ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 17.09.2008

BEFORE
THE HON'BLE RAJES KUMAR, J.

Civil Misc. Writ Petition No. 48732 of 2008

Smt. Ram Murti Devi ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri. Gulab Chandra

Counsel for the Respondents:
S.C.

Constitution of India-Article 226- Principle of natural justice-long term of entry in revenue record-expunged without issuing show cause notice without giving opportunity of hearing to the petitioner-only reason disclosed entry to be forged one-even then it can not be cancelled without giving opportunity to the affected person.

Held: Para 5

Admittedly, in the present case, the name of the petitioner was found entered in the revenue record since 1966, the petitioner claims to have purchased the land in dispute from one Sri Ganga Vijai Bahadur, against the registered sale deed dated 27.6.1966 and, therefore, before expunging the name of the petitioner from the revenue record, opportunity of hearing must be given. It is only the allegation that the entry made in the name of the petitioner in the revenue record is forged. The allegation may be wrong also and is rebuttable. Such allegation can be proved wrong only when the person is provided opportunity. Therefore, the petitioner must be given opportunity to prove his title towards the land in dispute by adducing the necessary evidences and to rebut the allegation that the entry was forged. Admittedly, in the present case, the petitioner has not been provided opportunity of hearing. Thus, there is a clear violation of principle of natural justice.

Case law discussed:
2005 (1) CRC 422; AIR 1991 SC 909.

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

1. By means of present petition, the petitioner is challenging the order of the Additional Commissioner, Kanpur Division, Kanpur dated 15.2.2008 by which the revision was filed by the petitioner against the order of the Collector, Kannauj dated 6.5.2000 has been confirmed. By the order dated 6.5.2000, the name of the petitioner from the revenue record has been expunged in respect of the land in dispute.

2. Learned counsel for the petitioner submitted that the petitioner has purchased the land in dispute on 27.6.1966 from Zamindar Sri Ganga Vijai Bahadur against the registered sale deed dated 27.6.1966. The copy of the sale deed is Annexure-1 to the writ petition, and on the basis of the sale deed, the name of the petitioner has been recorded in the revenue record. He submitted that without giving any notice or any opportunity of hearing of any manner whatsoever the name of the petitioner from the revenue record has been expunged which was recorded in the year 1966. He submitted that the Collector, Kannauj has arrived to an erroneous conclusion that the entry in the revenue record is forged and, therefore, the petitioner is not entitled for the opportunity of hearing. The view of the Additional Commissioner, Kanpur Division, Kanpur in the revision is also

illegal that no opportunity is required to be given where the entry in the revenue record is found to be forged. He submitted that this Court in the case of **Chaturgun and others Versus State of U.P. and others, reported in [2005 (1) CRC 422]** on a consideration of decision of the Apex Court in the case of **Uttar Pradesh Judicial Doctors Action Committee Versus Dr. B. Sheetal Nandwani, reported in AIR 1991 SC 909** and the various other Supreme Court judgements held that before expunging the name of the person from the revenue record whose name is found recorded since last several years without giving opportunity of hearing, is wholly unjustified.

3. Learned Standing Counsel submitted that let the matter be remanded back to the Collector, Kannauj to decide the matter afresh after giving opportunity of hearing to the petitioner.

4. In the case of **Chaturgun and others Versus State of U.P. and others (Supra)** this Court has considered the various decisions of the Supreme Court and of this Court, including the decision of the Supreme Court in the case of **Uttar Pradesh Judicial Doctors Action Committee Versus Dr. B. Sheetal Nandwani (Supra)** and has held that before expunging the entry from the revenue record after the long period opportunity of hearing should be provided.

5. Admittedly, in the present case, the name of the petitioner was found entered in the revenue record since 1966, the petitioner claims to have purchased the land in dispute from one Sri Ganga Vijai Bahadur, against the registered sale deed dated 27.6.1966 and, therefore, before expunging the name of the petitioner from the revenue record, opportunity of hearing must be given. It is only the allegation that the entry made in the name of the petitioner in the revenue record is forged. The allegation may be wrong also and is rebuttable. Such allegation can be proved wrong only when the person is provided opportunity. Therefore, the petitioner must be given opportunity to prove his title towards the land in dispute by adducing the necessary evidences and to rebut the allegation that the entry was forged. Admittedly, in the present case, the petitioner has not been provided opportunity of hearing. Thus, there is a clear violation of principle of natural justice.

6. In the result, writ petition is allowed. The order of the Additional Commissioner, Kanpur Division, Kanpur dated 15.2.2008 in revision no. 30 of 2007 and the order of the Collector, Kannauj dated 6.5.2008 in suit no. 84 of 2000, State Versus Shiv Balak and others are quashed. The matter is remanded back to the Collector, Kannauj to decide the matter afresh after giving opportunity of hearing to the petitioner, The petitioner is directed to appear before the Collector, Kannauj along with certified copy of the order on 29.9.2008. The Collector, Kannauj either on the same day or on any other day issue a notice giving opportunity of hearing to the petitioner to adduce the necessary evidences and after hearing the petitioner decide the matter expeditiously. There shall be a status-Quo till the decision by the, Collector, Kannauj as on today. Petition allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 03.09.2008

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 4283 of 1992

Shishu Pal Singh and others...Petitioners
Versus
Prescribed Authority/Upper Ziladhikari and others ...Respondents

Counsel for the Petitioner:
Sri. Y.S. Saxena
Sri Manoj Misra

Counsel for the Respondents:
S.C.

U.P. Imposition of Ceiling of Land Holdings Act 1960, Section 10(2)-surplus land-after death of father the petitioner filed objection claiming the land purchased by them from their individual source of income-not to be clubbed with the unit of their father-being minor cannot filed objection-rejected by the prescribed authority and appellate authority shifted the onus upon the petitioner to prove their separate ostensibility of holdings-ignoring their uncontroverted oral evidence-held-illegal.

Held: Para 8

The petitioners gave their statements that they are all residing separately. Mere non production of ration-card cannot justify an inference that the statements given on oath by the petitioners were false unless some evidence is produced by the State to show the said averment to be incorrect. From a bare reading of the appellate order, it is evident that it has solely proceeded on the assumption as if the onus lie upon the petitioners to show that the holding was separate, ostensibly in their names and did not belong to their father Het Ram Singh. The basic approach of the appellate authority in the present matter is clearly illegal and contrary to law.

Case law discussed:
1979 AWC 23.

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

1. Heard Sri Manoj Misra, learned counsel for the petitioner and learned Standing Counsel for the respondents.

2. The writ petition is directed against the order dated 30.3.1991 passed by Prescribed Authority/Addl. District Magistrate under Section 10 (2) of U.P. Imposition of Ceiling of Land Holdings Act 1960 (hereinafter referred to as the 'Act') and the or er dated 29.1.1992 passed by the Commissioner, Moradabad Division, Moradabad, dismissing the appeal of the petitioner.

3. A notice under section 10 (2) of the Act was served upon petitioners father Het Ram Singh on 12.3.1988 to show cause as to why his holding of 17.40 acres be not declared surplus. He filed objection on 24.3.1988. During the continuance of the said proceedings before the prescribed authority, Sri Het Ram Singh died and the petitioners were substituted as his legal heirs. The petitioners filed sale-deeds executed separately in their name showing that they were all major having their own income and have purchased the land independently and. therefore, their holdings cannot be included with the holding of their father. The prescribed authority however, rejected their objection and held that except of the sale-deeds no evidence was produced to show that the sons were separately residing from the father and their holdings were

separate and moreover, one of his son, namely, Shishu Pal Singh obtained loan from the State Bank by mortgaging father's property and this shows that the land was jointly held by petitioners and their father as one unit and consequently, declared a total 17.40 acres of land as surplus and directed for taking over possession. The petitioners filed Ceiling Appeal No. 99 1991 before the Commissioner, which was rejected on 29.1.1992.

4. The learned counsel for the petitioners are not included within the term "family" defined under section 3(7) of the Act and in order to include their holding by placing reliance on Explanation-1 of Section 5 of Act, heavy onus lies upon the State to prove that the holding was *benami,* i.e , " ostensibly in the name of any other person, though it is land held by him in his own rights". In the case in hand, the respondents have proceeded otherwise by observing that the petitioner did not produce any evidence to show that the land was not held by petitioner's father in his own rights and therefore, the basic approach of the respondents is clearly erroneous, illegal and contrary to law. He has also placed reliance on a single judgment of this Court in **Writ Petition No. 2315 of 1997 Banshi Singh & others Vs. District Judge, Moradabad & others** decided on 3.1.1997. The learned standing counsel opposed the submission and supported the reasons assigned by the respondents.

5. It would be appropriate to consider what the Act has prohibited and in what manner. Section 5 of the Act imposes ceiling on the land providing that no tenure holder shall be entitled to hold in the aggregate throughout U.P., any land in excess of ceiling area applicable to him. The term "tenure holder" has been defined in Section 3 sub-section 17 of the Act and reads as under:

"3 Definitions.....

(17) 'tenure holder' means a person who is holder of a holding but except in Chapter III does not include-
(a) a woman whose husband is a tenure-holder.
(b) a minor child whose father or mother is a tenure-holder.

The term 'holding' has been defined in Section 3(9) and reads as under:

"3.(9) 'holding' means the land or land held by a person as a bhumidhar, sirdar, asami or Goan Sabha or an asami mentioned in Section 11 of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950, other than a sub-tenant, or as a Government lessee, or as a sub-lessee of a Government lessee, where the period of the sub-lessee is co-extensive with the period of the lease;"

6. The term 'family' in relation to tenure holder has been defined in Section 3 sub-section-7 and reads as under:

*"**3.**(7) 'family' in relation to a tenure-holder, means himself or herself and his wife or her husband, as the case may be (other than a judicially separated wife or husband), minor sons and minor daughters (other than married daughters);"*

It is evident from the record that Het Ram had his own holdings. Besides, the six petitioners, who are the sons of Late Het Ram Singh, also have purchased certain

holdings in their names through different sale deeds which were exclusively in their names, However, the Lekhpal and Tehsildar included all the said holdings in the name of Late Het Ram Singh showing that in total, he had 25.81 acres of land and therefore, 17.40 acres of land was liable to be declared surplus. The case of the petitioners was that their holding were separate, they were residing separately and therefore, their holdings, which they have purchased through their own separate sale deeds, cannot be included or clubbed with the holding of Late Het Ram Singh. The appellate authority has rejected the appeal only on ground that the petitions contention that they were residing separately from their father cannot be accepted since one of the petitioners Shishu Pal Singh has obtained a loan for purchasing a tractor after getting his father's land mortgaged and the onus to prove that they were residing separately lies upon the petitioners, which they did not discharge.

7. From the order of the appellate authority, it appears that he proceeded on the assumption that once notice under Section 10(2) of the Act has been issued based on the enquiry of the Lekhpal and Tehsildar etc. alleging that the noticee held certain holding in his own rights though ostensibly in the name of other, it is the liability of the noticee to prove otherwise. This approach is absolutely misconceived and contrary to law. Explanation-1 Section 5 is in the nature of exception inasmuch normally every tenure holder is entitled to hold a land to the extent provided in the Act, but in a case where the land actually belongs to one but has been purchased in the name of some other person, that is a kind of *benami* transaction, in that case only to prevent such cases so as not to frustrate the very purpose of the Act, the explanation-l has provided that such land shall be included in the holding area of a tenure holder, but to prove the existence of such fact, the onus lies on the State heavily and not otherwise. Explanation-1 read with Section 5 is very clear that neither it purports to add nor to limit the normal meaning of the expression 'tenure-holder' as defined in Section-3 sub-section-17 of the Act and, thus, clearly shows that the land must be held by the tenure holder in his own rights. In case, the State claims that any land is held ostensibly by the tenure holder, the onus lies upon the State to establish the same. A somewhat similar issue came up for consideration before a Division Bench of this Court in **Mohammad Abbas Vs. State of U.P. & others 1979 AWC 23.** There two major sons of the tenure holder executed sale deeds on 12.5.1971, 7.9.1971 and 8.3.1972 transferring the entire land recorded in their names. Thereafter, the tenure holder claimed two additional hectares of land on the ground that his two major sons did not hold any land on the appointed date, i.e., 8.6.1973, but the said claim was rejected by the ceiling authorities holding that the transfer of land by major sons after 24.1.1971 was liable to be ignored as they could not establish that the sale deeds were executed in good faith and for adequate consideration. Referring to Section 5 sub-section 3 of the Act, the Court held that the ceiling area to which a tenure holder is entitled is fixed with reference to the number of members in the tenure-holder's family and land held by other members of the tenure-holder's family is to be aggregated with the land held by the tenure holder. The word "family" as defined in the Act in relation

to a tenure holder, means himself or herself and his wife or her husband, as the case may be (other than a judicially separated wife or husband) minor sons and minor daughters (other than married daughters). It shows that the said definition does not include the major sons of the tenure holder. By virtue of Section 5(3), if the tenure holder is a male, land recorded in the name of his wife, provided she is not judicially separated wife, and minor sons and minor daughters can be clubbed in determining the ceiling area which the tenure holder is entitled to retain. This shows that the land held by the major sons is not to be included in the holding of the tenure holder. The only possibility for including the said land, therefore, would have been if Explanation-1 of section 5(1) would have been applicable, namely, if the land is ostensibly held by the tenure holder in the name of any other person, but for the said purpose, heavy burden lie upon the State to prove this fact. Considering this aspect of the matter with reference to Explanation-1 to Section 5(1) of the Act, another Division Bench of this Court in **Banshi Singh (supra)** wherein this Court held as under:

"Explanation 1 of Section 5(1) clearly shows that when the state alleges that the land is ostensibly being held by a tenure-holder in the name of any other person which should be treated as the land belonging to the tenure-holder then the burden lies upon the State to prove this fact. Merely because in the notice the State has clubbed the land belonging to others under the pretext that it is being held ostensibly in the name of sons or any other person, the burden cannot be said to have been discharged. Once a notice under Section 10(2) is served upon the tenure-holder he has to show cause and while showing cause if the tenure-holder establishes by prima facie evidence by filing documents or by giving evidence that the land was being held by other persons in their own capacity, the burden shifts upon the State to establish the fact that the land is being held by the tenure-holder ostensibly in the name of others. In order to discharge this burden the State has to establish by some cogent and satisfactory evidence that the land is being held by the tenure-holder. Merely because the land has been clubbed in the land of petitioner no. 1 in the notice issued under Section 10(2) of U.P. Imposition of Ceiling on Land Holdings Act or merely because the Lekhpal gives a statement that the petitioner is in possession, is not sufficient to discharge that burden and to establish that the land was ostensibly being held by the tenure-holder in the name of others. In the present case petitioner no. 1 led evidence by showing that the names of the sons were entered in revenue records right from 1264F and after the partition their names were entered separately on the basis of the partition decree. When the State was alleging that the land was being ostensibly held by petitioner no. 1, the State had to discharge that burden by giving cogent and satisfactory evidence. In the present case no such evidence was adduced and the mere statement of the lekhpal was not sufficient to rebut the evidence and to hold that the land was being held ostensibly by petitioner no. 1 in the names of the sons. "

8. Moreover, the only reason for non suiting the petitioners given by the appellate authority that the land of Het Ram Singh was given as security for obtaining loan by one of the petitioners

and thus shows that the entire holding belong to Het Ram Singh, in my view, is thoroughly misconceived. It is very difficult to co-relate the said transaction to the conclusion which has been drawn by the learned appellate authority. A father and son having separate holding, residing separately but if help each other in their period of difficulty or whenever necessity arises, would not mean that they constitute one unit and entire thing belong to the father or the son, as the case may be. In Indian society and in common practice, if the sons or daughters or even brothers or other relatives needs help, the first helping hand would be that of normally the relatives or the friends and, therefore, for purpose of land, if Het Ram's land was mortgaged with respect to the petitioner no. 1, that itself would not justify the conclusion that the entire holding belong to Het Ram in his own right though ostensibly in the name of the petitioners. The petitioners gave their statements that they are all residing separately. Mere non production of ration-card cannot justify an inference that the statements given on oath by the petitioners were false unless some evidence is produced by the State to show the said averment to be incorrect. From a bare reading of the appellate order, it is evident that it has solely proceeded on the assumption as if the onus lie upon the petitioners to show that the holding was separate, ostensibly in their names and did not belong to their father Het Ram Singh. The basic approach of the appellate authority in the present matter is clearly illegal and contrary to law.

9. In the result, the writ petition succeeds and is allowed. The appellate order dated 29.1.1992 passed by Commissioner, Moradabad Division, Moradabad (Annexure-3 to the writ petition) is hereby quashed and the matter is remitted back to the appellate authority to consider and decide the matter afresh. Since it is very old matter, it is directed that the appellate authority shall decide the appeal afresh in accordance with law and in the light of the observations made hereinabove expeditiously preferably within a period of one year from the date of production of certified copy of this order. No costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 30.09.2008

BEFORE
THE HON'BLE TARUN AGARWALA, J.

Civil Misc. Writ Petition No. 51845 of 2008

Pawan Kumar Nayak ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri. P.N. Singh

Counsel for the Respondents:
Sri. H.R. Mishra
Sri. H.K. Shukla
S.C.

U.P. Panchayat Raj (Removal of Pradhans, Up Pradhans and Members) Enquiry Rule 1997-Rule 5-order ceasing financial and administrative powers of village Pradhan-without recording his subjective satisfaction to hold enquiry on material disclosed in preliminary enquiry-nor the order disclosed appointment of enquiry officer-held-mandatory provision of Rule 5 totally ignored-not sustainable.

Held: Para 6

In the present case, there is no finding of the District Magistrate regarding its subjective satisfaction that an enquiry should be held against the Pradhan under Section 95 (1)(g) of the Act nor an order has been passed directing the enquiry officer to hold such enquiry. Consequently, the impugned order ceasing the financial and administrative powers of the petitioner is not sustainable and is quashed. The writ petition is allowed.

(Delivered by Hon'ble Tarun Agarwala, J.)

1. Heard Sri P.N. Singh, the learned counsel for the petitioner and Sri H.R. Misra, the learned senior counsel assisted by Sri H.K.Shukla, for the contesting respondent No.5 and the standing counsel for the remaining respondents.

2. The petitioner is an elected Pradhan and, by the impugned order dated 13.9.2008, his financial powers has been ceased and, a committee of three members of the Gram Panchayat has been constituted comprising of three members of the Gram Panchayat to exercise the powers of the Pradhan under the first proviso to Section 95 (1)(g) of the U.P. Panchayat Raj Act. Since factual controversy is not involved, the present writ petition is being disposed of with the consent of the parties at the admission stage itself without calling for a counter affidavit.

3. From a perusal of the impugned order, it transpires that the petitioner filed his objection to the preliminary report and thereafter the prescribed authority namely, the District Magistrate passed an order ceasing the financial and administrative powers of the petitioner.

4. Upon hearing the parties at some length, this Court finds that the impugned order has been passed in violation of the provisions of Rule 5 of the U.P. Panchayat Raj (Removal of Pradhans, Up-Pradhans and Members) Enquiry Rules, 1997.

5. Enquiry Officer- *Where the State Government is of the opinion, on the basis of the report referred to in sub-rule (2) of Rule 4 or otherwise that an enquiry should be held against a Pradhan or Up-Pradhan or Member under the proviso to Clause (g) of subsection (1) of Section 95, it shall forthwith constitute a committee envisaged by proviso to clause (g) of sub-section (1) of Section 95, of the Act and by an order ask an Enquiry Officer, other than the Enquiry Officer nominated under sub-rule (2) of Rule 4, to hold the enquiry."*

5. From a bare perusal of the aforesaid Rules, it is clear that upon the submission of the preliminary enquiry report under Rule 4 of the Rules, the prescribed authority is required to record its subjective satisfaction, namely, that an inquiry is required to be held against the Pradhan under Section 95 (1)(g) of the Rules, and only then it can issue an order ceasing the financial and administrative powers of the Pradhan under the proviso to Section 95 (1)(g) of the Act and by an order ask the enquiry officer to hold an enquiry under Rule 6 of the Rules.

6. In the present case, there is no finding of the District Magistrate regarding its subjective satisfaction that an enquiry should be held against the Pradhan under Section 95(1)(g) of the Act nor an order has been passed directing the enquiry officer to hold such enquiry.

Consequently, the impugned order ceasing the financial and administrative powers of the petitioner is not sustainable and is quashed. The writ petition is allowed.

7. It would be open to the District Magistrate to pass a fresh order in accordance with the provisions of Section 95(1)(g) of the Act read with the Rules of 1997. Petition allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 02.09.2008

BEFORE
THE HON'BLE RAJIV SHARMA, J.

