

(1990) 04 AHC CK 0048

In the Allahabad High Court

Case No : Civil Misc. Writ No's. 4215, 4392, 4214, 4208, 4417 and etc. etc. of 1990

Triloki Nath Pandey

APPELLANT

Vs

State of U.P. and others

RESPONDENT

Date of Decision : 30-04-1990

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 27 Rule 4, Order 27 Rule 8B, 2, 2(7)
Constitution of India, 1950 — Article 134A, 14, 16, 16(1), 226
Criminal Procedure Code, 1973 (CrPC) — Section 2, 24
Government of India Act, 1935 — Section 241, 241(2), 7B
Uttar Pradesh Fundamental Rules — Rule 1, 103, 162, 2, 99
Uttar Pradesh Zamindari Abolition and Land Reforms Rules, 1952 — Rule 114

Citation : AIR 1990 All 143 : (1990) 1 UPLBEC 542

Hon'ble Judges : V.N. Khare, J;H.C. Mital, J

Bench : Division Bench

Advocate : G.P. Mathur, for the Appellant; Standing Counsel, for the Respondent

Final Decision : Dismissed

Judgement

V. N. Khare, J.—Since common questions of fact and law in this writ petition and in the connected writ petitions are involved, we propose to decide these writ petitions by a common judgment.

2. The petitioner in Writ Petition No. 4215 of 1990 is an Advocate and was appointed as a District Government Counsel (Civil), Basti on 7-4-1983 for a period of one year. His appointment as District Government Counsel (Civil) Basti is alleged to have been extended from time to time, the last extension being for a period from 1-7-1989 to 30-6-1992.

3. Petitioner No. 1 in Writ Petition No. 4392 of 1990 is an Association duly registered with the Registrar of Societies, Chits and Firms, U.P. Lucknow-W, known as U.P. Government Counsel (Criminal) Welfare Association, Meerut Branch, District Courts, Meerut (hereinafter referred to as an "Association"). The

Association is said to be a State Level Organisation of Public Prosecutors and Additional Public Prosecutors appointed u/s 24 of the Code of Criminal Procedure having its headquarter at Bareilly. Petitioner No, 2 is its Secretary.

4. In Writ Petition No. 4214 of 1990 petitioner No. 2, was appointed as District Government Counsel (Criminal) for a period of one year. His term of office was renewed for another three years.

5. Writ Petition No. 4208 of 1990 has been filed by U. P, Government Counsel (Criminal) Welfare Associating having its office at District Judge's Court, Bareilly through its President Srikant. The President of the Association was appointed as District Government Counsel (Criminal) and his term was renewed from time to time and his present term was extended from 1-7-1989 to 23-6-1990.

6. The petitioner in Writ Petition No. 4417 of 1990 was appointed as District Government Counsel (Revenue), Basti by order dated 12-8-1988 for a period of one year. Although his term of office has not been renewed but he has been allowed to continue till further orders.

7. In Writ Petition No. 4479 of 1990 the petitioner was appointed as Additional District Government Counsel (Revenue) for a period beginning from 1-7-1987 to 30-8-1989. Although the term of the petitioner has not been renewed yet he is still continuing to act as such.

8. In Writ Petition No. 4424 of 1990 the petitioner is a Panel Lawyer appointed by the State Government.

9. The petitioner in Writ Petition No. 4500 of 1990 is a District Government Counsel (Criminal) Azamgarh and his term as District Government Counsel (Criminal) has been renewed for three years from 17-8-1989 to 3-7-1992.

10. The petitioner in Writ Petition No. 6025 of 1990 is District Government Counsel (Civil) at Etawah and continued to work as such till 28-2-1990.

11. The petitioner in Writ Petition No. 6026 of 1990 is working as a Panel Lawyer since 1983 appointed by the State Government.

12. The petitioners in Writ Petition No. 6027 of 1990 are working as Assistant Public Prosecutors Fatehpur since 1983.

13. The petitioner Swami Dayal in Writ Petition No. of 1990 was appointed as Sub- District Government Counsel (Civil), Bansi, Siddharthnagar.

14. In Writ Petition No. of 1990, filed by Gangadhar Upadhyay on 15th March, 1990, the petitioner was appointed as District Government Counsel (Revenue) and is working as such in Jaunpur.

15. By means of these writ petitions under Article 226 of the Constitution the petitioners have challenged the legality of the Government order dated 6th February, 1990 directing that the terms of all the Government Counsel including Penal Lawyers should be extended only up to 28th February, 1990 and the

District Magistrates of the Districts have been required to send fresh names for fresh appointments as District Government Counsel (Civil), District Government Counsel (Criminal), District Government Counsel (Revenue), Assistant Panel Lawyers and others. The impugned order further provides that the present Government Counsel shall be allowed to work only up to 28th February, 1990 and thereafter their appointment shall be terminated. A copy of the Government Order has been annexed as Annexure No. 4 to Writ Petition No. 4215 of 1990. This Government Order has been challenged on number of grounds and common prayer is for issuing a writ of certiorari quashing the impugned order and for issue of a writ of mandamus directing the respondents not to give effect to the order dated 6th February, 1990 and further directing the respondents not to proceed with the fresh selection in pursuance of the advertisement dated 4th February, 1990.

16. Sri G. P. Mathur, learned counsel appearing for the petitioner in Writ Petition No. 4215 of 1990 argued that the office of District Government Counsel (Civil) is a "civil post" within the meaning of Article 311 of the Constitution and, therefore, District Govt. Counsel (Civil) holds a civil post within the meaning of Article 311 of the Constitution and as such the appointment of the petitioner could not be terminated without giving him a notice to show cause against such termination as contemplated under Article 311 of the Constitution.

17. The learned counsel while elaborating his argument maintained that the petitioner holds a civil post under the State Government and as such is servant of the State Government and there exists a relationship of "master" and "servant" between the State and the petitioner. In view of this argument it has to be seen as to whether there exists a relationship of master and servant between the petitioner and the State Government and if it is found that the petitioner is not a servant of the State Government, he cannot be said to hold a civil post under the State Government, within the meaning of Art. 311 of the Constitution.

18. Learned counsel for the petitioner referred to us decisions in State of Uttar Pradesh and Another Vs. Audh Narain Singh and Another, , State of Assam and Others Vs. Shri Kanak Chandra Dutta, , State of Gujarat and Another Vs. Raman Lal Keshav Lal Soni and Others, , Mohammad Matteen Qidwai Vs. The Governor-General in Council, and Bibhuti Narayan Singh v. State 1986 (2) UPLBEC 1130 laying down several tests for determining relationship of employer and employees between the Government and the persons appointed by it.

19. Learned counsel before referring to various elements which according to him establish the relationship of "master" and "servant" between the petitioner and the State Government, referred to various tests laid down by the Supreme Court in the decisions noted above which determine the relationship of master and servant.

20. In State of Uttar Pradesh and Another Vs. Audh Narain Singh and Another, in

paragraph 8 it was observed thus:--

"Whether in a given case the relationship of master and servant exists is a question of fact, which must be determined on a consideration of all material and relevant circumstances having a bearing on that question. In general selection by the employer, coupled with payment by him of remuneration or wages, the right to control the method of work, and a power to suspend or remove from employment are indicative of the relation of master and servant. But co-existence of all these indicia is not predicated in every case to make the relation one of master and servant. In special classes of employment a contract of service may exist, even in the absence of one or more of these indicia. But ordinarily the right of an employer to control the method of doing the work, and the power of superintendence and control may be treated as strongly indicative of the relation of master and servant, for that relation imports the power not only to direct the doing of some work but also the power to direct the manner in which the work is to be done. If the employer has the power, prima facie, the relation is that of master and servant."

