

(2010) 10 AHC CK 0164
In the Allahabad High Court
Case No : Writ Petition No. 980 of 2007

Yaduvir Singh, Dr.

APPELLANT

Vs

State of U.P.through Principal Secretary Technical Education &
3 Ors

RESPONDENT

Date of Decision : 07-10-2010

Acts Referred:

Constitution of India, 1950 — Article 16, 166, 226

Citation : (2010) 10 AHC CK 0164

Hon'ble Judges : Devi Prasad Singh, J and Vedpal, J

Final Decision : Disposed Of

Judgement

Devi Prasad Singh,J.

1. Dispute relates to appointment on the post of Professor of Electrical Engineering in Harcourt Butler Technological Institute, Kanpur (In short, HBTI, Kanpur), an institute affiliated with U.P. Technical University, Lucknow (In short, university). HBTI, Kanpur is a society, registered under the Societies Registration Act, 1960, fully controlled and managed by the Board of Governors funded by the State Government.

2. The substantial question of law of public importance involved is as to :

"whether, once an approval is granted by the Chairman of the Board of Governors, in the present case, Minister/Chief Minister in accordance with rules, then the approval so granted may be reviewed with disapproval of selection and appointment merely because of change of government, more so in absence of any material which may be adverse and calling for interference with the earlier decision ?

FACTS

3. The HBTI, Kanpur is governed by the Governing Body of the society having power and superintendence, direction and control and also to manage the

moveable and immoveable property vested in it. According to the Article of Association, the Board is composed of following persons :

- I)Chairman : Minister for Technical Education, U.P.
- (ii)Vice Chairman : Secretary, Technical Education, Deptt. Of U.P.
- (iii)Member : Secretary, Finance Department, U.P. or his nominee, not below the rank of Joint Secretary
- (iv)Member : Director, Indian Institute of Technology, Kanpur.
- (v)Member : Vice Chancellor, Roorkee University, Roorkee.
- (vi)Member : Director of Technical Education, U.P. Kanpur.
- (vii)Member :A Nominee of the All India Council of Technical Education
- (viii)Member : One eminent technologist/engineer having specialisation in the field advent to the Institute/College to the nominated by the Board.
- (ix) Member : Vice Chancellor of University to which the College/Institution is affiliated.
- (x) Member : One Head of the Department of the college/Institution not below the rank of Professor to be nominated by the Board for one year by rotation in order of seniority
- (xi) Three eminent persons in the field of Technical Education to be nominated by the State Government.
- (xii) Member : One eminent person from industry to be nominated by the State Government.
- (xiii) Member Secretary : Director of the Institute.

Under the Memorandum, the Board of Governors approve a selection made by the duly constituted Selection Committee of posts exceeding maximum scale of Rs.3,500/.

4.The petitioner, who is an Associate Professor in the Department of Electrical Engineering, Thapar University, Patiala has done B. Tech., M.E. and Ph. D in Engineering and having more than fourteen years of teaching experience.

5.HBTI, Kanpur, by advertisement dated 21.7.2006, invited applications to fill up regular vacancies of 10 posts of Professors, 9 posts of Assistant Professor and 9 posts of Lecturer of various departments including the Electrical Engineering. A copy of the advertisement has been filed as Annexure No.4 to the writ petition. In response to the aforesaid advertisement, the petitioner applied for the post of Professor, Electrical Engineering along with others. He participated in the interview on 19.10.2006 in response to the call letter. After interview, the name of selected candidates were placed before the Board of Governors and after due

approval, appointment letters were issued for appointment on the post of Assistant Professor and Lecturer on 18.1.2007. However, no appointment letter was issued to the petitioner.

6. In response to the query made by the petitioner, by letter dated 17.4.2007, the petitioner was informed by the Registrar/Public Relations Officer, HBTI, Kanpur that his selection has not been approved by the government and the decision is awaited. It has been stated by the petitioner that the constitution of the Selection Committee was perfectly in accordance with rules.

7. Later on, a complaint was received against the petitioner's selection which was considered and adjudicated by the authorities and ex parte enquiry was held without any communication to the petitioner and HBTI, Kanpur and the government arrived to the conclusion that there was no fault with the selection process as well as constitution of the Committee in which the petitioner was selected.

8. However, on safer side, the opposite party No.3 took a decision that the approval of the Chairman of the Board of Governor/Minister, Higher Education should be obtained with regard to recommendation of the Selection Committee. The file was placed before the Minister, Technical Education and before he could take a decision, he resigned. Hence, the matter was placed before the Hon'ble Chief Minister who approved the petitioner's selection by an order dated 1.5.2007. Though the petitioner's selection was duly approved by the Chairman/Minister concerned, in the present case, the Chief Minister but on account of general election in the State of U.P., appointment letter could not be issued. After the election, new government of different political party was formed in the State of U.P. and one Shri Sadal Prasad became the Minister of Technical Education who happens to be ex officio Chairman of the Board of Governors. Instead of issuing appointment letter, the file was placed before the new Chief Minister. Hon'ble Chief Minister herself had not passed any order; rather the Secretary to the Chief Minister Shri Rohit Nandan has passed an order dated 4.6.2007 observing that fresh selection be held as desired. The said order dated 4.6.2007 which is on record is reproduced as under :

9. When this fact came into the knowledge of the office, the office made an endorsement that in case the petitioner is not appointed and the constitution of the Selection Committee is held to be invalid, the entire selection made in pursuance to the advertisement shall be liable to be cancelled as already appointment has been done. The office further noted that the selection was perfectly in accordance with rules and the Selection Committee was duly constituted consisting qualified persons. It shall be appropriate to reproduce the office note which is on record, obtained by the petitioner under Right to Information Act :

10. The petitioner having failed to get any response with regard to his appointment, moved an application under Right to Information Act in response to

which, the photostat copies of the original office note was provided to him which has been filed collectively as Annexure No.8 to the writ petition.

11. A close scrutiny of office note shows that, as has been observed (supra), earlier, the Chief Minister was having the portfolio of Technical Education who has approved the petitioner's selection and appointment on 1.5.2007. Later on by the change of government, one Sadi Lal was appointed as Minister of Technical Education. Under the rules, only the Minister of Technical Education who is the Chairman of the Governing Council has right to approve or disapprove a selection and appointment but the file was placed before the present Chief Minister on whose behalf, the Secretary made a remark to hold fresh selection since the Selection Committee was not properly constituted.

12. While reviewing the earlier order, the Secretary of the Chief Minister has made an endorsement and not the Chief Minister herself. However, on what ground, the Selection Committee was alleged to have not been constituted properly is not revealed by the order dated 4.6.2007, passed by the Secretary to the Chief Minister. In case there was some additional material calling for review of the decision taken by earlier Chief Minister who was having the portfolio of Technical Education, then that material should have been discussed but the same has not been done. It does not borne out from the record that when 10 persons were selected by the same Selection Committee out of which nine were appointed, then how and in what manner, the petitioner's selection can be held to have been made in an improper manner by a Selection Committee, allegedly, having not properly been constituted. It appears that a mechanical decision has been taken only because of the change of government as the petitioner had not suited to new set up.

13. The Memorandum of Association filed as Annexure No.3 to the writ petition shows that the provision with regard to constitution of Selection Committee has been given in Rule 4 of the byelaws. From the own record of the Ministry, it has not been disputed that the Selection Committee was constituted in accordance with the byelaws.

14. Art. 7 of the Memorandum of Association of HBTI, Kanpur, as observed, provides that the Minister for Technical Education, U.P. shall be its Chairman. Article 17 provides that the Chairman shall preside over the meeting of the society or the Board and in his absence, the Vice Chairman and each members will have got one vote under Art. 18. Article 19 relates to the resolution of the Board which provides that the Board shall convene its meeting with seven days prior notice and ruling of Chairman shall be final with regard to all persons under Article 20. The power and functions of the Board have been given in Art. 25 which provides that the has power to frame byelaws, create posts and fill up the vacancies of sanctioned staff.

15. From the material on record, there appears to be no doubt that the petitioner's appointment was duly approved by one Chief Minister and with the

change of government, the other Chief Minister reviewed the earlier decision though there was no new or fresh material calling for interference.

