

**(2007) 06 OHC CK 0061**

**In the Orissa High Court**

**Case No : Writ Petition (C) No. 9101 of 2003**

Management of Director, Microwave (Maintenance)

APPELLANT

Vs

Workmen and Another

RESPONDENT

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**Date of Decision : 22-06-2007**

**Acts Referred:**

Constitution of India, 1950 — Article 14, 16, 21, 226, 23

**Citation : (2007) 2 OLR 383 Supp**

**Hon'ble Judges : L. Mohapatra, J**

**Bench : Single Bench**

**Advocate :** Akshya Kumar Mishra, M.R. Mohapatra, Sanjay Ku. Mishra, D.P. Nanda, P.N. Mohapatra, M.K. Pati, R. Kanungo for O.P. No. 1 Gangadhar Tripathy, A.K. Swain, Bharat Jalli, Susama Pradhan Maheswar Satpathy and Sanjay Nayak for intervenor-O.P. No. 2, for the Respondent

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## **Judgement**

L. Mohapatra, J.—This writ application is directed against the award dated 19.5.2003 passed by the Central Government Industrial Tribunal-cum-Labour Court, Bhubaneswar, "in" Tr. I.D. Case No. 268 of 2001 directing the Petitioner to give temporary status to the second party-workmen and consider their regularization if posts are created/ sanctioned in future.

2. The Department of Telecommunication of the Government of India in the Ministry of Communication now known as Bharat Sanchar Nigam Limited runs the Microwave system of telecommunication, which exists throughout the country. The Telecommunication system has got three wings namely Project, Maintenance and Circle. The departmental activities have been divided into different regions, such as Assam, Bihar and West Bengal. Case of the second party-workmen is that a person can work either in Project or in Maintenance or in the Circle and such service is inter-transferable. If a workman is transferred from one Department to other, there is continuity in service. Similarly in Orissa under the Eastern Telecom Region there are three activities such as Project, Maintenance and Circle. The activity of the telecom system starts from the

Project. Project work covers laying of optical fiber cable line, tower orientation, power plant installation of general system Radio Relay Bay and others. The manual work like digging of earth, construction of microwave building, base of the tower are done by the contractor. The works being technical in nature, ordinary people cannot perform such work and some technical knowledge is required for the purpose. After the project work is over, it is handed over to the Maintenance Section for administrative convenience. It is also the case of the workmen that the workers working in the project are allowed to continue in employment under the Maintenance Department. Ordinarily services of such workers working in the project are not terminated even after completion of the project. According to the workmen 85% of the project workers are taken over to the Maintenance Department and rest are mostly retained for the purpose of uncompleted work at the project site and for needs of other projects. Claim of the workmen is that after completion of the project they are continuing in the Maintenance department and as such are entitled to temporary status as well as regularization having worked in the department for several years.

Case of the Petitioner which is the Management is that the workmen who have raised disputes are not their employees. According to the Petitioner said workmen are working in M/ s Oriental Security Service and on the basis of contract with the said security service they have been deployed and are working in the Project. According to the Management-Petitioner said Security Service is working under the Department by virtue of a contract, and provides security service on need basis as per terms and conditions of the contract. It is also case of the Management that the Project division undertakes the construction work of microwave towers and stations etc. in different Telecom Divisions and the control of the Divisions vest with the Chief General Manager, Microwave Project, Calcutta. After closure of the project the work of the stations with the other equipments and machineries are handed over to the Microwave Maintenance Division under the Chief General Manager, E.T.R., Calcutta. The Project and Maintenance Divisions are two separate and distinct wings of the telecom Department being controlled by two different chief General Managers. The Project Division looks to work departmentally or through Contractors and during continuance of the project work some casual workers used to be engaged on need basis for other miscellaneous work since the work of the Project is not of perennial in nature. After closure of the Project work the same is handed over to the Maintenance Division for the purpose of maintenance. The Management emphatically pleads that the workmen had never worked in the Maintenance Division and had been engaged as casual labourers in the project only for manual work and the technical works are done by the qualified persons of the Department. It is also the case of the Management that the casual labourers engaged in one project division cannot be engaged in Maintenance division simultaneously and they were never taken by the Maintenance even after closure of the Project except on few occasions. From the written statement filed by the Petitioner? Management it appears that similar contention was taken before the

Tribunal that the Opposite Parties-workmen are employed by the Security Agency as stated above and had never been employed by the Petitioner-Management and as such are not entitled to the relief claimed.

