

(2014) 05 AHC CK 0197

In the Allahabad High Court

Case No : Civil Misc. Writ Petition Nos. 40236 of 2012, 40244, 40433, 40381, 41542, 41702, 41883, 42554, 42559, 42526, 43465, 41289, 43704, 43783, 44446, 44649, 44651, 44767, 44653, 45037, 45627, 45601, 45634, 45638, 42301, 46465, 46734, 47248, 47687, 47879 of 2012

Asifuddin

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision : 26-05-2014

Acts Referred:

Constitution of India, 1950 — Article 12, 14, 16, 166, 21
Uttar Pradesh Municipalities Act, 1916 — Section 103, 120, 2, 34, 34(1)

Citation : (2014) 4 UPLBEC 2820

Hon'ble Judges : Surya Prakash Kesarwani, J

Bench : Single Bench

Advocate : Ashok Khare and Siddharth Khare, Advocate for the Appellant; J.B. Singh, Advocate for the Respondent

Judgement

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Surya Prakash Kesarwani, J.—Heard Sri Ashok Khare, learned senior Counsel assisted by Sri Siddharth Khare, Counsel for the petitioners and Sri Ashok Kumar Pandey, learned Additional Advocate General assisted by Sri J.N. Maurya, learned Additional Chief Standing Counsel for state respondents and Sri Jai Bahadur Singh for respondents No. 3 and 4. Other learned Counsels for the petitioners appearing in different writ petitions have adopted the arguments advanced by Sri Khare. Sri Naval Singh, learned Counsel appears for the petitioner in Writ Petition No. 42526 of 2012, Sri Ashok Kumar Pandey, learned Counsel appears for the petitioner in Writ Petitions No. 40433 of 2012, 45634 of 2012 and 45638 of 2012, Sri S.S. Srivastav, learned Counsel appears for petitioner in Writ Petition No. 20930 of 2013. Sri Rastrapati Khare appears for the petitioner in Writ Petition No. 61026 of 2012 and Sri Satya Prakash Mishra appears for petitioner in Writ Petition No. 47937 of 2012.

SUBMISSION ON BEHALF OF PETITIONERS

Sri Ashok Khare submits as under:

(i) All the local bodies in the State of U.P. are self-independent. Hence, unless power is specially conferred by the relevant statute, the impugned Government Order dated 23.7.2012 could not have been issued. Provisions of sub-section (1-B) and subsection 4 of Section 34 of the Municipalities Act, 1916 do not empower the State Government to issue a general Order dated 23.7.2012 to dispense with the services of the petitioners.

(ii) Section 34 is not applicable with respect to completed acts. Therefore, once the appointments of the petitioners on contractual basis were made several years ago, the same amounts to completed act. In the circumstances the impugned general order dated 23.7.2012 was wholly outside the purview of Section 34 of the Act.

(iii) Even if for arguments it is assumed that Section 34(1-B) of the Act has any application on the facts and circumstances of the case, it requires application of mind with respect to each individual or at least with respect to each local bodies, which has not been done in the present case.

(iv) The impugned general order, which is alleged by the respondents to be a Government Order does not comply with the mandatory requirement of Article 166 of the Constitution of India as it has not been issued in the name of the Governor and also it does not communicate the decision of the State Government. Reliance in this regard is placed on the Division bench judgment of this Court in the case of *Rajeev Sharma and others v. State of U.P. and others*, 1990 (1) UPLBEC 732 (paras 8 to 11).

(v) The impugned general order dated 23.7.2012 is vague and does not record any reason.

(vi) The classification made under the impugned order dated 23.7.2012 for exclusion of certain categories of employees of local bodies is not on the basis of appointment but on the basis of funding by the Central Government and orders of High Court. The contractual employees have not been excluded from the operation of the impugned Government Order because of alleged financial burden, which is not a valid classification and thus hit by Article 14 of the Constitution of India. Safai karmies, even though, appointed in the manner as petitioner were appointed, have been excluded from the operation of the impugned order while the petitioners have not been excluded which is discriminatory.

(vii) The petitioners of Writ Petition No. 40236 of 2012 were regularized by an order dated 25.10.2011 i.e. prior to the issuance of impugned Government Order dated 23.7.2012 and as such dispensing with their services under the impugned Government Order without affording opportunity is not only illegal but also violates principles of natural justice.

(viii) Some similarly situated persons have been permitted to continue and thus, the petitioners cannot be discriminated.

(ix) After termination of services of the petitioners, the respondents have taken services by outsourcing through contractors on higher payments. This shows the need of hands on one and on the other hand arbitrary approach of the respondents to oust the petitioners from service. Reliance is placed on the judgment of Hon"ble Supreme Court in the case of Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others, .

(x) The appointments of employees is the sole discretion of Chairman under Section 70 and 71 of the Act of 1916 and, therefore, the State Government has exceeded its power to issue the impugned Government Order dated 23.7.2012.

(xi) The Government Orders relied by the respondents cannot be enforced merely against the petitioners while leaving others.

(xii) The Government order dated 16.6.1999 filed as annexure No. 1 to the supplementary rejoinder affidavit dated 6.5.2014 provides that no new post be created during the financial year 1999-2000 and wherever necessary the work be taken on contract basis. Thus prohibition of non engagement of dailywagers/ contract employee was lifted by the said Government order dated 16.12.1991 became in operative.

2. Sri Rashtrapati Khare, submits that the petitioners are daily wagers engaged on contract basis and they have been serving since long and therefore, they cannot be ousted in one stroke without any prior intimation and opportunity. He relied upon the judgment of Hon"ble Supreme Court in the case of H.S. Rajashekhara v. State of Mysore, JT (2011) 13 SC 325, judgment of this Court in the case of State of U.P. and others v. Kamlesh Kumsar Tripathi and another, (2012) 4 UPLBEC 3245 and judgment of High Court of Jammu and Kashmir in the case of Mohd. Tayoob Laherwal and Others Vs. State of Jammu and Kashmir and Others, .

