

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 21719 of 2016
With
R/SPECIAL CIVIL APPLICATION NO. 1095 of 2017
With
R/SPECIAL CIVIL APPLICATION NO. 1122 of 2017
With
R/SPECIAL CIVIL APPLICATION NO. 21720 of 2016
With
R/SPECIAL CIVIL APPLICATION NO. 21721 of 2016
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R/SPECIAL CIVIL APPLICATION NO. 21930 of 2016
 With
R/SPECIAL CIVIL APPLICATION NO. 21937 of 2016

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE A.Y. KOGJE

Sd/-

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	Yes
2	To be referred to the Reporter or not ?	Yes
3	Whether their Lordships wish to see the fair copy of the judgment ?	No
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	No

SHIVANI ARVINDKUMAR SONAWANE

Versus

STATE OF GUJARAT & 3 other(s)

Appearance:

MR RAMNANDAN SINGH(1126) for the Petitioner(s) No. 1
 MS MANISHA LAVKUMAR SHAH, GOVERNMENT PLEADER assisted by MS
 SHRUTI PATHAK, AGP for the Respondent(s) No. 1
 MR CHINMAY M GANDHI(3979) for the Respondent(s) No. 2
 MR MB GANDHI(326) for the Respondent(s) No. 2
 NOTICE SERVED BY DS for the Respondent(s) No. 2

CORAM:HONOURABLE MR. JUSTICE A.Y. KOGJE

Date : 30/09/2022

ORAL JUDGMENT

1. **RULE.** Learned AGP Ms.Shruti Pathak waives service of Rule on behalf of respondent No.1 and learned Advocate Mr.Cchinmay Gandhi waives service of Rule on behalf of respondent No.2.
2. All these petitions are having identical facts and arise in common background and therefore, with consent of learned Advocates for the parties, are taken up for joint hearing and disposal. The facts are recorded from Special Civil Application No.21719 of 2016.
3. This petition along with group of petitions is preferred with the prayer to quash and set aside the impugned order dated 22.12.2016 passed by respondent No.2, whereby all appointments made in the regular pay scales of Class-III cadre vide advertisement dated 11.05.2013 were withdrawn from the date of their appointments and all such appointments were directed to be fixed as per the Finance Department's GRs dated 16.02.2006, 29.04.2010, 06.10.2011, 23.10.2014 and 20.10.2015. It was informed that the petitioners would be liable to deposit amount paid in excess of their salaries to the Chief Accounts Officer, Gandhinagar in excess to their salary to the Chief Accountant Office, Gandhinagar.
4. The brief facts are as that on 11.5.2013, GIDC

published advertisement for various kinds of recruitment for Class-I, Class-II and Class-III in various branches in local newspaper, pursuant to which, the petitioner, since was fulfilling eligibility criteria, had submitted online application form. After scrutiny of the forms, the petitioner was issued with letter for written examination and accordingly, the petitioner appeared in the written examination.

4.1 After passing written examination and viva-voce, the petitioner was found suitable, was issued with the appointment order on 16.11.2003 to the post for which the petitioner applied for. In the appointment order, the pay scale and pay grade was very much mentioned which was applicable to regular employee. In fact, the appointment was made in accordance with the provisions of the GIDC (Staff) Regulation, 1963. In the said appointment order, it was also mentioned that the petitioner would be on probation for a period of two years. The petitioner resumed the duty and completed the probation period of two years successfully and the GIDC did not extend the period of probation. Hence, as and when the petitioner completed two years from the date of resumption of duty, the petitioner was deemed to have been in the service, like regular employee.

4.2 The petitioner received the impugned order dated 22.12.2016 issued by the Executive Director of GIDC, as per which

the petitioner's appointment in the regular pay scale of Class-III is withdrawn and all the appointments were to be fixed as per the Government Resolutions dated 16.2.2006, 29.4.2010, 6.10.2011, 23.10.2014 and 20.10.2015, as such, the impugned order is passed on the basis of the communication dated 26.10.2016 made by respondent No.1 to respondent No.2. As per the impugned order, the Chief Account Officer has given estimated amount for recovery of alleged excess payment towards salary paid to the petitioner.

4.3 The impugned order is passed without affording any opportunity to the petitioner and without amending the GIDC (Staff) Regulations and more particularly, as per the communication dated 26.10.2016, order of respondent No.2 to withdraw the appointment of the petitioner and also direct to deposit the salary paid to the petitioner as per the pay scale specified in the appointment order, the impugned order is *per se* illegal and unlawful, arbitrary and tenable.

5. Learned Advocate for the petitioners submitted that the respondents have relied upon circulars dated 23.3.1998 (Page-162), 24.3.1998 (Page-165), Resolution dated 16.2.2006 (Page-167), 18.8.2009 (Page-196). All these circulars and resolutions cannot supersede the GIDC (Staff) Regulation, which is statutory Rule / Regulation passed by the State Legislature. The power to frame the regulation is derived from Section 54 of GID Act, 1962.

As per Section 54, regulation made under the Act has to be tabled before State legislature and after the same is passed by State legislature, it is that published in Official Gazette and then only it comes into effect. The example of same can be seen when 6th Pay Commission was implemented for GIDC staff and in opening paragraph at Page-357, it clearly stipulates that in exercise of power conferred under Section 54 of GID Act, 1962 read with Section 12 of GIDC with previous approval of the State Government hereby amends the Gujarat Industrial Development (Staff) Regulation, 1963 and this was treated as GIDC (Staff) (2nd Amendment) Regulation 2009 and there was some anomaly, so another notification was published in official Gazettee at Page 363, which also has provided some change in the pay scale. Thus, it is very clear that the Government in past had amended the regulation by publishing in Official Gazette and that too following under Section 54 and 12 of GID Act, 1962. Therefore, circular or resolution passed by Government would not apply to the staff of the Corporation as they are covered under special law, i.e. GIDC (Staff) Regulation, 1963. This issue is covered by the decision of Hon'ble Supreme Court in the case of Punjab Water Supply & Sewerage Board Vs. Ranjodh Singh and others reported in (2007)2 SCC 491. Para-19 of the said judgment may be considered. Similar view is taken by Hon'ble Supreme Court in the case of State of Sikkim Vs. Dorjee Tshering Bhutia and others reported in (1991)4 SCC 243

[Para-15]. It has also been held by Hon'ble Supreme Court in the case of C.L. Verma Vs. State of Madhya Pradesh and Another reported in 1989 Supp (2) SCC 437 [Para-6] that an administrative instruction cannot compete with statutory Rule and if there is contrary provision in the rule, the administrative instruction must give way and Rule shall prevail. Therefore, it is clear that if there was no rule or regulation holding the field then resolution or circular could have been applied upon employees of GIDC, but once the field is occupied by statutory Rule, then executive instructions, circulars, resolutions cannot substitute the statutory Rule, unless the Rule is amended by State Legislature and published in Official Gazette.