3. For the above dispute between the parties, a reference was made to the Tribunal for adjudication and the said reference is quoted below.

Whether the action of the 1st party Management of Director, Microwave (Maintenance) Division, ETR Deptt of Telecommunications by not giving temporary status and not regularizing the services of the 168 workmen(annexure) working since last 9 to 10 years without interruption is legal and justified? If not, to what relief the workmen are entitled?

Initially the Opposite Party-Union represented for 168 workmen for which the reference was made. Out of said 168 workmen, ten raised individual disputes for which separate references were made and one of the workmen is already dead. Therefore, the reference was confined to the rest of the workmen. On the basis of the pleadings of the parties the Tribunal framed two issues and the first issue which is relevant for the purpose of the case is whether action of the first party-management by not giving temporary status and not regularizing the services of the 168 workmen working since last 9 to 10 years without interruption is legal and justified. The 1st party-Management examined four witnesses including M/s Oriental Security Service and the 2nd party-workmen examined two witnesses and several documents were exhibited from both sides. Answering Issue No. 1 with reference to the evidence adduced before the Tribunal it was held that there was relationship of employer-employee between the Management and the workmen and the workmen had worked for 240 days and that the work of the 1st party-management is permanent and perennial in nature. This finding was arrived at by the Tribunal since it was of the view that M/s Oriental Security Service had been brought into picture only for the purpose of the case and the workmen were never employees of the said Oriental Security Service. On such finding the Tribunal directed the Petitioner-Management to grant temporary status to the workmen represented by the Opposite Party-Union and also directed that their cases shall be considered for regularization in future if posts are created/ sanctioned.

4. Shri P.N.Mohapatra, Learned Counsel appearing for the Petitioner submitted that it is admitted case of the parties that the Telephone system has three wings, namely Project, Maintenance and Circle and for each department there is a head known as Chief General Manager. In view of such admitted position, finding of the Tribunal that the three wings are not separate is erroneous. It was also contended that prior to 1997 the project work had not been handed over to the Petitioner and therefore if at all the Petitioners were working prior to 1997 in the project, their employment ceased to have in effect after completion of the project and moreover the workmen having worked under a private organization, they cannot be treated as employees of the Petitioner, even in the project wings. Learned Counsel further relied upon the documents exhibited in course of

hearing and with reference to the Ext. 14, the letter dated 30.3.2001 it was submitted that the said letter contains list of casual labourers having temporary status as on 1.8.1998 having completed 240 days in the preceding year as well as the number of casual labourers without temporary status as on 1.8.1998. The workmen in dispute having not completed the required number of days cannot be given temporary status even if they are treated to be employees under the Petitioner. This argument was advanced as an alternative argument by the Learned Counsel appearing for the Petitioner. The basic objection raised by the Learned Counsel for the Petitioner is that the Managing Partner of M/ s Oriental Security Service was examined in the disputed case and in his evidence it is stated that he had No. acquaintance with the workmen in dispute prior to 1997. He has also stated in his evidence that after formation of the organization No. advertisement has been issued calling for applications from the persons to work under them and the workmen in dispute had themselves submitted applications and on the basis of such applications they were given employment by the organization. In view of such evidence it was contended that the workmen in dispute never worked directly under the Petitioner?Management. Shri Mohapatra also contended that even if the contention of the workmen in dispute is accepted to the extent that they had been engaged prior to project work, after completion of the project their employment ceased and they could not have been employed any further. There is nothing on record to say that after completion of the project the workmen in dispute had been brought over to the Maintenance Department or they worked in the Maintenance Department under the Petitioner-management. Findings of the Tribunal that the introduction of Security Agency for the purpose of the case is a sham transaction is also disputed seriously by the Learned Counsel for the Petitioner. It is stated that there have been agreements with the said Security Agency from time to time and the security agency had a licence to engage people for maintenance of towers and ancillary works. On the basis of such licence the security agency had engaged people and all payments were made by the security agency and the Petitioner never played a role either in giving employment to the workmen in dispute for the purpose of maintenance nor had paid salary to them at any point of time. In this connection, Learned Counsel also referred to the documents exhibited in course of hearing of the dispute case, specifically those agreement which had been entered into between the Petitioner and the security agency as well as salary slip issued by the security agency to the workmen in dispute. As an alternative argument it was also submitted by the Learned Counsel for the Petitioner that even if for the sake of argument it is admitted that casual labourers had been engaged, they cannot be regularized in view of the decision reported in Secretary, State of Karnataka and Others Vs. Umadevi and Others, .

