A STATE OF U.P. & ANR.

v.

U.P. RAJYA KHANIJ VIKAS NIGAM S.S. & ORS.

(Civil Appeal No. 3202 of 2008)

MAY 2, 2008

B

[C.K. THAKKER AND D.K. JAIN, JJ.]

Constitution of India, 1950 – Article 226 – Decision of retrenchment of employees of Government concern – On C *account of loss occurring to the concern – Writ petition questioning the decision of retrenchment – Praying for absorption in other Government concerns in case of retrenchment –Several interim orders passed in the petition – Difference of opinion between the judges of Division Bench of* D *High Court – Reference to third judge – Final decision in favour of the workmen – Direction for their absorption on the basis of assurance given by the State and for payment of compensation – On appeal held: the writ petition was not maintainable in view of availability of alternative remedy – It cannot be laid down as legal proposition that once a petition* E *is admitted, it can never be dismissed on the ground of alternative remedy – Propriety of the action of the employer being a disputed question of fact could have been decided by a Labour Court alone on the basis of evidence adduced – The absorption was regulated by statutory rules – Hence* F *direction for absorption on assurance of State without considering the rules was not correct – There can be no estoppel against a statute – A court can direct a State by mandamus to act in consonance with law and not in violation thereof – The workers also failed to show having any right of* G *absorption – Order of High Court to pay compensation is also wrong as entitlement to compensation on account of violation of any law has not been shown – Moreover, the order was not even capable of implementation – Writs – Mandamus – Compensation – Estoppel – Labour Laws.*

H

The Board of Directors of U.P. State Mineral Development Corporation Ltd. (appellant) decided to retrench about 50% of its employees. Employees made representation to the appellant-Corporation as well as to the appellant-State making grievance that the action was illegal. They also prayed for their absorption in other departments of the State or other Public Sector Undertakings. However, no final order of retrenchment was passed. Since neither the Corporation nor the State gave any assurance, respondent-Samiti filed a writ petition. In the petition, by several interim orders, High Court had directed the Corporation and the State to pay salary to the workmen. Corporation contended that the petition was not maintainable as the same was premature because no action of retrenchment was taken and also alternative and efficacious remedy under U.P. Industrial Disputes Act was available to the employees; that decision of retrenchment of excess employees was taken in view of shrinkage of activities of the Corporation and because the Corporation was in acute financial crisis. The matter was placed before Division Bench for disposal of the matter. One of the Judges held that since alternative remedy was available to the workmen, writ petition was not maintainable. He held that the Corporation was 'totally sick' and dismissed the petition. Second judge held that the petition having been entertained and several interim orders having been passed, cannot be dismissed on the ground of availability of alternative remedy and on merits held in favour of the workmen and issued writ of mandamus. In view of difference of opinion, matter was referred to third judge, who concurred with opinion in favour of the employees and observing that the State Government had stated that employees would be absorbed, directed for their absorption. In the meantime review petition against the order was dismissed by the third judge, further directing the State to absorb the employees in phased manner. Thereafter State/

A Corporation moved application for placing the petition before Division Bench of High Court for final order in the writ petition. In the application, they also sought permission to place on record Rules regarding absorption and certain facts, which was denied by the Division Bench. B In appeal against that, Supreme Court directed the matter to be placed before Division Bench of High Court for final disposal. Accordingly when the matter was placed before Division Bench, it allowed the writ petition. Hence the present appeal.

C Allowing the appeal, the Court

HELD: 1.1 The High Court was wrong in holding that "the petition cannot be dismissed on the ground of alternative remedy if the same has been entertained and interim order has been passed". True it is that issuance D of rule nisi or passing of interim orders is a relevant consideration for not dismissing a petition if it appears to the High Court that the matter could be decided by a writ Court. But it cannot be laid down as a proposition of law that once a petition is admitted, it could never be dismissed E on the ground of alternative remedy. [Paras 35 and 38] [557-B, C, H; 558-A]

Suresh Chandra Tewari v. District Supply Officer, AIR 1992 All 331 – held inapplicable.

F *Methodist Church in India v. Bareilly Development Authority,* AIR 1988 All 151; *Whirlpool Corporation v. Registrar of Trademarks,* AIR 1999 SC 22 – referred to.

1.2 On the facts and in the circumstances of the case, particularly in view of assertions by the Corporation that G its work had been substantially reduced; it was running into losses; the question was considered by the Board of Directors and it was resolved to retrench certain employees, it would have been appropriate, had the High Court not entertained the writ petition under Article 226 of H the Constitution of India. [Para 39] [558-D, E]

Scooters India v. Vijai E. V. Eldre **1998 (6) SCC 549 – referred to.** A

1.3 Whether the action could or could not have been taken or whether the action of the Corporation was or was not in consonance with law could be decided on the basis of evidence to be adduced by the parties. *Normally,* when such disputed questions of fact come up for consideration and are required to be answered, appropriate forum would not be a writ court but a Labour Court or an Industrial Tribunal which has jurisdiction to go into the controversy. On the basis of evidence led by the parties, the Court/Tribunal would record a finding of fact and reach an appropriate conclusion. Even on that ground, therefore, the High Court was not justified in allowing the petition and in granting relief. [Para 41] [558-G; 559-A, B] B C D

