
(2012) 06 DEL CK 0005
In the Delhi High Court
Case No : Writ Petition (C) 1268 of 2012

NHRC and Another

APPELLANT

Vs

Sheenu Saxena and Others

RESPONDENT

Date of Decision : 01-06-2012

Acts Referred:

Constitution of India, 1950 — Article 12, 14, 141, 142, 16

Citation : (2012) 06 DEL CK 0005

Hon'ble Judges : V.K. Jain, J;Badar Durrez Ahmed, J

Bench : Division Bench

Advocate : R.V. Sinha and Mr. A.S. Singh, for the Appellant; Jyoti Singh, Ms. Saahila Lamba, for the Respondent

Final Decision : Allowed

Judgement

V.K. Jain, J.—The petitioner, National Human Right Commission (NHRC), vide its OM dated 16.7.2003, invited applications for appointment of 06 Lower Division Clerks (LDCs) on regular temporary basis. The respondents, amongst others were called pursuant to the applications submitted by them and were subjected to written examination and typing test. A panel of 22 successful candidates from general category and 05 candidates from OBC category was drawn up in the order of merit in February, 2004. Subsequently, temporary vacancies arose in NHRC on account of regular LDCs proceeding on deputation. Since, these were not regular vacancies, efforts were made to fill up these short-term vacancies on deputation basis, but, the selected candidates were not relieved by their parent departments. Therefore, 09 candidates, including the respondents in this writ petition, who had been included in the panel drawn in February, 2004 were offered appointment on ad-hoc basis. Subsequently, when regular vacancies arose, first 04 out of those 09 persons who were higher in order of merit were regularized against those vacancies. While considering the case of the remaining 05 ad-hoc appointees (respondents in this writ petition) for further extension, OM dated 14.11.2007 issued by Department of Personnel & Training advising

against ad-hoc appointments to the extent it was possible, came to the notice of NHRC. The OM stipulated that the Ministries/Departments could grant permission for ad-hoc appointment for one year and further extension of one year at a time upto 02 years could be granted with the approval of the concerned Secretary. Accordingly, the ad-hoc appointment of the respondents, who had completed 03 years of ad-hoc service was not extended beyond 31.8.2010. On the representation made by the respondents, they were re-appointed for a period of 06 months w.e.f. 7.9.2010, purely on ad-hoc basis, with no claim for seniority or regularization on the basis of such appointment. Their term was later extended upto 6.9.2011, vide letter dated 15.9.2011, the respondents were informed that their ad-hoc appointment had not been extended beyond 6.9.2011. The NHRC, in the meanwhile, issued an advertisement to fill up 02 posts of Personal Assistant (PA) and 04 posts of Lower Division Clerk (LDC) on direct recruitment basis. OA No. 3469/2011 was then filed by the respondents seeking a declaration that the action of the petitioner in not allowing them to perform duties w.e.f. 16.9.2011 was illegal. They also sought an order directing NHRC to allow them to perform their normal duties till their regularization was considered by the competent authority. They also sought quashing of the advertisement which NHRC had issued for recruitment from the open market.

2. The Tribunal passed an interim order staying the operation of the letter of NHRC dated 15.9.2011 whereby the respondents were informed that their ad-hoc tenure had not been extended beyond 6.9.2011. Vide impugned order dated 01.2.2012, the Tribunal quashed the order/letter dated 15.09.2011, whereby the respondents were informed that their ad hoc services had not been extended beyond 06.09.2011. The Tribunal also directed NHRC to ensure that the respondents were taken back on ad-hoc service as LDCs. The petitioners before this Court were also directed to consider the respondents for existing regular vacancies of LDCs in unreserved categories. The Tribunal also directed the NHRC to pay back wages to the respondents from the date of their engagement, till they joined in terms of the directions issued by it.

3. Shri R.V.Sinha, the learned Counsel for the petitioners has assailed the order passed by the Tribunal primarily on the following grounds:

a) The appointment of the respondents being purely on ad-hoc basis, such an appointment conferred no right upon the respondents and could be terminated at any time without assigning any reason.

b) In view of the decision of the Constitution Bench of the Supreme Court in Secretary, State of Karnataka & Ors. v. Umadevi & Ors: AIR 2006 SC 1806, no directions could have been given by the Tribunal for considering the respondents for appointment on regular basis since neither the respondents were in service on the cut-off date laid down by the Constitution Bench, nor had they put in 10 years service, which was the minimum requirement laid down by the Supreme Court for regularization, and

c) The vacancies which arose post-advertisement dated 16.7.2003 cannot be filled by appointing those, who were empanelled in February, 2004.

4. Ms. Jyoti Singh, the learned senior counsel for the respondents, however, defended the order of the Tribunal on the following grounds:

a) The respondents were appointed through regular process of selection prescribed for LDCs,

b) 04 persons, who were placed in the panel prepared in February, 2004 have already been regularized by the petitioners, and

c) Having worked continuously for 03 years and considering the regularization of some other persons placed in the panel, the respondents had a legitimate expectation of being regularized.