Civil Misc. Writ Petition No. 13863 of 2001

Smt. Shehnaz Bano ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri. B.D. Mandhyan
Sri Satish Mandhyan

Counsel for the Respondents:
Sri. R.K. Tripathi
Sri. R.S. Mishra
Sri. Rudreshwari Prasad
Sri. P.D. Tripathi
S.C.

U.P. Recruitment of Dependants of Government Servants (Dying in Harness) Rules 1974-Rule-6-Compassionate appointment-claim of petitioner being widow of deceased employee having 7 minor children-denied on the ground of receiving pension-but given to the son of first wife of the deceased employee-without considering the hardship and financial burden to maintain 7 children-held-without considering comparative hardship of the claimants rejection of claim-illegal-consequential direction issued.

Held: Para 21

Undisputedly, the petitioner is a widow who has to sustain ten children, out of which most of them are minors. Therefore, had the concerned authority applied its mind correctly to the materials on record and given consideration to the provisions of Rules 7 of 1974 Rules, it is the petitioner whose claim is much stronger in comparison to respondent no.4 and she should have been given suitable appointment on Class IV post. The impugned order dated 23.3.2001 has been passed without considering the relevant Rules and wrongly giving too much weightage to the provisions of Paragraph 9 of the Government Order dated 4.9.2000. It is also relevant to point out that in the said impugned order dated 23.3.2001, there is no mention that the comparative hardship was considered and the claim of respondent no.4 was found genuine. It is to be kept in mind that while considering as to who is to be given employment, the paramount factor which shall be taken into consideration is the overall interest of the welfare of the entire family.

Case law discussed:
(2001) 1 UPLBEC 706.

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

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

2. The present writ petition has been filed by the wife of Tufail Ahmad for a direction to the competent to consider her case for compassionate appointment against a post of Category IV and for quashing the communique/order dated 23.2.2001, passed by the Secretary, Basic Shiksha Parishad.

3. Factual matrix of the case are that deceased Tufail Ahmad had solemnised marriage with Smt. Qamar Jahan and out of the said wedlock, three children were born, i.e., two sons and a daughter. Smt. Qamar Jahan wife of Tufail Ahmad died on 14.3.1973. Thereafter, late Tufail Ahmad married the present petitioner and was blessed with ten children. Mohammad Azmal (respondent no.4) and his brother, who are the sons of Tufail Ahmad from the first Wife, started living separately and respondent no.4 started doing the business of fruits. The daughter born out of the wedlock from the first wife was got married by the deceased in his life time. Tufail Ahmad husband of the petitioner expired on 13.11.1999 leaving behind the petitioner and ten children. A succession certificate was also obtained by the petitioner from the District Magistrate.

4. Counsel for the petitioner pointed out that since the name of the petitioner was recorded as wife of Tufail Ahmad in service record, admissible dues were paid to the petitioner and now family pension is also being paid to her. After the death of the husband, the petitioner moved an application for granting appointment in relaxation to normal rules on compassionate grounds for her son Zunaid Ahmad. However, since he wanted to study further, the petitioner then applied for her own appointment on 31.3.2000. In the meantime, the respondent no.4, who was born from the first wife without impleading the petitioner, filed a writ petition no. 28995 of 2000 before this Court seeking a direction to consider his case for compassionate appointment. Consequent to the order of this Court, the Zila Basic Shiksha Adhikari, Allahabad issued a letter dated 26.9.2000 to the respondent no.4 to appear before him. When the present petitioner came to know about the said letter, she also gave an application staking her claim in preference to that of respondent no.4 as her financial condition was more precarious because she has to take care and support ten children and it has become very difficult for her to maintain all the members of the family in a meagre amount of pension and as such she is in dire need of a job. On 16.10.2000, the petitioner as also the respondent no.4 appeared before Zila Basic Shiksha Adhikari, who after hearing the respective claims, was satisfied that the claim of the petitioner is bona fide and asked her to give application in writing, which was given by the petitioner on 18.10.2000.

5. Later on, Secretary, U.P. Basic Shiksha Parishad, Allahabad vide letter dated 23.3.2001 directed for giving appointment to respondent no.4 mentioning therein that in para 9 of the Government Order, the dependent son of deceased has got first preference. The said order of the Secretary, U.P. Basic Shikasha Parishad has been assailed in the present writ petition interalia on the grounds that the Secretary wrongly interpreted that the son is at the top of the list of preference vide order dated 23.3.2001. The Secretary did not consider the vital fact that it is the petitioner who is looking after the children of late Tufail Ahmad. The petitioner has no other source of livelihood except the meagre pension which she is getting. Her husband was the only bread earner of the family.

6. Counsel for the petitioner further submitted that the impugned order is arbitrary and unjust as the same has been

passed without considering the attending circumstances and the important fact that the deceased Tufail left behind a widowed wife (petitioner) and ten children. The reasoning that the son is at the top of the list as given in the Government Order dated 4th September, 2000, reference of which has been given In the impugned order, is incorrect. In fact, the wife or husband is to be given top priority/preference in such compassionate appointment.

7. Mohd. Ajmal, Son of Tufail Ahmad, who has been arrayed as respondent no.4 in the present writ petition and in whose favour the impugned order dated 23.3.2001 has been issued, filed a counter affidavit denying the allegations made in the writ petition.

8. In the counter affidavit, it has been mentioned that he is the only person entitled to get job after the death of his father. It is incorrect to say that he is engaged in the business of fruits and is well of. As a matter of fact, he is doing labour work in order to sustain him and is in dire need of job. There is no infirmity in the impugned order which has been passed after considering the fact that the claim of the respondent no.4 is genuine for compassionate appointment. It has further been indicated that the petitioner is not even class 5th passed, whereas under the Government Order, it is provided that one should have educational qualification upto class 5th and, therefore, the financial the petitioner cannot be considered for appointment. Furthermore, the financial condition of the petitioner is much better than the answering respondent no4 as he is at the verge of starvation and is unable to provide food to the family. He also pointed out that it is incorrect to say that he is having two wives, as alleged by the petitioner.

9. Refuting the allegations of answering respondent no.4, counsel for the petitioner submitted that after the death of Tufail Ahmad, the petitioner being his legally wedded wife has stronger claim than answering respondent no.4. Further, for compassionate appointment, the educational qualification, do not have meaning at all. The educational qualification and age bar are usually relaxed in such cases otherwise the very purpose of appointment on compassionate ground would be frustrated.

10. At the outset, it would be relevant to point out that on 13.4.2001, this Court directed all the respondents to file counter affidavit and passed a detailed order staying the operation and implementation of the order dated 23.3.2001 issued by the Secretary, U.P. Basic Shiksha Parishad.

11. In order to appreciate the rival submissions, it is relevant to peruse the relevant rules.

12. The Uttar Pradesh Recruitment of Dependants of Government Servants (Dying in Harness) Rules, 1974 has been framed in exercise of the powers conferred by Article 309 of the Constitution of India. The Uttar Pradesh Recruitment of Dependants of Government Servants Dying in Harness Rules, 1974 (in short referred to as "Dying in Harness Rules, 1974") are special set of rules, which have been made for providing a source of livelihood, and to give some respite to the members of the deceased Government servant's

family at a time when the family is suddenly struck with a calamity where the sole bread earner dies. The overall idea and concept of these rules is to keep the family in main streamline of the society for which economic security and social status is to be provided by the State Government.

13. Initially, these Rules were applicable to the Government Servant, deceased Government Servant and the family. Rule 2(C) where the word 'family' has been defined reads as under:-
"family" shall include the following relations of the deceased Government servant:

(i) wife or husband.
(ii) sons;
(iii) unmarried and widowed daughters

14. Rule 3 or the said rules makes these rules applicable to the recruitment of dependants of the deceased government servants to public services and posts in connection with the affairs of the State of Uttar Pradesh, except services and post which are within the purview of the Uttar Pradesh Public Service Commission.

15. Rule 4 gives an overriding effect to those rules by providing that they shall have the effect notwithstanding anything to the contrary contained in any rules, regulations or orders in force at the commencement of those rules. Rule 5 of the Dying in Harness Rules, 1974 deals with the recruitment of the member of the family of the deceased on a suitable post.
Rule 6 provides that an application for appointment under these Rules shall be addressed to the appointing authority in respect of the post for which appointment is sought.

16. Rule 7 which is relevant for the purposes of adjudicating the present controversy reads as under:-

*"**7. Procedure when more than one member of the family seeks employment-** If more than one member of the family of the deceased Government servant seeks employment under these rules, the Head Officer shall decide about the suitability of the person for giving employment. The decision will be taken keeping in view also the overall interest of the welfare of the entire family particularly the widow and the minor members thereof. "*

17. It is pertinent to mention that Dying in Harness Rules, 1974 were amended from time to time and by Uttar Pradesh Recruitment of Dependants of Government Servants Dying in Harness (Sixth Amendment) Rules 2001, the relations included in the family of the deceased government servant have been described, which reads as under:-

1. Wife or Husband
2. Son
3. Unmarried daughters and widowed daughters.
4. Dependant unmarried brother, unmarried sister and widowed mother of the deceased government servant, if he was unmarried.

18. On June 28th, 2006, the State Government brought Uttar Pradesh Recruitment of Dependants of Government· Servants Dying in Harness (Seventh Amendment) Rules, 2006, whereby in Rule 5 it has been inserted in clause (3) and (4) as under:-

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

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

19. Here, it would be relevant to point out that the State Government issued a Government Order No. 5193/15-5-2000-400(222)/99, dated 4th September, 2000 with regard to the appointment of dependants of teachers/employees in the establishment of Basic Shiksha Parishad. The said Government Order lays down the conditions and the procedure to be followed for such appointment. Para 9 of the said Government Order says that the dependants of teachers/employees of U.P. Basic Shiksha Parishad means the son of the employee, unmarried or widowed daughter, wife or husband of the deceased.

20. In the said Government Order either in Para 9 or any other Paragraphs there is no mention of any preference to be given to the dependants of the deceased. Para 9 of the Government Order dated 4th September, 2000 on which reliance has been placed by respondent no.1, while issuing directions vide order dated 23.3.2001. It only provides the meaning of the words dependants of teachers/employees. Mere mentioning the son of the employee first, will not lead to an inference that it is the seriatum which is to be followed while considering the appointment on compassionate ground. The inference drawn by the Secretary, U.P. Basic Shiksha Parishad that as the deceased's son is mentioned first, as such, the respondent no.4 is entitled to be given appointment, is wholly erroneous and unjustified. The impugned order is also against Rule 7 of the 1974 Rules as while considering the appointment where more than one member of the family claims employment, the appointing authority is under an obligation to decide the same keeping in view of the overall interest of the welfare of the entire family particularly the widow and the minor members thereof. Moreover, the law is well settled that the executive instructions cannot override the Rules and as such the concerned authority should have given due regard to the relevant Rules, 1974 while passing the impugned order.

21. Undisputedly, the petitioner is a widow who has to sustain ten children, out of which most of them are minors. Therefore, had the concerned authority applied its mind correctly to the materials on record and given consideration to the provisions of Rules 7 of 1974 Rules, it is the petitioner whose claim is much stronger in comparison to respondent no.4 and she should have been given suitable appointment on Class IV post. The impugned order dated 23.3.2001 has been passed without considering the relevant Rules and wrongly giving too much weightage to the provisions of Paragraph 9 of the Government Order dated 4.9.2000. It is also relevant to point out that in the said impugned order dated

23.3.2001, there is no mention that the comparative hardship was considered and the claim of respondent no.4 was found genuine. It is to be kept in mind that while considering as to who is to be given employment, the paramount factor which shall be taken into consideration is the overall interest of the welfare of the entire family.

22. In the instant case, income out of meagre pension was not sufficient to maintain, and, therefore, to tide over the financial crisis on the sudden death of the employee refusing appointment on compassionate ground to the petitioner is wholly unjustified. I am of the view that the financial position of the family of the deceased employee requires such compassionate appointment on the facts of the case. It may be added that the receipt of family pension by the widow cannot be taken to be a good ground for rejecting the case for appointment on compassionate ground. It may be mentioned that this Court in the case of Committee of Management, R.B. Rao Intermediate College, Deoria and others Vs. Joint Director of Education, Gorakhpur and others (2001) 1 UPLBEC 706 took a view that a widow cannot be denied appointment on compassionate ground just because of its illiteracy.

23. Looking to the pathetic condition of the family and financial stress and strain that it has undergone all these years, the order dated 23.3.2001 was not justified and reflects non-application of mind. The respondents have not at all taken into account the tremendous difficulties that the petitioner and his family faced upon the death of their head of family way back in the year 1999.

24. For the reasons aforesaid, the order dated 23.3.2001, passed by the Secretary, U.P. Basic Shiksha Parishad is hereby quashed. The concerned authorities (respondent nos. 1 to 3) are directed to consider the claim of the petitioner for compassionate appointment after considering the provisions of Rules of Dying in Harness Rules, 1974, in the light of the observations made hereinabove. The authorities shall pass the appropriate orders within a maximum period of six weeks' considering the fact that the poor widowed lady is litigating this matter since last seven years to get justice.

25. For the foregoing reasons, writ petition is allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.08.2008

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

First Appeal From Order No.947 of 2006

The New India Assurance Co. Ltd
...Appellant
Versus
Smt. Suman and others ...Respondents

Counsel for the Appellant:
Sri. Arvind Kumar

Counsel for the Respondents:
Sri. R.K. Porwal

Motor Vehicle Act 1988-173-Rejection of application filed under Section 166-after examining the witness-appeal on the ground after examining the witness about rash and negligence-cannot be dismissed as not maintainable hence illegal-held-order passed by claim

tribunal may be termed as irregular-but cannot be illegal-hence appeal not maintainable-can be questioned in revision.

Held: Para 6

So far as the other point as agitated that collective application under Section 163-A and under Section 166 is so fundamental in nature if Insurance Company has right to oppose, we are of the view that it is for the Court to treat the claim petition under either of the Sections but not to reject solely on such ground. Therefore, when the Tribunal has proceeded with the proof of rash and negligence of the driver, it has to be construed that the Court proceeded under Section 166 of the Act but not under Section 163-A of the Act. Therefore, in totality, we do not find any prudent cause to support the contentions of the appellant. Hence the appeal is liable to be dismissed and accordingly, is dismissed, however, without imposing any cost.

Case law discussed:
2007 (4) ADJ 101; AIR 2002 SC 3350.

(Delivered by Hon'ble Amitava Lala, J.)

1. This appeal has been preferred by the Insurance Company challenging the judgement and order dated 7.1.2006 passed by the concerned Motor Accident Claims Tribunal, Etawah, in spite of rejection of the application under Section 170 of the Motor Vehicles Act, 1988.

2. We have considered the issue of right of appeal in our judgement reported in **2007 (4) ADJ 101 (Oriental Insurance Company Limited Vs. Smt. Manju and others)** following the Supreme Court reported in **AIR 2002 SC 3350 (National Insurance Co. Ltd., Chandigarh Vs. Nicolleta Rohtagi and others).** Therefore, no new case is available therein excepting very few which are discussed herein.

3. Mr. Arvind Kumar, learned counsel appearing in support of the appellant, contended before this Court that the order which has been passed rejecting the application on 20.9.2004 is falicious in nature. Either the application will be rejected or the same will be allowed. There is no scope of holding that the same is not maintainable as Insurance Company has already examined the witnesses. He further contended that the original claim petition was filed both under section 163-A and under Section 166 of the Motor Vehicles Act 1988, therefore, the same is required to be dismissed as a matter of course. It is a question of maintainability of the claim petition, therefore, the Insurance Company has a right independent of the rejection of the application under Section 170 of the Act. He relied upon the judgment of the Division Bench of this Court in F.A.F.O. No. 513 of 2007, National Insurance Company Limited Vs. S.L. Sharma dated 19.3.2008.

4. Mr. R.K. Porwal, learned counsel appearing for the claimants, contended before this Court that Section 170 of the Act is provided for specific purposes. Such type of application cannot be made mechanically. In the instant case, the application was made after examination of the witness is over. Therefore, the Court held that there is no necessity of permitting Section 170 to the Insurance to contest the claim. He has further said that there is existing right of an Insurance Company to examine any witness provided the cause falls under Section 149 (2) of the Act but not beyond the same. The Tribunal considered this part and

only thereafter the application was rejected.

5. He also argued before this Court that definitely an application will be made either under Section 163-A or Section 166 of the Act but if the claim petition is filed referring two sections it is to be seen by the tribunal under which Section the parties are required to be proceeded before the Tribunal. In the present case rash and negligent driving of the vehicle was called upon to prove by the claimant/s. Therefore, obviously the claim petition is to be treated under Section 166 but not under Section 163-A. It is also stated that for the purposes of the applicability of the multiplier as a guidance, the second schedule under such Section was considered not for any other purposes. Mr. Arvind Kumar contended that since the owner was not examined, therefore, the Insurance Company has right to contest to which the Tribunal fell into error. However, upon going through the judgment and order, we find that the owner was produced for examination. Therefore, factually such statement is incorrect.

6. Therefore, taking into totality of the matter, we are of the view that the way of rejection of the order may be defective or irregular but it cannot be said to be illegal for the purpose of intervention of the Appeal Court. In the case of an irregular rejection, there is every right of the insurance to make a revisional application as we have already held in the case of Manju Devi (supra). We do not find any cogent reasons to interfere with the order at the appellant Insurance Company independently. So far as the other point as agitated that collective application under Section 163-A and under Section 166 is so fundamental in nature if Insurance Company has right to oppose, we are of the view that it is for the Court to treat the claim petition under either of the Sections but not to reject solely on such ground. Therefore, when the Tribunal has proceeded with the proof of rash and negligence of the driver, it has to be construed that the Court proceeded under Section 166 of the Act but not under Section 163-A of the Act. Therefore, in totality, we do not find any prudent cause to support the contentions of the appellant. Hence the appeal is liable to be dismissed and accordingly, is dismissed, however, without imposing any cost.

7. Incidentally, the appellant-insurance company prayed that the statutory deposit of Rs.25,000/- made before this Court for preferring this appeal be remitted back to the concerned Motor Accidents Claims Tribunal as expeditiously as possible in order to adjust the same with the amount of compensation to be paid to the claimants, however, such prayer is allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 07.08.2008

BEFORE
THE HON'BLE V.M. SAHAI, J.
THE HON'BLE S.P. MEHROTRA, J.

Civil Misc. Writ Petition No. 11872 of 2000

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

Counsel for the Petitioner:
Sri. Umesh Chandra Mishra

Counsel for the Respondents:
Sri. Pushpendra Singh
S.C.

Constitution of India, Article 311-change of status and designation-in the garb of reshuffling scheme-petitioner joined on 12.06.1997 on the post of Good Tax Officer after completing successful training-change of cadre from transport department to treasury department-cannot be against the desire of petitioner-even on probation period protection of Article 311 available.

Held: Para 4 & 6

Once a civil servant joins his post under the Government, even during the period of probation, Article 311 of the Constitution of India starts applying and the protection recommended by the Article become available. A Government servant acquires the right to the post and he cannot be removed from that post, whether by reason of alleged reshuffling or other reason short of improper performance of duty , in case of probationers , or misconduct in case of confirmed employees.

In the circumstances, we are of the opinion that the petitioner cannot be moved out of the service cadre of the Transport Department against his will.

(Delivered by Hon'ble V.M. Sahai, J.)

1. We have heard learned counsel for the petitioner, the learned Standing Counsel and the learned counsel for the respondent no.4.

2. It is not denied that the petitioner, after selection by the U.P. Public service Commission, joined on 12.6.1997, and underwent requisite training at the Head Quarter of Transport Commissioner, and thereafter at the U.P. Administrative Academy, Nainital. After completion of his training, the petitioner was granted regular posting, and he joined his duties as Goods Tax/ Passenger Tax Officer in the Office of Regional Transport Officer, Bareilly and was continuing in that service when the impugned orders dated 23.10.1998 and 21.12.1999 issued by the State Government (Annexure nos. 2 and 5 to the writ petition) and the order dated 2.2.2000 issued by the Transport Commissioner, U.P., Lucknow (Annexure no. 6 to the writ petition) were passed by the aforesaid impugned orders, passed after more than two years of the petitioner's working in the Transport Department of the U.P. Government, he was asked to change the service cadre and was directed to join the State Civil service as Treasury Officer/ Accounts Officers which is a distinct and separate service cadre under the said State Government. This action has been sought to be justified by the respondents under the name of reshuffling. It is submitted by the respondents that this reshuffling is done according to the choice given by the candidate at the time of their selection by the Commission and because of the situation created by the reason of non-joining or resignation of certain candidates which requires readjustment of the merit- list and the choice of the candidates.

