

(2012) 12 AHC CK 0251

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 16406 of 2011

Prashant Kumar Katiyar

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 19-12-2012

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 30

Citation : (2013) 1 ADJ 523 : (2013) 3 ALJ 658 : (2013) LabIC 2196

Hon'ble Judges : Sunil Hali, J;R.K. Agrawal, J;Amreshwar Pratap Sahi, J

Bench : Full Bench

Judgement

1. This reference has arisen out of a conflict having been noticed by a learned Single Judge between the division bench judgment in the case of Ved Prakash Vs. Hari Krishna Singh and others Special Appeal No. 30 of 2011 decided on 19th January, 2011 at Lucknow that has partly disapproved the ratio of the decision of a learned Single Judge in the case of Raja Ram Vs. State of U.P. and others decided on 30.11.2009 reported in 2009 (10) ADJ Pg. 585, and the decision delivered by another division bench at Allahabad in the case of U.P. Secondary Education Services Selection Board Allahabad Vs. State of U.P. & others Special Appeal No. 146 of 2010 decided on 21st January, 2011 that arose out of the Single Judge judgment in the case of U.P. Secondary Education Service Selection Board Vs. State of UP and Others, . The judgment in the case of Ved Prakash (supra) was rendered at Lucknow two days earlier to the judgment in the case of U.P. Secondary Education Services Selection Board Allahabad (supra) which was delivered on 21.1.2011 without noticing the judgment in the case of Ved Prakash (supra). These two simultaneous pronouncements within a short span in the peculiar circumstances noted above has given rise to this reference. The learned Single Judge after having noticed the abovementioned facts came to the conclusion that this conflict deserves to be resolved and accordingly framed three questions for being referred to a larger bench for an authoritative pronouncement under Chapter V Rule 6 of the Allahabad High Court Rules, 1952. Hon"ble the then Chief Justice was pleased to constitute the present Full Bench

for resolving the said conflict on only two of the three questions framed by the learned Single Judge vide order dated 15th July, 2011.

2. The matter was heard on 12th September, 2011 by this Full Bench and one of the questions raised was reframed by the following order:-

We have heard Sri L.K. Trigunait in Writ Petition No. 16406 of 2011 for the petitioner, Sri Ashok Khare learned Senior Counsel for the petitioner in Writ Petition No. 27992 of 2011 and Sri P.S. Baghel learned Senior Counsel for the other side. Sri Zafar Naiyar learned Additional Advocate General has appeared for the State.

The reference made by the learned Single Judge vide order dated 7th April, 2011 is to the following effect:-

(a) Whether a dependent can claim appointment against a post of teacher even after the post has been requisitioned to the selection Board in view of the Regulations 101 to 106 of Chapter III of the Regulations framed under the Intermediate Education Act merely because he has qualifications for the same, specifically when on the date of requisition, no such application for compassionate appointment was pending.

(b) Whether Article 16 of the Constitution of India will be applicable to the teachers working in recognized Intermediate Colleges which are under the private management even if aided by the State Government.

(c) Whether the judgment of the Division Bench of this Court in the case of Ved Prakash (Supra) lays down the correct law.

While placing the matter before the Full Bench, Hon"ble the Chief Justice on 15th July, 2011 passed the following order:-

Matter be referred to the Full Bench presided over by a D.B. presided over by R.K. Agrawal, J. and A.P. Sahi, J. on questions (a) & (c) only.

Sd/ Chief Justice 15/7/11

Advancing his submissions, Sri Ashok Khare learned Senior Counsel pointed out that Question No. (c) refers to the correctness of the Division Bench decision in the case of Ved Prakash Vs. Hari Krishna Singh, Special Appeal No. (30) of 2011, decided on 19th January, 2011. The said decision in turn refers to the decision of a learned Single Judge in the case of Raja Ram Vs. State of U.P. & others reported in 2009 (10) ADJ 585, decided on 30th November, 2009.

The judgment in the case of Ved Prakash (supra) by the Division Bench which is in conflict with the decision in the case of U.P. Secondary Education Service Selection Board Vs. State of UP and Others, , was decided on 21st January, 2011 upholding the decision of the learned Single Judge in the case of Raja Ram (supra). It is evident that this judgment came two days after the judgment in the case of Ved Prakash. These two judgements therefore have not noticed each

other as the judgment in the case of Ved Prakash (supra) was delivered at Lucknow whereas the judgment in the case of U.P. Secondary Education (supra) came to be delivered at Allahabad within a short interval of a couple of days.

The subsequent judgment in the case of U.P. Secondary Education (supra) upholds the very same judgment of the learned Single Judge in Raja Ram's case (supra) which had been partly disapproved by the Division Bench in the case of Ved Prakash delivered a couple of days earlier.

Sri Khare therefore submits that the aforesaid conflict having arisen, Question No. (c) referred to before the Full bench deserves to be reframed so as to resolve the issues raised on a wider canvas involving the interpretation of the relevant provisions of the Uttar Pradesh Secondary Education Services Selection Board Act, 1982 and the U.P. Secondary Education Services Selection Board Rules, 1998, Rule 11 and Rule 13(5) thereof in particular, which have arisen on account of the aforesaid conflicting views expressed by the two Division Benches. He submits that this would fall within the scope of reference already made by the learned Single Judge and Hon'ble the Chief Justice, and accordingly the questions be reframed to the aforesaid extent.

Chapter V Rule 6 of the Allahabad High Court Rules, 1952 empowers Hon'ble the Chief Justice to constitute a Larger Bench to decide a case or a question formulated by a bench hearing a case. The provision allows a larger bench to hear the matter to the extent of the reference formulated by the bench hearing the case, and as such the scope of the reference cannot be expanded while hearing the reference. However, the question can be reframed if it falls within the scope of the reference.

Having noticed what has been stated above we are of the opinion that the submission raised by Sri Khare deserves to be accepted to which Sri Zafar Naiyar learned Additional Advocate General on behalf of the State has no objection. This bench while proceeding to answer the reference has to deal with all provisions touching the reference, including the judgments on the point that have been pronounced upto now either way. The question referred, therefore deserves a reframing as suggested and agreed to by the learned counsel for the parties. Accordingly, with the consent of the learned counsel for the parties, we reframe Question No. (c) as follows:-

(c) Whether the judgment of the Division Bench of this Court in the case of Ved Prakash (supra) is in direct conflict with the Division Bench judgment in the case of U.P. Secondary Education (supra), and which of the two decisions lay down the law correctly.

The question having been reframed, learned counsels request that the matter be adjourned for today to enable them to assist the Court accordingly.

List on 19th September, 2011 at 10 a.m.

3. The arguments proceeded, and the other writ petition no. 27992 of 2011 that

has been filed by the candidates seeking placement after being selected by the Selection Board, has also been heard as it was connected vide order dated 18.5.2011 with the leading writ petition keeping in view the nature of the relief claimed therein.

4. Sri L.K. Trigunait has advanced his submissions on behalf of the petitioners in the leading writ petition, Sri Ashok Khare, learned Senior Counsel has advanced his submissions in the connected writ petition, Sri Zafar Naiyar, the then Additional Advocate General advanced his submissions on behalf of the State and Sri P.S. Baghel Sr. Advocate (now elevated to the bench) alongwith Sri A.K. Yadav advanced his submissions on behalf of the U.P. Secondary Education Services Selection Board (hereinafter referred to as the Board). Written submissions have been filed by Sri Trigunait, Sri Ravi Shanker Prasad, Additional Chief Standing Counsel assisting Sri Zafar Naiyar for the State and also by Sri A.K. Yadav, learned counsel for the Board assisting Sri Baghel. Judgements have been cited at the bar that have been taken notice of while answering the questions raised.

5. The leading writ petition has been filed by a dependant of a teacher, namely late Radhey Shyam Katiyar, who was working as a Lecturer in Hindi and lost his life in a road accident. The petitioner Prashant Kumar Katiyar being his dependant came to be appointed under the Dying-in-Harness Regulations contained in Regulations 103 to 107 of Chapter III of the U.P. Intermediate Education Act, 1921. His appointment has been cancelled on the directions of the U.P. Secondary Education Services Selection Board dated 4.3.2011 by the District Inspector of Schools on 7.3.2011 on the ground that the post of Assistant Teacher in L.T. Grade, against which the said petitioner was appointed to teach the Subject of Social Science in Gram Vikas Inter College Ramabai Nagar, had already been requisitioned and notified to the Board to be filled up by direct recruitment, and therefore the candidate selected against the said post, namely Sri Dayaram, should be appointed thereon. A development had taken in between namely that the appointment of the petitioner was made in the year 2004 and he having completed more than five years of substantive service, was also recommended for being promoted under the relevant regulations on the post of a Lecturer that was approved by the District Inspector of Schools on 1st of February, 2011. It is after his promotion that the impugned orders came to be passed cancelling his basic appointment as an Assistant Teacher. The petitioner therefore assails the orders contending that his appointment having been made under the 3rd proviso to Section 16(1) of the U.P. Secondary Education Services Selection Board Act, 1982 cannot be disturbed, which appointment is under a statutory right conferred on a dependant of an employee dying-in-harness, under the regulations of the 1921 Act referred to hereinabove.

6. The connected writ petition has been filed by those candidates who have been selected by the Board, but have not been appointed on account of vacancies having been filled up by the other modes of direct appointment as contained in

the three provisos to Section 16(1) of the 1982 Act. The petitioners in this second writ petition have referred to the impediments that have arisen on account of the conflict of the two division bench judgements referred to hereinabove and the referring order of the learned Single Judge. They were all finally selected and empanelled by the Board on the post of Lecturers and Assistant Teachers respectively, against advertisement No. 1 of 2009, but have not been offered appointment by the Management or the authorities. They have detailed the nature of the legal impediments that are to be resolved in Para 29 of their writ petition and have prayed for their appointment and in the alternative for their adjustment under Rule 13(5) of the 1998 Rules. The conflict and the reference was noticed by the learned Judge before whom this petition was presented who passed the following order on 18.5.2011:-

Hon"ble Krishna Murari, J.

