the land proposed to be received in exchange at hereditary rates and) if he is satisfied that the exchange is not invalid according to the proviso to sub-section (1) of Section 161, call upon the parties, the lessees, mortgagees or holders of other encumbrances, if any, to show cause why the exchange should not be made. Every such notice shall be accompanied by a copy of the application which shall be supplied by the applicant.

146. The Assistant Collector shall thereupon decide the objections, if any, and pass suitable orders. If he decides that the exchange should be allowed, he shall also make an order for the delivery of possession, if necessary, and for the correction of papers.

147. (If the Assistant Collector permits exchange) in respect of land constituting a portion of a holding, he shall apportion the land revenue payable for the holding between such portion and the remainder of the holding."

5. On perusal of aforesaid provisions, it would transpire that section 161 confers a right upon a bhumidhar to exchange the land held by him with another bhumidhar. This facility has been extended to the gaon sabha with respect to the land vested in section 117 of the Act as well as other local authorities also, subject to the condition that no exchange is permissible except with the permission of the Assistant Collector. The Assistant Collector can also refuse the permission if difference between the rental value of the land given in exchange and the land received in exchange, calculated at hereditary rate, is more than 10% of the lower rental value.

6. The Rule 144 provides the procedure for submitting application for exchange of the land. Rule 145 talks about the action to

be taken by the Assistant Collector after receipt of an application for exchange of land. Rule 146 empowers the Assistant Collector to decide the objections received with respect to the exchange of land and the Rule 147 talks about the duty of the Assistant Collector when he permits the exchange of portion of a holding.

7. From the conjoint reading of Section 161 as well as the Rules relating thereto, it would transpire that the legislature has extended a facility to a bhumidhar for exchange of his bhumidhari land with another bhumidhar for their convenience with certain conditions, and the first condition therein is, that such exchange cannot be held to be valid unless permission of the Assistant Collector has been obtained. There is also a rider that the Assistant Collector can refuse the permission for exchange of land if the difference between the rental value of land given in exchange of land received in exchange, calculated at hereditary rate, is more than 10% of the lower rental value.

8. In section 161 of the Act, the word 'Exchange' has been used, which means:

"Oxford English Dictionary, 11th Edition, by Catherine Soanes.

Give something and receive something else in return.

a short conversation or argument.

The changing of money to its equivalent in another currency.

A system or market in which commercial transactions involving currency, shares, etc. can be carried out within or between countries.

Law Lexicon, General Editor Justice Y.V. Chandrachud, 1997 Edition:

When two persons mutually transfer the ownership of one thing for the ownership of another, neither thing nor both things being money only, the transaction is called an "exchange".

An exchange involves the transfer of property by one person to another and reciprocally the transfer of property by that other to the first person. There must be a mutual transfer of ownership of one thing for the ownership of another.

A negotiation by which one person transfers to another goods or funds which he has in a certain place, either for other goods, or at a price agreed upon, or at a price which is fixed by commercial usage."

9. From the bare reading of the meaning of the word 'exchange' it would transpire that it is not unilateral transaction and is mutual one and it depends on the readiness and willingness of both the parties, i.e., the party which wants to exchange and the party which accepts the exchange proposed by the other party.

10. The role of Assistant Collector will come into play when the details of exchange is available with him, with the readiness and willingness of the parties to exchange, and if the parties are agreed for exchange of holdings with each other, in that eventuality, they have to file an application in accordance with the provisions contained in Rule 144, with the details of Khasra No. of the plots, which the applicant wishes to receive and of the plots which he offers in the exchange and the copy of the khatauni relating to the khatas in which all such plots are included. A statement containing the details of any valid deeds, mortgaged or other encumbrance with which the land is to be exchanged may be

burdened, together with the names and addresses of the leasees, mortgagees or holders of other encumbrances.

11. After receipt of such application for permission of exchange of land, the Assistant Collector, as required under Rule 145, shall cause to be calculated the rental value of the land proposed to be given in exchange and of the land proposed to be received in exchange and hereditary rights. If he is satisfied that the exchange is not valid according to the proviso of sub-section (1) of Section 161, shall call upon the parties the lessee, the morgagee or holder of other encumbrances, if any, to show cause why the exchange should not be made. Every such notice shall be accompanied by a notice of application which shall be supplied by the applicant. Rule 146 empowers the Assistant Collector to decide the objections, and if he decides that exchange should be allowed, the Rule also empowers him to pass an order for delivery of possession, if necessary, and for correction of the papers.

12. Here, in this case, from the perusal of the application dated 25.11.2011 (Annexure '3' to the writ petition), it would transpire that it is unilateral proposal of the petitioner for exchange of his holding with the gaon sabha on the ground that the land with which exchange is sought is recorded as a 'gaddha' and it is in front of the petitioner's house, due to which a lot of inconvenience is being caused and there is every likelihood of spreading of disease in the locality and the application has been filed without resolution of the Gaon Sabha i.e. without its consent. Therefore, I am of the considered opinion that unless both the parties agree for exchange, the Sub Divisional Magistrate cannot entertain an application filed on the instance of an individual for exchange of his land to another individual unless he is willing to exchange. The willingness of the parties to exchange is the condition precedent for presenting the application before the Sub Divisional Magistrate under section 161 of the Act.

13. It is well settled that if a statute provides to do a thing in a particular manner, then that thing has to be done in that very manner. The aforesaid legal proposition is based on a legal maxim " Expressio unius est exclusio alterius", and other manner and procedure is ordinarily not permissible'. ***(Vide Taylor Vs. Taylor, (1876) 1 Ch.D. 426; Nazir Ahmed Vs. King Emperor,*** AIR 1936 PC 253; ***Deep Chand Vs. State of Rajasthan,*** AIR 1961 SC 1527; ***Haresh Dayaram Thakur Vs. State of Maharashtra & Ors.,*** (2000) 6 SCC 179; ***Dhanajaya Reddy Vs. State of Karnataka etc. etc.,*** (2001) 4 SCC 9; ***Commissioner of Income Tax, Mumbai Vs. Anjum M.H. Ghaswala & Ors.,*** (2002) 1 SCC 633).

14. It is also well settled that if any thing has not been done in the manner provided for under the Statute and the Statute has provided a consequence for non-performance of such act as provided for, then those provisions are mandatory and not directory. While determining whether a provision is mandatory or directory, in addition to the language used therein, the Court has to examine the context in which the provision is used and the purpose behind it to achieve. It may also be necessary to find out the intention of the legislature for enacting it and the serious and general inconveniences or injustice to persons relating thereto from its application. As I have noticed that the exchange of land belonging to a bhumidhar to another bhumidhar is not unilateral transaction by a willing party to exchange, there must be consent of the person with whom exchange

has been sought and unless there is an agreement of exchange between the parties, there is no such power, vested with the Assistant Collector, under the statute, to compel a bhumidhar for exchange of his land with another bhumidhar against his will. I am of the view that conferment of right of exchange of the land under Section 161 of the Act read with relevant rules as detailed is subject to convenience of both the parties to the exchange and in the eventuality the willingness of both the sides to exchange, the Section 161 imposes duty upon the Assistant Collector either to grant permission or to refuse the same if the same is not inconformity with the section 161 of the Act and the rules 144 to 147 of the Rules.

15. Here in this case, a writ of mandamus has been sought for by the petitioner, which cannot be issued against the statutory provision directing the authority concerned to perform his duty which he is not legally obliged to perform. It is well settled that for issuing a writ of mandamus, there must be a statutory duty imposed upon the authority concerned and there is failure on the part of that authority to discharge that statutory obligation. Further, the person seeking writ of mandamus must show that he has a legal right to the performance of a legal duty by the party, against whom mandamus is sought. Reference may be given to the judgment of the Apex Court in ***State of M.P. Vs. G.C.Mandawar, AIR 1954 SC 493 and Lekhraj Sathramdas Lalvani Vs. N.M.Shah, Deputy Custodian Cum Managing Officer, Bombay & Ors. AIR 1966 SC 333.***

16. In view of the foregoing discussions, no relief, as prayed, can be granted to the petitioners. The writ petition is dismissed. However, dismissal of the writ petition will not preclude the petitioners to file appropriate application in accordance with law.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 01.05.2012

BEFORE
THE HON'BLE RAKESH TIWARI, J.
THE HON'BLE HET SINGH YADAV, J.

Civil Misc. Writ Petition No. 5757 Of 2007

Union of India, through Director General, Department of Posts,India, New Delhi and others ...Petitioners

Versus

Smt. Chandra Prabha Jain and others ...Respondents

Counsel for the Petitioner:
Sri Harish Chandra Dubey

Counsel for the Respondents:
.....

<u>Constitution of India, Article 226</u>- Retirement benefit- applicant/respondent working as contingent Chowkidar as Casual- employer w.e.f. 29.00.89 while juniors were given status of temporary employee-G.O. regarding status of regular Status after completing 3 years service-applicant/respondent retired on 14.07.99-denial pensionary benefit- direction of Tribunal held justified- warrant no interference-petition dismissed.

Held Para: 12

Considering the facts and circumstances of the case, we are of the considered view that conclusions drawn by the Tribunal in the impugned judgment and order, do not suffer from any illegality and infirmity, warranting interference in extra ordinary powers under Art. 226 of the Constitution.

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

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

2. This petition is directed against judgment and order dated August, 2006 passed by the Central Administrative Tribunal, Allahabad Bench, Allahabad in Original Application No. 1331 of 1999, Bhanu Prakash Jain Vs. Union of India and others, by which the respondents were directed to give pensionary/terminal benefits to applicant no. 1 (widow of the deceased original applicant), if such benefits were made admissible to any of the junior to him and in order to do so treat the applicant as regularised one.

3. It appears from record that Bhanu Prakash Jain approached the Tribunal by filing O.A. no. 1331 of 1999, alleging that he was initially appointed as contingent paid Chowkidar in the year 1969 in Firozabad Head Post Office. Later on the post was redesignated as C.P. Farrash. He continued working as C.P. Farrash but was neither regularised nor conferred a temporary status.

4. Pursuant to certain directions issued by the Apex Court, postal department had framed a scheme whereunder casual employees working on 29.11.1989 were conferred a temporary status. Bhanu Prakash Jain was also conferred temporary status w.e.f. 10.1.1993 vide memo dated 4.1.1992 though juniors to him were conferred temporary status w.e.f. 29.11.1989 vide office memo dated 20.11.1991. He complained against discriminatory attitude of the authorities in this regard. He retired from service on 14.7.1999 after attaining superannuation at the age of 60 years. Though provident fund was released vide order dated 6.8.1999 to him, but as the rest of the claims admissible under the rules were not paid, he prayed before the Tribunal for a direction to the respondents to provide pensionary/terminal benefits to him as after conferment of temporary status, a casual labour completing three years is to be treated at par with temporary status Group 'D' employees of the department.

5. During pendency of the aforesaid O.A. Applicant-Bhanu Prakash Jain expired and his heirs and legal representatives were substituted.

6. Claim of the applicant before the Tribunal was opposed by the department (petitioner in this petition), inter alia that since he had not completed requisite period after having been conferred temporary status, hence he was not entitled to pensionary benefits. According to the department, conferment of temporary status does not amount to a regular appointment and services of the applicant were never regularised.

7. After hearing the parties and on perusal of the record, the Tribunal has held thus:

There is no dispute on the point that the original applicant served the respondents for over a period of 30 years. There is no successful denial of the fact that his juniors were accorded temporary status on 29.11.1989 and he was given that status w.e.f. 10.1.1993. Even after 10.1.1993, he served with new status for more than six years. The original applicant has said in so many words that regularisation was the matter which rested in the hands of respondents and he being

illiterate, had no control over the same nor the means to know about all this.

What I consider just, in the facts and circumstances of the case, is to ask the respondents to grant pensionary benefits /terminal benefits to the eligible applicants, if such benefits were given to any casual labourer, junior to the original applicant in that category and for doing the same to treat the original applicant as regularised one.

So this O.A. Is finally disposed of with a direction to the respondents to give pensionary /terminal benefits to applicant no. 1(widow of the deceased original applicant), if such benefits were made admissible to any of the junior to the applicant (late Sri Jain) and in order to do so shall treat him as regularised one. This exercise shall be completed within a period of four months from the date a certified copy of this order is placed before them."

8. Learned counsel for the petitioner has assailed the order impugned on the ground that as per the subsequent circulars which he has not annexed with the present petition, an employee having attained the status of temporary employee, is entitled to all the service benefits including pensionary benefits on completion of three years of service with temporary status but only after regularisation of his services. According to him, services of late Bhanu Prakash Jain, having not been regularised, he was not entitled for the relief granted by the Tribunal.

9. The submission so made by the counsel for petitioner is against his own document i.e. copy of the circular dated 30.11.1992 issued by the Chief Post Mater General, U.P. appended as annexure no. 5 to the writ petition, relevant extract of which reads thus :

"Sub: Regularisation of Casual Labourers

Vide this office circular letter no. 45-95/87-SPB I dated 12.4.1991 a scheme for giving temporary status to casual labourers fulfilling certain conditions was circulated.

2. In their ***judgment dated 29.11.1989, the Hon. Supreme Court have held that after rendering three years of continuous service with temporary status, the casual labourers shall be treated at par with temporary Group 'D' employees of the department of Posts and would thereby be entitled to such benefits as are admissible to Group 'D" employees on regular basis.***

3.In compliance with the above said directives of the Hon. Supreme Court it has been decided that the Casual Labourers of this department conferred with temporary status as per the scheme circulated in the above said circular no. 45/95/87-SPB-I dated 12.4.1991 ***be treated at par with temporary Group 'D' employees with effect from the date they complete three years of service in the newly acquired temporary status as per the above said scheme. From that date they will be entitled to benefits admissible to temporary Group 'D' employees such as :***

All kinds of leave admissible to temporary employees, Holidays as admissible to regular employees, Counting of service for the purpose of pension and ***terminal benefits as in the case of***

temporary employees appointed on regular basis *for those temporary employees who are given temporary status and who completed three years of service in that status while granting them pension and retirement benefits after their regularisation....."*

10. From the aforesaid circular, it is ample clear that in compliance of directions issued by the Apex Court, policy decision was taken by the department that those casual labourers who have been conferred with temporary status, are to be treated at part with temporary group 'D' employees on completion of three years of service and terminal benefits would be admissible to them as admissible to temporary employees appointed on regular basis. It is not in dispute that applicant before the Tribunal was granted temporary status w.e.f. 10.1.1993 and he retired from service on 14.7.1999, after completing more than three years of service as required for the purpose.

11. So far as subsequent circulars referred to by the counsel for petitioner but not annexed with the petition, are concerned, suffice it to say that any departmental circular or executive instruction which is not in consonance with the directive issued by the Apex Court, is a nullity.

12. Considering the facts and circumstances of the case, we are of the considered view that conclusions drawn by the Tribunal in the impugned judgment and order, do not suffer from any illegality and infirmity, warranting interference in extra ordinary powers under Art. 226 of the Constitution.

13. For all the reasons stated above, the writ petition fails and is accordingly dismissed, upholding the judgment and order passed by the Tribunal. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.05.2012

BEFORE
THE HON'BLE PRADEEP KUMAR SINGH BAGHEL, J.

Civil Misc. Writ Petition No.8009 of 2011

C/M Public Intermediate College ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Yogish Kumar Saxena

Counsel for the Respondents:
C. S. C.
Sri Sushma Devi

U.P. Intermediate Education Act-1921-Section 16-G(7)-life of suspension order-if not approved or disapproved within 60 days-deemed approved-generaly misused by the authorities with collusion of erring teacher-R-4-facing criminal Trail for serious charges-injailed for 14 days and drawn salary of detention period also-adversely affect the discipline of the Institution-DIOS take appropriate decision within two weeks-upon in action on part of DIOS-liberty granted to approach before Joint Director to look into the conduct of such officer.

Held: Para 33

In the totality of the circumstances, a direction is issued upon the District Inspector of Schools to take decision in accordance with law in the matter of

suspension of respondent no. 4 within two weeks from the date of communication of this order. If the District Inspector of Schools for any reason fails to take the decision within the said period, the Committee of Management may file a representation before the Joint Director.

Case law discussed:

1995-LAWS (All)-2-4; 2001 (1) UPLBEC 468; (1996) 11 SCC 760 at page 768; AIR 2004 SC 49; 1991 (3) SCC 67; AIR 1992 SC 2219

(Delivered by Hon'ble Pradeep Kumar Singh Baghel, J.)

1. The petitioner, Committee of Management, Public Intermediate College, Motihan, Allahabad has made this writ petition for a direction upon District Inspector of Schools, Allahabad to approve the suspension of respondent no. 4, in accordance with law, who is the Principal of the said College.

2. A brief reference to the factual aspect would suffice.

3. Petitioner is a Committee of Management of an educational institution namely Public Intermediate College, Motihan, Allahabad (for short College). It is a recognised Institution. It is governed by the provisions of U.P. Intermediate Education Act, 1921, the Regulations framed thereunder and U.P. Secondary Education (Service Selection Board) Act, 1982.

4. The respondent no. 4 is an Assistant Teacher in the institution. He was initially appointed on compassionate ground. He was placed under suspension by the Committee of Management on 23.9.2010 on the serious allegations of indiscipline and misconduct. The resolution of the Committee of Management placing him under suspension, was sent to the District Inspector of Schools on the same day. However, the District Inspector of Schools has failed to take any action in terms of Section 16(G)(7) of U.P. Intermediate Education Act, 1921 (for short Act 1921). In view of his failure to exercise his statutory power, the respondent no. 4 has joined the institution, as suspension order lapses after 60 days as envisaged by Section 16-G(7).

5. I have heard Mr. Yogish Kumar Saxena, learned counsel for the petitioner and the learned Standing Counsel for the respondents.

6. Learned counsel for the petitioner urged that there are very serious allegations against respondent no. 4 under the Gambling Act. Several criminal cases are pending against him and he was also sent to jail for about 14 days and concealing the said facts he had drawn the salary of the period when he was in jail. However, the District Inspector of Schools has failed to pass any order.

7. He has further submitted that the action of District Inspector of Schools is wholly arbitrary and there is no justifiable reason for not passing the order within the reasonable period.

8. Mr. Saxena has placed reliance upon a Full Bench judgement of this Court in the case of ***Chandra Bhushan Misra vs. District Inspector of Schools Deoria reported in 1995-LAWS (All)-2-4.*** Para 4 of this judgement are as follows:

"If the Inspector has not passed any order under sub-section (7) or has passed unsustainable order, this Court at the

instance of the person aggrieved can under Article 226 of the Constitution pass appropriate order and issue direction to the Inspector for passing the order afresh in accordance with law. Such a writ petition does not become infructuous after the expiry of sixty days from the date of the order of suspension. This Court has the jurisdiction under Article 226 of the Constitution to pass effective order in view of the facts and circumstances of the case."

