
(2007) 05 MP CK 0004
In the Madhya Pradesh High Court

M.P. Urja Vikas Nigam Ltd. and Others	APPELLANT
Vs	
Rudra Prasad Mishra	RESPONDENT

Date of Decision : 02-05-2007

Acts Referred:

Constitution of India, 1950 — Article 12, 14, 142, 16, 162
Contract Act, 1872 — Section 70

Citation : (2007) 3 JLJ 350 : (2008) 1 LLJ 50

Hon'ble Judges : S.R. Waghmare, J;Dipak Misra, J

Bench : Division Bench

Judgement

Dipak Misra, J.—The defensibility and legal acceptability of the order dated December 11, 2006 passed by the learned single Judge in W.P. (S) No. 6088/2006 is called in question by the appellants invoking the jurisdiction u/s 2(1) of the Madhya Pradesh Uchha Nayaiaaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, 200S (for brevity "the Act").

The facts Which are essential to be expositied for disposal of the present appeal are that the respondent had preferred M.P. No. 4589/1993 for issue of a mandamus to the respondents therein to treat him as a Field Assistant-cum-Clerk from the date of his joining the service and to extend him all consequential benefits. The said writ petition was allowed in part by the learned single Judge by order dated April 16, 2002, wherein it was directed that the respondents should treat him as regular helper after completion of period of two years from the date he first entered into the contract service. In addition to that a further direction was issued that he should be granted differential of pay for the period subsequent to regularization.

2. The said order came to be assailed in L.P.A. No. 388/2003. The Division Bench on October 23,2003 passed the following order as under:

This appeal is taken up for final disposal with the consent of parties.

The Management being aggrieved by the order of the learned single Judge

directing the respondent workman to be absorbed and regularized, has filed this L.P.A. It is a, common ground that workman, is working from the year 1989 and is continuing to work.

Ms. Shobha Menon, learned senior counsel, for the appellant submits that the appellant is working only from 1989 and after 1999 only by virtue of interim order he is continuously working.

In the facts and circumstances of the case, it would be appropriate to modify the order of the learned single Judge to the extent that the respondent shall continue in service and shall be regularized as and when vacancy arises. The appellant is entitled to arrears of salary with effect from the order dated April 16, 2002 passed by the learned single Judge at lowest time scale in his qadre and the same shall, be paid within, a period of three months from the date of receipt of the copy of this order. It is made, clear that the appellant shall not be removed for the reasons of non-availability of job in view of his service with management since 1989.

3. In pursuance of the aforesaid order, the Management issued an order on March 6, 2004 and fixed the petitioner at the lowest time scale in the grade of helper and it was further ordered that he shall be regularized as and when vacancy arises. With the passage of time, one Ramdas Sen, a Peon stood superannuated, and as misfortune would have it one Mazhar Mohammad expired in 2004. Thus, as the respondent felt, two vacancies emerged and, therefore, he was entitled to be regularized but as that benefit was not extended he filed W.P. No. 6088/2006 (S). In the aforesaid writ petition, grant of medical reimbursement, pay scale and such other ancillary benefits.

4. The present appellants, the respondents, in the writ petition, resisted the claim by placing reliance on the decision rendered in Secretary, State of Karnataka and Others Vs. Umadevi and Others, the learned single Judge appreciating the factual matrix and the controversy that emerged for consideration expressed the opinion that the order passed by the Division Bench in L.P.A. has attained finality, the decision rendered in the case of Umadevi (supra) is not applicable to the case at hand and the vacancies due to the death of Mazhar Mohamad and superannuation of Ramdas Sen vacancies have occurred. Eventually, the learned single Judge directed as under:

7. Thus, I hold that the petitioner is entitled to be regularized from the date of death of Mazhar Mohammad Helper and/or from the date of retirement of Ramadas Sen whichever is earlier. The respondents are directed to regularize the petitioner from the date whichever is earlier. The petitioner be paid arrears of salary at the lowest time scale in the grade from April 16, 2002 till the date on which he shall be deemed to be regularized in terms of this order. He shall be entitled for consequential benefits of regularization including earned leave, medical reimbursement etc., as are payable to the regular employees of the respondents from the said date. Appropriate order in this regard be issued within

one month. He shall also be paid Rs. 1,10,000/- for his treatment within one month from the date of receipt of copy of this order. Needless to emphasize; that the respondents shall not insist upon furnishing of the bank guarantee for the release of the said amount for his treatment.

