
(2014) 05 SHI CK 0013
In the High Court Of Himachal Pradesh
Case No : CWP No. 7013 of 2013

Naresh Kumar

APPELLANT

Vs

The State of H.P. and Others

RESPONDENT

Date of Decision : 06-05-2014

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 226, 309, 32
Police Act, 1861 — Section 17

Citation : (2014) 05 SHI CK 0013

Hon'ble Judges : Tarlok Singh Chauhan, J

Bench : Single Bench

Advocate : Sunil Chaudhary, Advocate in CWP Nos. 6996, 7012, 7013, 7014 to 7027, 7036, 7037, 7039, 7041 to 7045 of 2013, Ms. Archana Dutt, Advocate in CWP Nos. 8216 and 9804 of 2013, Advocate for the Appellant; Shrawan Dogra, Advocate General, Ms. Meenakshi Sharma, Addl. Advocate General, Ms. Parul Negi and Mr. Kush Sharma, Deputy Advocate Generals, Advocate for the Respondent

Final Decision : Disposed Off

Judgement

Tarlok Singh Chauhan, J.—Since common questions of law and facts arise for consideration, therefore, this batch of writ petitions are taken up together for hearing and are being disposed of by common judgment.

2. The Government of Himachal Pradesh, Department of Panchayati Raj issued Notification No. PCH-HC(1)-5/2000 dated 21.10.2000, whereby it issued guidelines for engaging Technical Staff in the Gram Panchayats for the execution of developmental works. As per this notification, the scheme envisaged was applicable for all over the State and was to provide employment opportunities to those unemployed persons who otherwise were qualified in various trades like Junior Engineers/Surveyors/Draftsman etc.

3. The petitioners were eligible and participated in the selection process and ultimately were appointed as Technical Assistants (Takniki Sahayak) in the

respondent department on contract basis. The petitioners initially at the time of appointment were paid fixed honorarium of Rs. 1200/- per month and apart from this they were also being paid commission at the rate as prescribed by the respondents department from time to time. As per terms and conditions of this notification, the petitioners were required to work only for 4 hours a day.

4. On 18.2.2005, the respondents issued another notification superseding the notification dated 21.10.2000 and formulated a new scheme for engaging Technical Assistants in the Gram Panchayats. The eligibility of qualification was fixed as degree/diplomas in Civil Engineering from recognized institution. It was further provided that all the persons appointed under the scheme of 21.10.2000 shall also be eligible, if otherwise qualified. It was further provided that Technical Assistant (Takniki Sahayak) was to be paid 2% of the cost of each work as service fee and the same would be paid in two installments i.e. one on the completion of 50% of the work and final installment at the completion of the work.

5. The State Government in supersession of Notification dated 18.5.2005, issued yet another Notification dated 7.4.2008, whereby once again new scheme was formulated for engaging Technical Assistant (Takniki Sahayak) for Gram Panchayats. Now as per this scheme, the Takniki Sahayak were required to ensure quality and cost effectiveness of civil works being carried out and executed by the Gram Panchayats under National Rural Employment Guarantee Scheme and all other development works in the State of Himachal Pradesh. In this notification, the Takniki Sahayak were given powers to accord technical approval and assessment of work of Rs. 1,50,000/-. The service fee for the works upto Rs. 50,000/- was fixed at 2% and thereafter 1.5% upto Rs. 1,50,000/-.

6. The State vide notification dated 25.8.2012 enhanced the minimum fixed monthly amount payment to the petitioners from Rs. 4,000/- and Rs. 5,000/- to Rs. 5500/-. Besides this, the rate of the commission for works upto Rs. 1,00,000/- was fixed at the rate of 2%, works upto Rs. 2,00,000/- at the rate of 1.50% while the works of above Rs. 2,00,000/- the commission was fixed at the rate of 1.25%.

7. In September, 2012, the respondent-State issued Notification whereby it was decided to pay Rs. 240/- per day to the Technical Assistants who had completed 10 years of service. Another change brought in this notification was that the services of the petitioners from the status of "contract employee" was converted to that of "daily wager".

