

(2011) 05 AHC CK 0297

In the Allahabad High Court

Case No : Civil Misc. Writ Petition No. 60844 of 2005

Dr. Satya Pandey

APPELLANT

Vs

Director of Education (Higher) U.P. and Others

RESPONDENT

Date of Decision : 20-05-2011

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 226, 309
Uttar Pradesh Higher Education Services Commission (Procedure for Selection of Teachers) Regulations, 1983 — Regulation 4, 5, 6, 7, 8
Uttar Pradesh Higher Education Services Commission Act, 1980 — Section 12, 12(1), 12(4), 13, 13(1)
Uttar Pradesh Higher Education Services Commission Rules, 1981 — Rule 663
Uttar Pradesh Intermediate Education Act, 1921 — Section 16G(3)
Uttar Pradesh State Universities Act, 1973 — Section 35

Citation : (2011) 7 ADJ 135 : (2011) 2 UPLBEC 1416

Hon'ble Judges : Sunil Ambwani, J; Dilip Gupta, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

1. The Petitioner has sought the quashing of the order dated 6th August, 2005 passed by the Director of Education (Higher Education), Allahabad (hereinafter referred to as the "Director") by which, pursuant to the order dated 29th July, 2005 issued by the State Government, the Manager of the Committee of Management of Nagrik Degree College, Janghai, Jaunpur has been directed to cancel the appointment of the Petitioner as Principal of the said College consequent to the cancellation of the placement of the Petitioner by the Director.

2. The Director, after having received the list of selected candidates from the Higher Services Commission (hereinafter referred to as the "Commission") established u/s 3 of the Uttar Pradesh Higher Education Services Commission Act, 1980 (hereinafter referred to as the "Act"), issued the order dated 3rd August, 1995 for placement of the Petitioner as Principal in Ganesh Shanker Vidhyarthi College, Kanpur Dehat. This selection was made by the Commission pursuant to Advertisement No. 21 of 1995 issued on 31st January, 1995. The

Petitioner did not join the College. Thereafter, placement orders were issued by the Director for appointment of the Petitioner as Principal for Maharishi Dayanand Mahila Maha Vidyalaya, Mau and Mahila Maha Vidyalaya, Bahraich pursuant to fresh selections made by the Commission on the basis of Advertisement No. 25 of 1998 in which the Petitioner had also applied, but the Petitioner did not join the said Colleges. Subsequently, after a gap of about nine years, the Director reverted to the selection made by the Commission against Advertisement No. 21 of 1995 and issued the order dated 12th January, 2004 for placement of the Petitioner as Principal in the Nagrik Degree College, Janghai, Jaunpur u/s 13(3) of the Act as a vacancy had arisen in the said College on account of the resignation submitted by the Principal of the said College. The management of the College consequently issued appointment order in favour of the Petitioner. It is this placement order dated 12th January, 2004 that was cancelled by the Director by the order dated 6th August, 2005 as it was found to be in violation of the provisions of the Act and a direction was issued to the College to cancel the appointment of the Petitioner.

3. It needs to be noticed that the Act deals with the establishment of the Commission for the selection of teachers including Principals and for making recommendation to the management of the colleges affiliated to or recognized by the University for making appointment and for matters connected therewith or incidental thereto. Prior to the enactment of the aforesaid Act, the appointment to the post of teachers in the Nongovernmental Colleges affiliated to the various Universities in the State of Uttar Pradesh was made by the Selection Committee of the management of the concerned college but for various reasons, the said process was not found to be congenial and the aforesaid Act was enacted.

4. Sections 12, 13 and 14 of the Act which deal with the procedure for appointment of teachers, recommendation of the Commission and duty of management respectively were amended by U.P. Act No. 2 of 1992 with effect from 22nd November, 1991. The amended Section 12 of the Act provides that every appointment as a teacher of any college shall be made by the management in accordance with the provisions of the Act and any appointment made in contravention thereof shall be void. The management is required to intimate the existing vacancies and the vacancies likely to be caused during the course of the ensuing academic year to the Director who shall notify to the Commission, a subject-wise consolidated list of vacancies intimated to him by the colleges. The Commission then is required to give wide publicity of the vacancies and the candidates have to indicate their order of preference for various colleges, vacancies wherein have been advertised. The amended Section 13 of the Act provides that the Commission shall, after holding interview of the candidates (with or without written examination) send to the Director a list recommending such number of names of candidates found most suitable in each subject. Such names shall be arranged in order of merit and the list sent by the Commission shall be valid till the receipt of a new list from the Commission. Sub-Section (3) of Section 13 of the Act provides that the Director shall, having due regard to the

order of preference indicated by the candidates, intimate to the management the name of a candidate from the list for being appointed in the vacancy intimated u/s 12(2) of the Act. Sub-section (4) of Section 13 of the Act, however, provides that where a vacancy occurs due to death, resignation or otherwise, during the period of validity of the list referred to in Section 13(2) of the Act and such vacancy has not been notified to the Commission u/s 12(3) of the Act, the Director may intimate to the management the name of a candidate from such list for appointment in such vacancy. The amended Section 14 of the Act provides that the management shall, within a period of one month from the date of receipt of intimation u/s 13 of the Act, issue appointment letter to the person whose name has been intimated. However, where such person fails to join the post within the time allowed in the appointment letter or within such extended time as the management may allow, or where such person is not available for appointment, the Director shall, on the request of the management, intimate a fresh name from the list sent by the Commission.

5. In the present case, Advertisement No. 21 of 1995 was issued by the Commission on 31st January, 1995 for the post of Principals of both male and female Post Graduate Colleges and Degree Colleges. The number of posts for general and reserved categories were also mentioned. The Petitioner applied for the post of Principal in a male Degree College. The Commission, after making the selection, sent the list of Principals for male Degree Colleges to the Director on 7th July, 1995 in which the Petitioner was placed at Serial No. 10. The Director, thereafter, issued the order dated 3rd August, 1995 for placement of the Petitioner as Principal of Ganesh Shanker Vidyarthi Degree College, Kanpur Dehat. It is the case of the Petitioner that since the said College did not issue appointment letter to the Petitioner, she joined as Principal in Bajrang Post Graduate Degree College, Kunda, Pratapgarh on 23rd May, 1996. The Committee of Management of this College and the Petitioner then filed Writ Petition No. 1475 (SB) of 1998 before the Lucknow Bench for issuance of appropriate directions to the Director as the Director had not issued any placement order in favour of the Petitioner for this College.

6. It is further stated that in the meantime Advertisement No. 25 of 1998 was issued by the Commission on 13th August, 1998 for filling up posts of Principals of both male and female Post Graduate Colleges and Degree Colleges in the following manner:

1. Post Graduate College (male)- 49 (all aided colleges)
2. Post Graduate College (female)- 06 (all aided colleges)
3. Degree College (male)- 60 (17 aided colleges + 43 unaided colleges)
4. Degree College (female)- 24(6 aided colleges + 18 unaided colleges)

Out of these Colleges, two Post Graduate Colleges and two Degree Colleges were transferred to the State of Uttaranchal in 2000.

7. The Petitioner also submitted an application for being considered for appointment as a Principal pursuant to the aforesaid Advertisement No. 25 of 1998 and was placed at Serial No. 11 in the list dated 18th April, 2001 sent by the Commission to the Director containing names of Principals of female Degree Colleges. The Director then issued the order dated 4th March, 2002 for placement of the Petitioner as Principal in Maharishi Dayanand Mahila Maha Vidyalaya, Mau but the Director cancelled the said placement order and issued a fresh order dated 22nd May, 2003 for placement of the Petitioner as Principal in the Mahila Maha Vidyalaya, Bahraich. Subsequently, the said placement order dated 22nd May, 2003 was also cancelled by the Director on 27th November, 2003 and a fresh communication dated 12th January, 2004 was sent by the Director to the Secretary/Manager/Authorized Controller of Nagrik Degree College, Janghai, Jaunpur for appointment of the Petitioner as Principal in this Degree College. The order mentions that a vacancy had arisen in this College on the post of Principal on account of the resignation submitted by the Principal Dr. Ram Acharya Mishra and in terms of the resolution dated 7th July, 1995 of the Commission, the name of the Petitioner was being sent for making appointment u/s 13(3) of the Act as the College had no objection to the appointment of the Petitioner. The Degree College was, therefore, directed to issue appointment letter to the Petitioner within 30 days. The said College issued the appointment letter dated 17th January, 2004 to the Petitioner where after she joined as Principal on 17th January, 2004.

