

(2006) 05 AHC CK 0185

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No"s. 33224 and 40447 of 2002, 22492 and 22954 of 2003, 3733 of 2005 and 24319 of 2006

Praveen Kant Uppadhyay

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision : 24-05-2006

Acts Referred:

Constitution of India, 1950 — Article 12, 226, 309
Sports College, Lucknow (Teaching and Allied Staff) Service Rules, 1981 — Rule 8
Uttar Pradesh Intermediate Education Act, 1921 — Section 16A, 16H
Uttar Pradesh Secondary Education Service Selection Board Rules, 1998 — Rule 17(4), 2, 25, 5

Citation : (2006) 7 AWC 7237

Hon'ble Judges : Tarun Agarwala, J

Bench : Single Bench

Advocate : M.D. Mishra, P.K. Upadhyay, Vijay Sinha, S.C. Dwivedi, V.B. Singh and Anil Bhushan, for the Appellant; Amit Bose, V.K. Singh, Ashutosh Tiwari, D.R. Sinha and A.K. Dwivedi, for the Respondent

Final Decision : Disposed Of

Judgement

Tarun Agarwala, J.—This bunch of writ petitions raises similar questions, therefore is being decided together.

2. The petitioner Sri Praveen Kant Upadhyay, has filed Writ Petition No. 40447 of 2002 alleging that he was appointed as an Assistant Teacher by an order dated 2.9.2001, but was designated as a Guest Subject Expert. The appointment was made on a contract basis, on a fixed pay of Rs. 5000/- per month and for a limited period. It was alleged that the appointment was made with a legitimate expectation, that one day, the services of the petitioner would be regularised in the respondents college. The petitioner further alleged that his appointment was made against a substantive vacancy. It was also alleged that no Rules have been framed for regulating the service conditions of the teaching staff of the respondent college. The petitioner, therefore, prayed that having worked for two

years on a substantive post, he was liable to be regularised in the service.

3. During the pendency of the aforesaid writ petition, it transpires that an advertisement dated 1.5.2003 was issued inviting applications for appointment on the posts of Assistant Teacher in Guru Govind Singh Sports College, Lucknow and Bir Bahadur Singh Sports College, Gorakhpur. The petitioner, Sri P.K. Upadhyay, therefore filed Civil Misc. Writ Petition No. 22493 of 2003 praying for the quashing of the advertisement dated 1.5.2003, on the ground, that having worked for more than two years on a substantive post, he was entitled to be regularised in the service.

4. During the pendency of the writ petitions, the respondents issued another advertisement dated 23.12.2004 inviting applications for appointment of Assistant Teachers in the Sports College. This advertisement was again challenged by Sri P.K. Upadhyay by filing Civil Misc. Writ Petition No. 3733 of 2005.

5. In all the aforesaid three writ petitions, interim orders were passed. In Writ Petition No. 40447 of 2002, an interim order dated 25.9.2002 was passed directing the petitioner to continue as a teacher till such time a regularly selected candidate joined the post. When the advertisement dated 23.12.2004 was issued, an interim order dated 28.1.2005 was passed directing that the selection process would continue but the results would not to be declared.

6. Smt. Deep Mala and others also filed Civil Misc. Writ Petition No. 33224 of 2002 praying for the regularisation of their services. The said petitioners contended that they were working as Assistant Teachers since 1991, 1992, 1993 and 1996 respectively, against sanctioned posts which were created on 9.2.1990. They further contended that they were working against the substantive vacancies and had the requisite qualifications and that similarly situated persons were given appointments in the Sports College of Lucknow. The said petitioners has brought on record indicating that the Board of Management as well as the Principal of the Sports College had written several letters to the State Government and to the Sports Minister for the regularisation of their services. Consequently, in view of the length of the service, the petitioners prayed that they are entitled to be regularised. The said petitioners also filed Civil Misc. Writ Petition No. 22954 of 2006, challenging the advertisement dated 1.5.2003 and 3.5.2003 which was issued for the appointment of the Assistant Teachers.

7. Sri Ram Lautan has also filed Writ Petition No. 24319 of 2006 praying that pursuant to the advertisement dated 23.12.2004, he had applied for appointment on the post of Assistant Teacher and that he appeared in the interview which was held on 19.1.2006. The petitioner prayed that the results of the interview should be declared and the post which were advertised be filled up.