1.4 The pleas on behalf of the employees that the Corporation was not right when it stated that there was no work and several projects came to be closed; that many employees were absorbed by the Corporation and there was an element of 'pick and choose' which was arbitrary, discriminatory, unreasonable and violative of Articles 14, 19 and 21 of the Constitution; and that according to the Samiti, loss caused to the Corporation, it was the result of wrong and improper decisions of the Corporation and the State Government and poor employees should not suffer on that count, it could be examined by an appropriate Court/Tribunal under the Industrial Law and not by a writ Court exercising power of judicial review under Article 226 of the Constitution. If the impugned action of the Corporation retrenching several employees is not in consonance with law, the employees are certainly entitled to relief from an appropriate authority. If any action is taken which is arbitrary, unreasonable or otherwise not in consonance with the provisions of law, such authority or Court/ Tribunal is bound to consider it and legal and legitimate E F G H

A relief can always be granted keeping in view the evidence before it and considering statutory provisions in vogue. [Paras 49 and 50] [562-A-E]

2.1 The High Court was not right in rejecting prayer of the Corporation to bring on record statutory rules B framed under the Proviso to Article 309 of the Constitution of India. If there were statutory rules and such rules provide for absorption of employees on certain grounds and on fulfillment of some conditions laid down in those rules, it was the duty of the High Court to consider those C rules and to decide whether under the statutory rules, such absorption could be ordered. [Para 42] [559-C-E]

2.2 A Court of Law can direct the Government or an instrumentality of State by mandamus to act in consonance with law and not in violation of statutory D provisions. Unless a Court records a finding that act of absorption of all employees of the Corporation either in Government Department or in any other Public Sector Undertaking is in accordance with law, no writ can be issued. [Para 46] [561-A, B]

E

2.3 Since the High Court was considering the prayer of the petitioners to grant a writ in the nature of mandamus, it was, expected of the High Court to keep in view the relevant provisions of law. The High Court mainly relied upon an assurance said to have been given by the F Secretary on behalf of the Corporation that excess employees would be absorbed either in the Government Department or in other Public Sector Undertakings. From the record it appears that it was the case of the Secretary of the Corporation that no such assurance was given by G him to the Court. But even if he had given such assurance, it was of no consequence since in the teeth of statutory rules, such assurance had no legal efficacy. Moreover, an application was made on affidavit by the Secretary of the Corporation clarifying the position and praying for H modification of the earlier order passed by the High Court

in which such statement on behalf of the Corporation appeared. The High Court, however, rejected even that application. Even on that ground, the High Court ought not to have issued final directions. [Para 43] [559-E-H; 560-A, B]

2.4 It is settled law that there can be no estoppel against a statute. If the field was occupied by statutory rules, the employees could get their rights only under those rules. The High Court was equally bound to consider those rules and to come to the conclusion whether under the statutory rules, the retrenched employees were entitled to absorption either in Government Department or in any other Public Sector Undertaking. Statement, assurance or even undertaking of any officer or a counsel of the respondent-Corporation or of the Government Pleader of the State is irrelevant. The High Court, ought to have considered the prayer of the Corporation and decided the question if it wanted to dispose of the matter on merits inspite of availability of alternative remedy to the employees.[Para 44] [560-B, C, D]

3. It was incumbent on the employees to show the right of absorption of retrenched employees in Government Department or other Public Sector Undertakings. The petitioners had prayed for a writ of mandamus which presupposes a legal right in favour of the applicant. Such right must be a subsisting right and enforceable in a Court of Law. There must be corresponding legal duty on the part of the respondent-Corporation or Government which required the Corporation or Government 'to do that which a statute required it to do'. No such right of absorption has been shown by the petitioners. Nor any such corresponding duty of the respondents could be shown to the High Court by the employees. No such direction of absorption of all employees, hence, could be issued by the High Court.

A **The High Court failed to appreciate all these relevant considerations. [Para 45] [560-E-H; 561-A]**

4.1 Regarding payment of compensation to the employees also, the High Court was not right. No finding has been recorded by the High Court that a specific or B **particular provision of law had been violated which entitled the workers to claim compensation. No reasons had been recorded by the High Court in the impugned judgment for issuing such direction nor any basis for such direction has been shown. Therefore, no such blanket** C **direction could have been issued by the High Court which was not even capable of implementation. [Para 47] [561-C-F]**

4.2 It is worth consideration whether an order passed D **or direction issued is susceptible of implementation and enforcement, and if it is not implemented whether appropriate proceedings including proceedings for willful disobedience of the order of the Court can be initiated against the opposite party. The direction issued by the High Court falls short of this test and on that ground also,** E **the order is vulnerable. [Para 48] [561-F, G]**

5. Though the writ petition filed by the petitioners stands dismissed, it is open to the employees to approach an appropriate Court/Tribunal in accordance with law and F **to raise all contentions available to them. It is equally open to the Corporation and the State authorities, to defend and support the action taken by them. [Para 52] [562-H; 563-A]**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3202 of 2008.

G

From the Judgment and Order dated 14.7.2006 of the High Court of Judicature at Allahabad, Lucknow Bench, Lucknow in W.P. No. 338 (S/B) of 1997.

Dr. R.G. Padia, Mohd. Furzail Khan and Anuvrat Sharma H for the Appellants.

L. Nageswar Rao, Vikrant Yadav, Amit Kumar Chawla, Sanjay R. Hegde and Pradeep Misra for the Respondents. A

The Judgment of the Court was delivered by

C.K. THAKKER, J. 1. Leave granted.

