BEFORE THE UTTARAKHAND PUBLIC SERVICES TRIBUNAL
AT DEHRADUN

Present: Hon'ble Mr. Justice J.C.S.Rawat

------ Chairman

Hon'ble Mr. D.K.Kotia

-------Vice Chairman (A)

CLAIM PETITION NO. 11/2012

Suresh Kumar Gupta, S/o Sri J.R.Gupta, R/o 393, Panchwati, Ballupur, Dehradun.

……Petitioner

VERSUS

1. State of Uttarakhand through Principal Secretary, P.W.D., Civil Secretariat, Dehradun.
2. Chief Engineer Level-I, P.W.D., Yamuna Colony, Dehradun.

…….Respondents.

Present: Sri M.C.Pant, Ld. Counsel
for the petitioner.
Sri Umesh Dhaundiyal, Ld. A.P.O.
for the respondents.

JUDGMENT

DATED: OCTOBER 30, 2015.

(Hon'ble Justice J.C.S. Rawat, Chairman)

1. This petition has been filed for seeking following relief:-

"A. *Issue order or direction to quash the impugned order dated 23.9.2011 and Noting dated 14.10.2011 of respondent No. 1 and 2 by which they have denied the salary to the petitioner and also directed to refund the salary w.e.f. 28.2.2011 to 30.06.2011 along with its effect and operation also in league with all consequential proceedings based on the impugned orders after calling entire record from the respondents declaring the dame against the rules and law.*

B. Issue order or direction to the respondent no. 1 to pay the salary for the period of w.e.f. 7.11 to 12.09. 11 including arrears of D.A. w.e.f. 01.01.2011 to 12.09.2011 had it been the impugned order was never in existence.

C. *Issue order or direction to the respondents to pay compensation, which is in tune of Rs. 2,00,000 along with 18% interest thereof or such amount, which the court may deem fit and proper in the circumstances of the case.*

D. *Issue any other suitable direction or order as this Hon'ble Tribunal may deem fit in the circumstances of the case.*

E. *Award costs of the claim petition to the petitioner"*

2. The petitioner was appointed as Officer on Special Duty till 28.2.2010 in P.W.D. after his retirement by the Government order of 31.07.2009 in the same pay scale which the petitioner was getting at the time of his retirement. Thereafter vide order dated 25.3.2010, his services have been further extended up to 28.2.2011 as O.S.D.. His duties have been prescribed in the appointment letter. Before the expiry of his second term as O.S.D., he preferred an application to the Respondent No.1 i.e. State Government on 03.01.2011 to extend his tenure for further period w.e.f. 28.2.2011 The said application was processed but no Government order could be issued till 12.09.2011 and he on his own, according to the petitioner, left the post. Though there was no sanction of the post and there was no government order extending the period of service of the petitioner, it is revealed that the salary has been paid to the petitioner till June 2011 and the respondent vide impugned order has asked either to show his extension for the said period or to deposit the salary from March to June in the Government Exchequer in accordance with the calculation made in the impugned order. He has also claimed salary and other benefits w.e.f. July 2011 to September 2011.

3. The respondents contested the claim petition on the ground that there was no ex tension beyond 28.2.2011 of the petitioner and there was no extension of the post on which he had been working in the department. It was also pointed out that according to the Government Order the re-employment cannot be granted beyond the age of 62 years. The said G.O. has been annexed as Annexure RA-4 to the rejoinder affidavit. It was further alleged that such reappointment or re-employment can only be made with the prior approval of the Personnel Department of

the Government and of the Finance Department. At the last Ld. Counsel for respondents has prayed to dismiss the claim petition.

4. We have heard learned counsel for the parties and perused the record .

5. Ld. Counsel for the petitioner contended that the Chief Minister had approved his appointment on 26.7.2011 vide Annexure A-7 colly to the claim petition. It is revealed from the perusal of the Pg. 39 of the claim petition that a direction has been given by the Chief Minister which is as under:-

   "श्री एस0 के0 गुप्ता, जो विशेषकार्याधिकारी, लो0 नि0 वि0 के पद पर कार्यरत है कि सेवायें विशेष परिस्थितियों में इस पद पर एक वर्ष अर्थात दिनांक 28.02.2012 तक के लिए विस्तारित करने की अनुमति प्रदान की जाती है । तदनुसार आदेश जारी करें ।"

6. Ld. Counsel for the petitioner further stressed that if the Chief Minister has ordered the extension of the services of the petitioner till 28.2.2012 and directed to issue the order accordingly, there was no impediment in the issuance of the order. He further contended that this order clearly extends the period of the services of the petitioner, so he had been discharging his duties as O.S.D. in the office. He further contended that the Chief Minister was the competent authority to extend the period of the services of the petitioner till 28.2.2012 conceding the request of the petitioner, so the issuance of the Government order was the clerical job. In such a situation he cannot be denied that his term has not been extended beyond 28.2.2011. The second argument he put forward on the basis of Annexure-A-7 that his application submitted in the month of January, 2010 was processed by the department and the Annexure-7 colly clearly reveals that the Government order, which has been referred in the written statement of being appointed only till the age of 62, had already been relaxed by the State Government and the Chief Minister on the said file had approved the proposal that is on record. Ld. Counsel for the petitioner further pointed out that the approval of the extension of his services after 28.2.2012 has been granted and it should be given from the date of his joining by relaxing the G.O. of 17.11.1994. The approval is also on record. He further contended that thereafter the order was not issued

and the file was sent again back to the Finance Department and at the last the order of the Chief Secretary, on behalf of Chief Minister, was sent to all the departments in which it has been ordered that if any appointment has been made by the former Chief Minister within two or three days of the order of the present Chief Minister, would not be made effective. So this order could not be issued and later on the petitioner immediately left the job and intimated accordingly and the said file was closed on that basis by the Chief Minister.