5. We have examined, by way of sample, the appointment letters issued to the respondent Sarita Gusain and Archana Tripathi. It was clearly stated in paras 06 & 07 of the letter that the appointment is purely on ad-hoc basis. In clause 10 of the letter, it was stipulated that since the appointment is purely on ad-hoc basis, the same was liable to be terminated at any time without assigning any reason. It was further stipulated that the appointee will have no right to regularization of services.

6. In *Vidyavardhaka Sangha and Another Vs. Y.D. Deshpande and Others*, the Supreme Court observed that the appointment made on probation/ad hoc basis for a specific period of time comes to an end by efflux of time and the person holding such post can have no right to continue on the post. The Court noted that in the case before it, the respondents had continued in employment for some years albeit on the terms and conditions stipulated in the appointment order. The Court was of the view that they cannot now be permitted to turn their back and say that the appointments could not be terminated on the basis of their appointment letters. The Court observed that under Article 141 of the Constitution, the judgment of the Constitution Bench in *Secretary, State of Karnataka and Others Vs. Umadevi and Others*, is binding on all Courts, including the Supreme Court till the same is overruled by a larger Bench.

7. In the case before us, it was clearly stated in the appointment letters issued to the respondents that their appointments were purely on ad-hoc basis and were liable to be terminated at any time, without giving any reasons. It was also made clear to them, in the letter itself, that their appointment on ad-hoc basis will confer no right upon them for regularization of their services. The case before us therefore, is squarely covered by the decision of Supreme Court in *Vidyavardhaka Sangha (supra)*. Having accepted the ad-hoc appointment on the condition that it would confer no right on them to seek regularization and it could be terminated at any time, the respondents cannot be allowed to seek regularization on the basis of their ad-hoc appointment. No legal right of the respondents therefore was infringed on account of their ad-hoc appointment not

being extended beyond 6.9.2011.

8. It was contended by the learned Senior Counsel for the respondents that since the respondents possessed the prescribed qualifications and were empanelled after they had passed the prescribed test, held in accordance with the rules, their empanelment and subsequent appointment on ad-hoc basis was not illegal and therefore ought to be regularized. She submitted that a distinction has to be made in the appointments which are illegal and therefore incapable of being regularized and the appointments which are irregular and therefore can be regularized. We, however, find no merit in the contention. In view of the legal proposition enunciated by the Supreme Court in a catena of decisions including *Rakhi Ray (infra)*, *Rajkishore Nanda (infra)* and *Mukul Saikia (infra)* appointment of the respondents on regular basis would be violative of Article 14 of the Constitution and would, therefore, be clearly illegal. The respondents could have been appointed only against the vacancies which were notified at the time they were empanelled in February, 2004, but, once the 06 posts of LDCs advertised on 16.7.2003 were filled up, the vacancies arising subsequent to filling up of those 06 advertised posts, could not have been filled up appointing the candidates, who had been placed in the waiting panel. In fact, even the regularization of 04 candidates who were higher to the respondents in the order of merit in the panel drawn in February, 2004 was not in accordance with the law. But, as held by the Supreme Court in *Arulmozhi (infra)*, there can be no equality in illegality and therefore the respondents cannot claim regularization merely because some other persons, who were placed in the same panel in which the respondents were placed, were wrongly regularized. In any case, once OM dated 14.11.2007 has been issued by DoP&T, regularization of the respondents, if directed, would be in breach of the instructions contained in the said OM. Thus, from whatever angle we may examine the matter, the respondents have no case for regularization of their services or for their appointment on regular basis, on the strength of the panel prepared in February, 2004.

9. In *Secretary, State of Karnataka and Others Vs. Umadevi and Others*, a Constitution Bench of the Supreme Court, while considering absorption, regularization or permanent continuance of temporary, contractual, casual, daily wage or ad hoc employees who had been in service for quite some time, inter alia, recognized the power of the State and its instrumentalities to employ persons in posts which are temporary on daily wages as additional hands or taking them in, without following the required procedure to discharge the duties in respect of the posts that are sanctioned and required to be filled in terms of the relevant procedure and noted that there was nothing in Constitution which prohibits such engagements. The Court was of the view that a total embargo on such employments 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 succour to

them. The Court observed that innumerable citizens of our vast country are in search of employment, one is not compelled to accept a casual or temporary employment if he is not inclined to go in for such an employment and it is in that context that one has to proceed on the basis that the employment was accepted fully knowing the nature and the consequences flowing from it. As regards the argument that since the employee had 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, the Court felt that if accepted, this argument would enable the jettisoning of the procedure established by law for public employment and would have to fail when tested on the touchstone of the constitutionality and equality of opportunity enshrined under Article 14 of the Constitution. Dealing with the doctrine of legitimate expectation advanced by the employees, the Court observed that when a person enters a temporary employment or gets engagement as a contractual or casual worker and the engagement is not based on a proper selection as recognized by relevant rules or procedure, he is aware of the consequences of the appointment being temporary, casual or contractual in nature and he cannot invoke the theory of legitimate expectation for being confirmed in the post, where appointment could be made only by following a proper procedure for selection. The Court felt that the theory of legitimate expectation cannot be successfully advanced by temporary, contractual or casual employees and it cannot be held that the State had held out any promise while engaging these persons either to continue them where they were or to make them permanent. The Court noted that the State cannot constitutionally make such a promise.