21. In *State of Assam and Others Vs. Shri Kanak Chandra Dutta*, in paragraph 9 it was observed thus:--

"The question is whether a Mauzadar is a person holding a civil post under the State within Art. 311 of the Constitution. There is no formal definition of "post" and "civil post". The sense in which they are used in the Services Chapter of Part XIV of the Constitution is indicated by their context and setting. A civil post is distinguished in Art. 310 from a post connected with defence; it is a post on the civil as distinguished from the defence side of the administration, an employment in a civil capacity under the Union or the State, see marginal note to Art. 311. In Art. 311, a member of a civil service of the Union or an all India service or a civil service of a State is mentioned separately, and a civil post means a post not connected with defence outside the regular civil services. A post is a service or employment. A person holding a post under a State is a person serving or employed under the State, see the marginal notes to Arts. 309, 310 and 311. The heading and the sub-heading of Part XIV and Chapter I emphasise the element of service. There is a relationship of master and servant between the State and a person said to be holding a post under it. The existence of this relationship is indicated by the State's right to select and appoint the holder of the post, its right to suspend and dismiss him, its right to control the manner and method of his doing the work and the payment by it of his wages or remuneration. A relationship of master and servant may be established by the presence of all or some of these indicia, in conjunction with other circumstances and it is a question of fact in each case whether there is such a relation between the State and the alleged holder of a post."

22. In *State of Gujarat and Another Vs. Raman Lal Keshav Lal Soni and Others*, in para 27 it was observed thus:--

"We have to first consider the question whether the members of the Gujarat Panchayats Service are Government servants. Earlier we have already said enough to indicate our view that they are Government servants. We do not propose and indeed it is neither politic nor possible to lay down any definitive test to determine when a person may be said to hold a civil post under the Government. Several factors may indicate the relationship of master and servant. None may be conclusive. On the other hand, no single factor may be considered absolutely essential. The presence of all or some of the factors, such as the right to select for appointment, the right to appoint, the right to terminate the employment, the right to take other disciplinary action, the right to prescribe the conditions of service, the nature of the duties performed by the employee, the right to control the employee's manner and method of the work, the right to issue directions and the right to determine and the source from which wages or salary are paid and a host of such circumstances, may have to be considered to determine the existence of the relationship of master and servant. In each case, it is a question of fact whether a person is a servant of the State or not. Amongst the cases cited before us were Gurugobinda Basu Vs. Sankari Prasad Ghosal and Others, ; State of Uttar Pradesh and Another Vs. Audh Narain Singh and Another, ; State of Assam and Others Vs. Shri Kanak Chandra Dutta, ; D.R. Gurushantappa Vs. Abdul Khuddus Anwar and Others, ; Dr. S.L. Agarwal Vs. The General Manager, Hindustan Steel Ltd., ; and Jalgaon Zila Parishad v. Duman Gobind, C.A. Nos. 24 and 25 of 1968 decided on December 20, 1968. We have considered all of them and do not consider it necessary to refer to each of the cases."

23. In *Bibhuti Narayan Singh v. State* (1986 (2) UPLBEC 1130) (*supra*) it was observed thus:--

"These, then, are the relevant considerations for determining the controversy. In my view, there are broadly two tests for determining the question whether a person holds a "civil post", one, whether the person is employed to perform duties and functions which fall within the sphere of activities, duties, and functions of the State, and two, whether the person claiming to be the holder of a civil post is under the employment and administrative control of the State, as regards his appointment, and other terms of employment as well as his work and conduct."

24. On the basis of the aforesaid decisions the learned Counsel for the petitioner argued that although it is not possible to lay down any definitive or conclusive test to determine when a person may be said to hold a civil post under the Government yet several tests may indicate the relationship of master and servant such as right to select for appointment, right to appoint, right to control the employee's manner and method of work and payment of salary and power to take disciplinary action. In light of these tests the learned Counsel for the petitioner referred to certain paragraphs of the Legal Remembrancer's Manual and Rules and Orders relating to the Department of Legal Remembrancer to the Government of Uttar Pradesh and also the provisions of Code of Civil Procedure.

25. Para 1.06 of the Legal Remembrancer's Manual 1975 provides that the District Government Counsel (Civil, Revenue, Criminal) are Law Officers of the Government.

26 Para 3.04 of the Manual provides that all Law Officers except the Advocate General, shall be under the control and supervision of the Legal Remembrancer.

27. Para 7.01 which appears in Chapter VII of the Manual provides that the District Government Counsel are legal practitioners appointed by the State Government to conduct in any Court, other than the High Court, such civil, criminal or revenue cases on behalf of the State Government, as may be assigned to them either generally or specially by the Government, and the legal practitioner so appointed shall be known as District Government Counsel (Civil).

28. Para 7.02 of the Manual provides that the Government shall ordinarily appoint a District Government Counsel (Civil) for each district in the State.

29. Para 7.03 of the Manual provides that whenever the post of any of the Government Counsel in the district is likely to fall vacant within the next three months, or when a new post has been created, the District Officer concerned shall notify the vacancy to the members of the Bar. The names so received shall be considered by the District Officer in consultation with the District Judge. Thereafter, the District Officer shall submit in order of preference names of legal practitioners for each post to the Legal Remembrancer.

30. Sub-para (1) of Para 7.06 of the Manual provides that the legal practitioners finally selected by the Government may be appointed District Government Counsel for one year from the date of taking over his charge.

31. Sub-sec. (7) of Sec. 2, CPC defines "Government Pleader". It says, "Government Pleader" includes any officer appointed by the State Government to perform all or any of the functions expressly imposed by this Code on the Government Pleader and also any pleader acting under the directions of the Government Pleader".

32. Order XXVII, Rule 4 of the Code provides that the Government Pleader in any Court shall be the agent of the Government for the purpose of receiving process against the Government issued by such Court.

33. Order XXVII, Rule 8-B of the Code provides that the Government Pleader means in relation to any suit by or against a State Government or against a public officer in the service of a State, the State Government and the Government Pleader as defined in Cl. (7) of Sec. 2 or such other pleader as the State Government may appoint, whether generally or specially, for the purposes of this Order. (Sic)

34. On the strength of the aforesaid provisions the learned Counsel argued that since the Government has power of selection for appointment and appointment of District Government Counsel (Civil), one of the crucial test for determining a

relationship of master and servant between the District Government Counsel (Civil) and the State Government is satisfied and District Government Counsel (Civil) has to be treated as a Government servant.

35. No doubt the aforesaid provisions do show that the Government has a right to select for appointment and further right to appoint, but as laid down by the Supreme Court factors may indicate the relationship of a master and servant but none may be conclusive and on the other hand no single factor may be considered absolutely essential. The presence of all or some of the factors, such as right to select for appointment and some of the factors and host of such circumstances may have to be considered to determine the existence of relationship of a master and servant and in each case it is a question of fact whether a person is a servant of the State or not. As observed earlier, no doubt, there is a right to select for appointment and further right to appoint in the government but we have to see what is the nature of appointment of the petitioner when he was appointed as a District Government Counsel (Civil).

