

(1998) 04 MP CK 0007
In the Madhya Pradesh High Court
Case No : W. P. 1307 of 1997 (J)

Dr. Govind Prasad Mishra

APPELLANT

Vs

Rani Durgawati Vishwavidyalaya and Others

RESPONDENT

Date of Decision : 02-04-1998

Acts Referred:

Madhya Pradesh Vishwavidyalaya Adhiniyam, 1973 — Section 49(2)
University Grants Commission Act, 1956 — Section 12, 4

Citation : (1998) 2 MPJR 169

Hon'ble Judges : A. K. Mathur, C.J.; S. K. Kulshreshtha, J

Bench : Division Bench

Advocate : P. N. Dubey, for the Appellant; Ravindra Shrivastava, Advocates for respondents No. 1 to 3 and Mr. V. K. Tankha with Ku. A. Banerjee, Advocate, for the Respondent

Final Decision : Allowed

Judgement

The petitioner challenges the promotion of the respondent No. 4 Smt. Karuna S. Verma by the respondents 1 and 2 to the post of professor under the "Merit Promotion Scheme" in the Department of Biology in Rani Durgawati Vishwa Vidyalaya, Jabalpur. As per the petitioner, he is public spirited person and is a scientist in veterinary discipline. He is an Ex-Member of Board of Management of Jawahar Lal Nehru Krishi Vishwa Vidyalaya, Jabalpur as also an Ex-Member of Executive Council of Rani Durgawati Vishwa Vidyalaya (respondent No. 1). The petitioner claims interest in proper and efficient functioning of the respondent No. 1 University and, therefore, his locus standi to file the present petition in public interest. The petitioner has clarified that he is not personally prejudiced against any of the respondents, including the respondent No. 4 whose appointment he has challenged, and the petition has been filed purely in public interest.

The petitioner has averred that the respondent No. 1 Rani Durgawati Vishwa Vidyalaya, Jabalpur, has been incorporated as University specified under second

schedule to the M. P. Vishwa Vidyalaya Adhiniyam 1973 (hereinafter referred to as V. V. Adhiniyam) and is, therefore, governed by the provisions thereof which provide for appointment to the teaching posts as per the procedure laid down in section 49. Sub-section (2) of section 49 of the V. V. Adhiniyam provides for constitution of selection committee for selection to the post of professor, Reader or Lecturer or to any other teaching post of the University. The University Grants Commission promulgated a "Merit Promotion Scheme" which was adopted for implementation by the respondent No. 1 University under Ordinance 69 laying down the procedure for appointment of teachers under the said scheme subject to restrictions contained in the ordinance. One such restriction was that not more than 1/3rd of the number of total permanent posts of Lecturers or Readers within a department may hold such merit promotions as next height level at any given time. Further, the promotion as Professor under the Merit Promotion Scheme was to be restricted to not more than two Readers within the department in the duration of the plan period. The petitioner contends that in all seven Readers were borne on the department of Biological / Micro Science and out of them three had already been promoted to hold the post of Professor under the Merit Promotion Scheme leaving no room for any further Promotion in view of the restriction of 1/3rd which already stood exceeded. The petitioner has further pointed out the Ordinance 69 required the respondent to refer the work presented by individual teacher to at least two referees in the subject / discipline concerned and the evaluation reports of these referees to be made available to the selection Committee, which should have three outside experts, for consideration of such cases, but this procedure was not followed. The Selection Committee, which interviewed the candidates on 28.11.96, had been constituted for considering the cases for direct recruitment to the post of Professor, but she was found less meritorious and another person was selected; but the same Selection Committee is then said to have recommended her for promotion under the Merit Promotion Scheme on the same day, which clearly spells out the undue and under served favor having been granted to the respondent No. 4 in her promotion under the Merit Promotion Scheme without adherence to the procedure prescribed therefore. The petitioner contends that prior consultation with the Dean of the faculty was not made and signatures of the Selection Committee constituted for making selection under the Career Advancement Scheme, had been obtained although on the very day, the Committee had not recommended her for appointment under the said Career Advancement Scheme. The petitioner has referred to a representation having been made one Bhagwati Dhar Bajpai to the Chancellor against illegal promotion of the respondent No. 4, but since the illegality has not been removed by the respondents, this petition has been brought in public interest.