It was also noted by the Court that there is no fundamental right in those who have been employed on daily wages or temporarily or on contractual basis, to claim that they have a right to be absorbed in service. The Court also held that such employees cannot claim a right to be treated at par with those who are regularly employed. The Court also rejected the contention that right to life protected by Article 21 of the Constitution would include the right to employment since acceptance of such a plea would lead to the consequence of depriving a large number of other aspirants of an opportunity to compete for the post or employment.

The Court, however, noted that there may be cases where irregular appointments of duly qualified persons are made in duly sanctioned vacant posts and the employees continue to work for more than 10 years or more, but without intervention of the order of the Courts or of Tribunals. The Court directed that Union of India, 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 10 years or more in duly sanctioned posts, but not under cover of order of Courts or of Tribunals and should further ensure that regular recruitments are undertaken to fill those vacant sanctioned posts that are required to be filled up, in cases where temporary employees or daily wagers are being now employed. The Court directed that the process must be set in motion

within six months from the date of its order. The Court clarified that the decisions which run counter to the principles settled in this decision or in which directions run counter to this decision would stand denuded of their status as precedents.

10. In *State of Karnataka and Ors. v. Sri G.V. Chandrashekar*: (2009) SCC 342, the respondent before Supreme Court was appointed as a typist on 05.09.1985 and worked for more than 10 years, without break in service. He sought a direction for regularization of his services with all consequential. The Tribunal directed that the question of regularization of his service be examined with reference to the records. The writ petition filed by the State against the order of the Tribunal having been dismissed, the matter was taken by the State to Supreme Court by way of Special Leave. Some other matters, involving similar issue, were also examined by Supreme Court in this case. Relying upon the decision in the case of *Uma Devi and Others* (supra), the appeal filed by the State was allowed and the order passed by the High Court was set aside.

11. In view of the mandate of law enunciated by the Constitution Bench of the Supreme Court, no employee appointed on daily/casual/ad-hoc basis can seek regularization unless he was appointed against a clear vacant post and he had worked for at least 10 years on the date the decision was rendered in *Uma Devi* (supra). In the case before us, the respondents were appointed on ad-hoc basis against short term vacancies and not against any vacant posts. The posts against which they were appointed were already occupied by those who were on deputation. Only the short-term vacancies created by their deputation, were filled up by making ad hoc appointments of the respondents. Moreover, they had put in only about 2 years and 04 months of service when the Supreme Court rendered its decision in *Uma Devi* (supra) on 10.4.2006. Therefore, they cannot seek regularization of their service and if directed, such a regularization would be in violation of law declared by the Supreme Court in that case.

12. In *Rakhi Ray and Others Vs. The High Court of Delhi and Others*, , the Supreme Court, inter-alia, held as under:-

It is a settled legal proposition that vacancies cannot be filled up over and above the number of vacancies advertised as "the recruitment of the candidates in excess of the notified vacancies is a denial and deprivation of the constitutional right under Article 14 read with Article 16(1) of the Constitution", of those persons who acquired eligibility for the post in question in accordance with the statutory rules subsequent to the date of notification of vacancies. Filling up the vacancies over the notified vacancies is neither permissible nor desirable, for the reason, that it amounts to "improper exercise of power and only in a rare and exceptional circumstance and in emergent situation, such a rule can be deviated and such a deviation is permissible only after adopting policy decision based on some rational", otherwise the exercise would be arbitrary. Filling up of vacancies over the notified vacancies amounts to filling up of future vacancies and thus, not permissible in law. (Vide *Union of India and Ors. v. Ishwar Singh Khatri and Ors.* (1992) Supp 3 SCC 84; *Gujarat State Dy. Executive Engineers' Association Vs.*

State of Gujarat and Others, ; State of Bihar and Others Vs. Secretariat Assistant Successful Examinees Union 1986 and Others, Prem Singh and Others Vs. Haryana State Electricity Board and Others, and Ashok Kumar and Others Vs. Chairman, Banking Service Recruitment Board and Others,

