
(2015) 04 AHC CK 0106
In the Allahabad High Court
Case No : Writ Petition No. 6516 (SS) of 2008

Sandeep Kumar Balmiki and Others

APPELLANT

Vs

State of Uttar Pradesh and Others

RESPONDENT

Date of Decision : 03-04-2015

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 309, 311

Citation : (2015) 4 ADJ 485 : (2015) 4 AWC 3425

Hon'ble Judges : Rajan Roy, J

Bench : Single Bench

Advocate : Upendra Nath Misra, for the Appellant; Mansoor Ahmad and C.S.C.,
Advocates for the Respondent

Final Decision : Dismissed

Judgement

Rajan Roy, J.—Heard Sri Upendra Nath Misra, learned counsel for the petitioners and Sri Mansoor Ahmad, learned Chief Standing Counsel for the opposite parties. Challenge herein is to the order dated 27.9.2008 passed by opposite party No. 4 by which the selection and appointment of the petitioners on group "D" posts in the office of C.M.O. Barabanki was cancelled.

2. The facts of the case are as under:--

On 22.8.2006 the State Government decided to fill up the vacant Class-IV posts under the opposite parties and requisitioned necessary details in this regard. After receiving the details it approved the time schedule for such selection vide its order dated 12.9.2006 and granted approval to the concerned opposite parties to proceed with the same. The said time schedule, as approved by the State Government, was circulated to the district units by the Director. As per Chief Medical Officer, Barabanki, the letter of the Director dated 30.9.2006 in this regard was received by him belatedly on 22.10.2006. Accordingly he got the advertisement published in two newspapers on 27.10.2006 inviting applications from eligible persons for filling up 17 existing vacancies. As per the said

advertisement the application forms could be obtained from the office of the Chief Medical Officer, Barabanki by 31st October, 2006. The last date for submission of the application forms was 2.11.2006. The application forms duly filled could only be sent by registered post/courier. On 13.11.2006 a selection committee was constituted by the Chief Medical Officer, Barabanki as directed by the Additional Director, Faizabad vide his letter dated 13.11.2006. The interviews were held from 16.11.2006 to 18.11.2006. On the last day of interview i.e. 18.11.2006 result was declared and the appointment orders were also prepared and issued to the selected candidates on that very day. It is said that 23 selected candidates to whom the appointment letters were issued joined their services on 20.11.2006.

3. Some time in. September/October, 2006, elections to the Nagar Nigam were notified. As there was some confusion about the effect of the election notification, clarification was sought and ultimately the State Government on 29.11.2006 issued an order imposing ban on selection and appointments in view of the notification of the election.

4. In the meantime certain complaints were received by the District Magistrate, Barabanki regarding the selection in question, therefore, on 25.11.2006, he ordered an enquiry into the matter by the Additional District Magistrate and Finance and Accounts Officer, Barabanki and also stayed the appointments based on such selection. The concerned officials who were asked to conduct the enquiry into the matter by the District Magistrate, Barabanki submitted their enquiry report on 26.3.2007 wherein they mentioned various illegalities which were detected in the said selection.

5. On 19.12.2006 the Director Administration, Medical and Health ordered an enquiry by Additional Director Medical and Health, Faizabad. The Additional Director vide his report dated 26.12.2006 did not find any lapse on the part of the Chief Medical Officer, Barabanki.

6. On 6.6.2007 the State Government ordered an inquiry to be conducted by the Director Administration, Medical and Health, taking into consideration the report of the District Magistrate, Barabanki submitted on 6.3.2007. The concerned Director was transferred during the pendency of the enquiry, accordingly, vide orders dated 3.8.2007 and 5.9.2007 fresh orders were passed to hold the enquiry, whereupon the enquiry report dated 16.7.2008 was submitted.

7. In the meantime disciplinary proceedings against Sri T.R. Kalra, the then Chief Medical Officer, Barabanki, were initiated wherein the enquiry report was submitted on 4.9.2009 by the Director Family Welfare, who exonerated him. However, it is said that this report was not accepted by the State Government and on 23.2.2010 a notice was issued to Sri Kalra, who sought time for submitting his reply but till the date of reserving the judgment his reply had not been received by the State Government, as stated by the Chief Standing Counsel at the bar, therefore, the matter against him is still pending with the State

Government. It is said that Sri Kalra has retired, after being promoted.

8. Be that as it may, based on the enquiry report dated 16.7.2008 the State Government passed the impugned order dated 19.9.2008 mentioning therein the illegalities detected in the selection in question and canceling the same with a direction to the concerned officers to take consequential action in pursuance of which the Director passed the order dated 24.9.2008 and Chief Medical Officer in turn passed the order on 27.9.2008 cancelling the appointments of the petitioners herein.

9. The order of the State Government dated 19.9.2008 mentions the following illegalities in the selection: (1) Advertisement was not published as per the prescribed format nor details of reserved vacancies were mentioned therein; (2) Advertisement was not published as per prescribed time schedule and sufficient time was not given to candidates for applying; (3) Nominee of district magistrate was not included in the selection committee; (4) sufficient time was not given to candidates for collecting application form nor for calling them for interview; (5) Time schedule prescribed was not followed, inspite of there being sufficient time from 18.11.2006 till 25.11.2006, the result was declared on the last day of interview and selected candidates were asked to join by issuing appointment orders on the same date; (6) 23 appointments were made against 17 posts which were advertised; (7) Only 18 applications were received through registered post/courier during 30.10.2006 to 2.11.2006 for class IV posts but in the select list 602 applications were shown as received and 487 candidates were shown as having appeared in the interview; (8) Notification for election to the Nagar Nigam was issued and State Government stayed the selections and appointments on 29.11.2006 but candidates were allowed to join on last day of interview itself, thus, there was clear infraction by the appointing authority of the relevant Service Rules, Government orders, directions of superior officers and Reservation Rules.