8. During the pendency of the writ petitions, the petitioner, Sri P.K. Upadhyay filed amendment applications stating that the Sports College, Gorakhpur had been upgraded upto the Intermediate level and, therefore he was liable to be

promoted as a Lecturer. The petitioner also prayed that the Board of Management of the Sports College Society should be impleaded as a necessary party and that Sri Nirmal Singh Saini, the Director of the Sports College should also be impleaded as a respondent. The petitioner further prayed that a writ of quo warranto should be issued for the quashing of the appointment of Sri Nirmal Singh Saini as the Director of the College. Sri P.K.Upadhyay also prayed for the quashing of the order dated 25.3.2006 by which his application for the regularisation of his services was rejected by the respondents.

9. The contention of the learned Counsel for Sri P.K.Upadhyay is that under the Rules framed by the society, Sri Nirmal Singh Saini does not hold the requisite qualifications and, therefore was not entitled to occupy the office of the Director and, consequently was not entitled to issue the advertisement for appointment on the posts of Assistant Teacher.

10. The respondents have filed a counter affidavit and submitted that the institution is managed by the U.P. Sports College Society, which is a Society registered under the Societies Registration Act. The Society has a memorandum of association and has framed Rules and Regulations, as well as, the Rules relating to the service conditions of its staff and employees. The respondents further submitted that the college is maintained by the Society, which in turn, is an instrumentality of the State and comes within the ambit of Article 12 of the Constitution of India. The respondents submitted that the petitioners were appointed on a contract basis, as a guest teacher and had no lien on the post. The petitioners had given an undertaking that they would not seek any regularisation or file a petition in the High Court for the regularisation of their services. The contract of appointment was given to the petitioners on account of exigency of service in the larger interest of the students and, as per the Government Order dated 29.8.2001, the respondents were permitted to employ persons on a contract basis, till such time as the regular appointments were made. The respondents categorically contended that the petitioners were never appointed against a sanctioned post. The respondents further submitted that the amendment applications were misconceived, inasmuch as, the petitioner Sri P.K.Upadhyay was not entitled to pray for a writ of quo warranto in a petition where the petitioner himself was seeking a relief for the regularisation of his service. In any case, Sri Nirmal Singh Saini was appointed as a Director in the year 1991. The said appointment could not be challenged after a long lapse of time. The respondents, further submitted that the petitioner's case for their regularisation was rejected by the authorities. Further, the petitioners had no locus standi to challenge the advertisement dated 23.12.2004, inasmuch as, the said advertisement related to appointment of Assistant Teachers for the Lucknow Sports College and had nothing to do with any appointment relating to the Gorakhpur Sports College. The respondents, therefore, contended that no case was made out by the petitioners and that the writ petitions were liable to be dismissed.

11. Heard Sri M.D. Mishra, the learned Counsel for the petitioner, Sri P.K.Upadhyay, Sri S.C. Dwivedi, the learned Counsel appearing for Smt. Deep Mala and others, Sri Anil Bhushan, the learned Counsel for Sri Ram Lautan, Sri Amit Bose, Sri V.K. Singh and Sri Ashutosh Tiwari, the learned Counsels appearing for the respondents.

12. Sri M.D. Mishra, the learned Counsel for the petitioner submitted that it was not clear as to whether the Sports College of Gorakhpur was a Government College, a Government aided College or a private institution and that the petitioner was unaware as to what Rules or Regulations applied to the staff appointed in the Sports college. The learned Counsel submitted that if the Sports College, Gorakhpur was a government college, then the Rules and Regulations framed for the government employees would govern the service conditions of the staff appointed in that college. If it was a Government aided institution, then the appointments were required to be made by the Public Service Commission or under the Intermediate Education Act and that a Scheme of Administration was required to be framed u/s 16-A of the Intermediate Education Act. If the said College was a private institution, in that event, a private contract of service would be applicable. It was also urged that the respondents are not clear as to what Rules or Regulations are applicable, inasmuch as, at one place, the respondents have alleged that the U.P. Secondary Education Service Selection Board Rules 1998 was applicable for appointments of Assistant Teachers in their College, on the other hand, the respondents are following the Government Rules and Regulations by making appointments on compassionate grounds under the Dying in Harness Rules. The learned Counsel further submitted that Nirmal Singh Saini had no right to be appointed as the Director of the College and, consequently had no authority to issue the impugned advertisement, since he did not hold the requisite qualifications as prescribed under the Rules. The learned Counsel further submitted that since the college had been upgraded to the Intermediate level, Sri P.K.Upadhyay was liable to be promoted as a Lecturer. It was lastly, submitted by Sri M.D. Mishra as well as by Sri S.C. Dwivedi, that the petitioners having worked for a considerable length of service, on a substantive vacancy, and eligible for being appointed as Assistant Teachers, were consequently liable to be regularised in the service.

