State Of U.P vs Neeraj Awasthi & Others on 16 December, 2005

Author: S.B. Sinha

Bench: S.B. Sinha, P.P. Naolekar

CASE NO.:
Appeal (civil) 4092 of 2001

PETITIONER:
State of U.P.

RESPONDENT:
Neeraj Awasthi & Others

DATE OF JUDGMENT: 16/12/2005

BENCH:
S.B. Sinha & P.P. Naolekar

JUDGMENT:

JUDGMENT W I T H CIVIL APPEAL NOS. 3872, 3873, 4038, 4093-4102, 7545-7646, 7647-7748 of 2001, CIVIL APPEAL NO. 6810 of 2005 and CIVIL APPEAL NO. 6814 of 2005 S.B. Sinha, J :

The jurisdiction of the High Court to issue a direction for framing a scheme for regularisation of the employees of the U.P. State Agricultural Produce Market Board (for short "the Board") is in question in this batch of appeals which arise out of judgments and orders passed by the High Court of Judicature at Allahabad in the writ petitions filed by the private respondents either dismissing or allowing the same.

ACT The legislature of the State of Uttar Pradesh enacted The Uttar Pradesh Krishi Utpadan Mandi Adhiniyam, 1964 (for short "the Act"). The Board has been established under Section 26-A of the Act. Section 26-B provides for the constitution of the Board. In exercise of its power conferred upon it by Section 25-A and 26-X of the Act, regulations have also been framed by the Board laying down the terms and conditions of the service of the employees of the Market Committees known as the Uttar Pradesh Agricultural Produce Market Committees (Centralised) Services Regulations, 1984 (for short "Services Regulations"). Similar regulations have also been framed by the Board in respect of its own employees being the Uttar Pradesh Agricultural Produce Markets Board (Officers and Staff Establishment) Regulations, 1984 (for short "Establishment Regulations").

BACKGROUND FACT In the State of Uttar Pradesh, there are 244 Market Committees. 3395 posts were sanctioned but indisputably 5600 appointments have been made. We are herein concerned with the orders of appointments and orders of

terminations issued in respect of about 1021 employees who were appointed between the period 1.4.1996 and 30.10.1997. A resolution was passed by the Board on or about 30th September, 1996 proposing regularisation of the services of those employees who have completed one thousand days of service. The Board had also its construction divisions. The said proposal was, however, confined to the employees working in the construction divisions against contingency funds. Approval having been sought for from the State Government in relation to framing of appropriate rules, in this behalf, informations were sought for from various departments including Mandi Parishad in regard to the appointments made in past six months by a letter dated 20th November, 1997. Relevant informations were furnished by the Director of the Mandi Parishad whereafter the State sought for further informations and details regarding the appointments made in the Mandi Parishad and Mandi Samities by a letter dated 17.3.1998. Such informations were sought for by the State again by a letter dated 18.5.1998. On or about 12.2.1999, an order was issued by the State directing that services of all such employees who had been irregularly appointed during the period 1.4.1996 to 30.10.1997 be cancelled on last-come-first-go-basis stating:

"1. The irregular appointment made in the Mandi Parishad and Mandi Samities during the period w.e.f. 1.4.96 to 30.10.97 should be cancelled immediately. The following course should be adopted to terminate such appointments:

(a) There is no legal impediment in terminating the service of the employee concerned after cancelling the appointments which have been made without any created/ sanctioned post but the reason therefor shall have to be recorded in the order.

(b) There is no legal impediment in terminating the service after cancelling the appointments of such persons as did not have educational qualifications prescribed for the post concerned but the reason therefor should be recorded in the order.

(c) The termination of service of such persons, as have been appointed in relation to some post and also have educational qualification prescribed for that post, should be made in accordance with the procedure mentioned in their appointment order. In case, no procedure is mentioned in the appointments order, their service should be terminated after giving either notice or pay in lieu thereof.

(2) In this regard I have to inform this thing also that after making intensive examination in respect of irregular appointments made in the Mandi Parishad and Mandi Samities before 1.4.96, kindly furnish clear report alongwith detailed statement by 20.2.99.

(3) Kindly make available in each case by 18.2.99 your proposal with clear recommendation to the Govt. for action against the officers responsible for the said

irregular appointments."

Further directions were issued on 17.3.1999 in the following terms:

> "In regard to the appointed subject and Semi Govt. Letter No. Dire-Camp/99-468 dt. 8.3.99, I have been directed to say that keeping in view, the decision taken by Govt. in regard to irregular appointments made on the post of various categories in U.P. State Agricultural Production Marketing Board, there has been no requirement of prescribed procedure rules. In such circumstances, the proposal sent to Govt. vide letter 1418/Camp dt. 18.10.96 of Marketing Board Office is rejected by the Govt. after due consideration."

Pursuant thereto or in furtherance of such directions, the services of a large number of employees were terminated on or about 20th March, 1999.

On 27.1.1998, the Director of the Board informed the Secretary, Department of Agriculture that all appointments are unauthorized/ irregular and, thus, void ab initio and, therefore, their appointments should be terminated following the rules. In the said letter, the opinion of the Chairman of the Board was quoted stating:

> "As the action, whatsoever, taken in this matter will create wide ranging ramifications (both political and administrative) therefore it will be proper to send the factual report of the whole case to Govt. for guidance. It will be expedient to take further action after consulting the department of justice and obtaining orders from the Hon'ble Minister for Agriculture and the Hon'ble Chief Minister."

Photocopies of the notesheets and photocopies of the details of all appointments and the report received from the Deputy Director (Administration) were annexed thereto.

It may be noticed that the State in the meantime had also refused to approve the proposed rules framed by the Board for regularisation of its employees.

PROCEEDINGS BEFORE THE HIGH COURT Questioning the aforementioned directions of the State, one Rajnish Varsheny filed a writ petition before a Division Bench of the Allahabad High Court in April, 1999. By a judgment and order dated 11.8.2000, a learned Single Judge of the Allahabad High Court allowed the same holding that the orders of termination issued pursuant to the orders of the State Government dated 12.2.1992 were illegal. A Division Bench of the High Court, Lucknow Bench, put its seal of approval to the order of the learned Single Judge by a judgment and order dated 5.9.2000 in similar writ petitions filed by other dismissed employees. A writ petition filed by one Anshuman Misra, however, was dismissed by another Division Bench of the Allahabad High Court at Lucknow upholding the said order of the State Government.