Issue involved in the petition with respect to interpretation of Rule 13 (5) of U.P. Secondary Education Services Selection Board Rules, 1998 has been referred to a larger bench vide judgment and order dated 07.04.2011 in Writ Petition No. 16406 of 2011 on account of conflicting decisions of two Division Benches in the case of U.P. Secondary Education Service Selection Board Vs. State of UP and Others, and Special Appeal (Defective) No. 30 of 2011, Ved Prakash Vs. Hari Krishna Singh & Ors. decided on 19.01.2011.

Accordingly, this writ petition may also be tagged along with the reference made in Writ Petition No. 16406 of 2011 and be placed before the larger Bench.

7. The issue of adjustment under Rule 13(5) of the 1998 Rules therefore was also canvassed by the learned counsel as the judgment under reference, namely that of U.P. Secondary Education Service Selection Board Vs. State of UP and Others, refers to its impact and manner of enforcement. The implementation of the said rule being intertwined with the scope of interpretation of the judgments under reference has also been addressed. It is in the aforesaid background that we found it necessary to reframe the question no. (c) as noted hereinabove.

8. Sri Trigunait, learned counsel for the compassionate appointee contends that the mode of compassionate appointment is one of the exceptions to Section 16(1) of the 1982 Act and is a statutory right which takes within its fold the claim of such dependants and the same does not amount to any infringement on the rights of selected candidates. To the contrary he contends that in view of the nature of the exigency that arises on account of the sudden death of an employee, the regulations protect the interest of such a dependant by offering appointment against the post of an Assistant Teacher under the regulations referred to hereinabove and this right cannot be impeded merely because the post has been requisitioned for being filled up by direct recruitment through selection by the Board, and has been advertised. He submits that selection does not give any right of appointment and even otherwise so long as the vacancy is not actually filled up it continues to exist and has to be offered to a dependant of

an employee dying in harness, which contingency is exceptional that in no way infringes either Article 14 or Article 16 of the Constitution of India.

9. Sri Trigunait submits that this is a specific mode of appointment under the proviso that governs the main section and as a matter of fact curtails the right of the Board from proceeding to make any selection or propose any appointment against a post that is available for a compassionate appointee before having actually been filled up by a formal appointment.

10. He further submits that regulations 103 to 107 of Chapter III under the 1921 Act are enabling provisions and they do not in any way bring about any inconsistency in the manner of appointment as per the procedure provided under the 1982 Act and the U.P. Secondary Education Service Selection Board Rules, 1998. He contends that the category of appointment under the compassionate appointment rules was introduced long back under the regulations framed under the 1921 Act, and has been incorporated as a proviso to Section 16 of the 1982 Act, in order to avoid any inconsistency in the modes of appointment. He further submits that no complications would be created in case of vacancies already notified and advertised are offered to such a candidate before its actually being filled up by any candidate selected by the Board. He further contends that while proceeding to send a requisition under the 1998 Rules, and intimation for the vacancies for advertisement, there cannot be a possibility of apprehending the death of a teacher in future, and therefore no such information can be given to the Board. He submits that this contingency is therefore exceptional as its occurrence is absolutely uncertain and it is for this reason that the 1998 rules do not prohibit the offering of any appointment to a claimant under the Dying-in-Harness Regulations.

11. He has invited the attention of the Court to Rule 11 and its sub rules to indicate that the statement of vacancies that have to be forwarded to the Board for being advertised include vacancies that are likely to arise due to retirement of any employee upto the last day of the year of recruitment. Sub-rule (3) of Rule 11 takes care of such situations where a vacancy arises midway after the vacancies have been notified under sub-rule (1) as indicated above. He therefore contends that vacancies arising due to the death of a teacher can be notified if the management sends this information within 15 days of its occurrence and the Inspector shall then send it within 10 days to the Board. It is pointed out that while doing so the District Inspector of Schools has to coordinate the sending of this information by synchronizing the process of the claim of a compassionate appointee that may have arisen due to such death by invoking the provisions of Regulations 102 to 107. He therefore submits that at every stage these enquiries have to be made by the District Inspector of Schools and he cannot notify a vacancy that has to be offered to a dependant whose claim has arisen during the year of recruitment. Even thereafter upon notification and advertisement, so long as the vacancy has not been filled up, any claim of compassionate appointment will have to be given precedence if the post is actually vacant.

12. He has further urged that a compassionate appointment is given in order to relieve the distress of a disabled family on account of the loss of its breadwinner, and there the judgment in the case of Raja Ram (supra) as affirmed by the Division Bench in U.P. Secondary Education Services Selection Board Allahabad (supra) does not lay down the law correctly. He contends that the ratio in the case of earlier division bench of Ved Prakash (supra) deserves to be affirmed as it takes notice of all the relevant provisions and the contingencies relating to appointment under the compassionate appointment regulations.

13. Sri Trigunait has asserted the rights of a compassionate appointee to be on a higher pedestal deserving placement in a separate class on account of the pressing need of such a claimant, as against a selectee of the Board, who is yet to be appointed, and no right to whom accrues so long as appointment is not offered to him upon selection. He therefore urges that the law laid down by the division bench in the case of Ved Prakash (supra) should be affirmed as it is in tune with the right of a compassionate appointee as recognized under the statutory provisions aforesaid that are supported by the decisions of the apex court as referred to in the judgment of Ved Prakash (supra).

14. Sri Ashok Khare, learned Senior Counsel on the other hand contends that the 1998 Rules clearly provide for a procedure for the intimation of a vacancy upon determination by the management through the District Inspector of Schools under Rule 11 thereof. He contends that once this process is undertaken and the information is finally tendered to the Selection Board, then the reversal of this process or its impediment by any other mode of appointment is prohibited. He contends that the management having determined the vacancy to be filled up by direct recruitment, forwards the same, which is in compliance of the aforesaid rules framed under the 1982 Act. He submits that if the procedure is provided, then the management has to proceed in that manner alone, and it cannot take recourse to any of the provisos of Section 16(1) later on after the vacancies have been requisitioned, notified and advertised for being filled up through selection. Sri Khare therefore submits that all the selected candidates deserve to be appointed and they can also be accommodated against these advertised vacancies in terms of Rule 13(5) of the 1998 Rules.

15. He alternatively contends that so far as the requisition is concerned it can be withdrawn or cancelled after the advertisement of the vacancies if there are valid reasons for the same and for this he relies on three decisions namely AIR 1982 SC Pg. I.J. Divakar and Others Vs. Government of Andhra Pradesh and Another, ; 1994 SCC (L&S) 1317 State of M.P. & others Vs. Raghuveer Singh Yadav; and the decision in the case of Rajasthan Public Service Commission Vs. Chanan Ram and Another, . He has also pointed out to the decisions that hold that a selected candidate has no indefeasible right for appointment and it can only be defeated on valid grounds as held by the apex court in the case of Shankarsan Dash Vs. Union of India, and in the case of State of Uttaranchal and Others Vs. Sidharth Srivastava and Others, . For the same proposition he relies on a third judgment

that of State of U.P. and Others Vs. Rajkumar Sharma and Others, .

16. He has further pointed out three other decisions in support of the arguments namely Dr. Ramesh Chandra Pandey Vs. State of U.P. and others reported in 2007 (7) ADJ 218; Kamlesh Kumar Sharma Vs. Yogesh Kumar Gupta and others, and Director of Education (Secondary) and Another Vs. Pushpendra Kumar and Others, Pg. 192.

17. Apart from these submissions, Sri Khare has submitted that so far as writ petition no. 27992 of 2011 is concerned, the petitioners in that writ petition are also aggrieved by the placement of the respondents therein who are lower in merit, whereas the petitioners who have been recommended deserved appointment, and in the alternative they are entitled to be adjusted under Rule 13(5) against other substantively vacant posts notified in other institutions. In effect Sri Khare also prays for reversal of the decision in the case of Raja Ram as upheld by the division bench in the case of U.P. Secondary Education Services Selection Board (supra) to the extent it disallows adjustment of selected candidates against unadvertised vacancies. He submits that if the vacancies are available upon notification, and even if they have not been advertised, Rule 13(5) can be taken recourse to for adjusting the petitioners who have been validly selected. Sri Khare therefore in effect seeks reversal of the division bench judgment in the case of Satish Kumar Vs. State of U.P. and Others, that holds that adjustment cannot be made against unadvertised vacancies.

18. Learned counsel for the Selection Board has urged that according to sub-section (2) of Section 16 of the 1982 Act no appointment can be made except under the said provisions and the 1998 rules framed thereunder, and any appointment made in contravention thereof will be void. He therefore submits that the selection by the Board is only for the purpose of appointment which cannot be processed except as provided under Sections 10, 11 and 16 of the 1982 Act read with the 1998 Rules. He contends that the managements are not authorized to take any step for appointment under any of the provisos, once the requisition has been dispatched and the vacancies have been determined to be forwarded by the District Inspector of Schools for being advertised. He contends that once this process has been completed and the information has reached the Board, neither the management nor the District Inspector of Schools can withdraw the said requisition or act in contravention thereto, inasmuch as, against such a vacancy which has been notified, it is only the Board alone which can make selections by direct recruitment. It is therefore urged that the provisions have to be harmonised without impinging upon the process of selection initiated by the Selection Board after notification of the vacancy. The contention therefore is that once the vacancy has been formally intimated to the Board in writing through the District Inspector of Schools then no alteration can be made as that would violate the provisions of Rule 11 of the 1998 Rules. It is contended that once the selection process has started the Management or the District Inspector of Schools cannot take resort to any other mode of

appointment as that would amount to encroaching upon the powers of the Selection Board under the 1982 Act read with rules framed thereunder. The power to make adjustments under Rule 13(5) of the 1998 Rules has been defended.