13. From the record, it is clear that there is a Society known as U.P. Sports College Society, which is registered under the Societies Registration Act 1860, This Society has a Memorandum of Association. The object of the Society, amongst others is to establish Sport Colleges in Uttar Pradesh and to provide special education training of a high standard with the aim of preparing the boys and girls physically for different sports and games and to take steps for the management and administration of the Sports College and to prescribe a policy for the general education, coaching in physical education, sports and games etc. As per the Memorandum of the Association and as per the Rules and Regulations framed, the Board of Management and the members of the society consists of the Sports Minister, the Principal Secretary, of the Sports Department,

Commissioner and Secretary to the Government of U.P. Finance Department, Commissioner and Secretary to the Education Department, Director of Education, Director of Secondary Education, Director of Sports, the Principals of the Sports Colleges, joint Secretary of the Sports Department, etc , etc.

14. Clause 7 of the Uttar Pradesh Sports Colleges Society Rules and Regulations gives power to the Board of Management to carry out the objects of the Society. Clause 7[d] and [e] of the said Rules confers the power to the Board for appointment, dismissal and removal of teaching and non teaching staff of the colleges. The said provisions are quoted hereunder:

7.[2] [d] appointment, dismissal and removal of Principals of the Sports Colleges.

[e] confirmation, appointment, removal or dismissal of teaching and coaching staffer staff of equivalent status of the sports colleges .

15. The Society has also framed Rules relating to the service conditions for the teaching and non-teaching staff of the Sports Colleges which is known as the Sports College, Lucknow [Teaching and Allied Staff] Service Rules 1981. These Rules have been approved by the State Government by a Government Order dated 3.7.1984. Rule 2[d] of the said Rules states as under:

2- [d] all other teaching and non-teaching staff of the Sports College established, run and managed by the Uttar Pradesh Sports Colleges Society, Lucknow.

16. Rule 5 of the said Rules relates to the procedure for the recruitment of teaching and non-teaching staff which is quoted hereunder.

5. [1] Whenever it is required to fill any posts, the Principal, shall invite applications through nearest employment Exchange and /or by advertisements in one or more newspapers having wide circulation in the areas and shall send the copy of the same to the government as well as the Director, Sports.

Provided that in the case of vacancies in the posts of Principal and Administrative Officer, applications shall be invited by the Secretary to Government of Uttar Pradesh Sports Department;

Provided further that the selection to the post of Principal/Administrative Officer will be made from out of the candidates whose names are recommended by the Government of Uttar Pradesh in Sports Department;

Provided also that it shall be open to make an appointment of any teaching or non-teaching post on deputation on the terms and conditions as approved by the Government from time to time from a Department of the Uttar Pradesh Government after necessary interview as laid down in Sub-rules [3];

17. Rule 17[4] provides for the termination of a temporary employee and Rule 25 provides for the relaxation of the conditions of service, which are quoted hereunder.

AGE OF RETIREMENT AND TERMINATION OF SERVICE

17.[4] Service of a temporary employee shall be liable to termination on one month notice on either side or one month's pay in lieu thereof.

RELAXATION FROM CONDITIONS OF SERVICE

(25) Where the Secretary to Government of Uttar Pradesh in the Sports Department [Vice-Chairman] is satisfied that the operation of any rule regulating the conditions of service of persons appointed to these establishment caused undue hardship in any particular case, he may, by order, dispense with or relax the requirements of that rule to such an extent and subject to such conditions as he may consider expedient for dealing with the case in a just and suitable manner.

18. From the record, it transpires that the society is running two sports colleges known as Bir Bahadur Singh Sports College, Gorakhpur and Guru Govind Singh Sports College, Lucknow. The Sports College at Gorakhpur came into existence in the year 1988.