16. While assailing the impugned action of the respondents, Ms. Madhumita Bose submitted that only because of change of the government, earlier decision granting approval should not have been reviewed, more so when no fresh material was available on record to assail the petitioner's selection or constitution of the Selection Committee. It has also been submitted that Hon'ble Chief Minister has not applied her mind and a decision has been taken mechanically against the petitioner. It has also been argued that it is the Minister of Technical Education who has got power to approve or disapprove being a statutory authority, i.e. the Chairman of the Governing Council. She further submits that the petitioner has been discriminated by the respondents State since the selection of nine other persons held by the same Selection Committee have been approved and Professors have been appointed of various discipline. Only with regard to the petitioner, different decision has been taken on unfounded ground. It has been stated that it was the hard luck of the petitioner, that because of election, no appointment order was issued though the petitioner's selection was approved. In case, there would have been no election, the petitioner would have also been appointed along with others. The petitioner's counsel further submits that it is a fit case where extraordinary remedy under Art. 226 of the Constitution of India should be exercised to set aside the impugned order passed by the Secretary on behalf of the Chief Minister and the appointment letter may be issued.

17. The petitioner's counsel has relied upon the judgments reported in (2002)2 SCC 507 State of Haryana versus State of Punjab and another, (2006)4 SCC 683 State of Karnataka and another versus All India Manufacturers Organisation and others, [2009(27) LCD 853] Samarjeet Tiwari and others versus State of U.P. And others, [2010(28) LCD 334] Brigadier M.A. Khan versus Union of India and others and (2008)2 SCC 161 Jitendra Kumar and others versus State of Haryana and another.

18. On the other hand, learned Standing Counsel submits that mere selection does not extend any right and the government has got power to decline to make appointment even if a person is selected. Though, on behalf of the State, no counter affidavit has been filed assailing the factual averment made in the writ petition but it has been stated that the selectee does not have got unfettered claim for appointment. Learned Standing Counsel further submits that the decision taken by the Chief Minister is not open to judicial review. The learned Standing Counsel has relied upon the cases, reported in AIR 1963 Supreme Court 395 Bachhittar Singh versus State of Punjab and another, (1996)2 SCC 26 Gulabrao Keshavrao Patil and others versus State of Gujarat and others, (2006) 1 SCC 779 Union of India and others versus Kali Dass Batish and another, (2008)1 SCC 318 Balakrushna Behera and another versus Satya Prakash Dash and (2009) 2 SCC 479 S.S. Balu and another versus State of Kerala and others.

19. On behalf of HBTI, Kanpur, Mr. Ratnesh Chandra, learned counsel submits that there was no fault on the part of HBTI, Kanpur in holding the selection. The Committee was duly constituted. Even if the petitioner's selection is cancelled, there will be vacancy and to meet out the exigency of service, the HBTI, Kanpur may proceed to hold fresh selection in accordance with the byelaws.

20. There is no dispute over the proposition of law that the discretion exercised by the Government with regard to selection, approval or disapproval should ordinarily not be interfered. It is for the government to make appointment from the select list and if necessary, may keep the vacancies unfilled but in the present case, controversy involved is different than what has been argued by the learned Standing Counsel. Here the selection was made by a duly constituted Selection Committee, approved by the Board of Governors and also approved by the erstwhile government through the Chief Minister. Accordingly, it is necessary to deal with discretionary power of the State Government.

DISCRETIONARY POWER

21. According to Webster's Encyclopaedia Unabridged Dictionary (1994), p.411, the "Discretion" means the power, right or liberty to decide one way or the other, to act according to one's own judgment; freedom of choice; to be completely under one's power or control; the freedom to decide what should be done in a particular situation.

22. In *Rooke* case, (1598) 5 Co Rep 99b (100a), the "Discretion" proclaimed, Coke, "is a science of understanding to discern between falsity and truth, between right and wrong, between shadows and substance, between equity and colourable glosses and pretences, and not to do according to their wills and private affections.

23. In *Sharp v. Wakefield*, reported in 1891 AC 173, 179, Lord Halsbury rightly observed as under:

""[D]iscretion" means when it is said that something is to be done within the discretion of the authorities that something is to be done according to the rules of reason and justice, not according to private opinion..... according to law and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself...."

24. Hon"ble Supreme Court in a case reported in 2004(2) SCC 590; *Union of India v. Kuldeep Singh* has held that the discretion is to know through law what is just. To quote:

"Discretion is to know through law what is just. Where a judge has and exercises a judicial discretion his order is unappealable unless he did so under a mistake of law or fact or in disregard of principle, or after taking into account irrelevant matters. It will help to show this if it can be shown that there were no materials on which he could exercise his discretion in the way he did....."

Their Lordships of Hon''ble Supreme Court further proceeded to hold as under:

"20. When anything is left to any person, judge or Magistrate to be done according to his discretion, the law intends it must be done with sound discretion, and according to law. (See Tomlin's Law Dictionary) In its ordinary meaning, the word "discretion" signifies unrestrained exercise of choice or will; freedom to act according to one's own judgment; unrestrained exercise of will; the liberty or power of acting without control other than one's own judgment. But, when applied to public functionaries, it means a power or right conferred upon them by law, of acting officially in certain circumstances according to the dictates of their own judgment and conscience, uncontrolled by the judgment or conscience of others. Discretion is to discern between right and wrong; and therefore, whoever hath power to act at discretion, is bound by the rule of reason and law. (See Tomlin's Law Dictionary)

21. Discretion, in general, is the discernment of what is right and proper. It denotes knowledge and prudence, that discernment which enables a person to judge critically of what is correct and proper united with caution; nice discernment, and judgment directed by circumspection; deliberate judgment; soundness of judgment; a science or understanding to discern between falsity and truth, between wrong and right, between shadow and substance, between equity and colourable glosses and pretences, and not to do according to the will and private affections of persons. When it is said that something is to be done within the discretion of the authorities, that something is to be done according to the rules of reason and justice, not according to private opinion; according to law and not humour. It is to be not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man, competent to the discharge of his office out to confine himself (per Lord Halsbury, L.C., in *Sharp v. Wakefield*). (Also see *S.G. Jaisinghani v. Union of India*)

22. The word ""discretion" standing single and unsupported by circumstances signifies exercise of judgment, skill or wisdom as distinguished from folly, unthinking or haste; evidently therefore a discretion cannot be arbitrary but must be a result of judicial thinking. The word in itself implies vigilant circumspection and care; therefore, where the legislature concedes discretion it also imposes a heavy responsibility. "The discretion of a judge is the law of tyrants; it is always unknown. It is different in different men. It is casual, and depends upon constitution, temper and passion. In the best it is often times caprice; in the worst it is every vice, folly, and passion to which human nature is liable." Said Lord Camden, L.C.J., in *Hindson and Kersey*".

25. In view of above in case the statutory discretion is vested in an authority then such discretion should be exercised not in arbitrary, whimsical and fanciful manner. It must be reflected from the outcome of event that the authority concerned has exercised discretion within the sound principle of law, skill and wisdom with vigilant circumspection and care. The discretionary power imposes a

heavy responsibility on a person or authority. The latitude or liberty accorded by statute, Circular or Order to the higher authority does not permit to exercise such power in unjust and unfair manner. In the case of Kuldeep Singh (supra), their Lordships of Apex Court further held as under:

" If a certain latitude or liberty is accorded by a statute or rules to a judge as distinguished from a ministerial or administrative official, in adjudicating on matters brought before him, it is judicial discretion. It limits and regulates the exercise of discretion, and prevents it from being wholly absolute, capricious, or exempt from review."

JUDICIAL REVIEW

26. Hon'ble Supreme Court in the case of State of U.P. vs. Mohd. Nooh reported in 1958 SC 86, Pratap Singh vs. State of Punjab reported in AIR 1964 SC 72, Fasih Chaudhary vs. D.G. Doordarshan reported in 1989(1) SCC 189 held that if the act complained of is without jurisdiction or is in excess of authority conferred by statute or there is abuse or misuse of power, a Court can interfere. In such an eventuality, mere fact that there is denial of allegation of malafide or oblique motive or of its having taken into consideration improper or irrelevant matter does not preclude the court from enquiring into the truth of allegations levelled against the authority and granting appropriate relief to the aggrieved party.