10. It is relevant to point out that when the petitioners were not paid their salary after submitting their joining on 20.11.2006, they approached this Court by means of Writ Petition No. 848 (SS) of 2007 (Vimlesh Kumar and others v. State of U.P. and others) and Writ Petition No. 850 (SS) of 2007 (Ashish Srivastava v. State of U.P. and others) praying for salary, wherein, an interim order was passed on 19.7.2007, in compliance of which the Chief Medical Officer, Barabanki, issued orders on 1.8.2007 for payment of salary to the petitioners with effect from 20.11.2006. Being aggrieved the State Government filed an appeal against the interim order referred to above, which was dismissed. Thereafter, the State Government filed S.L.P.(C) No. 13319 of 2009 (Civil Appeal No. 6517 of 2009) before the Supreme Court challenging the aforesaid interim order of this Court wherein, initially, a stay order was granted by the Supreme Court in March, 2009, but ultimately on 18.9.2009 the SLP was allowed and interim order passed by this Court was set aside with an observation for the High Court to decide the writ petition within three months.

11. The contention of Sri Upendra Nath Misra, learned counsel for the petitioners is that by means of the impugned orders the services of the petitioners, who were regular employees, were terminated without issuing any notice and giving any opportunity of hearing, which could not have been done. The services of the petitioners could not have been dispensed with without taking recourse to the procedure prescribed under Article 311 of the Constitution of India. The allegations contained in the Government Order dated 19.9.2008 are unfounded. As far as the allegation of non-adherence to the time schedule fixed by the State Government is concerned, the letter dated 25.9.2006 was received by the Chief Medical Officer, Barabanki on 22.10.2006, as is evident from the statement of the Chief Medical Officer, Barabanki during the enquiry, and therefore, the requisite advertisement could not be issued on the date prescribed, but, after receipt of the said letter the advertisement was issued on 27.10.2006. As far as the ban on appointments imposed by the State Government vide order dated 29.11.2006 is concerned, the selection process had already been completed much prior to the issuance of the said Government Order and, therefore, the said ground is untenable. As far as the constitution of the selection committee is concerned, no doubt, the nominee of the District Magistrate was not included in the selection committee, but, the selection committee was constituted by the Chief Medical Officer Barabanki as per the direction of the Additional Director vide letter dated 13.11.2006 and it did comprise the representatives of scheduled caste and backward class etc., therefore, there was no substantial illegality in the matter in terms of Rules of 2006. He further contended that under the Rules of 1985 there was no such provision for including a nominee of District Magistrate and this provision was added in the said Rules much later on 18.7.2008, i.e. after the selection had already been held. He further contended that the appointing authority of the posts in question was the Chief Medical Officer, Barabanki who alone could have passed the order of termination/dismissal. The said officer virtually surrendered his discretion in favour of the State Government by acting mechanically on its dictates; without any application of mind at his end he passed the impugned order of termination, therefore, for this reason also the impugned order is not sustainable. The alleged enquiry report which had been made the basis of the impugned action was never served upon the petitioners who were kept in the dark throughout. He also contended that the allegation of excess appointments against the posts advertised is also not tenable. As per the advertisement existing vacancies were to be filled. As per the report dated 4.9.2009 submitted in the disciplinary proceedings relating to Sri T.R. Kalra the record contained a note regarding existence of 23 vacancies on the relevant date, therefore, merely because 17 posts were mentioned in the advertisement, it would not invalidate the appointment of 23 persons. It is not a case in which the vacancies occurred subsequently. These 23 vacancies in fact existed on the date of advertisement but only 17 vacancies were mentioned in the advertisement, therefore, there was no illegality in making 23 appointments. He also assailed the assertion of the opposite parties that only 18 applications were received and submitted. As per submission made by the concerned clerk which

was on record, 822 applications were distributed out of which 500 filled up applications were received.

