ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.08.2011

BEFORE
THE HON'BLE ARUN TANDON, J.

Civil Misc. Company Application No. - 4 of 1995

S.C. Shukla ...Applicant
Versus
The Official Liquidator, Uttar Pradesh and Uttarakhand ...Respondent

Counsel for the Petitioner:
Sri Ashok Bhushan
Sri A.K.Mishra
Sri Ashok Mehta
O.L. U.L. Patole

Counsel for the Respondents:
Sri A.K. Gupta
Sri Ajay Kumar Shukla
Sri Ankush Tandon
Sri C.B. Gupta
Sri Kush Saxena
Sri Kushal Kant
Sri Manish Tandon
Sri Narendra Mohan
Sri P.C.Jhingan
Sri R.P. Agarwal
Sri Ravi Kant
Sri Rohit Agrawal
Sri S.K.Mishra
Sri S.N.Gupta
Sri Sandeep Saxena
Sri Somesh Khare
Sri Subhodh Kumar
Sri V.M. Sharma
Sri Vinay Khare
Sri Vipin Sinha
Sri Yashwant Verma

Companies Act, Section 468, 535(e)- Delivery of possession-wound up of TELCO-applicant working as Divisional Manager given undertaking to vacate the premise in question upto 30/6/99- concealing his VRS continued illegal possession upto 12 years for nominal amount of Rs. 69 per month-really shocking application rejected-office liquidator to take possession within two weeks pay Rs. 5000/-per month basis rent of w.e.f. 99 to 30.08.2011 failing which-D.M. To recover as arrears of land revenue-also direction issued for contempt proceeding under Section 195 readwith 340 Cr.P.C.

Held: Para 19

Because of such uncalled for proceeding being initiated before Company Court, the disposal of the properties of TAFCO has been withheld for decades together, which in turn result in denial of money to the creditors. The application filed by Sri S.C. Shukla is held to be an abuse of process of the Court.

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

1. This is an application filed by Sri S.C. Shukla with the prayer that the order dated 05.02.2009 passed by the Company Court may be recalled and the applicant may not be evicted from the property in dispute and further the Official Liquidator may be directed to not to interfere with the peaceful possession of the applicant over the bungalow in question.

2. At the very outset the Court may record that the process of the Court has been abused by the present applicant, as would be apparent from the facts which shall be recorded herein under. He has to be dealt with in a manner so that the similarly situate employees do not endeavour in future to create such a situation.

3. TAFCO India Limited was directed to be wound up under the order of the Company Court as early as on 18.08.1998. Sri S.C. Shukla applicant was

admittedly an officer of the said company. In his capacity as the Divisional Manager (Administration) an allotment letter was issued by the TAFCO on 09th February, 1994 allotting him Bungalow No. 13/399-B. The allotment letter contained a specific recital that the allotment will remain valid so long as Sri S.C. Shukla continues in actual employment of Corporation. Copy of the allotment letter has been produced by Sri Rohit Agrawal, counsel for Sri S.C. Shukla, today in the Court, which is taken on record.

4. Sri S.C. Shukla is stated to have made an application opting for VRS after TAFCO was wound up. In terms of the conditions imposed he also gave an undertaking along with other 627 employees and 31 officers in form of affidavit to the effect that he shall vacate the official accommodation on 30th June, 1999 and handover vacant possession of the said premises to the TAFCO. It was further undertaken that in case of failure to vacate the bungalow by 30th June, 1999 he shall render himself liable to damages and further legal action including criminal for not vacating the house. It was further specifically stated that he shall have no lien on the said bungalow after 30.06.1999.

5. The averments made in respect of such undertaking of Sri S.C. Shukla is contained in paragraph 9 of the counter affidavit filed on behalf of the Official Liquidator to the present application and is being quoted herein below:

"9. That it is pertinent to mention here that between 1.11.1999 to 30.6.1999, 627 employees as well as 31 offices submitted declaration and gave undertaking to the effect that they will vacate the official accommodation on 30th June, 1999 and handover vacant possession of the said premises to the TAFCO and further undertook that in case of failure to vacate the bungalow by 30th June, 1999 they shall be liable to pay damages and further legal action including criminal for not vacating the house and shall be solely responsible for the damages and shall have no lien on the said bungalow after 30.6.1999."

6. A rejoinder affidavit has been filed by Sri S.C. Shukla and the contents of paragraph 9 of the counter affidavit has been replied by means of paragraph 10 of the rejoinder affidavit, which reads as follows:

"10. That the contents of paragraph 9 of the affidavit are not admitted as stated and hence denied. It is stated that the undertaking given was in the capacity of employer-employee relationship and the same has nothing in relation to the dispute regarding the title of the property in dispute."

7. Today Sri Manoj Mishra, Advocate, appearing on behalf of Sri S.C. Shukla, fairly stated that Sri S.C. Shukla was allotted the bungalow in his official capacity because of his being an officer of the TAFCO. Further in view of the winding up order passed by the Company Court in 1998 his engagement as an officer of TAFCO stood discharged in terms of the provisions of the Company Code Act and Rules framed thereunder by operation of law. He could not dispute the fact that an undertaking in form of affidavit had been filed for availing the V.R.S.

8. It is not in dispute that with the winding up order being issued by the Company Court, all the properties of the TAFCO stood vested in the Company Court, to be managed thereafter by the Official Liquidator.

9. Sri S.C. Shukla, contrary to the undertaking given, continues in actual possession of the bungalow even today. For the purpose of justifying his illegal occupation of the official accommodation even after 1999, a peculiar stand has been taken before this Court, namely that under Section 468 of the Company Act the Official Liquidator can take possession of such properties as are prima facie found to be of the company which has been directed for wound up.

10. Since the British India Corporation (BIC) has set up a claim qua the properties of TAFCO, including bungalow in dispute, the TAFCO cannot be said to have prima facie title. Secondly, in view of Section 535 of the Companies Act that the Official Liquidator has to issue the declaimer inasmuch as the property is covered by Section 535 Clause (c), as it is not salable because of dispute of title raised by the BIC.

11. For appreciating the objections raised, it would be worthwhile to refer to Section 468 and Section 535(c) of the Companies Act, which read as follows:

"468. *Delivery of property to liquidator.- The Tribunal may, at any time after making a winding up order, require any contributory for the time being on the list of contributories, and any trustee, receiver, banker, agent, officer or other employee of the company, to pay, deliver, surrender or transfer forthwith or within such time as the Tribunal directs, to the liquidator, any money, property or books and papers in his custody or under his control to which the company is prima facie entitled.*

535. Disclaimer of onerous property in case of a company which is being wound up.-(1) *Where any part of the property of a company which is being wound up consists of-*

(a) land of any tenure, burdened with onerous convenants;

(b) shares or stock in companies;

(c) any other property which is unsaleable or is not readily saleable, by reason of its binding the processor thereof either to the performance of any onerous act or to the payment of any sum of money; or

(d) unprofitable contracts,

the liquidator of the company, notwithstanding that he has endeavoured to sell or has taken possession of the property, or exercised any act of ownership in relation thereto, or done anything in pursuance of the contract, may, with the leave of the Tribunal and subject to the provisions of this section, by writing signed by him, at any time within twelve months after the commencement of the winding up or such extended period as may be allowed by the Tribunal, disclaim the property:"

12. From a simple reading of Section 468 it will be seen that only for the purposes of taking possession by Official Liquidator, after an order of

winding up, only prima facie title of the company over the property under winding up is to be seen.

13. Sri S.C. Shukla cannot be permitted to question the title of the TAFCO over the bungalow, as it was actually allotted to him by TAFCO. Further he had given an undertaking in form of an affidavit for availing the V.R.S. that he shall deliver the possession of the bungalow to TAFCO on or before 30.06.1999. It is on this undertaking that money in terms of V.R.S. (running into lacs of rupees) was paid to him. Can Sri S.C. Shukla be now permitted to say that the TAFCO does not even have prima facie title over the bungalow. The answer has to be a big No.

14. It may be recorded that deliberately Sri S.C. Shukla had not disclosed the factum of the undertaking given by him at the time of availing the V.R.S. in the present application and with the help of such concealment of fact he succeeded in obtaining an interim order on the application which permitted him to deposit a sum of Rs. 10,000/- only and in turn had the effect of staying his eviction.

15. At lease for the period after 30th June, 1999 till date i. e. for more than 12 years Sri S.C. Shukla has paid a sum of Rs. 10,000/- only towards use and occupation of the bungalow, which would work out to Rs. 833/- per year i. e. Rs. 69/- per month, which on the face of it shocks the conscious of the Court.

16. The dispute between BIC and TAFCO in respect of the property is still to be adjudicated by the Company Court qua which Sri S.C. Shukla can have no say. It is admitted to Sri S.C. Shukla that he was handed over possession of bungalow at the behest of TAFCO and not de hors the title claimed thereon by TAFCO.

17. Reference to Section 535(c) is totally out of context, inasmuch as the Official Liquidator has not issued any such disclaimer nor it is so required to be issued at this stage.

18. This Court has no hesitation to hold that the person like Sri S.C. Shukla are not entitled to any sympathy of the Court. He has unauthorizedly retained the possession of the bungalow spread over more than 200 square yard, situate in the heart of Kanpur City, for 12 years even after the company having been wound up and even after his having filed an undertaking in the form of affidavit that he shall vacate and deliver the possession of the premises to TAFCO by 30.06.1999.

19. Because of such uncalled for proceeding being initiated before Company Court, the disposal of the properties of TAFCO has been withheld for decades together, which in turn result in denial of money to the creditors. The application filed by Sri S.C. Shukla is held to be an abuse of process of the Court.

20. In the facts of the case this Court directs that the Official Liquidator shall dispossess Sri S.C. Shukla from the premises in question within two weeks from today, if he himself does not vacate the same within this period, in any case by 15th September, 2011. District Magistrate and Senior Superintendent of Police, Kanpur Nagar are directed to provide all assistance to the Official Liquidator for the purpose. There should be no complaint to the court that the Official Liquidator could not take

possession of the bungalow because of inaction on the part of the said district authorities.

21. For the use and occupation of the premises unauthorizedly for the period between 01.07.1999 to 30.08.2011, Sri S.C. Shukla is further directed to pay a sum of Rs. 5,000/- (Five Thousand) per month through a bank draft drawn in the name of Official Liquidator of this Court by 31.09.2011, failing which the District Magistrate shall ensure recovery of the said damages as arrears of land revenue. The aforesaid exercise must be completed within two months from today.

22. Sri S.C. Shukla is further called upon to show cause as to why contempt proceedings/proceedings under Section 195 read with Section 340 Cr.P.C. be not initiated against him for concealing material facts in the application filed before this Court.

23. For the purpose three weeks' time is prayed for by Sri Manoj Mishra, Advocate.

24. Let matter be listed for the purpose again on 26th September, 2011.

25. A copy of this order be issued to the Chief Standing Counsel free of cost for being forwarded to the District Magistrate and Senior Superintendent of Police, Kanpur Nagar for necessary compliance.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: LUCKNOW 03.08.2011

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

Criminal Revision No. 300 of 2011

Irfan alias Saddam ...Revisionist
Versus
State of U.P. and another
...Opposite Parties

Juvenile Justice (Care and Protection Act of children) Act 2000-Section 52-Appeal against the order passed by Juvenile Justice Board-dismissed by the session Judge as not maintainable by placing reliance upon Jabar Singh case-held-misconceived-much difference in fact of Jabar Singh case-appeal against the decision of Board-held maintainable.

Held: Para 8

While mentioning about the word 'finding of the court', the Apex Court virtually meant the finding of the trial court and in reference to trial court's order that observation was made that appeal was not maintainable and it was only that revision was maintainable as appeal was maintainable against the order of the competent authority. The finding recorded by the learned Sessions judge, therefore, is beside the point and beside the case law which has been mentioned and has been relied upon by him. There is much difference in the facts of both the cases and the appeal is certainly maintainable in view of the provisions contained in Section 52 of the Act when an order is passed by the competent authority.

Case law discussed:
2010 (1) L.Cr.R. (SC) page 353

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

1. Heard learned counsel for the revisionist and learned AGA.

2. Through this revision, the revisionist has challenged the order passed by the learned Sessions Judge dated 29.6.2011, inter alia, on the ground that the learned Sessions Judge has misdirected himself in dismissing the appeal of the revisionist on technical ground that revision is maintainable.

3. The facts in brief are that in reference to an incident which took place on 25.3.2010 at about 7:30 A.M., an FIR was lodged on the same day at 8:15 A.M. by complainant Mohd. Riyaz Khan against Naim Ullah, Imran alias Immi and the present accused revisionist. The revisionist was produced before the Magistrate, Juvenile Justice Board, Sultanpur as he pleaded minority in respect of himself. The evidence was adduced before the learned Magistrate and after conclusion of the evidence, learned Magistrate proceeded to hold that the revisionist was about 22 years of age at the time of occurrence. Aggrieved with the said order, revisionist preferred a criminal appeal in the court of learned Sessions Judge under Section 52 of the Juvenile Justice (Care and Protection of Children) Act, 2000 (for short "the Act"). The appeal was filed before the learned Sessions Judge on 3.6.2011 and was heard on 29.6.2011. The parties appeared before the learned Sessions Judge and put forward their claim. Learned Sessions Judge after appreciating the argument of the parties, dismissed the appeal of the revisionist on technical ground saying that the appeal was not maintainable as against the order passed by the Magistrate, it was only revision, which was maintainable in view of the law propounded by the Apex Court in the case of **Jabar Singh vs. Dinesh Chandra,** 2010 (1) L.Cr.R. (SC) page 353.

4. Submission of learned counsel for the revisionist is that Section 52 of the Act clearly contemplates filing of an appeal against any order of the Magistrate and Section 53 of the Act contemplates entertainment of revision by the High Court. Thus, he submits that in view of the clear provision contained in the Act, learned Sessions Judge has misdirected himself in referring a finding that the revision was maintainable. It is also submitted that **Jabar Singh** (supra) also does not lay down the aforesaid proposition but in fact in the said case a revision was filed against the trial court's order before the High Court and the accused was never presented before the competent authority i.e. Juvenile Justice Board and the aforesaid fact has been dealt with in the said case. The Apex Court observed in reference to the proceedings initiated for determination of juvenality before the trial court that Section 49 of the Act thus contains no provision prohibiting the court to determine the claim of juvenality if raised and in reference to Section 49 of the Act, it was held by the Apex Court that a plain reading of Section 52 of the Act shows that no statutory appeal is available against any finding of the trial court that a person was not juvenile at the time of commission of the offence. Learned counsel submits that the said observation has been made in reference to the trial court's order but not in reference to the proceedings before the Juvenile Justice Board. Learned Sessions Judge has totally misdirected himself in relying upon the said decision and dismissing the appeal of the revisionist.

5. Learned AGA has also agreed that if an accused is presented before the competent authority under Section 49 (1)

of the Act, then it is the competent authority, who will determine the juvenality of that accused and against that order an appeal under Section 52 of the Act would be maintainable. Learned AGA has also drawn the attention of the Court towards Sections 52 and 53 of the Act and the proposition of law laid down in the case of **Jabar Singh** (supra) and has submitted that when there is a specific provision under the statute for filing an appeal, the said provision cannot be by-passed and has to be adhered to.

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

7. The revisionist moved an application before the Juvenile Justice Board claiming that he was minor. The said application of the revisionist was rejected and thereafter he filed an appeal. During pendency of the appeal, the matter was heard and relying upon **Jabar Singh** (supra), it was held by the learned Sessions Judge that appeal was not maintainable. Learned Sessions Judge totally misdirected himself and rather misunderstood the said case law while dealing with the issue in question. Section 52 of the Act provides as under:-

"52. Appeals.-- (1) Subject to the provisions of this section, any person aggrieved by an order made by a competent authority under this Act may, within thirty days from the date of such order, prefer an appeal to the Court of Session:

Provided that the Court of Session may entertain the appeal after the expiry of the said period of thirty days if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time.

(2) No appeal shall lie from--

(a) any order of acquittal made by the Board in respect of a juvenile alleged to have committed an offence; or

(b) any order made by a Committee in respect of a finding that a person is not a neglected juvenile.

(3) No second appeal shall lie from any order of the Court of Session passed in appeal under this section."

Revision under Section 53 of the Act can be filed before the High Court, which reads as under:-

"53. Revision.--The High Court may, at any time, either of its own motion or on an application received in this behalf, call for the record of any proceeding in which any competent authority or Court of Session has passed an order for the purpose of satisfying itself as to the legality or propriety of any such order and may pass such order in relation thereto as it thinks fit:

Provided that the High Court shall not pass an order under this section prejudicial to any person without giving him a reasonable opportunity of being heard."

8. From reading both the sections, it is crystal clear that when an application is moved before the competent authority under Section 49 of the Act for determination of juvenality, then appeal would be maintainable under Section 52 of the Act before the Sessions Judge. In

Jabar Singh (supra), the application was moved before the trial court and not before the competent authority and in that reference in para-29 of the said report, it has been said by the Apex Court that Section 52 of the Act shows that no statutory appeal is available against any finding of the trial court. While mentioning about the word 'finding of the court', the Apex Court virtually meant the finding of the trial court and in reference to trial court's order that observation was made that appeal was not maintainable and it was only that revision was maintainable as appeal was maintainable against the order of the competent authority. The finding recorded by the learned Sessions judge, therefore, is beside the point and beside the case law which has been mentioned and has been relied upon by him. There is much difference in the facts of both the cases and the appeal is certainly maintainable in view of the provisions contained in Section 52 of the Act when an order is passed by the competent authority.

9. In this view of the matter, the revision is allowed and the order dated 29.6.2011 passed by the Sessions Judge, Sultanpur is hereby set aside. The matter is remitted to the Sessions Judge, Sultanpur to decide the appeal of the revisionist in accordance with law on merit.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 02.08.2011

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

First Appeal From Order No. - 424 of 2002

National Insurance Company Ltd.
...Petitioner
Versus
Smt. Nand Rani and others 3
...Respondents

Counsel for the Petitioner:
Sri S.C.Gualti

Counsel for the Respondents:
Sri N.C. Upadhyay

Motor Vehicle Act, 1988 Section 173- Appeal against award of claim tribunal- by insurance company-on ground the driver at the time of accident not possessing valid driving license-even on possessing insurance policy-held-law laid down by the larger bench of Apex Court in Swaran Singh case-insurance company to pay entire amount of award- with liberty to recover the same from the insurer.

Held: Para 14

In view of the above, the appeal is allowed in part. The impugned award dated 4.5.2002 is modified to the extent that it shall be open to the appellant Insurance Company to recover the amount under award from the insured in terms of the procedure provided by Hon'ble Supreme Court in the case of Swaran Singh (supra). It is further provided that the appellant Insurance Company shall deposit entire amount before the Tribunal within two months and the Tribunal shall release the same within one month in favour of the claimant respondents. Deposit made in

this Court, shall be remitted to the Tribunal forthwith by the Registry.

Case law discussed:

T.A.C. 1997 (I) Page 223; 2008 (2) T.A.C. 369 (S.C.); (2003) 3 SCC 338; AIR 2004 SC 1531; (2008) 9 SCC 284; (2011) 2 SCC 94; 2010 AIR SCW 7184; 2010 (28) LCD 1188; 2010 (2) SCC 706; 2007 (6) ADJ 225; 2005 (2) SCC 673; 2008(1) UPLBEC 211

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

1. Heard Sri S.C. Gulati, learned counsel for the appellant, and Sri Rajendra Jaiswal, learned counsel for the opposite party No.1 to 3. None appears on behalf of the opposite party No.4.

2. Present appeal under Section 173 of Motor Vehicles Act, 1988 has been preferred against the impugned award dated 4.5.2002 passed by the Motor Accident Claims Tribunal/Special Judge, Kanpur in M.C.A. No.305 of 2000.

3. The claim petition preferred by the claimant respondents is in view of the accident occurred on 30.10.2000 whereby the deceased was returning to village Roopha from village Chandra within the premises of police station Maholi, District Sitapur. While he was returning to his village on his cycle, a Truck No.A-S-25/B-1907 coming from Shahjahanpur being driven rashly and negligently, hit the deceased. As a consequence thereof, he succumbed to injuries on spot. An F.I.R. was lodged and the claimants approached the Tribunal for payment of compensation. The Tribunal framed issues with regard to insurance cover, accident and driving license and arrived at the conclusion that the accident occurred because of rash and negligent driving of the truck by the driver and awarded compensation to the tune of Rs.1,82,000.00.

4. The solitary argument advanced by Sri S.C. Gulati learned counsel for the appellant is that the driver was not possessing driving license. Hence the appellant Insurance Company is not liable to pay compensation. He has invited attention to the finding recorded by the Tribunal. The Tribunal recorded finding that even if driving license is fake, the Insurance Company cannot shirk from its liability to pay compensation. The Tribunal relied upon the judgment of Punjab and Haryana High Court, reported in **T.A.C. 1997 (i) Page 233: National Insurance Co. Ltd., Vs. Smt. Santro Devi and others,** whereby, it has been held that the dependants of the deceased cannot be deprived of compensation even if the driving license is forged. The operative portion of the judgment of the Tribunal is reproduced as under:

"In T.A.C. 1997 (i) Page 233 at page 234 National Insurance Co. Lt. Versus Smt. Santro Devi and others it was held by the Hon'ble High Court of Punjab and Haryana that in a case where the owner of the Vehicle bonafidely believed in the validity at the forged driving licence and employed the driver having fake driving licence then that would not amount the violation of contract of the insurance policy. Merely employing a driver with a forged driving licence would not absolve the insurer of its liability. Mensrea of knowledge or intention of the insured to violate the terms of policy or the provisions of the Act will have to be proved.

In view of the aforesaid rulings, it is clear that the insurance company can not shirk its liability to pay the compensation even if the driver of the defaulting vehicle was found holding a fake driving licence.

The insurance company can be exonerated from its liability only if it is proved that the insured had deliberately violated the terms and conditions of the insurance policy. In other words in a case where the owner of a vehicle had employed a driver holding a forged driving licence he can be hold responsible for the breach of the terms and conditions of the insurance policy only when it is proved that he knew at the time of employing the driver that the driver was holding a take or forged driving licence. He can not be held guilty for the breach of terms and conditions of the insurance police O.P. No.9 when he bonafidely believed in the validity of a forged driving licence. Mensrea or knowledge or intention of the insured to violate the terms of Policy or the provisions of the act will have to be proved.

In the present case there is no evidence on the record to prove that the owner (o.p. no.1) was knowing at the time of employing the driver that he was having a forged driving licence, there is no evidence on record to conclude that o.p.no.1 had Mensrea or Knowledge or intention to violate the terms of policy by employing a driver having a forged driving licence."

5. From the plain reading of the award, it appears that the Tribunal is of the view that since the owner has engaged the driver bona fidely possessing driving license, hence he cannot be held responsible with regard to payment of compensation. While assailing the impugned award, Sri S.C. Gulati learned counsel relied upon the case reported in **2008 (2) T.A.C. 369 (S.C.): Sardari and others. Vs. Sushil Kumar and others.** The sum and substance of the argument advanced by Sri S.C. Gulati is that fake driving license, amount to violation of terms and condition with regard to insurance policy and in the event of breach of the condition of the insurance policy, the Insurance Company may not be held responsible to pay compensation. The argument advance by the learned counsel for the appellant carries weight. The payment of compensation in pursuance of the insurance policy is based on agreement entered into between the parties and in case, the condition of agreement is violated, then the consequence in terms and conditions provided in the agreement shall follow. Accordingly, in case valid driving license is part and parcel of Insurance Policy under the agreement then breach of such condition shall make out a case favouring the Insurance Company not to pay compensation. The relevant para-7 of the judgment of Sardari (supra) is reproduced as under:

"7. The concurrent finding of fact herein is that Sushil Kumar never held a license. The owner of the vehicle has a statutory obligation to see that the driver of the vehicle whom he authorized to drive the same holds a valid license. Here again, a visible distinction may be noticed, viz. where the license is fake and a case where the license has expired, although initially when the driver was appointed, he had a valid license.

The question came up for consideration before this Court in United India Insurance Co. Ltd. Vs. Gian Chand and Others [(1997) 7 SCC 558], wherein it was held;

"12. Under the circumstances, when the insured had handed over the vehicle for being driven by an unlicensed driver, the Insurance Company would get exonerated

from its liability to meet the claims of the third party who might have suffered on account of vehicular accident caused by such unlicensed driver...."

A three Judges' Bench of this Court in National Insurance Co. Ltd. Vs. Swaran Singh and Others [(2004) 3 SCC 297], upon going through the provisions of the Act as also the precedents operating in the field, laid down the following dicta;

"84. We have analysed the relevant provisions of the said Act in terms whereof a motor vehicle must be driven by a person having a driving licence. The owner of a motor vehicle in terms of Section 5 of the Act has a responsibility to see that no vehicle is driven except by a person who does not satisfy the provisions of Section 3 or 4 of the Act. In a case, therefore, where the driver of the vehicle, admittedly, did not hold any licence and the same was allowed consciously to be driven by the owner of the vehicle by such person, the insurer is entitled to succeed in its defence and avoid liability. The matter, however, may be different where a disputed question of fact arises as to whether the driver had a valid licence or where the owner of the vehicle committed a breach of the terms of the contract of insurance as also the provisions of the Act by consciously allowing any person to drive a vehicle who did not have a valid driving licence. In a given case, the driver of the vehicle may not have any hand in it at all e.g. a case where an accident takes place owing to a mechanical fault or vis major. (See Jitendra Kumar 22 .)"

In National Insurance Co. Ltd. Vs. Kusum Rai and Others [(2006) 4 SCC 250], a Bench of this Court (wherein one of us was a member) held;

11. It has not been disputed before us that the vehicle was being used as a taxi. It was, therefore, a commercial vehicle. The driver of the said vehicle, thus, was required to hold an appropriate licence therefor. Ram Lal who allegedly was driving the said vehicle at the relevant time, as noticed hereinbefore, was holder of a licence to drive a light motor vehicle only. He did not possess any licence to drive a commercial vehicle. Evidently, therefore, there was a breach of condition of the contract of insurance. The appellant, therefore, could raise the said defence.

14. This Court in Swaran Singh clearly laid down that the liability of the Insurance Company vis-vis the owner would depend upon several factors. The owner would be liable for payment of compensation in a case where the driver was not having a licence at all. It was the obligation on the part of the owner to take adequate care to see that the driver had an appropriate licence to drive the vehicle.

The question as regards the liability of the owner vis-`-vis the driver being not in possession of valid license has also been considered in para 89 in Swaran Singh (supra)."

6. In view of the settled proposition of law, the appellant Insurance Company does not seem to be responsible to implement the award with regard to payment of compensation.

7. On the other hand, Sri Rajendra Jaiswal learned counsel representing claimants has referred two other judgments of Hon'ble Supreme Court reported in **(2003) 3 SCC 338: United India Insurance Co. Ltd. Vs. Lehru and others and AIR 2004 SC 1531: National**

Insurance Co. Ltd. Vs. Swaran Singh and others.

8. It shall be relevant to mention here that both these judgments have been considered by the Hon'ble Supreme Court in the case of Sardari (supra). However, one aspect of the matter seems to have not been discussed in the case relied upon by Sri S.C. Gulati, that is, whether the insurer may be directed to pay compensation with liberty to recovery the same from the owner of the vehicle.

9. In the case of Lehru (supra) Hon'ble Supreme Court observed as under:

"20. When an owner is hiring a driver he will therefore have to check whether the driver has a driving licence. If the driver produces a driving licence which on the face of it looks genuine, the owner is not expected to find out whether the licence has in fact been issued by a competent authority or not. The owner would then take the test of the driver. If he finds that the driver is competent to drive the vehicle, he will hire the driver. We find it rather strange that Insurance Companies expect owners to make enquiries with RTO's, which are spread all over the country, whether the driving licence shown to them is valid or not. Thus where the owner has satisfied himself that the driver has a licence and is driving competently there would be no breach of Section 149(2)(a)(ii). The Insurance Company would not then be absolved of liability. If it ultimately turns out that the licence was fake the Insurance Company would continue to remain liable unless they prove that the owner/insured was aware or had noticed that the licence was fake and still permitted that person to drive. More importantly even in such a case the Insurance Company would remain liable to the innocent third party, but it may be able to recover from the insured. This is the law which has been laid down in Skandia 's Sohan Lal Passi 's and Kamla 's case. We are in full agreement with the views expressed therein and see no reason to take a different view."

Thus, their lordships of Hon'ble Supreme Court have held that where, owner was hiring the driver, then it is his duty to check whether the driver has valid driving license. Their lordships held that even if the driving license is fake, the Insurance Company will remain liable to pay to the innocent third party with liberty to recover from the insured.

10. In the case of Swaran Singh (supra) after considering number of judgments of the Hon'ble Supreme Court, their lordships had considered various issues and summed up the finding in para 105 of the judgment [not considered iin Sardari (supra)] which is reproduced as under:

"105. The summary of our findings to the various issues as raised in these petitions are as follows:

"(i) Chapter XI of the Motor Vehicles Act, 1988 providing compulsory insurance of vehicles against third party risks is a social welfare legislation to extend relief by compensation to victims of accidents caused by use of motor vehicles. The provisions of compulsory insurance coverage of all vehicles are with this paramount object and the provisions of the Act have to be so interpreted as to effectuate the said object.

(ii) Insurer is entitled to raise a defence in a claim petition filed under Section 163 A or Section 166 of the Motor Vehicles Act, 1988 inter alia in terms of Section 149(2)(a)(ii) of the said Act.

(iii) The breach of policy condition e.g., disqualification of driver or invalid driving licence of the driver, as contained in sub-section (2)(a)(ii) of section 149, have to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time.

(iv) The insurance companies are, however, with a view to avoid their liability must not only establish the available defence(s) raised in the said proceedings but must also establish 'breach' on the part of the owner of the vehicle; the burden of proof wherefor would be on them.

(v) The court cannot lay down any criteria as to how said burden would be discharged, inasmuch as the same would depend upon the facts and circumstance of each case.

(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches on the condition of driving licence is/ are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insured under section 149(2) of the Act.

(vii) The question as to whether the owner has taken reasonable care to find out as to whether the driving licence produced by the driver, (a fake one or otherwise), does not fulfil the requirements of law or not will have to be determined in each case.

(viii) If a vehicle at the time of accident was driven by a person having a learner's licence, the insurance companies would be liable to satisfy the decree.

(ix) The claims tribunal constituted under Section 165 read with Section 168 is empowered to adjudicate all claims in respect of the accidents involving death or of bodily injury or damage to property of third party arising in use of motor vehicle. The said power of the tribunal is not restricted to decide the claims inter se between claimant or claimants on one side and insured, insurer and driver on the other. In the course of adjudicating the claim for compensation and to decide the availability of defence or defences to the insurer, the Tribunal has necessarily the power and jurisdiction to decide disputes inter se between insurer and the insured. The decision rendered on the claims and disputes inter se between the insurer and insured in the course of adjudication of

claim for compensation by the claimants and the award made thereon is enforceable and executable in the same manner as provided in Section 174 of the Act for enforcement and execution of the award in favour of the claimants.

(x) Where on adjudication of the claim under the Act the tribunal arrives at a conclusion that the insurer has satisfactorily proved its defence in accordance with the provisions of section 149(2) read with sub-section (7), as interpreted by this Court above, the Tribunal can direct that the insurer is liable to be reimbursed by the insured for the compensation and other amounts which it has been compelled to pay to the third party under the award of the tribunal. Such determination of claim by the Tribunal will be enforceable and the money found due to the insurer from the insured will be recoverable on a certificate issued by the tribunal to the Collector in the same manner under Section 174 of the Act as arrears of land revenue. The certificate will be issued for the recovery as arrears of land revenue only if, as required by sub-section (3) of Section 168 of the Act the insured fails to deposit the amount awarded in favour of the insurer within thirty days from the date of announcement of the award by the tribunal.

(xi) The provisions contained in sub-section (4) with proviso thereunder and sub-section (5) which are intended to cover specified contingencies mentioned therein to enable the insurer to recover amount paid under the contract of insurance on behalf of the insured can be taken recourse of by the Tribunal and be extended to claims and defences of insurer against insured by relegating them to the remedy before regular court in cases where on given facts and circumstances adjudication of their claims inter se might delay the adjudication of the claims of the victims."

11. Thus, from Swaran Singh's case (supra), it is obvious that the Tribunal has got power to direct the insurer to pay compensation and recover the same from the owner on a certificate issued by the Tribunal to the Collector in the same manner as provided under Section 174 of Motor Vehicles Act, 1988, the certificate will be issued for recovery as arrears of land revenue only if as required by sub-section (3) of Section 168 of the Act. The insurer failed to deposit the amount awarded in favour of the insurer within 30 days from the date of announcement of award by the Tribunal.

12. Though it has been submitted by Sri S.C. Gulati, vide later judgment of Sardari Lal (supra) Insurance Company shall not be responsible to pay compensation and the amount of award should be recovered from the owner but argument advanced by Sri S.C. Gulati is not sustainable for two reasons: firstly, because in the case of Sardari Lal (supra), the question involved with regard to recovery from the insured has not been dealt with specifically and secondly, the judgment of Swaran Singh (supra) is of larger Bench decided by three Hon'ble Judges of Hon'ble Supreme Court whereas, the judgment of Sardari Lal (supra) has been pronounced by two Hon'ble Judges.

13. Accordingly, keeping in view the proposition of law settled by Hon'ble Supreme Court, with regard to binding precedent that the judgment of larger Bench is binding, Swaran Singh (supra) holds the field to decide the issues involved, vide, **(2008) 9 SCC 284 Rajbir**

Singh Dalal Vs. Chaudhary Dental Universy Sirsa, (2011) 2 SCC 94, Safiya Bee Vs. Mohd. Vajahath Hussain @ Fasi, 2010 AIR SCW 7184, Sant Lal Gupta and others Vs. Modern Co-operative Group Housing Society Ltd. and others, 2010 (28) LCD 1188, Smt. Sheeladevi and another Vs. State of U.P. And others (full bench), 2010 (2) SCC 706, Mahesh Ratilal Shah Vs. Union of India, 2007 (6) ADJ 225 : Murali Singh and another Versus Deputy Director of Consolidation, Varanasi and others, 2005 (2) SCC 673 : Central Board of Dawoodi Bohra Community and another Versus State of Maharashtra and another, (2008 (1) UPLBEC 211, Manju Lata Agrawal (Smt.) Vs. State of U.P. and another). The case of Swaran Singh (supra), shall occupy the field with regard to payment of compensation and liability of Insurance Company to the extent of repugnancy.

14. In view of the above, the appeal is allowed in part. The impugned award dated 4.5.2002 is modified to the extent that it shall be open to the appellant Insurance Company to recover the amount under award from the insured in terms of the procedure provided by Hon'ble Supreme Court in the case of Swaran Singh (supra). It is further provided that the appellant Insurance Company shall deposit entire amount before the Tribunal within two months and the Tribunal shall release the same within one month in favour of the claimant respondents. Deposit made in this Court, shall be remitted to the Tribunal forthwith by the Registry.

15. The appeal is allowed accordingly in part. Costs easy.

REVISIONAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 03.08.2011

BEFORE
THE HON'BLE RAJESH CHANDRA,J.

Criminal Revision No. 4615 of 2010

Santosh Kumar Singh and others
...Revisionists
Versus
State of U.P. and another ...Opp. Parties

Counsel for the Petitioner:
Sri Sudhir Kumar Singh

Counsel for the Respondents:
Sri Hemant Kumar
Sri S.K. Ojha
A.G.A.

Criminal Revision summoning order for alleged offence under section 498-A, 323, 504, 506 I.P.C.-from statement of witnesses recorded under section 200 and 202 Cr.P.C.-demand of dowry, abuse and beating-established-held order passed by Trail Court perfectly valid-No interference called for.

Held: Para 9

A perusal of the impugned order indicates that the same has been passed after considering the evidence available on record and there is no illegality in the same. There was evidence of the complainant to the effect that there was demand of dowry and due to non-fulfillment of the same, the complainant was being abused, threatened and beaten as well. This order of the trial court is perfectly valid and call for no interference at this stage.

Case law discussed:
1964 (SCR) 639; 1976 (1) ACC 225 (S.C.); 2002 (44) A.C.C. 168 (S.C.)

(Delivered by Hon'ble Rajesh Chandra,J.)

1. The present revision has been filed challenging the order dated 21.8.2010 by which the Judicial Magistrate- I, Ballia has summoned the revisionists for the offences under Section 498-A,323,504 and 506 I.P.C. and Section 3/4 of Dowry Prohibition Act.

2. In brief, the facts of the case are that the complainant Smt. Rani Singh filed a complaint against the present revisionist Santosh Kumar Singh and others alleging therein that the complainant Rani Singh was married to Santosh Kumar Singh about 10 years back and at the time of marriage, sufficient dowry was given but her in-laws were not satisfied with the same. Further the allegation is that the accused persons were consistently pressing a demand for the T.V., Fridge , Cooler and Rs. one lakh in cash and due to non-fulfillment of demand of dowry, the complainant somehow being teased and harassed. On 25..3.2010 at about 2.00 p.m., the complainant was severely beaten and an attempt was also made to ablaze her by pouring kerosene oil. The complainant somehow managed to escape and came to her parental house. She was also medically examined.

