
(2007) 02 AHC CK 0134
In the Allahabad High Court
Case No : Writ Petition No.4725 (S/S) of 2005

Suraj Singh and Others

APPELLANT

Vs

State of U.P.and Others

RESPONDENT

Date of Decision : 23-02-2007

Acts Referred:

Constitution of India, 1950 — Article 14, 226
Industrial Disputes Act, 1947 — Section 2(j), 2(ka)

Citation : (2007) 02 AHC CK 0134

Hon'ble Judges : Devi Prasad Singh, J

Final Decision : Allowed

Judgement

Devi Prasad Singh, J.—I have heard the learned counsel for the parties" and after exchange of affidavits, proceeded to decide the present writ petition finally at admission stage, with the consent of parties.

The present petition has been preferred under Article 226 of the Constitution of India feeling aggrieved with the selection process initiated by opposite parties in pursuance to impugned advertisement dated 15th March, 2005 as contained in Annexure6 to the writ petition initiated to fill up the regular vacancies of Class III and Class IV posts of U.P. Khadi Evam Gramodyog Board, Lucknow (in short hereinafter referred as the Board) on the ground that the opposite parties had proceeded to fill up the vacancies in question in utter disregard to relevant Rules as well as for extraneous reasons.

2. The brief facts of the case are that the opposite party No.2 by the impugned advertisement No.21 of 2005 dated 15th March 2005, as contained in Annexure6 to the writ petition, had proceeded to fill up the vacancies of Spinning Guide, Peon and Watchman. The procedure adopted by the respondents to fill up the vacancies is based on interview.

3. Thirty marks have been provided for interview for the post of peon/chaukidar (67 posts). Apart from the 10 additional marks have been provided for the serving employees of the Board with the rider that the employees serving in the

Board shall be entitled for 2 marks for each year of their service which shall be maximum to 10 marks. Thus the total marks for Class IV employees for the interview comes to 40 marks.

4. Similarly, for the post of Spinning Guide (21 posts) apart from 30 marks of interview 10 marks have been provided for serving employees with rider of 2 marks for each year of the service. Further 2 per cent marks have been allocated on the basis of total marks received in the High School examination with the rider of maximum of 10 marks. Thus total marks for the post of Spinning Guide comes to 50 (30+10+10=50). The allocation of marks and constitution of Selection Committee has been provided vide order dated 13.5.2005 for Spinning Guide and Class IV posts vide two separate orders of the same date, copies of which have been filed as Annexure SCA9 and 10 to the SCA filed by the respondents. In pursuance to impugned advertisement interview for the post in questions were held but the result has been not declared on account of interim order passed in the present writ petition.

5. The Board has been constituted in pursuance to the Act of State Legislature namely U.P. Khadi and Village Industries Board Act, 1960 (in short hereinafter referred as "the Act"). The Board was constituted with the aim and object for the development of Khadi and Village Industries in the State of U.P. and the matter connected therewith. Under Section 4 of the Act by Government notification in official gazette the Board has been constituted which is a body corporate having perpetual succession and common seal. Under Section 5 the Minister Incharge of the Khadi and Village Industries of the State Government shall be ExOfficio Chairman of the Board. The Director of the industries of the Government of U.P. or its nominee, Secretary, Government of U.P. of the Industry Department, Secretary, Government of U.P. of Finance Department, Secretary, Government of U.P. of the Rural Department or their nominees are the members of Board. Apart from these members seven nonofficial members are to be appointed by State Government who are in the opinion of State Government has got experience and capacity to deal with matters relating to the development of Khadi and Village Industries. Under Subsection 2 of Section 5 the State Government appoints the full time Vice Chairman for the Board.

6. Under Section 2(III) Khadi has been defined and Section 3 of the Act empowers the State Government to declare the Khadi Industries meant for development by the Board by publishing the official notification and making it part of Act as Schedule.

7. The power of appointment of employees or staff has been given under Subsection 10 of the Act. Under Subsection 1 of Section 10, the State Government has been accorded power to appoint Chief Executive Officer, Financial Advisor and Account Officer. The appointment of Account Officer has been subjected to consultation with the Board. Subsection 3 of Section 10 empowers the Board to make appointment in accordance to Regulations and for other post or employees as they thinks fit and proper. For convenience Section

10 is reproduced as under:

?(1) The State Government shall, on such terms and conditions as it may be general or special order specify in this behalf, appoint such person, including a government servant, as it deems fit, as

(a) Chief Executive Officer,

(b) a Financial Advisor, and

(c) an Accounts Officer.

(2) The Accounts Officer shall be appointed in consultation with the Board.

(3) The Board may, in accordance with the Regulations made in this behalf, appoint such other officers and employees as it thinks fit.]?

8. The Board is the highest body and its function has been provided under Section 15 of the Act. However, Section 16 provides that while discharging its duties under the Act Board shall be bound by the directions issued by the State Government. For convenience Section 16 is reproduced as under:

(1) In the discharge of its functions under this Act, the Board shall be bound by such directions as the State Government may give to it.

(2) The Board shall not dispose or acquire immovable property, except with the prior approval in writing of the State Government.

9. Section 36 of the Act empowers the State Government to make Rule for carrying out the purpose of Act. For convenience Section 36 of the Act is reproduced as under:

(1) The State Government may, after previous publication and by notification in official Gazette, make rules for carrying out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing powers, such rules may provide for all or any of the following matters, namely

(a) [* * *]

(b) [* * *]

(c) [the powers and duties of the Financial Advisor and Accounts Officer]

(d) the matters concerning the functions of the Board.

(e) expenditure to be embodied in the annual financial statement;

(f) the matters concerning the programmes and schemes of the Board;

(g) the matters concerning the annual financial statement and the supplementary financial statement of the Board;

(h) [the submission of the annual report under Section 29;]

- (i) the form and manner in which accounts and other records in relation to the functions of the Board shall be maintained under subsection (1) of Section 30;
- (j) the preparation and submission of the annual statement of accounts under subsection (2) of Section 30;
- (k) the procedure to be followed in removing a member under Section 6;
- (l) the procedure to be followed and the conditions to be observed in borrowing moneys under Section 28;
- (m) the conditions subject to which and the mode in which contracts may be entered into by or on behalf of the Board; and
- (n) any other matter which has to be or may be prescribed.

(3) All Rules made under this Act shall, as soon as may be after they are made, be laid before each House of the State Legislature which it is in session, for a total period of fourteen days extending in its one session, of more than one successive session and shall unless some later date is appointed, take effect, from the date of their publication in the official Gazette, subject to such modifications or annulments as the two Houses of the Legislature may agree to make so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done thereunder.?

10. Section 37 of the Act empowers the Board to make Regulations with previous sanction of the State Government consistent with the provisions of the Act as well as the Rules made under the Act. All such Regulations are liable to be notified in official gazette. For convenience Section 37 of the Act is reproduced as under:

(1) The Board may, with the previous sanction of the State Government, make Regulations consistent with this Act, and the Rules made thereunder and notify them in the Official Gazette.

(2) In particular and without prejudice to the generality of the foregoing power, the Board may make Regulations providing for

(a) the procedure in regard to the transaction of business of the Board or of its Committees;

[(b) the appointment and conditions of service of the persons referred to in subsection (3) of Section 10;]

(c) the matters relating to functions and duties of the employees of the Board;

(d) [* * *]

(e) [* * *]

(f) any other matter which has to be or may be provided for by Regulations.

11. However, Section 38 of the Act further provides that the provision under the Act shall be in addition to, and not in derogation of, the provisions and any other law for time being in force relating to Khadi and Village Industries. For convenience Section 38 of the Act is reproduced as under:

(1) Nothing in this Act shall apply or be deemed to apply to any industry, the control of which by the Union is declared by Parliament by law to be expedient in the public interest.

(2) The provisions of this Act shall be in addition to, and not in derogation of, the provisions any other law for the time being in force relating to Khadi and Village Industries.

12. In pursuance to power conferred by Section 2 (VIII) and Section 3(1) of the Act some of the industries have been identified for the purpose of their development and has been mentioned under the Schedule attached with the Act. For convenience the Schedule of the Act is reproduced as under;

SCHEDULE

[See Section 2(Viii) and 3(1)]

1. Beekeeping.
2. Cottage Match Industry.
3. Cottage Pottery Industry.
4. Cottage Soap Industry.
5. Flaying, curing and tanning of hides and skins and ancillary industries concerned with the same and cottage leather industry.
6. Ghani oil industry.
7. Handmade Paper.
8. Manufacture of Cane Gur and Khandsari.
9. Palm Gur making and other palm products industry.
10. Processing of cereals and pulses.
11. Fibre other than coir.
12. Black Smithy and Carpentry (Manufacturing and servicing not involving the use of power: power may be used in the case of manufacture of Ambar Charkhas and their accessories.)
13. In pursuance to power conferred by Section 37 of the Act by notification dated 1.6.1973 the Board had framed and notified the Regulations. According to Regulation 2 the various provisions relating to government servant has been made applicable for the employees of the Board. Under Regulation 9 it has been

provided that the vacancies of various posts and service in the board shall be filled up in the manner the vacancies of industries department are being filled up. It shall be relevant to mention that when the Board was constituted, certain employees were transferred to Board from the Directorate of Industries to serve the Board. For convenience Regulation 2 and Regulation 9 is reproduced as under:

14. The Regulation dated 1.6.1973 covers the post in question. The post of Spinning guide and peon/watchman has been mentioned at Sl. No.15 and 18 of the schedule of the Regulation notified on 1.6.1973. While disclosing these posts it has been categorically mentioned that these post falls within the Industrial Dispute Act with the title. 15. The Regulation notified on 1.6.1973 was further amended by another notification dated 20.6.1990. However, while amending the Regulation of the year 1973, Regulation 9 has not been changed and has been maintained as it is.

16. The service condition of industry department is governed by ?U.P. Industries Department Class IV Service Rule 1974? (in short hereinafter referred as the 1974 Rule). Rule 13 of 1974 Rule deals with the procedure relating to direct recruitment. SubRule 2 of Rule 13 provides that appointing authority shall invite application through the employment exchange in accordance to procedure prescribed by the Government in that behalf. Under SubRule 3 of Rule 13, it has been provided that all applications received through employment exchange shall be scrutinized by the appointing authority who shall call upon such persons who seems to be best qualified for interview before the Selection Committee. SubRule 5 of the Rule 13 provides that in making assessment of suitability during the course of interview the educational qualifications, health, temperament and past experience bearing to post and the fact that candidate know cycling shall be taken into considerations. The name shall be arranged in order of preference. The Select list contains the names of candidates" double to the number of vacancies for which the selection is made. SubRule 4 of Rule 13 provides the persons who shall be the member of Selection Committee.

For convenience Rule 13 is reproduced as under:

?13. Direct recruitment (1) The appointing authority concerned shall ascertain the probable number of vacancies likely to occur in different categories of posts in the service during the course of the year which are required to be filled up by direct recruitment appointing authority shall also determine the number of vacancies to be reserved, if any, for candidates belonging to scheduled caste and other categories under Rule 5.

(2) The appointing authority shall invite applications through the Employment Exchange in accordance with the procedure prescribed by the Government in this behalf.

Note The procedure for inviting applications at the time of commencement of these Rules is given in Appendix C to these Rules.

(3) The applications received through the Employment Exchange shall be scrutinized by the appointing authority which shall call such persons as seem best qualified under these Rules for interview before the Selection Committee at a date and time to be fixed for the purpose.

(4) The Selection Committee referred to in subRule (3) shall consist of the following

(a) for the post at the Head Office

(1) Assistant Director of industries (Establishment).

(2) A representative from the local employment Exchange.

(b) for the posts at the Zonal/subZonal Office

(1) Zonal/subZonal Officer

(2) A representative from the local employment Exchange.

(c) for the post under Rural Industries Projects

(1) Dy. Director of Industries (Rural Industries Project)

(2) A representative from the local employment Exchange.

(d) for the posts under Area Development Office

(1) Area Development Officer.

(2) A representative from the local Employment Exchange.

(e) for the posts at the District Level

(1) District Industries Officer

(2) A representative from the local Employment Exchange.

(f) for the posts under any other scheme

(1) An officer of the Department nominated by the Director.

(2) A representative from the local Employment Exchange.

(5) The Selection Committee shall interview candidates and select to such candidates as in its opinion are most suitable for the post. In making assessment of the suitability regard shall be shown to the educational qualifications, health, temperament and past experience having bearing to the post and the fact that the candidate knows cycling. The names of the selected candidates shall be arranged in a select list to be drawn up on order of preference. The list shall be contain the names of the candidates double the number of vacancies for which the selection is made. The list shall hold good for one year or until next selection.?

The averments made in Para 4, 5 and 6 of the Supplementary Counter Affidavit

reveal that the advertisement was issued and selection was done in pursuance to provision contained in mRrj izns''k [kknh rFkk xzkeks|ksx cksMZ] lewg ?kj Isok fofu;ekoyh 2005 (in short hereinafter referred as the 2005 Rules), a copy of which has been filed as Annexure SCA 1 to the Supplementary Counter Affidavit. Though the 2005 Rules indicate the date of notification as 23rd March 2005 but it seems to be published in the U.P. Gazette on 28th May 2005.

Accordingly, the submission of Shri H.S. Jain, learned counsel for the petitioner is that the 1995 Regulation shall not be applicable for the selection in question. Clause 2 of Rule 1 provides that the Regulation shall be enforced w.e.f. its publication in official gazette, i.e. ?;g xtV esa izdkf''kr gksus ds fnukad ls iznf''kZr gksxh]

17. It has been submitted by respondents' counsel that petitioner's service can not be regularized as under U.P. Regularisation of Daily Wages Appointment of Group D Posts Rules 2001, (in short hereinafter referred as Regularisation Rule 2001), only those Class IV employees or daily wagger employees may be regularized who were appointed prior to 29.6.1991.

18. While assailing the impugned advertisement and selection initiated by the respondents learned counsel for the petitioner Shri H.S. Jain had submitted that:

(I) The impugned selection process was initiated and processed in violation of relevant Rules, Regulations and settled proposition of law.

