

(2017) 05 AHC CK 0123
In the Allahabad High Court
Case No : 899 of 2014

Ram Krishna In 880(Spla)2013

APPELLANT

Vs

State Of U.P.Throu.Secy.Vocational & Technical Edu. Lko.&
Ors

RESPONDENT

Date of Decision : 25-05-2017

Acts Referred:

Constitution of India, Article 14, Article 226, Article 141, Article 16 -
Allahabad High Court Rules, 1952, Rule 12

Citation : (2017) 05 AHC CK 0123

Hon'ble Judges : Narayan Shukla, Sheo Kumar Singh-I

Bench : Division Bench

Advocate : Abhishek Dwivedi

Final Decision : Dismissed

Judgement

1. Present review petition under Chapter V Rule 12 of the Allahabad High Court Rules, 1952 has been filed to review the judgment and order dated 09.07.2014 passed in Special Appeal No.880 of 2013 (State of U.P. and others v. Ram Krishna).

2. Learned counsel for the applicant has submitted that the applicant was legally entitled for regularization in service on the post of Instructor on the basis of consideration and opinion reported by Director, Training and Employment, U.P. but the State Government kept the matter pending and later on the applicant was not regularized in the service. Feeling aggrieved by the inaction of the State, the applicant approached to this Court by filing Writ Petition No.6452 (SS) of 2010 under Article 226 of the Constitution of India, which was allowed vide judgment and order dated 04.07.2013 in terms of order dated 18.04.2013 passed in Writ Petition No.3425 (SS) of 2010. Against the order passed in writ petition, the State preferred Special Appeal No.880 of 2013 which was allowed vide judgment and order dated 09.07.2014 setting aside the order dated

04.07.2013 passed in Writ Petition No.6452 (SS) of 2010 against which the present review petition has been filed.

3. While considering the matter of regularization of the applicant/petitioner the relaxation which was vested in the State Government was not exercised rather discretionary power of relaxation was denied against the applicant. This Court while considering the special appeal considered Rule 4 of the Regularization Rules which provides that any person who was directly appointed on ad-hoc basis before January 1, 1977 and is continuing in service as such on the date of commencement of these rules, possessed requisite qualifications prescribed for regular appointment at the time of such ad-hoc appointment and has completed three years continuous service shall be considered for regular appointment in permanent or temporary vacancy as may be available on the basis of his record and suitability before any regular appointment is made in such vacancy in accordance with relevant service rules.

4. The applicant/petitioner was not having requisite minimum eligibility criteria and experience and in view of settled proposition of law the matter was decided. This Court while considering the matter of applicant discussed the proposition of law as held in State of U.P. and others v. Rekha Rani reported in JT 2011 (4) SC 6, where it was observed by Hon"ble the Apex Court that the High Court in exercise of its power under Article 226 of the Constitution of India cannot regularize an employee. Merely because some others had been regularized does not give any right to the applicant. An illegality cannot be perpetuated.

5. Learned counsel for the State has submitted that before proceeding to the relief clause as prayed by the petitioner it is necessary to examine the Rules relating to ad-hoc appointments and appointments against substantive vacancies. A distinction has been drawn in (1) appointment according to the procedure established by law.

6. In A. Umarani Vs. Registrar, Co-operative Societies & Ors, (2004) 7 SCC 112, a large number of employees of the Co-operative Societies in the State of Tamil Nadu had been appointed without notifying the vacancies through the Employment Exchange and without following the other mandatory provisions of the Act and the Rules framed thereunder relating to recruitment. With a view to condone the serious lapses on the part of the Co-operative Societies in making such appointment the State Government issued various orders from time to time for regularizing such appointments. The Supreme Court held that such orders could not have been passed with retrospective effect condoning the actions on the part of the Co-operative Societies which were in flagrant violation of the provisions of the Act and the Rules. While holding that the provisions of the Act and the Rules reflect the Legislative Recruitment Policy and the provisions were mandatory in nature, the Supreme Court after referring to a number of earlier decisions held that an appointment made in violation of the mandatory provisions of the statute would be wholly illegal. Such illegality cannot be cured by taking recourse to regularization. While deciding the said case, reliance was

placed on its earlier judgment in State of H.P. Vs. Suresh Kumar Verma and another, (1996) 7 SCC 562.

