

(2004) 10 AHC CK 0050
In the Allahabad High Court
Case No : Writ Petition No. 5133 of 2004 (S/S)

Manish Dixit and Others

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 12-10-2004

Acts Referred:

Constitution of India, 1950 — Article 12, 309, 311
Contract Act, 1872 — Section 23
Uttar Pradesh Harijan and Social Welfare Department, Ministerial Service (Ist amended Rules) Rules, 1998 — Rule 14, 15
Uttar Pradesh Harijan and Social Welfare Department, Ministerial Service Rules, 1991 — Rule 14, 15, 19, 2, 20
Uttar Pradesh State Government Servants Confirmation Rules, 1991 — Rule 27, 5(3)

Citation : (2005) 5 AWC 4028

Hon'ble Judges : Devi Prasad Singh, J

Bench : Single Bench

Advocate : Vikas Singh, for the Appellant; C.S.C., for the Respondent

Final Decision : Dismissed

Judgement

Devi Prasad Singh, J.—Heard the learned Counsel for the parties.

2. The Petitioners are working on the post of Investigator/Computer/ Data Verifier/Data Entry Operators. For all these posts, they were selected in pursuance to an advertisement dated 12th August 2000, copy of which has been filed as Annexure-3 to the writ petition. Petitioners and some other persons appeared for written test as well as for interview and after successfully completing their test and thereafter interview, they were appointed on the posts in questions on contract basis. One of such appointment letter dated 12th July 2000, issued by the competent authority for appointment on the post of Data Entry Operator has been filed as Annexure-7 to the writ petition.

3. According to the learned Counsel for the Petitioners, service conditions of Petitioners are governed by the "U.P. Harijan and Social Welfare Department, Ministerial Service Rules, 1991 (In short hereinafter referred as 1991 Rules),

copy of which has been filed as Annexure-8 to the writ petition. Rule 1991, has been amended by U.P. Harijan and Social Welfare Department, Ministerial Service (Ist amended Rules) Rules, 1998 (In short hereinafter referred as Rule 1998 amended), copy of which has been filed as Annexure-9 to the writ petition.

4. According to the learned Counsel for the Petitioners, all the Petitioners are working on their respective posts continuously with due salary payable to them in accordance to rules. The copy of the advertisement filed as Annexure-3 to the writ petition, shows that the applications were invited for the posts in question for appointment on contract basis. Copy of the appointment letter filed as Annexure-7 of one of the Petitioners shows that Petitioners were appointed on contract basis for the period till the regular selection is done in accordance to rules. Copy of the agreement acknowledged and signed by the Petitioners in required format attached to the appointment letter shows that Petitioners have accepted the assignment for the period till the work is available or till the regular incumbent joins.

5. By the impugned advertisement dated 22nd August 2004, as contained in Annexure-1 to the writ petition, the opposite parties have proceeded ahead to fill up the various regular vacancies including the posts being occupied by the Petitioners by inviting applications from the eligible persons in accordance to the service rules. The advertisement dated 22nd August 2004, which has been impugned in the writ petition has been assailed by the learned Counsel for the Petitioners on the ground that:

(1) Petitioners were appointed against the regular vacancies on contract basis in accordance to the provisions given in service rules, hence, they should be treated to be appointed on substantive posts.

(2) Since the Petitioners were appointed against the clear vacancies, they are entitled to continue on the said post and they shall be deemed to be regularised or absorbed against the regular vacancies. Accordingly, the opposite parties have no right to fill up the vacancies in question by the impugned advertisement.

6. While assailing the impugned advertisement, learned Counsel for the Petitioners Sri Vikas Singh has relied upon the judgment of Hon'ble Supreme Court in K. A. Abdul Majeed v. State of Kerala and Ors. (2000) 6 SCC 292; S.N. Dhingra and Others Vs. Union of India and Others, ; State of Orissa and Others Vs. Shri Arun Kumar Patnaik and Others, ; Olga Tellis and Others Vs. Bombay Municipal Corporation and Others, ; Narsing Pal v. Union of India and Ors. (2003) 3 SCC 588; Secretary-cum-Chief Engineer, Chandigarh Vs. Hari Om Sharma and Others, ; Union of India and Others Vs. Kishorilal Bablani, ; Basavaraj R. Patil and Ors. v. The State of Karnataka, 2001 SCC 87. ; Jagmal Singh Yadav v. M. Rammaiya and Ors. (1997) 2 SCC 593; Union of India (UOI) and Others Vs. Arun Kumar Roy, ; Rudra Kumar Sain and Others Vs. Union of India and Others, and L.G. Chaudhari Vs. Secretary, L.S.G. Department, Government of Bihar and Others, .