(II) The provision contained in U.P. Industrial Dispute Act and Rules framed thereunder shall be applicable, which has not been followed.

(III) Entire selection process suffers from arbitrary exercise of power for extraneous reasons and under political considerations hence suffers from malice and not sustainable under law. Opposite parties had acted in discriminatory manner by not considering the petitioner's case for regularization.

(IV) Members of Selection Committee for extraneous reasons and also for political compulsion had not granted marks separately by creating different heads. All the members of Selection Committee had jointly signed the interview sheet. (para 39 of the Writ petition)

(V) According to petitioner's counsel, petitioners service have been protected by Industrial Dispute Act as well as U.P. Industrial Employment Model Standing Order 1991 (para 2, 3 and 13) and Industrial Employment (standing order) Act 1946. (See 2(e) and Section 12A) Entire interview and selection conducted by the respondents was a sham transaction in a very arbitrary manner by doing paperwork to select candidates possessing either higher links or for extraneous considerations.

(VI) Persons have been selected for Junior Spinning Guide by awarding higher marks even though they do not possess requisite qualification and experience.

(VII) Similarly situated candidates have been regularized, hence petitioner

suffered discriminatory treatment by the Board. Persons appointed as consolidated pay in the year 1995/96 & 1996/97 regularised vide order dated 1.7.2003. However, the order of regularization, which was cancelled on 13.9.2005, has been stayed in other writ petitions filed by the respective candidates.

(VIII) Petitioners are entitled for payment of Bonus.

19. Learned counsel for the petitioner had relied upon the various judgments of this Court and Apex Court reported in 1971 (1) SCC 38, *Minor A. Peeriakaruppan v. State of Tamil Nadu and Others*; 1995 (Sup.1) SCC 206, *Satpal and Others v. State of Haryana and Others*; 1993 (3) SCC 663, *D.V. Bakhshi and Others v. Union of India*; 1990 (Suppl) SCC 711, *U.P. Sec. Edu. Comm. v. Smt. Santosh Choudhary*; 2004 (60 SCC 786, *Indra Prakash Gupta v. State of J & K*; 1983 (2) SCC 4, *Gopal Ji Shashtri v. State of Bihar*.

20. On the other hand, the submission of learned Advocate General assisted by Shri A.K. Pandey that the selection was initiated and processed in accordance to relevant rules and law and does not suffer from any infirmity or impropriety. It has been submitted that those candidates whose services were regularized the order of regularization has been cancelled at later stage keeping in view the finding recorded by this Court in this writ petition at interim stage. A copy of cancellation of order of regularization passed by the competent authority has been filed as Annexure SCA 12 to the Supplementary counter affidavit filed by the respondents Board. However, the order dated 13th September 2005 by which the order of regularization dated 30.1.1999 of 9 employees have been cancelled provides that those employees shall continue to discharge duty on ad hoc basis.

21. Though initially there was no dispute that Board is an industry but at later stage, Shri Anil Tewari, learned counsel for the respondents had proceeded to submit that Board is not an industry, hence, provisions contained in Industrial Dispute Act shall not be applicable. At later stage, Shri Anil Tewari learned counsel appeared and argued afresh on behalf of respondents Board. The submission of Shri Anil Tewari is that being temporary or daily wage employees petitioners service can not be regularized. In case they have got any grievance they should approach the labour Court. It has further been submitted that petitioner's have got no right to challenge the impugned selection. They have participated in the selection process. They are not the aggrieved persons. The further submission of the learned counsel for the respondents is that selection has rightly been held in pursuance to interview and even if 2005 Rule was notified on 28.5.2005, the draft Rule could have been followed by the authority. The selection can not be quashed as there is no error apparent at the face of record and this Court has no right to hold an enquiry in the absence of any material. There is no material on record which may establish malafide in the conduction of examination and moreover since concerned officers have not been made party, no inference can be drawn relating to involvement of malafide. It has further been submitted that in block marks can be granted by the Selection

Committee while holding the interview.

Learned counsel for the respondents Shri Anil Kumar Tewari had relied upon the cases reported in 2006 (4) SCC 1, Secretary State of Karnataka v. Umadevi, 2006 (5) SCC 493, National Fertilizer Limited v. Somvir Singh, 2006 (1) SCC 667, State of U.P. v. Neeraj Kumar, 2004 (7) SCC 112, A. Umarani v. Registrar Coop. Societies, 1992 (4) SCC 118, State of Haryana v. Piara Singh, 1997 (1) SCC 245, Union of India v. Mahendra Singh, (1997) 1 SCC 1, Ashwani Kumar v. State of Bihar, 1992 (4) SCC 99, Delhi Development Horticulture Employees Union v. Delhi Admn., 1992 (4) SCC 33, Director Institute of Management Development v. Pushpa Srivastava, 2003 (3) SCC 347, Ramkrishna Kamat v. State of Karnataka, 1996 (7) SCC 499, Hindustan Shipyard Ltd. v. Dr. P. Sambasiva Rao, 2006 (5) SCC 469, A.P. Foods v. S. Samuel, 1991 (2) UPLBEC 898, Chandrama Singh v. Managing Director, 1976 (1) SCC 496, Premier Automobiles Ltd. v. Kamlekar Shantaram Wadke, 1995 (5) SCC 75, Rajasthan S.R.T.C. v. Krishna Kant, 2000 (7) SCC 719, Kiran Gupta v. State of U.P., AIR 1991 SC 2248, Sardara Singh v. State of Punjab, 2000(5) SCC 630, Prabodh Sagar v. Punjab State Electricity Board, 2001 (2) SCC 330, State of Punjab v. V.K. Khanna, 1979 (2) SCC 491, S.R. Venkataraman v. Union of India, 2001(1) SCC 182, Kumaon Mandal Vikas Nigam v. Girja Shanker Pant, 2005 (5) SCC 151, State of Rajasthan v. Ram Chandra, 2004 (12) SCC 390, Medley Minerals Indian Ltd. v. State of Orissa, 1976 (3) SCC 334, The Regional Manager v. Pawan Kumar Dubey, 1985 (1) SCC 523, K. Nagraj v. State of A.P., 1979 (3) SCC 229, State of U.P. v. Hindustan Aluminium Corporation, 1995 Supp (4) SCC 89, Dr. J.N. Banavalikar v. Municipal Corporation of Delhi, 1998 (4) SCC 114, Vimal Kumari v. State of Harayana and Others, 1986 Supp. SCC 285, Om Prakash Shukla v. Akhilesh Kumar Shukla, 1995 (3) SCC 466, Madan Lal v. State of J & K, AIR 1960 SC 137, S.L. Degde v. M.B. Tirumale, 1977 (10) SCC 220, Beant Singh v. Union of India, AIR 1964 SC 477, Syed Yakoob v. K.S. Radhakrishnan, AIR 1975 SC 2092, Disciplinary Committee of Bar Council of Maharashtra v. M.V. Dhabolkar, AIR 1976 SC 2602, Maharaj Singh v. State of U.P., 1976 (1) SCC 671, Jashbhai Motibhai Desai v. Roshan Kumar, 1999 (6) SCC 667, Common Cause v. Union of India, 2002 (5) SCC 521, Sect. Minor Irrigation v. Sahngoo Ram Arya and (1976) 4 SCC 153, State of Karnataka and another v. M.Farida and Others Union Public Service Commission.

22. During the pendency of present writ petition an application for withdrawal of the writ petition was moved, which was rejected by this Court by order dated 23.5.2006 on the ground that serious allegation has been raised by the petitioner"s against the Board, hence in public interest it shall be appropriate that writ petition may be decided on merit. However, at later stage, Shri H.S. Jain, learned counsel for the petitioner informed that some of the petitioners have not signed the withdrawal application.

23. During the course of hearing records were perused by this Court in the presence of parties" counsel. A statement was made by Shri Brahmanand, Chief

Executive Officer of the Board that he was the Chairman of the Examination Committee but he is not aware relating to the recording of day to day proceeding by the Interview Committee. Records show that the Examination Committee on 16.5.2005 had decided that 250 candidates shall be called on each day for interview. Cycle test was to be held in Regional Industrial Training Center, Daliganj Camp, Lucknow. The outcome of cycle test has been recorded in the sheets containing 10851 candidates. The performance of candidates in cycle test has not been recorded individually on the basis of quality point marks. However, the outcome of test has been marked by P for Passed, F for Failed and A for Absent. According to Chief Executive Officer the sheets have been signed by the three officers, who were the members of Committee namely; Arvind Kumar Srivastava, Sri K.N. Khare and Shri Ramesh Chandra Pant. The members of Committee had not granted marks separately on the basis of test. The entire sheet seems to have been filled up by same pen with black ink without indicating the time, date, month and year of the test. This fact has been recorded in the ordersheet dated 13.9.2006 after perusal of record in the presence of parties' counsel.

24. In the spinning test 830 candidates were appeared and outcome of test has been recorded in the same manner as of cycle test. The sheet has been signed by Shri D.N. Pandey, Shri Ramesh Chandra Singh and Shri V.K. Singh said to be members of subcommittee of the spinning test. The sheet containing the outcome of test of spinning also does not disclose the year, month, date and time of the test. It contains only initial of the members of the SubCommittee.

Attendance of the candidates appeared in spinning test has been recorded in a register. The register does not contain column indicating the year, month and date. However, in the two or three pages initials have been made by some officers indicating total attendance, as noticed by this Court in the order sheet dated 13.9.2006.

25. On other register, which was produced before this Court, relates to attendance of peon and watchman who appeared for interview. During the course of perusal of record on 13.9.2006 the Chief Executive Officer of the Board on the basis of instruction received from Shri Sanjay Kumar Kakkar had stated that the register contains the names of 10694 candidates and register has been filled up by one Shri Ajay Kumar Maurya working as Clerk in the Boards office. However, the compilation sheet prepared through computer contains the names of 10272 candidates whose applications were found valid for the post of peon and chowkidar. Accordingly, in case attendance register is presumed to be correct then there is no explanation as to how 422 (10694-10272=422) excess candidates appeared in test and alleged to sign attendance register though not submitted applications.

26. A perusal of result of Selection Committee, which has held interview for the post of spinning guide shows that at the bottom of each sheet five members of Interview Committee had made their initials and marks have been granted

adjacent to name of each candidates in respective column. No separate marks have been granted by members of the Selection Committee to each candidate who appeared for interview.

27. Similarly in the case of peon and chowkidar also five persons of the Committee had signed at the bottom of interview sheets and marks have been granted adjacent to each candidate in respective column. No separate marks have been granted by the members of Interview Committee.

The facts, after perusal of records noticed by this Court in the presence of learned counsel for the parties, is the part of order sheet dated 13.9.2006.

28. On 3.11.2006 a statement was made by Shri A.K. Tewari, learned counsel for the respondents Board as to who had made entry on the sheets containing marks granted by the Interview Committee. The statement made by learned counsel for the respondents Board on 3.11.2006, to the extent it is relevant for the disposal of present dispute, is reproduced as under:

?On the basis of instructions received, Sri Anil Kumar Tewari, learned counsel for the respondent Board submits that the interview sheets and marks for the post of Peons and Chaukidars were filled up and recorded by Sri Sanjay Kumar Kakkar, Assistant Director (Industry) who was the member of the Interview Committee and the marks in the interview sheets for the posts of Junior Spinning Guide were recorded by Sri Narendra Prasad Maurya, Senior Manager being the member of the Selection Committee. These two officers are present in the Court.

It has been further submitted that no separate marks have been granted by the members of the Selection Committee or the Interview Committee. At the time when the selection was held, Sri Sanjay Kumar Kakkar was having the charge of Deputy Chief Executive Officer and Sri Narendra Prasad Maurya was holding the post of Deputy Executive Officer. The allegations contained in para 5 of the second supplementary affidavit dated 19th of February, 2006 has not been categorically denied by the respondents. While giving a reply in para 6 of the second supplementary counter affidavit, on account of vague denial on the part of the respondents, an adverse inference may be drawn. However, Sri Anil Kumar Tewari, learned counsel for the respondentBoard further wants time to file a proper affidavit with categorical averments relating to the allegations raised in the second supplementary affidavit dated 19th of February, 2006.

29. During the course of hearing a doubt was raised by Shri H.S. Jain learned counsel for the petitioner on certain points, hence, records were again perused on 7.12.2006. For convenience order sheet dated 7.12.2006 is reproduced as under:

?Shri H.S. Jain, learned counsel for the petitioner while proceeding with the argument submits that though the interview for the post in question was held on 10.6.2005 and 3.8.2005 but marks in interview given on only one day not day to day basis by the Interview Committee, hence records has been reopened and

perused in the presence of parties counsel with the assistance of Officer of Board Shri Sanjay Kumar Kakkar presently working as Deputy Chief Executive Officer.

As noted in the order dated 13.9.2006 the result of Spinning Guide contains the names of 830 persons and have been recorded in 16 pages. Every page has been signed by the three members of the Committee namely; Shri D.N. Pandey, Shri Ramesh Chandra Singh and Shri Vinod Kumar Singh as informed by the Deputy Chief Executive Officer. However all the 16 pages does not contain any date on any page which may disclose that when the practical test of Spinning Guide was held.

According to Shri Anil Tewari, learned counsel for the respondents test conducted for three days. The interview sheet of Junior Spinning Guide contains the signature of all six persons of Interview Committee namely; Shri Sanjay Kumar Kakkar, Asafia Bano, Shri Narendra Prasad Maurya, Shri Arun Kumar Dwivedi, Shri Jawahar Ram and Shri Dharendra Kumar Agarwal. In the interview sheet as noted in order dated 13.9.2006 marks have been recorded adjacent to the names of each and every candidate. In the interview sheet no date has been indicated by the members of the Interview Committee. However, at top of the sheet date has been typed as 29th July, 2005, 30th July, 2005 and 1st August, 2005. On 29th July, 2005 the sheets contain description of 289 persons though some of them are absent. On 30th of July, 2005 sheet contains the name of candidates from Roll No.290 to 567 and some of them are absent. On 1st of August, 2005 the names of the candidates possessing Roll No.590 to 830 has been recorded and some of them are absent.

