

(2010) 12 AHC CK 0154

In the Allahabad High Court

Case No : Writ Petition Nos. 6938 along with W. P. Nos. 3224 of 2004 and 1993 of 2008 & etc. etc.

Vijay Shankar Shukla and Ors.

APPELLANT

Vs

State of U.P.& Ors.

RESPONDENT

Date of Decision : 09-12-2010

Acts Referred:

Constitution of India, 1950 — Article 16

Citation : (2010) 12 AHC CK 0154

Hon'ble Judges : Shabihul Hasnain, J

Final Decision : Dismissed

Judgement

Shabihul Hasnain, J.—This is a bunch of seventy seven writ petitions. The binding thread running through all these writ petitions, is the subject matter of repatriation of the petitioners from the borrowing department/Agency. All the petitioners are at present working in the State Urban Development Agency (hereinafter called as "SUDA"). Orders have been passed by SUDA directing the petitioners to return to their parent department. In one form or the other, all the petitioners have challenged the orders of their repatriation from SUDA. Before venturing into the merits of the case and the claim of the petitioners, it will be necessary to know what SUDA actually stands for.

2. It has been informed that SUDA is an agency/autonomous body, registered under the Societies Registration Act, 1960. It has temporary establishment in the State till the scheme lasts. SUDA is being run with the temporary grant, sanction of which are given on year to year basis from the Government of U.P. The administrative expenditure is meted out from the grant by the Government of India/State Government for the schemes related to the upliftment of the weaker section of urban areas. SUDA has no permanent establishment, it is an autonomous body and the powers vest in the governing body of the Society, and dependent upon the financial sanction by the State, Government. Temporary staff on deputation basis or on contract basis, are being deputed in SUDA.

3. As has been indicated above, all the petitioners have challenged their repatriation from SUDA to their parent department. Since common question of law and facts are involved, it will be proper that all the writ petitions may be decided by a common order.

4. The petitioners have come to SUDA from various Departments/Corporation/ Govt. Companies and other instrumentalities of the State. The petitioners, who are working in SUDA can be classified in various categories but for purposes of these petitions, they can be classified mainly in two groups. The first category consists of such employees, whose parent department are still existing and functioning; the second category consists of those employees, whose parent department have either become sick or are not existing today.

5. Some of the petitioners are on deputation, while some of them are on contract basis. The main question for consideration before this Court is whether the petitioners have any right under the law to continue in service of SUDA? On the other hand, can SUDA, order for en masse repatriation of all its employees ? Further question is, whether SUDA is repatriating those employees also whose parent department do not exist any more. Can SUDA be allowed to pass and execute such repatriation orders, wherein repatriation order may take form of termination order. Can termination/retrenchment of the employees be allowed to stand in the garb of repatriation. These are some of the questions, which have been argued forcefully, strongly, passionately and compassionately before this Court. Legal arguments have been advanced, at the same time, human considerations have also been directed to visit the conscience of this Court.

6. In almost all the writ petitions, stay order has been granted and the petitioners are working with the opposite party on the strength of such stay orders.

7. The petitioner in W.P. No. 6938 (SS) 2008, has challenged the order of the Director, dated 19.9. 2008, which is contained in annexure no. 1 to the writ petition. This order is of repatriation of the petitioner to the parent department i.e. U.P. Sahkari Chini Mill Limited, on the ground that he has completed five years of his deputation with the SUDA. Simultaneously, the petitioners have challenged the Government Order dated November 15, 2003 issued by the Principal Secretary, Shahari Rozgar Evam Garibi Unmoolan Karyakram Anubhag, as contained in Annexure No.3 to this writ petition, addressed to the Director, SUDA. The subject matter of this order is repatriation of the employees in SUDA. By this order, the earlier government order dated 1487/6912002, 24/Sa/90, dt. 29.5.2002 has been cancelled with immediate effect and it has been directed that all the employees who are on deputation and have completed five years should be repatriated back to their parent department. In this regard, it becomes imperative that G.O. dated 29.5.2002 may also be seen.

8. The G.O. dated 29.5.2002 has been annexed as Annexure3, a perusal of which, shows that it was in the nature of a query. The process of repatriation

which was being undertaken by SUDA, was temporarily stopped by this order. It was also mentioned that this order has been passed in order to gain time and for information so that a more informed and comprehensive decision could be taken with regard to policy of repatriation.

9. In this context, its cancellation by subsequent G.O. of November 15, 2003 becomes more relevant. Put in simple manner, the G.O. dated 29.5.2002 merges with the G.O. dated November 15, 2003 and loses its significance.