27. In number of cases Hon'ble Supreme Court ruled that every arbitrary action, whether in the nature of legislative or administrative or quasijudicial exercise of power, attract the prohibition of Article 14 of the Constitution of India vide AIR 1974 SC 555; E.P.Royappa v. State of Tamil Nadu, 1979 (3) SCC 489; R.D. Shetty v. International Airport Authority, 1978 (1) SCC 248; Maneka Gandhi v. Union of India, 1981(1) SCC 722; Ajay Hasia v. Khalid Mujib, 1990 (3) SCC 223; Shri Sitaram Sugar Co. Ltd. v. Union of India.

28. In M.I. Builders Pvt. Ltd. v. Radhey Shyam reported in (1999) 6 SCC 464, the Apex Court ruled that the decision is unlawful if it is one to which no reasonable authority could have come.

29. The Constitution Bench of Hon'ble Supreme Court in a case reported in AIR 1991 SC 101; Delhi Transport Corporation v. D.T.C. Mazdoor Congress and others had repelled the presumption that person holding high office does not commit wrong. Discretion enjoyed by the persons holding high offices should not be left to the good sense of individuals. Relevant portion from the judgment of Delhi Transport Corporation (supra) is reproduced as under:

"There is need to minimize the scope of the arbitrary use of power in all walks of life. It is inadvisable to depend on the good sense of the individuals, however highplaced they may be. It is all the more improper and undesirable to expose the precious rights like the rights of life, liberty and property to the vagaries of the individual whims and fancies. It is trite to say that individuals are not and do not become wise because they occupy high seats of power, and good sense,

circumspection and fairness does not go with the posts, however high they may be. There is only a complaisant presumption that those who occupy high posts have a high sense of responsibility. The presumption is neither legal nor rational. History does not support it and reality does not warrant it. In particular, in a society pledged to uphold the rule of law, it would be both unwise and impolitic to leave any aspect of its life to be governed by discretion when it can conveniently and easily be covered by the rule of law.....

25. The "high authority" theory so called has already been adverted to earlier. Beyond the selfdeluding and selfasserting righteous presumption, there is nothing to support it. This theory undoubtedly weighed with some authorities for some time in the past. But its unrealistic pretensions were soon noticed and it was buried without even so much as an ode to it. Even while Shah, J. in his dissenting opinion in *Moti Ram Deka v. General Manager, N.E.P. Railways, Maligaon, Pandu*, (1964) 5 SCR 683: (AIR 1964 SC 600) had given vent to it, Das Guptam H. in his concurring judgment but dealing with the same point of unguided provisions of Rule 148(3) of the Railways Establishment Code, had not supported that view and had struck down the rule as being violative of Article 14 of the Constitution. The majority did not deal with this point at all and struck down the Rule as being void on account of the discrimination it introduced between railway servants and other government servants."

30. The Supreme Court in 2005(5) SCC 181; *State of NCT of Delhi and another v. Sanjeev alias Bittoo* upheld the right of judicial review under Article 226 on the basis of illegality in decision making process coupled with irrationally and perversity. While holding that decision is irrational and Court may look into the material on record. (Paragraphs 16, 17 and 21)

31. Hon"ble Supreme Court further held in the case reported in 2005(5) SCC 181; *State of NCT of Delhi and another v. Sanjeev alias Bittoo* that if the administrative or judicial power has been exercised on nonconsideration or nonapplication of mind to relevant factors, such exercise shall stand vitiated. Relevant portion from the judgment of Sanjeev (supra) is reproduced as under:

"If the power has been exercised on a nonconsideration or nonapplication of mind to relevant factors, the exercise of power will be regarded as manifestly erroneous. If a power (whether legislative or administrative) is exercised on the basis of facts which do not exist and which are patently erroneous, such exercise of power will stand vitiated."

32. In *Centre for Public Interest Litigation and another v. Union of India* reported in 2005 (8) SCC 202, the Hon"ble Supreme Court reiterated the settled proposition of law that every administrative action should be reasonable, just and fair. Hon"ble Supreme Court further held that the procedure adopted by the Administrative body should not be only fair but also seems to be just, fair and proper.

33. In celebrated case, reported in 1980(2) SCC 1789 *Minerva Mills Limited*

versus Union of India, their Lordships of Hon^{ble} Supreme Court held that three articles of our Constitution, i.e. Articles 14, 19 and 21 are golden triangle which affords to the people of this country an assurance that the promise held forth, by the Preamble will be performed by ushering an egalitarian era through the discipline of fundamental rights, that is, without emasculation of the rights to liberty and equality which alone can help preserve the dignity of the individual.

34. In a case reported in AIR 1981 SC 344 Fertiliser Corporation Kamagar Union (Regd.) Sindri and others versus Union of India and others, while considering the power conferred by Articles 32 and 226 of the Constitution of India, their Lordships of Hon^{ble} Supreme Court held that Art. 32 can be used only for enforcement of fundamental right but Art. 226 also for "any other purpose".

35. In a recent case, reported in (2009)9 SCC 610 Babubhai Jamnadas Patel versus State of Gujarat and others, their Lordships of Hon^{ble} Supreme Court held that appropriate direction may be issued to do complete justice between the parties. It shall be appropriate to reproduce relevant portion :

"46. The courts, and in particular the High Courts and the Supreme Court, are the sentinels of justice and have been vested with extraordinary powers of judicial review and supervision to ensure that the rights of the citizens are duly protected. The courts have to maintain a constant vigil against the inaction of the authorities in discharging their duties and obligations in the interest of the citizens for whom they exist. This Court, as also the High Courts, have had to issue appropriate writs and directions from time to time to ensure that the authorities performed at least such duties as they were required to perform under the various statutes and orders passed by the administration."

36. Democratic polity is founded on the principle that each individual possess equal value and the dignity of a person is important factor to be secured by courts without any discrimination. Baroness Hale in Ghaidan versus GodinMendoza [2004]UKHL 30; [2004]2 A.C. 557 observed :

"Democracy is founded on the principle that each individual has equal value. Treating some as automatically having less value than others not only causes pain and distress to that person but also violates his or her dignity as a human being."

37. Hon^{ble} Supreme Court in a case reported in (2008)3 SCC 484 Moni Shankar versus Union of India and another has held that the doctrine of unreasonableness is giving way to doctrine of proportionality propounded by Wednesbury (supra) (para 17).

38. In one another judgment, reported in (2006)3 SCC 173 Commissioner of Police and others versus Syed Hussain, their Lordships of Hon^{ble} Supreme Court have held that while exercising power of judicial review, the Court may not merely follow the Wednesbury principle but now adjudication involves a full blown merit judgment. To reproduce para 12, to quote;

"Thus, even assuming that a time has come where this Court can develop "administrative law" by following the recent decisions of the House of Lords, we are of the opinion it is not one of such cases where the doctrine of proportionality should be invoked. In "Ex p Daly" (supra) it was held that the depth of judicial review and the deference due to the administrative discretion vary with the subject matter. It was further stated : (All ER p.447, para 32)

"It may well be, however, that the law can never be satisfied in any administrative field merely by a finding that the decision under review is not capricious or absurd."

As for example in Huang and Ors. v. Secretary of State for the Home Department, referring to R. v. Secretary of State of the Home Department, ex. P. Dale, it was held that in certain cases, the adjudicator may require to conduct a judicial exercise which is not merely more intrusive than Wednesbury, but involves a fullblown merits judgment, which is yet more than Ex p. Daly requires on a judicial review where the Court has to decide a proportionality issue."

39. In another case, reported in (2008)2 SCC 161 Jitendra Kumar and others versus State of Haryana and another, Wednesbury doctrine has been considered and Hon"ble supreme Court held that now it is on terminal decline. Their Lordships of Hon"ble Supreme Court held that the doctrine of unreasonableness is giving way to the doctrine of proportionality (para 63).

40. Keeping in view the settled proposition of law, in case both the orders of two Chief Ministers dated 1.5.2007 and 4.6.2007 are cumulatively taken into account, then it appears that when the approval was granted on 1.5.2007, entire material was before the Chief Minister on record and after considering the same, approval was granted by the Chief Minister under his own signature.