According to Shri Anil Kumar Tewari, learned counsel for the respondents on 29th of July, 2006, 200 persons were called for interview, out of which 145 appeared for the interview. On 30th of July, 2005, 200 persons were called, out of which 135 turned up and on 1.8.2005, remaining 159 were called and out of which 106 turned up. Accordingly, Shri Anil Kumar Tewari submits that 386 person turned up for interview for the post of Junior Spinning Guide.

I have perused the sheet of Cycle Test again meant for the post of Peon/ Chowkidar. The sheet contains the signature of six persons as noted in the order dated 13th September, 2006. Though the sheet contains the name of 10651 candidates but it does not disclose the dates when test of Cycle was conducted by the Committee. Members of the Committee has also not written the date while putting their initial. According to Shri Sanjay Kakkar three persons namely Shri Arvind Srivastava, Shri Ramesh Chandra Pant and Shri K.N. Khare has signed the sheet of cycle test.

According to Shri Anil Kumar Tewari, learned counsel for the respondents total 10272 persons were called whose applications were found to be valid against which only 6324 appeared.

Shri Anil Kumar Tewari further submits that on account of panchayat election no further action could be taken on the basis of outcome of practical test of cycle.

As noted in the order dated 13.9.2006, 41 envelopes contain the marks granted in interview for Peon/Chowkidar of various dates. According to Shri Sanjay Kumar Kakkar, Officer present in Court five persons namely Shri Badri Singh Yadav, Shri Rajendra Kumar, Shri Sanjay Kumar Kakkar, Smt. Neeru Srivastava and Shri M.T. Hamid, had signed the interview sheets. Though in the interview sheet the date is in printed form but members of the Interview Committee while making initial have not written the date while making signature. Signature made by the members of Interview Committee is in different ink.

Let the records be kept in a sealed cover again with the Registrar of this Court.

Put up tomorrow i.e. 8.12.2006 for further hearing at 2.00 P.M.

7.12.2006"

30. Apart from above factual position in para 5 of the Second Supplementary Affidavit, serious allegations were made by the petitioners against the Cabinet Minister of the State Government as well as certain other officers.

For Convenience Para 2, 3, 4 and 5 of the 2nd Supplementary Affidavit dated 19.2.2006 are reproduced as under:

?2. That during the midst of the process of recruitment the petitioners have to file this petition as opposite parties were collecting money to the tune of Rs.1,50,000/ or Rs.3,00,000/ as the case may be from the candidates for making selection. A supplementary affidavit was also filed to that effect.

3. That with a view to select the persons of the choice the interview held is in eyewash and entire selection process is a farce.

4. That the petitioners have come to know and believe to be true that impugned recruitment has been done on extraneous considerations and the persons who are working with Sri Rajaram Pandey the Minister of the department and with the officers of the Board have been given higher marks and also those who kith and kin of those persons.

5. That the petitioners have come to know that the marks have been given to the candidates in a most arbitrary manner and higher marks have been given to those who have paid the money or who are relative, kith and kin or working with the Minister of the Department or officers of the Board. In this regard a chart is being given below showing the names and other description:

Sl. No. Name of the candidate Relation/Connection

1. Sri Satyanaam He is brother of the Messenger of Sri Shivpal Singh Yadav, the Cabinet Minister.

2. Sri Vidya Sagar Singh He is relative of Sri B.K. Singh, working as Dy. Chief Executive Officer at Head Office in Board

3. Sri Navneet Srivastava He is relative of Arvind Srivastava working as Dy. Chief

Executive Officer Cooperative at Head Office in Board

4. Sri Gopal Singh He is relative of Sri Arvind working as Shadow of the Minister Sri Rajaram Pandey.

5. Sri Mithilesh Kumar Soni He is brother of Sri Kamlesh Verma, working as Accountant at Head Office of the Board.

6. Sri Ambuj Kumar Singh He is brother of Sri Arvind Singh working as Manager in the Board at Allahabad.

7. Sri Manoj Kumar Singh He is closely connected with Sri Jawahar Ram working as Senior Manager of the Board at Azamgarh.

8. Sri Hari Om Dubey He is son of Sri Sheetla Prasad Dubey Driver of the Board working with Sri Rajaram Pandey, the Cabinet Minister.

9. Sri Dharmendra Kumar Dixit He is son of the Driver posted by the Government with Cabinet Minister Sri Rajaram Pandey.

10. Sri Bal Mukund Pandey He is relative of Sri Rajaram Pandey, the Cabinet Minister and is working in the Board at Allahabad.

11. Sri Bhagwan Das He is closely connected with Sri D.K. Agarwal, ExSenior Chief Executive Officer of the Board at Allahabad

12. Sri Amit Kumar He is son of Sri Shiv Kishore the accountant working at Head Office of the Board.

13. Sri Ram Awadh He is son of Sri Ram Ratan. He is working on daily wage basis in the Board, but he works as domestic servant of Sri Ramesh Yadav the Vice Chairman of the Board. His father Ram Ratan also perform domestic work of Sri Ramesh Yadav.

14. Sri Sanjay He is son of Raghu Nath. He is working on daily wage basis in the Board, but he works as domestic servant of Sri Ramesh Yadav the Vice Chairman of the Board.

15. Sri Deshraj He is son of Sri Ram Shanker. Sri Ram Shanker is working as Peon of Sri Ramesh Yadav the Vice Chairman of the Board.

16. Sri Rajesh Singh He belongs to district Pratapgarh. He has been shown as daily wager in the Board but he works as driver with Sri Rajaram Pandey, the Cabinet Minister.

17. Ms. Geeta Devi She is relative of Sri Ramesh Lal, the Steno attach to the Cabinet Minister Sri Rajaram Pandey.

18. Sri Lalit He is working as domestic servant of the Cabinet Minister Sri Rajaram Pandey.

19. Sri Surendra Bahadur He is working as driver on daily wage basis in the

Board, but he works with Chief Executive Officer of the Board, Sri Ramesh Chandra Mishra.

20. Sri Khem Singh Bahadur He is working as domestic servant of Sri Rajaram Pandey, the Cabinet Minister.

31. The allegations contained in IInd Supplementary Affidavit referred hereinabove were denied by Shri S.K. Kakkar, Deputy Chief Executive Officer of the Board vide his affidavit dated 24.2.2006. The reply given by the respondents in Para 4, 5 and 6 of the counter affidavit to the IInd supplementary affidavit are reproduced as under:

?4. That the contents of the para2 of the 2nd supplementary affidavit are false, baseless, fictitious and imaginary and hence denied. In reply to the contents of the Para2 of the 2nd Supplementary affidavit it is mentioned here that the answering opposite parties have neither demanded any money nor have any information/Knowledge of any such demand.

5. That the contents of the Para3 and 4 of the 2nd supplementary affidavit are false and hence denied. In reply to the contents of para 3 and 4 of the 2nd supplementary affidavit it is mentioned that the selection to the post of peon and Kanistha Katai Margdarshak is being made strictly in accordance with law and the interviews have been conducted by the Selection Committee in a fair manner and the marks have been awarded on the basis of the performance of the candidate.

6. That the contents of the para5 of the 2nd supplementary affidavit are misleading, mischievous, fictitious and imaginary and the same needs no comment from the answering opposite parties so as to the personal relations are concerned and the rest of the contents of the para 5 of the 2nd supplementary affidavit are denied. In reply to the contents of the para 5 of the 2nd supplementary affidavit it is mentioned here that the selection process has been conducted strictly in accordance with law after advertising the post in two leading news papers of Hindi and one daily news paper of Urdu having wide circulation in the State of Uttar Pradesh and every eligible persons was entitled to apply for the same. As far as selection of the named candidates against the advertised post is concerned, the answering opposite parties can not comment on the same as the result has not been finally prepared and all the marks sheet relating to interview are concerned, the same have been deposited in the Hon''ble Court in compliance of the Hon''ble Court''s order.

However, the answering opposite parties respectfully submits that each and every candidate who has appeared in the interview has equal chance of selection and marking it to the merit list including the petitioners.

The following candidates, out of 20 named candidates named by the petitioners, were engaged by the Board on contract basis from time to time depending upon the work and some of them are still working and certain persons have been discontinued, their names are as under:

1. Sri Bal Mukuand Pandey Working on contract basis
2. Sri Rajesh Singh Working on contract basis
3. Sri Sanjay Working on contract basis
4. Sri Ram Awadh Working on contract basis
5. Sri Bhagwan Das Working on contract basis
6. Sri Khem Singh Bahadur Contract discontinued in the year 2002.

The petitioners have wrongly mentioned the persons at serial No.13, 14 & 16 are working as daily wage basis but they are working on contract basis and the person mentioned at Serial No.19 is not working in the Board either as daily wagger or on contract basis.?

32. During the course of hearing on 3.11.2006 when it was pointed out that reply given in para 5 of the counter affidavit to the 2nd supplementary affidavit is vague and there is no categorical denial of relationship and grant of higher marks, supplementary counter affidavit was filed by the respondents Board on 7.11.2006.

33. Though initially while filing reply to 2nd supplementary affidavit the entire allegations of Para 5 was denied by the respondents but in pursuance to observation made by this Court during the course of hearing while filing the supplementary counter affidavit dated 7.11.2006 allegations has been admitted to some extent. For convenience Para 5 of the supplementary counter affidavit filed by the Dr. Neeru Srivastava, presently working as Joint Chief Executive Officer (Karmik), U.P. Khadi and Village Industries Board, is reproduced as under:

?That the petitioners in paragraph 5 of the second supplementary affidavit dated 19.2.2006 has made absolutely false allegations that higher marks have been given to certain incumbents who have paid the money or who are relative kith and kin or working with the Hon''ble Minister of the department or the officers of the Board and the names of 20 persons have been mentioned. The said allegations made in paragraph 5 of the second supplementary affidavit as stated are absolutely false and are categorically and vehemently denied except that Sri Navneet Srivastava whose name is mentioned at Serial No.3 of the chart is real brother of Sri Arvind Srivastava, Arvind Srivastava is presently posted as Deputy Chief Executive Officer (Cooperative) whereas Sri Mithlesh Kumar Soni brother of Sri Kamlesh Verma. Sri Ambuj Kumar Singh is brother of Sri Arvind Kumar Singh, Manoj Kumar Singh is the son of Sri Jawahar Ram. Hari Om Dubey is the son of Sri Shitla Prasad Dubey, Sri Shitla Prasad Dubey is Driver in the Board and deputed on duty with the Chairman of the Board. Sri Amit Kumar is son of Sri Shiv Kishore. Sri Shiv Kishore was previously posted at the head office of the Board and presently posted in the office of district Village Industries Office, at Gonda. Desh Raj is son of Sri Ram Shanker. Sri Ram Shanker is posted as peon in the office of the Vice Chairman Sri Ramesh Yadav. Sri Rajesh Singh although

has not been shown to be the relative of any one was employed on contract basis. However, it is clarified that Sri Rajesh Singh is no more as he has recently expires in a road accident. Ms. Geeta Devi is sister of Sri Ramesh Lal stenographer. Sri Ramesh Lal Stenographer is attached to the office of the Hon"ble Minister of the concerned Department.

In this regard it is submitted that the allegation that Sri Satya Ram is brother of messenger of Sri Shiv Pal Singh Yadav are vague uncertain and are categorically and vehemently denied.

It is also submitted that there is no officer posted or working in the Board with the name of Sri B.K. Singh posted and employed as Deputy Chief Executive Officer at the Head Office in the Board and the allegation that he is relative of Sri Vidya Sagar Singh is categorically and vehemently denied. The allegation that Sri Gopal Singh is relative of Sri Arvind is categorically and vehemently denied.

Similarly the allegation that Sri Dharmendra Kumar Dixit is son of a driver posted by the Government with the cabinet minister is false and is categorically denied. Likewise the allegation that Bal Mukund Pandey is relative of Sri Raja Ram Pandey, Hon"ble Minister is also categorically denied. Further allegation that Sri Bhagwan Das is closely connected with Sri D.K. Agarwal, Ex. Senior Chief Executive Officer of the Board, working at Bareilly is also categorically and vehemently denied.

It is clarified that Sri D.K. Agarwal was the Senior Joint Chief Executive Officer in the Board who has retired from service on 30th September, 2005. It is also clarified that Ram Awadh Singh working as Domestic servant of Sri Ramesh Yadav Vice Chairman of the Board. Further it is admitted that Sri Ram Awadh is employed in the Board on contractual basis but it is denied that he is working as Domestic Servant of Sri Ramesh Yadav, the Vice Chairman of the Board.

The allegations that Sri Lalit is working as Domestic servant of the Hon"ble Cabinet Minister Sri Raja Ram Pandey is absolutely false and is denied. Likewise the allegation that Sri Surendra Bahadur is an employee of the Board on daily wages and is working with the Chief Executive Officer of the Board, namely; Sri Ramesh Chandra Mishra is categorically vehemently denied. It is also clarified that Sri Ramesh Chandra Mishra was previously posted as Chief Executive Officer of the Board but he has been transferred in the month of May, 2006. The further allegation that Sri Khem Bhadur Singh is working as Domestic Servant of the Hon"ble Cabinet Minister Sri Raja Ram Pandey is categorically and vehemently denied.?

34. Subject to facts and circumstances of the case and arguments advanced by the parties" counsel, question arisen for adjudication in the present controversy are adjudicated as follows:

[A] MAINTAINABILITY OF THE WRIT PETITION:

(1) A preliminary objection was raised by the respondents" counsel that present

writ petition is not maintainable on three grounds:

- (a) Petitioners have got alternative remedy to approach labour Court.
- (b) Since petitioners were appeared in the examination in question hence they have no right to challenge the advertisement in question.
- (c) Petitioners are not aggrieved party hence they have no right to file the writ petition.