7. While defending the impugned advertisement, learned standing counsel submits that originally the appointments were done on contractual basis in accordance to earlier advertisement. After due selection, appointment letters were issued and the Petitioners have signed the agreement. The entitlement of Petitioners' continuance in service is only upto the period till the regular selection is done. Accordingly the submission of Sri M. P. Singh, learned standing counsel is that Petitioners' appointment cannot be treated to be done against the substantive posts and lacks element of permanency. Petitioner's right should be considered in the terms of appointment letter and the agreement signed by them. Accordingly, the submission of the standing counsel is that after lapse of almost 3 years, the State Government is going to fill up the vacancies in accordance to rules and the Petitioners have got no right to deny or disown their contractual appointment which was done in pursuance of earlier advertisement. The Government has got right to fill up the vacancies in accordance to service rules.

8. Service Rules, 1991, defines as to who shall be member of service or as well as what is substantial appointments. For convenience Rules 2, 3 (c), 3 (h), 3 (i), 3 (j) and 3 (k) are reproduced as under:

2. Status of service.-The Uttar Pradesh Harijan and Social Welfare Department, Ministerial Service is a non-gazetted Subordinate Service comprising Group "C" posts.

3 (c) "Commission" means the Uttar Pradesh Subordinate Services Selection Commission.

3 (h) "Member of Services" means a person substantively appointed under the rules or the rules or orders in force prior to the commencement of these rules, to a post in the cadre of the service.

3 (i) "Service" means the Uttar Pradesh Harijan and Social Welfare Department, Ministerial Rules.

3 (j) "Substantive appointment" means an appointment, not being an ad hoc appointment on a post in the cadre of the service, made after selection in accordance to the rules and, if there are no rules, in accordance with the procedure prescribed for the time being by executive instructions issued by the Government.

3 (k) "Year of recruitment" means a period of twelve months commencing from the first day of July of calendar year.

9. Cadre of service have been defined under Rule 4. For convenience, Rule 4 is reproduced as under:

4. Cadre of service.-(1) The strength of the service of each category of post therein shall be such as may be determined by the Government from time to time.

(2) The strength of the service and of each category of posts therein shall until orders praying the same are passed under Sub-rule (1) be as given in the Appendix provided that:

(1) the appointing authority may leave unfilled or the Governor may hold in abeyance any vacant post, without thereby entitling any person to compensation or ;

(2) the Governor may create such additional permanent or temporary posts as he may consider proper.

10. Under Rule 14 of the 1991 Rules, procedure for determination of vacancies has been given and under Rule 15, procedure for direct recruitment on the basis of competitive examination has been given. For convenience Rules 14 and 15 are reproduced as under:

14. Determination of vacancies. - The appointment authority shall determine the number of vacancies to be filled during the course of the year of recruitment as also the number of vacancies to be reserved for candidates belonging to the Scheduled Castes, Schedules Tribes and other categories under Rule 6. The vacancies to be filled through the Commission shall be intimated to them.

15. Procedure for direct recruitment on the basis of competitive examination:

(1) Direct recruitment to the posts specified at serial numbers 8, 9, 12, 14, 16 and 19 in the Appendix shall be made through a competitive examination conducted by the Commission.

(2) Application for permission to appear in the competitive examination shall be invited by the Commission in the prescribed form.

(3) No candidate shall be admitted to the examination unless he holds a certificate of admission, issued by the Commission.

(4) The Commission shall prepare a list of candidate in order of their proficiency as disclosed by the aggregate of marks obtained by each candidate at the written examination and recommend such number of candidates as they consider fit for appointment. If two or more candidates obtained equal marks in the aggregate the Commission shall arrange their names in order of merit on the basis of their general suitability for the service. The number of names in the list shall be larger (but not larger by more than 25 per cent) than the number of vacancies. The Commission shall forward the list to the appointing authority.

11. Under Rule 19, provision for probation and under Rule 20, provision for confirmation have been given. For convenience Rules 19 and 20 are reproduced as under:

19. Probation.-(1) A person on appointment to a post in the service in or against a permanent vacancy shall be placed on probation for a period of two years.

(2) The appointing authority may, for reasons to be recorded, extend the period

of probation in individual cases specifying the date upto which the extension is granted:

Provided that, save in exceptional circumstances, the period of probation shall not be extended beyond one year and in no circumstances beyond two years.

(3) If it appears to the appointing authority at any time during or at the end of the period of probation or extended period of probation that a probationer has not made sufficient use of his opportunities or his work and conduct are unsatisfactory he may be reverted to his substantive post, if any and if he does not hold a lien. On any post his services may be dispensed with.