Respondents 1 and 2 have filed return to oppugn the allegations of the petitioner with regard to the manner and procedure adopted by the respondents in granting promotion to the respondent No. 4 under the Merit Promotion Scheme and have, in particular, pointed out that the interpretation placed by the petitioner on the

provisions of the Scheme, if examined in proper perspective in conjunction with the U.G.C. Scheme for merit promotion, is erroneous. The respondents have also challenged the locus standi of the petitioner to maintain a writ petition for a writ of quo warrantor and have further pointed out that such a writ even otherwise does not lie as the respondent No. 4 does not hold any public office. The respondents have supported the promotion of respondent No. 4 as valid. The respondent No. 4 has also filed a reply and, apart from adopting the return filed on behalf of the respondents 1 and 2, has further pointed out that the petition has been sponsored by one Dr. S. P. Gautam, who, instead of himself approaching the Court on account of this apprehension of the respondent No. 4 being appointed as Head of the Department in preference to him in view of the subsequent legislative changes in the V. V. Adhinyam has brought the matter before the Court through the present petitioner. According to respondent No. 4, Dr. S. P. Gautam, who was, at one point of time, her student, was less meritorious but was still selected in preference to her, on account of extraneous considerations, by the Committee in the meeting dated 28.11.96 while the respondent was promoted under the Merit Promotion Scheme. Dr. S. P. Gautam does not want to come to the fore-front, with the result the present petition has been maliciously brought through the petitioner by him.

The respondent No. 4 has also pointed out that in the meanwhile, one person, viz., Dr. Oomachand has retired on 28.2.98 and since now a post has become available, the existing number of Professors even as per the interpretation placed by the petitioner on the Ordinance 69 of the Rani Durgawati Vishwa Vidyalaya, does not exceed the prescribed number.

We have heard Shri P. N. Dubey, learned counsel for the petitioner, Shri Ravindra Shrivastava, learned counsel for respondents 1 and 2 and Shri V. K. Tankha, learned counsel for respondent No. 4. Learned counsel for the petitioner has urged that on account of patent infirmity in the appointment of respondent No. 4 as Professor under the Merit Promotion Scheme in violation of Ordinance 69 of the University and favors writ large, the appointment deserves to be quashed.

Learned counsel for the respondents, while having not much to say to controvert the contentions of the petitioner of factual matrix except that the interpretation of the petitioner with regard to the restrictions contained in the scheme is fallacious, has taken subterfuge under the specious pleas that the petitioner has no locus standi to maintain this petition for a writ of quo warrantor, his bonafides in approaching the Court with honest intention and purpose are in serious doubt as the case appears to have been sponsored by a colleague of respondent No. 4 for his personal gains, that the writ of quo warrantor would not lie as the respondent No. 4 is not a holder of public office and that the petition has become in fructuous as now a post of Professor under the Merit Promotion Scheme has become available on account of retirement of Dr. Oomachand.

The University Grants Commission established u/s 4 of the U.G.C. Act, 1956, in exercise of the power u/s 12 of the said Act, by a communication dated

23.11.82, recommended implementation of the Merit Promotion Scheme for the University appointed teachers and by a communication dated 31.12.82 recommended a similar scheme for college appointed teachers. The basic objective of the scheme was to recognize the outstanding work done by the University teachers in the area of teaching and research subject such work to objective evaluation of experts in the subject area concerned and to provide for reasonable opportunities for professional advancement to such teachers who merit academic recognition on a competitive basis. The scheme was in the nature of a "flexible complementing scheme" wherein no additional posts were required to be created and the existing persons on the basis of critical assessment were to be promoted to the next higher level to hold the post as personal to them. The resultant vacancy was, therefore, not required to be filled. These guide-lines for implementation of the Merit Promotion Scheme for University teachers have been appended as Annexure R-1 / 1 to the Return of respondents 1 and 2. Clause 3 of the scheme provides for method of implementation and Clause 4 contains the restrictions. As the controversy in the present petition related to such method and restrictions, clauses 3 and 4 of the guide-lines are reproduced hereunder:

3. (a) Teachers in the University departments engaged in advanced teaching and research and whose contribution and achievements are such as to merit recognition, may be considered for merit promotion, in the first instance, after completing six years of continuous service in their respective Cadre, of which at least three years should be in the institution where he / she is being considered for such assessment and merit promotion.

(b) Any teacher who has been considered and not elected for merit promotion in the initial presentation could however submit his work again only after a lapse of three years.

(c) Teachers interested in such assessment and consideration of merit promotions should present their work to the University, through their department latest by 31st December each year or a date stipulated by the University.

(d) The University should generally take a decision before the beginning of the next academic year, so that such promotions can become effective from the date of the beginning of the next academic session.