5.1 It is submitted that when Government authorities have taken a conscious decision to appointment on various vacant posts of Class-III on pay scales as per the GIDC (Staff) Regulation, 1963, then there is no mistake committed either by Government or by GIDC, whether the respondents' submission that the mistake has been accepted by GIDC by shifting illegal burden upon GIDC is justified.

5.2 It is submitted that the respondents have relied upon the affidavit of GIDC more particularly paragraph 19 of the affidavit at Page-51 to 53, wherein GIDC has deposed that the appointment made on 2 years' probation was quite contrary and paradoxical to

State Policy and it is also stated that if employer has committed mistake, same can be corrected and nobody take benefit of mistake as the Government instructions or Government policy was very clear. It is submitted that the application submitted by the GIDC to Government vide letter dated 20.12.2012 for filling up the posts of Additional Assistant Engineer (Civil) wherein they have supplied the extract of GIDC (Staff) Regulation at Page-209 of the petition. Nowhere it is mentioned that they want to appoint on fixed pay scale. Similarly, there is another letter dated 20.12.2012 (Page-210) wherein also, application was submitted for various posts with their pay scales which is provided from Page 213 to 214. The noting is provided at Page-394 and 395 for various posts. It is submitted that the noting clearly stipulates that there is signature of Section Officer, Under-Secretary, Officer on Special Duty, Principal Secretary (all from Industries & Mines Department), when there is signature of Secretary (Economic Affairs from Finance Department) signed on 18.3.2013. Nowhere is stated in this noting that the appointment is to be made on fixed scale and next page (at 395) is clearly mentions that 172 posts should be filled as per GIDC (Staff) Regulation. Thus, the Government authorities themselves allowed the GIDC to fill up the vacancies as per the GIDC (Staff) Regulation and not on fixed pay scale. Next Page-396 is sanction given for 8 vacant posts of Steno Grade-III, wherein also signatures of all authorities of Industries & Mines

Department and the Secretary of Economic Affairs have put their signatures and the order is passed by the Government, i.e. Industries & Mines Department, at Page 404, directing GIDC to fill up the posts as per GIDC (Staff) Regulation, 1963, nowhere it is stated that appointment is to be done in fixed pay scale. It is submitted that there was similar requisition was made for Driver on 20.12.2012 by GIDC by supplying pay scale of Driver. But, at page-404, the Industries & Mines Department has clearly held that the Class-III Driver is to be appointed as per Government circulars, means that no permission was granted by Industries & Mines Department, and Secretary, Economic Affairs. Similar kind of permission was granted for filling up 8 vacant posts of Steno Grade-III. Nowhere it is mentioned that the post is to be filled on fixed pay scale. Thus, GIDC cannot be fastened with liability that GIDC committed mistake in appointing the petitioner and such other employees, not on a fixed pay but on regular pay scale. Thus, no mistake is committed by GIDC.

5.3 It is submitted that when there is advertisement on Government website and also same was published in local newspapers published in Gujarati vernacular language, can the stand of the Government that they were not aware of about the recruitment of Class-III employees on various posts was made with pay scale and without stipulation that appointment was not being

made for fixed period of 5 years, can be accepted.

5.4 It is submitted that advertisement for filling up the posts is supplied from Page 26 to 35 and same advertisement was also published in local newspapers 'Sandesh' and 'The Times of India' prescribing pay scales for various posts of Class-III. Once the advertisement was published in newspaper and website of Government, can the submission of Government is accepted that they were not aware of that appointment of the petitioner was made on pay scales of each post and not on fixed pay for 5 years. Copies of advertisements published in local newspapers are supplied herewith for kind perusal of My Lord.

5.5 It is submitted that when advertisement stipulates that appointment was being made on pay scale and pay band and appointment order stipulates that the employees were being appointed on two years' probation, which is in tune with GIDC (Staff) Regulation, 1963, and the employees completed the probation as per the terms of appointment, whether after such completion of probation period, which was not extended by the authority, whether the impugned order could be passed by altering the condition of appointment.

5.6 It is submitted that the advertisement stipulates that there was pay scale for each post and last page 35 in last

paragraph, it is clearly stated that recruitment was being done strictly as per GIDC (Staff) Regulation, 1963 and the appointment would be regulated by amendment in the GIDC (Staff) Regulation. Appointment order dated 16.11.2013 at Page 36 stipulated the period of 2 years' probation. As per GIDC (Staff) Regulation, Rule 15 deals with period of probation and Rule 17 deals with power to extend the probation period. Once the probation period was not extended, the petitioners are deemed to have been confirmed in service on completion of probation period, i.e. on 16.11.2015. Thus, the petitioners acquired vested right of becoming permanent employee on completion of probation period. There was no mistake done by GIDC. It is only because of letter dated 26.10.2016 written by Industries & Mines Department that the GIDC passed the impugned order. Thus, the order could not have been passed without giving any justified reason and more particularly when the petitioner has acquired vested right on completion of probation period, because they are deemed to have been confirmed employee on completion of probation period.

5.7 It is submitted that the impugned order changing the service conditions of the petitioner causing prejudice could not have been passed without giving an opportunity of hearing, which is held by catena of judgments and one of such judgments is already cited by petitioner in the case of **Balco Captive Plant**

Mazdoor Sangh & Anr. Vs. National Thermal Power Corporation & Ors., reported in **(2007) 14 SCC 234**, more particularly paragraph No.35 deals with the issue. It is submitted that the Supreme Court in the case of Balco Captive Power Plant Mazdoor Sangh (supra) has held condition of service of employees cannot be altered causing prejudice without affording opportunity of pre-decisional hearing as same would amount to arbitrary and violative of Article 14 of the Constitution of India. In the present case, petitioners have acquired their vested right on completion of probation period. They were appointed strictly in accordance with GIDC (Staff) Regulation, 1963. Without issuing notice to change the service condition, the impugned order converting the petitioners from regular employee to fixed pay employee could not have been passed and is not sustainable in law.