41. From the order dated 4.6.2007, it appears that the mechanical observation has been made raising doubt over the constitution of the selection Committee cancelling the petitioner's selection and directing to proceed afresh, that too not by the Chief Minister herself but by the Secretary to the Chief Minister on the basis of instruction received. There appears to be no fresh material on record between the period i.e. 1.5.2007 to 4.6.2007 which may, prima facie, establish that the Selection Committee was not properly constituted. Neither it is borne out from the record/office note nor from the order dated 4.6.2007 that the Selection Committee was not constituted in accordance with the byelaws, hence the impugned order dated 4.6.2007, passed by the Secretary to the Chief Minister seems to be based on unfounded facts and is arbitrary exercise of power. The discretion exercised by the government seems to be highly arbitrary and based on no material calling to review the earlier decision dated 1.5.2007.

42. There is one other aspect of the matter. Though the decision dated 4.6.2007 seems to be based on no fresh material but for one other ground, it seems to be not sustainable. Without discussing the illegality in constitution of the Selection Committee, it has been observed that fresh selection should be held since it is

expected by the Chief Minister. Under rules of business, in case final decision is to be taken by the Chief Minister in any matter, then that should be done under his/her own signature keeping in view the office note prepared or made by the Secretary. In the present case, only the wish of the Chief Minister has been noted by the Secretary while cancelling the selection directing to hold fresh selection without applying mind to record, which includes the opinion of Special Secretary.

43. In a democratic polity, there cannot be feudalistic approach. In case a Minister or the Chief Minister is expected to apply his/her mind under the Rules of Business, then the final order must contain his/her own signature as was done earlier by the then Chief Minister while granting approval on 1.5.2007. In democratic polity, it is always expected that everyone shall be accountable for his or her action and to make a constitutional functionary accountable, it shall be obligatory that at the end of the day when final decision is taken with regard to any dispute, it must be signed by the Minister or the Chief Minister concerned. Any provision which gives uncontrolled and unguided power without making a constitutional functionary accountable about his or her action shall be against the constitutional mandate. The Principal Secretary or the Chief Secretary under the Rules of Business may make recommendations but they are not final authorities. While taking final decision in a matter which requires to be done by the Minister or the Chief Minister, then such minister or Chief Minister must put his/her signatures over the decision so taken to show that he/she has applied mind. In absence of signature by the Chief Minister or the Minister concerned, a decision shall/may not be liable to be enforced. Hence, on this ground also, the decision dated 4.6.2007 directing to hold fresh selection is neither lawful nor just and proper. Signature denotes the application of mind by the authority concerned.

PURPOSE OF SIGNATURE

44. What is the purpose of signature while discharging obligation by the Ministerial authority under the Rules of Business ? While deciding a writ petition No.5(S/B) of 2010 Luxmi Kant Shukla versus State of U.P. and others vide judgment and order dated 16.9.2010, we have occasion to deal with the issue. It shall be appropriate to discuss the importance of signature over an order in short.

45. The question of public importance raised and involved as to whether while exercising power under the "Rules of the Business" it is necessary to sign on the decision taken on record.

46. The purpose of signature is to authenticate an action and establish that the decision has been taken by the competent authority. In case an order or decision is signed then there can not be any other interpretation except that the person who made the signature had applied his or her mind in the decision making process. No matter who communicated the order.

47. Making of signature on record also remove possible doubt as to who has taken the decision. Once a person signed on an order then it shall be binding and

make accountable such person. Ordinarily, the signature shows that the relevant material on record has been perused and gone through by the authority concerned while deciding an issue or taking a decision.

48. In Stroud's Judicial Dictionary of Word and Phrases, Seventh Edition, Volume 2 page 2545 the word "signature/signed" has been discussed and defined as under:

"Signed; Signature. Speaking generally, a signature is the writing, or otherwise affixing, a person's name, or a mark to represent his name, by himself or by his authority (R. v. Kent Justices L.R. And Q.B. 305), with the intention of authenticating a document as being that of, or as binding on, the person whose name or mark is so written or affixed. In Morton V. Copeland (16 C.B.. 535), Maule J., said., "Signature does not, necessarily, mean writing a person's Christian and surname, but any mark which identified it as the act of the party", but the reporter adds in a note, "provided it be proved or admitted to be genuine, and be the accustomed mode of signature of the party". Without more, "to sign" is not the same as "to subscribe"."

49. In Words and Phrases Permanent Edition Volume 39 published by West Publishing Co. page 365, the word "signature" has been described as under:

"...As defined by Bouvier, "signature" is understood as the art of putting down a man's name at the end of an instrument to attest its validity. Wade Vs. State, 2 S.W. 594, 22, Tex.App. 256.

The word "signature" is defined as the act of putting down a man's name at the end of an instrument to attest its validity, and writing, as words traced with a pen, or stamped, printed, engraved, or made legible by any other device. Smith v. Greenville County, 199 S.E. 416, 419, 188 S.C. 349."

50. Further in Words and Phrases (supra) purpose of requirement of signature has been described as under:

"Under statute respecting execution of Wills, a holograph will must be signed by the testator in such a manner as to make it manifest that the name is intended as a signature, and in absence of any affirmative evidence on face of the paper that it is intended as a signature, testator's name appearing at the commencement or in the body of the will is not a sufficient "signature". Hall v. Brigstocke, 58 S.E. 2D 529, 532, 190 Va. 459, 19 A.L.R. 2D 921.

Testator's name is not to be considered a "signature" to a will unless face of instrument discloses that it was intended as such and signature then is only an authentication as to so much of the writing as it was designed to authenticate. Fenton v. Davis, 47 S.E. 2N 372,376, 187 Vs. 463.

A "signature" consists both of the act of writing one's name and of intention thereby to finally authenticate the instrument. Lee Vs. Vaughan's Seed Store, 141 S.W. 496, 498, 101 Ark. 68, 37 L.r.A.N.S., 352; Kirkpatrick v. board of

Canvassers, 44 S.E. 465, 468, 53 W.Vs. 275.

Name appearing on instrument is not considered as "signature" unless inserted or adopted with intent to authenticate the writing. *Dorian Holding & Trading Corporation v. Brunswick Terminal & Ry. Securities Co.*, 245 N.Y.S. 410, 412, 230 App. Div. 514.

A signature, according to *Greenleaf*, consists both the act of writing the party's name and of the intention of thereby finally authenticating the instrument. *Vines v. Clingfost*, 21 Ark. 309, 312; *Watson v. Pipes*, 32 Miss. 451, 466; *Board of Trustees Seventh St. Colored M.E. Church v. Campbell*, 21 So. 184, 187, 48 La. Ann. 1543; *Davis v. Sanders*, 19 S.E. 138, 139, 40 S.C. 507.

A "signature" is said to consist of two parts the act of writing the name, and the intention of thereby finally authenticating the instrument. This, however, relates to the signature of an individual to papers of a private nature, and, when its sufficiency is put to the test, he is estopped from denying that it is his signature by proof of the fact that he directed it to be written for him, and that it was done in his presence. From this proof the act and intent on his part are sufficiently made out. *Walker v. Mobley*, Tex., 105 S.W. 61, 62, citing 2 *Greenl. Ev.* 674."

51. In *Black's Law Dictionary*, Ninth Edition, Bryan A. Garner Editor in Chief the word "signatory" has been defined as under:

Signatory (sign?toree), n. (1866) A person or entity that signs a document, personally or through an agent, and thereby becomes a party to an agreement. signatory, adj.

52. In *ENCYCLOPAEDIC LAW LEXICON* Volume 4, *ASHOKA LAW HOUSE NEW DELHI (INDIA)*, 21ST CENTURY UNABRIDGED, the word "signature" has been defined as under:

Signature. No precise or exact definition of the word "signature" is given in the Indian Income Tax Act or in any other law. In the General Clauses Act also there is no exhaustive definition of the word. It only says what the word "signature" shall include. It includes the affixing of a mark. In India it is a common practice that when the executant of a document is illiterate he simply touches the pen wherewith some person signs his name for him. Reference in this connection may be made to page 972, para 1659, of *Gour on the Law of Transfer*. The signature made in this way is personal signature of the executant. It is his autograph. No question of agency arises in such a situation. *Commissioner of Agricultural Incometax, West Bengal Sri Keshab Chandra Mandal*, (1950) 18 ITR 569 at 582 (SC).