12. Sri Upendra Nath Misra, in support of his contention, relied on the following judgments:

1. Shrawan Kr. Jha v. State of Bihar, 1991 (Suppl.) 1 SCC 330
2. S. Govindaraju Vs. Karnataka S.R.T.C. and Another, AIR 1986 SC 1680 : (1986) 2 LLJ 351 : (1986) 1 SCALE 794 : (1986) 3 SCC 273 : (1986) 2 SCR 509 : (1986) 2 UJ 542
3. Basudeo Tiwary Vs. Sido Kanhu University and Others, (1998) 7 AD 189 : AIR 1998 SC 3261 : (1998) 6 JT 464 : (1998) LabIC 3539 : (1999) 1 LLJ 200 : (1998) 5 SCALE 300 : (1998) 8 SCC 194 : (1999) SCC(L&S) 174 : (1998) 1 SCR 633 Supp : (1999) 1 UJ 253 : (1998) AIRSCW 3186 : (1998) 7 Supreme 361
4. Shridhar Vs. Nagar Palika, Jaunpur and Others, AIR 1990 SC 307 : (1990) 60 FLR 386 : (1989) 4 JT 327 : (1989) 2 SCALE 1115 : (1990) SCC 157 Supp : (1989) 2 SCR 201 Supp
5. Jaswant Singh and Others Vs. State of Madhya Pradesh and Others, AIR 2000 SC 3586(1) : (2000) 87 FLR 281 : (2000) 8 JT 258 : (2002) 9 SCC 700
6. Jai Shanker Tripathi v. State of U.P., 2005 (23) LCD 1345
7. Vijay Prakash Singh v. Z.P. Rae Bareli, 2005 (23) LCD 1461
8. Benny T.D. and Others Vs. Registrar of Cooperative Societies and Another, AIR 1998 SC 2012 : (1999) 1 LLJ 527 : (1998) 3 SCALE 392 : (1998) 5 SCC 269 : (1998) SCC(L&S) 1338 : (1998) 3 SCR 147 : (1998) 1 UJ 747 : (1998) AIRSCW 1865 : (1998) 4 Supreme 490
9. Prem Singh and Others Vs. Haryana State Electricity Board and Others, (1996) 4 AD 593 : (1996) 5 JT 219 : (1996) 2 LLJ 786 : (1996) 4 SCALE 354 : (1996) 4 SCC 319 : (1996) 2 SCR 401 Supp : (1996) 2 UJ 239
10. State of Bihar and Others Vs. Secretariat Assistant Successful Examinees Union 1986 and Others, AIR 1994 SC 736 : (1994) 68 FLR 73 : (1993) 6 JT 462 : (1994) 1 LLJ 625 : (1993) 4 SCALE 38 : (1994) 1 SCC 126 : (1993) 3 SCR 134 Supp : (1994) 1 UJ 235
11. Suvidya Yadav and another v. State of Haryana and others, (2002) 10 SCC 269
12. Sandeep Singh v. State of Haryana and another, (2002) 10 SCC 549
13. Virender S. Hooda and Others Vs. State of Haryana and Another, AIR 1999 SC 1701 : (1999) 5 JT 621 : (1999) 2 LLJ 800 : (1999) 2 SCALE 590 : (1999) 3 SCC 696 : (1999) SCC(L&S) 824 : (1999) 2 UJ 1137 : (1999) AIRSCW 1327 : (1999) 4 Supreme 319

14. Sadananda Halo and Others Vs. Momtaz Ali Sheikh and Others, (2008) 3 JT 74 : (2008) 3 SCALE 209 : (2008) 4 SCC 619 : (2008) 2 SCC(L&S) 9

15. The Purtabpore Co., Ltd. Vs. Cane Commissioner of Bihar and Others, AIR 1970 SC 1896 : (1969) 1 SCC 308 : (1969) 2 SCR 807

16. Anirudhsinhji Jadeja and another Vs. State of Gujarat, AIR 1995 SC 2390 : (1995) CriLJ 4154 : (1995) 3 Crimes 518 : (1995) 6 JT 146 : (1995) 4 SCALE 715 : (1995) 5 SCC 302 : (1995) 2 SCR 637 Supp : (1995) 2 UJ 610

17. Tarlochan Dev Sharma Vs. State of Punjab and Others, AIR 2001 SC 2524 : (2001) 5 JT 645 : (2001) 4 SCALE 472 : (2001) 6 SCC 260 : (2001) 3 SCR 1146 : (2001) AIRSCW 2689 : (2001) 5 Supreme 361

13. On the other hand Sri Mansoor Ahmad, learned Chief Standing Counsel, firstly submitted that admittedly there was no nominee of District Magistrate in the selection committee constituted by the Chief Medical Officer, Barabanki on 13.11.2006 which considered and recommended the names of the petitioners for appointment. This was a clear violation of the mandatory provision of the Group "D" Rules 1985 and the Rules known as U.P. Direct Recruitment to the Posts (Inclusion of a Member Nominated by District Magistrate in the Selection Committee) Rules, 2006 which came into effect on 3.3.2006 and were very much in force on the date of constitution of the selection committee. These rules had been given over riding effect over any thing to the contrary contained in any other rules or orders. In this regard he invited the attention of the Court to the contents of para 8 of the writ petition which, according to him, contain an admission by the petitioners as far as this ground is concerned. In view of this admitted position, according to him, the very constitution of the selection committee being invalid, the selection and appointments made in pursuance thereof cannot be sustained in law. Reliance was placed in this regard on the pleadings made in the counter-affidavits especially para 10 of the 1st counter-affidavit. In this regard he relied upon the judgment of this Court in Vimal Organics Ltd. v. State of U.P., 2008 (3) ADJ 91 (DB) ; Jai Ram Yadav and others v. U.P. Gonna Beej Evam Vikas Nigam Limited and others; Dr. Triloki Nath Singh Vs. Dr. Bhagwan Din Misra and others, AIR 1990 SC 2063 : (1991) 61 FLR 648 : (1990) 3 JT 513 : (1990) 2 SCALE 268 : (1990) 4 SCC 510 : (1990) 3 SCR 727 : (1991) 2 SLJ 85 : (1990) 2 UJ 522 and National Fertilizers Ltd. and Others Vs. Somvir Singh, AIR 2006 SC 2319 : (2006) 6 CompLJ 310 : (2006) 110 FLR 211 : (2006) 11 JT 279 : (2006) 2 LLJ 1113 : (2006) 6 SCALE 101 : (2006) 5 SCC 493 : (2006) SCC(L&S) 1152 : (2006) 2 SCR 397 Supp : (2007) 1 SLJ 151 : (2006) AIRSCW 2972 : (2006) 4 Supreme 290 .