3. The submissions from the side of the respondents are contrary to the basic law.

4. Once a civil servant joins his post under the Government, even during the period of probation, Article 311 of the Constitution of India starts applying and the protection recommended by the Article become available. A Government servant acquires the right to the post and

he cannot be removed from that post, whether by reason of alleged reshuffling or other reason short of improper performance of duty, in case of probationers or misconduct in case of confirmed employees.

5. The petitioner in this writ petition claims that he is not willing to move out of cadre of Transport Department of the State Government and it is not the case of the respondents that there is any short-coming in the performance of his duties by the petitioner, much less any misconduct.

6. In the circumstances, we are of the opinion that the petitioner cannot be moved out of the service cadre of the Transport Department against his will.

7. Accordingly, the writ petition is allowed and the impugned orders dated 23.10.1998 and 21.12.1999 issued by the State Government (Annexure nos. 2 and 5 to the writ petition) and the order dated 2.2.2000 issued by the Transport Commissioner, U.P. Lucknow (Annexure no.6 to the writ petition) are quashed.

Petition allowed.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 15.09.2008

BEFORE
THE HON'BLE S. U. KHAN, J.

Civil Misc. Writ Petition No. 5571 of 1984

Qazi Abdul Wahab ...Petitioner
Versus
The Special Judge (A.D.J.), Bijnor and others ...Respondents

Counsel for the Petitioner:
Sri. S.A. Gilani

Counsel for the Respondents:
S.C.

U.P. Urban Buildings (Regulation, Letting And Eviction) Act 1972-Section 20(4)-tenant deposited entire amount of rent and damages-during pendency of earlier revision pending against eviction-landlord in second notice communicated willingness to withdraw the rent deposited in earlier decided suit-held-such deposit perfectly valid-entitled to benefit of Section of 20(4) of the Act.

Held: Para 18, 19 & 20

In the second notice dated 27.04.1979, the landlord clearly asked for details of deposit and communicated its willingness to withdraw the rent deposited by the tenant in the decided suit. This clearly meant that the landlord had approved the deposit, hence it cannot be said that the said deposit cannot be taken into consideration.

Accordingly, I am of the opinion that deposit of rent by the tenant in the decided suit in between the two notices sent by the landlord was valid.

In this manner, rent was deposited within 30 days from the first notice and at the time of second notice, tenant was not defaulter even for a month. Accordingly, suit could not have been decreed for eviction on the ground of default.

Case law discussed:
AIR 2008 SC 187, 2008 (2) A.R.C. 613, AIR 2000 SC 568, J 2004(2) ARC 64, 2004(2) ARC 652, AIR 1998 SC 602, (2008) 5 SCC 287, 2008 (71) ALR 499, AIR 1996 SC 2410, 2004 (2) A.R.C. 652.

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

1. Heard learned counsel for the petitioner. No one appeared on behalf of tenants respondents.

2. This is landlord's writ petition arising out of suit for eviction instituted by him against original tenant respondent No.3 Master Salahuddin in the form of S.C.C. Suit No.100 of 1979. Eviction was sought on the ground of default and decree for recovery of arrears of rent was also prayed for. Property in dispute is a shop, rent of which is Rs.50/- per month.

3. Prior to the filing of the suit giving rise to the instant writ petition, landlord had filed another similar suit being Suit No.253 of 1973. In the earlier suit, tenant had deposited the entire rent on the first date of hearing, hence suit was dismissed for eviction and landlord was permitted to withdraw the amount deposited by tenant under Section 20(4) of U.P. Urban Buildings (Regulation of Letting, Rent & Eviction) Act, 1972. Against the said decision, landlord filed revision before the District Judge, which was dismissed on 01.10.1975. Landlord filed second revision before the High Court (Civil Revision No.105 of 1978), which was pending when the second suit giving rise to the instant writ petition was filed. In the second suit, defendant took the plea that he was depositing the rent in the previous decided suit, hence he was not defaulter.

4. Before filing the second suit, notice was given by the plaintiff landlord on 17.03.1979, which was served on 21.03.1979. Tenant sent reply to the said notice on 15.04.1979. Thereafter, second notice was given by the landlord on 27.04.1979, which was served upon tenant on 01.05.1979.

5. Landlord also asserted that even in the old decided suit, tenant had not deposited house tax, water tax and chhajja tax.

6. In the old suit, tenant deposited the rent for two years from May, 1977 till April, 1979 on 18.04.1979. Tenant contended that accordingly when the second notice was given, he was not defaulter and within one month from receipt of the first notice, he had deposited the amount.

7. It was also argued by the tenant that in the earlier suit an excess amount of Rs.906.88/- was deposited, which could be adjusted in the house tax, water tax and chhajja tax.

8. The main contention of the plaintiff was that after receiving the first notice on 21.03.1979, deposit could not be made by the tenant in the old decided suit.

9. The trial court/ J.S.C.C., Bijnor held that even on the principle of Section 30 of the Act, where tenant is permitted to deposit the rent before Munsif, tenant is not entitled to deposit the rent or to continue to deposit the rent after receipt of the notice.

10. Accordingly, trail court decreed the suit for eviction through judgment and decree dated 11.02.1982. Suit for recovery of arrears of rent of Rs.2500/- as asked for was also decreed.

11. Against the judgment and decree passed by the trial court, tenant respondent filed Civil Revision No.95 of 1982. Special Judge/ A.D.J. Bijnor, through judgment and order dated 19.01.1984, allowed the revision, set aside the judgment and decree passed by

the trial court and suit was dismissed. However, landlord was permitted to withdraw the amount deposited by the tenant in Original Suit No.259 of 1973 (old suit). The revisional court held that rent from May, 1977 till April, 1979 deposited by the tenant in the old decided suit on 18.04.1979 had to be taken into consideration.

12. The revisional court held that as at the time of giving both the notices in 1979 and even at the time of filing of the suit, revision was pending in the High Court against dismissal of the earlier suit for eviction, hence tenant was entitled to deposit the rent in the said suit under Order XV Rule 5, C.P.C. Revisional Court held that under the said provision, tenant was not bound to deposit the rent after decision of the suit but during pendency of revision, however he was entitled and justified to do so.

13. Copy of first notice dated 17.03.1979 is Annexure-1 to the writ petition and copy of second notice dated 27.04.1979 is Annexure-2 to the writ petition. In the first notice, it was mentioned that rent was due since 01.01.1970, hence suit No.70 of 1973 was filed. In the said suit, rent was deposited by the tenant. It was further stated that after adjusting the rent deposited by the tenant in the suit of 1973, the balance rent was due against the tenant which the landlord was entitled to get subject to the decision of the revision pending in the High Court. It was demanded that unpaid rent should be paid within a month and tenancy was also terminated. In the second notice, it was mentioned that earlier notice was given. It was also mentioned that tenant gave a wrong reply on 15.04.1979 (sic.) intimating that rent from May, 1977 till April, 1979 @ Rs.50/- per month had been deposited in the suit. Thereafter, it was mentioned in the second notice that tenant in his reply notice had not intimated that the rent for two years from May, 1977 to April, 1979 had been deposited in which court and in which case and on what date and at what rate and through what tender number. It was also mentioned that after decision of Suit No.253 of 1973, tenant was not legally entitled to deposit the rent in the said suit. It was further mentioned in the second notice that if in fact tenant had deposited the rent after April, 1977 in the Court (in the earlier suit), then its detail should immediately be sent in writing to the landlord so that in case money had validly been deposited, then landlord could withdraw the same subject to the decision of the revision pending in the High Court failing which it would be deemed that whatever amount was deposited by the tenant was illegal. Through the said notice, tenancy was again terminated. Revisional Court took a technical view of the matter by holding that second notice waived the first notice hence deposit was valid as first notice demanding rent did not remain any notice in the eye of law.

14. The main point to be decided in this case is as to whether rent deposited in the decided suit of 1973 was valid or not and can be adjusted in the rent or not?

15. The Supreme Court in **Carona Ltd. Vs. M/s Parvathy Swaminathan and sons, AIR 2008 SC 187** (Para-45) and **R.K. Shukla Vs. Sudhrist Narain Anand, 2008 (2) A.R.C. 613 (Para-17)** has held that if during pendency of proceedings before High Court in between landlord and tenant, tenant does

not pay or deposit the rent to the landlord, this itself may be a good ground for refusing to grant any relief to the tenant under the discretionary remedy of appeal before the Supreme Court or writ petition before the High Court.

16. Accordingly, if during pendency of revision of the landlord, tenant deposits the rent in the decided suit instead of criticism, he deserves appreciation. In revision, appeal or writ petition by the tenant the court usually grants stay order on the condition that the rent as and when it accrues must be deposited by the tenant in the decided suit. Accordingly, if without any order of the higher Court and even after winning from the Court below, tenant deposits the rent in a decided suit, it cannot be said that deposit is not valid. Even before receiving the notice of the landlord in 1979, tenant had already deposited two years' rent, i.e. from October, 1975 till April, 1977 in the decided suit. After receiving the first notice, tenant again deposited the rent for subsequent period of two years, i.e. from May, 1977 to April, 1979 in the same decided suit.

17. Moreover, Supreme Court in **AIR 2000 SC 568 "C. Chandramohan v. Sengottaiyan**" has held that if rent is deposited in the case initiated by the tenant for deposit of rent and the said case is dismissed still in case landlord has withdrawn the amount tenant will not remain defaulter.

18. In the second notice dated 27.04.1979, the landlord clearly asked for details of deposit and communicated its willingness to withdraw the rent deposited by the tenant in the decided suit. This clearly meant that the landlord had approved the deposit, hence it cannot be said that the said deposit cannot be taken into consideration.

19. Accordingly, I am of the opinion that deposit of rent by the tenant in the decided suit in between the two notices sent by the landlord was valid.

20. In this manner, rent was deposited within 30 days from the first notice and at the time of second notice, tenant was not defaulter even for a month. Accordingly, suit could not have been decreed for eviction on the ground of default.

Accordingly, writ petition is dismissed.

I have held in ***Khursheeda Vs. A.D.J 2004(2) ARC 64 and H.M. Kichlu Vs. A.D.J 2004(2) ARC 652*** that while granting relief against eviction to the tenant in respect of building covered by Rent Control Act or while maintaining the said relief already granted by the courts below, writ court is empowered to enhance the rent to a reasonable extent.

In the aforesaid authority of Khursheeda (supra), I placed reliance upon the Supreme Court authority of **M.V.Acharya Vs. State of Maharashtra AIR 1998 SC 602,** where it was held that it was essential to provide for periodical enhancement of rent under the Rent Control Acts. The Supreme Court has further held that frozen rents are giving rise to lawlessness and landlords out of frustration are approaching muscle man to get the premises vacated and courts of law are becoming redundant in this sphere. This authority has recently been followed by the Supreme Court in **Satyawati**

Sharma (dead) by L.Rs. Vs. Union of India and another, (2008) 5 SCC 287: 2008 (71) ALR 499, part of Para-29 & Para-34 of which are quoted below:-

*"**29.** It is trite to say that legislation which may be quite reasonable and rationale at the time of its enactment may with the lapse of time and/ or due to change of circumstances become arbitrary, unreasonable and violative of the doctrine of equity and even if the validity of such legislation may have been upheld at a given point of time, the Court may, in subsequent litigation, strike down the same if it is found that the rationale of classification has become non-existent.*

***34.** In Malpe Vishwanath Acharya and others Vs. State of Maharashtra and another (supra), the Court found that the criteria for determination and fixation of rent by freezing or by pegging down of rent as on 01.09.1940 or as on first date of letting, had, with the passage of time become irrational and arbitrary but did not strike down the same on the ground that extended period of Bombay Rent Act was coming to an end on 31.03.1998."*

Under U.P. Rent Control Act, there is no provision of enhancement of rent after October, 1972 [Except where landlord is public charitable or public religious institution (Section 9-A) or government is tenant (section 21(8)]. In the aforesaid authority of Khursheeda, I have also placed reliance upon the authority of Supreme Court reported in **AIR 1996 SC 2410 "Shangrila Food Products Ltd. v. Life Insurance Corporation of India"**, paragraph-11 of which is quoted below:-

"It is well-settled that the High Court in exercise of its jurisdiction under Article 226 of the Constitution can take cognizance of the entire facts and circumstances of the case and pass appropriate orders to give the parties complete and substantial justice. This jurisdiction of the High Court, being extraordinary, is normally exercisable keeping in mind the principles of equity. One of the ends of the equity is to promote honesty and fair play. If there be any unfair advantage gained by a party priorly, before invoking the jurisdiction of the High Court, the Court can take into account the unfair advantage gained and can require the party to shed the unfair gain before granting relief."

Thereafter in Para-8 of the aforesaid authority of Khursheeda, I held as under:-

"Rent Control Act confers a reasonable advantage upon the tenant of protection against arbitrary eviction. Tenant under the Rent Control Act cannot be evicted except on specific grounds like bonafide need of the landlord, arrears of rent, subletting and material alteration etc. This advantage is also coupled with the advantage of immunity from enhancement of rent. The latter advantage cannot be said to be either reasonable or equitable. The Supreme Court in the aforesaid authority of S.F.P. Vs. L.I.C (A.I.R 1996 S.C 2410). has laid down that while granting relief to a party the writ court can very well ask the said party to shed the unfair advantage which it gained under the impugned order. By slightly extending the said doctrine it may safely be held that while granting the reasonable advantage to the tenant conferred upon him by the Rent Control Act the tenant may be asked to shed the un-reasonable arbitrary advantage conferred upon him by the said Rent Control Act. The writ

court therefore while granting or maintaining the relief against arbitrary ejectment to the tenant can very well ask the tenant to shed the un-reasonable benefit of the Rent Control Act granted to him in the form of immunity against enhancement of rent, however inadequate the rent might be. Tenant will have to shed the undue advantage of immunity from enhancement of rent under the Rent Control Act to barter his protection from arbitrary eviction provided for by the said Act."

Thereafter in **H.M. Kitchlu vs. A.D.J. 2004 (2) A.R.C. 652**, I have held that the same principle of enhancement of rent to a reasonable extent may be made applicable while dismissing the writ petition of the landlord for the reason that by doing so writ court approves the protection of Rent Control Act granted to the tenant by the courts below.

Property in dispute is a shop, rent of Rs.30/- per month is virtually as well as actually no rent. It is rather ridiculous. Accordingly, it is directed that w.e.f. October, 2008 onwards, tenants respondents shall be liable to pay rent @ Rs.1000/- per month. No further amount as house tax, water tax or chhajja tax shall be payable over and above the aforesaid rent of Rs.1000/- per month. As no one has appeared for the tenants, hence landlord shall send certified copy of this judgment to any one of the tenants through registered post.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.09.2008

BEFORE
THE HON'BLE V.M. SAHAI, J.
THE HON'BLE PANKAJ MITHAL, J.

Special Appeal No.1298 of 2008.

Mahipal Singh ...Appellant
Versus
The State of U.P. & others ...Respondents

Counsel for the Petitioner:
Sri. Mithilesh Kumar Tiwari

Counsel for the Respondents:
Sri. V.K. Singh
Sri. J.N. Maurya

Constitution of India, Article 226- Termination of service-petitioner working as Shiksha Mitra-B.S.A. passed termination order as per direction of District Magistrate-direction of Single Judge to make representation to the D.M.-putting rider and closing the door of justice from future right of challenge-held-illusory and futile exercise-learned Single Judge exceeded the jurisdiction-cannot sustain.

Held: Para 8 & 9

In view of aforesaid facts and circumstances, we are of the opinion that the order passed by the learned single Judge exceeds jurisdiction and, therefore, if cannot be sustained under law. Accordingly, we allow the appeal and set-aside the judgment and order of the learned single Judge dated 1.9.2008 and send back the matter before the appropriate Bench of the learned single Judge for decision afresh on merits

The special appeal is allowed as above. No order as to costs.

(Delivered by Hon'ble V.M. Sahai, J.)

1. We have heard Sri Mithilesh Kumar Tiwari learned counsel for the appellant, learned standing counsel appearing for respondents no. 1 and 2, Sri V.K. Singh learned counsel appearing for respondents no.4 and 5 and Sri J.N. Maurya, learned counsel appearing for respondents no.3 and 6.

2. This intra court appeal has been preferred by the appellant against the judgment and order dated 1.9.2008 passed by the learned single Judge dismissing his writ petition no.43748 of 2008 with the direction to the petitioner to move a representation with regard to his grievance before the District Magistrate, who has been directed to decide the same within a time bound period. It further provides that if the appellant is not satisfied by the decision of the District Magistrate on the representation he may file a civil suit.

3. Learned counsel for the appellant has urged two points. First, the order dated 25.7.2008 impugned in the writ petition was passed by the District Basic Shiksha Adhikari on the direction of the District Magistrate to terminate the services of the appellant as Shiksha Mitra and. therefore, there was no justification to relegate the appellant to file a representation before the District Magistrate. Secondly, it has been argued that the appellant's right to seek redressal by invoking Article 226 of the Constitution in future has also been taken away, which is not permissible under law.

4. We have perused the order of the District Basic Shiksha Adhikari dated 25.7.2008. The order clearly recites that the services of the appellant were terminated on a complaint made to the District Magistrate, on the direction of the District Magistrate. Therefore, we are of the opinion that there was no purpose in sending the appellant to the District Magistrate for ventilating his grievance. The District Magistrate has already taken a decision in the matter and, as such, the exercise of making a representation before him on the face of it is futile.

5. Regarding the other submission, it is necessary to reproduce the relevant part of the impugned judgment and order of the learned single Judge which is as under:-

"The petitioner may move a fresh representation ventilating his grievance before the District Magistrate, Kanpur Dehat within a period of one week from today who shall decide the same by a reasoned and speaking order, in accordance with law within another period of two weeks thereafter. In case the petitioner is aggrieved by the decision of the representation, he may approach the Civil Court by filing civil suit as he has an alternative and efficacious remedy by way of filing civil suit before the Civil Court."

6. A plain reading of the aforesaid order indicates that the Court has not only relegated the appellant to an alternative remedy of making a representation, which under the facts and circumstances stated above is nothing but illusory and a futile exercise, but at the same time has directed him not to approach this Court again even if the decision on his representation goes against him. In other words, the doors of justice has been closed for him with a further rider that in future also the door of justice would not be opened for him and

instead he should file a civil suit. This part of the order of the learned single Judge is more in the nature of advisory jurisdiction and amounts to pre-closing the doors of justice for the appellant in future. This has been done even before the appellant has knocked the doors of justice again. We cannot subscribe to the view taken by the learned single Judge in this regard as it is not for the courts to give advise. The appellant has not solicited the advise and there was no question of such solicitation as the order has not yet been passed by the District Magistrate.

7. Besides the above, the court is not supposed to pass orders in vacuum or in anticipation so as to foreclose the light of the appellant to invoke the extra ordinary jurisdiction of the Court in future for a cause of action which has not yet arisen.

8. In view of aforesaid facts and circumstances, we are of the opinion that the order passed by the learned single Judge exceeds jurisdiction and, therefore, if cannot be sustained under law. Accordingly, we allow the appeal and set-aside the judgment and order of the learned single Judge dated 1.9.2008 and send back the matter before the appropriate Bench of the learned single Judge for decision afresh on merits

9. The special appeal is allowed as above. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.09.2008

BEFORE
THE HON'BLE ASHOK BHUSHAN, J.

Civil Misc. Writ Petition No. 18929 of 2005

Ram Sewak Sharma ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri. S.K. Yadav

Counsel for the Respondents:
Sri. H.R. Mishra
S.C.

U.P. Primary Agricultural Co-operative Credit Societies Centralised Service Rules 1976-as amended by 12th amended Rules 2004-power of appellate authority-against the order of dismissal by DAC-RAC allowed the appeal and modified the order of dismissal with reinstatement by withholding two increments subject to payment of embezzled amount-DAC refused the joining even after deposit of damaged amount-held-during pendency of appeal the appellate authority becomes the State Cadre Authority-as such after 30.06.2004 RAC has no authority to decide the appeal-order passed by DAC justified-direction issued to decide the revision.

Held: Para 16

In the present case the right of appeal has not been taken away but the forum has been changed. The RAC which was vested earlier with power to hear the appeal against an order of the DAC has been deleted by virtue of (12th Amendment) Rules, 2004 and the power to hear the appeal is vested in the State Cadre Authority w.e.f. 30/6/2004. The RAC being not in existence after the

amendment rules, there is no question of its exercising any jurisdiction in pending appeals, when the forum was changed and the power to hear appeal was vested in the State Cadre Authority the pending appeals were required to be heard by the new forum created. The RAC was not even in existence after 30/6/2004, therefore, there was no occasion for it to hear any appeal by it. The judgement relied on by the counsel for the petitioner in the above case does not help the petitioner in the present case.

