
(2009) 12 AHC CK 0309
In the Allahabad High Court

Nazim Ali and Others

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 01-12-2009

Acts Referred:

Constitution of India, 1950 — Article 14, 311, 39A

Citation : (2010) 2 AWC 2010 : (2010) 124 FLR 19

Hon'ble Judges : Sudhir Agarwal, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Sudhir Agarwal, J.—Fifteen petitioners have filed this writ petition aggrieved by the impugned orders of termination dated 18.7.1992, Annexures-10 to 24 to the writ petition, passed by the Regional Ayurvedic and Unani Officer, Rampur terminating the petitioners on the ground that their services are no longer required and are terminated with immediate effect.

2. It is said that the petitioners were appointed on various dates between March, 1991 to March, 1992 as class IV employee in the pay scale of 750-940 for a period of one year by the respondent No. 3. Some of the appointment letters have been filed as Annexures-1 to 9 to the writ petition. It is said that on and after 31.7.1992, the respondent No. 3 stopped taking work from the petitioners pursuant to the impugned orders of termination, which are ex facie arbitrary and illegal. The petitioners came to know later on that the respondent No. 1 issued a Government order dated 17.6.1992 informing that the post of Junior Clerk are now included within the purview of U.P. Subordinate Services Selection Commission in view of U.P. Ayurvedic and Unani (Clerical Cadre) Service Rules, 1991 and hence, the Government has imposed ban on ad hoc appointments. Besides, it says that there is no provision of ad hoc appointment under the rules therefore all ad hoc and daily wage appointments made by the then Director be cancelled. It is further said that in view of the Government decision, all ad hoc clerical appointments and daily wage appointments on classes III and IV posts

are being cancelled. To the same effect, the Government order dated 18.6.1992 was issued which was circulated to all the Officers by the respondent No. 2 vide its letter dated 22.7.1992 and pursuant thereto the impugned orders have been passed.

3. It is contended that the appointment of the petitioners was made after making due selection in accordance with rules by the competent authority and, therefore, the same could not have been cancelled by the respondent No. 3 under the dictates of the respondents No. 2 and 3 without applying his own mind and this vitiates the impugned orders of termination. Further the appointments of the petitioners were made against the newly created permanent posts, on which the petitioners were discharging their duties satisfactorily and that the impugned orders are punitive in nature and, therefore, violative of Articles 14, 39A and 311 of the Constitution of India. Further neither the respondents have sought to remove the employees nor the posts on which the petitioners were appointed have been abolished and on the contrary the posts still exist, therefore termination of the petitioners without assigning any reason is arbitrary and discriminatory. No show cause notice or opportunity was afforded to the petitioners which also vitiates the order. Further that one month's notice or salary in lieu thereof, as required under the Uttar Pradesh Temporary Government Servants (Termination of Service) Rules, 1975, hereinafter referred to "1975 Rules", has not been provided hence also the impugned orders are vitiated in law. Lastly, it is submitted that there is no complaint against the working of the petitioners and, therefore, also the impugned orders are vitiated in law.

4. Sri P.K. Singh, advocate besides the above, also relied on two decisions of this Court in Writ Petition No. 34668 of 1992, Umesh Kumar v. Director, Ayurvedik and Unani Service, Uttar Pradesh, Lucknow, decided on 11.2.1998 and Writ Petition No. 24413 of 1992, Rama Shankar Yadav v. State of U.P. and Ors., decided on 11.2.1998 and submitted that the persons similarly placed with the petitioners have been granted relief under the above two judgments therefore, the petitioners are also entitled for the same relief. He also placed reliance on the Apex Court decision in the case of Arun Kumar Rout and Others Vs. State of Bihar and Others,

5. In the counter-affidavit filed on behalf of all the respondents sworn by Dr. Mahesh Chandra Sharma posted as Regional Ayurvedic and Unani Officer, Rampur, it is stated that the petitioners were appointed on purely temporary basis for a period of one year without following the procedure laid down under the Rules. The vacancies were never advertised in any newspaper nor notified to the employment exchange nor displayed on the notice board. No Selection Committee, as per the rules, was ever constituted, no test or interview took place and all the temporary appointments were made under the direction and order of the then Director, Ayurvedic and Unani, Lucknow in gross violation of the rules, though he was not the appointing authority of class IV employees. It is

said that after having knowledge of such irregularities committed by the Director, the State Government initiated proceedings against him and placed him under suspension but the same could not be finalized since he died in the meantime. It is said that since the petitioners were appointed in violation of the procedure prescribed under the rules, there is no question of regularization of their services. The petitioners' services were terminated as they were not required and they were temporary hence in accordance with the terms of their appointment letter, the termination orders were issued. It is said that the petitioners have not placed on record any document to show that any proper procedure in making their selection was followed.