14. Sri Mansoor Ahmad further submitted that as against 17 vacancies which were advertised, 23 appointments were made i.e. 6 excess appointments were made against posts which were never advertised, which was impermissible. Moreover, the advertisement did not give the break-up of the reserved category posts. He further submitted that as per terms of advertisement the application

forms were to be sent only by registered post/courier and only 18 application forms were received by the aforesaid mode as per the dak receipt register in the office of Chief Medical Officer, Barabanki, but, a total of 602 application forms were shown to have been submitted out of which 483 candidates actually participated, this clearly shows that the Chief Medical Officer, Barabanki entertained such applications also which were submitted by other modes, which was impermissible. Sri Mansoor Ahmad further submitted that as far as denial of principle of natural justice is concerned, considering the illegalities pointed out in the impugned order, the defects in the constitution of the selection committee, and other defects, they could not have been cured even if opportunity of hearing was given to the petitioners, therefore, such an opportunity would only be an "empty formality". He further submitted that it is incorrect to say that the concerned Chief Medical Officer was exonerated. In fact the enquiry report submitted in his favour was not accepted and notice was issued to the petitioner to which no reply was received from him, therefore, till date no decision has been taken in the matter.

15. After hearing the learned counsel for the petitioner and the opposite parties and perusing the records I am not inclined to interfere with the impugned orders. The reasons are mentioned hereinafter.

16. The contention of Sri Misra that the petitioners being regular employees, their services could not have been dispensed with without recourse to Article 311 of the Constitution of India, is not acceptable. A perusal of the appointment orders of the petitioners reveals that their appointment was a temporary one which was terminable at any time without prior notice. The petitioners accepted the terms of their appointment without any demur. As per Rule 24 read with Rule 25 of the Rules of 1985 a person on appointment to a post in the establishment in a permanent vacancy is required to be placed on probation for one year which can be extended for another year. If the work and conduct is satisfactory the probationer is to be confirmed at the end of the period of probation or extended period of probation, as the case may be. The reference in the appointment order to the appointment being temporary appears to be in view of Rule 24 and 25 of the Rules of 1985. As per terms of their appointment and Rule 24 read with Rule 25 of the Rules of 1985, clearly, the services of the petitioners were temporary/on probation. It is nobody's case that they were confirmed and made permanent. The Court is of the view that as the selection and appointment of the petitioners itself was dehors the rules and illegal, and as this Court is affirming the impugned decision, therefore, Article 311 of the Constitution of India was not at all attracted. Reference may be made in this regard to the pronouncement of Supreme Court in the case of *R. Vishwanatha Pillai Vs. State of Kerala and Others*, AIR 2004 SC 1469 : (2004) 2 CTC 196 : (2004) 1 JT 88 : (2004) 1 SCALE 285 : (2004) 2 SCC 105 : (2004) SCC(L&S) 350 : (2004) 2 SCR 360 : (2004) AIRSCW 419 : (2004) AIRSCW 4826 : (2004) AIRSCW 3038 : (2004) 4 Supreme 77 : (2004) 6 Supreme 306 : (2004) 1 Supreme 436, wherein their Lordships repelled a similar argument and observed in para 15 "Unless the

appellant can lay a claim to the post on the basis of his appointment he cannot claim the constitutional guarantee given under Article 311 of the Constitution". Though it was a case involving appointment on the basis of false caste certificate, thus a fraud, but the ratio of the said judgment is applicable not only to fraudulent appointments, but also to illegal ones, as is evident from paras 16 and 17 thereof, wherein, the Supreme Court, after taking note of a Division Bench judgment of Patna High Court and its Full Bench laying down the proposition that if the very appointment to the civil post is vitiated by fraud, forgery or crime or illegality, it would necessarily follow that no constitutional rights under Article 311 of the Constitution can possibly flow, expressed its agreement with the view taken by the Patna High Court in para 18 of its judgment. Paragraphs 16, 17 and 18 of the judgment of Hon"ble Supreme Court are being quoted hereunder:

"In *Ishwar Dayal Sah v. State of Bihar*, 1987 Lab IC 390, the Division Bench of the Patna High Court examined the point as to whether a person who obtained the appointment on the basis of a false caste certificate was entitled to the protection of Article 311 of the Constitution. In the said case the employee had obtained appointment by producing a caste certificate that he belonged to a Scheduled Caste community which later on was found to be false. His appointment was cancelled. It was contended by the employee that the cancellation of his appointment amounted to removal from service within the meaning of Article 311 of the Constitution and was therefore void. It was contended that he could not be terminated from service without holding departmental enquiry as provided under the Rules. Dealing with the above contention the High Court held that if the very appointment to the civil post is vitiated by fraud, forgery or crime or illegality, it would necessarily follow that no constitutional rights under Article 311 of the Constitution can possibly flow. It was held: (Lab IC pp 394-95)

"If the very appointment to civil post is vitiated by fraud, forgery or crime or illegality, it would necessarily follow that no constitutional rights under Article 311 can possibly flow from such a tainted force. In such a situation the question is whether the person concerned is at all a civil servant of the Union or the State and if he is not validly so, then the issue remains outside the purview of Article 311. If the very entry or the crossing of the threshold into the arena of the civil service of the State or the Union is put in issue and the door is barred against him, the cloak of protection under Article 311 is not attracted."