In State of Orissa And Another v. Rajkishore Nanda And Others: (2010) 6 SCC 777, an advertisement was issued to fill up 15 posts of junior clerks and a written examination was held to fill up those posts. However, before the selection process could be completed, the number of vacancies was increased from 15 to 33 and in keeping with the requirement of the rules, a merit list of 66 candidates was published on 06.11.1995. The respondents whose names appeared in the merit list, however, could not be offered appointment, they being lower in the merit list. In an OA filed by them, the Tribunal directed that they be offered appointment till the select list stood exhausted. The State filed a writ petition against the order passed by the Tribunal. The High Court modified the order of the Tribunal to the extent that the appellants before the Supreme Court (respondents in OA) were directed to offer appointment to only those who had approached the Tribunal. The matter was further taken to the Supreme Court by the State, by way of Special Leave and the contention of the appellant/State was that once the advertised vacancies were filled up the selection process stood exhausted and came to an end. It was also contended by the State that where the rules provide to detriment the vacancies on a yearly basis, the life of the select list cannot be more than one year and once the life of the select list expired, no appointment can be offered from the panel. Allowing the appeal filed by the State, the Supreme Court, inter alia, held as under:-

It is a settled legal proposition that vacancies cannot be filled up over and above the number of vacancies advertised as "the recruitment of the candidates in excess of the notified vacancies is a denial and deprivation of the constitutional right under Article 14 read with Article 16(1) of the Constitution", of those persons who acquired eligibility for the post in question in accordance with the statutory rules subsequent to the date of notification of vacancies. Filling up the vacancies over the notified vacancies is neither permissible nor desirable, for the reason, that it amounts to "improper exercise of power and only in a rare and exceptional circumstance and in emergent situation, such a rule can be deviated and such a deviation is permissible only after adopting policy decision based on some rational", otherwise the exercise would be arbitrary. Filling up of vacancies over the notified vacancies amounts to filling up of future vacancies and thus, not permissible in law. (Vide State of Bihar & Ors. Vs. The Secretariat Assistant Successful Examinees Union 1986, Prem Sing v. Haryana SEB, Ashok Kumar v. Banking Service Recruitment Board, Surinder Singh v. State of Punjab and Rakhi Ray v. High Court of Delhi). A person whose name appears in the select list does not acquire any indefeasible right of appointment. Empanelment at the best is a condition of eligibility for the purpose of appointment and by itself does not amount to selection or create a vested right to be appointed. The vacancies have to be filled up as per the statutory rules and in conformity with the constitutional

mandate. A select list cannot be treated as a reservoir for the purpose of appointments, that vacancy can be filled up taking the names from that list as and when it is so required. It is the settled legal proposition that no relief can be granted to the candidate if he approaches the Court after expiry of the Select List. If the selection process is over, select list has expired and appointments had been made, no relief can be granted by the Court at a belated stage. (Vide J. Ashok Kumar Vs. State of A.P. and Others, ; State of Bihar and others Vs. Md. Kalimuddin and others, State of U. P. and others Vs. Harish Chandra and others, Sushma Suri Vs. Govt. of National Capital Territory of Delhi and Another, ; State of U.P. Vs. Ram Sawrup Saroj, ; K. Thulaseedharan Vs. The Kerala State Public Service Commission, Trivandrum and Others, ; Deepa Keyes -Vs.- Kerala State Electricity Board & Anr., (2007) 6 SCC 194; and Subha B. Nair and Others Vs. State of Kerala and Others, As the appointments had been made as per the select list prepared in 1995 and selection process came to an end, there was no occasion for the Tribunal to entertain the Applications in 1997, 1998 and 1999 for the simple reason that once the number of vacancies determined are filled, the selection process came to an end, no further appointment could be made from 1995 panel. The purpose of making the list of double of the vacancies determined is to offer the appointment to the persons from the waiting list in case persons who are offered appointment do not join. But it does not give any vested right in favour of the candidates whose names appeared therein.

In State of Punjab Vs. Raghbir Chand Sharma and Another, only one post was advertised and the candidate whose name appeared at Serial

No.1 in the select list was appointed. He, however, resigned after joining the post. It was contended before the Supreme Court that the vacancies which became available on his resignation could be filled up by offering appointment to the next candidate from the select list. Rejecting the contention, the Supreme Court, inter-alia held, as under:-

With the appointment of the first candidate for the only post in respect of which the consideration came to be made and select list prepared, the panel ceased to exist and has outlived its utility and at any rate, no one else in the panel can legitimately contend that he should have been offered appointment either in the vacancy arising on account of the subsequent resignation of the person appointed from the panel or any other vacancies arising subsequently.

In J and K. Public Service Commission, etc. Vs. Dr. Narinder Mohan and others etc. etc., , the Supreme Court, inter alia, observed as under:

This Court in Dr A.K. Jain and Others Vs. Union of India (UOI) and Others, gave directions under Article 142 to regularise the services of the ad hoc doctors appointed on or before October 1, 1984. It is a direction under Article 142 on the peculiar facts and circumstances therein. Therefore, the High Court is not right in placing reliance on the judgment as a ratio to give the direction to the PSC to consider the cases of the respondents. Article 142 - power is confided only to this