3. Sri Satyaprakash Mishra, and other learned Counsels appearing in different writ petitions have adopted the arguments of Sri Ashok Khare.

SUBMISSION ON BEHALF OF RESPONDENTS

4. Sri Ashok Kumar Pandey, learned Additional Advocate General submits as under:

(i) The petitioners were engaged under different orders on contract basis issued by the authorities of the concerned local bodies without recording the facts as to the availability of substantive vacancies and qualification and without any advertisement. These appointments were wholly illegal and in breach of directions of State Government and as such the State Government has rightly exercised the powers conferred under Section 34(1-B) of the Act, 1916 as well as the powers conferred under the U.P. Municipal Corporation Act, 1959 to issue the

impugned Government Order dated 23.7.2012.

(ii) There is no pleading in the writ petition by the petitioners that how they were appointed. Thus, illegality in appointments is evident on record. The regularization of petitioners of Writ Petition No. 40236 of 2012 was done by the Chairman, Nagarpalika Parishad, Budaun on ground of sympathy without there being any scheme of regularization and as such regularization of two contractual workers was wholly void ab-initio.

(iii) The Government Order No. U.O. 249/Nine-I-19-48 Misc/91 dated 6.12.1991 filed as Annexure SCA-2 to the supplementary counter-affidavit of Sri Mithilesh Prasad Dwivedi, Executive Officer, Nagarpalika Parishad, Gopiganj, District Sant Ravi Das Nagar (Bhadohi) dated 27.1.2014 in Writ Petition No. 4117 of 2012 contains clear directions to local bodies including U.P. Jal Nigam and Jal Sansthan that no person shall be appointed as daily wage worker or work charge employee after the date of this G.O. The Government Order No. 2/5/91-T.C.Ka-2-94 dated 18.4.1994 and Government Order No. 3988/9.1.2010. 203 Sa/2010 dated 7.12.2010 also noted that despite clear directions of the state Government for not appointing/engaging persons on daily wages/contract basis, certain local bodies are still making appointments on daily wage/contract basis, which is prohibited and its is directed that in case of need the work be taken by outsourcing on contract basis for a definite period on specified conditions. These two Government Orders have been filed as Annexure No. CA-1 and CA-2 to the supplementary counter-affidavit of Sri Rajesh Bahadur, Under Secretary, Nagar Vikas, Government of U.P., Lucknow dated 9.4.2014.

(iv) There is no pleading in any writ petition with regard to compliance of Section 70(a) and 70(b) of the Act, 1916.

(v) Exclusion of Safai Karmis from the purview of the impugned Government Order dated 23.7.2012 is wholly valid inasmuch as Safai Karmis were permitted to be appointed on contract basis vide G.O. No. 140/9-1-2005 dated 26.8.2005, a copy of which has been filed as Annexure No. SCA-3 to the counter-affidavit of Sri Rajesh Bahadur, Under Secretary, Nagar Vikas, Government of U.P., Lucknow dated 11.11.2013. A complete transparent procedure including issuance of advertisement have been provided in the said G.O. As against this, the appointments of the petitioners were done in a wholly illegal manner and without any authority of law.

(vi) The controversy raised in these writ petitions is concluded by the judgment of this Court dated 12.9.2013, passed in Writ Petition No. 45274 of 2013 and judgment dated 3.9.2012 passed in Writ Petition No. 4432 of 2012, copies of which have been filed as Annexure No. SCA-4 and SCA-5 to the supplementary counter-affidavit dated 9.4.2013 in Writ Petition No. 4026 of 2012.

(vii) The Government order dated 16.6.1999 merely relates to the financial year 1999-2000 regarding non creation of new post and thus deals with an entirely different situation. It does not relax or permits the Government departments or

local bodies to engage dailywagers or to engage an employee on contract basis. The Government order dated 16.6.1999 merely permitted the concerned departments to get work done on contract basis in case of exigency. It does not permit engagement of persons on dailywage basis or on contract basis.

5. In support of his submissions, Sri Pandey has also relied upon the following judgments:

- (i) Arun Kumar Choubey Vs. Administrator, Nagar Palika, Mirzapur and Another, .
- (ii) Md. Ashif and Others Vs. State of Bihar and Others, and Secretary, State of Karnataka and Others Vs. Umadevi and Others, .
- (iii) Smt. Suman Verma and Others Vs. Special Secretary, Nagar Vikash Anubhag-6, Government of U.P. and Others, .

FINDINGS

6. I have carefully considered the submission of learned Counsel for the parties. The submission of learned Counsel for the parties give rise to following questions:

- (i) Whether the impugned order dated 23.7.2012 is valid?
- (ii) Whether the impugned orders terminating the engagements of the petitioners, who were working on contract employee/dailywagers, are valid?
- (iii) Whether the State Government is bound to recover amount of wages/salary paid to dailywagers/contract employees from the officers/office bearers of local bodies who appointed such dailywagers/contract employees in contravention of the relevant Government orders including the Government order dated 6.12.1991 and the Government order dated 24.4.2013?