7. The Supreme Court in R.N. Nanjundappa Vs. T. Thimmaiah & Anr. (1992) 2 SCR 799 held as under:-

" If the appointment itself is in infraction of the rules or if it is in violation of the provisions of the Constitution illegality cannot be regularized. Ratification or regularization is possible of an act which is within the power and province of the authority but there has been some non-compliance with procedure or manner which does not go to the root of the appointment. Regularization cannot be said to be a mode of recruitment. To accede to such a proposition would be to introduce a new head of appointment in defiance of rules or it may have the effect of setting at naught the rules."

8. In Jawaharlal Nehru Technological University Vs. T. Sumalatha (Smt.) & Ors., (2003) 10 SCC 405, the Supreme Court rejected a similar contention stating:

"The learned counsel therefore contends that there is every justification for absorbing the concerned respondents on regular basis in recognition of their long satisfactory service. The learned counsel further contends that the adhoc arrangement to employ them on consolidated pay should not go on forever. The contention of the learned counsel cannot be sustained for more than one reason and we find no valid grounds to grant the relief of regularization. There is nothing on record to show that the concerned employees were appointed after following due procedure for selection. Apparently, they were picked and chosen by the University authorities to cater to the exigencies of work in the Nodal Centre"

9. In the State of Bihar & Ors. Vs. Project Uchcha Vidya Shikshak Sangh & Ors. (2006) 2 SCC 545, the Apex Court held that:-

" that question of regularization of services does not arise if the appointment has been made at initial stage in violation of the provisions of Article 14 and 16 of the Constitution of India. "

10. While deciding the case of Secretary, State of Karnataka and Ors Vs. Umadevi and Ors reported in (2006) 4 SCC-1 it was held as under:-

There is another question as to why the State be allowed to depart from the normal rule and indulge in temporary employment in permanent posts? The Court is bound to insist on the State making regular and proper recruitments and is bound not to encourage or shut its eyes to the persistent transgression of the rules of regular recruitment. The direction to make permanent the distinction between regularization and making permanent, was not emphasized here can only encourage the State, the model employer, to flout its own rules and would confer undue benefits on a few at the cost of many waiting to compete.

11. In Director, Institute of Management Development, U.P. Vs. Pushpa Srivastava reported in (1993) ILLJ190 SC it was held as under:-

"when the appointment was purely ad hoc and on a contractual basis for a limited period, therefore, by expiry of the period, the right to remain in the post comes to an end."

12. In *Madhyamik Shiksha Parishad, U.P. Vs. Anil Kumar Mishra and Ors* reported in (1994) II LLJ 977 SC it was held as under:-

"that an ad hoc appointees/temporary employees engaged on ad hoc basis and paid on piece rate basis for certain clerical work and discontinued on completion of their task, were not entitled to reinstatement or regularization of their services even if their working period ranged from year to years."

24. In *State of Himachal Pradesh Vs. Suresh Kumar Verma* (1996 (1) SCR 972), a three Judge Bench of this Court held that a person appointed on daily wage basis was not an appointee to a post according to Rules. On his termination, on the project employing him coming to an end, the Court could not issue a direction to re-engage him in any other work or appoint him against existing vacancies. This Court said: "It is settled law that having made rules of recruitment to various services under the State or to a class of posts under the State, the State is bound to follow the same and to have the selection of the candidates made as per recruitment rules and appointments shall be made accordingly. From the date of discharging the duties attached to the post the incumbent becomes a member of the services. Appointment on daily wage basis is not an appointment to a post according to the Rules."

13. In *State of Haryana Vs. Piara Singh and Others* [1992) 3 SCR 826., the court was considering the sustainability of certain directions issued by the High Court in the light of various orders passed by the State for the absorption of its ad hoc or temporary employees and daily wagers or casual labour. And concluded in paragraphs 45 to 50:

"The normal rule, of course, is regular recruitment through the prescribed agency but exigencies of administration may sometimes call for an ad hoc or temporary appointment to be made. In such a situation, effort should always be to replace such an ad hoc/temporary employee by a regularly selected employee as early as possible. Such a temporary employee may also compete along with others for such regular selection/appointment. If he gets selected, well and good, but if he does not, he must give way to the regularly selected candidate. The appointment of the regularly selected candidate cannot be withheld or kept in abeyance for the sake of such an ad hoc/temporary employee.

Secondly, an ad hoc or temporary employee should not be replaced by another ad hoc or temporary employee; he must be replaced only by a regularly selected employee. This is necessary to avoid arbitrary action on the part of the appointing authority.