(4) A probationer who is reverted or whose services are dispensed with under Sub-rule (3) shall not be entitled to any compensation.

(5) The appointing authority may allow continuous service, rendered in an officiating or temporary capacity in a post included in the cadre or any other equivalent or higher post to be taken into account for the purposes of computing the period of probation.

20. Confirmation.-(1) Subject to the provisions of Sub-rule (2) a probationer shall be confirmed in his appointment at the end of the period of probation or the extended period of probation if:

(a) His work and conduct are reported to be satisfactory.

(b) His integrity is certified, and (c) The appointing authority is satisfied that he is otherwise fit for confirmation.

(2) Where, in accordance with the provisions of the Uttar Pradesh State Government Servants Confirmation Rules, 1991, as amended from time to time, confirmation is not necessary the order under Sub-rule (3) of Rule 5 of those rules declaring that the person concerned has successfully completed the probation shall be deemed to be the order of confirmation.

12. In Rule 27, provision has been made for relaxation of the condition of service. For convenience Rule 27 is reproduced as under:

27. Relaxation from the conditions of service.-Where the State Government is satisfied that the operation of any rule regulating the conditions of service of persons appointed to the service causes undue hardship in any particular case, it may, notwithstanding anything contained in the rules applicable to the case, by order, dispense with or relax the requirements of that rule to such extent and subject to such conditions as it may consider necessary for dealing with the case in a just and equitable manner.

13. However, Rules 14 and 15 as amended in 1998 are reproduced as under:

14. The appointing authority shall determine the number of vacancies to be filled during the course of the year as also the number of vacancies to be reserved for candidates belonging to Schedule Caste, Schedule Tribes and other categories

under Rule 6.

15. Direct recruitment to the various categories of posts shall be made through the Selection Committee in accordance with the provisions of the Uttar Pradesh Procedure for Direct Recruitment for Group "C" Posts (outside the provinces of the Uttar Pradesh Public Service Commission) Rules, 1998, as amended from time to time.

14. 1991 Rules, have been framed in pursuance to the provisions contained in Article 309 of the Constitution of India. As is evident from Rule 15 appointment through direct recruitment should be done by the competitive examination conducted by the Commission. According to the Rule 2, the Ministerial Service of the department is a non-gazetted subordinate service comprising Group "C" posts. According to the provisions contained in Rule 3 (c) "Commission" means the U.P. Subordinate Services Selection Commission. Under Rule 3, only those persons shall be deemed to be appointed on substantive posts who were appointed after selection in accordance to the Rules. However, such appointment shall not include the ad hoc appointment on a post in the cadre of service. After the appointment, a person is placed on probation for the period of one year which may be extended for further one year and only in the event of satisfactory services provided under Rule 19, his services shall be confirmed. The confirmation shall be done in pursuance to Rule 20, in case the services of an incumbent is satisfactory and his integrity is certified upto the satisfaction of the appointing authority.

15. The case of Sri Arun Kumar Patnaik (supra), relates to a person who was appointed as Assistant Engineer on temporary post. During the contractual period, the Assistant Engineer was promoted to higher post and the appointment and seniority was challenged after 11 years. The Assistant Engineer was selected through U.P. Public Service Commission in accordance to rules. Thereafter, his services were regularised. However, the seniority was granted to the person concerned from the date of his initial appointment. Hon''ble Supreme Court in the said case held that the person was appointed in accordance to rules on contract basis, he shall be entitled for his seniority from the date of his initial appointment. Under relevant service rules, the Government was empowered to treat any part of temporary services towards prescribed period.

16. Under the above facts and circumstances, the proposition of law of Apex Court in the case of Sri Arun Kumar Patnaik's case (supra) shall not be applicable in the present controversy.

17. In the case of K. A. Abdul Majeed, appointment was made for selection in pursuance of an advertisement on the post in question and he was placed for probation. Later on, the Petitioner was promoted to the next higher grade. After a long lapse of time, initial appointment was challenged at the instance of private Respondents on the ground that it was a backdoor appointment, hence, Hon''ble Supreme Court held that question of initial appointment cannot be disputed at

the time of fixation of seniority. For convenience, paras 8, 9 and 11 of K. A. Abdul Majeed's case are reproduced as under:

8. It is an admitted position that the post was advertised by G.C.D.A. and the Appellant possessed all the qualifications as shown in the advertisement. He was duly selected and appointed. He successfully completed his period of probation. He was given one promotion to the next higher grade and his probation was declared in the promoted post of Upper Division Typist. In view of these admitted facts, we find force in the submission of Mr. Dave that after a long lapse of time the question of initial appointment cannot be reopened at the instance of the private Respondents and that too for altering his seniority. Therefore, the contention of Mr. Iyer, learned senior counsel has to be rejected.