5. Learned Counsel appearing for the workmen in dispute submitted that "Bharatia Dak Tar Mazdoor Manch" and "National Federation of P&T Employees" had filed W.P. No. 373 of 1986 and W.P. No. 302 of 1996 respectively before the Apex Court claiming equal pay for equal work and regularization of daily rated

casual labourers in P & T Department doing work similar to that of regular workers of the Department. In October, 1987 both the cases were decided together directing the Department to prepare a scheme within 8 months on a rational basis for absorbing as far as possible the casual labourers who have been continuously employed, working for more than one year in the Posts and Telegraphs Department. Pursuant to the said direction, a scheme was prepared known as "Casual Labourers (Grant of Temporary Status & Regularization) Scheme of the Department of Telecommunications, 1989". The scheme was extended to the TSMs who were recruited after 30.3.1985 and completed 10 years of service as on 31.3.1997. Again the said scheme was extended in respect of casual labourers either engaged directly or through contractor working as on 1.8.1998. The workmen in dispute come within such category. Referring to the letters, Exts. 4, 11, and 12, Learned Counsel for the workmen in dispute further submitted that vide Ext. 12 the Asst. General Manager (STN) decided to regularize all the casual labourers working in the Department including those who have been granted temporary status w.e.f. 1.10.2000 in the order mentioned in the said document. All casual labourers who have been granted temporary status upto issuance of the Order Dated 12.2.1999 and further letter dated 9.6.2000 were to be regularized. All full time casual labourers as indicated in the Annexure were to be regularized. All part time casual labourers who were converted into full time casual laborers vide letter dated 16.9.1999 were to be regularized. All part time casual labourers working for less than 4 hours per day and converted into full time casual labourers vide letter dated 25.8.2000 were to be regularized. All Ayas and Supervisors converted into full time casual labourers as per Order Dated 29.9.2000 were to be regularized. It was also observed in the said circulars that if there is still any case of casual labourers left out due to any reasons, that may be referred to the Headquarters separately. On 6.3.2000 the General Manager, ETR, Calcutta recommended the case of the present workmen in dispute for grant of temporary status and for their regularization. Similar recommendation was also made on 4.7.2000 by the Director, Maintenance, ETR, Bhubaneswar. Reliance was placed by the Learned Counsel on Exhibits 27, 28, 31 and 37 which are recommendations made by the Department for grant of temporary status and for regularization to the workmen in dispute. With reference to the aforesaid letters, Learned Counsel submitted that on consideration of the scheme prepared by the Department pursuant to the order of the Apex Court, such recommendations had been made by different authorities being satisfied that the workmen in dispute are entitled to temporary status as well as regularization. However, a different stand has been taken by the Management even on the face of such letter to say that the workmen in dispute had never been engaged by the Petitioner-management and they had been engaged through security agency. Such a stand was available to be taken earlier also, but introduction of security agency having been introduced for the purpose of the dispute case, there is no mention of employment of the workmen in dispute by the security agency in one of the letters referred to above. On the above basis, it was contended by the Learned Counsel for the workmen in

dispute that the findings of the Tribunal that all records relating to engagement of security agency are sham transactions is justified and should not be disturbed. Learned Counsel relied upon decisions of the Apex Court as well as other High Courts in support of his claim that the workmen in dispute having been directly employed under the Management?Petitioner and having completed the required number of days in the preceding year as well as in view of the scheme prepared pursuant to the direction of the Apex Court, the Tribunal was justified in granting temporary status and for consideration of their case for regularization in future.

6. The Security Agency which was not a party before the Tribunal filed an application for intervention before this Court when the writ application was pending. The intervention application having been allowed, Learned Counsel appearing for the said Security Agency was permitted to submit on the merits of the case. Learned Counsel supported the stand taken by the Petitioner? management and stated that agreements were executed between the Petitioner and the security agency for engagement of labourers for the maintenance of Towers and its ancillary machineries. Learned Counsel for the intervenor supporting the contention of the Learned Counsel for the Petitioner further submitted that the workmen in dispute had never been engaged directly by the Petitioner and they had been engaged by the Security Agency for the purpose of maintenance.