36. Sub-para (1) of Para 7.06 of the Manual provides that the legal practitioner finally selected by the Government may be appointed District Government Counsel for one year from the date of his taking over charge. Sub-para (2) further provides that if the work and conduct of the legal practitioner is found satisfactory he may be furnished with a deed of engagement in Form No. 1 for a term not exceeding three years. On his first engagement a copy of Form No. 2 shall be supplied to him and he shall complete and return it to the Legal Remembrancer for record. Sub-para (3) further provides that the appointment of any legal practitioner as a District Government Counsel is only professional engagement terminable at will on either side and is not appointment to a post under the Government. Accordingly the Government reserves the power to terminate the appointment of any District Government Counsel without assigning any cause.

37. Form I appended with the Manual is a deed of engagement required to be entered into between petitioner and the State Government. The deed of engagement shows that appointment of petitioner is professional engagement terminable at will by either side.

38. The power of selection and appointment may be there but the nature of appointment is like a professional engagement. We are, therefore, of the view that this factor alone is not determinative of establishing relationship of master and servant between the petitioner and the State Government.

39. Learned Counsel for the petitioner referred to various other provisions of the Legal Remembrancer's Manual to show that the State Government has a right to control the method and manner of work of District Government Counsel (Civil) and right to issue directions to him and therefore, it establishes the relationship of master and servant between the petitioner and the Government.

40. Learned Counsel referred to Paragraph 3.04 of the Manual and argued that

under this para the District Government Counsel has to work under the control and supervision of the Legal Remembrancer to the Government.

41. Para 7.18 of the Manual provides that a District Government Counsel in the district shall be under the control and supervision of the District Officer and all reports whether condemnatory or commendatory in regard to the work of District Government Counsel shall be submitted by the District Officer to the Government through the Legal Remembrancer. The District Government Counsel shall before leaving his district, obtain the permission of the District Officer but such permission shall not be necessary for absence only on days on which the Courts are not open.

42. The other provisions referred to us in this connection are Paras 7.07, 7.19, 7.20, 7.20(5) and 7.22(5) of the Legal Remembrancer's Manual.

43. Para 7.07 provides that the District Government Counsel shall not participate in political activities.

44. Para 7.19 provides that the District Government Counsel (Civil) is required to appear on behalf of the State Government in all civil suits, proceedings in the Civil Courts, cases relating to contempt of court when required by the District Officer or the District Judge, appeals, revisions or references and to advise free of charge in all legal matters.

45. Para 7.20 enumerates duties of the District Government Counsel (Crl.) and Para 7.22(5) provides that the District Government Counsel may also be required, if necessary, to appear in any case in any Court outside the district.

46. The other provisions of the Manual relied upon by the learned Counsel for the petitioner to show the extent of control exercised by the Government in the working of the District Government Counsel are Paras 15.18, 15.20, 15.33, 15.49, 17.01, 17.03 and 17.11.

47. Para 15.18 provides that the draft of a suit has to be prepared by the District Government Counsel and the same shall be forwarded to the Head of Department/District Officer along with his opinion on the merits of the case and if there is difference of opinion between the District Government Counsel and the District Officer, the matter has to be referred to the Legal Remembrancer for decision whose opinion shall be final.

48. Para 15.20 of the Manual provides for sanction of Government necessary for institution of a civil suit.

49. Para 15.33 provides for authority for defence of suits against Government given to the District Government Counsel in certain cases by the Head of Department and by the Legal Remembrancer.

50. Para 15.49 provides that no alteration or additions shall ordinarily be made in the pleadings after they have been approved by the Legal Remembrancer and filed in Court, and if any alterations, additions are considered necessary by the

District Government Counsel, he shall submit the brief to the Legal Remembrancer for orders and no such amendment be carried out without the prior approval of the Legal Remembrancer.

51. Para 17.01 directs that no appeal shall be filed unless in the opinion of the Legal Remembrancer there is a balance of probability that the same will be successful.

52. Para 17.03 provides that the appeal or revision maybe filed on the recommendation of the Head of Department or the District Officer.

53. Para 17.11 provides that when it is decided to file an appeal to the Court of District Judge, the Legal Remembrancer shall send the brief along with the memorandum of appeal to the District Government Counsel to file the appeal.

54. While appreciating the argument of the learned Counsel for the petitioner we have to bear in mind that the "State" is not a living person and further the "State" is one of the biggest litigant in the State. Someone on behalf of the State has to function. So far as the judicial side of the State is concerned the Judicial Secretary is in charge of the litigation and he gives direction whether a case has to be defended or not. He gives instructions on behalf of the State to the District Government Counsel. Since the State is one of the biggest litigant and is not a living person, certain procedure has been laid down in what manner the litigation, for or against the State, has to be carried out. The provisions relied upon by the learned Counsel for the petitioner do not show the control exercised by the State over the working of the District Government Counsel in Courts namely, while making argument, pleading the case and preparing a case for the Government. No provision has been shown to us that Government can control the manner of performing the work of the District Government Counsel. In fact, what we find is that there is absolutely no control over the manner of performance of work by the District Government Counsel, by the Government, when he pleads the cases of the State Government before a court of law.

55. In law the time honoured expression "Master" and "Servant" indicates the relationship which exists when one person employs another to do certain work and exercises right of control over the performance of work to the extent of prescribed manner under which it is to be executed. The employer thus is master and the person who is employed to work is a servant. The important test in determining whether one employed to do certain work is servant or employee, is the control over the working which is reserved to the employer. In other words, the identifying mark of an employee is that he should be under the control or supervision of the employer in respect of the details of working. In the present case we find that the State has absolutely no control over the method and manner of performance of the District Government Counsel while appearing before a court of law. We are accordingly of the view that the factors essential for establishing right to control the employee's manner and method of working are absent in the present case. Applying the test we hold that there is no relationship

of "employer" and "employee" between the State Government and the District Government Counsel.

56. Faced with this situation, learned Counsel appearing for the petitioner argued that the test of right to control over the method of working of an employee is no longer relevant while determining the relationship of "master" and "servant" in view of the development of law due to the industrial revolution and changes in our society in the past thirty years inasmuch as the nature of control depends upon the nature of working.

57. The learned Counsel cited examples of performance of work by Doctors, Engineers and Scientists employed by the State Government and argued that the State Government cannot possibly have any control over the performance of working of a Surgeon when he is operating a patient and thus this test of control by the Government over the manner of performance of working of the District Government Counsel (Civil) cannot be applied at all for establishing the relationship of an "employer" and "employee".

58. The learned Counsel referred few English decisions in support of his argument. In *Argent v. Minister of Social Security* (1968) 1 WLR 1749 it was observed as follows:

"If one studies the cases to which I have been referred, a number of tests have been propounded over the years for resolving the problem which I have to solve. For example, in the earlier cases it seems to have been suggested that the most important test, if not the all important test, was the extent of the control exercised by the employer over the servant. If one goes back to some of the cases in the first decade of this century, one sees that that was regarded almost as the conclusive test. But it is also clear that as one watches the development of the law in the first 60 years of this century and particularly the development of the law in the last 15 or 20 years in the field, the emphasis has shifted and no longer rests so strongly upon the question of control. Control is obviously an important factor. In some cases it may still be the decisive factor, but it is wrong to say that in every case it is the decisive factor. It is now, as I venture to think, no more than a factor, albeit a very important one, In a workman's compensation case decided some 20 years ago in the House of Lords, *Short v. J. and W. Henderson Ltd.* (1946) 62 TLR 427 H. L. Lord Thankerton, delivering the leading speech said "that he would recapitulate the four indicia of a contract of service derived by the Lord Justice Clerk from the authorities to which the Lord Justice Clerk had referred".