19. In the light of the aforesaid provisions and the admission made by the respondents, it is clear that the U.P. Sports College Society is a Society registered under the Societies Registration Act and is running two Sports Colleges at Lucknow and Gorakhpur. The Memorandum of Association and the Rules framed by the said Society makes it apparently clear, that the Society is an instrumentality of the State and comes within the ambit of a "State" as contemplated under Article 12 of the Constitution of India. The record suggests that the Society and the Colleges is maintained by the State Government. Consequently, the submission of Sri M.D. Mishra, the learned Counsel for the petitioner, that the provisions of U.P. Intermediate Education Act 1921 is applicable and that a Scheme of Administration is required to be framed u/s 16-A of the Act, is patently misconceived. The Society has framed its Rules of 1981 which have been approved by the State Government in the year 1981 and these Rules of 1981 governs the service conditions of the teaching and non-teaching staff of the two colleges of the society, namely, the Sports College, Lucknow and the Sports College, Gorakhpur. Further, in view of the provisions of Section 16-H of the U.P. Intermediate Education Act, the Sports Colleges, being maintained by the State Government is, consequently exempted from the applicability of the U.P. Intermediate Education Act 1921. The Society is not required to frame a Scheme of Administration and is competent to frame its own Rules and Regulations incorporating the service conditions of its teaching and non-teaching staff. The petitioners, drew the attention of the Court, to the advertisement that was issued by the respondents, which indicated that the respondents were following the procedure prescribed under the U.P. Secondary Education Service Selection Board Rules 1988 for the appointment on the post of Assistant Teacher. In my view, taking recourse to a provision of the Rules of 1998 framed under the Intermediate Education Act by the respondents does not mean that the said Rules are applicable for the appointment on the post of Assistant Teachers. Similarly, if the respondents appoints a person on compassionate ground, it does

not mean that the respondents are governed by the Government Rules and Regulations. It is always open to the respondents to adopt any Rules and Regulations framed by the State Government, and an isolated incident, of an appointment on compassionate ground, does not mean that the Rules and Regulations framed by the State Government governs the teaching and non-teaching staff of the society and its colleges.

20. The submission of the learned Counsel for the petitioner that a writ of quo warranto should be issued declaring Sri Nirmal Singh Saini incompetent to hold the post of Director or issue the advertisement is, patently misconceived. The petitioners have filed the present writ petition for the regularisation of their services. The cause of action, for initiating the writ petition is, that the petitioner Sri P.K. Upadhyay had completed two years of service, on a substantive post and, was therefore, entitled for the regularisation. In the opinion of the Court, the petitioner Sri P.K. Upadhyay, at this stage had no cause of action to challenge the appointment of Sri Nirmal Singh Saini, in view of the fact that Nirmal Singh Saini was appointed as a Director, as far back, as in the year 1981. Since, Sri Nirmal Singh Saini has been working on this post for more than two decades, it was not open to the petitioner at this stage, to question his appointment at a stage when his own appointment was under consideration before the Court. The Supreme Court in *M.S. Mudhol and Another Vs. S.D. Halegar and Others*, held that a writ of quo warranto would not lie nor could such a writ be issued after a long lapse of delay, especially where the person continued to function for 12 years. The Supreme Court held, that in such a scenario, the appointment should not be disturbed, In the opinion of the Court, the aforesaid judgement is squarely applicable to the present facts and circumstances of the case. Sri Nirmal Singh Saini was appointed in the year 1991 and, therefore his appointment could not be disturbed nor could be questioned at this stage. Consequently, the submission of the learned Counsel for the petitioner on this aspect, is rejected. The amendment application, seeking such a relief to this extent is, accordingly rejected.

21. The submission of the learned Counsel for the petitioner that since the college had been upgraded upto the Intermediate level, the petitioner was consequently, liable to be promoted as a teacher is, also bereft of merit. The counter affidavit reveals that the College was only upgraded upto the High School level and has not been upgraded up to the Intermediate level. Consequently, the relief for the promotion to the post of Lecturer does not arise. The claim for the post of lecturer by Sri P.K. Upadhyay is accordingly rejected. The amendment application, seeking a relief to this extent is, misconceived, and is rejected.

22. It has come on record, that the Society issued various advertisements for the appointment of Assistant Teachers. Two advertisements No. 156 and 157 dated 4.9.2002 and 6.9.2002 were issued for the appointment of Assistant Teachers in Lucknow Sports College as well in Gorakhpur Sports College. No selection

process had taken place and the said advertisement died a natural death. Subsequently, the respondents issued another advertisement dated 1.5.2003 for the appointment of Assistant Teachers in the Lucknow Sports College as well as for the Gorakhpur Sports College. The selection process, pursuant to this advertisement, was stayed by an interim order of this Court. Consequently, no selection could take place. It has been stated at the Bar, by the learned Counsel for the respondents, that pursuant to this advertisement, no selection had taken place. Consequently, in view of the statement made by the respondents, the prayer for the quashing of these two advertisement in Writ Petition No. 22492 of 2003 by Sri P.K. Uadhyay and Writ Petition No. 22594 of 2003 by Smt. Deep Mala and others does not survive any longer and these petitions are dismissed as infructuous.