2. The present appeal is directed against the judgment and final order dated July 14, 2006 passed by the High Court of judicature at Allahabad, (Lucknow Bench) in Writ Petition No. 338 (S/B) of 1997. By the said order, the writ petition filed by Uttar Pradesh Rajya Khanij Vikas Nigam Sangharsh Samiti ('Samiti' for short) and Others against the U.P. State Mineral Development Corporation Ltd. and the State of U.P. was allowed and a writ of mandamus was issued to the respondents to absorb the employees of the Corporation in various organizations of State Government/ Public Sector Undertakings and to pay compensation in accordance with law. B C D

3. The case has a chequered history and it is necessary to highlight it to understand the controversy raised in the present proceedings.

4. On March 23, 1974, U.P. State Mineral Development Corporation Ltd. ('Corporation' for short) was incorporated as a Government Company under Section 617 of the Companies Act, 1956. The Corporation was established with a view to provide acceleration in the field of mining and other incidental activities. Initially, the Corporation was floated with authorized share capital of Rs.20 crores which was subsequently increased to Rs.60 crores. It was a Government Company wherein 100% paid up share capital was by the State. It was thus completely owned by the Government. It was under the direct control and supervision of the State Government. The Corporation was thus an 'instrumentality' of the State. In the beginning, the Corporation showed profits. Subsequently, however, the financial status was deteriorated and it started incurring losses. The Board of Directors, therefore, on December 19, 1996 decided to retrench 460 employees. The Board was required to pay retrenchment E F G H

A compensation to those employees. Accordingly, a request was made to the State Government to advance loan of Rs.5 crores to enable the Corporation to pay retrenchment compensation to the employees. A resolution to that effect was also passed by the Board of Directors. In the resolution, reasons were indicated
B which impelled the Corporation to take a decision to retrench more than 50% of its staff. There were 838 employees out of which 744 were regular employees and 94 were on consolidated salary.

5. Feeling aggrieved by the decision of the Board of
C Directors, employees preferred a representation to the Chairman-cum-Managing Director of the Corporation and also to the State Government. In the representation, grievance was made by them that the proposed action was illegal and they should not be retrenched. It was indicated that financial position
D of the Corporation could be improved. A prayer was also made to absorb employees of the Corporation in other Departments of the State or other Public Sector Undertakings if they were to be relieved. No final order of retrenchment was, however, passed. Since neither the Corporation nor the Government gave
E assurance with regard to continuation or otherwise of the Corporation, nor as to absorption of employees working in the Corporation in the State Government or any other Corporation, the Samiti was constrained to file a writ petition in the High Court of Judicature at Allahabad, (Lucknow Bench) in 1997 for the
F following reliefs;

Whereas, it is most respectfully prayed that this Hon'ble Court may kindly be pleased to-

(i) To issue a writ, order or direction in the nature of
G mandamus directing the respondent to absorb the services of the employees of the Corporation on suitable posts in any of the Corporation under its control in any of its department;

(ii) To issue a writ, order or direction in the nature of
H mandamus commanding the State of U.P. to prepare

a list of retrenched employees of the various Corporations and absorb them in accordance with length of their services;

In the alternative, issue a writ, order or direction in the nature of mandamus commanding the State of U.P. and the Corporation to pay compensation at the rate admissible under the provision of the Industrial Disputes Act, 1947 and additional wages at the rate of six years salary to the member of the petitioner-Association who are sought to be retrenched;

(iii) To issue a writ, order or any direction which the Hon'ble Court may deem just and proper in the circumstances of the case; and

(iv) To allow the writ petition with all costs in favour of the petitioner.

6. It was the allegation of the Samiti in the writ petition that loss has been sustained by the Corporation because of various wrong policy decisions taken by the U.P. Government and the Corporation. Several employees of the Corporation were not paid their salary and they were facing great hardship. Their family members had also suffered a lot and they were on the verge of starvation.

7. A counter-affidavit was filed on behalf of the Corporation through its Managing Director. By way of preliminary objections, it was contended that the petition was premature inasmuch as no action of retrenchment was taken by the Corporation. Moreover, alternative and efficacious remedy under the U.P. Industrial Disputes Act was available to the petitioners. On merits, it was contended that in view of shrinkage in the activities of the Corporation and also increase of wage bill because of huge surplus manpower, the Board of Directors of the Corporation took a decision on December 19, 1996 to retrench excess employees in accordance with law. According to the deponent, the Corporation was in acute financial crisis and totally

A dependant on grant-in-aid from the U.P. Government. The Corporation had closed down its mining activities in Lambidhar Mines at Mussorie as per the direction issued by the Supreme Court (this Court). Even at other places, it had to face competition from private sector. Because of drastic change in global B industrialization and liberalized economic policy introduced by the Government, non-resident Indians (NRIs) were attracted and several industrial entrepreneurs in the State entered into the business of mining. Various projects had been developed in joint sector as well as in private sector which had also adversely C affected the Corporation. The Corporation was not able to pay salary to its employees in its various Units at Dehradun, Chopan, Allahabad, Lalitpur etc. It was stated that an Undertaking cannot be forced to run its business on continuous loss and be directed to carry on huge surplus manpower and work force without work. D It was, therefore, submitted that the writ petition filed by the Samiti was liable to be dismissed.