It is quite true that when signature by an agent is allowable the writing of the name of the principal by agent is considered as the signature of the principal himself. But this result only follows when it is allowable for the agent to sign the name of the principal. If on a construction of a statute signature by an agent is not found allowable then the writing of the name of the principal by the agent

however clearly he may have been authorised by the principal cannot be understood as the signature of the principal for the purposes of that statute. If a statute requires only personal signature of a person, which also includes a mark, the signature or the mark must be that of the man himself. There must be physical contact between that person and the signature or the mark put on the document. *Commissioner, Agricultural Income-tax v. Keshav Chandra*, AIR 1950 SC 265 at 271 : 1950 SCJ 364 : 1950 SCR 435 : (1950) 18 ITR 569 : ILR (1951) 2 Cal 7."

53. In Wharton's Law Lexicon Fourteenth Edition, Universal Law Publishing Co. Pvt. Ltd the word "signature" and purpose of signature has been defined as under:

"Signature, a sign or mark impressed upon anything; a stamp, a mark; the name of a person written by himself either in full or by initials as regards his Christian name or names, and in full as regards his surname, or by initials only (In the goods of Blewitt, (1880) 5 P.D. 116), or by mark only, though he can write (*Baker v. Denning*, (1938) 8 Ad. & E. 94)

Signature is required to authenticate a will (see WILL), a deed after 1925 (Law of Property Act, 1925, s. 73), a guarantee and other documents mentioned in the Statute of Frauds (see FRAUDS, STATUTE OF), and a risk note within the meaning of the seventh section of the Railway and Canal Traffic Act, 1854 (see RISK NOTE). Pleadings must be signed by counsel if settled by him, and if not, by the solicitor or the party; R.S.C. 1883, Ord. XIX, r.4. No fee to counsel is allowed on taxation unless vouched by his signature. *Ibid.*, Ord. LXV., r. 27, reg. 52.

Signmanual. 1. The royal signature. Sometimes required by statute as evidence of the authority of the sovereign, e.g., by the Jud. Act, 1925, s. 4 (2), replacing Jud. Act, 1873, s. 31, in reference to the transfer of a judge of the High Court from one division thereof to another. Towards the end of the reign of King George the Fourth, the royal signature was, in consequence of the king's illness, by 11 Geo. 4 & 1 Wm. 4, c. 23, authorized to be affixed for him by commission."

RULES OF BUSINESS

54. Governor, State of U.P. in exercise of power conferred under Clause 2 and 3 of Article 166 of the Constitution has framed the U.P. Rules of Business 1975 (in short rule of business). Rule 1 of the Business Rule deals with the title, Rule 2 deals with definition of department and Rule 3 deals with disposal of business. Rule 5 deals with the power of Chief Minister, Finance Minister and other Ministers. Rule 8 deals with the submission of cases to the Chief Minister and Governor and Rule 10 deals with the responsibility of departmental Secretaries. Under Rule 11 power has been given to Chief Minister to permit or condone a departure from rules to the extent it deems necessary.

55. The second schedule contains the various items which are to be placed

before the Chief Minister or the Governor. Relevant provision relating to present controversy are reproduced as under:

"THE SECOND SCHEDULE

(Rule 8)

Cases to be submitted to the Chief Minister and/or the Governor

Serial Nature of cases Authority to whom

no. To be submitted

1. Proposal for the grant of pardons, reprieves The Chief Minister
respites or remissions of punishment or for and the Governor
the suspension, remission or commutation
of a sentence in pursuance of Article 161 of
the Constitution or sections 432 and 433 of
the Code of Criminal Procedure 1973 except
cases of suspension or remission or sentence
for a period not exceeding two months at a time
and one year in the aggregate.

.....

.....

13. Excluding the gazetted officers of class II, proposals The Chief
For the dismissal, removal, reduction in rank, supens Minister
ion or compulsory retirement of any gazetted officer
belonging to a State Service or of higher status.

14. Proposals for the appointment confirmation (wherever The Chief
Applicable) and posting (whether applicable) of the Minister
following officers :

(a) Secretaries, Special Secretaries and Joint Secretaries
of Departments of Government.

(b) Heads of Departments, Members of the Board of
Revenue and Commissioners including those
holding charge as such in stop gap arrangement.

(c) Special Offices (e.g. Food Commissioner, Planning Officer etc.)

(d) District Judges.

(e) Additional and Deputy Inspectors General of Police.

(f) Deputy Commissioners or Collectors, Additional Commissioners and Deputy Development Commissioners

(g) Superintendent of Police.

14A Creation of posts carrying pay scales, the maximum of The Chief Which exceeds Rs. 2,500 per month, after clearance being Minister Given by the Finance Minister.

.....

18. Any proposals for the institution of a prosecution by The Chief Government against the advice tendered by the Law Minister Department.

19. Any departure from these Rules which comes to the The Chief notice of the Chief Secretary or the Secretary of any Minister Department"

56. A plain reading of Rules of Business shows that matter with regard to dismissal, removal, reduction in rank, suspension or compulsory retirement of any gazetted officer belonging to a State Service or of higher status shall be submitted to Chief Minister of the State. Thus, under the Rules of Business a decision is to be taken by the Chief Minister with regard to higher officers of State services or higher status.

57. The Rule shows that records shall be submitted to the Chief Minister to take a decision. Submission of records means, effective decision with due application of mind by the Chief Minister himself/herself and not by the subordinates. Oral instruction does not necessarily entails application of mind to official notes and material on record.

58. The Rules of Business laid down who has to take decision with regard to subject matter. Usually, these rules enable the Minister in charge of a department to dispose of cases coming before him. Under the Rules of Business, Minister is also authorized to make standing orders, and to give such direction as Minister thinks fit for disposal of subject. All these are done on behalf of governor of the

state in pursuance to Rules of Business.

In the present case, though the Cabinet Minister for Technical Education is different person but under the Rules of Business, the Chief Minister was entitled to summon record and take a decision.

59. Article 154 and 166 regulate the working of the state executive. Article 166 relates to conduct of the business of the State Government and is couched in terms similar to those in Article 77. The executive power of the State is vested in the Governor who exercises it either directly or through officers subordinate to him in accordance with the Constitution. Parliament or the State legislature may confer by law functions on any authority subordinate to the Governor under Article 154(2) (b). Governor empowers to make rule for the more convenient transaction of the business of the State Government under Article 166 (3) of the Constitution of India. Under the Rules of Business, the government business is divided amongst the Ministers as well as Chief Minister and specific functions are allotted to different Ministers. Thus, every executive action of the state government is expressed to be taken in the name of Governor under Article 166 (1) of the Constitution of India. Article 166 prescribed the mode in which an executive action has to be expressed. The orders and instruments made and the executed in the Governor's name to be authenticated in such a manner as may be specified in the Rules of Business made by the government. For convenience Article 166 of the constitution of India is reproduced as under:

"Article 166 of the Constitution of India. Conduct of business of the Government of a State

(1) All executive action of the Government of a State shall be expressed to be taken in the name of the Governor

(2) Orders and other instruments made and executed in the name of the Governor shall be authenticated in such manner as may be specified in rules to be made by the Governor, and the validity of an order or instruction which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the Governor

(3) The Governor shall make rules for the more convenient transaction of the business of the Government of the State, and for the allocation among Ministers of the said business in so far as it is not business with respect to which the Governor is by or under this Constitution required to act in his discretion"

60. While deciding the writ petition No.5(S/B) of 2010 (Supra), vide judgment and order dated 16.9.2010, we had occasion to consider various pronouncements of Privy Counsel and Hon'ble Supreme Court, those are, AIR(32) 1945 Privy Council 156 Emperor versus Sibtan Banerji and others, AIR 1955 SC 160 P. Joseph John versus TravencoreCochin, AIR 1952 SC 181 Dattatreya Moreshwar Pangarkar versus State of Bombay and others, AIR 1959 SC 65 Messrs. Ghaio Mal and Sons versus State of Delhi and others, AIR 1963 SC 395 Bachhitar Singh

versus State of Punjab, AIR 1967 SC 1145 M/s Bijoya Lakshmi Cotton Mills Limited versus State of West Bengal and others, AIR 1970 SC 1102 A. Sanjeevi Naidu etc. versus State of Madras, AIR 1973 SC 563 Fonseca (P) Limited versus L.C. Gupta, AIR 1975 SC 1755 Union of India and others versus Sri Pati Ranjan, AIR 1974 SC 2192 Samsher Singh versus State of Punjab, AIR 1975 Delhi 221 Shori Lal Jain versus Lt. Governor Delhi and others, AIR 1996 SC 765 State of Madhya Pradesh and others versus Dr. Yashwant Trimbak, 2004(13) SCC 788 = 2003 AIR (SCW) 7269 Tafcon Projects (I) Private Limited versus Union of India and others and AIR 1970 Ker 252 P.K. Kunju versus State of Kerala and others to interpret Article 166 of the Constitution of India.