7. Ld. A.P.O. pointed out that the Government order has not been issued regarding the appointment of the petitioner and the extension of the post, as such it cannot be claimed to have been extended till further order. Even if the Chief Minister has made the direction, but without a Government order it has no sanctity. The perusal of the previous Government order, by which the petitioner had been appointed in the year 2009-10 for one year only, a post had been created by the Government and against that a proper Government order had been issued against which he had joined the services. The petitioner had been given the re-employment against a created post. The said right has been conferred upon the Government by the G.O. referred in the W.S. as Annexure-R-3 and R-4 and mode and manner have also been given for eligibility for the same. When the period of the services of the petitioner was extended till 28.2.2011, a complaint was received to the Government which has also been filed by the respondents. The said complaint was dealt with by the Secretariat and it was specifically pointed out in the complaint that the aspect of his age has not been considered at the time of the second re-appointment. It was also alleged in the complaint that he has completed 62 years prior to the extension, so his extension could not have been made in accordance with law. The Secretariat submitted a note that the said G.O. also permits the department to relieve such employees as soon as it comes to the notice of the department that the re-employed has completed the age of 62 years and it was further requested that the matter may be placed before the C.M. The Secretary of the concerned department

submitted the matter before the Chief Minister and the Chief Minister said keep it pending for the time being. At the time of the second extension, this aspect was also considered by the department. Though the approval was given relaxing the said G.O. by the Chief Minister on file only.

8. Before proceeding with the contention of the parties, we would like to observe that there are certain business rules in every State that how an official's work should be discharged. It is in every State even in the Central Government the file has to move from the bureaucratic setup to the Chief Minister and the Chief Minister thereafter gives his consent to the proposal. Thus, according to the Rules of business, both things must come simultaneously then it can be held that things have been done in accordance with law. Now in the business Rules it is also necessary that the outcome of the said approval must be by way of a Government order until and unless that order has been issued even though the approval has been taken on the file that does not help to any person.

9. A similar matter came up before the Hon'ble Apex Court in **Chief Executive Officer, Pondicherry Khadi And Village Industries Board and Another Vs K. Aroquia Radja & Others (2013)1 SCC (L&S) 813** in which certain employees were appointed by the Chairman of the Khadi Gramodyog, Pondicherry, their proposal for regularization was sent to the State Government and the State Government rejected the proposal on the ground that these appointments were made as co-terminuous appointments with the Chairman. Thereafter the matter was placed directly by the Chairman before the Lt. Governor and the Lt. Governor granted the approval without seeking any opinion of the bureaucratic setup or Secretariat. The matter came up before the Hon'ble High Court and the writ petitioners, who had been approved by the Governor, sought a direction to implement the said order of Lt. Governor. The Hon'ble Single Judge and thereafter in appeal, Division Bench a direction was made to implement the said order of the Lt. Governor. Later on the Government rejected the approval of the

petitioners and again a writ petition was also filed, in which a direction was again made to implement the order of Ld. Governor by the Court. Aggrieved by the said order the Khadi Gramodyog Board preferred an appeal before this Court. The Hon'ble Apex Court in Para 15 & 16 has held as under:-

> "*15. We have noted the submissions of counsel for both the parties. It is very clear from the narration of facts as above that the respondents were engaged only because their names were sponsored by the then Chairman of the Board. They have not come into the service either through the Employment Exchange or through any procedure in which they were required to compete against other eligible candidates. It is also seen that the proposal which was sent to the Governor for his approval was not sent through the normal routine of the concerned Administrative machinery, and through the Chief Secretary of Puducherry. Since the proposal was not routed through the normal channel of administration, the factual position with respect to the irregular employment of the respondents could not be placed before the Governor. The relevant facts such as those relating to their initial engagement, availability of sanctioned posts in the same category in the Board, relevant rules for engagement of the employees etc. could also not be placed before the Governor. Even so the proposal itself recorded that the respondents had put in just 3½ years of service, and the proposal to regularize them had been once turned down by the Government. Section 15 of the Board Act clearly laid down that the Board was bound by the directions given by the Government in the performance of its function under the Act. The Governor was not supposed to act on his own, but with the aid and advice of the Council of Ministers. The question as to whether it will result into creation of additional posts and additional financial liability was required to be referred to the Government. Besides, the resolution only recorded the request of the Chairman in that behalf. It was not a resolution of the Board approving regularization or relaxing the existing norms, as a special case.*
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> ***16**. The learned Single Judge allowed the Writ Petition No.3181 of 2008 at the admission stage itself without affording an opportunity to the appellants to place these relevant facts before the Court, which led to an erroneous decision. If the petition was to be allowed, the least that was expected was to permit the respondents to the petition to file their response, and then take the decision one way or the other. Again the Division Bench also did not look into the substantive issue before it although the relevant material was placed before the bench in the writ appeal. The learned Single*

Judge who heard the second writ petition merely followed the decision of the Division Bench in writ appeal."