59. In *Market Investigations v. Minister of Social Security* (1969) 2 WLR 8 it was observed -

"I think it is fair to say that there was at one time a school of thought according to which the extent and degree of the contract which B was entitled to exercise over A in the performance of the work would be a decisive factor, it has for long been apparent that an analysis of the extent and degree of such control is not in

itself decisive. Thus in *Collins v. Hertfordshire County Council* (1947) KB 598 it had been suggested that the distinguishing feature of a contract of service is that the master cannot only order or require what is to be done but also how it shall be done. The inadequacy of this test was pointed out by Somervell, L. J. in *Cassidy v. Ministry of Health* (1951) 2 KB 343 when he referred to the case of a certified master of a ship. The master may be employed by the owners under what is clearly a contract of service, and yet the owners have no power to tell him how to navigate his ship. As Lord Parker, C. J, pointed out in *Morren v. Swinton and Pendlebury Borough Council* (1965) 1 WLR 576 when one is dealing with a professional man, "or a man of some particular skill and experience, there can be no question of an employer telling him how to do work; therefore the absence of control and direction in that sense can be of little, if any, use as a test".

60. In *Montreal v. Montreal Locomotive Works Ltd.* (1947) 1 DLR 161 PC. Lord Wright said at page 169 :

In earlier cases a single test, such as the presence or absence of control was often relied on to determine whether the case was one of master and servant, mostly in order to decide issues of tortious liability on the part of the master or superior. In the more complex conditions of modern industry, more complicated tests have to be applied. It has been suggested that a fourfold test would in some cases be more appropriate, a complex in evolving (1) control; (2) ownership of the tools; (3) chance of profit; (4) risk of loss. Control in itself is not always conclusive. Thus the master of a chartered vessel is generally the employee of the ship-owner though the character can direct the employment of the vessel. Again the law often limits the employer's right to interfere with the employee's conduct, as also do trade union regulations. In many cases the question can only be settled by examining the whole of the various elements which constitute the relationship between the parties. In this way it is in some cases possible to decide the issue by raising as the crucial question whose business is it, or in other words by asking whether the party is carrying on the business, in the sense of carrying it on for himself or on his own behalf and not merely for a superior."

61. The learned Advocate General appearing for the State argued that there may be cases where actual control over the performance may not be possible immediately but if the employee commits a misconduct or exceeds to his brief, he can be punished. But in the case of District Government Counsel there is no power with the Government to punish.

62. No doubt the decisions referred to by the learned Counsel for the petitioner point out certain cases where there may not be actual control over an employee performing his work but if the employee is found to have been negligent in his working or commits misconduct or exceeds to authority, he can be subjected to an appropriate disciplinary action.

63. We have gone through the provisions of the Legal Remembrancer's Manual and Deed of Engagement. There is no power with the Government to take any disciplinary action against a District Government Counsel if he commits misconduct by way of dismissal or removal as to disqualify him from appearing before a court of law. If a District Government Counsel commits misconduct or causes irreparable loss to the Government, the Government has to make a complaint to the Bar Council for taking disciplinary action against him like any other ordinary client. In fact absence of power for taking disciplinary action against a Government Counsel clinches the issue before us. Thus the test of taking a disciplinary action in our opinion, is decisive of the matter for determining the relationship of "employer" and "employee" between the State Government and the District Government Counsel. Since the Government cannot take any disciplinary action for any misconduct of the District Government Counsel, we are of opinion that the relationship of master and servant is not established between the District Government Counsel and the State Government.

64. Learned Counsel for the petitioner then referred to various other provisions of the Manual to show that the Government had power to take disciplinary action against the District Government Counsel if he is found negligent or commits misconduct in performance of his, work. He argued that there are provisions to show that if the District Government Counsel commits default he can be punished and for that purpose he invited our attention to Paras 7.09 and 7.61 of the Manual. Para 7.09 provides that the District Officer and the District Judge shall, before the end of every year, place on record his opinion on the capacity and work of the District Government Counsel and such record shall be confidential and maintained by the District Officer. Sub-para (2) of the aforesaid Para further provides that the character roll of every District Government Counsel shall also be maintained by the Government in Judicial (Legal Advice) Section and any shortcomings on the part of the District Government Counsel shall at once be brought to the notice of the Legal Remembrancer.

65. Para 7.61 further provides that if it appears that the District Government Counsel has been guilty of any neglect or im- propriety the Legal Remembrancer may after taking the explanation of the District Government Counsel concerned, direct that the whole or any portion of the fees which Would otherwise have been payable to him shall be forfeited.

66. On the basis of the aforesaid provisions learned Counsel for the petitioner argued that the Government maintains a character roll of the District Government Counsel and has power to forfeit the fees of the District Government Counsel if it is found that he has committed any misconduct or negligence in his duties. So far as maintenance of character roll is concerned, it is maintained for the purpose of judging the performance of work of the District Government Counsel which is required for renewal of the term of appointment of the District Government Counsel. So far as forfeiture of fees is concerned, it is like any client forfeiting pr refusing to pay if his work is not found to have been done by a

lawyer. We are, therefore, of opinion that factors pointed out by learned Counsel for the petitioner do not constitute power of taking disciplinary action with the Government against a Government Counsel found negligent in his duties assigned to him.

67. Learned Counsel for the petitioner then submitted that District Government Counsel (Civil) are being paid a monthly pay, they are debarred from private practice and further debarred from participating in any political activity inasmuch as they have to retire on attaining the age of superannuation and all these factors are indicative of relationship of "employer" and "employee" between the District Government Counsel (Civil) and the State Government. Learned Counsel referred to Annexure "3" to the Civil Misc. Writ No. 4215 of 1990 and Para 7.07 and 7.13 of the Manual. Government Order dated 30th June, 1989 provides that District Government Counsel (Civil) of "A" Class districts shall be paid Rs. 4,000/- per month, Rs. 300/- towards library allowance and in lieu of this the District Government Counsel shall not be allowed to have private practice in the Court. Para 7.07 of the Manual provides that the District Government Counsel shall not participate in political activity. Para 7.13 of the Manual provides that no legal practitioner shall be appointed if his age exceeds 62 years nor his term shall be extended beyond the age of 62 years unless the Government for any special reasons, in any case, directs otherwise. Learned Counsel also relied upon a decision in Union of India (UOI) Vs. M.A. Chowdhary, in support of his argument.

68. The learned Advocate General replied that what is paid to the District Government Counsel is a fee and not salary. According to him fee can be paid casewise, per day, week or month, and further, so far as ban on private practice is concerned, he argued that it is a term of engagement and it is always open to a client to insist on his lawyer not to accept any other case with a view to take special interest in his cases. So far as the age of superannuation is concerned learned Advocate General argued that what Para 7.13 of the Manual provides is not the age of superannuation but the age after which a person will not be eligible for continuance as District Government Counsel (Civil). Learned Advocate General further submitted that District Government Counsel by reason of his engagement is required not to participate in any political activity as there may be a case where a political party is involved and in any case these factors do not constitute relationship of "master" and "servant".

69. We have seen earlier that sub-paragraphs (2) and (3) of Para 7.06 of Legal Remembrancer's Manual read with Form I appended with the Manual which is deed of engagement, show that appointment of District Government Counsel is only professional engagement and what is paid and manner and method in which it is paid is provided in Chapter VII of the Manual. It is not necessary to refer all provisions in this regard, suffice it to refer Paras 7.49, 7.50, 7.53 and 7.54 of the Manual.