35. So far as first argument of respondents' counsel that controversy may be relegated to labour Court does not seem to be sustainable keeping in view the present facts and circumstances of the case. Petitioners have challenged the selection on the ground of noncompliance of provisions contained in Industrial Dispute Act as well as Model Standing Orders. It has also been submitted by the petitioner that entire selection process was sham event and selection has been done of the candidates who are kith and kin of persons holding high offices in the Government. Respondents had also raised an objection that Board is not an industry. Once an objection has been raised that Board is not an industry then it shall not be appropriate to relegate the matter to labour Court. From the facts and circumstances of the case as discussed in the present judgment it is a fit case where jurisdiction of Article 226 of the Constitution of India should be exercised to settle the law as to whether Board is an industry or not?

36. Otherwise also even if an alternative remedy is available to the applicant, High Court may not refuse to grant relief under Article 226 of the Constitution of India. If the alternative remedy is not suitable, adequate or equally efficacious, where the remedy is illusory an applicant can not be asked to avail said remedy.

37. In *K.K. Kochuni v. State of Madras* reported in AIR 1959 SC 725, the Constitution bench of Hon'ble Supreme Court held that mere existence of alternative remedy shall not be a bar to exercise jurisdiction under Article 226 of the Constitution of India. The exercise of discretion relating to alternative remedy is a Rule of policy, practice rather than Rule of law. It is self imposed limitation and does not oust the jurisdiction of this Court to exercise power conferred by Article 226 of the Constitution of India even if an alternative remedy is available to an aggrieved person vide (*AIR 1950 SC 163, Rasid Ahmad v. Municipal Board Kairana*; *AIR 1969 SC 556, Babu Ram v. Zila Parishad*; *AIR 1954 SC 403, Himmat Lal v. State of Madhya Pradesh*).

38. Long back Hon'ble Supreme Court in a case reported in AIR 1953 SC 252, *State of Bombay v. United Motors* had that alternative remedy shall not come into the way where party come to Court with an allegation that his fundamental right has been violated and sought the relief under Article 226 of the Constitution of India. It has further been held by Apex Court in the cases reported in *Calcutta Discount Company v. I.T.O.*, AIR 1961 SC 372; *Bhopal Sugar Industry v. STO*, AIR 1967 SC 549 and some other cases that where a mandatory provision of law have not been complied with and petitioners suffer from no fault on his or her

part, the alternative remedy shall not be a bar to exercise jurisdiction under Article 226 of the Constitution of India. In the cases reported in 2000(10) SCC 482, Union of India v. State of Haryana and 2002 (3) SCC, Maharashtra State Judicial Services Association v. High Court of Judicature at Bombay, Hon''ble Supreme Court held that where important question of law is involved it shall be open to exercise extraordinary jurisdiction of Article 226 of the Constitution of India to settle a controversy. The existence of any alternative remedy shall not be a bar.

39. It has been further held by Apex Court that where public authority is acting contrary to provision of law or taking undue advantage of its own then alternative remedy shall not be a bar vide; AIR 1990 SC 772, Salonah T.Company v. Superintendent of Taxes; 2001 (9) SCC 99, T.N. Transport Corporation v. Neethivalangan; 1980 (2) SCC 437, Shiv Shankar Dal Mill v. State of Haryana.

In one other judgment reported in 1998 (8) SCC 1, Whirpool Corporation v. Registrar of Trade Marks, Hon''ble Supreme Court had held that alternative remedy shall not be a bar and dismissal of writ petition by High Court held to be not proper. The order passed by the authorities arbitrarily by abusing the power or in violation of principle of natural justice may always be subjected to judicial review under Article 226 of the Constitution of India.

40. In the case of Chandrama Singh (supra) relied upon by the respondents'' counsel there was no dispute between the parties that establishment concerned was not an industry. In the present case still it is to be decided as to whether Board is an industry or not. There was no allegation that there was involvement of persons holding high offices in the Government. The facts and circumstances of the Chandrama Singh's case (supra) is entirely different then the present case. Accordingly it does not seem to applicable to relegate the matter to labour Court.

41. In the other cases also relied upon by the respondents counsel A.P. Foods (supra) Premier Automobiles Ltd. (supra). Rajasthan S.R.T.C. (supra) though Hon''ble Supreme Court had held that ordinarily matter should be relegated to labour Court or the other statutory bodies but facts and circumstances of those cases were entirely different than the present one. In the present case serious allegations has been raised by the petitioner against the respondents which includes malafide exercise of power for extraneous reasons and considerations and noncompliance of statutory provisions and alleged involvement of corrupt practices in the process of selection. Petitioners had indicated the conduct of high authorities including the minister of the State Government. Accordingly as discussed hereinabove, relying upon various Apex Court judgments it shall not be appropriate to relegate the controversy to Labour Court more so when a question has been raised by the respondents that Board is not an industry.

In view of above, it shall not be appropriate to relegate the present controversy

to labour Court.

42. Now coming to next argument advanced by the respondent's counsel relating to maintainability of writ petition. Since petitioners have participated in the selection process they can not challenge the selection. Learned counsel for the respondents had relied upon the cases of Om Prakash Shukla (supra) and Madan Lal (supra). In the case of Om Prakash Shukla (supra) selection and appointment in the judgeship of Kanpur was quashed by the High Court while allowing the writ petition filed by unsuccessful candidates. Those who selected had approached the Apex Court. Apex Court ruled that since writ petition was filed by unsuccessful candidates after declaration of result, hence it was not maintainable. Hon'ble Supreme Court had directed to appoint the candidates who were succeeded in the examination. However, Hon'ble Supreme Court had not dismissed the writ petition exclusively on the ground of its maintainability but had proceeded to consider the alleged illegality committed during the course of examination and recorded a finding on merit as well as questioning the rights of nonselectees to file writ petition.

43. Facts and circumstance of the present case seems to be entirely different. In the present case, writ petition has been filed by the petitioners before declaration of result after getting information relating to the involvement of unfair means and malafide actions on the part of the respondents. While proceeding ahead with the selection process the petitioners have approached this Court without awaiting the outcome of the examination in question. Petitioners have claimed that opposite parties have not only acted for malafide reasons but also have violated the relevant Rules and Regulations while proceeding with the selection process. They have approached this Court immediately without awaiting the outcome of examination. Accordingly the case of Om Prakash Shukla (supra) shall not come in the way to exercise the power of judicial review against the impugned selection process under Article 226 of the Constitution of India.

44. In the case of Madan Lal (supra) relied upon by the respondents' counsel also select list was challenged by the unsuccessful candidates. Accordingly, Hon'ble Supreme Court apart from deciding the controversy on merit held that petition was not maintainable. As held hereinabove, present writ petition has not been filed by unsuccessful candidates but it has been filed during the selection process on finding substantial illegalities and malafide action on the part of respondents. The case of Madan Lal (supra) shall also not come in the way to exercise power of judicial review under Article 226 of the Constitution of India.

45. One of the arguments advanced by the respondent's counsel is that since petitioners are not aggrieved party hence also writ petition shall not be maintainable. Argument advanced by the respondents counsel seems to misconceive. Petitioners are very well aggrieved party. The argument advanced by the petitioner is that their statutory right of absorption in pursuance to model standing orders has been violated while proceeding ahead to hold the selection. It has also been submitted by petitioner's counsel that appointment and

selection has been done for extraneous reasons and considerations. Accordingly, the petitioners are very well aggrieved party and they have right to approach this Court under extraordinary remedy of Article 226 of the Constitution of India. The cases relied upon by the respondent's counsel i.e. Disciplinary Committee of Bar Council of Maharashtra (supra) and Maharaj Singh (supra) relate to different facts and circumstances and shall not come into the way of petitioner to approach this Court under Article 226 of the Constitution of India.

46. In both the cases relied upon by the respondent's counsel their Lordships of Apex Court while laying down the criteria to decide the question as to who may be aggrieved person, held, to quote;

?The test is whether the words person aggrieved include "a person who has a genuine grievance because an order has been made which prejudicially affects his interests.?

While referring to a decision rendered by Lord Denning in the case of Maharaj Singh (supra) Hon''ble Supreme Court held that the word ?person aggrieved? is of wide import and should not be subjected to a restrictive interpretation. However, the word of caution has been given to the effect that a person should have genuine grievance because an order has been made which prejudicially affects his interest.

47. In view of above objections raised by the respondents counsel for dismissal of writ petition does not seem to survive, hence, rejected. The present writ petition may very well be entertained and decided by exercising power conferred by Article 226 of the Constitution of India.

A writ of certiorari can be issued by this Court as petitioners are aggrieved persons keeping in view the Apex Court judgment of Jashbhai Motibhai Desai (supra) cited by respondent's counsel.

(B) WHETHER U.P. KHADI EVAM GRAMODYOG OBARD, LUCKNOW IS AN INDUSTRY?

48. As discussed hereinabove, the schedule appended with the Act provides the sphere of working of Board. It shall be duty of Board to take necessary steps for the development of Beekeeping, Cottage Match Industry, Cottage Pottery Industry, Cottage Soap Industry and several other items provided by schedule appended with the Act. According to booklet published and circulated by the Government of U.P. through Secretary Shri Yogesh Kumar, which has been placed on record during the course of argument showing the activities of Board in the year 200405. The Board had taken various steps for the advancement of cottage industry in the State of U.P. The Board has not only granted financial assistance to various cottage industries but also supplied raw materials to the skilled labourers and industries. Various industrial items were purchased and sold by the Board to the needy persons as well as cottage industries. Various items are produced by the Board itself from its own industries established throughout the

State of U.P. under various schemes like Kambal Yojna, Cooperative Yojna and so on. Weaving industries have been established in Najibabad (Bijnore) Mirzapur as well as Gopiganj (Bhadohi) in district Jaunpur, Hadilabad (Gazipur), Khajni (Gorakhpur) and Tikarmafi (Sultanpur) cottage industries or industries for the production of various weaving items like Blanket etc. have been established with marketing facilities. Cooperative Societies have been established by the Board to deal with purchase and sale of various items with steps to give employment to skill labourers.

49. For the control of various business activities, the related posts have been created by the Boards like Sahayak Nideshak (wollen), Sahayak Nideshak (blanket), Sahayak Nideshak (khadi), Sahayak Nideshak (handmade paper), Sahayak Nideshak (leather). Post of production superintendent has also been created by the Board to regulate the production of various items. The infrastructure created by the Board to meet out the administrative requirement emerges from the booklet containing the report of activities of Board 200405. For convenience the administrative infrastructure as given in Appendix2 of the booklet published by the Government is reproduced as under:

50. In view of above, it is evident that the Board has been engaged in various activities not only to provide financial assistance to various industries but also itself is producing various items through its cottage and other industries.

51. Section 2(j) of the Industrial Dispute Act 1947 (Central Act) define the ? industry?, for convenience reproduced as under:

?industry? means any business, trade, undertaking, manufacture or calling of employers and includes any calling, service, employment, handicraft, or industrial occupation or avocation of workmen;

From the plain reading of definition given in the Industrial Dispute Act reproduced hereinabove from the activities of Board as discussed, it shall seem to be indulged into industrial activities and Board may safely be treated as industry.

Section 2 (Ka) of the Industrial Dispute Act defines the word ?Industrial Establishment? as under:

?Industrial establishment or undertaking? means an establishment or undertaking in which any industry is carried on:

Provided that where several activities are carried on in an establishment or undertaking and only one or some of such activities is or are an industry or industries, then:

(a) if any unit of such establishment or undertaking carrying on any activity, being an industry, is several from the other unit or units of such establishment or undertaking, such unit shall be deemed to be a separate industrial establishment or undertaking;

(b) if the predominant activity or each of the predominant activities carried on in such establishment or undertaking or any unit thereof is an industry and the other activity or each of the other activities carried on in such establishment or undertaking or unit thereof is not severable from and is, for the purpose of carrying on, or aiding the carrying on of, such predominant activity or activities, the entire establishment or undertaking or, as the case may be, unit thereof shall be deemed to be an industrial establishment or undertaking;]

Thus, keeping in view the definition of industries as well as industrial establishment given in the Industrial Dispute Act, Board may very safely be held as an industry.

52. Hon"ble Supreme Court in a case reported in 1990 (4) SCC 472, Karnani Properties Ltd. v. State of W.B., held that a real estate company leasing out mansions and for their maintenance employing workers like sweepers, durwan, plumbers, bill collectors, mistries, liftmen etc. may be treated as industry.

Running of tubewell by Government or Government own cooperation has been held to be industry by the Apex Court in a case reported in 1991 (1) SCC 189 Gurmail Singh v. State of Punjab, similarly, Dandakaranya Project has held to be an industry by Apex Court reported in 1997 SCC (L&S) 434, Management of Dandakaranya Project v. Workmen.

53. In a leading judgment of Bangalore Water Supply & Sewerage Board v. A. Rajappa and Others, reported in 1978 SCC (L&S) 215, Apex Court held that restricted category of professions, clubs, corporation, research laboratories may be held as industry because of their dominant nature of work in which they are engaged. In the case of Bangalore Water Supply (supra) Apex Court had relied upon the definition of industry given in Section 2(j) of the Industrial Dispute Act reproduced hereinabove. It has been held by the Apex Court in the case of Bangalore Water Supply (supra) that word industry has got wide import. For convenience relevant para from the judgment of Bangalore Water Supply (supra) is reproduced as under:

"Industry", as defined in Section 2(j) and explained in Banerji (supra), has a wide import.

(a) where (i) systematic activity, (ii) organized by cooperation between employer and employees (the direct and substantial element is chimerical) (iii) for the production and/or distribution of goods and services calculated to satisfy human wants and wishes (not spiritual or religious but inclusive of material things or services geared to celestial bliss e.f. making, on a large scale Prasad or food), prima facie, there is an "industry" in that enterprise.

(b) Absence of profit motive or gainful objective is irrelevant, be the venture in the public, joint, private or other sector.

(c) The true focus is functional and the decisive test is the nature of the activity with special emphasis on the employeremployee relations.

(d) If the organization is a trade or business it does not cease to be one because of philanthropy animating the undertaking.?