8. Now, the claim of the petitioners is that despite having been engaged on contract basis from the year 2001 onwards, their services were required to be regularized as per existing policy of the State Government but instead of regularizing their services the same had been converted as aforesaid. The petitioners claim that no doubt as per notification dated 21.10.2000 they had to

work only for four hours but thereafter this notification was superseded by notification dated 18.2.2005 and thereafter the petitioners are working on contract basis for full day. Thus, according to them their services are required to be regularized as per the existing policy of the State Government for contract employees i.e. after completion of six years of contract service.

9. It was also claimed that the department had not framed any Recruitment and Promotion Rules for filling up the post of Takniki Sahayak and the appointments were being made in accordance with executive instructions/notification issued from time to time. However, in the year 2012, the draft rules for Recruitment and Promotion were framed but till date the same have not been notified by the State Government.

10. On the basis of such submissions, the petitioners prayed that the notification dated September, 2012 issued by the respondents department whereby the status of the petitioners has been converted from "contract employee" to "daily wager" may be quashed and set aside and the respondents be directed to regularize the services of the petitioners as per the policy of the State Government for regularization of contract employees from due date alongwith all consequential benefits. It is further prayed that the respondents be directed to consider the case of the petitioners for paying them Rs. 360/- per day with effect from the year 2008 and lastly, it was prayed that the respondents be directed to frame rules for regularization of the services of the petitioners keeping in view the fact that they have already put in more than 12 years of service.

11. The respondents filed their reply wherein by way of preliminary submissions, it was submitted that the petitions were not maintainable as all the Panchayats which were the appointing authorities of the petitioners have not been impleaded as necessary parties. It was claimed that the petitioners were in fact the employees of the concerned Panchayats and not of the State Government and therefore, the services cannot be regularized. It was also alleged that petitioners have not been recruited through the Himachal Pradesh Public Service Commission or the Himachal Pradesh Subordinate Services Selection Board and therefore, they cannot claim regularization at par with other employees recruited through these agencies. It was claimed that the job of the Takniki Sahayak was contractual in nature extendable on the availability of resources and performance of the concerned Takniki Sahayak. It was admitted that the Scheme dated 21.10.2000 was superseded by new Scheme notified vide Notification dated 18.2.2005. The object of the new scheme was to provide a panel of technically qualified Takniki Sahayaks at the Block level. The Gram Panchayat was given choice to select Takniki Sahayak from the panel for execution of work in the concerned Gram Panchayat. It was envisaged that there will be no liability on the Gram Panchayat to pay honorarium to the Takniki Sahayak, in case there was no work in the Gram Panchayat. Thus, the engagement of the Takniki Sahayak was "work related which was the main objective of the Notification dated 18.2.2005".

12. It was claimed that the post of Takniki Sahayak was not a cadre post of the

department and only a panel had been prepared for requisitioning their services of the Takniki Sahayak as per the requirement of the Gram Panchayat. Therefore, in such facts and circumstances, the policy framed by the State Government for regularizing the services of its employees was not applicable to the cases of the petitioners.

13. The petitioners filed rejoinder(s) whereby they denied the averments made in the reply(s) and reiterated the averments made in the petitions. In addition to that the petitioners placed on record an office order issued by the Block Development Officer, Battiyat, District Chamba to claim that the appointments of the petitioners in fact had been made by the Government and not by the concerned Panchayats.

14. During the pendency of the petitions, different applications for placing on record additional documents was preferred by the petitioners. The petitioners had sought to place on record the proceedings of the Cabinet whereby the proposal made by the Principal Secretary through finance department to the State Government for considering the wages of the petitioners at the rate of Rs. 360/- per day w.e.f. 7.4.2008 was rejected by the Cabinet. The petitioners also pointed out in the applications that the respondents had granted similar relief to the Panchayat Sahayaks. The Panchayat Sahayaks who have now been re-designated as Contract Secretary have been regularized w.e.f. 2007 with all consequential benefits. The petitioners placed on record Notification dated 24.3.2005 issued by the respondents-State whereby 100 new posts of Junior Engineers was sought to be filled up and the Selection Committee like in the case of the petitioners was to comprise and consists of the following members:-

1. Sub Divisional Magistrate: Chairman
2. Chairman P.S.: Member.
3. Assistant Engineer (Dev.): Member
4. Executive Officer P.S.: Member Secretary.