70. Clause 21 of Sec. 9 of Chapter II of Uttar Pradesh Fundamental Rules defines

"Pay" which is reproduced below:

"(21) Pay means amount drawn monthly by a Government servant as -- (i) the pay, other than special pay or pay granted in view of his personal qualifications, which has been sanctioned for a post held by him substantively or in an officiating capacity, or to which he is entitled by reason of his position in a cadre, and

(ii) overseas pay, technical pay, special pay and personal pay, and

(iii) any other emoluments which may be specially classed as pay by the Governor."

71. According to the aforesaid definition "pay" means amount drawn monthly by a Government servant as the pay which has been sanctioned for a post held by him substantively or in an officiating capacity or to which he is entitled by reason of his position in a cadre. In later part of this judgment we have held that The District Government Counsel does not hold a civil post and, therefore, what is paid to him cannot be attributed to pay within the meaning of the aforesaid clause. Thus on a reading of the aforesaid provisions we are of opinion that what is paid to the District Government Counsel for conducting the cases for and on behalf of the State Government, is in the nature of fee and not monthly pay. Fee can be paid per case, per day weekly or monthly. We, therefore, hold that the payment to the District Government Counsel by the Government is in the nature of fee and not monthly pay.

72. So far as ban on private practice of the District Government Counsel is concerned, it is a matter of contract. The District Government Counsel at the time of their engagement have a choice either to accept the engagement or not to accept on the conditions laid down by the Government. The petitioner having accepted the terms of engagement with these conditions it is not open to him now to build up a case that he is employee of the State Government. Learned Advocate General is correct when he says that it is always open to a client to insist on his lawyer not to accept any other brief with a view to take special interest in his case. This factor, as argued by learned Counsel for the petitioner, in our opinion does not constitute relationship of "master" and "servant" between Government and the District Government Counsel.

73. So far as the alleged age of superannuation is concerned, we are of opinion that it lays down the age after which the District Government Counsel (Civil) will become ineligible for appointment as such. No pension or retiring benefits have been provided after a District Government Counsel attains the age of 62 years. We are, therefore, of opinion that this factor also does not constitute relationship of master and servant between the State Government and the District Government Counsel. The decision in the case of Union of India (UOI) Vs. M.A. Chowdhary, is not applicable to the present controversy which is before us. In that case learned Counsel appearing for the Union of India himself admitted that Article 311 was applicable to the staff of the All India Radio.

74. Learned Counsel for the petitioner also placed reliance upon a decision in *Pirthwinath Chowdhry Vs. State of Uttar Pradesh*, . No doubt in that case it was held that the Additional Government Advocate of High Court was a Government servant. But this case is clearly distinguishable from the case before us. There, the Court was dealing with the termination of services of Addl. Government Advocate who appeared for the Government in the High Court. The case of Additional Government Advocate was governed by Rules made under Sec. 241 of the Government of India Act, 1935. It was specifically declared that Additional Government Advocate was a Government servant and held a civil post. Admittedly, the petitioner is not being appointed under the said Rule and, therefore, the case relied upon by the learned Counsel for the petitioner is of no assistance to him.

74A. On the contrary, there is uniformity in the decision by several Courts that District Government Counsel appointed by the Government to conduct their cases in District Courts are not Government servants. (1969 Lab IC 1257 (AP) Civil Misc. Writ No. 2829 of 1967, *Raj Kishore Lal v. State of U. P.*, decided on 8th Sept., 1967 by a Division Bench of this Court consisting of Hon'ble S. N. Dwivedi and M. Chandra, JJ.) and Civil Misc. Writ No. 1657 of 1979 decided by this Court on 9-12-1981. We respectfully agree with the said decisions.

75. In view of the above, we hold that The relationship of employer and employee has not been established between the State Government and the District Government Counsel and, therefore, the District Government Counsel does not hold civil post within the meaning of Article 311 of the Constitution and as such the protection of Art. 311 was not, available to him at the time when his appointment was terminated and thus the impugned order terminating the appointment of the petitioner is not in violation of Art. 311 of the Constitution.

76. Sri Ravi Kant, learned Counsel appearing in other connected writ petitions argued that office of Public Prosecutors, Additional Public Prosecutors (earlier known as District Government Counsel (Crl.) Panel Lawyers) the District Government Counsel (Revenue) and District Government Counsel (Civil) hold office under the State and as such provisions of Art. 16 of the Constitution are applicable to them and since termination of petitioners appointments is arbitrary and without any reasonable cause, it is hit by Art. 16 of the Constitution. Further argument has also been made that the instructions contained in the Legal Remembrancer's Manual although non-statutory in nature, are binding on the State Government and any breach of such instructions would render the action of the State Government terminating the appointment of the petitioners as arbitrary and illegal. Further in any case the power of State Government to terminate the appointment of Government Counsel at any time as contained in the Manual is hit by Articles 14 and 16 of the Constitution of India.

77. On the argument of the learned Counsel for the petitioners; the first question which arises for consideration is whether the offices of the petitioners are "office" under the State. Section 2(u) pf the Code of Criminal Procedure provides for

appointment of the Public Prosecutors and under Sec. 24 there is a method laid down for their appointments. Similarly, in Sec. 2(7) of the Code of Civil Procedure there is a provision for a Government Counsel to represent the State. Similar is the provision for District Government Counsel (Revenue) in U. P. Zamindari Abolition and Land Reforms Act and Rule 114 of the Rules framed thereunder. Learned Counsel also referred to the provisions of S. 24, sub-section (9) of the Code of Criminal Procedure.

78. Learned Counsel further referred to the decisions in the case of Suresh Prakash Agarwal v. State of Uttar Pradesh, 1970 All LJ 351; The State of Uttar Pradesh Vs. Sri Bholanath Srivastava and Others, ; A. Mohambaram Vs. M.A. Jayavelu and Others, ; Mundrika Prasad Singh Vs. State of Bihar, ; and Mukul Dalal and Others Vs. Union of India (UOI) and Others, , in support of his contentions.

79. In the case of M. P. Sinha v. State of Bihar (supra) the Hon'ble Supreme Court held that a Government Pleader is more than an Advocate for a litigant and holds a public office. In Mukul Dalal v. Union of India (supra) it was held that the office of the Public Prosecutor is a public one and therein Their Lordships approved the following observations of the Delhi High Court in the case of K.C. Sood v. S.G. Gudimani 1981 CriLJ 1779:--

"It is a public office of trust and, therefore, like any other public office is susceptible to misuse and corruption if not properly insulated. It is an office of responsibility more important than many others because holder is required to prosecute with detachment on the one hand and yet with vigour on the other."

80. In State of U. P. v. Bholanath Srivastava (supra) it was held that the office of Government Counsel is office under the State.

81. In view of various decisions we have no hesitation in holding that The office of Public Prosecutor, Additional Public Prosecutor, District Government Counsel (Civil), District Government Counsel (Revenue) is office under the State.

82. At this stage a further argument was sought to be built up that there was no difference between "office" and "post" and, therefore, these officers hold a public post and reliance was placed on the following observation of Their Lordships of the Supreme Court in the case of State of Assam and Others Vs. Shri Kanak Chandra Dutta, (at p. 886):-

"In the context of Arts. 309, 310 and 311 a post denotes an office. A person who holds a civil post under a State holds "office" during the pleasure of the Governor of the State, except as expressly provided by the Constitution, see Art. 310. A post under the State is an office or a position to which duties in connection with the affairs of the State are attached, an office or a position to which a person is appointed and which may exist apart from and independently of the holder of the post."