5. Questioning the correctness of the, order, Ms. Shobha Menon, learned senior Counsel along with Mr. Nilesh Pillai, learned counsel appearing for the appellants has raised the following contentions:

(i) The order passed by the learned single Judge is vulnerable inasmuch as the learned single Judge has failed to appreciate that the vacancy as an actual fact has not occurred in the cadre of helper.

(ii) The direction to regularize is totally misconceived in view of the decision rendered by the Apex Court in the case of Umadevi (supra).

(iii) The direction to pay the arrears of salary at the lowest time scale in grade from April 16, 2002 till date is sensitively susceptible inasmuch as the appellants have already paid the said salary at the lowest time scale grade to the respondent.

(iv) The direction to pay Rs. 1,10,000/- for the treatment of the respondent within one month from the date of receipt of the copy of the order is indefensible as such a right does not accrue in favour of the respondent, for grant of such an amount is governed by the rules and the respondent is not entitled to the same.

(v) The respondent cannot be treated as an employee of the appellant--Nigam as he was working under a, project run by the Nigam.

6. Combating the aforesaid submission put forth by the learned senior Counsel for the appellants, Mr. Ashok Lalwani, learned (counsel appearing for the respondent has submitted as follows:

(a) The decision rendered in Umadevi (supra) is not applicable inasmuch as the order passed by the Division Bench in L.P.A. No. 388/2003 has attained finality having been accepted by the appellants.

(b) The learned single Judge has issued the direction keeping in view the directions issued by the Division Bench and hence, the same cannot be found fault with being in consonance with the order passed by the Division Bench.

(c) The submission that by death of Mazhar Mohammad and superannuation of Ramdas Sen no vacancy has occurred in the cadre is totally unacceptable as they were working in the cadre of helper and hence, occurrence of vacancy is automatic.

(d) The stand that the respondent is not an employee of the Madhya Pradesh Urja Vikas Nigam Limited is to be thrown overboard as such a finding had been recorded in the earlier proceeding and the same having gone unassailed stands concluded between the parties to the lis.

(e) The respondent is entitled to be regularized and also entitled to the time scale pay in the revised scale of pay and, therefore, the direction by the learned single Judge in that regard is inexceptionable.

(vi) The command to the appellants to pay the amount for treatment is beyond reproach as the respondent is entitled to the same under the scheme of employment.

7. First we shall advert to the facet whether the law laid down in the case of Umadevi (supra) would apply to the case at hand. We would advert to the law laid down in Umadevi (supra) at a later stage for Reasons. At present suffice it to say in the case at hand the directions that were issued in the L.P.A. No. 388/2003 were categorical, unambiguous and unequivocal. The directions issued therein have gone unchallenged. In fact, we have been apprised at the Bar that the respondent had assailed the said order in a SLP which was dismissed. Therefore, the irresistible conclusion is order passed in the L.P.A. is binding the parties inter se and quite apart from the above, the appellant-Nigam has issued an order in terms of the L.P.A. Order, Thus, submission of Ms. Menon is unacceptable on this score.

8. The next issue that emerges for consideration is whether vacancies have actually occurred or not. There can be no scintilla of doubt that if the vacancies have, occurred the respondent is entitled to be regularized as per the direction of this Court as well as the order passed by the Nigam. As there was a lot of debate with regard to the occurring of vacancy and other aspects, this Court on April 18, 2007 had passed the following order:

To have the entire controversy put to rest, it is though opposite that the Managing Director, M.P. Urja Vikas Nigam Limited shall file an affidavit clearly and; categorically as regards the following aspects:

(a) What was the sanctioned strength as on October 23, 2003 of Helpers in M.P. Urja Vikas Nigam Limited?

(a) Whether Mazhar Mohammad and Ramdas Sen were regular employees within the sanctioned strength as on October 23, 2003?

(c) What was the revised pay scale of Helpers of the Nigam as on April 16, 2002?

(d) The date of death of Mazhar Mohammad Khan shall also be incorporated in the affidavit.

The affidavit shall be absolutely unambiguous and there should be no qualifier should be add, this Court wants to; have a specific information.

Ms. Menon undertakes to file an affidavit within a week hence.

9. In pursuance of the aforesaid order, an affidavit has been filed by the Managing Director. The essential part of the affidavit reads as under:

1. That the total sanctioned strength of Class IV employees (which includes

Helpers, Peons, Chowkidars and Mali) in M.P. Urja Vikas Nigam as on October 23, 2003 was 63. There has been no specific number of posts of Helpers separately sanctioned.