6. I have heard learned Counsel for the parties and perused the record.

7. The first thing, which is very clear from a bare perusal of the letters of appointment of the petitioners is that, the petitioners were sought to be appointed as class IV employee on purely temporary basis for a limited period of one year with the further stipulation that their appointment being purely temporary, is liable to be terminated at any point of time without any prior notice. The counsels for the petitioners did not dispute that all the appointment letters of all the petitioners are in similar language with only difference that in some of such letters, the period of engagement is not mentioned like Annexures-7, 8 and 9 which states that the appointments are temporary and liable to be terminated at any time without any prior notice. It is also not disputed that ex facie the impugned orders of termination are termination simplicitor whereby the petitioners' services have been terminated by stating that the same is no longer required. Once it is evident that the petitioners were temporary employees and were liable to be terminated at any point of time, I find apparently no reason warranting any interference in the impugned orders of termination since a temporary employee has no right to hold the post and in accordance with the terms of their appointment letter can be terminated at any point of time unless it is shown that the termination is by way of punishment or is otherwise violative of any statutory provision.

8. The counsel for the petitioners did not suggest even for a moment during the course of argument that impugned order of termination is punitive and no such ground has been taken in the writ petition, therefore, apparently there is no reason to examine the impugned order from that angle but even if I look into this aspect of the matter, I find that the issue is squarely covered by a Division Bench decision in *Paras Nath Pandey Vs. Director, North Central Zone*, wherein para 57 of the judgment, the Court has laid down certain guidelines so as to determine as to when a termination simplicitor can be said to be punitive, and it reads as under:

5 7. From the above discussions, the principles discernible to find out whether a simple order of termination/discharge of a temporary employee or probationer is punitive or not, broadly, may be stated as under:

(a) The termination of services of a temporary servant or probationer under the rules of his employment or in exercise of contractual right is neither per se dismissal nor removal and does not attract the provisions of Article 311 of the Constitution.

(b) An order of termination simplicitor prima facie is not a punishment and carries no evil consequences.

(c) Where termination simplicitor is challenged on the ground of casting stigma of penal in nature, the Court initially would glance the order itself to find out whether it cast any stigma and can be said to be penal or not. If it does not, no further enquiry shall be held unless there is some material to show certain circumstances, preceding or attending, shadowing the simplicitoriness of the said order.

(d) The Court is not precluded from going beyond the order to find out as to whether circumstances, preceding or attending, makes it punitive or not. If the circumstances, preceding or attending, show only the motive of the employer to terminate, it being immaterial would not vitiate the order unless it is found that order is founded on such act or omission constituting misconduct.

(e) If the order visits the public servant with evil consequences or casts aspersions against his character or integrity, it would be an order by way of punishment irrespective of whether the employee was a mere probationer or temporary.

(f) "Motive" and "foundation" are distinct, though the distinction is either very thin or overlapping. "Motive" is the moving power, which impels action for a definite result, or to put it differently. "Motive" is that which incites or stimulates a person to do an act. "Foundation", however, is the basis, i.e., the conduct of the employee. When his acts and omissions treated to be misconduct, proved or founded, it becomes a case of foundation.

(g) If an order has a punitive flavour in cause or consequence, it is dismissal, but if it falls short of it, it would not.

(h) Where the employer is satisfied of the misconduct and the consequent desirability of termination, it is dismissal even though the order is worded innocuously. However, where there is mere suspicion of misconduct and the employer does not wish to bother about it, and, instead of going into the correctness of guilt, feel like not to keep the employee and thus terminate him, it is simpliciter termination and not punitive.

(i) Where the termination simplicitor is preceded by an enquiry, preliminary or regular, the Court would see the purpose, object of such enquiry as also the stage at which, the order of termination has been passed.

(j) Every enquiry preceding the order of termination/discharge, would not make it punitive. Where an enquiry contemplated in the rules before terminating a

probationer or temporary employee is held, it would not make the order punitive.

(k) If the enquiry is to find out whether the employee is fit to be confirmed or retained in service or to continue, such an enquiry would not render termination punitive.