Thus, this judgment squarely covers the controversy. The order has been made by the Chief Minister directly on 26.10.2011 in which there was no official noting. In these circumstances this order has no sanctity and the Government is not bound to make notification in accordance with this order.

10. Whereas the second angle of the matter that the approval has been made by the Chief Minister on 17.08.2011 on the file itself is concerned, no Government order has been issued to that effect and only formal approval was on the record and thereafter the file was sent to the Finance Department and meanwhile the new incumbent Chief Minister has stopped to make any order regarding any appointment made by the former Chief Minister. In this aspect the law is very clear that if an order has been issued by the Government in conformity with Article 166 of the Constitution in the case of the State or the approval cannot have any effect. The Hon'ble Apex Court in the case of **Gulf Goans Hotels Company Limited & another Vs. Union of India and others (2014)10 SCC 673** in Para 19,20 & 21 has held as under:-

" 19. Article 77 of the Constitution provides the form in which the Executive must make and authenticate its orders and decisions. Clause (1) of Article 77 provides that all executive action of the Government must be expressed to be taken in the name of the President. The celebrated author H.M.Seervai in Constitutional Law of India, 4th Edition, Volume 2, 1999 describes the consequences of Government orders or instructions not being in accordance with Clauses (1) or (2) of Article 77 by opining that the same would deprive of the orders of the immunity conferred by the aforesaid clauses and they may be open to challenge on the ground that they have not been made by or under the authority of the President in which case the burden would be on the Government to show that they were, in fact, so made. In the present case, the said burden has not been discharged in any manner whatsoever. The decision in Air India Cabin Crew Association vs. Yeshaswinee Merchant[10], taking a somewhat different view can, perhaps, be explained by the fact that in the said case the impugned directions contained in the Government letter (not expressed in the name of the President) was in exercise of the statutory power under Section 34of the Air

Corporations Act, 1953. In the present case, the impugned guidelines have not been issued under any existing statute.

20. Clause (2) of Article 77 also provides for the authentication of orders and instruments in a manner as may be prescribed by the Rules. In this regard, vide S.O. 2297 dated 3rd November, 1958 published in the Gazette of India, the President has issued the Authentication (Orders and Other Instruments) Rules, 1958. The said Rules have been superseded subsequently in 2002. Admittedly, the provisions of the said Rules of 1958 had not been followed in the present case insofar as the promulgation of the guidelines is concerned.

21. In the absence of due authentication and promulgation of the guidelines, the contents thereof cannot be treated as an order of the Government and would really represent an expression of opinion. In law, the said guidelines and its binding effect would be no more than what was expressed by this Court in ***State of Uttaranchal vs. Sunil Kumar Vaish (2011)8 SCC, 670*** *in the following paragraph of the report :*

> ***"It is settled law that all executive actions of the Government of India and the Government of a State are required to be taken in the name of the President or the Governor of the State concerned, as the case may be [Articles 77(1) and 166(1)]. Orders and other instruments made and executed in the name of the President or the Governor of a State, as the case may be, are required to be authenticated in the manner specified in the rules made by the President or the Governor, as the case may be [Articles 77(2) and 166(2)]. In other words, unless an order is expressed in the name of the President or the Governor and is authenticated in the manner prescribed by the rules, the same cannot be treated as an order on behalf of the Government."***

[Para 23] "A noting recorded in the file is merely a noting simpliciter and nothing more. It merely represents expression of opinion by the particular individual. By no stretch of imagination, such noting can be treated as a decision of the Government. Even if the competent authority records its opinion in the file on the merits of the matter under consideration, the same cannot be termed as a decision of the Government unless it is sanctified and acted upon by issuing an order in accordance with Articles 77(1) and (2) or Articles 166(1) and (2). The noting in the file or even a decision gets culminated into an order affecting right of the parties only when it is expressed in the name of the President or the Governor, as the case may be, [pic]and authenticated in the manner provided in Article 77(2) or Article 166(2). A noting or even a decision recorded in the file can always be reviewed/reversed/overruled or overturned and the court cannot

take cognizance of the earlier noting or decision for exercise of the power of judicial review."

11. The aforesaid judgment refers a case of Uttarakhand State also in which it has been made clear by the Hon'ble Court that noting recorded in the file is merely a noting simpliciter and nothing more which merely represents expression of opinion by a particular individual. By no stretch of imagination can such noting be treated as a decision of Government. Even if the competent authority records its opinion in the file on the merits of the matter under consideration, the same cannot be termed as a decision of the Government unless it is authenticated in accordance with law. Thus, this judgment of the Hon'ble Apex Court also clearly covers the controversy in the present case. In view of the above, we do not find any force in the contention of the Ld. Counsel for the petitioner.

