
(2014) 11 GAU CK 0011
In the Gauhati High Court
Case No : Writ Petition (Civil) 255 (K) of 2011

Atouzo Pienyu

APPELLANT

Vs

The State of Nagaland

RESPONDENT

Date of Decision : 14-11-2014

Acts Referred:

Constitution of India, 1950 — Article 14, 142, 16, 162, 226

Citation : (2015) 2 GLT 482 : (2015) LabIC 276

Hon'ble Judges : Nishitendu Chaudhury, J

Bench : Single Bench

Advocate : A. Zhimomi, I. Longjem, S.M. Ozukum, Joshua, Lydia and Aloto, Advocate for the Appellant; T.B. Jamir, Addl. Advocate General, C.T. Jamir, Sr. Advocate and Wati Jamir, Advocate for the Respondent

Judgement

Nishitendu Chaudhury, J.—As many as 29(twenty-nine) unemployed Veterinary Science Graduates of the State of Nagaland formed an association under the name and style of "Unemployed Veterinary Graduates Association" to ventilate their grievance for inequitable mode of appointment of Veterinary Assistant Surgeons in the State giving complete go by to the provisions of Nagaland Animal Husbandry & Veterinary Service Rules, 1979 (hereinafter referred to as "the Rules"). According to the writ petitioners, the permanent vacancies of Veterinary Assistant Surgeon (for short, VAS) can be filled up only by way of direct recruitment under Rule 6 and 7 of the Rules in view of item 1 in schedule-II to the Rules for appointment of VAS which is Class-II Gazetted Officers of Junior Grade under the Veterinary Service of the State. The State respondents went on appointing persons on contract basis on pick and choose policy without asking the Nagaland Public Service Commission (for short, NPSC) to issue advertisement and hold selection. These employees initially appointed on contract basis were subsequently regularized in service on the basis of Office Memorandum issued on 04.08.2008 vide No. AR-5/Asso/98. Resultantly, eligible candidates were denied right of equal opportunity for being considered for appointment to the State Service and in the process Article 16 of the Constitution

has been grossly infringed. The writ petitioners, therefore, have approached this Court by filing this writ petition praying for appropriate direction to quash and set aside the aforesaid O.M. dated 04.08.2008 as well as notifications dated 20.11.2007 (Annexure-3), 16.03.2009 (Annexure-9), 18.06.2011 (Annexure-20) and 13.09.2011 (Annexure-51) whereby the services of the respondents No. 4 to 16 were regularized. They have also prayed to issue consequent direction to the respondents to comply with the Rules for filling up the vacant posts of VAS by way of prescribed procedure.

2. Private respondent No. 4 was initially appointed on contract basis w.e.f. 10.03.1997 to 14.11.2007 by granting successive extension from time to time and subsequently by notification dated 20.11.2007 (Annexure-3) his service was regularized as VAS (Class-I Gazetted) under the establishment of Animal Husbandry and Veterinary Department of the State. Respondent No. 5 was appointed as Lecturer in VFATI, Medziphema on contract basis initially for a period of 1(one) year against leave vacancy of one Dr. M. Catherine and this was extended successively till his service was regularized by notification dated 16.03.2009 w.e.f. his initial appointment on contract basis. The initial appointment of respondent No. 5 on 12.08.2003 was against a leave vacancy. In the subsequent extension orders issued from time to time till 24.08.2006, it was mentioned that the same appointment would remain in force till Dr. M. Catherine, the substantive incumbent of the post, returns from deputation. However, in extension order dated 19.08.2008 this rider did not find place and rather it was mentioned that the extension would be valid till 11.08.2009 or till recruitment is done, whichever is earlier. Before the expiry of this extension his services were regularized on 16.03.2009 (Annexure-9) by taking recourse to the provisions of O.M. dated 04.08.2008 referred to above.

3. Respondent No. 6 was initially appointed to the post of VAS on another leave vacancy in the year 1997 and subsequently by order dated 29.09.2006 his contract service was extended against a permanent vacancy. Respondents No. 8 and 9 were similarly appointed against leave vacancies but were subsequently regularized against regular vacancies. Respondent No. 10 was initially appointed on 12.06.2006 against leave vacancy and was subsequently appointed against existing vacancy on 09.07.2007 due to promotion of the regular incumbent of the post. By Cabinet approval accorded on 31.05.2011, regularization of services of aforesaid respondents No. 6 to 10 was made and consequently notification was issued on 18.06.2011 (Annexure-20) for regularizing their services. In the same process, respondents No. 11 to 16 were appointed on contract basis in the year 2007 and thereafter by notification dated 13.09.2011 (Annexure-51) their services were regularized on the strength of O.M. dated 04.08.2008. Thus, all the private respondents No. 4 to 8 were initially appointed on contract basis for fixed period of time which were extended from time to time and ultimately by taking recourse to O.M. dated 04.08.2008 their services were regularized without going for the procedure prescribed under Rule 7 of the statutory rules framed under proviso to Article 309 of the Constitution of India. These regularization

orders have been challenged by the present petitioners on the ground that there being a statutory recruitment rule in existence, the Executive acted illegally, unconstitutionally and arbitrarily in invoking power under Article 162 of the Constitution to make appointment to permanent vacancies. The petitioners, therefore, have prayed for setting aside of these regularization orders and also for consequent direction to the authorities for filling up of these posts by following the procedure of the statutory rules holding the field.