The parties are, thus, before us.

SUBMISSIONS On behalf of the Board:

Submission of Mr. M. L. Verma, learned senior counsel appearing on behalf of the Board are:

(i) In terms of the statutory mandate contained in Section 26-M of the Act, the Board was bound by the directions issued by the State.

(ii) The appointments having been made in utter disregard of the mandatory provisions of the Services Regulations and the Establishment Regulations, the employees did not derive any legal right to continue in the said posts.

(iii) Such appointments having been made on a pick and choose method and on an adhoc basis, the judgments of the High Court cannot be sustained.

(iv) Indisputably the provisions of U.P. Industrial Disputes Act and the rules framed thereunder relating to retrenchment of workmen were complied with and in that view of the mater it cannot be said that the orders of termination passed against the employees were illegal.

(v) In any view of the matter, the remedy of the employees, if any, was to approach the industrial courts.

(vi) It is not a case, it was urged, where principles of natural justice were required to be complied with.

On behalf of the State Mr. Uday Umesh Lalit, learned senior counsel appearing on behalf of the State of Uttar Pradesh submitted that from the records it would appear that the State adopted a known criterion for cancellation of appointment of such employees who were in the last slots, namely, 1.4.1996 to 30.10.1997. Such orders of termination ensured that the principles of last-come-first-go basis are followed and the employees are paid one month's salary in lieu of notice as also 15 days wages for each completed year of service by way of compensation. No appointment having been made after 30.10.1997, the impugned judgment of the High Court cannot be sustained.

On behalf of the Writ Petitioners Mr. Anoop G. Chaudhari, learned senior counsel appearing on behalf of the Respondents, on the other hand, urged:

(i) that the appointments of the employees cannot be said to be illegal as the provisions contained in the respective regulations apply to appointments in regular cadre.

(ii) There is no embargo in appointing employees on adhoc basis in exigency of service or on work charge basis recognised in the regulations in view of the fact that such employees do not derive the benefits which are granted to the regular

employees.

(iii) Section 26-M of the Act had no application in the facts of the case in view of the fact that appointment of adhoc employees is not a matter which would come within the purview of the functions of the Board as envisaged under Section 26-F and 26-L of the Act. In any event, so far as the appointments of employees employed in the Market Committees are concerned, the same being governed by Section 23 of the Act, Section 26-M thereof will have no application.

(iv) By reason of purported directions issued under Section 26-M, the rights and privileges granted to the employees under other statutes cannot be taken away.

(v) In view of the decision of this Court in Rakesh Ranjan Verma and Others v. State of Bihar and Others [1992 Supp (2) SCC 343] and U.P. State Electricity Board v. Ram Autar and Another [(1996) 8 SCC 506], the statutory power of appointment being vested in the Board, the State could not interfere therewith.

(vi) In any view of the matter, the purported policy decision adopted by the State must be held to be wholly illegal and without jurisdiction as prior thereto the requirements of each of the samities had not been taken into consideration. It was pointed out that even by 1998 full reports had not been submitted by the Board as regards the financial position of the Market Committees vis-a-vis the strength of the employees and, thus, the policy decision must be held to have been made without any application of mind.

(vii) A policy decision of a State cannot be communicated by a demi- official letter without complying with the constitutional norms.

(viii) One set of adhoc employees and/ or daily wagers should not be replaced by another set of adhoc employees/ daily wagers.

(ix) The Board having adopted a resolution to regularise the services of its employees, there was no need to obtain any approval from the State.

(x) As admittedly no appointment whatsoever was made in terms of the statutory regulations since the inception of constitution of the Market Committees and Boards, the State could not have ignored the past practice particularly in a case of this nature where the employees concerned have requisite educational qualifications.

(xi) The court in such a situation can be said to have the requisite jurisdiction in directing a State within the meaning of Article 12 of the Constitution of India to make a scheme of regularisation.

Mr. G.L. Sanghi, learned senior counsel appearing on behalf of another writ applicant submitted that institutions of the market committees and the Board having their activities principally in rural areas, the human problem should not be ignored as without such daily wagers or adhoc employees functions of the statutory body may have to be stopped.

The learned counsel submitted that the appointments being not void ab initio and of no effect, the State could not have issued directions for termination of their services. As the appointments were made having regard to the necessity felt by the Market Committees and the Board, this Court should not exercise its discretionary jurisdiction under Article 136 of the Constitution of India.

Mrs. Shobha Dixit, learned senior counsel appearing on behalf of Rajnish Varshney supplemented the arguments of Mr. Chaudhary and Mr. Sanghi contending that there was no material before the government for issuing the impugned instructions. It was submitted that the Market Committees having regard to Section 19 of the Act had their own funds, the case of each Committee should have been considered separately.

HIGH COURT A learned Single Judge of the High Court in his order dated 11.8.2000, which has been approved by the Division Bench of the Allahabad High Court in its judgment dated 5.9.2000, held that:

> (i) the normal functions of the Board pertain to establishment or construction of new Market yards; control over Market Committees, direction to the Committees to ensure efficiency, etc., it could not have interfered in the functioning of the Market Committees.
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> (ii) The procedures prescribed were to be applied in relation to selection of regular employees and not adhoc employees or daily wagers.
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> (iii) No principle has been laid down as to why adhoc employees engaged before 1.4.1996 and after 30.10.1997 should be retained in service and, thus, the action of the State was discriminatory in nature.
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> (iv) The Government instead of formulating any policy resorted to an arbitrary method of issuing a 'Tugalaki' order in terminating the services of the employees recruited between 1.4.1996 and 30.10.1997 were also terminated.
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> (v) Although such irregular appointments have been made by several directors but only those made by two of them, namely, Shri P.N. Misra and Dr. Raja Ram, having been picked up for being cancelled, the same being discriminatory and mala fide, the order impugned in the writ application were unsustainable.
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> (vi) An employee should not be continued to be kept as adhoc employee for more than 240 days.