3. Magistrate recorded the statement of the complainant under Section 200 Cr.P.C. in which she confirmed the allegations made in the complaint. The Magistrate also recorded the statements of Amarnath Singh and Kharak Bahadur Singh under Section 202 Cr.P.C. in which they also confirmed that the accused persons were making demand of dowry and Smt. Rani Singh was being harassed and teased for the same.

4. After considering the evidence, the Magistrate passed the order which is under challenge in this revision.

5. During the pendency of the revision in this Court, the matter was sent to the Mediation Center so that some amicable settlement may take place between the parties but the Mediation Center has reported that the mediation has failed.

6. I have heard the learned counsel for the revisionists, learned A.G.A. as well as learned counsel for the Opposite Party No. 2. The learned counsel for the revisionists argued that the Magistrate has passed the impugned order in a routine manner without there being any evidence on record.

7. I have given my thoughtful consideration to the submissions made on behalf of the revisionists . In the case of **Chandra Deo Singh Vs. Prakash Chandra Bose,** 1964 (SCR) 639 the Hon'ble Apex Court held that at the stage of inquiry under Section 202 Cr.P.C., the test was whether there was sufficient ground for proceeding and not whether there was sufficient ground for conviction . Again in the case of **Smt. Nagwwa Vs. Veeranna Shivalingappa Kanjalgi and other,** 1976 (1) ACC 225 (S.C.) while considering the scope of enquiry under Section 202 Cr.P.C. , the Hon'ble Apex Court has held that it is extremely limited only to the ascertainment of truth of falsehood of the allegations made inthe complaint (a) on the basis of the materials placed by the complainant before the Court; (b) for the limited purpose of finding out whether a prima-facie case for issue of process has been made out; (c) for deciding the question purely from the point

of view of complainant without at all adverting to any defence that the accused may have. In that case, it has been held by way of illustration that the order of magistrate issuing process can be quashed where the allegations made in the complainant or the statements of the witnesses recorded in support of the same taken at their face value made out absolutely no case against the accused or the complaint does not disclose the essential ingredients of an office which is alleged against accused.

8. In the case of **S.W. Palanitkar and others Vs. State of Bihar and another** 2002 (44) A.C.C., 168 (S.C.) the Hon'ble Apex Court has held that at the stage of passing order under Section 203 Cr.P.C. searching sufficient ground tp convict is not necessary.

9. A perusal of the impugned order indicates that the same has been passed after considering the evidence available on record and there is no illegality in the same. There was evidence of the complainant to the effect that there was demand of dowry and due to non-fulfillment of the same, the complainant was being abused, threatened and beaten as well. This order of the trial court is perfectly valid and call for no interference at this stage.

Revision is accordingly dismissed.

10. However, considering the nature of the offence, it is provided that if the revisionists surrender before the Trial Court within three weeks from today and move an application for bail, their bail application shall be disposed of expeditiously, if possible, the same day.

11. Office is directed to send a copy of this order to the trial court by registered post A.D.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 30.08.2011

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

Misc. Bench No. - 7770 of 2011

Chandra Bhushan Pandey ...Petitioner
Versus
Sri Narain Singh, Minister For Horticulture Deptt. and others ...Respondents

Counsel for the Petitioner:
Sri Ashok Pande
Sri Rohit Tripathi

Counsel for the Respondents:
C.S.C

Constitution of India ,Article 226-Writ Petition-"person aggrieved" means-who suffered legal injury or deprived from having legal entitlement-petitioner alleged office bearer-seeking removal of the Secretary Horticulture Department-as not paying heed to the grievance of employees association-held-not aggrieved person-no locus to file the petition-dismissed.

Held: Para 12

Therefore, in our considered view, the petitioner is not a person aggrieved in regard to subject matter involved in the instant case, hence , he has no locus standi to file the present Writ Petition under Article 226 of the Constitution of India.

Case law discussed:
2003 (5) SCC 413; AIR 1974 SC 1719; AIR 1977 SC 1361; AIR 1976 SC 578

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

1. Heard Sri Ashok Pande, learned counsel for petitioner and Sri J. N. Mathur, Additional Advocate General and Smt. Sangeeta Chandra learned State counsel appearing on behalf of official respondents.

2. Sri Chandra Bhushan Pandey, the president of Officers' Association, Ministry for Horticulture, Department of State of Uttar Pradesh has filed present writ petition under Article 226 of the Constitution of India seeking a direction to Sri Narain Singh, Minister for Horticulture Department, Civil Secretariat, Lucknow/ respondent no.1 to ask/ recommend to respondent no.2 to withdraw/remove respondent no.4 (Jeevan Lal Verma) from the post of Personal Secretary and to appoint a new person in his place.

3. The above said relief has been claimed on the alleged facts which in nut shell are that the petitioner being President of the Association has raised grievances of the members of the association including the problem created by personal secretary of Sri Narain Singh, Minister for Horticulture, as the said person with oblique motive and purpose is not listening the complaints made by the members of the association and for the said purpose, he is demanding illegal gratification. However, no heed has been paid by respondent no.1 in spite of several representations as annexed as Annexure no.1, to the writ petition.

4. In view of the above said factual matrix, the core question which has to be decided in the instant writ petition is, as to whether the petitioner falls within the ambit and scope of the definition of 'person aggrieved' in order to enable him to file present writ petition for redressal of grievance and to get relief as claimed.

5. According to our opinion, a 'person aggrieved' means a person who is wrongly deprived of his entitlement which he is legally entitled to receive and it does not include any kind of disappointment or personal inconvenience. 'Person aggrieved' means a person who is injured or he is adversely affected in a legal sense.

6. It is settled law that a person who suffers from legal injury only can challenge the act/action/order etc. by filing a writ petition. Writ Petition under Article 226 of the Constitution is maintainable for enforcing a statutory or legal right or when there is a complaint by the petitioner that there is a breach of the statutory duty on the part of the authorities. Therefore, there must be a judicially enforceable right for the enforcement of which the writ jurisdiction can be resorted to. The Court can enforce the performance of a statutory duty by public bodies through its writ jurisdiction at the behest of a person, provided such person satisfies the Court that he has a legal right to insist on such performance. The existence of the said right is the condition precedent to invoke the writ jurisdiction. *[Utkal University etc. Vs. Dr. Nrusingha Charan Sarangi and others* (AIR 1999 SC 943) and *Laxminarayan R. Bhattad and others vs. State of Maharashtra and another* (2003) 5 SCC 413].

7. Legal right is an averment of entitlement arising out of law. It is, in fact, an advantage or benefit conferred upon a person by a rule of law *[Shanti Kumar R. Canji vs. Home Insurance Co. of New York* (AIR 1974 SC 1719) and *State of Rajasthan v. Union of India and others* (AIR 1977 SC 1361)].

8. In *Jasbhai Motibhai Desai v. Roshan Kumar Hazi Bashir Ahmad and others* [AIR 1976 SC 578], the Apex Court has held that only a person who is aggrieved by an order, can maintain a writ petition. The expression 'aggrieved person' has been explained by the Apex Court observing that such a person must show that he has a more particular or peculiar interest of his own beyond that of the general public in seeing that the law is properly administered. In the said case, a cinema hall owner had challenged the sanction of setting up of a rival cinema hall in the town contending that it would adversely affect monopolistic commercial interest, causing pecuniary harm and loss of business from competition. The Hon'ble Apex Court observed as under,

"Such harm or loss is not wrongful in the eye of law because it does not result in injury to a legal right or a legally protected interest, the business competition causing it being a lawful activity. Judicially, harm of this description is called daminum sine injuria. The term injuria being here used in its true sense reason why law suffers a person knowingly to inflict harm of this description on another, without holding him accountable for it, is that such harm done to an individual is a gain to society at large. In the light of the above discussion, it is demonstratively clear that the appellant has not been denied or deprived of a legal right. He has not sustained injury to any legally protected interest. In fact, the impugned order does not operate as a decision against him, much less does it wrongfully effect his title to something. He has not been subjected to legal wrong. He has suffered no grievance. He has no legal peg for a justiciable claim to hand on. Therefore, he is not a "person aggrieved" to challenge the ground of the no objection certificate. (see *Babua Ram and others Vs. State of U.P. and another* (1995) 2 SCC 689 and *Northern Plastics Ltd. Vs. Hindustan Photo Films Mfg. Co. Ltd. and others* (1997) 4SCC 452) and a decision given by a Coordinate Bench of this Court in the case of *Dharam Raj Vs. State of U.P. and others,* 2009 (27) LCD 1373"

9. Thus, the person aggrieved is, therefore, in this context, would mean a person who had suffered legal injury or one who has been unjustly deprived or denied of something.

10. In *Collin's English Dictionary,* the word "aggrieved" has been defined to mean "to ensure unjustly especially by infringing a person's legal rights". In *Webster Comprehensive Dictionary,* International Edition at page 28, 'aggrieved person' is defined to mean "subjected to ill-treatment, feeling an injury or injustice. Injured, as by legal decision adversely infringing upon one's rights". In *Stroud's Judicial Dictionary,* Fifth Ed., Vol. 1, pages 83-84, person aggrieved means "person injured or damaged in a legal sense".

11. In *Black's Law Dictionary,* Sixth Ed. at page 65, aggrieved has been

defined to mean "having suffered loss or injury; damnified; injured", aggrieved person has been defined to mean:

"One whose legal right is invaded by an act complained of, or whose pecuniary interest is directly and adversely affected by a decree or judgment. One whose right of property may be established or divested. The word "aggrieved" refers to a substantial grievance, a denial of some personal, pecuniary or property right, or the imposition upon a party of a burden or obligation."

12. Therefore, in our considered view, the petitioner is not a person aggrieved in regard to subject matter involved in the instant case, hence , he has no locus standi to file the present Writ Petition under Article 226 of the Constitution of India.

13. Further, Sri J.N. Mathur, learned Additional Advocate General of U.P. has very fairly submitted that he will look into the matter and bring it to the notice of respondents no. 1 and 2 to take appropriate action , if the same is correct. We hope and trust on the submission made by Sri Mathur, who will use his office to do the needful.

14. For the foregoing reasons, writ petition is dismissed with above observations.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 18.08.2011

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

Civil Misc. Writ Petition No. 8658 of 2006

Kamal Kumar Srivastava ...Petitioner
Versus
Board of Revenue U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Gajendra Pratap

Counsel for the Respondents:
Sri Hari Shanker Mishra
Sri Pramod Kumar Srivastava
Sri J.P. Tiwari
Sri P.S. Baghel
Sri Rajendra Prasad Tiwari
Sri Uma Kant
Sri V.B. Upadhya
Sri V.S. Giri
Sri Vipin Sinha
Sri Dharm Pal Singh
C.S.C

U.P.Z.A. & L.R. Act , 1950 read with U.P.Z.A & L.R. Rules 1952-Rule 281-286-Auction Sale of agricultural land-recovery of amount of loan advance by U.P. Finance Corporation-if such amount can not be recovered as arrears of land and revenue-subsequent entire follow up action without jurisdiction-view taken by Board of Revenue-held-justified-Petition dismissed.

Held: Para 38

The functions being quasi-judicial, the Commissioner continues to have a judicious duty to perform with a conscience to guide him to apply his mind. He cannot turn a blind eye or a deaf ear to the decision in Unique Butyl's case by any contrivance of ignorance or

by cultivating any art of forgetfullness. Obedience to law is not only a duty but also a moral obligation towards society. Performance of a statutory duty cast under a rule has to be underlined with such principles. The Commissioner, in the given circumstances of a case, may have to ensure such a performance by avoiding the dilemma between an illegality and irregularity.

Case law discussed:

(2003) 2 SCC 455; AIR 1968 Supreme Court Pg. 954 (Para. 4); AIR 1971 Supreme Court Pg. 1558 (Para.21); 1998 ACJ Pg. 1462(Paras. 2 and 5); 1991 AWC Pg. 842 (Para. 9); AIR 1987 Supreme Court pg. 1443 (Para. 14); 2000 (3) SCC Pg. 87 (Para. 10); 2006 (4) ADJ Pg. 34; (1997) 8 SCC 22;

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

1. This petition arises out of an order passed by the learned Commissioner respondent no. 2 in objections filed by the respondent no. 4 and 5 under Rule 285-I of the Uttar Pradesh Zamindari Abolitional & Land Reforms Rules, 1952, in relation to an auction conducted for sale of plot no. 273 situate in village at Buxi Uparhar, Pargana & Tehsil Sadar, District Allahabad. The order has been affirmed by the Board of Revenue in revision.

2. The background in which the auction took place is that the respondent no. 6 - Dinesh Kumar Pandey took a loan from the U.P. Financial Corporation to set up a Small Plastic Production Unit. He defaulted in repayment of the loan, as a result whereof, the Financial Corporation issued a recovery certificate.

3. The plot in dispute was mortgaged against the said loan and as such the same was put to auction to realise the dues as arrears of land revenue under the provisions of the U.P. Z.A. & L.R. Act, 1950. The auction for immovable property is conducted under Section 284 of the U.P. Z.A. & L.R. Act, 1950, read with under Rules 281 to 286 of the U.P. Z.A. & L.R. Rules, 1952.

4. The petitioner claims to have participated in the said auction proceedings on 25th June, 2002, in which one Smt. Sobha Yadav was the highest bidder. The auction was however cancelled on the ground of inadequacy of the bid amount and the property was again put to sale on 7th September, 2002, on which date the petitioner succeeded in offering an amount of Rs. 4,40,000/- for the land in dispute and the bid was knocked down in his favour.

5. The auction proceedings were challenged by the respondent nos. 4 and 5 by moving an objection under Rule 285-I as provided for under the 1952 Rules, and the Commissioner, who is the competent authority, instead of deciding the matter himself remitted the matter to the Sub Divisional Magistrate who had conducted the auction. This order of the Commissioner dated 10th December, 2002 was subjected to challenge in writ petition no. 7370 of 2003 by the respondent no. 4 Smt. Dhanpatti and the respondent no. 5 Sarla Devi. This petition was allowed on 30th November, 2004 on the ground that it is the Commissioner who has to decide objection and the same cannot be remitted to the Sub Divisional Magistrate under the provisions of Rule 285-I of the U.P. Z.A. & L.R. Rules, 1952. A rider was also put in that till the decision is taken on the objection, no further constructions shall be made by the petitioner auction purchaser.

6. The matter reached the learned Commissioner once again, and the same proceeded before him. The respondent owner of the plot took a clear plea that the bid amount was inadequate as the property was worth Rs. 10 lacs, and that the auction was conducted in violation of the rules. It was also urged by the owner that Dinesh Kumar Pandey had misutilized the documents and title deed of the property by placing it in the custody of the Financial Corporation for the purpose of mortgage, and that the recovery was absolutely illegal. No notice was given about the auction nor any attachment was carried out or proclamation issued to the said respondent. There were only two participants in the auction and one of them was the petitioner who is an employee in the Collectorate which fact is admitted by him. He is a clerk in the office of the District Development Officer, hence, he could not have participated in the auction in view of the bar operating by virtue of Rule 285-B of the 1952 Rules.

7. The aforesaid objection was supplemented after remand by the High Court where it was stated that the recovery certificate which had been sent by the U.P. Financial Corporation indicated that the price of the property was Rs. 8,35,000/- and that the description of the property and address was not correctly shown. The notice was not received by the respondent which was sent on a wrong address deliberately.

8. In Paragraph 18 of the said supplementary objection it was categorically stated that no recovery should be made through the process of arrears of land revenue in view of the Act No. 51 of 1993 which is an Act of Parliament and the law had been declared categorically on this point in the case of ***M/s Unique Butyle Tube Industries Pvt. Ltd. Vs. U.P. Financial Corporation & others, reported in (2003) 2 SCC 455.*** It was also asserted therein that the proceedings with regard to the conduct of auction had been enquired into through the then Additional District Magistrate, Finance & Revenue, who had submitted a report on 6th March, 2003, clearly stating therein that the auction had been conducted under the undue influence of the Tehsil Sadar Authorities and had been hurriedly carried out. This supplementary objection dated 13.12.2004 is on record as Annexure CA-2 of the counter affidavit.

9. The learned Commissioner proceeded to consider the objections and recorded a finding that the petitioner (auction purchaser) was not in a position to influence the auction proceedings and therefore the objection that he being an employee of the Collectorate has affected the auction proceedings does not appear to be correct.

10. On the issue relating to the irregularities mentioned in the objection the learned Commissioner came to the conclusion that he is not fully in agreement with the said objections even though some of the steps relating to procedure have not been correctly taken. He however, held that since the respondent - Smt. Dhanpatti had information about the auction, therefore the contention of the respondent that she had no information about the second round of auction cannot be accepted.

11. Learned Commissioner further went on to hold that the petitioner's

contention that there was no fault on the part of the auction purchaser appears to be correct and that he has raised constructions after having purchased the plot. However the Commissioner went on to allow the objection filed by the respondent solely on the ground that in view of the provisions of 1993 Act, it would be appropriate to set aside the auction. The role of the U.P. Financial Corporation was not found to be justified.

12. The said order of the learned Commissioner was assailed before the Board of Revenue which also came to the conclusion that since the recovery proceedings initiated fell within the scope of the powers of the Debt Recovery Tribunal, therefore, any arguments raised on behalf of the petitioner cannot be accepted and the revision was accordingly dismissed. Aggrieved, the petitioner is before this court under Article 226 of the Constitution of India.

13. The petition was entertained and an interim order was passed on 21.2.2006 to the effect that the parties shall maintain status quo and that the petitioner will not alienate the property in dispute.

14. Sri Gajendra Pratap learned senior counsel for the petitioner advanced his submissions focused on the point that the learned Commissioner while allowing the objection has travelled completely beyond the scope of Rule 285-I of the U.P. Z.A. & L.R. Rules, 1952. To understand his submissions further Rule 285-I is reproduced herein under:-

"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) [* *]*

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

15. The submission of Sri Gajendra Pratap is to the effect that an auction can be set aside only if there is a material irregularity in the holding of the auction either in the publication thereof or its conduct and further the objector will have to prove to the satisfaction of the Commissioner that the objector has sustained substantial injury by reason of such irregularity or mistake.

16. In the instant case Sri Gajendra Pratap submits that the finding with regard to any such irregularity or mistake is against the respondent and the Commissioner has categorically held that he has not found any irregularity in the conduct of auction. Once, this finding has been arrived at it was not open to the Commissioner to enter into the issue of legality of the auction, namely, the impact of the 1993 Act (supra), and the law as declared in M/s Unique Butyle's case (supra).

17. He contends that no effort was made by the respondent to move any application under Rule 285-H to set aside the sale, and if the respondent was aggrieved by any fraud having been played by the original borrower Mr. Dinesh Kumar Pandey, and the auction

having been conducted on account of some fraud in relation thereto, then a suit could have been filed in the Civil Court for setting aside the sale on the ground of fraud as provided for under the proviso to Rule 285-K. He contends that the learned Commissioner under Rule 285-I acts as a Tribunal with limited jurisdiction and authority to set aside a sale on the ground as defined therein. It has no authority to decide the validity of the proceedings of recovery or its own authority to decide such an objection. He submits that even if the proceedings of auction were void as contended by the respondent then the same could have been ignored at an appropriate forum but it could not have been subject matter of adjudication on an objection under Rule 285-I. The sale could not have been set aside on such a ground under the said rule. He further submits that there is no finding on any substantial injury having been caused to the owner of the property and in the absence of any ingredient as defined in the rules the sale could not have been annulled. He submits that an auction purchaser needs a equal protection under the law inspite of a complete procedure having been provided for the protection of the debtor.

18. Sri Pratap further invited the attention of the Court to the original objection filed under 285-I, to contend that no such plea had been taken initially in the year 2002, nor such a plea was taken before this Court when the previous writ petition no. 7370 of 2003 had been filed. In such a situation, this pleading in this proceeding should be treated to be barred on the principles of Order II Rule 2.

He has cited the following decisions in support of his submissions:-

1.AIR 1968 Supreme Court Pg. 954 (Para. 4), Ram Chandra Arya Vs. Man Singh & another.

2.AIR 1971 Supreme Court Pg. 1558 (Para. 21), Union of India Vs. Tarachand Gupta & Bros.

3.1998 ACJ Pg. 1462 (Paras. 2 and 5), Smt. Mahmooda Vs. District Judge, Bahraich & others.

4.1991 AWC Pg. 842 (Para. 9), Bachi Ram Vs. Swami Santosha Nandji.

5.AIR 1987 Supreme Court pg. 1443 (Para.14), Ganpat Singh Vs. Kailash Shankar & others.

6. 2000 (3) SCC Pg. 87 (Para. 10), Kadiyala Rama Rao Vs. Gutala Kahna Rao & others.

19. He has further invited the attention of the court to the provisions of Order XXI Rule 90 Civil Procedure Code and the celebrated authorities on this branch of jurisprudence by Wade & Forsyth and that of De-Smith.

20. Replying to the said submissions Sri Dharm Pal Singh learned Senior Counsel assisted by Sri H.S. Mishra submits that the petitioner manipulated this auction in his favour as he was a Collectorate employee and under Rule 285-B of the 1952 Rules, such an employee was ineligible to participate in the auction. He contends that after the first proclamation, the auction was conducted but set aside, and the second proclamation was issued on 23.8.2002 for

holding an auction on 7th September, 2002. He therefore contends that the second auction was held in violation of Rule 285-A, which requires 30 days of notice, whereas the proclamation only gives 15 days time. He submits that even though the findings recorded by the learned Commissioner were not challenged separately yet the finding of the learned Commissioner that there was no irregularity in the auction, is incorrect. The violation of the said Rule as also the participation of the petitioner both are material irregularities that vitiate the auction and therefore the sale deserves to be set aside. No notice was given to the answering respondent and that the finding of knowledge about the second proclamation is perverse. Not only this, the Collector before proceeding to put up the property to an auction failed to acknowledge his inability to do so in view of the law as expounded in M/s Unique Butyle's case (supra), and apart from this, the U.P. Financial Corporation had clearly written a letter on 31st January, 2002, requesting the Collector not to recover the amount as against the respondent - Smt. Dhanpatti. He further submits that the value of the property was not indicated in the proclamation and Rule 283 appears to have been violated for which reliance is placed on the judgment of a learned single Judge in the case of ***Pravesh Kumar Sachdeva Vs. State of U.P. & another, reported in 2006 (4) ADJ Pg. 34.***

21. He has further invited the attention of the Court to Paragraph 13 of the decision in the case of **Martin Burn Ltd. Vs. Municipal Corporation, Calcutta, AIR 1966 Supreme Court 529**, to contend that the meaning of the word irregularity should not be confined only to procedural defects, and which would also include within its fold the authority to hold auction. He further submits that the Commissioner in his own order had clearly held that all steps that were required to be taken had not been followed. Hence, the order of the Commissioner should not be construed as if there was no irregularity in the auction proceedings.

22. Having considered these rival submissions and in view of the position of law that emerges, the contention of Sri Gajendra Pratap that the Commissioner has to proceed within the precincts of Rule 285-I cannot be doubted. The authority cited by him in the case of ***Shanti Devi Vs. State of U.P. & others, (1997) 8 SCC 22,*** the scope of the said rules have been explained in paragraph 8, 12 and 13 thereof. There an objection had been raised at the stage of the confirmation of sale that the auction of the land was in violation of Section 154 of the U.P. Z.A. & L.R. Act, which provides that no person can hold land in excess of 12.50 acres. This nature of objection was held to be entertainable after confirmation and it was not an objection relating to any irregularity or mistake in publishing or conducting the auction. Such an objection was therefore held not to be barred and could have been raised. The scope of the said decision was in relation to the statutory duty of the Collector to ensure that the provision of Section 154 is not violated. While deciding the case, the apex court derived support from the provisions of the C.P.C. to hold that Rule 285-H and Rule 285-I are akin to Order XXI Rule 90.

23. Sri Gajendra Pratap submits that this authority therefore should be extended to construe that the

Commissioner cannot travel beyond the irregularities or mistake as defined under Rule 285-I of the U.P. Z.A. & L.R. Rules, and enter into the question of illegality. He supports his contention with the recital contained in the authority of the Wade & Forsyth to the following effect:-

"As to these 'jurisdictional facts' the tribunal's decision cannot be conclusive, for otherwise it could by its own error give itself powers which were never conferred upon it by Parliament."

24. On this issue he has also invited the attention of the court to the language used in Order XXI Rule 90 and he therefore submits that the authorities relied on by him clearly establish that the Commissioner had committed an error in proceeding to entertain the objection after having found that there was no irregularity in the auction proceedings.

25. On this issue Sri Gajendra Pratap is right in his submission that this objection came to be raised after the matter was remitted by this Court on 30th November, 2004. His submission is that this Court had only directed the decision on the original objection which had been filed along with the said petition dated 18.9.2002. What he intends to communicate is that the supplementary objection filed in the year 2004 by the respondent after remand could not have been subject matter of consideration.

26. This in my opinion would not be the correct position of law, inasmuch as, once the matter had been remitted to the Commissioner to decide the matter afresh then the objection will be deemed to have been pending before the Commissioner and it was open to the objector to raise all other pleas that were available for the purpose of the decision on the objection. Secondly, what was brought to the notice of the learned Commissioner was the correct position of law in relation to the authority to hold auction. Whether this could have been gone into by the Commissioner or not is a different issue, but the supplementary objection filed by the respondent could not have been rejected merely because it raised additional points in support of the objection already filed. The petitioner was not prejudiced as he had full opportunity to contest the said objection.

27. Coming to the main issue advanced, an action authorised by law is one which is sanctioned by law. Such an action which is authorised by law has to be in accordance with law or in other words in conformity with law. An action which is unlawful cannot be described as lawful only on the ground that authority which has been conferred with the power to deal with the action has no authority by itself to decide such an objection. It is true that the Commissioner cannot travel beyond the scope of the power invested in him under Rule 285-I, which has the ingredient only of material irregularity or mistake coupled with the satisfaction of substantial injury. The Commissioner cannot by a wrong decision clutch at a jurisdiction which he does not posses nor can he refuse to exercise jurisdiction which he otherwise possesses. He can only decide a question which is within his jurisdiction.

28. In the instant case the Commissioner, to translate his own words, has stated that he does not fully agree with the contention of the objector that the auction should be annulled on the

ground of non-compliance of procedure. In the very next sentence he holds that it is true that every step that was required to be taken has not been taken. He however, again holds that the meaning of the word step stood fulfilled as it substantially means, notice by the authority, and which according to him was given to the respondent. The Commissioner therefore himself did not spell out each step that had been complied with or those steps which had been faulted with. It is here where Sri Gajendra Pratap insists that even if it is assumed that there was some irregularity, and that the finding is incomplete, then the matter would at best require a remission before the Commissioner as it cannot be conclusively said that there was any material irregularity.

29. The said argument of Sri Gajendra Pratap has to be understood in the light of the other two submissions made by Sri Dharm Pal Singh, who has pointed out that Rule 285-A and Rule 285-B have been violated. The second proclamation gave only 15 days notice and the finding that the respondent had notice of the said second proclamation is perverse.

30. Sri Gajendra Pratap contends that once the proclamation that had been issued after the first auction, had been set aside, the respondent will be presumed to have knowledge, more so, when the first auction had been set aside and was in the knowledge of the respondent. The aforesaid contention of Sri Gajendra Pratap is not borne out from the record.

31. The learned Commissioner could not have travelled beyond Rule 285-I, and after having recorded a finding in favour of the petitioner on the issue of irregularity, should have further gone to record a finding of substantial injury, which he did not do. To that extent the Commissioner may not have fulfilled his obligation as required under Rule 285-I, nonetheless the gamut of the findings do indicate that the Commissioner had doubt about all the steps having been taken for holding of the auction in accordance with rules. The finding on irregularity was therefore neither clinching nor conclusive so as to read it entirely in favour of the petitioner. The Commissioner for reasons best known to him employed a dubious language to make his reasoning look more obscure than transparent.

32. In this background, the auction was set aside by the Commissioner on the ground of an illegality, apart from any irregularity or mistake as urged on behalf of the learned counsel for the petitioner, holding that recovery was impermissible through a procedure as arrears of land revenue. This basis has been affirmatively enunciated in matters relating to loans taken from the Financial Corporation clearly and unequivocally in the matter of M/s Unique Butyle's case (supra). The Apex Court has already referred this matter to a larger bench but so far as the law already declared is concerned, it still holds the field. The decision in the case of M/s Unique Butyle (supra), therefore clearly declares law that such a recovery cannot be undertaken as arrears of land revenue.

33. If the very authorisation of conducting an auction under the revenue law as arrears of land revenue cannot be countenanced then it would be a travesty of justice to allow the Commissioner to reject such an objection where the very

basic authority of auction is outside the purview of the Act. It is correct on the part of Sri Gajendra Pratap to urge that the respondent could have straight away challenged the auction proceedings before the Collector by raising an objection or by assailing the same through a writ petition before this Court which has not been done.

34. Sri Gajendra Pratap may be right in his submissions on the scope of the Commissioner's powers under Rule 285-I but it is equally true that this Court in the exercise of its jurisdiction under Article 226 read with Article 227 of the Constitution of India is not denuded of its power to come to the aid of a litigant whose rights should be taken away on account of an incorrect forum having been approached by him. Otherwise also, the law declared by the Apex Court binds all under Article 141, the tribunals and the courts alike.

35. As a matter of fact the respondent had approached this Court by filing a writ petition where this issue had not been raised yet the Commissioner was directed to decide the objections filed by the respondent. The Commissioner or the Board could not have taken it as a ground of irregularity or mistake but they could not have ignored a patent want of jurisdiction to hold the auction. The authority cited by Sri Gajendra Pratap in the matter relating to a conditional sale would not be applicable in the instant case where by operation of a statute of Parliament and declaration of law to that effect by the Apex Court, the very authority of the revenue officials under a statute has been taken away denuding them of any authority to hold any auction. The proceeding of auction, therefore would be void and this Court would not upturn the order once it is established that the law declared by the apex court clearly comes to the aid of the respondents. The operation of a statute cannot be subjugated by the incompetence of the authority to decide an objection under a rule.

36. The Commissioner may not have the authority to decide an illegality but he can always acknowledge that the auction could not have been held under the procedure of the U.P. Z.A. & L.R. Act, and the rules prescribed thereunder. If the very authority to hold an auction is taken away then the Commissioner or the Board of Revenue cannot be said to have committed any error in declaring the auction to be illegal. This Court would also not exercise its discretion where any interference may cause the restoration of an unlawful auction.

37. This Court is not oblivious of the distinction between "illegality" and "irregularity" as pointed out by Sri Gajendra Pratap with the aid of Law Lexicon by P. Ramanatha Aiyer. The word "illegal" has been defined in Section 43 of the Indian Penal Code which is comprehensive in nature. Illegality, in my opinion, is a higher degree of patent infirmity in law which is fundamental, as compared to an irregularity which is limited generally to procedural lapses. The Commissioner under Rule 285-I may not be conferred with powers to deal with any illegality other than the irregularity or mistake defined therein, but he is also not empowered to ignore the mandate of substantive law declared by the apex court. The Commissioner cannot say that he has the choice to turn blind to a law enunciated directly on the issue by the

highest court of the land. Even this court has hardly any or little choice. The duty of all courts and tribunals under Article 144 of the Constitution of India is to come to the aid of the Supreme Court to uphold the laws and therefore all options to avoid law stand ruled out. The binding nature of the law in Unique Butyl's case (supra) eclipses all arguments of mere procedural irregularities. It would be impossible for any tribunal or court to guess, probe, adjudicate and decide the wisdom of any law declared by the apex court. Neither equitable considerations nor principles of estoppel would be attracted in the face of the decision of the Supreme Court.

38. That which is fundamental cannot be avoided or buried under a canopy of assumed helplessness. This would bring about more injustice than adherence to law. It is correct for Sri Gajendra Pratap to say that if the rules require the performance of a duty by the Commissioner in a particular manner, then it has to be performed in that manner alone. However, this duty cannot be performed by sacrificing law itself at the altar of diminished jurisdiction. The Commissioner has not lost the authority to obey law. He cannot pretend to be blind and continue to see things with open eyes simultaneously. The functions being quasi-judicial, the Commissioner continues to have a judicious duty to perform with a conscience to guide him to apply his mind. He cannot turn a blind eye or a deaf ear to the decision in Unique Butyl's case by any contrivance of ignorance or by cultivating any art of forgetfullness. Obedience to law is not only a duty but also a moral obligation towards society. Performance of a statutory duty cast under a rule has to be underlined with such principles. The Commissioner, in the given circumstances of a case, may have to ensure such a performance by avoiding the dilemma between an illegality and irregularity.

39. Sri Gajendra Pratap then urged that the petitioner had raised certain constructions and he has sold away a parcel of the land to a third party and as such the matter can be disposed of by compensating the respondent adequately in lieu of the said property in terms of money. Sri Dharm Pal Singh clearly denied accepting any such offer. It will be relevant to repeat that this Court while allowing the writ petition on 30th November, 2004, restrained the petitioner (auction purchaser) from raising any further constructions. Not only this, in the new writ petition there was a restraint of a status quo and from alienating the property in dispute. Sri Singh has further indicated that there were other interim orders operating before the learned Commissioner and the Board of Revenue and that any deliberate attempt on the part of the petitioner to sell the property or raise any constructions is hit by such orders and by the doctrine of pendenti-lite. There can be no dispute on the said proposition.

40. oIn view of the conclusions drawn hereinabove, it is difficult to upturn the decision of the Commissioner as affirmed in revision.

41. The writ petition fails and is hereby dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.08.2011

BEFORE
THE HON'BLE SUDHIR AGARWAL,J.

Civil Misc. Writ Petition No. 12756 of 1993

Ram Swaroop Singh ...Petitioner
Versus
State of U.P. and another ...Respondents

Counsel for the Petition:
Sri Anil Sharma

Counsel for the Respondents:
S.C.

Civil Procedure Code Order 41 Rule 23- Remand-order when entire material available before the appellate authority-itself should decide the matter on merit instead of remanding before Prescribed authority-unnecessary remand-order not sustainable.

Held: Para 5

Before holding an order or part of order to be incorrect it is incumbent upon the appellate authority to discuss and demonstrate as to how it found the order in appeal incorrect or vitiated on one or other ground. The mere observation that finding recorded by court below is incorrect makes the order unreasoned and non speaking and such an order cannot sustain. An order of reman ought not to have been passed in routine course but the appellate court must consider the matter with more seriousness and unless and until it finds that order of court below cannot be sustained at all then after demonstrating and discussing the matter it ought to have passed an order. When the entire material on record is available the appellate court ought not to have remanded the matter but should have decided on its own. An order of remand normally passed when something not evident from record has to be seen.

Case law discussed:
1993 UPTC-407; 1995 UPTC-1035; AIR 1999 SC 1125; AIR 2004 SC 1239; 2006(8) ADJ 586

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

1. Heard Shri Anil Sharma, learned counsel for petitioner and the Standing Counsel for the respondents.

2. It is contended that the land purchased by major son of the petitioner from his own resources could not have been included in the land of the petitioner. When he received the notice under Section 10(2) read with Section 29 of the U.P. Imposition of Ceiling on Land Holdings Act, 1973, he raised his objection whereupon the Prescribed Authority recorded a finding while considering Issue Nos. 5 & 6, that the land purchased by Pritam Singh, son of the petitioner from his own resources cannot be included in the holdings of Ram Swaroop Singh and the issues were decided in favour of the petitioner.

3. Learned Commissioner in appeal held the findings recorded by Prescribed Authority on Issues 5 & 6 incorrect and that court below has not taken decision on merits on the said issue and on this ground he remanded back the matter to the court below to decide afresh on merits after hearing both the parties. However while holding the findings it has not shown how the findings are incorrect.

4. After hearing the learned counsel for the parties and perusing the record, I find force in the contention of the learned counsel for petitioner. The appellate authority has committed illegality in setting aside the judgement and order of

the Prescribed Authority without referring to any incorrectness in the findings in respect of Issues 5 & 6.

5. Before holding an order or part of order to be incorrect it is incumbent upon the appellate authority to discuss and demonstrate as to how it found the order in appeal incorrect or vitiated on one or other ground. The mere observation that finding recorded by court below is incorrect makes the order unreasoned and non speaking and such an order cannot sustain. An order of reman ought not to have been passed in routine course but the appellate court must consider the matter with more seriousness and unless and until it finds that order of court below cannot be sustained at all then after demonstrating and discussing the matter it ought to have passed an order. When the entire material on record is available the appellate court ought not to have remanded the matter but should have decided on its own. An order of remand normally passed when something not evident from record has to be seen.

6. This Court in ***M/s Nehru Steel Rolling Mills, Muzaffarnagar Vs. Commissioner of Sales Tax, 1993 UPTC-407*** (Hon'ble M. Katju, J. as His Lordship then was) while considering the correctness of an order passed by the Sales Tax Tribunal remanding the matter to Deputy Commissioner observed as under :

"In my opinion a remand order should not be readily made, and it should only be made when for very strong reasons the authority cannot itself dispose of the matter on merits. It seems that these remand orders were made by the authorities merely to get rid of the case so that the authority could avoid going into the matter deeply and deciding the issue once and for all. This kind of attitude is to be deprecated."