Case law discussed:

JT 1996 (4) SC 1990.

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

1. Heard Shri S.K Yadav, learned counsel for the petitioner; Shri H.R. Mishra and the learned Standing Counsel for the respondents.

2. Counter and rejoinder affidavits have been exchanged, the writ petition is being finally decided.

3. By this writ petition, petitioner has prayed for quashing the order dated 10/2/2005, Annexure-10 to the writ petition passed by the District Administrative Committee (hereinafter called the "DAC") whereby it was stated that no action can be taken on the joining report of the petitioner since the order of the Regional Administrative Committee (hereinafter called the "R.A.C.") dated 08/7/2004 is subsequent to (12th Amendment) Rules, 2004.

4. Brief facts necessary for deciding the writ petition are; the petitioner was appointed as cadre Secretary on 18/12/1976. The service conditions of the cadre Secretary are governed by Rules namely, The Uttar Pradesh Primary Agricultural Co-operative Societies Centralised service Rules, 1976 (hereinafter called the " Rules 1976"). On certain allegations, the petitioner was placed under suspension and disciplinary proceedings were initiated against him and by an order dated 06/8/1998 the petitioner was removed from service by the District Administrative Committee (hereinafter called the "DAC"). On proof of certain charges which also included the charges of embezzlement the petitioner filed an appeal which was dismissed on 23/1/1999 by the Regional Administrative Committee. Petitioner claims to have filed a review appeal before the appellate authority when the said review appeal was pending. The petitioner filed Writ Petition No. 3700 of 2004 which was disposed of by this Court on 03/2/2004 with the observation that since the petitioner having already pursuing his alternative remedy of representation/review, the petition cannot be entertained. Subsequently, the RAC issued notice on 17/3/2004, asking the petitioner to appear before the RAC, and the RAC subsequently fixed 16/4/2004 and on that date the RAC took a decision by which the punishment of removal/dismissal was modified by punishment of stoppage of one increment with a direction to deposit certain amount and thereafter reinstatement of the petitioner without any back wages was ordered. In pursuance of the order of the RAC dated 7/7/2004 petitioner claims to have deposited the amount as directed by the RAC and then submitted a joining report before the DAC. The DAC on the joining report of the petitioner passed the impugned order dated 10/2/2005 refusing to accept the joining of the petitioner on the ground that the relevant rules having been amended by (12th Amendment)

Rules, 2004 w.e.f. 30/6/2004, no order could be made by RAC dated 08/7/2004.

5. This Court while entertaining the writ petition issued notice on 17/3/2005 to the petitioner to show cause as to why the punishment awarded to him be not enhanced. Petitioner was asked to file supplementary affidavit in reply to which he has filed supplementary affidavit on 12/7/2005.

6. Learned counsel for the petitioner challenging the order contended that the mere fact that by (12th amendment) Rules, 2004 the appellate authority has been changed and shall not affect the right by the RAC to decide the appeal. He submitted that there was no provision in the (12th Amendment) Rules, 2004 as to what will happen with regard to the pending appeals. The pending appeal has to be decided by the appellate authority and the RAC thus clearly had jurisdiction to decide the appeal and the order dated 08/7/2004 was in accordance with law. He has placed reliance on the judgement of the Hon'ble Supreme Court JT 1996 (4) SC 1990, Commissioner of Income Tax, Bangalore Vs. Smt. R. Sharadamma .

7. A counter affidavit has been filed on behalf of the respondent no. 4 in which it was stated that by (12th Amendment) Rules, 2004, U.P. Primary Agricultural Co-operative Credit Societies Centralised Service, 1976 the appellate authority has been changed and after 30/6/2004, the RAC was no longer the appellate authority, hence it had no jurisdiction to decide the appeal and the appellate authority has now become the State Cadre Authority, hence the appeal if any could have been pressed before the State cadre Authority only. It has been stated in the counter affidavit that the DAC has rightly issued the impugned letter to the petitioner.

I have considered the contention of the parties and perused the record.

8. The Rules, 1976 have been framed under the Uttar Pradesh Co-operative Societies Act, 1965 (hereinafter called the "Act, 1965") for regulating the service conditions of the cadre Secretaries and the petitioner is governed by the Rules, 1976. Under the said 1976 Rules, the DAC is the appointing authority and the regulations have been framed under Rule 30 which provides for disciplinary inquiry against a member of the centralised service. Rules, 1976 provide for constitution of the State cadre Authority and RAC under Rule 7.

9. According to Regulation 1978, the RAC is the appellate authority. The 1976 Rules were amended by the 12th Amendment Rules 2004 w.e.f. 30/6/2004. The said rules were published in the gazette and by virtue of Rule 1 sub-rule 2 they came into effect from the date of publication in the gazette. Rule 7 of the aforesaid rules which provides for constitution of the State Cadre Authority, RAC and DAC was amended. The provision of RAC has been deleted w.e.f. 30/6/2004.

"Rule 8 of Rules 1976 provides for power and function of the State Cadre Authority. Rule 8 (i) sub-rule 10 as amended by (12th Amendment) Rules, 2004 provides as under:

Rule 8 (1) The authority shall be the Chief Policy making body for the centralised service. The Authority shall have following powers, duties and responsibilities: -

(i) ….....
(ii) ….....

(x) to hear appeals against the orders passed by the District Administrative Committee.

10. Thus, by the Uttar Pradesh Primary Agricultural Co-operative Credit Societies Centralised Service (Twelfth Amendment) Rules, 2004 the RAC has been deleted and the power to hear the appeal which was earlier vested in the RAC is now vested in the State Cadre Authority by virtue of amendment in Rule 8. Earlier by virtue of Rule 11 prior to (12th Amendment Rules, 2004) the power to hear appeal against the order of the DAC was vested in the RAC.

Rule 11 sub rule (iv) (prior to amendment) is quoted below:

"11. **Powers and duties of Regional Administrative Committee**.-(l) Subject to the policy laid down and guidelines and instructions issued by the Authority, the Regional Committee shall be responsible for the general supervision and control of the members of the centralised service in the region. The Regional Committee shall have also the following duties and responsibilities-
(i) ….....

(iv) To hear and decide appeals arising from the official orders of major punishment (i.e. dismissal, removal or reduction in rank) passed by the District Committee;

11. Rule 11 quoted above has been deleted by the (12th Amendment) Rules, 2004. Thus, the effect of the amendment by (12th Amendment) Rules, 2004 was that the power to hear appeal is transferred and vested in the State cadre Authority and the RAC which was functioning prior to amendment has been deleted. Thus, in the present case when the order was passed by the RAC dated 07/7/2004 it was not in existence and it having been deleted on 30/6/2004. The RAC was not having any appellate jurisdiction w.e.f. 30/6/2004 and the power to hear appeal was vested in the sate cadre Authority.

12. In view of the above, the DAC did not commit any error in not taking any action in pursuance of the resolution dated 07/7/2004 of RAC and no error has been committed by the DAC in not accepting the joining report of the petitioner.

13. Learned counsel for the petitioner has placed reliance on the judgement of Apex Court in Commissioner of Income Tax (supra). In the said case before the Apex Court the penalty proceedings were pending before the Inspecting Assistant Commissioner under section 274 (2) of the Income Tax Act, 1961 (hereinafter called the "Act, 1961.") certain amendments were made under Section 274 (2) of the Act, 1961, consequence of which was that no penalty proceedings could be proceeded with when the particulars having been concealed was not of more than Rs. Twenty Five Thousand.

14. It was contended before the Apex Court that even if the amendment has been made in Section 274 (2) of the Act, 1961 the same shall have no effect on pending proceedings of the penalty which has been referred to by the Inspecting Assistant Commissioner. The Apex Court referring to its earlier

judgement laid down the following in paragraphs 8 and 10.

"8.The Court then observed that once a reference was validly made to the Inspecting Assistant Commissioner he did not lose the jurisdiction to deal with the matter on account of the aforesaid Amendment Act. It pointed out that the Amending Act does not contain any provision that the references validly pending before the Inspecting Assistant Commissioner should be returned without passing any final order if the amount of income in respect of which the particulars have been concealed did not exceed Rupees twenty five thousand. The said circumstance, it held, supported the inference drawn by the Court that the Inspecting Assistant Commissioner continued to have jurisdiction to impose penalty. The Court observed:

"It is also true that no litigant has any vested right in the matter of procedural, law but, where the question is of change of forum, it ceases to be a question of procedure only. The forum of appeal or proceedings is a vested right as opposed to pure procedure to be followed before a particular forum. The right becomes vested when the proceedings are initiated in the Tribunal or the court of first instance and unless the Legislature has, by express words or by necessary implication, clearly so indicated, that vested right will continue in spite of the change of jurisdiction of the different Tribunals or forums."

10. In our opinion, the principle underlying the said decision is squarely applicable herein. In this case also, a reference was made to the Inspecting Assistant Commissioner in accordance with the law in force on the date of reference. Once the Inspecting Assistant Commissioner was thus seized of the matter, he did not lose seizin thereof on account of the deletion of sub-section (2) of section 274. This is also the principle underlying Section 6 of the General Clauses Act."

15. The proposition which was laid down by the Apex Court in the said case was that the forum of appeal is a vested right. The right becomes vested when the proceedings are initiated in the Tribunal or a Court and unless the legislature has by express words and necessary implications clearly indicate, the vested right will continue irrespective of change of jurisdiction of different Tribunals or forum. There cannot be any dispute to the proposition as laid down by the Apex Court in the said case. However the present case has a distinguishing feature.

16. In the present case the right of appeal has not been taken away but the forum has been changed. The RAC which was vested earlier with power to hear the appeal against an order of the DAC has been deleted by virtue of (12th Amendment) Rules, 2004 and the power to hear the appeal is vested in the State Cadre Authority w.e.f. 30/6/2004. The RAC being not in existence after the amendment rules, there is no question of its exercising any jurisdiction in pending appeals, when the forum was changed and the power to hear appeal was vested in the State Cadre Authority the pending appeals were required to be heard by the new forum created. The RAC was not even in existence after 30/6/2004, therefore, there was no occasion for it to hear any appeal by it. The judgement relied on by the counsel for the petitioner in the above

case does not help the petitioner in the present case.

17. With regard to the notice issued by this Court on 17/3/2005, as to why the punishment awarded to the petitioner be not enhanced, learned counsel for the petitioner contended that under the 1978 Regulations, the power is vested with the appellate authority even to enhance the punishment after notice, hence no consideration of such issue is required in this case.

18. In view of the foregoing discussion, it is clear that the review appeal of the petitioner was to be heard, if at all, by the State Cadre Authority and the RAC did net have any jurisdiction to decide the appeal and the order of the RAC dated 07/07/2004 was without jurisdiction. The DAC has rightly took a decision not to act on such decision. However, in view of the fact that a view has been taken that power to hear the appeal only vested in the State Cadre Authority, it will be open for the petitioner to submit a copy of his review appeal which was filed before the RAC at the time when it had jurisdiction before the State Cadre Authority as per (12th Amendment) Rules, 2004, who may consider the review appeal of the petitioner and take an appropriate decision in accordance with law.

19. As submitted by the learned counsel for the petitioner, since the appellate authority has also the power to enhance the punishment, it is not necessary to take any decision in consequence to notice dated 17/3/2005, and all matters be left open to the appellate authority to take decision accordingly.

20. In the result, the prayer of the petitioner for quashing the order dated 10/2/2005 passed by the DAC is refused. However, liberty is given to the petitioner to file the copy of the review appeal along with the copy of this order before the State Cadre Authority which is now the appellate authority who after receiving the copy of the review appeal may consider and take an appropriate decision in accordance with law. In view of the fact that the matter is pending for quite a long period, the said appellate authority snail expeditiously decide the review appeal preferably within a period of six months from the date of filing a certified copy of the order before it

21. It is made clear that this Court is not expressing any opinion on the merits of the case and it is for the appellate authority to look into the entire facts and circumstances of the case and take a decision in accordance with law.

Subject to above, the writ petition is disposed of.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.08.2008

BEFORE
THE HON'BLE RAKESH TIWARI, J.

Civil Misc. Writ Petition No. 4226 Of 2002

State of U.P. ...Petitioner
Versus
The Presiding Officer, Labour Court and another ...Respondents

Counsel for the Petitioner:
S.C.

Counsel for the Respondents:
Sri. Siddarth
S.C.

U.P. Industrial Dispute Act 1947 -Section 33-c-workman working on daily wages basis-claim for regularisation denied-direction to pay the salary benefit like regular employee-held-doctrine of equal pay for equal work-not available-even otherwise the labour Courts or Industrial Tribunals are excluded with jurisdiction in view of provisions 4k to 10 of the Act.

Held: Para 16

To my mind, this order would not have been passed by the Labour Court as even otherwise no appointment can be directed to be made by the Labour Court de-horse the rules for recruitment even under Section 4K of the U.P. Industrial Disputes Act,1947 to Section 10 of the Industrial Disputes Act (Central), 1947 as the jurisdiction of Labour Courts or the Industrial Tribunal is excluded to that extent in view of settled position of law in this regard by the Apex Court in a stream of decisions which are binding on all courts including Labour Courts as it has all the trapping of Courts, under Article 141 of the Constitution.
Case law discussed:
1997(75) FLR 776; (2004) 1 SCC-34; (1998) 9 SCC-595; (2006) 9 SCC-321; (2006) 4 SCC-1.

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

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

2. This writ petition has been filed against the order dated 16.8.2001 passed in Misc. Case No. 353 of 1999 passed by the labour Court, U.P. Kanpur Nagar.

3. Brief facts of the case are that an Adjudication Case no. 19 of 1991 was pending before the Labour Court. During the pendency of the said reference the workman was restrained from working, hence an application under Section 6-E of the U.P. Industrial Disputes Act, 1947 was moved by him before the Labour Court for adjudication of deemed reference under Section 6-F of the Act for violation of it provisions. Section 6-F of the U.P. Industrial Disputes Act, 1947 providing for adjudication in respect of dispute as to whether condition of service charged during the pendency of any proceedings before the Labour Court is as under:-

" **6-F. Special for adjudication as to whether the conditions of service, etc. changed during the pendency of proceedings-** Where an employer contravenes the provisions of Section 6-E during the pendency of proceedings before a Labour Court or Tribunal, any workmen aggrieved by such contravention may make a complaint in writing in the prescribed manner, to the Labour Court or Tribunal as the case may be, and on receipt of such complaint that Labour Court or Tribunal as the case may be, shall adjudicate upon the complaint as if it were a dispute referred to or pending before it, in accordance with this Act and shall submit its award to the State Government and the provisions of this Act shall apply accordingly."

4. The case was registered as Reference Case no. 188 of 1991 wherein the respondent workman has stated that he was working as a daily wager, Chaukidar, Mali, Adeshpalak since October, 1988.

5. The Labour Court by its award dated 30.9.1993 held that there as a violation of Section 6-F of the Act as such the workman was entitled to reinstatement

of service as daily wager from 10.6. 1991.The award dated 30.9.1993 became final as the writ petition and Special Leave Petition filed by the petitioner were dismissed.

6. Adjudication case no. 19 of 1991 was in respect of regularization of services of the workman as well as other daily wagers working along with him was also decided vide award dated 15.3.95. It appears from the award dated 15.3.1995 that neither the services of respondent nO.2 were regularized nor the services of other daily wagers who were working along with him were regularized and their claim was rejected.

7. However, on the basis of the award dated 30.9.93 in Reference Case No. 188 of 1991, respondent no.2 filed an application under Section 6-H(2) of the Act before the Labour Court, U.P. Kanpur claiming a sum of Rs.46,100/- as permanent employee but the Labour Court vide its order dated 8.4.1996 in R.D. Case No. 96 of 1995 allowed only a sum of Rs.39,800/- treating the workman as daily wager.

8. It further appears that respondent no.2 had also filed an application under Section 33 (C) (2) of the U.P. Industrial Disputes Act, 1947 claiming bonus which was registered as Misc. Case No. 190 of 1996. The aforesaid application was rejected vide order dated 6.4.1998 by the Labour Court. Respondent no.2 also filed an application under Section 33 (C) (2) of the Act claiming his wages as Tube-well operator on regular basis which was registered as Misc. Case no. 353 of 1999. The aforesaid application was allowed by the Labour Court vide order dated 16.8.2001 and is under challenge in this writ petition.

9. It is apparent from above that earlier the claim of the workman for regularization in service was rejected vide order dated 15.3.95 in Adjudication Case No. 19 of 1991 but in Misc. Case No.1353 of 1999 under Section 33-C (2) he was directed to be paid salary of regular employee as there was no permanent and vacant post available. The claim of the workman has been rejected twice. The Labour Court in Reference no. 188 of 1991 and in R.D. case no. 96 of 1995 as well as in Misc. Case No. 190/96 rejected the claim of the workman on the ground that he was a daily wager. To my mind, no order could have been passed by the Labour Court under Section 33 (C) (2) of the Act for payment of salary as is paid to regular employee on basis of principles of equal pay for equal work in the aforesaid backdrop until and unless it is proved by the workman concerned that he shoulders the same responsibility as is shoulder by a regular employee that he was working on a permanent post. Even as a daily wager he is discharging the same duties as is discharged by a regular employee.

10. Law in this regard has been settled by the Apex Court in the case of **State of Haryana and others Versus Jasmer Singh and others, 1997(75) FLR 776** in which it has been held for application of principles of 'equal pay for equal work' various dimensions of given a job are required to be considered as such dexterity that job may entail may differ from job to job. It was also held by the Apex Court that employees on daily wages can not claim equal treatment with employees in regular service and also can

not get minimum of regular pay scales. The regularization of service is a matter of State policy. The observation made by the Apex Court in this regard is as under:-

"The quality of work which is produced may be different and even the nature of work assigned may be different. It is not just a comparison of physical activity. The application of the principle of 'equal pay for equal work' requires consideration of various dimensions of a given job. The accuracy required and the dexterity that the job may entail may differ from job to job. It must be left to be evaluated and determined by an expert body.

It is, therefore, clear that the quality of work performed by different sets of persons holding different jobs will have to be evaluated. There may be differences in educational or technical qualifications which may have a bearing on the skills which the holders bring to their job although the designation of the job may be the same."

11. To the same effect is the judgment rendered by the Apex Court in **Government of West Bengal v. Taruk K. Roy, (2004) 1 SCC-347** wherein in paragraph 14 it has been held that doctrine of equal pay for equal work would be automatically applied.

12. The petitioner is a daily wager, therefore, can be treated as a separate class. The Labour Court without discussing all various factors as stated above in Adjudication Case it could not have directed for payment of salary to the workman at par with a regular employee.

13. Admittedly, the petitioner was not appointed on any post and the labour Court has granted him salary at par with a regular employee on the ground that when the said post is available he may be appointed on the said post. This could not have been done by the Labour Court under Section 33 (c) 2 the Act or even in Adjudication case for the reason that the petitioner was not appointed on a permanent post and thus the award passed by the Labour Court appears to have been passed on surmises and conjectures. The principle of equal pay for equal work can not be accepted even for the post of ledger clerks as has been held in the case of **State of Punjab Vs. Devinder Singh, (1998) 9 SCC-595** . It was held by the Apex Court in the case of **State of Haryana and others Versus Charanjit Singh and others, (2006) 9 SCC-321** that the Court has to determine the applicability of said principle on considering all relevant facts like classification enumerated, being merit experience. jncentivisation, mode of selection/recruitment, qualifications, quality, nature, reliability of work done, responsibility entailed, regardless of nomenclature/job description or volume of output.

14. Sri Siddarth, learned counsel for the respondent workman has also relied upon paragraphs 54 and 55 of the judgment rendered in **Secretary, State of Karnataka and others Vs. Uma Devi (3) and others, (2006) 4 SCC-1** in which it has been held that-

"54. It is also clarified that those decisions which run counter to the principle settled in this decision, or in which directions running counter to what we have held herein, will stand denuded of their status as precedents.