(vii) The resolution of the Board to regularise services of such employees who have completed one thousand days of service was valid. As the writ petitioners have been working in various Committees for a long period ranging from six to nine years, termination of their services was arbitrary.

(viii) The principles of natural justice have been ignored in terminating the services of such employees and, thus, the orders terminating the services of the writ petitioners were bad in law.

It was directed:

"Having regard to the discussions made above, I am inclined to hold that written and verbal termination orders of the petitioners issued by the authorities at the direction of the Government as contained in letter dated 12.2.99 are arbitrary, unreasonable and discriminatory and, therefore, all such termination orders along with the irrational impugned letter of source dated 12.2.99 are hereby quashed. A writ of certiorari is issued accordingly. Further, a writ of mandamus is also issued commanding the opposite parties to allow the petitioners to resume their duty with immediate effect. They shall be deemed to have continued in service and as such, they shall be relegated to their original position. However, they will not get their back wages. The U.P. Agricultural Produce Market Board shall within six months resolve and formulate a policy to deal with the terms of their service by giving due consideration to its earlier resolution regarding regularization of their services. The Board will also take stern step to ensure that such an odd situation to the embarrassment of the competent authorities does not arise in future."

However, as noticed supra, another Division Bench of the same Court in its judgment dated 13.11.2000 opined that the appointments having been made in violation of the statutory regulations, the appointees must be held to have entered into service through backdoor and in that view of the matter, the State has the requisite jurisdiction to issue a direction in terms of Section 26-M of the Act.

The judgment of the Division Bench dated 5.9.2000 passed in Rajnish Varshney v. State of U.P. was made in ignorance of an earlier division bench decision in Raja Ram Maurya v. U.P. Rajya Krishi Utpadan Mandi Parishad, Lucknow and, thus, was rendered per incuriam.

RELEVANT PROVISIONS OF THE STATUTES Before adverting to the rival contentions, we may briefly notice the provisions of the said Act.

Market Committees are incorporated and constituted in terms of Sections 12 and 13. Section 19 of the said Act provides for establishment of a Market Committee Fund. Sub-section (2) of Section 19 mandates that all expenditure incurred by the committee shall be defrayed out of the said fund and the surplus, if any, shall be invested in such a manner as may be prescribed. Sub-section (3) of Section 19 inter alia illustrates as to how such funds are to be utilised including salaries, pensions

and allowances, etc. and other expenses, as may be prescribed, as specified in clause (ii). The proviso appended thereto mandates that annual expenditure in respect of matters specified in clause (ii) shall not exceed 10% of the total annual receipts of the Committee excluding loans raised by it and advances or grants made to it except with the prior approval of the Board.

Section 23 of the Act occurring in Chapter IV provides for appointments of officers and servants of the Market Committee and their conditions of services. The appointments of such officers who may be appointed for carrying out the purpose of the Act must be done in terms of the bye-laws framed by it. Sub-section (2) of Section 23 envisages that every Committee shall have such number of Secretaries and such other officers as may be considered necessary by the Board for the effective discharge of the functions of the Committee, appointed by the Board on such terms and conditions as may be provided for in the regulations made by it.

Chapter V of the Act deals with external control. Establishment and constitution of the Board are envisaged under Sections 26-A and 26-B. Section 26-A empowers the Board to appoint such officers and servants as it considers necessary for efficient performance of its functions on such terms and conditions, as may be provided for in the regulations made by the Board. Section 26-L provides for the powers and functions of the Board. Functions of the Board are provided for in Sub-section (1) thereof stating:

> "(i) superintendence and control over the working of the Market Committees and other affairs thereof including programmes undertaken by such Committees for the construction of New Market Yards and development of existing Markets and Market Areas;
>
> (ii) giving such direction to Committees in general or any Committee in particular with a view to ensure efficiency thereof;
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> (iii) any other function entrusted to it by this Act;
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> (iv) such other functions as may be entrusted to the Board by the State Government by notification in the Gazette."

The powers of the Board have been enumerated under Sub-section (2) of Section 26-L of the Act which includes:

> "(x) to do such other things as may be of general interest to Market Committees or considered necessary for the efficient functioning of the Board as may be specified from time to time by the State Government."

Section 26-M of the Act empowers the State Government to issue directions in the following terms:

> "(1) In the discharge of its functions, the Board shall be guided by such directions on question of policy, as may be given to it by the State Government.

> (2) If any question arises whether any matter is or is not a matter as respects which the State Government may issue a direction under sub-

section (1), the decision of the State Government shall be final."

Section 26-V of the Act provides for accounts and audit. Section 26- X thereof empowers the Board to make regulations with the previous approval of the State Government which shall be subject to the said Act and the rules made thereunder. Section 32 of the Act confers power upon the Board to call for the proceedings of a Committee for the purpose of satisfying itself as regard legality or propriety of a decision or an order or orders and pass order thereon as it may deem fit if it is of the opinion that the decision or order of the Committee should be modified, annulled or reversed. Section 33-B of the Act reads as under:

> "Powers of the State Government.-(1) The State Government with a view to satisfying itself that the powers, functions and duties of the Board or a Committee by or under this Act are exercised or performed by it properly, may require the Commissioner or the Collector or any other person or persons to inspect or cause to be inspected any property, office, document or any work, of the Board or the Committee or to make inquiries into all or any of the activities of the Board or the Committee in such manner as may be prescribed and to report to it the result of such inquiry within such period as may be specified.
>
> (2) The Board or the Committee, as the case may be, shall give to the Commissioner or the Collector, or other person or persons, all facilities during inspection and for the proper conduct of the inquiry and shall produce any document or information in its possession, when so demanded for the purpose of such inspections or inquiry, as the case may be."

Section 39 of the Act provides for the bye-laws making power in the Market Committee. Proviso appended to Section 33 provides that no bye- law other than a bye-law made by adopting draft or model bye-law suggested by the Board shall be valid unless approved by it. Section 40 of the Act provides for rule making power.