7. Again in ***M/s Abid Hasan Watch Company, Varanasi Vs. Commissioner of Sales Tax, 1995 UPTC-1035,*** this Court observed in paras 8, 9 and 10 as under :

"(8) The procedural law regarding remand may be stated. It is this that Appeal Court may remand a case if it has been decided on a preliminary point and said judgment of lower court is set aside in appeal by the Appeal Court. It may again send the case to lower court with directions in case it is necessary in the interest of justice. Another contingency is where the court from whose decree an appeal is preferred has disposed of the case otherwise than on a preliminary point and the decree is reversed in appeal and a retrial is considered necessary, the Appellate Court can remand the case to decide specific issue or issues. The Appellate Court may also frame issue or issues for determination after remand. In such a case additional evidence may also be directed to be taken. Otherwise the evidence already on record will again be read.

(9) If, however, the evidence on record is sufficient to enable to Appellate Court to pronounce judgment, the Appellate Court may after resettling the issues, if necessary, finally determine the suit.

(10) I would now deal with a few situations where remand or a prayer for it should be frowned upon. It is in exceptional cases that remand may be

ordered, like when there has been no real trial. Mere insufficiency of evidence is no ground for allowing a party to adduce further evidence on remand. If there is insufficiency of evidence for any party to prove his case, he will suffer. Remand with a view to enable a party to fill up lacuna in evidence is not permissible. In protracted litigation the remand should not be resorted to on the ground that final curtain should be drawn."

8. The question has also been considered by the Apex Court in a catena of cases and it will be useful to refer some recent judgments. In ***Ashwinkumar K. Patel Vs. Upendra J. Patel and others, AIR 1999 SC 1125,*** the Apex Court held that even the High Court should not remand a case under Order 41 Rule 23 C.P.C. to lower Court merely if some reasoning of the lower Court is wrong, since it leads to unnecessary delay and cause prejudice to the parties. If the material is available, the High Court should decide the matter itself since it can consider all the aspects. The relevant observations as contained in para-7 is reproduced as under :

"In out view, the High Court should not ordinarily remand a case under Order 41, Rule 23, C.P.C. to the lower Court merely because it considered that the reasoning of the lower Court in some respects was wrong. Such remand orders lead to unnecessary delays and cause prejudice to the parties to the case. When the material was available before the High Court, it should have itself decided the appeal one way or other. It could have considered the various aspects of the case mentioned in the order of the trial Court and considered whether the order of the trial Court ought to be confirmed or reversed or modified."

9. Recently, in ***Pushpa Devi and another Vs. Binod Kumar Gupta and another, AIR 2004 SC 1239*** it was held if the entire material is available and the parties have raised all issues before the Appellate Court, it should not remand the matter but decide on its own.

10. In ***M/s S.P. Builders and others Vs. Chairman, Debt Recovery Appellate Tribunal Allahabad and others, 2006(8) ADJ 586*** this Court while considering when an order of remand can be passed, has said:

". . . . . the Appellate Tribunal is not a body of limited jurisdiction. It exercise power co-extensive with the Tribunal itself. In these circumstances, if there was no want of any relevant material, if the Tribunal has not discussed some issues properly, it was open to the Appellate Tribunal to consider itself all such issues and to decide the matter but, that, by itself, cannot be a reason to remand the matter to the Tribunal."

11. In view of above exposition of law and discussion with respect to order impugned in this writ petition, in my view, the impugned order cannot sustain.

12. Accordingly, the writ petition is allowed. The order dated 17.2.1993 passed by appellate authority is hereby quashed. The matter is remanded to the Commissioner for considering and passing fresh order in accordance with law.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.08.2011

BEFORE
THE HON'BLE AMRESHWAR PRATAP SAHI,J.

Civil Misc. Writ Petition No. 17743 of 1997

Jagdish Pandey ...Petitioner
Versus
Addl. Collector(City) and others
...Respondents

Counsel for the Petitioner:
Sri Salil Kumar Rai

Counsel for the Respondents:
Sri R.K. Chaubey
Sri M.N. Singh
Sri V.K. Singh
C.S.C.

Gaon Sabha Manual Para 131-Memo of Appeal-presented by D.G.C. (Revenue)-signed by private person-disclosing only reason the village Pradhan refused to sign-held-illegal-a private person can not be be substitute of the secretary of Gaon Sabha-D.G.C. Failed to discharge his duty properly-provision of Para 131 are mandatory can not be by passed in any manner.

Held: Para 13

The provisions of Para 131 appear to be binding and peremptory in nature. The procedure therein cannot be bypassed or else it would lead to a chaos. If any person or villager is allowed to sign documents the same would be not only inappropriate but also illegal as such a person will have no authority to represent a Gaon Sabha. The said provision cannot be wished off merely as directory in view of he language employed therein.

Case law discussed:
1981 RD 1; 1996 AWC 1035; 2007 (2) ALJ 175; 1980 AWC 243; 1983 RD 75; 1976 RD 400; 1965 RD 349

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

1. Heard Sri S.K. Rai, learned counsel for the petitioner, Sri R.K. Chaubey, learned counsel for the respondent no.4. The respondent nos. 5 and 6 are collateral of the petitioner, who have not put any contest. Sri M.N. Singh, learned counsel has ably assisted the Court on behalf of respondent no.3. Learned Standing counsel appears for the respondent nos. 1 and 2.

2. The challenge in this petition is to the order dated 14th March, 1997, passed by the Additional Collector, Gorakhpur, in a revision filed by the Gaon Sabha, respondent no.3 holding, that the memo of revision as presented was competent, and that the revision could be entertained even it was signed by a private person, namely, respondent no.4. The Revising Authority relied on the decision in the case of ***Gaon Sabha V. Ram Karan Singh reported in 1981 RD 1*** to support the said legal proposition inferred by him.

3. Sri S.K. Rai, learned counsel for the petitioner submits that the inference so drawn by the learned Additional Collector is erroneous in law without considering the provisions of Paragrah-131 of the Gaon Sabha Manual as contained in Chapter-6 thereof, and that a private person had no authority under law to sign the memo of revision and get it presented through the District Government Counsel. He contends that it has been time and again held by this Court that the procedure prescribed in law has to be followed and that it should have been done in that manner alone for which reliance is placed on a Division Bench Judgement in the case of ***Babu Ram Verma V. Sub Divisional Officer and***

others reported in 1996 AWC 1035, followed by another Division Bench judgement in the case of ***Gram Panchayat, Pusawali Block-Junawai of etc. Vs. State of U.P. & others reported in 2007 (2) ALJ 175.***

4. He has further relied on the decision of a learned Single Judge in the case of **Vrindaban and others Vs. Gaon Sabha Omri Kalan reported in 1980 AWC 243** and the decision in the case of **Gaon Sabha Vs. Dy. Director of Consolidation Gyanpur, varanasi and others reported in 1983 RD 75** to support his submission.

5. The contention in short is that the impugned order is unsustainable as it has totally over looked the law propounded in the decisions aforesaid and that it has erroneously placed reliance on the judgment in the case of Gaon Sabha Vs. Ram Karan Singh (Supra) which is not a direct authority on the proposition that was to be taken into consideration for deciding the instant case.

6. Sri Chaubey on the other hand relying on the same decision in the case of Gaon Sabha Vs. Ram Karan Singh (Supra) submits that the answering respondent no.4 being a villager is entitled to use the road which is the subject matter of encroachment and, therefore, he has every right to contest the claim on behalf of the Gaon Sabha not only collectively but also individually. He contends that the memo of revision was, therefore, signed in that capacity, moreso, when the Gram Pradhan has refused to sign the memo of revision. He further contends that the revision was signed in his individual capacity and the District Government Counsel is entitled to represent the Gaon Sabha as held in the decision which has been relied upon by the learned Additional Collector. There being no legal infirmity, a minor irregularity cannot be fatal for the revision to be maintainable and hence the impugned order does not require any interference.

7. Learned counsel for the Gaon Sabha Sri M.N. Singh has assisted the Court by inviting the attention of the Court to Paragraph131 of the Gaon Sabha Manaual which is to the following effect:-

"131. Lawyers have been appointed who shall represent the Bhumi Prabhandhak Samiti (Land Management Committee) and give it legal advice where necessary. The Committee shall not engage any lawyer other than the penal lawyer appointed. In important cases, however, special lawyers can be engaged with the specific provision of the Collector in writing.

There is a Vakil or Mukhtar in each tehsil and one civil and one revenue lawyer at the district headquarters. The District Government Counsel is incharge of the whole work.

The Bhumi Prabandhak Samiti (Land Management Committee) requiring the advice of a lawyer should request the Tahsildar or the Sub-Divisional Officer to arrange for it.

The chairman of Bhumi Prabandhak Samiti (Land Management Committee) shall consult the penal lawyer in all cases in which he is summoned or is impleaded as defendant.

If in any case the Bhumi Prabandhak Samiti (Land Management Committee) refuse to sign a plaint or to defend a case, as advised by the panel lawyer or the special lawyer, if engaged, as the case may be, or as instructed by the Tahsildar or the Sub-Divisional Officer, the Lekhpal as Secretary of the Bhumi Prabandhak samiti (Land Management Committee) shall act for the Bhumi Prabandhak Samiti (Land Management Committee) under orders of the Tahsildar for the above purpose only."

8. Sri M.N. Singh submits that if the Land Management Committee or its authority refuses to sign a plaint on behalf of the Gaon Sabha or to defend the case as advised by its counsel then the instructions have to be obtained from the Tahsildar and it would be the obligation of the Lekhpal of the village concerned to sign the memo of plaint/appeal/revision on behalf of the Gaon Sabha being the Ex-Officio Secretary of the Bhumi Prabandhak Samiti (Land Management Committee). It is, therefore, contended that the Gaon Sabha has to be represented appropriately in the manner prescribed therein and not otherwise. Sri Singh has invited the attention of the Court to the decision in the case of **Sahdeo V. Roshal Ali reported in 1976 RD 400** and in the case of Gaon Sabha Vs. Deputy Director of Consolidation (Supra) to contend that an appropriate authorization is mandatory and not directory and the previous view taken by the High Court in the case of **Land Management Committee V. Board of Revenue U.P. Allahabad reported in 1965 RD 349,** is no longer good law. He has invited the attention of the Court to paragraph-6 of the decision in the case of Babu Ram (Supra) where the Division Bench has approved the earlier decision of Sita Ram's case (Supra) holding that the provisions of Paragraph-128 of the Gaon Sabha Manual are mandatory and not directory. He extends the said arguments in respect of paragraph-131 of the Gaon Sabha Manaul and submits that there is a remedy provided and in view of this, the same has to be followed and the Gaon Sabha is bound by the same.

9. Having heard learned counsel for the parties. The prime issue which requires consideration is as to whether the memo of revision that was presented by the District Government Counsel signed by the respondent no.4, was a competent revision or not.

10. The judgment in the case of Gaon Sabha Vs. Ram Karan Singh (Supra) on which reliance has been placed holds that an appeal filed in terms of Para 128 of the Gaon Sabha Manaul did not require passing of a resolution by the Land Management Committee as a condition precedent and that the appeal so filed on behalf of the Gaon Sabha through its counsel was competent. It was further held that even if a Vakalatnama had not been executed in favour of the Gaon Sabha then too even the empaneled counsel was entitled to represent the appeal and, therefore, the appeal cannot be held to be incompetent.

11. In the instant case, the facts are entirely different as involved in the decisions aforesaid. Here it is the admitted case that the memo was not signed by the Gram Pradhan and that he had, as a matter of fact, refused to sign the said memo of revision. The respondent no.4 Sri Komal was never authorized either by the Gaon Sabha or by the Land Management Committee to sign the memo of revision. The decision, therefore, in the case of Gaon Sabha Vs. Ram Karan Singh (Supra) does

not apply on the facts of the present case as the same is clearly distinguishable. Learned counsel for the Gaon Sabha Sri M.N. Singh invited the attention of the Court to the decision of the Board of Revenue which though may not be a precedent for the High Court to follow straightway but is of great persuasive value. After having threadbare discussed the provisions of the Gaon Sabha Manual it was clearly held that the procedure prescribed for presentation of such appeals and revisions does not allow any deviation from the Rules as prescribed under the Gaon Sabha Manual. If para-131 as relied by the learned counsel for the petitioner and by the learned counsel for the Gaon Sabha is applicable then in that view of the matter there can be no doubt that if the officials of the Land Management Committee or the Gram Pradhan has refused to sign the memo of revision, the Secretary of the Land Management Committee has to carry out the procedure upon an order to be passed by the Tehsildar.

12. In the instant case, it is admitted on record that the Gram Pradhan had refused to sign the memo of revision. On the contrary, the respondent no.4, Komal in his individual capacity signed the same. The respondent no.4 had no authority to do so and be a substitute of the Lekhpal, who is enjoined with this duty. Under the provisions of paragraph-131, the District Government Counsel ought to have called upon the Tehsildar to send the Lekhpal for appropriate signatures in order to file a memo of revision and that having not been done, the District Government Counsel failed to apply the provisions of paragraph-131. He could not have made Sri Komal a substitute in place of the Lekhpal of the village.

13. The provisions of Para 131 appear to be binding and peremptory in nature. The procedure therein cannot be bypassed or else it would lead to a chaos. If any person or villager is allowed to sign documents the same would be not only inappropriate but also illegal as such a person will have no authority to represent a Gaon Sabha. The said provision cannot be wished off merely as directory in view of he language employed therein.

14. In view of the aforesaid conclusions drawn, the order impugned dated 14th March, 1997 is unsustainable and is hereby quashed. Consequently the revision which has been decided by the order dated 28th April, 1997 was also an incompetent order and the same is also set aside.

15. This, however, does not denude either the Gaon Sabha or the respondent no. 4 to initiate appropriate proceedings in accordance with law which might be permissible keeping in view the nature of the property of the Gaon Sabha.

16. A debate was also canvassed before the Court in relation to Plot no. 186 which was being claimed by the respondent no.4 himself. The said issue relating to the exact plot number and the claim of the respondent no.4 is not required to go into by this Court in view of the conclusions made hereinabove.

17. Accordingly, the writ petition is allowed. No order as to cost.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 17.08.2011

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

Criminal Misc. Application No. 21604 of 2011

Ramakant Pathak ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri D.N. Pandey

Counsel for the Respondents:
A.G.A.

Criminal Procedure Code-Section 482-notice under section 110 Cr.P.C. In Printed and Performa by Magistrate without application of judicial mind-held-illegal.

Held: Para 4

In 2009 (2) JIC 918, Mahesh Prasad Kannaujiya Vs. State of U.P. this court has held that notice under Section 110 Cr.P.C. should not be given on printed proforma and the notice on cyclostyle proforma is illegal. In the instant case, also the notice has been given on a printed proforma/ cyclostyle proforma wherein name of the noticee, name of the police station, dates, name of the village are written by hand and remaining content of the notice is printed. Such a notice cannot be said to be in accordance with law and is rather illegal.

Case law discussed:
2009 (2) JIC 918

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

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

2. This application u/s 482 Cr.P.C. with a prayer to quash the notice dated 4.5.2011 issued by Sub Divisional Magistrate, Burhanpur, District-Azamgarh, under Section 110 Cr.P.C. in Case No. 25, State of U.P. Vs. Ramakant.

3. Learned counsel for the applicant submitted that the notice under Section 110 Cr.P.C. has been issued on a printed proforma with the blanks filled in by hand and there was no application of mind on the part of the S.D.M.

4. In **2009 (2) JIC 918, Mahesh Prasad Kannaujiya Vs. State of U.P.** this court has held that notice under Section 110 Cr.P.C. should not be given on printed proforma and the notice on cyclostyle proforma is illegal. In the instant case, also the notice has been given on a printed proforma/ cyclostyle proforma wherein name of the noticee, name of the police station, dates, name of the village are written by hand and remaining content of the notice is printed. Such a notice cannot be said to be in accordance with law and is rather illegal.

5. The application u/s 482 Cr.P.C. is allowed. Notice dated 4.5.2011 is quashed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATD: ALLAHABAD 03.08.2011

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

Civil Misc. Writ Petition No.27360 of 2008

Smt. Nirmala Devi and others
...Petitioners
Versus
Upper Commissioner Nagar Nigam, Allahabad and others ...Respondents

Counsel for the Petitioner:
Sri A.B.Singh

Counsel for the Respondents:
Sri R.C. Shukla
Sri P.C. Shukla
Sri Rajesh Kumar Pandey
C.S.C.

Municipal Corporation Act 1959-Section-472-Power of Review-order passed in mutation proceeding under Section 213 (3)-appealble under Section 472-in absence of statutory provision of review-order without jurisdiction

Held: Para 21

In mutation proceedings when an order is passed by the authority which is without jurisdiction this Court can interfere with such an order in exercise of writ jurisdiction. Present is the case of a nature where the Up Nagar Adhikari having already decided the matter on merit has reviewed the same without there being any jurisdiction to review the judgment on merits.

Case Law discussed:
AIR 1987 SC 2186; (1997) 2 CRC 266; 2009 (108) RD 551; 2005(98) RD 720; 1991 RD 72; 1993 (35) ALR page 332; 2002 (93) RD 6; 1956 A.L.J. 807

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

1. Heard Sri A.B.Singh, learned counsel for the petitioners, Sri R.C.Shukla appears for respondent Nos.5, 6 and 7 and Sri Rajesh Kumar Pandey appears for respondent No.1.

Counter and rejoinder affidavits have been exchanged.

2. With the consent of the learned counsel for the parties the writ petition is being finally decided.

3. By this writ petition the petitioners have prayed for quashing the order dated 19.5.2008, passed by Up Nagar Ayukat by which earlier order dated 11.6.2007 passed with regard to House No.337/18, Shivkuti, Allahabad has been recalled and a direction has been issued to record the name of respondent Nos.5, 6 and 7.

4. Brief facts of the case which are necessary to be noted for deciding the writ petition are- that with regard to House No.337/18 situate at Shivkuti, Allahabad an order for mutation dated 11.6.2007 was passed for mutating the name of the writ petitioners which was made subject to decision of the Civil Court, in pending Civil Suit No.613 of 1989. After the said order was passed after hearing both the parties, the proceedings were reopened on the application submitted by the respondent Nos.5, 6 and 7 before Mayor. The petitioners as well as respondent Nos.5, 6 and 7 submitted application for mutating their names on the basis of respective sale deeds. Both the parties resisted claim of other side. The dispute regarding title between vendors of both

the parties is pending consideration before the Civil Court in Suit No.613 of 1989. After the order dated 11.6.2007 mutating the name of petitioners and rejecting the objection of respondent Nos.5, 6 and 7 an application was submitted to the Mayor of the Nagar Nigam by respondent Nos.5, 6 and 7 in which certain directions were issued. It appears that on the aforesaid directions again notices were issued to the parties and after hearing the parties a fresh order dated 19.5.2008 has been passed by which earlier order dated 11.6.2007 has been set aside and a direction was issued for mutating the name of respondent Nos.5, 6 and 7. The petitioners aggrieved by the said decision has come up in the writ petition.

5. Learned counsel for the petitioners challenging the order contended that the said order passed on 19.5.2008 being review of the earlier order dated 11.6.2007 is without jurisdiction. He submits that when earlier authority after hearing the parties passed the order dated 11.6.2007 mutating the name of the petitioners, the remedy if any available to the respondents was to file an appeal under Section 513 of the U.P. Municipal Corporation Act, 1959 (hereinafter referred to 'Act') and recourse of review was without jurisdiction. He further submits that there was no jurisdiction in the Mayor to direct to rehear the matter. In support of his submission he placed reliance on the judgment of the Apex Court in the case of **Dr. Smt. Kuntesh Gupta vs. Management of Hindu Kanya Mahavidyalaya, Sitapur (U.P.) and others**, AIR 1987 SC 2186 and the Full Bench decision of this Court in **Shivraj and others vs. Deputy Director of Consolidation, Allahabad and others**,(1997)2 CRC 266.

6. Learned counsel appearing for the Nagar Nigam refuting the submissions of the learned counsel for the petitioners contended that the proceedings were reopened on the directions issued by the Mayor, hence, there is no error in the proceedings. He submits that after the order dated 11.6.2007 an application was given by the respondents to the Mayor on which he directed for fresh hearing.

7. Sri R.C.Shukla, learned counsel appearing for respondent Nos.5, 6 and 7 refuting the submission of the petitioners' counsel contended that there is an inherent jurisdiction in the authority who has passed the order dated 11.6.2007 to correct any error. He submits that under Section 213 of the Act there is a power to alter or amend the assessment list which power includes for correcting the order as and when required. He further submits that every Court or authority has jurisdiction to correct any error. He has placed reliance on judgment of the Apex Court reported in 1990 RD 47, **Sri Dadu Dayal Mahasabha vs. Sukhdev Arya and another** and 2009(108) RD 551 **S.Satnam Jsingh and others vs. Surender Kaur and another.**

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

8. The present case is a case where the competent authority has exercised jurisdiction under Section 213 of the Act. Sub sections (1) and (3) of Section 213 of the Act are as follows:

"213. Amendment and alteration of list.- (1) The Executive Committee or a sub-committee thereof appointed in this behalf may at any time alter or amend the assessment list,-

(a) by entering therein the name of any person or any property which ought to have been entered or any property which has become liable to taxation after the authentication of the assessment list; or

(b) by substituting therein for the name of the owner or occupier of any property the name of any other person who has succeeded by transfer or otherwise to the ownership or occupation of the property; or

(c) by enhancing the valuation of, or assessment on, any property which [has become incorrectly valued or assessed or which, by reason of fraud, misrepresentation or mistake, has been incorrectly valued or assessed]; or

(d) by revaluing or re-assessing any property the value of which has been increased by additions or alterations to buildings; or

(e) where the percentage on the annual value at which any tax is to be levied has been altered by the Corporation under the provisions [of this Act] by making a corresponding alteration in the amount of the tax payable in each case; or

(f) by reducing upon the application of the owner or on satisfactory evidence that the owner is untraceable and the need for reduction established, upon its own initiative, the valuation of any building which has been wholly or partly demolished or destroyed; or

(g) by correcting any clerical, arithmetical or other apparent error;

Provided that the Executive committee or the sub-committee, as the case may be, shall give at least one month's notice to any person interested in any alteration [or amendment] which the Executive Committee or sub-committee proposes to make under clauses (a), (b), (c) or (d) of sub-section (1) and of the date on which the alteration [or amendment] will be made.

[(1-A) For the removal of doubts it is hereby declared that it shall not be necessary to follow the procedure laid down in Sections 199 to 203 or in Sections 207 to 210 in respect of any alteration made under clause (e) of sub-section (1) as a result of a determination of the rate of tax under Section 148.].

(2).....

(3) Every alteration [or amendment] made under sub-section (1) shall be authenticated by the signature or signatures of the person authorised by Section 210 and, subject to the result of an appeal under Section 472, shall take effect from the date on which the next instalment falls due.

Sub-section (3) of Section 213 clearly contemplates filing of an appeal under Section 472.

Sub-sections (1) and (2) of Section 472 are relevant in the present case which are as follows:

*"**472. Appeals when and to whom to lie.-** (1) Subject to the provisions hereinafter contained, appeals against any annual value or tax fixed or charged under this Act shall be heard and determined by the Judge:*

[Provided that any such appeal pending at any stage before the Judge may be transferred by the District Judge for hearing and disposal, to any Additional Judge of the Court of Small Causes or Civil Judge or Additional Civil Judge having jurisdiction in the City.]

(2) No such appeal shall be heard unless-

(a) it is brought within fifteen days after the accrual of the cause of complaint;

(b) in the case of an appeal against an annual value an objection has previously been made [and has been disposed of under Section 209];

(c) in the case of an appeal against any tax in respect of which provisions exists under this Act for an objection to be made to the [Municipal Commissioner] against the demand; such objection has previously been made and disposed of;

[(d) in the case of an appeal against any amendment or alteration made in the assessment list for property taxes under sub-section (1) of Section 213, an objection has been made in pursuance of a notice issued under the proviso to the said sub-section and such objection has been disposed of;]

(e) in the case of an appeal against a tax, or in the case of an appeal made against an annual value after a bill for any property tax assessed upon such value has been presented to the appellant, the amount claimed from the appellant has been deposited by him with the [Municipal Commissioner]."

9. The submission which has been pressed by counsel for the petitioners is that the order passed under Section 213, dated 11.6.2007, could not have been reviewed by the authority since the said order was subject to result of an appeal under sub-section (3) of Section 213 of the Act and there is no specific provision for review under the statute. Whereas Sri Shukla refuting the submissions contended that under Section 213, Assessment List, can be altered and amended at any time and the authority who has passed the order dated 11.6.2007 was fully competent to review that order.

10. For appreciating the submissions of the learned counsel for the parties it is necessary to look into the ambit and scope of Section 213(1) of the Act. Sub-section (1) of Section 213 provides that the Executive Committee or a sub-committee thereof appointed in this behalf may at any time alter or amend the assessment list. The power under Section 213(1) can be exercised undoubtedly from time to time as occasion arises but the question which is to be considered is as to when an order was passed after hearing both the parties, whether that can be reviewed by the same authority or not. The present is a case where the mutation was sought under Section 213(1)(b) of the Act which was allowed on 11.6.2007, when specific

provision for appeal is mentioned under sub-section(3) of Section 213 of the Act, the Legislature clearly contemplated challenge of such order by way of an appeal. Clause (g) of sub-section (1) Section 213 contemplates correction of any clerical, arithmetical or other apparent error in the assessment list. The present is not case of correction of clerical, arithmetical or other apparent error rather it was a case of deciding the claim of two set of persons who were claiming their mutation on the basis of the respective sale deeds.

11. The Apex Court in the case of Dr. Smt. Kuntesh Gupta (supra) held as under:

"It is now well established that a quasi judicial authority cannot review its own order, unless the power of review is expressly conferred on it by the statute under which it derives its jurisdiction. The Vice-Chancellor in considering the question of approval of an order of dismissal of the Principal, acts as a quasi judicial authority. It is not disputed that the provisions of the U.P. State Universities Act, 1973 or of the Statutes of the University do not confer any power of review on the Vice-Chancellor. In the circumstances, it must be held that the Vice-Chancellor acted wholly without jurisdiction in reviewing her order dated January 24, 1987 by her order dated March 7, 1987. The said order of the Vice Chancellor dated March 7, 1987 was a nullity."

12. The Full Bench judgment of this Court in the case of Sivraj (supra) considered the power of the Deputy Director of Consolidation to review the judgment given under Section 48 of the U.P. Consolidation of Holdings Act. After considering the provisions the Full Bench held that unless the the power of review is specifically conferred by the statute the consolidation authorities has no power to review or revise their judgment. The Full Bench of this Court held as under:

"The aforementioned decisions of this Court, as we read them, do not support the proposition of law that any Tribunal exercising judicial or quasi-judicial power, which is not vested with power of review under the statute expressly or by necessary implication, has an inherent power of review of its previous order in any circumstances. In our view the decisions only lay down the proposition that a Tribunal exercising judicial or quasi-judicial power has the inherent power to correct a clerical mistake or arithmetical error in its order and has the power to review an order which has been obtained by practising fraud on the court, provided that injustice has been perpetrated on a party by such order. Therefore, these decisions should not be construed as laying down any proposition of law contrary to the well settled principle of law that any order delivered and signed by a judicial or quasi-judicial authority attains finality subject to appeal or revision as provided under the Act and if the authority passing the order is not specifically vested with power of review under the statute, it cannot reopen the proceeding and review/revise its previous order.

Coming to the provisions of the U.P. Consolidation of Holdings Act, it is our considered view that the consolidation authorities, particularly the Deputy

Director of Consolidation while deciding a revision petition exercises judicial or quasi judicial power and, therefore his order is final subject to any power of appeal or revision vested in superior authority under the Act. The consolidation authorities, particularly the Deputy Director of Consolidation, is not vested with any power of review of his order and, therefore, cannot reopen any proceeding and cannot review or revise his earlier order. However, as a judicial or quasi-judicial authority he has the power to correct any clerical mistake/arithmetical error manifest error in his order in exercise of his inherent power as a tribunal."

13. Learned counsel for the respondents has relied on the judgment of the Apex Court in Sri Dadu Dayal Mahasabha (supra) where the Court was considering the inherent power of the Court under Section 151 C.P.C. The Apex Court in the said judgment laid down that the Court has inherent power under Section 151 to correct its own proceedings, if it was misled by one of the parties, that was a case where order of withdrawal of the suit was obtained which was sought to be cancelled. The Court held that if the same was obtained by misleading the Court, the same can very well be recalled. There cannot be any disputed to the proposition as laid down in the aforesaid judgment. However, the court has inherent jurisdiction to recall its order which was obtained by misleading the Court. If fraud is played on the Court, it is the Court who has power to correct the said earlier order. Present is not a case where any fraud has been played. Earlier order was passed mutating the name of the petitioners after hearing the contesting respondents. The second case relied by learned counsel for the petitioner is **Indian Charge Chrome, Ltd. and another vs. Union of India and others,** 2005(98)RD 720 where the review was sought of a judgment of the Apex Court. The Apex Court admitted the review against its own judgment. The Court as noted above has power to review its own judgment. But, in the present case, the question for consideration is the power of a statutory authority who have been conferred certain limited jurisdiction under the statue. The above decision also does not help the respondent in the present case.

14. The last judgment which is relied is S. Satnam Singh (supra) which case had arisen out of the suit in the Civil Court. The Court laid down the proposition that the Court is always empowered to rectify the mistake the Court has committed. Present is not a case where any court is correcting its own mistake rather present is a case where after decision is taken by the statutory authority under Section 213, the same authority again re-hear the matter on the direction of the Mayor and review its judgment. No provision has been shown to the Court which empowers the Mayor to issue any direction to reopen the matter which has been decided by a statutory authority.

15. In the present case we are of the view that the petition has substance and the order dated 11.6.2007 could not have been reviewed by the Up Nagar Ayukt and the remedy available to the respondents was to file an appeal under Section 472 of the Municipal Corporation Act, 1959.

16. Learned counsel for the respondents have submitted that the petitioners having challenged the order passed by the municipal authorities in mutation proceedings, the remedy available to the petitioners is to institute a suit in the competent court and the writ petition be not entertained.

17. Learned counsel for the respondents has placed reliance on a Division Bench Judgment of this Court reported in 1991 RD 72 , **Ram Bharose Lal vs. State of U.P. and others.** In the case of Ram Bharosey Lal the petitioner has filed a writ petition for a mandamus directing the District Magistrate to effect a change in the relevant village record scoring out the name of individuals. The writ petition was dismissed by a Division Bench against which a Special Leave Petition was filed, which was permitted to be withdrawn and therefore, thereafter a review application was filed by the petitioner before the Division Bench. Following was laid down by the Division Bench:-

"The main relief sought by the petitioner is to direct the District Magistrate to effect change or mutation in the relevant record or rights by expunging the name of the vendors and entering the names of vendees, actually seeking direction to the Collector to make mutation of the name of the petitioner similar to an application under Sec.34 of U.P. Land Revenue Act 1901. Even though relief sought by the petitioners may be under different Act but legal effect of the order of mutation in that event also remains the same. As a matter of fact, the mutation proceedings may be under Sec.34 of U.P. Land Revenue Act or under some other similar Act, but the legal effect in both the events remains the same. These proceedings do not decide the right or title of the parties rather these proceedings are just fiscal in nature. They have just got legal effect of entering name of vendee in place of the vendor or the name of lessee in place of lessor or donee in place of doner. These mutation proceedings are to enable the State to receive revenue from vendee.

By now it is well settled that where the dispute is in mutation proceedings which do not adjudicate upon rights or title of the parties, this Court need not interfere under Article 226 of the Constitution. In such matters persons aggrieved shall have rider to seek remedy in the appropriate Court.

Even though the order of Division Bench was not detained one, but in our opinion it is absolutely correct. There is no justification to review or recall the order dated 5.2.1988 passed by Division Bench. Review petition fails and is dismissed. It shall, however, remain open for the petitioner to seek remedy before appropriate Court."

18. The above case was on entirely different premise. The writ petition was directly filed in this Court praying relief akin to mutation of name, which petition was dismissed by this Court. Although observation was made that mutation proceedings does not adjudicate upon rights and titles of the parties and the aggrieved persons shall have to seek remedy in the appropriate court but the said case did not lay any proposition that even if the order passed by statutory authority in mutation proceedings is without jurisdiction this Court under

Article 226 cannot interfere in such an illegal order.

19. A learned Single Judge had occasion to consider mutation proceedings under U.P. Municipalities Act, 1916. In 1993(35)ALR page 332, **Hukmanand Sharma vs. The Chief Judicial Magistrate, Dehradun and others,** it was observed by this Court that in the said case that proceedings for mutation in the Municipal record are fiscal in nature. However, in the case an illegal order is passed in the mutation proceedings, the same can be expunged. This Court observed that the fact that either of the parties can approach to the Civil Court does not mean that an illegal order passed by the Nagar Palika can be allowed to stand. Following was laid down in the said judgment:

"Proceedings for mutation in the municipal records are fiscal in nature and are limited to the realisation of municipal taxes. The Nagar Palika has no authority to conc justice lusively decide as to who is the rightful owner of the property. This power is vested in a Civil Court and the party, who is aggrieved by mutation, can go to a civil court for declaration of its rights and for such relief, as the circumstances of the case may warrant. The learned counsel for the respondents, therefore, contended that the petitioner's remedy lies in approaching a Civil Court for determination of its rights. It is true that either of the parties can approach to the Civil Court, but that does not mean that an illegal order passed by the Nagar Palika can be allowed to stand merely because it is not conclusive. The petitioner's name was already recorded in the municipal records. The respondent No.4 did not appeal to the appellate authority. After the order, it applied in 1973 for mutation of its name and the proceedings lingered on for several years. The administrative authorities are not at liberty to pass any order whatever and when ever they like. The order passed by the executive officer expunging the name of the petitioner was, therefore, illegal and deserves to be quashed.

The writ petition is, accordingly allowed and the order dated 15th June, 1981 passed by the executive officer, Nagar Palika, Rishikesh, a copy of which is Annexure '2' to the writ petition, is hereby quashed. In the circumstances of the case, the parties will bear their own costs."

20. This Court while considering the provisions of Section 34 of the U.P. Land Revenue Act, 1901 has examined the ambit and scope of entertaining the writ petition against the order passed in mutation proceedings in 2002(93)RD 6**, Lal Bachan vs. Board of Revenue , U.P., Lucknow and others)** referring to the Division Bench judgment of this Court in **Jaipal, Minor vs. The Board of Revenue, U.P., Allahabad and others,** 1956 A.L.J. 807 following was laid down by this Court:

"12. In view of the above discussions, it is clear that although the writ petition arising out of the mutation proceedings cannot be held to be non-maintainable but this Court do not entertain the writ petition under Article 226 of the Constitution due to reason that parties have right to get the title adjudicated by regular suit and the orders passed in mutation proceedings are summary in nature.

13. The second question which needs to be considered is as to in what circumstances the writ petition can be entertained arising out of the mutation proceedings. The Division Bench of this Court in Jaipal's case (supra) has referred to "exception" to the general rule in following words:

"The only exception to this general rule is in those cases in which the entry itself confers a title on the petitioner by virtue of the provisions of the U.P. Zamindari Abolition and Land Reforms Act. This petition does not fall in that class and we think therefore this Court should not entertain it. It is accordingly dismissed with costs."

14. Learned Single Judge in Sridhar's case (supra) also entertained the writ petition. The learned Single Judge in the aforesaid writ petition by entertaining the writ petition had noted that the aforesaid case was not simple mutation case but in the said case mutation was being claimed on the basis of the orders passed by the consolidation authorities on the basis of the sale deed. It was claimed in that writ petition that the name on the basis of the sale deed was mutated by consolidation authorities and name also came in C.H. Form No.45 but the said entry was not corrected in the revenue records hence the mutation was filed. That was the distinguishing feature which was found by the Court and due to that reason the said writ petition was entertained. The Court in the aforesaid case also endorsed the view that had it been the case of simple mutation the writ petition could not have been entertained. It was held in paragraph 9 of the aforesaid case:

"9. In the present case, as already mentioned, it was not a case of simple mutation of the name of the respondent No.3 on the basis of the sale deed. The said deed is said to be dated 10.7.1967 allegedly executed by the petitioner in favour of the respondent No.3. The fact that the sale deed was executed by the petitioner has been denied vehemently. The said sale deed is claimed to have been placed before the consolidation authorities in 1968 and the name of the respondent No.3 was recorded as owner on the basis of the said sale-deed over the plot in question. Had that been the simple case based on that mutation of names in consolidation proceedings was made in 1968 soon after the execution of the sale-deed and on the basis of the said consolidation entries on C.H. Form No.45, the name of the opposite party No.3 continued to be recorded in the revenue records thereafter denotification of village under Section 52 of the Act continuously, there was no difficulty in refusing to entertain the writ petition challenging the mutation entries under Article 226 of the Constitution."