19. The judgements that have been submitted on behalf of the State through Sri Ravi Shanker Prasad Additional Chief Standing Counsel in addition to the judgements already submitted at the bar are in the case of State of U.P. and Others Vs. Rajkumar Sharma and Others, Pg. 330; Bhawani Prasad Sonkar Vs. Union of India (UOI) and Others, and V. Sivamurthy Vs. State of Andhra Pradesh and Others, Pg. 730. The contention is that the rights of a compassionate appointee cannot be defeated, and that the mode of compassionate appointment is itself an exception to Article 16 of the Constitution of India, and therefore it cannot be struck down by invoking Article 14. The learned Additional Chief Standing Counsel therefore contends that the appointments made on compassionate basis have to be viewed from that angle by harmonising the provisions of the regulations framed for compassionate appointment under the 1921 Act read with the rules of 1998 framed under the 1982 Act. The claims of compassionate appointment have to be saved and Rule 13(5) has to be read accordingly.

20. Having considered the arguments at length, the answer to the questions referred would be dependent upon tracing the powers of the management to determine the vacancy to be filled up by direct recruitment. This necessarily takes us to the issue of the powers of the management to make appointments. The legislative history therefore requires reference in the context of the dispute that has arisen for being resolved by this Full Bench. Without any unnecessary details, suffice it to mention that appointments in relation to privately managed recognised and State aided or unaided Secondary Institutions were being governed by the provisions of the U.P. Intermediate Education Act, 1921 and the regulations framed thereunder. The provisions as then stood and applicable provided for the constitution of selection committees, which were separate in the case of minority institutions with a power to the District Inspector of Schools to approve such appointments. The procedure for appointment in minority institutions is slightly different and we are not concerned with direct recruitment in such institutions as the procedure for them continues to be the same under the 1921 Act, except in the case of appointment through transfer which requires some explanation.

21. In order to streamline the appointments on the post of teachers and in order to get the best standard material amongst teachers the State Legislature came up with the U.P. Secondary Education [Services Selection Boards] Act, 1982 (U.P. Act No. 5 of 1982) that came into force w.e.f. 14th of July, 1981. The Board was established for the purpose of selecting teachers and the procedure for direct recruitment and by promotion were both incorporated u/s 10 and Section 12 of the 1982 Act respectively. Other modes were prescribed as exceptions including

the absorption of retrenched employees, appointment by way of transfer from one institution to another, appointments on compassionate basis and also through regularisation. Another mode introduced in 2005 is by way of promotion to the extent of 25% posts in Assistant Teacher's (L.T.) grade as per Rule 10(c) (ii) of 1998 Rules read with Chapter II Regulation 7 of the 1921 Act. These are exceptions to Section 16 where it is provided that notwithstanding anything to the contrary and the aforesaid exceptions, the appointment of every teacher shall be made only on the recommendation of the Board and sub-section (2) provides that any appointment made in contravention of the provisions of sub-section (1) shall be void. Section 16 is quoted herein under:-

Section 16. Appointment to be made only on the recommendation of the Board. -

(1) Notwithstanding anything to the contrary contained in the Intermediate Education, 1921 or the regulations made thereunder but [subject to the provisions of [Sections 12, 18, 21-B, 21-C, 21-D, [21-E, 21-F], 33, 33-A, 33-B, 33-C, and [33-F], every appointment of a teacher, shall on or after the date of the commencement of the Uttar Pradesh Secondary Education Services Selection Board (Amendment) Act, 2001 be made by the management only on the recommendation of the Board).

Provided that in respect of retrenched employees, the provisions of Section 16-EE of the Intermediate Education Act, 1921, shall mutatis mutandis apply.

Provided further that the appointment of a teacher by transfer from one institution to another, may be made in accordance with the regulations made under Clause (c) of sub-section (2) of Section 16-G of the Intermediate Education Act, 1921.

[Provided also that the dependent, of a teacher or other employees of an Institution dying in harness, who possesses the qualifications prescribed under the Intermediate Education Act, 1921 may be appointed as teacher in Trained Graduate's Grade in accordance with the regulations made under sub-section (4) of Section 9 of the said Act]

(2) Any appointment made in contravention of the provisions of sub-section (1) shall be void.

22. Accordingly, for the purpose of this dispute the procedure for appointment on sanctioned posts by direct recruitment in privately managed, recognised, aided or unaided secondary institutions in the State of U.P., except the minority institutions are now governed by the aforesaid provisions. Since we are not concerned with the procedure of selection by promotion, we shall refer only to the procedure for selection by direct recruitment. Needless to point out that 50% of the posts of Lecturers have to be filled up by way of promotion and the rest by direct recruitment. The posts of Assistant Teachers in L.T. grade have to be filled by direct recruitment except for, as provided, 25% of the posts by promotion under Rule 10 of the 1998 Rules. If candidates are not available for such

promotion, then the vacancy has to be filled by direct recruitment.

23. Accordingly Sections 10 and 11 of the 1982 Act are extracted herein under in relation to the procedure of selection by direct recruitment as follows:-

Section 10. Procedure of selection by direct recruitment. -

(1) For the purpose of making appointment of a teacher, by direct recruitment, the management shall determine the number of vacancies existing or likely to fall vacant during the year of recruitment and in the case of a post other than the post of Head of the Institution, also the number of vacancies to be reserved for the candidates belonging to the Scheduled Castes, the Scheduled Tribes and other Backward Classes of citizens in accordance with the Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994 and notify the vacancies to the Board in such manner and through such officer or authority as may be prescribed.

(2) The procedure of selection of candidates for direct recruitment to the post of teachers shall be such as may be prescribed.

Provided that the Board shall, with a view to inviting talented persons, give wide publicity in the State to the vacancies notified under sub-section (1).

Section. 11. Panel of candidates. -

(1) The Board shall, as soon as may be, after the vacancy is notified under sub-section (1) of Section 10, hold examinations, where necessary, and interviews, of the candidates and prepare a panel of those found suitable for appointment.

(2) The panel referred to in sub-section (1) shall be forwarded by the Board to the officer or authority referred to in sub-section (1) of Section 10 in such manner as may be prescribed.

(3) After the receipt of the panel under subsection (2), the officer or authority concerned shall in the prescribed manner intimate the Management of the Institution the names of the selected candidates in respect of the vacancies notified under sub-section (1) of Section 10.

(4) The management shall, within a period of one month from the date of receipt of such intimation, issue appointment letter to such selected candidate.

(5) Where such selected candidate fails to join the post in such institution within the time allowed in the appointment letter or within such extended time as the Management may allow in this behalf, or where such candidate is otherwise not available for appointment, the officer or authority concerned may, on the request of the Management, intimate, in the prescribed manner, fresh name or names from the panel forwarded by the Board under subsection (2).

24. The Act empowers the framing of Rules u/s 35 which is as follows:-

Sec. 35. Power to make rules. - The State Government may, by notification,

make rules for carrying out the purposes of this Act.

25. Accordingly, the State Government has been framing rules from time to time and for the purpose of the present controversy, relating to the procedure of recruitment, reference be had to the U.P. Secondary Education Services Selection Board Rules, 1998 (hereinafter and hereinbefore referred to as 1998 Rules) which are in force, and applicable to the controversy. The rules that are relevant to determine the source of recruitment and the procedure for determination of vacancies as also the procedure of the Board for making selection are contained in Rule 10, 11, 12 and 13. Rule 10 and 11 are quoted in its entirety as they are relevant to the present controversy whereas relevant parts of Rule 12 namely Rule 12(1), (8) (9) (10) and (11) are quoted here inunder:-

10. Source of recruitment. - Recruitment to various categories of teachers shall be made from the following sources:

Provided that if in any year of recruitment suitable eligible candidates are not available for recruitment by promotion, the posts, may be filled in by direct recruitment:

Provided further that if in calculating respective percentages of posts under this rule, there comes a fraction then the fraction of the posts to be filled by direct recruitment shall be ignored and the fraction of the posts to be filled by promotion shall be increased to make it one post.

11. Determination and notification of vacancies. -(1) For the purposes of direct recruitment to the post of teacher, the Management shall determine the number of vacancies in accordance with sub-section (1) of Section 10 and notify the vacancies through the Inspector, in the Board in the manner hereinafter provided.

(2)(a) the statement of vacancies for each category of post to be filled in by direct recruitment including the vacancies that are likely to arise due to retirement on the last day of the year of recruitment, shall be sent in quadruplicate, in the proforma given in Appendix "A" by the Management to the Inspector by July 15 of the year of recruitment and the Inspector shall, after verification from the record of his office, prepare consolidated statement of vacancies of the district subject-wise in respect of the vacancies of lecturer grade, and group-wise in respect of vacancies of trained graduates grade. The consolidated statement so prepared shall, along with the copies of statement received from the Management, be sent by the Inspector to the Board by July 31, with a copy thereof to the Joint Director:

Provided that if the State Government is satisfied that it is expedient so to do, it may, by order in writing, fix other dates for notification of vacancies to the Board in respect of any particular year of recruitment:

Provided further that in respect of the vacancies existing on the date of the commencement of these rules as well as the vacancies that are likely to arise on June 30, 1998, the Management shall, unless some other dates are fixed under

the preceding proviso, send the statement of vacancies by July 20, 1998 to the Inspector and the Inspector shall send the consolidated statement in accordance with this sub-rule to the Board by July 25, 1998.

Explanation - For the purposes of this sub-rule, the word group-wise in respect of the trained graduate's grade means in accordance with the following groups, namely:

(b) With regard to the post of Principal or Headmaster, the Manager shall also forward the names of two senior most teachers, alongwith copies of their service records (including character rolls) and such other records or particulars as the Board may require from time to time.

Explanation - For the purpose of this sub-rule "seniormost teachers" mean the seniormost teachers in the post of the highest grade in the institution, irrespective of total service put in the institution.

(3) If, after the vacancies have been notified under sub-rule (2), any vacancy in the post of a teacher occurs, the Management shall, within fifteen days of its occurrence, notify to the Inspector in accordance with the said sub-rule and the Inspector shall within ten days of its receipt by him send it to the Board.

(4) Where, for any year of recruitment, the Management does not notify the vacancies by the date specified in sub-rule (2) or fails to notify them in accordance with the said sub-rule, the Inspector shall on the basis of the record of his office, determine the vacancies in such institution in accordance with sub-section (1) of Section 10 and notify them to the Board in the manner and by the date referred to in the said sub-rule. The vacancies notified to the Board under this sub-rule shall be deemed to be notified by the Management of such institution.