The State Government framed rules known as "The U.P. Krishi Utpadan Mandi Niyamavali, 1965 (for short "the Rules") in terms of Section 40 of the Act. The functions, duties and powers of the Committees in terms of Sections 16 and 17 of the Act have been laid down in Rule 46. Rule 60 states that the qualification, designations, grades, salaries and allowance of the posts of officers and servants whose appointing authority is the Committee shall be approved by the Director. Such appointment made by the Committee under sub-section (1) of Section 23 of the Act for those posts wherefor the Committee is the appointing authority shall be intimated within 30 days of the date of such appointments to the Directors or to such officer as may be authorised by the Director in this behalf. Sub-rule (3) of Rule 60 mandates that the Market Committee shall maintain service records and character rolls in such forms as are prescribed for government servants and those records shall be kept in the custody of the Market Secretary. Rule 63 provides for the functions, powers and

duties of the Secretary.

In exercise of its regulation making power, as noticed hereinbefore, Services Regulations and the Establishment Regulations have been made.

Regulation 2(e) defines "Employee" to mean 'every person appointed on whole time basis in Classes A, B, C and D mentioned in Regulation 5, whether on contract basis, on deputation or otherwise but does not include persons employed on daily wages, work charged and on part-time basis. Chapter IV of the Establishment Regulations provides for recruitment and appointment. Regulation 9 specifies the appointing authority in respect of the posts shown in Column 1 of the table. Regulation 10 provides for the source of recruitment inter alia providing that 85 per cent posts in lowest grade in Class C shall be filled by direct recruitment and 15 per cent by promotion from Class D and all the posts in Class D shall be filled by direct recruitment. Regulation 11(1) provides for constitution of a Selection Committee for the purpose of recruitment to Class A and B posts whereas Regulation 11(2) provides for constitution of a Selection Committee for recruitment to Class C and D posts. Regulation 12 empowers the appointing authority to determine the number of vacancies in all the classes to be filled during the course of the year as also the number of vacancies to be reserved for candidates belonging to Schedules Castes and Scheduled Tribes and other categories under Regulation 8. The other sub-regulations contained in Regulation 12 provides for the mode and manner in which such vacancies shall be filled up. Chapter V lays down the conditions of service by way of appointment, probation, confirmation and seniority. Chapter VI provides for superannuation, pay, allowances and other service conditions.

The Services Regulations contain similar provisions. Part III of the said Regulations deal with recruitment and procedure. Regulation 10 lays down that recruitment may be made either from the open market or from promotion. Regulation 11 provides for reservation. Constitution of Selection Committee is contained in Regulation 12. Regulation 14 provides for determination of vacancies whereas Regulation 16 provides for the procedure of selection by direct recruitment. Chapter V of the said Regulations lays down the mode and manner in which the appointment, probation, confirmation and seniority would be made.

LEGALITY OF THE APPOINTMENTS The Board is a 'State' within the meaning of Article 12 of the Constitution of India. It was constituted in terms of the provisions of the said Act. The powers and functions of the Board as also the State in terms of the provisions of the statute having been delineated, they must act strictly in terms thereof. It is a statutory authority. Its powers, duties and functions are governed by the statute. It is responsible for constitution of the Market Committees for the purpose of overseeing that the agriculturists while selling their agricultural produce receive the just price therefor. It not only regulates sale and purchase of the agricultural produce but also controls the markets where such agricultural produces are bought and sold. The Board is entitled to levy market fee and recover the same from the buyers and sellers through Market Committees. Indisputably, Market Committees and the Board have power to appoint officers and servants. Although, the power of the Board in this respect is not circumscribed, that of the Market Committees is. Market Committees can appoint only such number of secretaries and other officers as may be necessary for efficient discharge of its functions. Terms and conditions of such services

are to be provided by it. Section 19 of the Act, however, imposes further restriction on the power of the Market Committee by limiting the annual expenditure made in this regard not exceeding 10% of the total annual receipt of the Committee.

The appointments for different classes of employees are to be made by the Board and the officers, as the case may be, in terms of the provisions of the regulations.

Both the Services Regulations and the Establishment Regulations, as noticed hereinbefore, are applicable respectively to the employees of the Board as also the Market Committees. The said regulations provide for detailed procedure for appointment and the terms and conditions therefor. No appointment, thus, can be made in violation of the provisions of statute and statutory rules.

Submission of the learned counsel appearing on behalf of the employees is that the procedures prescribed by reason of the Regulations are applicable to the regular employees. It is so. The question which, however, falls for consideration is as to whether any appointment can be made de'hors the provisions of the Act and the rules. Our attention has been drawn to the definition of 'employee' which does not include persons employed on daily wages, work charged and/ or part-time basis. If the expression "employee" does not bring within its fold any person employed on daily wages, work charged or on part- time basis, the same would mean that the persons so appointed would not be the employees within the meaning of the said regulation. It would, therefore, not be correct to contend that the Market Committee or the Board have the jurisdiction to appoint anybody on daily wages, work charged or on part-time basis de'hors the rules. The power to make appointments by the committee or the board whether contained in Section 23 or Section 26-F of the Act are statutory in nature. In absence of any provisions conferred upon them to appoint any employee de'hors the provisions of Sections 23 and 26-F and the regulations framed thereunder, indisputably would mean that such appointments are de'hors the Act and the rules. The Rules also provide that any appointment made by the Committee under Sub-section (1) of Section 23 shall be intimated within 30 days of such appointment to the Director or to such other officer as may be authorised by the Director in this behalf. It implies that although the Market Committee may have power to make appointments, such appointments can be made in relation to the posts created therefor by the Board wherefor requisite intimation has to be given to the Director or the officer authorised in this behalf. We may assume that for meeting the exigencies of situations it may be possible for the Committee or the Board to appoint a person on adhoc basis. Such adhoc employees, however, being not employee within the meaning of the provisions of the Act and the Regulations, a legal relationship between the employer and the employee would not come into being. As no legal relationship of employer and employee comes into being, evidently, such persons do not derive any status. They a fortiori derive no legal right to continue in service subject, of course, to the compliance of the provisions of any other Act or the rules conferring certain benefits to them. [See State of M.P. and Another v. Dharam Bir (1998) 6 SCC 165] Sections 23 and 26-F of the Act categorically mandate that all appointments must be made in terms of the provisions of the regulations. The terms and conditions of such services are also required to be prescribed by the regulations, the logical corollary whereof would be that permanent status is required to be given to a person who is not otherwise an employee of the Board or the Market committee, as the case may be. It is required to be done in terms of the regulation only.