5.8 It is submitted that the impugned order directing recovery from Class-III employee is not permissible when the Supreme Court has mandated that no recovery from Class-III or Class-IV employee was permitted by decision in case of ***State of Punjab & Ors. Vs. Rafiq Masih***, reported in **(2015) 4 SCC 334**, more particularly para 18(1) of the said judgment mandates the same by using the word that recovery by employer would be impermissible in law.

5.9 It is submitted that the Government authorities have

misled this Court by not disclosing the correct facts on affidavit dated 17.8.2022 in para-14 that word 'Driver' was a typographical error in letter dated 20.3.2013, although similar requisition for filling up the post of Driver (Class-III) was sent by the GIDC to the Government just similar like Additional Assistant Engineer on 20.12.2012, wherein also the pay scale of the Driver was supplied, by supplying the extract of GIDC (Staff) Regulation, 1963, more particularly Page No.405 of the petition, wherein no such word Driver or Class-IV is mentioned when permission was given to appointment 8 Stenographers of Grade-III after obtaining the permission of Finance Department on 9.4.2013 and that too appointment is ordered to be made as per the GIDC (Staff) Regulation, 1963.

5.10 It is submitted that respondent No.1 filed an affidavit on 17.8.2022, in which specific contention was taken in para No.14 that the word Driver in the last paragraph of letter dated 20.3.2013 was a typographical error. Learned Government Pleader relied upon the affidavit as she may not be aware of that there was also similar application submitted by GIDC for filling the post of Driver Class-III on 20.12.2012, supplying the copy of pay scale of driver i.e. Rs.5200-20200. Perhaps, the Industries & Mines Department did not forward the application for approval of Secretary, Economic Affairs. Therefore, specifically, it has been mentioned that the

appointment of driver in Class-III and Class-IV employee would be regulated by Finance Department resolutions. Thus, there is no mistake in the letter dated 20.3.2013 by writing the word Driver because letter was sent by GIDC on 20.12.2012. On the contrary, this makes it very clear that there was distinction between petitioners and Class-III Driver and Class-IV employees. Copies of applications submitted by GIDC to Industries and Mines Department for filling up the posts of Driver and Steno Grade-III are supplied herewith for kind perusal of My Lord.

5.11 It is submitted that in 2008, employees were appointed without calling for any advertisement as it has happened in the case of the petitioner. Most of the petitioners were working somewhere else and some of them were working in fixed pay scale. They have left their job and joined the service pursuant to passing of written examination and qualifying interview conducted by GIDC. Thus, it was open to every citizen to apply for the posts published in 2013. Secondly, the advertisement in 2017 was for fixed pay scale. So, they were knowing that they are going to be appointed on fixed pay scale. In the present case, GIDC itself submitted application for giving pay scale with permission of Finance Department and when Industries & Mines Department, and Finance Department have permitted them to fill up the posts on pay scale, then only they had advertised the vacancies for filling

the posts on pay scale. If the appointees of 2017 have grievance, they can always move to appropriate forum of law for getting benefit as per GIDC (Staff) Regulation. In fact, injustice is being done to the petitioner because they had left various job and joined GIDC because of pay scales offered to them. Thus, neither there is heart burning nor there is any injustice to other employees. They have to fight for their own right.

5.12 It is submitted that there is no doubt that the Government can give direction to corporation for following the policy. However, for amendment in the Staff Regulation, Section 54 has to be followed and unless the Staff Regulation is amended, any direction given under Section 17 cannot be applied because there is a statutory obligation of the Government to place the amendment before State Legislature.

5.12 It is submitted that it is contended on behalf of the respondents that all appointments of Class-III is done on fixed pay scale and not on pay scale. This contention of the respondents is not correct because the petitioner has filed affidavit dated 23.5.2019. In paragraph No.4 of the said affidavit, it was contended that the District education Board had published the advertisement for filling up the post of Head Teacher Class-III, which is stated in the heading of the advertisement and pay scale is mentioned on first paragraph. This paragraph is not controverted by the

respondents. However, so far as Chief Officer of Municipality Class-III is concerned, the vacancies were advertised by GPSC at Page 239, and pay scale is mentioned at Page 240. The respondent has filed the affidavit on 17.8.2022, wherein they have supplied the Rule dated 7.6.2016 and also notification dated 18.7.2016. The contention of the respondent is that there is a special Rule for filling up the post of Chief Officer Class-III, so they can be extended the benefit of pay scale. This is what is the submission of the petitioner that there is a special law, which is known as GIDC (Staff) Regulations, 1963 and the pay and allowances is regulated by the GIDC (Staff) Regulations, 1963. Thus, there was no mistake being committed either GIDC or by Industries & Mines Department in extending the benefit of pay scale to the petitioners.

5.13 Rule 63 of GIDC (Staff) Regulation clearly lays down as under:-

“63. Pay and Allowances: The scales of pay attached to the various posts under the Corporation shall be those laid down in Appendixes (A) and (B) to these regulations and the same shall not be varied without first amending the relevant Regulation.”

5.14 Thus, there is no mistake in appointing the petitioner on pay scale as no amendment has been done in Appendixes (A) and (B) of GIDC (Staff) Regulation. On the contrary, amendment is

done in 2009 and 2012 for giving benefits of 6th Pay Commission.

5.15 It is submitted that some of the petitioners got promotion during pendency of the petition and list of petitioners who have been promoted is supplied. Some of the petitioners have been promoted to the post of Assistant Manager Class-II and some of them have been promoted as Junior officers and some of them have been promoted Stenograph Grade-II. Thus, some of the petitioners have reached to higher posts, and the situation has become irreversible, because they have completed the probation period on promoted post also.