Court. This ratio in *Dr P.P.C. Rawani and Others Vs. Union of India (UOI) and Others*, is also not an authority under Article 141. Therein the orders issued by this Court under Article 32 of the Constitution to regularise the ad hoc appointments had become final. When contempt petition was filed for non-implementation, the Union had come forward with an application expressing its difficulty to give effect to the orders of this Court. In that behalf, while appreciating the difficulties expressed by the Union in implementation, this Court gave further direction to implement the order issued under Article 32 of the Constitution. Therefore, it is more in the nature of an execution and not a ratio under Article 141. In *Union of India (UOI) and Others Vs. Dr Gyan Prakash Singh*, this Court by a Bench of three Judges considered the affect of the order in *AK Jain's* case and held that the doctors appointed on ad hoc basis and taken charge after October 1, 1984 have no automatic right for confirmation and they have to take their chance by appearing before the PSC for recruitment. In *H.C. Puttaswamy and others Vs. The Hon'ble Chief Justice of Karnataka High Court, Bangalore and others*, this Court while holding that the subordinate courts in Karnataka State without consultation of the PSC are not valid appointments, exercising the power under Article 142, directed that their appointments as a regular, on humanitarian grounds, since they have put in more than 10 years service. It is to be noted that the recruitment was only for clerical grade (Class-III post) and it is not a ratio under Article 141. In *State of Haryana and others Vs. Piara Singh and others etc. etc.*, this Court noted that the normal rule is recruitment through the prescribed agency but due to administrative exigencies, an ad hoc or temporary appointments may be made. In such a situation, this Court held that efforts should always be made to replace such ad hoc or temporary employees by regularly selected employees, as early as possible. The temporary employees also would get liberty to compete along with others for regular selection but if he is not selected, he must give way to the regularly selected candidates. Appointment of the regularly selected candidate cannot be withheld or kept in abeyance for the sake of such an ad hoc or temporary employee. Ad hoc or temporary employee should not be replaced by another ad hoc or temporary employee. He must be replaced only by regularly selected employee. The ad hoc appointment should not be a device to circumvent the rule of reservation. If a temporary on ad hoc employee continued for a fairly long spell, the authorities must consider his case for regularisation provided he is eligible and qualified according to the rules and his service record is satisfactory and his appointment does not run counter to the reservation policy of the State. It is to be remembered that in that case, the appointments are only to Class-III or Class-IV posts and the selection made was by subordinate selection committee. Therefore, this Court did not appear to have intended to lay down as a general rule that in every category of ad hoc appointment, if the ad hoc appointee continued for long period, the rules of recruitment should be relaxed and the appointment by regularisation be made. Thus considered, we have no hesitation to hold that the direction of the Division Bench is clearly illegal and the learned Single Judge is right in directing the State Government to notify the

vacancies to the PSC and the PSC should advertise and make recruitment of the candidates in accordance with the rules.

In *Chandigarh Administration and another Vs. Jagjit Singh and another*, , the Supreme Court, inter alia, observed as under:

Generally speaking, the mere fact that the respondent-authority has passed a particular order in the case of another person similarly situated can never be the ground for issuing a writ in favour of the petitioner on the plea of discrimination. The order in favour of the other person might be legal and valid or it might not be. That has to be investigated first before it can be directed to be followed in the case of the petitioner. If the order in favour of the other person is found to be contrary to law or not warranted in the facts and circumstances of his case, it is obvious that such illegal or unwarranted order cannot be made the basis of issuing a writ compelling the respondent-authority to repeat the illegality or to pass another unwarranted order. The extra-ordinary and discretionary power of the High Court cannot be exercised for such a purpose. Merely because the respondent-authority has passed one illegal/unwarranted order, it does not entitle the High Court to compel the authority to repeat that illegality over again and again. The illegal/unwarranted action must be corrected, if it can be done according to law - indeed, wherever it is possible, the court should direct the appropriate authority to correct such wrong orders in accordance with law - but even if it cannot be corrected, it is difficult to see how it can be made a basis for its repetition. By refusing to direct the respondent-authority to repeat the illegality, the court is not condoning the earlier illegal act/order nor can such illegal order constitute the basis for a legitimate complaint of discrimination. Giving effect to such pleas would be prejudicial to the interests of law and will do incalculable mischief to public interest.

In *Gursharan Singh and others etc. Vs. New Delhi Municipal Committee and others*, , the Supreme Court, inter alia observed as under:

There appears to be some confusion in respect of the scope of Article 14 of the Constitution which guarantees equality before law to all citizens. This guarantee of equality before law is a positive concept and it cannot be enforced by a citizen or court in a negative manner. To put it in other words, if an illegality or irregularity has been committed in favour of any individual or a group of individuals, the others cannot invoke the jurisdiction of the High Court or of this Court, that the same irregularity or illegality be committed by the State or an authority which can be held to be a State within the meaning of Article 12 of the Constitution, so far such petitioners are concerned, on the reasoning that they have been denied the benefits which have been extended to others although in an irregular or illegal manner. Such petitioners can question the validity of orders which are said to have been passed in favour of persons who were not entitled to the same, but they cannot claim orders which are not sanctioned by law in their favour on principle of equality before law. Neither Article 14 of the Constitution conceives within the equality clause this concept nor Article 226 empowers the

High Court to enforce such claim of equality before law. If such claims are enforced, it shall amount to directing to continue and perpetuate an illegal procedure or an illegal order for extending similar benefits to others. Before a claim based on equality clause is upheld, it must be established by the petitioner that his claim being just and legal, has been denied to him, while it has been extended to others and in this process there has been a discrimination.