(e) While the final selection of persons to be promoted can be made by the university in accordance with its normal procedure, it would be necessary to refer to the work (to include research publications, book, reviews, curriculum development, teaching aids, innovation in teaching methods, equipment developed etc.) presented by the individual teachers to at least two referees in the subject / discipline concerned. The referees are to be selected by the Vice Chancellor out of panel of names set up according to the procedure prescribed by the University for selection Committee. The evaluation reports by these referees should be kept confidential and should be made available to the Selection Committee. The final selection would be based upon the referee evaluation

comments and the unanimous opinion of the outside experts (at least two outside experts in the case of promotion to readers and three outside experts for promotion to Professors) on the Selection Committee.

(f) the post of a reader given to a lecturer or the position of the professor given to a reader, through merit promotion, would be personal to the incumbent concerned.

(g) the main criteria for promotion under this scheme would be the merit of the academic contributions and not the seniority of the teachers.

Not more than 1/3rd of the number of the permanent position of lecturers or readers within a department may hold such merit promotions at next higher level at any given time. Further, not more than two readers may be given such merit promotion as professor within a department for the duration of plan period. The persons holding such merit promotions would not count for determining the total posts in the cadre of readers for purposes of merit promotion to professors. It would be desirable for a department not to fully utilize the merit promotion scheme at one time, but to phase it out, so that the full quota could be reached over a period of time and make it possible for consideration of fresh cases each year. Ordinarily not more than 1/3rd of these promotion may be filled in any given year.

The respondent University being a University governed by the provisions of the M. P. V. V. Adhiniyam, 1973 has power to make statutes and ordinance as per sections 35, 36, 37 and 38 of the V. V. Adhiniyam. In exercise of the said power, the respondent No. 1 University made Ordinance 69 for implementation of the Merit Promotion Scheme. The preamble to the Ordinance recites that the role of teachers is crucial in the maintenance of academic standards and discipline in an educational institution and a great responsibility, therefore, lies on the teachers to ensure that proper academic atmosphere is maintained in the institution and that all academic work is carried out efficiently and with devotion to duty as a full time employee of the institution and, therefore, there should be regular assessment of his work and at the same time, it is necessary that teachers are provided reasonable opportunities for career advancement and recognition of merit. Since the challenge is based on the provision made in the scheme and the method of its implementation, it would be appropriate to reproduce the relevant provisions of the Ordinance, which read as under :-

The basic objectives of the scheme should be :

- (1) to recognize outstanding work done by the University teachers in the areas of teaching and research;
- (2) subject such work to objective evaluation by experts in the subject areas concerned and
- (3) To provide for reasonable opportunities for professional advancement to such teachers, who merit academic recognition, on a competitive basis. The scheme

therefore may be appropriately named as "Merit Promotion Scheme for University Teachers".

This would be in the nature of a "flexible complementing scheme" wherein no additional posts are created, and the existing persons on the basis of critical assessment are promoted to the next higher level and the position is held by such incumbents as personal to them, and no resultant vacancy is required to be filled. Such a Scheme would considerably encourage the teachers to engage in advanced teaching and research and make distinct contributions which would merit recognition and promotion.

METHOD OF IMPLEMENTATION :-

(a) Teachers in the University Department engaged in advanced teaching and research and whose contribution and achievements are such to merit recognition, may be considered for merit promotion in the first instance, after completing eight years of continuous service in their respective cadre, of which at least four years should be in the institution where he / she is being considered for such assessment and merit promotion.

(b) Any teacher who has been considered and not selected for promotion in the initial presentation could, however, submit his work again only after a lapse of two years.

(c) Teachers interested in such assessment and consideration of merit promotion should present their work to the University, through their Department, latest by 31st December each year on a date stipulated by the University.

(d) The University should generally take a decision before the beginning of the next academic year so that such promotions can become effective from the date of the beginning of the next academic session.

(e) While the final selection of persons to be promoted can be made by the University in accordance with his normal procedure, it would be necessary to refer the work (to include research publications, book reviews, curriculum development, teaching aids, innovation in teaching methods, equipment developed etc.) presented by the individual teachers to at least two referees in the subject / discipline concerned. The referees are to be selected by the Vice - Chancellor out a panel of names set up according to the procedure prescribed by the University for selection committees. The evaluation reports by these referees should be kept confidential and should be made available to the selection committee. Merit Promotion be given by the appointing authority to a teacher only on recommendation of the selection committee duly constituted after it has given due consideration to the opinion of the referees. There should be at least two outside experts on the selection Committee in the case of promotion to readers and three outside experts for promotion to professors in these cases.

(f) The post of a reader given to a lecturer or the position of a professor given to a reader, through merit promotion, would be personal to the incumbent

concerned.

(g) Not more than 1/3 of the number of total permanent position of lecturers or readers within a department may hold such merit promotions as next higher level at any given time. Further, not more than two readers may be given such merit promotion as professor within a department for the duration of plan period. The persons holding such merit promotions would not count for determining the total posts in the cadre of readers for purposes of merit promotion to professors. It would be desirable for a department not to fully utilize the merit promotion scheme at one time but to phase it out so that the full quota could be reached in the plan period."