10. The different grounds have been taken in different writ petitions against repatriation. More or less, the grounds can be summarized as below:

1. That the work and conduct of the petitioner has been above the board and there has been no complaint about it by the authorities of SUDA. In such circumstances, why the petitioners are being repatriated to be replaced by fresh employees ?

2. That the petitioners have gained experience of the working of SUDA and since SUDA is not incurring any financial or loss of prestige, then the repatriation is not justified.

3. That the work and project are available with the SUDA hence repatriation is not justified.

4. That some of the employees belong to such units where their parent department is nonexisting today, the repatriation of whom would mean, the loss of job. The repatriation will become a measure of punishment.

5. That the State Government does not have any right to issue the G.O. giving directions to SUDA to repatriate the petitioners because the SUDA is an autonomous body and the powers vest in the governing body of the SUDA.

6. That in all cases when the petitioners approached the High Court stay was granted meaning thereby that the petitioners were able to prove a prima facie satisfaction of the Court in their favour.

11. Counter affidavit has been filed on behalf of SUDA in all the writ petitions while the same has been filed by the State only in two writ petitions viz W.P. No.6938(SS) 2008 and W.P. No.3224 (SS) 2004.

12. Sri Vivek Raj Singh has raised objections to the effect that the writ petition, itself is not maintainable. The petitioners were given appointment in SUDA, on the basis of order, which was in the form of agreement and the deputation was made in terms of the contract. Since repatriation is being made; in terms of the contract, hence no writ petition will lie. It has been argued that when a person has got substantive right in his favour, and the said right is being legally fixed, only then a writ petition would be maintainable. At the very outset, the para 45 of the judgment of Hon'ble Supreme Court in Secretary State of Karnataka and others vs. Uma Devi (3) and others reported in 2006(4) SCC 1 : (2006 (3) AIR Kar R 320 : AIR 2006 SC 1806, was placed before this Court. Same is being

quoted below:

"When the Court is approached for relief by way of a writ, the Court has necessarily to ask, itself, whether the person before it had any legal right to be enforced."

13. It has been further submitted that initially every incumbent before joining SUDA is required to enter into an agreement in which the period of continuance in SUDA is for two and a half years. This may be extended for another period of two and half years. As such after completion of the aforesaid period of five years, incumbent is repatriated to his parent department, which has been done in the cases before the Court.

14. The judgment of Kunal Nanda vs. Union of India and another, reported in 2000(5)SCC 362 : (AIR 2000 SC 2076 : 2000 Lab IC 1992), has been placed by Mr. Vivek Raj Singh, counsel for the opposite parties. In para 6, their Lordships have held;

"On the legal submissions also made there are no merits whatsoever. It is well settled that unless the claim of the deputationist for a permanent absorption in the department where he works on deputation is based upon any statutory rule, regulation or order having the force of law, a deputationist cannot assert and succeed in any such claim for absorption. The basic principle underlying deputation itself is that the person concerned, can always and at any time be repatriated to his parent department to serve in his substantive position."

15. In another case of Union of India vs. S.N. Palekar 2001 (10) SCC 520, it has been held in para 2 that no direction could have been given by the Central Administrative Tribunal to the Union of India to absorb the respondent with effect from the date on the post of Deputy Director, who was on deputation; meaning thereby that the deputationist cannot claim either a right to or can he claim absorption on permanent basis to the post in question.

16. The most deadly weapon used by Sri Vivek Raj Singh against the petitioner comes from the armory of the judgment in case of Secretary State of Karnataka vs. Uma Devi (III) and others reported in 2006(4) SCC 1 : (2006 (3) AIR Kar R 320 : AIR 2006 SC 1806, commonly known as Uma Devi's case. It is interesting to note that this judgment was not only used for attacking the contention of the petitioner but came as a shield against some of the passionate argument raised by the learned counsel for the petitioner. In para 12 and 13, Hon'ble Supreme Court has tried to put a word of caution for its subordinate courts in the following manner.

".....Once this right of the Government is recognized and the mandate of the constitutional requirement for public employment is respected, there cannot be much difficulty in coming to the conclusion that it is ordinarily not proper for courts whether acting under Article 226 of the Constitution or under Article 32 of the Constitution, to direct absorption in permanent employment of those who

have been engaged without following a due process of selection as envisaged by the constitutional scheme."

".....It cannot also be forgotten that it is not the role of courts to ignore, encourage or approve appointments made or engagements given outside the constitutional scheme. In effect, orders based on such sentiments or approach would result in perpetuating illegalities and in the jettisoning of the scheme of public employment adopted by us while adopting the Constitution. The approving of such acts also results in depriving many of their opportunity to compete for public employment. We have, therefore, to consider the question objectively and based on the constitutional and statutory provisions. In this context, we have also to bear in mind the exposition of law by a Constitution Bench in *State of Punjab v. Jagdip Singh and Ors.* (AIR 1964 SC 521)(SCR pp. 97172). It was held therein,

"In our opinion, where a Government servant has no right to a post or to a particular status, though an authority under the Government acting beyond its competence had purported to give that person a status which it was not entitled to give, he will not in law be deemed to have been validly appointed to the post or given the particular status."