17. The point was again examined by a Full Bench of the Patna High Court in *Rita Mishra and Others Vs. Director, Primary Education, Bihar and Others etc.*, AIR 1988 Patna 26 : (1988) 36 BLJR 1 . The question posed before the Full Bench was whether a public servant was entitled to payment of salary to him for the work done despite the fact that his letter of appointment was forged, fraudulent or illegal. The Full Bench held: (AIR p. 32, para 13)

"13. It is manifest from the above that the rights to salary, pension and other

service benefits are entirely statutory in nature in public service. Therefore, these rights, including the right to salary, spring from a valid and legal appointment to the post. Once it is found that the very appointment is illegal and is non est in the eye of law, no statutory entitlement for salary or consequential rights of pension and other monetary benefits can arise. In particular, if the very appointment is rested on forgery, no statutory right can flow from it."

18. We agree with the view taken by the Patna High Court in the aforesaid cases."

17. Thus, a regular and permanent employee may also not be entitled to the protection of Article 311 of the constitution of India, if, his appointment itself was illegal or fraudulent, thereby warranting its cancellation, as, such action, is not punitive i.e. it is not based on any misconduct during his tenure as a civil servant, though, in the case of a permanent employee an opportunity of hearing may be required to be given.

18. Moreover, it is not a case where any stigma has been attached to the petitioners. No stigmatic finding has been recorded against the petitioners in any enquiry or order. It is not a case of dismissal or removal or termination from service based on any misconduct after enquiry. It is not a punitive action. It is a case of cancellation of selection and appointment of an employee on probation/temporary service on account of the selection being vitiated for non-adherence to the relevant rules and Government orders. In view of the above discussion the Court is of the view that Article 311 of the Constitution is not at all attracted to the case at hand.

19. In this very context Sri Misra submitted that as the petitioners were not at all at fault and there was no misrepresentation or fraud on their part, therefore, the impugned action is neither fair nor reasonable and is too harsh. This plea has no legal basis. The petitioners cannot claim any enforceable right on a civil post unless their selection and appointment is as per rules. Sympathy or equity by itself cannot have any role in such matters. Reference may be made in this regard to the pronouncement of the Supreme Court in the case of Ashok Kumar Sonkar Vs. Union of India (UOI) and Others, (2007) 6 JT 127 : (2007) 3 SCALE 517 : (2007) 4 SCC 54 : (2007) 2 SCC(L&S) 19 : (2007) 3 SCR 95 : (2007) 3 SLJ 420 .

20. Now coming to the illegalities in the selection the same are noticed as under:

(a) Admittedly, as per the pleadings of the petitioner in the writ petition the selection committee constituted by the Chief Medical Officer, Barabanki vide order dated 13.11.2006 was neither in accordance with Rule 16 of The Group D Employees Rules 1985 (hereinafter referred as the rules of 1985) nor in accordance with the The Uttar Pradesh Direct Recruitment to Group "D" Posts (Inclusion of a Member Nominated by the District Magistrate in the Selection Committee) Rules, 2006 (hereinafter referred as the Rules of 2006). Rule 16 of the Rules of 1985, as amended in the year 1992, reads as under:

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

(1) Appointing Authority:

(2) An officer belonging to Scheduled Caste/Scheduled Tribe, nominated by the District Magistrate if the Appointing Authority does not belong to Scheduled Caste/Scheduled Tribe. If the Appointing Authority belongs to Scheduled Caste/Scheduled Tribe, an officer other than belonging to Scheduled Caste/Scheduled Tribe, Minority Community and Backward Class to be nominated by the District Magistrate.

(3) Two officers nominated by the Appointing Authority, one of whom shall be an officer belonging to Minority Community and the other to backward Class. If such suitable officers are not available in his department or organization, such officers shall, on the request of the Appointing Authority, be nominated by the District Magistrate and on his failure to do so, by reason of non-availability of suitable officers, such officers shall be nominated by the Divisional Commissioner."

Admittedly, the Chief Medical Officer, Barabanki, who was the appointing authority, did not belong to the Scheduled Caste/Scheduled Tribe, therefore, a nominee of the District Magistrate belonging to the Scheduled Caste/Scheduled Tribe was required to be included as per Rule 16(2) of the Rules of 1985, but this was not done.

The Rules of 2006 read as under:--

THE UTTAR PRADESH DIRECT RECRUITMENT TO GROUP "D" POSTS (INCLUSION OF A MEMBER NOMINATED BY THE DISTRICT MAGISTRATE IN THE SELECTION COMMITTEE) RULES, 2006.

1.(1) These rules may be called the Uttar Pradesh Direct Recruitment to Group "D" Posts (Inclusion of a Member nominated by the District Magistrate in the Selection Committee) Rules, 2006.

(2) They shall come into force at once.