83. We are not disposed to go further into this controversy, for testing the main

argument of Sri Ravi Kant, learned Counsel for the petitioners, as we have already held that District Government Counsel (Civil), District Government Counsel (Revenue), Public Prosecutors and Additional Public Prosecutors are holders of offices under the State.

84. After finding that the petitioners are the holders of "office" under the State, the question arises for consideration, whether Art. 16 of the Constitution is attracted while petitioners' appointments were terminated by the Government. Learned Counsel for the petitioners strongly relied upon the decision of the learned single Judge in the case of Suresh Prakash Agarwal v. State of Uttar Pradesh 1970 All LJ 351 (supra).

85. On the other hand argument of the learned Advocate General is that assuming that the petitioners hold office under the State, the Law Officers after appointment continue in the legal profession and their relationship with the State is still essentially of Counsel and client, and the cases of the petitioners are to be governed by the terms of contract and Article 16 is not available to them when their appointments were sought to be terminated. The learned Advocate General referred to various provisions of Advocates Act and the Rules framed by the Bar Council as well as the provisions of Legal Remembrancer's Manual in this regard.

86. On the arguments of the learned Counsel for the parties it has now to be seen what is the relationship between the petitioners and the State Government after their appointment to various offices under the State.

87. Para 1.01 of the Manual discloses that the Legal Remembrancer's Manual is the authoritative compilation of the Government orders and instructions for the conduct of legal affairs of the State Govt. To repeat --Chapter VII of the Manual deals with the appointment of District Government Counsel. Para 7.01 says that the District Government Counsel are the legal practitioners appointed by the State Government to conduct its cases in various Courts, Under Para 7.02 the power of appointment vests in the State Government. Para 7.03 provides the procedure and eligibility for appointment to the office of Government Counsel, Paragraph 7.06(2) and (3) are quoted below:--

"7.06(2). At the end of the aforesaid period, the District Officer after consulting the District Judge shall submit a report on his work and conduct to the Legal Remembrancer together with the statement of work done in Form No. 9. Should his work and conduct be found to be unsatisfactory the matter shall be reported to the Government for orders. If the report in respect of his work and conduct is satisfactory, he may be furnished with a deed of engagement in Form No. 1 for a term not exceeding three years. On his first engagement a copy of Form No. 2 shall be supplied to him and he shall complete and return it to the Legal Remembrancer for record.

(3). The appointment of any legal practitioner as a District Government Counsel is only professional engagement terminable at Will on either side and is not appointment to a post under the Government. Accordingly the Government

reserves the power to terminate the appointment of and District Government Counsel at any time without assigning any cause."

A perusal of the aforesaid provisions would show that if the work of a District Government Counsel is found satisfactory he shall be furnished with a deed of engagement in Form No. 1 for a term not exceeding three years and on his first engagement a copy of Form No. 2 shall be supplied to him and he shall complete and return it to the Legal Remembrancer for record and further the appointment of any legal practitioner as a District Government Counsel is only professional engagement terminable at will on either side and is not appointment to a post under the Government. The Government reserves the power to terminate the appointment of any District Government Counsel at any time without assigning any cause. The deed of engagement in Form No. 1 provides that the appointment of District Government Counsel can be terminated without giving any reason. From these provisions what we find is that even after appointment as Government Counsel, the petitioners continue in the legal profession and appear as Advocates before the Courts on behalf of the State and relationship between the petitioners and the State Government, in substance, is that of counsel and client.

88. In *The State of Uttar Pradesh Vs. Sri Bhola Nath Srivastava and Others*, a Division Bench of this Court held as follows (at p. 465 of AIR) :--

"In the appointment of Law Officers, we think that it would not be proper for the State to issue advertisements or notice inviting applications for the same. It must be remembered that, even after appointment as a Law Officer, the Advocate so appointed continues in the legal profession and appears as an Advocate before the High Court on behalf of the State. The relationship between him and the State is still essentially that of counsel and client."

(Underlined by us)

89. We are in agreement with the view taken by this Court in the case of *The State of Uttar Pradesh Vs. Sri Bhola Nath Srivastava and Others*, and hold that even after appointment of an Advocate as District Government Counsel under the State Government, the relationship between him and the State Government is that of counsel and client.

90. Once we have held that even after appointment of an Advocate as Government Counsel, the relationship between him and the State Government is essentially that of a counsel and client, we have to see whether this relationship is governed by any Statute or Statutory Rule or by a contract.

91. During the arguments we have not been shown any provision of any Statute or Statutory Rule governing the relationship between the petitioners and the State Government. Provisions referred to by learned Counsel for the parties in this respect were Legal Remembrancer's Manual and Deed of Engagement appended with the Manual. We have already noticed that the provisions of Legal

Remembrancer's Manual, a compilation of Government orders and instructions, are non-statutory in nature. These provisions of the Manual besides other things require execution of deed of engagement in Forms I and II after appointment of the Government Counsel. The deed of engagement inter alia, provides period of professional engagement, work assigned to the Government Counsel and power of determination of professional engagement by the State Government. Admittedly, all the petitioners have accepted deed of engagements which are non-statutory and purely contractual, and therefore, the rights are to be governed by the terms of contract between the parties. The last clause of contract (deed of engagement) stipulates that the State Government shall have power to terminate the appointment of petitioners at any time without assigning any reason. In view of this clause the power to terminate the appointments of petitioners flows from the deed of engagement (contract) which has been accepted by the petitioners.

92. In this context the next question that arises for consideration is, whether the petitioners having entered into a contract which empowers the Government to terminate their appointments at any time without giving any reason, can complain that termination of their appointment is violative of Art. 16 of the Constitution of India.

93. Learned Advocate General appearing for the State submitted that relationship-between the parties are governed by the terms of contract and Art. 16 of the Constitution is not available to the petitioners when their appointment is terminated by the State Govt. Learned Advocate General in support of his argument relied upon the decision in Radhakrishna Agarwal and Others Vs. State of Bihar and Others, ; Divisional Forest Officer Vs. Bishwanath Tea Co. Ltd., ; Bareilly Development Authority and Another Vs. Ajay Pal Singh and Others, ; and P.K. Kunjukrishnan Nair Vs. State of Kerala and Others, .

94. In the case of Radhakrishna Agarwal and Others Vs. State of Bihar and Others, it was held as follows (at p. 1500 of AIR) :--

"10... ..

But, after the State or its agents have entered into the field of ordinary contract, the relations are no longer governed by the constitutional provisions but by the legally valid contract which determines rights and obligations of the parties inter se. No question arises of violation of Art. 14 or of any other constitutional provision when the State or its agents, purporting to act within this field, perform any act. In this sphere, they can only claim rights conferred upon them by contract and are bound by the terms of contract only unless some statute steps in and confers some special statutory power or obligation on the State in the contractual field which is apart from contract."

95. In the case of Divisional Forest Officer (supra), it was held that a person cannot enforce any specific term of contract by means of petition under Art. 226 of the Constitution.

96. In Bareilly Development Authority and Another Vs. Ajay Pal Singh and Others, , it was held as follows (at p. 1083 of AIR) :--

"20... ..

the authority or its agent after entering into the field of ordinary contract acts purely in its executive capacity. Thereafter the relations are no longer governed by the constitutional provisions but by the legally valid contract which determines the rights and obligations of the parties inter se. In this sphere, they can only claim rights conferred upon them by the contract in the absence of any statutory obligations on the part of the authority (i.e. BDA in this case) in the said contractual field."