9. Following the said Full Bench decision, this Court time and again has highlighted the same view that the District Inspector of Schools should take a decision within reasonable time, provided that the Committee of Management has complied the Regulations 39 and has sent all the required papers within a stipulated period in terms of said Regulation.

10. Mr. Saxena has further urged that on 11.2.2011 when this writ petition was entertained, this Court requested the Standing Counsel to seek the instruction and the mater was directed to put up on 15.2.2011. Thereafter the District Inspector of Schools issued a notice dated 24.2.2011 wherein he asked the Committee of Management to be present on 28.2.2011. The said notice has been brought on record by the learned counsel for the petitioner by way of a supplementary affidavit.

11. Sri Saxena lastly submitted that in response to the notice dated 24.2.2011, the Committee of Management has again submitted all the papers at the earlier occasion. However, till date no decision has been taken by the District Inspector of Schools.

12. The learned Standing Counsel has submitted that after 60 days lapsed, the respondent no. 4 was entitled to join as there is no suspension order in operation. The learned Standing Counsel has further submitted that there is no statutory requirement that District Inspector of Schools must pass the order within 60 days.

13. I have considered the rival submissions of the respective parties.

14. Section 16 G(7) is designed with a laudable objective that Management may not harass the teacher by placing him under suspension and prolonging the disciplinary proceedings for an indefinite period. The intention of the legislature is obvious from the plain reading of Section 16-G(5) (7) and (8) that a Head/teacher of Institution may be placed under suspension when charges against him are serious enough and/or any criminal case for an offence involving moral turpitude against him is under investigation, inquiry or trial. But facts of this case eloquently speak how the office of the District Inspector of Schools is abusing the power in favour of teacher to frustrate the disciplinary proceedings itself. If during disciplinary proceedings a teacher is allowed to remain in the institution, he can temper relevant documentary evidences and consequently change the course of disciplinary proceedings. The office of District Inspector of Schools becomes easy tools in the hands of erring teacher/Principal.

15. In **Chandra Bhushan Misra's case (supra),** it has been observed that although the order of suspension will lapse after the expiry of 60 days. However, it will come into force and will become effective immediately on such approval. The Court has further observed that any

other constructions may frustrate the object of the provision.

16. This Court in the case of **Committee of Management, Intermediate College, Gorai vs. District Inspector of Schools, Varanasi & another, 2001 (1) UPLBEC 468** has taken note of the inaction of the office of the District Inspector of Schools in such matters. The relevant part of the judgement is as follows:

4. Section 16- G (8) of the Act empowers the District Inspector of Schools to revoke suspension if the management is found to be delaying inquiry. Section 16-G (7) provides for automatic cessation of suspension order if no approval or disapproval is granted within sixty days. The two provisions read together manifest the legislative anxiety of protecting a teacher against arbitrary action of the management. But it does not empower the District Inspector of Schools to abuse it so as to frustrate the action of the management where it proposes to proceed in accordance with law. Facts of this case demonstrate that the District Inspector of Schools has failed to discharge his duty with responsibility. ***It calls for an inquiry by the higher authorities.*** When the management sent the suspension order under Section 16-G (6) of the Act to the District Inspector of Schools for grant of approval, he could not sit tight over the matter till the expiry of sixty days statutory period.

17. This Court, in the aforesaid case, has laid down the law that such action calls an enquiry by the higher authority. On similar facts, there are series of decisions deprecating the delay on the part of District Inspector of Schools in taking decision.

18. If a teacher or Principal is placed under suspension and no action is taken by District Inspector of Schools by virtue of the statutory provision, the Principal/teacher is entitled to resume his duties after lapse of 60 days when the suspension order becomes inoperative. Consequent upon such inaction the suspended Principal/teacher resumes his duty as a Principal likewise teacher is also allowed to discharge his duties as a teacher. If there are serious charges of misconduct or criminal cases against Principal/teacher, it affects general administration, discipline, control over subordinate staff and employees as well as standard of the education of the institution.

19. The Supreme Court in the case of ***Mahak Singh (Dr) v. Chancellor, Ch. Charan Singh University, Meerut, (1996) 11 SCC 760, at page 768*** has observed in the following terms:

"We would be loath to give any relief to the appellant so as to entitle him to work as Acting Principal of the Degree College when he is facing the charge of double murder. We obviously cannot and do not express any opinion on his culpability but at least this involvement and cloud affect his credentials for being considered as a suitable candidate for the post of Acting Principal of the ***college wherein students have to be taught discipline and are to be equipped with knowledge, expertise and higher values of life so as to make them better citizens."***

20. Similar view has been take by the Supreme Court in **Nirmala Secondary School, Port Blair vs. M.T. Khan, AIR 2004 SC 49.**

21. In the present case, the respondent no. 4 was placed under suspension on 22.9.2010 on the grounds that he was facing criminal case under sections 308, 323, 504 and 506 I.P.C. and he was in jail for 14 days. It is stated that he is also facing the charges under Gambling Act and a charge sheet in Criminal Case No. 472 of 2007 under sections 308, 323, 504 and 506 I.P.C. has also been submitted against him.

22. The Committee of Management has sent all the papers relating to the suspension of respondent no. 4 in the office of District Inspector of Schools on 23.9.2010. The said document bears the receipt of the office of District Inspector of Schools The Committee of Management has also served the charge sheet in the disciplinary proceedings on 14.10.2010 which the respondent no. 4 had refused and, therefore, it was published in the newspaper. The Committee of Management after the lapse of 60 days had permitted the respondent no. 4 to join the institution. It is also stated that this Court in the instant writ petition on 11.2.2011 directed the Standing Counsel to seek instruction and the matter was to be heard on 18.2.2011. On the said date, time was again sought to seek instruction. In the mean time, during the pendency of the writ petition, the District Inspector of Schools had issued a notice on 24.2.2011 and fixed 28.2.2011. According to the petitioner on 28.2.2011, the representative of the Committee of Management appeared on the said date and he has again submitted all the documents and the records. The District Inspector of Schools did not take any decision. The petitioner had made two representations dated 30.5.2011 and thereafter 15.7.2011 but those representations failed to find any favourable response from the office of District Inspector of Schools. From the facts of the case, it is established that the office of District Inspector of Schools is abusing its power under section 16-G (7) of the Intermediate Education Act, 1921.

23. The Intermediate Education Act and the Regulations framed therein are silent that in such a situation what course of action may be adopted against erring Principal/teacher.

24. After coming into force of U.P. Secondary Education Service Selection Board Act, 1982, Section 21 of the said Act put a restriction on dismissal, removal or reduction in rank of a Principal/Head of Institution/teacher except with prior approval of the Board. Section 21 further enjoins that any action without prior approval shall be void.

25. In exercise of powers under sections 7 and 34 of the U.P. Secondary Education Service Commission and Selection Board Act, 1982, the U.P. Secondary Education Services Commission (Procedure for Approval of Punishment) Regulations, 1985 have been framed. The Regulation provides elaborate procedure to be followed before taking any decision on the proposal of Committee of Management for dismissal/removal/reduction in rank or any other punishment of Principal/teacher.

26. It is a common ground that the Board usually takes sometimes upto three/four years to complete the entire process of the hearing provided under the above regulation and in the mean time the Principal/teacher is allowed to continue in

the institution. Keeping in view of ground realities, it is more important to exercise the power under Section 16-G (7) objectively and timely by the District Inspector of Schools.

27. In absence of any statutory remedy provided under the Intermediate Education Act or U.P. Secondary Education Service Selection Board, the Committee of Management or the teacher does not have any statutory remedy except to invoke the extraordinary jurisdiction of this Court under Article 226 of the Constitution. The docket of this Court is already choked by huge pending cases.

28. At the cost of repetition, the Principal/teacher is facing disciplinary proceeding, the administration of the institution and the studying of the students are adversely affected. Such a situation is not in the interest of institution and the students. In absence of any statutory remedy, in my view, if the District Inspector of Schools fails to exercise his statutory power within 60 days, aggrieved party may file a representation to the higher authority, the Joint Director of Education, inviting his attention to inaction on the part of the office of District Inspector of Schools. If such a representation is filed before the Joint Director he may seek the comments of District Inspector of Schools for the reason of inaction on his part.

29. The Court is not oblivious of the fact that in absence of any statutory provision whether such a jurisdiction can be exercised by the Joint Director and whether this Court can issue such a direction. The Supreme Court has answered the question in **Ratan Chand, Hira Chand vs. Askar Nawazung reported in 1991 (3) SCC 67** in following terms:

"the legislature often fails to keep pace with the changing needs and values nor is it realistic to expect that it will have provided for all contingencies and eventualities. ***It is, therefore, not only necessary but obligatory on the Courts to step in to fill the lacuna***. When Courts perform this function undoubtedly they legislate judicially. But that is a kind of legislation which stands implicitly delegated to them to further the object of the legislation and to promote the goals of the society."

30. In another case, the Supreme Court in **Sarojini Ramaswami vs. Union of India, AIR 1992 SC 2219** has ruled as under:

"In this context it is also useful to recall the observation of R.S. Pathak, CJ. speaking for the Constitution Bench in Union of India v. Raghubir Singh (dead) by LRs, (1989) 2 SCC 754 (AIR 1989 SC 1933) about the nature and scope of judicial review in India. The learned Chief Justice stated thus:

".....It used to be disputed that Judges make law. Today, it is no longer a matter of doubt that a substantial volume of law governing the lives of the citizen and regulating the function of the State flows from the decisions of the Superior Courts. "There was a time", observed Lord Reid, "When it was thought almost indecent to suggest that judges make law-they only declare it... But we do not believe in fairy tales any more."

31. Bearing in the mind the principle aforesaid, I am of the view that if the Joint Director is conferred only this much power to ask the District Inspector of Schools, reason for delay and to issue a direction to him to take decision within reasonable time, will not be tantamount to exceed the jurisdiction under Article 226 of the Constitution.

32. Regard being had to the fact that section 16-A (7) provided forum to decide the election dispute of Committee of Management. The Joint Director had jurisdiction to decide the claim of rival Committee of Management but in view of large number of complaints received by the State Government that Authority entrusted the statutory obligations are misusing their power under Act 1921, the State Government issued Government Order 19.12.2000 for redistributing the jurisdiction to various authorities at regional level. The validity of the Government Order was challenged in this Court. However, this Court upheld its validity. The Regional Committees so constituted are functioning smoothly for more than a decade

33. In the totality of the circumstances, a direction is issued upon the District Inspector of Schools to take decision in accordance with law in the matter of suspension of respondent no. 4 within two weeks from the date of communication of this order. If the District Inspector of Schools for any reason fails to take the decision within the said period, the Committee of Management may file a representation before the Joint Director.

34. The writ petition is allowed in the aforesaid terms. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 10.05.2012

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 9511 of 2009

Babu Ram ...Petitioner
Versus
State of U.P. and others ...Respondent

Counsel for the Petitioner:
Sri Uemsh Chandra Mishra

Counsel for the Respondents:
C.S.C.

Arms Act-Section 17 (3) (b)-cancellation of fire arm license on ground of public interest-can be canceled on ground of public safety-public safety can not be equated with Public interest-when statute do not provide such ground-licensing authority committed great illegality-both order quashed-being without jurisdiction.

Held: Para 3

Both the authorities below have recorded their satisfaction that cancellation of petitioner's firearm licence is necessary for public interest. Under Section 17 of Arms Act a firearm licence cannot be cancelled in public interest. The grounds specifically mentioned says that it is only either of public peace or safety. The word "public interest" is not the same thing as "public peace" or "public safety". In fact the word "public interest" is much wider than the word "public peace" or "public safety". When Legislature itself has not conferred any power upon the licensing authority to cancel a firearm licence in public interest, such exercise in public interest by authorities below is wholly without jurisdiction.

Case law discussed:
2003 All L.J. 1769; 2012 (4) ADJ 716

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

1. Heard Sri Sushil Kumar Dubey, Advocate holding brief on behalf of Sri Umesh Chandra Mishra, learned counsel for the petitioner and learned Standing Counsel for the respondents.

2. This writ petition is directed against the order dated 31.01.2007 passed by Additional District Magistrate, Etawah cancelling firearm licence of petitioner observing that allowing licence with petitioner is not in public interest. For the same reason the Commissioner has also rejected petitioner's appeal vide order dated 19.07.2008, which has also been impugned in this writ petition.

3. Both the authorities below have recorded their satisfaction that cancellation of petitioner's firearm licence is necessary for public interest. Under Section 17 of Arms Act a firearm licence cannot be cancelled in public interest. The grounds specifically mentioned says that it is only either of public peace or safety. The word "public interest" is not the same thing as "public peace" or "public safety". In fact the word "public interest" is much wider than the word "public peace" or "public safety". When Legislature itself has not conferred any power upon the licensing authority to cancel a firearm licence in public interest, such exercise in public interest by authorities below is wholly without jurisdiction.

4. In **Dharamvir Singh Vs. The State, 2003 All L.J. 1769,** the Court in para 6 of the judgement said:

"There is no finding that the revocation of licence was considered necessary for the security of the public peace or public safety. Public interest cannot be equated to term for the security of the public peace or public safety. . . . . ."

5. The above decision has been followed in **Rajendra Deo Pandey Vs. State of U.P. and others, 2012(4) ADJ 716.**

6. Learned Standing Counsel also could not dispute having gone through the impugned orders that the two orders have been passed holding that it is necessary in public interest and no for the reasons stated in Section 17(3)(b) of the Act.

7. In the result, the writ petition is allowed. The impugned orders dated 31.01.2007 and 19.07.2008 are hereby quashed. No costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.04.2012

BEFORE
THE HON'BLE BHARATI SAPRU, J.

Civil Misc. Writ Petition no. 10855 of 1998

Naththi Lal ...Petitioner
Versus
Asstt.Regional Manager UPSRTC & another ...Respondents

Counsel for the Petitioner:
Sri Rajiv Sharma
Sri A.K. Tripathi
Sri T.R. Gupta
Sri Rahul Sahai

Counsel for the Respondents:
S.C.
Sri V.P. Mathur
Sri Samir Sharma

Constitution of India, Article 226- termination from service-petitioner

working as driver-refused to taking Bus out unless repaired-considering terrible risk of accident-on charge of indiscipline-dismissal order passed-while corporation employee admitted during cross examination that left side bus suspension was broken-held-punishment of dismissal too harsh-moreover no dereliction of duty but the driver acted with due caution and prudence can not be termed as indiscipline-termination order quashed.

Held: Para 11 and 12

In my opinion that the driver while taking a stand with regard to the broken suspension had acted prudently and had done so in the best interest of all involved and most of all passengers who would have travelled on that bus. The driver in my opinion had taken due caution in the matter and had not indulged in any dereliction of duty nor had caused any harm or loss to the corporation by his decision. Should any accident had taken place then too, the blame would have been fixed on the driver.

In the facts and circumstances of the case, I am of the opinion that the driver acted with due caution and prudence. The punishment imposed by way of the impugned order, is, therefore excessive and too harsh, which is, accordingly, set aside.

(Delivered by Hon'ble Bharati Sapru, J.)

1. This petition has been filed by the petitioner against an order of termination passed by the respondent no.1 on 22.4.1997 by which the petitioner who was a driver in the respondent corporation has been removed from service.

2. The facts of the case are that the petitioner was a driver was deputed to drive bus no.9055. On 31.3.1996 he was supposed to take the bus out which was to carry passengers but the petitioner refuses to take the bus out on the ground that the bus was not in a fit condition to be taken on the road or to carry passengers.

3. The specific plea taken by the petitioner was that the left side fork of the suspension was broken and the vehicle was not in a condition to carry passengers.

4. According to the petitioner he refused taking the bus out unless the bus was properly repaired as there was a terrible risk of an accident thereby causing loss to human life.

5. The petitioner was asked to take the bus out despite his insistence and when he refused, a charge of indiscipline was levelled against him.

6. It has come on record in the order itself that one of the officials himself found that the suspension was broken on the left side of the bus but had been tied up. This evidence was given by Prabhakar Sharma. The other evidence which was given by the member of the corporation was that the bus could have been driven.

7. For this act of indiscipline, the enquiry officer has found the petitioner guilty and the petitioner was terminated from service.

8. Having heard learned counsel for both sides and having perused the material on record, I am of the opinion that the punishment imposed on the petitioner is too harsh and disproportionate for reasons that the petitioner has been terminated for one single act of so-called indiscipline.

9. Prior to this, the record does not reflect that the petitioner has ever been guilty of any ground of indiscipline.

10. Insofar as the charge of indiscipline levelled against the petitioner in the case in hand, is concerned, I am of the opinion that the so-called act of indiscipline cannot be termed as an act of indiscipline because it is the part of the discipline of a driver to take vehicle out on road only he ensures that the vehicle is road worthy and fit to carry passengers and it should not in any manner pose any risk to human life.

11. In my opinion that the driver while taking a stand with regard to the broken suspension had acted prudently and had done so in the best interest of all involved and most of all passengers who would have travelled on that bus. The driver in my opinion had taken due caution in the matter and had not indulged in any dereliction of duty nor had caused any harm or loss to the corporation by his decision. Should any accident had taken place then too, the blame would have been fixed on the driver.

12. In the facts and circumstances of the case, I am of the opinion that the driver acted with due caution and prudence. The punishment imposed by way of the impugned order, is, therefore excessive and too harsh, which is, accordingly, set aside.

13. The writ petition is allowed as above. No costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.05.2012

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 17313 of 1997

U.P.S.R.T.C. & another ...Petitioner
Versus
Brij Nandan Lal & others ...Respondents

Counsel for the Petitioner:
Sri V.M. Sahai
Sri M.M.Sahai

Counsel for the Respondents
C.S.C.
Sri B.N.Singh

Constitution of India, Article 226-Labor Court award-granting designation of store clerk with all consequential benefits challenged-on ground workman engaged on post of Mazdoor-discharge work of clerk-can not give any right to claim salary on basis of equal pay for equal work-unless appointed on promoted post in accordance with Rules-virtually Labor Court even recording the findings about no vacancy-in garb of reinstatement granted promotion-while lump sum amount of compensation could be given on want of vacancy-held-Labour Court exceeded its jurisdiction-award set a side-whatsoever amount given-should not be recovered.

Held: Para 16 anda 17

The mere fact that a person is discharging duties of a particular nature would not entitle him to claim a right to the post or else other benefits of that post unless he is appointed on the post in accordance with the procedure prescribed in law.

From the award of Labour Court it also does not appear that the whole sole

duties, responsibilities and obligations of Store Clerk were conferred upon the workman. Whatever said by the workman, even if is accepted, it only shows that he was allowed to discharge some duties of clerical in nature but that by itself does not mean that he was given full fledged responsibility of a Class III post with all attending obligations, liabilities and consequences.