(l) Where the employer hold a formal enquiry to find out the correctness of the alleged misconduct of the employee and proceed on the finding thereof, such an order would be punitive, and, cannot be passed without giving an opportunity to the concerned employee.

(m) If some formal departmental enquiry commenced but not pursued to the end. Instead a simple order of termination is passed, the motive operating in the mind of the authority would be immaterial and such an order would be non-punitive.

(n) When an order of termination is assailed on the ground of mala fide or arbitrariness, while defending the plea of mala fide, if the authority has referred certain facts justifying the order of discharge relating to misconduct, negligence or inefficiency of the employee in the appeal or in the affidavit filed before the Court, that would not make the order founded on any misconduct.

(o) Sometimes when some reason is mentioned in the order, that by itself would not make the order punitive or stigmatic. The following words mentioned in the order have not been held to be punitive:

(i) "want of application",

(ii) "lack of potential",

(iii) "found not dependable",

(iv) "under suspension",

(v) "work is unsatisfactory",

(vi) "unlikely to prove an efficient officer".

(p) Description of background facts also have not been held to be stigmatic.

(q) However, the words "undesirable to be retained in Government service", have been held stigmatic.

(r) If there is (i) a full scale formal enquiry, (ii) in the allegations involving moral turpitude or misconduct, (iii) which culminated in a finding of guilt ; where all these three factors are present, the order of termination would be punitive irrespective of the form. However, if any one of three factors is missing, then it would not be punitive.

9. Considering the impugned orders in the light of para 57 in the case of Paras Nath Pandey (supra), I do not find by any stretch of imagination that the impugned order is punitive.

10. Though the petitioners have alleged that the impugned orders have been passed pursuant to the Government orders dated 17.6.1992 and 18.6.1992 as circulated by the respondent No. 2 by his letter dated 22.7.1992 but apparently it does not appear that the impugned orders have been passed pursuant to the Director's letter dated 22.7.1992 communicating the Government orders dated 18.6.1992 etc. inasmuch as, the impugned orders of termination have been passed on 18.7.1992 and four days ahead the Director issued the circular dated 22.7.1992 and this shows that the impugned orders have not been passed pursuant to the directions issued by the respondent Nos. 1 and 2.

11. Now, coming to the judgment cited by the petitioners' counsel stating that in the similar circumstances other persons have been granted relief by this Court, it would be appropriate to reproduce and/or to refer those orders herein.

12. In Umesh Kumar (supra), the judgment dated 11.2.1998 of this Court reads as under:

The interim order dated 16.9.1992 is hereby confirmed in view of the order passed in Writ Petition No. 24413/92. The matter is finally disposed of. There will be no order as to costs.

In the second case, i.e., Rama Shankar Yadav (supra), the judgment dated 11.2.1998 reads as under:

Heard learned Counsel for the parties.

The petitioner is an ad hoc employee of the respondents and was employed as Junior clerk on ad hoc basis in Rajkiya Ayurvedic Evam Unani Nirmanshala, Lucknow by the respondent No. 2, Director, Ayurvedic and Yunani Services, U.P., Lucknow on 30.5.1991 and he continued his services till 1992 but on 18.6.1992, the services of the said employee was terminated alongwith about 2000 employees belonging to classes III and IV category on the ground that the same was ad hoc appointment though the Director, Ayurvedic and Yunani Services, U.P., Lucknow had authority to appoint such persons, as such the services of the such persons were terminated on extra legal consideration. The learned Counsel for the petitioner submits that there were posts available for the said employees at the time of passing said termination order. It was further submitted that in their places some other persons were appointed, as such, it could not be said that posts were not available in the department. It was most arbitrary for the Government to terminate the services of the employees without affording any reasonable opportunity of being heard as such, the said termination was illegal and mala fide. It was also an attempt to cover up wrongs and mistakes done by some officials of the department. The petitioner was not at fault. Further, it was submitted that the petitioner has been working in the department since 1991 and this Court was also pleased to pass an order of stay against the termination order. I have considered the case of the petitioner carefully and find that the order of termination was illegal and arbitrary as the petitioner was initially appointed by the Director of the department on ad hoc basis and the Director

had authority to appoint such person, as such, there was no illegality or irregularity in the said appointment. The petitioner is still continuing in the services of the department. In that view of the matter, I quash the order dated 18.6.1992 and confirm the interim order dated 10.7.1992.