The Board is entitled to take a decision which is within its powers and functions delineated by the Act. A decision by way of resolution or otherwise cannot be taken by the Board which is beyond the scope and purview of the Act and the regulations framed thereunder.

The Board, therefore, was bound to make a regulation if it intended to put the respondents on its rolls. The High Court, as noticed hereinbefore, however, was of the opinion that it was not necessary so to do. For the reasons aforementioned, we do not agree.

POWER OF STATE TO ISSUE DIRECTIONS The State in exercise of its power conferred upon it could issue directions. The power of the State Government is confined to issue directions on question of policy. It cannot, however, interfere in the day to day functionings of the Board. Such policy decision, however, must be in relation to the activities of the Board under the Act and not de'hors the same. [See Rakesh Ranjan Verma (supra), Ram Autar (supra) and Bangalore Development Authority & Others v. R. Hanumaiah & Others 2005 (8) SCALE 80] Such a decision on the part of the State Government must be taken in terms of the constitutional scheme, i.e., upon compliance of the requirement of Article 162 read with Article 166 of the Constitution of India. In the instant case, the directions were purported to have been issued by an officer of the State. Such directions were not shown to have been issued pursuant to any decision taken by a competent authority in terms of the Rules of Executive Business of the State framed under Article 166 of the Constitution of India.

In Punit Rai v. Dinesh Chaudhary, [(2003) 8 SCC 204], this Court held:

> "The said circular letter has not been issued by the State in exercise of its power under Article 162 of the Constitution of India. It is not stated therein that the decision has been taken by the Cabinet or any authority authorized in this behalf in terms of Article 166(3) of the Constitution of India. It is trite that a circular letter being an administrative instruction is not a law within the meaning of Article 13 of the Constitution of India. (See Dwarka Nath Tewari v. State of Bihar)"

However, it is not correct that the power of the State to issue directions must be confined to the matters enumerated in Sub-section (1) of Section 26-L of the Act. Section 26-L is subject to the provisions of the Act. The functions of the Board enumerated in Section 26-L of the Act are, therefore, not exhaustive. Appointment of servants and officers are also one of the functions of the Board. The Board also has right to supervise and control the activities of the officers and Market Committees. In that view of the matter, if a policy decision is taken by the Board in regard to the appointment or terms and conditions of the servants, in the event, regulations made in this behalf do not contain any provisions, such policy decision must conform to the directions of the State issued in that behalf, if any. The Board further is empowered to do such other things as are specified in clause

(x) of Section 26-L of the Act.

The Board, however, in law could not have abdicated its power in favour of the State Government.

We are, therefore, of the opinion that the direction by the State was strictly not in accordance with law.

The directions of the State were, therefore, although not binding on the Board, the same cannot be said to be wholly irrational. In his report dated 7.1.1998, the Chairman of the Board sought for advice of the Government. The State had the power of supervision over the activities of the officers of the Board and the Board itself. While granting such advice, the State had taken into consideration the last segment of employment. The State was not expected to direct the Board and the Board in turn could not have directed the Market Committees to dismiss all the employees who have been illegally appointed. If such directions had been confined to the period 1.4.1996 to 30.10.1997 on following certain basic principles like last-come- first-go-basis, we do not see any reason as to why the same would be termed to be arbitrary or discriminatory.

NATURAL JUSTICE If the employees are workmen within the purview of the U.P. Industrial Disputes Act, they are protected thereunder. Rules 42 and 43 of the U.P. Industrial Disputes Rules provide that before effecting any retrenchment in terms of the provisions of Section 6-N of the U.P. Industrial Disputes Act, the employees concerned would be entitled to a notice of one month or in lieu thereof pay for one month and 15 days wages for each completed year service by way of compensation. If such a retrenchment is effected under the Industrial Disputes Act, the question of complying with the principles of natural justice would not arise. The principle of natural justice would be attracted only when the services of some persons are terminated by way of a punitive measure or thereby a stigma is attached. [See Dr. Suresh Chandra Verma and Others v. The Chancellor, Nagpur University and Others (1990) 4 SCC 55, para 16, Karnataka Public Service Commission and Others v. B.M. Vijaya Shankar and Others, (1992) 2 SCC 206, paras 4 and 5 and State of M.P. and Others v. Shyama Pardhi and Others (1996) 7 SCC 118, paras 4 and 5] In Viveka Nand Sethi v. Chairman, J&K Bank Ltd. and Others [(2005) 5 SCC 337], it was held:

> "The principle of natural justice, it is trite, is no unruly horse. When facts are admitted, an enquiry would be an empty formality. Even the principle of estoppel will apply. [See Gurjeewan Garewal (Dr.) v. Dr. Sumitra Dash] The principles of natural justice are required to be complied with having regard to the fact situation obtaining therein. It cannot be put in a straitjacket formula. It cannot be applied in a vacuum without reference to the relevant facts and circumstances of the case."

The High Court, therefore, must be held to have erred in law in holding that the principles of natural justice were required to be complied with.

DIRECTIONS OF THE HIGH COURT The directions of the High Court, in our opinion, were not justified. It may be that in implementing the advice of the State, some of the officers of the Board became overzealous in terminating services of the employees who were appointed prior to 1.4.1996. The learned Single Judge of the High Court was not, therefore, correct in describing a decision of the Board an arbitrary or a discriminatory one. No sufficient or cogent reason has been assigned by the learned Single Judge to arrive at a finding that such period has been picked up out of the hat. With a view to judge the correctness or otherwise of such a decision, it was necessary to consider the

backdrop thereof. We have noticed hereinbefore the contents of the correspondences passed between the parties. When the advice of the Chief Minister and/ or the State was sought for, the Chief Minister wanted the details of such appointment made within the last six months. However, at a later stage, the validity or otherwise of the appointments made by the Directors of the Board on different periods had been taken into consideration. It is only upon application of mind on the facts and circumstances of this case that a direction was issued on 17.3.1999 by the State.