4. The official respondents No. 1, 2 and 3 have filed one affidavit in opposition wherein it is claimed that most of the private respondents though initially appointed against leave vacancies/deputation vacancies but the vacancies ultimately became permanent. Since the private respondents in the mean time had rendered service for more than 3(three) years to the satisfaction of the authorities, the provision of aforesaid O.M. dated 04.08.2008 became applicable to them as well. Their suitability was duly ascertained by screening tests and thereupon Cabinet adopted a decision to regularize their services. Consequently, notifications were issued from time to time to regularize the services. Huge numbers of similarly situated ad hoc/contract employees in other departments also were permanently absorbed on the strength of the said O.M. and so denying the same benefit to the private respondents would have been unjust and uncalled for. According to the official respondents, there was no illegality in regularizing the services of the private respondents on the strength of O.M. dated 04.08.2008.

5. The private respondents No. 4 to 16 have filed a separate affidavit wherein apart from defending their regularization orders, they have also raised question as to maintainability of the writ petition basically on following points:

I) The writ petitioners do not have locus standi to challenge the regularization of the private respondents and they do not have any cause of action insofar as the impugned regularization is concerned.

II) The writ petition is bad for delay and laches. The Office Memorandum was initially issued on 25.08.2007 and superseded by impugned O.M. dated 04.08.2008 but the writ petitioners challenged the same only in the year 2011 after the same was applied for regularizing the services of the private respondents.

III) The writ petition itself is a frivolous and fictitious one, inasmuch as, some of the writ petitioners themselves availed the benefit of contract service at least for some period of time and thereafter when they failed to get the benefit of regularization, they have filed the writ petition challenging the regularization of the successful candidates.

IV) The writ petitioners cannot be said to be aggrieved persons as none of their legal rights have been violated because of regularization of the private respondents No. 4 to 6.

In Para 9 and 10 of this affidavit in opposition, the private respondents have stated full facts leading to their initial appointment on contract basis. They have also stated that Screening Committees were constituted in strict compliance of the provision of O.M. dated 04.08.2008 and upon being satisfied that private respondents were eligible and suitable for awarding benefits under the O.M., were recommended. The Cabinet approved the recommendation and only thereafter notifications regularizing the services of the respondents No. 4 to 16 were issued. According to the private respondents, the O.M. has been duly complied with and so there is no scope for judicial review into the impugned regularization orders.

6. Writ petitioners have filed affidavit in reply against both these affidavits in opposition wherein they have reiterated and re-affirmed their stand taken in the writ petition. According to the writ petitioners, once the leave/deputation vacancies against which the private respondents were initially appointed on contract basis became clear vacancies, the provision of statutory rules became applicable and consequently the O.M. dated 04.08.2008 became inapplicable to these cases. Having so found, the regularization taking recourse to executive instructions overriding the provision of the statutory rules is untenable and so even if, the O.M. remains in force, the regularization orders of the private respondents cannot be sustained.

7. I have heard Mr. I. Longjem, learned counsel for the petitioners, Mr. T.B. Jamir, learned Additional Advocate General for the respondents No. 1, 2 and 3 and Mr. C.T. Jamir, learned senior counsel assisted by Mr. Wati Jamir, Advocate on behalf of the respondents No. 4 to 16. I have also perused the pleadings of all the parties.

8. Mr. I. Longjem, learned counsel for the petitioners, submits that regularization of service dehors the rules is impermissible under the scheme of the Constitution and so, the very regularization orders are liable to be struck down by way of judicial review. To buttress his argument Mr. I. Longjem has placed reliance on judgments of the Hon"ble Supreme Court.

9. Per contra, Mr. T.B. Jamir, learned Additional Advocate General, submits that the private respondents rendered service against permanent vacancies for long period of time. The petitioners did not challenge either the initial appointments or the regularization orders in relevant time and in the process right has accrued to the private respondents consequent to their regularization of service. Unsettling the settled position, therefore, at the stage, would amount to injustice and would be contrary to the Principles of Equity, Justice and good conscience. Mr. T.B. Jamir has placed reliance on Para 33 of the Constitution Bench judgment of the Hon"ble Supreme Court in the case of Rabindranath Bose and Others Vs. The Union of India (UOI) and Others, .