The writ petition is finally disposed of. There will be no order as to costs.

13. It appears that following the decision passed in Writ Petition No. 24413 of 1992, His Lordship passed a similar order in Writ Petition No. 24415 of 1992, *Sri Ram Tiwari v. State of U.P.*, decided on 11.2.1992, itself which is as under:

The interim order dated 9.7.1992 is hereby affirmed in view of the orders passed in Writ Petition No. 24413 of 1992, the matter is finally disposed of. There will be no order as to costs.

14. This order passed in *Sri Ram Tiwari (supra)* has been considered in a similar matter by another Hon'ble single Judge in *Satish Chandra Patariya Vs. State of U.P. and Prabhari Chikitsadhikari Rajkiya Ayurvedic Evam Unani Chikitsalaya*, and His Lordship in para 23 of the judgment held as under:

I have heard learned Counsels for the parties. The petitioner was appointed absolutely temporarily on ad hoc basis. The nature of appointment of the petitioner was ad hoc and the ad hoc appointee shall have no right to the post and in terms and conditions of the appointment, the services of the petitioner could be dispensed with simply by an order simpliciter without any notice or show cause or without opportunity of hearing. The decision of this Court/single Judge passed on 11.3.1998 in Writ Petition No. 24415 of 1992 referred on behalf of petitioner has not laid down any law, but was passed in particular facts and circumstances and has only confirmed the interim order earlier granted. I do not treat the said order as binding precedence, therefore, I am hesitant to follow the said judgment as the said judgment is per incurium. In view of the above observations, no relief as prayed for could be given to the petitioner, therefore, the writ petition is dismissed.

15. For my purposes, it is not necessary to go to the extent his Lordship has observed in *Satish Chandra Patel (supra)*, for the reason that from a perusal of the judgment of His Lordship in the case of *Rama Shankar Yadav (supra)*, it appears that, it was a case of termination of a junior clerk who was appointed on ad hoc basis by an order dated 10.5.1991 issued by the Director, Ayurvedic and Unani Services, U.P., Lucknow. It further appears that His Lordship found that after terminating the petitioner Ram Shankar Yadav, some other persons were appointed in his place and that was a reason on the basis whereof the order of termination was sought to be challenged on the ground of arbitrariness. It appears that His Lordship further found that the appointment was made by the Director, who had authority to appoint Junior Clerk and as such there was no illegality or irregularity in his appointment. Hence, His Lordship found that termination was not valid and the same was quashed. The above facts have no application to the facts of the present case.

16. Proceeding to consider the validity of appointment of the petitioners, I find that it is not the case of the petitioners that any specific rule has been framed for appointment of class IV employees in the office of the respondents No. 2 and 3 separately. In absence thereof the general rules framed in exercise of powers under proviso to Article 309 of the Constitution of India governing recruitment and conditions of service of class IV employees would hold the field. Such rules were available as long back in 1975, i.e., U.P. Class IV Employees Service Rules, 1975, hereinafter referred to "Service Rules, 1975" were enacted which were applicable to all the subordinate offices as defined in Clause 4 (h) of Service Rules, 1975, which is reproduced as under:

"Subordinate Offices" shall refer to all the offices under the control of the Government excluding the Secretariat, offices of State Legislature, Lok Ayukt, Public Service Commission, High Court, Subordinate Courts under the Control and Superintendence of the High Court, Advocate General and the establishments under the control of the Advocate General.

17. The application of Service Rules, 1975 and overriding effect given to the said rules was provided in Rules 2 and 3, which read as under:

2. Application of these rules.--These rules shall apply to all class IV (now Group D) posts, referred to in Rule 6 in all the subordinate offices as defined in Clause (h) of Rule 4.

3. Overriding effect of these rules.--In the event of any inconsistency between these rules and specific rule or rules pertaining to any of the aforesaid posts in any department:

(i) the provisions, contained in these rules shall prevail to the extent of the inconsistency in case the specific rules were made prior to the commencement of these rules ; and

(ii) the provisions contained in the specific rules shall prevail in case they are made after the commencement of these rules.