(3) They shall apply to direct recruitment to Group "D" Posts under the rule making power of the Governor under the proviso to Article 309 of the Constitution except the posts which are within the purview of the Uttar Pradesh Public Service Commission.

2. These rules shall have effect notwithstanding anything to the contrary contained in any other rules or orders.

3. In these rules, unless there is anything repugnant in the subject or context:--

(a) "Constitution" means the Constitution of India;

(b) "Government" means the State Government of Uttar Pradesh.

(c) "Governor" means the Governor of Uttar Pradesh.

4. The Selection Committee prescribed for direct recruitment to Group "D" Posts under the provisions of the relevant Service Rules shall, henceforth, invariably include an officer nominated by the District Magistrate as one of the Members of the Selection Committee."

The Rules of 2006 are applicable to direct recruitment Group "D" posts under the rule making power of the Governor under proviso to Article 309 of the Constitution of India except the posts which are within the purview of the U.P. Public Service Commission. Indisputably, the Group "D" posts in question were under rule making power of the Governor under Article 309 of the Constitution of India as is evident from a bare perusal of the Rules of 1985 which have been made under proviso to Article 309 of the Constitution of India. It is nobody's case that Group "D" posts are within the purview of the U.P. Public Service Commission. Thus Rules of 2006 were applicable to the selection and appointments in question. Rule 2 of the Rules of 2006 contains a non-obstante clause, thus, these rules have overriding effect over anything to the contrary contained in any other rules or orders. These rules came into force on 3.3.2006 and were in operation on the date of constitution of the selection committee on 13.11.2006. These rules were applicable in addition to the provisions contained in Rule 16 of the Rules of 1985 as amended in the year 1992, thus, in addition to the stipulation contained therein, a nominee of the District Magistrate was necessarily to be included in the selection committee for direct recruitment to Group "D" posts in view of the rules of 2006. The words "shall" and Invariably" used in Rule 4 of the Rules of 2006 leave no doubt that inclusion of a nominee of the District Magistrate was mandatory. The term Invariably" means not variable, constant and always uniform. The inclusion of a nominee of the District Magistrate in the selection committee has been prescribed to ensure impartiality, objectivity and transparency in the selection. It minimizes the scope of connivance amongst officials who constitute the selection committee. The nominee is the watchdog. This appears to be the purpose and object behind the Rules of 2006. The amendment in the Rules of 1985 in the year 2008 is thus inconsequential and the submission of Sri Misra that there was no substantial illegality as representatives of various categories were part of the selection committee constituted by the C.M.O., is not acceptable, being rather simplistic. Indisputably, there was no nominee of the district magistrate in the selection committee as per the Rules of 1985 nor as per the Rules of 2006, as is admitted in para 8 of the writ petition, and has been asserted in para 10 of the 1st counter-affidavit, therefore, its constitution itself being de-hors the rules, this by itself is sufficient to sustain the action impugned.

(b) The time schedule for holding the selection in question and making appointments was fixed by the State Government was as under:

(i) Issuance of advertisement: By 9.10.2006.

- (ii) Last date for submission of application form: 23.10.2006
- (iii) Issuance of call letters for interview: By 3.11.2006
- (iv) Holding of interview: Between 13.11.2006 and 18.11.2006.
- (v) Declaration of Result: By 25.11.2006.
- (vi) Issuance of Appointment Letters: By 30.11.2006.

Assuming that the letter dated 25.9.2006 containing the aforesaid time schedule was received by the Chief Medical Officer, Barabanki on 22.10.2006 on account of which the advertisement could not be issued by 9.10.2006 and the same was issued only on 27.10.2006, the fact remains that the application forms could be obtained by the candidates from the office of the Chief Medical Officer, Barabanki, latest by 31.10.2006 and the last date for submission of the application forms was 2.11.2006, in between, 29.10.2006 was a Sunday, and offices remain closed, at best 5 days, with one Sunday in between, were available to the candidates for obtaining and then submitting the application form, which was quite inadequate. If a candidate obtained an application form on 31.10.2006 and sent the same by registered post or courier, it may not have been possible for it to reach the office of Chief Medical Officer on 2.11.2006 i.e. within two days. Several candidates may not have applied for this very reason. As per the above mentioned time table 14 days" time had been prescribed. The C.M.O. could not have relaxed the time schedule fixed and approved by the State Government on its own without the approval of the Government.

As per the advertisement the applications were to be sent either by registered post or courier. The enquiry report dated 16.7.2008, which is on record, contains a finding based on the relevant dak register, that only 18 applications were received by the said mode though a total of 602 applications have been shown as having been received. Thus 584 applications were received by a mode not permissible as per the advertisement which was clearly a transgression of the terms of the advertisement. The statement of the witness relied upon by the petitioner does not offer any reasonable explanation in this regard.

As per time schedule fixed by the State Government the interviews were to be held over a period of 5 days but in this case the interviews were completed within 3 days i.e. from 16.11.2006 to 18.11.2006. A total of 487 candidates were interviewed, meaning thereby, at least 162 candidates were interviewed per day. Surprisingly, in spite of there being sufficient time to declare the result by 25.11.2006 (as per prescribed time schedule) the selection committee hurriedly declared the result on the last day of the interviews itself i.e. 18.11.2006, after interviewing at least 162 candidates, if not more. Not only this, the appointment letters were also prepared and issued on the same day. Thus, this hurried exercise of holding interviews of more than 160 candidates, declaring result, preparing appointment letters and issuing the same, was completed in one go, on the same day, though there was no such hurry. As per time schedule the

result could have been declared by 25.11.2006 and appointment letters could have been issued by 30.11.2006. This undue, unnecessary and unjustified haste in the matter is clearly borne out.