QUESTION NO. 1

7. Undisputedly the petitioners were engaged either on dailywage basis or as contract employee by the officers/office bearers of the concerned local bodies without existence of any substantive vacancy. One such order of engagement dated 6.10.2004, which has been filed as annexure No. 1 to the Writ Petition No. 40236 of 2012 is reproduced below:

8. The State Government has issued a Government order No. U.O. 249/Nine-1-19-48 Misc/91 dated 6.12.1991 filed as annexure CA-2 to the supplementary counter-affidavit of Sri Mithlesh Prasad Dwivedi Executive Officer, Nagar Palika Parisad Gopiganj, District Sant Ravidas Nagar (Bhadohi) dated 27.1.2014 in connected Writ Petition No. 4117 of 2013, which provides as under:

9. It appears that instructions were also issued from time to time by the State Government in the light of afore quoted Government order but the officers/office bearers of local bodies continued to appoint/engage persons on dailywage/contract basis and as such the State Government issued impugned Government order dated 23.7.2012, which is reproduced below:

10. The legality and validity of the aforesaid Government order dated 23.7.2012 was challenged in writ petition (S/S) No. 4432 of 2012, Ashok Kumar Singh and another v. State of U.P. through Principle Secretary department of Nagar Vikas Lucknow and others, which was decided on 3.9.2012 by the Lucknow Bench of this Court, the operative portion of which is reproduced below:

"So far as the impugned Government Order dated 23.7.2012 is concerned, from perusal of the same it is evident that the State Government has taken a policy decision to cancel all those contractual appointments which have been made against the relevant Rules and Government Orders in order to provide undue benefit to certain individual persons as such appointments are putting unnecessary financial burden on the concerning Corporations.

I do not find any infirmity or illegality in the decision so taken by the State Government.

The writ petition being devoid of merit is liable to be dismissed, it is accordingly dismissed."

11. Section 34(1-B) and Section 70 of the U.P. Municipalities Act, 1916 are the relevant provisions which are reproduced below:

Section 34(1-B).--The State Government may, on its own motion or on report or complaint received by order prohibit the execution or further execution of a resolution or order passed or made under this or any other enactment by a [Municipality] or, a committee of a [Municipality] or a joint committee or any officer or servant of a [Municipality] or of a Joint Committee, if in its opinion such resolution or order is prejudicial to the public interest, [or has been passed or made in abuse of powers or in flagrant breach of any provision of any law for the time being in force] and may prohibit the doing or continuance by any person of any act in pursuance of or under cover of such resolution or order.]

Section- 70: Temporary servants required for emergency.--The power to appoint and fix the salaries of temporary servants in cases of emergency shall vest in the [President] subject to the following conditions, namely,-

(a) the President, in exercise of such powers, shall not act in contravention of-

(i) any general or special directions as the State Government may, from time to time issue;

(ii) an order of the [Municipality] prohibiting the employment of temporary servants for any particular work; and]

(b) each appointment under this Section by the [President] shall be reported at the next meeting of the [Municipality] following the appointment.

12. A perusal of Section 34(1-B) clearly reveals that the State Government may on its own motion or on report or complaint received, by order prohibit the execution or further execution of a resolution or order passed or made under this

or any other enactment of a municipality or a committee of a municipality or a joint committee or any officer or servant of a municipality or of a Joint Committee, if in its opinion such resolution or order is prejudicial to the public interest or has been passed or made in abuse of powers or in flagrant breach of any provision of any law for the time being in force, and may prohibit doing of continuance by any person of any act in pursuance of or under cover of such resolution or order. Thus the powers of the State Government in issuing either the Government order dated 6.12.1991 or the impugned Government order dated 23.7.2012 are well traceable to the powers conferred under Section 34(1-B) of the Act. The impugned order dated 23.7.2012 prohibits the doing of continuance of illegal and unauthorized engagement of persons on contract basis or as dailywagers. This order also directed the officer of all local bodies, District Magistrate of all districts and the Director local bodies U.P. Lucknow that the engagement of illegally appointed contract employees be immediately terminated and salary being paid to them be not withdrawn from the funds of local bodies from the next month. Thus, this Government order is well within the four corners of the powers conferred under Section 34(1-B) of the Act.

13. Apart from the above it is relevant to note that state legislature has enacted the U.P. State Control over Public Corporation Act, 1975 which provides that every statutory body by what ever name called established or constituted under any U.P. Act excepting universities governed by the U.P. Universities Act, 1973, as re-enacted and amended by the U.P. Universities (Re-enactment and Amendment) Act, 1974 shall, in the discharge of its function, be guided by such directions on questions of policies, as may be given to it by the State Government, notwithstanding that no such power has specially been conferred on the State Government under the law establishing or constituting such statutory body.

14. In view of the provision of Section 2 of this Act. The State Government possess the power to frame policies for discharge of function by the statutory bodies which shall be guided by the direction of the State Government on the question of policies.

15. Section 70 of the Act, 1916 empowers the President of Municipality to appoint and fix salary of temporary servant in cases of emergency but the President cannot exercise this power in contravention of any general or special directions of the State Government issued from time to time or any order of municipality prohibiting the employment of temporary servant in any particular work. Thus, Section 70 empowers the State Government to issue general or special directions to the municipalities from time to time. The Government order dated 6.12.1991 and other subsequent orders including the impugned order dated 23.7.2012 are also well traceable to the powers of the State Government conferred under Section 70 of the Act.

16. The provisions of Section 34(1-B) came for consideration before this Court in the case of Smt. Suman Verma and others v. Special Secretary Nagar Vikas

Anubhag-6, Government of U.P. Lucknow and others, in which this Court considered the cancellation of appointment/regularization of junior clerks who were appointed by the Chairperson of Nagar Palika Parisad despite the directions given by the State Government and without prior approval of the State Government. This Court held as under:

10. Section 34(1-B) was added by U.P. Act No. 7 of 1949 and was amended by U.P. Act No. 26 of 1964 with effect from 30.11.1964. In *Rishi Kumar Gupta and Others Vs. Nanoomal Yadav and Others*, , the Court was concerned with exercise of powers by Prescribed Authority under Section 34, in respect of resolution of electing member as Vice President of the Municipalities. The Division Bench held following the judgment in *Municipal Board, Kannauj Vs. The State of Uttar Pradesh and Others*, , that once the resolution electing the Vice President became operative, there remains nothing to be done under resolution which could be prohibited by the Commissioner by exercising his power under Section 34(1). It was held that the authority was created for a limited purpose and where a power is given under a statute to do a certain thing in a certain way, the things must be done in that way. The view expressed by Supreme Court in *Municipal Board, Kannauj Vs. The State of Uttar Pradesh and Others*, , was followed in *Har Pal Singh Vs. The State of U.P. and Another*, . In these cases the Division Bench was concerned with a compromise entered into by the Board with third party in pursuance of a resolution passed by the Board, the bench drew a distinction between a resolution and a contract. The Act postulates that a contract before entered into by the Board must be proceeded by a resolution. It was held that Section 34(1-B) empowers the State Government to cancel a resolution and it is not possible to read into it, a power to enter into a contract by the Board with a third party.