It was for the Panchayat Samiti to invite the application and would the appointing authority.

15. The petitioners also placed on record letter dated 4.4.2014 whereby the Junior Engineers who have completed their 8 years of contract service upto 31.3.2013 have been ordered to be regularized. Letter dated 9.7.2013 written by the Director (Panchayati Raj) to the Secretaries Zila Parishad, Shimla, Hamirpur, Una, Mandi, Kangra, Chamba and Solan, whereby it has been informed that the contract services of the Junior Engineers who have completed 6 years services upto 31.3.2013 would be regularized. Notification dated 9.9.2008 whereby the contract appointees in the Government Departments had been ordered to be regularized on completion of 8 years of continuous service upto 31.3.2008, and lastly the proceedings of the Cabinet held on 4.3.2014 wherein the Cabinet had considered and approved the proposal to regularize the services of the Panchayat

Assistants.

16. The learned counsel for the petitioners have strenuously argued that when their counter parts i.e. Panchayat Assistants and Junior Engineers were appointed by the similar selection committee on similar terms and conditions have been regularized, they alone cannot be singled out. The petitioners had undergone proper selection in accordance with the scheme and are duly qualified like to JEs and Panchayat Sahayaks. In fact the draft rules have been prepared which clearly shows that the cadre of the Takniki Sahayak is existing in the department. The matter had even gone to the Cabinet which gave a step motherly treatment to the petitioners. In such circumstances, the learned counsel for the petitioners have contended that the respondents should be called upon to create distinct and separate cadre and sanction the post of Takniki Sahayak as had been done by the Hon''ble Supreme Court in Nihal Singh and Others Vs. State of Punjab and Others, .

17. I need not refer to this judgment in extenso because In CWP No. 6451 of 2011 titled Rakesh Kumar vs. State of H.P. and others, a co-ordinate Bench (Justice Rajiv Sharma, J) has already considered the same. The petitioner in the aforesaid case had claimed to be working uninterruptedly w.e.f. 13.3.2001 and claimed that his services be regularized. The writ petition was allowed and the respondents were directed to regularize the services of the petitioner as Junior Engineer in the District Rural Development Agency, Shimla. It was observed therein as under:-

9. Mr. Virender K. Verma, learned Additional Advocate General, has also argued that the petitioner has now been shifted to Integrated Watershed Management Programme and he has joined his duties on 13.9.2011. Since the petitioner has been working as Junior Engineer since 8.3.2001 uninterruptedly, he had no alternative but to join his duties on 13.9.2011. The action of the respondent not to regularize the petitioner, who has put in more than twelve years" service uninterruptedly, is arbitrary. It is violative of articles 14 and 16 of the Constitution of India. The action of the respondent-State not to regularize the petitioner amounts to unfair labour practice as well. The respondent-State cannot be permitted to exploit the petitioner and similar situated persons by keeping them on contract basis for more than a decade. The respondents have also not complied with the letter dated 16.6.2009 annexure P-4. It has clearly been spelt out in the letter that after consultation from the Finance Department, it was agreed that all the District Rural Development Agencies may adopt the Government of Himachal Pradesh policy for regularization of daily wages/contract basis employees as per approved norms of the Government of India. The petitioner was entitled to be regularized as per instructions issued by the State Government since he has completed now more than eight years" uninterrupted service. There is master and servant relationship between the petitioner and District Rural Development Agency, Shimla. The Disciplinary and Appointing authority of the petitioner, as noticed hereinabove, is District Rural Development

Agency, Shimla.

10. Their Lordships of Hon"ble Supreme Court in Nihal Singh and ors. vs. State of Punjab and ors., have held as under:-

17. It is obvious both from the said section and also the appointment orders, the appellants are appointed by the State in exercise of the statutory power u/s 17 of the Act. The appellants are amenable to the disciplinary control of the State as in the case of any other regular police officers. The only distinction is that they are to be paid daily wages of Rs. 35 (which came to be revised from time to time). Further, such payment was to be made by the bank to whom the services of each one of the appellants is made available.