8. It also transpires from the record of the writ petition that Advertisement No. 36 was also issued by the Commission for filling-up the posts of Principals of certain Colleges including Nagrik Degree College, Janghai, Jaunpur.

9. In the meantime, as complaints about large scale irregularities in the placement/appointments of Principals by the Director were received, the State Government conducted an enquiry through the District Magistrate, Allahabad. It was found in the enquiry that many persons were appointed as Principals of the Degree Colleges/Post Graduate Colleges against the provisions of the Act as well as against the decision of the Supreme Court in Kamlesh Kumar Sharma Vs. Yogesh Kumar Gupta and others, The State Government, therefore, by the order dated 29th July, 2005 issued directions to the Director to cancel such placement orders. Accordingly, the Director by the order dated 6th August, 2005 cancelled the placement order dated 12th January, 2004 of the Petitioner and also issued directions to the Committee of Management of Nagrik Degree College, Janghai, Jaunpur to cancel the appointment of the Petitioner.

10. On 14th September, 2005 while entertaining this petition, the Court passed an interim order that the impugned order dated 6th August, 2005 passed by the Director shall be kept in abeyance. The State of Uttar Pradesh filed Special Leave to Appeal (C) No. 2659 of 2008 in the Supreme Court. This SLP was dismissed on 23rd January, 2009 but it observed that the hearing on the stay vacation application should be expedited. The matter has, accordingly been heard.

11. Sri Ashok Khare, learned Senior Counsel appearing for the Petitioner submitted that the order dated 6th August, 2005 deserves to be set aside as it has been passed in utter violation of the principles of natural justice since no notice was issued to the Petitioner and nor any opportunity was given to the Petitioner to place her version; the Director or the State Government did not have the power to terminate the services of the Petitioner once the appointment order was issued by the Committee of Management and the Petitioner had joined the post; the role of the Director is limited up to the stage of placement and the Director cannot issue directions for cancellation of the appointment after the teacher joins the post as the Act ceases to apply; the service conditions of the Petitioner are governed by the provisions of U.P. State Universities Act, 1973 (hereinafter referred to as the "Universities Act") and the Statutes framed there under and the services of the Petitioner had been terminated without following the procedure prescribed u/s 35 of the Universities Act; the order dated 6th August, 2005 also deserves to be set aside on sympathetic grounds as the Petitioner has worked as Principal for a substantial number of years and that in any case, the order issued by the Director on 12th January, 2004 for placement of the Petitioner as Principal in Nagrik Degree College, Janghai, Jaunpur does not suffer from any infirmity.

12. Sri Satish Chaturvedi, learned Additional Advocate General for the State, however, submitted that appointments can only be made against advertised posts and, therefore, as the post of Principal in the said college was not advertised prior to appointment and in fact was advertised subsequently in Advertisement No. 36, the order dated 12th January, 2004 issued by the Director for placement of the Petitioner in Nagrik Degree College is void; that if the placement order itself is void, it can be cancelled and there is no necessity of taking recourse to the provisions of Section 35 of the Universities Act; that even otherwise opportunity was not required to be given to the Petitioner since the enquiry was not with regard to the misconduct of the Petitioner but with regard to her placement in the College by the Director; that in any case no opportunity is required to be given if a different conclusion cannot follow and that no sympathy should be shown to the Petitioner as equity will not come to her aid when her placement has been found to be against the provisions of the Act.

13. In order to appreciate the contentions advanced by the learned Counsel for the parties, it will be appropriate to first examine the relevant provisions of the Act.

14. As noticed hereinabove, the Act provides for selection of teachers for appointment to the Colleges affiliated or recognized by the State Universities. While the provisions relating to the establishment of the Commission are contained in Chapter II of the Act, Chapter III of the Act provides for the functions of the Commission. Sections 12, 13 and 14 of the Act which are contained in Chapter III were substituted by U.P. Act No. 2 of 1992 with effect from 22nd November, 1991. One reason mentioned in the statement, objects and

reasons for amending the Act is to streamline the manner of selection of teachers by providing that subject-wise consolidated number of vacancies likely to be caused during an academic year should be notified to the Commission which will send the list of candidates selected for appointment to the Director who will intimate the names to the Management for making appointments.

15. The amended Sections 12, 13 and 14 of the Act, which are relevant for the purposes of the controversy involved in this petition, are as follows:

12. Procedure for appointment of teachers.-(1) Every appointment as a teacher of any College shall be made by the management in accordance with the provisions of this Act and every appointment made in contravention thereof shall be void.

Provided that a permanent teacher of an affiliated or associated college, who has been appointed in accordance with the provisions of this Act and has completed ten years' service as such and who wishes to be transferred to any other college, may be transferred in the manner prescribed by rules from one college to another, only when the respective management of the colleges concerned give their consents in writing.

(1-a) Notwithstanding any decree or order of a Court, a teacher who has been appointed as such by transfer from one college to another in pursuance of the Government Orders No. 429 Shiksha Mantri/Sattar-6-98-15-95, dated 17.8.1998 or No. 393/Sattar-1-99-15(6)-99, dated 28.10.1999 shall be deemed to have been validly appointed as if the provisions the principal Act as amended by the Uttar Pradesh Higher Education Services Commission (Second Amendment) Act, 2004 were in force at all material times.

(2) The management shall intimate the existing vacancies and the vacancies, likely to be caused during the course of the ensuing academic year, to the Director at such time and in such manner, as may be prescribed.

Explanation. The expression "academic year" means the period of 12 months commencing on July 1.

(3) The Director shall notify to the Commission at such time and in such manner as may be prescribed a subject-wise consolidated list of vacancies intimated to him from all Colleges.

(4) The manner of selection of persons for appointment to the posts of teachers of a College shall be such, as may be determined by regulations:

Provided that the Commission shall with a view to inviting talented persons give wide publicity in the State to the vacancies notified to it under Sub-section (3):

Provided further that the candidates shall be required to indicate their order of preference for the various Colleges, vacancies wherein have been advertised.

13. Recommendation of Commission.- (1) The Commission, shall as soon as

possible, after the notification of vacancies to it under Sub-section (3) of Section 12, hold interview (with or without written examination) of the candidates and send to the Director a list recommending such number of names of candidates found most suitable in each subject as may be, so far as practicable, twenty five per cent more than the number of vacancies in that subject. Such names shall be arranged in order of merit shown in the interview, or in the examination and interview if an examination is held.

(2) The list sent by the Commission shall be valid till the receipt of a new list from the Commission.

(3) The Director shall having due regard in the prescribed manner, to the order of preference if any indicated by the candidates under the second proviso to Sub-section (4) of Section 12, intimate to the management the name of a candidate from the list referred to in Sub-section (2) of Section 12.

(4) Where a vacancy occurs due to death, resignation or otherwise during the period of validity of the list referred to in Sub-section (2) and such vacancy has not been notified to the Commission under Sub-section (3) of Section 12, the Director may intimate to the management the name of a candidate from such list for appointment in such vacancy.

(5) Notwithstanding anything in the preceding provisions, whereto abolition of any post of teacher in any college, services of the person substantively appointed to such post is terminated the State Government may make suitable order for his appointment in a suitable vacancy, whether notified under Sub-section (3) of Section 12 or not in any other college, and thereupon the Director shall intimate to the management accordingly.

(6) The Director shall send a copy of the intimation made under Sub-section (3) or Sub-section (4) or Sub-section (5) to the candidate concerned.

14. Duty of Management.-(1) The management shall within a period of one month from the date of receipt of intimation under Sub-section (3) or Sub-section (4) or Sub-section (5) of Section 13, issue appointment letter to the person whose name has been intimated.

(2) Where the person referred to in Sub-section (1) fails to join the post within the time allowed in the appointment letter or within such extended time as the management may allow in this behalf, or where such person is otherwise not available for appointment, the Director, shall on the request of the management intimate fresh name from the list sent by the Commission under Sub-section (1) of Section 13 in the manner prescribed.

(emphasis supplied)

Section 15 of the Act deals with inquiry by the Director and is as follows:

15. Inquiry by Director.-(1) Where any person is entitled to be appointed as a teacher in any College in accordance with Sections 12 to 14, but he is not so

appointed by the management within the time provided therefore, he may apply to the Director for a direction under Sub-section (2).

(2) On receipt of an application under Sub-section (1), the Director may hold an inquiry, and if he is satisfied that the management has failed to appoint the applicant as a teacher in contravention of the provisions of this Act, he may by order, require-

(a) the management to appoint the applicant as a teacher, and to pay him salary from the date specified in the order; and,

(b) the Principal of the College concerned to take work from him as a teacher.