2. That Mazhar Mohammad and Ramdas Sen were regular employees within the sanctioned strength as on October 23, 2003.

3. That the revised pay scale of Helpers of the Nigam as on April 16, 2002 was 2250-55-2660-60-3200.

4. That the date of death of Mazhar Mohammad is September 3, 2004.

5. That necessary documents to the said effect are filed herewith and marked as Annexure No. 1 to XIII.

10. Annexure II to the said document at item No. 37 shows the cadre strength of Helper/Peon/Chowkidar/Sweeper/Gardner is 95. As per document IV certain posts have been allocated to the State of Chhatisgarh under the State Reorganization Act, 2000. Eventually, it is put forth that there has been reduction in the cadre and there is surplus. There is nothing on record to doubt the same. In view of the aforesaid, we are inclined to hold that despite the death of Mazhar Mohammad and superannuation of Ramdas Sen vacancies have not occurred. Hence, the direction by the learned single Judge on that score cannot be regarded as presentable.

11. The next aspect which requires to be dwelled upon is whether the respondent is entitled to the benefit of lowest time scale pay in the grade from April 16, 2002. The affidavit sworn to by the Managing Director clearly states the revised pay scale to the Helper of the Nigam as on April 16, 2002 was Rs. 2250-55-2660-60-3200. The submission of Ms. Menon is that the respondent cannot get the lowest of the time-scale of the said pay scale and, therefore, he has been paid at the time scale of the pay scale of Rs. 750-900 and hence, no fault has been committed by appellant.

12. The aforesaid submission of Ms. Menon, in our considered opinion, is totally misconceived. The respondent is an employee of the Nigam. He is working as a helper. He cannot be regularized at present. It will depend upon the occurrence of vacancy. However, the Division Bench had directed that he would be entitled to arrears of salary with effect from the order dated April 16, 2002 at the lowest time scale in his cadre. The pay scale at that juncture as has been mentioned is Rs. 2550-55-2660-60-3200. Once the pay scale has been revised the respondent has to get the benefit of the said pay scale in the lowest time-scale of pay as directed by the Division Bench. We are inclined to think so as the earlier pay scale has become extinct. In the ultimate conclusion, the appellants are bound to compute at the said revised scale pay for the-purpose of conferral of benefit of lowest time scale pay to the respondent and the same should be computed and paid within a period of one month.

13. We will be failing in our duty unless; we advert to the two fold submission of

Ms. Menon that there cannot be a direction for regularization. Mr. Lalwani has vehemently opposed the said stance. We have already held, that the decision rendered in L.P.A. No. 388-2003 has attained the finality qua parties to the said lis. While saying so we had indicated that we will be dealing with the said facet at a later stage. We proceed to do so as in most of the cases submissions are advanced seeking regularization. True it is, the present case is an exception because of the earlier order. Otherwise as there has been change in law the same has to be appropriately understood and properly applied.

14. In *Uma Devi* (supra) in para 34 it has been held as under 2006-II-LLJ-722 at p. 738:

34. ...The High Court acting under Article 226 of the Constitution, 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 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 Court 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.

15. In para 48 their Lordships expressed the view that the right to be treated equally with the other employees employed on daily wages, cannot be extended to a claim for equal treatment with those who were regularly employed, as that would amount to treating of unequals as equals. Thereafter their Lordships proceeding to state that when a Court is approached for relief by way of a writ the Court necessarily has to ask itself whether the person before it has any legal right to be enforced.

Thereafter their Lordship repelled the submission which was sought to be structured on the base of Article 21 of the Constitution.

16. In paragraph 41 their Lordships have stated thus 2006-II-LLJ-722 at p. 741:

41. ...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 Government 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.

17. In paragraph 43 the Constitution Bench has expressed the view as under 2006-II-LLJ-722 at p. 742:

43. ...Thus Court held that in order that a mandamus may issue to compel the authorities to do something, it must be shown that the statute imposes a legal duty on the authority and the aggrieved party had a legal right under the statute or rule to enforce it. This classical position continues and a mandamus could not be issued in favour of the employee directing the Government to make them permanent since the employee 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.

18. After so stating their Lordships in paragraph 44 have expressed the opinion as under 2006-II-LLJ-722 at p. 742:

44. One aspect needs to be clarified. There may be case 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 person 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 Court 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 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 1 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 subjudice, 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.