18. From the mere fact that the payment of wages came from the bank at whose disposal the services of each of the appellants was kept did not render the appellants employees of those banks. The appointment is made by the State. The disciplinary control vests with the State. The two factors which conclusively establish that the relationship of master and servant exists between the State and the appellants. A fact which is clearly recognized by the division bench of the High Court in LPA No. 209 of 1992. It may be worthwhile mentioning here that under the law of contracts in this country the consideration for a contract need not always necessarily flow from the parties to a contract. The decision of the SSP to reject the claim of the appellants only on the basis that the payment of wages to the appellants herein was being made by the concerned banks rendering them disentitled to seek regularization of their services from the State is clearly untenable.

21. But we do not see any justification for the State to take a defence that after permitting the utilization of the services of large number of people like the appellants for decades to say that there are no sanctioned posts to absorb the appellants. Sanctioned posts do not fall from heaven. State has to create them by a conscious choice on the basis of some rational assessment of the need.

22. The question is whether this court can compel the State of Punjab to create posts and absorb the appellants into the services of the State on a permanent basis consistent with the Constitution Bench decision of this court in Umadevi's case. To answer this question, the ratio decidendi of the Umadevi's case is required to be examined. In that case, this Court was considering the legality of the action of the State in resorting to irregular appointments without reference to the duty to comply with the proper appointment procedure contemplated by the Constitution. "4. ... 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 recognized by our Constitution, has to be seriously pondered over.

(emphasis supplied)

23. It can be seen from the above that the entire issue pivoted around the fact that the State initially made appointments without following any rational procedure envisaged under the Scheme of the Constitution in the matters of public appointments. This court while recognising the authority of the State to make temporary appointments engaging workers on daily wages declared that the regularisation of the employment of such persons which was made without following the procedure conforming to the requirement of the Scheme of the Constitution in the matter of public appointments cannot become an alternate mode of recruitment to public appointment. It was further declared that the jurisdiction of the Constitutional Courts under Article 226 or Article 32 cannot be exercised to compel the State or to enable the State to perpetuate an illegality. This court held that compelling the State to absorb persons who were employed by the State as casual workers or daily-wage workers for a long period on the ground that such a practice would be an arbitrary practice and violative of Article 14 and would itself offend another aspect of Article 14 i.e. the State chose initially to appoint such persons without any rational procedure recognized by law thereby depriving vast number of other eligible candidates who were similarly situated to compete for such employment.

24. Even going by the principles laid down in Umadevi's case, we are of the opinion that the State of Punjab cannot be heard to say that the appellants are not entitled to be absorbed into the services of the State on permanent basis as their appointments were purely temporary and not against any sanctioned posts created by the State.

25. In our opinion, the initial appointment of the appellants can never be categorized as an irregular appointment. The initial appointment of the appellants is made in accordance with the statutory procedure contemplated under the Act. The decision to resort to such a procedure was taken at the

highest level of the State by conscious choice as already noticed by us. The High Court in its decision in LPA No. 209 of 1992 recorded that the decision to resort to the procedure u/s 17 of the Act was taken in a meeting dated 24.3.1984 between the Advisor to the Government of Punjab and senior officers of the various Banks in the public sector. Such a decision was taken as there was a need to provide necessary security to the public sector banks. As the State was not in a position to provide requisite police guards to the banks, it was decided by the State to resort to section 17 of the Act. As the employment of such additional force would create a further financial burden on the State, various public sector banks undertook to take over the financial burden arising out of such employment. In this regard, the written statement filed before the High Court in the instant case by respondent nos. 1 to 3 through the Assistant Inspector General of Police (Welfare & Litigation) is necessary to be noticed. It is stated in the said affidavit:

2. That in meeting of higher officers held on 27.3.1984 in Governor House Chandigarh with Shri Surinder Nath, IPS, Advisor to Governor of Punjab, in which following decisions were taken:-

i) That it will not be possible to provide police guard to banks unless the Banks were willing to pay for the same and additional force could be arranged on that basis, it was decided that police guards should be requisitioned by the Banks for their biggest branches located at the Distt. and Sub Divisional towns. They should place the requisition with the Distt. SSPs endorsing a copy of IG CID. In the requisition, they should clearly state that the costs of guard would be met by them. It will then be for the police department to get additional force sanctioned. This task should be done on a top priority. In the meantime depending upon the urgency of the need of any particular branch, police Deptt. may provide from police strength for its protection.

ii) For all other branches guards will be provided by Distt. SSP after selecting suitable ex-servicemen or other able bodied persons who will be appointed as Special Police Officer in terms of Section 17 of the Police Act. Preference may be given to persons who may already be in possession of licence weapons. All persons appointed as SPO for this purpose will be given a brief training for about 7 days in the Police Lines in the handling of weapons taking suitable position for protection of branches. These SPOs will work under the discipline and control and as per Police Act, they will have the same powers, privileges and protection and shall be amenable to same penalty as an ordinary police personnel.