Rule 12(1). Procedure for direct recruitment.(1) The Board shall, in respect of the vacancies to be filled by direct recruitment, advertise the vacancies including those reserved for candidates belonging to Scheduled Castes, Scheduled Tribes, Other Backward Classes and other reserved categories as applicable to Government service from time to time, in at least two daily newspapers, having wide circulation in the State and call for applications for being considered for selection in the pro forma published in the advertisement. For the post of Principal of an Intermediate College or the Headmaster of a High School, the name and place of the institution shall also be mentioned in the advertisement and the candidates shall be required to give the choice of not more than three institutions in order of preference and if he wishes to be considered for any particular institution or institutions and for no other institution, he may mention the fact in his application.

Rule 12(8). The Board the, for each category of post, prepare panel of those found most suitable for appointment in order of merit as disclosed by the marks obtained by them after adding the marks obtained under clause (4) or sub-clause

(5) above, as the case may be, with the marks obtained in the interview. The panel for the post of Principal or Headmaster shall be prepared institution-wise after giving due regard to the preference given by a candidate, if any, for appointment in a particular institution whereas for the posts in the Lecturers and trained graduates grade, it shall be prepared subject-wise and group-wise respectively. If two or more candidates obtain equal marks, the name of the candidate who has higher quality points shall be placed higher in the panel and if the marks obtained in the quality points are also equal, then the name of the candidate who is older in age shall be placed higher. In the panel for the post of Principal or Headmaster, the number of names shall be three times of the number of the vacancy and for the post of teachers in the lecturers and trained graduates grade, it shall be larger (but not larger than twenty-five per cent) than the number of vacancies.

Rule 12(9). At the time of interview of candidates, for the post of teachers in lecturers and trained graduates grade, the Board shall, after showing the list of the institutions which have notified the vacancy to it, require the candidates to give, if he so desires, the choice of not more than five such institutions in order of preference, where, if selected, he may wish to be appointed.

Rule 12(10). The Board shall after preparing the panel in accordance with sub-rule (8), allocate the institutions to the selected candidates in respect of the posts of teachers in lecturers and trained graduates grade in such manner that the candidate whose name appears at the top of the panel shall be allocated the institution of his first preference given in accordance with sub-rule (9). Where a selected candidate cannot be allocated any of the institutions of his preference on the ground that the candidates placed higher in the panel have already been allocated such institutions and there remains no vacancy in them, the Board may allocate any institution to him as it may deem fit.

Rule 12(11). The Board shall forward the panel prepared under sub-rule (8) along with the name of the institutions allocated to selected candidates in accordance with sub-rule (10) to the Inspector with a copy thereof to the Joint Director and also notify them on its notice board.

26. Rule 13 shall be referred to later on in view of the arguments relating to adjustment. The "year of recruitment" has been defined in Section 2(1) of the 1982 Act which reads as follows:

Sec. 2(1) "Year of recruitment" means a period of twelve months commencing from first day of July of a calendar year.

27. Thus a complete mechanism has been provided for determination of the vacancies by the management, the intimation thereof and verification by the District Inspector of Schools and the requisition and notification of the vacancies to the Board thereafter. The vacancies have to be then advertised as per Rule 12 and selections have to be resorted to.

28. The first and foremost question therefore is that if a vacancy has been determined for being filled up by direct recruitment and intimated to the Board, can the management or the District Inspector of Schools continue to have the power to rescind their decision and review the vacancies for accommodating a candidate claiming a vacancy by the other modes u/s 16 of the 1982 Act.

29. The answer to this question is also dependent on the procedure of determination in Section 10 of the 1982 Act referred to hereinabove. The power is given to the management to determine the number of vacancies existing or likely to fall vacant during the year of recruitment. Thus the initial task of determining the vacancy is on the management by identifying the number of vacancies that are existing or are likely to fall vacant, for example on account of retirement etc. during the year of recruitment.

30. The procedure to ascertain is regulated by the Act and Rules, inasmuch as, this would involve the nature of the vacancy and the post that was held by the earlier incumbent. This would mean as to what subject was taught by the earlier incumbent and the current requirement of the institution. It is at this stage that a determination has to be made as to whether the post has to be filled up by direct recruitment or by promotion. Rule 10 of the 1998 Rules clearly provides for the appointment in the Lecturers Grade 50% by direct recruitment and 50% by promotion from amongst substantively appointed teachers of the Trained Graduate Grade (L.T. Grade).

31. The vacancies of Trained Graduate Grade (L.T. Grade) are to be filled by direct recruitment except for 25% by promotion as per Rule 10(c)(ii) of 1998 Rules.

32. After the vacancies for direct recruitment are determined, the management is also obliged to calculate the applicability of reservation for the candidates belonging to the reserved category for the purpose of giving benefit to eligible candidates. The aforesaid calculation therefore has to be in accordance with the rules provided for reservation namely the Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994 Act as applicable in the State of U.P.

33. This determination by the management in respect of direct recruitment is to be made under Rule 11 of the 1998 Rules quoted hereinabove. The statement of the vacancies so determined by the management have to be sent to the District Inspector of Schools by 15th of July of the year of recruitment, and the Inspector after verifying it from the records of his office has to prepare a consolidated statement of the vacancies of all the institutions in the district subject-wise and group-wise in respect of Trained Graduate Grade posts. The statement has to reach the Inspector by 31st of July of the year of recruitment with a copy thereof to the Joint Director of Education. The State Government has however been given the power to fix other dates for notification in respect of any particular year of recruitment. It is necessary to keep in mind the meaning of the words

"year of recruitment" and "group-wise arrangement of vacancies" in relation to Trained Graduate Grade vacancies as per Section 2(1) of the 1982 Act and the explanation to Rule 11 of the 1998 Rules.

34. On this exercise being completed by 31st of July, if any other vacancy occurs thereafter for example by death or resignation then the management within 15 days of its occurrence shall notify the said vacancy to the District Inspector of Schools. The Inspector within 10 days of receipt of such information send it to the U.P. Secondary Education Services Selection Board for being notified. It is this procedure which has to be followed for the notification/intimation of the vacancies to the Board as per Section 10 of the 1982 Act read with Rule 11 of the 1998 Rules.

35. The provisions of Sub-Rule (4) of Rule 11 also provide for the alternative arrangement where there is a failure on the part of the management to notify the vacancies by the date fixed. The said rule authorises the District Inspector of Schools to determine the vacancies on the basis of the records that are available in his office and notify it to the Board which shall be deemed to be notified by the management of such institution.

36. It is this entire exercise with regard to determination that has to be performed mandatorily by the management and the District Inspector of Schools, to enable the Board to advertise the vacancy as notified which shall be done through wide publicity as provided for u/s 10(2) of the 1982 Act read with Rule 12(1) as quoted hereinabove.

37. The controversy raised in this reference is vis-a-vis the impact of the action taken by the management and the District Inspector of Schools for determination of the vacancies and the consequential advertisement made by the Board and any attempt to alter the same by adopting the exceptional modes of appointment.

38. In our opinion if the management has determined the vacancy or the District Inspector of Schools has done it as per Rule 11(4) then in that event the alteration of such determination and intimation is controlled only to the extent as provided by sub-rule (3) of Rule 11 which authorises the management and the Inspector to notify any fresh vacancy that may have occurred after such notification. The management or the District Inspector of Schools therefore has not been empowered under the rules to reverse the determination and it can only add to it, subject to the contingency as contemplated under sub-rule (3) of Rule 11. This however does not take away the power to correct any arithmetical or calculative errors that may have crept into such determination.

39. To our mind, the function of the management and the District Inspector of Schools, therefore, has to follow this procedure and it is trite law that if a statute requires a thing to be done in a particular manner then it should be done in that manner alone and not otherwise. The procedure under the Act and Rules is mandatory and it has to be done in that manner alone. Reference be had to Para 20 and 23 of the division bench judgment in the case of Kumari Poonam Vs.

State of U.P. and Others, and to Para 24 of the decision in the case of U.P. Secondary Education Service Selection Board Vs. State of UP and Others, . The rules have been framed consciously by making a provision of limited alteration in the determination by adding to the vacancies on account of any fresh occurrence during the year of recruitment itself. Thus impliedly no power has been conferred for altering the vacancies already determined and intimated to the Board for the purpose of notification under the Act and Rules. The requisition to fill up the vacancies after having sent to the Board therefore becomes unalterable as the Board proceeds with the advertisement under Rule 12 by publishing the vacancy in accordance with reservation rules and in accordance with the subject-wise and group-wise vacancies against which appointments are to be made inviting applications from candidates giving their preference of the institution which choice has to be indicated by the candidate. At this stage, to upset the procedure after advertisement by giving any further leverage would be to disturb the entire process of selection and if such a concession is given, the management can indulge into motivated manipulations which are not uncommon and give rise to uncalled for controversies ending up in litigation.

40. We would also like to put a note of caution for the District Inspector of Schools while performing his duty of verification of the determination of vacancies. There can be cases where the management deliberately modifies a requirement in the name of extending benefit to some candidate/teacher who may be desirous of seeking promotion but otherwise not eligible within the year of recruitment. The management can withhold such information and it is at this stage that the District Inspector of Schools has to exercise his powers under sub-rule (4). The management at times may not cooperate with the District Inspector of Schools and therefore the District Inspector of Schools has to determine the vacancy as per the records available in his office and inform the Board. The responsibility therefore rests on the District Inspector of Schools to undertake this exercise by putting the management to clear notice during the year of recruitment itself. The District Inspector of Schools on coming to know of any additional vacancy if any that arises or the management having withheld such information is obliged to take action forthwith and disallow the management from taking any undue advantage in such situations. The vacancy that has occurred during the year of recruitment has to be mandatorily informed as noted hereinabove as no selection can be held except through the Board.

41. Once it is held that the power of the management and the District Inspector of Schools after determination, and intimation to the Board, to re-introduce any alteration is taken away then the management cannot be given the authority to adopt any other mode of recruitment.