17. Again in para 35, Hon"ble Supreme Court has warned against misplaced sympathy of the Court to the petitioner and has observed, which is quoted below (Para 28 of AIR):

Incidentally, the Bench also referred to the nature of the orders to be passed in exercise of this Court's jurisdiction under Article 142 of the Constitution. This Court stated that jurisdiction under Article 142 of the Constitution could not be exercised on misplaced sympathy. This Court quoted with approval the observations of Farewell, L.J. in *Latham v. Richard Johnson & Nephew Ltd.* 1913 (1) KB 398"

"We must be very careful not to allow our sympathy with the infant plaintiff to affect our judgment. Sentiment is a dangerous will o' the wisp to take as a guide in the search for legal principles."

Further in para 43, it has been stated below :

".....If it is a contractual appointment, the appointment comes to an end at the end of the contract, if it were an engagement or appointment on daily wages or casual basis, the same would come to an end when it is discontinued".

".....The High Courts acting under Article 226 of the Constitution of India, should not ordinarily issue directions for absorption, regularization, or permanent continuance unless the recruitment itself was made regularly and in terms of the constitutional scheme. Merely because, an employee had continued under cover of an order of Court, which we have described as "litigious employment" in the earlier part of the judgment, he would not be entitled to any right to be absorbed or made permanent in the service. In fact, in such cases, the High Court may not

be justified in issuing interim directions, since, after all, if ultimately the employee approaching it is found entitled to relief, it may be possible for it to mould the relief in such a manner that ultimately no prejudice will be caused to him, whereas an interim direction to continue his employment would hold up the regular procedure for selection or impose on the State the burden of paying an employee who is really not required. The courts must be careful in ensuring that they do not interfere unduly with the economic arrangement of its affairs by the State or its instrumentalities or lend themselves the instruments to facilitate the bypassing of the constitutional and statutory mandates."

18. In para 45, it has been held as under (Para 36 of AIR):

"It is not as if the person who accepts an engagement either temporary or casual in nature, is not aware of the nature of his employment. He accepts the employment with eyes open. It may be true that he is not in a position to bargain not at arms length since he might have been searching for some employment so as to eke out his livelihood and accepts whatever he gets. But on that ground alone, it would not be appropriate to jettison the constitutional scheme of appointment and to take the view that a person who has temporarily or casually got employed should be directed to be continued permanently. By doing so, it will be creating another mode of public appointment which is not permissible. If the court were to void a contractual employment of this nature on the ground that the parties were not having equal bargaining power, that too would not enable the court to grant any relief to that employee....."

"It is in that context that one has to proceed on the basis that the employment was accepted fully knowing the nature of it and the consequences flowing from it....."

19. In para 47, the theory of legitimate expectation has also been considered by their Lordships and has been formulated, which is quoted below (Para 38 of AIR):

"When a person enters a temporary employment or gets engagement as a contractual or casual worker and the engagement is not based on a proper selection as recognized by the relevant rules or procedure, he is aware of the consequences of the appointment being temporary, casual or contractual in nature. Such a person cannot invoke the theory of legitimate expectation for being confirmed in the post when an appointment to the post could be made only by following a proper procedure for selection and in concerned cases, in consultation with the Public Service Commission. Therefore, the theory of legitimate expectation cannot be successfully advanced by temporary, contractual or casual employees. It cannot also be held that the State has held out any promise while engaging these persons either to continue them where they are or to make them permanent. The State cannot constitutionally make such a promise. It is also obvious that the theory cannot be invoked to seek a positive relief of being made permanent in the post."

20. One of the latest judgment of Managing Director, U.P. Rajkiya Nirman Nigam

vs. P.K. Bhatnagar and others 2007(14) SCC 498, has been placed. In para 11, while dismissing claim of the petitioner to be regularized, the Court has held that if the State Government desires to take any other stand at this stage, that would have to be decided in the proceedings other than these. For the purposes of this case we have no hesitation in holding that Respondent 1 was the State Government's employee and was sent on deputation to the appellant. Now that the repatriation order has been passed by the State Government, Respondent 1 cannot claim to be in service with the appellant.

21. In addition to all these Supreme Court's judgment, reliance has also been placed on the decision of this Court in W.P. No. 1419(SB) 2006, of a bench, headed by the then Chief Justice H.L. Gokhale. The writ petition was filed by the present counsel for the petitioners against repatriation. The petition was dismissed as withdrawn.