5.16 It is submitted that reliance placed on the decision by learned Government Pleader in case of **Rajesh Pravinchandra Rajyaguru Vs. Gujarat Water Supply & Sewerage Board & Ors.**, reported in **2021 SCC online SC 1282** would not apply in the facts of this case because the mistake of the department was regarding extending the benefit of pay scale without any rule governing for such benefit. There was no special law regulating the pay scale of those employees. But, in the present case, there is a special law regulating the service condition of the employees of GIDC (i.e. GIDC Staff Regulation). Hence, judgment cited by respondent cannot be applied in the facts of the present case.

6. As against this, learned Government Pleader appearing

for the respondent-State submitted that GIDC is hundred percent controlled by the State of Gujarat and it is a state undertaking and statutorily bound to follow the government policies and its regulations. It is submitted that Section 17 of the Gujarat Industrial Development Act, 1962, empowers the State Government to issue directions to the Corporation. The said Section reads as under:-

“17. Directions by the State Government.- The State Government may from time to time issue to the Corporation such general or special directions of policy as it thinks necessary or expedient for the purposes of carrying out the purposes of this Act and the Corporation shall be bound to follow and act upon such directions”.

6.1 It is submitted that, the Clause-6 of the Government Resolution dated 16.02.2006 stipulates that this policy shall also be applicable to the appointments made in board/corporation as well as grant in aid institutions. However, the boards and corporations for the purpose of making appointments for Class III and Class IV posts shall have to take approval of Finance Department. On account of coming into force of this policy, all the appointments for class III and class IV in the State of Gujarat including Public Sector Undertakings and Boards are made on fixed pay for initial period of five years on deputation after which, the concerned employee shall

be placed in regular pay scale.

6.2 It is submitted that, after being appointed on regular pay scale on completion of five years, the employee shall be required to undertake training and departmental examination. Approval was also granted to GIDC subject to Government Policies and past appointments of Class-III in the year 2008 and subsequent appointments in the year 2016 was also in accordance with the State Government's policy of Fixed Pay.

6.3 It is on account of coming into force of this policy, all the appointments for class III and class IV in the State of Gujarat are since the date made on fixed pay for initial period of five years on probation after which, the concerned employee shall be placed in regular pay scale. Further, after being appointed on regular pay scale on completion of five years, the employee shall be required to undertake training and departmental examination. It is submitted that since 2006 onwards, therefore, all appointments in class III and Class IV in all the Government Departments, boards and corporations are made on fixed pay.

6.4 It is submitted that the appointments which were made by the GIDC in the year 2008 were also in the fixed pay as demonstrated hereinabove. Since the GIDC was also required to adhere to this policy, the appointments in the year 2008 were made

by GIDC on fixed pay. Copies of such appointment orders are annexed with Affidavit in Reply at Annexure-R4 (Colly.). Further, subsequently in the year 2018 also, the appointments have been made in fixed pay by the GIDC. Therefore, the GIDC could not have deviated from the Government policy and instructions issued time to time.

6.5 It is submitted that when there are specific rules, then the resolution cannot supersede the rule because the same is issued invoking powers under Article 309 of the Constitution of India. That, this contention of the petitioner is thoroughly misconceived as under the service jurisprudence, there is a difference between 'revision of pay' as well as 'fixed pay'. It is submitted that 'fixed pay' is stipulated at the time of entry in service on probation or deputation. The policy of the State Government dated 16.02.2006 provides for a scheme of appointments by Direct Recruitment on probation period of five years on fixed pay on all the posts for Class-III and Class-IV cadre. The policy stipulates for appointments on the fixed pay whereunder, the employees are appointed on probation and for the said period, they would be entitled to fixed pay for a period of five years. This policy is uniformly followed across all the departments of the State Government.

6.6 That, the policy therefore provides for 'fixed pay' for

five years at the time of entry of an employee in the Government service on probation. On the other hand, revision of pay would be applicable only after an employee is regularized or permanently appointed. It is after an employee is entitled to regular pay scale, that there is revision of his/her existing pay scale and pay band which is governed by Revision of Pay rules issued time to time. Therefore, there is a basic fallacy in the submission canvassed by the petitioner in comparing fixed pay to that of revision of pay and contending that the revision of pay rules is given a go-bye by Government Resolution. In fact, revision of pay is not applicable to the employees who are appointed on fixed Pay.

6.7 It is submitted that, if the policy is given go-bye and the case of petitioner is accepted, the same would cause unrest and injustice to the other employees of GIDC who have been appointed in the fixed pay prior to the petitioner and subsequent thereto also.

6.8 It is submitted that as regards the submissions of the petitioners with respect to the file notings are concerned, the petitioners have contended that as per the communication dated 20.03.2013, approval was granted by the State Government by specifying that post of Additional Assistant Engineer, Assistant Draftsman, Work Assistant, Clerk Cum Typist, Assistant and Junior Officer are to be recruited as per Recruitment Rules of GIDC and that approval was given on 18.03.2013 by the Finance Department.

It is further contended by the petitioners that as far as Driver in Class-III and various posts in Class-IV category are concerned, for the purpose of their appointment only it is clearly stipulated that they shall be appointed as per the instructions of the Finance Department. Apropos to this contention raised by the petitioners, it is submitted that at the time of seeking approval qua the proposal of appointments in the GIDC, there was deliberation till the highest level.

6.9 It is submitted that in continuation of aforesaid noting, thereafter approval was given on 18.03.2013. As per the file notings with respect to such approval given, communication dated 20.03.2013 was issued. Inadvertently, the communication mentions word "Driver" in the last part. Otherwise, the communication is issued stating that posts in the cadre of Class-III and Class-IV shall be filled as per the prevalent instructions of the Finance Department. A bare perusal to the communication dated 20.03.2013 would indicate that the same mentions all cadres for which appointments are to be made as against number of vacancies in the table incorporated in the communication. The table in the communication dated 20.03.2013 does not make any provision for cadre of Driver. Therefore, there was no requirement to mention the word "Driver" in the last part of communication. It is due to typographical error and inadvertently, that the communication

mentions word “Driver” in the last part. It is submitted that the aforesaid contention was also raised by the State Government in the Letters Patent Appeal

6.10 It is submitted that the petitioners have erred in relying upon the instances of appointment of Chief Officers in the Nagarpalika, since, the appointments made are governed by the Gujarat State Officers Service Recruitment Rules, 2016 which are framed in exercise of powers under section 47A(2) of the Gujarat Municipalities Act, 1963 and in the supersession of the Gujarat State Municipal Chief Officer Service (Recruitment, Absorption and Condition of Services) Rules, 1996. Under these rules of 1996, all appointments are made to the post of Chief Officer initially on a probation period of one year.