11. In *Municipal Board Kannauj (supra)* the Supreme Court was concerned with interpretation of Section 34(1-B) as it stood before its amendment by U.P. Act No. 26 of 1964. The word "or has been passed or made in abuse of powers or in flagrant breach of any provision of any law for the time being in force" were added by the amendment. The Supreme Court held that the unamended Sub-section (1-B) read with Sub-section (4), does not apply to resolution or order which exhausts itself after it was passed or made.

12. An illegal appointment by an officer of the Board in abuse of its powers, can be restricted by the State Government. I do not find that the amended Sub-section (1-B), can be read in such a manner, to restrict the powers of the State Government in respect of illegal appointment made after the amendment, on the ground that such appointments have been made and that thereafter nothing further remains to be done. In *Municipal Board Kannauj (supra)*, the Supreme Court was concerned with the dismissal of certain supervisor by the Executive Officer of the Municipal Board. The dismissal or removal of an employee brings an employment to an end. In such case there was nothing further to be done. But where an employee has been appointed illegally he continues to serve the

Board and remains in office inspite of his illegal appointment. The State Government, therefore, can restrain such person to act and thus cancel the appointment under Sub-section (1-B). Such an exercise of power by the State Government will fall within the purview of the word "may prohibit the doing or continuance by any person at any act in pursuance of or under cover of such order".

(emphasis supplied by me)

17. In the case of Arun Kumar Chaubey v. Administrator, Nagar Palika, Mirzapur and another, (2001) 3 UPLBC 2198, this Court considered the provisions of Section 70 and 71 of the U.P. Municipalities Act, 1916 and held as under:

9. Admittedly, the petitioner was appointed by the President of the Municipal Board on the post of clerk initially on daily wage basis. Subsequently, his term was extended and he was ultimately appointed on temporary basis as a clerk by the President. Under the provisions of the Act and the Rules, the President had no jurisdiction to make appointment on the post of clerk. The appointment could be made by the Board or at least should have been ratified by the Board in its meeting held immediately after the appointment was made. Neither the Board appointed the petitioner nor ever ratified his appointment. A reference in this regard may be made to the provisions of Sections 70 and 71 of the U.P. Municipalities Act, 1916. Section 70 of the Act provides that the President of the Board may appoint a temporary servant but the appointment made by him is to be ratified by the Board in the meeting held immediately after the appointment was made. Clause (b) of Section 70 of the Act reads as under:

"each appointment under this Section by the President shall be reported at the next meeting of the Board following the appointment."

18. The judgment in the case of Rishi Kumar Gupta and Others Vs. Nanoomal Yadav and Others, relied by Sri Ashok Khare, learned Senior Counsel, relates to the controversy with regard to the exercise of powers of prescribe authority under Section 34 in respect of resolution of electing member by the President of municipality which is not the controversy involved in the present writ petition. This judgment has been explained by this Court in the case of Smt. Suman Verma and others (supra). Thus this judgment does not help the petitioners.

19. The next judgment relied by Sri Khare on this issue is the judgment in the case of Nagar Palika Parisad v. State of U.P., 2010 (10) ADJ 263, in which the controversy was with regard to the contracts for construction work given by Nagar Palika Parisad during the pendency of inquiry instituted by the State Government, thus, this judgment also has no relevance on the controversy involved in the present writ petition.

20. Section 99 to Section 103 under Chapter III of the U.P. Municipalities Act, 1916 contain provisions with regard to the budget and prohibition of expenditure in excess of budget. Chapter IV of the Act, 1916 contains the provisions with

regard to the municipal fund and property. Section 120 under Chapter IV provides that municipal fund and all property vested in a municipality shall be applied for purpose, express or implied, for which, by or under this or any other enactment, powers are conferred or duties or obligations are imposed upon the municipality.

21. In view of discussion made above, I have no hesitation to hold that the impugned order dated 23.7.2012 issued by the State Government is well within the powers conferred on it under Section 34(1-B) and Section 70(a) of the U.P. Municipalities Act, 1916 and therefore, it is wholly valid.

QUESTION NO. 2

22. As already noted above, the orders of engagement/appointment of the petitioners on contract basis/dailywage basis issued for specified period by the Executive Officer or other authorities of the concerned municipalities without availability of any substantive vacancy and without compliance to the provisions of Section 70 are in contravention of the Government order dated 6.12.1991 and other subsequent Government orders and as such these engagements/appointments were wholly null and void and as such the impugned orders of dis-engagement/termination are wholly valid. It is also undisputed that the period of engagement of the petitioners have expired. In writ petition No. 40236 of 2012, the petitioners engaged as contract employee, were regularized by the President of the Nagar Palika Parisad, Badaun vide order dated 25.10.2011 on the ground of sympathy. One such order of regularization dated 25.10.2011 is reproduced below:

23. Undisputedly the regularization of a contract employee done by the President of the Nagar Palika Parisad, Badaun, was wholly without authority of law and without any scheme of regularization or statutory provisions. Such regularization is wholly null and void. The regularization so made is nothing but abuse of office. In the case of Secretary, State of Karnataka and Others Vs. Umadevi and Others, . The Constitution Bench of Hon"ble Supreme Court laid down the law as under:

"2. Public employment in a sovereign socialist secular democratic republic, has to be as set down by the Constitution and the laws made thereunder. Our constitutional scheme envisages employment by the Government and its instrumentalities on the basis of a procedure established in that behalf. Equality of opportunity is the hallmark, and the Constitution has provided also for affirmative action to ensure that unequals are not treated equals. Thus, any public employment has to be in terms of the constitutional scheme.