55. In cases relating to service in the Commercial Taxes Department, the High Court has directed that those engaged on daily wages, be paid wages equal to the salary and allowances that are being paid to the regular employees of their cadre in government service with effect from the dates from which they were respectively appointed. The objection taken was to the direction for payment from the dates of engagement. We find that the High Court had clearly gone wrong in directing that these employees be paid salary equal to the salary and allowances that are being paid to the regular employees of their cadre in government service with effect from the dates from which they were respectively engaged or appointed. It was not open to the High Court to impose such an obligation on the State when the very question before the High Court in the case was whether these employees were entitled to have equal pay for equal work so called and were entitled to any other benefit. They had also been engaged in the teeth of directions not to do so. We are, therefore, of the view that, at best, the Division Bench of the High Court should have directed that wages equal to the salary that is being paid to regular employees be paid to those daily-wage employees with effect from the date of its judgment. Hence, that part of the direction of the Division Bench is modified that it is directed that these daily wage earners be paid wages equal to the salary at the lowest grade of employees of their cadre in the Commercial Taxes Department in government service from the date of the judgment of the Division Bench of the High Court. **Since. they are only daily wage earners. there would be no question of other allowances being paid to them. In view of our conclusion. that the Courts are not expected to issue" directions for making such persons permanent in service. we set aside that part of the direction of the High Court directing the Government to consider their cases for regularization. We also notice that the High Court has not adverted to the aspect as to whether it was regularization or it was giving permanency that was being directed by the High Court. In such a situation the direction in that regard will stand deleted and the appeals filed by the State would stand allowed to that extent.** If sanctioned posts are vacant (they are said to be vacant) the State will take immediate steps for filling those posts by a regular process of selection. But when regular recruitment is undertaken, the respondents in CAs Nos. 3595-612 and those in the Commercial Taxes Department similarly situated, will be allowed to compete, waiving the age restriction imposed for the recruitment and giving some weightage for their having been engaged for the work in the Department for a significant period of time. That would be the extent of the exercise of power by this Court under Article 142 of the Constitution to do justice to them."

15. As regards **Uma Devi's case (supra)** the Apex Court has clearly held that daily wagers cannot be paid other allowances as are being paid wages to regular employees and the Courts are not expected to issue directions for making such persons permanent in service and set aside the judgment of the High Court directing for considering the cases of such daily wage employees for regularization. If the High Court cannot issue a direction to consider regularization of employee in exercise of its extraordinary power under Article 226, then can the Labour Court

under Section 33-C(2) direct payment of regular salary of a permanent employee to a daily wager on the ground that there is no vacant of sanctioned post.

16. To my mind, this order would not have been passed by the Labour Court as even otherwise no appointment can be directed to be made by the Labour Court de-horse the rules for recruitment even under Section 4K of the U.P. Industrial Disputes Act, 1947 to Section 10 of the Industrial Disputes Act (Central), 1947 as the jurisdiction of Labour Courts or the Industrial Tribunal is excluded to that extent in view of settled position of law in this regard by the Apex Court in a stream of decisions which are binding on all courts including Labour Courts as it has all the trapping of Courts, under Article 141 of the Constitution.

17. For the reasons stated above and in view of the facts and circumstances of the case as well as on consideration of law particularly that the cases cited by the petitioner are clearly distinguishable, the writ petition is allowed and the impugned order is hereby quashed. No order as to costs.

APPELLATE JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 01.09.2008

BEFORE
THE HON'BLE SHIV SHANKER, J.

Criminal Appeal No. 486 of 1982

Jhabboo and others ...Appellants
Versus
State of U.P. ...Respondent

Counsel for the Appellants:
Sri. R.C. Kandpal
Sri. S.K. Tiwari

Counsel for the Respondent:
A.G.A.

Indian Penal Code-Section 395/397 I.P.C.-conviction of 10 years R.I.-all the appellants resident of same village-FIR lodged after 13 hours without explanation-looted property not recovered from the custody of appellants-itself shows innocence of appellants-trial Court committed great illegality by passing conviction order-hence set aside.

Held: Para 17

It is also worth while to mention here that the accused-appellants were not arrested on the spot at the time of committing dacoity nor any looted property was recovered or discovered from their possession or on their pointing out. It is very surprising that all the appellants are resident of same village. They were named in the F.I.R. After one day of the incident they were arrested by the police but nothing was recovered. This also shows the innocence of the appellants. Therefore it appears that the appellants have been falsely implicated by P.W. 1 in lodging the FIR. due to the enmity. However the trial court has committed the error, illegality in convicting the appellants for the charges levelled against them.

(Delivered by Hon'ble Shiv Shanker, J.)

1. This criminal appeal, under section 374 (2) Criminal Procedure Code, has been filed against the impugned judgment and order dated l6.2.1982 passed in Session Trial No. 376 of 1980 State Vs. Jhabboo and others convicting the accused Jhabboo or the offence under sections 395/397 of Indian Penal Code and he was sentenced to under go rigorous imprisonment for 10 years. Other accused-appellant Sunder, Hansh and Itwari were also found guilty for the

offence punishable under section 395 Indian Penal Code and they were also convicted and sentenced to under go rigorous imprisonment for 10 years each.

2. Brief facts arising out in this criminal appeal is that Sri Punni son of Khushali lodged the first information report on 21.6.1997 at 12.40 P.M. regarding the occurrence dated 20/21.6.l979 at about 11.00 P.M. after covering the distance of 10 km. Against all the four appellants and some unknown miscreants wherein it has been stated that all the four accused -appellants named in the first information report along with some unknown persons had entered in the house of informant and committed dacoity and they have taken ten articles mentioned in the F.I.R. In the same time the wife of informant, brother of informant and wife of his brother were beaten by the miscreants with Dandas. Consequently they sustained injuries in the alleged occurrence. All the miscreants were seen by the informant and the witnesses in the-light of torches and lantern. They were also holding gun and country made pistols at the time of incident. Named accused-appellants have been identified in the same incident at the time of alleged dacoity. After lodging the F.I.R. Investigation was entrusted to S.I Babu Ram. On 21.6.1979 at about 3.40 P.M. Smt. Sonwati was medically examined by the Doctor and fire arm injuries were found on her person. Smt. Pyari was also examined on 21.6.1979 at 4.05 P.M. and 12 injuries were found on her person.

3. Kanhai was also medically examined by the Doctor on 21.6.1979 at 4.35 P.M. and 5 injuries were found on his person. Madari has also been examined on 21.6.1979 at 5.00 P.M. and 10 injuries were found on his person. Therefore all the four persons sustained injuries by blunt object.

4. During the course of investigation the lantern was taken into possession from the place of incident and given in supurdagi of the informant and prepared its fard supurdaginama and the alleged torch was also taken from the place of occurrence and was given in the Supurdagi of witness Hari Prasad and prepared its fard supurdaginama. The torches of Hari Prasad and Shakatu were also taken by the Investigating Officer and same were given in the Supurdagi of one Kallu witness and prepared it fard supurdaginama.

5. The in investigating Officer inspected the place of occurrence at the instance of informant and prepared site plan. After completion of the investigation Officer has filed charge against all the four accused-appellants. After commitment of the case they were charged by the concerned Addl. Session Judge for the offences punishable under sections 395 and 397 I.P.C. They pleaded no guilty and claimed to be tried. Statements of all the four accused persons were recorded by the trial court under section 313 Cr.P.C. They have denied all the evidence adduced against them and further they have stated that they have been falsely implicated in this case due to previous enmity.

6. The prosecution examined P.W.1 Punni. P.W.2 Madari, P.W.3 Dr. Aditya Kumar, P.W. 4 Lal Mohammad, P.W. 5 Head Constable Lajja Ram, P.W.6 Kallan and P.W. 7 S.l. Babu Ram.

7. No any oral or documentary evidence has been adduced on behalf of the accused persons in their defense.

8. After considering the submissions made by learned counsel for both the parties the Sessions Judge has convicted all the four appellants and sentenced them as mentioned above. Feeling aggrieved by it they have preferred the present criminal appeal.

9. I have heard the arguments of learned counsel for the appellants, learned A.G.A. and perused the whole evidence on record.

10. Learned counsel for the appellants submitted that the F.I.R. has been lodged with delay of about 13 hours. No sufficient explanation has been given regarding it. It is further contended that the appellants were identified in the house of P.W. l informant in the light of lantern and its fard and supurdaginama was also prepared by the Investigating Officer but the same has not been produced in evidence and same has not been shown in the site plan in the house of P.W. 1 to be hanged at any place. It is admitted that there was dark night. In such circumstances the dacoit could not be identified in the dark night in the house of P.W. 1. It is further contended that the prosecution witnesses stated that they were identified in the torch light out side of the house of P.W.1. In the dark night no one can be identified in the torch light while the number of dacoit has been shown as 14 or 16. It is further contended that all the four appellants are resident of same village and near the house of P.W.1. In such circumstances there is no evidence on record that they had gone to the house of P.W.1 by covering their faces. It is further contended that they were not arrested on the spot. No any looted property was recovered from their possession or on their pointing out. Unknown miscreants have not been arrested by the police till now. Therefore unknown miscreants have committed the offence and the appellants have been falsely implicated in this case due to enmity.

11. On the other hand learned A.G.A. submitted that all the appellants were named in the F.l.R. They were identified by all the witnesses in the light of lantern and torches at the time of incident. It is further submitted that four persons were beaten by the miscreants. Consequently, they sustained the injuries on their person. There was previous enmity. In such circumstances they have committed the offence of dacoity in the house of P.W. 1 and the trial court had rightly convicted the appellants for charges levelled against them.

12. This occurrence of dacoity has committed on 20/21.6. 1979 at 11.00 P.M. in the house of P.W.1 and the F.I.R. was lodged on 21.6.l979 at 12.40 P.M. Therefore the FIR. Ext. Ka-6 has been lodged with a delay of about 13 hours. No any sufficient explanation has been given in the F.I.R. The injured persons were medically examined after sending them from the concerned police station after lodging the F.I.R. This is not the case that firstly the injured were taken to the hospital, thereafter the F.I.R. was lodged. Therefore the F.I.R. has been lodged with a delay of about 13 hours. In absence of any sufficient explanation regarding such delay no reliable can be placed upon such F.I.R.

13. In the F.I.R. four appellants and 10-12 unknown miscreants have been shown to be dacoits. The unknown miscreants have not yet been arrested by the police during the course of investigation. All the four appellants have been named in the F.I.R. This incident has taken place in the year 1979. The appellants Jhabboo and Sunder are the real brother, Hansh is son of Jhabboo and Itwari son of Komil. It has been admitted by P.W. 1 Punni in his cross examination that three appellants Jhabboo, Sunder and Hansh are resident of the same village and in front of his house after passing the gali. Therefore all four appellants are the resident of same village of P.W.1. This incident is of 1979 in those days no body could dare commit the offence of dacoity in his/their village without covering his/their face/faces. However, they have not covered their faces while entering to the house of P.W.1. Therefore they have not taken precaution at the time of committing the offence of dacoity.

14. P.W. 7 S.I. Babu Ram who is Investigating Officer of this case has admitted in his cross-examination that the place of burning of lantern in the house was not shown in the site plan Ext. Ka-8 as such place was not told to him by any witness. P.W. 1 has admitted in his cross examination that there was dark night. He has also admitted that dacoits were seen by him in the Angan in lantern light which was hanging at the tree of Vine which was situated in his Angan. According to the evidence of this witness there was one tree of Vine which was standing in his Angan and lantern was burning in hanging at the same tree. This fact is not corroborated with the testimony of P.W.7 or with the site plan. Therefore it has become suspicion that any lantern was burning in the Angan of P.W. l at the time of incident at the Vine tree. In 'absence of lantern light the dacoits could not be identified in the Angan and in the torch light out side of his house in the dark night. It is also worth while to mention here that such lantern and torches have also not been produced at the time of evidence, on behalf of the prosecution.

15. P.W.1 Punni, P.W. 2 Madari, P.W. 4 Lal Mohammad and P.W.6 Kallan have been produced on behalf of the prosecution to prove the case. P.W. 2 is the injured witness. P.W. 6 Kallan is said to be the eye witness but he has not. supported the prosecution case in his deposition.

16. P.W. 1 Punni has already admitted that there was dispute in between the accused-appellants and P.W. 1 regarding the passage. Therefore the complaint was filed against the appellants on behalf of P.W.1 before the alleged occurrence of dacoity. In this complaint Lal Mohammad P.W. 4 was also the witness and he is also the witness in the present occurrence. Therefore he could not be independent witness but he may be treated as interested witness against the accused-appellants. Therefore no any other independent witness of incident has been examined on behalf of the prosecution. P.W. 2 Madari is real brother of P.W. 1. Therefore no reliance can be placed upon the testimony of P.W. 1, P.W.2 and P.W.4 and this possibility cannot be ruled that the offence of dacoity was committed by unknown miscreants and later on the appellants have been involved by P.W.1 on the basis of previous enmity of the complaint case.

17. It is also worth while to mention here that the accused-appellants were not arrested on the spot at the time of committing dacoity nor any looted property was recovered or discovered from their possession or on their pointing out. It is very surprising that all the appellants are resident of same village. They were named in the F.I.R. After one day of the incident they were arrested: by the police but nothing was recovered. This also shows the innocence of the appellants. Therefore it appears that the appellants have been falsely implicated by P.W. 1 in lodging the FIR. due to the enmity. However the trial court has committed the error, illegality in convicting the appellants for the charges levelled against them.

18. In view of discussions made above I am or the considered view that this appeal has force and deserves to be allowed. Consequently this appeal is allowed. The impugned judgment and order passed by the trial court is hereby set aside. All the above four appellants are hereby acquitted for the charges levelled against them. They are on bail. Their bail bonds arc cancelled and sureties discharged. There is no need to surrender them.

19. A copy of this judgment along with the record of court below be sent immediately to the court concerned for its compliance.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.08.2008

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 43788 of 2008

Apatesh Rai ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri C.S. Srivastava
Sri Sudhanshu Srivastava

Counsel for the Respondents:
S.C.

Constitution of India Art. 226- Compassionate Appointment by dependent of Shiksha Mitra-claimed appointment on compassionate ground- in absence of such scheme or G.O. providing benefit of compassionate appointment-Court can not issue such direction.

Held: Para 3

In the absence of any such scheme available for the heirs of the Shiksha Mitra the claim of petitioner is thoroughly misconceived. Moreover, there is another aspect of the matter. The appointment of Shiksha Mitra is made on tenure basis for a particular session. The wife of petitioner has died on 22.05.2008 and for the Session 2008-09 she has no legal right to continue except of consideration of her case for renewal on the basis of her past performance otherwise the post is liable to be filled in by fresh selection. In such kind of appointment normally the claim of compassionate appointment is not attracted.

Case law discussed:
2006(5) SCC 523, JT 2007 (3) 398.

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

1. The petitioner claims compassionate appointment on the ground that his wife who was appointed as Shiksha Mitra for the Session 2002-03 and continued thereafter, died on 22.05.2008 and after her death the petitioner has moved an application seeking compassionate appointment but neither any decision has been taken thereafter nor he has been provided compassionate appointment. He, therefore, prayed that this application be directed to be decided by the respondent no. 4.

2. However, in my view, the writ petition is thoroughly misconceived and, therefore, there is no question of directing the respondent no. 4 to decide the aforesaid application of petitioner. It is not disputed by the petitioner that there is no provision either statutory or otherwise providing for any scheme of compassionate appointment to the heirs of the person who died while working as Shiksha Mitra. It is well settled, if there is no scheme for providing compassionate appointment the same cannot be claimed or granted as held by the Apex Court in **Indian Drugs & Pharmaceuticals Ltd. Vs. Devki Devi and others, 2006(5) SCC 523** and the same has been followed in the case of **State Bank of India Vs. Somvir Singh, JT 2007 (3) 398** wherein the Apex Court held as under:

"There is no right whatsoever nature to claim compassionate appointment on any ground other than one, if any, conferred by the employer by way of scheme or instructions as the case may be."

3. In the absence of any such scheme available for the heirs of the Shiksha Mitra the claim of petitioner is thoroughly misconceived. Moreover, there is another aspect of the matter. The appointment of Shiksha Mitra is made on tenure basis for a particular session. The wife of petitioner has died on 22.05.2008 and for the Session 2008-09 she has no legal right to continue except of consideration of her case for renewal on the basis of her past performance otherwise the post is liable to be filled in by fresh selection. In such kind of appointment normally the claim of compassionate appointment is not attracted.

4. In view of above, it is evident that the petitioner has no personal right to continue on the post of Shiksha Mitra and hence also the concept of compassionate appointment could not affect to such kind of appointment.

5. The writ petition, therefore, lacks merit and is accordingly dismissed.

ORIGINAL JURISDICTION
CRIMINAL SIDE
DATED: ALLAHABAD 08.08.2008

BEFORE
THE HON'BLE BARKAT ALI ZAIDI, J.
THE HON'BLE V.K. VERMA, J.

Criminal Misc. Writ Petition No. 12533 of 2008

Ram Das Dohrey and others ...Petitioners
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioners:
Dr. Arun Srivastava

Counsel for the Respondents:
Sri Shamshuddin Ahmad
A.G.A.

Constitution of India, Art. 226-Quashing of F.I.R.-petitioners Bank authority-allegation of unlock of locker burgling of jewellery of worth Rs.20 lacs-can not be said that no offence made out-held-defalcation of Bank-seeking confidence of general public-if Bank unsafe where people go-No interference called for keeping in view of the verdict of the Apex Court-petition dismissed.

Held: Para 11

The defalcation by the Bank employees should be deemed unpardonable, since it undermines, the confidence of the populace in financial institutions. If they feel Banks are unsafe where the people shall keep their money? It will create confusion and disruption in society, and any lenience, in such mattes will be wholly misplaced.

Case law discussed:
2007 (2) Supreme 661 decided on 27.2.2007

(Delivered by Hon'ble Barkat Ali Zaidi J.)

1. Spiralling crime has reached the portals of the Bank. A mother and her daughter in Budaun City found her locker in the Bank of Baroda, Raees Market Branch, Budaun unlocked and burgled. It contained jewellery worth round 20 lacs.

2. The three bank officials, who are said to have been responsible for the same have been named in the First Information Report.

3. These three Bank officials have come to this Court under Article 226 of the Constitution of India seeking to quash the First Information Report lodged against them in this regard under section 406,506 I.P.C. at P.S. Kotwali There is also an interim prayer for the authorities being restrained from arresting them.

4. We have heard Dr. Arun Srivastava, Advocate, counsel for the petitioners and Sri Shamshuddin Ahmad, Addl. Government Advocate for the State.

5. The petition is liable to dismissal in limine, because, the Supreme Court has unequivocally pronounced in a number of cases that a First Information Report can be quashed, only, when no offence is spelled out from the contents of the First Information Report. Reference in this connection may be made of the case **T. Vengara Naidu versus Dora Swami Naidu and others**, 2007 (2) Supreme 661 decided on 27.2.2007.

6. On the basis of the allegations contained in the First Information Report, it cannot be said that no offence is made out against the accused.

7. One of the contentions of the counsel for the petitioners is that the mother would have removed the jewellery earlier from the locker. That is, however, a matter which will be a subject of investigation, and no presumption can be raised at this stage.

8. The other argument of the counsel for the petitioners is that no offence under sections 406, 504 Indian Penal Code is made out. No reason in the petition has been given, as to why, these offences are not made out. When there is an allegation of jewellery missing from the locker, a prima-facie offence is made out.

9. It cannot be said that in a situation like this, no offence will be made out. It was further pointed out that three of the

petitioners have been in the service of the Bank for the last 31, 27 and 23 year respectively, and they have a clean record. No inference can be drawn from this circumstance, about the innocence, of the petitioners.

10. It was also pointed out by the learned counsel for the petitioners that the financial status of the ladies was not such as to enable them to collect jewellery of around 20 lacs. It was further argued by the counsel for the petitioners that no description of the jewellery has been given in the First Information Report. These are matters of details to be discovered during investigation and no inference from them can be drawn, at this stage, about the allegations being false. It is disconcerting to note that, instead of being helpful, the petitioners were hostile and antagonistic.

11. The defalcation by the Bank employees should be deemed unpardonable, since it undermines, the confidence of the populace in financial institutions. If they feel Banks are unsafe where the people shall keep their money? It will create confusion and disruption in society, and any lenience, in such mattes will be wholly misplaced.

12. Petition dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 13.08.2008

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

First Appeal From Order No. 2448 of 2008

The New India Assurance Company Ltd. ...Appellant
Versus
Lekhraj and others ...Respondents

Counsel for the Appellant:
Sri Vinay Khare

Counsel for the Respondents:

Motor Vehicle Act 1988-Section 163-A, 166-Difference between the two provisions explained-under section 166 No financial limit but under Section 163-a maximum limit of 40,000/-prescribed-deceased getting salary Rs.12,242/- any deduction towards instatement of home loan-can not be excluded Court to consider several factor to award just compensation-No interference called for.