12. It is also to be noted that the petitioner has completed the age of 62 years and the appointment, if it would have been made in utter violation of the G.O., the Ld. Counsel for the petitioner contended that the Chief Minister has already granted the relaxation to the petitioner in such a situation this order cannot be a hurdle in the appointment of the petitioner as the petitioner has already been granted relaxation by the Chief Minister. Ld. A.P.O. refuted the contention. The petitioner's claim petition's Para 4.6 clearly provides that on 07.09.2011 due to the change of the Chief Minister, the petitioner himself showed his unwillingness to continue and left the charge of O.S.D. on 13.09.2011 Keeping in view of the separate order passed by the Chief Minister to issue the appointment to the petitioner and further making the relaxation to the appointment of the petitioner seems that the relaxation has been made only to a particular person. Under the rules of law it is provided that if any such relaxation is made, it must show its reasoning as to why such relaxation is being made only in the case of the particular person. Secondly, if such relaxation has been made, it would have been made to all the persons who come within that criteria. Thus, it is mandate of the Constitution that adherence to rule of law is

mandatory provision. The Hon'ble Supreme Court while dealing with this issue in the case of **Union of India Vs. Dharam Pal 2009 (1) SCC (L&S) 790** has held in Para 32 as under:-

> *"In any view of the matter, it is now well settled that even power of relaxation even specifically provided in the appointing authority himself being created a statute cannot be exercised in an arbitrary and cavalier fashion.*
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> **In Kendriya Vidyalaya Sangathan and Ors. v. Sajal Kumar Roy and Ors. [(2006) 8 SCC 671]**, *this Court held:*
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> *"11...The appointing authorities are required to apply their mind while exercising their discretionary jurisdiction to relax the age limits. Discretion of the authorities is required to be exercised only for deserving candidates and upon recommendations of the Appointing Committee/ Selection Committee. The requirements to comply with the rules, it is trite, were required to be complied with fairly and reasonably. They were bound by the rules. The discretionary jurisdiction could be exercised for relaxation of age provided for in the rules and within the four corners thereof. As Respondents do not come within the purview of the exception contained in Article 45of the Education Code, in our opinion, the Tribunal and consequently, the High Court committed a manifest error in issuing the aforementioned directions."*

13. The Hon'ble Apex Court while dealing this issue has specifically mentioned the appointing authorities are required to apply their mind while exercising their jurisdiction to relax the age limit. Discretion of the authorities is required to be exercised only for deserving candidates and upon recommendations of the Appointing Committee/ Selection Committee. The requirement to comply with the rules is mandatory provision. Thus, we do not find any force in the contention that the relaxation of the age on the basis of which the petitioner's appointment has been approved, was in accordance with law.

14. Ld. Counsel for the petitioner contended that the petitioner was allowed to work by the respondents beyond the period of extension and now the State is estopped to say anything contrary to this. He further contended that the petitioner's tenure was not extended beyond 28.2.2011 even then he discharged his duties in the department and he is entitled to get the salary under Section 22 of the Indian

Contract Act; the respondents cannot direct the petitioner to deposit the said amount. The services of the petitioner had not been extended beyond February, 2011 and as such he was not entitled to get the salary for the said period. From the perusal of the record it is revealed that the petitioner had filed certain correspondences in which he has written few letters to the different departments, copy had been endorsed to the Principal Secretary, P.W.D. and there is some correspondence from the side of some of the different departments to the petitioner.

15. The contention was refused by the learned A.P.O. At the outset we will like to discuss the nature of the appointment which has been made by the State Government. From the perusal of the order Annexure- 2 it is revealed that the post of O.S.D. has been created and the petitioner has been appointed on the said post and the perusal of the appointment order clearly reveals that the petitioner has been appointed by the Government under his control. Ld. Counsel for the parties could not demonstrate that he had been appointed in the department under the control of any of the officer of P.W.D. The petitioner had been allotted the accommodation for the office in the Government itself and it was also directed that the staff will also be provided from the Secretariat of Uttarakhand. The duties had also been assigned in the said appointment letter. With regard to the duties, we will make discussion later on at the appropriate place.

16. The second letter of appointment by which his services have been extended on the same post till 28.2.2011 is Annexure-3 to the claim petition. The post of O.S.D., which was created for one year, had also been created & extended for one year only. One thing is very clear that the post as well the petitioner had to continue as O.S.D. till 28.2.2011. Thereafter, neither the petitioner nor his post was to be existed after 28.2.2011 and it is also admitted to the petitioner that his tenure has not been extended by any of the Government Order.