3. A sovereign Government, considering the economic situation in the country and the work to be got done, is not precluded from making temporary appointments or engaging workers on daily wages. Going by a law newly enacted, The National Rural Employment Guarantee Act, 2005, the object is to give employment to at least one member of a family for hundred days in an year,

on paying wages as fixed under that Act. But, a regular process of recruitment or appointment has to be resorted to, when regular vacancies in posts, at a particular point of time, are to be filled up and the filling up of those vacancies cannot be done in a haphazard manner or based on patronage or other considerations. Regular appointment must be the rule.

4. But, sometimes this process is not adhered to and the Constitutional scheme of public employment is by-passed. The Union, the States, their departments and instrumentalities have resorted to irregular appointments, especially in the lower rungs of the service, without reference to the duty to ensure a proper appointment procedure through the Public Service Commission or otherwise as per the Rules adopted and to permit these irregular appointees or those appointed on contract or on daily wages, to continue year after year, thus, keeping out those who are qualified to apply for the post concerned and depriving them of an opportunity to compete for the post. It has also led to persons who get employed, without the following of a regular procedure or even through the back door or on daily wages, approaching Courts, seeking directions to make them permanent in their posts and to prevent regular recruitment to the concerned posts. Courts have not always kept the legal aspects in mind and have occasionally even stayed the regular process of employment being set in motion and in some cases, even directed that these illegal, irregular or improper entrants be absorbed into service. A class of employment which can only be called "litigious employment", has risen like a phoenix seriously impairing the constitutional scheme. Such orders are passed apparently in exercise of the wide powers under Article 226 of the Constitution of India. Whether the wide powers under Article 226 of the Constitution is intended to be used for a purpose certain to defeat the concept of social justice and equal opportunity for all, subject to affirmative action in the matter of public employment as recognized by our Constitution, has to be seriously pondered over. It is time, that Courts desist from issuing orders preventing regular selection or recruitment at the instance of such persons and from issuing directions for continuance of those who have not secured regular appointments as per procedure established. The passing of orders for continuance, tends to defeat the very Constitutional scheme of public employment. It has to be emphasized that this is not the role envisaged for High Courts in the scheme of things and their wide powers under Article 226 of the Constitution of India are not intended to be used for the purpose of perpetuating illegalities, irregularities or improprieties or for scuttling the whole scheme of public employment. Its role as the sentinel and as the guardian of equal rights protection should not be forgotten.

5. This Court has also on occasions issued directions which could not be said to be consistent with the Constitutional scheme of public employment. Such directions are issued presumably on the basis of equitable considerations or individualization of justice. The question arises, equity to whom? Equity for the handful of people who have approached the Court with a claim, or equity for the teeming millions of this country seeking employment and seeking a fair

opportunity for competing for employment? When one side of the coin is considered, the other side of the coin, has also to be considered and the way open to any Court of law or justice, is to adhere to the law as laid down by the Constitution and not to make directions, which at times, even if do not run counter to the Constitutional scheme, certainly tend to water down the Constitutional requirements. It is this conflict that is reflected in these cases referred to the Constitution Bench.

6. The power of a State as an employer is more limited than that of a private employer inasmuch as it is subjected to constitutional limitations and cannot be exercised arbitrarily (See Basu's Shorter Constitution of India). Article 309 of the Constitution gives the Government the power to frame Rules for the purpose of laying down the conditions of service and recruitment of persons to be appointed to public services and posts in connection with the affairs of the Union or any of the States. That Article contemplates the drawing up of a procedure and Rules to regulate the recruitment and regulate the service conditions of appointees appointed to public posts. It is well acknowledged that because of this, the entire process of recruitment for services is controlled by detailed procedure which specify the necessary qualifications, the mode of appointment etc. If Rules have been made under Article 309 of the Constitution, then the Government can make appointments only in accordance with the Rules. The State is meant to be a model employer. The Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959 was enacted to ensure equal opportunity for employment seekers. Though this Act may not oblige an employer to employ only those persons who have been sponsored by employment exchanges, it places an obligation on the employer to notify the vacancies that may arise in the various departments and for filling up of those vacancies, based on a procedure. Normally, statutory Rules are framed under the authority of law governing employment. It is recognized that no Government order, notification or circular can be substituted for the statutory Rules framed under the authority of law. This is because, following any other course could be disastrous inasmuch as it will deprive the security of tenure and the right of equality conferred on civil servants under the Constitutional scheme. It may even amount to negating the accepted service jurisprudence. Therefore, when statutory Rules are framed under Article 309 of the Constitution which are exhaustive, the only fair means to adopt is to make appointments based on the Rules so framed.

43. Thus, it is clear that adherence to the rule of equality in public employment is a basic feature of our Constitution and since the rule of law is the core of our Constitution, a Court would certainly be disabled from passing an order upholding a violation of Article 14 or in ordering the overlooking of the need to comply with the requirements of Article 14 read with Article 16 of the Constitution. Therefore, consistent with the scheme for public employment, this Court while laying down the law, has necessarily to hold that unless the appointment is in terms of the relevant Rules and after a proper competition among qualified persons, the same would not confer any right on the appointee.