54. Thus in the case of Bangalore Water Supply (supra), universities, research institutions, textile, Cooperative Societies have also been held as industry.

In a case reported in 1988 (2) SCC 537, *Desh Raj v. State of Punjab*, irrigation department of the State Government has been held to be industry.

However, the case of Bangalore Water Supply (supra) has been referred to larger Bench by Apex Court in a case reported in 1998 SCC (L&S) 806, *Coir Board, Ernakulam, Cochin and another v. Indira Devi P.S. and Others*.

However, reference to larger Bench shall not be an obstacle to decide the present controversy keeping in view the existing laws vide; 1988 (4) SCC 12, *State of Orissa v. Dandasi Sahu*.

In a case reported in 1998 (3) SCC 237, *All India Radio v. Santosh Kumar and another*, All India Radio has been held industry.

Life Insurance Corporation of India has been held to be industry by Apex Court in a case reported in (1983) 3 SCC 237, *S.K. Verma v. Mahesh Chandra and anOthers*. While holding Life Insurance Corporation of India as industry their Lordship of Apex Court held that interpretation of Section 2(j), 2(k) and 2(s) should be liberal and pragmatic so as to advance the object of the Act being a welfare legislation.

55. Learned counsel for the petitioner has invited attention towards a case reported in 1983 (2) SCC 4, *Gopal Ji Shastri v. State of Bihar*. While dealing with the Khadi Board of the State of Bihar in the case of Gopal Ji (supra), Hon'ble Supreme Court held that Bihar Khadi Gramoddyog Sangh is an industry. Their Lordships of Apex Court has relied upon a judgment of Bangalore Water Supply (supra).

56. While filing an affidavit dated 7th March, 2006 Shri Ramesh Chandra Mishra, Chief Executive Officer of the Board had stated in para 15, 16, 17 and 18 that Board has been engaged not only in production of Khadi but also produce and sell its own product. Productions are done at trainingcumproduction center and in factories established by the Board. Thus, it is evident that Board has been engaged in Industrial activities while discharging duties under the Act.

57. The definition of industry in the U.P. Industrial Disptue Act is same as to Central Act referred hereinabove. The word industry has been defined in Section 2(k) of the U.P. Industrial Disptue Act. Literally the same language has been used by the State legislatures while defining the word industry under Section 2(k) in the State Act. Hence discussion made hereinabove on behalf of Central Act shall very well be applicable to the State Act.

58. In view of settled proposition of law and keeping in view the function of Board and its unit referred hereinabove the Khadi Board may safely be declared

and held as an "industry".

(C) RELEVANT INDUSTRIAL PROVISIONS AND THEIR EFFECT UNDER THE PRESENT DISPUTE:

59. Section 25 (F) of the Industrial Dispute Act 1947 (Central) (in short hereinafter referred as the Central Act) provided that workmen employed in any industry having continuous service for not less than one year under an employer shall not be retrenched unless workmen has been given one month's notice indicating the reason for retrenchment and be paid compensation. Even if, an undertaking is transferred or ownership of management is changed, the employees of such undertaking shall be entitled for compensation in pursuance to provision contained in Section 25 (FF) of the Central Act. Section 25 (H) of the Central Act is reproduced as under:

?25(H): Reemployment of retrenched workmen Where any workmen are retrenched, and the employer proposes to take into his employ any persons, he shall, in such manner as may be prescribed, give an opportunity [to the retrenched workmen who are citizens of India to offer themselves for reemployment, and such retrenched workmen] who offer themselves for reemployment shall have preference over other persons.?

60. Section 25(J) of the Central Act further provides that any law in consistent to Chapter 5(a) of the Central Act shall not be given effect. Section 25(J) further provided that in case an employee is entitled for certain benefits in pursuance to any standing order, award, Rules and Regulations, contracts, etc. which is favourable to the workmen then the workmen shall be entitled to get those benefits which are more favourable and beneficial to the workmen which he gets from the provision contained in Chapter 5(a) of the Central Act. For convenience Section 25(J) of the Central Act is reproduced as under:

?25(J): Effect of Laws inconsistent with this Chapter (1) The provisions of this chapter shall have effect notwithstanding anything inconsistent therewith contained in any other law [including standing orders made under the Industrial Employment (Standing Orders) Act, 1946 (20 of 1946)].

[Provided that where under the provisions of any other Act or Rules, orders or notifications issued thereunder or under any standing orders or any award, contract of service or otherwise, a workman is entitled to benefits in respect of any matter which are more favourable to him than those to which he would be entitled under this Act, the workman shall continue to be entitled to the more favourable benefits in respect of that matter, notwithstanding that he receives benefits in respect of other matters under this Act.]

(2) For the removal of doubts, it is hereby declared that nothing contained in this Chapter shall be deemed to affect the provisions of any other law for the time being in force in any state in so far as that law provides for the settlement of industrial disputes, but the rights and liabilities of employers and workmen in so

far as they relate to layoff and retrenchment shall be determined in accordance with the provisions of this Chapter.]?

61. Section 25(N) of the Central Act further commands the industrial establishment to follow certain procedure before dispensing the services of workmen. Workmen can not be retrenched by any employer unless follow the provisions contained in 25(N) of the Central Act.

Section 25(T) and Section 25(U) of the Central Act prohibit the unfair labour practice and provides penalty for committing unfair labour practice. Chapter 6 of the Central Act further provides various penalties for unfair labour practices.

62. The provisions referred hereinabove have been literally provided in U.P. Industrial Dispute Act (in short hereinafter referred as the U.P. Act) particularly under Section 6(a) to Section 6(X). Section 12 of the U.P. Act further provides that the provision contained in Central Act shall continue in operation and shall not effect the State Government power to take decision under the Central Act or to deal with any settlement or industrial dispute.

63. U.P. Industrial Employment Model Standing Order 1991 (in short hereinafter referred as the Standing Order) was notified in official gazetted and came into effect on 24.7.1992. Model Standing Orders have been framed in pursuance to power conferred by Industrial Employment (Standing Orders) Act 1946. Under Section 7 of the Industrial Employment (Standing Order) Act 1946 (in short Standing Order Act) shall come into operation as and when its authenticated copies are sent in pursuance to provision contained in Subsection 3 of Section 5 of the Standing Order Act. It has not been disputed by the parties" counsel that Model Standing Orders are in operation in the State of U.P.

64. Para 3 of the Model Standing Order classify the workmen. Permanent Workman, Probationer, Substitute Workman, temporary workman, apprentice have been classified as under:

73. Classification of workmen Workmen shall be classified as follows:

(a) ?Permanent Workman?: A permanent workman is a workman who has been engaged on a permanent basis and includes a person who has satisfactorily completed his probationary period in the same or another occupation in an industrial establishment.

(b) ?Probationer?: A probationer is a workman who is provisionally employed to fill a permanent vacancy and has not satisfactorily completed his probationary period in that occupation.

A permanent workman employed as a probationer in a new occupation may, at any time during his probationary period, be reverted to his old permanent post by an order, in writing, signed by the employer and such a probationer may also, at any time during this said probationary period, seek reversion to his old permanent post by making an application therefore in writing. A probationer shall

retain his lien and seniority in his old permanent post as long as he is not made permanent in his new occupation.

Seven days before the date of expiry of probationary period the workman shall be informed in writing that he has been confirmed or his probationary period has been extended further. In case no order has been communicated to the workman in writing either confirming the workman or extending the period of probation or terminating the services for unsatisfactory performance, the workman shall be deemed to have been confirmed on the post with effect from the date the probationary period expired.

(c) ?Substitute Workman?: A substitute workman is a workman who is employed on the post of permanent workman, or a probationer, who is temporarily absent on leave or otherwise.

(d) ?Temporary Workman?: A temporary workman is a workman who is engaged for a work which is essentially of a temporary or casual character likely to be finished within one year or who is engaged temporarily in connection with a temporary increase in a work of permanent nature for a limited period not exceeding six months;

Provided that a workman who is regularly engaged on term appointment basis with artificial breaks although work exists, would not be deemed to be a temporary workman and would be entitled to be made permanent even if the services for less than 240 days in a calendar year.

(e) ?Apprentice?: an apprentice is a workman who has been engaged in an industrial establishment under the provisions of the Apprentices Act, 1961.?

65. Keeping in view the definition given hereinabove petitioners who were working against the regular vacancy shall be entitled for the benefit of Para 3 and 13. They were appointed against the permanent vacancies. Those vacancies are going to be filled up by impugned advertisement without extending the benefit of Model Standing Orders, hence not sustainable.

66. Para 13 of the Model Standing Order provides condition for promotion, recruitment and transfer of workman. For convenience Para 13 of the Model Standing Order is reproduced as under:

?Condition for promotion, recruitment and transfer of a workman

(1) Promotions to workmen shall be granted without discrimination and with due regard to seniority and suitability for the post.

(2) The employer shall notify to the Regional/Additional/Deputy Labour Commissioner of the area concerned, on or before the 31st day of January every year the number of permanent posts, in the industrial establishment, and the number of workmen who are probationers against permanent posts, substitutes, temporary hands and apprentices, categorywise employed on the first day of January of that year.

(3) Out of the total strength of an establishment 80 per cent of the posts shall be permanent.

(4) The employer shall fill at least 80 per cent of the permanent vacancies not reserved for probationers out of substitutes on senioritycumcategory basis, within six months from the date of the post falling vacant;

Provided that the employer shall not, except in special exigencies such as harvesting, marriage or festival seasons the total period of which does not exceed 45 days in a calendar year, engage substitutes and temporary workman. Substitute in a calendar year shall not exceed maximum percentage of absenteeism.

(5) While filling regular vacancies/posts in an establishment, the temporary workmen of the establishment shall also be considered.

(6) If an establishment has its units out of the State, no workman shall be transferred out of the State without his prior consent.

(7) In the event of closure of an unit or sections and departments thereof, the workmen so affected will be discharged with such benefits as are admissible to them under law for the time being in force. Such displaced workmen shall have a right to be taken back in service in the order of seniority by the employer in case the unit, section or department as the case may be, starts functioning, either under old name or ownership or otherwise.?

Under Para 13 it shall be duty of employer to notify the regional or additional Labour Commissioner of the area on or before 31st January of every year the number of permanent posts in the industrial establishment and the number of workmen who are probationer against the permanent posts.

It further provides that 80 per cent posts should be permanent. Para 13 provides that preferential treatment should be given while filling the vacancies of probationers, substitute workman and temporary workman. The provision contained in Para 13 of the Model Standing Order seems to have got mandatory force.

67. It has been admitted by the respondents in the counter affidavit filed by Shri S.K. Kakkar under Para 7 and 8 that petitioners were negaged as daily wager and after serving for several years their engagement has been converted into contractual assignment. It has been further stated in Para 8 of the counter affidavit that though petitioners" engagement has been converted into contractual assignment but it has not been approved by Board. Thus, it appears that with intention to deprive the petitioners from their statutory rights available under Industrial Law their engagement has been converted into contractual assignment. The engagement letter filed with the writ petition collectively as Annexure2 indicates that it was done sometime in the year 200203. In a controversy relating to workmen, the employers possess dominant role and for the shake of bread the class IV or other employees or the workmen always

succumb to pressure exerted by the authorities. Accordingly, services rendered by the petitioners as daily wager employee can not be treated a nonest to deprive the benefit available under Industrial Law. Relevant portion from para 7 and 8 of the counter affidavit filed by Shri S.K. Kakkar dated 23.8.2005 is reproduced as under:

It is relevant to submit here that the requirement and need and later on, on their request they were engaged on contract/consolidated basis in the same capacity.

The petitioners engagement have been converted into contract/consolidation basis on their own request and the same has never been approved by the Board and no approval to petitioners engagement has been granted by the Board.

68. Since, it has been admitted by the respondents themselves that petitioners conversion of daily wager services into contractual assignment lacks approval from Board, conversion of the nature of assignment shall not affect the petitioners' right to claim benefit under the Industrial Law. In these days of unemployment and prevailing unethical scenario in the society the statutory rights accruing to employees should not be taken away or be made redundant on flimsy grounds.

69. In view of above, since petitioners are workmen it was incumbent upon the Board while filling or advertising the vacancies in question to give preferential treatment to the petitioners who were already working in the Board against regular vacancies. It was not permissible for the Board to fill up the vacancies by the impugned advertisement without complying with the provision contained in Para 13 of the Model Standing Order.

[D] REGULARISATION OF PETITIONERS

70. While preferring the present writ petition petitioner has also prayed that their services may be regularized. However, nothing has been brought on record by the petitioner to substantiate the claim relating to regularization in Class III or IV cadre. In service jurisprudence regularization of an employee may be done only in accordance to relevant Rules or Regulations and not otherwise. In the absence of Rules and Regulations which may empower the authorities to consider the petitioner's case for regularization, no mandamus may be issued by this Court while exercising power conferred under Article 226 of the Constitution of India. Petitioners are working in Class III and Class IV cadre almost since 5 to 10 years. The particulars of petitioners' appointment, as provided by the learned counsel for the petitioner, is as under:

S.No. Name As daily Change Serial No.

wager in List

1. Suraj Singh March 1997 1.6.2001 fixed 41

salary of Rs.3500/

2. Shiv Murat 20.8.1988 June 2000 Salary 48

Upadhyaya Rs.2000/ w.e.f.

1.6.2003 Salary

Rs.2500/

3. Bhairo Prasad 16.11.1996 1.6.2003 on contact 37

basis on pay of Rs.3500/

4. Aniruddha 18.9.1996 1.6.2003 consolidated 36

Kushwaha pay Rs.3500/

5. Brijendra Kumar 8.3.2000 9.3.2001 monthly salary of 38

Kushwaha Rs.2000/ 9.9.2001 monthly

salary Rs.2500/ 1.6.2003

on contact basis monthly

salary 3500/

6. Shrawan Kumar 1.1.2001 1.3.2002 to 4.5.2002 fixed 51

Saini salary of Rs.2500/ w.e.f.