(3) The amount of salary, if any, due to such teacher shall, on a certificate issued by the Director, be recoverable by the Collector as arrears of land revenue.

16. The Full Bench of this Court in *Dr. Vinay Kumar v. Director of Education (Higher) Allahabad and Ors.* (2005) 4 ESC 2953 examined the provisions of the Act including the provisions of Sections 12 and 13 to answer the reference made to it as to whether the law laid down in *Dr. Prakash Chandra Srivastava v. Director of Higher Education, Allahabad and Anr.* reported in 2002 (5) ESC 2202 and followed in *Alka Rani Gupta (Km.) v. Director of Education (Higher) and Ors.* reported in 2003 (2) ESC 942 is in accordance with the provisions of Section 13 of the Act.

17. In the case of *Alka Rani Gupta (supra)*, the Division Bench of this Court had observed:

9. Thus the legal position which emerges from the above provisions in the Act and Regulations is as follows:

(i) Where a large number of candidates are selected for various institutions by the Commission, the Commission has to prepare a select list in accordance with the merit determined by the Commission.

(ii) The candidate who is on the top of the select list will be given his first preference.

(iii) Then the candidate who is at serial position No. 2 in the select list will be considered by the Director. If his first choice has already been filled by the candidate at the top of the select list then this candidate will be given his second choice, otherwise he will get his first choice.

(iv) Then we come to the candidate who is on the third position in the select list. If the choice of his first preference has not been already allotted to a candidate higher than him in the select list he will be given that institution, otherwise he will be given his second choice, unless that too has been allotted to the candidate above him, in which case he will be allotted the institution of his third choice. In this way the Director will do the placement.

18. However, the Division Bench went on to carve out exceptions from the said

Rule in the very next two paragraphs, namely, paragraphs 10 and 11. These two paragraphs are also set out below:

10. In our opinion this is the only logical and reasonable method for making placement of a candidate selected by the Commission, and if this is not followed there is bound to be chaos, corruption, arbitrariness, casteism etc. There shall be only one exception to the above method and procedure for making placement, namely that if there is an ad hoc Principal already working in the College, or Lecturer working in the said College who has been selected by the Commission for the post of Principal, then the ad hoc Principal/Lecturer should be given placement in the same College as Principal provided that the management has no objection.

11. We are laying down this exception in view of the division bench decision of this Court in Dr. Prakash Chandra Srivastava Vs. Director of Higher Education and Another, In paragraph 10 of the said decision it has been observed that problems and disputes arise between the Principal and the management when the management is forced to issue an appointment order in favour of a person against its wishes. Thrusting an unwilling Principal on an unwilling management is not in the interest of the institution. This is the only exception to the method and procedure of placement, which we have laid down in this judgment.

19. The Full Bench in Dr. Vinay Kumar (supra) after considering these two decisions in Prakash Chandra Srivastava (supra) and Alka Rani (supra) opined what was required to be done by the Director while issuing the placement orders and the observations are:

37. In our opinion, the Director at the time of making intimation is to take into account only two things, in regard to every candidate, namely, the candidate's merit position as determined u/s 13(1), and the preferential list of colleges or institutions given by the candidate himself.

38 How the Director is to allot the candidates to the different colleges on the basis of these two items and these two items only are, with respect, correctly laid down by the Division Bench in paragraph 9 in Alka Rani's case (supra) and we agree with that paragraph in toto.

39 In our opinion the Director does not use a discretionary power in making intimations under Sub-section (3) of Section 13. Instead of the Director, any other person with an equally logical mind as the Director will also be able to perform the same act but the Director has been given the authority, so as to carry conviction and to make it safe for the colleges to follow the recommendations and intimations coming under his signature.

40. The working of Sub-section (3) of Section 13 shows that Director's action is compulsorily prescribed by the said Sub-section. Although the said Sub-section does not refer to the merit list at all yet as laid down in paragraph 9 of Dr. Alka Rani's case (supra) the merit list must be considered by the Director and in this

regard the Director cannot disregard Sub-section (1) of Section 13 and the exercise performed under that Sub-section. The exercise by the Director is performed thereafter and must be performed thereon.

43. In this view of the matter we abide by what was said in paragraphs 9 and 10 (first sentence only) of Dr. Alka Rani's case (supra) and respectfully disapprove what was said in that case in paragraphs 10 (rest) and 11. We make it clear that we approve of the first sentence in paragraph 10 of Dr. Alka Rani's case (supra) but disapprove only of the latter part of that paragraph where the exception is said to be spelt out.

(emphasis supplied)

20. It is, therefore, clear that the Director at the time of issuing the placement orders has to take into account only two things with regard to every candidate, namely, the candidate's merit position as determined u/s 13(1) of the Act and the preferential list of colleges or institutions given by the candidate himself and that the Director does not have an unfettered discretionary power in sending intimation u/s 13(3) of the Act.

21. In *Rama Shankar Rai v. State of U.P. and Anr.* 2008 (7) ADJ 422, a Division Bench of this Court also examined the scope of discretion to be exercised by the Director u/s 13(3) of the Act while intimating the management the name of the candidates from the list sent by the Commission and observed:

We are pained to observe that the Director of Higher Education has completely failed to appreciate the order passed by this Court. There is no doubt that the Director has the powers and the discretion for placements. His discretion, however, has to be guided by the principles of fairness, reasonableness and non-arbitrariness. The statutory authority does not have a right to say that his discretion is absolute. Every statutory authority is guided by the Constitutional goals and principles of equality enshrined in Articles 14 and 16 of the Constitution of India. We are conscious of the fact that a Full Bench of the Court held that this Court can neither amend nor interpret the provisions of law, in a manner that would amend the legislation. We do not propose to tread in the field of legislating laws. We are, however, sure that we have the powers given to us by Article 226 of the Constitution of India to issue a writ of mandamus to any authority within the State and within our jurisdiction to ask him to perform his duties in accordance with law, and to adopt a fair and reasonable guidelines, which he proposes to follow in exercise of his discretion.

22. The issue that needs to be addressed in this petition is whether the order dated 12th January, 2004 issued by the Director for placement of the Petitioner as Principal in Nagrik Degree College, Janghai, Jaunpur and the subsequent appointment of the Petitioner as Principal in this College on 17th January, 2004 are in accordance with Section 13 of the Act.

23. It transpires from the records that initially Advertisement No. 21 of 1995 was

issued on 31st January, 1995 for the posts of Principals for male and female Post Graduate Colleges and Degree Colleges. The Petitioner applied for the post of Principal in a male Degree College and was placed at Serial No. 10 in the list of Principals belonging to the general category in male Degree Colleges. It is not the case of the Petitioner that the post of Principal in Nagrik Degree College was notified in this advertisement and nor is there anything on the record to so indicate.

24. Subsequently Advertisement No. 25 of 1998 was issued by the Commission on 13th August, 1998 for making appointments of Principals in various male and female Post Graduate and Degree Colleges. The post of Principal in Nagrik Degree College was also not included in this advertisement. The Petitioner submitted application for appointment as Principal in a female Degree College. The Commission made the selections and sent the list dated 18th April, 2001 to the Director in which the name of the Petitioner was mentioned at Serial No. 11 in the list of Principals of female Degree Colleges in the general category. The Director, then issued two placement orders dated 4th March, 2002 and 22nd May, 2003 for the Petitioner against colleges which were included in this Advertisement No. 25 of 1998 but these placement orders were subsequently cancelled by the Director. It is thereafter that the Director issued the placement order dated 12th January, 2004 for appointment of the Petitioner as Principal in Nagrik Degree College, Janghai, Jaunpur. This placement order mentions that the post of Principal had fallen vacant in the said college on account of the resignation submitted by the Principal Dr. Ram Acharya Mishra and, therefore, in accordance with the resolution of the Commission dated 7th July, 1995, the name of the Petitioner was being recommended for appointment as Principal in the said College. It needs to be mentioned that the recommendation of the Commission made on 7th July, 1995 was in respect of the selections made pursuant to Advertisement No. 21 of 1995 in which the Petitioner was placed at Serial No. 10 in the list sent by the Commission. It is pursuant to the aforesaid placement order dated 12th January, 2004 of the Director that the College issued the appointment order dated 17th January, 2004 to the Petitioner and the Petitioner joined as Principal in the said College.