It was under the above method of implementation that according to the respondents, respondent No. 4 had been granted promotion to the post of Professor, which the petitioner has challenged as in violation thereof.

Before proceeding to consider the validity of the promotion, it is necessary to refer to the legal objections raised by the respondents. The first objection is with regard to the locus standi of the petitioner to seek information by a writ of quo warrantor in a matter with which he is himself admittedly not concerned, except as a person interested in proper functioning of the university. The petitioner contends that he has been a member of the Board of Management of Jawahar Lal Nehru Krishi Vishwa Vidyalaya, Jabalpur, and also a member of the Executive Council of the respondent No. 1 University in the past and has, therefore, a deep interest in the proper and efficient functioning of the said University. It is, therefore, clear that although the petitioner himself does not claim to gain any personal advantage if the promotion of the respondents No. 4 is quashed, his interest in the affairs of the University governed by statutory provisions can not be undermined. The question of locus standi had come up before the Single Bench of this Court in Rajendar Kumar Chandanmal Vs. Government of State and Others, . It was observed that for the issue of a writ of quo warrantor, no special kind of interest in the realtor is needed nor is it necessary that any of his specific legal right be infringed. It is enough for its issue that the realtor is a member of the public and acts bona fide and is not a mere pawn in the game having been set up by others. Later a Division Bench of this Court in Sudhir Kumar v. Municipal Corporation, Jabalpur (1978 M. P. L. J. 14) considered this aspect and held that the right to move the Court is available to a member of public who acts bone fide and who is not a "man of straw" set up by others as a mere pawn in the game. In the case of Dr. P. S. Venkataswamy v. University of Mysore (A.I.R. 1964 Mys 159), it was held that ordinarily the petitioner has to make out his personal interest except in case of writ of quo warrantor. The learned counsel for the respondents have also relied on the decision of the Calcutta High Court in S. B. Ray v. P. N. Banerjee (72 C. W.N. 50) that a writ of quo warrantor would lie only if the office is a public office and is held by usurper without authority and mandamus for refund of money at the instance of the petitioner who is himself not entitled to claim such refund from the person said to have usurped the office

is not maintainable. Apart from the fact that it has consistently been held that a writ in the nature of quo warrantor is maintainable at instance of realtor, who claims no personal interest, there is also a recent decision of the Supreme Court in *Dr. (Mrs.) Meera Massey, Dr. Abha Malhotra and Dr. S.C. Bhadwal and Others Vs. Dr. S.R. Mehrotra and Others*, on the point. In the said case, the petitioner had filed the writ petition challenging the anomalies and illegalities in the procedure adopted by the University in making selection and regularizing various posts in violation of the provisions of the statute and ordinances and the facts revealed that he was genuinely concerned to rectify the wrongs without any personal animosity against anyone. It was, therefore, held that there was no merit in the challenge to the locus standi of the petitioner. In the present case, the petitioner has not only made out a case indicating his interest in proper functioning of the University, but he has also been a member of the Executive Body in the past and, therefore, has a genuine concern in the affairs of the University. Merely because the petitioner has no interest in the sense that he is personally not affected by the appointment of respondent No. 4, it cannot be said that the petitioner, in pointing out the flaws in the appointment and the breach of the statutory provisions, has no locus standi to maintain such a petition.

The next question urged on behalf of the respondents, particularly respondent No. 4 is that the petitioner has ill motive in approaching the Court as he is in fact espousing the cause of Dr. Gautam who was selected by the Committee in direct recruitment under the Career Advancement Scheme in preference to the respondent No. 4 and who apprehends that respondent No. 4 will be appointed as Head of the Department being senior most person. It has also been pointed out that the said Dr. Gautam at one point of time was a student of respondent No. 4 and it was not possible for him, therefore, to directly approach the Court against his own teacher without a marked degree of embarrassment. It is true that if the realtor seeking information through a writ of quo warrantor has no personal interest, he should at the same time not have any motive for approaching the Court, having been used as pawn in the game as held in *Sudhir v. Municipal Corporation Jabalpur* (ibid). Reliance has been placed upon the case of *A. N. Shashtri y. State of Punjab* (1988 (Supp) S. C. C. 127) in which the Supreme Court has cautioned that the Court should consider whether the writ is the outcome of any ill will or malice. In the said case, the promotion to the post of Director was challenged on the ground that the incumbent did not possess the educational qualification prescribed for the post by Punjab Ayurvedic. Deptt. (Class I and II) Rules, 1963. It was observed that the same qualification was prescribed for the post of Deputy Director which the incumbent earlier held and since there was no challenge to his appointment to the post of Deputy Director and the incumbent had been serving as Professor for several years for which the qualification was no different, the challenge was not sustainable. In the said decision, material was placed on record to show that the writ petitioner before the High Court were at one point of time students of the respondent and it was observed that ordinarily one would expect obligations, piety and reverence in the

conduct of the writ petitioners towards him which were surprisingly wanting. However, the petition was dismissed on the ground that the petitioners had failed to establish that the appellant did not possess the requisite qualifications.