10. Mr. C.T. Jamir, appearing for the respondents No. 4 to 16, has initially argued that the writ petition is liable to be dismissed on the points of locus standi, delay,

equity and for lack of cause of action. According to the learned senior counsel, some of the writ petitioners themselves having availed the benefit of contract service as VAS, cannot be heard to challenge the process of regularization only because they could not get their services regularized. Mr. C.T. Jamir argues that writ petitioners have not approached this Court with clean hands and so writ petition itself is liable to be dismissed in limine. Relying in the case of *Bimlesh Tanwar Vs. State of Haryana and Others*, Mr. C.T. Jamir would argue that the regularization of private respondents have become a settled position by now and so, after so many years the same cannot be disturbed. He also placed reliance in the case of *Amarendra Kumar Mohapatra and Others Vs. State of Orissa and Others*, to argue that the private respondents are entitled to one time consideration as contemplated under Para 53 of the case of *Uma Devi (supra)* and so, state respondents have not committed any wrong in issuing the impugned notifications regularizing the services of the private respondents taking recourse to the provision of O.M. dated 04.08.2008 whereby large number of similarly situated contract/ad hoc employees under the State Government were regularized. According to Mr. Jamir, allowing the writ petition would create a bad precedent and may open flood gate for unwarranted litigations.

11. The Nagaland Animal Husbandry & Veterinary Service Rules, 1979 were framed on 12.03.1979 in exercise of power under proviso to Article 309 of the Constitution of India. It would appear from the Schedule I of the Rules that the Nagaland Animal Husbandry & Veterinary Service is divided into 2(two) categories, namely, Class-I and Class-II services. The Class II Nagaland Animal Husbandry & Veterinary Service is again categorized into Senior Grade and Junior Grade. The post of Veterinary Assistant Surgeon (VAS) is mentioned at Item 1 of Junior Grade in the Class-II Service. Schedule II of the Rules contains percentage of the vacancies in each category of services by Direct Recruitment as well as by promotion, the qualification of Direct Recruitment, eligibility and other conditions for promotions. In Item 1 of Junior Grade (Class-II Gazetted) of the Nagaland Animal Husbandry & Veterinary Service the post of Veterinary Assistant Surgeon (VAS) is to be filled up 100% by direct recruitment and qualification for the post is BVSc/BVSc & H/GBVC/GMVC or equivalent. So there is no question of filling up of the post of Veterinary Assistant Surgeon (VAS) by promotion and it has to be filled up by direct recruitment. Procedure for direct recruitment is laid down under Rule 7 of the Rules and the same is quoted below:-

"7. PROCEDURE FOR RECRUITMENT BY COMPETATIVE EXAMINATION.

(a) Where it is necessary for the posts to be filled by direct recruitment, the Head of Department shall send requisition in duplicate to the Commission through the Government administrative department in the form prescribed by the Commission. The Commission shall advertise the posts specifying the terms and condition of these Rules.

(b) A candidate must apply before such date, in such manner, in such form as

may be prescribed by the Commission.

(c) An examination or interview for selection to the Service shall be held at such time and place as may be prescribed and notified by the Commission for the purpose. Every such notice shall, as far as possible, specify the number of vacancies to be filled up on the result of the examination.

(d) The examination shall be conducted by the Commission in accordance with the Rules and syllabus as may be prescribed by the Government in consultation with the Commission.

(e) The commission shall arrange the names of all qualified candidate in order of merit and appointment shall be made in the order of the names appeared in the list, subject to the Sub-Rule (f) of this Rule. The merit list shall remain valid for a period of 6 months from the date of approval by the commission.

(f) The inclusion of candidate's name in the list of successful candidate shall confer no right to appointment, unless the Government is satisfied after such enquiry as may be considered necessary that the candidate is suitable in all respects for appointment to the service."

12. Admittedly, private respondents have been regularized against the permanent vacancies of the post of VAS. As stated above, all the private respondents were initially appointed on contract basis and almost all of them were appointed against leave/deputation vacancies. As the regular incumbents of the post ultimately did not return, the post fell vacant and so Government initially extended their contract service against the permanent vacancies which were followed by regularization on the strength of O.M. dated 04.08.2008. This Office Memorandum dated 04.08.2008 was issued in supersession of the earlier O.M. dated 23.08.2007 issued by the Chief Secretary to the Government of Nagaland. This on term was in supersession of departmental O.M. dated 18.08.2004 and 12.05.2004. In O.M. dated 23.08.2007 it was stated that the contract employees who had completed more than 3(three) years of continuous service on contract/ad hoc against sanctioned post as on 14.05.2007 would be regularized by the department. However, such regularization would not apply to posts where there are pending court cases or where the posts have already been requisitioned for filling through Nagaland Public Service Commission. It was provided that employees having completed more than 10(ten) years of service against sanctioned post and who fulfilled the eligibility criteria for the post including requisite educational qualification and that their performances were satisfactory, their cases would be submitted to the Government for approval for regularization after obtaining recommendation of Screening Committee, the constitution of which is also prescribed under Office Memorandum. The employees who have completed 5 to 10 years of service would, however, in addition to 3(three) criteria would have to qualify themselves in suitability tests to be conducted by the concerned department under the Chairmanship of Head of the Administrative department. The aforesaid O.M. dated 23.08.2007 was