Thirdly, even where an ad hoc or temporary employment is necessitated on account of the exigencies of administration, he should ordinarily be drawn from

the employment exchange unless it cannot brook delay in which case the pressing cause must be stated on the file. If no candidate is available or is not sponsored by the employment exchange, some appropriate method consistent with the requirements of Article 16 should be followed. In other words, there must be a notice published in the appropriate manner calling for applications and all those who apply in response thereto should be considered fairly.

An unqualified person ought to be appointed only when qualified persons are not available through the above processes."

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"It is settled law that having made rules of recruitment to various services under the State or to a class of posts under the State, the State is bound to follow the same and to have the selection of the candidates made as per recruitment rules and appointments shall be made accordingly. From the date of discharging the duties attached to the post the incumbent becomes a member of the services. Appointment on daily wage basis is not an appointment to a post according to the Rules."

15. In *Ashwani Kumar and others Vs. State of Bihar and others* (1996 Supp. (10) SCR 120), the Court was considering the validity of confirmation of the irregularly employed. It was stated:

"So far as the question of confirmation of these employees whose entry was illegal and void, is concerned, it is to be noted that question of confirmation or regularization of an irregularly appointed candidate would arise if the candidate concerned is appointed in an irregular manner or on ad hoc basis against an available vacancy which is already sanctioned. But if the initial entry itself is unauthorized and is not against any sanctioned vacancy, question of regularizing the incumbent on such a non-existing vacancy would never survive for consideration and even if such purported regularization or confirmation is given it would be an exercise in futility."

16. In *Union Public Service Commission Vs. Girish Jayanti Lal Vaghela & Others* [2006 (2) SCALE 115], the Court answered the question of ad hoc appointment and regularization and stated:-

"Article 16 which finds place in Part III of the Constitution relating to fundamental rights provides that there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. The main object of Article 16 is to create a constitutional right to equality of opportunity and employment in public offices. The words

"employment" or "appointment" cover not merely the initial appointment but also other attributes of service like promotion and age of superannuation etc. The appointment to any post under the State can only be made after a proper advertisement has been made inviting applications from eligible candidates and holding of selection by a body of experts or a specially constituted committee whose members are fair and impartial through a written examination or interview or some other rational criteria for judging the inter se merit of candidates who have applied in response to the advertisement made. A regular appointment to a post under the State or Union cannot be made without issuing advertisement in the prescribed manner which may in some cases include inviting applications from the employment exchange where eligible candidates get their names registered. Any regular appointment made on a post under the State or Union without issuing advertisement inviting applications from eligible candidates and without holding a proper selection where all eligible candidates get a fair chance to compete would violate the guarantee enshrined under Article 16 of the Constitution (See B.S. Minhas Vs. Indian Statistical Institute and others AIR 1984 SC 363)."

17. The principles to be adopted in the matter of public appointments have been formulated by the Court in M.P. State Coop. Bank Ltd., Bhopal v. Nanuram Yadav & Ors., (2007) 8 SCC 264 as under:

"(1) The appointments made without following the appropriate procedure under the rules/government circulars and without advertisement or inviting applications from the open market would amount to breach of Articles 14 and 16 of the Constitution of India.

(2) Regularisation cannot be a mode of appointment.

(3) An appointment made in violation of the mandatory provisions of the statute and in particular, ignoring the minimum educational qualification and other essential qualification would be wholly illegal. Such illegality cannot be cured by taking recourse to regularisation.

(4) Those who come by back-door should go through that door.

(5) No regularisation is permissible in exercise of the statutory power conferred under Article 162 of the Constitution of India if the appointments have been made in contravention of the statutory rules.

(6) The court should not exercise its jurisdiction on misplaced sympathy.

(7) If the mischief played is so widespread and all pervasive, affecting the result, so as to make it difficult to pick out the persons who have been unlawfully benefited or wrongfully deprived of their selection, it will neither be possible nor necessary to issue individual show-cause notice to each selectee. The only way out would be to cancel the whole selection.

(8) When the entire selection is stinking, conceived in fraud and delivered in

deceit, individual innocence has no place and the entire selection has to be set aside."

18. A similar view has been reiterated by the Constitution Bench in *Secretary, State of Karnataka & Ors. v. Umadevi & Ors.*, AIR 2006 SC 1806, observing that any appointment made in violation of the Statutory Rules as also in violation of Articles 14 and 16 of the Constitution would be a nullity. "Adherence to Articles 14 and 16 of the Constitution is a must in the process of public employment". The Court further rejected the prayer that ad hoc appointees working for long be considered for regularisation as such a course only encourages the State to flout its own rules and would confer undue benefits on some at the cost of many waiting to compete.