9. As the Appellant was appointed after the post was advertised and he was duly selected before appointment, it cannot be said that the appointment of the Appellant was through the back door and therefore we reject the contention of Mr. Sukumarna, learned senior counsel.

11. The language of the above Rule 27 is clear and unambiguous. The seniority of an employee has to be determined by the date of order of the first appointment in the service unless he has been reduced to a lower rank as punishment or any portion of his service would not be counted towards probation. Admittedly, the Appellant was never reduced to a lower rank. It was neither pleaded nor were any records placed to show that any portion of the service of the Appellant could not be counted towards probation. Indeed in the posts of Lower Division Typist as well as Upper Division Typist, his probation was declared based on his initial appointment and subsequent promotions respectively. The question whether initial appointment was regular or not cannot be considered at the time of fixation of seniority under this Rule. As the fixation of seniority by G.C.D.A. by the impugned seniority list is not in accordance with Rule 27, referred to above, it is, therefore, bad in law and consequently the impugned seniority list is liable to be quashed.

18. In the case of S. N. Dhingra and Ors. (supra), the controversy was relating to fortuitous or stopgap appointment. The fact of the case of S. N. Dhingra (supra) is that the post of Chief Metropolitan Magistrates was upgraded to the rank of Delhi Higher Judicial Service. In this case, Hon'ble Supreme Court held that since the Appellants of the writ petition were possessing the necessary qualification and experience for being appointed on the post of Delhi Higher Judicial Service, their appointment can be held fortuitous and stopgap and for the entire period should be considered for the purpose of seniority. For convenience, para 9 of S. N. Dhingra's case (supra) is reproduced as under:

9. The next question that arises for consideration, therefore, is whether such appointments though nomenclatures "stopgap and fortuitous" can all be held to be such in the light of the enunciation of those terminology in Rudra Kumar case. There is no dispute that the Constitution Bench in Rudra Kumar case has clearly

indicated that whether a particular appointment is really fortuitous or stopgap has to be decided in the facts and circumstances of the case and any universal principle cannot be made for the purpose. In the case in hand, the administrator had upgraded those post of Chief Metropolitan Magistrates to be in Delhi Higher Judicial Services, the posts have been filled up by these Respondents belonging to Delhi Judicial Service in consultation with the High Court. These Respondents did possess the requisite qualification and experience for being appointed to Delhi Higher Judicial Service and they have been continuing in the said higher judicial service from 1986. In this premises, it would be travesty of justice if their continuous appointment in the service is not taken into account for the purpose of their seniority, merely because of the use of the expression "stopgap and fortuitous" in the order dated 16.1.1986. It may be stated that the order had emanated from the High Court and in Rudra Kumar case, the Constitution Bench has already dealt with the obsession of the High Court, the promotees have suffered in the matter of their and how in single case the Court resolved the impasse by directing continuous length of service to be the guiding principle for determination of the seniority in the cadre. Having examined the entire facts and circumstances of the case in hand, particularly, the upgradation of the post of Chief Metropolitan Magistrate to the post in Delhi Higher Judicial Service and filling up of those posts in consultation with the High Court by the administrator, we find it difficult to hold that such appointment of the Respondents from 16.10.1986 till 1989 were, in fact really fortuitous or stopgap. To hold such appointment to be fortuitous or stopgap, would be against the spirit of the judgment of this Court in single and reaffirmed in Rudra Kumar case. We, therefore, not persuaded to agree with the submissions of Mr. Shanti Bhushan that the appointment of Respondents from 16.1.1986 till 1989 must be held to be fortuitous or stopgap and on that score ought not to be counted for the purpose of their seniority in the cadre.

19. In *Olga Tellis and Ors. case* (supra), Hon"ble Supreme Court had held that there cannot be estoppel against the constitutional rights. The Constitution is not only paramount law of the land but it is the source and substance of all laws. Its provisions are conceived in public interest and are intended to serve a public purpose. Even, a concession will not act as barrier to enforce any particular fundamental right and shall not create an estoppel against a person or any subsequent proceedings. The Apex Court ruled that in case, the arguments of estoppel is held to be valid, then all the powerful State could easily tempt an individual to forgo the precious personal freedom on promise of transitory, immediate benefits. The plea of estoppel is closely connected with the plea of waiver.