Case law discussed:

2011 ADJ (5) 348; AIR 1984 SC 1683; 1991 (62) FLR 583; 1997 (75) FLR 147; (2005) 1 UPLBEC 247; Civil Misc. Writ Petition No.27769 of 1995 (M/s Swadeshi Cotton Mills Vs. The Presiding Officer & Ors.) decided on 10.3.2003; 2011 (3) SCC 436;2009 LabIC 905=2008 JT (10) 578; 1966 (2) SCR 465; Workmen Employed by Hindustan Lever Ltd. (supra)

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

1. Heard Sri Mayank, Advocate, holding brief of Sri M.M.Sahai for the petitioner and Sri B.N.Singh, learned counsel appearing for respondent No.1.

2. This writ petition is directed against the award dated 31st October, 1996 of Labour Court (5), U.P. Kanpur in Adjudication Case No.64/1990 whereby it has held that respondent workman Sri Brij Nandan Lal is entitled for designation and post of Store Clerk w.e.f. 6.12.1989 with all consequential benefits.

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

4. The workman Brij Nandan Lal admittedly was engaged as Mazdoor on 1.6.1963 in Farrukhabad Depot of erstwhile State Transport Department of U.P. Government which subsequently became Uttar Pradesh State Road Transport Corporation (hereinafter referred to as "UPSRTC") a statutory body under State Road Transport Act. He claims that after promotion of one Om Prakash Shakya, Store Clerk as Assistant Store Keeper on 1.2.1979, post of Store Clerk fell vacant and the authorities concerned deployed the workman Braj Nandan Lal to perform duties of Store Clerk. He has functioned and discharged the aforesaid duties but has not been given designation and other consequential benefits of the said post. He raised an industrial dispute in 1989. The conciliation proceedings having been failed on the recommendation of Conciliation Officer, the State Government in exercise of power under Section 4-K of the U.P. Industrial Disputes Act, 1947 (hereinafter referred to as "Act 1947") vide notification dated 6.12.1989, made the following reference for adjudication by Labour Court respondent No.2:

"क्या सेवायोजकों द्वारा अपने कर्मचारी बृजनन्दन लाल पुत्र श्री प्यारे लाल को उसके कार्य की प्रकृति के अनुसार स्टोर क्लर्क का पदनाम व तद्नुसार वेतनमान न दिया जाना उचित तथा/अथवा वैधानिक है? यदि नहीं, तो संबंधित कर्मचारी क्या हितलाभ /उपशम पाने का अधिकारी है, किस तिथि से तथा किस अन्य विवरण सहित?"

5. The workman filed a detailed written statement and also adduced certain documents to show that he had been performing certain duties which are clerical in nature. The documents also include his own letter in which he has claimed to have been discharging duties as Store Clerk since 1979 and therefore claimed regular appointment on the said post. A document said to be letter dated 17.7.1986 sent by Deputy Manager, Central Zone recommending for regular appointment of the workman in stores was also filed before the Labour Court.

6. The employer, on the contrary, took the stand in the written statement that the

workman was a permanent Mazdoor i.e. a Class IV employee and was never appointed on the higher post of Store Clerk by any competent authority in accordance with procedure prescribed in the rules. In fact the workman was employed to function under the Store Keeper and discharge duties of unskilled nature. He did not function as Store Clerk at all. In any case it is submitted that ministerial post of Class III i.e. Store Clerk is a promotional post from a Class IV employees and in the garb of designation, promotion cannot be allowed.

7. The Labour court by means of the impugned award, however, has answered the reference in favour of the workman.

8. Sri Mayank, learned counsel appearing on behalf of the petitioner contended that by means of impugned award the Labour Court in effect has granted promotion to the workman concerned ignoring statutory provisions under which such promotion could be made from the employees working as Class IV and therefore, Labour Court acted wholly illegally has also exceeded its jurisdiction. He placed reliance on the decision of this Court in **U.P.S.R.T.C. Kanpur Vs. Imtiyaz Ahmad 2011 ADJ (5) 348.**

9. Sri B.N.Singh, however, appearing on behalf of the workman submitted that it is a simple case of granting designation and status to the workman and not a promotion and in fact, it is a case of 'fitment'. He placed reliance on Apex Court's decision in **Workmen Employed by Hindustan Lever Ltd. Vs. Hindustan Lever Limited, AIR 1984 SC 1683 and this Court's decisions in National Textile Corporation (U.P.) Ltd. Vs. The Presiding Officer, Labour Court I, Kanpur & Ors., 1991(62) FLR 583, Nagar Mahapalika, Gorakhpur Vs. Labour Court, Gorakhpur & others 1997(75) FLR 147, U.P. State Road Transport Corporation Vs. Ramesh Kumar Yadav & Ors. (2005) 1 UPLBEC 247 and Civil Misc. Writ Petition No.27769 of 1995 (M/s Swadeshi Cotton Mills Vs. The Presiding Officer & Ors.)** decided on 10.3.2003.

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

11. The question up for consideration is, "whether here is a simple case of fitment or in the garb of granting designation and post, the Labour Court has granted promotion to the workman".

12. From the impugned award as also the pleadings it is evident that appointment on a post of Clerk in UPSRTC is governed by statutory rules framed by the petitioner-Corporation as also the departmental instructions issued in this regard. Learned counsel for the petitioner pointed out that on a clerical post there are two sources of recruitment namely direct recruitment and promotion of Class IV employees. It is not disputed that the workman never participated in a selection for a clerical post as a direct recruit. He has also not been promoted thereon by the Competent Authority after following the procedure prescribed for promotion. It is also evident that the petitioner employer took a specific stand that there was no post of Store Clerk at the place where workman was posted and this fact could not be contradicted by the workman. The Labour Court itself has observed that if the post was not available, the workman ought to have been allowed pay and salary admissible to a clerical staff on the principle of 'equal pay for equal work'. In my view the Tribunal has clearly misdirected itself by ignoring that in order

to apply principle of "equal pay for equal work" existence of a post has to be shown. Even otherwise, no principle of service jurisprudence has been shown to exist that a person if not recruited or employed in accordance with the procedure prescribed, yet, if worked or discharged duties of a particular nature, he would have a lien and right to claim a particular designation and even if it does not exist.

13. The concept of "holding over" has been held inapplicable in the matter of employment by the Apex Court in **State of Orissa and another Vs. Mamata Mohanty, 2011(3) SCC 436** and the Court said:

"The concept of adverse possession of lien on post or holding over are not applicable in service jurisprudence. Therefore, continuation of a person wrongly appointed on post does not create any right in his favour."

14. Here is not a case where the workman was appointed by the competent authority following a procedure prescribed in law on a particular post and thereafter a dispute was raised in respect to the nature of appointment or category of appointment or classification of appointment like permanent, temporary, ad hoc etc. The decision of Apex Court therefore in **Workmen Employed by Hindustan Lever Ltd. (supra)** would not apply to the facts of this case, inasmuch as, there it was a case where workmen were already promoted on the post of which they were claiming benefit and it was only the nature/classification on the said post wich was disputed, as is evident from para 12 of the judgment wherein the Apex Court has observed:

"The Tribunal overlooked the fact that the demand was in respect of workmen already promoted i.e. in respect of whom managerial function of selecting personnel for promotion had been already performed. The demand was in respect of already promoted workmen, may be in an officiating capacity, for their classification from acting or temporary to confirmed that is permanent, in the higher grade to which they were promoted, after a reasonable period of service which according to the Union must be three months of service. By no cannon of construction, this demand could be said to be one for promotion."

15. The dispute in the present case, in my view, is akin and covered by the law laid down by Apex Court in **U.P. State Sugar & Cane Vs. Chini Mill Mazdoor Sangh 2009 LabIC 905=2008 JT (10) 578** wherein the workmen were employed as seasonal workman but they claimed to have worked throughout the year like permanent workmen and hence claimed benefit of a permanent workmen. The reference was made "whether the workman can be declared permanent". The Labour Court answered the reference in favour of the workmen. The Apex Court referring its earlier Constitution Bench judgment in **Management of Brook Bond India (P) Limited Vs. Workmen, 1966 (2) SCR 465; and Workmen Employed by Hindustan Lever Ltd. (supra),** held in paras 21, 22, 23 and 24 as under:

21. That there are different categories of workers employed in the sugar industries, and, in particular, during the crushing season, is not disputed by any of the parties. It is not denied that apart from the permanent workmen, the other categories of workmen are employed during the crushing season which begins in the month of

October in a given year and continues till the month of April of the following year. It is the period during which the sugarcane crop is harvested, and, thereafter, transported to different mills where they are crushed for production of sugar. Admittedly, as will appear from Standing Order No. 2, a muster- roll of all employees, who are not permanent, is maintained by the different sugar mills and at the beginning of the crushing season the seasonal labour who had worked during the previous crushing season are asked to join their duties for the crushing season in their old jobs. It is also not denied that the pay scales of the different categories of workmen are different.

22. It has been submitted on behalf of the appellant that even when the seasonal workmen are employed during the off season they are paid the same wages as are paid to them during the crushing season, which is one of the basic distinctions between them and permanent workmen who are on the rolls of the sugar mills. It is also an admitted position that, in terms of the policy followed by the sugar mills, promotions are given from one category to the next higher category depending on the number of vacancies as are available at a given point of time. Even in the instant case, of the 39 workmen referred to in the terms of reference, 13 had been made permanent by the appellant which supports the case of the appellant that promotion is given from one category to the higher categories as and when vacancies are available and that such function was clearly a managerial function which could not have been discharged by the Labour Court.

23. We are in agreement with the views expressed by the Constitution Bench of this Court in the Brooke Bond case (supra) as also those of the three-Judge Bench in the Hindustan Lever case (supra). In our view, this is not a case of fitment depending on the nature of the work performed, but a case of promotion as and when vacancies are available. Both the Labour Court as well as the High Court do not appear to have considered this aspect of the matter with the attention it deserved and proceeded on the basis that this was a case where the respondent Nos. 2-15 had been denied their right to be categorised as permanent workmen on account of the nature of the work performed by them throughout the year. The High Court has, in fact, merely relied on the findings of the Labour Court without independently applying its mind to the said aspect of the matter.

24. We, therefore, accept the submissions advanced by Mr. Upadhyay and allow the appeal. The Award of the Labour Court and the Judgment of the High Court impugned in this appeal, are set aside.

16. Applying the criteria laid down by the Apex Court, here also, from a Class IV post a workman is promoted in cadre which is a Class III, as and when the vacancy are available, after following the procedure prescribed in law therefore what was claimed by the workman was promotion and not a mere fitment. The mere fact that a person is discharging duties of a particular nature would not entitle him to claim a right to the post or else other benefits of that post unless he is appointed on the post in accordance with the procedure prescribed in law.

17. From the award of Labour Court it also does not appear that the whole sole duties, responsibilities and obligations of

Store Clerk were conferred upon the workman. Whatever said by the workman, even if is accepted, it only shows that he was allowed to discharge some duties of clerical in nature but that by itself does not mean that he was given full fledged responsibility of a Class III post with all attending obligations, liabilities and consequences. This aspect has been considered by this Court in **U.P.S.R.T.C. Kanpur Vs. Imtiaz Ahmad (supra)** and in paras 7, 8 and 9 the Court held as under:

"7. Moreover, directing prospective grant of designation and pay scale is nothing but promotion ignoring the claim of other similarly situate workmen. Labour court did not even bother to verify as to whether any post of mechanic was vacant or not.

8. Merely, because a person possesses minimum qualification, he can not be granted promotion. Possessing such qualification is only one of the necessary prerequisites. The others inter alia are availability of the post in the next grade and consideration of all other similarly situate employees and their seniority in the feeder cadre. Promotion in U.P.S.R.T.C. is governed by Rules and Regulations. Labour Court cannot by-pass the same. If such type of approach is approved then any officer may unduly favour any of his subordinates by taking the work of higher grade from him and thereafter that person obtains from the labour court award for grant of pay scale and designation of the said higher post.

9. A mechanic is required to perform different types of jobs. Particular type of job may require different types of operations. Some stages of an operation may be quite simple requiring to be performed even by unskilled labour other stages may be gradually complicated requiring to be performed by more competent mechanics. Merely because a mechanic of lower grade is also involved in a particular job it does not mean that he is entitled to be automatically promoted to the higher grade mechanic who is also involved in the same type of job.

In my view, this judgment squarely apply to the present case.

18. The question whether it is a case of promotion or not has not been considered by this Court in **U.P.State Road Transport Corporation Vs. Ramesh Kumar Yadav & Ors. (supra)** where the issue was raised whether question of non promotion would be an industrial dispute or not was considered and decided which is not the issue raised in this case. The aforesaid jdugment, therefore, would have no application to the case in hand.

19. Similarly in **Nagar Mahapalika, Gorakhpur (supra)** also the issue whether it is a case of promotion or not was not considered hence the said decision does not constitute a precedent binding on this Court and has no applicable to the present dispute.

20. In **National Textile Corporation (U.P.) Ltd. (supra),** the Court has held that promotion is a managerial function but then it has recorded its finding in short that in the matter before the Court that was not a case of promotion and therefore the Court did not interfere with the award of the Labour Court. The judgment is a short judgment and does not apply to the facts of the case where the appointment of the post is governed by the statutory provision framed namely U.P. State Road Transport Corporation Employees (Other than Officers) Service Regulation, 1981.

21. In view of above discussion, in my view, the impugned award of Labour Court cannot sustain. The writ petition is allowed. The award dated 31st October, 1996 (Annexure No.1 to the writ petition) passed by Labour Court (5), U.P. Kanpur in Adjudication Case No.64/1990 is hereby set aside.

22. No order as to costs.

23. However, the benefit, if any, with respect to the salary etc. if already given to the workman concerned, the petitioner shall not recover the same.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.04.2012

BEFORE
THE HON'BLE MANOJ MISRA, J.

Civil Misc. Writ Petition no. 19875 of 2004

C-24776 Prathvi Raj Sharma ...Petitioner
Versus
State of U.P. Thru' Secy. Min. of Home Affairs U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Shyam Ji Gaur
Sri Shyam Narain
Sri Sudhanshu Narain
Sri Gopal Srivastava

Counsel for the Respondents:
C.S.C.

Constitution of India, Article-226- Dismissal order-challenged on ground of disproportionate punishment-petitioner found guilty for unauthorized absent from duty-but also guilty for refusal of duty inspite of request of Guard Commander-left the SLR Rifle with 50 bullets-in disciplinary force such conduct-not tolerable-punishment of dismissal neither excessive nor shocking-warrants no interference.

Held: Para 21

Considering the facts and circumstances of the case, I am of the view that the punishment of dismissal awarded to the petitioner was one of the possible punishment that could be awarded to him considering the nature of his conduct and the fact that he was a member of a uniformed service, accordingly, it is not permissible for me to interfere with the same in exercise of power of judicial review.

Case law discussed:
(2012) 3 SCC 178; [2003 (2) LBESR 947 (All)]; AIR 1994 SC 215; (2003) 3 SCC 309; (2010) 11 SCC 314

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

1. I have heard learned counsel for the petitioner and the standing counsel for the respondents and have perused the record. As pleadings have been exchanged, with the consent of the counsel for the parties, the petition is being finally disposed of at the admission stage.

2. By this writ petition, the petitioner, who was a Constable in the Provincial Armed Constabulary, has challenged the dismissal order dated 21.07.2000, as also the appellate order of affirmance dated 28.02.2001, passed by the Commandant, 20th Battalion, P.A.C., Azamgarh and the Deputy Inspector General, P.A.C., Varanasi Range, Varanasi respectively.

3. The facts, in brief, are that while the petitioner was posted as a Constable at 20th Battalion, P.A.C., Azamgarh in the year 2000, he was served with a charge-sheet dated 16.3.2000 wherein it was

alleged that while the petitioner was posted as constable at 20th battalion PAC, Azamgarh, in the night of 8.1.2000, he was assigned guard-duty along with chief guard Bir Bahadur Singh for the first night shift starting from 20.00 hrs to 24.00 hrs. During the course of duty, it was alleged, at about 20.30 hrs, the petitioner refused to perform his duty despite request of the guard commander, and left the place of duty, after leaving the SLR rifle and 50 rounds of bullets, without the permission of the competent authority, and thereafter remained unauthorisedly absent for 11 days, 14 hours and 10 minutes up to 19.1.2000. As a result, the petitioner was charged for violation of the orders, and for gross dereliction of duties. For ready reference, the charge levelled against the petitioner as quoted in the enquiry report, which has been enclosed with the writ petition as Annexure No.1, is being reproduced below:-

" कि आप जब वर्ष 2000 में आरक्षी के पद पर एच.एल 20वीं वाहिनी पी.एस.सीआजमगढ़ में नियुक्त थे और वाहिनी डियूटी में कार्यरत थे तो दिनांक 8.1.2000 को आपकी डियूटी वाहिनी परिसर में एरिया प्रथम के प्रथम सिप्ट में समय 20.00 से 2400 बजे तक मुख्य आरक्षी बीर बहादुर सिंह मुख्यालय शाखा के साथ लगी थी तो समय 20.30 बजे वाहिनी राशन शाप के पास डियूटी के दौरान गार्द कमाण्डर के समझाने के बाद भी आपने डियूटी करने से इन्कार किया और एस0एल0आर0 0एवं0 वाल रखकर डियूटी छोड़कर बिना किसी अनुमति, अनुज्ञा, अवकाश के वाहिनी फेमली गेट से समय 21.30 बजे वाहिनी से बाहर चले गये तथा स्वतः मनमाने ढंग से अपनी इच्छा अनुसार दिनांक 19.1.2000 को वाहिनी मुख्यालय में आगमन किये इस प्रकार आप अपनी नियत डियूटी को छोड़कर 11 दिवस 14 घण्टा, 10 मिनट अनाधिकृत रूप से अनुपस्थित रहकर वाहिनी में आगमन किये। इस प्रकार आप आदेश की अवहेलना एवं अपने कर्तव्य का निर्वहन करने में पूर्ण रूपेण विफल रहने के दोषी हैश

4. On the aforesaid allegations, enquiry was held wherein nine witnesses were examined to prove the allegations leveled against the petitioner. The petitioner also examined two witnesses, namely, Mohan Kumar Mishra and Ajay Kumar Singh so as to prove that in the night of 08.01.2000 he had received a telephone call from his native village at district Gautambudh Nagar, as a result of which, he had to rush back to his native place for sorting out some urgent matters. The enquiry officer after considering the evidence led against the petitioner, as well as the defense evidence, found the allegations against the petitioner proved, and with respect to his defense came to the conclusion that although it was proved that some telephone call had come from the residence of the petitioner but it could not be proved that the matter was so urgent that the petitioner could not have waited for obtaining proper leave so as to go to his residence. In the enquiry it was also proved that the petitioner had left the SLR Rifle and 50 Rounds of Bullets with the other Guard, who was on duty with the petitioner, without depositing at the right place.

5. After concluding the enquiry, the enquiry officer submitted his report on 17.06.2000, thereby finding the petitioner guilty of the charges. On the said report, a show cause notice along with the enquiry report was issued to the petitioner, on 28.06.2000, thereby inviting explanation from him as to why he should not be dismissed from service on the proven charges.