8. It is clear from the record that several interim orders were passed by the High Court from time to time and the Corporation was directed to pay salary to the employees. The E matter was then placed for hearing which came up before a Division Bench of the High Court. The Bench consisted of two Hon'ble Judges, *viz*. Hon'ble Mr. Justice M. Katju (as His Lordship then was) and Hon'ble Mr. Justice U.K. Dhaon. Hon'ble Mr. Justice Katju, vide an order dated December 17, 1999 held F that the petitioners should have availed of alternative remedy available under the Industrial Law and should not have straightaway filed a writ petition in the High Court under Article 226 of the Constitution. According to His Lordship, if an industry was closed down, a remedy available to the workers was to G apply for closure compensation under Section 25 FFF of the Industrial Disputes Act, 1947 (hereinafter referred to as 'the Act') before the Labour Court/Tribunal. If it was not closed down, their remedy was to apply to the prescribed authority under the Payment of Wages Act or to a Labour Court/Tribunal under Section 33C(2) of the Act or under Section 6H(2) of the U.P. H

Industrial Disputes Act. But, it was not proper for the High Court to entertain such prayer in a writ jurisdiction under Article 226 of the Constitution. It was also observed that in spite of the fact that virtually the Corporation had stopped its activities and the business had come to an end, by several interim orders passed from time to time, the High Court directed the Corporation and the State to pay salary to the workmen though they had not worked. By such interim orders, crores of rupees had been paid to the workmen. Highlighting the difficulties of the Government and Public Sector Undertakings in commercial establishments, His Lordship made larger and wider observations as to the policy of the Government in commercial matters. His Lordship recommended the Central and State Governments to rapidly privatize most of the public sectors and services like banks, telephone, electricity, water works, municipal services, etc. We, however, express no opinion on that issue.

9. As regards, the appellant-Corporation, His Lordship said that it was a 'totally sick' unit. On the prayers of the Samiti, it was observed that the workers had been treated over-indulgently. Most of them had been without work and were surplus and crores of rupees had been paid to them for doing nothing. The money had come from public purse and it was unfair to grant relief in such a petition. Accordingly, the petition was ordered to be dismissed.

10. The other Judge (Hon'ble Mr. Justice U.K. Dhaon), however, did not concur with the view expressed by Hon'ble Mr. Justice Katju. According to His Lordship, the petitioners approached the Court by invoking Article 226 of the Constitution on April 10, 1997. Notice was issued by the Court on the petition on the next day *i.e.* on April 11, 1997 and several interim orders were passed thereafter from time to time. It would not be proper to dismiss the petition on the ground of availability of alternative remedy after the writ-petition was entertained, observed Hon'ble Mr. Justice Dhaon. His Lordship stated that the Corporation had considered the problem and in the counter-affidavit, it was said that attempts had been made to absorb employees of the

A Corporation either in the Government or in other Public Sector Undertakings. It was further observed that several interim orders which were passed by the Court came to be challenged by the Corporation in this Court and this Court also did not interfere with those orders. It was, therefore, not a fit case to dismiss the
B petition.

11. Moreover, as held by the High Court of Allahabad in *Suresh Chandra Tewari v. District Supply Officer,* AIR 1992 All 331, a petition cannot be dismissed on the ground of alternative remedy if the same had been entertained and interim order had
C been passed. Relying on another decision of the same Court in *Methodist Church in India v. Bareilly Development Authority,* AIR 1988 All 151, it was indicated that alternative remedy does not oust the jurisdiction of the High Court to grant relief under Article 226 of the Constitution and in spite of availability of such
D remedy, it is open to a High Court to grant relief if it is found necessary for promotion of justice or prevention of injustice which is the object of constitutional provision. Reliance was also placed on a decision of this Court in *Whirlpool Corporation v. Registrar of Trademarks,* AIR 1999 SC 22 that alternative
E remedy is no bar in case of infringement of fundamental rights enshrined in Part III of the Constitution.

12. Hon'ble Mr. Justice Dhaon then considered the merits of the case and possible absorption of employees of the Corporation in Government Departments or Public Sector
F Undertakings. Various meetings were held for the said purpose and assurance was given to the Court by the Corporation as also on behalf of the Government. His Lordship, in the circumstances was of the view that the writ petition was required to be allowed. The petition was accordingly allowed and a writ
G in the nature of mandamus was issued directing the respondents to pay salary to the employees within four months from the date of the order and also to take necessary steps for their absorption in various organizations of the State Government/Public Sector Undertakings expeditiously. Liberty, however, was granted to
H the respondents to take appropriate steps for the retrenchment

of the employees keeping in view the resolution passed by the Corporation.

13. In view of difference of opinion between two Hon'ble Judges of the Division Bench, an order was passed on the same day, signed by both the Hon'ble Judges to place the papers before the Hon'ble Chief Justice for constituting an appropriate Bench.

14. It appears that in view of cleavage of opinion, the matter was placed before a third Judge (Hon'ble Mr. Justice S.H.A. Raza), who after hearing the parties and considering opinions of two judges, held that he was in agreement with the view expressed by Hon'ble Mr. Justice Dhaon. His Lordship, however, observed that the State Government had stated that the employees of the Corporation would be absorbed and as such nothing remained to be decided except that the State Government should expedite their absorption in the State service or Public Sector Undertakings on suitable post within a period of three months from the date of receipt of a certified copy of the order.

15. His Lordship then stated;

"List the petition before the Division Bench for appropriate orders".