22. Mr.Vivek Raj Singh, used this judgment to argue that the Division Bench was not convinced by the arguments of the petitioner. At the same time, learned counsel for the petitioner Mr. Mohd. Mansoor has also referred to a Division Bench decision of this Court passed in W.P. No. 97(SB) 2009, wherein the aforesaid judgment in 1419(SB)2006 has been mentioned and interim order has been passed. This order was passed on 23.1. 2009 and has been annexed with the Supplementary Affidavit filed by the petitioner as S.A.4.

23. One more argument raised by opposite parties is to the effect that SUDA is not a permanent body, the life span and the post created under the scheme of this, spans only for year to year. The government orders are issued on year to year basis for extension/continuity of the post. In this regard, he has brought on record, the G.O., dated 12.4.2006 by virtue of which the continuance of total 858 temporary posts was extended till 28.2.2007. Similarly, vide G.O. dated 29.3.2007 it was extended till 29.2.2008. Again government order was issued on 11.4.2008 and extension was granted till 28.2.2009. The Government Orders were issued on 22.3.2009 extending the term till 28.2.2010 and finally the G.O. dated 26.2.2010 extending the term till 28.2.2011 were issued. One more common, refrain factors in all these common orders is that all these Government Orders have been passed in terms of the conditions laid down in G.O. No.1019/6910375 (sa)/97, dt. 02.05.2003.

24. Learned counsel for the opposite parties has, painstakingly, tried to demonstrate that the department itself is not permanent, hence the services of the petitioners can neither be made permanent nor it can be absorbed. The employees of SUDA have to necessarily work on temporary post or on contractual appointments. Long continuation in SUDA beyond the period of deputation raises problems for the administrator of the agency. The employees belong to their parent department, yet they are working within the administrative control of SUDA and for any disciplinary action against the employees, the SUDA has to depend on the wisdom and efficiency of the parent department. The disciplinary authority remains with the parent department and

the liability with the SUDA. It is because of this reason that SUDA wants to repatriate the petitioners. He emphasises that even if SUDA wants to absorb services of its employees, it is not within the capacity and control of SUDA because of its annual renewal. When the department itself is dependent on the sanction and grant of the Central/State Government then it can not create any permanent liability in the form of absorption of the petitioners.

25. Sri Prashant Chandra, Senior Advocate assisted by Sri Anurag Verma for some petition and Sri Mohd. Mansoor for rest of the petition have argued that the action of the opposite parties in passing the order of repatriation is arbitrary, he would argue that there is no apparent decipherable reason for which repatriation is being made. He says that the work and conduct of the petitioners has been satisfactory. The agency is not running in loss. It is in fact, getting more and more projects. It is likely to last for another 25 years. In such circumstances, the experienced hands should not be sent out of the department. Any such action can only be termed as arbitrary, unreasonable and whimsical. In this regard, he has relied upon the judgment of *A.L.Kalra Vs. Projectdt and Equipment Corporation of India*, 1994 (3) SCC 316 : (AIR 1984 SC 1361 : 1984 Lab IC 961). While referring to para 19 he says that every arbitrary executive action effecting the public employment is violative of Article 14 and 16 of the Constitution whether under taken by the State itself or by the instrumentalities.

"The scope and ambit of Article 14 have been the subject matter of a catena of decisions. One facet of Article 14 which has been noticed in *E.P. Royappa v. State of Tamil Nadu* deserves special mention because that effectively answers the contention of Mr. Sinha. The Constitution Bench speaking through Bhagwati, J. in a concurring judgment in *Royappa's* case observed as under:

The basic principle which, therefore, informs both Articles 14 and 16 is equality and inhibition against discrimination. Now what is the content and reach of this great equalising principle ? It is a founding faith, to use the words of pedantic or lexicographic approach. We cannot countenance any attempt to truncate its allembracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be "cribbed, cabined and confined" within traditional and doctrinaire limits. From a positivistic point of view equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies ; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14, and if it affects any matter relating to public employment, it is also violative of Article 16. Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment.

This view was approved by the Constitution Bench in *Ajay Hasia* case (AIR 1981 SC 487). It thus appears well settled that Article 14 strikes at arbitrariness in executive/administrative action because any action that is arbitrary must

necessarily involve the negation of equality. One need not confine the denial of equality to a comparative evaluation between two persons to arrive at a conclusion of discriminatory treatment. An action per se arbitrary itself denies equal of protection by law. The Constitution Bench pertinently observed in *Ajay Hasia's* case and put the matter beyond controversy when it said "wherever therefore, there is arbitrariness in State action whether it be of the legislature or of the executive or of an "authority" under Article 12, Article 14 immediately springs into action and strikes down such State action. This view was further elaborated and affirmed in *D.S. Nakara v. Union of India*(AIR 1983 SC 130). In *Maneka Gandhi v. Union of India* (AIR 1978 SC 597)it was observed that Article 14 strikes at arbitrariness in State action and ensure fairness and equality of treatment. It is thus too late in the day to contend that an executive action shown to be arbitrary is not either judicially reviewable or within the reach of Article 14. The contention as formulated by Mr. Sinha must accordingly be negated.