6. In absence of any reply from the petitioner to the show cause notice, the Commandant, 20th Battalion, P.A.C., Azamgarh by his order dated 21.7.2000 dismissed the petitioner from service. Aggrieved by the order of dismissal, the

petitioner preferred an appeal before the Deputy Inspector General, P.A.C., Varanasi Range, Varanasi.

7. In his appeal, the petitioner stated that on the fateful night a phone call had come from his residence which necessitated immediate journey of the petitioner to his native village, therefore, the petitioner after informing the Guard Commander, who directed the petitioner to deposit the rifle and the bullets with the Constable next in duty namely, Mohan Kumar Mishra, left the station and since it was late night, he could not get in touch with any officer for seeking leave. He further stated that there was no willful absenting from duty, therefore, his case may be viewed sympathetically, and that he may be pardoned for the mistake.

8. The appellate authority affirmed the order of dismissal with observation that the police force is a disciplined force and since the petitioner left the station during the course of his duty, without informing or seeking permission from the competent authority, and also by leaving his weapon and the bullets in the custody of a fellow constable without making any attempt to deposit the same with a competent authority, there was no occasion to view the misconduct of the petitioner in a sympathetic manner.

9. Aggrieved by the order of rejection of the appeal, the petitioner has filed this petition. The stamp reporter reported that the petition was delayed by 1074 days. The petitioner sought to explain the delay by stating that he was in a penurious condition and could not earlier manage money to meet the expenses required for filing a writ petition.

10. Initially, on 21.05.2004, this petition was dismissed on the ground that no one had appeared to press the petition, as also for lack of cogent explanation with regard to the delay of 1074 days reported by the stamp reporter. However, this order was recalled on 28.04.2006 and the petition was restored. Later, it appears, that the petitioner filed a supplementary affidavit, on 31.07.2006, thereby enclosing two documents, namely, a memorial dated 09.02.2004 addressed to the Governor against the order of the appellate authority and a letter dated 01.01.2005 disclosing that the memorial was rejected as not maintainable. In the aforesaid background, I am of the view that the petitioner was pursuing his cause, therefore, cannot be held to be guilty of laches.

11. Coming to the merit of the case, the counsel for the petitioner has not seriously challenged the findings recorded by the enquiry officer or the manner in which the enquiry was held. The only ground pressed by the counsel for the petitioner was that the order of dismissal was shockingly disproportionate to the charges leveled against the petitioner. He contended that in the enquiry it was proved that there was a phone call from his native village, which demanded immediate presence of the petitioner at his native village, therefore, it could not be said that the absence of the petitioner was willful so as to warrant a major penalty of dismissal. The counsel for the petitioner has further submitted that the absence was of about 12 days only and that immediately after returning from home the petitioner had submitted a joining application thereby informing the authorities that there was a phone call

informing him of some quarrel relating to his house and land, therefore, he had to rush back to his home. The petitioner's counsel has placed reliance on a judgment of the Apex Court in the case of **KRUSHNAKANT B. PARMAR V. UNION OF INDIA AND ANOTHER** reported in **(2012) 3 SCC 178.** In addition to the aforesaid decision, the petitioner has also relied on the judgment of this Court in the case of **CONSTABLE NO. 850774845, LALJI PANDEY V. DIRECTOR GENERAL, C.R.P.F., NEW DELHI & Ors**. reported in **[2003 (2) LBESR 947 (All)]** as well as the decision of the Apex Court in the case of **UNION OF INDIA AND Ors v. GIRIRAJ SHARMA** reported in **AIR 1994 SC 215.**

12. In the case of **Krushnakant B. Parmar v. Union of India (supra),** the Apex Court, in paragraph Nos. 17, 18 and 19, observed as follows:-

"17. If the absence is the result of compelling circumstances under which it was not possible to report or perform duty, such absence can not be held to be wilful. Absence from duty without any application or prior permission may amount to unauthorised absence, but it does not always mean wilful. There may be different eventualities due to which an employee may abstain from duty, including compelling circumstances beyond his control like illness, accident, hospitalisation, etc., but in such case the employee cannot be held guilty of failure of devotion to duty or behaviour unbecoming of a Government servant.

18. In a departmental proceeding, if allegation of unauthorised absence from duty is made, the disciplinary authority is required to prove that the absence is wilful, in absence of such finding, the absence will not amount to misconduct.

19. In the present case the Inquiry Officer on appreciation of evidence though held that the appellant was unauthorisedly absent from duty but failed to hold the absence is wilful; the disciplinary authority as also the Appellate Authority, failed to appreciate the same and wrongly held the appellant guilty."

13. Relying upon the aforesaid observations of the Apex Court, the counsel for the petitioner submitted that in the instant case also there were compelling circumstances justifying the immediate movement of the petitioner from the place of his duty to his residence and, therefore, it could not be said that the absence of the petitioner was willful. The counsel for the petitioner further submitted that the charge against the petitioner of leaving the SLR Rifle with 50 rounds of Bullets cannot be said to be totally established inasmuch as admittedly the petitioner had left the Rifle and the Bullets in the custody of a fellow Constable and it is not that the Rifle and the Bullets were left abandoned.

14. On the basis of the above submissions, the counsel for the petitioner stated that the punishment of dismissal was shockingly disproportionate and the ends of justice would be served if the petitioner is awarded some minor punishment.

15. Per contra, the Standing Counsel appearing for the respondents submitted that the police force, and in particular the Armed Police Force, is a disciplined force

where refusal to perform duty would be a serious misconduct. He submitted that the petitioner was not only charged with absence from duty, but was also charged with refusal to perform duty, which has been proved in the enquiry report. If the charge had been only for remaining absent from duty, then the punishment of dismissal could have been challenged on ground of being disproportionate. However, since the charge in the present case was not only of absence from duty but also of refusal to perform duty, therefore, the punishment of dismissal cannot be said to be disproportionate.

16. Having considered the submissions of the parties and having gone through the record, I find that the charge proved against the petitioner is not simply that of abstaining or absenting from duty, but is also that of refusal to perform duty, which was assigned to the petitioner in the night of 8.1.2000. It has been proved that the petitioner while on duty, despite request from the guard commander, refused to continue with his duty and left the place after leaving his weapon and the bullets in the presence of his fellow constable on duty. Once the enquiry officer upheld the charge of refusal to perform duty coupled with absence from duty, that too by a member of the Police Armed Constabulary, which is a disciplined force, the punishment of dismissal from service cannot be said to grossly disproportionate. The judgment of the Apex Court in the case of **Krushnakant B. Parmar v. Union of India (supra)** has to be considered in the light of the facts of that case, as would be evident from paragraph Nos. 12, 13 and 14 of the said judgment, which are being reproduced below:-

"12. The records suggest that on 11th August, 1995, the appellant requested the respondents to transfer him from Palanpur to any nearest place at Ahmedabad or Nadiad or Anand which was accepted by respondents and an order of transfer was issued by the respondents on 21-8-1995 transferring the appellant to the office of DCIO, Nadiad with immediate effect. On 25-8-1995, the Joint Assistant Director, SIB ordered to release the appellant from Palanpur to join duty at Nadiad with effect from 31-8-1995. In view of such order the appellant was relieved and joined at Nadiad. However, the order of transfer was cancelled by the respondents on 4-9-1995 and he was transferred at a distance place which was challenged by him before the Central Administrative Tribunal.

13. After cancellation of the order of transfer the appellant sent a complaint on 18-9-1995 before the authorities that the DCIO, Palanpur, Mr. P. Venkateswarlu was not allowing him to join duty. The order of transfer was challenged by him before the Central Administrative Tribunal, Ahmedabad alleging bias against Mr. Venkateswarlu, DCIO, Palanpur, in-charge of the office which was accepted by the Central Administrative Tribunal and the order of transfer was set aside. Thereafter appellant joined duty on 11-12-1995 and proceeded on leave for 11 days due to illness of his father.

14. The Inquiry Officer noticed the aforesaid facts and held the appellant was unauthorisedly absent between 3-10-1995 and 7-11-1995; 9-11-1995 and 10-12-1995; 10-12-1995 and 2-8-1995. However, while coming to such

contention, the authority failed to decide whether such absence amounted to misconduct. The evidence led by the appellant in support of his claim that he was prevented to sign the attendance register and to perform duty though noticed the Inquiry Officer on presumption and surmises, held the charge proved."

17. So far as the judgments in the cases of **CONSTABLE NO. 850774845, LALJI PANDEY V. DIRECTOR GENERAL, C.R.P.F., NEW DELHI & Ors. (supra) and UNION OF INDIA AND Ors v. GIRIRAJ SHARMA(supra)** are concerned, the facts were different. There the incumbent had gone on a sanctioned leave and had remained unauthorisedly absent by overstaying the period of leave. Whereas in the instant case the petitioner had not only refused to perform night duty for which he was provided with a Rifle and 50 rounds of bullets, but, in spite of request by the Guard Commander, left his Rifle with 50 rounds of bullets and proceeded to leave station without obtaining permission or leave from the competent authority. Such being the fact, the conduct of the petitioner reflected gross indiscipline and in a uniformed service, such as in the case of the petitioner, it could justify imposition of a major punishment including that of dismissal.

18. The Apex Court in the case of **Mithilesh Singh v. Union of India and Ors** reported in **(2003) 3 SCC 309**, dealt with a similar controversy, as is in the present case, which would be evident from paragraph No.3 of the judgment, which reads as follows:-

"The appellant was appointed as Constable in the Railway Protection Special Force on 16.4.1978. Disciplinary proceedings were initiated against him by issuing notice under Section 9(1) of the Railway Protection Force Act 1957 (in short 'the Act') read with Rule 44 of the Railway Protection Force Rules, 1959 (in short 'the Rules'). Gravamen of charge against him was that he had left duties as well as the Tarantaran Station without permission. He was detailed with others for Quarter Guard cum Station Static Guard duty on 22.5.1987. At about 11:25 hrs. he asked the Guard Commander to keep his arms and ammunition telling that he was proceeding home. The Guard Commander asked him not to go without permission. But disobeying the orders, he left his duty as well as the Station Tarantaran without any permission. This was considered to be an act of indiscipline and carelessness in duty. His defence was that he was required to attend the wedding of his brother-in- law and, therefore, he had to leave the Station in any case. It was further stated by him that he asked the Inspector in-charge that Adjutant had assured him about grant of leave, but the Inspector in-charge refused to grant leave. Faced with this situation he had to leave with a view to keep his family commitments. It was also stated by him that he had handed over his arms and ammunition for safe custody. He returned after 25 days for which he had asked for leave. The authorities on completion of the disciplinary proceedings found that the charge was proved and penalty from removal from service was awarded."

The Apex Court while considering the quantum of punishment in the said case, in paragraph Nos. 9 and 10 of the judgment, observed as under:-

"9. The only other plea is regarding punishment awarded. As has been observed in a series of cases, the scope of interference with punishment awarded by a disciplinary authority is very limited and unless the punishment appears to be shockingly disproportionate, the Court cannot interfere with the same. Reference may be made to a few of them. See: ***B.C. Chaturvedi v. Union of India and Ors., [1995] 6 SCC 749, State of U.P. and Ors. v. Ashok Kumar Singh and Anr., [1996] 1 SCC 302. Union of India and Anr. v. G. Ganayutham, [1997] 7 SCC 463; Union of India V. J.R. Dhiman, [1999] 6 SCC 403 and Om Kumar and Ors. v. Union of India, [2001] 2 SCC 386.***

10. We find from the factual position, which is undisputed that the appellant was posted at Tarantaran in Punjab, a terrorist affected area and was, at the relevant time, working in the Railway Protection' Special Force. Any act of indiscipline of such an employee cannot be lightly taken. In Ashok Kumar Singh's case supra, the employee was a police constable and it was held that act of indiscipline by such a person needs to be dealt with sternly. As noted by the Division Bench of the High Court, penalty of removal of service is statutorily prescribed. It is for the employee concerned to show that how penalty was disproportionate to the proved charges. No mitigating circumstance has been placed by the appellant to show, as to how the punishment could be characterized as disproportionate and/or shocking. On the contrary as established in the discipline proceedings, the appellant left the arms and ammunition unguarded and not in any proper custody. This aggravated the aberrations. Therefore, the order of removal from service cannot be faulted. There is no reason to interfere with the orders of the Division Bench of the High Court."

19. From the record of the instant case, I find that the petitioner has not been able to produce sufficient material either before the enquiry officer or even before the appellate authority to justify his refusal to perform duty, as also absenting from duty, by leaving the station for journey to his native village, without even informing or obtaining leave from the competent authority, as also without keeping the weapon and the bullets at the right place. He has not been able to prove that he was under such compelling circumstances that there was no option left for him than to act in the manner in which he did. The only explanation provided by the petitioner for such an act of indiscipline is receipt of a phone call from the native village demanding his presence there. The petitioner, despite full opportunity, has not proved in the enquiry or even before the appellate authority that the phone call was in respect of some death in the family or that the ground was so urgent that without immediately rushing to his native village, he could not have achieved the purpose of his journey, or that somebody was so grievously injured or ill that if he had not reached immediately, things could have gone beyond control or repair. In fact, the enquiry officer in his report has recorded a finding to the effect that although the petitioner has been able to prove that there was a phone call from his native village, but he had failed to prove the urgency for leaving the station immediately, in the manner that he did. In the given circumstances, I do not find any mitigating factor which may suggest that the punishment awarded to the petitioner

was so shockingly disproportionate, which could be interfered with in exercise of power under the writ jurisdiction of this court.

20. It would be necessary to note that while judicially reviewing an order of punishment imposed upon a delinquent employee the writ court would not assume the role of an appellate authority. The Apex Court in the case of **Charanjit Lamba v. Commanding Officer, Army Southern Command, r**eported in **(2010) 11 SCC 314**, in paragraph No.20, observed as follows:-

"What is clear is that while judicially reviewing an order of punishment imposed upon a delinquent employee the writ court would not assume the role of an appellate authority. It would not impose a lesser punishment merely because it considers the same to be more reasonable than what the disciplinary authority has imposed. It is only in cases where the punishment is so disproportionate to the gravity of charge that no reasonable person placed in the position of the disciplinary authority could have imposed such a punishment that a writ court may step in to interfere with same."

21. Considering the facts and circumstances of the case, I am of the view that the punishment of dismissal awarded to the petitioner was one of the possible punishment that could be awarded to him considering the nature of his conduct and the fact that he was a member of a uniformed service, accordingly, it is not permissible for me to interfere with the same in exercise of power of judicial review.

22. For the reasons aforesaid, the petition lacks merit and is here by **dismissed.**

23. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.04.2012

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 20611 of 2012

Smt. Bhajno Devi ...Petitioner
Versus
State of U.P. through Secretary and others ...Respondents

Counsel for the Petitioner:
Sri Satish Mandhyan

Counsel for the Respondents:
C.S.C.

U.P. Panchayat Raj Act 1947, Section 95 (1) (g)-removal of village in question reserved for S.C. Women-contention of petitioner being "Bajgi" in state of Punjab-a scheduled caste-hence after marriage in U.P. She became S.C.-held-misconceived-a caste declaration in particular category in other state can not be treated in same writ jurisdiction-order can not be interfered.

Held: Para 6

It is, thus, evident that in view of admitted facts as stated in para 4 and 5 of writ petition as also exposition of law as discussed above, the petitioner was not eligible or entitled to contest the election of Gram Pradhan of Village Teep, being not a Scheduled Caste, as per the notified list of Scheduled Caste in State of U.P. and therefore her very election was illegal since its inception, hence she could have been removed

from Office having been elected in violation of statutory provisions.

Case law discussed:

2010 (10) ADJ 1; (2004) 1 UPLBEC 217; Civil Misc. Writ Petition No. 3936 of 2002 (Satpal Meena and others Vs. UP Public Service Commission, Allahabad and others); (2005) 2 SCC 731; AIR 2005 SC 1933; AIR 2007 SC 262; Writ Petition No. 38893 of 2008 (Brijendra Singh Vs. State Of U.P. and Others); Writ Petition No. 31995 of 2000 (Ganesh Singh Vs. District Magistrate & others); (2006) 8 SCC 776;

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

1. Writ petition is directed against the order dated 12.4.2012 passed by District Magistrate, Bijnor removing petitioner from post of Gram Pradhan of Gram Panchayat Teep under Section 95 (1) (g) of U.P. Panchayat Raj Act, 1947 (hereinafter referred to as "Act, 1947") on the ground that seat was reserved for Scheduled Caste woman and petitioner contested the election claiming herself to be a Scheduled Caste candidate (caste Bajgi) though actually she does not belong to that caste and even the caste certificate dated 29.9.2010 alleged to have been issued by Tahasildar was not actually issued by him as has been confirmed by Tahasildar by letter no. 533@ Vadd@ tkfr@ lR;kiu@ 2012 dated 6.1.2012. Therefore the very election of petitioner to the post of Gram Pradhan was void ab-initio.

2. Sri Madhyan learned counsel for petitioner contended that the impugned order has 0.00"been passed in utter violation of principles of natural justice and on the basis of enquiry conducted against petitioner behind her back and hence is liable to be set aside. He submitted that neither the report submitted by Tahasilar was ever apprised to petitioner nor petitioner was confronted with any material which was against her and considered by District Magistrate in passing the impugned order. Reliance is placed on a Full Bench Judgement in **Vivekanand Yadav Vs. State of U.P. & others 2010 (10) ADJ 1** in support of submission that the procedure of enquiry as contemplated in Act, 1947 is mandatory and in case any order of removal has been passed without following the said procedure, it shall be illegal and void ab-initio.

3. It is not in dispute that petitioner belong to Bajigar caste which is declared to be scheduled caste in the State of Punjab. It is not so declared in the State of U.P. is also not disputed. Petitioner was married to Sri Lazza Ram, who belong to caste Bajgi which is scheduled cast in State of U.P. Without looking to the other questions, two questions which are relevant on the basis of facts averred in para 4 of writ petition would be:

(1) Whether a Scheduled Caste in one State can claim benefit of such status in another State in which he/she is not declared to be a Scheduled Caste.

(2) Whether by virtue of marriage, caste of a women would become that of husband entitling her to contest the election on a seat reserved for that caste or community.

4. So far as first question is concerned, the Apex Court has already replied this question in **UP Public Service Commission, Allahabad Vs. Sanjai Kumar Singh (2004) 1 UPLBEC 217** wherein it was held that an ordinarily residents of other State whose caste is not in the reserved

category in the State of U.P. is not entitled to benefit of reservation even if they belong to the reserved category in their own State. A division bench of this Court earlier took the same view in **Civil Misc. Writ Petition No. 3936 of 2002 (Satpal Meena and others Vs. UP Public Service Commission, Allahabad and others)** decided on 5.9.2002. The above authorities have been relied and followed by a Division Bench of this Court in **Civil Misc Writ Petition No. 26044 of 2000 (Mohd Hassan Jafri Vs. The Director of Higher Education UP Allahabad and others)** decided on 2.4.2004.