97. In P.K. Kunjukrishnan Nair Vs. State of Kerala and Others, , it was held as follows (at p. 256 of AIR) :--

"(11). In the very nature of things relationship between State and Law Officers cannot be equated to that of master and servant; it is on a higher plane, in a different context and at a different level. No doubt the office of the Government Pleader is an office under the State. But the office is one which necessitates an extraordinary high degree of confidence on the part of the State Government and it appears to me that to compel the State Government to continue to deal with a Law Officer irrespective of other circumstances would be an arbitrary imposition of a service of a Law Officer on the Government; that may also be contrary to public policy.

(12). In regard to condition of service relating to mode of termination of appointment of public servants, there can be varying standards to be applied to different posts depending on the nature of the posts and duties attached to such posts. Classifications of persons holding sensitive positions in public employment in the matter of termination of service is certainly reasonable and justified by public interest. In view of the fiduciary nature of client-counsel relationship between the State and Law Officer, a provision that the State shall be entitled to terminate the engagement of counsel on notice cannot be regarded as discriminatory or arbitrary or violative of Arts. 14 and 16 of the Constitution. An Advocate is not justified in clinging on to any case, notwithstanding the indication of the client that he no longer wants the service of the counsel. The mere fact that the relationship is expressed to be salaried employment does not in any manner affect or alter the nature of the relationship. No Advocate will be justified in dictating terms to the client as to the period of notice terminating the engagement. The notice of course, shall be reasonable and the termination of the engagement shall be subject to the rights of the legal practitioner. A Government Law Officer is not in any better position. State which has made the Rules is bound by the provisions of the Rules and, therefore, obliged to give notice. Rule 17 cannot be held to be arbitrary or opposed to public policy."

98. From the principles as laid down by the Hon"ble Supreme Court in cases referred to above, it is clear that where the contract entered into between the

State and a person aggrieved is non-statutory and purely contractual, the rights are governed only by the terms of the contract. No doubt before entering into contract State Government is bound by constitutional obligations and Articles 14 and 16 of the Constitution are available but once the State and person aggrieved have entered into the field of ordinary contract, the relations are no longer governed by the constitutional provisions i.e. Art. 16 of the Constitution but by the legally valid contract which determines rights of the parties. The relationship between the petitioner and the State Government is that of a counsel and client, The terms of appointment are reduced in writing in the deed of professional engagement and, therefore, the right of termination shall flow from the term of contract if there is stipulation in this respect. Admittedly, the deed of engagement gives power to the Government to terminate the appointment of the Government Counsel at any time without giving any reason. In this view of the matter after the petitioners have entered into a contract, the constitutional provision i.e. Article 16 of the Constitution cannot be pressed into service. We are, therefore, of opinion that Art. 16 of the Constitution is not available to the petitioners when their appointments were sought to be terminated although appointments to offices of District Government Counsel and Public Prosecutors are covered by Art. 16(1) of the Constitution.

99. Strong reliance was placed by the learned Counsel for the petitioners on the case of *Suresh Prakash Agarwal v. State of U. P.* 1970 All LJ 351 (supra) for the proposition that Art. 16 is available to the petitioners when their appointments were sought to be terminated. In view of the special relationship between the petitioners and the State Government which is that of counsel and client, and further, that right to terminate the appointment of Government Counsel flows from the contract, we are of the view that the decision in *Suresh Prakash Agarwal* (supra) holding that Article 16 is applicable at the time of termination of appointment does not lay down the correct law. To this extent we overrule the aforesaid decision.

100. In view of the above discussion we hold that the provisions of Art. 16 are not attracted when appointments of petitioners as District Government Counsel were terminated by the State Government.

101. We shall now take up the second argument of Sri Ravi Kant that instructions contained in the Legal Remembrancer's Manual although non-statutory in nature are binding on the State Government and any breach of such instructions would render the action of the State Government terminating the appointment of petitioner as arbitrary and illegal and further in any case the power of the State Government to terminate the appointment of Government Counsel at any time as contained in the Manual is hit by Articles 14 and 16 of the Constitution of India. While submitting the learned Counsel omits sub-para (3) of Para 7.06 of the Manual which is already quoted in this judgment. Sub-para (3) provides that the appointment of any legal practitioner as Government Counsel is only professional engagement terminable at will on either side and Government

reserves the power to terminate the appointment of District Government Counsel at any time without assigning any cause. In view of this clause it is not open to the petitioners to contend that termination of their appointments is contrary to the provisions of the Manual, Such a provision cannot be regarded as discriminatory, arbitrary or violative of Arts. 14 and 16 of the Constitution because of special nature of the office and duty attaches to the said office and judiciary nature of client and counsel relationship between the State Government and the Law Officer. (See P.K. Kunjukrishnan Nair Vs. State of Kerala and Others, . We accordingly hold that, termination of appointment of petitioners is not in contravention of the provisions of Legal Remembrancer's Manual nor the power of State Government to terminate the appointment at any time without assigning any reason is violative of Arts. 14 and 16 of the Constitution.

102. Sri Ravi Kant then urged that while terminating the appointment of Government Counsel the State Government has not disclosed either to the petitioners or to the Court the so-called policy allegedly formulated by them and in case there is any policy, the same is not based upon any stated or known norms, basis or rationale and it has been framed on wholly irrelevant and extraneous considerations and is liable to be struck down by this Court. In support of his argument the learned Counsel has relied upon a number of decisions : In the case of Col. A.S. Sangwan Vs. Union of India (UOI) and Others, ; H.H. Maharajadhiraja Madhav Rao Jivaji Rao Scindia Bahadur of Gwalior and Others Vs. Union of India and Another, ; Narendra Kumar Maheshwari Vs. Union of India (UOI) and Others, ; and Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh and Others, .

103. A counter-affidavit has been filed in these cases wherein the decision to terminate the appointment of the Government Counsel who were appointed prior to January 1990, has been sought to be justified on the ground that the panel of Government lawyers was too old and the Government wanted to replace it by new ones and the same was being done for streamlining the conduct of cases for and on behalf of the State of U. P. inasmuch as to have effective prosecution of cases by the State Government.

104. We need not go into the details of the argument of the learned Counsel for the petitioners and the cases cited by him in view of the fact that similar situation arose in the case of Brijraj Tripathi v. State of U. P. (Writ Petn. No. 2688 of 1982, decided by a Division Bench of this Court consisting of Hon'ble K.N. Goyal and R.C. Deo Sharma, JJ. on 31st March, 1983). In this case the appointments of Government Counsel made between January, 1977 and June, 1980 were terminated by the State Government. The Government invited fresh proposals for appointments. The person whose appointment was terminated challenged the order of termination of his appointment. The order of termination was challenged on one of the grounds that the policy decision of the State Government to terminate the appointment of the Government Counsel was arbitrary and motivated by political considerations. This Court dealing with the

situation held as follows:--

"Unfortunately, however, it is not practicable for this Court to scrutinise the appointments of Government Counsel on the basis of comparative merit. It is of course not a happy situation that successor Governments look with suspicion on appointments of Standing Counsel appointed by their predecessors. However, when the Government (which includes the political executive as well as bureaucracy) as litigant chooses to appoint one person instead of another as its counsel it may take into account various factors which on a totality go into the creation of a relationship of confidence between the two. Hence a judicial scrutiny of comparative merit of various counsel is extremely difficult. In this view of the matter after the suggestions of arbitrariness and political motivations are, for all practical purposes, normally not open to scrutiny in the matter of appointment or removal of Government Counsel, unlike the case of civil servants."