If it is a contractual appointment, the appointment comes to an end at the end of the contract, if it were an engagement or appointment on daily wages or casual basis, the same would come to an end when it is discontinued. Similarly, a temporary employee could not claim to be made permanent on the expiry of his term of appointment. It has also to be clarified that merely because a temporary employee or a casual wage worker is continued for a time beyond the term of his appointment, he would not be entitled to be absorbed in regular service or made permanent, merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant Rules. It is not open to the Court to prevent regular recruitment at the instance of temporary employees whose period of employment has come to an end or of ad hoc employees who by the very nature of their appointment, do not acquire any right. High Courts acting under Article 226 of the Constitution of India, should not ordinarily issue directions for absorption, regularization, or permanent continuance unless the recruitment itself was made regularly and in terms of the constitutional scheme. Merely because, an employee had continued under cover of an order of Court, which we have described as "litigious employment" in the earlier part of the judgment, he would not be entitled to any right to be absorbed or made permanent in the service. In fact, in such cases, the High Court may not be justified in issuing interim directions, since, after all, if ultimately the employee approaching it is found entitled to relief, it may be possible for it to mould the relief in such a manner that ultimately no prejudice will be caused to him, whereas an interim direction to continue his employment would hold up the regular procedure for selection or impose on the State the burden of paying an employee who is really not required. The Courts must be careful in ensuring that they do not interfere unduly with the economic arrangement of its affairs by the State or its instrumentalities or lend themselves the instruments to facilitate the bypassing of the constitutional and statutory mandates.

45. While directing that appointments, temporary or casual, be regularized or made permanent, Courts are swayed by the fact that the concerned person has worked for some time and in some cases for a considerable length of time. If is not as if the person who accepts an engagement either temporary or casual in nature, is not aware of the nature of his employment. He accepts the employment with eyes open. It may be true that he is not in a position to bargain-not at arm's length-since he might have been searching for some employment so as to eke out his livelihood and accepts whatever he gets. But on that ground alone, it would not be appropriate to jettison the constitutional scheme of appointment and to take the view that a person who has temporarily or casually got employed should be directed to be continued permanently. By doing so, it will be creating another mode of public appointment which is not permissible. If the Court were to void a contractual employment of this nature on the ground that the parties were not having equal bargaining power, that too would not enable the Court to grant any relief to that employee. A total embargo

on such casual or temporary employment is not possible, given the exigencies of administration and if imposed, would only mean that some people who at least get employment temporarily, contractually or casually, would not be getting even that employment when securing of such employment brings at least some succor to them. After all, innumerable citizens of our vast country are in search of employment and one is not compelled to accept a casual or temporary employment if one is not inclined to go in for such an employment. It is in that context that one has to proceed on the basis that the employment was accepted fully knowing the nature of it and the consequences flowing from it. In other words, even while accepting the employment, the person concerned knows the nature of his employment. It is not an appointment to a post in the real sense of the term. The claim acquired by him in the post in which he is temporarily employed or the interest in that post cannot be considered to be of such a magnitude as to enable the giving up of the procedure established, for making regular appointments to available posts in the services of the State. The argument that since one has been working for some time in the post, it will not be just to discontinue him, even though he was aware of the nature of the employment when he first took it up, is not one that would enable the jettisoning of the procedure established by law for public employment and would have to fail when tested on the touchstone of constitutionality and equality of opportunity enshrined in Article 14 of the Constitution of India.

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

51. The argument that the right to life protected by Article 21 of the Constitution of India would include the right to employment cannot also be accepted at this juncture. The law is dynamic and our Constitution is a living document. May be at some future point of time, the right to employment can also be brought in under the concept of right to life or even included as a fundamental right. The new statute is perhaps a beginning. As things now stand, the acceptance of such a plea at the instance of the employees before us would lead to the consequence of depriving a large number of other aspirants of an opportunity to compete for the post or employment. Their right to employment, if it is a part of right to life,

would stand denuded by the preferring of those who have got in casually or those who have come through the back door. The obligation cast on the State under Article 39(a) of the Constitution of India is to ensure that all citizens equally have the right to adequate means of livelihood. It will be more consistent with that policy if the Courts recognize that an appointment to a post in Government service or in the service of its instrumentalities, can only be by way of a proper selection in the manner recognized by the relevant legislation in the context of the relevant provisions of the Constitution. In the name of individualizing justice, it is also not possible to shut our eyes to the constitutional scheme and the right of the numerous as against the few who are before the Court. The Directive Principles of State Policy have also to be reconciled with the rights available to the citizen under Part III of the Constitution and the obligation of the State to one and all and not to a particular group of citizens. We, therefore, overrule the argument based on Article 21 of the Constitution.

52. Normally, what is sought for by such temporary employees when they approach the Court, is the issue of a writ of mandamus directing the employer, the State or its instrumentalities, to absorb them in permanent service or to allow them to continue. In this context, the question arises whether a mandamus could be issued in favour of such persons. At this juncture, it will be proper to refer to the decision of the Constitution Bench of this Court in *Rai Shivendra Bahadur Vs. The Governing Body of the Nalanda College*, . That case arose out of a refusal to promote the writ petitioner therein as the Principal of a college. This Court held that in order that a mandamus may issue to compel the authorities to do something, it must be shown that the statute imposes a legal duty on the authority and the aggrieved party had a legal right under the statute or rule to enforce it. This classical position continues and a mandamus could not be issued in favour of the employees directing the Government to make them permanent since the employees cannot show that they have an enforceable legal right to be permanently absorbed or that the State has a legal duty to make them permanent.

54. It is also clarified that those decisions which run counter to the principle settled in this decision, or in which directions running counter to what we have held herein, will stand denuded of their status as precedents.

(emphasis supplied by me)

24. The law laid down by the constitution Bench of Hon''ble Supreme Court in the case of *Umadevi* (supra) has been consistently followed.

25. In the case of *Md. Ashif and Others Vs. State of Bihar and Others*, , Hon''ble Supreme Court held as under:

13. Applying the test laid down by this Court in *Umadevi* (3) case and the case referred to above, to the case at hand, there is no gainsaying that the appointments of the appellants as Primary Health Workers were totally illegal and violative of Articles 14 and 16 of the Constitution which guarantee equality of

opportunity to all those who were otherwise eligible for such appointments. The Chief Medical Officer who had made the appointments was not vested with the power to do so nor were the claims of other candidates eligible for appointments against the posts to which the appellants were appointed, considered. Surprisingly, the appointments had come by way of absorption of the appellants who were working as Voluntary Health Workers on a monthly honorarium of Rs. 50 only.