20. In *Narsing Pal's case* (supra), the services of an employee were terminated and in consequence thereof, he has accepted the retrenched compensation. Accordingly, the High Court had declined to interfere at later stage, when the Petitioner has approached under Article 226 of the Constitution of India assailing the order of termination. Hon"ble Supreme Court while setting aside the

judgment of the High Court held that Appellant of the case was a casual labourer who attained the temporary status after having been put in 10 years of service. The acceptance of compensation does not mean that he had surrendered all his constitutional right in favour of the Respondents. Even, the rights under the Constitution cannot be bartered away. They cannot be compromised nor there can be any estoppel against the exercise of fundamental rights available in the Constitution since the termination of service or appointment in nature was in violation of the principles of natural justice affecting the constitutional right of the employee, the order was not sustainable.

21. In the case of Secretary-cum-Chief Engineer (supra), an employee was promoted on stopgap arrangement and an undertaking was obtained from him that he will not claim the salary for the higher post or any benefit of the said post. Hon"ble Supreme Court held that such undertaking was illegal. The Government being the employer cannot be permitted to rely upon such undertaking even if the promotion is made in stopgap arrangement. For convenience para 8 of the judgment of Secretary-cum-Chief Engineer (supra) is reproduced as under:

8. Learned Counsel for the Appellant attempted to contend that when the Respondent was promoted in stopgap arrangement as Junior Engineer I, he had given an undertaking to the Appellant that on the basis of stopgap arrangement, he would not claim promotion as of right nor would he claim any benefit pertaining to that post. The arguments to say the least, is preposterous. Apart from the fact that the Government in its capacity as a model employer cannot be permitted to raise such an argument, the undertaking which is said to constitute an agreement between the parties cannot be enforced at law. The Respondent being an employee of the Appellant had to break his period of stagnation although, as we have found earlier, he was the only person amongst the non-diploma holders available for promotion to the post of Junior Engineer I and was, therefore, likely to be considered for promotion in his own right. An agreement that if a person is promoted to the higher post or put to officiate on that post or, as in the instant case, a stopgap arrangement is made to place him on the higher post, he would not claim higher salary or other attendant benefits would be contrary to law and also against public policy. It would, therefore, be unenforceable in view of Section 23 of the Contract Act, 1872.

22. In the case of Union of India v. Kishori Lal Bablani (supra), the controversy was relating to appointment on class I post in the Custom department. The Petitioner of the writ petition was holding the post of Customs Appraiser. He filed the writ petition on the ground that when the Class I vacancies were advertised, the actual number of regular posts were 97 but instead of 97 vacancies, only 40 vacancies were advertised. The Central Administrative Tribunal has accepted Petitioner"s contention and permitted to consider Petitioner"s case for appointment against the vacancies reserved for promotees quota of the Assistant Collector, Custom as was existing in the year 1974. The Tribunal has granted

notional promotion to the Officer in Class I cadre. The Hon''ble Supreme Court upheld the judgment of the Tribunal.

23. In the case of Kishore K. Pati (supra), the selection process was initiated for appointment through the employment exchange. Hon''ble single Judge of the High Court had permitted some persons to appear for interview before the Selection Committee, though their names were not sponsored by the employment exchange. The decision of Hon''ble single Judge of the High Court was set aside by the Division Bench. Hon''ble Supreme Court had restored the order of Hon''ble single Judge of the High Court with the finding that it was just and proper.

24. In the case of Jagmal Singh Yadav (supra), Hon''ble Supreme Court had held that there is no quota of direct recruits for promotees. The employees who have joined earlier, their services should be confirmed according to the date of their joining in the cadre of Assistant Engineer after giving weightage and preference to direct recruits. In the absence of quota of promotees, those who have joined earlier, should be confirmed first.

25. In the case of Rudra Kumar Sain and Ors. (supra), the controversy was relating to the computation of inter se seniority of officers holding cadre post. Hon''ble Supreme Court held that for the purpose of seniority, it should be seen that the purposes for which the post was created and the nature of appointment of the officer as stated in the appointment order. Even, an employee appointed on stopgap basis or ad hoc basis in accordance to rules with requisite qualifications and continues on the post for a long period, then such appointment cannot be held "stopgap or fortuitous". For convenience, para Nos. 19 and 20 of Rudra Kumar Sain and Ors. case (supra) are reproduced as under:

19. The meaning to be assigned to these terms while interpreting provisions of a service rule will depend on the provisions of that rule and the context in and the purpose for which the expressions are used. The meaning of any of these terms in the context of computation of inter se seniority of officers holding cadre post will depend on the facts and circumstances in which the appointment came to be made. For that purpose, it will be necessary to look into the purpose for which the post was created and the nature of appointment of the officer as stated in the appointment order, then particular temporary contingency and for a period specified in the order, then the appointment to such a post can be aptly described as "ad hoc" or "stopgap". If a post is created to meet a situation which has suddenly arisen on account of happening of some event of a temporary nature then the appointment of such a post can aptly be described as "fortuitous" in nature. If an appointment is made to meet the contingency arising on account of delay in completing the process of regular recruitment to the post due to any reason and it is not possible to leave the post vacant till then, and to meet the contingency an appointment is made then it can appropriately be called as a "stopgap" arrangement and appointment in the post as "ad hoc" appointment. It is not possible to lay down any straitjacket formula nor give an

exhaustive list of circumstances and situation in which such an appointment (ad hoc, fortuitous or stopgap) can be made. As such, this discussion is not intended to enumerate the circumstances or situations in which appointments of officers can be said to come within the scope of any of these terms. It is only to indicate how the matter should be approached while dealing with the questions of inter se seniority of officers in the cadre.

20. In service jurisprudence, a person who possesses the requisite qualification for being appointed to a particular post and then he is appointed with the approval and consultation of the appropriate authority and continues in the post for a long period, then such an appointment cannot be held to be "stopgap or fortuitous or purely ad hoc". In this view of the matter, the reasoning and basis on which the appointment of the promotees in the Delhi Higher Judicial Services in the case in hand was held by the High Court to be "fortuitous/ ad hoc/ stopgap" are wholly erroneous and, therefore, exclusion of those appointees to have their continuous length of service for seniority is erroneous.

26. In the case of L. G. Chowdhary (supra), Hon''ble Supreme Court held that in the absence of formal order drawn up in terms of Article 166 of the Constitution, an aggrieved officer will be entitled to prove by evidence that he was appointed on permanent and substantive basis.

27. In one another case in Union of India (UOI) and Others Vs. Arun Kumar Roy, , Hon''ble Supreme Court held that after the appointment has been done on contractual basis and after entering into the service, the service conditions shall be governed by the service rules and the employees shall have the right to get benefits of the service rules. There is no dispute over the proposition of Hon''ble Supreme Court in Arun Kumar Rai's case that after entering into the service every Government servant shall be governed by the service conditions provided by the Rules. But, the question still remains whether a person appointed on contractual basis shall be entitled for regularisation. Arun Kumar Rai's case does not extend any help to the Petitioners. Hon''ble Supreme Court in Arun Kumar Rai's case held that an employee will have no right to claim the benefits of terms of the contract which are not in consonance with the said service rules. The service rules will have got overriding effect. For convenience para Nos. 18, 19 and 20 of Arun Kumar Rai's case are reproduced as under:

18. The question whether the terms embodied in order of appointment should govern the service conditions of employees in Government service or the rules governing them is not an open question now. It is now well-settled that a Government servant whose appointment though originates in a contract, acquires a status and thereafter is governed by the service rules and not by the terms of contract. The powers of the Government under Article 309 to make rules, to regulate the service conditions of its employees are very wide and unfettered. These powers can be exercised unilaterally without the consent of the employees concerned. It will, therefore, be idle to contend that in case of employees under the Government, the terms of the contract of appointment

should prevail over the rules governing their service conditions. The origin of Government service often times is contractual. There is always an offer and acceptance, thus bring it to being as completed contract between the Government and its employees. Once appointed, a Government servant acquires a status and thereafter his position is not one governed by the contract of appointment. Public law governing service conditions steps in to regulate the relationship between the employer and employee. His emoluments and other service conditions are thereafter regulated by the appropriate authority empowered to do so. Such regulation is permissible in law unilaterally without reciprocal consent. This Court made this clear in two judgments rendered by two Constitution Benches of this Court in *Roshan Lal Tandon v. Union of India* and in *State of J&K v. Triloki Nath Khosla*.

19. Thus, it is clear and not open to doubt that the terms and conditions of the service of an employee under the Government who enters service on contract, will once he is appointed, be governed by the rules governing his service conditions. It will not be permissible thereafter for him to rely upon the terms of contract which are not in consonance with the rules governing the service.

20. The powers of the Government under Article 309 of the to make rules regulating the service conditions of the Government employees cannot, in any manner, be fettered by any agreement. The Respondent cannot, therefore, succeed either on the terms of the contract or on the notification on which the High Court has relied upon. Nor can he press into service the rule of estoppel against the Government.