7. Considering the submissions of the Learned Counsel appearing for all the parties, and the reference, the following questions emerge for consideration.

(i) Whether the workmen in dispute were working under the Project directly under the Petitioner management or not?

(ii) Whether the workmen were engaged by the intervenor or the intervenor was introduced for the purpose of the dispute case?

(iii) Whether the workmen satisfy the requirements for getting temporary status and regularization?

8. The first and second points are interlinked. It is, therefore, necessary to refer to the oral and documentary evidence adduced by the parties to answer the same. One Prakash Chandra Patel was examined as witness No. 1 on behalf of the workmen. In his deposition he has stated that since 1990 he is working under the 1st party-management continuously. He has also stated that the activities of the Telecom starts from Project. The project work covers, optical fiber cable laying, tower orientation, power plant installation for generation system, Radio Relay Bay and others. The manual work like digging of earth, construction of microwave building, base, of the tower are done by the contractor and the work of the contractor is supervised by the workmen. The project work is continuous in nature till it is completed, whereafter it is handed over to the Maintenance Section. In course of project work the materials like equipments, charger machine, generator, are indented and after receipt of the same it is issued to the contractors. He has also stated that some of the workmen are

technically and academically qualified. This witness has further stated that the persons who attended the project work were handed over the maintenance work. The work of maintenance covers starting of generator by Battery, testing of 2 to 140 MW system in case of STD failure. Optical cable fiber joining, orientation of antenna on the top of the tower and other ancillary works required for smooth functioning of the telecom system. Maintenance of work is done under shifting system round the clock. In case of failure of system and equipment the workmen first try to remove the defects, failing which assistance of engineers is taken. This witness has further stated that most of the workmen have come to the Maintenance in the year 1995 after completion of project in which they were working. This witness has also stated they are daily rated workmen and are paid at the end of the month and the rates are fixed by the Telecom Department. When the rate of payment was reduced to a sum of Rs. 750/- as consolidated salary for a month, a dispute was raised and at that point of time they came to know that they have shown to have been engaged as labourers under a contractor. The matter was brought before the Asst. Labour Commissioner(Central), Bhubaneswar and on 5.9.1997 a settlement was made which has been exhibited as Ext.2 and the contractor was not a party to the said settlement. After the settlement, the workmen are being paid at daily rate basis fixed by the Telecom Department. He has stated that when ever there is a dispute or difference, the settlement is ordinarily done between the management and the workmen and the contractor does not come to picture He has also stated that the workers had made a representation to the Management for regularization and they were again shown as workmen under a contractor namely Oriental Security Service, but during reconciliation the said security service was not made party nor it was called for reconciliation. Initially they were receiving payments in Form ACG-17 and when they demanded for regularization it was never informed to them that there is a ban order and unless the payments were received through the contractor they would be removed/disengaged. He has admitted that the workmen are normally receiving payments by putting their signatures on white paper with revenue stamp on protest but payment is made by the Telecom department. Similar is the evidence of other witnesses examined on behalf of the workmen. This witness have also stated that they are working continuously either in project or maintenance but purposefully artificial breaks have been shown. These witnesses have also stated that their names have been recommended for grant of temporary status as well as for regularization, but No. further step had been taken either for grant of temporary status or regularization. In view of the above, the dispute was raised and the matter was referred to the Tribunal for adjudication.

The evidence from the management side is that the optical fiber termination station, Microwave station, are guarded by the security guards and these security guards were supplied by M/s Oriental Security Service, Bhubaneswar. The workmen are working as security guards having been engaged by Oriental Security Service. It is also stated in evidence by the management witnesses that

time and time agreements have been executed with the Oriental Security Service for providing such security guards. It is also stated by the witness examined on behalf of the management that there is No. direct relationship of employer employee between the management of Telecom Department and the workmen.