14. The High Court has, in our opinion, correctly held that there was no cadre of Voluntary Health Workers who were working on an honorarium in State-run dispensaries. The very nature of the appointment given to the appellants as Voluntary Health Workers was honorary in nature which entitled them to the payment of not more than Rs. 50 per month. It is difficult to appreciate how the Chief Medical Officer could have regularized/absorbed such Voluntary Health Workers doing honorary service against the post of Primary Health Workers which carried a regular pay scale and which could be filled only in accordance with the procedure prescribed for that purpose. The appointment of the appellants against the said posts was thus manifestly illegal and wholly undeserved to say the least. Inasmuch as these appointments came to be cancelled pursuant to the said directions no matter nearly a decade and a half later the termination could not be said to be illegal so as to warrant interference of a writ Court for reinstatement of those illegally appointed. The High Court was in that view of the matter, justified in declining interference with the order of cancellation and dismissing the writ petitions.

(emphasis supplied by me)

26. In the case of Satya Prakash and Others Vs. State of Bihar and Others, , Hon''ble Supreme Court held as under:

8. Let us refer to paragraphs 15 and 16 of Umadevi's judgment in this context. Necessity of keeping in mind the distinction between regularization and conferment of permanence in service jurisprudence has also been highlighted by this Court by referring to the following passages from R.N. Nanjundappa's case, which reads as follows: "If the appointment itself is in infraction of the Rules or if it is in violation of the provisions of the Constitution illegality cannot be regularized. Ratification or regularization is possible of an act which is within the power and province of the authority but there has been some noncompliance with procedure or manner which does not go to the root of the appointment. Regularization cannot be said to be a mode of recruitment."

Further Constitution Bench referred to in B.N. Nagarajan's case in para 16 of the judgment and stated as follows: "We have, therefore, to keep this distinction in mind and proceed on the basis that only something that is irregular for want of compliance with one of the elements in the process of selection which does not go to the root of the process, can be regularized and that it alone can be regularized and granting permanence of employment is a totally different

concept and cannot be equated with regularization."

Then, in Umadevi's case in paragraph 53 the Court is stated as follows:

"One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in S.V. Narayanappa R.N. Nanjundappa and B.N. Nagarajan and referred to in para 15 above of duly qualified persons in duly sanctioned vacant posts might have been made and the employees have continued to work for ten years or more but without the intervention of orders of the Courts or of Tribunals. The question of regularization of the services of such employees may have to be considered on merits in the light of the principles, settled by this Court in cases above-referred to and in the light of this judgment. In that context, the Union of India, the State Governments and their instrumentalities should take steps to regularize as a one-time measure, the services of such irregularly appointed, who have worked for ten years or more in duly sanctioned posts but not under cover or orders of the Courts or of Tribunals and should further ensure that regular recruitments are undertaken to fill those vacant sanctioned posts that require to be filled up, in cases where temporary employees or daily wagers are being now employed. The process must be set in motion within six months from this date."

12. In our view, the appellants herein would fall under the category of persons mentioned in paragraphs 8 and 55 of the judgment and not in paragraph 53 of judgment of Umadevi's.

(emphasis supplied by me)

27. Admittedly, the petitioners were not appointed in terms of the relevant Rules or in adherence to Article 14 and 16 of the Constitution of India. This Courts cannot encourage appointments which are made outside the constitutional scheme. No direction for regularization of the petitioners who have not been appointed by following due procedure of law could have been issued by the President of the Nagar Palika Parisad. The local bodies are bound to comply with the constitutional requirements as adumbrated in Article 14 and 16 of the Constitution of India. The appointment of the petitioners were made in violation of Article 14 and 16 and therefore, these appointments or regularization are nullity. To allow the prayer of the petitioners would mean to permit them to be recruited through back door which this Court cannot do.

28. The appointments in local bodies which are state within the meaning of Article 12 of the Constitution of India should be made after issuing proper advertisement for inviting applications from eligible candidates in accordance with the relevant statutory provisions or the Government orders. Selection should be held as provided under the relevant statutes and after compliance of the provisions of Article 14 and 16 of the Constitution of India. The selection should be fair and impartial through a written examination or interview or some other rational criteria in judging inter-se merit of candidates who apply pursuant to the advertisement. In some cases applications may be invited from the

employment exchange where eligible candidates get their name registered. The selection should be such in which eligible candidates get a fair chance to compete. The appointments/engagement/regularization of the petitioners were undisputedly made in violation of the above noted settled principle of law. Therefore, their dis-engagements under the impugned orders are wholly justified.

29. Equal opportunity is the basic feature of over the constitution. Public employment is repository of the state power. The framers of the constitution clearly intended and shown strong desire and constitutional philosophy to implement principle of equality in the true sense in the matter of public employment in view of unambiguous constitutional scheme as reflected from Article 14 and 16 and 309 of the Constitution of India. Under the circumstances, it would be wholly improper for this Court to give any direction for regularization or continuance of services of the petitioners, who were engaged on dailywage basis or as contractual employees and not appointed following due procedure of law.

30. The question of regularization of contractual employee and dailywager was also considered by Hon"ble Supreme Court in the case of State of Urisa v. Chandra Sekhar Mishra, (2002) 10 SCC 583, wherein Hon"ble Supreme Court held that relief of appointment as regular employee cannot be granted to a contractual employee. In the case of Surendra Prasad Tewari Vs. Uttar Pradesh Rajya Krishi Utpadan Mandi Parishad and Others, , the Hon"ble Supreme Court considered the scheme of the Constitution and held that dismissal of writ petitions by the High Court of the contractual employees seeking directions for regularization was wholly proper.