25. We have, therefore, to examine whether the Director could have issued the order dated 12th January, 2004 purportedly exercising powers u/s 13(3) of the Act for placement of the Petitioner as Principal in Nagrik Degree College, Janghai, Jaunpur on the basis of the list dated 7th July, 1995 prepared by the Commission in connection with Advertisement No. 21 of 1995 though the post of Principal for this College had not been advertised in Advertisement No. 21 of 1995 and that too after the list dated 18th April, 2001 was received by the Director from the Commission pursuant to Advertisement No. 25 of 1998.

26. As noticed above, the management is under an obligation to intimate the existing vacancies and the vacancies likely to be caused during the course of the ensuing academic year to the Director and the Director has to notify to the

Commission a subject-wise consolidated list of vacancies intimated to him from all colleges. Section 12(4) of the Act further provides that the Commission has to give wide publicity to the vacancies so that talented persons submit applications and the candidates are also required to indicate their order of preference for the various colleges, vacancies wherein have been advertised. The procedure for determination and intimation of the vacancies and the procedure for notification, submission of application and indication of preference is contained in Regulations 4 and 5 of the Uttar Pradesh Higher Education Services Commission (Procedure for Selection of Teachers) Regulations, 1983 (hereinafter referred to as the "Regulations"). The said Regulations are quoted below:

4. Determination and intimation of vacancies.

(1) The Management shall determine and intimate to the Commission, in the pro forma, given in Appendix Form I to the Uttar Pradesh Higher Education Services Commission Rules, 1981 and in the manner hereinafter specified, the vacancies existing or likely to fall vacant during the year of recruitment.

(2) The statement of vacancies shall be sent by the Management to the Commission by May 31 preceding the year of recruitment with a copy to the Director and where the vacancy has occurred during the session or after the requisition has already been sent within 15 days of the occurrence of the vacancy:

Provided that where the Commission is satisfied that there are sufficient reasons for doing so, it may with the approval of the Government, relax or modify the time schedule in respect of any year generally or in respect of any particular college.

(3) Where the Management has failed to notify the vacancy or the vacancies by the specified date or in the manner prescribed, the Commission may require the Director to notify the vacancy and the vacancy so notified shall be deemed to be notified by the Management.

5. Notification of vacancies, submission of application and indication of preference. The Commission shall advertise the vacancies in the three issues of at least three newspapers. The Commission shall send a copy of the advertisement to the Director and may, if it considers proper, also send a copy thereto to the District Inspector of Schools and to the Colleges. Such advertisement shall, inter alia, indicate the total number of vacancies as also the number of vacancies in women's colleges and other colleges separately, the names of the college(s) and where they are situate and shall require the candidates to apply in prescribed form and to give if he so desires, the choice of not more than five colleges in order of preference. Where a candidate wishes to be considered for a particular college or colleges only and for no other, he shall mention the fact in his application.

Provided that where the number of colleges is large or for any other reason the

Commission considers it inexpedient, it may, instead of mentioning the names and particulars of the colleges in the advertisement, send a copy thereof to the colleges and to the District Inspector of Schools and mention in the advertisement that particulars of the colleges may be seen in the office of the Commission, the office of District Inspector of Schools or in the Colleges:

Provided also that the Commission shall not be bound by the choice given by the candidate and may, in its discretion, recommend him for appointment in a college other than indicated by him.

27. The procedure for selection and recommendation for appointment and the notification of the names of the selected candidates are contained in Regulations 6, 7 and 8 of the Regulations. u/s 13 of the Act, the Commission has to send the list to the Director recommending such number of names of candidates found most suitable in each subject and then the Director, having due regard to the order of preference, if any, indicated by the candidates, intimates the Management the name of a candidate from the list for being appointed in the vacancy notified u/s 12 of the Act.

28. The aforesaid provisions leave no manner of doubt that the Director cannot intimate to the Management the name of a candidate for a College if vacancy in that College has not been notified in the advertisement. Section 12(1) of the Act makes it explicit that every appointment as a teacher of any College made in contravention of the provisions of the Act shall be void.

29. This legal position was made absolutely clear by the Supreme Court in *Kamlesh Kumar Sharma (supra)* which was decided on 9th February, 1998, much prior to the issuance of the placement order of the present Petitioner on 12th January, 2004. In *Kamlesh Kumar Sharma (supra)* Advertisement No. 18 was issued by the Commission on 20th April, 1992 for filling up certain vacancies of Principals. The Appellant-Kamlesh Kumar Sharma applied for the said post and his name was included in the select list prepared by the Commission but for certain reasons, he could not be appointed. On 1st July, 1993, a post of Principal in Maharaj Singh Degree College, Saharanpur fell vacant on account of the retirement of the regular Principal. The Director, purportedly exercising powers under Sub-section (4) of Section 13 of the Act, directed the management of the college to appoint the Appellant-Kamlesh Kumar Sharma. This action was challenged by the Respondent. It was contended that such appointment could not have been made as the post had not been advertised since the post of Principal fell vacant subsequent to the issuance of the advertisement on 1st July, 1993. The Authorities, on the other hand, contended that the word "otherwise" occurring in Section 13(4) of the Act should not be read ejusdem generis and was wide enough to cover and take within its sweep all vacancies including the vacancies for which interview was not held. The Supreme Court did not accept this submission of the Authorities and it was held, after examination of the provisions of Sections 12, 13 and 14 of the Act, that a person on the panel list cannot be appointed against a vacancy not advertised. The observations are:

14. We find, after giving out careful consideration that in case the Appellant's argument is accepted by giving wider interpretation to the word "otherwise", it would thwart the very object of the Act. In other words it would permit the filling of the vacancy occurring which was never advertised and a person in the select list panel, even though not applying for any vacancy would be absorbed. Hence would be limiting the sphere of selection in contradiction to be object of the provision to draw larger applicants by advertising every vacancy to be filled in. We have no hesitation to say that any appointment to be made on a vacancy occurring in the succeeding year in question for which there is no advertisement under the provisions of Sub-section (4) of Section 12, the person on the panel list of preceding academic year in question, cannot be absorbed or be appointed. The word "otherwise" has to be read as ejusdem generis that is to say in group similar to death, resignation, long leave vacancy, invalidation, person not joining after being duly selected. In other words, it would be a case of unforeseen vacancies which could not be conceived u/s 12(2). Section 12(2) conceives of a vacancy which is existing on the date the vacancy is to be advertised and which is likely to be caused in future but constricted for a period ending in the ensuing academic year in question. The words "likely to be caused" u/s 12(2) are followed by the words "during the course of the ensuing academic year" that is any person likely to retire by the end of the academic year in question. In other words, such vacancies could be foreseen and not unforeseen. While vacancies u/s 13(4) are unforeseen vacancies which fall under the group, death and/or resignation. Hence the word "otherwise" cannot be given the wide and liberal interpretation which would exclude large number of expected applicants who could be waiting to apply for the vacancies occurring in the succeeding year in question.

17. of course, the filling of vacancies under Sub-section (4) of Section 13 on the vacancies already advertised arises only in case the person does not join or on account of death or resignation or person after joining, becomes invalid or such unforeseen circumstances. In other words, all the circumstances has to be within the vacancies already advertised and not beyond it. The sphere of Sub-section (4) of Section 13 is within the vacancies for which the Commission took interview or the examination, as the case may be, under Sub-section (1) of Section 13. Sub-section (2) which says that the list so prepared shall be valid till the receipt of a new list from the commission only means that in case there is delay in the next new list and any vacancy occurs on account of the unforeseen reason within the vacancies advertised, the said vacancy can be filled up under Sub-section (4) of Section 13. The list would not come to an end after a period of one year, as was earlier, and would continue for a limited purpose as explained above till the selection in the next academic year in question is made and recommendations are sent with a fresh list.

21 As per the scheme of the Act and the aforesaid provisions, for each academic year in question, the management has to intimate the existing vacancies and vacancies likely to be caused by the end of the ensuing academic year in

question. Thereafter, the Director shall notify the same to the Commission and the Commission, in turn, will invite applications by giving wide publicity in the State of such vacancies. The vacancies cannot be filled except by following the procedure as contained therein. Sub-section (1) or Section 12 has incorporated in strong words that any appointment made in contravention of the provisions or the Act shall be void. This was to ensure no back door entry but selection only as provided under the said sections.