REGULARISATION The direction of the High Court to frame scheme for regularisation of the employees as also the resolution of the Board to regularise the services of the employees who had completed one thousand days of service must be considered having regard to the aforementioned legal position in mind.

When questioned, Mr. Chaudhari and Mr. Sanghi submitted that regularisation would mean permanence. Regularisation of the services of an employee would, therefore, mean that the concerned persons who had no status within the purview of the definition of 'employee' would become employee. Thus, a change in the status would be effected.

An attempt to induct an employee without following the procedure would be a backdoor appointment. Such backdoor appointments have been deprecated by this Court times without number. [See for example Delhi Development Horticulture Employees' Union v. Delhi Admn. (1992) 4 SCC 99, para 23] Even in State of Haryana v. Piara Singh [(1992) 4 SCC 118], whereupon the learned counsel for the parties relied upon, it is stated:

> "Ordinarily speaking, the creation and abolition of a post is the prerogative of the Executive. It is the Executive again that lays down the conditions of service subject, of course, to a law made by the appropriate legislature. This power to prescribe the conditions of service can be exercised either by making rules under the proviso to Article 309 of the Constitution or (in the absence of such rules) by issuing rules/instruct-ions in exercise of its executive power. The court comes into the picture only to ensure observance of fundamental rights, statutory provisions, rules and other instructions, if any, governing the conditions of service. The main concern of the court in such matters is to ensure the rule of law and to see that the Executive acts fairly and gives a fair deal to its employees consistent with the requirements of Articles 14 and 16 "

A 3-Judge Bench of this Court upon taking into consideration a large number of decision in A. Umarani v. Registrar, Cooperative Societies and Others [(2004) 7 SCC 112] held that illegal appointments cannot be regularised. It was further held:

> "No regularisation is, thus, permissible in exercise of the statutory power conferred under Article 162 of the Constitution if the appointments have been made in contravention of the statutory rules."

The power to frame regulations is expressly conferred on the Board in terms of Section 26 of the Act. Such regulations are to be made with the previous approval of the State Government. Indisputably, the State Government by its letter dated 17.3.1999 refused to accord permission in relation thereto.

If no appointment could be made by the State in exercise of its power under Article 162 of the Constitution of India as the same would be in contravention of the statutory rules, there cannot be any doubt whatsoever that the Board or for that matter the Market Committees cannot make an appointment in violation of the Act and the Regulations framed thereunder.

In Executive Engineer, ZP Engg. Divn. And Another v. Digambara Rao and Others [(2004) 8 SCC 262], it was held:

> "It may not be out of place to mention that completion of 240 days of continuous service in a year may not by itself be a ground for directing an order of regularisation. It is also not the case of the respondents that they were appointed in accordance with the extant rules. No direction for regularisation of their services, therefore, could be issued. (See A. Umarani v. Registrar, Coop. Societies and Pankaj Gupta v. State of J&K) Submission of Mr Maruthi Rao to the effect that keeping in view the fact that the respondents are diploma-holders and they have crossed the age of 40 by now, this Court should not interfere with the impugned judgment is stated to be rejected."

[See also Madhyamik Shiksha Parishad, U.P. v. Anil Kumar Mishra and Others, (2005) 5 SCC 122] In Mahendra L. Jain and Others v. Indore Development Authority and Others [(2005) 1 SCC 639], it was categorically held:

> "The question, therefore, which arises for consideration is as to whether they could lay a valid claim for regularisation of their services. The answer thereto must be rendered in the negative. Regularisation cannot be claimed as a matter of right. An illegal appointment cannot be legalised by taking recourse to regularisation. What can be regularised is an irregularity and not an illegality. The constitutional scheme which the country has adopted does not contemplate any back-door appointment. A State before offering public service to a person must comply with the constitutional requirements of Articles 14 and 16 of the Constitution. All actions of the State must conform to the constitutional requirements. A daily-wager in the absence of a statutory provision in this behalf would not be entitled to regularisation. (See State of U.P. v. Ajay Kumar and Jawaharlal Nehru Krishi Vishwa Vidyalaya v. Bal Kishan Soni.)"

In Manager, Reserve Bank of India, Bangalore v. S. Mani and Others [(2005) 5 SCC 100], Umarani (supra) was followed holding that in law 240 days of continuous service by itself give rise to permanence which reason has weight with the opinion of learned Single Judge of the High Court.

It is, therefore, not correct to contend that only because in the correspondences between the State and the Board the appointments of such persons have been described to be irregular, the same

would not mean that they are not illegal.

In any event, no temporary or permanent status can be granted to an employee by way of regularisation. [See Union of India v. Gagan Kumar (2005) 5 SCC 70 and State of Maharashtra and Another v. R.S. Bhonde and Others (2005) 5 SCC 751].

PRECEDENTS Mr. Chaudhary has relied upon a large number of decisions to contend that this Court has directed framing of such schemes.

In Surya Narain Yadav and Others v. Bihar State Electricity Board and Others [(1985) 3 SCC 38], the writ petitioners were appointed as trainee engineers pursuant to an advertisement issued therein. Representations have been made to them that after their training was completed, they would be absorbed in regular employment of the Board. Some employees who were getting age-barred for government employment and had left the Board were told to come back under the temptation of getting permanently employed under the Board. When the Board was reeling under a strike of its employees, these trainee engineers stood by the Board to keep up the generation and distribution of electricity and had been assured of absorption. The Board had decided to absorb them on permanent basis but initially on a probation of two years without conducting any further examination. It was in aforementioned situation, this Court applied the principles of promissory estoppel and observed that the Board should have regularized the services of the trainee engineers. The Court did not lay down any law that regularization would be directed despite the fact appointments had been made in violation of the rules.

In Piara Singh (supra), this Court was beset with the scheme framed by the State to regularize the services of its employees. The Bench did not go into the question of validity or otherwise of such a scheme. We have, however, noticed hereinbefore that even such a scheme would be impermissible in law.