In the present case, we fail to comprehend how Dr. Gautam was in any way was prevented from approaching this Court on account of any personal embarrassment. It is clear from the record that he had competed with the respondent for appointment to the post of professor and the same selection committee had recommended him in preference to the candidature of the respondent No. 4, who was granted promotion under the Merit Promotion Scheme. Dr. Gautam having already entered the arena of competition with respondent No. 4 and having been preferred to her in appointment to the post, had no reason to be bashful in challenging the appointment of respondent No. 4 and creating the petitioner as a stooge for his cause. The promotion made under the Merit Promotion Scheme had come up for consideration before the Supreme Court in the case of Dr. Rashmi Srivastava and Dr. B.D. Srivastava Vs. Vikram University and others, with regard to inter se seniority of directly recruited Readers and the Merit Promotees, wherein it was held that as the promotion to the post of Readers and Professors was personal to the incumbent, they held only ex-cadre post and, therefore, seniority could not be counted in the cadre post although they continued to hold the post of Professor or Reader, as the case may be. It was observed that such promotees formed a distinct class of cadre not only because of the source of their appointment but also because of the nature and character of appointment and nature of the post which they held. Under these circumstances, there was no case of tie between Dr. Gautam and the respondent No. 4. The malice attributed to the petitioner thus appears to be on an illusory foundation. We, therefore, find no substance in the allegation that the petitioner has no locus standi to maintain this petition or that the petition has been filed with any oblique motive.

The respondents have challenged the maintainability of the petition on the ground inter alia that no writ of quo warrantor lies unless it is demonstrated that the usurper holds public office. Reference has been made to section 11 of the M. P. Vishwa Vidyalaya Adhiniyam, which describes officers of the University viz., the Kuladhipati, the Kulpati, the Deans of the Faculties, the Registrar, the Dean of Students Welfare and such other officers in the service of the University as may be declared by the statutes to be officers of the University. "Teachers of the University" have been defined by section 4 (xx) to mean Professors, Readers, Lecturers and such other persons as may be appointed for imparting instructions or conducting research, with the approval of the Academic Council in the University or the College or Institution maintained or recognized by the University. The classification of Teachers is contained in section 63. Section 49 appearing under Chapter IX of the Act provides for appointment under Chapter IX of the Act provides for appointments to teaching posts in the University. It is, therefore, contended that the duty which a Professor in a department of the University discharges is merely pedagogic and in a marginal degree,

administrative. Reference has been made to the decision of *S. B. Ray v. Banerjee* (ibid), in which it was held that the post of Principal of University College was not a public office and a writ in the nature of Quo Warranto did not lie at the instance of a private realtor. Reference was made to the discussion contained in *Extraordinary Legal Remedies* by Ferris that a public office is the right, authority and duty created and conferred by law, by which an individual is vested with some portion of the sovereign functions of the Government to be exercised by him for the benefit of the public, for the term and by the tenure prescribed by law. It implies a delegation of a portion of the sovereign power. The discussion is contained in paragraphs 40 and 41 of the said decision, which read as follows :-

40. In the instant case, satisfactory evidence in support of the allegations of improper notice against the petitioner, has not, in our opinion been placed on record. But we have to examine whether the office with which we are concerned in this application is an office of a public nature or a public office. In Ferris on "Extraordinary Legal Remedies," page 166, article 145, it is stated; "A public office is the right, - authority and duty created and conferred by law, by which an individual is vested with some portion of the sovereign functions of the Government to be exercised by him for the benefit of the public, for the term and by the tenure prescribed by law. It implies a delegation of a portion of the sovereign power. It is a trust conferred by public authority for a public purpose, embracing the ideas of tenure, duration, emoluments and duties. A public officer is thus to be distinguished from a mere employment or agency resting on contract, to which such powers and functions are not attached. The Common Law Rule is that in order for the writ to lie, the office must be of a public nature. The determining factor, the test, is whether the officer involves a delegation of some of the solemn functions of Government, either executive, legislative or judicial, to be exercised by the holder for public benefit. Unless his powers are of this nature, he is not a public officer. As one authority puts it, the test to be applied in determining whether an information will lie, are the source of the office, which should be from the sovereign authority, the tenure, which should be fixed and published; and the duties which should be of a public nature.