17. It is also in the pleadings of the petitioner that he was not interested after the change of the Government w.e.f. 13.09.2011. First of all we

will discuss the nature of the petitioner's appointment. The petitioner has been appointed against a newly created post of O.S.D. for a period of one year which was extended again for one year. Thus, the Government was competent to create such post under Article 310(2) of the Constitution. Now the question arises what will be the nature of the post created and the person so appointed against the post of the O.S.D. by virtue of the above Article. It is the settled principle of law that Government servant holds office during the pleasure of the Governor as the case may be and he had all the privileges as provided under Article 311 of the Constitution. The above doctrine of pleasure is invoked by the Government in the public interest after he joins the services in the Government. It is also true that the person so appointed under Article 310(2) of the Constitution, the relationship between the Government servant and the Government starts at the initial stage as contractual service because there is an acceptance in every case. As soon as the person who accepts the job of the State Government, he acquires an status of a Government servant and his right of obligation are no longer determined by the consent of the parties. This applies in all the appointments made under Article 310 of the Constitution. It is also provided that the State Government has the power to frame Rules to regulate the conditions of services of the Government servant in accordance with his convenience under Article 309 of the Constitution. If any person is appointed under Article 310(2) of the Constitution, his terms and conditions are governed by the Government order issued under Article 154 & 162 of the Constitution of India. If the Government has framed any rule for the appointment under Article 310(2) , also the service condition of the person so appointed under Article 310(2) will be governed by the said Rules. When a Government servant joins service of the Government , though it can be said to be a contractual at the beginning, would be governed by the Rules or by the executive orders which will be issued by the Government. The service condition of a Government servant would not be decided by the mutual consent of both the parties. Thus, immediately after joining the services , the

Government servant's services become statutory. His service conditions can be changed, altered unilaterally by the Government. The legal position of the Government servant is more one of status than of contracts. The status is attached to a fiduciary relationship of rights and duties imposed by the public law and not by the agreement of the parties. The above proposition of law has been laid down in **Roshan Lal Tondon Vs. Union of India 1968 SCR (1) 185** has held as under:-

"It is 'true that the origin of Government service is contractual. There is an offer and acceptance in every case. But once appointed to his post or office the Government servant acquires a status and his rights and obligations are no longer determined by consent of both parties, but by statute or statutory rules which may be framed and altered unilaterally by the Government. In other words, the legal position of a Government servant is more one of status than of contract. The hall-mark of status is the attachment to a legal relationship of rights and duties imposed by the public 'law and not by mere agreement of the parties. The emolument of the Government servant and his terms of service are governed by statute or statutory rules which may be unilaterally altered by the Government without the consent of the employee. It is true that Art. 311 imposes constitutional restrictions upon the power of removal granted to the President and the Governor under Art. 310. But it is obvious that the relationship between the Government and its servant is not like an ordinary contract of service between a master and servant. The legal relationship is something entirely different, something in the nature of status. It is much more than a purely contractual relationship voluntarily entered into between the parties. The duties of status are 'fixed by the law and in the enforcement of these duties society has an interest. In the language of juris- prudence status is a condition of membership of a group of which powers and duties are exclusively determined by law and not by agreement between the parties concerned. The matter is clearly stated by Salmond and Williams on Contracts as follows:

"So we may find both contractual and status- obligations produced by the same transaction. the one transaction may result in the creation not only of obligations defined by the parties and so pertaining to the sphere of contract but also and concurrently of obligations de- fined by the law,itself, and so pertaining to the sphere of status. A contract of service between employer and employee, while for the most part pertaining exclusively to the sphere of contract, pertains also to that of status so far as the law itself has seen fit to attach to this relation compulsory incidents, such as liability to pay compensation for accidents. The extent to Which the law is content to leave matters within the domain of contract to be determined by the exercise of the

autonomous authority of the parties themselves, or thinks fit to bring the matter within the sphere of status by mining for itself the contents of the relationship, is a matter depending on considerations of public policy. In such contracts as those of service the tendency in modem times is to withdraw the matter more and more from the domain of contract into that of status." .Im (Salmond and Williams on Contracts, 2nd edition p. 12).

We are therefore of the opinion that the petitioner has no vested contractual right in regard to the terms of his service and that Counsel for the petitioner has been unable to make good his submission on this aspect of the case".

The same view has been reaffirmed by the Hon'ble Apex Court **in Dinesh Chandra Sangma Vs. State of Assam & others 1978 SCR(1) 607** decided on 5th October, 1977.

18. It is clear that adherence to the Rule of law in public employment is a basic feature of Constitution and since the rule of law is the core of our Constitution, a Court could certainly be disabled from passing an order upholding the violation of Article 14 of the Constitution and any order overlooking to comply with the requirement of Article 14 read with Article 16 of the Constitution. If a temporary appointment is made, the appointment comes to an end at the end of such employment as contemplated in the order. These appointments are made on the need basis or sometimes it is given as an employment keeping in view the sympathetic attitude towards officer or official after his retirement. When the person, so appointed, joins or accepts the temporary engagement, he is aware of the nature of the employment. He accepts the employment with open eyes. It may be true that he may not be in a position to bargain not at arms length. Since he might have been in a position to seek some reemployment, so as to eke out his basic requirement, accepts the said employment whatever he gets. Thus, his position is very clear. Ld. Counsel for the petitioner could not demonstrate that the petitioner had never applied for any re-employment after retirement and the post was offered to the petitioner. Contra to it, it is very much on record that the petitioner applied for the third extension in the month of January, 2010. Thus, the petitioner was aware about his tenure and the post. The petitioner's

tenure ended in the month of February, 2011; and it was a fixed term. In the fixed term appointment or in a retirement, there is no need to give any notice to such employee who is going to retire or his term is going to an end. Hon'ble Apex Court in the case of **State of Gujrat & Another Vs. P.J. Kampavat & Others 1992(3) SCC 226** had an occasion to look into a similar situation. In this case several persons were appointed directly in the office of the C.M. on purely temporary basis for a limited period up to the tenure of the C.M. The Hon'ble Court held that such appointment was purely on temporary basis and further it was coterminous that of the Chief Minister's tenure and such services came to an end simultaneously with the tenure of the Chief Minister. No separate order of termination or even a notice was necessary for putting an end the services. The Hon'ble Apex court has held as under in Para 11:-