15. Another case in which this Court had entertained the writ petition was Rudra Pratap's case (supra) in which case the Court interfered on the ground that the Board of Revenue while deciding the mutation case has also decided the question of title. The learned Single Judge observed in paragraph 2 in the said judgment as under:

"In that case no doubt it was held that mutation proceedings ordinarily relate to the question of possession and do not decide the question of title for which there is a separate remedy by way of a suit and as such the High Court

should not interfere in the order passed in mutation proceedings. But it was also observed in that case that this consideration should not be applied in cases where the question of title is also decided in mutation proceedings. In my opinion the present case belongs to that category of cases in as much as the Board of Revenue has proceeded to decide the question of title. The Board of Revenue has not ordered mutation in favour of the third respondent merely on the basis of her possession, but it has ordered mutation in her favour on the ground that she is entitled to succeed to the land in dispute whereas the petitioners are not so entitled. The finding even if not conclusive, does throw a shadow on the clear title of the petitioners. The petitioners, in my opinion, are entitled to seek the assistance of the Court to remove that shadow and it is not necessary to drive them to the remedy of a suit."

16. The cases in which the writ petition can also be entertained arising out of the mutation proceedings may be cases in which an authority not having jurisdiction has passed an order or interfered with an order passed in the proceedings. The writ petition challenging an order passed without jurisdiction can be entertained by the Court despite availability of an alternative remedy. However. In that case also the Court will interfere only when it appears that substantial injustice has been suffered by a party. In view of the above discussion, it is held that the writ petition arising out of the mutation proceedings under Section 34, U. P. Land Revenue Act cannot be entertained by this Court subject to only exception as laid down by the Division Bench in Jaipal's case (supra). The writ petition may also be entertained where authority passing the order had no Jurisdiction."

21. In mutation proceedings when an order is passed by the authority which is without jurisdiction this Court can interfere with such an order in exercise of writ jurisdiction. Present is the case of a nature where the Up Nagar Adhikari having already decided the matter on merit has reviewed the same without there being any jurisdiction to review the judgment on merits.

22. In view of the foregoing discussions, we are of the view that the order impugned dated 19.5.2008 cannot be sustained and deserves to be set aside. However, in view of the fact that this writ petition challenging the order dated 19.5.2008 was filed in this Court on 2.6.2008 and an interim order was passed on 4.2.2008 staying the effect of order dated 19.5.2008 which interim order has been continuing in this writ petition, in the ends of justice the respondent Nos.5, 6 and 7 may be given an opportunity to file an appeal under U.P. Municipal Corporation Act, 1959.

23. In the result the order dated 19.5.2008 is set aside. Respondent Nos.5, 6 and 7 may file an appeal against the order dated 19.5.2008 under Section 472 of the U.P. Municipal Corporation Act, 1959 in accordance with law.

24. The writ petition is disposed of accordingly.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 12.08.2011

BEFORE
THE HON'BLE SUNIL AMBWANI, J.
THE HON'BLE K. N. PANDEY, J.

Civil Misc. Writ Petition No.32101 of 2004

Dr. V.P. Singh and others ...Petitioners
Versus
Executive Council Banaras Hindu University, Varanasi and others ...Respondents

Counsel for the Petitioner:
Sri G.K.Singh
Sri V.K. Singh

Counsel for the Respondents:
Sri Rakesh Sinha
Sri K.C. Sinha
Sri Pankaj Naqvi
Sri P.N.Rai
Sri V.K.Upadhyay
Sri V.K. Srivastava
C.S.C.

Central University Retirement Benefit Rules, 1967-Rule-3(iii)-Request to switch over from old pension benefits to new Pension Scheme-who failed to give option within prescribed period-Vice Chancellor initially accepted but subsequently withdraw-central Govt. refused to accept the recommendation for switch over-held-justified no recurring cause of action arose to put claim after such long time.

Held: Para 17

We are of the opinion that the Vice Chancellor on his own without there being any approval of the Executive Council, which is in turn bound in the matters of financial discipline, by the decisions taken by the University Grants Commission, which fully funds the University, did not have any authority to extend the date for option.

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

1. We have heard Shri G.K. Singh for the petitioners. Shri Rakesh Sinha for the Central Government. Shri Pankaj Naqvi for Banaras Hindu University and Shri V.K. Upadhyay for the University Grants Commission.

2. All the petitioners are teachers/ employees of the Banaras Hindu University. By the writ petition No.32101 of 2004 they have prayed for quashing the decision of the Executive Council of the University dated 19th-20th July, 2002 as communicated by the Registrar of the University on 5.9.2002 regretting to approve the orders of the Vice Chancellor of the University dated 20.3.2001 and 18.1.2002 to grant another opportunity to the university employees, and to all those who have superannuated after 1.1.1996, to opt for the pension scheme. Consequently, the action taken in compliance to the Vice Chancellor order dated 18.1.2002 was withdrawn. The petitioners have further prayed for writ of mandamus commanding the university to allow the petitioners to switch back from Contributory Provident Fund Scheme (CPF Scheme) to General Provident Fund-cum-Gratuity-cum-Pension Scheme (GPF-Gratuity-Cum-Pension Scheme).

3. In Writ Petition No.28790 of 2004, the petitioner has challenged the decision of the Executive Council dated 31st May, 2003 communicated to the petitioner vide letter dated 24th July, 2003.

4. Brief facts giving rise to these writ petitions are that the Fourth Central Pay Commission recommended that all contributory fund beneficiaries in service as on 1.1.1986 should be deemed to have come over to the Pension Scheme unless they specifically opt to continue under the Contributory Provident Fund Scheme. The Department of Pension and Pensioners Welfare accordingly issued an order on 1.5.1987 under which the option was to be exercised by 30.9.1987. Those employees, who opted to continue under CPF Scheme were expressly retained in CPF Scheme. All the petitioners opted to continue with CPF Scheme.

5. Shri G.K. Singh appearing for the petitioners states that the Benaras Hindu University vide its Circular dated 26.3.2001 invited applications from the employees of the respondent university for changing over from CPF to GPF-Gratuity-Pension Scheme. The option was to be exercised by 25.5.2001. The decision to give an opportunity to the employees was taken by the Vice Chancellor on the recommendation of a committee, which was appointed by the competent authority of the university and included two members of the Executive Council. Many employees exercised the option and were allotted the GPF numbers. Although in respect of some of the numbers 'interim' word was mentioned but in many cases the word 'interim' was not mentioned. The process continued for a period of 17 years after which the facility was discontinued and a decision was taken by the Executive Council of the University on 19th-20th July, 2002, which is under challenge.

6. It is submitted by learned counsel for the petitioner that the Executive Council of the University has acted arbitrarily in not accepting the option form, which was submitted by the petitioner in pursuance to the notification dated 26.3.2001. The university had in the past also invited options in the year 1988 and thrice in the year 1995 from the teachers/ employees of the Universities. There are several other premier institutes/ universities in the country in which the teachers and employees have been extended the facility of switching back from CPF to GPF-Gratuity-Pension Scheme upto the year 2003.

7. The petitioners have amended the writ petitions and have challenged the decision of the Government of India and the University Grants Commission dated 22.7.2003, 23.9.2003 and 20.10.2003 rejecting the request of the University to allow the teachers/ employees to switch over to the GPF-Gratuity-Pension Scheme and have challenged the order dated 22.7.2003 passed by the Joint Secretary (Personnel), Department of Expenditure, Ministry of Finance, Government of India, the order dated 23.9.2003 passed by the Under Secretary, University Grants Commission, and the order dated 20.10.2003 passed by the Deputy Secretary, Department of Secondary and Higher Education, Minister of Human Resource Development, Government of India. It is submitted that on the recommendation of 5th Pay Commission the pay package was drastically amended in favour of the employees, who had opted for GPF-Gratuity-Pension Scheme and has adversely affected those, who continued under CPF Scheme in as much as the age of superannuation was raised

from 60 to 62 years; the commutation of pension was increased from 1/3rd of the pension to 40% of the pension amount; 25% of the non-practicing allowance was provided to the teachers belonging to medical profession to be treated as pay, for calculating pension. The dearness allowance was added for the purposes of calculation of gratuity, with ceiling of Rs.3.5 lacs and family pension was liberalised w.e.f. 1st January, 1998 giving the benefit to mother/ father, in the absence of spouse and children. The denial of an opportunity, which has been given to the teachers of many other institutes, to switch back from CPF to GPF Scheme, is thus wholly arbitrary and illegal and violative of petitioners' rights under Art. 14 and 16 of the Constitution of India.

8. Shri Pankaj Naqvi appearing for the Banaras Hindu University, states that the President of India in the capacity as visitor of the University had approved the amendment of Statute 43 of the B.H.U. Act and accordingly the Central University Retirement Benefit Rules, 1967 were circulated by notification dated 29.12.1967 requesting the employees of the University to exercise their option under Rule 3 (iii) of the Rules. Those employees, who opted for CPF Scheme were again given an opportunity to switch over providing for the last date of exercising the option by 31st December, 1995. Thereafter, no further opportunity was allowed. Some of the employees, who had opted for CPF Scheme and also did not avail the option by 31st December, 1995 made joint representation giving him another opportunity. Their representation was forwarded to University Grants Commission, New Delhi in November, 1999. The University Grants Commission referred the matter to the Ministry of Human Resource Development, which in turn sought the advice of Ministry of Finance. The Ministry of Finance did not accept the joint representation.

9. The Vice Chancellor constituted a Committee under the Chairmanship of Shri D.K. Rai vide notification dated 31.1.2001 to examine whether the request of the teachers/ employees to give one more opportunity can be considered. The Committee recommended that the letters of UGC dated 15th June, 2000 and Ministry of Human Resource Development dated 19th June, 2000 be reported to the Executive Council for its permission to make it applicable within the scope of Statute 43 of the Banaras Hindu University. The Vice Chancellor by his order dated 20.3.2001 accepted the recommendation and issued a circular allowing another opportunity to all the employees inviting revised option forms to all those employees, who were on the rolls of the university as on 31.12.1995 and have superannuated prior tot he issuance of the Circular dated 26.3.2001. The matter was placed before the Executive Council of the University, which in its meeting dated 19th-20th July, 2001 resolved that since the invitation of option is in contravention of the directives of the UGC/ MHRD, the same cannot be accepted. Consequently, the Vice Chancellor by his order dated 18.1.2002 was withdrawn the option and the decision was circulated to all the concerned in the University vide notification dated 5th/9th September, 2002.

10. Shri Pankaj Naqvi submits that the University is fully funded by the University Grants Commission, and is bound by the directions of the Ministry of Finance. Since the Ministry of Finance did not agree, neither the Ministry of Human Resource Development nor the UGC were competent, under the financial discipline, to accept the request for giving another option to switch over to the pension scheme.

11. Shri Rakesh Sinha, learned counsel appearing for the Central Government has relied upon the affidavit of Shri R.P. Tiwari, Under Secretary, Department of Higher Education, Ministry of Human Resource Development, Shastri Bhawan, New Delhi, in which it is stated that as a matter of policy the Union Government has discontinued the GPF-Gratuity-Pension Scheme to all the employees joining Central Government, and that after 1.1.2004 all the Central Government employees were offerred and have been brought under the new Pension Scheme. The Ministry of Finance has suggested that all the employees covered under the GPF-Gratuity-Pension Scheme may be considered to switch over to new pension scheme and thus there is no merit in the writ petition in which prayers have been made by the petitioners to allow them to switch back to the GPF-Gratuity-Pension Scheme, after they have opted for CPF Scheme.

12. With regard to discrimination it is stated by Shri Rakesh Sinha relying upon para 10 of the counter affidavit that the Ministry of Human Resource Development by its letter dated 1.9.2003 and 21.5.2004 communicated to the Directors of IITs at Bombay, Kanpur, Delhi, Gorakhpur, Madras, Guwahati and Roorki that option exercised by the employees at the time of implementation of the 4th Central Pay Commission was final and there is no question of further exercising the option to switch over to the GPF-Gratuity-Pension Scheme. The Directors of these IITs were requested not to entertain any request for switch over from the staff, who have since retired. The Delhi University was also not given permission by UGC for extension of date of option from CPF Scheme to GPF Scheme.

13. Shri V.K. Upadhyay appearing for the University Grants Commission has relied upon the counter affidavit of Dr. N.K. Jain, Joint Secretary, University Grants Commission, New Delhi. He has reiterated the objections taken by the University as well as the Central Government. He submits that the University Grants Commission had taken up the matter by letter dated 8.8.2001 to the Joint Secretary, Government of India, MHRD to consider to extend the scheme and to notify a clear view of cut off date so that the institutions do not fix their own cut off date. The Ministry of Human Resource Development, Government of India by its letter dated 22.9.2001 informed the UGC that earlier the matter was examined in consultation with the Ministry of Finance (Department of Expenditure). The Ministry had regretted and expressed its inability to allow one more option to change over from CPF to GPF Scheme to the employees of the UGC and institutions maintained by it. Earlier the Ministry of Human Resource Development, Government of India by letter dated 19.6.2000 had also communicated the matter pertaining to

the option in consultation with the Ministry of Finance and had regretted its inability to allow one more option.

14. It is submitted by learned counsel appearing for UGC that Ministry of Human Resource Development by its letter dated 24.12.2002 forwarded a letter to the Vice Chancellor, Banaras Hindu University regarding change of option. After examining the matter UGC informed by its letter dated 23.9.2003 that the options were available only upto 30.9.1987 and as such request of University cannot be considered.

15. So far as discrimination is concerned, learned counsel appearing for UGC submits that the Banaras Hindu University extended the date in the year 1988 and in 1995 on its own, without the approval of UGC. The UGC by its letter dated 23rd September, 2003 informed the University that one more option to change over cannot be accepted. In case of Assam University the employees, who were recruited after 1994 and that at that time only GPF Scheme was available, the Assam University by mistake given CPF to the employees, which was not permissible. In para 8 of the counter affidavit of Dr. M.K. Jain, Joint Secretary, UGC it is stated that IITs at Kanpur, Bombay, Gorakhpur and Roorki are not covered under the purview of UGC and that Delhi University was not given any permission by UGC to extend the date. By D.O. letter dated 25.5.1999 addressed to the Registrar, University of Delhi, a copy of which was endorsed to all Central University cut of date for change over from CPF to GPF was informed to be 30.9.1987 and the benefit of retirement liabilities for such employees after cut off date was to be treated as unapproved expenditure. On the basis of the reply received from the Delhi University to UGC they suggested to Ministry of Human Resource Development on 3rd September, 2002 to regularise the change for Delhi University upto 31.3.1998 or that the Government of India may instruct UGC with pension liability of the employee be not made by UGC, who have permitted irregular conversion from CPF to Pension Scheme after 30.9.1987. In reference to these letters the Ministry of Human Resource Development informed UGC on 24.10.2002 that since the UGC is funding agency and it itself had extended the government policy on conversion from CPF to GPS to the Central Government and deemed universities receiving 100% maintenance grant, no specific government instructions are warranted to those employees of the University of Delhi, who had not permitted to make conversion from CPF to GPF Pension Scheme after prescribed cut off date. The UGC had not permitted the University for extension of the dates. The conversion was accepted by the Executive Council of the Delhi University, where there is no representative of UGC/ Government of India. The permission for extension to some of the employees by Banaras Hindu University after the cut off date is in violation of the instructions given by the Government of India and UGC.

16. From these facts, we find that the University Grants Commission had never communicated any decision to the Banaras Hindu University to extend cut off date for change of the option. The Ministry of Human Resource Development had requested Ministry of

Finance (Department of Expenditure), which did not agree to extend the cut off date for switching over from CPF to GPF Scheme. The Office Memorandum No.4/1/87 dated 1.5.1987 notifying the scheme pertaining to change over from CPF to GPF was never amended. The Vice Chancellor of the Banaras Hindu University, on his own without any authority from University Grants Commission and further without there being any resolution of the Executive Council appears to have extended the date for some of its employees upto 31st December, 1995. The change offerred to them was beyond the authority of the Vice Chancellor of the University. The Committee headed by Prof. D.K. Rai had made a recommendation for giving one more opportunity to switch over to GPF, which appears to have been accepted by the Vice Chancellor, without the recommendations of the Executive Council and that finally the Executive Council by its impugned decision regretting its inability to approve the orders of the Vice Chancellor dated 20.3.2001 and 18.1.2002. The Vice Chancellor of the University could not have acted against the directives of the University Grants Commission and Ministry of Human Resource Development as the University is fully funded by the University Grants Commission.

17. We are of the opinion that the Vice Chancellor on his own without there being any approval of the Executive Council, which is in turn bound in the matters of financial discipline, by the decisions taken by the University Grants Commission, which fully funds the University, did not have any authority to extend the date for option.

18. In the present case the question involved is not to extend the date of option but to allow the petitioner to withdraw their option to continue in the CPF Scheme. Under the scheme all the teachers/ employees were allowed the benefit of GPF-Gratuity-Pension Scheme. Only those employees, who had exercised their option to continue under the CPF Scheme were not given the benefit. Rule 3 (iii) of the Central University Retirement Benefit Rules, 1967 were not amended to give authority to the Vice Chancellor to extend the last date. The Vice Chancellor on his own without any valid authority vested in him extended the cut off date in the year 1988 and in 1995. The petitioners did not take benefit of this unauthorised extension policy also. They, therefore, have no right whatsoever to claim further extension. The Executive Council did not commit any mistake in regretting its inability to extend the date following the directives of the UGD and Ministry of Human Resource Development.

19. The petitioners are teachers and employees of the University. They had fully understood the financial implications of the option exercised by them. The benefits offered by the 5th Pay Commission given w.e.f. 1.1.1996 could not be a ground to allow them to opt for GPF-Gratuity-Pension Scheme almost nine years after the cut off date fixed at 30.9.1987 had expired.

20. The University Grants Commission has given sufficient explanation to the complaint of discrimination. The Guwahati University

employees appointed in 1994 were wrongly offered CPF Scheme and thus they were all brought into GPF Scheme for rectifying the error. The IITs were instructed by UGC/ MHRD not to extend cut of date since they are not funded by the U.G.C. Any decision taken by them will not amount to discrimination with the teachers/ employees of the Central Universities. The Delhi University continued with an illegality, against the clarifications issued by the UGC and Ministry of Human Resource Development.

21. In **Union of India Vs. M.K. Sarkar, (2010) 2 SCC 59** the Supreme Court held where an employee governed by CPF Scheme did not opt for pension scheme, despite several chances given to him, his representation 22 years after his retirement, with willingness to refund the amount cannot be permitted to switch over to pension scheme. If his request is accepted, the effect would be to permit him to secure double benefit. There was no recurring or continuing cause of action to file writ petition after such a long time. If was further held that when he had notice or knowledge of the availability of option he could not be heard to contend that he did not have written intimation of option.

22. We also find that this writ petition was filed on 5.8.2004 challenging the decision of the Executive Council of the University dated 19/20th July, 2002, communicated by the Registrar of the University on 5.9.2002, and much after the new pension scheme had become applicable to all the employees joining Central Government after 1.1.2004. The employees, who were covered by GPF-Gratuity-Pension Scheme were given offer to switch over to new pension scheme and thus in the year 2004 there was absolutely no justification for the petitioners, many of whom have retired long ago to be offered an opportunity to change their option and to switch back to GPF-Gratuity-Pension Scheme.

23. Both the writ petitions are **dismissed.**

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 04.08.2011

BEFORE
THE HON'BLE AMRESHWAR PRATAP SAHI,J.

Civil Misc. Writ Petition No. 33458 of 2010

Hargen ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri R.P. Dubey
Sri A.N. Tiwari

Counsel for the Respondents:
Sri Brahma Deo Mishra
C.S.C.

U.P. Consolidation of Holdings Act , 1973-Sect6ion-49-Basis of lease 1939-objection that land being Banjar Land can not be adjudicated by Consolidation Authorities held misconceived-nature of right claimed on basis of long entry-could be decided by the consolidation Court-view taken by Board of Revenue-held-proper.

Held: Para 4

The contention of the petitioner is that since the land is recorded as Banjar, and therefore the consolidation authorities would not have jurisdiction to proceed

with the matter, cannot be accepted for the simple reason that the objection to be entertained by the consolidation authorities is to be based on the nature of the rights claimed and not on the nature of the recorded entry. The argument of the learned counsel for the petitioner therefore is unsustainable.

Case law discussed:

1983 (2) RD 153; 1983 RD 299

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

1. Heard learned counsel for the petitioner Sri R.P. Dubey.

2. Sri Dubey submits that the issue relating to the bar of Section 49 of the U.P. Consolidation of Holdings Act, 1953, could not have been taken into consideration by the Board of Revenue and that even otherwise the petitioner has perfected his title by virtue of his long standing possession since 1939 on the basis of a lease. He contends that the bar of Section 49 would not operate as the consolidation authorities have no right to adjudicate any controversy relating to land recorded as Banjar and for that he relies on two decisions of this court in the case of Ramphal & others Vs. Champat Singh & others, 1983 (2) RD 153 and the decision in the case of Bhillar & others Vs. Dy. Director of Consolidation, Jaunpur & others, 1983 RD 299.

3. Having heard Sri Dubey learned counsel for the petitioner what transpires from the facts on record is that the petitioner is claiming his tenancy rights on the basis of an alleged lease of 1939. The claim, therefore, is founded on long standing possession of a lease. This is a claim which squarely falls for adjudication of such rights within the provisions of the U.P. C.H. Act, 1953, namely, Section 4 read with Section 5 and Section 9 (A-2) thereof.

4. The contention of the petitioner is that since the land is recorded as Banjar, and therefore the consolidation authorities would not have jurisdiction to proceed with the matter, cannot be accepted for the simple reason that the objection to be entertained by the consolidation authorities is to be based on the nature of the rights claimed and not on the nature of the recorded entry. The argument of the learned counsel for the petitioner therefore is unsustainable.

5. In the opinion of the court, the bar of Section 49 would squarely apply in the instant case and the findings recorded by the Board of Revenue cannot be interfered with. The decisions relied upon by the learned counsel for the petitioner therefore would not be applicable as explained above.

6. The writ petition is dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.08.2011

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition no. 37741 of 2007

Sri Krishna Rai and others ...Petitioners
Versus
Banaras Hindu University Thru' Registrar B.H.U. and others ...Respondents

Counsel for the Petitioner:
Sri Ashok Mehta'
Sri Vijay Shanker

Counsel for the Respondents:
Sri Pankaj Naqvi
Sri Arun Prakash

Sri V.K.Singh
Sri Sunil Tripathi
S.C.

Office Procedure Manual prescribed by Executive Council-criteria for promotion under 25% Quota from class 4th to the post of junior clerk-seniority with suitability subject to passing Screening test-no where provided for interview and typing test-procedure adopted by Executive Council comparing unequal with equal-arbitrary-25 years senior class 4th employee can not be equated with 10 years employee having better qualification comparatively-selection list quashed with direction to complete selection process within 3 months

Held: Para 55

One more aspect also not be ignored. In making such promotions persons totally unequal to each other in various respects have to be considered. A Class IV employee who was appointed in 1977 has much longer experience of a Class IV post but in the context of personality and other aspects, he may not compare with his much junior entered in service as Class IV employee after 10, 20 or 25 years. The subsequent educational advancement also cannot be ignored. It is evident that persons who were appointed in 1977 to 1997, i.e. petitioners, got occasion for consideration for promotion to Class III post after decades of service. For such persons, making interview as a part of selection when it was not contemplated in the relevant procedure prescribed by the University obviously made it difficult for them to qualify since they may not compete with young and youngest new employees having better qualifications. But one must also have considered that they at the fag end of service to their credit, have long experience. Better honour and respect needed so that they may retire from a higher post after getting at least one promotion at the fag end of their service. The University must have all these facts and other relevant aspects in mind when laid down the procedure in the Manual, but unfortunately the Board of Examiners acted unmindful of wider aspects. The acted wholly illegally by ignoring the established procedure laid down in the Rules and on the contrary settled their own selection procedure by exceeding their authority and jurisdiction.

Case law discussed:

AIR 1996 SC 352; AIR 1984 SC 541; AIR 1985 SC 1351; AIR 1987 SC 2267; (2004) 9 SCC 286; (2002) 10 SCC 359; (2007) 11 SCC 10; (2009) 5 SCC 518; (1995) 3 SCC 486; (2002) 6 SCC 132; (2007) 9 SCC 548; (1987) 4 SCC 486; (1988) 2 SCC 242; (2000) 8 SCC 395; 1995(2) JT 291; JT 1998(1) SC 295; JT 1999 (1)SC 101; 2002 (6) SCC 127; 2003 (1) ESC 235; Special Appeal No. 1222 of 2005 Km. Saurabh Vibhushan Vs. State of U.P. & others

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

1. 34 petitioners, working as Class-IV employees in Banaras Hindu University (hereinafter referred to as 'BHU'), have filed this writ petition under Article 226 of the Constitution of India challenging promotion of respondents 3 to 16 vide order dated 5.6.2007 (Annexure 9) to the post of Junior Clerk and order dated 2.7.2007 (Annexure 1) rejecting petitioners' representation.

2. Sri Ashok Mehta, Advocate, has advanced submissions on behalf of petitioners and Sri Sunil Kumar Tripathi, Advocate, has appeared for BHU. None has appeared on behalf of respondents 3 to 16. Office report dated 18.1.2011 shows that respondents 3, 7, 11, 12 and 13 were served and their acknowledgments were also received while respondents 4, 5, 6, 8, 9, 10, 14, 15 and 16 were issued notices but neither acknowledgment nor undelivered notice received in office. Thus under the Rules, service upon them is deemed sufficient. Sri Tripathi, however, told that

respondents 3 to 16 have authorized University to defend them.

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

4. All the petitioners were appointed on various dates between 1977 to 1997 and presently are permanent Class IV employees in BHU. They claim to have passed matriculation or equivalent examination and are eligible for consideration for promotion to the post of Junior Clerk under 25 % promotion quota.

5. The last promotion before the impugned one from Class IV to Class III was made on 21.6.1982 after holding examination on 23.12.1980. On 6.9.1995 though an advertisement was issued for Class IV employees working in BHU inviting applications for promotion against 25% promotion quota in Class III but it did not proceed further.

6. Under the existing provisions, eligibility for promotion from Class IV to Class III is five years service, High School qualification and passing of departmental examination-cum-seniority.

7. A notification/advertisement was issued on 17.12.2005 (Anneuxre 4 to the writ petition) inviting application from Class IV permanent employees of BHU for appointment as Junior Clerk under 25% promotion quota in the pay scale of Rs. 3050-4590. The eligibility prescribed in the said notification reads as under:

"Eligibility:

All Class- IV employees, who have put in five years services and who have passed matriculation examination or equivalent will be eligible for appointment as Junior Clerk under 25% promotion quota.

Such eligible candidates will be tested in:

A typing test in English/Hind for a minimum of 30 words per minutes; and after qualifying in the test.

Note: If an employee does not pass the typing test and is otherwise eligible for promotion he/she be promoted subject to the condition that he/she passes the typing test within two years from the date of his/her promotion failing which he/she will be reverted.

Provided further that for such employees, typing test be held at least twice a year.

Two papers of simple English,Hindi and Arithmetic of one hour duration."

8. In furtherance thereof, the BHU decided to hold a computer typing test on 20.4.2006 whereagainst all petitioners represented. The aforesaid test was postponed. BHU issued a clarification vide letter dated 4.5.2006 stating that final merit list shall be based on the marks obtained in typing test, written test and interview. The candidates may give typing test either on computer or on manual typewriter having option. The date of typing test accordingly was fixed on 16.5.2006.

9. Petitioners, thereafter, made representation on 16.6.2006 requesting BHU to promote Class IV employees considering their seniority. BHU, however, promoted/appointed 14 persons on the post of Junior Clerk from Class IV vide appointment letters dated 5.6.2007. All the

appointment letters are identically worded and one of such appointment letter is on record as Anneuxre-9 to the writ petition issued on 5.6.2007. Since seniority was completely given a go-bye, petitioners made representation on 12.6.2007 which has been rejected by order dated 2.7.2007.

10. It is said that there are 242 posts of Junior Clerk vacant out of which 62 comes within the quota of Class IV employees but 14 have been promoted. The impugned promotion and selection is in violation of Clause 6.4 of Office Procedure Manual (hereinafter referred to as 'Manual') as prescribed by Executive Council on 2/3.4.1990 as amended on 23/24.4.1996.

11. A counter affidavit has been filed on behalf of respondents 1 and 2 sworn by Sri S.K. Bose, Senior Assistant. Basic facts are not disputed. It says that procedure for promotion is prescribed by Executive Council's resolution no. 223 dated 2/3.11.1980 printed on page 27 at Clause 6.4 in Manual, 1985. It provides as under:

"6.4 Promotion of Class IV staff to the Cadre of Junior Clerk:

(i) All Class- IV employees who have put in five years services and who have passed matriculation examination or equivalent will be eligible for promotion to the post of Junior Clerk grade.

(ii) Such eligible candidates will be tested in:-

(a) A typing test in English/Hind for a minimum for a minimum speed of 30 words per minute and after qualifying in the test.

Note: If an employee does not pass the typing test and is otherwise eligible for promotion he be promoted subject to the condition that he passes the typing test within two years from the date of his promotion failing which he will be reverted.

Provided further that for such employees, typing test be held at least twice a year.

Two papers of simple English,Hindi and Arithmetic of one hour's duration.

Further, the Executive Council vide ECR No. 131 dated March 29-30, 1996 has raised 20 to 25% of the vacancies in all cadre of posts (Group 'C' and 'D') for promotion of Group- 'D' in-service employees. A seniority-list of such employees shall be prepared after passing the Departmental test. No relaxation in prescribed qualification shall be given for in-service employees."

12. The total sanctioned strength of Junior Clerks in BHU is 266 out of which 223 were lying vacant. As per U.G.C. directions issued on 6.9.2002, 25% of resultant vacancies are to be filled in after approval by U.G.C. It takes care of 56 vacancies. 25% of 56 comes to 14 and that is how promotion for 14 vacancies was considered. Applications were invited vide notification dated 17.12.2005 fixing last date for submission of application forms at 16.1.2006. 385 applications were received. A Board of Examiner was constituted by Vice-Chancellor for undertaking typing and written test. The aforesaid Board decided to award maximum 20 marks for typing, 60 marks for written test and 20 for interview. The typing test was conducted on 23.5.2006 and written test was held on 23.9.2006. Those who secured 33 and above marks in typing and written test were called for interview. Thus 190 candidates were called

for interview held on 31.5.2007 and 1.6.2007. Merit list was prepared accordingly by Board of Examiners. In the light of the recommendations, appointment letters were issued to 14 selected candidates i.e. respondents 3 to 16. It is said that selection has been made strictly in accordance with guide lines of Executive Council and there is no violation of Clause 6.4 of Manual, 1985.

13. Sri Ashok Mehta, learned counsel for petitioner submitted that the procedure nowhere contemplates any interview. It talks for a departmental test whereafter preparation of a seniority list and then those who qualify in typing test, are to be promoted. He submitted, the procedure shows that typing is only a "desirable qualification" inasmuch the same will not deprive a person from promotion but the condition is that one can pass typing test before or after promotion but within two years from the date thereof. Relaxation in typing test is also permitted to the employees who are above 45 years.

14. It is said that the marks of typing test have been added in departmental test and no seniority list has been prepared, therefore, the entire selection has been made illegally. He drew my attention to Anneuxre RA-1 to the rejoinder affidavit which is notification dated 9.12.1980 and contended that earlier criteria for promotion was seniority and performance in departmental test. There was no condition of passing typing test before promotion. On the contrary, typing test could have been passed even after promotion but within two years.

15. Learned counsel for BHU, on the contrary, relied on the stand taken by University in the counter affidavit and submitted that the selection has been made in accordance with procedure prescribed in the Manual and in the light of decision taken by Selection Committee, hence, warrants no interference. He also stated that respondents no. 3 to 16 have authorized the University to take care of their interest and the Counsel for the University may appear on their behalf and may represent their case. He, therefore, submitted that the stand taken by him be construed as the stand taken by respondents no. 3 to 16.

16. The short question up for consideration is, whether selection and promotion in the present case has been done in accordance with the procedure prescribed or not.

17. In the rejoinder affidavit, petitioners have referred to a different procedure though in the writ petition in para 5 they admit that for promotion from Class IV to Class III, procedure in Clause 6.4 of Manual would apply. A minor amendment was made by Executive Council vide its resolution dated 3/5.11.1995 notified on 23/24.4.1996 which in respect to Class IV employees reads as under:

"The provision of reservation under promotion quota for Group-D employees for all cadres (Group C & D) be raised to 25 per cent from 20 per cent and panel of in-service employees for promotion be prepared after taking Departmental Test. However, no relaxation in educational/ technical qualification as prescribed under the rules for promotion quota be given to in-service employees."

18. Clause 6.4 of the Manual, in Sub-clause 1, talks of eligibility for promotion to the post of Junior Clerk. All Class IV employees who have put in five years

service, passed matriculation examination or equivalent are so eligible.

19. Sub-clause 2 of Clause 6.4 talks of a typing test which is to be held after qualifying in departmental test.

20. Note appended to the said sub-clause provides that an employee who does not pass typing test but is otherwise eligible for promotion, would be promoted, subject to the condition that he passes typing test within two years from the date of promotion failing which he will be reverted. The proviso says that for such employees, typing test be held at least twice a year.

21. Then there is a written test contemplated in Clause 6.4 consisting of two papers of simple English, Hindi and Arithmetic of one hour duration.

22. The matter of importance is that in Clause 6.4 (II) (2), the test other than typing test has been referred to by observing "qualifying in the test". This Court has also gone through the resolution of Executive Council of 1996, which, while extending quota of promotion from 20 to 25%, talks preparation of panel of in-service employees for promotion after taking departmental test. It clearly says that there shall be no relaxation in educational and technical qualifications.

23. These provisions have been understood by BHU in their true perspective when notification for selection was issued as is evident from the conditions mentioned therein. It is nobody's case that there is any other change or alternation either by Executive Council or any other authority having jurisdiction in the matter incorporating any alteration or amendment in the aforesaid procedure. It goes without saying that note appended to Sub-clause 2(a) of Clause 6.4 says that passing of typing test is a pre-condition for qualifying for promotion in Class III from Class IV. If a candidate is otherwise eligible, and has passed departmental test, he can be promoted, whereafter he may pass typing test in two years.

24. No provision has been shown which contemplate any interview or marks therefor. Even the departmental test is contemplated as a qualifying examination for eligible candidates. Reading clause 6.4 of Manual in the light of Executive Council's resolution notified on 23/24.4.1996 requiring preparation of a seniority list of the candidate who have passed departmental test, this Court has no manner of doubt that for promotion from Class IV to Class III, the extant procedure available in BHU talks of only a departmental test which consists of a written test in two papers of English, Hindi and Arithmetic. Those who pass the said test shall be promoted in Class III in order of seniority. If they have already passed typing test, their promotion will be absolute subject to provision of probation etc. but if they have not passed typing test, then promotion would be conditional i.e. they have to pass typing test within two years failing which they would be reverted. Neither the procedure contemplates preparation of a merit list based on the marks obtained in tying test, written test and interview nor passing of typing test is a pre-condition for getting promotion on Class III post nor interview at all a part of selection procedure.

25. The respondent-University in the counter affidavit has said that this was incorporated by Board of Examiners on 11.4.2006. It is apparently, in my view, in

the teeth of procedure prescribed in Clause 6.4 of Manual read with Executive Council's resolution dated 23/24.4.1996 and the procedure notified by respondents inviting applications on 17.12.2005.

26. The incidental but necessary question then comes up whether the Board of Examiner, which is a body constituted by Vice Chancellor to hold selection in accordance with existing provisions, did possess any power to make alteration/ change in the procedure of selection. In my view, the matter is squarely covered by a decision of the Apex Court in **Krushna Chandra Sahu Vs. State of Orissa AIR 1996 SC 352.** In para 35 of the judgment, the Court said:

"The members of the Selection Board or for that matter, any other Selection Committee, do not have the jurisdiction to lay down the criteria for selection unless they are authorised specifically in that regard by the Rules made under Art. 309. It is basically the function of the rule making authority to provide the basis for selection."

27. Further in para 36 the Court said:

"The Selection Committee does not even have the inherent jurisdiction to lay down the norms for selection nor can such power be assumed by necessary implication."

28. Earlier, in **Ramchandra Iyer Vs. Union of India AIR 1984 SC 541,** in para 44 the Court said:

""By necessary inference, there was no such power in the ASRB to add to the required qualifications. If, such power is claimed, it has to be explicit and cannot be read by necessary implication for the obvious reasons that such deviation from the rules is likely to cause irreparable and irreversible harm"

29. In **Umesh Chandra Shukla Vs. Union of India AIR 1985 SC 1351** also the Apex Court held that selection committee does not possess any inherent power to lay down its own standards in addition to that is prescribed under the rules.

30. In **Durgacharan Misra Vs. State of Orissa AIR 1987 SC 2267,** following Apex Court decision in Ramchandra Iyer (**supra**) the Apex Court pointed out limitations of the selection committee stating that it has no jurisdiction to prescribe the minimum marks which a candidate had to secure at the viva voce test.

31. The Apex Court in **Krushna Chandra Sahu (supra)** in para 38 also said that Selection Committee or the Selection Board cannot be held to have jurisdiction to lay down any standard or basis for selection as it would amount to legislate a rule for selection.