28. A Constitution of Bench of Hon''ble Supreme Court in a case in *Roshan Lal Tandon v. Union of India*, 1967 SLR 833, held that under the contractual appointment, there is offer and acceptance. However, after appointment, the service conditions shall be governed by the Service Rules. For convenience, the relevant portion from *Roshan Lal Tandon*'s case is reproduced as under:

It is an offer and acceptance in every case. But, once appointed to his post or office the Government servant acquires a status and his rights and obligations are no longer determined by consent of both parties, but by statute or statutory rules which may be framed and altered unilaterally by the Government. In other words, the legal position of a Government servant is more one of status than contract. The hall-marks of status is the attachment to a legal relationship of rights and duties imposed by the public law and not by mere agreement of the parties. The emoluments of the Government servant and his terms of service are governed by statute or statutory rules which may be unilaterally altered by the Government without the consent of the employee. It is true that Article 311 imposes constitutional restrictions upon the power of removal granted to the President and the Government and its servant is not like an ordinary contract of service between a master and servant. The legal relationship is something entirely different, something in the nature of status. It is much more than a purely contractual relationship voluntarily entered into between the parties. The

duties of status are fixed by the law and in the enforcement of these duties society has an interest. In the language of jurisprudence status in condition of membership of a group of which powers and duties are exclusively determined by law and not by agreement between the parties concerned. The matter is stated by Salmond and Williams on contracts as follows:

So we may find both contractual and status obligations produced by the same transaction. The one transaction may result in the creation not only of obligations defined by the parties and so pertaining to the sphere of contract but also and concurrently of obligations defined by the law itself, and so pertaining to the sphere of status. A contract of service between employer and employee, while for the most part pertaining exclusively to the sphere of contract, pertains also to that of status so far as the law itself has seen fit to attach to his relation compulsory accidents. The extent to which the law is content to leave matters within the domain of contract to be determined by the exercise of the autonomous authority of the parties themselves, or thinks fit to bring the matter within the sphere of status by authoritatively determining for itself the contents of the relationship, is a matter depending on consideration of public policy. In such contracts as those of service the tendency in modern times is to withdraw the matter more from the domain of contract into that of status.

29. In view of the above, no doubt after appointment, the Petitioners service conditions shall be governed by the service rules. But the question still remains as to whether the Petitioners can be treated as regular employees or ad hoc employees and as to whether the Petitioners can be treated to be appointed against the substantive posts. The copy of the service rules has been filed as Annexure-8 to the writ petition. From the perusal of service rules, it is evident that the selecting authority of the post of Investigator-cum-Computer Investigator and for the posts of Data Entry Operator and Data Verifier is Commission. The minimum qualification under rule for the post of Investigator - cum - Computer Investigator is Master Degree in Mathematics or Statistic granted by the university and for the post of Data Entry Operator and Data Verifier, a Bachelor Degree with Mathematics or Statistics or Economics with minimum three months training in Computer course from a recognised institution. The Sub-rule (c) of Rule 3 defines the Commission. The Commission means the U.P. Subordinate Service Selection Commission. Admittedly, the Petitioners were not selected by the Commission. They were appointed by the Director on contract basis. From the advertisement, it is evident that the assignment was for contractual basis. For convenience, the advertisement dated 12.8.2000 as published by the Director in news papers is reproduced as under:

30. The perusal of the aforesaid advertisement at the face of the record shows that the qualification and other necessary conditions provided by the schedule of the rule was not published in the newspapers. Accordingly, all the possible aspirants were not having the opportunity to apply in response to the said advertisement. Moreover, since the advertisement was not for substantive posts

in accordance to rules and it was for contractual assignments, this Court can take into notice of the fact that several desirable persons could not have applied on account of unwillingness to hold contractual posts.

11. Under the above facts and circumstances, it is evident that the Petitioners were not appointed in accordance to rules and also they were not selected by the competent authority provided under rules. The various pronouncements referred and discussed hereinabove of Hon"ble Supreme Court provides that after appointment and induction into service the service condition shall be governed by Service Rules as an employee gets a status. The proposition of law settled by Hon"ble Supreme Court appears to be that after appointment, an employee shall be entitled to all benefits which is being available to a Government servant under Service Rules. Of course till Petitioners continue in service in pursuance to their contractual appointment they will be entitled for all benefits which are available to the employees of their respective cadre. However, their nature of appointment cannot be termed to be substantive appointment, in case they were not selected by the competent authority in accordance to law after due advertisement of post. While making a regular selection on a substantive post apart from other facts and circumstances, the publication of number of vacancies and nature of post has got significance or importance. In the present case, the advertisement was for contractual assignment, without disclosing the number of posts, the nature of such appointment cannot be changed at later stage to treat it as a regular selection for a substantive post unless rules provides to do so.

31. Under these facts and circumstances, the Petitioner"s appointment cannot be held to be appointment on substantive post done in accordance to law.