42. To explain this it would be appropriate to refer to the provisos under which this power to the management and the approving authority is conceded namely, absorption, by transfer, by adjustment or by way of promotion. The management and the District Inspector of Schools have all records and they are aware of the

vacancies as also any such claim, for example, of absorption or promotion. They have therefore to notice such claims if they exist in accordance with law, and then proceed to intimate the vacancies for direct recruitment. If they indulge into any deliberate manipulation or incorrect determination, they cannot be allowed to take undue advantage of such manipulation or incorrect determination. Consequently any teacher or candidate cannot be permitted to claim any benefit.

43. Taking up the case of transfer, which can be done unilaterally and even bilaterally by exchange of teachers, has to be done on resolutions passed by the two institutions that are to allow such appointment by way of transfer. If there is an application of any such teacher seeking appointment by way of transfer the same has to be forwarded to the competent authority as per the regulations meant for such appointment under Chapter III of the U.P. Intermediate Education Act, 1921 read with provision to Section 16 of the 1982 Act. This exercise, if any, therefore has to be concluded prior to the determination and intimation of the vacancy to the Board as per the calendar fixed under the rules. The management or a teacher cannot be permitted to make a request for allowing such transfer after the determination of the vacancies and the initiation of the process by the Board. The choice to fill up a vacancy by way of transfer therefore has to be exercised reasonably and its determination has to be finalized prior to the sending of the intimation and not thereafter. This will prevent any confusion or future complication in the process of selection that has to be undertaken by the Board. The authority of the Board to proceed with the selection therefore should not be disturbed by such intervening claims relating to transfer.

44. The provisions for appointment of a teacher by way of transfer from one institution to another is authorised under the proviso to Section 16 of the 1982 Act. Transfer has been made permissible in view of the provisions of the Intermediate Education Act, 1921. Section 16-G (c) of the 1921 Act authorises appointment by way of transfers for which regulations have been framed under Chapter III, Regulations 55 to 61. The explanation to regulation 61 also indicates that the transfer shall be permitted from one recognised aided institution to another recognised aided institution or from one recognised unaided institution to another recognised unaided institution. The vacancy on account of such transfer if occurring shall be filled up, in case it is reserved, from the same category of a teacher.

45. We therefore find ourselves in full agreement with the view expressed by the division bench in cases relating to transfer as reasoned out in the decision of Smt. Anita Sinha Vs. State of U.P. and others 2009 (2) AWC 1384. There also the vacancy had been notified to the Board and was then advertised. In between a teacher applied for transfer and simultaneously the Board proceeded to hold selection for the same vacancy. The result of the empanelled candidate was declared but a few days before that, the transferee teacher got an order approving her transfer and joined on the post. She challenged the selections but her writ petition before the learned Single Judge failed which was upheld in the

division bench judgment noted hereinabove. Para 7 of the said judgment gives extensive reasons and we approve of the same. The only clarification in the said judgment that we like to put on record is that appointment by way of transfer can be made against a vacant sanctioned post or else in cases of unilateral transfer, the same might result in increase of sanctioned strength of teachers which cannot be permitted except with the approval of the Director as per Section 9 of the U.P. High School and Inter Colleges (Payment of Salaries of Teachers and Other Employees) Act 1971 read with Rule 19 of the 1993 Rules framed thereunder for aided institutions and similar terms expressed in the recognition order by the competent authority for unaided institutions.

46. It is to be noted that Section 30 of the 1980 Act clearly provides that it shall not apply to an institution established and administered by a minority referred to in Clause (1) of Article 30 of the Constitution of India and Section 32 makes the 1921 Act applicable in so far as it is not inconsistent with the provisions of the 1982 Act. In such a situation, the proviso for appointment by way of a transfer u/s 16-G(2)(c) of the 1921 Act cannot be made applicable under the 1982 Act on a minority institution. There is however no provision under Regulation 55 to 61 about any such appointment by way of transfer of a teacher from one minority institution to a non-minority institution, whether aided or unaided.

47. We would like to therefore make it clear that in order to prevent any misuse, since the mode of recruitment in a minority institution is not through the selection Board, a teacher of a minority institution would not be entitled for appointment by way of transfer to a non-minority institution. This clarification is necessary as a teacher may get himself appointed in a minority institution, which is without facing the Board, and then get himself transferred to a non-minority institution. If this is permitted then candidates can very easily bypass the selection process of the Board and after getting themselves appointed in a minority institution through the management directly under the 1921 Act can seek transfer to a non-minority institution. We therefore hold that the appointment by way of transfer as contemplated u/s 16 of the 1982 Act is not applicable to minority institutions and at the same time the appointment by way of transfer of a teacher of a minority institution to a non-minority institution is also impermissible.

48. There is no difficulty with regard to the calculation of a post to be filled up by absorption or by promotion which can also be done by the management before determining the vacancies in the year of recruitment. The calculation has to be made for the year of recruitment and sent by 31st of July. Thus any claim thereafter having arisen will have to wait for the vacancy to occur thereafter. The calculation is not in respect of all possible claims that may arise in future. This aspect is clearly governed by the expression "year of recruitment" as explained hereinabove and by the calendar fixed under the rules. Accordingly the same reasoning as in the case of transfers would apply here and neither the management nor the District Inspector of Schools can be permitted to alter the

process of recruitment/appointment by taking recourse to the provisos u/s 16 after the vacancies have been determined and notified to the Board under the provisions referred to hereinabove.

49. The most contentious issue that remains to be resolved is in relation to the decision in the case of Ved Prakash (supra) which was not noticed by the division bench that affirmed the case of Raja Ram (supra). This was directly in relation to the disputed claim of a compassionate appointment and interpretation of Rule 13(5) of the 1998 Rules. The process of appointment on a compassionate basis on the post of a teacher or the post of a class III or Class IV employee is not governed by any procedure under the 1998 Rules of the 1982 Act. According to the third proviso to Section 16, in relation thereto, compassionate appointment is governed by Section 16-G of the 1921 Act read with Regulations 101 to 107 of the Regulations framed under Chapter III thereof. The information of the death of an employee and the resultant vacancy has to be intimated to the District Inspector of Schools by the appointing authority, namely, the management or the Principal as the case may be within one week of the occurrence of such contingency. The dependant of such an employee can be offered the post of a teacher or a non-teaching post subject to such availability and further subject to the dependant possessing such qualifications on any post that may be available either in the same institution or any other institution in the entire district. For this a Register shall be maintained with the District Inspector of Schools where such claims throughout the district shall be noted. The dependant shall be entitled to move an application for appointment which shall be processed by the District Inspector of Schools through a Committee consisting of the Inspector, the Accounts Officer in his office and the District Basic Education Officer as provided for under Regulation 105. Regulation 106 provides that the candidate shall be offered appointment as far as possible in the same institution or against any post available in any other institution in a recognised and aided institution as the case may be. This mode of appointment is only indicated in relation to recognised and aided institutions where the employee was working and is not in relation to unaided institutions. The appointment has to be issued within one month by the District Inspector of Schools. If the post is not available in any institution throughout the district then the appointment shall be made against a supernumerary post.

50. In our opinion, death is a contingency that is uncertain, and therefore, to contemplate such a situation for the purpose of intimation at the time of determination is impossible. It is for this reason that sub-rule (3) of Rule 11 empowers the management to add such a vacancy in relation to a post to the Board.

51. The claim of compassionate appointment can be made under the regulations not only against the post of a teacher but also against a Class III or a Class IV post which is a non-teaching post. It is true that appointment to a dependant is to be made keeping in view the rationale that the family should be not allowed to

face distress after having lost its breadwinner. This does not contemplate a particular choice of appointment as a teacher only. The distress can be removed by offering an appointment against a Class III or a Class IV post subject to its availability as per Regulation 103 of Chapter III under the 1921 Act. The question is if the post of a teacher has not been actually filled up, which is available, can the same be offered to such a dependant even after intimation of the vacancy to the Board and is advertised to be filled up by direct recruitment.

52. Selection by itself does not give a right of appointment but, if selections are held by the Board, the candidate has to be appointed by the management and on its failure to do so by the authorities as contemplated u/s 17 of the 1982 Act. What is peculiar is that no appointment to the post of a teacher by direct recruitment in a recognised school under the 1921 Act can be made except through the process of selection by the Board. The selection therefore has a sanctity and a statutory protection to the extent that it is only a candidate selected under the 1982 Act who can be appointed by way of direct recruitment to a post in a recognised institution. The exceptions are made in Section 16 itself. It is therefore to our mind a process by which the obligation of the management to make an appointment from the choice of the Board is compulsory. The management on its own, except in the cases of minority institutions, cannot make an appointment unless the candidate is selected by the Board.

53. A candidate therefore upon being selected can get his appointment enforced in law by virtue of the provisions of Section 11 read with Section 17 of the 1982 Act. The management is bound to make such an appointment by issuing a letter of appointment and on its failure to do so the procedure for such enforcement has been provided for u/s 17.

54. The selection by the Board, therefore, is not a mere selection or an empty formality but is a complete process of appointment through a selection procedure under the aforesaid Act. This virtually confers the power of not only selection but also of appointment on the statutory authorities, and the management of an institution is no exception to it. The candidate therefore gets a right of being appointed provided he is otherwise eligible under the Act itself. The management cannot refuse to appoint a selected candidate unless there is any valid or legal impediment. The theory that a selected candidate has got no indefeasible right of appointment is not the real issue involved and the judgment of the apex court in the case of Shankarsan Dash Vs. Union of India, and other judgements to that effect as cited at the bar do not in any way curtail the right of a selected candidate to get appointed under the 1982 Act as pointed out hereinabove. We endorse the reasoning given by the division bench in the case of Smt. Anita Sinha (supra) in Para 11 to 13 quoted herein under:-

11. As regards other submission made by learned counsel for the appellant that the candidate selected by the Commission does not have an indefeasible right for appointment, the provisions of the Act and Rules have already been referred to above from which it is clear that scheme of the 1998 Rules and the 1982 Act

contains character of imperativeness and the management is obliged to offer appointment to a selected candidate. Therefore, in the Scheme of 1982 Act and 1998 Rules the cases under other enactments cited by Sri Khare on the point that a selected candidate does not have an indefeasible right to be given appointment, do not apply. In support of his contention that a selected candidate has no indefeasible right for appointment, reliance has been placed by the counsel for the appellant upon: Shankarsan Dash Vs. Union of India, ; Dr. Ramulu and another, etc. Vs. Dr. S. Suryaprakash Rao and others, ; State of Uttaranchal and Others Vs. Sidharth Srivastava and Others, and State of U.P. and Others Vs. Rajkumar Sharma and Others, .