superseded by the subsequent O.M. dated 04.08.2008 and thereby requirement of completion of 3(three) years of continuous service as on 14.05.2007 was done away with. However, the same criteria for employees having more than 10(ten) years of contract service and 5-10 years of contract service were retained by the subsequent O.M.

13. The question that arises in this case is whether such a scheme providing for regularization of service is permissible when there is a rule framed under proviso to Article 309 governing appointment to the same post. The power of the Government in making appointment without following the prescribed rules came up for consideration in various judgments of the Hon''ble Supreme Court. Regularization in service law connotes official formalization of an appointment which was made on stop gap/ad hoc basis without following normal rules of appointment. Such formalization makes the appointment regular. The ordinary meaning of regularization is to make regular. The word "regular" has been defined in Black's Law Dictionary as follows:-

"Conformable to law. Steady or uniform in course, practice, or occurrence; not subject to unexplained or irrational variation. Usual, customary, normal or general. *Gerald v. American Cas. Co. of Reading, Pa., D.C.N.C., 249 F. Supp. 355, 357.* Made according to rule, duly authorized, formed after uniform type; built or arranged according to established plan, law, or principle. Antonym of "casual" or "occasional". *Palle v. Industrial Commission, 79 Utah 47, 7 P. 2d. 284, 290.*"

This, however, does not necessarily connote permanence in view of the judgment of the Hon''ble Supreme Court in the case of *B.N. Nagarajan and Others Vs. State of Karnataka and Others, .* In this judgment Hon''ble Supreme Court referred to earlier decisions in *State of Mysore and Another Vs. S.V. Narayanappa, and R.N. Nanjundappa Vs. T. Thimmiah and Another, In S.V. Narayanappa (supra),* Supreme Court held that regularization did not automatically amount to permanence de hors confirmation as prescribed under the relevant service rules. In *R.N. Nanjundappa (supra),* Supreme Court held that a rule made under Article 309 of the Constitution providing for regularization of appointment strikes at the root of the existing appointment rules and the effect of regularization is to nullify the operation. But this concept of regularization so long in vogue in service law field has been seriously affected by the judgment of the Hon''ble Supreme Court in the case of *Secretary, State of Karnataka and Others Vs. Umadevi and Others, .* Constitution Bench in the aforesaid case has done away with the exception of general practice of regularization at least to some extent. The relevant paragraphs of this judgment are quoted below:-

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 as equals. Thus, any public employment has to be in terms of the constitutional scheme.

4. But, sometimes this process is not adhered to and the constitutional scheme of public employment is bypassed. 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 Commissions 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 backdoor or on daily wages, approaching the courts, seeking directions to make them permanent in their posts and to prevent regular recruitment to the posts concerned. The 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. Whether the wide powers under Article 226 of the Constitution are 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 recognised by our Constitution, has to be seriously pondered over. It is time, that the 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 emphasised that this is not the role envisaged for the High Courts in the scheme of things and their wide powers under Article 226 of the Constitution 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 individualisation 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.

15. Even at the threshold, it is necessary to keep in mind the distinction between regularisation and conferment of permanence in service jurisprudence. In *State of Mysore v. S.V. Narayanappa* this Court stated that it was a misconception to consider that regularisation meant permanence. In *R.N. Nanjundappa v. T. Thimmiah* this Court dealt with an argument that regularisation would mean conferring the quality of permanence on the appointment. This Court stated: (SCC pp. 416-17, para 26)

"Counsel on behalf of the respondent contended that regularisation would mean conferring the quality of permanence on the appointment whereas counsel on behalf of the State contended that regularisation did not mean permanence but that it was a case of regularisation of the rules under Article 309. Both the contentions are fallacious. 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 regularised. Ratification or regularisation is possible of an act which is within the power and province of the authority but there has been some non-compliance with procedure or manner which does not go to the root of the appointment. Regularisation cannot be said to be a mode of recruitment. To accede to such a proposition would be to introduce a new head of appointment in defiance of rules or it may have the effect of setting at naught the rules."