16. The above order was passed on January 5, 2001.

17. In view of the above direction, it was incumbent on the Registry to place the matter before a Division Bench. It was, however, not done.

18. Meanwhile, a Review Petition No. 70 s/s of 2001 was filed by the State Government highlighting difficulties in the process of absorption. It was, therefore, prayed to review the order, dated January 5, 2001.

19. When the review was placed before Hon'ble Mr. Justice Raza, it was dismissed by the Court observing that the learned Additional Chief Standing Counsel pressed only one point in

A the review petition that the direction of the Court to absorb employees of the Corporation be extended so that the majority judgment of the Court could be implemented by the State Government. The request was accepted and the State Government was directed to absorb employees in a phased
B manner within a period of six months.

20. The Court then stated;

"As the State Government itself has derived a policy of absorption, the matter need not put up before the Division
C Bench".

21. Review petition was thus disposed of on July 13, 2001. In view of the above observations, the matter was not placed before a Division Bench and no order was passed by the Bench. Contempt proceedings were also initiated by the employees
D that the orders passed by the Court were not obeyed and not implemented.

22. On March 19, 2005, the appellants moved an application before the Senior Judge of the High Court (Lucknow Bench) for listing the writ petition before an appropriate Bench
E for final disposal; since there was no final decision on the writ petition except opinions of three Hon'ble Judges. The application moved by the Corporation was registered as Civil Miscellaneous Application No. 12153 of 2005. The Senior Judge of the Lucknow Bench passed the following order on March 30, 2005;
F

"List before a Division Bench in which Hon'ble U.K. Dhaon is a member in next week."

23. The matter was then placed before a Division Bench (Coram : U.K. Dhaon & J.M. Paliwal, JJ.) The Corporation on
G May 9, 2005, filed supplementary counter-affidavit placing on record *inter alia* the following facts and materials;

(i) Absorption Rules, 1991;

(ii) Policy of the State Government regarding absorption
H of employees, dated July 10, 2000;

(iii) Application for modification of undertaking of Harminder Raj Singh recorded in the order dated August 4, 1999; A

(iv) Absorption Rules, 2003.

24. On July 19, 2005, the Division Bench of the High Court, instead of deciding the writ petition decided the application, dated March 10, 2005 (which was for listing of the matter before a Division Bench). It was observed that the matter was heard and finally decided by the Hon'ble Third Judge in accordance with Rule 3 of Chapter VIII of the Allahabad High Court Rules, 1952 and, hence, no further order was required to be passed. The application was, therefore, rejected. B C

25. The High Court was obviously in error in passing the above order. The State and the Corporation, therefore, filed Special Leave Petition in this Court which was registered as Civil Appeal No. 5473 of 2005. It was contended before this Court that after difference of opinion between two Hon'ble Judges, the matter was placed before a third Judge who decided it and directed to place it before a Division Bench which ought to have been done and the case ought to have been placed before a Division Bench. Even if Review was rejected against the order passed by the third Judge, proper procedure was required to be followed which was not done. The Senior Judge (Lucknow Bench) also ordered to place the matter before a Division Bench. The order passed by the Single Judge, therefore, could not be said to be legal and lawful. D E F

26. This Court referred to the relevant rules and upheld the contention of the State and observed that the matter ought to have been placed before a Division Bench. On September 2, 2005, a two Judge Bench of this Court to which one of us (C.K. Thakker, J.) was a party, *inter alia,* passed the following order: G

> "In the aforesaid circumstances, we set aside the impugned judgment and direct that Writ Petition No. 338 (S/B) of 1997 shall be listed before appropriate Bench for H

A orders in accordance with law, considering the orders passed by two learned Single Judges on 17th December, 1999 disagreeing with each other and also the opinion of the learned third Judge in the matter, dated 5th January, 2001. The Division Bench will decide the matter B expeditiously, without being influenced by any observations made by this Court and in accordance with law, preferably within a period of three months."

27. In the light of the direction issued by this Court, the matter was remitted to the High Court and was placed before a C Division Bench. The Division Bench of the High Court allowed the writ petition filed by the petitioners and issued the following direction;

"On a thoughtful consideration of the matter, we are also of the view that when the matter was referred to Hon'ble D Third Judge and he recorded his opinion and issued a specific direction to the office that the matter be placed before the Division Bench of appropriate orders, it was duty of the office to have placed the matter before the Division Bench for suitable orders. ***The application dated 09/13.05.2005 moved by the State of U.P. for taking on record the supplementary counter-affidavit pointing out difficulties in absorption of the employees of the corporation, is not maintainable.*** E No additional material at this stage, can be entertained in F this petition. The application is, therefore, rejected. The writ petition is finally disposed of in the following terms;

The writ petition is allowed and ***a writ of mandamus is issued directing the opposite parties to absorb the employees of the petitioners-association within four months from today in various organizations of the State Government/Public Sectors and to pay compensation, in accordance with law.*** G However, it will be open for the opposite parties to take necessary steps for the retrenchment of the employees of the petitioners- H

association keeping in view the resolution dated 19.12.1996 of the Board of Directors of the Corporation. Parties shall bear their own costs." A

(emphasis supplied)

28. It is this order which is challenged by the appellants in the present appeal. B

29. Notice was issued on December 11, 2006. The respondents appeared, accepted the notice and prayed time to file counter affidavit. Meanwhile, operation of the judgment was stayed. The Registry was thereafter asked to place the matter for final hearing on a non-miscellaneous day and that is how the matter has come up before us. C