105. We have noticed above that The office of Government Counsel is of trust and confidence and even after appointment the relationship of Government Counsel with the Government continues to remain as that of "counsel" and "client" and any policy decision to terminate the appointment of Government Counsel to be substituted by fresh panel of Government Counsel, does not call for scrutiny by this Court. We accordingly reject the argument of the learned Counsel for the petitioners.

106. Learned Counsel for the petitioner then contended that the Government Order dated 6th February, 1990 (Annexure 4 to the Writ Petition) is discriminatory and hit by Arts. 14 and 16 of the Constitution. It was submitted the Para 4 of the impugned order does not terminate the appointment of those Government Counsel who were appointed from 1st January, 1990 whereas the appointments made prior to 1st January, 1990 have been sought to be terminated which is arbitrary and discriminatory. The argument is that the cut-off date as 1st January, 1990 is not based upon any discernible rationale principle and wholly unrelated to the object sought to be achieved.

107. Learned Advocate General appearing for the State argued that the cut-off date as 1st January, 1990 has been provided as the work and conduct of the Government Counsel appointed on or after the said date are yet to be watched and assessed and, therefore, Para 4 of the Government Order does not suffer from the vice of Arts. 14 and 16 of the Constitution. No doubt the fundamental principle is that Article 14 of the Constitution forbids class legislation but permits a reasonable classification for the purpose of legislation: Each classification must satisfy the twin test of classification being founded on intelligible differentia which distinguishes person or things that are grouped together from those that are left out of the group and that differentia must have rationale to the object sought to be achieved by the Statute or the order in question. In the present case we find that the present Government came in power in December, 1989. It has not been pointed out that any appointment of District Government Counsel

was made in December, 1989. It has come on record that the policy of the Government is to replace the age-old panel by new panel for the purpose of streamlining and conduct of cases for and on behalf of the Government. The work and conduct of Government Counsel appointed after 1st January, 1990 by the present Government have yet to be seen and assessed. Learned Advocate General argued that in case it is found that they are not up to the standard the Government may determine their appointment as well. The aforesaid facts show that this classification of Government Counsel appointed on or after 1st January, 1990, whose appointment have not been terminated, satisfy the twin test of classification. The work and conduct of newly appointed Government Counsel is yet to be watched whereas the work and conduct of Government Counsel have already been seen and further the object being to replace the age-old panel by a new panel of Government Counsel for effective prosecution of cases for and on behalf of the State. We accordingly hold that clause 4 of the impugned order does not suffer from the vice of Art. 14 of the Constitution.

108. Sri Sushil Harkauli, learned Counsel appearing for the petitioner in Writ Petition No. 4208 of 1990, referred to Fundamental Rule 2 which applies to Government servants whose conditions of service have been or may be prescribed by the Governor. In sub-section 7(b) of the Fundamental Rule "Government servant" has been defined as a person appointed to a civil post or civil service under the Government. The learned Counsel also referred to Rule 162 relating to rules made by the Governor under the U. P. Fundamental Rule 103(c) providing that a "Law Officer" holding one of the posts mentioned in Fundamental Rule 99 in Part I of that Volume and a Government Pleader, Deputy Government Advocate, Junior Standing Counsel, may be granted leave according to rules framed thereunder. On that basis it was argued that the rules indicated that the Government Law Officers were State employees and Fundamental Rules are applicable to them.

109. The learned Advocate General, on the other hand, pointed out that Fundamental Rules cannot affect the nature of appointment of the petitioners. These rules according to sub-rule (2) were applicable to all the Government servants whose services have been or may be prescribed under subsection (2)(b) of S. 241 of the Government of India Act, 1935, and that S. 7-B defines a Government servant, as stated above, as a person appointed on a civil post or as a civil servant under the State whose conditions of service have been or may be prescribed by the Governor under Sec. 241(2)(b) of the Act.

110. As held earlier, there being no relationship of "employer" and "employee" between the State Government and the District Government Counsel, District Government Counsel do not hold a civil post. The rule referred to is not applicable to the petitioner as the appointments of the petitioners have not been made under the rules framed under Sec. 241 of the Government of India Act.

111. To sum up, what we have held are as indicated below:--

(i) The relationship of employer and employee has not been established between the Government Counsel and the State Government and, therefore, the District Government Counsel does not hold civil post within the meaning of Article 311 of the Constitution.

(ii) Since the District Government Counsel does not hold civil post within the meaning of Art. 311, the provisions of Art. 311 of the Constitution are not attracted when his appointment is sought to be terminated.

(iii) The impugned order terminating the appointment of the petitioners is not violative of Art. 311 of the Constitution.

(iv) The offices of District Government Counsel (Civil), District Government Counsel (Revenue), Public Prosecutors, Addl. Public Prosecutors are offices under the State but even after appointment to their respective offices, their relationship with the State is that of counsel and client.

(v) The relationship between District Government Counsel (Civil), District Government Counsel (Revenue), Public Prosecutors, Addl. Public Prosecutors, Panel Lawyers are governed by contract (deed of engagement) which is non-statutory, purely contractual.

(vi) The right to terminate the appointment of District Government Counsel (Civil), District Government Counsel (Revenue), Public Prosecutors, Addl. Public Prosecutors etc., flows from the contract (deed of engagement) and protection of Art. 16 of the Constitution is not available to the petitioners when their appointment was sought to be terminated by the State Government.

(vii) Sub-para (3) of Para 7.06 of the Manual is not hit by Arts. 14 and 16 of the Constitution and termination of appointment of the petitioners is not in breach of the provisions of the Manual.

(viii) Office of the Government Counsel is of trust and confidence and even after appointment the relationship of Government Counsel with the Government continues to remain as that of a counsel and client and any decision of the State Government to terminate the appointment of Government Counsel to be substituted by fresh panel of Government Counsel, does not call for scrutiny by this Court.

(ix) Para 4 of the impugned Government Order dated 6-2-1990 providing that the appointment of Government Counsel appointed on or after 1st January, 1990, shall not be terminated, does not suffer from the vice of Article 14 of the Constitution.

(x) Fundamental Rules do not apply to the petitioners as they were not appointed under the provisions of rules framed under Sec. 241 of the Government of India Act, 1935, or held civil posts.

112. For the reasons enunciated above, we do not find any merit in the various contentions raised by the learned Counsel for the petitioners.

113. Before we part with these cases, we may recall the argument of the learned Counsel for the petitioners when it was argued that termination of appointments of petitioners is mala fide and with a view to appoint the members and sympathisers of the present Government in power. As no fact in this respect was laid in these writ petitions, therefore, it is not possible for us to enter into this controversy. However, learned Advocate General appearing for the respondents countered this argument by saying that appointments of Government Counsel have not been terminated on account of any malice or any political reason but with a view to replace the age-old panel by new panel from amongst wider field of eligible lawyers and in that case cases of these Government Counsel shall also be considered along with others for appointment to those offices. This argument of the learned Advocate General that cases of these Government Counsel shall also be considered, appears to us fair. We have no doubt in our mind that cases of these Government Counsel shall be considered by the Government and other authorities involved in the process of selection for appointment to those offices, before making appointments.

114. The writ petitions are accordingly dismissed. There shall be no order as to costs. The undertaking given by the learned Advocate General to this Court is hereby discharged.

115. After the judgment was pronounced learned Counsel appearing for the petitioners made an oral prayer for grant of certificate under Art. 134A of the Constitution. We are of opinion that the case does not involve any substantial question of law of general importance and, therefore, the oral prayer is rejected.

116. Petition dismissed.