26. It can be seen from the above that a selection process was designed under which the District Senior Superintendent of Police is required to choose suitable ex-servicemen or other able bodied persons for being appointed as Special Police Officers in terms of section 17 of the Act. It is indicated that the persons who are already in possession of a licensed weapon are to be given priority.

28. Such a procedure making recruitments through the employment exchanges

was held to be consistent with the requirement of Articles 14 and 16 of the Constitution by this Court in Union of India (UOI) and Others Vs. N. Hargopal and Others,

29. The abovementioned process clearly indicates it is not a case where persons like the appellants were arbitrarily chosen to the exclusion of other eligible candidates. It required all able bodied persons to be considered by the SSP who was charged with the responsibility of selecting suitable candidates.

30. Such a process of selection is sanctioned by law u/s 17 of the Act. Viewed in the context of the situation prevailing at that point of time in the State of Punjab, such a process cannot be said to be irrational. The need was to obtain the services of persons who had some experience and training in handling an extraordinary situation of dealing with armed miscreants.

I am afraid that the ratio of the judgment in Rakesh Kumar's case (supra) cannot be made applicable to the case in hand because unlike the present case there existed a regular cadre of Junior Engineers against which post the petitioners therein (Rakesh Kumar) had been ordered to be regularized, while in the present case, it is an admitted fact that there is no cadre of Takniki Sahayak in the respondent department against which post the petitioner can be ordered to be regularized. Insofar, Nihal Singh case (supra) is concerned, the appointment of the petitioner therein was held to be made in exercise of the statutory power u/s 17 of the Police Act, therefore, essentially the post to which the petitioner therein had been appointed was cadre post. But nonetheless the other observations of the Apex Court as quoted above are required to be observed and followed by the respondents.

18. To counter such arguments, learned Advocate General has contended that in exercise of jurisdiction, this court would not venture to legislate nor issue a direction to the legislature to enact the law in a particular manner. It is argued that the Court would have a very limited role and in exercise of that power it was not open to have judicial legislation which is only in exceptional circumstances where there is inaction by the executive, for whatever reason, the judiciary must step in, in exercise of its constitutional obligations to provide a solution till such time the legislature acts to perform its role by enacting proper legislation to cover the field. In support of such arguments, the learned Advocate General has placed reliance on the judgment of the Hon"ble Supreme Court in V.K. Naswa Vs. Home Secretary, Union of India (UOI) and Others, wherein it has been held that:-

6. It is a settled legal proposition that the court can neither legislate nor issue a direction to the Legislature to enact in a particular manner.

7. In Mallikarjuna Rao and Others Vs. State of Andhra Pradesh and Others, and V.K. Sood Vs. Secretary, Civil Aviation and others, , this Court has held that the Writ Court, in exercise of its power under Article 226, has no power even indirectly to require the Executive to exercise its law-making power. The Court observed that it is neither legal nor proper for the High Court to issue directions

or advisory sermons to the Executive in respect of the sphere which is exclusively within the domain of the Executive under the Constitution. The power under Article 309 of the Constitution to frame rules is the legislative power. This power under the Constitution has to be exercised by the President or the Governor of a State, as the case may be. The Courts cannot usurp the functions assigned to the Executive under the Constitution and cannot even indirectly require the Executive to exercise its law-making power in any manner. The Courts cannot assume to themselves a supervisory role over the rule-making power of the Executive under Article 309 of the Constitution. While deciding the said case, the Court placed reliance on a large number of judgments, particularly *Narinder Chand Hem Raj and Others Vs. Lt. Governor, Administrator, Union Territory, Himachal Pradesh and Others*, , where it has been held that legislative power can be exercised only by the legislature or its delegate and none else.