12. In paragraph 7 of the reports in Shankarsan Dash it was held:

It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquired an indefeasible right to be appointed, which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation of qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons. And if the vacancies or any of them filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted. This correct position has been consistently followed by this Court, and we do not find any discordant note in the decisions in State of Haryana Vs. Subhash Chander Marwaha, Neelima Shangla Vs. State of Haryana, or Jatendra Kumar Vs. State of Punjab.

13. In the passage above quoted the ordinary rule and its exception has been laid down. The ordinary rule is that the State is under no legal duty to fill up all or any of the vacancies and the exception is unless the relevant recruitment rules indicate otherwise. The provisions of the 1982 Act and 1982 Rules, we have already considered, make it amply clear that a selected candidate has a right to be given an appointment against a vacancy which was advertised. It has already been noticed that there is imperativeness in the scheme of the 1998 Rules and a time bound period has been provided within which various steps from the notification of the panel upto the appointment has been provided. The other three cases cited by the counsel for the appellant also do not relate to the 1982 Act or the 1998 Rules. The Rules applicable in those cases do not confer any right upon the selected candidates to claim an appointment unlike the 1982 Act and the 1998 Rules. In fact, the cases cited have no application for another reason. What has been held in those cases is that the Government has a discretion to fill up or not to fill up a vacancy and a selected candidate cannot as a matter of right claim an appointment if the Government chooses not to fill up the vacancy. In the present case that is not the question has been filled up. The

question is as to which of the two rules of appointment would apply.

55. The doubt we have to clear in the aforesaid judgment is in relation to compassionate appointments and cases of retrenchment absorption. The learned judges while answering the arguments of the counsel in respect of these issues observed in Para 10 thereof as under:-

10. Transfer can also be made at any time of the year in a situation when there would be no conflict with the selection process. Such would usually be a situation when no vacancy is to be filled up as for instance in the case of mutual transfer. Let us now examine the correctness of Mr. Khare's contention that the limitation regarding the stage in which the vacancy can be filled up by transfer can be no different from the other two alternative modes of appointment, namely, u/s 16EE of the Intermediate Education Act and compassionate appointment under the Regulations. The purpose of harmonious construction is to reconcile the operation of two apparently inconsistent provisions any by limiting the play of one or the other or both to make them operate within their own fields. In the case of conflict between the provisions relating to appointment on the recommendation of the Commission and appointment by transfer this was done by limiting the application of the provisions of transfer to a stage before issuance of advertisement by the Commission in view of our finding that the provisions of transfer were not designed to be a mode of recruitment although a transfer order would not be invalid on account of the mere fact that the post on which the transfer was made was vacant so long as the process of filling up the vacancy had not reached a particular stage. As distinguished from a transfer, appointment of retrenched employees can be made only against a vacancy. In the case of compassionate appointment too the appointment has to be made against an existing vacancy or if it is to be made when there is no vacancy by creating a supernumerary post it would have to be adjusted as soon as a vacancy is created. The two other modes of appointment are, therefore, meant to operate only on the existence of a vacancy just as in the case of appointment by the Commission. It is to be noted that the element of the Management's discretion in refusing consent to a proposal of transfer of a teacher of another institution is unfettered. Under the scheme of the Regulations relating to transfer no appointment of a teacher can be made in the institution without consent of the Management while in the other two modes of appointment the management has little discretion. A teacher does not have a right of being transferred. The nature of the right of a retrenched employee and that of a dependent of an employee dying-in-harness to claim appointment is of a superior nature to the claim of a teacher seeking transfer. The analogy of the other two modes of appointment is therefore, not apt. The object of appointment by transfer and that of appointment under the other modes is also different. The contention of Mr. Khare that operation of the provisions of each of the three modes of appointment namely, by transfer, by absorption of a retrenched employee and by compassionate appointment is to be harmonised with the provision of appointment of a candidate selected by the Commission in the same manner

does not appear to have merit. From the interpretation we have made that an order of appointment by transfer cannot be made after the Commission has issued an advertisement, it does not follow that a similar restriction to the exercise of the process of appointment in respect of the other two modes would also have to be carved out, because the nature and object of the other appointments and the rights of the persons to be given the other appointments is different. We see no merit in the contention of Mr. Khare that a similar limitation as in the case of transfer, regarding the stage of the selection process for determining the availability of the other modes of recruitment would have to be adopted in the other cases too. However, the question as to whether in the case of appointment of retrenched employees and compassionate appointments, an appointment can be made after the stage of issuance of advertisement by the Commission, is not directly involved in this case.

56. Then comes the judgment of Ved Prakash (supra) that overrules the decision of the learned Single Judge in the case of Raja Ram (supra). The division bench relying on the apex court decisions of Director of Education Vs. Pushpendra Kumar & Ors (supra) and the case of Hira Man Vs. State of U.P. and others, held that to deny appointment to a compassionate claimant after the post is requisitioned and advertised through the Board, would be to defeat the very object of compassionate appointment.

57. In our opinion the aforesaid two decisions in the case of Smt. Anita Sinha (supra) and Ved Prakash (supra) with due respect have fallen short of closely examining the purpose and scope of compassionate appointments keeping in view the language employed in Regulation 103 of Chapter III of the 1921 Act that stands extracted herein under:-

58. A compassion is extending a hand of help in distress purely on humanitarian considerations. A family that has lost its breadwinner has been placed on a different footing. This underlying philosophy behind a rule extending such benefit, therefore, has been placed in a different class, and on a pedestal that does not, in matters of appointment, attract either the violation of Article 14 or 16 of the Constitution. The purpose of such benefit would be frustrated if the interpretation is otherwise. It is here that we propose to delineate on the nature of the competing rights as between someone claiming compassionate appointment and a candidate who applies against an advertisement for direct recruitment. The nature of rights arise from competing claims that can be best-assessed on the strength of an interpretation by the court drawing a distinction between a vested right, an accrued right and a statutory right.

59. In reference to the present case, there is no dispute that the rights being discussed arise out of the same statute namely the 1982 Act and the 1998 Rules read with the 1921 Act and the regulations framed thereunder. In common parlance a right is an entitlement claimed on some basis or on recognised interest. It is something that can be said to be capable of being enforced. A legal right is that which can be lawfully claimed and is legally enforceable. In law

whatever is legal, is just, subject to judicial interpretation. Such rights are usually conferred by competent codes framed under the parent laws, like in our country, the Constitution of India and are therefore recognised to exist making them enforceable. It is something that is due in law within a permitted standard and defined sphere like a rule or a canon. It seeks to make a person possess of something that lawfully and justly accrues to him/her in a legitimate form.

60. A statutory right is one that is conferred by or under a statute. The enforceability of a statutory right or a right conferred under law would depend on when a person becomes possessed of such a right. This involves, as in the present context, the accrual and vesting of rights under the statute.

61. Accrual means the moment of occurrence or arrival which gives a rise, setting something into motion. It commences an operation and in the context of a right, it makes it operational or operative. It comes naturally upon a conferment and renders it capable of being enforced. In other words it is a collected accumulation that gives rise to an interest that has the potency of being enforced. As per Black's Law Dictionary (Ninth Edition published by West Thomson Reuters) an accrued right is a matured right, a right that is ripe for enforcement.

62. Maturity is development and ripening. It is a state of readiness at the right time. That which is mature becomes due as it is complete. This stage of maturity of a right conferred under a statute makes it enforceable subject to the fulfillment of the terms and conditions of the statute itself, for e.g. in the present context, subject to the eligibility, qualifications, success in the selection process, etc. These levels have to be possessed or accomplished in order to mature a right to the stage of accrual. It is thereafter that the consideration of enforceability can be geared into motion for acquisition of a right conferred under the statute. The maturity of a right sets the stage of accrual.

63. It is on the strength of such accrual that the right is available for being enforced. The right to be considered for its final consummation then commences and gets completed thereafter when it becomes a vested right, as in the present context, after appointment.

64. Applying the said principles, we find that the moment an employee dies, his dependant gets entitled for appointment under rules excluding the rigours of normal procedure provided he is otherwise eligible. Regulation 103 clearly sets into motion the statutory machinery that declares the accrual of a right in favour of the dependant, that is bound to be considered. It fully matures on actual appointment. The accrual therefore comes into existence immediately on an application being filed upon the death of the employee for consideration and appointment.

65. As against this, no such right of consideration for appointment accrues in a candidate who simply applies against an advertisement. An advertisement is a mere announcement that declares a time-table with the procedure and eligibility

conditions inviting offers for facing selections. Thus a candidate who applies, can at best claim a right to face selection, the result whereof is uncertain till the panel is finalized. Thus an application against an advertisement does not by itself bring about any accrual of right to appointment. It is only when a candidate clears the written and interview as per rules, that one can claim to have been selected for appointment. The accrual in favour of a candidate facing selection therefore is only after the selection process is complete.

66. Thus the rights of a dependant claiming compassionate appointment precedes and stands on a higher preference, as the right to be considered for appointment accrues on the death of the employee when an application is moved for appointment as per Regulation 105 of Chapter III. The choice of the post is left to be determined by the District Inspector of Schools to be processed through the committee subject to its availability in the district as per the eligibility and qualifications of the candidate. If the death has occurred and application has been moved, the statutory rules impose a duty which the authorities are obliged to carry out irrespective of the vacancy having been intimated and notified by the management and District Inspector of Schools.

67. To this extent we hold that the reasoning of the learned Single Judge in Para 36 of Raja Ram's case (supra) deserves to be modified and appointments on compassionate basis on the post of Assistant Teacher can be made even after the requisition has been sent to the Board. The alteration in the vacancy of the post of teacher, if any, on account of compassionate appointment shall be forthwith intimated to the Board before the post is advertised.

68. But what should happen on the post being advertised is where the shoe is pinching. The compassion of the dependant does not evaporate on an advertisement being made. The authorities therefore have to accommodate the claim.