23. The petitioner, Sri P.K.Upadhyay has filed Civil Misc. Writ Petition No. 3733 of 2005 for the quashing of the advertisement dated 23.12.2004. A perusal of this advertisement indicates that the appointments were sought for the post of Assistant Teachers for the Sports College at Lucknow. The said appointments had nothing to do with the filling up of any sanctioned post in the Sports College at Gorakhpur. The petitioner, was teaching on a contract basis in the Sports College, Gorakhpur. It has come on the record that Sri P.K.Upadhyay did not apply for an appointment as an Assistant Teacher in the Sports College at Lucknow pursuant to the advertisement dated 23.12.2004. Consequently, in the opinion of the Court, Sri P.K.Upadhyay had no right to challenge the advertisement dated 23.12.2004. Sri M.D. Mishra, the learned Counsel for the petitioner submitted that the advertisement indicated that upon the appointment of an Assistant Teacher at Lucknow, he could subsequently, be transferred to any other colleges maintained by the Society, and consequently apprehended, that upon the appointment of a candidate, made in pursuance of the advertisement dated 23.12.2004, the said candidate would be subsequently, transferred in the substantive vacancy at the Sports College, Gorakhpur, thereby causing the appointment of the petitioner on the contract basis to come to an end. Therefore, on this apprehension, the petitioner had challenged the advertisement dated 23.12.2004. In the opinion of the Court, the submission of the learned Counsel for the petitioner is bereft of merit. On mere apprehension, the advertisement cannot be challenged. The petitioner, having not applied as a candidate, was not entitled to challenge the advertisement. The respondent have stated in their affidavits, and the learned Counsel for the respondent Sri Amit Bose has also made a statement at the Bar that the appointments to be made, pursuant to the advertisement dated 23.12.2004, would not disturb the contract of service given to Sri P.K.Upadhyay. Consequently, the apprehension of the petitioner Sri P.K.Upadhyay, that he would be displaced upon the appointments being made, pursuant to the advertisement dated 23.12.2004 is misconceived. The arguments raised by Sri M.D. Mishra, the learned Counsel for the petitioner on this aspect is bereft of merit and is accordingly rejected. Thus, in the opinion of the Court, the writ Petition No. 3733 of 2005 filed by Sri P.K. Upadhyay does not

survive any longer and, is accordingly dismissed. The amendment application seeking a relief for the promotion as a Lecturer and for a writ of quo warranto is accordingly rejected for the reasons given in the preceding paragraphs. The amendment application, in so far as it relates to the prayer for the quashing of the order dated 25.3.2006, even though it was made in the present writ petition, would however, be considered while deciding Writ Petition No. 40447 of 2002, which is with regard to the regularisation of his services.

24. The last submission of Sri M.D. Mishra, the learned Counsel for the petitioner and Sri S.C. Dwivedi, the learned Counsel for the petitioner in the connected writ petition is with regard to the regularisation of the services.

25. The contention of the learned Counsel for the petitioners is that the petitioners had been working since long on substantive vacancies and that they have the requisite qualifications for the post of Assistant Teachers and, consequently they are liable to be given regular appointments on the post of Assistant Teachers. Further, the regular post of Assistant Teachers has not been filled up by the respondents since the inception of the Sports College for reasons best known to them. Consequently, in view of the fact that the petitioners have been working since long, it has been contended that the petitioners have acquired some sort of a legitimate expectation with regard to the regularisation of their services in the respondents Sports College. The learned Counsel for the petitioner further submitted that the order rejecting their representation for the regularisation of their services was patently erroneous and the same had been passed without any application of mind and without considering the relevant facts and circumstances prevailing in the present case. The mere fact that the Societies Rules of 1981 did not prescribe a procedure for the regularisation of their services did not mean that the State Government or the Sports College was powerless in not regularising their services. The State Government could always frame a scheme, as a one time measure, for the regularisation of the contract employees and such other similarly situated persons who were working since long.