30. We have heard learned counsel for the parties.

31. The learned counsel for the appellants contended that the High Court was wholly wrong in entertaining a petition under Article 226 of the Constitution and in not relegating the writ petitioners to avail of alternative remedy available under the Industrial Law. It was also submitted that disputed questions of fact were involved in the petition which could not be appropriately dealt with and decided in exercise of extraordinary jurisdiction by a writ court and on that ground also the Court ought to have directed the writ petitioners to approach an appropriate forum. Moreover, no action of retrenchment of employees had been taken and, as such, the writ petition was premature and not maintainable. D E F

32. On merits, it was submitted that it is settled law that creation, continuation and abolition of post is a 'sovereign function' and such a decision cannot be interfered with by a court of law in exercise of power of judicial review on limited parameters unless it is contrary to law, inconsistent with the provisions of the Constitution or mala fide. It has been clearly stated in the affidavit in reply by the Corporation that the activities of the Corporation were virtually stopped and 'no-work' resulted in taking a decision to close down the Corporation. It was urged G H

A that apart from earning profits, the Corporation had incurred huge losses. There were financial problems and economic difficulties. There was excess of manpower and hence a policy decision was taken to retrench surplus employees. Such a decision cannot be made subject matter of 'judicial review' when
B no provision of law had been violated. The counsel contended that even if there was violation of some provision of law and legitimate dues of employees were not paid or they were deprived of other benefits, such questions could have been agitated before an appropriate forum under appropriate law and
C not by a writ Court. So far as absorption of employees of the Corporation is concerned, an action can be taken by a Corporation which is an instrumentality of State within the meaning of Article 12 of the Constitution as also by the State of U.P. only in accordance with statutory rules framed by the State
D in exercise of power under proviso to Article 309 of the Constitution, *viz.* Uttar Pradesh Absorption of Retrenched Employees of Government or Public Corporations in Government Service Rules, 1991, as amended from time to time. A public authority cannot act inconsistent with or contrary to statutory rules. It was stated that no statement was made by
E any officer on behalf of the Corporation that the employees of the Corporation would be absorbed by the Government either in Government service or in any Public Sector Undertaking. But, even if some statement was made, it had no legal force and binding effect and cannot be enforced inasmuch as no statement
F could have been made which is not in consonance with law or against statutory rules. In the instant case, an application was also made by the Secretary of the Corporation stating therein that no assurance was given by him to the Court that the retrenched employees would be absorbed nor such assurance
G could be given by any one else. But the High Court, unfortunately, rejected the said application and proceeded to decide the matter on so-called assurance. According to the learned counsel, there can be no estoppel against a statute. If the relevant provisions of law do not entitle an employee after retrenchment to be
H absorbed in any other Department or Undertaking, no such right

can flow from a statement, assurance or even undertaking if it is not in consonance with law. It was submitted that the Court ought to have appreciated the fact that no employer can be compelled by a Court of Law to continue its business in losses and if the employer decides to close down its Undertaking, it has right to do so subject of course to law in force. If there is violation of any provision of law, appropriate authority can always pass an appropriate order but a writ Court cannot direct the employer to continue the employees in service, to pay salary to them nor it can order the State Government to absorb excess employees of such Corporation either in Government or any other Public Sector Undertaking. The counsel also made grievance against the direction to the Corporation to pay 'compensation'. On all these grounds, it was submitted that the appeal deserves to be allowed by setting aside the order passed by the High Court.

33. The learned counsel for the Samiti and the employees, on the other hand, supported the final order passed by the High Court. It was submitted that one of the Judges of the Division Bench was clearly in error in dismissing the petition on the ground of availability of alternative remedy. The other Judge was right in observing that an alternative remedy is not an 'absolute' bar to a writ remedy under Article 226 of the Constitution particularly when it relates to enforcement of fundamental rights guaranteed by Part III of the Constitution. Moreover, the writ petition had already been entertained, several orders were passed from time to time and as held in several decisions, once a petition is entertained, it cannot be dismissed on the ground of availability of alternative remedy and must be decided on merits. That was done by the other Judge and that part of the decision could not be said to be contrary to law.

34. On merits, it was submitted that the High Court was right in granting relief to the employees. The Corporation was established in 1974, employees were working since many years and keeping in view the facts and circumstances in their entirety, the High Court directed the State Government to absorb them

A in the Government Departments or other Public Sector Undertakings and such a decision cannot be said to be contrary to law. On behalf of the Corporation, an assurance was given that the employees would be absorbed. The Court was requested to grant time for the said purpose which has been B done. No fault can be found against such an action and the grievance raised by the Corporation is not well-founded. The Court, considering all the facts and circumstances, issued certain directions which are in consonance with law. It was also stated that several interim orders which were passed by the C Court from time to time were confirmed even by this Court. It was only because the matter was not placed before a Division Bench of the High Court and the earlier order was not complied with that this Court allowed the appeal filed by the State and remitted the matter to the High Court to be dealt with and decided D by a Division Bench. But once the Division Bench has decided the matter and passed an order, no interference is called for. It was also submitted that the Government has absorbed several employees by adopting 'pick and choose' method which shows that it wants to oblige 'fortunate few' without any legal basis or principle. It was further stated that it is not true that the E Corporation has closed its activities and mining work. It is working and several persons are still in service performing their functions and discharging their duties. For all these reasons, the appeal deserves to be dismissed.