(emphasis supplied)

30. In this connection reference also needs to be made to the Division Bench judgment of this Court in Civil Misc. Writ Petition No. 63176 of 2005 (Dr. Kunwar Babu Verma v. Director of Education (Higher) and Ors.) decided on 6th May, 2009. The Petitioner therein applied for appointment on the post of Principal pursuant to Advertisement No. 25 issued on 13th August, 1998. The Commission placed him at Serial No. 8 in the list of O.B.C. category candidates. The Director issued the order for placement of the Petitioner in Bachhu Lal Ram Dulari Degree College, Biswan, Sitapur but appointment order was not issued by the Management. Subsequently, the Director issued the order dated 17th April, 2003 u/s 13(4) of the Act for placement of the Petitioner as a Principal in Lok Rashtriya Degree College, Jasrana, Firozabad and the Petitioner joined on 1st May, 2003. The State Government, however, by its order dated 29th July, 2005 issued directions to the Director for cancellation of the appointment of the Petitioner as the post of Principal in Lok Rashtriya Degree College, Jasrana, Firozabad was not advertised. The Director passed an order dated 6th August, 2005 for cancellation of the appointment of the Petitioner as Principal in the said college. Upholding the order of cancellation, the Division Bench observed:

Be that as it may, since the interpretation of Section 13(4) of the Act clearly suggest that unadvertised post cannot be filled up from the select list, as it will affect the right of those who could have applied to the vacancy, the Petitioner does not have a right to hold the post as a Principal of the Lok Rashtriya Degree College, Jasrana, Firozabad and on this ground, we do not find any legal error in the order dated 29.7.2005 passed by the State Government and subsequently the order of the Director of Higher Education dated 6.8.2005 canceling the placement of the Petitioner.

(emphasis supplied)

31. In *Bhartendu Mishra (Dr.) v. State of U.P. and Ors.* (2008) 3 UPLBEC 2430, a Division Bench of this Court held that the vacancies which are not subject matter of an advertisement issued under the Act, cannot be filled-up from the wait list. The observations are:

The Petitioner's case is that his name was mentioned at the Serial No. 1 in the wait list prepared by the U.P. Higher Education Services Commission with reference to Advertisement No. 32. Although no vacancy was available in terms of the advertisement for the appointment of the wait listed candidate, Petitioner,

however, submits that subsequent vacancies in the subject concerned have become available in other colleges. He seeks appointment against these subsequent vacancies with reference to Section 13(4) of the U.P. Higher Education Services Commission Act, 1980.

It is admitted on record that the vacancies, which have now been caused and against which the Petitioner seeks appointment, were not subject matter of Advertisement No. 32. Reliance upon Section 13(4) of the U.P. Higher Education Services Commission Act, 1980 (hereinafter referred to as "Act, 1980") for the purposes of appointment against non-advertised vacancies is totally misconceived.

32. In the present case, there is nothing on the record to indicate that the post of Principal in Nagrik Degree College, Janghai, Jaunpur was notified in Advertisement No. 21 of 1995 or in Advertisement No. 25 of 1998. In fact it was subsequently notified in Advertisement No. 36 but still the Director issued the order dated 12th January, 2004 for placement of the Petitioner on the post of Principal in Nagrik Degree College, Janghai, Jaunpur on the basis of the merit list of candidates prepared by the Commission on 7th July, 1995 in connection with Advertisement No. 21 of 1995. It will, therefore, not be covered by Section 13(3) of the Act. It will also not be covered by Section 13(4) of the Act and the Supreme Court made this position absolutely clear in Kamlesh Kumar Sharma (supra) decided on 9th February, 1998. Yet, the Director issued the order dated 12th January, 2004 for placement of the Petitioner as Principal in the said College. What surprises us most is that this placement order dated 12th January, 2004 was issued by the Director taking the help of the select list prepared on the basis of the recruitment carried out nine years earlier against Advertisement No. 21 of 1995 and much after the subsequent recruitment against Advertisement No. 25 of 1998 in which the Petitioner had also applied and her name was included in the select list prepared by the Commission. Though the Director had issued two placement orders for the Petitioner but she did not join these Colleges. It appears that the Petitioner was only looking to join a college of her convenience and the Director helped the Petitioner to achieve this by issuing the placement order of the Petitioner when a vacancy in the Nagrik Degree College arose after the submission of the resignation by the regular Principal, even though this vacancy was not included in Advertisement No. 21 of 1995. The appointment of the Petitioner as Principal on the basis of this order is void as no placement could be made for a College not advertised and Section 12(1) of the Act expressly provides that every appointment of a teacher of any college made by the management in contravention of the provisions of the Act is void.

33. We must also remind ourselves of what was observed by the Full Bench of this Court in Dr. Vinay Kumar (supra) and by the Division Bench in Rama Shanker Rai (supra) that the Director does not have a discretion to intimate the name of a candidate to the management dehorse the provisions of Section 13 of the Act and that he has necessarily to see the merit position of the candidate and the

preference given by the candidate for the Colleges. The Director did initially issue the placement orders but they were cancelled. The subsequent placement order of the Director dated 12th January, 2004 ignores the essential and relevant criterion for placement and the Petitioner has been recommended for a College for which even advertisement had not been issued.

34. Even in the absence of Section 12(1) of the Act, we would have had no difficulty in holding that the appointment of the Petitioner is void, being contrary to the statutory provisions. In this connection reference needs to be made to the decision of the Supreme Court in *Pramod Kumar Vs. U.P. Secondary Education Services Commission and Others*, It was held that any appointment which is contrary to the Statute/statutory rules is void. This principle was reiterated by the Supreme Court in *Government of A.P. and Ors. v. K. Brahmanandam and Ors.* AIR 2008 SCW 5352. In *State of Orissa and Anr. v. Rajkishore Nanda and Ors.* (2010) 6 SCC 777, the Supreme Court also observed that a select list cannot be treated as a reservoir for the purpose of appointments, so as to fill vacancies by taking the names from such a list as and when it is so required.

35. Sri Satish Chaturvedi, learned Additional Advocate General appearing for the Respondents has also placed before the Court decisions of the Supreme Court which hold that no person can be appointed without inviting applications. These decisions have been cited by him to support his contention that the appointment of the Petitioner was null and void as the Petitioner was appointed on a post which was not advertised.

36. In *State of Orissa and Another Vs. Mamata Mohanty*, the Supreme Court observed that for an appointment to be valid, Articles 14 and 16 of the Constitution must be complied with and, therefore, a person cannot be appointed without inviting applications from all eligible candidates. The observations are:

Therefore, it is a settled legal proposition that no person can be appointed even on a temporary or ad hoc basis without inviting applications from all eligible candidates. If any appointment is made by merely inviting names from the employment exchange or putting a note on the notice board, etc. that will not meet the requirement of Articles 14 and 16 of the Constitution. Such a course violates the mandates of Articles 14 and 16 of the Constitution of India as it deprives the candidates who are eligible for the post, from being considered. A person employed in violation of these provisions is not entitled to any relief including salary. For a valid and legal appointment mandatory compliance with the said constitutional requirement is to be fulfilled. The equality clause enshrined in Article 16 requires that every such appointment be made by an open advertisement as to enable all eligible persons to compete on merit.

It is a settled legal proposition that if an order is bad in its inception, it does not get sanctified at a later stage. A subsequent action/development cannot validate an action which was not lawful at its inception, for the reason that the illegality strikes at the root of the order. It would be beyond the competence of any

authority to validate such an order. It would be ironic to permit a person to rely upon a law, in violation of which he has obtained the benefits. If an order at the initial stage is bad in law, then all further proceedings consequent thereto will be non est and have to be necessarily set aside. A right in law exists only and only when it has a lawful origin.

(emphasis supplied)

37. The same view had been taken by the Supreme Court in its earlier decision in *Nagendra Chandra and Ors. v. State of Jharkhand and Ors.* (2008) 1 SCC 798, and the observations are:

In view of the foregoing discussion, we have no option but to hold that if an appointment is made in infraction of the recruitment rules, the same would be violative of Articles 14 and 16 of the Constitution and being nullity would be liable to be cancelled. In the present case, as the vacancies were not advertised in the newspapers, the appointments made were not only in infraction of Rule 663(d) of the Bihar Police Manual but also violative of Articles 14 and 16 of the Constitution, which rendered the appointments of the Appellants as illegal; as such the competent authority was quite justified in terminating their services and the High Court, by the impugned order, was quite justified in upholding the same. (emphasis supplied)

38. The issue can be examined from yet another aspect. Section 13(2) of the Act provides that the list sent by the Commission shall be valid till the receipt of a new list from the Commission. The Commission prepared the list dated 7th July, 1995 pursuant to Advertisement No. 21 of 1995 in which the Petitioner was placed at Serial No. 10. This list could be valid only till the receipt of the new list from the Commission. The new list dated 18th April, 2001 was received by the Director from the Commission pursuant to Advertisement No. 25 of 1998. The earlier list dated 7th July, 1995 prepared by the Commission pursuant to the Advertisement No. 21 of 1995, therefore, could not have been utilized by the Director on 12th January, 2004 for issuing placement orders after the receipt of the list dated 18th April, 2001.