23. It must be conceded in fairness to Mr. Sinha that he is right in submitting that even if the respondent Corporation is an instrumentality of the State as comprehended in Article 12, yet the employees of the Corporation are not governed by Part XIV of the Constitution. Could it however be said that a protection conferred by Part III on public servant is comparatively less effective than the one conferred by Part XIV ? This aspect was examined by this Court in *Managing Director, Uttar Pradesh Warehousing Corporation and Anr. v. Vinay Narayan Vajpayee*(AIR 1980 SC 840 (atP.845846) where O. Chinnappa Reddy, J. in a concurring judgment has spoken so eloquently about it that it deserves quotation:

I find it very hard indeed to discover any distinction, on principle, between a person directly under the employment of the Government and a person under the employment of an agency or instrumentality of the Government or a Corporation, set up under a statute or incorporated but wholly owned by the Government. It is self evident and trite to say that the function of the State has long since ceased to be confined to the preservation of the public peace, the exaction of taxes and the defence of its frontiers. It now the function of the State to secure "social, economic and political justice", to preserve "liberty of thought, expression, belief, faith and worship", and to ensure "equality of status and of opportunity". That is the proclamation of the people in the preamble to the Constitution. The desire to attain these objectives has necessarily resulted in intense Governmental activity in manifold ways. Legislative and executivity have reached very far and have touched very many aspects of a citizen's life. The Government, directly or through the Corporations, set up by it or owned by it, now owns or manages, a large number of industries and institutions. It is the biggest builder in the country. Mammoth and minor irrigation projects, heavy and light engineering projects, projects of various kinds are undertaken by the Government. The Government is also the biggest trader in the country. The State and the multitudinous agencies and Corporations set up by it are the principal

purchasers of the produce and the products of our country and they control a vast and complex machinery of distribution. The Government, its agencies and instrumentalities, Corporations, set up by the Government under statutes and Corporations incorporated under the Companies Act but owned by the Government have thus become the biggest employers in the country. There is no good reason why, if Government is bound to observe the equality clauses of the Constitution in the matter of employment and in its dealings with the employees, the Corporations set up or owned by the Government should not be equally bound and why, instead, such Corporations could become citadels of patronage and arbitrary action. In a country like ours which teems with population, where the State, its agencies, its instrumentalities and its Corporations are the biggest employers and where millions seek employment and security, to confirm the applicability of the equality clauses of the constitution, in relation to matters of employment, strictly to direct employment under the Government is perhaps to mock at the Constitution and the people. Some element of public employment is all that is necessary to take the employee beyond the reach of the rule which denies him access to a Court to enforce a contract of employment and denies him the protection of Articles 14 and 16 of the Constitution. After all employment in the public sector has grown to vast dimensions and employees in the public sector often discharge as onerous duties as civil servants and participate in activities vital to our country's economy. In growing realization of the importance of employment in the public sector, Parliament and the Legislatures of the States have declared persons in the service of local authorities, Government companies and statutory corporations as public servants and extended to them by express enactment the protection usually extended to civil servants from suits and prosecution. It is, therefore, but right that the independence and integrity of those employed in the public sector should be secured as much as the independence and integrity of civil servants.

There fore the distinction sought to be drawn between protection of part XIV of the Constitution and Part III has no significance.

26. The main emphasis as is received from the aforesaid observations of their Lordship is on fair deal by the State towards its employees in a welfare State. The petitioners had tried to engage this course in testing the validity of repatriation order on the preamble of Article 14 of the Constitution of India, they would argue that action of the instrumentalities of the State in this particular case is arbitrary to the extent that it has no nexus, with any lofty objective to be achieved by the Agency. The SUDA has measurably failed to give out any reasonable explanation for its order of repatriation.

27. Further citing the case of Kumari Shrilekha Vidyarthi and others vs. State of U.P. and others (1991) 1 SCC 212 : (1993 All LJ 4 : AIR 1991 SC 537), attempt has been made by the petitioners to establish that the action of the SUDA was amenable to judicial review by this Court.