5. Coming to the second question, this is also no more res integra having been answered by Apex Court in **Sandhya Thakur Vs. Vimla Devi Kushwaha (2005) 2 SCC 731,** wherein the Apex Court observed has under:

"...the appellant, who by birth did not belong to a backward class or community, would not be entitled to contest a seat reserved for a backward class or community, merely on the basis of her marriage to a male of that community. Therefore, it is not possible to accept the argument that the appellant was entitled to contest a seat reserved for a backward community merely because of her marriage to a person belonging to the Namdev community or caste."

6. It is, thus, evident that in view of admitted facts as stated in para 4 and 5 of writ petition as also exposition of law as discussed above, the petitioner was not eligible or entitled to contest the election of Gram Pradhan of Village Teep, being not a Scheduled Caste, as per the notified list of Scheduled Caste in State of U.P. and therefore her very election was illegal since its inception, hence she could have been removed from Office having been elected in violation of statutory provisions.

7. Coming to the question of application of principles of natural justice, suffice is to mention that once it is admitted that the very election of petitioner was not in accordance with Statute and facts in this regard are virtually admitted and only one conclusion is possible, under Article 226 this Court is not obliged to interfere with an order which has resulted in substantive justice merely on the ground of some defect in the matter of procedure i.e. denial of opportunity of hearing since observance of principles of natural justice is not an empty formality. Where only one conclusion is possible, this Court can decline to interfere in exercise of power under Article 226 of the Constitution.

8. In **Karnataka State Road Transport Corporation and another Vs. S.G. Kotturappa AIR 2005 SC 1933,** the Apex Court held:

"The question as to what extent, principles of natural justice are required to be complied with would depend upon the fact situation obtaining in each case. The principles of natural justice cannot be applied in vacuum. They cannot be put in any straitjacket formula. The principles of natural justice are furthermore not required to be complied with when it will lead to an empty formality. What is needed for the employer in a case of this nature is to apply the objective criteria for arriving

at the subjective satisfaction. If the criterias required for arriving at an objective satisfaction stands fulfilled, the principles of natural justice may not have to be complied with...".

9. In **Punjab National Bank and others Vs. Manjeet Singh and another AIR 2007 SC 262,** the Apex Court said:

"The principles of natural justice were also not required to be complied with as the same would have been an empty formality. The court will not insist on compliance with the principles of natural justice in view of the binding nature of the award. Their application would be limited to a situation where the factual position or legal implication arising thereunder is disputed and not where it is not in dispute or cannot be disputed. If only one conclusion is possible, a writ would not issue only because there was a violation of the principle of natural justice."

(emphasis added)

10. This Court also in **Writ Petition No. 38893 of 2008 (Brijendra Singh Vs. State Of U.P. and Others)** decided on 18.5.2011 has taken somewhat similar view as under:

"... it is well settled that if only one conclusion is possible, the Court would not interfere in the impugned order ...."

11. In **P.D. Agrawal Vs. State Bank of India and others (2006) 8 SCC 776,** it has been observed by Apex Court:

"The Principles of natural justice cannot be put in a straight jacket formula. It must be seen in circumstantial flexibility. It has separate facets."

12. This Court also in **Writ Petition No. 31995 of 2000 (Ganesh Singh Vs. District Magistrate & others)** decided on 29.4.2011 has held as under:

"16. The principles of natural justice cannot be kept in a straight jacket formula. They apply in the facts and circumstances of each and every case. If the appointment of petitioner would have been made in accordance with law or at least some prima facie material would have to be placed to show what has been stated by respondents is not ex facie correct, then the matter may have required some further investigation. In the case in hand no such thing has been placed on record by petitioner or even pleadings to show that procedure prescribed under 1974 Rules was observed and thereafter petitioner was appointed. The appointment, therefore, is ex facie illegal and in the teeth of the Rules.

17. In the circumstances, this Court under Article 226 of the Constitution do not find it a fit case warranting interference. The writ petition, therefore, lacks merit and is dismissed."

13. In view of above, I do not find any reason to interfere.

14. Dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.04.2012

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 21109 of 1986

Rajendra Pal Singh ...Petitioner
Versus
The Commissioner and others ...Respondents

Counsel for the Petitioner:
Sri Anshu Chaudhary
Sri Anupam Kulshrestha
Sri G.N. Verma
Sri Prakash Chandra
Sri Rakesh Chandra
Sri Samar Singh

Counsel for the Respondents:
S.C.
Sri A. Rathore
Sri D.R. Sharma
Sri S.A. Khan

U.P. Zamindari Abolition and Land Reforms Rules-285-A-285-D auction sale-conducted by Naib Tehsildar-confirmed by Dy. Collector-held-in no manner Asst. Collector includes Naib Tehsildar-whether remaining 75% amount deposited within 15 days-due to arbitrary illegal action of authorities petitioner deprived from his property for last 25 years-entitled for exepmtory cost of Rs. 50000.

Held: Para 31 and 33

It shows that for the purpose of auction, Naib Tahsildar was authorised. By no stretch of imagination it can be said that this action and authorization of Naib Tahsildar satisfy the requirement of Rule 285-A of 1952 Rules which contemplates auction either by Collector or an Assistant Collector authorised in this behalf by him. In no manner Assistant Collector would include a Naib Tehsildar. Therefore the auction conducted on 27th January, 1997 was evidently not in conformity with Rule 285-A of 1952 Rules.

In view of the above, it is, thus, clear that though there is no non-compliance of Rule 285-D and 285-E, yet, it cannot be said that the auction had been conducted by the competent authority and, therefore, there is a clear violation of rule 285-A.

Case law discussed:
1960 ALJ 549; 1965 RD 379; 2009 (107) RD 22; 2004 (56) ALR 115 (SC)

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

1. Heard Mr Anshu Chodhary for the petitioner, learned Standing Counsel, representing respondent nos. 1 and 2, and Mr Diwakar Rai Sharma, representing respondent no. 4. None appeared for respondent no. 3, though the case has been taken up in the revised list.

2. Writ petition is directed against the order impugned dated 5.11.1986 (Annexure - B) passed by respondent no. 2, SDM/Tehsildar, Sikandara Rau, Aligarh, and the order dated 5.11.1986 passed by respondent no. 1, the Commissioner, Agra Division, Agra.

3. The respondent no. 2 has auctioned the attached property of the petitioner, at plot nos. 38006 and 380-kha and 450, total area 25- 12-15. on 13.3.1986, which has been confirmed by respondent no. 2 on 9.6.1986. The petitioner filed an appeal/application before the Commissioner for setting aside the auction which has been rejected by the impugned order dated 5.11.1986 passed by respondent no. 1.

4. Learned counsel for the petitioner has challenged the impugned auction on the ground that the same was in violation of Rule 285-A, 285-D, 285-E and 285-J of the U.P. Zamindari Abolition and Land Reforms Rules, read with section 284 of the U.P. Zamindari Abolition and Land Reforms Act.

5. The respondents have filed counter affidavit.

6. In the counter affidavit filed by respondent no. 4, who is auction-purchaser, it is stated that after munadi by beat and drums a date of auction was fixed on 13.3.1986. Land in dispute of the petitioner was auctioned in presence of Jwala Singh, gram pradhan and other villagers. Respondent no. 4 was the highest bidder for Rs. 16,000/-, out of which he deposited Rs. 4,000/- at the spot. A report was submitted by Naib Tehsildar on 9.6.1986, recommending for confirmation to SDO, Sikandara Rao, Aligarh. Since the petitioner neither deposited the amount sought to be recovered nor filed any objection against the aforesaid auction; though a notice was issued to the petitioner and served personally by the official respondents. It is stated that the notice was served on 30.4.1986. The petitioner instead filed an appeal before the Commissioner on 8.7.1986, which was barred by limitation and has rightly been rejected by the Commissioner. The SDO, Sikandra Rao, had already issued a sale certificate in favour of respondent no. 4 on 25th June, 1986.

7. The petitioner has filed a rejoinder affidavit, in reply to the counter affidavit filed on behalf of respondent no. 4, wherein the case in the writ petition has been reiterated. However, he has further said in paragraph 4 of the rejoinder affidavit that even warrant of attachment was issued by a revenue clerk, and not by the Collector, as is evident from annexure -1 to the writ petition. Therefore, even the attachment or sale proclamation was illegal.

8. There is one more fact in order to complete the narration of facts, that the balance amount of the auction-money was deposited by respondent no. 4 on 31.3.1986.

9. A short question up for consideration is whether the auction proceedings in respect to the land in question have been held in accordance with the procedure prescribed in the statute or not.

10. Section 279 of U.P. Zamindari Abolition & Land Reforms Act, 1950 (hereinafter referred to as '1950 Act') lays down various processes following whereto recovery of an amount, recoverable as arrears of land revenue, can be made. Sub section 1(d), (e) and (f) of Section 279 provides that the amount can be recovered:

(d) by attachment of the holding in respect of which the arrear is due;

(e) by lease or sale of the holding in respect of which the arrear is due;

(f) by attachment and sale of other immovable property of the defaulter.

11. The procedure for attachment, lease and sale of holding, against which an arrears is due and other property of the defaulter is provided in Sections 284 and

286 of 1950 Act read with U.P. Zamindari Abolition and Land Reforms Rules, 1952 (hereinafter referred to as "1952 Rules") and Rules 281 to 286 deals therewith.

12. Rule 281(2) of 1952 Rules provides that process for sale of holding under Section 284 of 1950 Act and of other immovable property under Section 286 of 1950 Act shall be issued by Collector. In respect to the procedure of sale, Rules 285-A, 285-D, 285-E, 285-G, 285-H and 285-I provides as under:

"285-A. Every sale under Sections 284 and 286 shall be made either by the Collector in person or by an Assistant Collector specially appointed by him in this behalf. No such sale shall take place on a Sunday or other gazetted holiday or until after the expiration of at least thirty days from the date on which the proclamation under Rule 282 was issued.

285-D. The person declared to be the purchaser shall be required to deposit immediately twenty-five per cent of the amount of this bid, and in default of such deposit the land shall forthwith be again put up and sold and such person shall be liable for the expenses attending the first sale and any deficiency of price which may occur on the re-sale which may be recovered from him by the Collector as if same were an arrear of land revenue.

285-E. The full amount of purchase money shall be paid by the purchaser on or before the fifteenth day from the date of the sale at the district treasury or any sub-treasury and in case of default the deposit, after the expenses of sale have been defrayed therefrom, shall be forfeited to Government and the property shall be re-sold and the defaulting purchaser shall forfeit all claims to the property or to any part of the sum for which it may be subsequently sold.

285-G. No sale after postponement under Rule 285-A, 285-D or 285-E in default of payment of the purchase money shall be made until a fresh proclamation has been issued as prescribed for the original sale.

285-H. (1) Any person whose holding or other immovable property has been sold under the Act may, at any time within thirty days from the date of sale, apply to have the sale set aside on his depositing in the Collector's office-

(a) for payment to the purchaser, a sum equal to 5 per cent of the purchase money; and

(b) for payment on account of the arrear, the amount specified in the proclamation in Z.A. Form 74 as that for the recovery of which the sale was ordered, less any amount which may, since the date of such proclamation of sale, have been paid on that account; and

(c) the costs of the sale.

On the making of such deposit, the Collector shall pass an order setting aside the sale :

Provided that if a person applied under Rule 258-I to set aside such sale he shall not be entitled to make an application under this rule.

285-I (I) At any time within thirty days from the date of the sale, application may be made to the Commissioner to set aside the sale on the ground of some

material irregularity or mistake in publishing or conducting it; but no sale shall be set aside on such ground unless the applicant proves to the satisfaction of the Commissioner that he has sustained substantial injury by reason of such irregularity or mistake.

(ii) Deleted.

(iii) The order of the Commissioner passed under this rule shall be final."

13. Referring to Rule 285(A), learned counsel for the petitioner contended that auction could have been made either by the Collector in person or by an Assistant Collector specially appointed by him in this behalf. He pointed out that in the present case, it is evident from the counter affidavit that proclamation of sale was issued by Deputy Collector, Aonla and Tehsildar, Aonla and auction was made by Naib Tahsildar, which is not consistent with the procedure prescribed in the statute and therefore, the entire proceedings are illegal.

14. It would be appropriate to consider the aforesaid submission in the light of the definition of "Collector" in 1950 Act. The statute initially enacted contain the definition of Collector under Section 3(4) of 1950 Act as under:

"Collector" includes an Assistant Collector of the first class empowered by the State Government by a notification in the Gazette to discharge all or any of the functions of a Collector under this Act.

15. This definition of Collector underwent an amendment in 1974 and after the amendment it reads as under:

"Collector" **means an officer appointed as Collector under the provisions of U.P. Land Revenue Act, 1901**, and includes an Assistant Collector of the first class empowered by the State Government by a notification in the Gazette to discharge all or any of the functions of Collector."
(Words in bold in paras 16 & 17 denotes the difference)

16. Under Section 3(27) it is provided that the words and expressions, under-proprietor, sub-proprietor, revenue "mahal", Collector, **Assistant Collector,** Assistant Collector-in-charge of sub-division, Commissioner, Board, Tahsildar and minor, not defined in Act, 1950 and used in the United Provinces Land Revenue Act, 1901 (hereinafter referred to as "1901 Act") shall have the meaning assigned to them in that Act.

17. The Collector is appointed under Section 14 of 1901 Act. It reads as under:

"The State Government shall appoint in each district an officer who shall be Collector of the district and who shall throughout his district, exercise all the powers and discharge his duties by this Act or any other law for the time being in force. The term includes a Deputy Commissioner as well as the Superintendent of Dehra Dun"

18. Considering the old definition of Collector, this Court in **Paras Nath Singh Vs. State of U.P., 1960 ALJ 549** held that under Section 223 of 1901 Act, powers of a Collector can be conferred on an Assistant Collector of First Class. The powers of a Collector cannot be conferred on a 'Tahsildar' since he as such is not an Assistant Collector of First Class.

19. This decision of **Paras Nath Singh (supra)** has been affirmed in intra court appeal by the Division Bench in **State of U.P. & Anr. Vs. Paraspati Gram Samaj, 1965 RD 379.**

20. Recently a Division Bench of this Court in M/s R.D.Cements Industries Pvt. Ltd. Vs. Collector/D.M., Lucknow, 2010(111) RD 211 has said:

"Accordingly giving harmonious construction to provisions contained in sub-section (4) of Section 3 read with Rule 285-A of the U.P.Z.A. & L.R. Rules, the auction and sale proceeding may be conducted either by the Collector himself or the Assistant Collector of First Class duly appointed by the Collector and no other authority."

"The Collector or Assistant Collector cannot delegate power to Naib Tahsildar to hold the auction and sale proceeding under Rule 285-A of the U.P.Z.A. & L.R. Rules."

21. Learned standing counsel, however, has relied on a notification dated 7th January, 1964 in his written argument and in para 8 thereof says that by notification No.3937/1-A-1165(1)/54 dated 7th January, 1964 all Tahsildars were appointed as Assistant Collector, First Class. It further says that by another notification No.3937(1)/JA-1166(1)/54 all Assistant Collector First Class appointed under the aforesaid notification have been empowered to discharge all functions of Collector under Section 122-B of Act 1950.

22. Though copies of the aforesaid notifications have not been placed on record but assuming what is stated therein correct, firstly, it cannot be said that the said notification authorises a Naib Tahsildar to conduct auction sale or even an Assistant Collector First Class who is not especially empowered by the Collector to do so can hold auction under Rule 285-A of 1952 Rules. It is evident that unless authorised by Collector, an Assistant Collector also cannot hold auction. It is different thing, if in the matter of appointment of Collector under 1901 Act, the State Government includes an Assistant Collector First Class also but that is not sufficient to authorise him to further authorise anyone else to hold auction. Moreover, the aforesaid notification at the best are in reference to Section 122-B and therefore would not help the respondents in the matter of auction governed by Section 284 read with Rule 285A of the Rules.

23. Justice M.C.Desai in Paras Nath Singh (supra) while considering Section 223 of 1901 Act said that Tahsildar is a Revenue Officer appointed under Act 1901, Section 17. The Assistant Collector First Class or Second Class is a different officer appointed by the State Government under the said Act. A Tehsildar as such is not an Assistant Collector either of Ist Class or 2nd Class. Section 224 of Act 1901 though empowers the State Government to confer upon any Tehsildar all or any powers of the Assistant Collector Second Class but not with those of Assistant Collector First Class. The Collector is another Revenue Officer appointed by the Government under 1901 Act. Section 223 empowers the State Government to confer upon any Assistant Collector of First Class all or any of the powers of the Collector. In exercise of this powers the State Government conferred power of a

Collector upon all Assistant Collector First Class. When State Government in its wisdom conferred powers of Assistant Collector upon all Assistant Collector of First Class, it would not mean that a Tahsildar can claim to possess power of a Collector when authorises to discharge functions of Assistant Collector of Ist Class. All the officers namely Assistant Collector First Class, Second Class, Tahsildar are different officers in their own capacity. When Tahsildar invested with a power of Assistant Collector, he still remain a Tahsildar and does not become an Assistant Collector. Same is the position when an Assistant Collector First Class is conferred power of a Collector, he himself would not be a Collector as such.

24. My attention is drawn to another decision of Hon'ble Single Judge's judgment in Jagat Pal Singh Vs. State of U.P. 1994 ACJ 608 wherein a circular of Board of Revenue issued on 17th January, 1976 has been considered conferring power upon Assistant Collector/Sub Divisional Officer to perform functions of Collector. The reliance is not correct. It shows that in respect to the auction under Section 286 of 1950 Act, Board of Revenue authorised Assistant Collector/Sub Divisional Officer to conduct auction proceedings subject to condition that confirmation of sale shall be done by Collector. This Court held that the circular of Board of Revenue would not validate an auction conducted under Section 284 of 1950 Act where the procedure under Rules 285-A to 285-I shall apply. The Court said:

"A perusal of this notification goes to show that the Sub-Divisional Officer/Assistant Collector has only been authorised by this notification to conduct the auction proceedings under Section 286 of the Zamindari Abolition and Land Reforms Act subject to the condition that confirmation of sale shall be done by the collector. The power of the Collector, when he acts under Section 284 of the Zamindari Abolition and Land Reforms Act has not been conferred upon the Assistant Collector/Sub-Divisional Officer by this notification. As seen in the earlier part of this judgment the sale in the present case has taken place under the provisions of Section 284 of the Act and not under Section 286. Therefore this notification dated 17.1.1976 will not apply to the facts of the present case. Moreover, there is another ground on the basis of which it cannot be said that the Assistant Collector/Sub-Divisional Officer has been invested with the power to confirm the sale. The last sentence of the notification dated 17-1-76 clearly goes to show that the power of conducting sale proceedings under Section 286 of the Act has been conferred upon the Assistant Collector/Sub-Divisional Officer with the condition that confirmation of sale shall be done by the Collector. It means that only a power to auction the property or conduct the sale has been given to the Assistant Collector/Sub-Divisional Officer and not a power to confirm the sale which has been given to the Collector under the provisions of Rule 285-I of the U.P. Zamindari Abolition and Land Reforms rules. Therefore this notification does not, in any way, confer powers on the Assistant Collector/Sub-Divisional Officer, holding the charge of a sub-division, to confirm the sale. Power to confirm the sale still vests with the Collector. It is the settled view that a person who has purchased the property in auction sale has a right to approach the

Court but a person who has not derived any title in the auction sale cannot come to the Court for enforcing his rights. Unless a right is conferred on the person that right cannot be got enforced by him by means of writ petition or by suit. The basis on the title on which the petitioner has filed the present writ petition is not there. Therefore the petitioner cannot complain that the Collector had no power to pass orders for re-auction of the property in dispute."