5.5.2002 on contact basis

@ pay of Rs.3500/

7. Brij Pal 1.1.2001 1.3.2002 on contact 39

basis @ of Rs.2500/

8. Mathura Dutt 1.1.2001 w.e.f. 1.3.2002 on contact 40

Joshi basis @ of Rs.2500/

71. So far as the persons appointed prior to 29.6.1991 are concerned they may have a case for regularization in accordance to Regularisation Rules namely; U.P. Regularisation of Daily wagers Employees (Group D) Service Rules 2001. It has not been disputed by the respondents" counsel that those who were appointed prior to 29.6.1991 may be considered for regularization.

72. Learned counsel for the respondents Shri A.K. Twarei while relying upon the cases namely; Umadevi (supra), National Fertilizer Limited (supra), Neeraj Kumar (supra), A. Umarani (supra), Piara Singh (supra), Mahendra Singh (supra), Ashwani Kumar (supra), Delhi Development Horticulture Employees Union (supra), Pushpa Srivastava (supra), Ramkrishna Kamat (supra), Hindustan Shipyard Ltd. (supra) had rightly submitted that no mandamus can be issued in

derogation of Rules and Regulations. In case there is no statutory provisions to consider for regularization of the services of the employees, no mandamus may be issued by this Court under extraordinary jurisdiction of Article 226 of the Constitution of India. All that can be done by this Court is to direct the opposite parties to consider for regularization in case it is permissible under the Rules, time being in force.

73. However, absence of any Rules or Regulations shall not preclude the State Government to formulate the scheme for the regularization of services of the petitioners who are serving since more than five years, keeping in view the law laid down by the Apex Court in *Piara Singh (supra)* as well as *Umarani (supra)*.

There is one other aspect of the matter. As to whether in the absence of any Rules to consider for regularization, petitioners shall be entitled to claim the benefits available to them under industrial law. Since, petitioners are working in Class III or Class IV cadre and from the nature of their job they seem to be workmen, the benefit available to them under industrial law can not be taken away. Respondents counsel have also not raised any objection questioning the status of petitioners as workmen. Rather it has been submitted that the controversy may be relegated to labour Court. Accordingly, keeping in view the nature of appointment even if petitioners service are not considered for regularization it shall be incumbent upon the authorities to extend all benefits available under industrial law discussed in the preceding paras if Board pleases it may formulate a scheme for petitioner's absorption in their respective cadre keeping in view the case of *Piara Singh (supra)* or *Umarani (supra)*.

74. One of the ground advanced by the petitioner's counsel that substantial number of daily wagers who were appointed subsequent to petitioners in the year 1995-96-1996-97 were regularized by an order dated 1.7.2003. When during the course of argument this Court had directed to brought on record the relevant material relating to regularization of subsequent appointees, by subsequent order dated 13.5.2005, the regularization order of juniors was cancelled. After cancellation of the order of regularization the aggrieved daily wager had approached this Court by preferring the writ petition in which interim orders were passed and they are continuing in service. Though in pursuance to interim order passed by this Court, order dated 13.5.2005 has been stayed but the fact is that juniors were regularized and are continuing in service.

75. However, as discussed hereinabove, no mandamus may be issued for regularization of petitioners' services in contravention of statutory provisions. Accordingly, so far as the regularization is concerned that can be done in pursuance to Regularisation Rules may be in pursuance to U.P. Regularisation of Daily Wages Appointments on Group D posts Rules, 2001 or any other Rule but not otherwise.

(E) APPLICABILITY OF RULES

76. Learned counsel for the respondents Board had invited attention toward a

letter dated 23.3.2005, a copy of which has been filed as AnnexureSCA1 to the Supplementary Counter Affidavit and proceeded to submit that the State Government had directed to fill up the vacancies in pursuance to mRrj iznas" [kknh rFkk xzkeks]ksx cksMZ] lewg ?k] Isok fofu;ekoyh 2005 (in short hereinafter referred as the 2005 Rules). According to respondents' counsel impugned advertisement and selection process has been initiated in pursuance to 2005 Rules. The argument advanced by the learned counsel for the respondents seems to be misconceived. The letter dated 23.3.2005 sent by the State Government directing the Board to fill up the vacancies does not say that they should be filled up in accordance to 2005 Rules. Only instruction given by the Government is that the Group D post should be filled up in accordance to relevant Service Rules or Regulations. There is no direction to apply 2005 Rules.

77. It has not been disputed by the respondent's counsel that 2005 Service Rules was published in the official gazette on 28.5.2005. On the other hand, petitioner's counsel Shri H.S. Jain had proceeded to submit that since Rule was published in the official gazette on 28.5.2005, it has got prospective application and could not have been relied upon to fill up the vacancies in pursuance to said Rules.

78. Repelling the argument of petitioner's counsel, learned counsel for the respondents Sri A.K. Tewari had proceeded to submit that in view of law laid down by the Apex Court in the case of Vimal Kumari reported in 1998 (4) SCC 114, relates to a situation where there was no Rules governing the service condition. However in the same case (supra) Hon"ble Supreme Court had declined to accept the argument of respondents relating to applicability of draft Rules which was not enforced since long period. Hon"ble Supreme Court held that draft rules which were lying in a frozen State could not have been utilized regulating the services of an employee working in the department. Present case seems to be based on different facts and circumstances. Here it is not a case where there were no Rules. As discussed hereinabove, the service conditions of the employees were governed by industrial law as well as the Act of 1960 and mRrj izns" [kknh rFkk xzkeks]ksx cksMZ] varfje Isok fofu;koyh notified on 1.6.1973 as amended by notification dated 30.12.1989. Since, the services of the employees of the industry department were taken by the Board, hence, to some extent the service Rules namely Uttar Pradesh Industries Department Class IV Service Rules 1974 was also attracted to regulate the service conditions.

79. Moreover, it is settled law that Act, Rules and Regulations shall be enforceable only from the date of publication in the official gazette. Respondents had committed substantial illegality by applying the 2005 Rules prior to its publication. In official gazette on the date when vacancies were advertised the 2005 Rule was not in operation.

80. Accordingly, since the selection process was initiated in pursuance to nonexisting Rule, it suffers from substantial illegality and shall be nullity in law. In a recent judgment reported in 2006(6) SCC 430, R.S. Girg v. State of U.P. and

Others, the Apex Court held that any appointment made without following the Rules shall be void ab initio. It has further been held by Apex Court in the case of R.S. Girg (supra) that the State can not make Rules or issue any instruction to meet out the exigencies in violation of statutory provisions. Such action is opposed to constitution scheme of equality clause enshrined in Article 14 and 16 of the Constitution of India. Their Lordships had reiterated the law laid down by the Apex Court in the case reported in 2006 (4) SCC 1, Secretary State of Karnataka v. Umadevi, and 2006 (5) SCC 493, National Fertilizer Limited v. Somvir Singh.

The provisions contained in [The] employment Exchanges (Compulsory Notification of Vacancies) Act, 1959 (in short hereinafter referred as Employment Exchange Act) should have been applied in view of Rule 13. A combined reading of Rule 13 with the provisions contained in the Employment Exchange Act it shall always be incumbent upon the Board to notify the vacancies to Employment Exchange in pursuance to provisions contained in Section 4 and 5 of the Employment Exchange Act but the same has not been followed while proceeding with the selection in question, hence, it suffers from substantial illegality. Rule 13 provides certain things, which are to be considered by Selection Committee during the course of interview. It does not provide for grant of marks on different head. Since, the names were not summoned from Employment Exchange on this score also the selection procedure adopted by the respondents seems to suffer from illegality.

(F) MARKS GRANTED IN INTERVIEW

81. It has been vehemently argued by learned counsel for the petitioner that the Selection Committee had granted in block marks to the candidates. Marks were not granted by the members of Board keeping in view the various heads, which were subject matter of consideration before the Selection Committee. Petitioner's counsel had relied upon the case reported in 1971 (1) SCC 38, Minor A. Periakaruppan v. State of Tamil Nadu and Others; 1971 (1) SCC 436, A. Periakaruppan Chettiar; (1976) 4 SCC 153, State of Karnataka and another v. M. Farida. The judgment of M. Farida (supra) has been delivered by a Constitutional Bench of Apex Court, hence, has got binding effect. While deciding the controversy Hon'ble Supreme Court in a case of M. Farida (supra) held that Selection Committee should grant marks against different heads. In case Rule does not contain a provision for grant of marks against separate heads then the Committee may grant marks in block without breakup to different heads. Relevant portion from the judgment of M. Farida (supra) is reproduced as under:

“for, as pointed out in the judgment under appeal, some of the qualities for test in Viswanath's case which Periakaruppan approved, were also intangible, like aptitude and personality. Further, even where the qualities to be tested are intangible qualities, if the relevant Rule required that separate marks should be allotted for each, the interviewers have to follow the Rule and do the best under the circumstances.

5. Whether a block mark should be given after the interview on a consideration of the qualities evinced by a candidate, or marks are to be allotted separately under each head depends, in our opinion, upon the Rule regulating the examination. In *Periakaruppan's* case it was held that the intention of the Government was that each of the specified qualities should carry equal marks. In these appeals we have not been called upon to decide whether the Rule concern in *Periakaruppan's* case was correctly interpreted. We do not however think that it would be correct to assume as a general proposition that in every case where the interviewing body is asked to take into consideration several specified qualities, they must be of equal value and separate marks should be allotted under each head; on the contrary, in our opinion, where the Rules do not contain a clear direction, it would be reasonable in such cases to suppose that the intention is that there should be a block assessment on any integrated test.?

Thus, in the case of *M. Farida* (supra) the judgment of *Periakaruppan* (supra) has been distinguished by the Apex Court.

82. In the case of *D.V. Bakhshi* (supra) while interpreting the Rules, the Apex Court held that keeping in view the provisions contained in the Rules, marks be assigned under relevant heads and record must be properly maintained in order to eliminate bias. The dispute before the Hon'ble Supreme Court was as to whether minimum 50 per cent marks fixed for oral test was permissible or not. Apex Court Ruled that the provision made does not suffer from any illegality keeping in view the related facts and circumstances involved therein. It has been held that the method of evaluation may vary and it can not be a matter of any straitjacket formula.

83. Keeping in view the judgment of Apex Court in *M. Farida's* case (supra) the Committee has not committed wrong by awarding marks to the candidates in block. But every member of the Committee should have given marks separately, as discussed hereinafter.

84. The procedure adopted by the Selection Committee while awarding marks seems to be not sustainable on one other ground. In the ordersheet dated 13.9.2006 and 7.12.2006 after perusal of record it was noticed that the members of Selection Committee constituted for both the posts have not granted marks separately. It was noticed by this Court after perusal of record that adjacent to the name of every candidate, the marks have been recorded and all the five members of the Committee have signed at the bottom of sheet containing marks granted in interview. The members of Selection Committee had not granted marks separately. Thus, it appears that the members of Selection Committee had not applied their mind by awarding marks at their end to each and every candidate. A natural inference which can be drawn from such action is that the members of Selection Committee had not applied their individual mind, while evaluating the merit of the each and every candidate. Accordingly, an inference may be drawn that marks were granted by only one person and other

members are only signatory.

85. The purpose of constitution of a Selection Committee consisting two or more persons as its member is to Rule out the involvement of arbitrariness, corruption for extraneous reasons or considerations. Whenever a multiple members Committee is constituted then it shall always be incumbent that each and every member of such Committee must grant marks after evaluating the merit of the candidates. While finally evaluating the merit of the candidate the marks granted by each and every member of the Selection Committee should be added or clubbed.

Nothing has been brought on record by the respondents while filing affidavit, which may indicate that all the members of the Selection Committee had applied their individual mind during the course of interview while evaluating the merit of the candidates. Accordingly, it may be safely inferred that members of Selection Committee had either not applied their mind while discharging their duties during the course of interview or they had signed the interview sheet in a mechanical manner for some unforeseen reasons.

86. Interview sheet of the Junior Spinning Guide contained the signature of all six persons of the Selection Committee at bottom without indicating the date when members have signed over the interview sheet. However, at the top of the sheet dates have been printed or typed in computerized format. Position is same with the interview sheet of Peon or Chowkidar. The Interview Committee was having five members and all the members have signed at bottom of the interview sheet without disclosing the date of signature or initial. Marks have been recorded adjacent to the names of candidates in printed format indicating various dates.

87. There is one more reason why it appears that members of Selection Committee had not applied their mind. When the marks were entered into sheet during the course of interview, marks in the interview sheet have been recorded by same pen in same colour. The marks were not recorded by the members of Selection Committee.

88. The interview of Junior Spinning Guide as well as Peon and Chowkidar was conducted in the same manner. The sheet was not filled up by the members of Selection Committee. No individual marks were granted as noted during the perusal of records. Neither any record was produced nor any statement was made that the members of Interview Committee had made some exercise on separate papers individually or collectively before recording the marks in interview sheet. No record has been maintained which may disclose the day to day proceeding prepared by the Selection Committee. Since, the interview continued for several days it was incumbent upon the Selection Committee for the Junior Spinning Guide as well as Chowkidar to maintain record of day to day proceeding of the Selection Committee. But neither such record was produced nor any argument has been advanced on this point. Attendance register marked

as ?Shakshatkar Panjika Kanishtha Katai Marg Darshak? running in 78 pages does not contain any column indicating the year, month and date of interview. In case, interview was held for several weeks then attendance register should have contain specific column indicating the date, month and year showing the exact date when the candidates approached and signed for the purpose of interview.

Similar is the position of the attendance register of Peon and Watchman, which runs in 354 pages. This register also does not contain the column indicating year, month and date. Accordingly, it can not be established as to when the candidates appeared for interview before the Committee concerned. Thus the entire procedure adopted by the respondents for holding interview seems to be farce or sham and suffers from highly arbitrariness may be for some extraneous reasons or considerations.

89. In view of above, all these material on record and facts discussed hereinabove it may safely be held that members of Selection Committee had not applied their mind while evaluating the merit of the candidates during the course of interview, hence, selection in question seems to be suffer from arbitrary exercise of power, hence, violative of Article 14 of the Constitution of India.