16. In *B.N. Nagarajan v. State of Karnataka* this Court clearly held that the words "regular" or "regularisation" do not connote permanence and cannot be construed so as to convey an idea of the nature of tenure of appointments. They are terms calculated to condone any procedural irregularities and are meant to cure only such defects as are attributable to methodology followed in making the appointments. This Court emphasised that when rules framed under Article 309 of the Constitution are in force, no regularisation is permissible in exercise of the executive powers of the Government under Article 162 of the Constitution in contravention of the rules. These decisions and the principles recognised therein have not been dissented to by this Court and on principle, we see no reason not to accept the proposition as enunciated in the above decisions. 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 regularised and that it alone can be regularised and granting permanence of employment is a totally different concept and cannot be equated with regularisation.

26. With respect, why should the State be allowed to depart from the normal rule and indulge in temporary employment in permanent posts? This Court, in our

view, is bound to insist on the State making regular and proper recruitments and is bound not to encourage or shut its eyes to the persistent transgression of the rules of regular recruitment. The direction to make permanent-the distinction between regularisation and making permanent, was not emphasised here-can only encourage the State, the model employer, to flout its own rules and would confer undue benefits on a few at the cost of many waiting to compete. With respect, the direction made in para 50 (of SCC) of Piara Singh is to some extent inconsistent with the conclusion in para 45 (of SCC) therein. With great respect, it appears to us that the last of the directions clearly runs counter to the constitutional scheme of employment recognised in the earlier part of the decision. Really, it cannot be said that this decision has laid down the law that all ad hoc, temporary or casual employees engaged without following the regular recruitment procedure should be made permanent.

33. It is not necessary to notice all the decisions of this Court on this aspect. By and large what emerges is that regular recruitment should be insisted upon, only in a contingency can an ad hoc appointment be made in a permanent vacancy, but the same should soon be followed by a regular recruitment and that appointments to non-available posts should not be taken note of for regularisation. The cases directing regularisation have mainly proceeded on the basis that having permitted the employee to work for some period, he should be absorbed, without really laying down any law to that effect, after discussing the constitutional scheme for public employment.

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. The High Courts acting under Article 226 of the Constitution, should not

ordinarily issue directions for absorption, regularisation, 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 the 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.

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 recognised 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 cases concerned, 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.

53. 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 regularisation of the services of such employees may have to be considered on merits in the light of the principles settled by this Court in the 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 regularise 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 of 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. We also clarify that regularisation, if any already made, but not sub judice, need not be reopened based on this judgment, but there should be no further bypassing of the constitutional requirement and regularising or making permanent, those not duly appointed as per the constitutional scheme.

14. Following Uma Devi (supra) Supreme Court passed judgment in the case of Post Master General, Kolkata and Others Vs. Tutu Das (Dutta), and deprecated the practice of executive action under Article 162 of the Constitution for regularizing service giving go by to the prescribed procedure under the appointment rules. Paragraphs 12, 13 and 15 of this judgment are relevant for the purpose of this case and the same are quoted below:-

12. What was considered to be permissible at a given point of time keeping in view the decisions of this Court which had then been operating in the field, does no longer hold good. Indisputably, the situation has completely changed in view of a large number of decisions rendered by this Court in last 15 years or so. It was felt that no appointment should be made contrary to the statutory provisions governing recruitment or the rules framed in that behalf under a statute or the proviso appended to Article 309 of the Constitution of India.

13. Equality clause contained in Articles 14 and 16 of the Constitution of India must be given primacy. No policy decision can be taken in terms of Article 77 or Article 162 of the Constitution of India which would run contrary to the constitutional or statutory schemes.

15. Before considering the submission of Mr. Roy based upon para 53 of Umadevi (3) we may notice that in A. Umarani v. Registrar, Co-op. Societies this Court held: (SCC p. 126, para 45)

"45. No regularisation is, thus, permissible in exercise of the statutory (sic executive) power conferred under Article 162 of the Constitution if the appointments have been made in contravention of the statutory rules."

15. The same law has been followed in the case of Indian Drugs and Pharmaceuticals Ltd. Vs. Workman, Indian Drugs and Pharmaceuticals Ltd., as well as State of U.P. and Others Vs. Desh Raj, . Paragraphs 31, 43, 44 and 49 of Indian Drugs and Pharmaceuticals Limited (supra) are relevant for the question under consideration in the present case and the same are quoted below:-

"31. No doubt, there can be occasions when the State or its instrumentalities employ persons on temporary or daily-wage basis in a contingency as additional hands without following the required procedure, but this does not confer any right on such persons to continue in service or get regular pay. Unless the appointments are made by following the rules, such appointees do not have any right to claim permanent absorption in the establishment.

43. In view of the above observations of this Court it has to be held that the

rules of recruitment cannot be relaxed and the court/tribunal cannot direct regularisation of temporary appointees dehors the rules, nor can it direct continuation of service of a temporary employee (whether called a casual, ad hoc or daily-rated employee) or payment of regular salaries to them.