In Madan Singh and Others etc. v. State of Haryana and Others [AIR 1988 SC 2133], this Court was dealing with a matter where the State Government had come forward with orders from time to time for absorption of work charged employees. The Court was of the opinion that the benefits conferred thereunder were available to them.

In Raj Narain Prasad and Others v. State of U.P. and Others [(1998) 8 SCC 473] yet again no law has been laid down. No decision other than Piara Singh (supra) has been referred to. Before this Court, a scheme was submitted in terms whereof the scheme had undertaken to regularize work- charged employees employed prior to 19.9.1985. This Court besides the proposals made therein issued certain other directions.

Strong reliance has been placed by Mr. Chaudhary on R.N. Nanjundappa v. T. Thimmiah & Anr. [(1972) 2 SCR 799] for the proposition that irregular employees can be regularized. Therein it was held:

"The contention on behalf of the State that a rule under Article 309 for regularisation of the appointment of a person would be a form of recruitment read with reference to power under Article 162 is unsound and unacceptable. The executive has the power to appoint. That power may have its source in Article 162. In the present case the rule which regularised the appointment of the respondent with effect from February 15, 1958, notwithstanding any rules cannot be said to be in exercise of power under Article 162. First, Article 162 does not speak of rules whereas Article 309 speaks of rules. Therefore, the present case touches the power of the State to make rules under Article 309 of the nature impeached here. Secondly when the Government acted under Article 309 the Government cannot be said to have acted also under Article 162 in the same breath. The two articles operate in different areas. Regularisation cannot be said to be a form of appointment.

Counsel on behalf of the respondent contended that regularisation would mean conferring the quality of permanence on the appointment whereas counsel on behalf of the State contended that regularisation did dot mean permanence but that it was a case of regularisation of the rules under Article 309. Both the contentions are fallacious. If the appointment itself is in infraction of the rules or if it is in violation of the provisions of the Constitution illegality cannot be regularised. Ratification or regularisation is possible of an act which is within the power and province of the authority but there has been some non-compliance with procedure or manner which does not go to the root of the appointment. Regularisation cannot be said to be a mode of recruitment. To accede to such a proposition would be to introduce a new head of appointment in defiance of rules or it may have the effect of setting at naught the rules."

The said decision has been noticed in various judgments referred to hereinbefore. It instead of helping the Respondents goes directly against them.

In All Manipur Regular Posts Vacancies Substitute Teachers' Association v. State of Manipur [1991 Supp (2) SCC 643], this Court was confronted with various interim orders passed by the High Court from time to time in several writ petitions. It was observed that if the direct recruitment takes place on one hand and substituted teachers are also directed to be regularized subsequently, it would create an enormous problem for the department to accommodate both the categories of persons and in the aforementioned situation, in exercise of its power under Article 142 of the Constitution of India, this Court with a view to avoid further litigation and also to avoid seemingly conflicting interim orders issued by the High Court gave certain directions. Such directions having evidently been issued by this Court in exercise of its power under Article 142 of the Constitution of India do not constitute a binding precedent. Even therein, the scope and ambit of this Court's jurisdiction under Article 142 vis-`-vis existence of the statue and statutory rules and the constitutional mandate contained in Articles 14 and 16 of the Constitution of India had not been taken into consideration.

On the other hand, in a series of decisions, which we have noticed hereinbefore, this Court has now firmly laid down the law that regularization cannot be a mode of appointment.

OTHER CONTENTIONS Mr. Chaudhari has placed strong reliance upon the provisions of the U.P. Regularisation of Adhoc Appointments (on Posts Outside the Purview of the Public Service Commission) Rules, 1979 purported to have been framed by the State in pursuance of the provisions of Clause (3) of Article 348 of the Constitution of India. Rule 4 of the said Rules reads, thus:

> "4. Regularisation of ad hoc appointments (1) Any person who
>
> (i) was directly appointed on ad hoc basis on or before June 30, 1998 and is continuing in service as such on the date of commencement of the Uttar Pradesh Regularisation of Ad hoc Appointments (On Posts Outside the Purview of the Public Service Commission) (Third Amendment) Rules, 2001.
>
> (ii) possessed requisite qualifications prescribed for regular appointment as the time of such ad hoc appointment; and
>
> (iii) has completed or, as the case may be, after he has completed three years service shall be considered for regular appointments in permanent or temporary vacancy, as may be available, on the basis of his record and suitability before any regular appointment is made in such vacancy in accordance with the relevant rules or orders. (2) In making regular appointments under these rules reservations for the candidates belonging to the Scheduled Castes, Scheduled Tribes, Backward Classes and other categories shall be made in accordance with the orders of the Government in force at the time of recruitment.
>
> (3) For the purpose of sub-rule (1) the appointing authority shall constitute a Selection Committee. (4) The appointing authority shall prepare an eligibility list of the candidates, arranged in order of seniority, as determined from the date of order of appointment and if two or more persons are appointed together from the order in which their names are arranged in the said appointment order, the list shall be placed before the Selection Committee along with the character rolls and such other records of the candidates as may be considered necessary to assess their suitability. (5) The Selection Committee shall consider the cases of the candidates on the basis of their records referred to in sub-rule (4).
>
> (6) The Selection Committee shall prepare a list of the selected candidates, the names in the list being arranged in order of seniority, and forward it to the appointing authority."

Apart from the fact that such contention has not been raised before the High Court as also in the counter-affidavit filed before us, the provisions of the said rules by no stretch of imagination can be said to be applicable in the instant case.

Submission of Mr. Chaudhary to take recourse to Regulation 29 of the Establishment Regulations providing that in regard to the matters not specifically covered by the rules persons appointed to the

services of the Board shall be governed by the regulations applicable generally to the State Government employees is misconceived.

The said submission of Mr. Chaudhary is furthermore inconsistent with his submissions, as noticed supra, that even in terms of Section 26-M of the Act, the State Government had no power to issue any direction governing appointment in respect of terms and conditions of the services of the employees. Persons who may be appointed to the services of the Board, furthermore, even according to the learned Counsel appearing on behalf of the Respondents, are those who are regular employees having been appointed in terms of the provisions of the Act and the Regulations framed thereunder. We have, therefore, no doubt in our mind that Regulation 29 of the Establishment Regulations which is in Chapter VII of the Act refers to only such regulations and orders which would be applicable to the regular employees.