9. Ext.2 is a decision arrived at between the Director, ETR, Bhubaneswar and the workmen represented by Union on 5.9.1997. The said document clearly shows that the decision was arrived at after discussion between the management and the Union and the Security Service did not come into picture at all. In the said decision it was agreed that issue of regularization shall be dealt with by different authorities in view of the decision of the Supreme Court and some decisions were taken with regard to payment of wages. This document itself shows that till 5.9.1997 the Oriental Security Service had not come into picture at all, whereas it is claimed that the workmen have been working since 1990. This document is not disputed by the management. The management relied upon the minutes of discussion dated 14.8.1997 marked as Ext.4 to show that even in August, 1997 the Oriental Security Service had been engaged. The evidence of P.W.2 clearly shows that introduction of the Oriental Security Service for the purpose of discussion had been objected by the workmen and therefore No. decision could be arrived at on 14.8.1997 and ultimately on 5.9.1997 a decision was arrived at. These two documents clearly support stand of the workmen that in course of discussion held on 14.8.1997 the Oriental Security Service was brought in which was objected by the workmen. Ext.4 further shows that No. decision had been arrived at on 14.8. 1997 and the next date of meeting was fixed to 5.9.1997. The settlement dated 5.9.1997 clearly indicates that the Oriental Security Service was not a part of discussion and none from the Oriental Security Service also signed the said settlement. I am, therefore, of the view that the oral evidence of the workmen that till September, 1997 Oriental Security Service had not come into picture and the management was trying to introduce the contractor with oblique motive stands proved. Ext.4 is another document (DOT Orders) regarding regularization of Mazdoor. Clause (2) of the said order shows that as per Casual Labourers (Grant of Temporary Status and Regularisation) Scheme, 1989, casual labourers are to be regularized. Even though there is a complete ban on recruitment of casual labourers, it has come to light that in many circles, defying the ban orders, had been recruited who have completed 10 years of employment. Therefore, the matter was again examined and it was decided by the Telecom Commission as one time measure on special consideration, to further delegate powers to all the Heads of Circles to create posts of Regular Mazdoors for regularization under the Scheme who have completed 10 years of service as on 31.3.1997 and the Annexure attached to the said order had a list of such labourers. The Annexure attached to the said DOT Order further shows that Annexure- B is the list of casual labourer who had been decided to be given temporary status as on 1.8.1998. It is claimed by the workmen that number of such casual labourers working in ETR under Annexure-123 are the workmen in dispute. Another document is Ext.14, wherein

the Deputy General Manager, ETR, Bhubaneswar has recommended cases of the present workmen for grant of temporary status. The list attached to the said letter of recommendation covers all the workmen in dispute. It is stated in the letter that details pertaining to all casual labourers working under different offices under the jurisdiction of ETR, Bhubaneswar are indicated in the list. The list shows that employments have been made since 1988-89 and the dates of engagement have been mentioned in the list. Exhibits 39 and 40 are the recommendations for regularization of some of workmen in dispute and Ext.40 specifically shows that some of the workmen are working since 1989-90. As against such document, evidence in support of the workmen in dispute, the management has relied upon agreements executed between it and the Oriental Security Service for engagement of security guards for the purpose of maintenance. Some receipts have also been exhibited to show that some of the workmen had received wages from the Security Agency and not from the management. On examination of the receipts in support of receipt of wages, it appears that in none of the receipts the workmen are shown to have been received their payment from the Oriental Security Service. On the other hand, the claim of the workmen that they had signed on blank white papers receipt may be correct. In view of such nature of evidence available on record, the stand of the management that the workmen had been engaged by the Oriental Security Service and not by the management appears to be an after thought not being supported by acceptable evidence. In view of the discussions made above, I agree with the view of the Learned Presiding Officer, Industrial Tribunal that the Security Agency has been brought into picture to avoid the responsibility of the management for giving temporary status to the workmen and for regularization.

10. The other question that requires determination is whether the workmen satisfy the requirements for getting temporary status as well as regularization. There is no dispute at the Bar that if the workmen in dispute are held to be the employees of the Petitioner-management, they shall be entitled to temporary status depending on the years of service they have rendered with reference to the scheme made pursuant to the decision of the Apex Court. Though it is contended by the Learned Counsel appearing for the workmen that all the workmen involved in the dispute have completed the required years of service for getting temporary status," Learned Counsel appearing for the Petitioner submitted that there are some workmen who have not completed the required years of service as per the scheme to get temporary status. The Court need not go into the individual case of each workman since their service records are available with the management. Those persons who have completed required years of service could be found out and temporary status could be conferred on them in terms of the scheme. Learned Counsel appearing for the workmen has also no objection if years of service rendered by each workman is calculated with reference to the records available with the management and accordingly temporary status is granted to those workmen who satisfy the requirements under the Scheme. It is, therefore, directed that the number of years of service

rendered by each workman represented by Opposite Party No. 1 Union be calculated, and those who satisfy the requirements for temporary status in terms of the Scheme be conferred with such status.