61. After considering these cases (supra), we have observed as under :

"72. To sum up from the aforesaid various pronouncements of Supreme Court and other High Courts, the decision taken by the Minister or Secretary or Deputy Secretary on behalf of Governor empowered under Rules of Business shall be meet out the requirement of Article 166. The decision so taken with regard to administration or quasi judicial matter should be authenticated by the person concerned who is empowered under the Rules of the Business. In case any other person takes a decision not authorized under the Rules of Business then such decision may vitiate. Decision taken under Rules of Business by the competent person duly authenticated shall deem to be decision of the Government.

73. The requirement of Rule of Business is that authentication must be by the person to whom the Governor delegated power. The decision on the subject matter followed by authentication is to be done by the person authorized under Rules of Business. There is nothing in the Rules of Business which may empower the minister or secretary to run the government by oral instruction in the decision making process. Otherwise also in democratic country person holding public office is neither a king nor queen or a Taluquedar or the Zamindar. He or she is the public servant to serve in accordance to own ability and knowledge. Person holding high office shall be accountable for his or her action and whenever a dispute arose or enquiry is held record must be maintained in such a manner so that there may not be any ambiguity as to who has taken a decision in reference to context.

62. In the aforesaid judgment, we have also considered dictionary meaning and purpose of the word "authentication" and the definition as given in Law Lexicon, Black's Law dictionary and also taken into account the Manual of Government Orders which provides that the verbal instruction given to personal staff of the Minister for compliance shall require confirmation in writing.

63. After considering various pronouncements of Hon'ble Supreme Court (supra) in the case of Luxmi Kant Shukla (supra), we have observed as under :

"82. A person cannot be deprived from right to live and livelihood arbitrarily without application of mind. Meaning thereby authority authorised under Rules of Business under Article 166 (2) must apply his own mind before authenticating a

document. Direction issued without applying mind in a matter where citizens fundamental rights guaranteed under Chapter III of the Constitutions is affected shall be hit by Article 14 and 21 of the Constitution of India."

"91. From time to time Hon"ble Supreme Court observed that the law always frowns on uncanalised and unfettered discretion conferred on any instrumentality of the State. The constitution envisages a society governed by rule of law. Absolute discretion uncontrolled by guidelines is antithesis of rule of law. When a statute vests unguided and unrestricted power in an authority to affect the right of a person without laying down any policy or principle which is to guide the authority in exercise of this power it will be affected by the vice of discrimination. Uncontrolled and unguided discretionary power is incompatible with Article 14 of the Constitution. One is the power controlled by law countenanced by the Constitution, the other falls outside the constitution. AIR 1987 SC 877, Sheo Nandan Paswan Vs. State of Bihar; AIR 2005 SC 4217, Ajit Kumar Nag Vs. GM (PJ) Indian Oil Corpn. Ltd.; AIR 1984 SC 1064/1071, Sudhir Chandra Vs. Tata Iron and Steel Co. Ltd.; 1978 (1) SCC 248, Maneka Gandhi Vs. Union of India AIR 1974 SC 555 E.P.Royappa Vs. State of Tamil Nadu, AIR 1988 SC 1089, B.B. Rajwanshi Vs. State of Uttar Pradesh, AIR 1983 SC 1235, Suman Gupta Vs. State of Jammu and Kashmir, AIR 981 SC 1829, Air India Vs. Nergesh Meerza."

"92. A Division Bench of this Court of which one of us was a Member (Justice Devi Prasad Singh) in a case reported in 2010 (28) LCD 1248 Dhirendra Kumar Rai Vs. State of U.P. held that in India the principle of high authority is not applicable on account of moral devaluation in system. The Division Bench in the case of Dhirendra Kumar Rai (supra) had relied upon the various pronouncements of Hon"ble Supreme Court including AIR 1964 SC 72, S.Pratap Singh Vs. State of Punjab; AIR 1987 SC 294, Shivajirao Nilangekar Patil Vs. Dr. Mahesh Madhav Gosavi and others; 1997 (6) SCC 169, Shri Arvind Dattatraya Dhande Vs. State of Maharashtra and others and AIR 1991 SC 101, Delhi Transport Corporation Vs. D.T.C. Mazdoor Congress. "

EQUALS CANNOT BE TREATED UNEQUALLY

64. From the office note, it appears that a note was forwarded to the Chief Minister with the plea that in pursuance to the same advertisement and by same Selection Committee, 10 persons were selected, out of which 9 have been appointed. Hence, cancellation of the petitioner"s appointment on the ground that the Selection Committee was not properly constituted shall not sustain in case subjected to judicial review but it appears that the advice given by the Special Secretary could not get favour from the Chief Minister resulting in cancellation of earlier appointment. It was done by the Chief Minister after summoning the record from the Minister concerned, i.e. Minister of Technical Education.

65. Now, it is trite in law that neither equals can be treated unequally nor unequals can be treated equally vide 1993 Vol. 3 SCC 677 Venkeshwar Theatre

versus State of Andhra Pradesh, 1990 (2) SCC 715, Direct Recruit Class II Engineer Vs. State of Maharashtra, 2003 Vol. 2 SCC 673 Onkar Lal Bajaj versus Union of India, AIR 1988 SC 130 Velur Educational Trust versus State of Andhra Pradesh, AIR 1980 SC 2841 J.P. Kulshreshtra versus Allahabad University.

66. Article 14 contains guarantee of equality before law to all persons and a protection to them against discrimination. It prohibits hostile discrimination by law and is also against class legislation treating equals as unequals and unequals as equals vide 1985 Vol. 3 SCC 398 Union of India versus Tulsiram Patel.

67. In view of above, since all the persons selected in pursuance to the same advertisement and by the same Selection Committee have been appointed and they are discharging duty without any objection from the State Government, denial of appointment to the petitioner is violative of the principle of equality clause based on unfounded ground and suffers from vice of arbitrariness.

68. It has been consistent view of Hon"ble Supreme Court that every action of the Executive must be informed by reasons and should be free from arbitrariness. The authorities have to pass the test of reasonableness and action should not lack bona fide and made colourable exercise of powers. The decision should be made by known principles and rules in general and must be guided by reasonableness and fairness vide 1979 SC 162 Ramana Dayaram Shetty versus International Airport Authority of India and others, 1993 Vol. 3 SCC 634 Hansraj H. Jain versus State of Maharashtra, AIR 1991 SC 101 Delhi Transport Corporation versus D.T.C. Mazdoor Congress, AIR 1991 SC 1902 Bangalore Medical Trust versus B.S. Mudappa, AIR 1983 SC 1235 Suman Gupta and others Vs. State of J. & K. and others, AIR 2004 SC 827 Union of India versus Kuldeep Singh.

69. In the present case, while exercising discretionary power under the Rules of Business framed under Article 166 of the Constitution of India, reasons assigned by the Chief Minister seems to be based on unfounded fact. In what manner, the Selection Committee was not constituted properly in accordance with rules is neither reflected from the office note nor from the direction, alleged to have been issued by the Chief Minister, more so when all the persons except the petitioner selected by the same Selection Committee were appointed and are discharging duty. Thus, at the face of record, decision taken by the State Government is based on unfounded facts.