What we have to determine in this application is whether the officer of the Principal of the University Law College is a public officer. Mr. N. C. Sen for the petitioner, submits that the Calcutta University is imparting education with State aid. One of the functions of the Government, therefore, has been delegated to the University/ And any officer under the University is a public officer. This argument appears to be far fetched. It does not seem to us that the office of the Principal of the University Law College involves a delegation of any of the solemn functions of Government either executive or legislative or judicial to be exercised by the Principal for public benefit. The Principal of the Law College is the head of an institution maintained, as we shall see later, by the Calcutta University and engaged in imparting legal education to those who are the students of that college. He may have administrative and pedagogic duties to be discharged in the interest of the students of his college; but we do not see how those duties

can be said to be duties of a public nature which Ferris has hinted at in the passage quoted above.

If there is failure or neglect on his part to perform his duties, his students or their guardians and in some case; even the staff of the college may be affected; but the public as such are not interested in the due observance of the obligations of his employment. In any event, the interest of the public, if any, is so remote that his office does not become a "public office" as explained by Ferris. From this point of view we are unable to hold that the principal of the Law College is a public officer vested with any portion of the sovereign function of the Government to be exercised by him for public benefit. In the premises, we are of opinion that a writ in the nature of Quo Warrantor does not lie at the instance of private relator in regard to the office of the Principal of the University College of Law."

As observed by the Supreme Court in *The University of Mysore and Another Vs. C.D. Govinda Rao and Another*, . it must be shown that the office in question is a public office and is held by the Usurper without legal authority. The relevant discussion is contained in paragraph 7 of the said judgment, which reads as follows :-

7. As Halsbury has observed :

An information in the nature of a quo warrantor took the place of the obsolete writ of quo warrantor which lay against a person who claimed or usurped an office, franchise or liberty, to enquire by what authority he supported his claim, in order that the right to the office or franchise might be determined." Broadly stated, the quo warrantor proceedings affords a judicial enquiry in which any person holding an - independent substantive public office, or franchise or liberty is called upon to show by what right he holds" the said office, franchise or liberty; if the inquiry leads to the finding that the holder of the office has no valid title to it, the issue of the writ of quo warrantor ousts him from that office. In other words, the procedure of quo warrantor confers jurisdiction and authority on the judiciary to control executive action in the matter of making appointments to public offices against the relevant statutory provisions, it also protects a citizen from being deprived of public office to which he may have a right. It would thus be seen that if these proceedings are adopted subject to the conditions recognized in that behalf, they tend to protect the public from usurpers of public office; in some cases, persons not entitled to public office may be allowed to occupy them and to continue to hold them as a result of the connivance of the executive or with its active help, and in such cases, if the jurisdiction of the courts to issue writ of quo warrantor is properly invoked, the usurper can be ousted and the person entitled to the post allowed to occupy it. It is thus clear that before a citizen can claim a writ of quo warrantor, he must satisfy the court, inter alia, that the office in question is a public office and is held by usurper without legal authority, and that necessarily leads to the enquiry as to whether the appointment of the said alleged usurper has been made in accordance with

law or not.

In *Sudhir Kumar v. Municipal Corporation, Jabalpur* (ibid), it was observed that in the case of a writ of Quo Warrantor, the office must be public, the office must be substantive in character, the office must have been created by statute or Constitution and the office must be shown to have been held by the Usurper without the authority. It was also observed that the court has jurisdiction and authority to control. Executive Action in the matters of making appointment to Public Officers against relevant statutory provisions. Respondents have also referred to the decision in *Dr. P. S. Venkataswamy v. University of Mysore* (ibid), in support of their contention that the post of Professor and Reader is not a public office and have contended that no writ of Quo Warrantor would, therefore, lie against the respondent no. 4 and since the petitioner claims no personal interest, he can not seek certiorari against the respondents.