69. It is here that we respectfully choose to adopt a different line of reasoning to differ with the view expressed by the division bench in the case of Ved Prakash (supra) read with the apprehension as expressed in Para 10 of the decision in the case of Smt. Anita Sinha's case (supra). These decisions proceed heavily on the issue of distress of the family of the deceased employee. There can be no quarrel with the said proposition. The point however to be noted is the mechanism provided under Regulation 103 to 107 of Chapter III to alleviate this distress. A perusal thereof leaves no room for doubt that the rule making authority has taken an exhaustive care to provide alternatives to ensure that the dependant in his moment of crisis may not be compelled to wait for the mitigation of his miserable situation. His pitiful state has to be redressed through a statutory clemency in matters of rigorous procedures to ease the path of appointment. Yet there is a procedure provided namely, if the post of a teacher is not available he can be offered a Class III or Class IV post in any other institution of the district. In any eventuality, if no post is available, a supernumerary post has to be created. Thus the State has taken care to make sure the securing of such

appointment to the point of certainty. The distress or calamity faced by a dependant thus can be redressed by all these modes or by adopting any one of them. The dependant therefore is not prejudiced or insecured if he or she is not offered appointment only as a teacher. To our mind the dependant has a claim but not a right to be appointed against a particular post. As a matter of fact compassion arising out of distress does not offer choices. The very first opportunity available has to be harnessed in favour of the dependant. If no post is available, then the opportunity has to be created by sanction of a supernumerary post. The misfortune of a dependant does not make him beg and to the contrary, compels the authorities to immediately relieve him of such an affliction.

70. At the same time a dependant cannot be conceived of saying that his/her compassion can be satisfied only if he or she is appointed as a teacher. It is the right of a dependant to get his compassion redressed, but not necessarily by appointment on a post of his or her choice. The apex court has time and again held that the sole objective of such appointments is to provide immediate succour to the family which finds itself in dire straits or in a state of destitution. It is not to create any appointment by way of some reservation. See Para 11 of Local Administration Department and Another Vs. M. Selvanayagam @ Kumaravelu, of Union of India (UOI) and Another Vs. B. Kishore, . The statutory provisions do not compel the authorities to offer the post of a teacher even if it is not available. This compulsion extends only to create a Class IV supernumerary post in the event no post is available in the entire district in any recognised aided institution.

71. Then there is another aspect which deserves notice. An employee dying in harness need not necessarily be a teacher. He can be a Class III or a Class IV employee. His dependant therefore cannot claim any legitimate expectation against a particular grade of post. It is in this backdrop that a dependant in the limited sense does not have a vested right to claim appointment against a particular post. He is not a looser in any sense and is protected comfortably to ensure his financial security and relieve him from distress. We draw support from the observations made by the Apex Court in Para 9 of the judgment in the case of Union of India (UOI) and Another Vs. Shashank Goswami and Another, extracted herein under:-

9. There can be no quarrel to the settled legal proposition that the claim for appointment on compassionate ground is based on the premises that the applicant was dependent on the deceased employee. Strictly, such a claim cannot be upheld on the touchstone of Article 14 or 16 of the Constitution of India. However, such claim is considered as reasonable and permissible on the basis of sudden crisis occurring in the family of such employee who has served the State and dies while in service. Appointment on compassionate ground cannot be claimed as a matter of right. As a rule public service appointment should be made strictly on the basis of open invitation of applications and merit. The

appointment on compassionate ground is not another source of recruitment but merely an exception to the aforesaid requirement taking into consideration the fact of the death of the employee while in service leaving his family without any means of livelihood. In such cases the object is to enable the family to get over sudden financial crisis and not to confer a status on the family. Thus, applicant cannot claim appointment in a particular class/group of post. Appointments on compassionate ground have to be made in accordance with the rules, regulations or administrative instructions taking into consideration the financial condition of the family of the deceased.

72. The said decision has been reiterated with approval in the case of State of Gujarat and Others Vs. Arvindkumar T. Tiwari and Another, .

73. The issue before us is a little different namely as to whether the management and the District Inspector of Schools can confer the benefit of compassionate appointment to a dependant of a deceased employee against the post of a teacher in the event the same has been requisitioned to the Board but has not actually been filled up. There can be two situations, namely, one where the interviews by the Board have not been held and mere applications have been received against the advertisement for filling up the post in question. The second situation can be where the selections have already been held and on the declaration of results the candidates have been empanelled but actual appointment has not been given. There is no doubt with regard to the second type of situation as noted above where the interviews have been held and the panel has been prepared. With the holding of the interview and the award of marks the selection process almost attains finality which is completed with the formal declaration of results. If the death of an employee takes place in such a contingency then even if the post has not been actually filled, the selection has already been made even though the death of an employee has taken place. Such a situation cannot confer a right on a dependant, inasmuch as, the post had already been advertised when no such contingency existed at the time of the requisition being sent to the Board and selections have been held.

74. The compassionate appointee therefore has to have a claim prior to the stage of the last date of receiving applications for the post under the advertisement by the Board. The reason is that if an adjustment has to be made or a recalculation has to be carried out the same can obviously be done prior to the said date before the Board starts sorting out the applications for selection. The compassionate appointee therefore can be considered for appointment prior to the stage of the last date in the advertisement even if the vacancies have been sent for being filled up by direct recruitment to the Board. The same should however not be attempted after the date has expired. In our opinion this would be a fair interpretation in view of the fact that the post can be offered to a compassionate appointee before it is made available through an advertisement for direct recruitment to the candidates from the open market.

75. There is yet another reason for us to explain this, namely, that the

appointment under the dying-in-harness regulation referred to hereinabove is not compulsorily against a teaching post. In order to relieve the family from distress the appointment can be made against a Class III or a Class IV posts which is the purpose of compassion. The claimant namely a dependant of an employee does not have a right of specific option to gain employment to overcome the distress of the family. It is to this extent that we do not approve of the reasoning given in Ved Prakash's case. A compassionate appointee does not have a right against a particular post. The statutory provisions make it clear that as far as possible he shall be offered the post of an Assistant Teacher and in the alternative the post of a Class III or a Class IV subject to availability in the district where the institution is situate. If a vacancy is not available then a supernumerary post can be created for accommodating the candidate as per rules and not otherwise. The law therefore as expounded in Ved Prakash's case in the light of what has been said above stands modified to the extent that the offer of appointment to a dependant of a deceased employee on the post of a teacher that has been requisitioned to the Board can be made if he fulfils the eligibility conditions otherwise, before the last date of the receipt of applications under the advertisement.

76. It is equally important for us to survey the exercise that is undertaken by the Board for holding selections. The candidates for the post of teachers are subjected to a written test. The answer sheets are evaluated and according to the marks obtained the merit is prepared by adding marks for special merit as per Rule 12(4). Then comes the stage of interview with 15% marks allotted for the said purpose. The Board is enjoined with the duty at this stage to formulate the ratio of candidates to be called for interview as per Rule 12(6) quoted hereinbefore.

77. The candidates at the time of interview are again required to give their choice as per Rule 12(9) which has already been extracted hereinabove.

78. The above mentioned exercise is a massive operation that consumes time and energy, and if the same is altered midway, the entire edifice will go haywire and might also collapse. This process takes time right from the sorting of applications, the written examinations and the holding of the interview. Each step has to be meticulously observed and any change in the vacancies would directly impinge upon such meticulous calculations that are very likely to disturb the ratio of candidates and their choices as per rule 12(6) and 12(9). This would adversely affect the preparation of the final panel and would require a re-exercise accordingly.

79. The object of such selections is to provide teachers against the posts as soon as possible that would be defeated if the process is interfered with when this exercise has already been undertaken. Institutions should not be asked to wait endlessly and teachers should be appointed timely so as to avoid any inconvenience to the students. To upset this process would be to invite disorder and interrupt the smooth completion of the selection process. It is for this reason

as well that we would choose to restrict the right of a dependant to claim appointment on compassionate basis on the post of a teacher after the post has been advertised upto the stage of the last date of receipt of applications. The reason is that upto that stage the process of selection can be modulated by changing the number of vacancies to the extent of providing any benefit that might accrue on account of a claim of compassionate appointment.

80. We are carving out this exception for such claims only as they stand on a different pedestal due to occurrence of the death of an employee which is uncertain as compared to the other exceptions of regularisation, transfer or promotion. These claims are certain and are known from before. They have to be considered vis-a-vis the year of recruitment and the date of entitlement of the claimant which may accrue in accordance with rules. Thus such claims are distinguishable in nature and content from the claim of compassionate appointment. They have therefore to be determined before the intimation takes the form of requisition by the management and the Inspector to be notified to the Board for holding selections. This task can be performed before 31st of July as required for determination under Rule 11(2) (a) of the 1998 Rules as the information of such claims is already available with the management and the Inspector. In this way the provision of compassionate appointment can be harmonised without affecting the selection process for direct recruitment upto the last date of receipt of applications in the advertisement. It deserves to be clarified that if, after the selections and appointments are over, there still remains a vacancy or fresh vacancies occur that have not been further notified, the claims under the other modes can be considered.

81. We now come to the last lap of this reference relating to the scope and intent of Rule 13(5) of the 1998 Rules. This aspect requires reference to the legal position that existed prior to the introduction of this rule on the statute w.e.f. 23.1.2007.

82. A learned single judge of this court in the case of Smt. Savita Gupta Vs. State of U.P. and Others, held relying on a Government Order dated 12.3.2001 that a candidate selected against a particular advertisement could be adjusted any other vacancy that may have been requisitioned and intimated but not advertised. This view was overruled in the case of Satish Kumar Vs. State of U.P. and Others, and it was held that neither a choice can be given nor such a vacancy can be offered which has not been advertised. It was ruled that executive instructions in the shape of a government order cannot amend or supersede statutory rules. This decision was rendered on 22.9.2006.