In *Gujarat State Dy. Executive Engineers' Association Vs. State of Gujarat and Others*, , the Supreme Court observed that waiting list in service matters are prepared either under the rules or even otherwise mainly to ensure that the working in the office does not suffer, if the selected candidates do not join for one or the other reason or the next selection or examination is not held soon. It was further observed that a candidate in the waiting list in the order of merit has a right to claim that he may be appointed if one or the other selected candidate does not join, but once the selected candidates join and no vacancy arises due to resignation etc. or for any other reason within the period the list is to operate under the rules or within reasonable period where no specific period is provided, then candidates from the waiting list have no right to claim appointment to any future vacancy which may arise, unless the selection was held for it.

13. In the case before us, advertisement dated 16.07.2003 having been issued only to fill up 6 posts of LDCs, the panel prepared in February, 2004 could have been used only to make appointments to those 06 advertised posts. In the event of one or more persons out of six persons selected to fill up the advertised posts not joining or being medically or otherwise found unfit for employment, waitlisted persons in the panel could have been appointed in place of such persons, in the order of merit, but, it was not legally permissible for the petitioners to fill up the vacancies, arising after issue of the advertisement dated 16.07.2003, by appointing the candidates kept in the panel. As consistently held by the Supreme Court, filling up of vacancies over the notified vacancies amounts to filling up of future vacancies which is not permissible in law and any such a step on the part of the State would be of denial of the constitutional rights guaranteed under Articles 14 and 16 (1) of the Constitution of India, to the persons who become eligible to apply and being considered for the posts falling vacant after issue of the advertisement. The only exception to the rule that only notified vacancies can be filled up by appointing the selected candidate is an emergent situation which makes it almost impossible to adhere to the established rule and thereby justifies deviation, provided a policy decision, based on rational factors, is taken to meet the emergent requirement, by appointing candidates from the panel of extra candidates. However, in the case before us, neither there is an emergent situation, warranting filling up of the existing vacancies by appointment of the respondents nor has a policy decision been taken by the NHRC to fill up the vacancies, which now exist in the cadre of LDCs, by offering appointment to the respondents. It is true that earlier when certain regular vacancies arose, the first four candidates in the panel of extra candidates were regularized against those vacancies, but, that, in our view, by itself would not warrant the issuance of such

a direction in the case of the respondents as well. As noted earlier, the Supreme Court has consistently held that there is no equality in illegality and the concept of negative equity is alien to our Constitution. If an illegality was committed by the petitioners, by regularizing four persons from the panel, we cannot direct it to repeat that illegality by regularizing the respondents. Even if we assume that four out of nine persons kept in the panel were regularized pursuant to a policy decision taken by the petitioners, that decision did not extend to the vacancies which arose subsequent to regularization of those four persons. As noted earlier by us, no policy decision was taken by the petitioners at any point of time, either to regularize all those who were appointed on ad hoc basis or not to make any fresh appointment on regular basis till those who were appointed on ad hoc basis were regularized.

14. The learned senior counsel for the respondents, during the course of the arguments, relied upon *Amlan Jyoti Borooah Vs. State of Assam and Others*, . In *Gujarat State Deputy Executive Engineer Association (supra)*, a circular was issued on 27.12.1983 stating therein the purpose of preparation of waiting list. It was clarified in the circular that when sufficient candidates were not available in the merit list prepared for regularization of a particular year, the shortfall could be met from the waiting list. It was further clarified that the waiting list could also be used to make recruitment during emergent conditions, but it could not be considered as a merit list for the subsequent years. In this context, the Supreme Court observed that the operation of waiting list should be confined to the vacancies notified for that examination and not for any vacancy arising in future unless a policy decision is taken by the Government to that effect. It was further observed that appointment in future vacancies from waiting list should be an exception rather than the rule. It was noted that in the case before the Supreme Court that was no contingency nor the State Government had taken any decision to fill the vacancy from the waiting list on the ground that it was not possible for it to hold the examination nor any emergent situation had arisen except the claim of some candidates from the waiting list that they should be given appointment for vacancies which arose between 1980 and 1983. The Court, however, declined to quash the appointment of those persons who had been appointed, and were working for five years, feeling that it would be unjust and harsh to quash their selection at that stage. In *Amlan Jyoti Borooah (supra)*, 112 vacancies were notified by Director General of Assam Police. A selection committee shortlisted 1803 candidates in the order of merit, the position of the appellant in the select list being 750. On 02.03.2000, the Inspector General of Police requested sanction for appointment of 174 Sub-Inspectors. The candidates who were found eligible were called for physical ability test and 169 candidates who had cleared the physical test /medical test were appointed. The appointment of those 169 candidates was not the subject matter of challenge. However, during the life of the select list of 1803 candidates which was prepared on 01.02.2000, the Director General of Police vide letter 21.12.2000, sought sanction of the State to fill up 77 additional vacancies. He pointed out that there