18. It may be stated that these rules were notified in the Gazette of July, 1975 and since then were in force till 1985. The sources of recruitment to the various categories of class IV post was provided in Rule 6 which reads as under:

6. Source of recruitment--The sources of recruitment to the various categories of class IV posts shall be as follows:

(a) Peon, Messenger, chaukldar, By direct recruitment. mall, farrash, Sweeper, Waterman/Bhisti, Tindal, Thela-man, Fireguard, Record- Lifter and every other non- technical post (scale at the commencement of the rules is Rs. 165-215);

(b) Peon-Jamadar (Scale at the By promotion from amongst commencement of these rules permanent peons. is Rs. 170-225);

(c) Daftri/Book Binder/ By promotion from amongst qualified Cyclostyle

Operator (scale at peons, Messengers and farrashes. the commencement of these rules is Rs. 170-225);

(d) Farrash jamadar (scale at the By promotion from amongst commencement of these rules permanent farrashes. is Rs. 170-225);

(e) Sweeper jamadar (scale at the By promotion from amongst commencement of these rules permanent sweepers. is Rs. 170-225);

(f) Head malt (scale at the By promotion from amongst commencement of these rules permanent malis. is Rs. 170-225) ;

Provided that where no eligible candidate/suitable candidate is available for promotion to a particular post which is required to be filled by promotion, the post may be filled by direct recruitment.

19. This Court find it unnecessary to deal with the said rules in further details, inasmuch as, another set of rules dealing with Group D employees of various departments of the Government of U.P. came to be framed in 1985 titled as "The Group "D" Employees Service, (U.P.), Rules 1985," hereinafter referred to as "1985 Rules". These rules were framed in supersession of. all existing rules on the subject, as is evident from its preamble which reproduce as under:

In exercise of the powers conferred by the proviso to Article 309 of the Constitution of India and in supersession of all existing rules and orders on the subject the Governor is pleased to make the following rules regulating the recruitment to certain categories of Group-D posts and the conditions of service of the persons appointed to such posts, in the various departments of the Government of Uttar Pradesh.

20. 1985 Rules are applicable to all Group "D" posts referred to in Rule 6 of 1985 Rules in respect of appointments made in all the subordinate offices as defined in Clause (h) of Rule 4 and have overriding effect over any other rule inconsistent thereto, as provided under Rules 2 and 3, which are reproduced as under:

2. Application of these rules.--(1) These rules shall apply to all Group "D" posts referred to in Rule 6 in all the subordinate offices as defined in Clause (h) of Rule 4.

(2) Whether a particular post is or not a non-technical post shall be referred to the Government in the Personnel Department and its decision shall be final.

3. Overriding effect of these rules.--In the event of any inconsistency between these rules and a specific rule or rules pertaining to any of the aforesaid posts in any department:

(i) the provisions, contained in these rules shall prevail to the extent of the inconsistency in case the specific rules were made prior to the commencement of these rules ; and

(ii) the provisions contained in the specific rules shall prevail in case they are

made after the commencement of these rules.

21. It is this set of the 1985 Rules which were holding the field in 1991 when the petitioners claimed to have been appointed in the office of the respondent No. 3 by various letters of appointment issued by the respondent No. 3. Rule 4 (h) of 1985 Rules, which defines the subordinate offices and the sources of recruitment to Group "D" posts as defined in Rule 6 read as under:

4 (h) "Subordinate Offices" shall refer to all the offices under the control of the Government, excluding the Secretariat, Offices of State Legislature, Lok Ayukt, Public Service Commission, High Court, Subordinate Courts under the control and the superintendence of the High Court, Advocate General and the establishment under the control of the Advocate General.

6. Source of recruitment--The sources of recruitment to the various categories of Group "D" posts shall be as follows:

(a) Peon, Messenger, chaukidar, By direct recruitment. mali, farrash, Sweeper, Waterman/Bhisti, Tindal, Thelaman, Record-lifter and every other non-technical post;

(b) Peon-Jamadar; By promotion from amongst permanent peons.

(c) Daftri/Book Binder/Cyclostyle By promotion from amongst Operator; qualified peons, Messenger and farrashs.

(d) Farrash jamadar; By promotion from amongst permanent farrashs.

(e) Sweeper jamadar; By promotion from amongst permanent sweepers.

(f) Head mali; By promotion from amongst permanent malis.

Provided that where no eligible/suitable candidate is available for promotion to a particular post which is required to be filled by promotion, the post may be filled by direct recruitment.