Strictly speaking, it is true that the petitioner has not been able to demonstrate that the respondent No. 4 holds a public office. A writ of Quo Warrantor would, therefore, not lie as the respondents apart from some administrative and teaching duty is not discharging any function concerning the general public directly, although education has now, in a way, become associated with the solemn function. In the present case, the petitioner is also seeking a direction to the respondent 1 to 3 to dispense with the service of the respondent No. 4 and to recover the public money paid to her on account of her occupying the officer in violation of the statutory provisions. As observed in *Or. P. S. Venkataswamy v. University of Mysore* (ibid) it is not well established that the essential purpose of Article 226 of the Constitution is to protect fundamental rights guaranteed by the constitution, to correct legislative or executive excesses or abuse of power and generally to see that all persons exercising authority and all tribunals and authorities including, in appropriate cases, a Government are kept within the bounds of their jurisdiction or sphere of authority of power. We may also refer to the decision of the Supreme Court in *Shivajirao Nilangekar Patil Vs. Dr Mahesh Madhav Gosavi and Others*, that where allegations made in the petition disclose a lamentable state of affairs in University which is a matter of public interest, it becomes duty of the court to hold enquiry into the allegations. The observations contained in paragraph 36 of the said judgment read thus:

The allegations made in the petition disclose a lamentable state of affairs in one of the premier universities of India. The petitioner might have moved in his private interest but enquiry into the conduct of the examiners of the Bombay University in one of the highest medical degrees was a matter of public interest. Such state of affairs having been brought to the notice of the Court, it was the duty of the Court to the public that the truth and the validity of the allegations made be inquired into. It was in furtherance of public interest that an enquiry into the state of affairs of public institution becomes necessary and private litigation assumes the character of public interest litigation and such an enquiry cannot be avoided if it is necessary and essential for the administration of justice.

Since the petitioner has brought to the notice of the court a patent illegality inasmuch as after the respondent No. 4 was not recommended by the committee for appointment to the post of Professor, the very committee is said to have made her selection under the Merit Promotion Scheme and a direction against the University and its office bearers is also being sought, we find that the High Court is not bereft of its power merely because it is said that the respondent No. 4 is not a holder of a public office, to issue writ or direction if on examination of the facts, the said glaring illegality becomes apparent to the court and deserves to be remedied in public interest. We may also refer to the ancillary argument that the representation before the respondent No. 3 is already pending and the alternative remedy has, thus, not been exhausted. When the petition raises a pure question of law, it would be a travesty of justice to non-suit the petitioner on that ground and that to when he is himself not the person who had sent the representation. We expect the respondent / University to act with a sense of responsibility and in accordance with the Act under it has been incorporated and the ordinance framed by it under the statutory provisions. The matter brought to our notice, is therefore, purely a question of law, as promotion under the Merit Promotion Scheme was not permissible in violation of the restrictions inherent in the scheme itself.

It has not been disputed before us, indeed it can not be, that the respondent No. 4 was not selected, in any case not recommended, for appointment to the post of Professor in the said department by the committee convened in this behalf on 28.11.1996 but, at the same time, the very committee made recommendation for promotion of the respondent No. 4 under the Merit Promotion Scheme. A resume of the scheme would bear out that the basic objective of the scheme is to recognize outstanding work done by the University Teachers in the areas of teaching and research and to subject such work to objective evaluation by experts in the special areas concerned and thus, to provide for reasonable opportunities for professional advancement to such teachers, who merit academic recognition on a competitive basis. Clause (e) of the Scheme in "method or recruitment" requires the University to refer the work presented by the individual teachers to at least two referees in the subject / discipline concerned and their evaluation reports are required to be made available to the Selection Committee and only on recommendation of the Committee, the appointment can be made. Section 49 of the M. P. Vishwa Vidyalyaya Adhiniyam, 1973 provides for the method of appointment to teaching posts and lays down as follows:

49. Appointment to teaching posts. -

(1) No person shall be appointed -

(i) as a Professor, Readers or Lecturer; or

(ii) to any other teaching post of the University paid by the University except on the recommendation of a committee of selection constituted in accordance with

sub-section (2):

Provided that if appointment to any of the teaching posts aforesaid is not expected to continue for more than six months and cannot be delayed without detriment to the interest of the Departmental or institution maintained by the University the Executive Council may make such appointment without obtaining the recommendation of the committee of selection constituted under sub-section (2) but the person so appointed shall not be retained on the same post for a period exceeding six months or appointed to another post in the service of the University except on the recommendation of the said committee of selection. Provided further that any such appointment purported to have been made under the preceding proviso prior to the 13th day of February, 1974 and continuing on such date shall continue till the 30th day of June, 1974 or the filling up of the post in accordance with sub-section (5), whichever is earlier.

(2) The members of the committee of selection shall be :-

(i) the Kulpati Chairman

(i-a) ***

(ii) ***

(iii) one expert to be nominated by Kuladhipati from a panel, submitted by the academic council of three experts in the subject not connected with the University in any manner whatsoever.

(iv) Three subject experts, not connected with the University in any manner whatsoever to be nominated by the Kuladhipati.

(v) ***

(3) Three members of the selection committee shall form a quorum.