Held: Para 3

We are of the view that such judgement is not supporting the cause of the appellant at all. The ratio of the judgement is that one has to choose as to whether the application will be filed under Section 163-A or under Section 166 of the Act, but both can not be proceeded simultaneously. In case it is under Section 163-A, limitation will be there but in case of application under Section 166 to arrive at a 'just' compensation, the Court has to consider various factors and arrive at the same. We are of the view that at the time of arriving at such finding if the Court considers various parts of the Schedule as a guide, the Court is not said to be at fault in adopting an appropriate process

for the purpose of arriving at compensation. The Court can not limit itself in such circumstance as because principle of structured formula under Section 163-A has been applied. The Court is compelled to arrive at 'just' compensation. There is no question of limit of compensation upto Rs.40,000/- in such circumstance. Submission appears to be misconceived in nature.

Case law discussed:

2007 (2) AWC 2050

(Delivered by Hon'ble Amitava Lala, J.)

1. The appellant-insurance company has challenged the judgement and order dated 26th April, 2008 passed by the concerned Motor Accidents Claims Tribunal, Gautam Budh Nagar. It has been contended by the learned Counsel appearing for the appellant that the claim petition was filed after a period of six months and no number of the vehicle was known at the time of accident when the first information report was lodged immediately on the next date of the accident. However, the police investigation was made, the vehicle was found out and the charge-sheet has been filed against the driver before the appropriate criminal Court of the competent jurisdiction. Therefore, we can not accept any ground with regard to non-involvement of the vehicle.

2. So far as income of the deceased is concerned, the tribunal held that as per the salary certificate the deceased was getting monthly salary of Rs.12,213/- but after deducting loan instalment he was taking home a sum of Rs.7,812/- , which the tribunal ultimately rounded up to Rs.7,800/- as per month salary and upon giving deduction even thereafter arrived at the compensation of Rs.9,66,000/-. Firstly, the insurance company contended that the income was Rs.7,812/- as held by the tribunal. According to us, it is misreading of the learned Counsel appearing for the insurance company because the salary is Rs.12,213/- pre month as per the certificate. Any deduction on account of loan is also part of the salary. Therefore, the tribunal itself came to a finding that the salary will be considered as Rs.7,800/- and upon giving deduction awarded the compensation, which should be held on the lower side but not on the higher side. The insurance-company further contended before this Court that when the tribunal has followed the Second Schedule under Section 163-A of the Motor Vehicles Act, 1988 (hereinafter called as the 'Act'), the quantum of income should be within the highest limit of such schedule i.e. Rs.40,000/- per annum not beyond that, and in support of his contention learned Counsel appearing for the appellant relied upon a Division Bench judgement of this Court reported in **2007 (2) AWC 2050 (Smt. Manjula Devi Mishra and others Vs. Commercial Motors, Kanpur and others).** The relevant portion of such judgement is as follows:

"... Besides, we would like to make it further clear that in view of decision rendered by Hon'ble Apex Court in U.P. State Road Transport Corporation v. Trilok Chandra, (1996) 4 SCC 362, wherein Hon'ble Apex Court has held that the multiplier and structural formula provided under Second Schedule of the Act can be used as guide for determination of compensation to be awarded to the claimants but in Deepal Girish Bhai Soni and others v. United India Insurance Co. Ltd., Baroda, AIR 2004 SC 2107: 2004 (3) AWC 2011 (SC) Hon'ble Apex Court has categorically

held that the claim petition under Section 163A can be maintainable only in respect of the victims of motor accident having annual income maximum upto Rs.40,000. Therefore, in our opinion, in cases where the allegations are made that the income of the victim is more than Rs.40,000 per annum it is not open for the Tribunal to entertain the claim petition under Section 163A of the Act, such claim petition can be maintainable under Section 166 of the Motor Vehicles Act, thus, it is not open for the Motor Accident Claims Tribunal to take advantage of Second Schedule of the Motor Vehicles Act and multiplier used therein where the income of victims of motor accident is more than Rs. 40,000 per annum. The multiplier in respect of age of victims of motor accident has co-relation with the income of the victims in the Second Schedule. Therefore it is not open for the Claim Tribunals to determine the annual income of the victim of motor accident over and above Rs.40,000 and then apply the multiplier on the basis of age alone as provided in the Second Schedule of the Act."

3. We are of the view that such judgement is not supporting the cause of the appellant at all. The ratio of the judgement is that one has to choose as to whether the application will be filed under Section 163-A or under Section 166 of the Act, but both can not be proceeded simultaneously. In case it is under Section 163-A, limitation will be there but in case of application under Section 166 to arrive at a 'just' compensation, the Court has to consider various factors and arrive at the same. We are of the view that at the time of arriving at such finding if the Court considers various parts of the Schedule as a guide, the Court is not said to be at fault in adopting an appropriate process for the purpose of arriving at compensation. The Court can not limit itself in such circumstance as because principle of structured formula under Section 163-A has been applied. The Court is compelled to arrive at 'just' compensation. There is no question of limit of compensation upto Rs.40,000/- in such circumstance. Submission appears to be misconceived in nature.

4. Therefore, in totality we do not find any ground for the purpose of admitting the appeal. Hence, the appeal is dismissed at the stage of admission, however, without imposing any cost.

5. Incidentally, the appellant-Insurance Company prayed that the statutory deposit of Rs.25,000/- made before this Court for preferring this appeal be remitted back to the concerned Motor Accidents Claims Tribunal as expeditiously as possible in order to adjust the same with the amount of compensation to be paid to the claimant, however, such prayer is allowed. Appeal dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 08.09.2008

BEFORE
THE HON'BLE V.M. SAHAI, J.
THE HON'BLE PANKAJ MITHAL, J.

Special Appeal No. 1142 of 2008

Smt. Neelu Devi ...Appellant/Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Appellant:
Sri Indrasen Singh Tomar
Sri Man Bahadur Singh

Counsel for the Respondents:
Sri Anuj Kumar
Sri Jagdish Pathak
Sri Tej Bhan Singh
S.C.

Constitution of India, Art.-226- Appointment of Shiksha Mitra- petitioner/Appellant although stood highest in merit-challenged on ground of her defective application due to want of domicile certificate-contention regarding extension of time by village Pradhan- illegal every application must be supported with domicile certification- rejection order as well as the view taken by learned Single Judge justified.

Held: Para 6

We accordingly, hold that the submission of the domicile certificate along with the application for appointment for Shiksha Mitra is a must and non submission of the same within time renders the application form incomplete and liable for rejection.

(Delivered by Hon'ble V.M. Sahai, J.)

1. We have heard Sri Man Bahadur Singh learned counsel for the appellant, learned Standing counsel for respondents no. 1 to 4, Sri Anuj Kumar for respondent no. 5, Sri Jagdish Pathak learned counsel appearing for respondent no. 6 and Sri Tej Bhan Singh, learned counsel appearing for respondent no. 7.

2. A single post of Shiksha Mitra of Prathamic Vidhyalaya Sikandarpur Aaima, block Mahrajganj, Tehsil Sagari district Azamgarh was advertised on 24th December 2006. The last date of submitting the application form complete in all respect was 24.1.2007. Three candidates including the appellant Smt. Neelu Devi and the respondent no. 6 Smt. Saroj Yadav applied within time. Smt. Neelu Devi submitted her application form in the prescribed proforma on 22.1.2007 but without annexing the copy of the domicile certificate. On her application seeking time for submitting such certificate the Gram Pradhan allowed her time uptil 30.1.2007 to submit the domicile certificate. She obtained domicile certificate on 27.1.2007 certifying that she is resident of the village concerned and the said certificate was presented and taken on record on the same day. In the selection, she secured higher marks and was selected. Her name was recommended for appointment as Shiksha Mitra by the Gram Shiksha Samiti and the same was approved by the District Level Committee also. Aggrieved by her selection, Smt. Saroj Yadav filed writ petition no. 11624 of 2008 which was disposed of with the direction to the District Magistrate to consider the grievance of Smt. Saroj Yadav by a speaking order. In pursuance thereof after hearing the parties concerned and calling for the report of the Basic Shiksha Adhikari, the District Magistrate vide order dated 6.6.2008 allowed the representation of Smt. Saroj Yadav and held that the application form of Smt. Neelu Devi was incomplete as it was not accompanied by the domicile certificate and as such her candidature was not valid.

3. The above order of the District Magistrate was challenged by the appellant Smt. Neelu Devi by filing writ petition no. 31675 of 2008. The petition was dismissed by learned Single Judge vide judgment and order dated 20.8.2008 which has been impugned in the present special appeal.

4. The first submission of the learned counsel for the appellant is that the appellant Smt. Neelu Devi's candidature could not have been rejected by the District Magistrate on the ground that her application form was incomplete. She had submitted the domicile certificate though after expiry of the last date for submitting the application form, but within time allowed by the Gram Pradhan who happens to be the member of the Gram Shiksha Samiti. This submission can not be accepted for the reason that the authority to accept the application form and to recommend the name of selected candidate for appointment as Shiksha Mitra under the scheme dated 1.7.2000 as amended from time to time vests with the Gram Shiksha Samiti. The Gram Pradhan personally or in his capacity as the President or the member of the Gram Shiksha Samiti has no authority of law to extend the time for submitting the application form or the documents/certificates in support thereof. Admittedly, no extra time was given by the Gram Shiksha Samiti to the appellant for submitting the domicile certificate. Therefore, when on the last date of submitting the application forms the appellant's application was in complete it was liable to be rejected as per para 7 (Da) of the amended scheme dated 10.10.2005. The scheme categorically provides that all required documents/certificates must be annexed along with the application form and that no extra time will be provided for the purpose. Therefore, the time schedule for submitting the application forms is required to be strictly followed without any deviation and the purpose being to avoid chaos and chances of large scale manipulations.

5. Learned counsel for the appellant next submitted that under the scheme there is no specific provision requiring submission of the domicile certificate with the application form and therefore the rejection of the candidature of the appellant Smt. Neelu Devi is wholly illegal. A perusal of the scheme for Shiksha Mitra reveals that it is not a scheme for employment but a scheme to provide education to the illiterate class of villagers. The scheme envisages for giving preference for appointments of Shiksha Mitra to the persons who are resident of the village concerned. Therefore, to verify the place of residence of the candidate, a domicile certificate issued by the competent authority certifying the candidates place of residence appears to be necessary. Therefore, even if in the amended scheme there is no specific reference that the candidate has to submit a domicile certificate along with the application form, nonetheless in view of the object of the scheme and the language of the advertisement the submission of all certificates including domicile candidates is mandatory.

6. We accordingly, hold that the submission of the domicile certificate along with the application for appointment for Shiksha Mitra is a must and non submission of the same within time renders the application form incomplete and liable for rejection.

7. In view of the aforesaid discussion, we are of the opinion that the learned Single Judge has not erred in dismissing the writ petition of the appellant.

Accordingly, the appeal fails and is dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED; ALLAHABAD 11.09.2008

BEFORE
THE HON'BLE S. RAFAT ALAM, J.
THE HON'BLE SUDHIR AGARWAL, J.

Special Appeal No. 80 of 1998

Sri Ram Swaroop Kainthola ...Appellant
Versus
Director of Education (Secondary) U.P. Allahabad and others ...Respondents

Counsel for Appellant:
Sri Rakesh Thapliyal
Sri Deepak Jaiswal
Sri Narendra Mohan
Sri Santosh Tripathi

Counsel for the Respondents:
Sri Shrikant Shukla
Sri B.D. Upadhyaya

U.P. Intermediate Education Act 192-Chapter II Regulation 3 (1)(b)-Seniority-date of appointment of petitioner and respondent no. 4 in C.T. Grade is same-R-4 promoted in L.T. grade on 26.4.90 while petitioner after completion of 10 years service given the benefit of L.T. grade salary only on 9.1.95-held-getting salary in particular pay scale can not be treated validly appointed-even otherwise R-4 was treated senior to the petitioner at every stage-never questioned by the petitioner-No occasion to claim seniority against R-4.

Held: Para 7

To the same effect is the view taken in Virendra Pandey Vs. State of U.P. and others, 1994(24) ALR 19 and Km. Sheela Sanyal Vs. State of U.P. and others, 1995 ALJ 589. A Single Judge of this Court (Hon'ble Dr. B.S. Chauhan, J., as His Lordship then was) in Madan Gopal Agrawal Vs. The District Inspector of Schools, Bijnor and others, 1996 (3) ESC 202 after referring to the relevant Government Orders said that grant of L.T. grade under the aforesaid Government Orders is personal and it does not mean holding of a post in L.T. grade inasmuch as, when such person would retire it would result in a vacancy in C.T. grade and not in L.T. grade. The incumbent cannot be said to hold post of Assistant Teacher in L.T. grade. Another Single Judge of this Court (Hon'ble Ashok Bhushan, J.) in Writ Petition No. 39731 of 2000, Ansal Lal Jha Vs. District Inspector of Schools, Badaun and another, decided on 13.02.2006 has followed the same. Besides, one of us (Hon'ble Sudhir Agarwal, J.) has also taken the same view in Smt. Bharti Roy Vs. Deputy Director of Education II, Kanpur and others, 2008(2) ESC 911. We are in respectfully agreement with the view taken in the aforesaid judgements. Since the petitioner was never appointed in L.T. grade but was only granted said pay scale as per the Government Order dated 03.06.1989, it is evident that he has no occasion to claim seniority over respondent no. 4 who has been promoted in L.T. grade and that too on regular basis w.e.f. 30.06.1996.

Case law discussed:
1993 (2) ESC 456, 1994(24) ALR 19, 1995 ALJ 589, 1996 (3) ESC 202, Writ Petition No. 39731 of 2000, 2008(2) ESC 911

(Delivered by Hon'ble S. Rafat Alam, J.)

1. This matter has been listed for orders with the office note dated 10.07.2007. We are of the view that the notice sent to respondent no. 3 shall be deemed to have served in view of the provisions contained under Chapter VIII, Rule12, Explanation II of the High Court Rules. However, on the request made by learned counsel for the parties the appeal

itself is taken up for hearing on merits and is being decided at this stage.

2. Heard Sri Deepak Jaiswal learned counsel for the appellant, learned Standing Counsel for respondents no. 1 and 2 and Sri Srikant Shukla, learned counsel appearing for respondent no. 4.

3. Aggrieved by the judgement dated 20.11.1997, whereby Hon'ble Single Judge has dismissed the Writ Petition No. 32056 of 1997 of the petitioner-appellant *(hereinafter referred to as the "petitioner")* disputing his seniority qua respondent no. 4, the petitioner has filed this intra Court appeal under the Rules of the Court.

4. The submission of learned counsel for the petitioner is that in B.T.C. grade the petitioner and respondent no. 4 were appointed on the same date i.e. 01.08.1977 and in C.T. Grade also they were promoted on the same date i.e. 19.01.1985. The respondent no. 4 was promoted in L.T. grade on ad hoc basis on 26.04.1990 while the petitioner was promoted in L.T. grade on 09.01.1995 after completion of his 10 years of service in C.T. Grade as per the Government Order dated 03.06.1989. But in view of the Regulation 3(1)(b) of Chapter II of the Regulations framed under U.P. Intermediate Education Act, 1921 he contended that the seniority of teachers in a grade shall be determined on the basis of their substantive appointment in that grade, therefore, the petitioner was entitled to be treated senior to respondent no. 4 on the basis of age. He submitted that the Hon'ble Single Judge has erred in law in not considering this aspect of the matter correctly.

5. However, we do not find any force in the submission. From the record it is evident that in B.T.C. grade and in C.T. Grade both petitioner and respondent no. 4 were appointed and promoted on the same date but throughout, respondent no. 4 was treated senior to the petitioner and that was never challenged by him. The respondent no. 4 being senior in C.T. Grade was granted promotion on ad hoc basis in L.T. grade on 26.04.1990 and was regularised on 30.06.1996 when the post fell substantially vacant due to the retirement of the incumbent. That promotion of respondent no. 4 was also not challenged by petitioner at any point of time. As his own case the petitioner was given L.T. grade on 09.01.1995. That being so, the respondent no. 4 in all circumstances is senior to the petitioner in L.T. grade having been appointed in the said grade much earlier to the petitioner. Moreover, the petitioner was not promoted in L.T. grade on 09.01.1995 but was allowed the said scale pursuant to the Government Order dated 03.06.1989 after having been completed his 10 years in C.T. grade. This Court in **Vipin Kumar Vs. D.I.O.S. and others, 1993 (2) ESC 456**, held that mere grant of pay scale in a particular grade is not equivalent to holding of substantial cadre in a particular grade. In para 9 of the judgement the Division Bench has said:

"A Teacher who is working in L.T. grade is to be promoted to the post of Lecturer's grade in the sense that he is to be promoted to the post of Lecturer in an institution. A teacher may be given Lecturer's pay scale but he may not be given the post. Unless he is given a post the mere fact that he has been given Lecturer's pay scale will not be taken as to have given him the post of Lecturer

unless he is duly promoted to the said post in accordance with the provisions of a Statute."

6. In the present case here is a matter where it is the grant of L.T. grade after rendering 10 years service in C.T. grade but the law laid down in **Vipin Kumar (supra)** would ipso facto apply with full force.

7. To the same effect is the view taken in **Virendra Pandey Vs. State of U.P. and others, 1994(24) ALR 19** and **Km. Sheela Sanyal Vs. State of U.P. and others, 1995 ALJ 589**. A Single Judge of this Court (Hon'ble Dr. B.S. Chauhan, J., as His Lordship then was) in **Madan Gopal Agrawal Vs. The District Inspector of Schools, Bijnor and others, 1996 (3) ESC 202** after referring to the relevant Government Orders said that grant of L.T. grade under the aforesaid Government Orders is personal and it does not mean holding of a post in L.T. grade inasmuch as, when such person would retire it would result in a vacancy in C.T. grade and not in L.T. grade. The incumbent cannot be said to hold post of Assistant Teacher in L.T. grade. Another Single Judge of this Court (Hon'ble Ashok Bhushan, J.) in **Writ Petition No. 39731 of 2000, Ansal Lal Jha Vs. District Inspector of Schools, Badaun and another**, decided on 13.02.2006 has followed the same. Besides, one of us (Hon'ble Sudhir Agarwal, J.) has also taken the same view in **Smt. Bharti Roy Vs. Deputy Director of Education II, Kanpur and others, 2008(2) ESC 911**. We are in respectfully agreement with the view taken in the aforesaid judgements. Since the petitioner was never appointed in L.T. grade but was only granted said pay scale as per the Government Order dated 03.06.1989, it is evident that he has no occasion to claim seniority over respondent no. 4 who has been promoted in L.T. grade and that too on regular basis w.e.f. 30.06.1996.

8. In the circumstances, we do not find any error legal or factual in the judgement under appeal. The appeal lacks merit and is accordingly dismissed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 29.08.2008

BEFORE
THE HON'BLE AMITAVA LALA, J.
THE HON'BLE SHISHIR KUMAR, J.

First Appeal From Order No. 991 of 2008

New India Assurance Co. Ltd.
...Defendant/Appellant
Versus
Smt. Prabhawati Devi and others
...Respondents

Counsel for the Appellant:
Sri Arvind Kumar

Counsel for the respondents:

(A) Words and Phrases-"Gratuitous Passengers" explained as per dictionary of law of Laxcan-as a passenger carried out on account of grace.

Held: Para 4

According to us, "*gratuitous passenger*" is neither authorised passenger nor unauthorised passenger. A "*gratuitous passenger*" is a passenger who has been carried out on account of grace.

(B) Motor Vehicle Act, 1988-Section 147-Gratuitous Passengers-whether the owner of goods travelling in cabin of

truck be treated within the meaning of Gratuitous passenger-held-"No".

Held: Para 8

In (2005) 12 SCC 243 (National Insurance Co. Ltd. Vs. Bommithi Subbhayamma And Others) and (2008) 1 SCC 423 (National Insurance Co. Ltd. Vs. Cholleti Bharatamma And Others) repeatedly this question arose before the Supreme Court. In the latest judgment, as aforesaid, Supreme Court has clarified that it is well settled that the owner of the goods means only the person who travels in the cabin of the vehicle. According to us, law does not say that whether owner of the goods or his authorised representative carried in the vehicle means only the person travelled in the cabin of the vehicle. Therefore, this aspect of the matter is yet open for the discussion. However, since in the present case owner of the vehicle carried in the cabin he can not be said a "*gratuitous passenger*".

Case law discussed:

206 Kan. 199. (2000) 1 SCC 237=2000 SCC (Cri) 130, (2003) 2 SCC 223 = (2003) SCC (Cri) 493, 2004 (2) SCC 1, (2005) 12 SCC 243, (2008) 1 SCC 423

(Delivered by Hon'ble Amitava Lala, J.)