22. The procedure for recruitment is provided in Part V consisting of Rules 16 to 21 whereof Rules 16 and 19 of 1985 Rules being relevant, are quoted below:

16. Constitution of Selection Committee.--For the purpose of recruitment to any post, there shall be constituted a Selection Committee as follows:

1. Appointing Authority ;

2. An officer belonging to Scheduled Castes/Scheduled Tribes, nominated by the District Magistrate if the appointing authority does not belong to Scheduled Castes/Scheduled Tribes. If the appointing authority belongs to Scheduled Castes/Scheduled Tribes, an officer other than belonging to Scheduled Castes/Scheduled Tribes, Minority Community and Backward Class to be nominated by the District Magistrate ;

3. Two officers nominated by the appointing authority, one of whom shall be an

officer belonging to Minority Community and the other to Backward Class. If such suitable officers are not available in his department or organisation, such officers shall on the request of the appointing authority, be nominated by the District Magistrate and on his failure to do so, by reason of nonavailability of suitable officer, such officers shall be nominated by the Divisional Commissioner.

19. Procedure for Selection.--

(1) The appointing authority shall determine the number of vacancies to be filled during the course of the year as also the number of the vacancies to be reserved for the candidates belonging to the Scheduled Castes, Scheduled Tribes and other categories. The vacancies shall be notified to the Employment Exchange. The appointing authority may also invite application directly from the persons who have their names registered in the Employment Exchange. For this purpose, the appointing authority shall issue an advertisement in a local daily newspaper besides pasting the notice for the same on the notice board. All such applications shall be placed before the Selection Committee.

(2) When the names of the General candidates and Reserve Candidates (for whom vacancies are required to be reserved under the orders of the Government) have been received by the Selection Committee it shall interview and select the candidate for the various posts.

(3) In making selection the Selection Committee shall give weightage to the retrenched employees awarding marks in the following manner:

(i) For the first complete year : 5 marks

(ii) For the next and every completed year of service : 5 marks:

Provided that the maximum marks awarded to a retrenched employee under this sub-rule shall not exceed.

(4) The number of the candidates to be selected will be larger (but not larger by more than 25 per cent) than the number of vacancies for which the selection has been made. The names in the select list shall be arranged according to the marks awarded at the interview.

23. It is no doubt true that though vaguely but the petitioners in paras 8 and 9 have said that the respondent No. 3, who is the appointing authority of the petitioners, appointed them after following the procedure of selection prescribed but no details thereof have been given in the writ petition. From the letters of the appointment also it does not appear that the same were issued after holding any selection in accordance with the rules. On the contrary, some of the letters of appointment suggest that the appointment was made by the appointing authority not on his own but under the directions of the respondent No. 2, as is evident from Annexure-6 to the writ petition, which is the appointment letter of the petitioner No. 13 and clearly states that pursuant to the Director Ayurvedic and Unani Service, U.P., Lucknow's letter dated 4.12.1991, the petitioner No. 13

namely Sri Kali Charan was appointed in the pay scale of 750-940 on temporary basis for a period of one year or till regular selected candidate is available. This letter is also evident to show that the appointments were not made after following the procedure prescribed for selection under 1985 Rules. Besides, the respondents in the counter-affidavit have categorically stated in para 4 that the procedure prescribed in the rules was not followed before making appointment of the petitioners. Para 4 of the counter-affidavit says as under:

That all the petitioner in the above noted writ petition were appointed on various dates since 1.10.1991 and onwards on temporary basis for one year. In their appointments no rules and regulations providing procedure for selection were followed. The vacancies, on which the petitioners alleged to have been appointed were never advertised in any newspapers having circulation in the area. Neither vacancies were notified to the employment exchange, nor vacancies were displayed on the notice board of the office. Further, no selection committee as per rules were ever constituted for their selection. No test or interview was held for selection of these employees. Thus, the entire temporary appointment made under the direction and order of Director of Ayurvedic and Unani, U.P., Lucknow (Annexure-6 of the writ petition) in gross violation of rules. Whereas the Director is not appointing authority of the class IV employee in the department. Though, the some appointments were made by the Regional, Ayurvedic and Unani Officer, Rampur, but the same was also made in pursuance of direction of the Director.