8. In *State of Himachal Pradesh Vs. A Parent of a Student of Medical College, Simla and Others*, , this Court deprecated the practice adopted by the Courts to issue directions to the legislature to enact a legislation to meet a particular situation observing: (SCC p. 174, para-4.

4. The direction given by the Division Bench was really nothing short of an indirect attempt to compel the State Government to initiate legislation with a view to curbing the evil of ragging, for Otherwise it is difficult to see why, after the clear and categorical statement by the chief Secretary on behalf of the State Government that the Government will introduce legislation if found necessary and so advised, the Division Bench should have proceeded to again give the same direction. Thus the Division Bench was clearly not entitled to do. It is entirely a matter for the executive branch of the Government to decided whether or not to introduce any particular legislation.

9. In *Asif Hameed and others Vs. State of Jammu and Kashmir and Others*, , this Court while dealing with a case like this at hand observed: (SCC p. 374, para-19)

19. While doing so, the Court must remain within its self-imposed limits. The Court sits in judgment on the action of a coordinate branch of the Government. While exercising power of judicial review of administrative action, the Court is not an Appellate Authority. The Constitution does not permit the Court to direct or advise the Executive in matter of policy or to sermonize qua any matter which under the Constitution lies within the sphere of Legislature or Executive.

(Emphasis added)

10. In *Union of India and another Vs. Deoki Nandan Aggarwal*, , this Court similarly observed: (SCC p. 332, para-14)

14. ...It is not the duty of the Court either to enlarge the scope of the legislation..... The Court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate. The power to legislate has not been conferred on the Court.

11. Similarly in *Ajaib Singh Vs. The Sirhind Co-Operative Marketing Cum-Processing Service Society Limited and Another*, , this Court held that Court cannot fix a period of limitation, if not fixed by the legislature, as "the Courts can admittedly interpret the law and do not make laws." The Court cannot interpret the statutory provision in such a manner "which would amount to legislation intentionally left over by the legislature".

12. A similar view has been reiterated by this Court in *Union of India (UOI) Vs. Association for Democratic Reforms and Another*, , observing that the Court cannot issue direction to the legislature for amending the Act or Rules. It is for the Parliament to amend the Act or Rules. In *District Mining Officer and Others Vs. Tata Iron and Steel Co. and Another*, , this Court held that function of the Court is only to expound the law and not to legislate.

13. Similarly, in *Supreme Court Employees' Welfare Association and Others Vs. Union of India (UOI) and Another*, , this Court held that Court cannot direct the legislature to enact a particular law for the reason that under the constitutional scheme the Parliament exercises sovereign power to enact law and no outside power or authority can issue a particular piece of legislation. (See also: *State of Jammu and Kashmir Vs. A.R. Zakki and others*,).

14. In *Union of India (UOI) Vs. Prakash P. Hinduja and Another*, , this Court held that if the Court issues a direction which amounts to legislation and is not complied with by the State, it cannot be held that the State has committed the Contempt of Court for the reason that the order passed by the Court was without jurisdiction and it has no competence to issue a direction amounting to legislation.

15. The issue involved herein was considered by this Court in *University of Kerala Vs. Council, Principals", Colleges, Kerala and Others*, . The Court elaborately explained the scope of separation of powers of different organs of the State under our Constitution; the validity of judicial legislation and if it is at all permissible, its limits; and the validity of judicial activism and the need for judicial restraint, etc. The Court observed: (SCC p. 361, para-13)

13. ... 19. At the outset, we would say that it is not possible for this Court to give any direction for amending the Act or the statutory rules. It is for Parliament to amend the Act and the Rules.,

16. In *State of U.P. and Others Vs. Jeet S. Bisht and Another*, , this Court held that issuing any such direction may amount to amendment of law which falls exclusively within the domain of the executive/legislature and the Court cannot amend the law.