1. This appeal filed by the Insurance Company arises out of judgment and order dated 21.01.2008 passed by the concerned Motor Accidents Claims Tribunal, Mirzapur awarding a sum of Rs.3,20,200.00 alongwith interest @ 7% per annum from the date of presentation of claim petition till its realisation payable to the claimants on account of death of the deceased.

2. The fact remains that the deceased was travelling by a truck no. U.A.N. 8427 as owner of cattle being cows and buffaloes alongwith son, a trader, driver and cleaner sitting in cabin. The vehicle was allegedly driven rashly and negligently by the driver which hit a tree and met with an accident as a result whereof the deceased died and his son become injured. The version of the driver is that he wanted to save some stray cattle on the road when the truck hit a tree and met with an accident. The tribunal accepted the version of the eye witness i.e. son of the deceased and held that the driver was rash and negligent at the time of driving the vehicle. It has also been held by the tribunal that the opposite parties not cross examined the witness on that score. From the analysis of the evidence, as made by the tribunal, it appears that the vehicle was carrying cattle i.e. cows and buffaloes and the driver rashly and negligently driven the vehicle. There was no violation of insurance policy. Before the tribunal at no point of time neither any issue was framed nor any discussion was held as to whether the deceased was "*gratuitous passenger*" or not. However, the appellant has raised such issue before the Court of appeal for the first time.

3. Against this background we have to see what is the meaning and import of the "gratuitous passenger" and its applicability in the present case. Meaning of "*gratuitous passenger*" is not available in the Motor Vehicles Act, 1988. As per Black's Law Dictionary, Sixth Edition, in a motor vehicle law, a person riding at invitation of owner or authorised agent without payment of a consideration or fare is a "*gratuitous passenger*". "Gratuitous passenger" is comparable with gratuitous guest. Therefore, we have to go by the meaning of *"guest"*. A "guest" in an automobile is one who takes ride in automobile driven by another

person, merely for his own pleasure or on his own business, and without making any return or conferring any benefit on automobile driver. *"Guest"* is used to denote one whom owner or possessor of vehicle invites or permits to ride with him as gratuity, **without any financial return except such slight benefits as are customarily extended as part of ordinary courtesies of road. See Rothwell v. Transmeier, 206 Kan. 199**.

4. According to us, "*gratuitous passenger*" is neither authorised passenger nor unauthorised passenger. A "*gratuitous passenger*" is a passenger who has been carried out on account of grace.

5. Section 147 of the Act contemplates policy of insurance against any liability which may be incurred by a person in respect of the death of or bodily injury to any person, **including owner of the goods or his authorised representative carried in the vehicle** or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place etc.

6. Therefore, the legal position is to be analysed hereunder. Previously, under Section 147 of the Act question of death or bodily injury to "*any person*" was incorporated in such Section. By an amendment w.e.f. 14.11.1994 it has been incorporated as *"injury to any person",* including owner of the goods or his authorised representative carried in the vehicle....."
Therefore, the expanded scope of *"any person"* even towards the "*gratuitous passenger*" was restricted to owner of the goods or his authorised representative carried in the vehicle. Hence, in accordance with law if they are being carried in the vehicle they should not be seem to be "*gratuitous passenger*". Such person includes the nomenclature "*any person*" as per the law itself. Therefore, as and when in a case it is proved beyond doubt that the owner was carried by vehicle he can not refuse in making compensation

7. According to us, "*any person*" means valid occupier of the vehicle and also outside the vehicle being "*third party*" by the analysis of the Supreme Court reported in **(2000) 1 SCC 237=2000 SCC (Cri) 130 (New India Assurance Company Vs. Stapal Singh and others)** "*any person*" includes gratuitous passenger. In **(2003) 2 SCC 223 = (2003) SCC (Cri) 493 (New India Assurance Co. Ltd. Vs. Asha Rani and others)** Supreme Court said 'no', "*any person*" does not include "*gratuitous passenger*". In **2004 (2) SCC 1 (National Insurance Co. Ltd. Vs. Baljit Kaur and others**) three Judges Bench of the Supreme Court held that there is no ambiguity under Section 147 of the Act. Earlier the words "*any person*" could be held not to include the owner of the goods or his authorised representative travelling in the goods vehicle. Parliament has now made it clear that such a construction is no longer possible. Now we find from the interpretation of the Supreme Court that the words "any person" as used in Section 147 of the Act, would be rendered otiose by an interpretation that removed "*gratuitous passengers*" from the ambit of the same. In other words, the owner of the goods and his authorised representative carried in the vehicle can not be said to be gratuitous passenger.

8. In **(2005) 12 SCC 243 (National Insurance Co. Ltd. Vs. Bommithi**

Subbhayamma And Others) and **(2008) 1 SCC 423 (National Insurance Co. Ltd. Vs. Cholleti Bharatamma And Others)** repeatedly this question arose before the Supreme Court. In the latest judgment, as aforesaid, Supreme Court has clarified that it is well settled that the owner of the goods means only the person who travels in the cabin of the vehicle. According to us, law does not say that whether owner of the goods or his authorised representative carried in the vehicle means only the person travelled in the cabin of the vehicle. Therefore, this aspect of the matter is yet open for the discussion. However, since in the present case owner of the vehicle carried in the cabin he can not be said a "*gratuitous passenger*".

9. Hence, we do not find any merit in the appeal and as such the same is dismissed even at the stage of admission, however, without imposing any cost.

10. Incidentally, the appellant-insurance company prayed that the statutory deposit of Rs.25,000/- made before this Court for preferring this appeal be remitted back to the concerned Motor Accidents Claims Tribunal as expeditiously as possible in order to adjust the same with the amount of compensation to be paid to the claimants, however, such prayer is allowed.

APPELLATE JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 22.08.2008

BEFORE
THE HON'BLE PANKAJ MITHAL, J.

Second Appeal No. 1595 of 1976

Ram Bharose Lal and another
...Plaintiff-Appellants
Versus
Tula Ram and others
...Defendants-Respondents

Counsel for the Appellants:
Sri Anil Sharma
Sri Rishi Ram
Sri K.K. Tiwari

Counsel for the Respondents:
Sri S. Alim Shah
Sri R.K. Shukla
Sri Jitendra Nath Singh
Sri Nagendra Kumar Srivastava
Sri Anil Shukla
Sri Neeraj Agrawal

Code of Civil Procedure-Section 100-Substantial Question of law-misinterpreting or mis reading document-itself a question of law-concurrent finding of fact recorded by Courts below-not sustainable-suit decreed.

Held: Para 17 & 23

From the legal position discussed above, it is clear that where a document of title has been misinterpreted, misconstrued or even misread it involves a substantial question of law or at-least a question of law.

Thus, I hold that the courts below have grossly erred in holding that the plaintiff/appellants are not the owners of the 'Rasta' by misreading the document of title. The substantial

question framed above as such is answered in affirmative in favour of the plaintiff/appellants.

Case law discussed:

AIR 2000 SC 3009, AIR 1928 PC 172, AIR 1996 SC 3111, (1999) 9 SCC 237, JT 2007(6) SC 347, AIR 1968 Allahabad 184, 2002 (4) AWC 2674 (S.C.), AIR 1959 SC 24, AIR 1962 SC 1314,

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

1. The dispute involved in this second appeal is about an '*Abchak'* (small piece of land used for flowing water) and a 9 ft. wide *'Rasta'*.

2. The plaintiff/appellants herein i.e. Ram Bharose Lal and Ram Autar instituted a suit for possession and permanent injunction in respect of the above disputed properties. The basis of the suit happens to be a sale deed dated 3.9.59 which was executed by Kunwar Hari Raj Singh transferring some land in their favour. The defendant/respondents contested the suit denying the title of the plaintiff/appellants over the aforesaid properties and at the same time claiming easementary right by prescription over the *'Rasta'*. The suit was dismissed by the court of first instance and the appeal of the plaintiff/appellants also met the same fate. Thus having lost from both the courts below they have preferred this second appeal.

3. The appeal was admitted vide order dated 15.10.1976 and a substantial question of law was framed on 31.3.2008 which is as under:

"Whether both the courts below committed an error of law in misinterpreting the title deed of the plaintiff-appellants?"

4. Heard Sri Anil Sharma learned counsel for the plaintiff/appellants and Sri S. Alim Shah, learned counsel for respondents.

5. The contention of the learned counsel for the plaintiff/appellants is that the courts below have misinterpreted and misconstrued the sale deed dated 3.5.59 in so far as on the complete and harmonious reading of the same it is evident that the plaintiff/appellants have purchased not only a piece of land but also the disputed *'Rasta'* under the said sale deed.

6. As regards the *'Abchak'* he has moved an application for taking additional evidence on record under Order XLI Rule 27 C.P.C. He contends that the partition deed between the family members of the defendant/respondents which he seeks to adduce as additional evidence clearly indicates that the '*Abchak*' in dispute is not the property of the defendant/respondents. The application has been strongly opposed by the defendant/respondents and it has been alleged that any such evidence which was within the knowledge of the plaintiff/appellants cannot be taken as additional evidence at this stage of the second appeal after it had remained pending for more than 22 years as no reasons have been disclosed for not bringing it on record earlier or in the courts below.

7. In my opinion, the aforesaid controversy with regard to the ownership right of the plaintiff/appellants over the *'Abchak'* can be resolved even without referring to any additional evidence. The plaintiff/appellants are the persons who are claiming ownership over the same,

therefore, it is for them to prove their title over it. The statement of the counsel for the plaintiff/appellants as recorded under Order X Rule 2 C.P.C. in the lower court on 19.7.71 in unequivocal terms states that the plaintiff/appellants are claiming ownership of the *'Abchak'* on the basis of the sale deed dated 3.5.59. The relevant portion of his statement as recorded on 19.7.71 is reproduced here-in-below:

"Sri O.P. Goyal for the plaintiff states that the plaintiffs are owners of the 'abchak' mentioned in para 5 (b) of the plaint through the deed of sale dated 5.9.1959."

8. In view of the above statement the entire claim of the plaintiff/appellants in respect of the *'Abchak'* is only by virtue of the sale deed dated 3.5.1959. I have gone through the above sale deed Ex. 1 on record. The sale deed nowhere recites that the said *'Abchak'* is also a subject matter of the transfer therein. The *'Abchak'* as such, has not been transferred by the said sale deed in favour of the plaintiff/appellants. Therefore, the entire thrust of the claim of the plaintiff/appellants in respect of the said *'Abchak'* on the basis of the above sale deed falls to the ground. Apart from the above, P.W.1 i.e. Ram Bharose Lal himself specifically states as per his statement that he is not the owner of the *'Abchak'*. Thus, the claim of the plaintiff/appellants in respect to the ownership of *'Abchak'* does not survive at all and as such any amount of additional evidence on this issue would not help them particularly in view of the statement of their counsel referred to above which is not disputed or is said to be incorrect. The plaintiff/appellants, therefore, cannot be permitted to improve their claim of ownership over *'Abchak'* by the evidence other than the sale deed and to override the statement of their counsel. Accordingly, application for additional evidence is virtually insignificant and requires no specific order and stands disposed of.

9. In view of aforesaid, i.e. the statement of the counsel for the plaintiff/appellants recorded under Order X Rule 2 C.P.C., the recital of the sale deed and the statement of P.W.1 Ram Bharose Lal, the inevitable conclusion on the point is that the plaintiff/appellants are not the owners of the said *'Abchak'*.

10. Therefore the finding about the ownership of the *'Abchak'* as recorded by the courts below is correct and suffers from no perversity.

11. Now I proceed to answer the substantial question of law as has been framed so as to adjudicate the rights of the parties in respect of the *'Rasta'*.

12. Sri S.A. Shah, learned counsel for the respondents at the outset has submitted that there is no misinterpretation or mis-construction of the sale deed by the courts below and, as such, no substantial question of law is involved in this second appeal.

13. In ***AIR 2000 SC 3009 Santakumari and others Vs. Lakshmi Amma Janaki Amma and others*** Supreme Court while considering the ambit of substantial question of law under Section 100 C.P.C. ruled that construction of a document under which a claim of property is made is a substantial question of law is a well settled proposition of law. This view was expressed by the Supreme

Court relying upon the earlier decision reported in ***AIR 1928 PC 172 Guran Ditta Vs. T. Ram Ditta*** as reaffirmed by the Supreme Court in ***AIR 1996 SC 3111 Kochikakkada Aboobacker Vs. Attah Kasim*** and ***(1999) 9 SCC 237 Neelu Narayani Vs. Lakshmanan***.

14. A similar view has been expressed by the Supreme Court in ***JT 2007(6) SC 347 P. Chandrasekharan and others Vs. S. Kanakarajan and others*** in the following words:

"13. There cannot be any doubt whatsoever that a substantial question of law is different from a question of law. Interpretation of a document which goes to the root of the title of a party to the lis would indisputably give rise to a question of law.

.....

.....

19. When thus the courts below misread and misinterpreted a document of title read with other documents and the plan for the identification of the suit lands whereupon the plaintiffs themselves relied upon, a substantial question of law arose for determination of the High Court in between the parties to the suit."

15. Thus, from the above two decisions of the Apex Court it is evident that where a document on which the title of the parties is based has been misinterpreted or even misread it would amount to a substantial question of law as it affects the valuable rights of the parties concerning tangible property.

16. On the other hand, Sri S.A. Shah has placed reliance upon ***AIR 1968 Allahabad 184 Parmatma Prasad Vs. Mt. Sampatti and other***. In this case a single Judge of Allahabad High Court while considering the words "mis-construction of a document" held that if a court has mis-constructed the legal affect and the nature of the document it would amount to mis-construction or mis-interpretation eg. where a document creates a lease deed but the court interprets the same to be a licence. The interpretation of the recital of the facts in the document would not amount to mis-construction of the document but would only be an erroneous view of the facts contained in the document. A similar view has been expressed by the Apex Court in the case of ***Ram Kishore and another Vs. Shanker Lal 2002 (4) AWC 2674 (S.C.)*** and it has been laid down that a consideration of a document of alienation of a property as to whether it is gift or a sale is a question of law. In ***AIR 1959 SC 24 Radha Sundar Dutta Vs. Mohd. Jahadur Rahim and others*** it has been laid down that the nature of the rights granted under a document is a matter to be decided on the consideration of the terms of the document which is a question of law. Further ***AIR 1962 SC 1314 Pattabhiramaswamy Vs. Sittarnumayya*** provides that a matter with regard to the construction of the terms of the document is a question of law. The relevant extract of the aforesaid ruling is reproduced here-in-below:

"It is well settled that a construction of a document of title or a document which is the foundation of the rights of the parties necessarily raises a question of law."

17. From the legal position discussed above, it is clear that where a document of title has been misinterpreted, misconstrued or even misread it involves

a substantial question of law or at-least a question of law.

18. Thus, in the instant case even though the sale deed dated 3.5.59, which is a document of title may not technically involve misconstruction or misinterpretation but even its misreading by the courts below is sufficient to give rise to a substantial question of law or at least a question of law which do requires consideration in this second appeal.

19. Now this second appeal was admitted on 15.10.76 i.e. much before the CPC Amendment Act 104 of 1976 was enforced w.e.f. 1.2.77. Section 97(2)(m) of the said CPC Amendment Act provides that the amendment introduced by Section 37 of the said Act mandating framing of substantial question of law before deciding second appeal would not apply to the second appeals which have been admitted before the enforcement of the aforesaid Section 37 and, as such, shall be decided as if such amendment has not come into force. Thus,. Framing of substantial question of law is not necessary where the second appeal has been admitted prior to 1.2.77 and such second appeals can be decided only on the basis of the question of law as was provided under the unamended CPC.

20. To examine as to whether the courts below have actually misread the sale deed dated 3.5.59 affecting the title of the plaintiff/appellants over the 'Rasta' it is appropriate to reproduce the same which is in Hindi as a whole:

"मैं कि श्री कुँवर हरी राज सिंह पुत्र श्री कुँवर राम सिंह साहब साकिन व रईस क़स्बा हल्दौर परगना दारानगर तहसील व ज़िला बिजनौर का हूँ।

जो कि एक किता आराजी महदुदा व पैमूदा जेल वाके मन्डी कस्बा नहटौर तहसील धामपुर जिला बिजनौर कि जिसका रास्ता आम दो रफ़्त नो फिट चोडा सहन बेरूनी में मिनजानिब पूरब होकर बसिम्त उत्तर खड़न्जा सरकारी पर को क़ायम है। जो बरूये तक़सीय खान्दानी बज़रिये सुलहनामा ब अदालत सिविल जजी बिजनौर ब मुक़दमा नम्बरी 20 सन 1955 ई. मुझ मुक़ीर बनाम श्री शिव महन्द्र कुमार सिंह वग़ैरा मुनफसला 31 मार्च सन 1955 ई. बशमूल दीगर जायदाद मुझ मुकीर की मिलमियत है जो पट्टा दवामी पर बरूये फैसला बाहमी बअदालत मुनसफी नगीना बमुक़दमा नम्बरी 494 सन 1949 ई० श्रीमती रानी बीबी कुंवर साहिबा बनाम शिखर चन्द वगैरा मुनफ़सला 22 दिसम्बर सन 1942ई. व बरूये पट्टा कबूलियत दवामी इकरारी शिखर चन्द मज़कूर फ़रीक अव्वल व श्रीमती रानी बीबी कुंवर साहिबा मौसूफा फरीक दोयम मवर्रिखा 22 दिसम्बर सन् 1942 ई. कि जिसकी रजिस्ट्री बही नं० एक जिल्द 344 के सुफ़ात 227 व 228 पर व 765 पर बतारीख 24 दिसम्बर सन 1942 ई० को दफ़्तर सिब रजिस्टरार धामपुर में हुई है कि राये पर देरक्ख्वी है कि जिस पर शिखर चन्द मज़कूर बअप्रदाये किराया
अब तक बतौर किराये दाराना क़ाबिज चले आते है। मुझ मुकीर को निस्बत आराजी मज़कूरा मय जुमला मुतश्रजिक़ात व हक़ हक़ूक के माल का नाअख्तियारात हासिल है। और हमको मजाज़ इअक़ात है। लिहाजा मुझ मुकीर ने बखुशी अपनी बदुरूस्ती हवास खमसा किता मजकरा बाला मय रास्ता व जुमला हक़ूक हर किस्म जो कुछ उससे ताअलुक रखते हैं बदले में मु. सात सौ रू. 700/- कि आधो जिसके मु० तीन सौ पचास 350/- रू. होते हैं हाथ श्री राम भरोसे लाल व रामऔतार पिसरान लाला छदम्मा लाल जैन साकिनान कस्बा नहटौर के बै कर दिया । और कुल ज़रे समन हस्ब तफ़सील जैल मुझ मुकीर ने मुशतरियान से वसूल या लिया और कता मुबैया मज़कूरा से कतई और अपना क़बजा मालिकाना उठा लिया और क़ब्जा बख़बी आज की तारीख से बमिस्ल अपने मुशतरियान का करा दिया तारीख इमरोजा से मुशतरियान को जुमला अख्तियारात मालिकाना वसूली किराया वबैरा हर तरह पर हासिल हो गये अब हमारा या किसी वारिसान या क़ायम मुक़काम हमारे का कोई हक़मा दावा निस्बत वसूली ज़रे समन व शैमुबय्या की बाबत बाकह नहीं रहा न आइन्दा होगा अगर कोई शरीक या सहीम कानूनी या शास्तरी पैदा होकर किसी तौर दावेदार होवे जो जवाब देही हर क़िस्म मय वापसी ज़रे समन वग़ैरा के बज़िम्मे मुझ मुकीर होगी लिहाजा यह बैनामा लिख दिया कि सनद रहे और वक्त पर काम आवे। नाम क़ता मुबय्या मज़कूरा अलावा रास्ता पूरबी व आब चक पच्छिमी के यह है।

पूरब पच्छिम छत्तीस 36 फिट- दक्खिन उत्तर सताइस फ़िट चार इन्च 27 फि० 4 इ।० हदुद यह हैं। पूरबी-सहन के रास्ता क़िता हाजा फिर आराज़ी मिलकित मुझ मुक़ीर मक़बजा

मुशतरियान । पच्छिमी आराजी आब चेक कते हाजा बादहू मकान बाबू नन्द किशोर जैन। दक्खिनी - मकान ला० सुमेर चन्द्र चन्द्र सैन जैन । उत्तरी- किता हवेली मुशतरियान तफ़सील वसूली जरे समन यह है। बतौर बैआना तारीख 30 8/59 ई० वसूल पाये 100/ रू० बर वक्र रजिस्टरी श्रीमान सब रजिस्टरार साहब के सनमुख वसूल पाये 600/ रू० मी० 700/ रू० (नोट) परत अव्वल को सतर तीन में लफ़्ज (का) क़लमज़द है।

और परत ३ सतर रमें लफ़्ज (सहन वे) क़लमजद व सतर 4 में इबारत
(किरायेदार मुझ मुक़ीर) निशान ' बनाकर हाशीये पर दाई तरफ़ तहरीर है।
तहरीर तारीख ३ सितम्बर सन 1959 ई० को बक़लम कातिब नहटौर"

(Emphasis supplied)

21. A plain reading of the above sale deed reveals that under the sale deed in the earlier part the vendor has described himself to be the owner of the *'Rasta'* and a piece of the land of which boundary and measurements are said to have been given at the foot of the document. At the foot of the document only the boundaries and measurements of the piece of the land have been given. However, in the body of the document it has been specifically stated that he is transferring the piece of land with *'Rasta'* (मय रास्ता) with complete rights for a total sale consideration of Rs.700/-. This part of the recital in the sale deed has completely been totally ignored by the two courts below and thus they have recorded that under the sale deed only the piece of land has been has been transferred. However, if the document as a whole is read it shows that the vendor has transferred not only the piece of land but also the *'Rasta*' which was also in the ownership of the vendor. Therefore, I am of the view that the aforesaid sale deed also transfers the 'Rasta' in favour of the plaintiff/appellants along with a piece of land as described therein.