39. This is what was also observed by the Supreme Court in *State of U.P. and Another Vs. Nidhi Khanna and Another*, The Commission issued Advertisement No. 29 for notifying vacancies of Lecturers in different non-Government Colleges. Nidhi Khanna applied for the post of Lecturer in Geography and a select list was prepared by the Commission on 19th July, 2001. Her name was placed at Serial No. 1 in the wait list of General Category candidates. The Director issued an order on 23rd November, 2002 appointing her as a Lecturer in Geography in R.G. Girls College, Meerut. However, as she did not join another candidate was appointed and her placement was cancelled. On 5th March, 2003, another merit list was prepared pursuant to Advertisement No. 32 and names of selected candidates were received by the Director on 7th March, 2003. On 3rd July, 2003, Nidhi Khanna met the Director and stated that though she was selected as

Lecturer in Geography pursuant to Advertisement No. 29 and was placed at Serial No. 1 in Wait List but she had not received letter of appointment. She also stated that there was a vacancy in C.M.P. Degree College, Allahabad and the said College had no objection if she was appointed. She, therefore, prayed that she be appointed in C.M.P. Degree College, Allahabad. The prayer was rejected by the Director on the ground that a new list had been prepared in March, 2003 pursuant to Advertisement No. 32 and she had been selected under Advertisement No. 29 which list was valid only till the new list was prepared. This led to the filing of the writ petition by Nidhi Khanna which was allowed by the High Court and a direction was issued to the authorities to appoint her as Lecturer in C.M.P. Degree College, Allahabad. The State of U.P. filed SLP in the Supreme Court. The Supreme Court set aside the directions of the High Court holding that such directions were contrary to the statutory provisions and the decision of the Supreme Court in Kamlesh Kumar Sharma (supra). It was observed that the earlier list prepared under Advertisement No. 29 came to an end when the new list was prepared under Advertisement No. 32. The observations of the Supreme Court are:

14. In our opinion, in view of the above legal position, the Appellants were right in their submission that Respondent 1 could not be appointed in pursuance of Advertisement No. 32 since she was selected and empanelled pursuant to Advertisement No. 29.

15. The learned Counsel for Respondent 1 contended that there was no fault on her part. It was also stated that though the Authorities asserted that a communication was sent to Respondent 1 at the address supplied by her, she had never received such so-called communication. It was also urged that the address at which the communication was sent was not correct address. It was only because of the fact that there was no communication by the Director of Higher Education that constrained Respondent 1 to approach him as to what had happened to her appointment though she was at Serial No. 1 in the wait list. Only at that time she was informed about the order of appointment and her placement in Meerut College but since she did not join duty, other person was appointed. Precisely because of subsequent development that Respondent 1 approached C.M.P. College, Allahabad and obtained "no objection certificate" from the management of that College, the High Court, submitted the counsel, believed the case of Respondent 1 and granted relief observing that it was the mistake of the Authorities for which the candidate should not suffer.

16. Without expressing final opinion as to correctness or otherwise as to assertion of Respondent 1, even if it is believed that what Respondent 1 contended before the High Court and before us is correct, in our considered opinion, no writ of Mandamus could have been issued by the High Court in the light of express and unequivocal statutory provisions referred to hereinabove and the declaration of law in Kamlesh Kumar Sharma Vs. Yogesh Kumar Gupta and others,

17. It is an admitted fact that the first Respondent was selected and empanelled in the Wait List pursuant to Advertisement No. 29 on July 19, 2001. It is further not disputed that Advertisement No. 32 was thereafter issued and Merit List was prepared on March 5, 2003 which was received by the Director on March 7, 2003. Once the above facts have been established, the statutory provisions will come into play. Under the said provisions as soon as the new list is prepared, the old list comes to an end. The High Court, in view of the above facts, in our considered opinion, could not have issued a writ of Mandamus directing the Authorities to act contrary to law. That is not the ambit and scope of writ of Mandamus.

(emphasis supplied)

40. Learned Counsel for the Petitioner has, however, placed reliance upon the decision of this Court in *M.C. Yadav (Dr.) v. The Director of Education (Higher Education), Allahabad and Ors.* (2001) 2 UPLBEC 1435 in support of the submission that the select list does not expire after a period of one year if the unforeseen vacancy referred to in Section 13(4) was not included in any subsequent advertisement on the basis of which the new list is drawn. This decision does not help the Petitioner in view of the decision of the Supreme Court in *Nidhi Khanna (supra)* and in any case the placement order of the Petitioner refers to Section 13(3) of the Act.

41. Learned Counsel for the Petitioner has also relied upon the decision of this Court in *Ram Gopal, Chairman, U.P. Higher Education Services Commission, Allahabad and Ors. v. State of Uttar Pradesh and Anr.* (1999) 2 UPLBEC 825 , which was subsequently followed in *Suraj Pal Shakya and others Vs. State of Uttar Pradesh and others*, These two decisions also do not help the Petitioner inasmuch as they deal with the issue whether the State Government can direct the Commission not to proceed with the selections under the Act.

42. This brings us to the second contention raised by the learned Senior Counsel for the Petitioner that once the Petitioner had been appointed as a Principal in the Degree College on the basis of the placement order issued by the Director, the State Government or the Director cannot cancel the placement order or the appointment order and that the services can be terminated only in accordance with the procedure prescribed u/s 35 of the Universities Act which provides that every decision of the management to dismiss or remove a teacher shall, before it is communicated to him, be reported to the Vice-chancellor and shall not take effect unless it has been approved by the Vice-chancellor.

43. It is the contention of the learned Additional Advocate General for the Respondents that it is not a case where punishment has been imposed on the Petitioner but it is a case where the order of the Director for placement of the Petitioner as a Principal in the Degree College has been found to be against the provisions of the Act and has been cancelled as a result of which the appointment also stands cancelled. It is his submission that the Petitioner had no

right to be appointed as the recommendation of the Director made in her favour and the subsequent appointment were void.

44. In the present case, as seen above, the order dated 12th January, 2004 issued by the Director has been found to be contrary to the provisions of the Act. The Petitioner was appointed in Nagrik Degree College on the basis of the aforesaid placement order issued by the Director. The appointment was, therefore, void and cannot confer any right upon the Petitioner. The Petitioner is, therefore, not justified in asserting that the State Government or the Director cannot cancel the placement order and the appointment. The Petitioner is also not justified in placing reliance upon Section 35 of the Universities Act as it is not a case where the services of the Petitioner have been terminated on account of some misconduct.

45. The decision of this Court in Pramod Kumar v. U.P. Secondary Education Services Commission, Allenganj, Allahabad through its Secretary and Ors. (2004) 3 UPLBEC 2957 supports the view taken by us. In the said decision it was observed:

Thus in the aforesaid view of the mater, we do not have any hesitation to hold that the present Petitioner having no right of appointment to the post of Assistant Teacher at the initial stage itself he cannot be said to have acquired a right to the post held by him after the appointment. As such, he is also not entitled to challenge the order of termination of his service on the ground of the management not complying to the provisions of Section 16-G(3)(a) of U.P. Intermediate Education Act, 1921.

46. It is for this reason that the submission advanced by the learned Counsel for the Petitioner that the services of the Petitioner could not have been terminated without giving proper opportunity to the Petitioner cannot also be accepted.

47. In this connection, learned Additional Advocate General for the State also submitted that in such a situation no opportunity is required to be given to the Petitioner particularly when, in view of the admitted factual position, giving of any opportunity will not improve the situation for the Petitioner. He has pointed out that the Court will not insist upon compliance of the principles of natural justice as it is an admitted position that the Petitioner was appointed against the provisions of the Act and against a post which had not been advertised.

48. To examine this issue, reference needs to be made to the decision of the Supreme Court in Ashok Kumar Sonkar Vs. Union of India (UOI) and Others, wherein it has been observed that principles of natural justice can be excluded where it will be a futile exercise and that where the appointment is a nullity, the Courts will not insist upon it. The observations are:

27. It is also, however, well-settled that it cannot be put any straight jacket formula. It may not be in a given case applied unless a prejudice is shown. It is not necessary where it would be a futile exercise.

28. A court of law does not insist on compliance of useless formality. It will not issue any such direction where the result would remain the same, in view of the fact situation prevailing or in terms of the legal consequences. Furthermore in this case, the selection of the Appellant was illegal. He was not qualified on the cut off date. Being ineligible to be considered for appointment, it would have been a futile exercise to give him an opportunity of being heard.