F 35. We have given most anxious and thoughtful consideration to the rival contentions of the parties. So far as preliminary objection raised by the Corporation before the High Court is concerned, in our considered view, the same was well-founded and ought to have been upheld. It was urged before G the High Court on behalf of the Corporation and the State Government that the writ petition was premature inasmuch as no retrenchment had been effected. Several disputed questions of fact were involved in the petition. If the contention of the *Samiti* was that there was illegal closure of Undertaking or there was non-payment of wages by the employer, appropriate H

proceedings could have been initiated under Industrial Law. In fact, one of the Judges of the Division Bench upheld the contention and observed that the employees could have claimed closure compensation under Section 25 FFF of the Act or could have approached prescribed authority under the Payment of wages Act relying upon Section 33C(2) of the Act or Section 6H(2) of the U.P. Industrial Disputes Act. The other Single Judge of the Division Bench, however, held that the writ petition had been entertained and interim orders were also passed. Relying upon *Suresh Chandra Tewari,* the learned Judge held that "the petition ***cannot be dismissed*** on the ground of alternative remedy if the same has been entertained and interim order has been passed". (emphasis supplied).

36. With respect to the learned Judge, it is neither the legal position nor such a proposition has been laid down in *Suresh Chandra Tewari* that once a petition is admitted, it ***cannot*** be dismissed on the ground of alternative remedy. It is no doubt correct that in the 'head note' of All India Reporter (AIR), it is stated that "petition cannot be rejected on the ground of availability of alternative remedy of filing appeal". But it has not been so held in the actual decision of the Court.

37. The relevant paragraph 2 of the decision reads thus:

> "2. At the time of hearing of this petition a threshold question, as to its maintainability was raised on the ground that the impugned order was an appealable one and, therefore, before approaching this Court the petitioner should have approached the appellate authority. ***Though there is much substance in the above contention, we do not feel inclined to reject this petition on the ground of alternative remedy having regard to the fact that the petition has been entertained and an interim order passed".***
>
> (emphasis supplied)

38. Even otherwise, the learned Judge was not right in law. True it is that issuance of *rule nisi* or passing of interim

A orders is a relevant consideration for not dismissing a petition if it appears to the High Court that the matter could be decided by a writ-Court. It has been so held even by this Court in several cases that even if alternative remedy is available, it cannot be held that a writ-petition is not maintainable. In our judgment, B however, it cannot be laid down as a ***proposition of law*** that once a petition is admitted, it could ***never*** be dismissed on the ground of alternative remedy. If such bald contention is upheld, even this Court cannot order dismissal of a writ petition which ought not to have been entertained by the High Court under C Article 226 of the Constitution in view of availability of alternative and equally efficacious remedy to the aggrieved party, once the High Court has entertained a writ-petition *albeit* wrongly and granted the relief to the petitioner.

39. On the facts and in the circumstances of the case, D particularly in view of assertions by the Corporation that its work had been substantially reduced; it was running into losses; the question was considered by the Board of Directors and it was resolved to retrench certain employees, it would have been appropriate, had the High Court not entertained the writ petition E under Article 226 of the Constitution. [See also *Scooters India v. Vijai E. V. Eldred,* (1998) 6 SCC 549]

40. The matter, however, did not rest on averments and counter-averments. The record reveals that the Corporation was convinced that retrenchment of certain employees was F absolutely necessary. According to the Corporation, because of globalization and entry of private sector in the business and also because of various orders passed by this Court from time to time in Public Interest Litigation (PIL), the activities of the Corporation had been considerably curtailed. It was incurring G losses and was not able to pay salaries and wages to its employees. It was, therefore, decided to take recourse to retrenchment in accordance with law.

41. Now, whether such action could or could not have been taken or whether the action was or was not in consonance with H

law could be decided on the basis of evidence to be adduced by the parties. ***Normally,*** when such disputed questions of fact come up for consideration and are required to be answered, appropriate forum would not be a writ court but a Labour Court or an Industrial Tribunal which has jurisdiction to go into the controversy. On the basis of evidence led by the parties, the Court/Tribunal would record a finding of fact and reach an appropriate conclusion. Even on that ground, therefore, the High Court was not justified in allowing the petition and in granting relief.

42. There is yet one more reason. In the High Court, the Corporation filed an application stating therein that regarding absorption of employees, statutory rules had been framed by the State Government in exercise of power under the proviso to Article 309 of the Constitution. A prayer was, therefore, made to allow the application to bring statutory rules on record and to consider them. The Court, however, rejected the prayer. In our opinion, the High Court was not right in rejecting such prayer. If there were statutory rules and such rules provide for absorption of employees on certain grounds and on fulfillment of some conditions laid down in those rules, it was the duty of the High Court to consider those rules and to decide whether under the statutory rules, such absorption could be ordered.

43. After all, the High Court was considering the prayer of the petitioners to grant a writ in the nature of mandamus. It was, therefore, expected of the High Court to keep in view the relevant provisions of law. The High Court mainly relied upon an assurance said to have been given by the Secretary on behalf of the Corporation that excess employees would be absorbed either in the Government Department or in other Public Sector Undertakings. From the record it appears that it was the case of the Secretary of the Corporation that no such assurance was given by him to the Hon'ble Court. But even if he had given such assurance, it was of no consequence since in the teeth of statutory rules, such assurance had no legal efficacy. Moreover, an application was made on affidavit by the Secretary of the

A Corporation clarifying the position and praying for modification of the earlier order passed by the High Court in which such statement on behalf of the Corporation appeared. The High Court, however, rejected even that application. In our considered opinion, even on that ground, the High Court ought not to have
B issued final directions.