22. At this juncture, Sri S.A. Shah, learned counsel for the respondents asserted that where two inferences are possible the view taken by the courts below should be accepted. The submission is not devoid of merit as in second appeal the High Court is not ordinarily entitle to substitute its own opinion but the said principle is not applicable where the view or the inference drawn from the document by the courts below is palpably erroneous and is beyond the comprehension of a prudent man. Here, as said earlier the courts below have not read the sale deed as a whole and have completely ignored its recitals where the 'Rasta' has also been transferred in unequivocal terms. Therefore, I am of the view that this is not a case where on the plain reading of the sale deed itself two views or inferences are possible.

23. Thus, I hold that the courts below have grossly erred in holding that the plaintiff/appellants are not the owners of the 'Rasta' by misreading the document of title. The substantial question framed above as such is answered in affirmative in favour of the plaintiff/appellants.

24. In the last, a faint effort has been made by the respondents to establish their easementary right over the aforesaid 'Rasta'. In this connection the court of first instant had framed an issue, i.e. issue no.2 to the effect as to whether the defendants have acquired easementary rights on the passage in suit? The said issue was decided against the respondents as there were no pleadings with regard to the same. In appeal preferred by the plaintiff/appellants before the lower

appellate court the respondents have not taken any cross objection in this regard or assailed the findings on issue no.2. I have perused the written statement of the defendant/respondents and find that the defendant/respondents have nowhere pleaded any such easementary right over the land. In the absence of the foundation in the pleadings to this effect, I do not find any error on the part of the court of first instance in deciding issue no.2 against the defendant/respondents. Even the appellate court has not recorded any specific finding that the defendant/respondents have acquired any easementary right over the said 'Rasta'. Therefore, this submission of the learned counsel for the defendant/respondents cannot be sustained and must fail.

25. In view of above discussion and the answer to the substantial question of law the appeal deserves to be allowed and is hereby allowed. The judgment and orders of the two courts below dated 1.6.1976 and 14.5.1973 passed in Civil Appeal No.128 of 1973 and Original Suit No.553 of 1968, respectively are set aside and the suit of the plaintiff/appellants is decreed in part for permanent prohibitory injunction restraining the defendant/respondents from encroaching the disputed 'Rasta' by making any construction or projection thereon and from interfering in the plaintiff/appellants' use and occupation of the same. Appeal allowed.

No costs.

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RIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 21.8.2008

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 32132 of 2001

Chandra Bhushan Bajpai ...Petitioner
Versus
Joint Director of Education, Kanpur Mandal Kanpur and others ..Respondents

Counsel for the Petitioner:
Sri Vishnu Bihari Tiwari

Counsel for the Respondents:
S.C.

U.P. State Aided Educational Institution Employees Contributory Provident Fund Insurance Pension Rules Rule-19 (a)(b)- Benefit of pension-retirement prior to enforcement of Rules-petitioner claiming to count the period of working in un-aided recognized institution-institution brought under grant in aid in March 1961-provisions of pension rule becomes effective on 1.10.1964-held-No person can claim particular service in particular employment for counting towards qualifying service.

Held: Para 8

It is clear case of the respondents that the institution in question was brought in grant-in-aid list in March 1961 though the petitioner served therein prior thereto. Therefore, U.P. Contributory Provident-Insurance-Pension Rules which came into force on 1.10.1964 are not applicable at all. Learned counsel for the petitioner could not place any other provision to substantiate his claim that the said service can be counted. Pension is not a bounty but as a matter of fact, a right, yet the mode and manner of its payment is governed strictly by relevant Rules. Unless the Rules provide, no

person can claim a particular service in a particular employment for counting as qualifying service.

Case law discussed:

Writ Petition No. 34579 of 1993), Writ Petition No. 11855 of 1994, Civil Misc. Writ Petition No. 14395 of 1992, (2001) 1 UPLBEC 916, 1990 AWC 1453, 1983 (1) SCC 305,

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

1. The grievance of the petitioner is that services rendered by him prior to 18th July 1961 at Mahatma Gandhi Vidyalaya Kaushalpuri, Kanpur (*hereinafter referred to as the 'institution'*) is not being counted towards qualifying service for the purpose of pension though in view of law laid down by this Court in **Ram Raksh Pal Vs. State of U.P. and others (Writ Petition No. 34579 of 1993) decided on 1.9.1995, Ram Janam Singh Vs. Deputy Director of Education and others (Writ Petition No. 11855 of 1994) decided on 14.9.1995, Ramjee Das vs. State of U.P. and others (Civil Misc. Writ Petition No. 14395 of 1992) decided on 20.11.1996, Ram Adhar Lal Srivastava Vs. State of U.P. and others (2001) 1 UPLBEC 916 and Shital Prasad Tripathi vs. State of U.P. and others 1990 AWC 1453** and Rule 19(a) and (b) of U.P. State Aided Educational Institution Employee's Contributory Provident Fund-Insurance-Pension Rules, (*hereinafter referred to as "the Rules*") the petitioner is entitled to count the same and, therefore, the impugned order dated 11.6.2001 (Annexure 10 to the writ petition) passed by Joint Director of Education, Kanpur Region, denying the said benefit is illegal.

2. In brief facts giving rise to the present dispute are that the petitioner claims to have worked as Assistant Teacher from 26.7.1957 to 17.7.1961 at the institution and thereafter he was appointed as Teacher in Sri Ram Lala Uchchatar Madhyamik Vidyalaya, Rawatpur, Kanpur from 18.7.1961 to 30.6.1990 and on attaining the age of superannuation, he retired on 30.6.1990. While computing the qualifying service of petitioner for the purpose of pension, the same has been taken into account from 18.7.1961. The petitioner contended that his earlier services rendered in the institution should also have been included and for the said purpose, he made representation to the concerned authority and when the same remained unheeded, he filed a writ petition no. 13456 of 2001 which was disposed of on 13.4.2001 directing the concerned authority to decide his representation, pursuant whereto the impugned order has been passed.

3. Learned Counsel for the petitioner contended that in respect of secondary educational institutions, service rendered by the teachers in the earlier institution is liable to be counted as directed by this Court in various cases referred to above and, therefore, he is also entitled to the same benefit and any other view would be contrary thereto. He also placed reliance on Government Order dated 5.1.1996 in support of his claim that he is entitled to count the aforesaid service.

4. The respondents through learned Standing Counsel have filed counter affidavit supporting the decision taken by the competent authority denying the claim of the petitioner and it has been stated that the institution was brought in grant-in-aid list in March 1962. In para 3 of the counter affidavit respondents have made this statement as a matter of fact and in

reply thereto in para 4 of the rejoinder affidavit the petitioner has not said anything regarding the aforesaid averment and there is not even a whisper or suggestion that the aforesaid institution was brought on grant-in-aid list prior to March 1962. Besides that no provision has been brought to the notice of this Court applicable to Junior High School wherein services rendered in unaided non-government Junior High School can be counted for the purpose of pension. The G.O. and rulings cited at the Bar on behalf of the petitioner are in respect to secondary education institution and contain different provision. where the provisions are different. G.O. dated 5.1.1996 is in respect to secondary educational institutions and provides for counting service rendered in unaided recognised educational institution provided it is the same institution wherefrom the teacher ultimately retired and for the period he has served when the institution was unaided, the management deposits its share of provident fund in Government treasury by 31st of March 1996.

5. The judgment of this Court in **Ram Raksh Pal (supra)** refers to G.Os dated 13.6.1979, 10.1.1986 and 16.9.1988 which were for counting of service in non-government institutions of such teachers who were ultimately appointed in Government institutions and retired therefrom and provides that service rendered in private institution may be counted towards retiral benefits provided the management's share of provident fund is deposited in Government Treasury within the time prescribed. This Court held that if the Management's share of Provident Fund is not deposited by the time mentioned in the G.Os, merely that reason would not be sufficient to deny the benefit to a teacher provided such deposit is subsequently made by the Management. **Ram Janam (Supra)** was a case where the institution was aided and only the service rendered by the teacher while he was working as clerk in the institution was not included which was found to be incorrect in the light of the provisions of the relevant Rules and it was held that such period is also liable to be taken into account. The aforesaid two judgments were followed in **Ramjee Das (supra).** Therefore, none of the aforesaid judgments are applicable to the facts and dispute involved in the present case. In **Shital Prasad Tripathi (supra)** the issue was with respect to cut off date on the question as to whether services rendered in aided or unaided institution can be counted or not provided the Management deposits share of provident fund. Even the said authority would not help the petitioner.

6. For the purpose of qualifying service U.P. Contributory Provident Fund Insurance Pension Rules are applicable wherein Rule 19(a) and (b) reads as under:

"19 (a) Service will not count for pension unless the employee holds a substantive post on a permanent establishment.

(b) Continuous temporary or officiating service followed without interruption by confirmation in the same or another post shall also count as qualifying service. (See also C.S.R. Para 422)."

7. The benefit of the aforesaid Rule would have been attracted to the case in hand provided the petitioner would have

worked in a institution which was provided grant in aid. Rule 3 of the aforesaid Rules clearly provides that it is applicable to permanent employees serving in State aided education institutions. Rule 3 reads as under:

"3. These rules shall apply to permanent employees serving in State aided educational institutions of the following categories run either by a Local Body or by a Private management and recognised by a competent authority as such for purposes of payment of grant-in-aid.

(1) Primary Schools;
(2) Junior High Schools;
(3) Higher Secondary Schools;
(4) Degree Colleges;
(5) Training Colleges."

8. It is clear case of the respondents that the institution in question was brought in grant-in-aid list in March 1961 though the petitioner served therein prior thereto. Therefore, U.P. Contributory Provident-Insurance-Pension Rules which came into force on 1.10.1964 are not applicable at all. Learned counsel for the petitioner could not place any other provision to substantiate his claim that the said service can be counted. Pension is not a bounty but as a matter of fact, a right, yet the mode and manner of its payment is governed strictly by relevant Rules. Unless the Rules provide, no person can claim a particular service in a particular employment for counting as qualifying service. The Apex Court, in ***D.S. Nakara Vs. Union of India 1983 (1) SCC 305*** while holding pension as a right, observed as follows:

"pension is a right and the payment of it does not depend upon the discretion of the Government but is governed by the rules and a government servant coming within those rules is entitled to claim pension. It was further held that the grant of pension does not depend upon anyone's discretion." (Para 20)

9. Learned counsel for the petitioner could not place before the Court any provision under which the services rendered in a recognised but un-aided Non-Government Junior High School could have been counted.

10. In view of the aforementioned discussion, I do not find any merit in this petition. It is accordingly, dismissed. No order as to costs.

ORIGINAL JURISDICTION
CIVIL SIDE
DATED: ALLAHABAD 26.08.2008

BEFORE
THE HON'BLE SUDHIR AGARWAL, J.

Civil Misc. Writ Petition No. 43867 of 2008

Km. Poonam Baghel ...Petitioner
Versus
State of U.P. and others ...Respondents

Counsel for the Petitioner:
Sri. H.N. Sharma

Counsel for the Respondents:
S.C.

Constitution of India, Article 226-Tenure appointment-terminable without notice-automatically comes to an end after expiry of particular term-cannot be extended by judicial order-no mandamus can be issued.

Held: Para 5

The appointment of the petitioner being for a fixed tenure, she has no right to continue beyond the period indicated in the letter of appointment. It is evident that the appointment made is time bound. Extension of appointment by judicial order therefore is not permissible.

Case law discussed:

(2002) 2 UPLBEC 1373, 1992 (4) SCC 33, Writ Petition No. 20871 of 2006 Dr Vijay Kumar Singh & others vs. State of U.P. & others, JT 2006 (4) SC 420, Civil Misc. Writ Petition No. 812 (S/B) of 2007, Dr. Manish Dixit and others Vs. State of U.P. and others.

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

1. The grievance of the petitioner is that she was appointed as Lecturer vide appointment letter dated 11.10.2007 in Dayalbagh Educational Institute (Deemed University) at Agra. Though the said appointment was for a period of one year being a fixed term temporary appointment but the petitioner is entitled to continue even thereafter since no person on the regular basis has been appointed on the said post.

2. However, I do not find any substance in the submission for the reason that the petitioner has no legal right to continue beyond the term of his appointment letter. The appointment letter clearly provides as under:

"I am directed to inform you that the Managing Council for the Non-University General Educational Institute has appointed you as Lecturer in Home Science in the DEI Prem Vidyalaya Girls Intermediate College on temporary (fixed-term) basis for a period of one year only from the date you assume charge of the post, on a starting basic pay of Rs.5500/- per month in the pay scale of Rs.5000-175-8650 plus admissible allowances under the rules of the Institute on the following terms and conditions:

1. You are appointed on temporary (fixed-term) basis against an existing vacancy which is likely to be filled up on regular basis and action for filling it up on regular basis is under process, therefore, your said service shall stand automatically terminated on expiry of your temporary (fixed-term) appointment or on resumption of duty by a regular incumbent on the post, whichever is earlier.

2. This temporary (fixed-term) appointment can also be terminated by either of the parties by giving one month's notice or by paying one month's salary in lieu thereof."

3. Clause 5 thereof further reads as under:

"5. This temporary (fixed-term) appointment of yours will not confer any prescriptive right for your future absorption in any service of the Institute."

4. In view of the aforesaid terms and conditions of appointment letter it is evident that she was a tenure appointee for one year without any claim for renewal after the tenure is over.

5. It is not in dispute that as per the terms of appointment, engagement of the petitioner was only for a particular session and by efflux of time the same would come to an end. The question is whether the petitioner can claim a right to continue in institution despite the aforesaid condition of appointment. The letter of appointment in effect would already lose its efficacy by efflux of time that it would

suo motu lapse on expiry of tenure. Whether the petitioner in such circumstance can be directed to continue even beyond that is the moot question to be considered and answered here. In my view reply would be in negative. The appointment of the petitioner being for a fixed tenure, she has no right to continue beyond the period indicated in the letter of appointment. It is evident that the appointment made is time bound. Extension of appointment by judicial order therefore is not permissible. A similar controversy came up for consideration before a Division Bench of this Court in **Alok Kumar Singh (Dr.) & 15 others Vs. state of U.P. & others, (2002) 2 UPLBEC 1373** wherein it has been held that the petitioner cannot claim any right to continue in service beyond the period of appointment provided in the letter of appointment.

6. Besides, the appointment of the petitioner, a fixed term, would come to an end automatically by efflux of time. In case the contention of the petitioner is accepted, it would amount to re-writing the appointment letter allowing the petitioner to continue without there being any letter of appointment issued by the competent authority for a period after the tenure is over. In **Director, Institute of Management Development, U.P. vs. Pushpa Srivastava (Smt.), 1992 (4) SCC 33** the Hon'ble Apex Court held that the appointment, which is made for a fixed tenure comes to an end on the expiry of the period of appointment provided in the letter of appointment and the incumbent need not be terminated as the termination of employment comes automatically by efflux of time. In this case also, admittedly, the appointment of the petitioner is for fixed tenure and in case the contention of the petitioner is accepted it will amount to giving an appointment by this Court for the period subsequent there to substituting itself to the position of appointing authority. This is neither permissible in law nor should be done. When a procedure is prescribed to do a thing in a particular manner, it should not be done otherwise. Similar view has been taken by this Court in **Writ Petition No. 20871 of 2006 Dr Vijay Kumar Singh & others vs. State of U.P. & others**, decided on 25.4.2006. Further a Constitution Bench of the Apex Court in **Secretary, State of Karnataka & others Vs. Uma Devi & others-JT 2006 (4) SC 420**, in para 34 of the judgment has observed as under-

"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."

7. Learned counsel for the petitioner further submits that on account of unemployment and lack of bargaining position, the petitioner cannot negotiate with the respondents on equal terms and therefore, the condition of engagement on contractual basis for one session is exploitative and is arbitrary. I am afraid that even this submission cannot be accepted. Rejecting similar argument in **Uma Devi (Supra),** the Apex Court in para 36 of the judgment has observed as under-

"It is not as if the person who accepts an engagement either temporary or casual in nature, is not aware of the nature of his employment. He accepts the employment with eyes open. It may be

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

8. A Division Bench has reiterated the aforesaid view after following the aforesaid judgment in **Sarvesh Kumar Singh Vs State of U.P and others, Writ Petition No. 25849 of 2006** decided on 11.05.2006; and **Amar Nath Tiwari Vs State of U.P and others, Writ Petition No. 28632 of 2006 decided on 23.05.2006**.

9. Learned counsel for the petitioner sought to place reliance on certain interim orders passed by this Court at the time of admission permitting the petitioners to continue till candidates regularly selected are available. However, this aspect of the matter has been considered by a Division Bench of this Court in **Civil Misc. Writ Petition No. 812 (S/B) of 2007, Dr. Manish Dixit and others Vs. State of U.P. and others** decided on 19.7.2007 and this Court held as under:

"Learned counsel for the petitioner sought to place reliance on an interim order dated 23.05.2007 passed by this Court in W.P.No.221 (S/B) of 2007 and the judgment dated 15.11.2006 passed by a Division Bench of this Court in W.P.No.1560 (S/B) of 2006. We find, from perusal of the aforesaid order, that the condition of appointment and various issues which have been considered by us in this case were neither raised nor argued nor decided in the aforesaid orders. Therefore in our view, the said orders cannot be treated to be a binding precedent to give relief sought by the petitioners in this writ petition particularly when the various issues which have been considered by us in the writ petition have already been decided finally by several Division Bench judgments of this Court as referred hereinabove. Learned counsel for the petitioners further placed some orders passed by this Court relating to disposal of the writ petition at the admission stage,

copies whereof are on page nos. 38-39 of the writ petition but there also we find, that the issues as have been considered here were not raised in those cases. Therefore the aforesaid judgments cannot be said to be binding precedent on the various issues which have been considered by this Court in the present case."

10. At this stage, it would also be appropriate to notice that earlier it was held by the Apex Court that right to earn livelihood is part and parcel of "right to life' under Article 21 of the Constitution and this was equated with the right to employment. However, the Apex Court in **Uma Devi (supra)** has rejected this submission that Article 21 would include the right to employment and in para 42 of the judgment has held as under:-

"42. The argument that the right to life protected by Article 21 of the Constitution of India 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 of employment can also be brought in under the concept of right of 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 back door. The obligation cast on the State under Article 39(a) of the Constitution of India 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 by way 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 individualizing 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 not to a particular group of citizens. We, therefore, overrule the argument based on Article 21 of the Constitution."

11. The Apex Court also considered the question as to whether a writ of mandamus can be issued by the Court directing the employer either to absorb the employee in permanent service or to allow him to continue, and in this context has held as under:

"In order to that a mandamus may issue to compel the authorities to do something, it must be shown that the statute imposes a legal duty on the authority and the aggrieved party had a legal right under the statute or rule to enforce it. "

12. It is not the case of the petitioner that respondents are under a legal duty or the petitioner has statutory or fundamental right to seek direction to continue the

petitioner till regular selected candidate is available.

13. In view of the aforesaid discussion, I do not find any merit in this writ petition. Dismissed. No order as to costs.