19. In this context, it is apposite to reproduce paragraph 46 in entirety 2006-II-LLJ-722 at p. 742:

46. In cases relating to service in the Commercial Taxes Department, the High Court has directed that those engaged on daily wages, be paid wages equal the salary and allowances that are being paid to the regular employees of their cadre in-Government service, with effect from the dates from which they were respectively appointed. The objection taken was to the direction for payment from the dates of engagement. We find that the High Court had clearly gone

wrong in directing that these employees be paid salary equal to the salary and allowances that are being paid to the regular employees of their cadre. In Government service, with effect from the dates from which they were respectively engaged or appointed. It was not open to the High Court to impose such an obligation on the State when the very question before the High Court in the case was whether these employees were entitled to have equal pay for equal work so called and were entitled to any other benefit. They had also been engaged in the teeth of directions not to do so. We are, therefore, of the view that, at best, the Division Bench of the High Court should have directed that wages equal to the salary that is being paid to regular employees be paid to these daily-wage-employees with effect from the date of its judgment. Hence, that part of the direction of the Division Bench is modified and it is directed that these daily-wage earners be paid wages equal to the salary at the lowest grade of employees of their cadre in the Commercial Taxes Department in Government service, from the date of the judgment of the Division Bench of the High Court. Since they are only daily wage earners, there would be no question of other] allowances being, paid to them. In view of our conclusion, that the Courts are not expected to issue directions for making such persons permanent in service, we set aside that part of the direction of the High Court directing the Government to consider their cases for regularization. We also notice that the High Court has not adverted to the aspect as to whether it was regularization or it was giving permanency that was being directed by the High Court. In such a situation, the" direction in that regard will stand deleted and the appeals filed by the State would stand allowed to that extent. If sanctioned posts are vacant (they are said to be vacant), the State will take immediate steps for filling those posts by a regular process of selections. But when regular recruitment is undertaken, the respondents in C.As. Nos. 3595-612 and those in the Commercial Taxes Department similarly situated, will be allowed to compete, waiving the age restriction imposed for the recruitment and giving some weightage for their having been engaged for work in the Department for a significant period of time. That would be the, extent of the exercise of power by this Court under Article 142 of the Constitution to do Justice to them.

(emphasis supplied)

20. On a perusal of aforesaid paragraph there can be no shadow of doubt that the directions were given in the prevalent circumstances of the said case pertaining to Commercial Tax Department which had, traveled to the Apex Court and directions were given and benefit of time scale of pay was granted and weightage was permitted for having been engaged and the said directions as their Lordships themselves have clarified were under Article 142 of the Constitution of India.

21. At this juncture it is profitable to refer to the decision rendered in Surendra Prasad Tewari Vs. Uttar Pradesh Rajya Krishi Utpadan Mandi Parishad and Others, . In the said case a two-Judge Bench of the Apex Court noted the points

raised by the appellant. Thereafter their Lordships referred to the constitution Bench decision-rendered in Umadevi (supra) and addressed, to the concept of public employment and eventually in paras 25, 29 and 38 expressed the view as under at p. 1034 of LLJ:

25. In the instant case, the appellant has continued in service for 14 years because of the interim order, granted by the High Court on September 15, 1992. In the aforesaid case, the Constitution Bench has observed that merely because an employee had continued under cover of an Order of the Court which the Court described as "litigious employment", he would not be entitled to any right to be absorbed or made permanent in the service.

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29. The ratio of the aforementioned judgment is that the Courts cannot encourage appointments which are made outside the constitutional scheme and it is improper for the Courts to give any direction for regularization of the person who has not been appointed by following the procedure laid down under Articles 14, 16 and 309 of the Constitution.

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38. In view of the clear and unambiguous constitutional scheme, the Court cannot countenance appointments to public office which have been made against the constitutional scheme. In the backdrop of constitutional philosophy, it would be improper for the Court to give direction for regularization of services of the person who is working either as daily-wager, ad hoc employee, probationer, temporary or contractual employee, not appointed following the procedure laid down under Articles 14, 16 and 309 of the Constitution. In our constitutional scheme, there is no room for back door entry in the matter of public employment.