24. It will also be interesting to reproduce para 4 of the rejoinder-affidavit whereby the petitioner says that no doubt the appointments of the petitioners were made by the respondents on regular vacancies on ad hoc basis on various dates since 1.10.1991 but to the best of the knowledge of the petitioners, all procedural formalities were undertaken. Para 4 of the rejoinder-affidavit reads as under:

That the contents of para 4 of the counter-affidavit are not admitted in the manner stated and are denied. In reply it is submitted that no doubt the appointments of the petitioners were made by the respondents on regular vacancies on ad hoc basis on various dates since 1.10.1991 but to the best of the knowledge of the petitioners all procedural formalities were undertaken in the selection and appointment of the petitioners. Further, it is not open to the respondents to plead in the counter-affidavit (filed after more than 15 years of the filing of the above noted writ petition) that the appointments of the petitioners were made in irregular manner. The Hon"ble Court may take note of the fact that the petitioners have continued in service ever since their respective dates of appointments and there has not been any break in the service of the petitioner till date.

25. If the vacancies were advertised in newspaper or requisitioned to the employment exchange and the petitioners applied pursuant to either mode after getting knowledge of the above vacancies, they could have straight away said that the vacancies were advertised pursuant whereof they applied and that they

were interviewed by a selection committee and thereafter the appointments were made. But no such averments has been given, instead the reply of the petitioners is vague and evasive. Besides as this Court has already noticed, Annexure-6 to the writ petition, which is also an appointment letter of the petitioner No. 13, clearly shows that no regular selection in accordance with rules was made. Apparently, the appointments of the petitioners were not made in accordance with the procedure prescribed in the statutory rules which was mandatory and appointment made in violation thereof cannot be said to be valid. In such a case even the principles of natural justice have no application. In *Amin Ullah and Ejaj Ahmad Vs. Director, Ayurvedic and Unani Services, Regional Ayurvedic Evam Unani Officer, Medical Officer, Government Ayurvedic Hospital and Medical Officer, Government Ayurvedic Hospital*, this Court observed that the appointment made without following the procedure prescribed in law is vitiated and in such a case, the affected person is not entitled for any notice or opportunity. The relevant extract of the judgment is reproduced as under:

It is well-settled that if proper procedure as provided under the law or rules has been followed, then total selection is vitiated. In such a case, the affected person is not entitled for any notice or opportunity as held by this Court that if such types of appointments have been made that will be treated to be void ab initio.

26. At this stage one more aspect may be important. Though power of making appointment in officiating and temporary vacancies was conferred upon the appointing authority under Rule 3(22) of 1985 Rules but such appointments could have been made only from the select list prepared under such rules and not otherwise. However, on 8.11.1991 another set of rules namely U.P. Public Services (Rescission of Provisions Regarding Temporary and Officiating Appointments) Rules, 1991, hereinafter referred to "1991 Rules" were enacted which was given overriding effect vide Rule 2 and it rescinded all provisions in the Rules relating to public services with respect to appointments in temporary and officiating capacity. Rules 2 and 4 of 1991 Rules are reproduced as under:

2. Overriding effect.--These rules shall have effect notwithstanding anything to the contrary contained in any other rules made by the Governor under the proviso to Article 309 of the Constitution or executive orders issued in this behalf.

4. Rescission.--The provisions regarding appointments in temporary and officiating capacity, if any, contained in rules relating to public services made by the Governor in exercise of the powers under the proviso to Article 309 of the Constitution prior to commencement of these rules are hereby rescinded.

27. Therefore, on and after 8.11.1991 the power of temporary or officiating appointments also ceased by virtue of 1991 Rules and could not have been exercised by the respondents and in particular respondent No. 2, even otherwise.

28. Now coming to the last aspect of the matter that the termination being simplicitor, without giving one month's pay or one month's notice is violative of Rule 3 of the U.P. Temporary Government Servants (Termination of Service)

Rules, 1975, I find that this is also untenable in law and has to be rejected. It would be appropriate to reproduce Rule 3, which is as under:

3. Termination of service.---(1) Notwithstanding anything to the contrary in any existing rules or orders on the subject, the services of a Government servant in temporary service shall be liable to be terminated at any time by notice in writing given either by the Government servant to the appointing authority or by the appointing authority to the Government servant.

(2) The period of notice shall be one month:

Provided that the service of any such Government servant may be terminated forthwith, and on such termination the Government servant shall be entitled to claim a sum equivalent to the amount of his pay plus allowances, if any, for the period of the notice or as the case may be, period for which such notice falls short of one month at the same rates at which he was drawing them immediately before the termination of his services:

Provided further that it shall be open to the appointing authority to relieve a Government servant without any notice or accept notice for a shorter period, without requiring the Government servant to pay any penalty in lieu of notice:

Provided also that such notice given by the Government servant against whom a disciplinary proceeding is pending or contemplated shall be effective only if it is accepted by the appointing authority, provided in the case of a contemplated disciplinary proceeding, the Government servant is informed of the non-acceptance of his notice before the expiry of that notice.