PRACTICAL TEST

90. The practical test for Junior Spinning Guide was conducted by a Committee consisting three persons headed by One Shri P.K. Singh as President, Shri D.N. Pandey and Shri Ramesh Chandra Singh as its member. Similarly, the practical test i.e. cycle test was conducted by another Committee headed by Sri K.N. Khare as its President and Shri Arvind Srivastava, Shri R.C. Pant as its member. According to circular it was incumbent upon the Committee constituted for practical test to send its result to the respective Selection Committee.

91. The result of successful candidates of cycle test has been marked by P (pass), F (fail) and A (absent). As noted during the perusal of record, the sheet seems to have been filled up by same pen and ink. Similar in the case of practical test of Junior Spinning Guide. Relevant portion from the ordersheet dated 13.9.2006 are reproduced as under:

?The outcome of the test has been marked by P for Passed, F for Failed and A for Absent. According to the Chief Executive Officer, sheets have been signed with the initials of 3 officers namely Sri Arvind Kumar Srivastava, Sri K.N. Khare and Sri Ramesh Chandra Pant who were said to be the members of the Committee for holding of the cycle test. The entire sheets seems to have been filled up by same pen in black ink without any date or marking or colour, starting with the name of Sri Surendra Bahadur Singh and end to Sri Surjeet Kumar. The sheets do not disclose the year, month, date and time when the signatures were made and the test was held. However, the sheets disclose that the majority of the persons who appeared in the cycle test were passed.

The outcome of the spinning test has also been marked as PPassed, FFailed and

Absent as it was done in the cycle test. According to the Chief Executive Officer present, the sheets for spinning test have been initialed or signed by 3 officers namely Sri D.N. Pandey, Sri Ramesh Chandra Singh and Sri V.K. Singh who were alleged to be the members of the subcommittee of the spinning test. The sheets do not disclose the year, month, date and time when the spinning test was held. The outcome of the test has been marked by P, A or F in black ink without any change of pattern.

92. Thus, from the record it is evident that no minimum qualifying marks was provided in practical test. Though the circular dated 13.9.2005 provides that outcome of practical test shall be communicated to Selection Committee seized with the interview but for the reasons best known, the Selection Committee has not been providing qualifying marks in practical test. However, during the course of argument it was stated by respondents that all the candidates were called on for interview but that will not suffice to sustain the procedure adopted by respondents to meet out the requirement of Article 14 of the Constitution of India. It is settled law that every procedure adopted by the authorities must meet out the requirement of Article 14 of the Constitution of India. Neither there is any guideline nor any criteria has been placed on record which may indicate that how the practical test was conducted for the Spinning and Cycling. What were the criteria to declare a person fail or pass during practical test? Like interview no day to day proceeding has been maintained by the authorities while holding the practical test for Junior Spinning Guide and Peon or Chowkidar.

93. The sheet containing the result of practical test does not contain any column of year, date and time, which may indicate that when the practical test was held. The members of Committee have also not indicated when they have held the practical test of Spinning Guide or Cycling. The procedure adopted by the respondents to hold practical test seems to suffer from highly arbitrariness and farce, hence, violative of Article 14 of the Constitution of India.

94. Thus the procedure adopted by the respondents during the course of interview as well as practical test both suffer from highly arbitrariness held in unjust and improper manner. The procedure does not transpire confidence to man of common prudence. Prima facie it appears that documents have been prepared and cooked up may be after filing of writ petition.

95. It is unfortunate that the procedure adopted for interview as well as practical test while considering more than ten thousands applicant for the post of Peon and Watchmen and more than One Thousands candidates for the post of Junior Spinning Guide was held in an unfair manner as discussed hereinabove.

96. Every arbitrariness being opposed the reasonableness is an antithesis of law though the administrative authorities clothed with the power of selection and appointment have got unfettered discretion to formulate procedure for selection and appointment but that should not be done in such a manner which may shake the conscience of a person having common prudence. Power should not be

utilized for vested interest to pollute the system of administration. In a case reported in 2000 (8) SCC 633, *Praveen Singh v. State of Punjab and Others*, Hon^{ble} Supreme Court had proceeded to hold as under:

“While it is true that the administrative or quasijudicial authority clothed with the power of selection and appointment ought to be left unfettered in adaptation of procedural aspect but that does not however mean and imply that the same would be made available to an employer at the cost of fair play, good conscience and equity. This Court in the case of *J.P. Kulshrestha (Dr.) v. Chancellor, Allahabad University* did recognize the undetectable manipulation of results being achieved by remote controlled tactics and masked as viva voce test resulting the sabotaging of the purity of proceedings. This Court held “interviews as such are not bad but polluting it to attain the illegitimate ends is bad.”

97. What is arbitrariness? How an action of the State held to be arbitrary, irrational or unreasonable. The test of reasonableness has been followed by relying upon *Wednesbury* principle. In a case reported in (2001) 2 SCC 386, *Om Kumar and Others v. Union of India*, while holding that any administrative action which is arbitrary may be struck down under Article 14 of the Constitution of India. Hon^{ble} Supreme Court had proceeded to hold as under:

“But, in *E.P. Royappa v. State of T.N.*, *Bhagwati, J.* laid down another test for purposes of Article 14. It was stated that if the administrative action was “arbitrary”. It could be struck down under Article 14. This principle is now uniformly followed in all Courts more rigorously than the one based on classification. Arbitrary action by the administrator is described as one that is irrational and not based on sound reason. It is also described as one that is unreasonable.

(b) If, under Article 14, administrative action is to be struck down as discriminative, proportionality applies and it is primary review. If it is held arbitrary, *Wednesbury* applies and it is secondary review.

67. But where an administrative action is challenged as “arbitrary” under Article 14 on the basis of *Royappa* (as in cases where punishments in disciplinary cases are challenged), the question will be whether the administrative order is “rational” or “reasonable” and the test then is the *Wednesbury* test. The Courts would then be confined only to a secondary role and will only have to see whether the administrator has done well in his primary role, whether he has acted illegally or has omitted relevant factors from consideration or has taken irrelevant factors into consideration or whether his view is one which no reasonable person could have taken. If his action does not satisfy these Rules, it is to be treated as arbitrary. (In *G.B. Mahajan v. Jalgaon Municipal Council* (SCC at p.111). *Venkatachaliah, J.* (as he then was) pointed out that “reasonableness” of the administrator under Article 14 in the context of administrative law has to be judged from the stand point of *Wednesbury* Rules. In *Tata Cellular v. Union of India* (SCC at pp.67980), *Indian Express Newspapers Bombay (P) Ltd. v. Union of*

India (SCC at p.691). Supreme Court Employees' Welfare Assn. v. Union of India (SCC at p.241) and U.P. Financial Corpn. v. Gem Cap (India) (P) Ltd. (SCC at p. 307) while judging whether the administrative action is 'arbitrary' under Article 14 (i.e. otherwise than being discriminatory), this Court has confined itself to a wednesbury review always.

68. Thus, when administrative action is attacked as discriminatory under Article 14, the principle of primary review is for the Courts by applying proportionality. However, where administrative action is questioned as 'arbitrary' under Article 14, the principle of secondary review based on Wednesbury principles applies.

98. The procedure adopted for interview as well as practical test as discussed hereinabove was highly arbitrary, unjust and improper, hence, violative of Article 14 of the Constitution of India. It does not meet the test required under Article 14 of the Constitution of India, hence, entire selection vitiates.

MALAFIDE/BIASNESS

99. One of the arguments advanced by the petitioners' counsel is that entire selection process was held at the dictate minister of department and high officials to accommodate their kith and kins. Accordingly, it has been submitted that authorities have exercise power malafidely to save their vested interest.

Hon'ble Supreme Court in the case of Prabodh Sagar (supra) held that malice means 'spite' or 'illwill'. It is the question of fact and not meaningless jargon. It has proper connotation. There must be factual support of allegation of malafide and mere user of word malafide would not be sufficed. Relevant portion from the judgment of Probodh Sagar (supra) is reproduced as under:

'Mala fides have been alleged against the statutory Board (Punjab State Electricity Board) but the contextual facts negate such an allegation. Incidentally, be it noted that expression 'mala fide' is not meaningless jargon and it has it proper connotation. Malice or mala fides can only be appreciated from the records of the case in the facts of each case. There cannot possibly be any set guidelines in regard to the proof of mala fides. Mala fides, where it is alleged, depends upon its own facts and circumstances. We ourselves feel it expedient to record that the petitioner had become more of a liability than an asset and in the event of there being such a situation vis-à-vis an employee, the employer will be within his liberty to take appropriate steps including the cessation of relationship between the employer and the employee. The service conditions of the Board's employees also provide for voluntary (sic compulsory) retirement, a person of the nature of the petitioner, as more fully detailed hereinbefore, cannot possibly be given any redress against the order of the Board for voluntary retirement. There must be factual support pertaining to the allegations of mala fides, unfortunately there is non. Mere user of word 'mala fide' by the petitioner would not by itself make the petition entertainable.'

100. In the case of V.K. Khanna (supra) their Lordships of Apex Court reiterated

the same principle and held that an action, which is not bonafide, may not ipso facto amount to be malafide. Malice should be proved by specific evidence. Hon"ble Supreme Court held that bias in any action negates fairness and reasonableness and leads to arbitrariness and malafides. Mere apprehensions shall not be sufficient to establish bias unless it is proved by cogent evidence showing improper conduct and motive. However, Hon"ble Supreme Court further held that mala fide intent or bias attitude can not be proved straitjacket formula but shall depend upon the facts and circumstances of each case.

101. While citing earlier judgment of Apex Court, Hon"ble Supreme Court held that motive and intention deal with different field and in common parlance a malicious act stands equated with an intentional act without just cause or excuse. While considering the mala fide act as well as malic in law and motive and distinguishing the intention with motive, in the case of V.K. Khanna (supra) Hon"ble Supreme Court held as under:

¶5. In almost all legal inquiries, intention as distinguished from motive is the allimportant factor and in common parlance a malicious act stands equated with an intentional act without just cause or excuse. In the case of Jones Bros. (Hunstanton) Ltd. v. Stevens the Court of Appeal has stated upon reliance on the decision of Lumley v. Gye as below:

¶For this purpose maliciously means no more than knowingly. This was distinctly laid down in Lumley v. Gye where Crompton, J. said that it was clear law that a person who wrongfully and maliciously, or, which is the same thing, with notice, interrupts the relation of master and servant by harbouring and keeping the servant after he has quitted his master during his period of service, commits a wrongful act for which he is responsible in law. Malice in law means the doing of a wrongful act intentionally without just cause or excuse; Bromage v. Prosser. "Intentionally" refers to the doing of the act; it does not mean that the defendant meant to be spiteful, though sometimes, as for instance to rebut a plea of privilege in defamation, malice in fact has to be proved.¶

6. In Girja Shankar Pant case this Court having regard to the changing structure of the society stated that the modernization of the society with the passage of time, has its due impact on the concept of bias as well. Tracing the test of real likelihood and reasonable suspicion, reliance was placed in the decision in the case of Parthasarathi (S. Parthasarathi v. State of A.P.) wherein Mathew, J. observed: (SCC pp.46566, para 16)

¶16. The test of "real likelihood" and "reasonable suspicion" are really inconsistent with each other. We think that the reviewing authority must make a determination on the basis of the whole evidence before it, whether a reasonable man would in the circumstances infer that there is real likelihood of bias. The Court must look at the impression which other people have. This follows from the principle that justice must not only be done but seen to be done. If rightminded persons would think that there is real likelihood of bias on the part of an

inquiring officer, he must not conduct the inquiry; nevertheless, there must be a real likelihood of bias. Surmise or conjecture would not be enough. There must exist circumstances from which reasonable men would think it probable or likely that the inquiring officer will be prejudiced against the delinquent. The Court will not inquire whether he was really prejudiced. If a reasonable man would think on the basis of the existing circumstances that he is likely to be prejudiced, that is sufficient to quash the decision [see per Lord Denning, M.R. in *Metropolitan Properties Co. (f.g.C.) Ltd. v. Lannon* (WLR at p.707)]. We should not, however, be understood to deny that the Court might with greater propriety apply the "reasonable suspicion" test in criminal or in proceedings analogous to criminal proceedings.?

7. Incidentally, Lord Thankerton in *Franklin v. Minister of Town and Country Planning* opined that the word "bias" is to denote a departure from the standing of evenhanded justice. *Girja Shankar* case further noted the different note sounded by the English Courts in the manner following: (SCC pp.199201, paras 3034)

?30. Recently however, the English Courts have sounded a different note, though may not be substantial but the automatic disqualification theory Rule stands to some extent diluted. The affirmation of this dilution however is dependent upon the facts and circumstances of the matter in issue. The House of Lords in the case of *R.v. Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte* (No.2) observed:

???..In Civil litigation the matters in issue will normally have an economic impact; therefore a Judge is automatically disqualified if he stands to make a financial gain as a consequence of his own decision of the case. But if, as in the present case. The matter at issue does not relate to money or economic advantage but is concerned with the promotion of the cause, the rationale disqualifying a Judge applied just as much if the Judge's decision will lead to the promotion of a cause in which the Judge is involved together with one of the parties.?

"31. Lord BrownWilkinson at p. 136 of the report stated:

?It is important not overstate what is being decided. It was suggested in argument that a decision setting aside the order of 25.11.1998 would lead to a position where Judges would be unable to sit on cases involving charities in whose work they are involved. It is suggested that, because of such involvement, a Judge would be disqualified. That is not correct. The facts of this present case are exceptional. The critical elements are (1) that A.I. was a party to the appeal; (2) that A.I. was joined in order to argue for a particular result; (3) the Judge was a director of a charity closely allied to A.I. and sharing, in this respect, A.I.'s objects. Only in cases where a Judge is taking an active role as trustee or director of a charity which is closely allied to and acting with a party to the litigation should a Judge normally be concerned either to recuse himself or

disclose the position to the parties. However, there may well be other exceptional cases in which the Judge would be well advised to disclose a possible interest.?