The fact that all appointments have been made without following the procedure or services of some persons appointed have been regularised in past, in our opinion, cannot be said to be a normal mode which must receive the seal of the court. Past practice is not always the best practice. If illegality has been committed in the past, it is beyond comprehension as to how such illegality can be allowed to perpetrate. The State and the Board were bound to take steps in accordance with law. Even in this behalf Article 14 of the Constitution of India will have no application. Article 14 has a positive concept. No equality can be claimed in illegality is now well- settled. [See State of A.P. v. S.B.P.V. Chalapathi Rao and Others,(1995) 1 SCC 724, para 8, Jalandhar Improvement Trust v. Sampuran Singh (1999) 3 SCC 494, para 13 and State of Bihar and Others v. Kameshwar Prasad Singh and Another (2000) 9 SCC 94, para 30].

In the instant case, furthermore, no post was sanctioned. It is now well-settled when a post is not sanctioned, normally, directions for reinstatement should not be issued. Even if some posts were available, it is for the Board or the Market Committee to fill-up the same in terms of the existing rules. They, having regard to the provisions of the regulations, may not fill up all the posts.

It may be that from the very inception the provisions of the Act and the Regulations framed thereunder had been given a complete go-by. It, furthermore, may be that the Board had adopted resolution for purported regularization of the services of its employees and employees of Market Committees appointed prior to 1.10.1988. We have, however, noticed hereinbefore that such a resolution on the part of the Board was beyond its domain. It is also true, as has been contended by Mr. Chaudhary and Mr. Sanghi, that the power to create posts was with the Board but the Board did not exercise its power nor the competent authorities of the Market Committees proceeded to appoint employees on the sweet will of the concerned authorities without in any way bothering for the provisions of the Act and the Rules framed thereunder. It is interesting to note that the Market Committees claimed themselves to be local authorities for the purpose of obtaining exemption from payment of income tax. The officers of the local authorities had a bounden duty not only to act within the four-corners of the statute but having regard to the constitutional scheme in mind. They failed and/ or neglected to do so. As appointments had been made de'hors the rules and without following the procedures known in law and in flagrant violation of constitutional scheme as laid down in Articles 14 and 16 of the Constitution of India, the appointments although might have been

made in exigencies of services, they must be held to be wholly illegal and without jurisdiction. An attempt has been made by the Respondents to show that the income of the Market Committees has increased from Rs. 1.92 crore to Rs. 210.88 crores and the quantum of construction work has also increased from Rs. 65.8 crores to Rs. 128.4 crores. It has also been suggested that in November, 2005, the income has increased in the year 2004-05 to Rs. 400 crores and the annual budget of the Market Committees which has been sanctioned is approximately Rs. 350 crores. The availability of funds is not and cannot be a valid ground to make the appointments of persons without proper sanction and creation of posts and cannot be taken to be an excuse to perpetuate illegalities.

A contention has been raised by Mrs. Dixit that there was no material before the Government for issuing the impugned instructions insofar as the financial position vis-`-vis the strength of the employees had been taken into consideration. It is not necessary for us to go into the aforementioned question inasmuch as we are herein concerned with the legality and/ or validity of the impugned orders of termination of services and the same having not been done, the appointment of the concerned employees were wholly illegal and without jurisdiction and, thus, void and of no effect.

CONCLUSION The upshot of our aforementioned discussions is:

> (i) The Board and the Market Committees were bound by the Act, the Rules and Regulations framed thereunder in making appointments.

Statutory provisions as also the constitutional requirements were required to be complied with.

(ii) The Board had no jurisdiction to frame any scheme for regularization in the pith of the statutory regulations operating in the field. Any legislation involving appointment or laying down the conditions of service of the employees would require prior sanction of the State.

(iii) The State of Uttar Pradesh in exercise of its purported power under Section 26-M of the Act could not have issued the directions as it has been done but such a direction cannot be said to be wholly unreasonable.

(iv) The State although could not exercise a statutory power beyond the provisions of the statute but the same although might have been done under a misconception of law but was not otherwise arbitrary or mala fide.

(v) Availability of vacancies and/ or the fund by themselves would not allow the Market Committees or the Board to make appointments in flagrant violation of the statutory provisions. Although the direction of the State of U.P. which had been acted upon by the Board did not have a statutory backing, the High Court could not have issued a writ of or in the nature of mandamus as the writ petitioners Respondents did not have any legal right.

(vi) We are not oblivious of the fact that there may be some employees whose services have been terminated without any rhyme or reason. Mr. Verma appearing on behalf of the Board has assured

us that the Board shall look into cases of such employees whose termination has been effected beyond the policy decision taken by the State although we do not intend to express any opinion as regards such employees.

We, however, direct the Board and the Market Committees to fill up all existing vacancies strictly in accordance with law as expeditiously as possible and preferably within six months from date. While doing so, amongst other eligible candidates, the candidature of the employees whose services have been terminated should also be taken into consideration and in the event, the appropriate authority of the Market Committees or the Board can relax the age-bar, the same would be done. The respective Market Committees, however, in the meanwhile, if for exigencies of the work, intend to appoint any person, it may do so. However, post facto approval therefor should be obtained from the Board. In the offers of appointment which may be issued to such temporary or ad hoc employees it shall be made clear that their appointments would be ad hoc in nature and the same shall be co-terminus with the appointment of regular employees.

In view of our findings aforementioned, we are of the opinion that the judgment and order dated 11.8.2000 passed by the learned Single Judge which has been upheld by the Division Bench by its order dated 5.9.2000 does not lay down the law correctly and the judgment and order dated 13.11.2000 passed by a Division Bench of the Lucknow Bench of the Allahabad High Court in Writ Petition No. 1093 (S/B) of 1999 lays down the law correctly. In the result, Civil Appeal arising out of SLP(C) No. 15797 of 2001 is dismissed and other civil appeals filed by the Board and the State of Uttar Pradesh as also civil appeal arising out of SLP(C) No. 15677 of 2003 filed by the Board are allowed. However, there shall be no order as to costs.