6.11 It is submitted that under the Gujarat State Officers Service Recruitment Rules, 2016, all appointments are made to the post of Chief Officer, Class-III initially on probation period of one year. These recruitment rules have been framed in consultation and approval with the Gujarat Public Service Commission (GPSC) and the General Administration Department. In addition thereto, as per Section 47A (5) of the Gujarat Municipalities Act, 1963, the officers included in the Municipal Service constituted under this section shall be the servant of the State Government; but they shall draw their salaries and allowances directly from the Municipal fund. It is

in this eventuality and juxtaposition that the fixed pay policy is not made applicable in case of the Chief Officers in the Nagarpalika. Therefore, despite of the appointment to the post of Chief Officer being a Class-III post, the policy of fix pay is not made applicable.

6.12 It is submitted that with respect to the contentions raised by the petitioner placing reliance on the appointment of Head Teachers is concerned, it is submitted that the contention is thoroughly misconceived. As far as the appointments to the post of Head Teachers are concerned, the same is governed by separate recruitment namely Head Teacher, Class-III in the Subordinate Service of the Directorate of Primary Education or respective District or Municipal Primary Education Committee, Recruitment Rules, 2010. As far as these appointments to the post of Head Teacher, Class-III is concerned, the same is done in the Subordinate Service of the Directorate of Primary Education or respective District or Municipal Primary Education Committee, Recruitment Rules, 2010. These appointments are made by promotion or by direct selection. As regards to the appointments made by promotion is concerned, the appointments are made from the Vidhyasahayaks or Teachers who have worked for atleast 5 years in the cadre of Primary Teacher, Class-III in the Subordinate Service of the Directorate of Primary Education or respective District or Municipal Primary Education Committee. Therefore, for

being eligible to be appointed as Head Teacher through promotion, the concerned candidate has to work as a Primary Teacher, Class-III or Vidhyasahayak. As regards to the appointment of Vidhyasahayak is concerned, their initial appointments are made on a fixed pay for a period of 5 years and thereafter, they are absorbed in regular service. Therefore, the contention which the petitioner raises with regards to the appointment of Head Teachers is not just and proper.

7. The bare facts of the petition are that the petitioners had made an application for respective posts in response to a public advertisement for recruitment by GIDC (Annexure-B). The advertisement prescribed all the details against the respective posts which included the pay-scale. Upon due selection process the petitioners were selected and having found eligible in all respects were given appointment orders to their respective posts and the petitioners were given posting where the petitioners started discharging their duties. At a later stage, the State Government realized that the appointments made of the petitioners against the pay-scale was de-hors the policy of the State Government to make any appointment initially for a period of five years on a fixed pay and thereafter, when candidate fulfills the requirement of the State policy are to be absorbed on respective post against the pay-scale. This lead to initiating correspondences both State and GIDC

ultimately leading to impugned actions of treating the petitioners as appointee on fixed pay for five years rather against a pay scale and consequential recovery of additional money paid to petitioners considering the difference of salary to be paid as fixed pay for five years and actual salary paid as per the pay scale applicable.

8. The public advertisement (Annexure-B) was floated on the website of GIDC on 11.05.2013. It carried several posts which included the post of Additional Assistant Engineer in various discipline. The advertisement contains the details like seats available in open category and reserved category. The prescribed age limit, educational qualification and also pay scale of "pay band Rs.9300-34800+grade pay Rs.4400." The advertisement also prescribed various conditions for 1 to 26 applicable to the recruitment process. By an order dated 16.11.2003, the petitioners were given appointment (Annexure-C) to the post of Additional Assistant Engineer(Civil), Class-III which specified the pay-scale. In the appointment order, Clause-1 and 3 are relevant which provide for two years probation period and applicability of GIDC Employee Regulations, 1963.

9. Thereafter, the impugned order dated 22.12.2016 (Annexure-A) came to be passed. This order referred to the reasons stating that the appointments made under the recruitment process was not in the line of appointment made in Government

Department and referred to the Government communication dated 26.10.2016 from Industries and Mines Department and withdrawing the appointment of petitioner against regular pay scale of Class-III.

10. The present case has a history whereby order dated 15.02.2017 passed by this Court in the present petition along with allied matters, it was held that the impugned order was unsustainable in law. This judgment and order dated 15.02.2017 was subsequently carried in Appeal by the State of Gujarat by preferring Letters Patent Appeal No. 173 of 2019 wherein, the Division Bench was pleased to pass following order:-

“8. Accordingly, we quash and set aside the order of the learned Single Judge and remand the matter to the learned Single Judge for a fresh hearing. The State shall file an affidavit-in-reply in the petition as so deemed fit justifying their stand for withdrawal for passing of the impugned orders under challenge in the petition. Such affidavit-in-reply shall be filed before the learned Single Judge within four weeks from the date of receipt of the certified copy of this order. Needless to say that though we are relegating the appellants to file such an affidavit before the learned Single Judge by quashing the order of the learned Single Judge, the respondent’s - original appellant’s service conditions which exist as on date shall be continued and not altered to her detriment till such petition is finally

heard and disposed of by the learned Single Judge on the basis of the pleadings of the parties so filed before him. Appeal is accordingly allowed. Civil Application for stay stands disposed of accordingly".

10.1 Accordingly, the petition is one again placed before this Court with the necessary pleadings and documents by the State Government and their counter.