83. The State Government issued a G.O. on 19.6.2006 (prior to the decision in Satish Kumar's case) again authorising adjustments. This was done after an order was passed in the shape of a general mandamus in the case of Prem Prakash Vs. State writ petition no. 75421 of 2005 decided on 19.2.2006 that had noticed large scale maladjustments resulting in candidates selected by the Board being not appointed. Accordingly to remove these anomalies a mechanism of a

committee was adopted to resolve such disputes. Directions were also issued to adhere to the directions dated 25.8.2005 in w.p. no. 46861 of 2005 (Satish Kumar Vs. State of U.P.). Taking shelter of these orders, and the G.O. dated 19.6.2006, the Board proceeded to finalise selections.

84. A large number of irregularities were alleged in the selection process against Advertisement No. 1 of 2005 to which a challenge was raised in the case of Dr. Ramesh Chandra Pandey and Others Vs. State of U.P. and Others, Pg. 218. The entire selections were quashed vide judgment dated 24.7.2007 with a direction to prepare a fresh merit on re-evaluation of the written examination and hold interview.

85. It is at this stage that reference has to be made to the introduction of Rule 13(5) in the 1998 Rules that was brought into force on 23.1.2007. This allowed adjustments against vacancies that are "notified" to the Board as would appear from the language of the Rule. It does not use the word advertised. Taking help of this rule, the Board proceeded to comply with the judgment dated 24.7.2007 in the case of Dr. Ramesh Chandra Pandey (supra) and made adjustments vis-a-vis the candidates who were left out from being appointed against the earlier advertisement No. 1 of 2004 against vacancies of advertisement no. 1 of 2005. On account of further adjustment of candidates appointed through other modes like absorption, transfer, promotion and compassionate appointments, the vacancies were either reduced or altered that gave rise to a fresh challenge to the select list and also to the scope of applicability of Rule 13(5) to make adjustments against unadvertised posts. A learned single judge in the case of Raja Ram (supra) decided on 30.11.2009 proceeded to read down Rule 13(5) by declaring that adjustment of a candidate to another institution can be made against a vacancy which has been subject matter of the same advertisement under which the candidate had applied and been selected. While doing so, the learned single Judge also enjoined any other mode of appointment u/s 16, including compassionate appointments, after the vacancy has been notified and advertised by the Board. Thus no other mode of appointment was permitted after the vacancy was notified to the Board.

86. This is how the issue of reference that was earlier confined to a conflict on the question of compassionate appointment came to be reframed by us to decide as to the laying down of correct law by the decisions under reference.

87. The aforesaid judgment of the learned single judge in Raja Ram's case, which also prohibited compassionate appointment after notification of a vacancy to the Board, was upheld by the Division Bench at Allahabad on 21.1.2011. The same judgment, to the extent it dealt with compassionate appointment and with a reference to Rule 13(5) was overruled in Ved Prakash's case at Lucknow, on 19.1.2011 which situation gave rise to the present reference.

88. Rule 13(5), in our opinion has to be read as held by the learned single judge in Raja Ram's case and upheld in the decision of U.P. Secondary Education

Service Selection Board Vs. State (supra). We are therefore unable to subscribe to the general observations made in Ved Prakash's case that are extracted and are to the following effect:-

This judgment, in our opinion, at the highest can be applied in those cases where during the pendency of the recruitment process, the Rules are amended and the Appointing Authority and/or the Board proceeded to select the candidates not based on the Rules which existed on the date of advertisement but on the basis of subsequent Rules. In the instant case, the Rules were already in existence and were in force when respondent no. 5 appointed the respondent no. 1 on compassionate basis.

It is true that Rule 13 (5) of the Rules 1998 was not under consideration but what was under consideration was filling in vacancies on compassionate appointment based on Regulations in aided and recognised schools. This judgment apparently was not placed before the learned Judge considering the case of Raja Ram (supra). Rule 13 (5) of the Rules 1998, thus, is an enabling provision that in the event a candidate is selected against a vacancy which was advertised and such a candidate could not be appointed on account of there being no vacancy, then in that event, such a candidate, who is otherwise eligible, can be adjusted against any other post.

If the view taken in Raja Ram (supra) is accepted, it would mean that if the vacancy has been requisitioned and advertised, then no appointment can be done. In our opinion, this would not be the correct interpretation of the Rule. The very purpose and object of compassionate appointment is to help a family in distress. Rules or procedure cannot defeat this objective. It makes no difference whether the appointment was made before or after the advertisement of the vacancy. Advertisement is only a means by which persons eligible are being called upon to apply for the post for being considered for appointment against such posts if they are otherwise qualified, which does not mean that an employer is bound to give appointment to a candidate who has been selected. Discretion always vests with the employer. This discretion is, of course, has to be rational and logical. In other words, there cannot be pick and choose. Similarly, the reasons given for not filling up the post after being advertised cannot be extraneous. If the vacancy is filled in on compassionate basis, it cannot be said to be arbitrary or extraneous or violative of equality clause enshrined under Article 16 of the Constitution of India."

Appointment on compassionate basis is governed by the Regulations which were not challenged before the learned Judge. Rule 13 (5) of the Rules, 1998 is an enabling provision, conferring power on the authorities if a candidate is selected and at the time of joining, the post is not available, then by virtue of the Rule to appoint such a candidate in any other institution against a notified post. This, in no manner, can defeat the object of compassionate appointment under the Regulations.

89. To our mind, the interpretation of Rule 13(5) was not directly involved in the case of Ved Prakash (*supra*) as it arose out of an interim order passed by a learned Single Judge in a pending writ petition relating to the claim of a compassionate appointee. The observation made by the bench describing Rule 13(5) to be an enabling power has to be understood for the purpose it was brought into existence. The rules, as framed, is to facilitate adjustments of selected candidates having faced the Board. This adjustment is against the vacancies notified and advertised. The rule can be invoked only for a candidate selected by the Board. It therefore has no control over the claim of a compassionate appointee. It comes into play only when the status of a vacancy is disturbed or a fresh vacancy is notified under the 1998 Rules. The position of law as explained in Raja Ram's case and approved by the division bench in the case of U.P. Secondary Education Services Selection Board (*supra*) has rightly confined the operation of the rule in respect of adjustment of posts under the same advertisement. An unadvertised vacancy cannot be offered to a candidate who had applied for a different advertisement as he has not competed with the candidates of another advertisement. A vacancy that was never advertised also cannot be offered as it would violate Article 14 of the Constitution and to that extent we approve of the view taken by the division bench in the case of Satish Kumar (*supra*).

90. A vacancy is a state, which is unoccupied or unfilled. It is vacuous or empty that can be characterised as free for being occupied. Given this status, a post, in the present case would become occupied upon placement by the Board after selection followed by an intimation offering appointment and consequential joining of the candidate. In this process, under the 1982 Act read with 1998 Rules, the function of the Board is to select, empanel and place the candidate after considering his choice as per the rules discussed hereinabove. The Board's activity thereafter terminates and the process of formal appointment is taken over by the educational authorities and the management. The question is as to what stage can the Board exercise its powers under Rule 13(5) to make adjustments.

91. In our view, once the appointment according to the empanelment is offered and the candidate joins, or when prevented from joining, action has been taken u/s 17 for his joining, the Board becomes functus officio for that vacancy which in law would cease to exist. The reason is that a placement by way of adjustment under Rule 13(5) can be made only against a vacancy and not after it is occupied. The Board also cannot be allowed to continue to alter empanelment for the convenience of candidates as it would then be an unruly horse giving discretion even after selections have been finalized. The exercise of options by the candidates is over at the stage of interview and the adjustments therefore have to be only if a vacancy is available and not otherwise.

92. It is correct that the division bench while deciding the case of U.P. Secondary Education Service Selection Board (*supra*) on 21.1.2011 was not apprised of the

Lucknow Bench decision dated 19.1.2011 while both judgements have proceeded to consider the same judgment of the learned single judge in the case of Raja Ram (supra). Nonetheless we do not approve of the view in Ved Prakash's case for the reasons given hereinabove, both on the issue of compassionate appointment and the interpretation of the scope of Rule 13 (5).

93. It is true that Rules are framed to serve the purpose of the Act and thus they are subordinate to it. They enable the provisions of the Act to be enforced so as to give effect to them. Rules therefore cannot override or abrogate the purpose of the Act. Conversely the rules framed cannot be rendered ineffective so as to make the selection process redundant or create obstructions. The rules therefore have to give effect to the selection process which is the purpose to frame them or else it would frustrate it. In order to avoid this, we have harmoniously interpreted them so that all the methods can co-exist without trenching upon each other. The operation of their fields has therefore been demarcated by us as observed by the division bench in Para 8 of the Smt. Anita Singh's case (supra).

94. In view of what has been said above, our answer to the questions (a) and (c) referred to us is as follows:-

A) The claim of a dependant as per the third proviso to Section 16 of the 1982 Act read with Regulations 101 to 107 of Chapter III of the Regulations framed under the 1921 Act can be considered for compassionate appointment on the post of an Assistant Teacher (TGT grade) against a vacancy that has been notified for being filled up by direct recruitment under the 1982 Act read with the 1998 Rules framed thereunder upto the stage of the last date for receipt of application forms under the advertisement, but not thereafter till the selections are completed by the Board followed by appointments under the provisions aforesaid.

B) The law regarding the claim of compassionate appointment as expounded in the case of Ved Prakash (supra) is overruled to extent as indicated above in (A) and explained in the body of the judgment.

C) The view taken by the learned Single Judge in the case of Raja Ram (supra) and affirmed by the division bench in the case of U.P. Secondary Education Services Selection Board, Allahabad (supra) stands modified to the extent as indicated in (A) hereinabove in so far as it relates to compassionate appointments only.

D) The view expressed by the learned Single Judge in Raja Ram's case (supra) and affirmed by the division bench in U.P. Secondary Education Services Selection Board (supra) in so far as it relates to other modes of appointment is approved and the judgements to that extent are affirmed.

E) The interpretation, the scope and applicability of Rule 13(5) of the 1998 Rules as affirmed in the case of U.P. Secondary Education Services Selection Board (supra) is upheld as laying down the law correctly by confining its applicability to

the vacancies that are subject matter of the same advertisement and not to such vacancies that were notified but not subject matter of the same advertisement.

Let the papers be now placed before the learned Single Judge for proceeding to decide the petitions accordingly.