31. Petitioners got engagement as a contractual worker without any proper selection. Therefore they cannot even invoke the theory of legitimate expectation for regularization as they knew the consequences of contractual appointment. Since the appointment of the petitioners was not consistent with the scheme for public employment, the same would not confer any right on the petitioners. Their contractual engagement came to an end when it was discontinued. Therefore, this Court acting under Article 226 of the Constitution of India cannot issue direction for continuance in employment, absorption or regularization. These appointments came to be cancelled under the impugned orders pursuant to directions validly issued vide Government order dated 23.7.2012.

32. In view of the discussion made above, the impugned orders of termination or dis-engagement of the petitioners are wholly valid.

QUESTION NO. 3

33. The Government order dated 6.12.1991 is the policy decision of the State Government to prohibit the practice of making illegal appointments by the officers/office bearers of local bodies in violation of the constitutional scheme on one hand and on the other hand to fix the liability of such officers/office bearers of local bodies, who have caused or are causing financial loss in the form of

payment of salary/wages to illegally appointed persons. The subsequent Government order dated 23.7.2012 followed by another Government order dated 24.4.2013 are also part of the policy decision of the State Government. The Government orders dated 6.12.1991 and 23.7.2012 have already been reproduced above. The Government order dated 24.4.2013 is reproduced below:

34. In the supplementary counter-affidavit dated 30.4.2014/2.5.2014 of Sri D.P. Giri Municipal Commissioner, Nagar Nigam, Allahabad filed on behalf of respondent No. 1 and 2 it has been stated in paragraph 5 and 6 as under:

"5. That so far as the action pursuant to the Government order dated 6.12.1991 and the order dated 23.7.2012, the State Government has issued an order on 24.4.2013 addressed to all the competent authorities to fix the responsibilities who are responsible for illegal appointments.

6. That a bare reading of the Government order referred in above it is apparent that the State Government has initiated the proceedings by taking appropriate action against the officers who have made illegal appointments in contravention of the Government order issued time to time."

35. In the case of Ashok Kumar Singh and another (supra) this Court has held that impugned Government order dated 23.7.2012 is a policy decision taken by the State Government to cancel of all those contractual appointments which have been made against the relevant Rules and Government orders in order to provide undue benefit to certain individuals and as such appointments are putting unnecessary burden on the concerned municipalities/corporation. The Government order dated 6.12.1991 is also a policy decision of the State Government. The Government order dated 24.4.2013 has been issued to ensure compliance of the earlier Government orders. By this Government order dated 24.4.2013 a direction has been issued to Director Local Bodies, U.P. Lucknow, all District Magistrate of U.P., all Municipal Commissioner and all President of Nagar Palikas to fix the liability of the officers who unauthorizedly and illegally appointed persons on contract basis and departmental proceedings be initiated against them and action taken report be submitted within 15 days. Although it is stated in paragraph 6 of the supplementary counter-affidavit that the Government had already initiated proceedings by taking appropriate action against the officers but in reality no action has been taken by the respondents despite the fact that the policy decision was taken by the State Government way back on 6.12.1991 and office bearers/officers have been continuously acting in contravention of the said policy decision.

36. The aforementioned Government orders reflects the policy decision of the State Government. It is well-settled that the Courts, in exercise of their power of judicial review did not ordinarily interfere with the policy decisions of the executive unless the policy can be faulted on account of malafide, unreasonableness, arbitrariness or unfairness etc. If the policy cannot be faulted on any of these grounds, the policy cannot be said to be invalid. Courts cannot

question the wisdom of the Government in taking a policy decision. Generally policy cannot be tested in a Court of law. The Government is entitled to lay down its policy which cannot be subjected to judicial review except in the circumstances mentioned above. Reference in this regard may be had to the judgments of Hon"ble Supreme Court in the cases reported in Subhash Photographics and Others Vs. Union of India (UOI) and Others, ; Delhi Science Forum and others Vs. Union of India and another, ; JT (2006) 6 SC 500, Ekta Shakti Foundation v. Government of NCT of Delhi, para-12; Krishnan Kakkanth Vs. Government of Kerala and others, ; State of Rajasthan and Others Vs. Lata Arun, ; State of Himachal Pradesh and Another Vs. Padam Devi and Others, ; State of Himachal Pradesh and others etc. Vs. Ganesh Wood Products and others, etc., ; M/s. Ugar Sugar Works Ltd. Vs. Delhi Administration and Others, ; The State of Maharashtra and Another Vs. Lok Shikshan Sansatha and Others, ; M/s. Shri Sitaram Sugar Co. Ltd. and another Vs. Union of India and others, ; State of Punjab and Others Vs. Ram Lubhaya Bagga Etc. Etc., ; JT (2001) 10 SC 466 para 91 to 99, Balco Employees Union Regd. v. Union of India and others; Gyan Prakash Vs. Union of India (UOI) and Others, ; Ram Singh Vijay Pal Singh and Others Vs. State of U.P. and Others, .

37. In view of the above noted facts and circumstances, a direction is issued to the respondent No. 1 to ensure strict compliance of the Government order dated 6.12.1991 and 24.4.2013 and submit compliance report before this Court within three months, giving details of total payments made by the Local Bodies in Uttar Pradesh to illegally appointed dailywagers/contract employees, action taken for realization of the amount so paid in contravention of the Government order dated 6.12.1991 and Government order dated 24.4.2013. Respondent No. 1 shall also ensure strict compliance of the Government orders dated 6.12.1991 and 23.7.2012 by all local bodies in Uttar Pradesh. Action taken report be submitted before this Court by respondent No. 1 by filing his personal affidavit on 1.9.2014. In view of the above discussions, all the writ petitions fail and are hereby dismissed. However, there shall be no order as to cost. Compliance report as directed above be submitted by the respondent No. 1 on or before 1.9.2014.