"***11.*** *For the reasons given above, we are of the opinion that the appointment of the respondents was a pure and simple contractual appointment and that such appointment does not attract and is outside the purview of the Bombay Civil Service Rules, 1959. Since the tenure of the ministers at whose instance and on whose recommendation they were appointed has come to an end with 10.12.1989 their service also came to an end simultaneously. No order of termination as such was necessary for putting an end to their service, much less a prior notice. They ought to go out in the manner they have come in."*

19. Thus, in view of the above judgment of the Hon'ble Apex Court, there was no need to give any notice to the petitioner at the end of his tenure to vacate the office.

20. The petitioner has taken a plea that he had received the correspondence from the State Government from different departments and he discharged work as such. Ld. Counsel for the petitioner demonstrated us that different departments had made communications to the Government and copy thereof had been sent to the petitioner. Apart from that Ld. Counsel for the petitioner also brought to our notice that the Estate Department of Secretariat had

issued a notice to vacate the room and one notice for cancellation of the said room was also issued. A letter written by the Planning Commission to different officers to hold a meeting in which his name has been given and copy has been sent to him. The ld. Counsel for the petitioner has shown one more letter in which it is mentioned by someone Engineer of P.W.D. that certain drawings of the bridges have already been collected and had been sent to the Government by the petitioner and the letter of the O.S.D. has been referred in the said letter. Ld. Counsel for the petitioner on the basis of such correspondence contends that the petitioner was discharging the work which had been assigned to him.

21. First of all we have to see whether any communication from the Government had been sent to the petitioner to continue in the service or discharge the obligation of the work which had been assigned to him. The petitioner had been appointed by the Government under the orders of the Principal Secretary, P.W.D. and he had been assigned a supervisory seat in the State Government over the departments. It was not only for the P.W.D., it was also for अवस्थापना विभाग etc. That duties, which had been assigned to the petitioner, had elaborately been written in his first appointment letter/ order of the Government which reads as under:-

"श्री एस0के0गुप्ता द्वारा विशेष कार्याधिकारी के रूप में निम्न पदीय दायित्वों का निवर्हन किया जायेगाः–

(i) लोक निर्माण विभाग के अन्तर्गत विभिन्न कार्य मैनुअल तैयार किया जाना तथा विभिन्न सेवा नियमावलियों एवं विभाग की गतिविधियों से सम्बन्धित अधिनियमों का संशोधित/ परिवर्धित किया जाना।

(ii) लोक लेखा समिति, प्राक्कलन समिति/ याचिका समिति आदि विभिन्न समितियों से सम्बन्धित लम्बित प्रकरणों के समयबद्ध निस्तारण हेतु आवश्यक समन्वय/ पर्यवेक्षण।

(iii) शासन स्तर पर विभिन्न महत्वपूर्ण परियोजना की रूप–रेखा तैयार करना, महत्वपूर्ण प्राक्कलनों के तकनीकी परीक्षण में सहायता अथवा महत्वपूर्ण शिकायतों की स्वतंत्र एवं निष्पक्ष जांच कराए जाने के उद्देश्य से समय–समय पर उत्पन्न होने वाली आवश्यकताओं को पूर्ति किया जाना।

(iv) उत्तराखण्ड राज्य अवस्थापना विकास निगम लि. के ग्रुप ''ए'' ''बी'' एवं ''सी'' के पदों पर समय –समय पर नियुक्ति हेतु प्राप्त आवेदन पत्रों की संवीक्षा तथा आवेदकों के डाटा चार्ट तैयार कराने में सलाह/ सहयोग देना।

(v) शासन स्तर से दी गई विभिन्न जांचों के सम्बन्ध में शासन को आख्या उपलब्ध कराना तथा विभिन्न पत्रावलियों पर यथा आवश्यकता तकनीकी आख्या उपलब्ध कराना।

(vi) वृहद परियोजनाओं के सम्बन्ध में म्व्ध्ठपक क्वबनउमदज तैयार कराने में विभागीय अभियन्ताओं को आवश्यकतानुसार परामर्श दिया जाना।

(vii) उत्तराखण्ड एरियल रोपवेज एक्ट एवं उत्तराखण्ड एरियल रोपवेज रूल्स तैयार कराना।

(अपपप) नियोजन, पुनर्गठन, लोक निर्माण विभाग तथा ए.डी.बी. से सम्बन्धित बैठकों में शासन के निर्देशानुसार भाग लेना।

(ix) शासन द्वारा समय–समय पर सौंपे जाने वाले अन्य कार्य।"