CHANGE OF OPINION

70. With the change of government, the successor Chief Minister has exercised her jurisdiction to cancel the petitioner's selection by changing the opinion that seems to be based on unfounded grounds(supra). In any case, if for the sake of argument, it is assumed that under the Rules of Business, Chief Minister was empowered to overrule the earlier decision of the erstwhile Chief Minister, then that should have been done in a just and fair manner based on some material calling to do so.

71. An authority or a person exercising power conferred under the Rule of Business does not have unfettered jurisdiction. The unfettered discretion is sworn enemy of the constitutional guarantee against discrimination. The unlimited jurisdiction leads to unreasonableness. No authority, administrative or judicial, has power to exercise discretion vested in it unless the same is based on justifiable grounds supported by acceptable material and reasons thereof vide 2005 Vol. 2 SCC 481 (para 14) Bharat Heavy Electricals limited versus M. Chandrashekhar Reddy.

72. In AIR 1969 SC 707 Rohtas Industry versus S.D. Agarwal, their Lordships of Hon"ble Supreme Court held that whether there is no material upon which the authority could form requisite subjective opinion, the Court may infer that the authority pass the order without applying its mind and so the order will be invalid. In AIR 1980 SC 1157 Nazeer Ahmad versus Assistant Custodian General Uvacuee Property, Hon"ble Supreme Court has set aside the notice to initiate proceeding on the ground that the notice was based on no material.

73. In AIR 1979 SC 49 S. Venkatraman versus Union of India, Hon"ble Supreme Court has quashed the order of compulsory retirement of a government servant which was done in public interest on the ground that there was nothing in government file which may make out a case for compulsory retirement. In absence of any adverse material, premature retirement found to be illegal and was treated as an instance of abuse of power.

74. In one another case reported in AIR 1982 SC 793 D. Ramaswami versus State of Tamilnadu, the order of premature retirement was set aside since from the record, there appears to be no material to take action. The order of premature retirement quashed as an instance of abuse of power.

75. In M.P. Industries Limited versus I.T.O. AIR 1970 SC 1011, the proceedings initiated under Section 34 of the Income Tax Act were quashed because there was no material to show that the Income Tax Officer has reason to form the belief that due to omission of failure on the part of the appellant to give material facts, some income has excepted the assistance.

76. In AIR 1991 SC 385 Jaswant Singh versus State of Punjab an order passed under Article 311(2) of the Constitution of India dispensing with enquiry was set aside by Hon"ble Supreme court on the ground that there was no material which may warrant dispensing of enquiry. Their Lordships of Hon"ble Supreme Court held that it was incumbent on the State to disclose the Court the material in existence on the date of passing of the impugned order in support of subjective satisfaction recorded. The decision to dispense with departmental enquiry cannot, therefore, be rested solely on the ipse dixit of the concerned authority.

77. In AIR 1988 SC 1388 Registrar, High Court of Madras versus R. Rajiah, Hon"ble Supreme Court observed that passing of an order where there is no material to justify the same would be an arbitrary exercise of power.

In a recent judgment and order dated 28.9.2010, passed in S.L.P.(C) No.19318/2007 Mohd. Yunus Khan versus State of U.P. and others, Hon''ble Supreme Court observed as under :

"Requirements of morale, discipline and justice have to be reconciled. Forced morale and discipline without assured justice breeds defiance and belligerency. Constitution protects not only the life and liberty but also the dignity of every person. Arbitrariness is an anathema to the principles of reasonableness and fairness. The rule of law prohibits the exercise of power in an arbitrary manner and/or in a manner that travels beyond the boundaries of reasonableness. Thus, a statutory authority is not permitted to act whimsically/arbitrarily. Its actions should be guided by the principles of reasonableness and fairness. The authority cannot be permitted to abuse the law or to use it unfairly."

These principles have been followed while deciding a case by one of us(Hon''ble Devi Prasad Singh, J) in a case reported in [2009(27) LCD 853] Samarjeet Tiwari and others versus State of U.P. and others and another Division Bench judgment of this Court, of which one of us(Hon''ble Devi Prasad Singh, J) was member, in a case reported in [2010(28)LCD 334] Brigadier M.A. Khan versus Union of India and others.

78.The case of Bachhittar Singh(supra) does not seem to extend any help to the respondent where their Lordships of Hon''ble Supreme Court held that the decision taken by the government must be communicated and until the order is communicated to the person affected, it would be open to the government to reconsider the same.

Similarly, in the case of Gulabrao Keshavrao Patil and others(supra), their Lordships of Hon''ble Supreme Court held that the decision of the Minister shall not be final unless it is expressed and communicated under the Rules of Business. Their Lordships held that Article 166(1) and (2) expressly envisage authentication of all the executive actions in such manner as specified in the Rule by the Governor (para 6). The judgment of Gulabrao Keshavrao Patil (supra), relied upon by the learned Chief Standing Counsel virtually supports the observation made by us in the preceding para.

79.The case of Kali Dass Batish and another (supra) relates to a dispute arising on account of policy decision of the government and relates to appointment of judicial member of the Central Administrative Tribunal whereby the Hon''ble Supreme Court held that there should be an effective consultation after laying down all necessary papers before the Chief Justice of India.

Virtually, the case of Kali Dass Batish(supra) also seems to profess that the authority empowered under the Rules of Business must apply mind while deciding a controversy.

80.In the case of Balakrushna Behera(supra), their Lordships of Hon''ble Supreme Court held that the High Court may not direct to make appointment

and selection does not confer a right. It depends upon facts and circumstances of each case. In appropriate case, power may be exercised(supra) to direct to consider for appointment to secure the ends of justice.

81. In the case of S.S. Balu(supra), on account of delay, the Hon'ble Supreme Court observed that it is not necessary to interfere. It is also held that no right accrues only because the name exists in the select list.

However, the case relied upon by the State Counsel does not seem to apply in the present controversy in view of the discussion made hereinabove.

As observed (supra), present dispute is not a case where a decision has been taken not to fill up a vacancy but earlier decision has been reviewed on unfounded ground to fill up the vacancy after holding fresh selection, hence suffers from vice of arbitrariness and hit by Art. 14 of the Constitution of India.

82. In view of above, once the petitioner's selection and appointment was approved on 1.5.2007 by the then Chief Minister, who was the incharge of the department of Technical Education, then in absence of any new material, as is evident from office note also, the subsequent decision dated 4.6.2007 reviewing the earlier one by successor Chief Minister seems to be arbitrary exercise of power based on no material. Accordingly, the order dated 4.6.2007 seems to be violative of Articles 14 and 21 of the Constitution of India.

83. Right to livelihood is part and parcel of right to life. Hence, while exercising power under the Rules of Business, earlier decision should not have been reviewed in absence of any material disclosing the illegality in constitution of the Selection Committee or change of situation or because of some new material showing irregularity and illegality in the selection process, more so when all the selectees were appointed except the petitioner.

CHANGE OF GOVERNMENT

84. Now, it is a settled principle of law that with the change of government, the decision taken by earlier government cannot be changed arbitrarily. The successor government is bound by the decision taken by the earlier government unless suffers from substantial illegality or abuse of power vide 2006 Vol. 4 SCC 683 State of Karnataka versus All India Manufacturers Organisation, 2004 Rol. 4 SCC 714 State of U.P. and another versus Johri Mal and 2002 Vol. 2 SCC 507 State of Haryana versus State of Punjab.

It shall be appropriate to reproduce relevant portion from the case of State of Haryana versus State of Punjab(supra), to quote:

" But at the same time when the political authority becomes dogmatic, unreasonable and indicates an attitude of irresponsible nature and when the court finds that nothing is moving even though there has been a largescale drainage of public exchequer and that the decision to have the canal had been reached on an agreement of all concerned, representing the will of the people,

the Court must pass appropriate orders and directions. What really bothers us most is the functioning of the political parties, who assume power to do whatever that suits and whatever would catch the votebank. They forget for a moment that the constitution conceives of a Government to be manned by the representatives of the people, who get themselves elected in an election. The decisions taken at the governmental level should not be so easily nullified by a change of government and by some other political party assuming power, particularly when such a decision affects some other State and the interest of the nation as a whole. It cannot be disputed that so far as policy is concerned, a political party assuming power is entitled to engraft the political philosophy behind the party, since that must be held to be the will of the people. But in the matter of governance of a State or in the matter of execution of a decision taken by a previous government, on the basis of a consensus arrived at, which does not involve any political philosophy, the succeeding government must be held duty bound to continue and carry on the unfinished job rather than putting a stop to the same."