32. The minutes of meeting of Board of Examiners (constituted by Vice-Chancellor) have been placed on record as Annexure 3 to Supplementary Counter Affidavit filed by respondents 1 and 2 and it says as under:

***"Considered** the matter relating to conduct of Typing Test on 16.05.2006 of the eligible Group-'D' employees of the University, Written Test and Interview for appointment to the post of Junior Clerk under 25% promotion quota.*

The Board of Examiners, after considering the facts and in view of the previous norms, decided the following

marking system for Typing Test, Written Test and Interview:

Mode of Test	**Maximum Marks**
Typing Test	- 20
For 30 wpm	- 10
For each two correct (maximum)	- 10
words- 1 mark as bonus	
Written Test:	**- 60**
Hindi	- 20
English (Paper-A)	- 20
Arithmetic (Paper-B)	- 20
Interview	**- 20**
Total :	**- 100 marks**

The Board of Examiners decided that the above-mentioned marking system be adopted for making final merit for appointment to the post of Junior Clerk from amongst eligible Group-'D' employees under 25% promotion quota in the University.

The Board of Examiners still further decided that all the eligible Group-'D' employees except exempted employees are required to appear in the Typing test. The excepted employees (by way of age or disabilities) be given 10 marks without appearing in the Typing Test. If they wish to appear in the Typing Test and if their performance in the Typing Test is more than 20 wpn, 1 mark be given for each two correct words but maximum 10 marks as in the case of general employees. All the eligible employees including exempted employees be subjected to written Test and Interview. The merit list be prepared on the basis of overall marks obtained by them in the Typing Test, Written Test and Interview."

33. The said Board consisted of Prof. Kalyan Singh, Department of Agronomy as Chairman and Sri N. Sundaram, Registrar, Prof. Kiran Barman, Department of Economics, Prof. S.K. Basu, Department of Computer Science, Dr. S.P. Mathur, Dy. Registrar (Admin.-1) as members and Sri M.L. Kanaujiya, Dy. Registrar (Admin.)- II as Member Secretary. The above decision of Board of Examiners is clearly in violation of procedure prescribed in Clause 6.4 of the Manual and Executive Council's resolution of 1996.

34. Learned counsel for respondents 1 and 2 has admitted that Board of Examiners was not authorized or conferred any power either under B.H.U. Act or statute or ordinance or any resolution of Executive Council so as to empower them to prescribe procedure for selection. On the contrary, repeatedly in the counter affidavit and the written submission, the case of the respondents 1 and 2 is that they have strictly followed the procedure prescribed in Clause 6.4 read with 1996 Resolution of Executive Council. It is not in dispute that the Executive Council is a statutory body under the Act and is empowered to frame rules and regulations, statutory in nature, for recruitment and conditions of service of the employees of University. They had so laid down procedure and that had to be followed as such. The Board of Examiners by no stretch of imagination possess any power to

create a procedure on their own in contravention or addition to what has been laid down by Executive Council. The aforesaid decision and consequential selection, therefore, in my view, is wholly illegal and contrary to the procedure prescribed in law.

35. Sri Tripathi, learned counsel for respondents, at this stage, submitted that an employee has no right of promotion but only has right of consideration for promotion. Petitioners were given an opportunity to participate in selection, they also participated and have not been selected. Having so appeared in selection and failing therein, they subsequently cannot turn around and challenge the very selection. Fortifying the aforesaid submission, he placed reliance on Apex Court's decisions in **K. Samantaray Vs. National Insurance Co. (2004) 9 SCC 286, Ved Prakash & others Vs. State of Haryana & others (2002) 10 SCC 359, Union of India Vs. A.K. Narula (2007) 11 SCC 10, K.A. Nagmani Vs. Indian Airlines (2009) 5 SCC 518, Madan Lal & others Vs. State of J & K (1995) 3 SCC 486, Chandra Prakash Tiwari Vs. Shakuntla Shukla (2002) 6 SCC 132 and UPSC Vs. S. Thiagarjan & others (2007) 9 SCC 548.**

36. The above proposition advanced by learned counsel for petitioner and the aforesaid decisions in respect to exposition of law as such admits no exceptions. The Million dollar question, however, would be, whether it would apply to the present case or not.

37. I first refer to the decisions relied by learned counsel for respondents 1 and 2.

38. In **K. Samantaray (supra)** the Apex Court in para 6 observed that in all services whether public or private, there is invariably a hierarchy of posts comprising of higher posts and lower posts. Promotion, as understood under the service law jurisprudence, is advancement in rank, grade or both and no employee has a right to be promoted, but has a right to be considered for promotion. Further, in para 11 of the judgment, Court observed that employer while laying down promotion policy or rule can always specify the area and parameter of weightage to be given in respect of merit and seniority separately so long as policy is not colourable exercise of power, nor has the effect of violating any statutory provision. The above exposition of law is well settled admits no exception. It may be pointed out at this stage that in **K. Samantaray (supra),** no statutory provision existed laying down the promotion policy, criteria etc. hence the employer, i.e. National Insurance Company formulated a promotion policy which has been quoted in the judgment in para 8. The Apex Court said that in absence of statutory rules, the employer can always formulate such policy since the legislative power in such matter vests with employer. It is in this context, in para 11 of the judgment the Court said:

"There is no statutory rule operating. It is for the employer to stipulate the criteria for promotion, the same pertaining really to the area of policy-making. It was, therefore, permissible for the respondent to have their own criteria for adjudging claims on the principle of seniority-cum-merit giving primacy to merit as well, depending upon the class, category and nature of posts in the hierarchy of administration and the requirements of efficiency for such posts."

39. In **Ved Prakash (supra),** the question was whether the criteria for

promotion "seniority-cum-merit' would mean that the promotion has to be made solely on the basis of seniority ignoring merit or not. It was held that expression 'seniority-cum-merit' cannot be construed equivalent to seniority alone, but in such case one must have minimum merit and if by considering the merit he is found unsuitable, the senior most person may be denied promotion. Evidently, the judgment has no application in the case in hand since in our case, the criteria for promotion is not as that was applicable in **Ved Prakash (supra)** and others and that too was governed by a statutory rule, namely, rule 9 of Punjab Forest Subordinate (Executive Section) Rules. The judgmental, therefore, has no application in the case in hand.

40. In **Union of India Vs. A.K. Narula (supra)**, the only question up for consideration was whether a selection made by a departmental promotion committee can be challenged by requiring the Court to examine whether the assessment of performance has been made rightly or not, like sitting in appeal. Repelling, Apex Court said that a process of assessment can be vitiated in law either on the ground of bias, mala fide or arbitrariness and not otherwise. The Court would not sit like an appellate authority and for this purpose relied on its earlier decisions in **State Bank of India Vs. Mohd. Mynuddin (1987) 4 SCC 486, Union of Public Service Commission Vs. Hiranyuala Dev (1988) 2 SCC 242, Badrinath Vs. Government of Tamilnadu (2000) 8 SCC 395.** Provisions as applicable therein were also considered and in para 15 of the judgment, the Court said:

"15. *The guidelines give a certain amount of play in the joints of DPC by providing that it need not be guided by the overall grading recorded in CRs. but may make its own assessment on the basis of the entries in CRs. DPC is required to make an overall assessment of the performance of each candidate separately, but by adopting the same standards, yardsticks and norms. It is only when the process of assessment is vitiated either on the ground of bias, mala fides or arbitrariness, that the selection calls for interference. Where DPC has proceeded in fair, impartial and reasonable manner, by applying the same yardstick and norms to all candidates and there is no arbitrariness in the process of assessment by DPC, the court will not interfere."*

41. There is no such dispute in our case, therefore, the judgment has no application.

42. In **K.A. Nagmani (supra),** the Apex Court in para 53, 54 and 55 observed that the appellant therein participated in the selection without any demur or protest and when the selection was complete and they were unsuccessful, they challenged the selection which cannot be permitted. Para 54, which says the above facts, is reproduced as under:

"54. *The Corporation did not violate the right to equality guaranteed under Articles 14 and 16 of the Constitution. The appellant having participated in the selection process along with the contesting respondents without any demur or protest cannot be allowed to turn round and question the very same process having failed to qualify for the promotion."*

43. In this context, relying on an earlier decision of Apex Court in **Madan Lal (supra)** and **Chandra Prakash Tiwari (supra),** the Court said that unsuccessful candidate in these cases cannot be allowed

to challenge the selection. In our case, the facts already stated would show when a typing test was held as a first item, petitioners protested and again they protested at the time of interview, but their protest was rejected. Here is not a case where petitioners did not protest or shown demur against the manner in which the selection was held. Besides, the decisions of Board of Examiners for providing different marks in three tests it, is nowhere stated by the respondents that it was ever disclosed or made known to the candidates. In any case, here is not a case wherein the selection is being challenged on the ground that proceeding according to statutory provisions, there is some irregularity but the contention is that the entire selection is vitiated being in the teeth of statutory procedure laid down by the Executive Council of the University. There is no estoppel against law.

44. In **Madan Lal versus State of Jammu & Kashmir, 1995 (2) JT 291,** the Hon'ble Supreme Court has held that once a person has taken a chance in the selection, he cannot resile back subsequently after having found himself unsuccessful and cannot be allowed to challenge the entire selection.

45. In **Union of India & another vs. N. Chandrashekharan & others, JT 1998 (1) SC 295,** the Hon'ble Apex Court has held as under:

"It is not in dispute that all the candidates were made aware of the procedure for promotion before they sat for the written test and before they appeared before the Departmental Promotion Committee. Therefore, they cannot turn around and contend later when they found they were not selected by challenging that procedure and contending that the marks prescribed for interview and confidential reports are disproportionately high and the authorities cannot fix a minimum to be secured either at interview or in the assessment on confidential report."

46. In **Utkal University etc. vs. Dr. N.C. Sarangi & others, JT 1999 (1) SC 101** wherein it was held as under:

"Both the University as well as the selected candidate have pointed out that this fact was known to the first respondent throughout. He did not, at any times, objected to the composition of the Selection Committee. He objected only after the selection was over and he was not selected. This would amount to waiver of such objection on the part of the first respondent."

47. In **Chandra Prakash Tiwari vs. Shakuntala Shukla,2002 (6) SCC 127,** the Hon'ble Apex Court has held as under:

"The law seems to be well settled that in the event a candidate appears at the interview and participates therein, only because the result of the interview is not "palatable" to him, he cannot turn round and subsequently contend that the process of interview was unfair or there was some lacuna in the process."

48. Following the judgments of the Hon'ble Apex Court, some of them referred to hereinabove, an Hon'ble Single Judge of this Court has also taken the same view in **Kavindra Kumar vs. Deputy Inspector General & others, 2003 (1) ESC 235** wherein it was held as under:

"It is thus held that these writ petitions, challenging the criterion for promotion, are

not maintainable at the instance of candidates who have participated in the selection without raising any objection."

49. A Division Bench of this Court (in which I was also a member) has also taken similar view in **Special Appeal No. 1222 of 2005 Km. Saurabh Vibhushan Vs. State of U.P. & others** decided on 11.9.2006 wherein it was held as under :

50. *"Now, after having failed to qualify in the selection the appellant has challenged the very qualification on the basis whereof the aforesaid selection has been made. In our view, the appellant having availed the opportunity of participating in the selection cannot be permitted to challenge the norms of the aforesaid selection."*

51. The three judgments, namely, **K.A. Nagmani (supra), Madan Lal (supra)** and **Chandra Prakash Tiwari (supra)**, similar others, some whereof discussed above, therefore, in my view, have no application to the facts of this case.

52. In **Union Public Service Commission Vs. S. Thiagarjan,** the Court in para 22 of the judgment has categorically held that the Selection Committee acted strictly in accordance with the provisions of the Promotion Regulations which are statutory in nature. That being so, its decision for not interfering with the selection would not help the respondents in any manner and reliance placed thereon, in my view, is thoroughly misconceived. Moreover, it was a case relating to selection made in accordance with statutory rules of the members of All India Service (i.e. Indian Forest Service) governed by the regulations framed under All India Services Act, 1951 and, therefore, has nothing common with the facts and dispute in this case.

53. In the present case, I am constrained to observe that the notification published by University categorically reiterated what was contained in Clause 6.4 of the Manual. The rules of game were made known to everybody but Board of Examiners, which was constituted to hold selection strictly in accordance with aforesaid decided norms, changed the rules in between the game and held selection in a manner unknown to the extant Rules applicable for promotion from Class IV to Class III in BHU. This was wholly illegal and without jurisdiction. It is well settled that rules of games cannot be allowed to be changed during the game.

54. This Court has no manner of doubt in the light of above discussion that petitioners have been discriminated and have been considered in a manner which was never contemplated by the University for considering promotion from Class IV to Class III.

55. One more aspect also not be ignored. In making such promotions persons totally unequal to each other in various respects have to be considered. A Class IV employee who was appointed in 1977 has much longer experience of a Class IV post but in the context of personality and other aspects, he may not compare with his much junior entered in service as Class IV employee after 10, 20 or 25 years. The subsequent educational advancement also cannot be ignored. It is evident that persons who were appointed in 1977 to 1997, i.e. petitioners, got occasion for consideration for promotion to Class III post after decades of service. For such persons, making interview as a part of selection when it was

not contemplated in the relevant procedure prescribed by the University obviously made it difficult for them to qualify since they may not compete with young and youngest new employees having better qualifications. But one must also have considered that they at the fag end of service to their credit, have long experience. Better honour and respect needed so that they may retire from a higher post after getting at least one promotion at the fag end of their service. The University must have all these facts and other relevant aspects in mind when laid down the procedure in the Manual, but unfortunately the Board of Examiners acted unmindful of wider aspects. The acted wholly illegally by ignoring the established procedure laid down in the Rules and on the contrary settled their own selection procedure by exceeding their authority and jurisdiction.

56. In the result, the writ petition is allowed. Impugned orders dated 5.6.2007 and 2.7.2007 and appointments of respondents 3 to 16 on Class IV posts are hereby quashed.

57. The University is directed to hold fresh selection for promotion to the post of Class III against the vacancies for which selection was held by notification dated 17.12.2005 and complete the same expeditiously and in any case, within three months from the date of production of certified copy of this order strictly in accordance with Rules and in the light of observations made above.

58. Petitioners are entitled to costs which I quantify to Rs. 50,000/-.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 20.08.2011

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

Civil Misc. Writ Petition No. 40027 of 2009

Smt. Tarannum Khatoon ...Petitioner
Versus
Branch Manager, L.I.C. of India Ghazipur and others ...Respondents

Counsel for the Petitioner:
Sri A.K. Gautam

Counsel for the Respondents:
Sri R.C. Shukla
S.C.

Constitution of India Article 226- Insurance Policy-petitioner's husband taken (triple cover) endorsement plan-claim devoid on ground before taking policy her husband was suffering from serious disease but canceling it got insured-no material produced in support of such allegation-held-impugned order-set-a-side-pay entire amount within 4 weeks with interest.

Held: Para 22

The aforesaid two judgements relied upon by learned counsel for the petitioner support the submissions of the petitioner's counsel. We are satisfied that there was no material before the Corporation to record a finding that the deceased has concealed any disease or any treatment which he underwent before taking of the proposal and the rejection of the claim in such facts and circumstances is totally arbitrary and unjust. The deceased died on 6th September, 2007. Four years have passed from the aforesaid date and his widow has been waiting for the benefit

of the policy for last more than four years.

Case law disussed:

Smt. Maya Tripathi Vs. Sr. Divisional Manager, L.I.C. and Another decided on 10th July, 2003; Shanta Bai alias Basanta Devi Vs. Life Insurance Corporation of India and others in writ petition no.26862 of 2002 decided on 21st August, 2003; Sushila Devi Vs. Life Insurance Corporation of India in writ petition no.39028 of 2002, decided on 15th March, 2007; AIR 1962 SC 814; 2007(1) AWC 487; 2006(2) AWC 1295; 2007 (1) AWC 487

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

1. Heard learned counsel for the petitioner and Sri R.C. Shukla, learned counsel appearing for the respondents no. 1, 2 and 3. Counter and rejoinder affidavits have been exchanged between the parties. We propose to dispose of the matter finally.

2. By this writ petition, the petitioner has prayed for quashing of the orders dated 1st May, 2008, passed by Senior Divisional Manager, Life Insurance Corporation, Varanasi and order dated 19th May, 2009, passed by Regional Manager, Kanpur (here-in-after referred to as ***'Corporation'***). By the order dated 1st May, 2008 the Senior Divisional Manager of the Corporation rejected the petitioner's claim under the insurance policy taken by Late Shahid Khan, husband of the petitioner. Subsequently order dated 19th May, 2009 was passed by the Regional Manager of the Corporation rejecting the petitioner's representation, which was disposed of in pursuance of an earlier order of this Court dated 13th April, 2009 passed in writ petition no.63982 of 2008.

3. The petitioner's case in the instant writ petition is that the petitioner is widow of Late Shahid Khan. Shahid Khan took a L.I.C. policy on 21st September, 2006, namely, *"Jeevan Mitra (Triple cover) endowment plan with profit (with accident benefits)"* for an amount of Rs.1,00,000/= for a period of 15 years. The petitioner's case is that at the time of taking the policy, the petitioner's husband was healthy and there was no complaint of any ailment or any disease. The Corporation also prepared the medical examination confidential report and on being found the petitioner's husband healthy, the policy bond was issued. The petitioner's husband subsequently died in Bhabhuwa Sadar Hospital, Bihar in the custody of police on 6th September, 2007. The petitioner being nominee of the aforesaid policy made an application for claim under the policy. The said claim was rejected by the order dated 1st May, 2008. The reason given with the rejection of the claim was that petitioner's husband was suffering from Kidney disease and anaemia much prior of taking of the policy, which was not disclosed at the time of taking the policy. The order also mentions that if the petitioner is not satisfied, she can submit a representation to the Regional Manager. The petitioner submitted a representation to the Regional Manager challenging the rejection of the claim and also came to this Court by filing a writ petition being writ petition no.63982 of 2008, which was disposed of directing the Regional Manager to decide the matter. The Regional Manager rejected the claim again approving the earlier decision. The Regional manager observed in the order that the petitioner was suffering from Kidney disease prior of taking L.I.C. Policy.

4. Learned counsel for the petitioner challenging the orders impugned in the

instant petition contends that the decision of the Corporation rejecting the claim is an arbitrary decision. The petitioner's husband at the time of taking the policy was medically examined by the Doctor of Corporation and was found not suffering from any disease. It is further submitted that at the time of death, the petitioner's husband was only ***33*** years of age and the rejection of the claim was totally arbitrary.

5. Sri R.C. Shukla, learned counsel for the respondents refuting the submissions made by learned counsel for the petitioner contended that after the death of petitioner's husband, the Corporation had conducted an investigation and came to know that petitioner's husband took treatment in Sar Sundar Lal Hospital, Kashi Hindu Vishwavidyalaya (In short "BHU") in July, 2007 and also obtained opinion of the private Doctor on 17th February, 2008 and the Corporation was satisfied that he was suffering from Kidney disease much before taking of the policy and thus the Corporation is perfectly right in rejecting the claim of the petitioner. Sri Shukla further submits that even if the petitioner's husband was suffering from any disease or ailment after taking the policy, he ought to have informed the Corporation about the disease. Sri Shukla has also placed reliance on three judgements of this Court as well as on one judgement of the Apex Court, which shall be referred to while considering the submissions in detail.

6. Learned counsel for the petitioner has also placed reliance on two judgements of this Court.

7. We have heard learned counsel for the parties and perused the records.

8. There is no dispute that the policy was taken by the petitioner's husband on 21st September, 2006 and at the time of taking of the policy, he was also medically examined by the Doctors of the Corporation and no disease was noted in the report. The copy of proposal of policy has been annexed as Annexure-'1' to the writ petition, which also indicate the age of other family members, including the date of birth of the petitioner's husband. At the time of taking the L.I.C. Policy, the deceased was 33 years and his date of birth was 20th July, 1973. The age of his mother and father was also mentioned as 60 and 61 years, respectively.

9. The claim was submitted that petitioner's husband died on 6th September, 2007 at Sadar Hospital, Bhabhuwa, Bihar on account of anaemia and Cardiac arrest. The rejection of the claim has been made on the ground that petitioner's husband was suffering from kidney disease and anaemia since before taking of the policy, which was not disclosed by him, hence her claim is rejected.

10. A counter affidavit has been filed by the Corporation in the instant writ petition in which the Corporation has placed reliance specially on three materials; firstly, the medical prescription (Outdoor) of BHU dated 11th August, 2007 and secondly the medical opinion obtained by the Corporation from its own private doctor dated 17th July, 2008, which is annexed as Annexure-CA-4 to the counter affidavit and the Post Mortam report. The opinion given by the doctor of the Corporation dated 17th July, 2008 was

obtained after the death of the patient allegedly on the basis of OPD slips of BHU. The OPD slips, which have been annexed by the respondents, only says that the petitioner's husband was treated on 11th August, 2007 and thereafter on the advise of the hospital various medicines and tests have been prescribed. The OPD slips, Annexure CA-1 to the counter affidavit does not suggest or record any medical history suggesting that deceased was suffering from kidney disease or anaemia since last five years as has been opined by Doctor of Corporation in his certificate dated ***7th July, 2007.*** The slips, which have been filed as Annexure CA-'1' to the counter affidavit (at page 25) suggest that patient was examined on 20.08.2007, complain of Nausea and vomiting as well as weakness and dizziness was noted for last 20 days. There can not be any dispute that a person who takes an insurance policy, if he is aware of any disease from which he is suffering which is serious in nature, he ought to have disclosed the same at the time of taking the insurance policy/cover. In the present case, the respondents have filed in the counter affidavit the medical prescription dated 11th August, 2007 i.e. the treatment under which the deceased went after 10 months of taking the insurance policy and the medial prescription does not even suggest about the medical history or any disease of which the petitioner's husband was suffering from years.

11. We fail to appreciate the opinion obtained by the Corporation by his own doctor, which was obtained on 17th February, 2008 much after the death of the deceased that he was suffering from "Chronic Renal Failure". The relevant portion of the said opinion of doctor is quoted below :-

"As per OPD slip of I.M.S. BHU dated 20.8.07 shows that LA was a known case of CRF (Chronic Renal Failure). Chronic Renal Failure takes about minimum five years to develop. Means LA suffering with this problem for last about five years."

12. The petitioner in her claim submitted to the LIC has claimed that the deceased has died due to anaemia and Cardiac arrest. There is no material to support the view taken by the private doctor dated 17th February, 2008, that there was a case of Chronic Renal Failure. In the counter affidavit or materials brought on the record, there is no material to suggest that petitioner's husband took any treatment prior to taking the insurance policy or it was known to him that he was suffering from any disease. The insurance cover was taken by a person who was 33 years of age.

13. The respondents-Corporation has also placed reliance on the Post Mortam report, which has been filed as Annexure-CA-2. Although Post Mortam report mentions death due to severe anaemia and non-functional Kidney leading to cardiac arrest, but the said Post Mortam report can not be basis of any finding or conclusion that the deceased was suffering from any Kidney disease at the time of taking policy bond.

14. Learned counsel for the respondents-Corporation has placed reliance of Division Bench Judgement in the case of ***Smt. Maya Tripathi Vs. Sr. Divisional Manager, L.I.C. and Another*** decided on ***10th July, 2003*** in writ

petition no.***36904 of 1991,*** where the Division Bench has upheld the order of the Corporation rejecting the claim. The reason given by the Division Bench in the said judgement for rejecting the claim clearly explain the reason for rejection of the claim. It is useful to quote the following observation made by the Division Bench :-

"No doubt, the discharge certificate was issued in the year 1987, while the husband of the petitioner took the policy in the year 1985, but we are of the view that the petitioner was suffering from serious ailments prior to taking the policy in the year 1985. thus, inference can be drawn from the discharge certificate (annexure C.A.III) itself. It is a common knowledge that when a person has an ailment, he first goes to a local doctor. It is only much later that the person ordinarily goes to All India Institute of Medical Science, New Delhi, when the treatment of the local doctor fails. Thus this fact is undisputed that the petitioner had been suffering for six years as stated in the aforesaid discharge certificate (annexure C.A.III)."

15. From the aforesaid, it is clear that there was material in the said case of Smt. Maya Tripathi that the deceased was suffering from the serious disease for last six years. There can not be any dispute to the proposition that non disclosure of known disease entail the rejection of claim by the insurance Corporation. Thus, the said judgement also does not help the respondents in the present case. Another judgement relied upon by the respondents' counsel in the case of ***Shanta Bai alias Basanta Devi Vs. Life Insurance Corporation of India and others*** in writ petition no.***26862 of 2002*** decided on ***21st August, 2003.*** In the aforesaid case the deceased took policy in the year 1998. The insurance claim was rejected in the investigation which was carried on by the Corporation, it was found that the deceased was hospitalised from 18th May, 1998 to 3rd June, 1998, which fact was never disclosed in the proposal form. On the aforesaid facts, the action of the Corporation was upheld. In the aforesaid judgement, the Division Bench has observed as under :-

"A perusal of the impugned order dated 25.11.2000 (Annexure-10 to the petition) shows that the petitioner's husband was hospitalized from 18.5.1998 to 3.6.1998 in the North Eastern Railway Hospital, Allahabad. In the policy form when a specific query was made whether during the proceeding 5 years the applicant suffered from an illness due to which he had to get treatment for more than one week he replied in the negative to the query. He also replied in the negative to the query whether he had to be hospitalized and that he was absent from work due to illness. The petitioner's husband gave false answer to this specific query also and hence it is evident that he obtained the policy by misrepresentation. We are thus satisfied that L.I.C. was perfectly justified in rejecting the petitioner's claim as in our opinion her husband had obtained the policy by stating false facts and concealing facts."

16. In the present case, there is no material referred to or relied in the counter affidavit, which may suggest that petitioner's husband took any medical treatment prior to taking of the policy bond. In the proposal form the deceased had answered that he never took any medical treatment, nor he was ever

hospitalised. There is no material brought on the record by the respondents to indicate that petitioner's husband took any medical treatment prior to taking of policy or was ever hospitalised.

17. The another case relied upon by respondents' counsel in the case of ***Sushila Devi Vs. Life Insurance Corporation of India*** in writ petition no.***39028 of 2002,*** decided on ***15th March, 2007***, was a case where the writ petition was dismissed. There was a finding recorded by the Division Bench that the deceased underwent the medical treatment for months together before taking the policy. The finding recorded by the Division Bench is quoted below :-

"On the other hand, Shri Prakash Padia, learned counsel appearing for the respondents submits that while filling up the .....for getting the Insurance Policy petitioner's husband had furnished wrong information, particularly, saying that he had never been ill for a period of one week, or hospitalised for any ailment for one week in the last five years; and he was having very good health. The respondents conducted an inquiry on the basis of which they came to know that the department wherein petitioner's husband was serving he had taken leave on three occasions for months together before taking the said Policies, and therefore, it was a clear cut case of concealment, and no interference is required."

18. The judgement which has been relied upon by learned counsel for the respondents in the case of ***Mithoolal Nayak Vs. LIC of India, reported in AIR 1962 SC, 814,*** was also a case where the insured person had been found guilty of mis-statements and fraudulent suppression of material information on the basis of which the Hon'ble Apex Court decided the case against the insured person. In the said case, the second proposal was submitted on 16th July, 1944 and a finding was recorded that the deceased consulted the Physician at Jabalpur and was examined and treated by the said doctor between 7th September, 1943 and 6th October, 1943. Thus, there was entire material and basis for recording the finding that at the time of proposal and before the taking proposal, he was treated medically, therefore the said case is also on its own facts.

19. Learned counsel for the petitioner has relied upon the judgements in the case of ***Smt. Meena Sahu alias Meenu Sahu Vs. L.I.C. of India and another,*** reported in ***2006(2) AWC, 1295*** and ***Umeash Narain Sharma Vs. New India Assurance Company Ltd. and others,*** reported in ***2007(1) AWC, 487.*** The Division Bench in the case of Smt. Meena Sahu has also considered the case of Mithoolal Nayak, AIR 1962 SC 814. The following was laid down in para 10, which reads as under :-

"In the instant case, the proposal form was not filled in by the deceased in his own handwriting. The deceased had no educational qualification. The deceased being a man of 36 years was supposed to be a healthy person. The medical examiner's confidential report enclosed with the policy in question reveals that no sign or symptoms of suffering from any physical disorder more particularly of jaundice were found in the medical examination of life assured by the doctor of the corporation nor the Life Insurance Corporation has produced any evidence to show that three was misrepresentation of facts which if known earlier would have stopped the Corporation from issuing the

policy. The medical examiner of the Corporation having examined the assured and submitted a favourable report regarding his health, the Life Insurance Corporation cannot wriggle out of the contract by saying that it was void or voidable at its option. It is not a case where the L.I.C. of India would not have consented to the contract of the insurance but for misrepresentation or suppression of material facts. The facts of the present case are distinguishable from Mitthoolal Nayak's case (supra). In the said case the policyholder had taken policy a few months before his death. In the present case there is no evidence that the policyholder was treated for any serious ailment short time before the taking of the policy. The L.I.C. of India, its development officer and other staff including the medical practitioner who has examined the person insured owe a responsibility to the person to whom they sell insurance and they are presumed to be acting in the interest of the Corporation. The L.I.C. of India cannot disclaim the liability to make payment of assured amount under life policy No. 310786680 for the acts and omissions of its development officer or medical practitioner appointed by it to examine the deceased before accepting the proposal."

20. Another judgement which has been relied upon by learned counsel for the petitioner is ***2007 (1) AWC, 487 - Umeash Narain Sharma Vs. New India Assurance Company Ltd. and others.*** In the aforesaid case, Mediclaim Insurance Policy was taken by the insured. An application was submitted by the insured of medical treatment, which was rejected. The following was laid down by the Division Bench in para 17, which reads as under :-

"From a reading of the aforesaid clause, we find that it will apply to such diseases which were in existence at the time of proposing the insurance policy, i.e., prior to the effective date of the insurance. It is the own case of the respondents that when the fresh policy was issued on 30.1.2001, being Policy No.48/8652 in the proposal form the petitioner had declared that there was no pre-existing complaint regarding his health vide paragraph 7 of the counter-affidavit filed by Shailendra Shukla, Deputy Manager, Legal. It is presumed that the respondents had checked and verified all the informations given in the proposal form by the petitioner before issuing the mediclaim insurance policy. Thus, it is no right to say that the petitioner is known case of CAD since 2000. In the counter-affidavit except for a bald statement that the petitioner is a known case of CAD since 2000, neither any document nor any material has been brought on record to establish the said averments. In view of the specific averments made in paragraph 7 of the counter-affidavit filed by Shailendra Shukla on behalf of the respondents, the stand taken by the respondents for rejecting the claim cannot be sustained."

21. From the aforesaid materials brought on record and submissions made by learned counsel for the parties, we are satisfied that neither there was any material with the Corporation to come to the conclusion that the petitioner's husband underwent any medical treatment prior to taking of policy bond or was ever hospitalised. There being no material suggesting to the aforesaid, the conclusion recorded by the Corporation that the petitioner's husband had concealed the material facts at the time of proposal is perverse. The question of concealment of

fact arises only when a person is said to be aware of a particular fact. In so far as the second submission of learned counsel for the Corporation that even if the petitioner's husband underwent medical treatment after taking of the policy, he ought to have informed the Corporation about the subsequent treatment, suffice it to say that no such ground has been taken in the impugned order rejecting his claim. The respondents cannot be permitted to add a new ground for rejection of the claim in arguments, which has not been mentioned in the impugned order.

22. The aforesaid two judgements relied upon by learned counsel for the petitioner support the submissions of the petitioner's counsel. We are satisfied that there was no material before the Corporation to record a finding that the deceased has concealed any disease or any treatment which he underwent before taking of the proposal and the rejection of the claim in such facts and circumstances is totally arbitrary and unjust. The deceased died on 6th September, 2007. Four years have passed from the aforesaid date and his widow has been waiting for the benefit of the policy for last more than four years.

23. We are of the view that the Corporation in addition to the amount, which was entitled to be paid under the policy, shall also pay the interest at the Bank rate on the said amount calculating the same with effect from the date of death of the deceased. The impugned orders dated 1st May, 2008 and 19th May, 2009 passed by the respondents are set aside. The respondents are directed to make the payment, as directed above, within one month from the date a copy of this order is produced before them. The writ petition is allowed. No costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED; ALLAHABAD 05.08.2011

BEFORE
THE HON'BLE RAJES KUMAR, J.

Civil Misc. Writ Petition No.43203 OF 2011

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

Counsel for the Petitioner:
Sri Siddharth Khare

Counsel for the Respondents:
M/S Suman Sirohi(S.C.)
C.S.C.

Constitution of India Article 226-compassionate appointment-petitioner on death of his father-offered the post of constable keeping in view of minimum age of 21 years-after joining on post of constable and attaining age of 21 years-claimed appointment on post of Sub-Inspector-held-can not be allowed to claim higher post as a matter of right-reasons disclosed.

Held: Para 10

In view of the above, the law laid down by the Apex Court and by this Court, it is settled that once the right to get the compassionate appointment is exhausted after accepting the appointment on one post, the person has no right to claim any higher post on compassionate appointment.

Case law discussed:
1995 SCC (L&S), 10; (2008) 1 SCC (L&S), 769; (2009) 2 SCC (L&S), 224; (2007) 2 SCC (L&S), 417

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

1. Heard Sri Siddharth Khare, learned counsel for the petitioner and Ms. Suman Sirohi, learned Standing Counsel.

2. The petitioner's father was the employee in the police department, who expired on 01.01.1999. After the death of his father, the petitioner applied for the compassionate appointment. The petitioner claimed compassionate appointment on the post of Sub-Inspector. Since the petitioner was not eligible for the post Sub-Inspector, the petitioner was given compassionate appointment on the post of Constable, which the petitioner has accepted and joined the post of Constable. It appears that the eligibility age of the post of Sub-Inspector was 21 years, which the petitioner could not fulfil and therefore, the offer for the post of Sub-Inspector has not been accepted. Later on when the petitioner attained the age of 21 years, the petitioner moved an application that now he is eligible for the post of Sub-Inspector and the same may be considered.

3. Learned Standing Counsel submitted that once the petitioner accepted the compassionate appointment on the post of Constable, his right for the higher post is consummated and ceases to exist and his appointment on the higher post can not be accepted. Reliance is placed on the various decisions of the Apex Court.

4. I have considered the rival submissions and perused the decisions cited by both the sides.

5. I do not find any substance in the argument of learned counsel for the petitioner.

6. In the case of **State of Rajasthan Vs. Umrao Singh, reported in 1995 SCC (L&S), 10.** The Apex Court held as follows:

"Admittedly the respondent's father died in harness while working as Sub-Inspector, CID (Special Branch) on 16.3.1988. The respondent filed an application on 8-4-1988 for his appointment on compassionate ground as Sub-Inspector or LDC according to the availability of vacancy. On a consideration of his plea, he was appointed to the post of LDC by order dated 14-12-1989. He accepted the appointment on compassionate ground was consummated. No further consideration on compassionate ground would ever arise. Otherwise, it would be a case of "endless compassion". Eligibility to be appointed as Sub-Inspector of Police is one thing, the process of selection is yet another thing. Merley because of the so-called eligibility, the learned Single Judge of the High Court was persuaded to the view that direction be issued under proviso to Rule 5 of Rules which has no application to the facts of this case."

7. In the case of **Andhra Pradesh State Road Transport Corporation, Musheerabad and others Vs. Sarvarunnisa Begum, reported in (2008) 1 SCC (L&S), 769.** The Apex Court held as follows:

5. In the present case, the additional monetary benefit has been given to the widow apart from the

benefits available to the widow after the death of her husband to get over the financial constraints on account of sudden death of her husband and, thus, as a matter of right, she was not entitled to claim the compassionate appointment and that too when it had not been brought to the notice of the Court that any vacancy was available where the respondent could have been accommodated by giving her a compassionate appointment. That apart, the Division Bench of the High Court has committed an error in modifying the direction of the Single Judge by directing the Corporation to appoint the respondent when no appeal was preferred by the respondent challenging order of the Single Judge."

8. In the case of **Santosh Kumar Dubey Vs. State of Uttar Pradesh and others, reported in (2009) 2 SCC (L&S), 224.** The Apex Court held as follows:

"11. The very concept of giving a compassionate appointment is to tide over the financial difficulties that are faced by the family of the deceased due to the death of the earning member of the family. There is immediate loss of earning for which the family suffers financial hardship. The benefit is given so that the family can tide over such financial constraints.

12. The request for appointment on compassionate grounds should be reasonable and proximate to the time of the death of the bread earner of the family, inasmuch as the very purpose of giving such benefit is to make financial help available to the family to overcome sudden economic crisis occurring in the family of the deceased who has died in harness. But this, however, cannot be another source of recruitment. This also cannot be treated as a bonanza and also as a right to get an appointment in government service."

9. In the case of **I.G. (Karmik) and others Vs. Prahalad Mani Tripathi, reported in (2007) 2 SCC (L&S), 417.** The Apex Court held as follows:

"12. Furthermore, the respondent accepted the said post without any demur whatsoever. He, therefore, upon obtaining appointment in a lower post could not have been permitted to turn round and contend that he was entitled for a higher post although not eligible therefor. A person cannot be appointed unless he fulfils the eligibility criteria. Physical fitness being an essential eligibility criteria. Physical fitness being an essential eligibility criteria, the Superintendent of Police could not have made any recommendation in violation of the rules. Nothing has been shown before us that even the petitioner came within the purview of any provisions containing grant of relaxation of such qualification. Whenever, a person invokes such a provision, it would be for him to show that the authority is vested with such a power."