28. In para 24 and 25, their Lordships have deprecated the role of the State

action, itself in split personality of Dr. Jakan and Mr. Hide in the contractual field, elaborating their views, their Lordship has held in para 24 and 25, as follows :

24. The State cannot be attributed the split personality of Dr. Jekyll and Mr. Hyde in the contractual field so as to impress on it all the characteristics of the State at the threshold while making a contract requiring it to fulfil the obligation of Article 14 of the Constitution and thereafter permitting it to cast off its garb of State to adorn the new robe of a private body during the subsistence of the contract enabling it to act arbitrarily subject only to the contractual obligations and remedies flowing from it. It is really the nature of its personality as State which is significant and must characterize all its actions, in whatever field, and not the nature of function, contractual or otherwise, which is decisive of the nature of scrutiny permitted for examining the validity of its act. The requirement of Article 14 being the duty to act fairly, justly and reasonably, there is nothing which militates against the concept of requiring the State always to so act, even in contractual matters. There is a basic difference between the acts of the State which must invariably be in public interest and those of a private individual, engaged in similar activities, being primarily for personal gain, which may or may not promote public interest. Viewed in this manner, in which we find no conceptual difficulty or anachronism, we find no reason why the requirement of Article 14 should not extend even in the sphere of contractual matters for regulating the conduct of the State activity.

25. In Wade's Administrative Law, 6th Ed., after indicating that "the powers of public authorities are essentially different from those of private persons", it has been succinctly stated at pp. 400-401 as under:

...The whole conception of unfettered discretion is inappropriate to a public authority, which possesses powers solely in order that it may use them for the public good.

There is nothing paradoxical in the imposition of such legal limits. It would indeed be paradoxical if they were not imposed. Nor is this principle an oddity of British or American law : it is equally prominent in French law. Nor is it a special restriction which fetters only local authorities : it applies no less to ministers of the Crown. Nor is it confined to the sphere of administration : it operates wherever discretion is given for some public purpose, for example, where a judge has a discretion to order jury trial. It is only where powers are given for the personal benefit of the person empowered that the discretion is absolute. Plainly this can have no application in public law.

For the same reasons there should in principle be no such thing as unreviewable administrative discretion, which should be just as much a contradiction in terms as unfettered discretion. The question which has to be asked is what is the scope of judicial review, and in a few special cases the scope for the review of discretionary decisions may be minimal. It remains axiomatic that all discretion is capable of abuse, and that legal limits to every power are to be found

somewhere.

(Emphasis supplied)

The view, we are taking, is, therefore, in consonance with the current thought in this field. We have no doubt that the scope of judicial review may vary with reference to the type of matter involved, but the fact that the action is reviewable, irrespective of the sphere in which it is exercised, cannot be doubted.

29. The petitioners have also touched the human factors involved in these writ petitions. It has been passionately argued by the petitioner that they are a bunch of unfortunate employees, who were earlier abandoned by their parent department, when they became sick or were closed down. After undergoing the vagaries of retrenchment/termination and the security of the job, the petitioners were given protection and shelter in SUDA. The State Government had tried to rehabilitate the petitioners in this agency and they were given to understand that their services will be absorbed or regularized here. The Court should consider their cases with human angle. In this regard, they have also referred to the case of H.C. Puttaswamy and others vs. The Hon"ble Chief Justice of Karnataka High Court, Bangalore and others (1991 (Supp) 2 SCC 421) : (AIR 1991 SC 295 : 1991 Lab IC 235), referring to para 12 and part of para 13 is being quoted below :

"12. Having reached the conclusion about the invalidity of the impugned appointments made by the Chief Justice, we cannot, however, refuse to recognise the consequence that involves on uprooting the appellants. Mr. Gopala Subramanayam, counsel for the appellants while highlighting the human problems involved in the case pleaded for sympathetic approach and made an impassioned appeal for allowing the appellants to continue in their respective posts. He has also referred to us several decisions of this Court where equitable directions were issued in the interests of justice even though the selection and appointments of candidates were held to be illegal and unsupportable.

"13.....One could only imagine their untold miseries and of their family if they are left at the midstream. Indeed, it would be an act of cruelty at this stage to ask them to appear for written test and viva voce to be conducted by the Public Service Commission for fresh selection (See: Lila Dhar v. State of Rajasthan(AIR 1981 SC 1777)

30. Sri Vivek Raj Singh, learned counsel for the opposite party has taken a strong defence that the equity cannot prevail over specific law. He has maintained that the petitioners do not have any right and he even put question on the maintainability of the writ petitions.

31. It has been argued on behalf of the petitioners that even the Chief Minister at one point of time, had made a statement at the floor of the House that the case of the petitioner shall be considered for absorption.