"32. Lord Hutton also in Pinochet case observed:

?There could be cases where the interest of the Judge in the subject matter of the proceedings arising from his strong commitment to some cause or belief or his association with a person or body involved in the proceedings could shake public confidence in the administration of justice as much as a shareholding (which might be small) in a public company involved in the litigation.?

33. Incidentally in *Locabail [Locabail (U.K.) Ltd. v. Bayfield Properties Ltd.]* the Court of Appeal upon a detail analysis of the oft-cited decision in *R. v. Gough* together with the *Dimes* case, *Pinochet* case, Australian High Court's decision in the case of *J.R.L. ex p C.J.L.*, *Re* as also the Federal Court in *Ebner, Re* and on the decision of the Constitutional Court of South Africa in *President of the Republic of South Africa v. South African Rugby Football Union* stated that it would be rather dangerous and futile to attempt to define or list the factors which may or may not give rise to a real danger of bias. The Court of Appeal continued to the effect that everything will depend upon facts which may include the nature of the issue to be decided. It further observed:

?By contrast, a real danger of bias might well be thought to arise if there were personal friendship or animosity between the Judge and any member of the public involved in the case; or if the Judge were closely acquainted with any member of the public involved in the case, particularly if the credibility of that individual could be significant in the decision of the case, or if, in a case where the credibility of any individual were an issue to be decided by the Judge, he had in a previous case rejected the evidence of that person in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind on any later occasion; or if on any question at issue in the proceedings before him the Judge had expressed views, particularly in the course of the hearing, on such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind (see *Vakuta v. Kelly*); or if, for any other reason, there were real ground for doubting the ability of the Judge to ignore extraneous considerations, prejudices and predilections and bring an objective judgment to bear on the issues before him. The mere facts that a Judge, earlier in the same case or in a previous case, had commented adversely on a party-witness, or found the evidence of a party or witness to be unreliable, would not without more found a sustainable objection. In most cases, we think, the answer, one way or the other, will be obvious. But if in any case there is real ground for doubt, that doubt should be resolved in favour of recusal. We repeat; every application must be decided on the facts and circumstance of the individual case. The greater the passage of time between the event relied on showing a danger of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be.?

34. The Court of Appeal judgment in *Locabail* though apparently as noticed above sounded a different note but in fact, in more occasions than one in the judgment itself, it has been clarified that conceptually the issue of bias ought to be decided on the facts and circumstances of the individual case a slight shift undoubtedly from the original thinking pertaining to the concept of bias to the effect that a mere apprehension of bias could otherwise be sufficient.?

8. The test, therefore, is as to whether there is a mere apprehension of bias or there is a real danger of bias and it is on this score that the surrounding circumstances must and ought to be collated and necessary conclusion drawn therefrom. In the event, however, the conclusion is otherwise that there is existing a real danger of bias administrative action cannot be sustained. If on the other hand allegations pertain to rather fanciful apprehension in administrative action, question of declaring them to be unsustainable on the basis therefore, would not arise.

9. It is in the same vein this Court termed it as reasonable likelihood of bias in *Rattan Lal Sharma* case (*Rattan Lal Sharma v. Managing Committee Dr. Hari Ram (coeducation) Higher Secondary School* wherein this Court was pleased to observe that the test is real likelihood of bias even if such bias was, in fact, the direct cause. In *Rattan Lal Sharma* case real likelihood of bias has been attributed a meaning to the effect that there must be at least a substantial possibility of bias in order to render an administrative action invalid. *Rattan Lal Sharma* case thus, in fact, has not expressed any opinion which runs counter to that in *Girja Shankar* case and the decision in the last noted case thus follows the earlier judgment in *Rattan Lal* case even though not specifically noticed therein.?

102. The aforesaid proposition of law also emerges from other cases i.e. *S.R. Venkataraman* (supra), *Kumaon Mandal Vikas Nigam* (supra), *Ram Chandra* (supra), *Medley Minerals Indian Ltd.* (supra), *The Regional Manager* (supra), *K. Nagraj* (supra), *Hindustan Aluminum Corporation* (supra) and *Dr. J.N. Banavalikar* (supra).

103. However, from the close reading of aforesaid judgment referred hereinabove, no finding may be recorded against the Minister of the Department or any person relating to their involvement for selection of their candidates, in view of fact that none of them have been arrayed as party but it is open for this Court to record a finding of bias or malice in law in the selection process adopted by the respondents from the material and evidence on record not only on the basis of pleading but also from the facts emerges from the perusal of record noted in the ordersheet referred hereinabove.

104. Hence, keeping in view the facts and circumstances of the case, even if, no malafide may be attributed to any individual person, the selection in question seems to suffer from malice in law. As discussed hereinabove, the provisions contained in Model Standing Orders have not been followed. The selection process was conducted in arbitrary manner. No record was maintained, of day to

day proceeding during the selection process. The board had acted like a private body while proceeding with the selection process for the following reasons out of Others:

- (i) Provisions contained in Model Standing Orders, Acts and Rules referred in preceding paras were not followed.
- (ii) No day to day proceeding was recorded by the Committee either of interview or practical test.
- (iii) Records were not signed indicating the various dates when the practical tests were held.
- (iv) Entire records of practical test as discussed hereinabove whether it was of spinning or cycling test seem to have been prepared at one stretch.
- (v) The attendance register does not contain any column of year, month and date when the candidates appeared for interview or written test.
- (vi) Members of Selection Committee had not recorded marks individually by evaluating each and every candidate during the course of interview.
- (vii) While submitting reply to the second supplementary affidavit filed by the petitioner relating to the relationship of several candidates with higherups, substantial number of relationship has been admitted though the allegation to that extent may themselves not be sufficient to establish malafide.
- (viii) From noncompliance of industrial law, the non compliance of 1974 Rules and the manner in which the Board and its Committees had proceeded to fill up the vacancies as discussed in the present judgment selection process adopted by Board does not inspire confidence and seems to emit foul smell. Authorities have acted in a manner treating the Board like personal property.

105. All these facts as well as material discussed in the preceding paras, at the face of record indicates that entire selection process was sham and farce and the members of Selection Committee and acted in such a manner which is not expected from a statutory body.

106. In a welfare state like ours it is inevitable that the organs of the State is regulated and controlled by Rule of law. The jurisdiction of administration bodies is increasing day by day. The concept of Rule of law would lose its significance if the instrumentalities of the State are not charged with the duty to discharge their functions in a fair and just manner.

107. The dividing line between administrative power and the quasi judicial power has been gradually obliterated. The requirement of acting judicially is nothing but it means to act justly and fairly and not arbitrarily or capriciously. Now it has been settled by Apex Court that even if a decision taken is on administrative side while holding selection or appointment, yardstick applicable to judicial or quasi judicial authority in discharge of their duties shall also be applicable to

administrative bodies. What was considered administrative power is now being considered as a quasi judicial power [vide: AIR 1970 SC 150, A.K. Kraipak and Others v. Union of India and Others (Constitution Bench)].

108. In A.K. Kraipak (supra) the Constitution Bench of Apex Court while considering the ambit and scope of writ of certiorari had proceeded to held as under:

?The Court of Appeal of New Zealand has held that the power to make a zoning order under Dairy Factory Supply Regulation 1936 has to be exercised judicially, see New Zealand and Dairy Board v. Okita Cooperative Dairy Co. Ltd., 1953 NZLR 366. This Court in Purtabpore Co. Ltd. v. Cane Commissioner of Bihar, Civil Appeal No.1464 of 1968. D/21.11.1968 (SC) held that the power to alter the area reserved under the SugarCane (Control) Orders, 1966 is a quasi judicial power. With the increase of the power of the administrative bodies it has become necessary to provide guidelines for the just exercise of their power. To prevent the abuse of that power and to see that it does not become a new despotism, Courts are gradually evolving the principles to be observed while exercising such powers. In matters like these public good is not advanced by a rigid adherence to precedents. New problems call for new solutions. It is neither possible nor desirable to fix the limits of a quasijudicial power. But for the purpose of the present case we shall assume that the power exercised by the selection Board was an administrative power and test the validity of the impugned selections on that basis.?

109. Keeping in view the material on record and facts discussed hereinabove entire selection process seems to suffer from malice in law [vide: V.K. Khanna (supra)] and farce. For the reasons best know to the authorities no just fair procedure was adopted for the interview as well as for the practical test. Records were also not maintained in a proper manner.

110. In S.R. Venkataraman (supra) the Apex Court had referred Viscount Haldane while defending malice in law as under; to reproduce:

????Viscount Haldane described it as follows in Shearer v. Shields, (1914) AC 808 at p. 813: ?A person who inflicts an inquiry upon another person in contravention of the law is not allowed to say that he did so with an innocent mind; he is taken to know the law, and he must act within the law. He may, therefore, be guilty of malice in law, although, so far the state of his mind is concerned, he acts ignorantly, and in that sense innocently.? Thus malice in its legal sense means malice such as may be assumed from the doing of a wrongful act intentionally but without just cause or excuse, or for want of reasonable or probable cause.?

111. It has been further held by Apex Court in a case of S.R. Venkataraman (supra) that while holding an action being suffer from malice in law it is not necessary to record a finding whether authorities had acted in good faith or in bad faith. Their Lordships of Apex Court in a case of S.R. Venkataraman (supra)

are held as under:

6. It is however not necessary to examine the question of malice in law in this case, for it is trite law that if a discretionary power has been exercised for an unauthorized purpose, it is generally immaterial whether its repository was acting in good faith or in bad faith. As was stated by Lord Goddard C.J., in *Pilling v. Abergele Urban District Council*, (1950) 1 KB 636 where a duty to determine a question is conferred on an authority which state their reasons for the decision, and the reasons which they state show that they have taken into account matters which they ought not to have taken into account, or that they have failed to take matters into account which they ought to have taken into account, the Court to which an appeal lies can and ought to adjudicate on the matter.

7. The principle which is applicable in such cases has thus been stated by Lord Esher M.R. in the *Queen on the Prosecution of Richard Westbrook v. the Vestry of St. Pancras*, (1890) 24 QBD 371 at p. 375:

If people who have to exercise a public duty by exercising their discretion take into account matters which the Courts consider not to be proper for the guidance of their discretion, then in the eye of the law they have not exercised their discretion.

This view has been followed in *Sedler v. Sheffield Corporation*, (1924) 1 Consolidation of Holdings Act 483.

112. In view of above, entire selection seems to suffer from malice in law, hence, vitiates.

113. One of the arguments advanced by the learned counsel for the respondents is that a writ of certiorari can be issued only to correct error apparent at the face of record. Learned counsel for the respondents had relied upon the judgments reported in *S.L. Hegde*, (supra), *Beant Singh* (supra), *Syed Yakoob* (supra). As discussed hereinabove the entire selection process suffers from substantial illegality and also the error is apparent at the face of record. Moreover, keeping in view the Constitution Bench judgment in *A.K. Kraipak* (supra), a writ of certiorari may be issued, as the selection process seems to suffer from malice in law as well as arbitrary being violative of Article 14 of the Constitution of India.

114. In view of above facts and circumstances discussed hereinabove for the sake of repetition it can be said that the authorities while proceeding with the selection process had treated the Board like their private body and not acted in just and fair manner. It is unfortunate that inspite of catena of judgments of the Apex Court and even after lapse of almost 60 years of independence, the instrumentalities of the State are holding selection to fill up the regular vacancies without adhering to Rule of law. Every unemployed youth of the country has got right to claim appointment against the vacancies created by the Government or its instrumentalities subject to his or her suitability in accordance to Rules. Denial of appointment to eligible person and induction of incompetent person in the

service cadre either of the state or its instrumentalities is the root cause of deteriorating administration and expansion of loss to the administration or corporations.

115. The facts and circumstances discussed hereinabove point out only one thing that entire selection was sham and farce and held not in a just and fair manner. Petitioners were fully entitled to approach this Court under extraordinary remedy of Article 226 of the Constitution of India before the declaration of result when substantial illegalities and arbitrariness were came into their knowledge. They have rightly invoked the extraordinary remedy of Article 226 of the Constitution of India to set the things right. This Court can not be moot spectator of unfair practice adopted during the course of selection process.

116. In view of above, writ petition deserves to be allowed with costs. In a case reported in (2005) 6 Supreme Court Cases 344, Salem Advocate Bar Association (II) v. Union of India, Hon"ble Supreme Court had laid down that whenever it is found that authorities had acted in a highly arbitrary manner then appropriate cost should be imposed to meet out the expenses incurred in litigation, time consumed, cost of litigation, mental agony and paid suffered by litigant while approaching the Court.

117. So far as bonus is concerned, petitioners have already submitted representation. The representations submitted by them for payment of bonus may very well be considered by the authorities in accordance to provisions contained in Payment of Bonus Act, 1965 and other law time being in force. Authorities may decide the petitioners' representation in accordance to law forthwith by passing a speaking and reasoned order.

118. Subject to above, writ petition is allowed with costs. A writ in the nature of certiorari is issued quashing the impugned advertisement dated 15.3.2006 as contained in Annexure 6 to the writ petition with natural consequence. The steps taken in pursuance to impugned advertisement to fill up the vacancies in question are also quashed.

A writ in the nature of mandamus is issued commanding the opposite parties to fill up the vacancies in question keeping in view the observation made in the present judgment expeditiously.

Respondents' board shall liable to pay costs to the tune of Rs.50,000/, which shall be deposited in this Court within a period of one month. Petitioner shall be entitled to withdraw cost to the tune of Rs.40,000/, out of which every petitioner shall be entitled to get Rs.5,000/ each. Rest of the cost shall be placed in the account relating to appointment of Amicus Curiae.

Chief Secretary, Government of U.P. may hold an enquiry and take appropriate disciplinary action in accordance to law against the officers who are responsible to hold selection in question in such unruly manner as observed in the present judgment and also recover the cost from such officers.

Registry shall return the records after lapse of statutory period of filing of Special Leave Petition in Apex Court.

Writ petition is allowed accordingly, with costs as quantifies hereinabove.

(Petition allowed)