44. It is well settled that regularisation cannot be a mode of appointment vide *Manager, Reserve Bank of India v. S. Mani* (AIR para 54).

49. Before parting with this case, we would like to state that although this Court would be very happy if everybody in the country is given a suitable job, the fact remains that in the present state of our country's economy the number of jobs are limited. Hence, everybody cannot be given a job, despite our earnest desire."

In *State of U.P. v. Desh Raj* (supra), Supreme Court reiterated the law laid down in *Uma Devi* (3) in regard to supremacy of the statutory rules and in paragraphs 7 to 12, position of law in this regard has been discussed. These paragraphs are quoted below:-

"7. Whatever may be the import and purport of such regularisation rules, in view of the recent Constitution Bench decision of this Court in *Secy., State of Karnataka v. Umadevi* (3), it is now well settled that the appointments, if made in violation of the constitutional scheme of equality as enshrined under Articles 14 and 16 of the Constitution of India, would be rendered illegal and, thus, void ab initio. No regularisation rules, therefore, could have been made by the State of Uttar Pradesh in derogation of the statutory or constitutional scheme.

8. Furthermore, the State of Uttar Pradesh must have made rules in terms of the proviso appended to Article 309 of the Constitution of India, providing for the mode and manner in which recruitments are to be made. Such rules have statutory force.

9. The learned counsel for the respondent, however, drew our attention to para 53 of *Umadevi* (3) which reads as under: (SCC p. 42)

"53. 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 regularisation of the services of such employees may have to be considered on merits in the light of the principles settled by this Court in the 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 regularise as a onetime measure, the services of such irregularly appointed, who have worked for ten years and more in duly sanctioned posts but not under cover of 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. We also clarify that regularisation, if any already made, but not sub judice, need not be reopened based on this judgment, but there should be no further bypassing of the constitutional requirement and regularising or making permanent, those not duly appointed as per the constitutional scheme."

10. The observations made in the said paragraph must be read in the light of the observations made in paras 15 and 16 of the judgment. The Constitution Bench referred to the decisions of this Court in *State of Mysore v. S.V. Narayanappa*, *R.N. Nanjundappa v. T. Thimmiah* and *B.N. Nagarajan v. State of Karnataka*. *B.N. Nagarajan* is a decision rendered by a three-Judge Bench of this Court in which it has clearly been held that the regularisation does not mean permanence. A distinction has clearly been made in those decisions between "irregularity" and "illegality". An appointment which was made throwing all constitutional obligations and statutory rules to the winds would render the same illegal whereas irregularity presupposes substantial compliance with the rules.

11. Distinction between irregularity and illegality is explicit. It has been so pointed out in *National Fertilizers Ltd. v. Somvir Singh* in the following terms: (SCC pp. 500-01, paras 23-25)

"23. The contention of the learned counsel appearing on behalf of the respondents that the appointments were irregular and not illegal, cannot be accepted for more than one reason. They were appointed only on the basis of their applications. The Recruitment Rules were not followed. Even the Selection Committee had not been properly constituted. In view of the ban on employment, no recruitment was permissible in law. The reservation policy adopted by the appellant had not been maintained. Even cases of minorities had not been given due consideration.

24. The Constitution Bench thought of directing regularisation of the services only of those employees whose appointments were irregular as explained in *State of Mysore v. S.V. Narayanappa*, *R.N. Nanjundappa v. T. Thimmiah* and *B.N. Nagarajan v. State of Karnataka* wherein this Court observed: [*Umadevi (3)* case, SCC p. 24, para 16]

"16. In *B.N. Nagarajan v. State of Karnataka* this Court clearly held that the words "regular" or "regularisation" do not connote permanence and cannot be construed so as to convey an idea of the nature of tenure of appointments. They are terms calculated to condone any procedural irregularities and are meant to cure only such defects as are attributable to methodology followed in making the appointments."

25. Judged by the standards laid down by this Court in the aforementioned decisions, the appointments of the respondents are illegal. They do not, thus, have any legal right to continue in service."

(See also State of M.P. v. Yogesh Chandra Dubey.)

12. It is not the case of the respondent that he was recruited in terms of the provisions of the Recruitment Rules framed under the proviso appended to Article 309 of the Constitution of India. In that view of the matter, ex facie his appointment was illegal. We, however, must observe that we have not been taken through the purport and import of the various provisions of the PWD Rules to which we have made reference hereto before. But in any event, the question of regularisation of the employees by reason of any policy decision adopted by the State is impermissible in law. The learned Division Bench could have dismissed the special appeal filed by the appellant on the ground of delay. It did not do so. It purported to uphold the order of the learned Single Judge even on merits."