29. A perusal of Rule 3 shows that the services of temporary Government servant are liable to be terminated at any time by notice in writing given by the appointing authority and the period of such notice shall be one month. However, first proviso of Rule 3 provides where services of Government servant is terminated forthwith, on such termination he shall be entitled to claim a sum equivalent to the amount of his pay plus allowances, if any, for the period of the notice or as the case may be, period for which such notice falls short of one month at the same rates at which he was drawing immediately before the termination of service.

30. It is the last proviso that makes it further clear that where the services are terminated without giving any notice of one month but with immediate effect, absence of notice would not make the termination invalid or irregular but the Government servant, who was terminated, will be entitled to claim a month's salary, i.e., the period for which the notice falls short. Therefore, lack of notice of one month to the petitioner does not make the impugned order of termination illegal or in violation of Rule 3 of U.P. Temporary Government Servants (Termination of Service) Rules, 1975.

31. However, I find that Rule 3 is not even otherwise applicable in the case of the petitioners with respect to notice or pay in lieu thereof, inasmuch as, Rule 4

makes the requirement of notice inapplicable to the cases where a Government servant of certain categories specified therein are terminated in accordance with the terms of their engagement of employment and the case of the petitioners is governed by Rule 4(g) which may be reproduced as under:

4. Savings.--Notwithstanding anything in these rules, the tenure or continuance of engagement or employment of the following categories of persons shall be governed by the terms of their engagement of employment, and nothing in these rules shall be construed to require the giving to them, or by them or one month's notice or pay or penalty in lieu thereof before the termination of their engagement of employment:

(g) persons employed for a specified period on condition that the period may be curtailed at any time.

32. I am, therefore, clearly of the view that the impugned orders of termination cannot be said to be in violation of any provision of U.P. Temporary Government Servants (Termination of Service) Rules, 1975.

33. So far as the Apex Court's decision in Arun Kumar's case (*supra*) is concerned, I find that there the Apex Court itself has said that the directions issued thereunder are confined to the special facts of that case and shall not be treated as precedent. Besides, recently the Constitution Bench of the Apex Court in *Secretary, State of Karnataka and Others Vs. Umadevi and Others*, has said that mere long service rendered by certain persons, who are not appointed validly or in accordance with law would not entitle them either to hold the post or continue in service. In absence of any statutory right to hold the post, and moreso the recruitment and appointment of the petitioners to the post being illegal and in violation of Article 16 of the Constitution of India read with the recruitment rules, I find no reason to grant any indulgence in this matter so as to confer any benefit upon a person who himself is a beneficiary of illegal act.

34. Lastly, it has been contended that the petitioners have continued under the interim order passed by this Court and, therefore, it would be extremely harsh to throw them as unemployed by dismissing the writ petition and in such case it would be appropriate that in equitable jurisdiction under Article 226 of the Constitution of India, this Court consider the length of continuous service of the petitioners though under the interim order of this Court and thus they should be allowed to continue. The submission is thoroughly misconceived. The continuance in service on the basis of interim order of this Court cannot be a ground to retain such benefit as that would amount to permitting the petitioners to take advantage of the Court's order and cause a perennial loss to the other side despite of the fact that the order impugned in the writ petition did not suffer from any legal error. This is against the well known principle that "act of Court shall prejudice none (*ductus curiae neminem gravabit*)" [See *South Eastern Coalfields Ltd. Vs. State of M.P. and Others*, and this Court under Article 226 of the Constitution would not pass an order, which would amount to permitting the

authorities to act in the breach of rule of law. This aspect has been considered in detail by a Division Bench of this Court (in which I was also a Member) in Smt. Vijay Rant v. Regional Inspectress of Girls Schools and Ors. 2007 (2) ESC 987 and referring to various authorities of the Apex Court, it has been held as under:

If a person has enjoyed certain benefits under the interim order, he/she would not be allowed to claim any further benefit due to change in law pursuant to enjoyment of certain benefit under an interim order of the Court. A benefit under the interim order is tentative and subject to final decision in the matter and cannot go beyond the final decision.

35. In view of the above discussions, I find no merit in the writ petition. Dismissed. The interim orders shall stand vacated. No costs.