17. In *Delhi Jal Board Vs. National Campaign for Dignity and Rights of Sewerage and Allied Workers and Others*, , this Court while dealing with the issue made the observation that in exceptional circumstances where there is inaction by the executive, for whatever reason, the judiciary must step in, in exercise of its

Constitutional obligations to provide a solution till such time the legislature acts to perform its role by enacting proper legislation to cover the field. (See also: Vishaka and others Vs. State of Rajasthan and Others, ; Common Cause (A Regd. Society) Vs. Union of India (UOI) and Others, ; and Destruction of Public and Private Properties Vs. State of A.P. and Others,)

18. Thus, it is crystal clear that the Court has a very limited role and in exercise of that, it is not open to have judicial legislation. Neither the Court can legislate, nor has it any competence to issue directions to the legislature to enact the law in a particular manner.

19. It is not in dispute that the Panchayat Sahayaks and Junior Engineers of the Panchayats were appointed by the respondents in the same and similar manner to that of the petitioners herein and have already been regularized. It is only the petitioners who have been given step motherly treatment for no justifiable reason. The action of the respondents not to regularize the services of the petitioners, who have admittedly put in more than twelve years' service at the time of filing of the petitions uninterruptedly, to say the least, is arbitrary. It is also violative of Articles 14 and 16 of the Constitution of India. The State has indulged in exploitation and unfair labour practice by keeping the petitioners on "contract basis" for more than a decade. The petitioners have been discriminated as their counter parts i.e. Junior Engineers and Panchayat Sahayaks have already been regularized.

20. The State is a Model employer and cannot be permitted to indulge in discrimination with its employees. This Court in H.P. State Industrial Development Corporation Ltd. vs. Shri Rajesh Kumar Kashyap 2014 (2) HLR (DB) 764 has held as follows:-

17. The Central Government, State Governments and likewise all Public Sector Undertakings are expected to function like model employers. A model employer is under an obligation to conduct itself with high probity and expected candour. An employer who is duty bound to act as a model employer has social obligation to treat an employee in an appropriate manner so that an employee is not condemned to feel totally subservient to situation. A model employer should not exploit the employees and take advantage of their helplessness and misery. Even in this case, the stand of the respondent is reprehensible and falls short of expectation of a model employer.

21. However, despite making the aforesaid observations this Court cannot order the creation of the posts and at the same time cannot also direct the status of permanency or regularization to be granted to the petitioners, as held by the Hon'ble Supreme Court in Maharashtra State Road Transport Corporation and Another Vs. Casteribe Rajya P. Karmchari Sanghatana, :-

37. There cannot be any quarrel with the proposition that courts cannot direct creation of posts. In Mahatma Phula Agricultural University and Others Vs. Nasik Zills Sheth Kamgar Union and Others, , this Court held: (SCC pp. 353-53, paras

12-14).

12. Mrs. Jaising, in support of Civil Appeals Nos. 4461-70 and 4457-60 [arising out of SLPs (C) Nos. 418-21 of 1999 and SLPs (C) Nos. 9023-32 of 1998] submitted that the workmen were entitled to be made permanent. She however fairly conceded that there were no sanctioned posts available to absorb all the workmen. In view of the law laid down by this Court the status of permanency cannot be granted when there are no posts. She however submitted that this Court should direct the Universities and the State Governments to frame a scheme by which, over a course of time, posts are created and the workmen employed on permanent basis. It was however fairly pointed out to the Court that many of these workmen have died and that the Universities have by now retrenched most of these workmen. In this view of the matter no useful purpose would be served in undergoing any such exercise.

13. To be seen that, in the impugned judgment, the High Court notes that, as per the law laid down by this Court, status of permanency could not be granted. In spite of this the High Court indirectly does what it could not do directly. The High Court, without granting the status of permanency, grants wages and other benefits applicable to permanent employees on the specious reasoning that inaction on the part of the Government in not creating posts amounted to unfair labour practice under Item 6 of Schedule IV of the MRTU & PULP Act. In so doing the High Court erroneously ignores the fact that approximately 2000 workmen had not even made a claim for permanency before it. Their claim for permanency had been rejected by the award dated 20-2-1985. These workmen were only seeking quantification of amounts as per this award. The challenge, before the High Court, was only to the quantification of the amounts. Yet by this sweeping order the High Court grants, even to these workmen, the wages and benefits payable to other permanent workmen.

14. Further, Item 6 of Schedule IV of the MRTU & PULP Act reads as follows:

6. To employ employees as "badlis", casuals or temporaries and to continue them as such for years, with the object of depriving them of the status and privileges of permanent employees.