34. It is not a case where appointment was irregular. If an appointment is irregular, the same can be regularized. The court may not take serious note of an irregularity within the meaning of the provisions of the Act. But if an appointment is illegal, it is non est in the eye of law, which renders the appointment to be a nullity.

35. We have noticed hereinbefore that in making appointment of the Appellant, the provisions of Articles 14 and 16 of the Constitution and statutory rules were not complied with. The appointment, therefore, was illegal and in that view of the matter, it would be wholly improper for us to invoke our equity jurisdiction.

(emphasis supplied)

49. In *State of Manipur and Ors. v. Y. Token Singh and Ors.* AIR 2007 SCW 1995, the Supreme Court also considered whether principles of natural justice are required to be complied with when the appointment was found to have been made without issuance of any advertisement. It was observed that in such a case giving of any opportunity would be an exercise in futility. The observations are:

14. The State while offering appointments, having regard to the constitutional scheme adumbrated in Articles 14 and 16 of the Constitution of India, must comply with its constitutional duty, subject to just and proper exceptions, to give an opportunity of being considered for appointment to all persons eligible therefore.

15. The posts of field staffs of the Revenue Department of the State of Manipur were, thus, required to be filled up having regard to the said constitutional scheme. We would proceed on the assumption that the State had not framed any recruitment rules in terms of the proviso appended to Article 309 of the Constitution of India but the same by itself would not clothe the Commissioner of Revenue to make recruitments in violation of the provisions contained in Articles 14 and 16 of the Constitution of India.

18. Moreover, it was for the Respondents who had filed the writ petitions to prove existence of legal right in their favour. They had inter alia prayed for issuance of a writ of or in the nature of mandamus. It was, thus, for them to establish existence of a legal right in their favour and a corresponding legal duty in the Respondents to continue to be employed. With a view to establish their legal rights to enable the High Court to issue a writ of mandamus, the Respondents were obligated to establish that the appointments had been made upon following the constitutional mandate adumbrated in Articles 14 and 16 of the Constitution

of India. They have not been able to show that any advertisement had been issued inviting applications from eligible candidates to fill up the said posts. It has also not been shown that the vacancies had been notified to the employment exchange.

22. The Respondents, therefore, in our opinion, were not entitled to hold the posts. In a case of this nature, where the facts are admitted, the principles of natural justice were not required to be complied with, particularly when the same would result in futility....

(emphasis supplied)

50. In *Mohd. Sartaj and Anr. v. State of U.P. and Ors.* AIR 2006 SCW 399, the Supreme Court also rejected the plea of compliance of principles of natural justice when the applicants could not show what prejudice had been caused to them on account of failure to serve notice. This is also the position in the present petition. The Petitioner could not have continued as Principal as the appointment was void. The relevant observations of the Supreme Court are:

12. It is the case of the Appellants that once appointed their services could not have been cancelled, without affording them an opportunity of being heard and giving them a chance to explain their position.

19. In the present case, the Appellants' case fall within the exception laid down in *S.L. Kapoor's* case (supra) and other supporting cases, as admittedly, the Appellants were not qualified and they did not possess the B.T.C. or Hindustani Teacher's Certificate or Junior Teacher's Certificate or Certificate of Teaching or certificate of any other training course recognized by the State Government as equivalent thereto at the time of their initial appointment. In view of the basic lack of qualifications, they could not have been appointed nor their appointment could have been continued. Hence the Appellants did not hold any right over the post and therefore no hearing was required before the cancellation of their services. In the present case, the cancellation order has been issued within a very short span of time giving no probability for any legitimate expectation to the Appellants regarding continuation of their service....

20. In our opinion, on the above facts no prejudice has been caused to the Appellants by not serving notice of giving hearing before the order of cancellation was issued.

(emphasis supplied)

51. Thus, the submission of the learned Senior Counsel for the Petitioner regarding violation of principles of natural justice cannot be accepted.

52. The last submission of the learned Counsel for the Petitioner is that the Petitioner is entitled to sympathy since she has continued as Principal of the College from 2004 and is not responsible for the issuance of a wrong order by the Director. A supplementary affidavit has also been filed by the Petitioner in

which it is stated that the Petitioner opted to retire at the age of 60 years and the Committee of Management of the Institution accepted the option by its resolution dated 11th August, 2009. The Director subsequently also accepted the option which was communicated to the Principal by the letter dated 19th August, 2009. It has, therefore, been submitted that as the Petitioner had initially worked as a Principal on the basis of the placement order dated 12th January, 2004 and thereafter on the basis of the interim order dated 14th September, 2005 and has also retired in 2009, the Court should protect the working of the Petitioner and should set aside the order dated 6th August, 2005 passed by the Director.

53. This submission of the learned Counsel for the Petitioner cannot be accepted.

54. In *Raghunath Rai Bareja and Another Vs. Punjab National Bank and Others*, the Supreme Court examined whether equity can prevail over law and observed:

Learned Counsel for the Respondent-Bank submitted that it will be very unfair if the Appellant who is a guarantor of the loan, and director of the Company which took the loan, avoids paying the debt. While we fully agree with the learned Counsel that equity is wholly in favour of the Respondent-Bank, since obviously a Bank should be allowed to recover its debts, we must, however, state that it is well settled that when there is a conflict between law and equity, it is the law which has to prevail, in accordance with the Latin maxim "*dura lex sed lex*", which means "the law is hard, but it is the law". Equity can only supplement the law, but it cannot supplant or override it.

(emphasis supplied)

55. In *Dr. M.S. Patil Vs. Gulbarga University and Others*, the Supreme Court examined whether sympathy should be shown in favour of persons wrongly appointed though they had worked for number of years as a result of wrong appointment and had continued because of the interim order passed by the Court and delay in final disposal of the writ petition. In this context the Supreme Court observed:

Once the facts of the case are narrated, there remains hardly anything to adjudicate upon. The facts of the case lead to only one conclusion that the Appellant was wrongly appointed to a post that was reserved for "Group B" category. The High Court has also found that the Appellant's selection for appointment to the post was tainted by the participation of the Head of the Department of Kannada, who was related to him, in the selection process. In those facts and circumstances, all that is needed is to dismiss the appeal without further ado.

But at this stage once again a strong appeal is made to let the Appellant continue on the post where he has already worked for over 17 years. Mr. Patil, learned Senior Counsel, appearing for the Appellant, submitted that throwing him out after more than 17 years would be very hard and unfair to him since now he cannot even go back to the college where he worked as lecturer and from where

he had resigned to join to this post.

We are unimpressed. In service law there is no place for the concepts of adverse possession or holding over. Helped by some University authorities and the gratuitous circumstances of the interim orders passed by the Court and the delay in final disposal of the matter, the Appellant has been occupying the post, for all these years that lawfully belonged to someone else. The equitable considerations are, thus, actually against him rather than in his favour.

(emphasis supplied)

56. It may also be useful to reproduce a passage from the judgment of the Supreme Court in the case of *State of Madhya Pradesh and Another Vs. Dharam Bir*, wherein it has been emphasized that the Courts should not be swayed by emotional appeals that the person has been working on the post for a substantial period. The observations are:

The plea that the Court should have a "human approach" and should not disturb a person who has already been working on this post for more than a decade also cannot be accepted as the Courts are hardly swayed by emotional appeals. In dispensing justice to the litigating parties, the Courts not only go into the merits of the respective cases, they also try to balance the equities so as to do complete justice between them. Thus the Courts always maintain a human approach. In the instant case also, this approach has not been departed from. We are fully conscious that the Respondent had worked on the post in question for quite a long time but it was only in ad hoc capacity. We are equally conscious that a selected candidate who also possesses necessary educational qualification is available. In this situation, if the Respondent is allowed to continue on this post merely on the basis of his concept of "human approach", it would be at the cost of a duly selected candidate who would be deprived of employment for which he has striven and had ultimately cleared the selection. In fact, it is the "human approach" which requires us to prefer the selected candidate over a person who does not possess even the requisite qualification. (emphasis supplied)

57. The Supreme Court in the case of *Kishorilal Charmakar and Another Vs. Distt. Education Officer and Another*, also examined the termination of persons who had been appointed under a bona fide mistake by considering them as Scheduled Tribes candidates and the mistake had not occurred on their account. It was submitted on their behalf that they had worked for 10 years as teachers under the interim orders granted by the Court in their favour and since they were not responsible for the mistake they should be allowed to continue. The Court rejected this contention holding that this alone could not entitle them to retain the undeserved benefit which had accrued to them.