22. In Principal, Mehar Chand Polytechnic, Jalandhar City and Another Vs. Anu Lumba and Others, , the Apex Court has expressed the view as under:

16, Public employment is a facet of right to equality envisaged under Article 16 of the Constitution of India. The State although is a model employer, its right to create posts and recruit people therefore, emanates from the statutes or statutory rules and/or rules framed under the proviso appended to Article 309 of the Constitution of India. The recruitment rules are framed with a view to give equal opportunity to all the citizens of India entitled for being considered for recruitment in the vacant posts.

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34. The respondent did not have legal right to be absorbed in service. They were appointed purely on temporary basis. It has not been shown by them that prior to their appointments, the recruitments of the provisions of Articles 14 and 16 of the Constitution had been complied with. Admittedly, there did not exist any sanctioned post. The project undertaken by the Union of India although

conditioned for some time was initially intended to be a time bound one. It was not meant for generating employment. It was meant for providing technical education to the agriculturalists. In absence of any legal right in the respondents, the High Court, thus, in our considered view, could not have issued a writ of or in the nature of mandamus.

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38. For the reason aforementioned, the impugned judgment cannot be sustained. In view of the fact that limited notice was issued in Civil Appeal Nos. 7051 and 7052 of 2002 arising out of SLP (Civil) Nos. 11597 and 22493 of 2001, we set aside only that part of the judgment whereby and whereunder the appellants had been directed to create posts and regularize the services of the respondents therein. The impugned judgments of the High Court to the aforementioned extent are set aside.

23. In *National Fertilizers Ltd. and Others Vs. Somvir Singh*, , their Lordships have expressed the opinion as follows at pp. 1115 and 1118 of LLJ:

13. The respondents herein were appointed only on application made by them. Admittedly, no advertisement was issued in a newspaper nor was the employment exchange notified as regards existence of vacancies. It is now trite law that "State" within the meaning of Article 12 of the Constitution is bound to comply with the constitutional requirements as adumbrated in Articles 14 and 16 thereof. When the Recruitment Rules are made, the employer would be bound to comply with the same. Any appointment in violation of such Rules would render them as nullities. It is also well settled that no recruitment should be permitted to be made through back door.

22. The contention of the learned Counsel appearing on behalf of the respondent 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.

23. The Constitution Bench though of directing regularization of the services only of those employees whose appointments were irregular as explained in *State of Mysore and Another Vs. S.V. Narayanappa*, , *R.N. Nanjundappa Vs. T. Thimmiah and Another*, , and *B.N. Nagarajan and Others Vs. State of Karnataka and Others*, wherein this Court observed 2006-II-LLJ-722 at p. 729:

14. 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 ideal 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....

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

25. It is true that the respondents had been working for a long time. It may also be true that they had not been paid wages on a regular scale of pay. But, they did not hold any post. They were, therefore, not entitled to be paid salary on a regular scale of pay. Furthermore, only because the respondents have worked for some time, the same by itself would not be a ground for directing regularization of their services in view of the decision of this Court in *Umadevi* (3).

(emphasis supplied)

24. It is worth-noting that thereafter in para 28 their Lordships directed as under:

28. ...We may, however, observe that their cases may be considered for future appointment and age bar, if any, in view of the policy decision of the appellant itself may be relaxed to the extent they had worked. The salary or any remuneration paid to them, however, may not be recovered. This order, however, is being, passed in exercise of our jurisdiction under Article 142 of the Constitution of India keeping in view the principles embodied in Section 70 of the Contract Act.

25. Recently in *Punjab Water Supply and Sewerage Board, Hoshiarpur Vs. Ranjodh Singh and Others*, , the Apex Court expressed the view that no person, who was temporarily or casually been employed could be directed to be continued permanently. Thereafter their Lordships referred to the decision rendered in *Somvir Singh* (supra) to point out the distinction between irregularity and illegality. After so holding their Lordships in para 19 to 22 expressed the view as under:

19. In the instant case, the High Court did not issue a writ of mandamus on arriving at a finding that the respondents had a legal right in relation to their claim for regularization, which it was obligated to do. It proceeded to issue the directions only on the basis of the purported policy decision adopted by the State. It failed to notice that a policy decision cannot be adopted by means of a circular letter and, as noticed hereinbefore, even a policy-decision adopted in terms of Article 162 of the Constitution of India in that behalf of would be void. Any departmental letter or executive instruction cannot prevail over statutory rule and constitutional provisions. Any appointment thus, made without following the procedure would be *ultra vires*.