The appointment letters are normally issued by registered post as is mentioned in the enquiry report dated 16.7.2008. In this case the appointment letters were issued on 18.11.2006 which must have been late in the afternoon or evening, considering the volume of work which was required to be completed during the day. Though, the mode by which they were issued is not known, but the appointees submitted their joining within one or two days i.e. on 20.11.2006. The enquiry report contains a recital that before joining the candidate had to get himself medically examined and obtain character certificates etc. The receipt of appointment letters and the submission of joining by them in such short time does give credence to the stand of the opposite parties that selection was not transparent and fair and that there was backdating.

The aforesaid facts are born out from the enquiry report dated 16.7.2008 which was brought on record by the opposite parties vide supplementary counter-affidavit dated 14.8.2014 but no rebuttal was filed, what to say a satisfactory one. Their pleadings are contained in the rejoinder-affidavits to the main counter-affidavit filed earlier and the submissions contained in the written submissions and those advanced during the course of arguments, which have already been referred to hereinabove do not furnish a satisfactory explanation.

When the aforesaid unnecessary haste is considered against the backdrop of the decision of the District Magistrate to order an inquiry into the selection and stay of the appointments and the belated response of the C.M.O. on 12.12.2006, as also the notification of election on 18.11.2006 and consequent stay of selection and appointment by the State Government on 29.11.2006, the belated response to this letter by C.M.O. vide letter dated 12.12.2006 stating that the candidates had already joined on 20.11.2006 itself, and the time schedule prescribed which was not adhered even after its belated communication on 22.12.2006, it is evident that there is more to it than what meets the eye, thereby giving credence to the assertion of the opposite parties, as contained in the enquiry report, that this exercise was ante dated and the selection was neither fair nor transparent. It was certainly not in keeping with tenets of Articles 14 and 16 of the Constitution of India.

(c) As far as the allegation of excess appointments is concerned as per the Rules of 1985 the competent authority is required to determine the number of vacancies to be filled during the course of the year under Rule 19. The term "year of recruitment" has been defined under Rule 4(j) which means 12 months commencing from 1st day of July of the calendar year. The report dated 4.9.2009 submitted in the disciplinary proceedings against the Chief Medical Officer, Barabanki refers to some noting in the files regarding existence of 23 vacancies, though only 17 were advertised. Except this report, there is no other document to show that 23 vacancies existing on the date of advertisement, nevertheless,

even if it was so, appointments could not have been made against 23 posts without taking the Government in confidence as the process had been initiated in pursuance to the G.O. dated 22.8.2006 and 12.9.2006, certainly not without advertising the same. Contrary to the submission of Sri Misra, the Advertisement did not contain any recital regarding vacancies being variable. The judgments relied upon by the learned counsel for the petitioners are, thus, of no help.

(d) The enquiry report dated 16.7.2008 mentions specific examples in respect of each post, which was advertised, wherein, the general category candidates were shown against the reserved posts and the reserved category candidates who were entitled to be included in the general list based on over all general merit were shown in the reserved category. These findings in the enquiry report have not been belied by the petitioners, therefore, for this reason also the selection was vitiated. I do not find any infirmity in the recitals contained in the enquiry report in this regard nor in the impugned order.

21. Now coming to the issue of denial of principles of natural justice, there is no straight jacket formula for application of the same. It is trite that principle of natural justice is no unruly horse. The principles of natural justice are to be complied with having regard to the fact situation existing in a case and not in a vacuum. There are well-settled exceptions to the same. One of the exceptions is that if based on undisputed facts only one view of the matter could be formed or only one conclusion could be arrived at, then, principles of natural justice are not attracted and the action impugned would not be invalidated only on account of their non-adherence. A reference may be made in this regard to the decision of Hon"ble Supreme Court in the case of Mohd. Sartaj and Another Vs. State of U.P. and Others, AIR 2006 SC 3492 : (2006) 108 FLR 847 : (2006) 1 JT 331 : (2006) 1 SCALE 265 : (2006) 2 SCC 315 : (2006) SCC(L&S) 295 : (2006) 1 SCR 377 : (2006) 2 SLJ 208 : (2006) AIRSCW 399 : (2006) 1 Supreme 262 and the case of Juwarsingh and Others Vs. State of Madhya Pradesh, AIR 1981 SC 373 : (1980) CriLJ 1418 : (1980) 4 SCC 379 . In this regard reference may also be made to the judgment of Hon"ble Supreme Court in the case of Viveka Nand Sethi Vs. Chairman, J and K Bank Ltd. and Others, (2005) 2 ESC 260 : (2005) 106 FLR 207 : (2005) 5 JT 193 : (2005) 2 LLJ 1034 : (2005) 5 SCC 337 : (2005) SCC(L&S) 689 : (2005) 1 SCR 1095 : (2005) 3 SLJ 148 . The case of S.L. Kapoor (supra) has also been considered in the case of Mohd. Sartaj (supra).