10. In view of the above, the law laid down by the Apex Court and by this Court, it is settled that once the right to get the compassionate appointment is exhausted after accepting the appointment on one post, the person has no right to claim any higher post on compassionate appointment.

11. In view of the above, the writ petition fails and is accordingly, dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.08.2011

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

Civil Misc. Writ Petition No. 43232 of 2011

Dr. Rajesh Kumar Singh ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Shailendra

Counsel for the Respondents:
Sri Ashok Khare
Sri B.D. Pandey
Sri Salil Kumar Rai
Sri Sudhanshu Pandey
C.S.C.

Gorakhpur University-U.P. State Universities Act Statutes 18-9-Appeal against determination of seniority-decided without affording any opportunity to the effected petitioner without disclosing any reason disturbed the finding of the Dean of the Faculty-ignoring the provision of statute 18.07 if date of joining are same-person being senior in age shall be treated as senior-held-order entails civil consequences-can not be passed without following the principle of Natural Justice-order impugned quashed with necessary direction to the executive council.

Held: Para 15

In the present case, nothing of this kind has been done. Neither has an opportunity been given to the petitioner before the Executive Council in its meeting held on 12.6.2011 nor any reasons have been given for disagreeing with the order of the Seniority Committee. As such, the order/resolution no. 39 of the Executive Council passed on 12.6.2011 deserves to be quashed.

Case law discussed:
1952 SCR 284; (1978) 1 SCC 248; (1978) 1 SCC 405; 1993 SCC 259

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

1. Heard Sri Shailendra, learned counsel appearing for the petitioner as well as learned Standing Counsel appearing for the State respondent no.1, Sri B.D. Pandey, learned counsel for the respondents no. 2 and 3 and Sri Ashok Khare, learned Senior Counsel along with Sri Salil Kumar Rai, learned counsel appearing for the respondent no. 4-Smt. Vinita Pathak and have perused the record.

2. Learned counsel for the respondents have categorically stated that this writ petition may be disposed of finally at the admission stage without calling for a counter affidavit. As such, with consent of learned counsel for the parties, this writ petition is being disposed of finally at the admission stage.

3. The brief facts of this case are that the petitioner-Dr. Rajesh Kumar Singh as well as respondent no. 4-Dr. Smt. Vinita Pathak were given substantive appointment in the Political Science department of the University by the decision of the Executive Council dated 1.12.1996. Besides other appointments, there were three appointments made in the Political Science department and in the list of appointees, the name of the respondent no. 4 was shown at serial no. 1 and that of the petitioner at serial no. 3. Thereafter, in the

year 1997, as per the supplementary seniority list published on 31.12.1997, the name of the petitioner was shown at serial no. 49 and that of the respondent no. 4 at serial no. 52 on the ground that though both of them had joined their services on the same day but since the petitioner was senior in age than the respondent no. 4, the petitioner would be treated senior to the respondent no. 4. Sri Salil Kumar Rai, learned counsel appearing for the respondents however states that no such seniority list was ever published or circulated by the Registrar of the University.

4. It is not disputed that a tentative seniority list was thereafter published on 23.7.2007, on which objections were invited. In the said tentative seniority list, the name of the petitioner finds place at serial no. 62 and that of the respondent no. 4 at serial no. 65. Then again on 6.10.2010, another tentative seniority list was published, in which again the petitioner was shown senior to the respondent no. 4. His name being placed at serial no. 26 and that of the respondent no. 4 at serial no. 29. Objections were again invited on the said tentative seniority list. It is stated that the respondent no. 4 filed objections to both the tentative seniority list. By means of the order dated 16.1.20011 passed by the Seniority Committee comprising of Vice Chancellor, Dean of Faculty of Law and Dean of Faculty of Commerce, the matter was decided in favour of the petitioner and considering the provisions of Statute 18.07 of the statutes of the University and the fact that the petitioner as well as the respondent no. 4 having been appointed on the same day and the petitioner being the senior in age, the petitioner was treated as senior to the respondent no. 4. Challenging the said order, the respondent no. 4 filed an appeal before the Executive Council under Clause 18.09 of the statutes of the University. The appeal of the respondent no. 4 was decided by the Executive Council in its meeting held on 12.6.2011, and the Executive Council vide resolution no. 39 maintained the list determined in its meeting dated 1.12.1996 and the respondent no. 4 was treated as senior to the petitioner. Pursuant to the said order of the Executive Council, the Registrar has passed the order dated 1.7.2011 treating the respondent no. 4 as senior to the petitioner. Aggrieved by the resolution no. 39 of the Executive Council dated 12.6.2011 and the order of the Registrar of the University dated 1.7.2011, this writ petition has been filed.

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

6. Though it has been argued by the learned counsel for the petitioner that the resolution of the Executive Council dated 1.12.96 did not fix any inter se seniority of the petitioner and respondent no. 4, we are not inclined to go into this question, in view of the order which we propose to pass.

7. The tentative seniority list was issued by the University lastly on 16.10.2011, in which the name of the petitioner was admittedly placed as senior to the respondent no. 4, objections were filed, which were decided by the Seniority Committee on 16.1.2011. Clause 18.09 of the statues of the University, which relates to constitution of Seniority Committee and filing of appeal against decision of Seniority Committee, reads as under:

"18.09 (1) The Vice-Chancellor shall from time to tile constitute one or more

seniority committees consisting of himself as Chairman and two Deans of Faculties to be nominated by the Chancellor.

Provided that the Dean of the Faculty to which the teachers, (whose seniority is in dispute) belong shall not be a member of the relative Seniority Committee.

(2) Every dispute about the seniority of a teacher of the University shall be referred to the Seniority Committee which shall decide the same giving reasons for the decision.

(3) Any teacher aggrieved with the decision of the Seniority Committee may prefer an appeal to the Executive Council within sixty days from the date of communication of such decision to the teacher concerned. If the Executive council disagrees with the Committee, it shall give reasons for such disagreement."

8. Sub-clause (3) of Clause 18.09 of the statues speaks about that reasons are to be recorded by the Executive Council in case if the Executive Council disagrees with the decision of the Seniority Committee, which is also to be a reasoned order as per sub-clause (2).

9. In the present case, the Seniority Committee had given its detailed reasons for fixing the seniority and placing the petitioner as senior to the respondent no. 4 and has also referred Clause 18.07 of the statutes of the University, which reads as under:-

"18.07. Where more than one teachers are entitled to count the same length of continuous service and their relative seniority cannot be determined in accordance with any of the foregoing provisions, then the seniority of such teachers shall be determined on the basis of seniority in age.

10. A perusal of resolution no. 39 would go to show that the only reason given by the Executive Council in its order passed on 12.6.2011 was that the representation (appeal) of the respondent no. 4 was considered and it was decided that the seniority as determined by the Executive Council in its meeting held on 1.12.1996 shall be applicable. It clearly does not meet the reasons given by the Seniority Committee for placing the petitioner as senior to the respondent no. 4. It also does not take note of the fact that in all tentative seniority list, which were published by the University, the petitioner had always been placed senior to the respondent no. 4, nor does it take into consideration Clause 18.07 of the statutes of the University.

11. Learned counsel for the petitioner thus submits that the order of the Executive Council, being without any valid reason and without considering the grounds/reasons given by the Seniority Committee, would be illegal and liable to the set aside. It is also submitted that as the appeal is provided under the statutes, it would be obligatory on the part of the appellate authority to give an opportunity to the aggrieved party before taking a final decision.

12. The said submission of the learned counsel for the petitioner has force. When an appellate authority is obliged in law to give reasons for disagreeing with the decision taken, which is appealed against, opportunity should be given to the party in whose favour the order has been passed. This would be necessary so as to

ensure that the ingredients of natural justice are satisfied. In case if the appellate authority decides the matter and upsets the order appealed against, the interest of the party (which is the petitioner in the present case) would be adversely affected without even having a chance to present his case before the appellate authority.

13. It is well settled that an order which involves civil consequences must be just, fair, reasonable, unarbitrary and impartial and should be in compliance with the principles of natural justice. The main aim of the principle of natural justice is to secure justice or to put it negatively to prevent miscarriage of the justice vide State of W.B. vs. Anwar Ali Sarkar, 1952 SCR 284; Maneka Gandhi Vs. Union of India, (1978) 1 SCC 248; Mohinder Singh Gill vs. Chief Election Commissioner, (1978) 1 SCC 405 and D.K.Yadav vs. J.M.A. Industries Ltd. reported in 1993 SCC 259;

14. These decisions have been followed in numerous cases decided thereafter which need not be detailed as this is the established principle of law that even an administrative order which leads to civil consequences must be passed in conformity with the rules of natural justice.

15. In the present case, if the decision of the Seniority Committee was to be reversed by the Executive Council, some opportunity (which need not of personal hearing) ought to have been given by the Executive Council to the petitioner. The least that could have been done was that the copy of the representation/appeal filed by the respondent no. 4 should have been provided to the petitioner giving him opportunity to file his written objection and the Executive Council could have then decide the matter after considering the grounds taken in the reply. In case if the Executive Council disagrees with the decision of the Seniority Committee, it ought to give reasons for such disagreement. In the present case, nothing of this kind has been done. Neither has an opportunity been given to the petitioner before the Executive Council in its meeting held on 12.6.2011 nor any reasons have been given for disagreeing with the order of the Seniority Committee. As such, the order/resolution no. 39 of the Executive Council passed on 12.6.2011 deserves to be quashed.

16. Accordingly, this writ petition succeeds and is allowed. The impugned order/resolution no. 39 of the Executive Council passed on 12.6.2011 as well as the consequential order dated 1.7.2011 passed by the Registrar of the University are hereby quashed. The Executive Council shall decide the appeal of the respondent no. 4, in accordance with law and in the light of the observations made hereinabove. The Registrar of the University shall make every endeavour to ensure that the appeal of the respondent no. 4 is placed and decided in light of the observation made hereinabove in the next meeting of the Executive Council and in case if the same is not possible, then in the subsequent meeting held thereafter.

17. There shall be no order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.08.2011

BEFORE
THE HON'BLE RAJES KUMAR, J.

Civil Misc. Writ Petition No. 43398 of 2011

Krishna Prasad and another ...Petitioners
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Bijendra Kumar Mishra

Counsel for the Respondents:
C.S.C.

U.P. Regularization of Daily Wags Appointment on Group D Post Rules 2001-Rule 4(a) (b)-regularization of Daily Wagers working prior to 1991-considering Globalization and Economic growth-engagement of Daily Wages, contractual employees-become well recognized system-there can not be any prohibition-but should be in accordance with law-0considering latest views of the Apex Court-guide lines given for Regularization.

Held: Para 12

In the present scenario of Globalisation and Economic growth, the execution of work by engaging the persons on contractual basis, daily basis and part time basis has become well recognised system and its results are more productive, efficient and economical. Having regard to the financial aspects the Central Government, State Government and their instrumentalities have right to engage daily wagers on the agreed wages, on contractual basis, adhoc and temporary basis and there is no prohibition in the Constitution or under any law of the land. However, their appointment should be in accordance to law.

Case law discussed:
(2006) 4 SCC 44; JT 2009 (4) SC 577; 2006 (4) SCC-1

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

1. Heard learned counsel for the petitioners and learned Standing Counsel.

2. The petitioners were working as daily wagers prior to June, 1991. The petitioners claim their regularization of service under the U.P. Regularisation of Daily Wages Appointment on Group D Post Rules, 2001 (hereinafter referred to as the 'Rules 2001').

3. The contention of the petitioners is that they fulfill all the conditions of the Rules 2001 and are eligible to be regularized. The names of the petitioners have not been considered for regularization because they are getting the minimum of pay scale as per order of this Court, in view of the Circular dated 24.6.20011.

4. I have considered the circular dated 24.06.2011. In my view, the regularization of the petitioners, who are working as daily wagers, can not be denied merely on the ground that the petitioners are getting minimum of pay scale on the basis of the order passed by this Court or otherwise, in case, if the petitioners fulfil all the requirements of the Rules 2001. There is nothing in the Rules 2001 which debars those Daily Wagers who are getting minimum of pay scale. It is settled principle of law that the circular cannot over-ride the rules. The circular dated 24.06.2011 is clarified as above. The claim of the petitioners for regularisation is to be considered strictly in accordance to rules. However, while

examining the case for regularisation, it may be considered that after getting the minimum of pay scale, the status of the petitioners remain as Daily Wagers and having regard to Rules 4 1(a) and (b) of the Rules 2001, in each regularisation/appointment letter it is to be specifically recorded that the conditions of Rules 4 1(a) and (b) are fulfilled.

Rules 4 1(a) and (b) are being referred hereinbelow:-

"4.Regularisation of daily wages appointments on Group 'D' Posts.-(1) Any person who-

(a)was directly appointed on daily wage basis on a Group 'D' post in the Government service before June 29, 1991 and is continuing in service as such on the date of commencement of these rules; and

(b)possessed requisite qualification prescribed for regular appointment for that post at the time of such appointment on daily wage basis under the relevant service rules, shall be considered for regular appointment in permanent or temporary vacancy, as may be available in Group 'D' post, on the date of commencement of these rules on the basis of his record and suitability before any regular appointment is made in such vacancy in accordance with the relevant service rules or orders."

5. In my view the Rules 2001 or any other Rules relating to the services of a Daily Wager, adhoc/temporary employee etc. are subject to the doctrine of equality enshrined under Articles 14 and 16 of the Constitution of India, which read as follows:

"14. The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

"16. Equality of opportunity in matters of public employment. -

(1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

(2) No citizen shall, on grounds only of religion, race, caste, sex,descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

(3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory prior to such employment or appointment.

(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

(4A) Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion, with consequential seniority, to any class or classes of posts in the

services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.

(4B) Nothing in this article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or (4A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent reservation on total number of that year.

(5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination."

6. Articles 14 and 16 of the Constitution of India have been considered by the Constitution Bench of the Apex Court in the case of ***Secretary, State of Karnataka and others vs. Uma Devi and others, reported in (2006) 4 SCC 44*** and subsequently in the case of ***State of Bihar vs. Upendra Narayan Singh and others, reported in JT 2009 (4) SC 577,*** in detail, with reference to the appointment of the Daily Wager, adhoc and temporary appointment.

7. The Apex Court in the case of ***State of Bihar vs. Upendra Narayan Singh and others*** (Supra) held that the equality clause enshrined in Article 16 of the Constitution mandates that every appointment to a public post or office should be made by way of open advertisement so as to enable all eligible persons to compete for selection on merits. It further held that for ensuring that equality of opportunity in the matters relating to the employment becomes a reality for all, Parliament enacted the Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959 (for short) 'the 1959 Act'). Section 4 of the Act casts a duty on the employer in every establishment in public sector in the State or a part thereof to notify every vacancy to the employment exchange before filling up the same.

Paragraph nos. 12, 14 and 15 of the judgment of the Apex Court in the case of State of Bihar vs. Upendra Narayan Singh and others (Supra) are reproduced below:-

12. In E.P. Royappa v. State of Tamil Nadu and others [(1974) 4 SCC 3], the Constitution Bench negatived the appellant's challenge to his transfer from the post of Chief Secretary of the State to that of Officer on Special Duty. P.N. Bhagwati, J. (as His Lordship then was) speaking for himself, Y.V. Chandrachud and V.R. Krishna Iyer, JJ. considered the ambit and reach of Articles 14 and 16 and observed :

"Article 14 is the genus while Article 16 is one of its species. Article 14 declares that the State shall not deny any person equality before the law or equal protection of the laws within the territory of India. Article 16 gives effect

to the doctrine of equality in all matters relating to public employment. Article 16 embodies the fundamental guarantee that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. No citizen shall be ineligible for or discriminated against irrespective of any employment or office under the State on the grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them. Though, enacted as a distinct and independent fundamental right because of its great importance as a principle ensuring equality of opportunity in public employment which is so vital to the building up of the new classless egalitarian society envisaged in the Constitution. The basic principle which, therefore, informs both Articles 14 and 16 is equality and inhibition against discrimination. Now, what is the content and reach of this great equalising principle? It is a founding faith, to use the words of Bose. J., "a way of life", and it must not be subjected to a narrow pedantic or lexicographic approach. We cannot countenance any attempt to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be "cribbed, cabined and confined" within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14, and if it effects any matter relating to public employment, it is also violative of Article 16. Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment."

14. In Girish Jayanti Lal Vaghela's case, this Court, while reversing an order passed by the Central Administrative Tribunal which had directed the Union Public Service Commission to relax the age requirement in the respondent's case, elucidated the meaning of the expression "equality of opportunity for all citizens in matters elating to public employment" in the following words:

"Article 16 which finds place in Part III of the Constitution relating to fundamental rights provides that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. The main object of Article 16 is to create a constitutional right to equality of opportunity and employment in public offices. The words `employment' or `appointment' cover not merely the initial appointment but also other attributes of service like promotion and age of superannuation, etc. The appointment to any post under the State can only be made after a proper advertisement has been made inviting applications from eligible candidates and holding of selection by a body of experts or a specially constituted committee whose members are fair and impartial through a written examination or interview or some other rational

criteria for judging the inter se merit of candidates who have applied in response to the advertisement made. A regular appointment to a post under the State or Union cannot be made without issuing advertisement in the prescribed manner which may in some cases include inviting applications from the employment exchange where eligible candidates get their names registered. Any regular appointment made on a post under the State or Union without issuing advertisement inviting applications from eligible candidates and without holding a proper selection where all eligible candidates get a fair chance to compete would violate the guarantee enshrined under Article 16 of the Constitution."

"15.....In Excise Superintendent, Malkapatnam, Krishna District, A.P. v. K.B.N. Visweshwara Rao and others [(1996) 6 SCC 216], a three-Judge Bench while reiterating that the requisitioning authority/establishment must send intimation to the employment exchange and the latter should sponsor the names of candidates, observed:

".... It is common knowledge that many a candidate is unable to have the names sponsored, though their names are either registered or are waiting to be registered in the employment exchange, with the result that the choice of selection is restricted to only such of the candidates whose names come to be sponsored by the employment exchange. Under these circumstances, many a deserving candidate is deprived of the right to be considered for appointment to a post under the State. Better view appears to be that it should be mandatory for the equisitioning authority/establishment to intimate the employment exchange, and employment exchange should sponsor the names of the candidates to the requisitioning departments for selection strictly according to seniority and reservation, as per requisition. In addition, the appropriate department or undertaking or establishment should call for the names by publication in the newspapers having wider circulation and also display on their office notice boards or announce on radio, television and employment news bulletins; and then consider the cases of all the candidates who have applied. If this procedure is adopted, fair play would be subserved. The equality of opportunity in the matter of employment would be available to all eligible candidates."

The same principle was reiterated in Arun Kumar Nayak v. Union of India and others [(2006) 8 SCC 111] in the following words:

"This Court in Visweshwara Rao, therefore, held that intimation to the employment exchange about the vacancy and candidates sponsored from the employment exchange is mandatory. This Court also held that in addition and consistent with the principle of fair play, justice and equal opportunity, the appropriate department or establishment should also call for the names by publication in the newspapers having wider circulation, announcement on radio, television and employment news bulletins and consider all the candidates who have applied. This view was taken to afford equal opportunity

to all the eligible candidates in the matter of employment. The rationale behind such direction is also consistent with the sound public policy that wider the opportunity of the notice of vacancy by wider publication in the newspapers, radio, television and employment news bulletin, the better candidates with better qualifications are attracted, so that adequate choices are made available and the best candidates would be selected and appointed to subserve the public interest better."

8. On consideration of the various decisions of the Apex Court, referred to herein above, the Apex Court in Paragraphs 16, 17, 20, 21, 22, 24, 26, 27 and 30 of the said judgment has further held as follows:-

"16. The ratio of the above noted three judgments is that in terms of Section 4 of the 1959 Act, every public employer is duty bound to notify the vacancies to the concerned employment exchange so as to enable it to sponsor the names of eligible candidates and also advertise the same in the newspapers having wider circulation, employment news bulletins, get announcement made on radio and television and consider all eligible candidates whose names may be forwarded by the concerned employment exchange and/or who may apply pursuant to the advertisement published in the newspapers or announcements made on radio/television.

17. Notwithstanding the basic mandate of Article 16 that there shall be equality of opportunity for all citizens in matters relating to employment for appointment to any office under the State, the spoil system which prevailed in America in 17th and 18th centuries has spread its tentacles in various segments of public employment apparatus and a huge illegal employment market has developed in the country adversely affecting the legal and constitutional rights of lakhs of meritorious members of younger generation of the country who are forced to seek intervention of the court and wait for justice for years together.

20. However, the hope and expectation of the framers of the Constitution that after independence every citizen will get equal opportunity in the matter of employment or appointment to any office under the State and members of civil services would remain committed to the Constitution and honestly serve the people of this country have been belied by what has actually happened in last four decades. The Public Service Commissions which have been given the status of Constitutional Authorities and which are supposed to be totally independent and impartial while discharging their function in terms of Article 320 have become victims of spoil system. In the beginning, people with the distinction in different fields of administration and social life were appointed as Chairman and members of the Public Service Commissions but with the passage of time appointment to these high offices became personal prerogatives of the political head of the Government and men with questionable background have been appointed to these coveted positions. Such appointees have, instead of

making selections for appointment to higher echelons of services on merit, indulged in exhibition of faithfulness to their mentors totally unmindful of their Constitutional responsibility. This is one of several reasons why most meritorious in the academics opt for private employment and ventures. The scenario is worst when it comes to appointment to lower strata of the civil services. Those who have been bestowed with the power to make appointment on Class III and Class IV posts have by and large misused and abused the same by violating relevant rules and instructions and have indulged in favouritism and nepotism with impunity resulting in total negation of the equality clause enshrined in Article 16 of the Constitution. Thousands of cases have been filed in the Courts by aggrieved persons with the complaints that appointment to Class III and Class IV posts have been made without issuing any advertisement or sending requisition to the employment exchange as per the requirement of the 1959 Act and those who have links with the party in power or political leaders or who could pull strings in the power corridors get the cake of employment. Cases have also been filed with the complaints that recruitment to the higher strata of civil services made by the Public Service Commissions have been affected by the virus of spoil system in different dimensions and selections have been made for considerations other than merit.

21. Unfortunately, some orders passed by the Courts have also contributed to the spread of spoil system in this country. The judgments of 1980s and early 1990s show that this Court gave expanded meaning to the equality clause enshrined in Articles 14 and 16 and issued directions for treating temporary/ad hoc/daily wage employees at par with regular employees in the matter of payment of salaries etc. The schemes framed by the Governments and public bodies for regularization of illegally appointed temporary/ad hoc/daily wage/casual employees got approval of the Courts. In some cases, the Courts also directed the State and its instrumentalities/agencies to frame schemes for regularization of the services of such employees. In State of Haryana v. Piara Singh [(1992) 4 SCC 118], this Court reiterated that appointment to the public posts should ordinarily be made by regular recruitment through the prescribed agency and that even where ad hoc or temporary employment is necessitated on account of the exigencies of administration, the candidate should be drawn from the employment exchange and that if no candidate is available or sponsored by the employment exchange, some method consistent with the requirements of Article 14 of the Constitution should be followed by publishing notice in appropriate manner calling for applications and all those who apply in response thereto should be considered fairly, but proceeded to observe that if an ad hoc or temporary employee is continued for a fairly long spell, the authorities are duty bound to consider his case for regularization subject to his fulfilling the conditions of eligibility and the requirement of satisfactory service. The propositions laid down in Piara Singh's case (supra) were followed by almost all

High Courts for directing the concerned State Governments and public authorities to regularize the services of adhoc/temporary/daily wage employees only on the ground that they have continued for a particular length of time. In some cases, the schemes framed for regularization of the services of the backdoor entrants were also approved. As a result of this, beneficiaries of spoil system and corruption garnered substantial share of Class III and Class IV posts and thereby caused irreparable damage to the service structure at the lower levels. Those appointed by backdoor methods or as a result of favoritism, nepotism or corruption do not show any commitment to their duty as public servant. Not only this, majority of them are found to be totally incompetent or inefficient.

22. In Delhi Development Horticulture Employees Union v. Delhi Administration, Delhi and others [(1992) 4 SCC 99], the Court took cognizance of the illegal employment market which has developed in the country and observed:

"Apart from the fact that the petitioners cannot be directed to be regularised for the reasons given above, we may take note of the pernicious consequences to which the direction for regularisation of workmen on the only ground that they have put in work for 240 or more days, has been leading. Although there is an Employment Exchange Act which requires recruitment on the basis of registration in the Employment Exchange, it has become a common practice to ignore the Employment Exchange and the persons registered in the Employment Exchanges, and to employ and get employed directly those who are either not registered with the Employment Exchange or who though registered are lower in the long waiting list in the Employment Register. The courts can take judicial notice of the fact that such employment is sought and given directly for various illegal considerations including money. The employment is given first for temporary periods with technical breaks to circumvent the relevant rules, and is continued for 240 or more days with a view to give the benefit of regularization knowing the judicial trend that those who have completed 240 or more days are directed to be automatically regularized. A good deal of illegal employment market has developed resulting in a new source of corruption and frustration of those who are waiting at the Employment Exchanges for years. Not all those who gain such backdoor entry in the employment are in need of the particular jobs. Though already employed elsewhere, they join the jobs for better and secured prospects. That is why most of the cases which come to the courts are of employment in government departments, public undertakings or agencies. Ultimately it is the people who bear the heavy burden of the surplus labour. The other equally injurious effect of indiscriminate regularization has been that many of the agencies have stopped undertaking casual or temporary works though they are urgent and essential for fear that if those who are employed on such works are required to be continued for 240 or more days they have to be absorbed as regular

employees although the works are time-bound and there is no need of the workmen beyond the completion of the works undertaken. The public interests are thus jeopardised on both counts."

(emphasis added)

24. Notwithstanding the critical observations made in Delhi Development Horticulture Employees Union vs. Delhi Administration, Delhi and others (supra) and State of U.P. and others v. U.P. State Law Officers Association and others (supra), illegal employment market continued to grow in the country and those entrusted with the power of making appointment and those who could pull strings in the corridors of power manipulated the system to ensure that their favourites get employment in complete and contemptuous disregard of the equality clause enshrined in Article 16 of the Constitution and Section 4 of the 1959 Act. However, the Courts gradually realized that unwarranted sympathy shown to the progenies of spoil system has eaten into the vitals of service structure of the State and public bodies and this is the reason why relief of reinstatement and/or regularization of service has been denied to illegal appointees/backdoor entrantsin large number of cases - Director, Institute of Management Development, U.P. v. Pushpa Srivastava [(1992) 4 SCC 33], Dr. M.A. Haque and others v. Union of India and others [(1993) 2 SCC 213], J & K Public Service Commission and others v. Dr. Narinder Mohan and others [(1994) 2 SCC 630], Dr. Arundhati Ajit Pargaonkar v. State of Maharashtra and others [1994 Suppl. (3) SCC 380], Union of India and others v. Kishan Gopal Vyas [(1996) 7 SCC 134], Union of India v. Moti Lal [(1996) 7 SCC 481], Hindustan Shipyard Ltd. and others v. Dr. P. Sambasiva Rao and others [(1996) 7 SCC 499], State of H.P. v. Suresh Kumar Verma and another [(1996) 7 SCC 562], Dr. Surinder Singh Jamwal and another v. State of J&K and others [(1996) 9 SCC 619], E. Ramakrishnan and others v. State of Kerala and others [(1996) 10 SCC 565], Union of India and others vs. Bishambar Dutt [1996 (11) SCC 341], Union of India and others v. Mahender Singh and others [1997] (1) SCC 245], P. Ravindran and others v. Union Territory of Pondicherry and others [1997 (1) SCC 350], Ashwani Kumar and others v. State of Bihar and others [1997 (2) SCC 1], Santosh Kumar Verma and others v. State of Bihar and others [(1997) 2 SCC 713], State of U.P. and others vs. Ajay Kumar [(1997) 4 SCC 88], Patna University and another v. Dr. Amita Tiwari [(1997) 7 SCC 198] and Madhyamik Shiksha Parishad, U.P. v. Anil Kumar Mishra and others [(2005) 5 SCC 122].

26. In Secretary, State of Karnataka vs. Uma Devi [2006 (4) SCC 1], the Constitution Bench considered different facets of the issue relating to regularization of services of ad hoc/temporary/daily wage employees and unequivocally ruled that such appointees are not entitled to claim regularization of service as of right. After taking cognizance of large scale irregularities committed in appointment at the lower rungs of the services and noticing several earlier decisions, the Constitution Bench observed:

"The Union, the States, their departments and instrumentalities have resorted to irregular appointments, especially in the lower rungs of the service, without reference to the duty to ensure a proper appointment procedure through the Public Service Commissions or otherwise as per the rules adopted and to permit these irregular appointees or those appointed on contract or on daily wages, to continue year after year, thus, keeping out those who are qualified to apply for the post concerned and depriving them of an opportunity to compete for the post. It has also led to persons who get employed, without the following of a regular procedure or even through the backdoor or on daily wages, approaching the courts, seeking directions to make them permanent in their posts and to prevent regular recruitment to the posts concerned. The courts have not always kept the legal aspects in mind and have occasionally even stayed the regular process of employment being set in motion and in some cases, even directed that these illegal, irregular or improper entrants be absorbed into service. A class of employment which can only be called "litigious employment", has risen like a phoenix seriously impairing the constitutional scheme. Such orders are passed apparently in exercise of the wide powers under Article 226 of the Constitution. Whether the wide powers under Article 226 of the Constitution are intended to be used for a purpose certain to defeat the concept of social justice and equal opportunity for all, subject to affirmative action in the matter of public employment as recognised by our Constitution, has to be seriously pondered over. It is time that the courts desist from issuing orders preventing regular selection or recruitment at the instance of such persons and from issuing directions for continuance of those who have not secured regular appointments as per procedure established. The passing of orders for continuance tends to defeat the very constitutional scheme of public employment. It has to be emphasised that this is not the role envisaged for the High Courts in the scheme of things and their wide powers under Article 226 of the Constitution are not intended to be used for the purpose of perpetuating illegalities, irregularities or improprieties or for scuttling the whole scheme of public employment. Its role as the sentinel and as the guardian of equal rights protection should not be forgotten."

"This Court has also on occasions issued directions which could not be said to be consistent with the constitutional scheme of public employment. Such directions are issued presumably on the basis of equitable considerations or individualisation of justice. The question arises, equity to whom? Equity for the handful of people who have approached the court with a claim, or equity for the teeming millions of this country seeking employment and seeking a fair opportunity for competing for employment? When one side of the coin is considered, the other side of the coin has also to be considered and the way open to any court of law or justice, is to adhere to the law as laid down by the Constitution and not to make directions, which at times, even if do not run counter to the constitutional scheme, certainly tend to water down

the constitutional requirements. It is this conflict that is reflected in these cases referred to the Constitution Bench."

While repelling the argument based on equity, the Constitution Bench observed:

".....But the fact that such engagements are resorted to, cannot be used to defeat the very scheme of public employment. Nor can a court say that the Union or the State Governments do not have the right to engage persons in various capacities for a duration or until the work in a particular project is completed. Once this right of the Government is recognised and the mandate of the constitutional requirement for public employment is respected, there cannot be much difficulty in coming to the conclusion that it is ordinarily not proper for the Courts whether acting under Article 226 of the Constitution or under Article 32 of the Constitution, to direct absorption in permanent employment of those who have been engaged without following a due process of selection as envisaged by the constitutional scheme.

What is sought to be pitted against this approach, is the so-called equity arising out of giving of temporary employment or engagement on daily wages and the continuance of such persons in the engaged work for a certain length of time. Such considerations can have only a limited role to play, when every qualified citizen has a right to apply for appointment, the adoption of the concept of rule of law and the scheme of the Constitution for appointment to posts. It cannot also be forgotten that it is not the role of the courts to ignore, encourage or approve appointments made or engagements given outside the constitutional scheme. In effect, orders based on such sentiments or approach would result in perpetuating illegalities and in the jettisoning of the scheme of public employment adopted by us while adopting the Constitution. The approving of such acts also results in depriving many of their opportunity to compete for public employment. We have, therefore, to consider the question objectively and based on the constitutional and statutory provisions."

[emphasis added]

The Constitution Bench then considered whether in exercise of power under Article 226 of the Constitution, the High Court could entertain claim for regularization and/or continuance in service made by those appointed without following the procedure prescribed in the rules or who are beneficiaries of illegal employment market and held:

"Thus, it is clear that adherence to the rule of equality in public employment is a basic feature of our Constitution and since the rule of law is the core of our Constitution, a court would certainly be disabled from passing an order upholding a violation of Article 14 or in ordering the overlooking of the need to comply with the requirements of Article 14 read with Article 16 of the Constitution. Therefore, consistent with the scheme for public employment, this Court

while laying down the law, has necessarily to hold that unless the appointment is in terms of the relevant rules and after a proper competition among qualified persons, the same would not confer any right on the appointee. If it is a contractual appointment, the appointment comes to an end at the end of the contract, if it were an engagement or appointment on daily wages or casual basis, the same would come to an end when it is discontinued. Similarly, a temporary employee could not claim to be made permanent on the expiry of his term of appointment. It has also to be clarified that merely because a temporary employee or a casual wage worker is continued for a time beyond the term of his appointment, he would not be entitled to be absorbed in regular service or made permanent, merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant rules. It is not open to the court to prevent regular recruitment at the instance of temporary employees whose period of employment has come to an end or of ad hoc employees who by the very nature of their appointment, do not acquire any right. The High Courts acting under Article 226 of the Constitution, should not ordinarily issue directions for absorption, regularisation, or permanent continuance unless the recruitment itself was made regularly and in terms of the constitutional scheme. Merely because an employee had continued under cover of an order of the court, which we have described as "litigious employment" in the earlier part of the judgment, he would not be entitled to any right to be absorbed or made permanent in the service. In fact, in such cases, the High Court may not be justified in issuing interim directions, since, after all, if ultimately the employee approaching it is found entitled to relief, it may be possible for it to mould the relief in such a manner that ultimately no prejudice will be caused to him, whereas an interim direction to continue his employment would hold up the regular procedure for selection or impose on the State the burden of paying an employee who is really not required. The courts must be careful in ensuring that they do not interfere unduly with the economic arrangement of its affairs by the State or its instrumentalities or lend themselves the instruments to facilitate the bypassing of the constitutional and statutory mandates. It is contended that the State action in not regularising the employees was not fair within the framework of the rule of law. The rule of law compels the State to make appointments as envisaged by the Constitution and in the manner we have indicated earlier. In most of these cases, no doubt, the employees had worked for some length of time but this has also been brought about by the pendency of proceedings in tribunals and courts initiated at the instance of the employees. Moreover, accepting an argument of this nature would mean that the State would be permitted to perpetuate an illegality in the matter of public employment and that would be a negation of the constitutional scheme adopted by us, the people of India. It is therefore not possible to accept the argument that there must be a direction to make permanent all the persons employed on daily wages.

When the court is approached for relief by way of a writ, the court has necessarily to ask itself whether the person before it had any legal right to be enforced. Considered in the light of the very clear constitutional scheme, it cannot be said that the employees have been able to establish a legal right to be made permanent even though they have never been appointed in terms of the relevant rules or in adherence of Articles 14 and 16 of the Constitution.

The argument that the right to life protected by Article 21 of the Constitution would include the right to employment cannot also be accepted at this juncture. The law is dynamic and our Constitution is a living document. May be at some future point of time, the right to employment can also be brought in under the concept of right to life or even included as a fundamental right. The new statute is perhaps a beginning. As things now stand, the acceptance of such a plea at the instance of the employees before us would lead to the consequence of depriving a large number of other aspirants of an opportunity to compete for the post or employment. Their right to employment, if it is a part of right to life, would stand denuded by the preferring of those who have got in casually or those who have come through the backdoor. The obligation cast on the State under Article 39(a) of the Constitution is to ensure that all citizens equally have the right to adequate means of livelihood. It will be more consistent with that policy if the courts recognise that an appointment to a post in government service or in the service of its instrumentalities, can only be byway of a proper selection in the manner recognised by the relevant legislation in the context of the relevant provisions of the Constitution. In the name of individualising justice, it is also not possible to shut our eyes to the constitutional scheme and the right of the numerous as against the few who are before the court. The directive principles of State policy have also to be reconciled with the rights available to the citizen under Part III of the Constitution and the obligation of the State to one and all and not to a particular group of citizens. We, therefore, overrule the argument based on Article 21 of the Constitution."

27. In the light of above, we shall now consider whether the High Court was justified in directing reinstatement of the respondents with consequential benefits. In the writ petition filed by them, the respondents herein made a bald assertion that they were appointed by the competent authority after following the prescribed procedure and pleaded that their services could not have been terminated in the garb of implementing the policy contained in letter dated 16.4.1996 overlooking the fact that they had been appointed prior to the cut off date, i.e., 28.10.1991 and the fact that they had continuously worked for almost 10 years. On behalf of the appellants herein, it was submitted that the writ petitioners should not be granted any relief because their initial appointments were per se illegal inasmuch as the concerned Regional Director had neither advertised the posts nor any requisition was sent to the employment exchange and there was no consideration of the competing claims of eligible persons.