20. This Court, recently in *Indian Drugs & Pharmaceuticals Ltd. v. Workman* opined that rules of recruitment cannot be relaxed and the Courts/Tribunals cannot direct regularization of temporary appointees de hors the rules, nor can it direct continuation of service of a temporary employee (whether called a casual,

ad hoc or daily-rate employment) or payment of regular salaries to them. See also *Municipal Corporation Jabalpur v. Om Prakash Dubey* ILR 2007 MP 157.

21. Our attention was drawn to an order of a I Division Bench of this Court date September 7, 2006 in *State of Punjab v. Lakhwinder Singh* wherein the matters had been remitted for consideration of the matters afresh in the light of the decisions of this Court referred to therein. Similar order appears to have been passed in *CIT v. Leena Jain*.

22. We are not persuaded to do so as the decisions of this Court stare in our face. We cannot ignore the same. It was faintly suggested that as the respondents are qualified to hold the posts and they had been continuously working for a long time, this Court may not interfere with the impugned judgment. In the face of a catena of decisions of this Court, we cannot accept the said submission.

26. At this juncture we may fruitfully refer to a two-Judge Bench decision rendered in *State of M.P. and Ors. v. Lalit Kumar Verma* 2007 I LLJ 789 , wherein their Lordships referred to paragraph 53 of the decision rendered in *Uma Devi (supra)* and analysed the directions issued in *Mineral Exploration Corporation Employees' Union Vs. Mineral Exploration Corporation Limited and Another*, and eventually distinguished the same on the ground that attention of the Court was not drawn to the earlier precedents including three-Judge Bench decision of the Court rendered in *B.N. Nagarajan (supra)*. After so holding their Lordships in paragraph 23 expressed the view as under:

23. The legal position somehow was-uncertain before the decision rendered by the Constitution Bench of this Court in *Uma Devi (supra)*. It has categorically been stated before us that there was no vacant post in the department in which the respondent could-be reinstated. The State had also adopted a policy decision regarding regularization, The said policy decision has also no application in the case of the respondent. Even otherwise, it would be-unconstitutional being hit by Article 16 of the Constitution of India.

27. In *State of U.P. and Others Vs. Desh Raj, ,* their Lordship referred to paragraph 53 of *Uma Devi (supra)* and after reproducing the said paragraph expressed the opinion in paragraphs 10 and 12 Which areas under at p. 618 of LLJ:

10. The observations made in the said paragraph must be read in the light of the observations made in paragraph 15 and 16 of the judgment. The Constitution Bench referred to the decisions of this Court in *State of Mysore and Another Vs. S.V. Narayanappa, , R.N. Nanjundappa Vs. T. Thimmiah and Another, ,* and *B.N. Nagarajan and Others Vs. State of Karnataka and Others, .* *B.N. Nagarajan* is a decision rendered by a three Judge Bench of this Court in which it has clearly been held that the regularization 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 winds would render the same illegal whereas irregularity pre-supposes substantial compliance of the rules.

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12. It is not the case of the respondents that they were 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* their appointments were illegal. We, however, must observe that we have not been taken through the purport and import or the various provisions of the PWD rules to which we have made reference here to before. But in any event, the question of regularization 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.

28 In the aforesaid case their Lordship placed reliance on the decision rendered in *State of Madhya Pradesh and Others Vs. Yogesh Chandra Dubey and Others*, . In our humble view the decision rendered in *Desh Raj (supra)* has taken note of *Uma Devi (supra)* and has proved the view expressed in *Yogesh Chandra (supra)*.

29. *Municipal Corporation, Jabalpur Vs. Om Prakash Dubey*, , reference was made to paragraph 33 making the distinction between two terms, namely "irregular appointment" and "illegal appointment" and distinguished the decision rendered in *Mineral Exploration Corporation Ltd. and Anr. (supra)* holding as under 2007-I-LLJ-1026 at p. 1033:

18. The said directions were issued keeping in view the peculiar facts, wherewith we are not concerned. The attention of this Court furthermore was not drawn to the judgment of this Court rendered in *R.N. Nanjundappa (supra)*. *State of Mysore and Anr. v. S.V. Narayanappa (supra)* and *B.N. Nagarajan (supra)*.

30. In the case of *Anu Lamba (supra)* the Apex Court had quashed the directions to create post and regularize the services of the respondents therein.

31. In *Somvir Singh (supra)* the directions issued by their Lordships in paragraph 28 are also, as clarified by their Lordships, are under Article 142 of the Constitution of India.