32. Two short counter affidavits have been filed on behalf of two Principal

Secretaries, namely Principal Secretary, Nagriya Rozgar Evam Garibi Unmulan Karyakram Vibhag, Govt. of U.P. opposite party no. 1 and Principal Secretary, Nagar Vikas, Govt. of U.P. opposite party no. 2. In essence, both these counter affidavits deny the right of the petitioners more or less on the same line of argument, yet we will discuss both the counter affidavits for the differences, if any.

33. Short counter affidavit on behalf of opposite party no. 1, has been filed by one Mahendra Kumar, Joint Secretary in the office of Nagriya Rozgar Evam Garibi Unmulan Karyakaram Department, Govt. of U.P.

34. Before giving parawise reply, counter affidavits speak about very creation of the Agency of SUDA. In para 3 of the counter affidavit of Mahendra Kumar, Joint Secretary, Nagriya Rozgar evam Garibi Unmoolan Karyakaram Department, Govt. of U.P., it has been stated that certain funds were being provided under particular scheme in order to achieve objective of the said scheme. Through the funds provided for such scheme, agency was constituted. Later on, it got registered under the provisions of societies registration Act, 1860 and is a registered body. However, very life of the body depended on the fund provided for fulfillment of given scheme. In case funds were not being provided, even the agency could come to end without completing the scheme and after completion of the scheme, there is no chance of its continuance. As such appointment of the staff on behalf of the agency, itself, is absolutely with alien, to the concept of the Agency. For this reason, from the beginning principles of borrowing the staff or engaging the person on contract basis has been adopted and in that regard, Govt. orders and the provision contained in Financial Handbook are to be followed and the State answering respondents being, itself, providing statutory as well as other terms and condition of borrowing the staff from other different bodies and there is definite policy that no borrowed person can be continued beyond the limit of five years. Strictly, such directions are to be followed by the agency, itself and the answering respondents. The answering respondents have taken care that the policy regarding borrowed staff is strictly followed and such claim on behalf of the petitioners or anybody else, for regular absorption in the agency, is absolutely untenable because the life of the agency does not have any permanency. In this regard, opposite party no. 1 refers to the impugned G.O. dated November 15, 2003. The G.O. was issued by Sri Khanjan Lal, the then Principal Secretary. The said G.O. cancels earlier G.O. dated May 29, 2003 and declares that all the employees working on deputation in SUDA may be repatriated to their parent department. An Office Memorandum dated 14.12.1982 has been issued by the Finance Department. In this G.O., reference has been made to the Govt. Order issued by the finance department on 14.12.1982. This office order, has been issued by Sri J.L. Bajaj, the then Finance Secretary.

35. In this Govt. order, six guidelines have been given after careful consideration of the matter. In any eventuality, the period of five years cannot be extended except with the prior permission of the State Government. The repatriation after

five years was made a rule and extension after five years was rare exception.

36. A similar Office Memorandum further strengthening the maximum period of deputation as five years was issued by one Sri Shiv Prakash, the then Joint Secretary of the Finance Department on 16.3.1999.

37. Principle of sending back the deputationist, to their parent department, strictly after five years, was again emphasized, by another order issued by the Principal Secretary, on 24.6.2002. The continuous stand with regard to repatriation of the deputationist was punctuated vide G.O. dated 26.5. 2003, issued by Sri D.S. Bagga, Chief Secretary, wherein it was stated that deputationist will not be sent back before completing three years, in the borrowing department but the bottom line, to the effect that the deputation was not to be extended beyond five years in any conditions, still remained the same. Setting all the controversy at rest, G.O. dated 4.3. 2004, was issued by the Principal Secretary, Sri Khanjan Lal, which says that it has been decided after careful consideration by the State Government that no deputationist was to be absorbed in the services of SUDA. It was also decided that all such applications and representations were to be rejected, in terms of this resolve by the State Government. There was direction to inform all concerned, about the rejection of their representations and applications, for absorption in SUDA.

38. Learned standing counsel says that this order stands final because it has not been challenged in any of the writ petitions. Reference to this G.O. has been made in para 11 of the counter affidavit. It has further been stated that the said decision was taken in view of the temporary nature of the establishment of SUDA, which is based on different scheme. Scheme in the name of National Slums Development Programme, Valmiki Ambedkar Malin Basti Avas Yojna are hundred percent financed by the Central Government and the Scheme in the name of Swarn Jyanti Shahri Rojgar Yojna is financed in the ratio of 75% and 25% by the Central Government and the State Government, respectively.