FINDING

85. In view of above, the controversy raised and involved are summarised as under :

(I) There appears to be no material on record which may reveal that the Selection Committee was improperly constituted. Out of 10 persons, selected in pursuance to the same advertisement and Selection Committee, 9 were appointed except the petitioner. Hence, cancellation of the petitioner's selection and appointment on the alleged ground that the Selection Committee was not properly constituted seems to import discriminatory treatment on the principle, "equals cannot be treated unequally."

(II) By order dated 1.5.2007, the then Chief Minister has approved the petitioner's selection and appointment. With the change of government in pursuance to the oral instruction, issued by the Chief Minister dated 4.6.2007, a decision was taken to cancel the petitioner's selection and appointment on the ground that the Selection Committee was not properly constituted. The office has raised objection that such decision cannot be taken in absence of any material but the office note was not considered. No adverse material came into light between 1.5.2007 and 4.6.2007 when in pursuance to the Chief Minister's oral instruction, a decision was communicated to hold fresh selection. In absence of any material on record, the decision dated 4.6.2007 suffers from vice of arbitrariness and hit by Articles 14 and 21 of the Constitution of India.

(III) There appears to be no illegality or infirmity in the petitioner's selection by the Selection Committee. It is not a case where the university wants to keep the post vacant. Learned counsel for the university made a statement at bar that in case the petitioner's selection is cancelled, they shall proceed to fill up the vacancy of the post of Professor, Electrical Engineering afresh. In such a

situation, action of the respondent State in cancelling the selection on unfounded ground is an instance of abuse of power and suffers from the vice of arbitrariness. Right to livelihood is a fundamental right protected by Article 21 of the Constitution of India and the petitioner cannot be deprived from his appointment on the post of Professor, more so when others have already been appointed long back selected by the same Selection Committee.

(IV) The Rules of Business, prepared under Article 166 of the Constitution of India authorise the Chief Minister, Minister or Secretaries of the Government to discharge duty in the name of Governor. The decision or order authenticated under the Rules of Business shall be deemed to be the decision of government. There cannot be oral authentication in the decision making process. Unless an order is signed by the person authorised under the Rules of Business, the order shall not be deemed to be authenticated. Accordingly, the reviewing decision of the earlier Chief Minister which was duly signed by the then Chief Minister by oral instruction of the successor Chief Minister, shall not be a valid order.

(V) Decision taken by the predecessor government is binding on the successor government unless earlier decision suffers from substantial illegality or unconstitutionality or mala fide.

(VI) Business Rule framed under Article 166 specify the jurisdiction conferred on various authorities of the State like Chief Minister, Minister, Secretaries on behalf of the Governor. Jurisdiction exercised under Rules of Business is not a delegated power but it is the decision of government made by authority conferred with power to adjudicate a dispute.

(VII) Unless an order or decision is authenticated by the competent authority in accordance to Rule of Business and keeping in view the letter and spirit of Article 166 (2) of the Constitution, decision so taken shall suffer from infirmity and illegality. It shall be necessary for the authority empowered under the Rules of Business while adjudicating a dispute or taking a decision or passing an order, to authenticate such order or decision by making an endorsement or putting his or her signature.

(VIII) Oral instruction issued by a person authorized under the Rules of Business affecting citizen(s) fundamental right or public interest or financial matters is an incident of nonapplication of mind hence not amount to authentication under Article 166 (2) of the Constitution. It shall be obligatory for the person authorized under Rules of Business to make endorsement by putting his or her signature over the order or decision taken with regard to subject matter involved.

(IX) Signature by the competent authority is the part and parcel of authentication of a document, order or decision taken under the Rules of Business. However, decision so taken may be communicated by an officer or authority subordinate to Chief Minister or Minister of the Department.

(X) Though a plea was raised that the Chief Minister has got no jurisdiction and

the Minister Technical Education Shri Sadal Prasad was competent to take decision under the Rules of Business but the submission seems to be not sustainable in view of the fact that the Chief Minister is the captain of team and it is he/she who distribute various portfolios to the Ministers of the Cabinet, hence has got power to call for record from any Minister and take a decision(Samsher Singh's case). Accordingly, on this score, submission of the petitioner's counsel while challenging the decision taken seems to be not sustainable.

86. There is one other question cropped up requires attention of the Court. Now, Hon"ble Supreme Court has settled that "quality of life" is fundamental right along with varieties of human subjects. In a civilised society, rule of law is prime concern for the government. Bureaucracy is expected to provide "good governance" to protect the constitutional and statutory right of citizen. Unless country is governed by rule of law, protecting citizens fundamental rights like livelihood, dignity, privacy and quality of life etc, it tantamount to failure of system creating chaos and disorder in the society.

Accordingly, "good governance" is part and partial of quality of life and protected by Arts. 14 and 21 of the Constitution. It is citizens" right to enjoy "good governance" which requires procedural certainty in decision making process(supra).

87. Oral adjudication of an issue by an authorised person under the Rule of Business is against the constitutional mandate and is the reminence of colonial past possess the element of feudal and autocratic temperament and is the antithesis of not only "rule of law" but also "good governance" as held by this Court/Bench vide judgment and order dated 16.9.2010, passed in Writ Petition No. 5(S/B) of 2010 Luxmi Kant Shukla versus State of U.P. and others.

88. Fali S. Nariman, a veteran counsel of the country in his autobiography, "Before Memory Fades", has rightly observed :

"Next only to population, the major problem about governance in our country is the enormous divide between the governed and those who govern. We have inherited this from over 200 years of Mughal rule, followed by more than a century of British rule. We have now reached the stage where those who govern, appear (to many of us) to belong to another race." (page 430)

89.A great Indian Saint, Philosopher and Guide Shri Kabir said :

Verse

"Whatever rises, also sets;

Whatever blossoms, also withers;

Whatever built, also crashes;

Whatever born, also dies."

90. In view of above, it appears that the petitioner has suffered mental pain,

agony and humiliation for no fault on his part with the change of government. He was deprived from his timely appointment on the post of Professor on unfounded ground (supra). It is unfortunate that the politics has crept into the academic field also and because of change of government, the petitioner seems to suffer. At least, education should be spared from political manoeuvring and no injustice should be done to academicians who qualify on merit. It is a fit case where exemplary cost should be imposed keeping in view the principle laid down by the Hon"ble Supreme Court in the case reported in (2005) 6 Supreme Court Cases 344, Salem Advocate Bar Association (II), Vs. Union of India.

91. In view of above, the writ petition deserves to be allowed. Accordingly, the writ petition is allowed and the relief is also moulded.

A writ in the nature of certiorari is issued quashing the impugned order dated 4.6.2007, passed by the Secretary of the Chief Minister with consequential benefits.

A writ in the nature of mandamus is issued commanding the opposite parties to consider the petitioner for appointment keeping in view the recommendation of the Selection Committee dated 18.1.2007 and observation made in the present judgement, with all consequential benefits.

Let a decision be taken expeditiously and preferably within a period of one month from the date of receipt of a certified copy of this order and the petitioner may be communicated accordingly.

Cost quantified to Rs.2 lacs which shall be deposited in this Court within two months by the Chief Secretary of U.P./Principal Secretary, Technical Education, out of which, the petitioner will be entitled to withdraw an amount of Rs.1,00,000/ (Rupees one lac only) and the rest(one lac) shall be relegated to the Mediation Centre, Lucknow. It shall be open to the petitioner to claim damages from the State for the injustice done to him keeping in view the observation made in the body of the judgment.

It shall be open for the Chief Secretary of the State to recover the cost from the persons who have been failed to tender correct advice resulting in denial of appointment to the petitioner, though he was lawfully selected.

Registry shall send a copy of the judgment within three days to the Chief Secretary, Government of U.P. as well as Principal Secretary, Technical Education for compliance and shall take follow up action.