11. In the year 2012, vide communication dated 20.12.2012, GIDC sought approval from the Industries and Mines Department to fill up 172 posts which fell vacant out of the sanctioned set up of 1666 posts. It is required to be highlighted here that for the purpose of according approval for filling up the vacant posts, as per the administrative hierarchy, the proposal is placed before the highest authority through channel of submission starting from Deputy Section Officer to the Secretary of the Department with file notings and thereafter, the necessary approval is given. By way of communication dated 20.03.2013 it was informed by Industries and Mines Department to GIDC that approval is granted for filling up 172 posts. It is submitted that the approval was granted keeping in mind the prevalent policies of the State Government time to time. However, the GIDC made appointments on regular pay scale ignoring the policy dated 16.02.2006 which provided for appointments to be made on fixed pay for five years. It is in the year 2016 when issue was raised with

respect to entry level pay, of the employees of GIDC that a proposal was sent to Industries and Mines Department by GIDC. It is at that juncture that it came to the notice of the Industries and Mines Department that GIDC had made appointments in violation and dehors the Government Policy. Immediately, instructions were given on 26.10.2016 by Industries and Mines Department to the GIDC to rectify the mistake.

12. At the root of the issue is the stand taken by Government that the appointment to be made in GIDC, being a State Authority, has to be in consonance of the State policy. The basic stand taken by the Government at the first instance is the advertisement given by the Corporation was in conflict with the policy of the State, since at the relevant time, there was policy of the Government that any recruitment in class-III and class-IV would not be made in the regular pay scale but it would be on the consolidated monthly lump sum basis, as contained in the Government Resolutions of the Finance Department. It is submitted that the action of the Corporation of giving appointment in regular pay scale was not in consonance with the policy of the State and therefore the Corporation was instructed by the State to correct its mistake to put its action in consonance with the policy of the State.

13. To understand the relationship between the State and the GIDC, it would be relevant to refer to the GIDC Act. The

statement and subject would show that for securing the orderly development of industries in industrial areas and industrial estates in the State and it is carrying on its activities for the last twenty three years. In view of the growth of industries in different industrial estates and industrial areas a need has arisen for establishing commercial centers also in such areas and estates. It is therefore, proposed to authorise the Corporation to establish commercial centers in connection with the industries established in the industrial areas and industrial estates. Further, it is proposed to designate the members of the Corporation as directors thereto and to designate the Chief Executive Officer of the Corporation as the Managing Director thereof.

13.1 Section 12 of the Act reads as under:-

“12. Officers and servants of Corporation:-

- (1) That State Government shall appoint a [Managing Director] and a Chief Accounts Officer of the Corporation.
- (2) The Corporation may appoint such other officers and servants, subordinate to the officers mentioned in sub-section (1), as it considers necessary for the efficient performance of its duties and function.
- (3) The conditions of appointment and service of the officers and servants and their scales of pay shall-

- (a) as regards the [Managing Director] and the Chief Accounts Officer: be such as maybe prescribed, and
- (b) as regards the other officers, servants, be such as may be determined by regulations."

13.2 The most relevant for our purpose is Section 17, which reads as under:-

"17. Directions by the State Government:-

The State Government from time to time issue to the Corporation such general or special directions of policy as it thinks necessary or expedient for the purpose of carrying out the purposes of this Act and the Corporation shall be bound to follow and act upon such directions."

13.3 The extent of hold of the State on the GIDC is referred in Section 48, which reads as under.

"48. Dissolution of Corporation:

(1) The State Government if satisfied that the purposes for which the Corporation was established under this Act have been substantially achieved so as to render its continuance. It may by notification, in the official Gazette declare that the Corporation shall be dissolved with effect from such date as may be specified in the notification, and thereupon the Corporation shall stand dissolved accordingly.

(2) From the said date-

- (a) all properties, funds and dues which are vested in, or realisable by, the Corporation shall vest in, or be realisable by the State Government: and
- (b) all liabilities which are enforceable against the Corporation shall be enforceable Against the State Government.

13.4 Section 54 of the Act reads as under:-

“54. Power to Make regulations:

- (1) The Corporation may, with the previous approval of the State Government make regulations consistent with this Act and the rules made thereunder, and. .carry out the purposes of this Act.'
- (2) In particular and without prejudice to the generality of the forgoing power such regulations may provide for all matters expressly required or allowed DY Act to be provided by regulations.
- (3) All regulations made under this section shall be published in the Official on Gazette and shall be laid for. not less that thirty days before the State Legislature as soon as possible after they are made, and shall be subject to rescission by the Legislature, or to such modification as the Legislature may make, during the session in which they are so laid, or the session immediately following.
- (4) Any rescission or modification so made by the State Legislature shall be published in the Official Gazette

and shall thereupon take effect."

13.5 Lastly, Section 58 of the Act reads as under:-

"58. Power to remove doubts and difficulties:-

If any doubt or difficulty arise in giving effect to the provisions of this Act the State Government may, by order, make provisions or give such direction not inconsistent with the express provisions of this Act as may appear to it to be necessary or expedient for the removal of doubt or difficulty, and the order of the State Government, in such cases shall be final."

14. In view of the aforesaid provisions to this Court, it appears that the GIDC though constitute under the Act would be under the State Government and would be governed by the policies of the State Government. Hence, even on the issue of recruitment the policy of the State Government would prevail.

15. Over and above this, over the period of time the GIDC has been following the policy of the State Government in so far as recruitment is concerned which includes recruitment prior to the present one in 2013 and subsequently thereto. Therefore, the stand taken by the GIDC also presume some credibility. The stand taken by GIDC before this Court on affidavit is that government had already introduced the scheme by way of Government of Gujarat, Finance Department Resolution dated

16.02.2006 and a policy has been published to the effect that the recruitment of all the services/employment in the State of Gujarat be made with a fixed pay for five years to control the non-planned expenditure of the State Government and after consultation and consideration by the committee of Secretaries, the decision was taken and other detailed reasons are also given in the said resolution. It provides for an appointment on a fixed pay on probation for a period of five years. It does provide that appointment/recruitment under the scheme shall be made under the provisions of the Recruitment Rules of the relevant cadre and question of giving any relaxation in the qualification or any other thing does not arise. It does indicate that persons appointed under the scheme shall be for a period of five years with monthly lump-sum pay without any exception. Para-6 of this resolution provides that these instructions of the State Government shall apply to Board, Corporation, Grant-in-aid institutions also and this recruitment scheme will also apply to them and Boards and Corporations are required to obtain the consent of the Finance Department for filling u the vacant posts out of the sanctioned posts of Class-III and IV. Therefore, the GIDC in para-19 of this affidavit has stated as under:-