11. The other question that comes up for consideration is whether the workmen are entitled to for regularization or not. The Tribunal in its order though directed for giving temporary status to the workmen, did not direct for regularization of the workmen, but directed the management to consider their regularization if posts are created/ sanctioned in future. So far as regularization is concerned, Learned Counsel appearing for both parties referred to several decisions of this Court as well as the Apex Court, but there is No. necessity to refer to those decisions since the Constitution Bench of the Supreme Court has settled the law by referring to all previous decisions which have been cited by the Learned Counsel for the parties. In the case of Secretary, State of Karnataka and Others Vs. Umadevi and Others, . The Constitution Bench held as follows:

While answering an objection to the locus standi of the Writ Petitioners in challenging the repeated issue of an ordinance by the Governor of Bihar, the exalted position of rule of law in the scheme of things was emphasized. Chief Justice Bhagwati speaking on behalf of Constitution Bench in Dr D.C. Wadhwa and Others Vs. State of Bihar and Others, stated:

The rule of law constitutes the core of our Constitution of India and it is the essence of the rule of law that the exercise of the power by the State whether it be the Legislature or the Executive or any" other authority should be within the Constitutional limitations and if any practice is adopted by the Executive which is an flagrant and systematic violation of its Constitutional limitations, Petitioner No. 1 as a member of the public would have sufficient interest to challenge such practice by filing a Writ Petition and it would be the Constitutional duty of this Court to entertain the Writ Petition and adjudicate upon the validity of such practice.

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 terms 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 adhoc employees who by the very nature of their appointment, do not acquire any right. High Courts acting under Article 226 of the Constitution 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 ensuing 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.

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.

It 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 arms 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 temporary 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, 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 establishment, for making regular appointments to available posts in the service 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, it not one that would enable the jettisoning of 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.

It is argued that in a country like India where there is No. much poverty and unemployment and there is No. equality of bargaining power, the action of the State in not making the employees permanent, would be violative of Article 21 of the Constitution. But the very argument indicates that there are so many waiting for employment and an equal opportunity for competing for employment and it is in that context that the Constitution as one of its basic features, has included Articles 14,16 and 309 so as to ensure that public employment is given only in a fair and equitable manner by giving all those who are qualified, an opportunity to seek employment. In the guise of upholding rights under Article 21 of the Constitution of India, a set of persons cannot be preferred over a vast majority of people waiting for an opportunity to compete for State employment. The acceptance of the argument on behalf of the Respondents would really negate the rights of the others conferred by Article 21 of the Constitution, assuming that we are in a position to hold that the right to employment is also a right coming within the purview of Article 21 of the Constitution." The argument that Article 23 of the Constitution is breached because the employment on daily wages amounts to forced labour, cannot be accepted. After all, the employees accepted the employment at their own volition and with eyes open as to the nature of their employment. The Governments also revised the minimum wages payable from time to time in the light of all relevant circumstances. It also appears to us that importing of these theories to defeat the basic requirement of public employment would defeat the Constitutional scheme and the Constitutional goal of equality.

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.

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 *Dr. Rai Shivendra Bahadur v. The Governing Body of the Nalanda College*, (1962) Supp.2 SCR 144). 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 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.

One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in *S.V.Narayanappa* (supra). *R.N.Nanjundappa* (supra) and *B.N.Nagrajan* (supra) and referred to in paragraph 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 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 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 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 of orders of 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 regularization, 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 regularizing or making permanent, those not duly appointed as per the Constitutional scheme.

12. In view of what has been decided by the Apex Court in the aforesaid Judgment, No. direction can be issued for regularization of the workmen. I, accordingly, set aside that part of the order in which the Tribunal directed the management?Petitioner to consider regularization of the workmen if posts are created/ sanctioned in future. It is for the Management to decide as to whether such workmen should be regularized in posts they are holding or not and the Court cannot issue mandamus directing regularization.

13. Accordingly, it is left open to the Management to take a decision as to whether the workmen in dispute can be regularized in future or not.

14. With the above findings and observations, the writ application is disposed of.