26. On the other hand, the learned Counsel for the respondents submitted that the petitioners were appointed on a contract basis for a limited period on account of the exigencies of the service and had no right to seek the regularisation of their services. The petitioner had also given an undertaking that they would not file any petition seeking regularisation of their services and, consequently, in view of the aforesaid, the petitioners were not entitled to any relief. It was also alleged that the petitioners were not eligible as they did not have the requisite qualifications nor were they working on a sanctioned post. The respondents further submitted that the appointments of the petitioners was made de hors the Rules, by a back door method, and therefore, such appointments could not be regularised in the absence of Rules framed in this regard.

27. The learned Counsel for the respondents has laid much emphasis on a judgement of the Supreme Court in Mahendra L. Jain and Others Vs. Indore

Development Authority and Others, and a Constitution Bench judgment of the Supreme Court in Secretary, State of Karnataka and Others Vs. Umadevi and Others, on the proposition that the regularisation of the appointments on a contract basis, could not be made in the constitutional scheme which envisages employment on the basis of a procedure established by Rules and Regulations.

28. Admittedly, the petitioners were appointed on a contract basis for a limited period in the year 1991, 1992, 1993, 1996 and lastly in the year 2000 on a contract basis for a limited period. The period of employment, on a contract basis, was extended by the respondents from time to time, in the interest of the students, till such time as regular selected candidate joined the post. For reasons best known to the respondents, regular selection process, as per the Rules of 1981, was never undertaken by the respondents, since the very inception of the Sports College. It is noteworthy to state here, that the Gorkahpur Sports College came into existence in 1988 and no selection process took place till the year 2002. The advertisement Nos. 156 and 157, dated 4.9.2002 and 6.9.2002 were issued for the appointments of the teaching staff in Gorakhpur Sports College, but the selection process was stayed by the respondents themselves for reasons best known to them. Another advertisement of 1.5.2003 was issued, which the petitioner challenged in which an interim order was passed staying the selection process. The challenge was made on the ground that the petitioners were liable to be regularised in the regular cadre, since they were working for a long time and held the requisite eligibility qualifications for the appointment on the post of Assistant Teachers.

29. The learned Counsel for the respondents submitted that the mere fact that the petitioners were working for a long time did not entitle them to continue in the service or make a claim for the regularisation of their services especially in the absence of any statutory provisions in this regard, and therefore, it was not possible for the respondents to regularise their services. In support of his submission the learned Counsel for the respondents laid stress on the constitutional bench judgment of the Supreme Court in the case of Uma Devi [3] [supra] on the proposition that in the absence of any Statutory Rules for the regularisation of a contract employee, the petitioners could not be given a government service through a back door nor could they claim regularisation of their services.

30. The Supreme Court in the case of Uma Devi [3] [supra] held that public employment had to be made on the basis of a procedure established by the Rules and Regulations and that only regular appointments could be made and that an irregular appointment, without following the procedure, as per the Rules and Regulations, should not be adopted nor such irregular appointments namely, temporary, casual, daily rated persons or on contract, having continued to work year after year, should not be permitted to be regularised and such powers should not be exercised by the Courts under Article 226 of the Constitution. The Supreme Court held that the employer could engage persons on a temporary

basis to meet the needs of the situation. However, the engagement, could not be used as a lever for the regularisation of their services, as it would defeat the scheme of public employment and therefore, the Courts, exercising powers under Article 226 of the Constitution, should refrain in directing absorption in a permanent employment of those who have been engaged without following the due process of selection as envisaged under the Rules and Regulations. The Supreme Court, further held, that equity would also not favour such persons who had been working for a considerable period of time nor sentiments should come in the way. The Supreme Court held that a person, who was engaged on a contractual basis, was not based on a proper selection as recognised by the rules or procedure and, such appointments could not invoke the theory of legitimate expectation for being confirmed on that post in the light of the fact that the said post could only be filled up after following a procedure prescribed under the Rules and Regulations, The Supreme Court further held that it could not be held that a promise of legitimate expectation was given by the respondents for the regularisation of their services on the mere ground, that these temporary or contract employees were allowed to continue for a period of time.

31. In *Director, Institute of Management Development, U.P. Vs. Smt. Pushpa Srivastava*, , the Supreme Court held that an appointment made on contractual basis on a consolidated pay for a fixed period and terminable without notice would not give a right to the said person for the regularisation of his services in the absence of any Rule providing for the regularisation of his service upon the expiry of the period of appointment.