32. In *Ranjodh Singh (supra)* a two-Judge Bench of the Apex Court has held that it is obligatory on the part of the High Court before issuing the writ of mandamus to arrive at the finding that the respondents have the legal rights in respect or regularization, as it is obliged to do so. Their Lordships have expressed the view that the policy decision. cannot be adopted by means of circular/letter and in fact, even the policy decision of Article 162 of the Constitution of India in that behalf would be void, for any appointment made without following the procedure would be *ultra vires*.

33. A decision rendered in the case of Rakish v. State of M.P. (2007) I MPLJ 133 has been brought to our notice. In the said decision the learned single Judge has noted the submissions in paragraph 10 as under:

10. On the second limb of argument, learned Additional Advocate General has placed reliance on a judgment of Supreme Court delivered by a Bench consisting of two Judges in the case of State of Madhya Pradesh and Others Vs. Yogesh Chandra Dubey and Others, . On the basis of the aforesaid judgments it is urged that a; direction for the minimum of the scale of pay, on which, petitioners are working on daily wage cannot be issued. It is further said that although in the case of Umadevi (supra) the Hon''ble Supreme Court has directed to grant the minimum of the pay in a scale corresponding to the post on which the petitioners are working but in the subsequent judgment of State of M.P. v. Yogesh Chandra Dubey (supra), it is held that such employees are not entitled for grant of benefit of minimum pay of scale. However, it is urged that in the light of the subsequent judgment of the Supreme Court in the case of Yogesh Chandra Dubey (supra) direction for grant of benefit of minimum of pay scale, cannot be issued.

34. Thereafter, the learned single Judge referred to paragraphs 12, 34, 35, 36, 37, 38, 39, 41, 43 and 53 of the decision rendered in Umadevi (supra) and eventually in paragraph 17 has expressed the view as under:

17. In view of the above, the argument of learned Additional advocate General, based on the judgment in the case of Yogesh Chandra Dubey (supra) to deny the benefit of the minimum of the pay scale cannot be sustained for the simple reason that the direction as issued in the case of Umadevi (supra) by the Supreme Court, is of the Constitutional Bench consisting of five judges and judgment in the case of Yogesh Chandra Dubey is by two Judges Bench. However, the judgment of Yogesh Dubey cannot overcome to the judgment rendered by the Bench consisting of five Judges in the case of Umadevi (supra). It is further seen from the record that the judgment of the Yogesh Chandra Dubey is subsequent to the judgment of the Umadevi (supra), however, it has not cited nor-considered or referred before the Supreme Court. "In such circumstances and in the light of the judgment of Umadevi (supra) as well as the earlier judgments of the Supreme Court in the case of Devinder Singh as well as Talwinder Singh (supra) it is apparent that the daily wages earners deserve to be paid the wages equal to the minimum salary of their cadre in the Government service instead to pay them their regular pay scale of pay. Thus, in view of the foregoing discussion it is to be held that the daily wages employees working from years together on the Collectorate are entitled to get the minimum of the pay on a scale to the corresponding post on which they are working.

35. In our considered view the direction that daily wages employees working from years together on the Collectorate are entitled to get the minimum of the pay scale to the corresponding post on which they are working is neither correct nor sound. The observations made in the case of Umadevi (supra) are neither general nor to that effect. In our hutnble view the case of Yogesh Chandra Dubey

(supra) does not say anything which transgressed any facet of Umadevi (supra). The learned single Judge, as we are disposed to think, has erroneously observed that the judgment in Yogesh Chandra Dubey (supra) cannot overcome the judgment rendered in the case of Umadevi (supra). We say so as we understand that certain directions were given in Umadevi (supra) in the context of the case and further some of them under Article 142 of the Constitution of India. The learned single Judge in the case of Rakesh (supra) in paragraphs. 20 and 22 has held as under:

20. Now to resolve the controversy for all the time in the entire State of Madhya Pradesh, in the matter of consideration of the regularization or regularization of the daily wages employees or to grant them benefit of the minimum of pay in a scale corresponding to the post to which they are working and in view of the foregoing discussion it is to be held that daily wages employees are not entitled for their regularization in terms of the police dated April 9, 1990 or on account of discrimination meted out, on account of regularization of the incumbent juniors. The consideration of regularization is permissible by one time measure only to those employees who were appointed irregularly and not illegally; on the vacant post, prior to December 31, 1988 and possessing qualification or eligibility and continuing without intervention of the orders of the Court, it is to be further held that the; daily wages employees who were engaged prior to. December 31, 1988 on daily wages; are entitled to get the minimum of the pay in a corresponding scale to the post on which they are working in the light of the judgment of Umadevi (supra). At the same time it is to be held here that the daily wages employees, who were appointed without following due process of law are only entitled to get relaxation of their age as well as the weightage/preference while facing the process of fresh selection. The Government must take recourse to fill up the vacant posts through their participation by following due process of selection for their appointment.