22. It is apparent that the petitioner had been working under the direct supervision of the Government. The work assigned at sl. No. 9 clearly reveals that the petitioner had to discharge any work assigned by the State Government. During the period when he has drawn the salary from the department, he has not filed any such document which relates to his work which was assigned to him. He had to frame the Rules, he had to prepare the manual and so many other things for which had been appointed. Ld. Counsel for the petitioner, inspite of giving him time, could not demonstrate that the petitioner had performed any of the duties which had been assigned to him during this period and no such document has been filed before the Tribunal. If the petitioner had discharged such work and was not in a position, to produce the record he should have very well asked to the Court to summon those records from the department. But he also failed to that extent. Merely receiving letters and sending few letters to others or receiving some letters to attend the meeting, is not sufficient that he had been discharging the work for so long. It is not so that the petitioner was a senior Class-I officer and he had been appointed on same pay and perks in the post so he had to discharge his

responsibilities as such according to his status. The petitioner had not filed even the minutes of Planning Commission in which he had joined the meeting. It is a common fact that if any person is appointed in the Government, nobody knows the period of his appointment as such in the State Government, because the Government order which has been made by way of appointment of the petitioner, has not been published and circulated among the other departments of the Government. It was only circulated to a limited officers to whom it was concerned. It is also apparent from the perusal of this letter that the salary drawn from the office of the Chief Engineer Level–I, Dehradun and the copy thereof had been sent to him. The impugned order clearly reveals that salary has been drawn by the petitioner from the chief Engineer level. The petitioner's appointment was not in the P.W.D. itself. It is also a known fact if any gazetted officer is transferred, a gazette notification to that effect is made in the official gazette. Class-II and above officers are known as gazetted officer because their status always reflects in the official gazette of the State Government. Publication of a notification in the gazette is a notice to all the departments. The purpose of making the notification is only to notify to the public that such person is holding a post as indicated in the gazette notification. As soon as the publication of an appointment and the transfer is made, it binds the public and it is an element of law and that order is also enforceable as a law. If any order is not published in the official gazette, it is an internal arrangement and it is not known to other persons. . In the present the letter of the appointment has not been sent for publication also. In the case of **Gulf Goan Hotels Company Ltd (supra)** admittedly all the constructions, though completed on different dates and in different phases, were completed before the Costal Regulation Zone were enacted(19.2.1991) in exercise of the power under the Environment (Protection) Act, 1986. The Central Government issued enforcement guidelines in which it was provided that the constructions in question are between 90-200 meter from the HTL (High Tide Line) despite the fact that under the guidelines in force which partake the character of

law. Under the enforced guidelines the construction within 500 mt. of the HTL was prohibited under the new guidelines. The notices were issued to those constructions which had already been made which come within that zone even though those were made prior to the enforcement of the old law. The said guidelines were not published in the gazette. The matter was challenged before the Bombay High Court and the Hon'ble High Court upheld the impugned order and also upheld the orders passed by the authorities requiring demolition of the existing structure. The matter came before the Hon'ble Apex Court and the Hon'ble Apex Court allowing the appeal held, ***the guidelines must have been published so that they could attain the law and could bind public by the said guidelines. The said proposition of law has been held in Para 24 and 25 of the judgment***. Thus, the appointment of the petitioner has not been notified in the gazette, cannot bind other persons. So, the correspondences made after his appointment would not be of any avail to the petitioner because the persons, who were not dealing with the petitioner, were not aware that his post has been abolished and his services have come to an end. Thus, the petitioner has no right to claim any benefit from the correspondences which have been filed by him.

23. Whereas the question of estoppels is concerned, when a person enters a temporary employment and the engagement is not based on a proper selection recognized to the rules, he is aware of the consequences of the appointment being temporary as such he cannot invoke the theory of legitimate expectation that his tenure would be extended. The State cannot make an assurance to appoint the petitioner.

24. It is also pertinent to mention here that the petitioner's extension was allowed till February, 2011 by the government. Meanwhile a complaint was received to the Government that petitioner has already completed 65 years of his age and his appointment is totally against the Government order. Copy of the said Government order was also furnished along with the complaint. The said complaint was processed and the Secretary, P.W.D. approved the proposal of the department

that the petitioner should not have been reappointed after the age of 62 as indicated in the said G.O. and he further approved the proposal to place it before the Chief Minister that his services can be dispensed with immediately as he has attained the age more than the period given in the aforesaid G.O. and the said G.O. also authorized the department to dispense with his services as his services cannot be extended. The Chief Minister ordered to keep the matter pending. Apart from that, if any reappointment or any extension is granted to any officer, it is mandatory upon the department to seek the advice of the Finance department and the Personnel department. In this case the petitioner had admittedly attained the age of 62 much prior to his extension, as such his services could not have been extended beyond that period. Thus, the Government in such a situation cannot give an assurance to the petitioner to discharge his work beyond the period of his extension i.e. February, 2011. The Hon'ble Apex Court in the Constitutional Bench in the case of **Secretary State of Karnataka Vs. Uma Devi, 2006 (4)SCC 1** has held as under:-

"The very engagement was against the constitutional scheme. Though, the Commissioner of the Commercial Taxes Department sought to get the appointments made permanent, there is no case that at the time of appointment any promise was held out. No such promise could also have been held out in view of the circulars and directives issued by the Government after Dharwad decision."