32. In *A. Umarani Vs. Registrar, Cooperative Societies and Others*, , the Supreme Court held that the regularisation in the service would not be made a mode of the recruitment in the service of the State and that the regularisation could not give permanence to an employee whose services was adhoc in nature. The Supreme Court further held that the fact that some persons had been working for a long time did not mean that they had acquired a right for the regularisation of their services. However, the Supreme Court in the case of *Secretary, State of Karnataka and Others Vs. Umadevi and Others*, has carved out an exception. In paragraph-53 of the said judgment, the Supreme Court held that if the persons appointed on adhoc, casual or contract basis were duly qualified and were working against a sanctioned post and continued to work for several years without any intervention of an order of the court, in such an eventuality, the process of regularisation could be made, and if it was ultimately found that the employee was entitled for the relief, it would be possible for the Court to accordingly mould the relief.

33. In the light of the aforesaid, the respondents argued that in so far as Sri P.K.Upadhyay was concerned, he is a litigious employee and indulged in "litigious employment" as held by the Supreme Court in the Constitutional Bench judgment [supra]. He filed Civil Misc. Writ petition within two years of his appointment and by an interim order continued to work on a contract basis.

Further, Sri P.K.Upadhyay did not possess the requisite qualifications. However, nothing has been said by the respondents with regard to the eligibility of the qualifications of the other petitioners.

34. The fact remains that for the regularisation in any service, two contingencies are essential, namely, that there is an availability of a clear substantive vacancy and that an employee is working on an adhoc , casual, temporary or on a contract basis which is continued from time to time and had been employed over a long period of time without any artificial breaks and that his service was otherwise required by the institution, This has been clearly stated by the Supreme Court itself in the case of Ashwani Kumar v. State of Bihar 1997 [2] SCC 1628, holding that the initial entry of such an employee could only be made against a sanctioned vacancy by following the Rules and Regulations governing such entry.

35. The Supreme Court in State of Haryana and others Vs. Piara Singh and others etc. etc., held that the State should act as a model employer and should not exploit its employee nor take advantage of the helplessness and miseries of the unemployed persons or the employee as the case may be, and where temporary, adhoc employees are continued for a long time, the Court presumes that there is need for a regular post and accordingly, could direct regularisation. The Supreme Court held:

Ordinarily speaking, the creation and abolition of a post is the prerogative of the Executive. It is the Executive again that lays down the conditions of service subject, of course, to a law made by the appropriate legislature. This power to prescribe the conditions of service can be exercised either by making Rules under the proviso to Article 309 of the Constitution or (in the absence of such Rules) by issuing Rules /instructions in exercise of its executive power. The Court comes into the picture only to ensure observance of fundamental rights, statutory provisions, Rules and other instructions, if any, governing the conditions of service. The main concern of the court in such matters is to ensure the Rule of law and to see that the executive acts fairly and gives a fair deal to its employees consistent with the requirements of Articles 14 and 16. It also means that the State should not exploit its employees nor should it seek to take advantage of the helplessness and misery of either the unemployed persons or the employees, as the case may be. As is often said, the State must be a model employer. It is for this reason, it is held that equal pay must be given for equal work, which is indeed one of the directive principles of the Constitution. It is for this very reason it is held that a person should not be kept in a temporary or ad hoc status for long. Where a temporary or ad hoc appointment is continued for long the Court presumes that there is need and warrant for a regular post and accordingly directs regularisation.

36. In the light of the aforesaid, it is clear that the petitioners were working since long except Sri P.K.Upadhyay, who was appointed in the year 2000. The respondents alleged that the petitioners were appointed on a contract basis and

not against a sanctioned post. This submission of the learned Counsel for the respondents is patently misconceived, as it has come on record that the sanctioned posts were never filled up by the respondents right from the inception of the college in the year 1988 till date and an effort was made for the first time to fill up the sanctioned posts, by a regular procedure in the year 2002. Nothing has been stated by the respondents with regard to the qualifications of the petitioners. The respondents have also not alleged that their teaching performance was not upto the mark or that they were otherwise not qualified to hold the said post.