“19. It is further submitted that GIDC is constituted and established under the provisions of Gujarat Industrial Development Act, 1962 and Section 47 of the Act

provides for taking action in case of default in performance of the duty and it further provides that in case it is found by the State Government that the Corporation has failed or neglected to perform the duty or obligations then in that case it provides that it is lawful for the State Government to order for supercession of the Corporation and thereafter reconstitution of the Corporation. In light of this, there is no option but it is clear beyond the shadow of doubt that the government had laid down the policy of fixed pay and five years probation which the respondent GIDC is bound to follow. But, through oversight of the establishment department as well as by the GIDC as a whole, the advertisement was published stating therein the terms and conditions of the appointment as well as the grade applicable and it is further mistake that after the two years probation instead of five years no further orders are issued, not only that but, the Corporation being bound by the government policies and therefore, advertisement which was issued under the mistake is now sought to be corrected. The appointments are also given accordingly but giving of regular scale and appointment for two years as probationers is quite contrary and paradoxical to the State's policy. Under these circumstances, the mistake which has happened and non compliance of the government policy which goes to the root and therefore, the present order is passed. I submitted that no one can take a benefit of the mistake or statutory instructions and here the government policy is very clear and the corporation which is a part of or unit of the government is bound to

follow the same but because of the reasons aforesaid, its non compliance is fatal to the Corporation and therefore, the order impugned is passed. It is submitted that when the employer committed any mistake, it has a right to correct the same and benefit of estoppels by an employer cannot be taken nor estoppels is applicable to the State or the policy of the State and the appointment on a vacant post sanctioned for a period of five years with a fixed salary is a policy matter and GIDC has no right to override or eo disobey the policy of the Government. Under these circumstances, moment it was brought to the notice about the mistake being committed in giving appointments to the employees concerned, orders are passed, which is consequential to the government policy and therefore, neither estoppels is applicable nor any principle of hearing is applicable. Under the circumstances, the petitions are required to be rejected.”

16. In view of the aforesaid, the argument of the petitioner regarding the Regulation prescribing the pay scale and that same pay scale were reflected in the advertisement and if any change is to be made regarding the regulations as pay-scale will have to be placed before the Legislative Assembly in view of Section 54 of the GIDC Act cannot be accepted as in the opinion of the Court, there is no modification of any regulation in the facts of this case nor there is an change in the pay-scale against the respective posts as to require invoking of Section 54. the stand of the GIDC and the State is only to the extent of bringing the recruitment process in

confirmatory with the State policy.

17. At this stage, relevant Clause-6 of the policy of the State Government under the Government Resolution dated 16.02.2006 is reproduced as under:-

“6. As the Economy Instructions of the State Government apply to the Board/Corporation/Grant-in-Aid Institution also, this Recruitment Scheme will also apply to them. However, the Board/Corporation as well as the Grant-in-Aid Institution shall have to obtain the content of the Finance Department though the Administration Department before filling the vacant posts out of the sanctioned posts of class-3 and class-4.”

17.1 The aforesaid Government Resolution wholly applies to all Boards/Corporation/University and public enterprise, which included the GIDC.

18. In view of the aforesaid reasoning, the Court does not find any illegality in the stand taken by the State Government that the appointment made on a pay scale is against the policy of the State Government for making recruitment for 5 years on a fixed pay. Therefore, it was open for the State and the GIDC to rectify the mistake.

19. One more aspect which would indicate that mistake is

the proposal by GIDC to the State Government-Finance Department for its approval for recruitment. The State, pursuant to the order of the Division Bench in LPA has filed an affidavit with additional documents which pertain to recruitment process. A perusal of these documents clearly indicates that practice and process so adopted by GIDC in seeking prior approval to any appointment, either by direct recruitment or by promotions. In case of the present recruitment also, such procedure was adopted. The proposal and file nothings are also produced on record (see pages 394 and 395). These notings are made in hierarchy by the department concerned for approval of the Finance Department for recruitment in vacant posts which had fallen vacant over the period of time out of the total sanctioned posts.

20. The vacant posts were 172 which were in Class-III to be filled in the present recruitment. Ultimately, the concerned Department - Industries and Mining Department in its communication dated 20.03.2013 (page No.406) conveyed the approval for recruitment to 172 vacant Class-III posts to the GIDC, on the basis of which, the recruitment took place. A close perusal of this communication will reveal that 172 Class-III posts include Additional Assistant Engineer, Assistant Draftsman Work Assistant, Clerk-cum-Typist, Assistant Junior Officer, but did not contain post of Driver, though the original proposal covered posts of Driver also.

Now, the instruction contained in the aforesaid communication that the recruitment in Class-III and Class-IV will be as per the current Rules of the State Government and as per the instructions of the Finance Department. However, in the last sentence of this communication, a word 'Driver' has appeared after word "Class-3". In the opinion of this Court, there is no reference to 'Driver' as a post in this communication as it referred to only the vacant posts for which approval is given. Moreover, this is not separate cadre of Class-III-Driver, where reference would be relevant for the purpose of this proposal and communication.

21. The Court therefore has no hesitation in holding that the word 'Driver' in the communication is a 'Typo'. Now, the recruitment procedure has proceeded on the footing that the Government Rules for recruitment and GR of the Finance Department would apply only to the recruitment of Class-III-Driver cadre and not applicable to the recruitment of other Class-III posts. Such recruitment process, in the opinion of the Court, is built up on a erroneous foundation. Hence also, the recruitment in question ought to have been in consonance with the State policy for recruitment initially for period of five years on a fixed pay.

22. This brings to the Court to the next question as to whether the impugned communication withstands the requirement of law insofar as it affects the individual petitioner. The principle

of *audi alteram partem* is well recognized in the administrative law and following the principle of natural justice is now recognized as an essential requirement in service jurisprudence.