The complaint was against the Universities. The High Court notes that as there were no posts the employees could not be made permanent. Once it comes to the conclusion that for lack of posts the employees could not be made permanent, how could it then go on to hold that they were continued as "badlis", casuals or temporaries with the object of depriving them of the status and privileges of permanent employees? To be noted that the complaint was not against the State Government. The complaint was against the Universities. The inaction on the part of the State Government to create posts would not mean that an unfair labour practice had been committed by the Universities. The reasoning given by the High Court to conclude that the case was squarely covered by Item 6 of Schedule IV of the MRTU & PULP Act cannot be sustained at

all and the impugned judgment has to be and is set aside. It is however clarified that the High Court was right in concluding that, as per the law laid down by this Court, status of permanency could not be granted. Thus all orders wherein permanency has been granted (except award dated 1-4-1985 in IT No. 27 of 1984) also stand set aside."

38. In the case of State of Maharashtra and Another Vs. R.S. Bhonde and Others, , this Court relied upon earlier judgment Mahatma Phule Agricultural University and reiterated the legal position thus: SCC p. 754, para-7)

7. Additionally, as observed by this Court in Mahatma Phula Agricultural University and Others Vs. Nasik Zills Sheth Kamgar Union and Others, the status of permanency cannot be granted when there is no post. Again in Gram Sevak Prashikshan Kendra v. Workmen (2001) 7 SCC 356, it was held that mere continuance every year of seasonal work obviously during the period when the work was available does not constitute a permanent status unless there exists post and regularisation is done.

39. In Indian Drugs and Pharmaceuticals Ltd. Vs. Workman, Indian Drugs and Pharmaceuticals Ltd., , this Court stated that courts cannot create a post where none exists. In paragraph 37 of the report, this Court held: (SCC p. 426)

37. Creation and abolition of posts and regularisation are purely executive functions vide P.U. Joshi and Others Vs. The Accountant General, Ahmedabad and Others, . Hence, the court cannot create a post where none exists. Also, we cannot issue any direction to absorb the respondents or continue them in service, or pay them salaries of regular employees, as these are purely executive functions. This Court cannot arrogate to itself the powers of the executive or legislature. There is broad separation of powers under the Constitution, and the judiciary, too, must know its limits.

40. In yet another case, Divisional Manager, Aravali Golf Club and Another Vs. Chander Hass and Another, , this Court said: (SCC p. 688 para-15)

15. The court cannot direct the creation of posts. Creation and sanction of posts is a prerogative of the executive or legislative authorities and the court cannot arrogate to itself this purely executive or legislative function, and direct creation of posts in any organisation. This Court has time and again pointed out that the creation of a post is an executive or legislative function and it involves economic factors. Hence the courts cannot take upon themselves the power of creation of a post. Therefore, the directions given by the High Court and the first appellate court to create the posts of tractor driver and regularise the services of the respondents against the said posts cannot be sustained and are hereby set aside.

41. Thus, there is no doubt that creation of posts is not within the domain of judicial functions which obviously pertains to the executive. It is also true that the status of permanency cannot be granted by the Court where no such posts exist and that executive functions and powers with regard to the creation of

posts cannot be arrogated by the Courts.

22. Nonetheless, the matter cannot be permitted to rest here. The respondents-State who are model employer still owe a duty to remove the discrimination, discontent and hard burning of the petitioners, particularly, when their counter parts i.e. Junior Engineers and Panchayat Sahayaks have already been regularized. The State cannot be permitted to continue to exploit the petitioners and perpetuate and prolong the illegality especially, when the appointments of the petitioners are not illegal or irregular as they have been appointed after due selection in accordance with the scheme like the Junior Engineers and Panchayat Sahayaks.

23. Taking into consideration the aforesaid facts and circumstances, all the abovesaid petitions are disposed of with the directions to the State Government to consider the cases of the petitioners in light of the decision already taken by it in the case of Junior Engineers and Panchayat Sahayak and also keeping in view the observations made hereinabove, with due deference to the judgment of the Hon"ble Supreme Court in Nihal Singh"s case. The decision be taken positively within a period of three months. Needless to say that the petitioners are at liberty to approach the Court in case the decision goes against them. All the pending application(s) are also disposed of with no order as to costs.