25. The petitioner has filed certain documents by which he has given certain instructions to the different Engineers of the different departments and the copies thereof have been sent to the Principal Secretary. Merely by sending unilateral letter to the department the interference cannot be taken that the petitioner has discharged his duties under the direction of the State Government. Thus, this unilateral act cannot be held that the petitioner had been discharging the work as such not gratuitously in the State.

26. The petitioner could not demonstrate any such correspondence which leads that the State Government has asked to continue on the post. In the absence of such order, he should have vacated the office and it is

presumed that he had not discharged his work from the date of expiry of his term. It is the duty of the petitioner to inform the Chief Engineer Level-I, Dehradun that his term has ended and he is not entitled for any salary. The Government itself is run by the high level bureaucrats and the bureaucrats are supposed to discharged their duties with utter fairness. The officers are the ear, eyes and head of the State. The petitioner, being a very senior officer, this was his bounden duty not to draw the salary from the Government exchequer. So, the petitioner has suppressed this fact also and he has not discharged his duties. Prior to the introduction of the I.T. Technology in the exchequer Class-I and Senior Class-I officer used to draw their salary by themselves and they were the self drawing officers. Even today, the T.A. bills etc. are withdrawn by themselves and they are responsible for those withdrawals from the exchequer. If the petitioner tenure had not been extended, he should not have withdrawn his salary from the exchequer. Thus, it is apparent that the petitioner had not discharged the work even if he had sent some letters anyways it does not make any difference. Retention of the office after the tenure by a senior officer is not in accordance with law and he is not entitled for any salary for the same period and beyond that also.

27. Ld. Counsel for the petitioner further contended that the petitioner is entitled to get the payment of the salary under Section 22 of the Indian Contract Act. This section applies only where the contract is not possible because it is caused by one of the parties and it being under the mistake as a matter of fact. As we have pointed out earlier that the contract only starts at the initial stage and thereafter the contract is converted into an status and it becomes statutory. The petitioner is not entitled to get the compensation for the period when he has alleged that he has discharged his work. The petitioner knowing very well that he has completed 65 years and he is not entitled to retain the job; the fact that the term of the service of the petitioner has ended and the post on which he had been posted, has already been ended, in these

circumstances it cannot be held that the petitioner is entitled to the benefit of Section 22 of the Contract Act.

28. Apart from that a halfhearted submission was made that the petitioner is entitled to get compensation under Section -22 as such he is not bound to return the amount which has already been taken by him and he is entitled to salary for the remaining period. As per Section 70 of the Indian Contract Act, the petitioner must plead that: (i) the petitioner was acting lawful when he was discharging his duties to other parties; (ii) He does not intend to do that gratuitously; (iii) that the defendant did enjoyed the benefit of the same. It is also necessary that such plea should be taken in the pleadings of the claim petition. The petitioner has not taken any plea of the doctrine of quantum of merits in his pleadings. The other party cannot be taken as a surprise at the time of the arguments by putting a new fact without his knowledge during the course of arguments. The purpose of the pleadings is to make known to other party that what is the case of the petitioner and the respondents had full opportunity to explain the circumstances. The petitioner has failed to discharge his obligation by way of pleading this fact in the pleadings, as such the petitioner is not entitled to the benefit of Section 70 of the Indian Contract Act in this matter.

29. Now the question arises as to whether the said amount can be recovered from the petitioner or not. As we have pointed out that the petitioner should not have drawn the salary; it was also a mistake on the part of the petitioner. If the over payment and the question of recovery arises from a senior officer, the Hon'ble Supreme Court has laid certain guidelines recently. In the case of **State of Punjab & Others Vs. Rafiq Masih & Others 2015 (2) SCC(L&S)33** in para 18 Hon'ble Court has held as under:-

"It is not possible to postulate all situations of hardship, which would govern employees on the issue of recovery, where payments have mistakenly been made by the employer, in excess of their entitlement. Be that as it may, based on the decisions referred to herein above, we may, as a ready reference, summarise the following few situations, wherein recoveries by the employers, would be impermissible in law:

(i) Recovery from employees belonging to Class-III and Class-IV service (or Group 'C' and Group 'D' service).

(ii) Recovery from retired employees, or employees who are due to retire within one year, of the order of recovery.

(iii) Recovery from employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.

(iv) Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.

(v) In any other case, where the Court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover."

30. The petitioner's case falls in the category-3 of such guidelines. The salary has been paid to the petitioner from March to June and the recovery of the said amount was sent on 23.9.2011, thus it is well within time; the petitioner has retired as Superintending Engineer and he was a very senior officer. Under these circumstances recovery of the amount is justified. In view of the above the petition fails and petition is liable to be dismissed.

ORDER

The claim petition is hereby dismissed. No order as to costs.

(D.K.KOTIA)
VICE CHAIRMAN (A)

(JUSTICE J.C.S.RAWAT)
CHAIRMAN

DATE: OCTOBER 30, 2015
DEHRADUN

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