25. Moreover, in my view, neither the Act nor the Rules in question confer power upon Board of Revenue to authorise Assistant Collector in such matter as this power is vested with the State Government.

26. In Ram Awadh Tiwari Vs. Sudarshan Tiwari & Ors., 2008 (105) RD 322 this question attracted this Court's attention specifically. In exercise of power under Section 3(4) of 1950 Act, a notification was issued on 11th June, 1953 to the following effect:

"In exercise of the powers conferred by clause (4) of section 3 of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 [(Act 1 of (1951)], the Governor is pleased to empower all the Sub-Divisional Officers in Uttar Pradesh except those in the districts of Almora, Garhwal, Tehri Garhwal and Rampur to discharge all the functions of a "Collector under the said Act."

27. Another notification was issued on 5th December, 1968 whereunder Sub Divisional Officers were empowered to exercise all powers of Collector under 1951 Act except the power under Section 198 of the said Act. Another notification under Section 3(4) of 1950 Act was issued on 17th January, 1976 to the following effect:

"In exercise of the powers under clause (4) of section 3 of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 (U.P. Act No. 1 of 1951), the Governor is pleased to empower all the Assistant Collectors of the First Class, who are Incharge of the sub-division, to discharge the functions of a "Collector" under Section 286 of the said Act in respect of any holding of a defaulter of which he is a Bhumidhar. Sirdar or Assami, subject to the condition that such sales are approved by the Collector."

28. It was contended in Ram Awadh Tiwari (Supra) that in view of aforesaid notifications, a Sub Divisional Officer and Assistant Collector can exercise all the powers of Collector including that of auction.

29. In the aforesaid judgment, this Court observed that Deputy Collector has been conferred power of Collector under 1950 Act except that of Section 198 but Assistant Collector, who is In charge of the Division has been authorised to exercise functions of Collector under Section 286 but the power of confirmation of sale still continued to be vested in Collector.

30. Even if what has been said above, can it be said that rule 285 has been followed in the present case? The answer would be in the negative. Annexure - 1 to the writ petition shows that Naib Tehsildar was authorised to conduct the auction of property in dispute. Pursuant thereto, the auction sale has been

held by Naib Tehsildar and he sought confirmation of auction from the Dy. Collector, vide his report dated 9.6.1986, who has confirmed the same on the same date.

31. It shows that for the purpose of auction, Naib Tahsildar was authorised. By no stretch of imagination it can be said that this action and authorization of Naib Tahsildar satisfy the requirement of Rule 285-A of 1952 Rules which contemplates auction either by Collector or an Assistant Collector authorised in this behalf by him. In no manner Assistant Collector would include a Naib Tehsildar. Therefore the auction conducted on 27th January, 1997 was evidently not in conformity with Rule 285-A of 1952 Rules.

32. Then comes the question whether Rule 285-D has been followed or not. It contemplates that 25% of the auction money shall be deposited at the fall of hammer and the remaining 75% within 15 days. In the circumstances it cannot be said that Rule 285-D has not been followed. As is evident from the record, on the date of auction, i.e. 13.3.1986, 25 percent of the bid amount was deposited by respondent no. 4 and the rest of the amount was to be deposited by 28.3.1986. But, as stated by the petitioner in paragraph 8 of the writ petition, the said amount was deposited on 31.3.1986.. This fact has been denied by respondent no. 4 in paragraph 8 of the counter affidavit and he has also filed two receipts of balance of amount dated 28.3.1986 with it, being annexure nos. - 2 and 3. Thus, it cannot be said that rule 285-D has not been followed in the case in hand.

33. In view of the above, it is, thus, clear that though there is no non-compliance of Rule 285-D and 285-E, yet, it cannot be said that the auction had been conducted by the competent authority and, therefore, there is a clear violation of rule 285-A.

34. Now, the crucial question at this stage would be the effect of non-compliance of rule 285-A.

35. The Apex Court has considered this issue in **State of U.P. & Ors. Vs. M/s Swadeshi Polytex Ltd. & Others**, 2009 (107) RD 22 and in para 14 of the judgment relying on an another decision in **S.J.S. Business Enterprises (P) Ltd. Vs. State of Bihar**, 2004 (56) ALR 115 (SC) the Apex Court held that such an auction would be illegal and inconsistent with the procedure prescribed in Rule 285 and 285-A.

36. In Swadeshi Polytex Ltd. (supra) which was a judgment arising out of a Division Bench judgment of this Court, Apex Court clearly held that procedure prescribed for auction in Rule 285-A and onwards is mandatory and non observance thereof shall vitiate entire auction. It is worthy to mention at this stage that after 42nd amendment of Constitution though right to property is no more a fundamental right but still it is a constitutional right guaranteed under Article 300-A which says that no person shall be deprived of his property except in accordance with procedure prescribed in law. Since Constitution guarantees a person of his right to property except procedure prescribed in law meaning thereby in the matter of procedure, observance thereof has to be in words and spirit strictly and consistent thereto, failing which deprivation of property would be illegal and also unconstitutional

being violative of Article 300-A of Constitution of India.

37. The petitioner has made a serious allegations agtainst official respondents but they proposed not to file any reply. The manner in which the auction in question has been held, clearly shows that it is not valid and there is a clear non-compliance of rule 285-A. The petitioner has been deprived of his property without following the procedure prescribed in law. For this defect/illegality in conducting the auction, responsibility lie solely upon respondent nos. 1 and 2. The petitioner has suffered and remained deprived of the benefit of his property for the last almost 25 years on account a serious illegality committed by respondent no. 1 and 2. In these circumstances, in my view, petitioner is entitled for a suitable cost which should be exemplary as well as compensatory in nature.

38. In view of the above, the writ petition is allowed.

39. The auction impugned in the writ petition is hereby quashed. As a result of quashing of auction in question, any subsequent proceeding conferring any right upon respondent no. 4 in respect of the land in dispute shall stand nullified and would not confery any right, title, benefit or interest upon respondent no. 4. So far as the money deposited by respondent no. 4 is concerned, he shall be entitled for its refund. However, for the simple reason that he has been enjoying the property in question during the entire period therefore, there is no occasion to allow any interest on the amount paid by respondent no. 4.

40. The petitioner shall also be entitled to the costs, quantified to Rs. 50,000/- against respondent no. 2.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 23.05.2012

BEFORE
THE HON'BLE RAN VIJAI SINGH, J.

Civil Misc. Writ Petition No. 25522 of 2012

Chandra Pal and another ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Santosh Kumar Pandey

Counsel for the Respondents:
C.S.C.
Sri Mahesh Narain Singh

Constitution of India, Article 226- application under order 9 rule 13- allowed by Trail Court condoning the delay in filing application-revision also dismissed-Writ Court-declined to interfere on technical objection that no separate application under heading of delay condonation filded-obviously at the time of recalling ex-parte order Trail Court considered the explanation-given in affidavit as well as merit of the case - discretion exercise in proper manner doing substantial justice-can not be interfered by Writ Court.

Held: Para 8

In view of the decision of the Apex Court it is abundantly clear that while considering the delay condonation application the court has to see the merit of the case also as the law of limitation is not meant to take away the right of Appeal. The courts are meant for imparting justice and not to scuttle the justice on technicalities. The length of delay is also not very much material if

there is a substance on merit. Further once the discretion has been exercised in positive manner then it should not be interfered with unless it is perverse and based on no material.

Case law discussed:

JT 1987 (1) SC 537=1987 (2) SCR 387; JT 2000 (5) 389

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

1. Through this writ petition, the petitioners have prayed for issuing a writ of certiorari quashing the order dated 28.3.2012 passed by respondent no. 2 and order dated 6.6.2008 passed by respondent no. 3. Vide order dated 6.6.2008, the application of the respondent-defendant filed under Order 9 Rule 13 of Code of Civil Procedure for setting aside the exparte decree was allowed after condoning the delay and by the subsequent order, the revision filed by the petitioner which was numbered as Revision No. 443 of 2007-2008 has been dismissed.

2. Sri Santosh Kumar Pandey, learned counsel for the petitioner, while assailing the impugned orders, has submitted that there was no section 5 application along with application for setting aside the exparte decree. He has also submitted that the application was barred by time, therefore it should have been accompanied with an application for condonation of delay with supporting an affidavit explaining the reason why the application was not filed well within time. He further contends that both the courts below have erred in ignoring this aspect of the matter as admittedly there was no application for condonation of delay and a separate affidavit was filed which was not the part of Section 5 application, therefore the courts below have erred taking that into consideration for condoning the delay and setting aside the exparte decree. In his submissions, the summons were duly served and the respondents avoided to participate in the proceeding.

3. Refuting the submission of learned counsel for the petitioner, Sri Gaurav Sisodiya, learned counsel appearing for the respondent no. 4 submits that the delay have been condoned and the exparte decree has been set aside and now substantial justice have been done to the parties and this Court sitting under Article 26 of the Constitution of India should not enter in these controversy.

4. I have heard learned counsel for the parties and considered their submissions.

5. From the perusal of the record, it transpires that although there was no application for condonation of delay but the grounds have been made praying for condonation of delay and an affidavit was also filed explaining the reason as to why the application was not filed well within time, there may be some technical defects in the format and filing of the application for condonation of delay but the Apex court has held that once the delay has been condoned meaning thereby the court has exercised the discretion in positive manner, the higher Court should not interfere with such order where the delay has been condoned.

6. The law relating to the delay condonation has been dealt with by the Apex Court in numerous cases and ratio of those cases favours the disposal of the cases on merit instead of rejecting the same on the ground of delay. The Apex

Court in the case of Collector, Land Acquisition, Anantnag & Anr. Vs. Mst. Katiji & Ors. (JT 1987 (1) SC 537 = 1987 ***(2) SCR 387)*** has given following guidelines while dealing with the delay condonation application :-

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

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

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

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

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

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

7. In the case of State of Bihar and others Vs. Kameshwar Singh and others reported in JT 2000 (5) 389 after considering various cases of the Apex Court on condonation of delay application has held :

Para 12..... " *The expression 'sufficient cause' should, therefore, be considered with pragmatism in justice-oriented process approach rather than the technical detention of sufficient case for explaining every day's delay. The factors which are peculiar to and characteristic of the functioning of pragmatic approach in justice -oriented process. The court should decide the matters on merits unless the case is hopelessly without merit. No separate standards to determine the cause laid by the State vis-a-vis private litigant could be laid to prove strict standards of sufficient cause".*

Para 13..... " *It is axiomatic that condonation of delay is a matter of discretion of the court. Section 5 of the Limitation Act does not say that such discretion can be exercised only if the delay is within a certain limit. Length of delay is no matter, acceptability of the explanation is the only criterion. Sometimes delay of the shortest range may be uncondonable due to want of acceptable explanation whereas in certain other cases, delay of a very long range can be condoned as the explanation thereof is satisfactory.* ***Once the court accepts the explanation as sufficient, it is the result of positive exercise of discretion and normally the superior court should not disturb such finding, much less in revisional jurisdiction,***

unless the exercise of discretion was on wholly untenable grounds or arbitrary or perverse. But it is a different matter when the first court refuses to condone the delay. In such cases, the superior court would be free to consider the cause shown for the delay afresh and it is open to such superior court to come to its own finding even untrammelled by the conclusion of the lower court".

8. In view of the decision of the Apex Court it is abundantly clear that while considering the delay condonation application the court has to see the merit of the case also as the law of limitation is not meant to take away the right of Appeal. The courts are meant for imparting justice and not to scuttle the justice on technicalities. The length of delay is also not very much material if there is a substance on merit. Further once the discretion has been exercised in positive manner then it should not be interfered with unless it is perverse and based on no material.

9. Here in this case, the delay has been condoned by the court below i.e. Sub-Divisional Officer Faridpur and the revision filed by the petitioner has been dismissed, now those orders are impugned in the writ petition. Sitting under Article 226 of the Constitution of India, I am not inclined to interfere in such a matter where the delay has been condoned.

10. However, considering the facts and circumstances of this case, I find that the cost imposed by the courts below of Rs. 300/- is very less and the same is being enhanced by Rs.1,000/- which is directed to be paid to the petitioners before the court of Sub-Divisional Officer, where the case is pending. In case the respondents, herein, deposit of Rs. 1,000/- along with certified copy of the order of this Court before the Sub-Divisional Officer, the Sub-Divisional Officer shall proceed thereafter in accordance with law.

11. The writ petition is disposed of.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.05.2012

BEFORE
THE HON'BLE ARUN TANDON, J.

Civil Misc. writ Petition No. 27344 of 2012

Ahmad Rasheed and others ...Petitioners
Versus
State of U.P. Thru Secy. and others ...Respondents

Counsel for the Petitioner:
Sri Ramesh Kumar Shukla
Sri Anil Sharma

Counsel for the Respondents:
C.S.C.

Constitution of India, Article 226-power to hold election-limited only to hold election-by person/authority nominated by court-where only one member by Court-where only one member surviving-authorize controller or such nominated person not competent to induct new member-only Court to frame scheme permissible under law-petition disposed of accordingly.

Held: Para 19

However, in the opinion of the Court the only remedy for the petitioners to file a civil suit for intervention in the matter so as to come over the peculiar situation, which has arising in the institution for want of valid members of the General Body and it is for the competent Civil

Court to frame a scheme as may be permissible under the law.

Case law discussed:

1991 (1) U.P.L.B.E.C. 558; 2000 A.L.R. (38) page 431; AIR 1971 SC 966

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

1. It is not in dispute that the elections of the Committee of Management of Bijnor Inter College, Bijnor were last held on 16th August, 1998. The elections were grant recognition on 9th September, 1998.

2. The dispute pertaining to the subsequent elections pleaded lastly travelled up to High Court in Special Appeal No. 1752 of 2010. The Division Bench of this Court disposed of the special appeal by issuing following directions:

"Accordingly, in view of the above agreed position between the parties, we dispose of this appeal by modifying the order of the learned Single Judge that the election of the Committee of Management of the institution shall be held under the supervision of the District Magistrate, Bijnor through the valid members of the Society.

So far as the management of the affairs of the institution is concerned, the same will abide by the order dated 1st September, 2010 passed by the Joint Director of Education, till the new Committee is constituted and takes charge.

The list of valid members, after due verification, will be prepared within six weeks, as directed by the learned Single Judge, and thereafter elections shall be held within one month from the said date by the Election Officer.

The appeal stands disposed of."

3. This Court may record that prior to the order of the Division Bench of this Court dated 27.10.2010, the Joint Director of Education had appointed Shri Hakeem Naseem-Ur-rahman, the outgoing President of the Committee of Management, as the nominated person for getting the fresh elections held, reference page 123 of the paper-book. According to the petitioners, the term of such nominated person/Authorized Controller can be three months only.

4. In the light of the directions issued by the Division Bench of this Court as aforesaid, the list of valid members after due verification was to be prepared within six weeks. Thereafter, the elections were to be held within one month to be notified by the Election Officer.

5. The petitioners claimed to be enrolled as life members by the earlier nominated person Shri Ikbal Ahmad.

6. The issue with regard to the finalization of the electoral college came be considered by the District Magistrate as directed, who in turn authorized the Sub Divisional Magistrate to oversee the elections.

7. The Sub Divisional Magistrate under the order impugned after referring to the judgment of the High Court in the case of ***Rajendra Pal Singh Vs. District Inspector of Schools, Jalaun*** reported in ***1991 (1) U.P.L.B.E.C. 558*** has held that a nominated person/Authorized Controller

has no competence to enroll new members to the General Body.

8. Therefore, such enrollment of the petitioners as life members has been held to be illegal. It has been held that there is only one surviving life member of the General Body. Therefore, in such circumstances a letter may be written to the Director of Education to appoint a person for enrolling new members.

9. It is against this order, the present writ petition has been filed.

Two questions have been raised in the present petition. ***(a)*** If a person has been appointed to held the fresh elections, he gets the competence to enroll new members and ***(b)*** in the facts of the case, there being only one surviving life member, the nominated person/Authorized Controller had to induct new members in the General Body so that valid elections could take place.

10. Heard Shri Anil Sharma, Advocate assisted by Shri R.K. Shukla, Advocate on behalf of the petitioners and learned Standing Counsel on behalf of the State-respondents.

11. It may be mentioned at the very outset that a Division Bench of this Court has held that the Authorized Controller has no competence to enroll new members reference ***Ranbir Singh Vs. District Inspector of Schools at Orai & others, 2000 A.L.R. (38) page 431.***

12. The Hon'ble Supreme Court of India in the case of ***Smt. Damayani Naranga Vs. Union of India, AIR 1971 SC 966*** has held that no member can be inducted except with the consent of the members of the voluntary Association as that of the present one.

13. In view of the legal position so explained, this Court has no hesitation to record that neither the Authorized Controller nor the nominated person has any right to enroll new members to the General Body for the purposes of holding fresh elections of the Committee of Management.

14. The right available to an association of persons belonging to minority section, which runs minority institutions is more sacrosanct, wherein the right to form the association stands protected not only under Article 19 (1) (C) but also under Article 30 of the Constitution of India.

15. This Court may further record that the powers, which have been conferred upon the nominated person/Authorized Controller under the scheme of administration i.e. Chapter IV Clause 5, proviso reads as follows:

''यदि प्रबन्ध समिति का पांच वर्ष का कार्यकाल समाप्त होने के पश्चात छः महीने के अन्दर मौजूदा प्रबन्ध समिति चुनाव नही कराती तो प्रबन्ध समिति स्वतः समाप्त समझी जायेगी तथा समाप्त होने वाली प्रबन्ध समिति का अध्यक्ष प्रबन्ध समिति का कार्यभार संभाल लेगा तथा वह तीन महीने के अन्दर चुनाव कराने का पाबन्द होगा अगर वह भी चुनाव नही कराता तो डी0डी0आर भंग होने वाली समति में से किसी भी व्यक्ति को चुनाव कराने के लिए नामजद करेंगे। जो चुनाव करायेगे।''

16. It is apparently clear that after the term of five years of the earlier Committee of Management expires then the President of the outgoing Committee of Management gets a limited right to get fresh elections of the Committee of Management held and in case he fails to

get fresh elections held then the Deputy Director of Education can appoint a person for the purposes of holding fresh elections. It is, therefore, clear that the right, which is conferred upon the nominated person is only to held fresh elections only. All other rights under the scheme of administration especially those pertaining to enrollment of new members is not conferred or transferred upon such nominated person/Authorized Controller.