23. At this stage, it is appropriate to refer to the judgment of the Apex Court in case of **Balco Captive Power Plant Mazdoor Sangh & Anr. Vs. National Thermal Power Corporation & Ors.**, reported in **(2007) 14 SCC, 234**. In this judgment, the issue was with regard to transfer of employer from one establishment to another on account of subsequent development, it was treated to be the change in service condition. Therefore, relying upon two previous decisions, the Apex Court in para-35 held as under:-

“35. The Government or its instrumentality cannot alter the conditions of service of its employees and any such alteration causing prejudice cannot be effected without affording opportunity of pre-decisional hearing and the same would amount to arbitrary and violative of Article 14. As pointed out earlier, in the case on hand, the employees are neither party to tripartite agreement nor they have been heard before changing their service condition. Therefore, the action of the management is violative of Article 14 of the Constitution of India. Similar view has been taken by this Court in H.L. Trehan V/s. Union of India (1989) 1 SCC 764 : 1989 SCC (L&S) 246 : (1989) 9 ATC 650 . In para 11 of the judgment, this Court observed as under: (SCC pp. 769-70)

"11. ... It is now a well-established principle of law that there can be no deprivation or curtailment of any existing right, advantage or benefit enjoyed by a government servant without complying with the rules of natural justice by giving the government servant concerned an opportunity of being heard. Any arbitrary or whimsical exercise of power prejudicially affecting the existing conditions of service of a government servant will offend against the provision of Article 14 of the Constitution. Admittedly, the employees of CORIL were not given an opportunity of hearing or representing their case before the impugned circular was issued by the Board of Directors. The impugned circular cannot, therefore, be sustained as it offends against the rules of natural justice."

24. In **judgment and order of this Court dated 26.02.2016 in SCA No.10826 of 2003** in case of ***Mukeshkumar Jaswantbhai Patel Vs. State of Gujarat*** the facts were that the petitioner was appointed as Assistant Teacher after following due procedure including grant of sanction to appointment. The stand of the Government was somewhat similar to the stand here that the appointment as per the policy has to be made as "Sikhan Sahayak" on fixed pay scale. This contention was negated by Single Judge on facts. The decision of Single Judge was approved by the Division Bench in Letters Patent Appeal (Stamp) No.2536 of 2017, where, in Civil Application for delay, the merits were also discussed

as under:-

"3.0. Even to satisfy ourselves *prima facie* whether there is any merit in the appeal. We have heard learned Assistant Government Pleader on merits also. We have considered the impugned judgment and order passed by the learned Single Judge. It is required to be noted that the original petitioner was as such appointed as Assistant Teacher in the year 2002 and after petitioner joined the services as Assistant teacher he started getting salary in the pay scale of Rs.5000-8000. However, thereafter vide order dated 11.03.2003 which was impugned before the learned Single Judge by altering condition of the services by converting the post of Assistant Teacher of the petitioner to Sikshan Sahayak and put the petitioner in the fixed monthly salary to be paid to the Sikshan Sahayak. It appears that it was the case on behalf of the department that as per the policy prevalent at the relevant time the appointment was required to be made on the basis of Sikshan Sahayak only. However, considering the fact that even NOC was issued by the appropriate authority for filling up post of Assistant Teacher and even the advertisement was also issued inviting application for the post of Assistant Teacher and even thereafter also, when after due selection, the original petitioner was appointed as an Assistant Teacher in the pay scale of Rs.5000-8000 his appointment was also approved by the appropriate authority and by impugned judgment and order, the learned Single

Judge has allowed the said petition and has quashed and set aside order converting the appointment of the petitioner from the post of Assistant Teacher to Sikshan Sahayak and has directed the respondents not to make any recovery from the petitioner and has held that the original petitioner is entitled to salary as an Assistant Teacher. It is required to be noted that even the order of recovery as well as converting the appointment of the petitioner from Assistant Teacher to Sikshan Sahayak was without even issuance of the notice to the petitioner and no opportunity of being heard was given to him. Considering the aforesaid facts and circumstances, it cannot be said that the learned Single Judge has committed any error in passing the impugned judgment and order. Under the circumstances, as such the appeal lacks merit.”

25. In the facts of the present case also, after the appointment of the petitioners to the post on a pay-scale, their appointment is sought to be converted into fixed pay which will be detrimental to the petitioners and will have civil consequences and therefore, it was incumbent upon the respondent-GIDC to adhere to the principle of natural justice. A perusal of the impugned order (Anneure-A) dated 22.12.2016 does not indicate that only show-cause notice was issued or an opportunity of hearing was given to the petitioners.

26. It is pertinent to observe from the record that the recruitment process, the appointment as per the advertisement was made by the GIDC and if now stand is taken by State and GIDC about a mistake in undertaking such recruitment process, then also such mistake lies at the door step of the respondents for which the petitioners cannot be held responsible at all.

27. Another aspect is on facts. Many of the petitioners were already on the Government service were posted against a pay-scale. Those petitioners relying upon the advertisement and recruitment/appointment had resigned from their respective previous services apparently believing that they are appointed against a pay-scale. The impugned action is detrimental to the interest of such petitioners and therefore, all they were required to be given an opportunity of hearing.

28. The last question which is required to be addressed is the recovery sought to be effected. The impugned order clearly directly effecting of recovery of the amount which is substantial from each of the petitioners. As discussed in preceding paras, such order, being in violation of principle of natural justice and without opportunity of hearing, is against the mandate of the Apex Court in the decision in case of ***State of Punjab & Ors. Vs. Rafiq Masih (White Washer)***, reported in **2015 (4) SCC 334**. Para-18 of this judgment declares the recovery from employee belonging to Class-

III as impermissible in law. It is not in dispute that petitioners are called class-III employees. The said para-18 reads as under:-

“18. 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.

29. Learned Government Pleader did attempt to salvage

the situation by relying on decision of the Apex Court in case ***Rajesh Pravincnahdra Rajyaguru Vs. Gujarat Water Supply & Sewerage Board & Ors.***, reported in **2021 SCC Online, SC , 1282**, referring particularly to paras-39 and 40 to submit that equation of posts and salary in a complex matter to be left to expert body and that in case of a mistake, the additional money paid can be recovered. Also effort was made that recovery can be in installments so as not to heavily burden the employees. However, in view of the clear mandate of Apex Court in case of Rafiq Masih (supra), the Court is unable to accept such proportion.

30. In view of the aforesaid reasonings, the petitions are partly allowed. The impugned order dated 22.12.2016 is set aside. However, in view of the observations made in this judgment, it is open for the respondents to take action in accordance with law and following principle of natural justice. Rule is made absolute to the aforesaid extent. No order as to costs.

Sd/-
(A.Y. KOGJE, J)

SHITOLE