30. At the hearing of this appeal, we asked the learned senior counsel appearing for the respondents to show that before appointing his clients on ad hoc basis, the then Regional Director, Gaya had issued an advertisement and/or sent requisition to the employment exchange and made selection after considering competing claims of the eligible candidates but he could not draw our attention to any document from which it could be inferred that the respondents were appointed after advertising the posts or by adopting some other method which could enable other eligible persons to at least apply for being considered for appointment. He, however, submitted that issue relating to legality of the initial appointments of the respondents has become purely academic and this Court need not go into the same because their services had been regularised by the competent authority in 1992."

9. After considering the precedent on the issue, the Apex Court held that if the initial appointment is in gross violation of doctrine of equality enshrined in Articles 14 and 16 and the provisions of the 1959 Act, merely because the service has been regularised, which was initially not in accordance to law, the plea of reinstatement cannot be considered.

10. It would be relevant to refer some more paragraphs of the decision of the Constitution Bench of the Apex Court in the case of ***Secretary, State of Karanataka and others vs. Uma Devi and others, reported in 2006 (4) SCC-1,*** which are referred hereinbelow:-

"43.Thus, it is clear that adherence to the rule of equality in public employment is a basic feature of our Constitution and since the rule of law is the core of our Constitution, a court would certainly be disabled from passing the order upholding a violation of Article 14 or in ordering the overlooking of the need to comply with the requirements of Article 14 read with Article 16 of the Constitution. Therefore, consistent with the scheme for public employment, this Court while laying down the law, has necessarily to hold that unless the appointment is in terms of the relevant rules and after a proper competition among qualified persons, the same would not confer any right on the appointee. If it is a contractual appointment, the appointment comes to an end at the end of the contract, if it were an engagement or appointment on daily wages or casual basis, the same would come to an end when it is discontinued. Similarly, a temporary employee could not claim to be made permanent on the expiry of his term of appointment. It has also to be clarified that merely because a temporary employee or a casual wage worker is continued for a time beyond the term of his appointment, he would not be entitled to be absorbed in regular service or made permanent, merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant rules. It is not open to the court to prevent regular recruitment at the instance of temporary employees whose period of employment has come to an end or of ad hoc employees who by the very nature of their appointment, do not

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

44. The concept of "equal pay for equal work" is different from the concept of conferring permanency on those who have been appointed on ad hoc basis, temporary basis, or based on no process of selection as envisaged by the rules. This Court has in various decisions applied the principle of equal pay for equal work and has laid down the parameters for the application of that principle. The decisions are rested on the concept of equality enshrined in our Constitution in the light of the directive principles in that behalf. But the acceptance of the principle cannot lead to a position where the court could direct that appointments made without following the due procedure established by law, be deemed permanent or issue directions to treat them as permanent. Doing so, would be negation of the principle of equality of opportunity. The power to make an order as is necessary for doing complete justice in any cause or matter pending before this Court, would not normally be used for giving the go-by to the procedure established by law in the matter of public employment. Take the situation arising in the cases before us from the State of Karnataka. Therein, after *Dharwad decision* the Government had issued repeated directions and mandatory orders that no temporary or ad hoc employment or engagement be given. Some of the authorities and departments had ignored those directions or defied those directions and had continued to give employment, specifically interdicted by the orders issued by the executive. Some of the appointing officers have been punished for their defiance. It would not be just or proper to pass an order in exercise of jurisdiction under Article 226 or 32 of the Constitution or in exercise of power under Article 142 of the Constitution permitting those persons engaged, to be absorbed or to be made permanent, based on their appointments or engagements. Complete justice would be justice according to law and though it would be open to this Court to mould the

relief, this Court would not grant a relief which would amount to perpetuating an illegality.

45. While directing that appointments, temporary or casual, be regularised or made permanent, the courts are swayed by the fact that the person concerned has worked for some time and in some cases for a considerable length of time. It is not as if the person who accepts an engagement either temporary or casual in nature, is not aware of the nature of his employment. He accepts the employment with open eyes. It may be true that he is not in a position to bargain-not at arm's length-since he might have been searching for some employment so as to eke out his livelihood and accepts whatever he gets. But on that ground alone, it would not be appropriate to jettison the constitutional scheme of appointment and to take the view that a person who has temporarily or casually got employed should be directed to be continued permanently. By doing so, it will be creating another mode of public appointment which is not permissible. If the court were to avoid a contractual employment of this nature on the ground that the parties were not having equal bargaining power, that too would not enable the court to grant any relief to that employee. A total embargo on such casual or temporary employment is not possible, given the exigencies of administration and if imposed, would only mean that some people who at least get employment temporarily, contractually or casually, would not be getting even that employment when securing of such employment brings at least some succour to them. After all, innumerable citizens of our vast country are in search of employment and one is not compelled to accept a casual or temporary employment if one is not inclined to go in for such an employment. It is in that context that one has to proceed on the basis that the employment was accepted fully knowing the nature of it and the consequences flowing from it. In other words, even while accepting the employment, the person concerned knows the nature of his employment. It is not an appointment to a post in the real sense of term. The claim acquired by him in the post in which he is temporarily employed or the interest in that post cannot be considered to be of such a magnitude as to enable the giving up of the procedure established, for making regular appointments to available posts in the services of the State. The argument that since one has been working for some time in the post, it will not be just to discontinue him, even though he was aware of the nature of the employment when he first took it up, is not (sic) one that would enable the jettisoning of the procedure established by law for public employment and would have to fail when tested on the touchstone of constitutionality and equality of opportunity enshrined in Article 14 of the Constitution.

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

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

11. The principle of law laid down by the Constitution Bench of the Apex Court in the case of State of Karanataka and others vs. Uma Devi and others (supra) and in other cases are being summarised hereinbelow:-

(a)The Union, the State, their authorities and instrumentalities have resorted to irregular appointments, especially in the lower rung of the service, without reference to the duty to ensure a proper appointment procedure through the Public Service Commissions or otherwise as per the rules adopted and to permit these irregular appointees or those appointed on contract or on daily wages, to continue year after year, thus, keeping out those who are qualified to apply for the post concerned and depriving them of an opportunity to compete for the post.

(b)Every citizen of the country has a right to be appointed as a daily wager, on adhoc basis/temporary basis as enshrined under Articles 14 and 16 of the Constitution of India.

(c)Appointments of daily wager, adhoc or temporary employee are subject to Articles 14 and 16 of the Constitution of India.

(d)Appointments of daily wager, adhoc or temporary appointments are to be made after following proper procedure giving equal opportunity to every citizen of the country to apply, namely, through proper channel etc.

(e)Those daily wager, adhoc, temporary appointed persons who have been appointed without following proper procedure have no right of regularisation.

(f)The Court should not issue direction for their regularisation, if their initial appointments are not in accordance to law, merely on the ground that they worked for a long period.

(g)If their initial appointments as daily wager, adhoc/temporary are per se illegal and dehorse the principle of law, their regularisation is also illegal.

(h) All the decisions contrary to the view taken by the Constitution Bench of the Apex Court in the case of ***Secretary, State of Karanataka and others vs. Uma Devi and others (supra)*** stood over-ruled and are held not taken to be precedent.

12. In the present scenario of Globalisation and Economic growth, the execution of work by engaging the persons on contractual basis, daily basis and part time basis has become well recognised system and its results are more

productive, efficient and economical. Having regard to the financial aspects the Central Government, State Government and their instrumentalities have right to engage daily wagers on the agreed wages, on contractual basis, adhoc and temporary basis and there is no prohibition in the Constitution or under any law of the land. However, their appointment should be in accordance to law.

In view of the above discussions, I hold that :

(i) that Rules 2001 for regularisation or any other Rule contemplating regularisation is subject to Articles 14 and 16 of the Constitution of India and those daily wagers, adhoc/temporary appointed persons, who have been appointed without following the proper procedure, their appointments are per se illegal and they have no right of regularisation.

(ii) While making regularisation, conditions of Rules must be strictly followed. Findings in respect of Rules 4(a) and (b) of the Rules 2001 be specifically recorded in each individual case.

(iii) Claim of regularisation cannot be denied, merely because person concerned is getting the minimum of pay scale.

(iv)The State Government and its instrumentalities are directed to follow the above principle of law in case of appointment and regularisation strictly.

13. With the aforesaid observations, the writ petition is disposed of. The authority concerned is directed to consider the case of the regularization of the petitioners in accordance to Rules, in the light of the observation made above.

14. Let a copy of the order be provided to the learned Chief Standing Counsel, U.P. for necessary action.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.08.2011

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

Civil Misc. Writ Petition No. 43472 of 2011

Om Prakash and others ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri K.K. Nirkhi

Counsel for the Respondent:
C.S.C.

Indian Evidence Act, 1872-Section-68-presumption of genuineness of Regd. Will-alleged to be executed on the same dated of death of execution-itself creates serious doubts-it is profounder to prove beyond reasonable doubt-even the opposite parties lost in civil court itself creates serious doubts except observation of suspicious nothing can be presumed.

Held: Para 11

The contesting respondent no. 5 may have lost the battle before the civil court but the present petitioners who were the defendants have also not gained anything out of the said proceedings except for an observation that the will was suspicious.

Case law discussed:
2009 (107) RD 372; 2004 (96) RD 98; 2004 (96) RD 656

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

1. Heard Sri K.K. Nirkhi learned counsel for the petitioner.

2. The contention raised is that the orders passed by the Board of Revenue as well as by the Revising Authority in proceedings under Section 34 of the U.P. Land Revenue Act, 1901, are erroneous and even otherwise in view of the proceedings of the civil court that culminated in the decision in Second Appeal No. 909 of 2010, vide judgment dated 14.12.2010 by this Court, the contesting respondents, particularly respondent no. 5 had no claim surviving and he could not have been extended the benefit of mutation in his favour to the holding of late Pyare Lal.

3. The dispute in short is in relation to the agricultural holdings of late Pyare Lal and the respondent no. 5 happens to be his real nephew (brother's son). The petitioners claim themselves to be the sister's son of late Pyare Lal. They contend that they have a registered will in their favour and the same could not have been discarded on the ground of mere suspicion, moreso, when the findings of the civil court are against the contesting respondent no.5 who failed to prove his title.

4. Before proceeding further, it would be appropriate to refer to the judgment of this court in second appeal hereinabove. Instead of explaining the same, the relevant portion of judgment is extracted herein below:-

"Having considered the submission of learned counsel for the parties and perused the record, both the courts below have recorded a categorical finding holding that the plaintiff-appellant failed to prove his title. It has been found that the plaintiff had earlier filed a Suit No. 203 of 1990 wherein the Civil Court while deciding the issue no.4 had found that the plaintiff can get a declaration of his title from the Revenue Court and it had returned the plaint to the plaintiff for being presented before the revenue court. The plaintiff did not file the plaint before the revenue court and has proceeded to file the instant suit for injunction.

In the present proceedings a finding of fact has been clearly recorded that the plaintiff has failed to prove his title over the land in question. Apart from the said finding the courts below have refused to grant injunction by holding that the plaintiff ought to have first sought declaration of his title from the appropriate court since his title has been placed under a cloud by the defendant-respondents who claim title by virtue of will executed by Pyare Lal. The plaintiff-appellant admittedly is the nephew of the deceased Pyare Lal. **The trial court while considering the will set up by the defendant-respondents has recorded a finding that it is suspicious since it was obtained on the date Pyare Lal died. The defendant's case was disbelieved for that reason but it was not a suit for cancellation of the will hence also a declaration either way was required.** The suit for injunction hence could not be maintainable unless a declaration was made.

The submission that the suit for injunction would be maintainable when the plaintiff has been found in possession and reliance upon the decisions cited by learned counsel is concerned, in this case

both the courts below found that the plaintiff has not proved his title **whereas the defendant's claim title through a will, which is suspicious and therefore, it held that since the title of the parties is required to be adjudicated, no injunction can be granted in favour of the plaintiff.** It was recorded by the trial court that the plaintiff-appellant was living with Pyare Lal his uncle and the defendant-respondents who were his nephews were also living since childhood with Pyare Lal till he died. Therefore, on the question of possession, it is unclear as to whether the plaintiff-appellant was in possession to the exclusion of the defendant-respondents or the defendant-respondents were also in possession, hence the decision relied by Sri Atul Dayal, learned counsel for the plaintiff-appellant on that question are clearly distinguishable from the fact of the present case.

The facts of the present case indicates that there is a dispute of title between the parties and the question of possession though relevant but an injunction could not be granted against a co-claimant of rights.

Consequently there was no error in the view taken by the courts below that the plaintiff-appellant ought to get his rights declared from the appropriate court. More particularly when in an earlier suit filed by him, the plaint was returned for obtaining such a declaration from the Revenue Court."

5. The respondent no. 5 - Mahabir was the plaintiff-appellant. It is therefore clear that he has to get his title declared before he succeeds to stake any claim.

6. So far as the petitioners are concerned they were the defendants in the said suit. The High Court in the judgment has clearly indicated that the will set up by the petitioners is suspicious, hence, no injunction could have been granted.

7. Sri Nirkhi contends that so long as the will is not cancelled, there is a presumption in favour of the will set up by the petitioners and he has relied on the apex court judgment in the case of **Abdul Rahim & others Vs. Sk. Abdul Zabar & others, reported in 2009 (107) RD 372,** to contend that a registered document carries with it a presumption of its validity, so long it is not set aside. In such a situation, the will set up by the petitioners had to be accepted and the courts below have committed an error by discarding the same on the basis of mere suspicion.

8. Learned counsel has further relied on the judgment of **Puran Singh Vs. Board of Revenue, U.P., Allahabad & others,** reported in **2004 (96) RD 98**, as well as in the case of **Sahed Jan @ Bonde & others Vs. Board of Revenue, U.P. at Lucknow & others**, reported in **2004 (96) RD 656,** to contend that the proceedings under Section 34 being summary in nature the courts below have erred in entering into the question of the validity of the will of the petitioners.

9. Having considered the aforesaid submissions, it is no doubt true that a registered document has a presumption in its favour but it is subject to any challenge or any evidence required to be led to prove such a document. In the instant case the document is a registered will which has to be proved in accordance with the provisions of Section 68 of the Indian

Evidence Act, 1872, and the presumption is subject to such proof. This can only be done in a regular proceeding before a court of competent jurisdiction.

10. Not only this, prima facie, such a will has to be proved before it is accepted. In the instant case, a clear finding has been recorded to the effect that the petitioners failed to lead any evidence in support of the will including the production of the attesting witnesses. It is on this basis that the will has been doubted. There is another circumstance which has been indicated in the orders, namely, that the death of the tenure holder took place on 26th July, 1980. In such a situation, the execution of the will on the same day and its registration makes the document doubtful. The authorities below have therefore only expressed a doubt which also stands corroborated by the judgment in the second appeal quoted hereinabove.

11. The contesting respondent no. 5 may have lost the battle before the civil court but the present petitioners who were the defendants have also not gained anything out of the said proceedings except for an observation that the will was suspicious.

12. Considering the aforesaid facts and circumstances of the case and the discussion made hereinabove, the petitioners will also have to establish their title in accordance with law and any orders passed during mutation proceedings would always be subject to the outcome of a regular suit. In such a situation, I am not inclined to interfere with the impugned orders.

13. The writ petition lacks merit and is accordingly dismissed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 11.08.2011

BEFORE
THE HON'BLE SUDHIR AGARWAL,J.

Civil Misc. Writ Petition No. 45471 of 2011

Brij Nandan Singh ...Petitioner
Versus
State of U.P. and another ...Respondents

Counsel for the Petitioner:
Sri J.A. Azmi
Sri Riyajuddin Ansari

Counsel for the Respondents:
C.S.C.

Constitution of India, Article 226-Denial of Fire Arms License-on ground-no adequate evidence regarding endanger of life and liberty and by whom-held-authorities ought not to behave like part of old British-to crush every demand of a pity subject-but deserves to consider with grater respect and honour-with more pragmatic and practical approach.

Held: Para 8

The authorities empowered to grant licence under the Act ought not to behave as if they are part of the old British sovereignty and the applicant is a pity subject whose every demand deserved to be crushed on one or the other pretext. The requirement of an Indian citizen governed by rule of law under the Indian Constitution deserved to be considered with greater respect and honour. The authorities thus shall have considered the requirement of applicant with more pragmatic and practical approach. Unless they find that in the garb of safety and security, applicant in fact intend to use the

weapon by obtaining a licence for a purpose other than self defence, it ought not to have been denied such licence. I am not putting the statutory power of authority concerned in a compartment since there may be more than one reasons for exercising statutory discretion against applicant but then that must justify in the context of purpose and objective of statute and necessarily ought not be whimsical.

Case law discussed:

2010(10) ADJ 782; Vinod Kumar Shukla Vs. State of U.P. and others, (Writ Petition No. 38645 of 2011), decided on 15.07.2011

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

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

2. Considering the pure legal submission advanced by learned counsel for the petitioner, learned Standing Counsel states that he does not propose to file any counter affidavit and the writ petition may be disposed of finally at this stage under the Rules of this Court.

3. It is contended that fire arm licence was applied by petitioner which has been declined by District Magistrate on the ground that petitioner did not prove by adducing adequate evidence that his life and liberty is endangered and if so by whom. That order has been confirmed in appeal.

4. It is contended that unless otherwise shown, every person is entitled to take care of his safety and security particularly when efficiency of State Police to provide adequate security is quite doubtful considering the total number of population vis a vis police personnel. Here both the authorities have rejected petitioner's application on a nonest ground. The orders are based on conjecture and surmises.

5. Learned Standing Counsel having gone through the impugned order could not support the impugned orders.

6. This Court in **Pawan Kumar Jha Vs. State of U.P. and others, 2010(10) ADJ 782** has held that undue restriction on keeping and bearing arms ought not be based on unfounded fear. Licence is normally to be granted unless there is something adverse.

7. A fire arm licence cannot be denied only on conjectures and surmises and without appreciating the objective of statute under which the power is being exercised. Right to life and liberty which includes within its ambit right of security and safety of a person and taking, adopting and pursuing such means as are necessary for such safety and security, is a fundamental right of every person. Keeping a fire arm for the purpose of personal safety and security is a mode and manner of protection of oneself and enjoyment of fundamental right of life and liberty under Article 21 of the Constitution. In the interest of maintenance of law and order certain reasonable restrictions have been imposed on such right but that would not make the fundamental right itself to be dependant on the vagaries of executive authorities. It is not a kind of privilege being granted by Government to individual but only to the extent where grant of fire arm licence to an individual would demonstratively prejudice or adversely affect the

maintenance of law and order including peace and tranquility in the society, ordinarily such right shall not be denied. It is in these circumstances, this Court has observed that grant of fire arm licence ordinarily be an action and denial an exception. In **Vinod Kumar Shukla Vs. State of U.P. and others, (Writ Petition No. 38645 of 2011),** decided on 15.07.2011 this Court has said:

"When a fire arm licence is granted for personal safety and security it does not mean that in the family consisting of several persons only one fire arm licence is to be granted. Moreover, this cannot be a reason for denial of arm licence. Fire arm licence can be denied only if the reason assigned by applicant or details given by him in application are not found to be correct but merely because there are one fire arm licence already possessed by one of the family member, the same cannot be denied. Grant of fire arm licence should ordinarily be an action and denial should be an exception. The approach of authorities below is clearly arbitrary and illegal. It also lacks purpose and objective of the statute."

8. The authorities empowered to grant licence under the Act ought not to behave as if they are part of the old British sovereignty and the applicant is a pity subject whose every demand deserved to be crushed on one or the other pretext. The requirement of an Indian citizen governed by rule of law under the Indian Constitution deserved to be considered with greater respect and honour. The authorities thus shall have considered the requirement of applicant with more pragmatic and practical approach. Unless they find that in the garb of safety and security, applicant in fact intend to use the weapon by obtaining a licence for a purpose other than self defence, it ought not to have been denied such licence. I am not putting the statutory power of authority concerned in a compartment since there may be more than one reasons for exercising statutory discretion against applicant but then that must justify in the context of purpose and objective of statute and necessarily ought not be whimsical.

9. Both impugned orders in the case in hand shows that on wholly conjectures and surmises the authorities have denied petitioner's claim for fire arm licence and have rejected his application in a most arbitrary manner. The two orders, therefore, cannot sustain.

10. In view of above, the writ petition is allowed. The impugned orders dated 25/27.01.2011 and 12.05.2011 are hereby quashed and the matter is remanded back to the Collector concerned to consider the same afresh in accordance with law and in the light of observations made above and pass a fresh order within a period of one month from the date of production of a certified copy of this order.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 05.07.2011

BEFORE
THE HON'BLE SUDHIR AGARWAL,J.

Civil Misc. Writ Petition No. 47088 of 2005

Ram Charan Pal and another ...Petitioner
Versus
State of U.P. Thru' Secy. Industry and others ...Respondents

Counsel for the Petitioner:
Sri Bhoopendra Nath Singh

Counsel for the Respondents:
Sri S.K. Mishra
S.C.

Constitution of India, Article 226-transfer-class 4th employee-transfered from Govt. Press Allahabad to Govt. Press Rampur-main thrust of argument-Group 'D' employee can not be transferred outside the District-held-misconceived-once an employee hold transferable post-can not be allow to work at place of his choice-considering ex-parte-interim order-continuing since last 6 years-very purpose of transfer itself frustrated-petition dismissed with cost of Rs. 15000/-.

Held: Para 46

In view of the above discussion and in absence of any provision to show that a Class IV employee shall not be transferred outside the district, it cannot be said that the order of transfer is illegal. Even the Government Order dated 4.10.1979, referred to by the petitioners, does not say so but in given circumstances, it requires that ordinarily transfer of Class IV employees may be made within the district but there is no complete embargo for their transfer outside the district. Moreover, since 1979 repeatedly several Government Orders have been issued laying down guidelines for transfers and in supersession of earlier orders. They have been issued on annual basis.

Case law discussed:
2004 SCC (L & S) 631; AIR 1974 SC 555; 1977 (4) SCC 193; JT 1986 (1) SC 249; AIR 1989 SC 1433; AIR 1991 SC 532; JT 1992 (6) SC 732; 1993 (1) SCC 148; 1993 Suppl. SCC 704; JT 1994 (5) SC 298; 1995 Suppl. (4) SCC 169; 2001 (8) SCC 574; 2003(4) SCC 104; 2004 (11) SCC 402; JT 2004 (2) SC 371; 2005 (7) SCC 227; Special Appeal No. 1296 of 2005 (Gulzar Singh Vs. State of U.P. & others); 2007 (8) SCC 793; JT 2007 (12) SC 467; 2007 (9) SCC 539; 2009 (11) SCALE 416; JT 2009 (10) SC 187; AIR 1993 SC 2444; 1992 (1) SCC 306; 2005 (2) ESC 1224; Civil Misc. Writ Petition No. 52249 of 2000 (Dr. Krishna Chandra Dubey Vs. Union of India & others) ; Gulab Singh (supra) and Ram Niwas Pandey & others Vs. Union of India & others (Special Appeal No. 769 of 2005); Civil Misc. Writ Petition No. 243 (SB) of 2007 Uma Shankar Rai Vs. State of U.P. & others; (1993) 4 SCC-25; (1994) 6 SCC-98; (1985) 1 All. ER 40; (1998(16) LCD-17); 2009 (4) ALJ 372; 2008 (2) ESC 1141; 1992 Supp. (1) SCC 222; AIR 1996 Supreme Court 326; JT 1996 (8) S.C. 550; AIR 2003 Supreme Court 1344; 2008(4) ADJ36=2008 (2) ESC 1312; 2008 (3) ADJ 705

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

1. Since the writ petition has been restored to its original number vide order of date, as requested and agreed by learned counsel for the parties, I proceed to hear the matter finally under the rules of the Court at this stage.

2. The order impugned in this writ petition is dated 8th June, 2005 whereby the petitioners working as Gateman, Government Press Allahabad have been transferred to Government Press, Rampur by Director, Mudran and Lekhan Samagri, U.P. Allahabad (hereinafter referred as "Director")

3. Sri B.N.Singh, learned counsel for the petitioner, contended that petitioners are class IV employees and therefore, cannot be transferred out of the District and in support thereof placed reliance on a Government Order dated 3404/Karmik-2/79 dated 4th October, 1979. He further contended that impugned order of transfer as a measure of victimization since petitioners used to oppose illegal activities of Employees/Trade Union leaders by not permitting them to commit any misconduct or any illegal action. The orders of transfer are, in effect, by way of punishment and therefore, vitiated in law. He contended that impugned orders are result of mala fide of one Jeet Lal, Gate Jamadar who made false complaint against petitioners resulting in initiation of departmental enquiry. He concluded his argument by stating that orders of transfer are neither in public interest nor on administrative grounds nor in the interest of administration but in utter disregard of Government Orders issued by respondent No.1.

4. Learned Standing Counsel, per contra, submitted that the petitioners have been transferred pursuant to a general order of transfer issued in respect of 18 employees and thus there was no occasion of any bias or mala fide vis a vis petitioners. He further contended that a Government Order, laying down policy guidelines with respect to transfer, does not result in creating a cause of action for challenging an order of transfer made in public interest or administrative exigency and that there is no substance in the contention that transfer has been made by way of punishment. He further contended, where the competent authorities found that a person for smooth working of the administration has to be transferred, such a transfer is also within the realm of administrative exigency and no interference is called for therein.

5. First of all, I would consider the question whether impugned orders of transfer are assailable on the ground that the same are in violation of the Government Order dated 04.10.1979.

6. Learned counsel for the petitioner could not dispute that in absence of any specific provision applicable to the petitioners in regard to transfer, general provision contained in Fundamental Rule 15 is applicable.

7. Construing Fundamental Rule 14-B the Apex Court in **Union of India & Ors. Vs. Janardhan Debanath & Anr. 2004 SCC (L & S) 631**, in para 12 said:

"Transfers unless they involved any such adverse impact or visit the persons concerned with any penal consequences, are not required to be subjected to same type of scrutiny, approach and assessment as in the case of dismissal, discharge, reversion or termination and utmost latitude should be left with the department concerned to enforce discipline, decency and decorum in public service which are indisputably essential to maintain quality of public service and meet untoward administrative exigencies to ensure smooth functioning of the administration."

8. No provision has been shown to this Court which made a complete embargo with respect to transfer of a Class IV employee from one place to another. The scope of judicial review of transfer and also the scope of assailability of an order of transfer allegedly in violation of a Government Order laying

down certain guidelines is no more an issue res integra having been considered in a catena of decisions.

9. It is no doubt true that an employee and in particular a Government servant is entitled to be treated fairly, impartially, free from any external influence and strictly in accordance with his service conditions, and rules and regulations framed in this regard. Like any other person, various fundamental rights are applicable to the Government servants also and in particular Article 14, 16 and 21 of the Constitution. If there is a case demonstrating that a Government servant has been dealt with unfairly or has been discriminated on one or the other ground, which are impermissible under Article 16 (2) of the Constitution like, caste, religion, race, sex, descent place of birth etc. this Court would not hesitate to interfere and restrain the State from doing so immediately. However, all these question pre conceive one fact that the Government employee has some kind of right which is being interfered either by singling him out or on account of mala fide etc. There are several aspects in service and in particular Government service. Some arise out of the rights of the Government servant and in some he has no right but exist there merely because one is a Government servant holding a position and status and by virtue thereof such incident of service has fallen upon him. Further, there are a number of incidents of service, some of which confer a legal right upon the Government servant and some do not result in a legal right. For example once a person is appointed as Government servant, his seniority by virtue of his date of entering the service is an incident of service. It confers a legal right upon him to claim that his seniority should be determined in accordance with the rules or the executive instruction in the absence of the statutory rules laying down the criteria for determining seniority. Similarly, another incident of service is that he is entitled to claim salary or wages as prescribed under statutory rules or executive orders. This also confer upon him a legally enforceable right whether flows from statutory rules or from executive instructions. Then if there is a hierarchy of posts and the rules allow a Government servant working on a particular post to be considered for promotion to a higher post, in certain circumstances, in such a case consideration for promotion is also an incident of service and here also it confers a legally enforceable right whether it emerges from rules or executive instructions. Simultaneously there are certain aspects which though are incidents of service but do not result in conferring any legal right upon the Government servant concerned, Enforceability in later cases varies from case to case. In some matters to a limited extent they may be enforceable and in some matters they may not be enforced at all. For example if by an executive order it is provided that a Government servant holding a particular post will have to show his performance upto a particular level, compliance thereof on the part of the Government servant is also an incident of service but its enforceability varies from case to case. For example the executive higher authorities may take action against such Government servants who fail to perform upto the desired level and such failure may result in adverse consequences in the matter of promotion, crossing of efficiency bar etc. Similarly such matter may also be considered by an executive higher authority at the time of considering

whether the Government servant concerned has rendered a dead wood necessitating compulsory retirement or not but Government servant cannot challenge the said standard in a Court of law on the ground that those standards according to capacity of the Government servant are excessive etc. and cannot be followed uniformly by all the Government servant since the capacity of every person varies depending on various aspects of the matter. Similarly another Government servant or the people at large may not claim something in his favour on the ground that a particular Government servant has not been able to discharge as per desired the level. For example if in a territorial jurisdiction of a particular Police Station, number of offenses in a particular period are more than another Police Station, the citizens residing in the former Police Station cannot come to a Court of law and say that in view of the executive instructions issued by the State Government, the Officer In-charge of the Police Station having failed to achieve the target or show his performance according to desired level and, therefore, he should be proceeded against in one or the other manner or should be removed from his office or from that Police Station. Similarly, if a member of a Subordinate Judiciary, who is supposed to decide certain number of cases in a month, fails to achieve the target, no litigant or advocate can come to a Court of law to ask that such judicial officer is not able to hold the office and should be removed or should be transferred to some other place. The executive orders, in this regard though require performance upto a particular standard for the public benefit and interest but non achievement thereof is not enforceable. In the administrative side, the executive authority higher in office may take into consideration the above executive instructions and the performance of the Government servant concerned while assessing his performance, but otherwise the executive instructions of the nature stated above are not enforceable since they do not result in creating a legally enforceable right. The executive instructions providing certain monetary benefit to Government servants or their family members are enforceable. However, the executive instructions constituting guidelines for the authority competent to transfer a Government servant from one place to another do not fall in the same category i.e. enforceable as they do not confer any legal right upon a Government servant. This is what the law has been in the matter of transfer throughout in the light of the authorities of the Apex Court as well as this Court. I will not burden this judgment with number of authorities on this subject but would like to come straightway on the main issue but before doing so, I propose to refer certain authorities to show how the matter of transfer of a Government servant has been treated by the Courts in India. After having an in-depth study on the subject I find it beyond doubt that throughout it has been held that transfer is an incident of service, which does not affect any legal right of a Government servant holding a transferable post.

10. Initially, in **E. P. Royappa Vs. State of Tamilnadu AIR 1974 SC 555** the Court said that it is an accepted principle that in a public service transfer is an incident of service. It is also an implied condition of service and appointing authority has a wide discretion in this matter. The Government is the best judge to decide how to distribute and utilize the services of its employees.

11. Thereafter, dealing with the transfer of the Hon'ble Judges of High Court, in **Union of India Vs. Sankalchand Himatlal Sheth 1977 (4) SCC 193** the Apex Court observed that transfer is an incident of service. It was further held that once a person has entered service he is bound by the conditions imposed either by the Service Rules or the Constitutional provisions. No person after having joined the service can be heard to say that he shall not be transferred from one place to another in the same service without his consent. Having accepted the service, the functionary has no choice left in the administrative action that can be taken by empowered authorities namely, transfer from one place to another, assignment of work and likewise.

12. In **B. Varadha Rao Vs. Vs. State of Karnataka JT 1986 (1) SC 249** the Court said that it is now well settled that a Government servant is liable to be transferred to a similar post in the same cadre. It is a normal feature and incident of Government service. No Government servant can claim to remain at a particular place or in a particular post unless, of course, his appointment itself is to a specified, non-transferable post.

13. In **B. Varadha Rao (supra)** an attempt was made to argue that since in **E. P. Royappa (supra)** it was held that the transfer is an implied condition of service, therefore, the transfer affecting the petitioner must be treated to have altered the service conditions to his disadvantage and such an order would be deemed to be an adverse order appealable under the provisions applicable in the rules pertaining to disciplinary action, but was rejected by the Court observing that transfer is always understood and construed as an incident of service. It does not result in alteration of any of the conditions of service to the disadvantage of the employee concerned. In the reference of **E. P. Royappa (supra)** with respect to observation "an implied condition of service" the Apex Court in **B. Varadha Rao (supra)** held as "just an observation in passing" and it was held that it cannot be relied upon in support of the contention that an order of transfer ipso facto varies to the disadvantage of a Government servant, any of his conditions of service making the impugned order appealable.

14. In **Gujarat Electricity Board Vs. Atmaram Sungomal Poshani AIR 1989 SC 1433,** the Apex Court further said that transfer from one place to another is necessary in public interest and efficiency in the public administration. Whenever, a public servant is transferred he must comply with the order but if there be any genuine difficulty in proceeding on transfer it is open to him to make representation to competent authority for stay, modification or cancellation of the transfer order. If the order of transfer is not stayed, modified or cancelled the concerned public servant must carry out the order of transfer. In the absence of any stay of the transfer order a public servant has no justification to avoid or evade the transfer order merely on the ground of having made a representation, or on the ground of his difficulty in moving from one place to the other. If he fails to proceed on transfer in compliance to the transfer order, he would expose himself to disciplinary action under the relevant Rules.

15. **In Shilpi Bose & Vs. State of Bihar AIR 1991 SC 532,** it was held:

"A Government servant holding a transferable post has no vested right to remain posted at one place or the other, he is liable to be transferred from one place to the other. Transfer orders issued by the competent authority do not violate any of his legal rights. Even if a transfer order is passed in violation of executive instructions or orders, the Courts ordinarily should not interfere with the order instead affected party should approach the higher authorities in the Department."

16. In the same judgment the Hon'ble Apex Court also held that a transfer order, even if, is issued to accommodate a public servant to avoid hardship, the same can not and should not be interfered by the Court merely because transfer orders were passed on the request of the concerned employees. No person has a vested right to remain posted to a particular place, and unless the transfer order is passed in violation of any mandatory rule, the High Court had no jurisdiction to interfere with the transfer orders. Relevant extract is quoted as under:

"If the competent authority issued transfer orders with a view to accommodate a public servant to avoid hardship, the same cannot and should not be interfered by the court merely because the transfer order were passed on the request of the employees concerned. The respondents have continued to be posted at their respective places for the last several years, they have no vested right to remain posted at one place. Since they hold transferable posts they are liable to be transferred from one place to the other. The transfer orders had been issued by the competent authority, which did not violate any mandatory rule, therefore, the High Court had no jurisdiction to interfere with the transfer orders. " (Para-3)

17. In **Rajendra Roy Vs. Union of India & another JT 1992 (6) SC 732,** it was said *"in a transferable post an order of transfer is a normal consequence and personal difficulties are matters for consideration of the department."*

18. In **Rajendra Rai Vs. Union of India 1993 (1) SCC 148 and Union of India Vs. N.P. Thomas 1993 Suppl. (1) SCC 704** it was said that the Court should not interfere with the transfer orders unless there is a violation of some statutory rule or where the transfer order was mala fide.

19. In **N.K. Singh Vs. Union of India JT 1994 (5) SC 298**, the Court said, *"Unless the decision is vitiated by mala fides or infraction of any professed norm of principle governing the transfer, which alone can be scrutinised judicially, there are no judicially manageable standards for scrutinising all transfers....."*

20. In **Abani Kanta Ray Vs. State of Orissa & others 1995 suppl. (4) SCC 169** the Court observed *"It is settled law that a transfer which is an incident of service is not to be interfered with by the Courts unless it is shown to be clearly arbitrary or vitiated by mala fides or infraction of any professed norm or principle governing the transfer."*

21. In **National Hydroelectric Power Corporation Ltd. Vs. Shri Bhagwan 2001 (8) SCC 574,** the Apex Court held that transfer of a particular employee appointed to the class or

category of transferable posts from one place to other is not only an incident, but a condition of service, necessary too in public interest and efficiency in the public administration.

22. In **Public Service Tribunal Bar Association Vs. State of U.P. & another 2003 (4) SCC 104** the Court said, *"Transfer is an incident of service and is made in administrative exigencies. Normally it is not to be interfered with by the Courts. This Court consistently has been taken a view that orders of transfer should not be interfered with except in rare cases where the transfer has been made in a vindictive manner."*

23. In **State of U. P. Vs. Gobardhan Lal 2004 (11) SCC 402,** the Court said *"Transfer of an employee is not only an incident inherent in the terms of appointment but also implicit as an essential condition of service in the absence of any specific indication to the contra in the law governing or conditions of service."*

24. In **Union of India VS. Janardhan Debanath JT 2004 (2) SC 371**, the Apex Court said, *"No Government servant or employee of a public undertaking has any legal right to be posted forever at any one particular place or place of his choice since transfer of a particular employee appointed to the class or category of transferable posts from one place to other is not only an incident, but a condition of service, necessary too in public interest and efficiency in the public administration. Unless an order of transfer is shown to be an outcome of mala fide exercise or stated to be in violation of statutory provisions prohibiting any such transfer, the Courts or the Tribunals normally cannot interfere with such orders as a matter of routine, as though they were the appellate authorities substituting their own decision for that of the employer/management...."*

25. Thus, the scope of judicial review in the matter of transfer is restricted inasmuch if an order of transfer is challenged on the ground of violation of statutory provision or lack of competence of the person who has passed the order or mala fide, only then the Court should interfere otherwise it is not liable to be interfered in judicial review. The reason for such a view taken by the Courts repeatedly is that no Government servant has a right to be posted in a particular post or position once appointed in service. He cannot claim that he should continue at same place as long as he desire.