39. In para 12 it has been stated that the sanction for continuance is given by the department on year to year basis.

40. In para 13 of the counter affidavit, Memorandum of Association of SUDA has been described. The governing body of the Society consist of Secretary, Urban Employment and Poverty Alleviation Programme Department, as Chairman; Secretary of Finance, Planning, Institutional Finance, Housing, Social Welfare of the State Government, Director, Local Bodies U.P., Regional Chief, HUDCO, Lucknow. Chief Town and Country Planner, Lucknow, U.P., as its members. The Director, SUDA, U.P. Lucknow is the Executive Secretary. Secretary, Medical, Health, Adult Education, Women Welfare, Labour Department, Sport Department, Urban Development, are also members and there are three non official members nominated by the State Government.

41. This goes to show that SUDA though called an autonomous body, still remained a Govt. Agency for the purposes of policy of employment. Autonomy

was only with regard to its day to day working. The contracts and their completion was largely independent of any governmental interference but so far service condition of the staff is concerned, the Govt. was having a firm grip on SUDA.

42. In reply to the petitioners' argument, that the concerning Minister had made statement in their favour, on the floor of the House, while replying to question no. 103, it has been stated in para18 of the counter affidavit that the answer was regarding created post of SUDA/DUDA. Against twenty one posts, employees of the Miniral Corporation and against forty four posts, employees of UPTRON India Limited, have been appointed in accordance with their suitability and utility. It does not mean that they have been appointed against any permanent post on regular basis but have been appointed against temporary post on the sanction of year to year basis.

43. Further the Govt. Order dated 15.11. 2003 has already been adopted by the Governing body of SUDA in its meeting dated 27.1.2004. Therefore, G.O. dated 24.2.2004 is absolutely valid. It has also been clarified that in para19 of the counter affidavit that G.O. dated 17.12. 2002 has been issued by the Secretary, I.T. & Electronics Department of the State Government, but G.O. dated 15.11.2003 has been issued by opposite party no. 1, which is concerning with the department of SUDA. The G.O. dated 17.12. 2002 thus, has no relevance regarding affairs of SUDA. Further G.O. dated 15.11.2003 speaks about repatriation of such employees from SUDA who have completed five years continuance service, while G.O. dated 17.12.2002 is in respect of appointment of Govt. employees of Govt. Department, in the offices of autonomous bodies/ Corporation/Undertaking on contract/Body shopping basis. Both the Govt. orders cannot be equated with each other. In any view of the matter, G.O. dated 17.12.2002 shall not apply to SUDA, which is a society registered under Societies Registration Act.

44. A charge of discrimination has also been levelled against the opposite parties. This has always been a favourite argument of the petitioners' counsels because it puts the opposite parties on defensive. In the present case, the petitioners have not been able to prove it through examples. Example of one Mr. Kannaujia has also been successfully answered by the opposite parties. The absorption order of Mr. Indrapal Kannaujia dated 4.3.2005 was cancelled by an office order dated 13.5.2005 issued by Sri R. Ramani, Principal Secretary. Thus, the argument draws a flak from the other side and is rejected by this Court.

45. One more argument has been made that en masse repatriation smells of malafide intention of fresh recruitment by the opposite parties. This has also not been substantiated, rather it is more illusory than real. In fact repatriation orders have been issued from time to time. Stay orders were granted in different writ petitions at different date. Today, when all the petitions are being taken up together, it looks as if all the repatriation orders are being passed en masse. Moreover, there has not been any fresh advertisement by the opposite parties.

All repatriation orders are based on one single preposition that the maximum limit of five years has to be adhered to and SUDA does not have a permanent status. The argument is thus, misconceived and rejected.

46. On the basis of aforesaid discussions, this Court comes to the conclusion that SUDA is well within its right to repatriate the petitioners, whose period of deputation have expired. Petitioners cannot insist to remain on deputation in SUDA beyond a period of five years. SUDA being a Society, whose existence run on year to year basis, cannot be forced to absorb any deputationist.

47. However, grievance of those petitioners, whose parent departments are either sick or are not in existence, is genuine. This Court feels that it is State Government, which directed SUDA to engage the petitioners on deputation, fixed the maximum period of deputation as five years and directed not to absorb any deputationist permanently. The decision taken by SUDA is mostly on the direction of the State Government. Hence it is a fit case where the State Government should direct its departments to take the affected petitioners either on deputation or on contract. In this regard, the State Government will be well advised to refer to Govt. Orders No. 20/1/91Ka2/2008 dated 22.9.2008, 20/1/91/Ka2/2008 dated 20.10.2008 and 20/1/91/Ka22008 dated 9.6.2009. All these Govt. Orders have been issued by the Principal Secretary, regarding the appointments of surplus staff. In these Govt. Orders directions have been issued to absorb/appoint the surplus staff in different departments.

48. Accordingly, all the petitions are dismissed and the interim orders are discharged.

49. However, it is provided that the State Government shall look into the matter of those petitioners, whose parent departments are either sick or are not in existence. The State Government shall take a decision in this regard, within a period of two months from today.