16. In M.P. State Coop. Bank Ltd., Bhopal Vs. Nanuram Yadav and Others, , Hon"ble Supreme Court has laid down the principles governing public appointment under paragraph 24 which is quoted below:-

"24. It is clear that in the matter of public appointments, the following principles are to be followed:

(1) The appointments made without following the appropriate procedure under the rules/government circulars and without advertisement or inviting applications from the open market would amount to breach of Articles 14 and 16 of the Constitution of India.

(2) Regularisation cannot be a mode of appointment.

(3) An appointment made in violation of the mandatory provisions of the statute and in particular, ignoring the minimum educational qualification and other essential qualification would be wholly illegal. Such illegality cannot be cured by taking recourse to regularisation.

(4) Those who come by back door should go through that door.

(5) No regularisation is permissible in exercise of the statutory power conferred under Article 162 of the Constitution of India if the appointments have been made in contravention of the statutory rules.

(6) The court should not exercise its jurisdiction on misplaced sympathy.

(7) If the mischief played is so widespread and all pervasive, affecting the result, so as to make it difficult to pick out the persons who have been unlawfully benefited or wrongfully deprived of their selection, it will neither be possible nor necessary to issue individual show-cause notice to each selectee. The only way out would be to cancel the whole selection.

(8) When the entire selection is stinking, conceived in fraud and delivered in deceit, individual innocence has no place and the entire selection has to be set aside."

17. The equality clause enshrined in Article 16 has been considered by the Hon'ble Supreme Court in the case of State of Bihar Vs. Upendra Narayan Singh and Others, thereof necessity for open advertisement to fill up public posts or office has been highlighted as a corollary of Article 16 of the Constitution. Paragraphs 25 and 26 of this judgment are quoted below:-

25. The equality clause enshrined in Article 16 mandates that every appointment to public posts or office should be made by open advertisement so as to enable all eligible persons to compete for selection on merit-Umesh Kumar Nagpal v. State of Haryana, UPSC v. Girish Jayanti Lal Vaghela, State of Manipur v. Y. Token Singh and Municipal Corpn., Hyderabad v. P. Mary Manoranjani. Although, the courts have carved out some exceptions to this rule, for example, compassionate appointment of the dependant of deceased employees, for the purpose of this case it is not necessary to elaborate that aspect.

26. In Girish Jayanti Lal Vaghela case this Court, while reversing an order passed by the Central Administrative Tribunal which had directed the Union Public Service Commission to relax the age requirement in the respondent's case, elucidated the meaning of the expression "equality of opportunity for all citizens in matters relating to public employment" in the following words: (SCC p. 490, para 12)

"12. Article 16 which finds place in Part III of the Constitution relating to fundamental rights provides that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. The main object of Article 16 is to create a constitutional right to equality of opportunity and employment in public offices. The words "employment or appointment" cover not merely the initial appointment but also other attributes of service like promotion and age of superannuation, etc. The appointment to any post under the State can only be made after a proper advertisement has been made inviting applications from eligible candidates and holding of selection by a body of experts or a specially constituted committee whose members are fair and impartial through a written examination or interview or some other rational criteria for judging the inter se merit of candidates who have applied in response to the advertisement made. A regular appointment to a post under the State or Union cannot be made without issuing advertisement in the prescribed manner which may in some cases include inviting applications from the employment exchange where eligible candidates get their names registered. Any regular appointment made on a post under the State or Union without issuing advertisement inviting applications from eligible candidates and without holding a proper selection where all eligible candidates get a fair chance to compete would violate the guarantee enshrined under Article 16 of the Constitution."

18. The case of Ajaya Kumar Das Vs. State of Orissa and Others, has been relied on by the learned counsel for the petitioner to argue that statutory rules framed under Article 309 of the Constitution can be amended only by a rule or

notification duly made under the same Article and not otherwise. This judgment has been relied on to argue that the procedure for direct recruitment having been prescribed under Rule 7 of the statutory rules of 1979, the O.M. issued on 04.08.2008 or on any other date in exercise of power under Article 162 of the Constitution cannot affect the statutory rules framed under proviso to Article 309 of the Constitution. Relying on the case of Ahmedabad Municipal Corporation Vs. Virendra Kumar Jayantibhai Patel, , the learned counsel for the petitioner would argue that there is no room for sympathy in regard to appointment in public posts and offices. The fact that the private respondents have been working against the post for over a decade or so cannot be a ground to consider their case to be valid on sympathetic consideration and that the legality and validity of the appointment has to be decided on the touch stone of Article 14 and 16 of the Constitution vis-?-vis Rule 7 of the 1979 Rules. The case of Manjit Kaur v. Salvation Army MacRobert Hospital reported in (2005) 12 SCC 495 has also been relied on for the same reason.