26. Noticing distinction in transfer of civilian employee including those working in public sector undertakings and those of disciplined forces, in **Major General J.K. Bansal Vs. Union of India 2005 (7) SCC 227,** the Apex Court said *"The scope of interference by courts in regard to members of armed forces is far more limited and narrow. It is for the higher authorities to decide when and where a member of the armed forces should be posted. The Courts should be extremely slow in interfering with an order of transfer of such category of persons and unless an exceptionally strong case is made out, no interference should be made."*

27. Considering **J.K. Bansal (supra), a Division Bench of this Court in Special Appeal No. 1296 of 2005 (Gulzar Singh Vs. State of U.P. &**

others) decided on 7.11.2005 in respect to member of police force observed as under :

"The present case, if not strictly identical to the case of Major General J.K.Bansal Versus Union of India and others (Supra), is quite nearer to the same. The petitioner-appellant in the present case is a member of a discipline force, namely, U.P. Police. His requirement and urgency as well as the exigency regarding posting would be totally different than other civil employees. There may be numerous factors on account whereof the competent authority has to post a particular member of Police Force at a particular place and unless and until a case of mala fide is made out or there is violation of statutory provision, there would be no occasion for this Court to interfere in the case of transfer of a member of a Police Force. The scope of judicial interference would definitely be limited and narrow in case of a disciplined Force comparing to scope available in the case of other civil servants. It is not the case of the petitioner-appellant that the impugned order of transfer is in contravention of any statutory mandatory provision."

28. In **Prabir Banerjee Vs. Union of India 2007 (8) SCC 793,** transfer of a member of central service, namely, Central Excise, from one zone to another zone was challenged on the ground that inter zonal transfer was prohibited in the department of Central Excise and Customs pursuant to the circular dated 19.2.2004 issued by the department of Revenue, Ministry of Finance, Government of India. The Court held that it is no doubt true that transfer is an incident of service in all India service under the Central Service Rules, but in the absence of any direct rule relating to transfer between the two collectorates, the field may be covered by the administrative instructions.

29. In **Mohd. Masood Ahmad Vs. State of U.P. & others JT 2007 (12) SC 467,** the Apex Court said *"Transfer is an exigency of service and is an administrative decision. Interference by the Courts with transfer order should only be in very rare cases." It further held "This Court has time and again expressed its disapproval of the Courts below interfering with the order of transfer of public servant from one place to another. It is entirely for the employer to decide when, where and at what point of time a public servant is transferred from his present posting. Ordinarily the Courts have no jurisdiction to interfere with the order of transfer."*

30. In **Prasar Bharti Vs. Amarjeet Singh 2007 (9) SCC 539,** the Court said that an order of transfer is an administrative order. There cannot be any doubt that the transfer being an incident of service should not be interfered except some cases where, inter alia, mala fide on the part of the authorities is proved.

31. In **Union of India & another Vs. Murlidhar Menon & others 2009 (11) SCALE 416** the Court observed that even if the conditions of service are not governed by the statutory rules, yet the transfer being an incident of service, an employee can be transferred which may be governed by the administrative instruction since an employee has no right to be posted at a particular place.

32. Recently, in **Rajendra Singh & others Vs. State of U.P. & others JT 2009 (10) SC 187**, the Court observed that a Government servant holding a transferable post has no vested right to remain posted at one place or other, he is liable to be transferred from one place to other.

33. The Court in **Rajendra Singh (supra)** also observed that the transfer orders issued by the competent authority do not violate any of the legal rights of the concerned employee. If a transfer order is passed in violation of a executive instruction or order, the Court ordinarily should not interfere with the order and the affected party should approach the higher authority in the department.

34. Thus, from the above it is evident that since an employee holding a transferable post has no right to continue at a particular place or position, an order of transfer does not violate any of his legal right whatsoever. That being so, an order of transfer cannot be interfered except of the contingency of mala fide, violation of Rule and competence since it cannot be said to be an order affecting the legal rights of an employee. The limited scope of interference in a judicial review, therefore, has been left to the cases where the order is either violative of statutory provision or is vitiated on account of mala fide or has been issued by a person incompetent. The transgression of administrative guidelines at the best provide an opportunity to the employee concerned to approach the higher authorities for redressal but its consequences would not go to the extent to vitiate the order of transfer. The question as to whether violation of transfer policy or guide lines relating to transfer contained in an executive order or executive insturcitoins or policy for a particular period laid down by the Government would result in vitiating the order of transfer has also been considered repeatedly in past by Apex Court as well as this Court.

35. The enforceability of a guideline laid down for transfer specifically came to be considered by the Apex Court in **Shilpi Bose (supra)** and it was held that even if transfer order is passed in violation of the executive instructions or orders, the Courts ordinarily should not interfere with the order and instead affected arty should approach the higher authorities in the Department.

36. Again in **Union of India & others Vs. S.L. Abbas AIR 1993 SC 2444** a similar argument was considered and in para 7 of the judgment the Court said, *"The said guidelines, however, does not confer upon the Government employee a legally enforceable right."*

37. Referring its earlier judgment in **Bank of India Vs. Jagjit Singh Mehta 1992 (1) SCC 306** the Apex Court in **S.L. Abbas (supra)** observed as under :

"The said observations in fact tend to negative the respondents contentions instead of supporting them. The judgment also does not support the Respondents' contention that if such an order is questioned in a Court or the Tribunal, the authority is obliged to justify the transfer by adducing the reasons therefor. It does not also say that the Court or Tribunal can quash the order of transfer, if any of the administrative instructions/guidelines are not followed, much less can it be characterized as mala fide for that

reason. To reiterate, the order of transfer can be questioned in a Court or Tribunal only where it is passed mala fide or where it is made in violation of the statutory provisions."

38. Same thing has been reiterated by the Apex Court in **Gobardhan Lal (supra)** in the following words :

"Even administrative guidelines for regulating transfers or containing transfer policies at best may afford an opportunity to the officer or servant concerned to approach their higher authorities for redress but cannot have the consequence of depriving or denying the competent authority to transfer a particular officer/servant to any place in public interest and as is found necessitated by exigencies of service as long as the official status is not affected adversely and there is no infraction of any career prospects such as seniority, scale of pay and secured emoluments."

39. Besides the judgments of the Apex Court, this Court has also considered the same time and again and has reiterated that the order of transfer made even in transgression of administrative guidelines cannot be interfered with, as they do not confer any legally enforceable rights, unless, as noticed supra, shown to be vitiated by mala fides or is made in violation of any statutory provision. Some of such authorities are as under.

40. In **Rajendra Prasad Vs. Union of India 2005 (2) ESC 1224,** a Division Bench observed, *"Transfer policy does not create legal right justiciable in the Court of law."*

41. In Division Bench of this Court in **Civil Misc. Writ Petition No. 52249 of 2000 (Dr. Krishna Chandra Dubey Vs. Union of India & others)** decided on 5.9.2009 said, *"It is clear that transfer policy does not create any legal right in favour of the employee. It is well settled law that a writ petition under article 226 of the Constitution is maintainable for enforcing the statutory or legal right or when there is a complaint by an employee that there is a breath of statutory duty on the part of the employer."*

42. In **Gulab Singh (supra)** and **Ram Niwas Pandey & others Vs. Union of India & others (Special Appeal No. 769 of 2005)** decided on 29.11.2005 also this Court held that transgression of transfer policy or executive instructions does not give a legally enforceable right to challenge an order of transfer.

43. In **Civil Misc. Writ Petition No. 243 (SB) of 2007 Uma Shankar Rai Vs. State of U.P. & others** *decided on 31.7.2007 this Court observed as under:*

"Dr L.P. Misra, learned counsel for the petitioner seriously contended that though the transfer of Government servant is made in exigencies of service, yet where transfer policy has been framed, the same is expected to be adhered to and cannot be defied in a discriminatory and selective manner. Any action of the authorities, even in respect of the matter of transfer, if is inconsistent to such policy would vitiate the order of transfer since it would render the same arbitrary and illegal. Referring to para 2 and 3 of the transfer policy dated 11.5.2006, he contended that the respondent no. 4 having completed his tenure of six years in the District and ten

years in the Commissionery even at Mirzapur yet he has again been sought to be posted at Mirzapur to accommodate him and the petitioner has been transferred to Varanasi, therefore, the impugned order is patently illegal. In support of the submission that order of transfer, if has been issued in violation of transfer policy, the same can be assailed since the transfer policy was laid down to adhere to and not to violate, reliance has been placed on the apex Court's decision in ***Home Secretary, U.T. of Chandigarh and another Vs. Darshjit Singh Grewal & others*** *(1993) 4 SCC-25;* ***N.K. Singh vs. Union of India and others*** *(1994) 6 SCC- 98;* ***R. vs. Secretary of State*** *(1985) 1 All. ER 40; and a Division Bench decision of this Court in* ***Smt. Gyatri Devi vs. State of U.P. and others*** *(1998 (16) LCD- 17). In other words the learned counsel for the petitioner contends that even through the order of transfer may not be challenged on the ground of mere violation of transfer policy, yet such order can be interfered with if the authorities who are supposed to adhere with the guidelines, have failed to do so.*

In our view the submission is mutually destructive and self contradictory. What the petitioner in fact has sought to argue is that the Executive once has laid down certain standards for guidance in its functioning, it must adhere to and any deviation thereof would vitiate the consequential action, which may be challenged in writ jurisdiction. The argument though attracting but in the matter of transfer, however, in our view, the same has no application. Transfer of Govt. servants in the State of U.P. is governed by the provisions contained in Fundamental Rule- 15, which reads as under :-

.....

It is not disputed that the post held by the petitioner is transferable and he is liable to be transferred from one place to another. The employer once possess right to transfer an employee from one place to another, in our view, there is no legal or otherwise corresponding obligation upon him to inform his employee as to why and in what circumstance an employee is being transferred from one place to another. Shifting and transferring of the employee from one place to another involves more than thousand reasons and it is difficult to identify all of them in black and white. The commonest reason may be a periodical shifting of person from one place to another, which does not require any special purpose; the other reasons include necessity of a particular officer at a particular place; avoidance of disturbance or inconvenience in working of the officer on account of a person at a particular place; unconfirmed complaints and to avoid any multiplication thereof; transfer may be resorted to and so on. These are all illustrations. The question as to whether in any of the circumstances when a person is transferred from one place to another without casting any stigma on him, does it infringe, in any manner, any right of such employee which may cause corresponding obligation or duty upon the employer to do something in such a reasonable manner which may spell out either from its action or from the record and when challenged in a Court of law, he is supposed to explain the same, In our view, the answer is emphatic no."

44. It further held :

"In view of the aforesaid well settled principles governing the matter of

transfer, the consistent opinion of the Courts in the matter of judicial review of the transfer orders has been that the order of transfer is open for judicial review on very limited grounds; namely if it is in violation of any statutory provisions or vitiated by mala-fides or passed by an authority holding no jurisdiction. Since the power of transfer in the hierarchical system of the Government can be exercised at different level, sometimes for the guidance of the authorities for exercise of power of transfer, certain executive instructions containing guidelines are issued by the Government so that they may be taken into account while exercising power of transfer. At times orders of transfer have been assailed before the Court on the ground that they have been issued in breach of the conditions of such guidelines or in transgression of administrative guidelines. Looking to the very nature of the power of transfer, the Courts have not allowed interference in the order of transfer on the ground of violation of administrative guidelines and still judicial review on such ground is impermissible unless it falls within the realm of malice in law. The reason behind appears to be that the order of transfer does not violate any right of the employee and the employer has no corresponding obligation to explain his employee as to why he is being transferred from one place to another."

45. The Division Bench judgment in **Uma Shanker Rai (supra)** has been followed by another Division bench in **Jitendra Singh Vs. State of U.P. & another 2009 (4) ALJ 372.**

46. In view of the above discussion and in absence of any provision to show that a Class IV employee shall not be transferred outside the district, it cannot be said that the order of transfer is illegal. Even the Government Order dated 4.10.1979, referred to by the petitioners, does not say so but in given circumstances, it requires that ordinarily transfer of Class IV employees may be made within the district but there is no complete embargo for their transfer outside the district. Moreover, since 1979 repeatedly several Government Orders have been issued laying down guidelines for transfers and in supersession of earlier orders. They have been issued on annual basis.

47. Learned counsel for the petitioner contended that in the Government Press, no person has ever been transferred outside the district. But, in the counter affidavit, respondents have filed a copy of note, Annexure C.A.1, whereunder petitioners have also been transferred which would show transfer of almost 18 persons from one district to another and it includes 12 Gateman. Thus, it cannot be said that transfer has been made only in respect to the petitioners transferring them out of district and no transfer has been made in respect to any other person. Moreover, Annexure C.A.1 also shows that the exigency of transfer of various persons have been considered by a Committee consisting of Director, Joint Director (Administration) and Personnel Officer and thereafter transfers have been given effect to. The scope of mala fide or bias in such a circumstances when a body of three persons has taken a decision, diminish considerably and nothing has been placed or pleaded in the writ petition to allege any mala fide or malice to the members constituting the Committee who has recommended for transfer. A mere

fact that one of the petitioner was placed under suspension or a departmental enquiry was going on by itself would not constitute a foundation for the impugned order of transfer unless there is something more than that. Unfortunately, there is nothing on record to substantiate that the impugned order of transfer has been made as a result of punishment. The vague and conjectural allegation would not vitiate an order of transfer otherwise passed in accordance with law objectively and independently. The Division Bench decision in **Om Prakash Singh Vs. State of U.P. & Ors. 2008 (2) ESC 1141** relied on by learned counsel for the petitioner has no applicability to the facts of this case. Therein the Court, from the perusal of the pleadings and record, found as a matter of fact that the order of transfer was made at the instance of Minister who was not of the department concerned and was otherwise found arbitrary.

48. It is well settled that a person against whom plea of mala fide is taken shall be impleaded eo nomine since plea of mala fide is not available against unnatural person. The Apex Court has gone to the extent that in absence of impleadment of a person eo nomine, against whom plea of mala fide is alleged, Court cannot not even entertain the plea of mala fide.

49. The Apex Court in **State of Bihar Vs. P.P. Sharma, 1992 Supp (1) SCC 222** in para 55 of the judgment, held: -

"It is a settled law that the person against whom mala fides or bias was imputed should be impleaded eo nomine as a party respondent to the proceedings and given an opportunity to meet those allegations. In his/her absence no enquiry into those allegations would be made. Otherwise it itself is violative of the principles of natural justice as it amounts to condemning a person without an opportunity. Admittedly, both R.K. Singh and G.N. Sharma were not impleaded. On this ground alone the High Court should have stopped enquiry into the allegation of mala fides or bias alleged against them." (emphasis added)

50. In **AIR 1996 Supreme Court 326, J.N. Banavalikar Vs. Municipal Corporation of Delhi,** in para 21 of the judgment, it has been held:

"Further in the absence of impleadment of the.....the person who had allegedly passed mala fide order in order to favour such junior doctor, any contention of mala fide action in fact i.e. malice in fact should not be countenanced by the Court."

51. In **JT 1996 (8) S.C. 550, A.I.S.B. Officers Federation and others Vs. Union of India and others,** in para 23, the Hon'ble Apex Court has said where a person, who has passed the order and against whom the plea of mala fide has been taken has not been impleaded, the petitioner cannot be allowed to raise the allegations of mala fide. The relevant observation of the Apex Court relevant are reproduced as under:

"The person against whom mala fides are alleged must be made a party to the proceeding. Board of Directors of the Bank sought to favour respondents 4 and 5 and, therefore, agreed to the proposal put before it. Neither the Chairman nor the Directors, who were present in the said meeting, have been impleaded as

respondents. This being so the petitioners cannot be allowed to raise the allegations of mala fide, which allegations, in fact, are without merit." (emphasis added)

52. In **AIR 2003 Supreme Court 1344, Federation of Railway Officers Association Vs. Union of India** it has been held:

"That allegations regarding mala fides cannot be vaguely made and it must be specified and clear. In this context, the concerned Minister who is stated to be involved in the formation of new Zone at Hazipur is not made a party who can meet the allegations." (emphasis added)

53. The aforesaid view has been followed by various Division Benches of this Court including **Dr. Harikant Mishra Vs. State of U.P. and others 2008(4) ADJ 36=2008(2) ESC 1312 and Salahuddin Vs. State of U.P. and another 2008(3) ADJ 705.** In view of the above, since the person against whom the plea of mala fide has been levelled is not impleaded, I have no hesitation in declining the contention of the petitioner to assail the impugned order on the ground of mala fide.

54. However, the aforesaid judgment are in connection with the case where the mala fide is alleged but where the allegation is malice in law, non impleadment of the person concerned *eo nomine* may not come in the way of entertaining such a plea. The plea itself however cannot be entertained on mere vague and unspecific averments unless it is pleaded and proved by placing relevant material on record. The Court will not make fishing and roving enquiries on mere suggestion by the learned counsel during the course of the argument or use of these words in the pleading that order suffers from vice of malice in law. In order to sustain such a contention, specific pleadings and relevant material in support thereof is necessary, which unfortunately is not existing/available in this case. Therefore, even the plea of malice in law, in the case in hand, is clearly misconceived.

55. Moreover, more than six years have already passed since impugned orders of transfer were issued. The petitioners have made these orders ineffective and inoperative by obtaining ex parte interim order passed by this Court on 7th July, 2005. It is really unfortunate that the very purpose of transfer made in administrative exigency or in public interest sometimes get frustrated when an ex parte interim order is passed and it continues for long since Court could not take up the matter expeditiously.

56. In any case, in view of the discussion above, I find no merit in the writ petition. The writ petition is dismissed with cost quantified to Rs.15,000/-.

57. Interim order, if any, stands vacated.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.08.2011

BEFORE
THE HON'BLE AMRESHWAR PRATAP SAHI,J.

Civil Misc. Writ Petition No. 49439 of 2011

Jitender Dhawan and another
...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri Vikash Budhwar
Sri Amit Shukla
Sri C.B. Yadav

Counsel for the Respondents:
C.S.C.

U.P.Z.A & L.R. Act-Section333- Revision-arises out from order passed by SDM-declaring rights title on Misc. Application itself-beyond jurisdiction-neither the application nor revision maintainable in case of assuming wrong question of jurisdiction

Held: Para 8

Even the revision which came to be filed by the State against the order on a miscellaneous application was not competent. The learned Commissioner without examining the issue has proceeded to set aside the order. Accordingly neither the order of the S.D.M. nor the order passed in revision could be sustained in law as they proceeded beyond the relevant provisions of the U.P.Z.A. L.R. Act, 1950 and the U.P.Land Revenue Act, 1901. The issue relating to a wrong assumption of jurisdiction has been dealt with in a recent decision of this Court in the case of Kamal Kumar Srivastava Vs. Board of Revenue & others, Writ Petition No. 8658 of 2006, decided on 18.8.2011.

Case law discussed:
Kamal Kumar Srivastava Vs. Board of Revenue & others, Writ Petition No. 8658 of 2006, decided on 18.8.2011.

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

1. Sri C.B.Yadav learned senior counsel for the petitioner has come up assailing the order passing by the learned Commissioner dated 15.12.2010 and the rejection of the restoration application vide order dated 8.6.2011 on the ground that the said revision was not maintainable under the provisions of Section 333 of the U.P.Z.A.& L.R.Act and therefore the findings recorded by the Commissioner are beyond his powers keeping in view the nature of the proceedings that were initiated at the instance of the petitioners.

2. It appears that the petitioners have a decree in their favour which is stated to be from a competent court. It is also the case of the petitioners that accordingly the revenue records have been maintained including the records during the consolidation proceedings and as such the petitioners stand recorded as tenures holder over the land in dispute. He submits with the aid of such evidence the petitioners are entitled to execute the decree which is in their favour.

3. A miscellaneous application appears to have been moved by the petitioner no.2 on 19.7.2007 which was entertained by the S.D.M.,Garh Mukteshwar, Ghaziabad whereupon certain reports were called for. This application was moved on the ground that the petitioners being the tenure holders of plot No.49 old plot No.400 were entitled for a demarcation of the area on the basis of the said decree as the Forest Department through its authorities are unnecessarily interfering with the possession of the petitioners. The

application was admittedly referred to as a miscellaneous application and was not any regular proceeding under the provisions of the U.P.Land Revenue Act, 1901 read with U.P.Z.A. & L.R.Act, 1950. This miscellaneous proceeding was virtually adjudicated upon by the S.D.M. and as a matter of fact under this miscellaneous exercise, a sort of a declaration was given in favour of the petitioners.

4. The State of U.P. went up in a revision before the Commissioner and the said order has been set aside with further observations clearly recorded against the petitioners to the effect that the S.D.M. has travelled absolutely beyond his competence and against the records. The Commissioner has issued directions to the District Magistrate and to the S.D.M., to re-examine the entire matter and pass appropriate orders after verifying the status of the land as to whether it is reserved forest land or not.

5. Sri Yadav contends that the revision not being maintainable, the impugned order deserves to be set aside, as the order passed on 25.9.2007 is not an order under any of the provisions of the U.P. Land revenue Act, 1901 Act read with U.P.Z.A. & L. R. Act

6. Learned standing counsel for all the respondents on the other hand submits that the matter does not require any counter affidavit as it is a pure legal question on the facts on record and therfoere the writ petition may be disposed of finally on merits. He submits that the petitioner himself approached the S.D.M. and the order of the S.D.M. travelled beyond his authority to grant a declaration in the nature as has been done in the present case, more so when the land according to the State is forest land. He submits that such a declaration was not permissible on a miscellaneous application. Hence the Commissioner did not exceed his jurisdiction in setting aside the same and passing the impugned order.

7. Having heard learned counsel for the parties the conceded position before the Court is that the orders passed by the S.D.M. were on a miscellaneous application. In the opinion of the Court the S.D.M., could not have proceeded to deal with the matter on a miscellaneous application. The S.D.M. should not have granted the declaration more so after assessing an evidence in relation to the claim of the petitioner which was otherwise according to the petitioner executable as a decree. The S.D.M. was not dealing with the execution of the decree that was in favour of the petitioners. Hence the S.D.M. ought to have restrained himself merely by passing any order that may be required on the administrative side. The order of the S.D.M. amounts to an exercise of jurisdiction which was beyond his power. The order was not within his competence.

8. Even the revision which came to be filed by the State against the order on a miscellaneous application was not competent. The learned Commissioner without examining the issue has proceeded to set aside the order. Accordingly neither the order of the S.D.M. nor the order passed in revision could be sustained in law as they proceeded beyond the relevant provisions of the U.P.Z.A. L.R. Act, 1950 and the U.P.Land Revenue Act, 1901. The issue relating to a wrong assumption of jurisdiction has been dealt with in a recent decision of this Court in the case of Kamal Kumar Srivastava Vs. Board of Revenue & others, Writ Petition No. 8658 of 2006, decided on 18.8.2011.

9. Accordingly the orders dated 15.12.2010 and 8.6.2011 passed by the Commissioner as also the order passed by the S.D.M. dated 25.9.2007 are set aside and the writ petition is disposed of accordingly without prejudice to the rights of either of the parties to contest the matter before the appropriate forum in accordance with law.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.08.2011

BEFORE
THE HON'BLE RAJES KUMAR, J.

Civil Misc. Writ Petition No.49837 OF 2011

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

Counsel for the Petitioner:
Sri Ramesh Chand Tiwari

Counsel for the Respondents:
C.S.C.

U.P. Recruitment of Dependent of government servant(dying in harness) rules 1974-Rule-5-compassionate appointment-claim made after 7 years of death-govt. Already refused to condone the delay on ground widow already getting pension-sufficient amount to meet financial crisis-held-can not be claimed as matter of right-guide lines issued by Apex Court in B.P. Sarkar Case be strictly followed.

Held: Para 3

I do not find any error in the impugned order. The claim of the petitioner for compassionate appointment can not be considered now after eight years. The petitioner is not able to establish the financial crises and facing undue hardship and how they have managed their finances upto now. The compassionate appointment is exception to the general rules of recruitment and therefore, it has to be considered strictly in accordance to the rules and principles laid down by this Court.

Case law discussed:
(1989) 4 SCC 468; (1994) 4 SCC 138; (1996) 1 SCC 301; (1997) 11 SCC 390; (1998) 9 SCC 485; (1998) 5 SCC 192; (1998) 2 SCC 412; (1998) 5 SCC 452; (2000) 7 SCC 192; (1998) 5 SCC 192; (2004) 7 SCC 265; (2004) 12 SCC 487; (2004) 3 UPLBEC 2534 (SC): (2004) 7 SCC 721; (2006) 5 SCC 766; (2006) 7 SCC 350; (2008) 1 UPLBEC 464 (SC): (2007) 8 SCC 148; [2008 (2) ESC 273 (SC)]; (2011) 4 SCC-209

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

1. The petitioner's father died in the year 1999 in harness. At that time the petitioner was minor. The petitioner applied for compassionate appointment on 01.12.2007, after eight years. The limitation for moving the application is five years. The State Government has only power to condone the delay and relax the period. By the impugned order, the State Government has refused to condone the delay on the ground that the petitioner's mother was getting the pension and the pension amount is sufficient to meet out the financial crises and after eight years, it can not be said that the petitioner is facing financial crises.

2. Heard learned counsel for the petitioner and learned Standing Counsel.

3. I do not find any error in the impugned order. The claim of the petitioner for compassionate appointment can not be considered now after eight years. The petitioner is not able to establish the financial crises and facing

undue hardship and how they have managed their finances upto now. The compassionate appointment is exception to the general rules of recruitment and therefore, it has to be considered strictly in accordance to the rules and principles laid down by this Court.

4. Rule 5 of the U.P. Recruitment of Dependants of Government Servant (Dying in Harness) Rules, 1974 provides for recruitment to a member of the family of the deceased which reads as follows:

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

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

(ii) is otherwise qualified for Government service, and

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

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

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

Rule 5 (iii) of the aforesaid Rules, 1974 provides that the application for employment should be given within five years from the date of the death of the Government servant. The proviso gives power to the State Government to dispense with or relax the requirement in case if the State Government is satisfied that the time limit fixed for making the application for employment causes undue hardship in any particular case. Therefore, the time limit fixed for making the application can only be dispensed with or relaxed when the applicant makes out a case of undue hardship. Since the compassionate appointment is the exception to the general rule of recruitment the undue hardship should be construed strictly.

5. The law relating to compassionate appointment is now being settled by the Apex Court. Some of the judgements of the Apex Court are referred herein above.

6. In ***Smt. Susma Gosain and others Vs. Union of India and others, (1989) 4 SCC, 468,*** the Supreme Court in the matter of appointment of the petitioner as Clerk in the office of Director General, Border Road observed that, "purpose of providing appointment on compassionate ground is to mitigate the hardship due to death of the bread earner in the family. Such appointment should, therefore, be provided immediately to redeem the family in distress. It is improper to keep such case pending for years. If there is no suitable post for appointment, supernumerary post should be created to accommodate the applicant."

7. In ***Umesh Kumar Nagpal v. State of Haryana and others, (1994) 4 SCC, 138,*** the Supreme Court held that while giving appointment in public service on compassionate ground, it is to be remembered that the appointment is in relaxation to the general rules. One such an exception is made in favour of the dependants of the employee dying-in-harness and leaving his family in penury and without any means of livelihood on pure humanitarian consideration, the public authority has to examine the financial condition of the family of the deceased, and it is only if it is satisfied, that but for the provisions of the employment, the family will not be able to meet the crisis that a job is to be offered to the eligible member of the family. The Supreme Court further held, *"the posts in Class-III and IV are the posts in non-manual and manual categories and hence they alone can be offered on compassionate ground, the object being to relieve the family, of the financial destitution and to hold it get over the emergency. The provisions of employment in such lower posts by making an exception to the rule is justifiable and valid since it is not discriminatory. The favourable treatment given to such dependent of the deceased employee in such posts has a rational nexus with the object sought to be achieved, viz. Relief against destitution. No other posts are expected or required to be given by the public authorities for the purposes. It must be remembered in this connection that as against destitute family of the deceased, there are millions of other families, which are equally, if not more destitute."* The exception to the rule made in favour of the family of the deceased employee is in consideration of the services rendered by him and the legitimate expectations, and the change in the status and affairs, of the family engendered by the erstwhile employment, which has suddenly upturned. In para 6 the Supreme Court held that compassionate appointment cannot be granted after a laps of reasonable period, which must be specified in the rules. The consideration for such employment is not a vested right, which can be exercised at any time in future.

8. In the case of **Jagdish Prasad v. State of Bihar, (1996) 1 SCC 301,** the Supreme Court observed:

"The very object of appointment of a dependent of the deceased employees who die-in-harness is to relieve unexpected immediate hardship and distress caused to the family by sudden demise of the earning member of the family."

9. In the case of **MMTC Ltd. v. Pramoda Dei, (1997) 11 SCC 390,** it is observed by the Supreme Court :

"As pointed out by this Court, the object of compassionate appointment is to enable the penurious family of the deceased employee to tide over the sudden financial crisis and not to provide employment, and that mere death of an employee does not entitle his family to compassionate appointment."

10. In the case of **S. Mohan v. Government of T.N., (1998) 9 SCC 485,** the Court stated that:

"The object being to enable the family to get over the financial crisis which it faces at the time of the death of the sole breadwinner, the compassionate appointment cannot be claimed and offered whatever the lapse of time and after the crisis is over."

11. This Court has observed in **Director of Education (Secretary) v. Pushpendra Kumar, (1998) 5 SCC 192:**

"The object underlying a provision for grant of compassionate employment is to enable the family of the deceased employee to tide over the sudden crisis resulting due to death of the bread-earner which has left the family in penury and without any means of livelihood. Out of pure humanitarian consideration and having regard to the fact that unless some source of livelihood is provided, the family would not be able to make both ends meet, a provision is made for giving gainful appointment to one of the dependants of the deceased who may be eligible for such appointment. Since a provision enables appointment being made without following the said procedure, it is in the nature of an exception to the general provisions. An exception cannot subsume the main provision to which it is an exception and thereby nullify the main provision by taking away completely the right conferred by the main provision. Care has, therefore, to be taken that a provision for grant of compassionate employment, which is in the nature of an exception to the general provisions, does not unduly interfere with the right of the persons who are eligible for appointment to seek employment against the post which would have been available to them, but for the provision enabling appointment being made on compassionate grounds of the dependant of a deceased employee. In Umesh Kumar Nagpal v. State of Haryana, this Court has taken note of the object underlying the rules providing for appointment on compassionate grounds and has held that the Government or the public authority concerned has to examine the financial condition of the family of the deceased and it is only if it is satisfied, that but for the provision of employment, the family will not be able to meet the crisis that a job is to be offered to the eligible member of the family."

12. In the case of **State of U.P. v. Paras Nath, (1998) 2 SCC 412,** the Court has held that:

"The purpose of providing employment to a dependant of a Government servant dying-in-harness in preference to anybody else, is to mitigate the hardship caused the family of the employee on account of his unexpected death while still in service. To alleviate the distress of the family,

such appointments are permissible on compassionate grounds provided there are Rules providing for such appointment. The purpose is to provide immediate financial assistance to the family of a deceased Government servant. None of these considerations can operate when the application is made after a long period of time such as seventeen years in the present case."

13. In **Haryana Public Service Commission vs. Harinder Singh and another, (1998) 5 SCC 452,** the Supreme Court held that in compassionate appointment, on the death of a defence personnel killed in 1991 Indo-Pak War, the respondent, when he sought appointment was Civil Engineer gainfully employed at the time though on contract, held, that whole idea of reservation is that those, who are dependent for their survival on men, who have lost their lives or become disabled in the service of nation, should not suffer. A person who was gainfully employed could not be termed as dependent of ex-serviceman.

14. In **Sanjai Kumar v. State of Bihar, (2000) 7 SCC, 192, the Supreme Court relying upon Director of Education (Secondary) v. Pushpendra Kumar, (1998) 5 SCC 192,** held that the compassionate appointment is intended to enable the family of the deceased employee to tide over sudden crisis resulting due to death of the bread earner, who has left the family in penury and without any means of livelihood. The applicant was minor, when he made his first application and was not eligible for appointment. *There cannot be reservation of a vacancy till such time such petitioner become major, after a number of years, unless there is some specific provisions.* The very basis of compassionate appointment is to seek that family gets immediate relief. The petitioner was 10 years old, when his mother died while she was working as Excise Constable. The Supreme Court did not find merit in the special leave petition against the decision of the High Court in which the writ petition was dismissed and the judgment was affirmed by the Division Bench.

15. In the case of **Punjab National Bank v. Ashwini Kumar Taneja, (2004) 7 SCC 265,** it was observed by the Court that:

"it is to be seen that the appointment on compassionate ground is not a source of recruitment but merely an exception to the requirement regarding appointments being made on open invitation of application on merits. Basic intention is that on the death of the employee concerned his family is not deprived of the means of livelihood. The object is to enable the family to get over sudden financial crisis."

16. In the case of **National Hydroelectric Power Corpn. v. Nanak Chand, (2004) 12 SCC 487,** the Court has stated that:

"It is to be seen that the appointment on compassionate ground is not a source of recruitment but merely an exception to the requirement regarding appointments being made on open invitation of application on merits. Basic intention is that on the death of the employee concerned his family is not deprived of the means of livelihood. The object is to enable the

family to get over sudden financial crisis."

17. In **General Manager (D & FB) and others v. Kunti Tiwary and another, (2004) 3 UPLBC 2534 (SC): (2004) 7 SCC 721**, the Supreme Court did not find any error in the decision of the bank which had taken a view that financial condition of the family was not penurious or without any means of livelihood. The compassionate appointment was denied on the ground that it could not be said that the respondents were living hand to mouth.

18. In the case of **State of J. and K. v. Sajad Ahmed Mir, (2006) 5 SCC 766,** the Court has held that:

"Normally, an employment in the Government or other public sectors should be open to all eligible candidates who can come forward to apply and compete with each other. It is consonance with Article 14 of the Constitution. On the basis of competitive merits, an appointment should be made to public office. This general rule should not be departed from except where compelling circumstances demand, such as, death of the sole breadwinner and likelihood of the family suffering because of the setback. Once it is proved that in spite of the death of the breadwinner, the family survived and substantial period is over, there is no necessity to say "goodbye" to the normal rule of appointment and to show favour to one at the cost of the interests of several others ignoring the mandate of Article 14 of the Constitution."

19. In **Union Bank of India and others v. M.T.Latheesh, (2006) 7 SCC 350,** the Supreme Court held that the dependent of the deceased employee of the bank making an application under the scheme for appointment made in 1997, it is not automatically become entitled to get compassionate employment nor does the possession of relevant qualification create any vested right in his favour to get appointed to a post specified by the scheme. His right is limited to get preferential treatment against the general principal of appointment subject to the discretion of the bank.

20. In **Kendriya Vidyalaya Sangathan and others v. Dharmendra Sharma, (2008) 1 UPLBEC 464 (SC): (2007) 8 SCC 148**, once again the Supreme Court reminded that the Court cannot direct compassionate appointment contrary to the policy. The Kendriya Vidyalaya Sangathan decided not to make Group-D appointment and to award work to contractors. It could not be compelled to make compassionate appointment contrary to its policy."

21. In the case of **Mumtaz Yunus Mulani vs. State of Maharashtra and others, reported in [2008 (2) ESC 273 (SC)],** the Apex Court has held that the claim for compassionate appointment was made after 12 years of the death of the deceased. The claim on compassionate ground has been denied. It has been observed that it is a settled principle of law that appointment on compassionate ground is not a source of recruitment. The reason for making such a benevolent scheme by the State or the Public Sector Undertaking is to see that the dependants of the deceased are not deprived of the means of livelihood. It only enables the

family of the deceased to get over the sudden financial crisis.

22. In the case of **Bhawani Prasad Sonkar vs. Union of India and others, reported in (2011) 4 SCC-209,** the Apex Court has held as follows:

"Thus, while considering a claim for employment on compassionate ground, the following factors have to be borne in mind:

(i) Compassionate employment cannot be made in the absence of rules or regulations issued by the Government or a public authority. The request is to be considered strictly in accordance with the governing scheme, and no discretion as such is left with any authority to make compassionate appointment dehors the scheme.

(ii) An application for compassionate employment must be preferred without undue delay and has to be considered within a reasonable period of time.

(iii) An appointment on compassionate ground is to meet the sudden crisis occurring in the family on account of the death or medical invalidation of the breadwinner while in service. Therefore, compassionate employment cannot be granted as a matter of course by way of largesse irrespective of the financial condition of the deceased/incapacitated employee's family at the time of his death or incapacity, as the case may be.

(iv) Compassionate employment is permissible only to one of the dependants of the deceased/incapacitated employee viz. parents, spouse, son or daughter and not to all relatives, and such appointments should be only to the lowest category that is Class III and IV posts."

23. In view of the law laid down by the Apex Court, I do not find any merit in the petition. The writ petition fails and is dismissed.