xx xx xx xx xx

22. In view of the foregoing discussion all these petitions deserve to be disposed of with the following directions:

i) The daily wages employees, engaged even prior to December 31, 1988 in the State of M.P., are not entitled for their regularization in the light of the policy dated January 9, 1990 or on the basis of plea of discrimination or otherwise, except who falls within the purview of direction of para (ii) below.

ii) The daily wages employees, who were appointed, irregularly (not illegally) prior to December 31, 1988 on a sanctioned vacant post, possessing qualification/eligibility and have continuously worked without intervention of the Court are entitled for their consideration or regularization in view of the discussion made hereinabove by adopting one time measure. The State Government or the instrumentalities of the State shall take recourse for such employees within a period of six months from today in the light of the observations as made in para

53 in the case of Umadevi (supra).

iii) For remaining other employees who are working on daily wages, and are not covered by the directions of para (ii) hereinabove, the Government is directed to initiate the process of regular selection and recruitment on the available vacant post as directed by the Supreme Court in the case Umadevi (supra).

iv) As and when vacancies are filled up by the Government by regular process of selection such daily wages employees, be benefited by the age relaxation to the period to which they have rendered their services, while facing regular process of selection for recruitment by them.

v) The respondents should also carve out the measure to grant them additional marks/preference in the process of selection, by virtue of their experience of work on the post, while filling up the vacancies in] accordance with the provisions of rules.

vi) Petitions filed by petitioners, challenging the order of cancellation or regularization, are allowed and the orders of cancellation of regularization are hereby quashed.

vii) Petitioners given minimum pay in the corresponding scale to the post or cadre in which they are working in the concerned department, from the date of passing of this-order. Such benefit be extended to them within a period of six months.

viii) Petitioners who want to seek the relief of classification by approaching the Labour Court, are free to take such recourse if they 3 are covered under the provisions of the Industrial Laws or Labour Laws.

ix) All these writ petitions are disposed of with the above directions.

36. In our considered view directions for grant of relaxation of age filling up, grant of direction to fill up the vacancies as a mandate, conferral of benefit for carving out measures to grant them additional marks, preference in the process of selection, grant of minimum pay in⁴ the corresponding scale, are contrary to judgments of the Supreme Court which have been cited hereinabove. In our humble view the said decisions have been misread and that is why the aforesaid general directions have been ⁴ issued. Hence, we conclude and hold that the decision rendered in the case of Rakesh (supra) does not lay down the law correctly in that regard. At this juncture we would also like to clarify another aspect i.e. the direction in paragraph 53 of Uma Devi (supra) only pertained to irregular appointments in addition to qualifiers provided therein.

37. In view of our premised reasons, we proceed to enumerate our conclusions in seriatim:

a) The case of the respondent stands closed by the verdict dated October 23, 2003 rendered in L.P.A. No. 388/2003.

- b) There is no clear and actual vacancy in " the cadre of helper/peon/chowkidar/ sweeper in the appellant-Corporation and, therefore, the question of regularization does not arise.
 - c) The respondent is entitled to lowest in the time-scale in the pay-scale of Rs. 2550-3200 with effect from April 16, 2002.
 - d) Differential sum be computed and paid to the respondent within a month from the date of receipt of the order passed today.
 - e) In case vacancies arise directions given in L.P.A. No. 388/2003 shall be carried out in letter and spirit as the said judgment has attained the finality. It is hereby clarified that the said decision is not to be treated as a precedent for any purpose because it only issued directions in that particular factual matrix.
 - f) The order passed by the learned single Judge to regularize the respondent is incorrect.
 - g) The directions issued by the learned single Judge to pay the amount of Rs. 1,10,000 for treatment is impermissible.
 - h) The judgment rendered in the case of Rakesh (supra) does not lay down the law correctly as has been discussed in paragraph 38 above.
36. Consequently the writ appeal is allowed in part. There shall be no order as to costs.