58. In yet another case the Supreme Court in AIR 1998 91 (SC) examined the effect of an interim order on the dismissal of the petition. In the said case the Respondent was not called for an interview since he did not possess the technical qualification. However, pursuant to the interim order passed by the High Court

requiring the Appellant to call him for interview he was interviewed and his name was included in the list of selected candidates. He was also appointed on a provisional basis and was also subsequently confirmed. The writ petition was ultimately dismissed by the High Court holding that on the cut of date, he did not possess the requisite qualification. It was submitted by the Respondent before the Supreme Court that since he had been continued in service and had also been confirmed, the Court should not disturb his appointment and his case should be considered sympathetically. The Supreme Court observed that the Appellants had taken the correct stand right from the beginning and the Respondent's application was not considered and he was not called for interview. It was only on account of the interim orders, which were obtained by the Respondent that he was given an appointment and continued. He was aware that his appointment was subject to the outcome of the petition and, therefore, a sympathetic view should not be taken.

59. In view of the aforesaid decisions of the Supreme Court, we have no difficulty in rejecting the submission of the learned Senior Counsel for the Petitioner that a sympathetic attitude should be adopted by us since the Petitioner has worked either on the basis of the placement order issued by the Director for which the Petitioner was not responsible or on the basis of the interim order passed by the Court.

60. Thus, for all the reasons stated above, the Petitioner is not entitled to any relief and the writ petition deserves to be dismissed.

61. We are aware that the dismissal of this writ petition will result in revival of the order dated 6th August, 2005 passed by the Director by which not only the placement of the Petitioner as Principal in the Nagrik Degree College, Janghai was cancelled but a direction was also issued to the Committee of Management of the Institution to cancel the appointment of the Petitioner. We have clarified the legal position but as the Petitioner has retired from service, we leave it open to the State Government to examine the issue and pass appropriate orders regarding the continuance of the Petitioner as Principal in the Degree College after the issuance of the order dated 6th August, 2005 by the Director.

62. We must, however, hasten to add that we are greatly perturbed by the manner in which the Director has proceeded to issue the placement orders. It has been found that the Director acted in complete defiance of the provisions of the Act and what is more disturbing is that though the Supreme Court clarified the legal position in Kamlesh Kumar Sharma (supra) way back on 9th February, 1998 that any vacancy which was not advertised u/s 12 of the Act cannot be filled-up even u/s 13(4) of the Act, yet the Director proceeded to issue the placement orders. What could not have been done u/s 13(4) of the Act certainly could not have been done u/s 13(3) of the Act. The Director took the decision in June, 2004 not only in this case but in number of other cases as is clear from the report submitted to the State Government and from the facts stated in the connected petitions which we have heard along with this petition. There is no

explanation whatsoever as to why such placement orders were issued.

63. It is also important to notice that in an earlier judgment of this Court, a Division Bench while examining placement order issued by the Director in Civil Misc. Writ Petition No. 40551 of 2004 (Committee of Management, Prayag Mahila Vidyapeeth Degree College v. State of U.P. and Ors.) decided on 29th November, 2006 also made strong observations against the Director which are as follows:

However, before parting with this case, we must mention about the facts that have come to light regarding the functioning of the office of the Director of Higher Education in the matter of placement of the Teachers and Principals. The Commission along with its letter dated 30th April, 2001 sent the list dated 18th-April, 2001 to the Director recommending the names of candidates found suitable in order of merit. The Director thereafter by the communication dated 31st August, 2002 recommended the name of Dr. Tripathi for the post of Principal of the College u/s 13(3) of the Commission Act and pursuant to the said communication Dr. Tripathi joined the College on 2nd September, 2002. After acceptance of the resignation of Dr. Tripathi on 11th October, 2003 by the Committee of Management, the Director sent the communication dated 18th November, 2003 to the College mentioning therein that the vacancy should be filled up by giving appointment to Dr. Pandey. We were surprised to notice that the name of Dr. Pandey was being recommended for appointment to the College after a period of more than two and a half years even though her name appeared at Serial No. 8 in the General Category main list. We, therefore, called for the original records from the office of the Director and the learned Standing Counsel has produced the same. The records reveal that a communication dated 12th May, 2001/4th March, 2002 had also been sent by the Director to Dr. Pandey for appointment as Principal in Gauri Shankar Mahila Mahavidyalaya, Bulandshahar but she did not join the said College. The records also reveal that the process for appointment of Dr. Pandey in the College at Allahabad actually started on 13th November, 2003 when the then Director made a note in the file relating to Post Graduate Colleges even though Prayag Mahila Vidyapeeth Degree College is a Graduate College. A direction was given to the office to prepare a note for the appointment of Dr. Pandey in the College and merely on the basis of the said noting made by the Director in the file relating to Post Graduate College that the office made a note on 14th November, 2003 for appointment of Dr. Pandey. This recommendation was accepted by the Joint Director and placed before the then Director who accepted the same on 15th November, 2003. Thereafter the order was issued on 18th November, 2003 in favour of Dr. Pandey and she joined on the same date.

The records, therefore, reveal a shocking state of affairs prevailing in the office of the Director. The records do not indicate that any communication had been sent by Dr. Pandey for appointing her in the College and only on the basis of some noting made by the Director of Higher Education in the file relating to Post Graduate Colleges that the office put up a note on 14th November, 2003 for

appointment of Dr. Pandey in the College. The note prepared by the office does not mention at all that Dr. Pandey who was at Serial No. 8 in the select list of 2001 had earlier been offered appointment in Gauri Shankar Mahavidyalaya, Bulandshahar but she did not join the College. According to the learned Senior Counsel for Dr. Pandey, she did not accept the offer of appointment in the said College at Bulandshahar for the reason that it was a Self Financing College and as soon as the offer of appointment in the College at Allahabad was made, she immediately joined it. In our opinion once Dr. Pandey had refused to accept the offer of appointment in the College at Bulandshahar, there was no reason to offer appointment to her subsequently in another College. The manner in which the Director had proceeded to offer appointment to Dr. Pandey clearly calls for an enquiry and indeed the learned Standing Counsel pointed out that the State Government had also ordered an enquiry to be conducted against the then Director in respect of the appointment made pursuant to advertisement No. 25 and some other advertisements by the Commissioner, Allahabad Division, Allahabad. The records also indicate that subsequently the Enquiry Officer was changed by the communication dated 2nd June, 2006. We, therefore, do not propose to deal further with this matter at this stage but direct that the pending enquiry against the then Director must be completed expeditiously preferably within a period of three months from today. The learned Standing Counsel shall bring this order to the notice of the authorities concerned for due compliance. The enquiry report shall also be placed before this Court as soon as it received so that appropriate orders can be passed. Let the office list the petition after receipt of the enquiry report for the purpose of passing an appropriate order in this regard.

(emphasis supplied)

64. Two Special Leave Petitions filed for setting aside the aforesaid judgment were dismissed by the Supreme Court on 3rd January, 2007. The order is as follows:

Heard Mr. Rakesh Dwivedi, learned Senior Counsel for the Petitioner in SLP (C) No. 20577/2006 and Mr. A.S. Pundir, learned Counsel for the Petitioner in SLP (C) No. 21760/2006.

We have carefully perused the orders impugned in these two special leave petitions. We see no justification at all to interfere with the well-considered order passed by the High Court. The special leave petitions stand dismissed. However, the dismissal of the SLP filed by Mr. Shakti Pandey shall not stand in the way of approaching the appropriate authority for his placement in any other college.

65. We do not know the fate of the enquiry that was ordered by the Division Bench, but what we do find in this petition is that the Director issued the placement orders in 2004 of persons selected in 1995 and that too against vacancies which were not even advertised in clear defiance of the provisions of Section 13 of the Act and the directions issued by the Supreme Court in Kamlesh

Kumar Shukla (supra). The action of the Director has resulted in giving undue benefit to such persons. According to us, mere cancellation of the placement orders and the appointments does not serve the purpose and suitable action needs to be taken against the Director(s) found responsible for this blatant violation of the provisions of the Act. We, therefore, feel compelled to direct for an enquiry by the State Government against issuance such placement orders by the Director(s) and we order so. Such enquiry shall be conducted against the Directors who have issued the placement orders referred to in the report of the State Government and which are the subject matter of this petition and the connected petitions in which we have delivered the judgment today. The enquiry shall be done by a Senior Officer of the State Government preferably by the Principal Secretary, Higher Education and shall be concluded as expeditiously as is possible.

66. Thus, for all the reasons stated above, the writ petition is dismissed with the aforesaid observations.