44. It is settled law that there can be no estoppel against a statute. If the field was occupied by statutory rules, the employees could get right only under those rules. The High Court was equally bound to consider those rules and to come to the conclusion
C whether under the statutory rules, the retrenched employees were entitled to absorption either in Government Department or in any other Public Sector Undertaking. Statement, assurance or even undertaking of any officer or a counsel of the respondent-Corporation or of the Government Pleader of the
D State is irrelevant. The High Court, in our view, ought to have considered the prayer of the Corporation and decided the question if it wanted to dispose of the matter on merits in spite of availability of alternative remedy to the employees.

45. Again, in our considered opinion, it was incumbent on
E the employees to show the right of absorption of retrenched employees in Government Department or other Public Sector Undertakings. The petitioners had prayed for a writ of mandamus which presupposes a legal right in favour of the applicant. Such right must be a subsisting right and enforceable in a Court of
F Law. There must be corresponding legal duty on the part of the respondent-Corporation or Government which required the Corporation or Government 'to do that which a statute required it to do'. No such right of absorption has been shown by the petitioners. Nor any such corresponding duty of the respondents
G could be shown to the High Court by the employees. As noted above, the case of the Corporation was that the retrenched employees could be absorbed only in accordance with statutory rules framed under proviso to Article 309 of the Constitution. No such direction of absorption of all employees, hence, could
H be issued by the High Court. The High Court failed to appreciate

all these relevant considerations. Even the application by which the Corporation sought to place on record statutory rules was rejected by the Court and a writ of mandamus was issued.

46. It is well settled that a Court of Law can direct the Government or an instrumentality of State by mandamus to act in consonance with law and not in violation of statutory provisions. Unless a Court records a finding that act of absorption of all employees of the Corporation either in Government Department or in any other Public Sector Undertaking is in accordance with law, no writ can be issued. Therefore, even on that ground, the directions of the High Court deserve to be set aside.

47. Regarding payment of compensation to the employees also, the High Court was not right. We have extracted the operative part of the order of the High Court in earlier part of the judgment. The High Court has stated that the appellants herein would absorb the employees of the Corporation and would "pay compensation in accordance with law". It was contended by the Corporation that there was no foundation in the entire writ petition as to the provisions of law under which such compensation could be claimed and violation of the law by the Corporation or by the State. No finding has been recorded by the High Court that a specific or particular provision of law had been violated which entitled the workers to claim compensation. No reasons had been recorded by the High Court in the impugned judgment for issuing such direction nor any basis for such direction has been shown. In our opinion, therefore, no such blanket direction could have been issued by the High Court which was not even capable of implementation.

48. To us, one of the considerations in such matters is whether an order passed or direction issued is susceptible of implementation and enforcement, and if it is not implemented whether appropriate proceedings including proceedings for willful disobedience of the order of the Court can be initiated against the opposite party. The direction issued by the High Court falls short of this test and on that ground also, the order is vulnerable.

A 49. It is contended on behalf of the employees that the Corporation was not right when it stated that there was no work and several projects came to be closed. It was also contended that many employees were absorbed by the Corporation and there was an element of 'pick and choose'. The said action was B arbitrary, discriminatory, unreasonable and violative of Articles 14, 19 and 21 of the Constitution. Regarding loss caused to the Corporation, according to the *Samiti*, it was the result of wrong and improper decisions of the Corporation and the State Government. Poor employees should not suffer on that count.

C 50. In our considered view, however, all such actions could be examined by an appropriate Court/Tribunal under the Industrial Law and not by a writ Court exercising power of judicial review under Article 226 of the Constitution. If the impugned action of the Corporation of retrenchment of several employees D is not in consonance with law, the employees are certainly entitled to relief from an appropriate authority. If any action is taken which is arbitrary, unreasonable or otherwise not in consonance with the provisions of law, such authority or Court/ Tribunal is bound to consider it and legal and legitimate relief E can always be granted keeping in view the evidence before it and considering statutory provisions in vogue. Unfortunately, the High Court did not consider all these aspects and issued a writ of mandamus which should not have been done. Hence, the order passed and directions issued by the High Court deserve F to be set aside.

51. For the foregoing reasons, the appeal deserves to be allowed and the order passed by the High Court is liable to be set aside and is accordingly set aside.

G 52. Since we are of the view that one of the Hon'ble Judges of the Division Bench of the High Court which decided the matter at the initial stage was right in relegating the petitioners to avail of alternative remedy under the Industrial Law and as we hold that the High Court should not have entertained the petition and decided the matter on merits, we clarify that though the writ H

petition filed by the petitioners stands dismissed, it is open to the employees to approach an appropriate Court/Tribunal in accordance with law and to raise all contentions available to them. It is equally open to the Corporation and the State authorities to defend and support the action taken by them. As and when such a course is adopted by the employees, the Court/ Tribunal will decide it strictly in accordance with law without being influenced by the fact that the writ petition filed by the writ petitioners is dismissed by this Court.

53. The appeal is allowed accordingly. Considering the facts and circumstances of the case, however, there shall be no order as to costs.

K.K.T. Appeal allowed.