(4) The Committee shall investigate the merits of the various candidates, and shall recommend to the executive Council the names, if any, of persons who it considers suitable for the posts, arranged in order of marks :

Provided that no recommendation shall be made unless at least two experts nominated under clauses (iii) and (iv) of sub-section (2) are present in the meeting in which such recommendation is to be decided upon.

(5) Out of the names so recommended under sub-section (4) of Executive Council shall appoint persons in order of merit:

Provided that where Executive Council proposes to make the appointment otherwise than in accordance with the order of merit arranged by the committee, the Executive Council shall record its reasons in writing and submit its proposal for sanction of the Kuladhipati.

In the rejoinder filed by the petitioner it has been pointed out that while clause

(e) of the Scheme requires three outside experts for promotion to the post of Professor under the Merit Promotion Scheme, the Committee which was constituted to consider cases of appointment under the Career Advancement Scheme and by which the respondent No. 4 had not been recommended, contained only two experts. This position has not been controverted. The scheme does not permit more than 1/3rd of the number of total permanent position of the Readers or Lecturers within the department to hold such merit promotion at next higher level at any given time but at the time when respondent No. 4 was promoted, there already stood more than 1/3rd number of the Readers promoted under the scheme as Professor and it was not permissible for the respondent Nos. 1 & 2 to promote the petitioner. The respondent 1 and 2 in their Return have disputed the position on the ground that as per the scheme formulated by the University Grants Commission, the number of such promotion under the scheme was not to ordinarily exceed 1/3rd of the cadre strength from which promotion was to be made in the particular department. The respondents have also appended a copy of the guidelines as Annexure R-1 /1, but we find that in clause (4) of the guidelines also it has been stated that not more than 1/3rd of the number of the total permanent position of Lecturers or Readers within a department may hold such merit promotions at next higher level at any given time. The rule having been couched in negative terms clearly spells out that 1/3rd is the upper limit which can not be exceeded in any case. Under these circumstances, it is clear that the promotion of the respondent No. 4 was made at a time when it was not possible for the University to promote her without violence to its own ordinance No. 69 and the guidelines issued for implementation of the merit promotion scheme. Clause (g) further lays down that not more than two Readers may be given such merit promotion as Professor within a department for the duration of plan period As rightly pointed out in the Rejoinder filed by the petitioner, the return of respondent 1 and 2 having admitted that Dr. Singh, Dr. Pathak and the respondent No. 4 were promoted in the 8th plan period, - the promotion also violated the said limit. It, is thus, manifest that the respondents 1 and 2 had no power or authority to grant any promotion under Merit Promotion Scheme in excess of the limit of 1/3rd of the total permanent positions and more than two posts in a given plan period. We are afraid that we can not construe the rule as directory as suggested by the respondents in view of the clear prohibition contained in it. It is, therefore, clear that not only that the petitioner had been promoted in pursuance of the purported recommendation of a committee which had not considered her suitable for the appointment on that very day under the Career Advancement Scheme, the promotion under Merit Promotion Scheme was also in violation of the restriction of such promotion to the 1/3rd of the total positions in the cadre and further, the restriction of not more than two professors within the duration of a plan. Shri Tankha, learned counsel for the respondent No. 4, has also pointed out that since during the pendency of this petition, one Dr. Oomachand has retired on 28.2.1998, the grievance does not survive as now the limits prescribed under the scheme no longer stand violated. While it is true that the Courts decide

normally the live issues or active controversies and not hypothetical or abstract propositions, in the present case, the retirement of one of the professors holding the post under Merit Promotion Scheme will not validate the illegal appointment from a retrospective date when the respondents 1 and 2 had no power even to consider making any such appointment, as the 1/3rd restriction already stood exceeded and in the plan period, already two professors had been granted the benefit. As held in the case of Rashmi Shrivastava (*supra*), the post is personal to the incumbent and is not required to be filled up like a vacancy in the cadre post. The retirement of one of the professors holding the post under the Merit Promotion Scheme would therefore, not grant any benefit to the respondent No. 4

The petitioner has also claimed a direction that the difference of amount be recovered from the respondent No. 4 for the period she has usurped the post of professor. Mandamus cannot normally be issued for refund of money and, in any case, cannot be issued at the instance of the petitioner who has himself no right to claim such refund.

In the result, this petition is allowed. The promotion of the respondent No. 4 under the Merit Promotion Scheme vide order dated 6.12.92 (Annexure P-1) is quashed. The respondent 1 and 2 shall, however, be free to consider her case for such promotion under Ordinance 69 subject to the restrictions contained therein even from the retrospective date when she could otherwise have been considered without violating the restriction of 1/3rd of the number of total permanent position and not more than two posts for the duration of a plan period. The parties shall, however, bear their own costs of this petition.