was insurgency situation in the State and Assembly Elections were to be held within next four months. He, therefore, sought permission from the State Level Empowered Committee to fill up those 77 vacancies from the result of the record of the previous recruitment already available with them. Thus, the compelling reasons for filling up these 77 vacancies was the fast deteriorating law and order situation in the State as also sudden spurt of extremists related incidence of violence. Later, sanction was sought to fill up 80 instead of 77 posts. 84 candidates out of the selected list were called for physical ability test on 22.01.2000 and 75 out of them were selected. The appellant before the Supreme Court and some other candidates filed a writ petition impugning the selection of those 84 candidates. During the pendency of the writ petition, 75 posts were filled up. The learned Single Judge of the High Court set aside the appointment of 54 candidates on a number of grounds. The Division Bench, however, upheld their appointment and set aside the order of the learned Single Judge. The matter was then taken to Supreme Court by way of Special Leave and while dismissing the appeal, the Supreme Court relied upon its earlier decisions in Gujarat State Deputy Executive Engineer Association (supra). Neither of these judgments helps the respondents for the simple reasons that neither there is any emergent situation, warranting regularization of respondents nor has any policy decision been taken by the petitioners to exhaust the panel prepared in February, 2004 or to regularize the respondents before making fresh appointment on regular basis. Unlike Amlan Jyoti Borooah (supra), the case before us does not involve challenge to appointments, by those who are still in the panel of extra candidates. Therefore, there is no question of protecting the appointment of the respondents, who were appointed purely on ad hoc basis and whose ad hoc appointment was not extended beyond 06.09.2011. Moreover, even if any decision is taken by the petitioners to regularize the respondents, such a decision would be illegal being contrary to OM, issued by DOP&T on 14.11.2007, which prohibits ad hoc appointment beyond three years.

15. The learned senior counsel for the respondents has also submitted copies of the decisions in Rajesh Burmann Vs. Mitul Chatterjee (Burman), , Union of India (UOI) and Another Vs. Arulmozhi Iniarasu and Others, State of Orissa and Others Vs. Bhagyadhar Dash, , State of Bihar Vs. Upendra Narayan Singh and Others, , State of U.P. and Others Vs. Desh Raj, , Ashok Kumar Sonkar v. UOI & Ors: (2007) 4 SCC 54, Govt. of A.P. and Others Vs. K. Brahmanandam and Others, , State of Punjab and Others Vs. Bahadur Singh and Others, , Official Liquidator Vs. Dayanand and Others, . In Mukul Saikia and Others Vs. State of Assam and Others, , the Supreme Court held that:- "if the requisition and advertisement was only for 27 posts, the State cannot appoint more than the number of posts advertised". The Select List "got exhausted when all the 27 posts were filled". Thereafter, the candidates below the 27 appointed candidates have no right to claim appointment to any vacancy in regard to which selection was not held."

In this case, the respondent advertised 27 posts of Child Development Project Officers and the Public Service Commission prepared a select list of 64

candidates. The select list was not operated after filling up 27 posts. The appellant before the Supreme Court sought appointment against the vacancies which arose

after those 27 posts have been filled up. Rejecting the contention, the Supreme Court held as under:- "At the outset it should be noticed that the select list prepared by APSC could be used to fill the notified vacancies and not future vacancies. If the requisition and advertisement was only for 27 posts, the State cannot appoint more than the number of posts advertised, even though APSC had prepared a select list of 64 candidates. The select list got exhausted when all the 27 posts were filled. Thereafter, the candidates below the 27 appointed candidates have no right to claim appointment to any vacancy in regard to which selection was not held. "It is well settled law that filling up of the vacancies over and above the number of vacancies advertised would be violative of Articles 14 and 16 of the Constitution of India. Mere inclusion of the appellants in the select list of the direct appointees does not confer any right on them to be appointed against the vacancies reserved for promotees. This judgment does not advance the case of the respondents in any manner and rather supports the case set up by the petitioners.

In *Union of India (UOI) and Another Vs. Arulmozhi Iniarasu and Others*, the respondents were engaged as part-time contingent casual labourers purely on temporary basis. Most of them were in continuous employment for a period ranging from 8 to 14 years in compliance of directions issued by the Ministry of Finance. The appellants before the Supreme Court dispensed with their services