37. Admittedly, the appointments were made in the interest of the students so that the teaching may not suffer. The petitioners were appointed for a limited period till such time a regular selected candidate was appointed. The respondents took no steps to fill up the sanctioned posts by a regular selection and allowed the petitioners to continue for years. Thus, the action of the respondents in permitting the petitioner to work for a considerable period of time gave a flicker of hope to the petitioners with regard to the regularisation of their services. In this regard, there are letters indicating that the Principal had written letters to the Director of the College and to the Sports Minister as well as to the Secretary, Department of Sports to the Government of U.P. to frame a Scheme for the regularisation of the contract employees and the teaching staff, including the petitioners. The record suggests that correspondence in this regard continued for several years, between the year 1995 to 2000. Consequently, the action and conduct of the respondents in making an effort for the regularisation of the services of the contract employees engaged by them, gave a legitimate expectation to the petitioners for being absorbed in the regular cadre, even though, the assurance , if any, did not develop in a crystalised right. Nonetheless, it gave a flicker of hope and some sort of a legitimate expectation which in the opinion of the court, was sufficient to give them a locus standi to seek a judicial review for the regularisation of their services.

38. In *Director, Institute of Management Development, U.P. Vs. Smt. Pushpa Srivastava*, , *Ashwani Kumar and Others Vs. State of Bihar and Others*, , *Daily Rated Casual Labour Employed under P and T Department Vs. Union of India (UOI) and Others*, , *Narender Chadha and Others Vs. Union of India and Others*, , *State of Haryana and another Vs. Ram Diya*, , *State of U.P. and Others Vs. Dr. Deep Narain Tripathi and Others*, and *Gujarat Agricultural University Vs. Rathod Labhu Bechar and Others*, , the Supreme Court held that where long period of service are rendered, the principles of legitimate expectation are squarely applicable. Further, in the light of the Constitutional Bench judgement in the *State of Karnataka v. Uma Devi*[3] [supra], the legitimate expectation has to be viewed in the light of the exception carved out by the Supreme Court itself as stated in paragraph 53 of the said judgment.

39. In the opinion of the court, the petitioners, even though they worked on a contract basis, but having continued to worked for a considerable long period of

time, gave them a legitimate expectation for the regularisation of their services and to seek a judicial review in this regard.

40. In the opinion of the Court, the petitioners were working on contract basis, but were working against a sanctioned post, inasmuch as, these sanctioned posts were never filled up by the respondents. The contract issued by the respondents in permitting the petitioners to work on a contract basis for years to come amounts to an unfair labour practice. The respondent, is an instrumentality of the State and was required to act as a model employer and should not have allowed the petitioners to continue for years on a contract basis and should not have exploited its employees. As a result of their continuance as contract employees for almost a decade, the petitioners have become overage and, at this stage, they are not in a position to compete with others or seek an employment in some other establishment. The respondents have urged that in any case, Sri P.K. Upadhyay cannot fit in this category in the exception carved out by the Supreme Court. Be that as it may, if the Court directs the regularisation, the same principle would apply to all similarly situated persons and the Court could not discriminate similarly situated persons, who were appointed on a contract basis. Even though, Sri P.K. Upadhyay would come in the category of a litigious employee, nonetheless, having worked for a considerable period of time, would be given the same treatment as given to the other petitioners.

41. In view of the aforesaid, the petitioners have made out a case for the regularisation of their services. Since, there are no Rules framed for the regularisation of their services, I direct the respondent Society to pursue the matter with the State Government and come out with a scheme for the regularisation of their services within three months from the date of the production of a certified copy of this order. In the event, the State Government refuses or fails to frame a scheme within the aforesaid period, in that eventuality, the Director of the Society will issue an advertisement for the appointment of Assistant Teachers on the sanctioned posts, after relaxing the age of the petitioners, as contemplated under Rule 8 of the Rules of 1981 read with Rule 25 of the said Rules, to enable the petitioners to apply for the said posts. The relaxation, if any, will be only with regard to the age and that no relaxation would be given with regard to the requisite educational qualifications. If the petitioner possesses the requisite qualifications, the selection committee would consider the petitioner's case for regular appointment.

42. In view of the aforesaid, the Writ Petition No. 22492 of 2003 , Writ Petition No. 22954 of 2003 and Writ Petition No. 3733 of 29005 are dismissed as infructuous. The Writ Petition No. 40447 of 2002 and Writ Petition No. 33224 of 2002 with regard to the regularisation of the services of the petitioners are disposed of in the light of the observations made above.

43. In view of the fact that I have held that the advertisement dated 23.12.2004 is not applicable for the appointments on the post of Assistant Teachers for Gorakhpur Sports College, the respondents are at liberty to declare the result

pursuant to the selection process held as per the said advertisement. Consequently, the Writ Petition No. 24319 of 2006, Ram Lautan v. State of U.P. and Ors. is, accordingly disposed of.