17. Reference may also be had to the Clause 1 of Chapter II, which confer a right upon the General Body to accept or not to accept a person as member with a further provision that in case of dispute, the decision of the President shall be final.

18. Admittedly, as on date the General Body comprises of only one member and there is no President. Therefore, the question of enrollment of new members in accordance with the scheme of administration does not arise. As already noticed above, the nominated person/Authorized Controller has not been conferred any power under the scheme of administration to enroll new members. The Sub Divisional Magistrate appears to be legally justified in recording a finding that the enrollment of new members by earlier nominated person was apparently illegal. Similarly, there cannot be any directions by the Joint Director of Education for authorizing any other person to induct new members to the General Body.

19. However, in the opinion of the Court the only remedy for the petitioners to file a civil suit for intervention in the matter so as to come over the peculiar situation, which has arising in the institution for want of valid members of the General Body and it is for the competent Civil Court to frame a scheme as may be permissible under the law.

20. Writ petition is disposed of with a direction upon the Education Authorities to not to enroll any new member to the General Body of the institution except under orders of a competent Civil Court.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.04.2012

BEFORE
THE HON'BLE AMRESHWAR PRATAP SAHI, J.

Civil Misc. Writ Petition No. 27994 of 2006

Smt. Madhubala ...Petitioner
Versus
H.P. Singh and others ...Respondents

Counsel for the Petitioner:
Sri Arun Sharma

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

Code of Criminal Procedure-order XXIII, Rule 3 (A)-compromise not signed by petitioner-nor authorize the Counsel to do so-order passed on basis of said compromise-held illegal-matter remitted back for decision on merit.

Held: Para 9

In the instant case there is no dispute that the compromise was not signed by the petitioner and the records also indicates the same impugned order, therefore, incorrectly assumes that the petitioner had signed the compromise. The authorization through the vakalatanama has to be supplemented by the actual compromise being signed by the parties themselves.

Case law discussed:
1992 (1) S.C.C. Page 31; AIR 1993 SC Page 1139

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

1. Heard Sri Arun Sharma, learned counsel for the petitioner and Sri Shukla who has put in appearance on behalf of the respondent no.2, Insurance Company. Inspite of service of notice on respondent no.1 by all modes, no one has put in appearance on his behalf.

2. The challenge in this petition is to the order passed by the Permanent Lok Adalat dated 29th July 2001 whereby it has proceeded to decide the motor accident claim on the basis of a compromise said to have been entered into by the counsel for the petitioner and the respondent no.2.

3. Sri Sharma contends that the petitioner had never instructed her counsel to enter into a compromise and even otherwise the compromise was against the interest of her minor child and there was no compromise in writing between the petitioner and the contesting opposite party.

4. The Permanent Lok Adalat proceeded on the basis of the compromise application bearing exhibit paper No. 22 A and came to the conclusion that in view of the said compromise having been read and explained to the parties, the same deserved to be accepted, as such, the order was passed accordingly on the basis thereof.

5. The petitioner has come up with a clear case that there was no compromise drawn up in writing or signed by the petitioner and, therefore, the recital contained in the order that the claimant has also signed the same is incorrect. She further submits that her counsel had not been instructed to enter into any compromise. The compromise memo was unauthorized and was not in conformity with the provisions of Order XXIII read with Rule 3 (A) of Civil Procedure Code. The matter had been heard on the previous occasion and the learned counsel was granted time to study the case law including the decision in the case of **Byram Pestonji Gariwala Vs. Union Bank of India 1992 Volume (1) S.C.C. Page 31.**

6. Sri Shukla, learned counsel for the respondent states that he does not propose to file any counter affidavit at this stage and, therefore, the matter be disposed of finally.

7. Sri Sharma has invited the attention of the Court to the Subsequent Judgment of the Apex Court in the case of **Banwari Lal Vs. Smt. Chando Devi reported in AIR 1993 SC Page 1139** paragraph Nos. 6 to 10 to urge that the compromise being absolutely void and not in conformity with law, the order impugned deserves to be set aside.

8. Having perused the aforesaid judgment the ratio laid down therein is that the Court must insist upon the parties to reduce the terms of compromise in writing and further it should be signed by the parties so as to make a complete agreement in terms of the Contract Act capable of being enforced by a court of law. The said judgment now categorically in view of the amendment brought about in Order

XXIII Rule 3 of the proviso therein, requires a compromise to the signed by the parties and presented before the Court.

9. In the instant case there is no dispute that the compromise was not signed by the petitioner and the records also indicates the same impugned order, therefore, incorrectly assumes that the petitioner had signed the compromise. The authorization through the vakalatanama has to be supplemented by the actual compromise being signed by the parties themselves.

10. In view of this wrong assumption of fact and keeping in view the law laid down by the Apex Court in the case of Banwari Lal (supra), the order dated 29th July 2001 and the subsequent order dated 25.3.2006 rejecting the misc. application of the petitioner, cannot be sustained.

11. Accordingly the impugned orders dated 29th July 2001 and 25.3.2006 are set aside. The matter stands remitted to the Motor Accident Claims Tribunal to proceed to decide the claim in accordance with law ignoring the said compromise as expeditiously as possible, preferably within a period six months from the date of production of a certified copy of this order. The writ petition is allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.05.2012

BEFORE
THE HON'BLE PANKAJ MITHAL, J.

Civil Misc. Writ Petition No. 30971 of 2011

Mohan Kumar Varshney and others
...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Vinod Kumar Agrawal

Counsel for the Respondents:
C.S.C.

Constitution of India Article 226- Deficiency of Stamp duty-Petitioner submitted reply to the Notice-but imposition of penalty without Notice on opportunity-violation of principle of Natural Justice-unsustainable.

Held: Para 7

In view of the above, determination of deficiency in excess of the amount mentioned in the notice is clearly in violation of the principles of the natural justice and can not be sustained in law. The authorities could not have travelled beyond the show cause notice in determining the deficiency.

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

1. Heard Sri Vinod Agrawal, learned counsel for the petitioner and Sri Nimai Das, learned Standing counsel.

2. Pleadings exchanged between the parties have been perused and with the consent of the parties the writ petition is being finally decided.

3. The challenge made in the writ petition is to the order dated 24.12.2009 passed by the Collector Mahamaya Nagar and the appellate order thereto dated 20.4.2011 passed by the Chief Controlling Revenue Authority.

4. The argument advanced by the learned counsel for the petitioner is that the authorities could not have determined the deficiency in stamp duty in excess of the amount shown in the show cause notice.

5. The show cause notice is on record. It requires the petitioner to submit explanation as to why deficiency in stamp duty of Rs. 8,37,000/- may not be determined in connection with the instrument dated 13.7.2005. It means that the authorities were themselves satisfied that there was deficiency of Rs. 8,37,000/- and not more. The petitioner as such was given opportunity only in that regard. There was no notice to the petitioner to submit reply as to why penalty of Rs. 30,11,160/- may not be imposed.

6. The show cause notice was never modified and no corrigendum in that regard was issued.

7. In view of the above, determination of deficiency in excess of the amount mentioned in the notice is clearly in violation of the principles of the natural justice and can not be sustained in law. The authorities could not have travelled beyond the show cause notice in determining the deficiency.

8. Accordingly, the impugned orders dated 24.12.2009 passed by the Collector and 20.4.2011 passed by the Chief Controlling Revenue Authority are quashed and the matter is remanded to the Collector for determining the deficiency afresh keeping in view the show cause notice issued to the petitioner.

9. The writ petition is allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.05.2012

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 32251 of 1994

Bhuvnendra Singh ...Petitioner
Versus
State of U.P. & another ...Respondents

Counsel for the Petitioner:
Sri M.S. Singh
Sri Ashok Khare
Sri M.K. Shukla
Sri Manu Khare
Sri Manish Singh
Sri H.O.K. Srivastava

Counsel for the Respondents:
S.C.

U.P. Imposition of Ceiling on Land Holding Act, 1966-Section 3 (8) readwith Section 10 (2)-surplus land-land earlier recorded with name of Father-died on 27.11.1983 and mother died on 17.04.87-after name recorded as neutral heir-notice issued-petitioner replied that sale transaction made after 24.01.71 as upto 84 the land was within ceiling limit-ignored by authority-held-illegal-land recorded as Pond covered by water-not within definition of land-held-land submerged under water should be exempted-non consideration these aspect-

held-great illegality-order quashed matter remitted back for fresh consideration.

Held: Para 5 and 9

The details of the sale deed have been given in para 23 and it shows that out of six deeds, there was only one sale deed dated 13.6.1986 which was executed after devolution of the holding of the petitioner's father upon petitioner after his death and rest of the deeds were executed when petitioner's holding was in his own rights and within the ceiling limits since the same was distinguished and other than holdings of petitioner's father, who was already subjected to ceiling proceedings separately at that time. In my view, this aspect has not been validly and legally considered by the authorities concerned and therefore, on this aspect the matters needs be reconsidered.

In the present case it is not in dispute that Gata No.604 on the spot actually was the land submerged under water and a pond. That be so, in view of the above exposition of law, it would not qualify to be a land so as to be included for the purpose of determining surplus land of the petitioner along with his other holding.

Case law discussed:
1978 AWC 574; 2008 (105) RD 185

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

1. Both these matters relates to common questions of law and facts and therefore, as requested and agreed by learned counsel for the parties, are being heard and decided by this common judgement.

2. Heard Sri Manu Khare, learned counsel for the petitioner and learned Standing Counsel for the respondents.

3. This writ petition has arisen out of the orders passed by ceiling authorities in the proceedings arising out of U.P. Imposition of Ceiling on Land Holdings Act, 1960 (hereinafter referred to as "Act 1960"). The Prescribed Authority by order dated 28.9.1993 (Annexure 1 to the writ petition) declared 5.11 acres at Village Malakapur, Pargana Koda, District Fatehpur being Gata No.450 and 480 irrigated land surplus and the Appellate Authority has confirmed the said order by rejecting petitioner's appeal vide order dated 30.5.1994.

4. Sri Manu Khare, learned counsel appearing for the petitioner contended that earlier ceiling proceedings were initiated against petitioner's father and had attained finality. However, on 27.11.1983 the petitioner's father died and on 17.4.1987 his mother died. The holding of the petitioner's parent naturally succeeded by the petitioner as a result whereof his holding exceeded the prescribed limit giving an occasion to the ceiling authorities to initiate ceiling proceedings by issuing a notice dated 1.7.1989 under Section 10(2) of the Act 1960. After considering the objections filed by the petitioner, 11 issues were framed by Prescribed Authority. Learned counsel for the petitioner contended that much before the death of the petitioner's parents, a sizeable area of holding belong to petitioner was already transferred by way of several sale deeds executed to various persons for bona fide and valid consideration. The same therefore could not have been included to determine surplus land against the petitioner. The authorities below have rejected petitioner's contention only on the ground that all the aforesaid sale deed were registered after 24.1.1971 ignoring the fact that upto 1983 the land in its entirety did not belong to the petitioner and whatever holding the petitioner had up to 1983 i.e. till the death of his father was within ceiling limit. Therefore in a bona fide manner he claims to have executed certain sale deeds, and, unless the same are found to be vitiated on account

of lack of bona fide and valid consideration, the same could not have been excluded only on the ground that they were executed after 24.1.1971.

5. The details of the sale deed have been given in para 23 and it shows that out of six deeds, there was only one sale deed dated 13.6.1986 which was executed after devolution of the holding of the petitioner's father upon petitioner after his death and rest of the deeds were executed when petitioner's holding was in his own rights and within the ceiling limits since the same was distinguished and other than holdings of petitioner's father, who was already subjected to ceiling proceedings separately at that time. In my view, this aspect has not been validly and legally considered by the authorities concerned and therefore, on this aspect the matters needs be reconsidered.

6. Secondly, it is contended that Gata No.233, 350 and 440 mentioned in the notice were grove land and therefore, had to be exempted. On this aspect issue no.4 was framed. The State contended that Gata No.350 was a typing error and it was actually 450. In respect to the land in Gata No.233 and 440, findings shows that in 440 it was registered as grove, mentioning the number of trees being 40 of guava and one of mango. Section 3(8) of the Act 1960 while defining grove land excluded the holding having trees of guava, papaya, banana and vine. In Gata No.440 virtually all the trees of guava and only one tree of mango which would not make it a grove land under Section 3(8) but the land virtually having trees of guava, it would not qualify to be a 'grove land' under Section 3(8) of the Act 1960. Similarly, since Gata No.233 have all the trees of guava, it also rightly has not been held to be a 'grove land'. However, in respect to Gata No.450, nothing has been said. As pointed out otherwise by the petitioner, no interference is called for in the aforesaid findings.

7. Learned counsel for the petitioner has relied on a decision of this Court in **Hamid Husain Vs. State of U.P., 1978 AWC 574**. The aforesaid judgment on the contrary, in my view, does not help the petitioner but goes against him inasmuch as in para 6 thereof it says:

"The trees which do not constitute grove within the meaning of this definition are guava, papaya, banana or vine trees."

8. Lastly, it is contended that Gata No.604 is a pond and the land being sub merged in the water does not fall within the definition of 'land' hence could not have been included to determine surplus area of the holding belong to the petitioner. This question has been considered vide issue No.8 and the Courts below have simply observed that under Act 1960 there is no provision to exclude a land which is a pond on the spot. In my view, the authorities below have erred in law in deciding issue no.8. This Court has considered this aspect in **Vibhuti Kumar Bajpai Vs. State of U.P. through Collector Lucknow & Ors., 2008(105) RD 185** and in para 12 and 13 of the judgment it has said as under:

12. The identical controversy arose in a case before this Court in the case of Tej Pal Singh v. State of U.P. and Ors. 1999 (90) RD 424, and the Court, while observing that in spite of directions of the Supreme Court dated 01.12.1987 given in SLP No. 3654 of 1987 that the petitioner's ceiling area be re-determined after arriving at a finding as to whether the plots of the petitioner are irrigated and submerged under water or not, the courts below have not adverted to the question involved in the light of judgment of

the Supreme Court, allowed the writ petition and set aside the orders impugned and also remanded the matter to the Prescribed Authority for making spot inspection. The relevant portion of the said judgment is as follows:

"3. The Prescribed Authority and in appeal, the Additional Commissioner mentioned in their judgments the two directions given by the Supreme Court which were required to be followed by the respondents, but while deciding the case of the petitioner, only gave lip service to the directions of the Supreme Court. The directions of the Apex Court are binding and its non-compliance directly or indirectly amounts to non-application of mind.

4. The question as to whether the land of the petitioner is submerged under water or not cannot be decided only from the entries mentioned in the records or upon the statement of Lekhpal. In view of the directions of the Apex Court, it was incumbent upon the Prescribed Authority to have made spot inspection in the presence of the petitioner and to have prepared a detailed report about the plots which are alleged to be submerged under water."

13. In another case Rani Prem Kunwar v. District Judge, Bareilly and Ors. 1978 AWC 431 again the question arose as to whether the land submerged with water can be treated to be the land for the purposes of the Act. This Court after considering the definition of the land laid down as under:

"5. The preamble makes it clear that the Act has been passed to provide land for landless agricultural labourers and for a more equitable distribution of land as also in the interest of community to ensure increased agricultural production and for other public purposes as best to subserve the common good. The object of the Act, therefore, is to carve out land from the large holdings so that the remaining holdings may be manageable and capable of more intensive cultivation as also to provide land to whose who could not have got it or who have very little of it. Obviously this purpose cannot be achieved unless there is land. A land which remains submerged with water and which cannot be used for any purpose contemplated by Section 3(14) of U.P. Act I of 1951 cannot be regarded as land nor it can serve the purposes contemplated by the preamble of the U.P. Imposition of Ceiling on Land Holdings Act.

6. The learned Standing Counsel has referred to Sections 3(2), 3(9), 3(16) and 3(17) which define ceiling area, holding, surplus land and tenure-holders respectively. His contention is that if the petitioner is tenure-holder of plot No. 135 and it is not exempted from Section 6 of the Act it will be included in determining the ceiling area. I am reluctant to subscribe to this view because in all these proceedings the word used is 'land' which is defined in Section 3(14) of U.P. Act I of 1951 only. As discussed above, plot No. 135 does not fall within the definition of land and it cannot be taken into consideration in determining the ceiling area. The learned District Judge committed manifest error of law by including it in that area."

9. In the present case it is not in dispute that Gata No.604 on the spot actually was the land submerged under water and a pond. That be so, in view of the above exposition of law, it would not qualify to be a land so as to be included for the purpose of determining surplus

land of the petitioner along with his other holding.

10. No other issue has been argued.

11. In view of the above discussion it is evident that the matter need be reconsidered by the authorities below on the issues discussed above.

12. The writ petition is allowed. The impugned orders dated 28.9.1993 and 30.5.1994 (Annexures No. 1 and 2 to the writ petition) are hereby set aside. The matter is remanded to the Prescribed Authority to reconsider the matter and pass a fresh order in accordance with law after affording opportunity of hearing to all concerned parties.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.05.2012

BEFORE
THE HON'BLE SHASHI KANT GUPTA, J.

Civil Misc. Writ Petition No. 48329 of 2011

Anil Kumar ...Petitioner

Versus

Kishan Lal ...Respondents

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

Counsel for the Respondents:
Sri Sandeep Agarwal
C.S.C.
Sri Rahul Sahai

Constitution of India, Article 226-suit for arrear of Rent and eviction-denied by Trail Court-with findings of default in rent-future benefits of Section 114 of T.P. Act not available-in absence of written argument between parties-interference by Revisional Court taking otherwise-views-held-illegal being contrary to law.

Held: Para 8

Since there is no written lease agreement between the parties, the provisions of Section 111(g) is not applicable, therefore, the respondent can not take benefit of Section 114 of the T.P. Act.

Case law discussed:
2005 (3) Allahabad Rent Cases, Page 764

(Delivered by Hon'ble Shashi Kant Gupta,J.)

1. This writ petition has been filed against the judgement and order dated 18.07.2011 passed by Lower Appellate Court/Additional District and Sessions Judge, Court No. 5, Mathura, whereby the order passed by the Trial Court dated 26.10.2009 was set aside and the matter was remanded to the Trial Court.

Brief facts of the case as set out in the writ petition are as follows:-

2. The petitioner purchased the disputed shop by registered sale deed dated 03.06.2004. The petitioner sent a registered notice under Section 106 of Transfer of Property Act, 1882 (in short "T.P. Act") which was duly served upon the tenant-opposite party and also replied by him. Thereafter, the petitioner filed a S.C.C. Suit No. 8 of 2005 for arrears of rent and ejectment. The respondent-tenant filed a written statement admitting the fact that the petitioner is a landlord and the rent is Rs.150/- per month.