32. The State of U.P. has framed another rule namely U.P. (U.P. Lok Seva Ayog Ke Chhetra Ke Bahar) Samuh "G" Rules 2002, as amended in the year 2003. By the impugned advertisement, the opposite parties are proceeding ahead to fill up the vacancies in pursuance to the Rules of 2002 which has got overriding effect for the purposes of recruitment and appointments against Group "C" vacancies. However, the Petitioners have not raised any objections against the applicability of the rules in pursuance to which the opposite parties are going to fill up the vacancies. It has also not been submitted by the Petitioner"s counsel that the rule in pursuance to which the impugned advertisement has been published, shall not be applicable to fill up the various regular vacancies of the department. It has also not been raised by the learned Counsel for the Petitioners that the service rules shall not be applicable to fill up the vacancies. Hence, validity of the impugned advertisement to fill up the vacancies in pursuance to 2002 Rules is not in question and need not to be considered.

33. As discussed hereinabove, the Petitioners" appointments cannot be treated to be done against the substantive posts in accordance to Service Rules. The selection was not done by the Commission. Accordingly, the submission of the learned Counsel for the Petitioners does not have got force, hence, seems to be misconceived.

34. So far as submission of the learned Counsel for the Petitioners relating to regularisation of Petitioner's services are concerned, it seems to be not permissible under law. The order for regularisation of the services can be passed only in case, the rules provide to do so. An appointment made in violation of mandatory provision of statute or rule cannot be cured by taking recourse to regularise even if the Petitioners have served for sufficiently long period. Those who come by back door must go through the back door. Contractual appointments done by an authority in violation of rules cannot be cured by the process of regularisation.

35. In a recent judgment in A. Umarani Vs. Registrar, Cooperative Societies and Others, , Hon"ble Supreme Court has proceeded to hold as under:

39. Regularisation, in our considered opinion, is not and cannot be the mode of recruitment by any "State" within the meaning of Article 12 of the Constitution of India or any body or authority governed by a statutory Act or the Rules framed thereunder. It is also now well-settled that an appointment made in violation of the mandatory provisions of the statute and in particular, ignoring the minimum educational qualification and other essential qualification would be wholly illegal. Such illegality cannot be cured by taking recourse to regularisation. (See State of H. P. v. Suresh Kumar Verma).

40. It is equally well-settled that those who come by back doors should go through that door. (See State of U.P. v. U.P. State Law Officers Assn.) 41. Regularisation furthermore cannot give permanence to an employee whose services are ad hoc in nature.

43. This Court yet again in R.N. Nanjundappa v. T. Thimmiah held: (SCC pp 416-17, para 26):

If the appointment itself is in infraction of the rules or if it is in violation of the provisions of the Constitution illegality cannot be regularised. Ratification or regularisation is possible of an act which is within the power and province of the authority but there has been some non-compliance with procedure or manner which does not go to the root of the appointment. Regularisation cannot be said to be mode of recruitment. To accede to such proposition would be to introduce a new head of appointment in defiance of rules or it may have the effect of setting at naught the rules.

70. Yet again, recently in Ramakrishna Kumar v. State of Karnataka this Court rejected a similar plea for regularisation of services stating: (SCC pp 377-78, para 7):

We repeatedly asked the learned Counsel for the Appellants on what basis or foundation in law the Appellants made their claim for regularisation and under what rules their recruitment was made so as to govern their service conditions. They were not in a position to answer except saying that the Appellants have been working for quite some time in various schools started pursuant to

resolutions passed by Zila Parishads in view of the Government orders and that their cases need to be considered sympathetically. It is clear from the order of the learned single Judge and looking to the very directions given, a very sympathetic view was taken. We do not find it either just or proper to show any further sympathy in the given facts and circumstances of the case. While being sympathetic to the persons who come before the Court the Courts cannot at the same time be unsympathetic to the large number of eligible persons waiting for a long time in a long queue seeking employment.

36. In view of the settled law discussed hereinabove, the Petitioners' appointment cannot be deemed to be appointment done on substantive posts in accordance to Rules. Their appointments cannot be treated as regular appointments. Under rule, there is no provision for conversion of contractual appointments into the regular appointments. Accordingly, a writ in the nature of mandamus cannot be issued in violation of Service Rules for conversion of Petitioners' contractual appointment into regular appointment. Nature of the appointment as borne out from the earlier advertisement and then the appointment letters cannot be changed to regular appointment by issuing a writ in the nature of mandamus.

37. Under the above facts and circumstances, the writ petition is devoid of merit and liable to be dismissed in limine. Accordingly, the writ petition is dismissed. No order as to costs.

38. The Petitioners shall be entitled to appear in the examination in pursuance to the impugned advertisement and the opposite parties may consider Petitioner's case for appointment on merit along with the other candidates.