and the work being done by them was handed over to contractors. The OA filed by the respondents having been dismissed by the Tribunal, they took up the matter to the High Court by way of the writ petition. The High Court directed the appellants before the Supreme Court to consider the matter afresh in the light of certain circulars issued by DOP&T pursuant to the decision of the Supreme Court in *Uma Devi (supra)*. On a fresh consideration of the matter, the Chief Commissioner of Central Excise held that the respondents did not satisfy the criteria laid down in *Uma Devi (supra)* and the OM issued by the DOP&T. Thereafter, a notice was issued inviting applications for recruitment to 40 posts of Sepoy. Initially the respondents were permitted to participate in the recruitment but later realizing that they had crossed the prescribing age limit, their applications were rejected. Being aggrieved, the respondents filed a fresh OA before the Tribunal which, relying upon the decision of the Supreme Court in *Nagendra Chandra Vs. State of Jharkhand and Others*, directed the appellant before the Supreme Court to consider the case of the respondent for appointment by relaxing the prescribed age limit. In the writ petition filed by the appellants, the High Court held that relaxation of the age limit could be upto 3 years for OBC candidates and 5 years for SC/ST candidates, subject to the condition that the relaxation would be applicable to those candidates who were actually erstwhile employees of the department. The contention of Union of India

before the Supreme Court was that

the High Court had committed an error in directing relaxation of age bar by treating the decision in Nagender Chandra (supra) as a binding precedent, without appreciating that the observations made in that case with regard to relaxation of age was given in exercise of power under Article 142 of the Constitution, which is not possessed by the High Court. It was held by the Supreme Court that the observations made in the penultimate paragraphs of its judgments in Nagender Chandra (supra) did not appear to be consistent with the ratio of the decision of the Constitution Bench in Sethi Auto Service Station and Another Vs. Delhi Development Authority and Others, held that since the terms of the letter of appointment of the respondents made it clear that the appointments were temporary and would not confer any right to claim any permanent post in the department and since no promise of absorption as regular employees had been made to them and in fact no such promise could be held out in view of the Government OA dated 07.06.1988 which banned employment of persons in regular posts.

As regards the contention that the action of the appellants was discriminatory inasmuch as some similar situated persons being appointed/absorbed as Sepoys, it was observed that a writ of mandamus can be issued by the High Court only when there exists a legal right in the writ petitioners and corresponding legal obligation

on the State. It was further observed that only because an illegality had been committed, the same cannot be directed to be perpetuated, since there can be no equality in any illegality. We fail to appreciate how this case in any manner advances the case of the respondents. This judgment, in fact, goes against the respondents before this Court. The Supreme Court in this case, not only rejected the plea of legitimate expectation but also the plea of hostile discrimination. The Court also set aside the order of the High Court granting age relaxation to the respondents.

The respondents before us are also invoking the doctrine of legitimate expectation and have contended that on account of regularization of some of the persons who were placed in the same panel in which they were placed, they also had a legitimate expectation of being regularized against the vacancies which arose subsequent to the regularization of those who were higher to them in the order of merit. They are also taking a plea of hostile discrimination by contending that having regularized some of the candidates placed in the panel, the petitioners cannot discriminate against the respondents by refusing to regularize them, despite availability of clear vacancies. Since such plea was expressly rejected by the Supreme Court in Arulmozhi (supra), it is not open to this Court to accept a similar contention from the respondents. The plea of legitimate expectation was also repeated by the Supreme Court in Uma Devi (supra).

16. We have also examined the other decisions, copies of which have been

submitted by the learned senior Counsel for the respondents but none of them lays down any such proposition of law which may be of any help to the respondents. We cannot while deciding this petition lose sight of the fact that a vast number of persons, who would not be eligible at the time vacancies were notified vide advertisement dated 16.7.2003 must by now have become eligible to apply for the post of LDCs in NHRC. It would mean denial of their fundamental rights, guaranteed to them under Article 14 & 16(1) of the Constitution, if they do not get any opportunity to compete for the posts which have fallen vacant in NHRC, and are now sought to be filled by making regular appointments. No vested right for regularization or regular appointment has accrued to the respondents on account of their ad hoc appointment to these posts. It would be an improper exercise of jurisdiction on our part to direct regularization of the respondents at the cost of vast number of persons, who are entitled to apply for these posts pursuant to the advertisement issued by NHRC to fill up these posts on regular basis. It would also be conducive to the efficiency of administration, if, only the best persons are appointed to the public offices. We see no good reason for the respondents not competing with the other persons in seeking appointment to these posts. If they are better than others, they would be appointed against these posts and if other candidates are found to be better than them there would be no reason for not appointing those persons.

We are conscious of the fact that some of the respondents may have become overage by this time. However, during arguments before us, the learned counsel for the petitioners stated, on instructions, that if the respondents apply pursuant to the advertisement issued by NHRC, the requisite age relaxation would be granted to them. This concession, on the part of the petitioners, would adequately meet the ends of justice and satisfy whatever equities the respondent have in their favour on account of their engagement on ad hoc basis. For the reasons stated hereinabove, the writ petition is allowed and the impugned order dated 1.2.2012 passed in OA No. 3469/2011 is hereby set aside. However, if the respondents apply pursuant to the advertisement issued by NHRC, within 04 weeks from today, requisite age relaxation shall be granted to them by the petitioners. In the facts and circumstances of the case, there shall be no order as to costs.