22. In the case at hand, indisputably, the very constitution of the selection committee was dehors the Rules of 1985 and the Rules of 2006 which have been made under the proviso to Article 309 of the Constitution of India, therefore, an enquiry or an opportunity of hearing would be an empty formality. The very procedure of selection and the manner in which it was done was in the teeth of Articles 14 and 16 of the Constitution of India. These defects, as discussed earlier, could not be cured by the petitioners even if a prior opportunity of hearing was given to them, therefore, giving of opportunity would have been a futile exercise. In any case sufficient opportunity was given to the petitioners

before this Court, but, for the reasons already mentioned earlier, the submissions advanced on their behalf have not found favour. The copy of the enquiry report dated 16.7.2008 pointing out the illegalities in the selection, was provided to the petitioners, before this Court, in August, 2014 and they had ample opportunity to rebut the findings contained therein, but they did not do so. The explanations offered by them in the pleadings and during the course of arguments, as also, in their written submissions, are not at all tenable for the reasons already mentioned herein above. Thus, effectively no prejudice has been caused to the petitioners as they have had sufficient opportunity to place their case before this Court. The principles of natural justice cannot be used as mere technical tools to set aside apparent illegalities.

23. At the earliest an inquiry was ordered by the District Magistrate on 25.11.2006, wherein the illegalities were detected, thereafter, an inquiry was ordered by the State Government on 6.6.2007, but, on account of transfer of the inquiry officer, the same could not be completed and again orders had to be issued in August and September 2007. After submission of the inquiry report on 16.7.2008, the impugned orders were passed in September 2008, thus, not only the action was initiated promptly but the same was also completed within a reasonable period. All along petitioners knew that the validity of their selection and appointment was being inquired and they even approached this Court for payment of salary by filing Writ Petition Nos. 848 (SS) of 2007 and 850 (SS) of 2007. Their services were never confirmed, thus, no vested right nor any legitimate expectation of continuance in service accrued in their favour.

24. The case of Shrawan Kumar Jha v. State of Bihar, 1991 Supp. (1) SCC 330 , which has been relied upon by the learned counsel for the petitioners was considered in the case of State of M.P. and Others Vs. Shyama Pardhi etc. etc., (1996) 1 AD 253 : AIR 1996 SC 2219 : (1995) 9 JT 578 : (1995) 7 SCALE 216 : (1996) 7 SCC 118 : (1995) 5 SCR 448 Supp : (1996) 1 UJ 218 , as also in the case of Mohd. Sartaj (supra) and it was distinguished on the ground that the appointment in question was per se illegal and in such cases the principles of natural justice have no application. In the case at hand also the selection and appointments are per se illegal and void ab initio.

25. In this regard reference may also be made to the case of Ashok Kumar Sonkar Vs. Union of India (UOI) and Others, (2007) 6 JT 127 : (2007) 3 SCALE 517 : (2007) 4 SCC 54 : (2007) 2 SCC(L&S) 19 : (2007) 3 SCR 95 : (2007) 3 SLJ 420 , wherein their Lordships of the Hon"ble Supreme Court held that as the provisions of Articles 14 and 16 of the Constitution and statutory rules were not complied with, the appointments were, therefore, illegal, being distinct from irregular appointments, and consequently it would be wholly improper to invoke the equity jurisdiction. On the question of application of the principles of natural justice also their Lordships, after referring to various judgments, held that the application of such principles is not necessary where it would be a futile exercise.

26. The contention of Sri Misra that the Chief Medical Officer surrendered his

discretion in favour of the State Government by acting mechanically on the dictates of the State Government, is also not tenable. As the Chief Medical Officer, who was the appointing authority and was also the Chairman of the Selection Committee, was himself alleged to have been involved in committing the illegalities, therefore, the State Government being the employer rightly got an enquiry conducted through the Director (Administration) Medical and Health and based thereon it rightly decided to invalidate the selection, and pass requisite orders to cancel the selection and appointments and communicated the same to the subordinate officers for taking appropriate consequential action, whereupon, the Chief Medical Officer passed the consequential order of cancellation and appointments of the petitioners. In the facts of the case, the action of the Chief Medical Officer cannot be faulted on this count. In the facts of the case the judgments relied upon by the learned counsel for the petitioners do not help his case.

27. Merely because the enquiry report was submitted in the disciplinary proceedings against the Chief Medical Officer Sri T.R. Kalra, exonerating him, by itself does not help the petitioners in view of the incriminating material brought on record by the opposite parties. It is also for this reason that the said report in respect of Sri Kalra has not been accepted by the State Government and notice has been issued to him to show-cause. Moreover, on a bare perusal of the said enquiry report dated 4.9.2009 this Court has no hesitation in saying that the same is a superficial report which does not consider relevant aspects of the matter which have been considered by the Director (Administration) Medical and Health in his report dated 16.7.2008. Similar is the report of Additional Director dated 26.12.2006.

28. The Court takes strong exception to the pendency of the disciplinary proceedings against Sri Kalra since 23.12.2010. If notice had been duly served upon him and he had not replied, then appropriate decision should have been taken as per law within a reasonable time. Accordingly the Principal Secretary, Medical and Health is directed to institute an enquiry regarding delay in the said proceedings and take appropriate action against the erring officials/employees, as per law. The proceedings against Sri Kalra shall be completed expeditiously if there is no legal impediment. In view of the above discussion the writ petition lacks merits and is dismissed. Parties to bear their own costs.