3. The Trial Court by order dated 26.10.2009 decreed the suit for arrears of rent holding that the U.P. Act No.

XIII of 1972 (in short "the Act") is not applicable to the property in dispute. It was also held that the respondent-tenant committed default in payment of rent and is not entitled to benefit of Section 114 of the T.P. Act. Feeling aggrieved and dissatisfied with the said order, the respondent filed a Revision, which was registered as S.C.C. Revision No. 20 of 2009. The Revisional Court by order dated 18.07.2011 allowed the revision and remanded the matter to the Trial Court for disposal afresh mainly on the ground that the Court below had erred in not giving the benefit of Section 114 of the T.P. Act. Hence the present writ petition.

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

5. Learned counsel for the petitioner has mainly argued that the order passed by the Revisional Court is wholly erroneous, perverse and arbitrary, therefore, it is liable to be set aside.

6. It is not disputed that no written lease agreement was executed between the parties, so, it can not be said that the lease was determined by way of forfeiture as provided under Section 111(g) of the T.P. Act. That being so, the necessary corollary whereof would be that the Provision of Section 114 of the T.P. Act would also not be applicable. Thus the respondent can not claim any benefit of Section 114 of the T.P. Act.

7. Learned counsel for the petitioner has relied upon a decision of this Court in the case of ***Yashpal Vs. Allahatala Malik Waqf Azakhan and others, 2005(3) Allahabad Rent Cases, Page 764,*** wherein it has been held as follows:-

"Hence, the submission made by the learned counsel for the petitioner (defendant) that Section 111, Clause (g) would be rendered redundant if Category (1) of the said Clause (g) is confined to only a written lease, cannot, in my view, be accepted.

Hence, in view of the aforesaid, it follows that for the applicability of Section 111 (g), Category (1), and, as such, of Section 114 of the Transfer of Property Act, it is necessary that the lease must be in writing containing the express condition as per the requirements of Section 111 (g), Category (1). In case, there is no written lease- deed, the provisions of Section 111(g), Category (1), and, as such, of Section 114 of the Transfer of Property Act will not apply. The provisions of Section 111 (g), Category (1), and consequently, of Section 114 of the Transfer of property Act are not applicable to oral lease. This view gets support from various judicial decisions."

8. Since there is no written lease agreement between the parties, the provisions of Section 111(g) is not applicable, therefore, the respondent can not take benefit of Section 114 of the T.P. Act.

9. I do not find any fault in the order passed by the Trial Court.

10. In view of the above, the order passed by the Revisional Court dated 18.07.2011 is set aside and order passed

by the Trial Court dated 26.10.2009 is hereby confirmed. The writ petition is accordingly, allowed.

11. After the judgment was dictated, learned counsel for the respondent urged that at least six months time may be granted to him for vacating the premises in question. The learned counsel for the landlord did not raise any objection to it.

12. As urged by the learned counsel for the respondent, six month's time is granted to the respondent to vacate the premises in dispute provided the respondent gives his undertaking in the form of an affidavit before the concerned Court within one month from today specifically stating therein that they will handover the peaceful possession of the said accommodation to the petitioner-landlord without inducting any third person within a period of six months from today and also deposit the entire decretal amount including the current rent/damages for use and occupation of the disputed premises within a period of one month from today.

13. In the event of default of any of the aforesaid conditions, the landlord will be at liberty to proceed to evict the respondent if necessary by coercive process with the aid of police force.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.05.2012

BEFORE
THE HON'BLE B. AMIT STHALEKAR, J.

Civil Misc. Writ Petition No. 58347 of 2006

Devendra Singh Sisodiya ...Petitioner
Versus
State of U.P. Thru' Secretary U.P. and others ...Respondents

Counsel for the Petitioner:
Sri A.S. Diwekar
Sri Meraj Uddin
Sri Pulak Ganguly

Counsel for the Respondent:
C.S.C.
Sri V.K. Singh
Sri N.N. Verma

Constitution of India, Article 226- Dismissal on ground of absent from duty-petitioner suffering form T.B. Duly supported by medical certificate-could not appear before inquiry officer-without fixing another date place and time-without even examining the authority on behalf of Department (author of chargesheet)-submitted report as petitioner fail to appear in inquiry-hence nothing to say-appeal also dismissed-even finding of guilt recorder without disclosing material on bass of inquiry report submitted on the document the basis of recording the finding-merely saying-petitioner did not participate on submitted any defence-dismissal order quashed with liberty to pass from order within period of two month.

Held: Para 13 and 14

As per the law laid down by the Supreme Court it is incumbent upon the enquiry officer to have discussed the report of the Sr. Station Officer, Taj Depot, Agra and the documents relied upon while

writing the said report. The author of the document was also required to have been examined in the enquiry. It is no defence to the respondents to bring home a finding of guilt against the petitioner merely on the ground that the petitioner did not participate or did not submit his defence reply to the charge sheet.

In view of the above facts and circumstances of the case and the legal position settled by the Supreme Court, this writ petition deserves to be allowed. Accordingly the writ petition is allowed and the impugned order dated 22.6.2004 and 21.9.2004 are quashed. The enquiry officer shall proceed to pass fresh order after taking into consideration the relied upon document and after discussing the material on the basis of which such report has been prepared by Shri Mahesh Chandra Kamal, Sr. Station Officer, Taj Depot, Agra. This exercise shall be completed by the respondent no. 3-Assistant Regional Manager, Taj Depot, Agra within a period of two months from the date a certified copy of this order is received by him.

Case law discussed:

(2010) 2 SCC 772; 2012 (1) AWC 354; (2009) 2 SCC 570

(Delivered by Hon'ble B. Amit Sthalekar, J.)

1. Supplementary rejoinder affidavit filed today is taken on record.

2. This writ petition has been filed by the petitioner seeking quashing of the order dated 22.6.2004 by which the petitioner was removed from the post of Conductor and the Appellate order dated 21.9.2004 rejecting the appeal of the petitioner.

3. The facts of the case, in brief, are that while working on the post of Conductor in the UPSRTC, the petitioner was issued a charge sheet dated 25.2.2003 by the Assistant Regional Manager, Taj Depot District Agra wherein it was alleged that the petitioner had remained absent from duty for a considerable period of time. It appears that on 30.3.2003 a fresh charge sheet was issued to the petitioner by the Regional Manager, Taj Depot Agra. An enquiry officer was appointed on 30.9.2003 and the first date of enquiry was fixed on 10.2.2004 at 11 a.m. It is further the case of the petitioner that a show cause notice was issued to him on 29.1.2004 and thereafter the services of the petitioner were terminated by the order dated 22.6.2004. Aggrieved the petitioner preferred an departmental appeal which too was rejected by the order dated 22.9.2004. In paragraph 8 of the writ petition it is stated that he was suffering from T.B. and a medical certificate was also issued by the Chief Medical Officer, Agra advising the petitioner rest from 30.3.2004 to 30.6.2004 and as such he could not appear before the enquiry officer.

4. When the matter was taken up earlier, this Court by its order dated 2.12.2011 had directed the petitioner to file a supplementary affidavit bringing on record the copy of the enquiry report. By a further order dated 26.4.2012 this Court had directed the UPSRTC to supply a copy of the enquiry report to the learned counsel for the petitioner. In pursuance of the direction of this court an affidavit has been filed on 13.5.2012 and a copy of the enquiry report has been filed as Annexure SCA-I.

5. I have heard Shri Pulak Ganguly, learned counsel for the petitioner, Shri N.N. Verma holding brief of Shri V.K. Singh learned counsel for the respondent nos. 2 and 3 and the learned standing counsel.

6. From a perusal of the enquiry report, which is at page 6 of the second

supplementary counter affidavit it will be seen that the contents of the charges against the petitioner have been outlined and it has been stated that the petitioner was absent from duty on the following dates:

MONTHS	WORKING DAYS
July, 2002	13 days
August, 2002	24 days
September, 2002	16 days
October, 2002	12 days
November, 2002	9 days
December, 2002	4 days.

7. It is also stated that the enquiry was fixed for 8.8.2003, 8.9.2003, 23.9.2003, 1.10.2003, 12.5.2003 and lastly on 31.12.2003 but the petitioner did not appear in the enquiry but sent a letter stating that charge sheet which had been issued to him earlier, had been lost and therefore a copy of the charge sheet may be supplied to him. Accordingly by a letter dated 30.9.2003 a copy of the charge sheet dated 30.3.2003 was supplied to the petitioner. Recording all these findings the enquiry officer has concluded that since the petitioner did not submit any reply to the charge sheet and also did not participate in the enquiry, therefore, he has nothing to say in his defence and from his conduct it is, therefore, clear that the charges stand proved.

8. The Supreme Court in the case of ***State of U.P. Vs. Saroj Kumar Sinha reported in (2010) 2 SCC 772*** has held as follows:

"26*. The first inquiry report is vitiated also on the ground that the inquiry officers failed to fix any date for the appearance of the respondent to answer the charges. Rule 7 (x) clearly provides as under:-*

"7.(x) Where the charged government servant does not appear on the date fixed in the inquiry or at any stage of the proceeding in spite of the service of the notice on him or having knowledge of the date, the inquiry officer shall proceed with the inquiry ex parte. In such a case the inquiry officer shall record the statement of witnesses mentioned in the charge-sheet in absence of the charged government servant."

27. *A bare perusal of the aforesaid sub-rule shows that when the respondent had failed to submit the explanation to the charge sheet it was incumbent upon the inquiry officer to fix a date for his appearance in the inquiry. It is only in a case when the government servant despite notice of the date fixed failed to appear that the inquiry officer can proceed with the inquiry ex parte. Even in such circumstances it is incumbent on the inquiry officer to record the statement of witnesses mentioned in the charge-sheet. Since the government servant is absent, he would clearly lose the benefit of cross-examination of the witnesses. But nonetheless in order to establish the charges the Department is required to produce the necessary evidence before the inquiry officer. This is so as to avoid the charge that the inquiry officer has acted as a prosecutor as well as a judge.*

28. *An inquiry officer acting in a quashi-judicial authority is in the position of an independent adjudicator. He is not supposed to be a representative of the department/disciplinary authority/Government. His function is to examine the evidence presented by the Department, even in the absence of the delinquent official to see as to whether the unrebutted evidence is sufficient to hold that the charges are proved. In the present case*

the aforesaid procedure has not been observed. Since no oral evidence has been examined the documents have not been proved, and could not have been taken into consideration to conclude that the charges have been proved against the respondents.

***29.** Apart from the above, by virtue of Article 311(2) of the Constitution of India the departmental enquiry had to be conducted in accordance with the rules of natural justice. It is a basic requirement of the rules of natural justice that an employee be given a reasonable opportunity of being heard in any proceedings which may culminate in punishment being imposed on the employee."*

9. A Division Bench of this Court in the case of ***Mahesh Narain Gupta Vs. State of U.P. reported in 2012 (1) AWC 354*** has held as follows:

"14. *In all 19 charges were mentioned in the charge-sheet. Although in the charge-sheet certain evidence in support of the charges are shown but perusal of the Enquiry Officer's report dated 18.3.2008 which has been pressed for awarding punishment to the petitioner, makes it clear that no evidence whatsoever was collected/recorded by the Enquiry Officer to get those charges proved. Report of the Enquiry Officer is of two pages and just after narrating the facts that letters were sent but the petitioner did not respond and filed any evidence it has been concluded that all the charges against the petitioner (Charges 1 to 19) are found to be proved."*

10. From the above legal position enunciated by the Supreme Court, it is clear that the charges are framed against an employee by the department through a charge sheet and primary responsibility of proving the charge/charges against the government servant lies upon the department. If a government servant does not appear before the enquiry deliberately or otherwise the charges against him have to be proved unless the government servant in so many words admits the charge against him.

11. In the present case in the charge sheet the relied upon document was the report submitted by one Shri Mahesh Chandra Kamal, Sr. Station Officer, Taj Depot Agra. In the enquiry this report has been made the basis of bringing home the findings of guilt against the petitioner. However, what was stated in the said report or what was the material on the basis of which that report was submitted or the documents which were taken into consideration for writing that report have not been disclosed in the enquiry at all. Even the author of the said report namely, Shri Mahesh Chandra Kamal has not been examined in the enquiry as witness on behalf of the department.

12. The Supreme Court in the case of ***Roop Singh Negi Vs. Punjab National Bank reported in (2009) 2 SCC 570*** has held in paragraph 14 as follows:

"14. *Indisputably, a departmental proceeding is a quasi-judicial proceeding. The enquiry officer performs a quasi-judicial function. The charges levelled against the delinquent officer must be found to have been proved. The enquiry officer has a duty to arrive at a finding upon taking into consideration the materials brought on record by the parties. The purported evidence collected during investigation by the investigating officer against all the accused by itself could not be treated to be evidence in the disciplinary proceeding. No*

witness was examined to prove the said documents. The management witnesses merely tendered the documents and did not prove the contents thereof. Reliance, inter alia, was placed by the enquiry officer on the FIR which could not have been treated as evidence."

13. As per the law laid down by the Supreme Court it is incumbent upon the enquiry officer to have discussed the report of the Sr. Station Officer, Taj Depot, Agra and the documents relied upon while writing the said report. The author of the document was also required to have been examined in the enquiry. It is no defence to the respondents to bring home a finding of guilt against the petitioner merely on the ground that the petitioner did not participate or did not submit his defence reply to the charge sheet.

14. In view of the above facts and circumstances of the case and the legal position settled by the Supreme Court, this writ petition deserves to be allowed. Accordingly the writ petition is allowed and the impugned order dated 22.6.2004 and 21.9.2004 are quashed. The enquiry officer shall proceed to pass fresh order after taking into consideration the relied upon document and after discussing the material on the basis of which such report has been prepared by Shri Mahesh Chandra Kamal, Sr. Station Officer, Taj Depot, Agra. This exercise shall be completed by the respondent no. 3-Assistant Regional Manager, Taj Depot, Agra within a period of two months from the date a certified copy of this order is received by him.

15. There shall be no order as to cost.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.05.2012

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 70649 of 2011

Ram Babu Chittoria ...Petitioner
Versus
High Court of Judicature at Allahabad and others ...Respondents

Counsel for the Petitioner:
Sri H.N.Singh
Sri Vineet Kumar Singh

Counsel for the Respondents:
Sri Y. Varma
Sri Ashish Misra

Constitution of India, Article 226- Dismissal from Service-petitioner working on reader-embezzlement of certain amount of fine-defence taken that amount of fine actually in hands of presiding officer-given on belated state-during inquiry neither the Presiding Officer shown as prosecution on defense witness-plea regarding denial of opportunity of cross-examination-not available -dismissal order confirmed by Appellate authority-held-justified.

Held: Para 8

When Sri Amit Kumar Pandey was not examined for chief, the question of his cross examination does not arise. It is true that Evidence Act as such is not applicable in departmental enquiry but simultaneously a witness, not adduced by the department in support of the charges and is also not called as defence witness cannot be produced so as to be cross-examined by party concerned though he himself has not otherwise said anything either in support of charge or against the charge. The request of petitioner therefore, to call Sri Amit

Kumar Pandey only for the purpose of cross-examination was wholly illegal. It cannot be said that in these circumstances if Sri Amit Kumar Pandey ultimately was not produced, that shall vitiate the proceedings. The respondents have found the charges proved flowing mainly from the admission of the petitioner and explanation he submitted. In respect to the explanation to the admission, onus lie upon him to prove which he failed.

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

1. Heard Sri H.N.Singh, learned counsel for the petitioner, Sri Ashish Mishra for the respondents and perused the record.

2. The petitioner was working as a Clerk; Class III ministerial employee in Judgship Agra. By order dated 17.7.2010 District Judge Agra has imposed punishment of dismissal upon the petitioner and his appeal has been rejected by the Court (Administrative Judge) by order dated 15.3.2011.

3. The petitioner was charged of misappropriation and embezzlement of the amount deposited by way of fine while posted as Reader in the Court of Civil Judge, Junior Division, Fatehabad, Agra. The charge includes that while receiving fine of Rs.1500/- the receipt was issued for Rs.150/- and similarly again for an amount of Rs.2,000 the receipt was issued for Rs.200/-.

4. In departmental enquiry, charges were found proved whereafter impugned order of punishment has been passed. The petitioner has admitted to receive the amount in question but failed to show deposit of entire amount within time in Nazarat. His defence is that the money was actually in the hands of Presiding Officer and he himself gave it belatedly to the petitioner hence there was a delay in deposit of the amount. Preparation of vouchers etc. by petitioner is also not disputed. Similarly preparation of receipts mentioning wrong amount of fine is also not disputed but defence is that the amount was mentioned on the dictates of Presiding Officer.

5. Sri H.N.Singh, learned counsel for the petitioner stated that his request for summoning the then Presiding Officer namely Sri Amit Kumar Pandey, Civil Judge (Junior Division), Sitapur was not allowed and therefore, entire proceedings are vitiated in law.

6. The Court finds that Sri Amit Kumar Pandey, Civil Judge (Junior Division) the then Presiding Officer of the Court was not a witness on behalf of respondents to prove charges but petitioner wanted to shift his blame upon Sri Amit Kumar Pandey. He did not request Enquiry Officer for producing Sri Amit Kumar Pandey as defence witness but what he actually requested is that he should be allowed to cross examine Sri Amit Kumar Pandey. This is evident from letter dated 01.9.2009 issued by Enquiry Officer to Sri Amit Kumar Pandey (Annexure 15 to the writ petition).

7. Sri H.N.Singh, learned counsel for the petitioner was required by this Court to show that a witness, if not produced by prosecution and has not recorded his examination-in-chief, can he be allowed to be cross-examined and if so, in what manner and under which principle of law. The Court also enquired as to whether petitioner wanted to produce Sri Amit Kumar Pandey as defence witness to which Sri Singh replied that he could not have

been produced as a defence witness since petitioner wanted to examine him so as to implicate him in the aforesaid charges and hence wanted to cross examine him.

8. When Sri Amit Kumar Pandey was not examined for chief, the question of his cross examination does not arise. It is true that Evidence Act as such is not applicable in departmental enquiry but simultaneously a witness, not adduced by the department in support of the charges and is also not called as defence witness cannot be produced so as to be cross-examined by party concerned though he himself has not otherwise said anything either in support of charge or against the charge. The request of petitioner therefore, to call Sri Amit Kumar Pandey only for the purpose of cross-examination was wholly illegal. It cannot be said that in these circumstances if Sri Amit Kumar Pandey ultimately was not produced, that shall vitiate the proceedings. The respondents have found the charges proved flowing mainly from the admission of the petitioner and explanation he submitted. In respect to the explanation to the admission, onus lie upon him to prove which he failed.

9. In the circumstances, I do not find it a fit case warranting interference under Article 226 of the Constitution. Even otherwise the writ petition, in view of above discussion is devoid of merit.

10. Dismissed.