19. On consideration of all these judgments one thing is clear that once there is a set of statutory rules governing recruitment to public posts and offices, the authority is duty bound to follow the same scrupulously. The basic reason for open advertisement and selection as prescribed under the Rules is to ensure competition among the eligible candidates so that equal opportunity as guaranteed under Article 16 of the Constitution is ensured. Appointments made without following appropriate procedure under the Rules holding the field and without advertisement and without inviting applications from open market would amount to infringement of Article 14 and 16 of the Constitution and so regularizing a service of a candidate otherwise not appointed by following prescribed procedure would not be a valid mode of appointment. The entry of these appointees into the service having been achieved through back door cannot acquire any right and so regularization of their services would amount to negating the prescribed procedure at the cost of Article 14 and 16 of the Constitution of India. Even taking recourse to a scheme framed under Article 162 of the Constitution to circumvent the procedure prescribed under a statutory rule would be contrary to the constitutional mandate. It is established law that no regularization is permissible on the strength of a Cabinet decision adopted in exercise of power under Article 162 of the Constitution of India and consequently such regularization is liable to be struck down.

20. While this is the established law holding the field in regard to regularization, the observation made by the Hon''ble Supreme Court in paragraph 53 of the case of Uma Devi (3) (supra) cannot be lost sight of. While deprecating the practice of adhocism, the Hon''ble Supreme Court has recorded a deviation in paragraph 53 by prescribing a onetime exercise to regularize services of irregularly appointed persons. In so doing, the ad hoc/contract appointments have been considered in two categories, namely, illegal appointments and irregular appointments. Illegal appointments are those where there is no sanctioned vacancy yet appointment has been made and where even if there is vacancy, the person appointed does

not have necessary qualification for being appointed to the post. The irregular appointments, on the other hand, are those appointments where there is a clear and sanctioned vacancy but regular process for selection has not been made to appoint a candidate who is otherwise qualified and eligible for the post. The onetime measure prescribed under paragraph 53 of this judgment is only for the irregular appointees and that, too, those who had worked for 10(ten) years or more in duly sanctioned post but not under cover of orders of the Courts or of Tribunals. If paragraph 53 is read in the context of the facts involved in this present case, it would appear that except respondents No. 4 and 6, no other respondents completed 10(ten) years of service as on the date of issuance of the impugned order of regularization. The date of initial appointment and their date of regularization were furnished by the official respondents to the counsel of the petitioners in reply to an application filed under Right to Information Act, 2005 and the same has been annexed as Annexure-69 to the writ petition. The details of date of joining service and date of regularization of the private respondents are available at page 99 of this writ petition and the same are furnished in the following table:-

The respondent No. 4, Dr. Takuyanger Ao was appointed on 10.03.1997 and he was regularized by notification dated 15.11.2007 after completion of 10(ten) years of service on contract basis. Similarly, respondent No. 6, Dr. Imlidangit was appointed on 24.11.1997 and he was regularized on 26.05.2011 after completion of more than 10(ten) years of service on contract basis. These respondents continued to remain on service on contract basis without aid of any order of any Court or Tribunal and so they are entitled to benefit of paragraph 53 of the judgment of Uma Devi (3) (supra). Regularization of respondents No. 4 and 6, therefore, even if considered from the view of paragraph 53 of Uma Devi (3) do not appear to be illegal or unauthorized and so regularization of respondents No. 4 (Dr. Takuyanger Ao) and 6 (Dr. Imlidangit) cannot be interfered with. But regularization of service of other respondents, namely, respondent No. 5 and respondents No. 7 to 16 of this writ petition are untenable in view of the law laid down by the Hon''ble Supreme Court in the aforesaid judgments. Their regularization orders, therefore, are hereby set aside.

21. The respondents shall be duty bound to comply with the procedure prescribed under Rule 7 of the 1979 Rules for the purpose of filling up the vacancies now held by the private respondent No. 5 and respondents No. 7 to 16 along with other such vacancies of similar nature. Even in paragraph 55 of Uma Devi (3) (supra), Supreme Court held that if sanctioned posts are vacant, the State would take immediate steps for filling those posts by regular process of selection and when the same is undertaken the irregular appointees in these posts would be allowed to compete, waiving the age restriction imposed for the recruitment and giving some weightage for they are having been engaged for work in the department for a significant period of time. Although the aforesaid relief was granted in exercise of power under Article 142 of the Constitution of India yet for the ends of justice, it is felt even in the present case the private

respondent No. 5 and respondents No. 7 to 16 have rendered substantially long years of service and it would be inequitable if they are not permitted to compete along with other eligible candidates merely because they have become over-aged. The official respondents shall condone the age bar in case of the respondent No. 5 and respondents No. 7 to 16 so as to enable them to participate in the selection process to be undertaken for filling up the permanent vacancies of Veterinary Assistant Surgeon (VAS) under Junior Grade Animal Husbandry & Veterinary Service (Class-II).

22. The writ petition is partly allowed.

23. No order as to costs.