19. In *State of Orissa & Anr. v. Mamata Mohanty*, (2011) 3 SCC 436, the Court dealt with the constitutional principle of providing equality of opportunity to all which mandatorily requires that vacancy must be notified in advance meaning thereby that information of the recruitment must be disseminated in a reasonable manner in public domain ensuring maximum participation of all eligible candidates; thereby the right of equal opportunity is effectuated. The Court held as under:-

"Therefore, it is a settled legal proposition that no person can be appointed even on a temporary or ad hoc basis without inviting applications from all eligible candidates. If any appointment is made by merely inviting names from the employment exchange or putting a note on the noticeboard, etc. that will not meet the requirement of Articles 14 and 16 of the Constitution. Such a course violates the mandates of Articles 14 and 16 of the Constitution of India as it deprives the candidates who are eligible for the post, from being considered. A person employed in violation of these provisions is not entitled to any relief including salary. For a valid and legal appointment mandatory compliance with the said constitutional requirement is to be fulfilled. The equality clause enshrined in Article 16 requires that every such appointment be made by an open advertisement as to enable all eligible persons to compete on merit."

20. Where any such appointments are made, they can be challenged in the court of law. The quo warranto proceeding affords a judicial remedy by which any person, who holds an independent substantive public office or franchise or liberty, is called upon to show by what right he holds the said office, franchise or liberty, so that his title to it may be duly determined, and in case the finding is that the holder of the office has no title, he would be ousted from that office by judicial order. In other words, the procedure of quo warranto gives the Judiciary a weapon to control the Executive from making appointment to public office against law and to protect a citizen from being deprived of public office to which he has a right. These proceedings also tend to protect the public from usurpers of public office who might be allowed to continue either with the connivance of the Executive or by reason of its apathy. It will, thus, be seen that before a person can effectively claim a writ of quo warranto, he has to satisfy the Court

that the office in question is a public office and is held by a usurper without legal authority, and that inevitably would lead to an enquiry as to whether the appointment of the alleged usurper has been made in accordance with law or not. For issuance of writ of quo warranto, the Court has to satisfy that the appointment is contrary to the statutory rules and the person holding the post has no right to hold it. (Vide: *The University of Mysore & Anr. v. C.D. Govinda Rao & Anr.*, AIR 1965 SC 491; *Shri Kumar Padma Prasad v. Union of India & Ors.*, AIR 1992 SC 1213; *B.R. Kapur v. State of Tamil Nadu & Anr.*, AIR 2001 SC 3435; *The Mor Modern Co-operative Transport Society Ltd. v. Financial Commissioner and Secretary to Govt., Haryana & Anr.*, AIR 2002 SC 2513; *Arun Singh v. State of Bihar & Ors.*, AIR 2006 SC 1413; *Hari Bansh Lal v. Sahodar Prasad Mahto & Ors.*, AIR 2010 SC 3515; and *Central Electricity Supply Utility of Odisha v. Dhobei Sahoo & Ors.*, (2014) 1 SCC 161).

21. Another important requirement of public appointment is that of transparency. Therefore, the advertisement must specify the number of posts available for selection and recruitment. The qualifications and other eligibility criteria for such posts should be explicitly provided and the schedule of recruitment process should be published with certainty and clarity. The advertisement should also specify the rules under which the selection is to be made and in absence of the rules, the procedure under which the selection is likely to be undertaken. This is necessary to prevent arbitrariness and to avoid change of criteria of selection after the selection process is commenced, thereby unjustly benefiting someone at the cost of others.

22. Thus, the aforesaid decisions are an authority on prescribing the limitations while making appointment against public posts in terms of Articles 14 and 16 of the Constitution. What has been deprecated by Court time and again is "backdoor appointments or appointment de hors the rules".

23. In *State of U.P. & Ors. v. U.P. State Law Officers Association & Ors.*, AIR 1994 SC 1654, the Court while dealing with the back-door entries in public appointment observed as under:

"The method of appointment is indeed not calculated to ensure that the meritorious alone will always be appointed or that the appointments made will not be on the considerations other than merit. In the absence of guidelines, the appointment may be made purely on personal or political consideration and be arbitrary. This being so those who come to be appointed by such arbitrary procedure can hardly complain if the termination of their appointment is equally arbitrary. Those who come by the back-door have to go by the same door....From the inception some engagements and contracts may be the product of the operation of the spoils system. There need be no legal anxiety to save them."

24. The creation and abolition of posts, formation and structuring/ restructuring of cadres, prescribing the source and mode of recruitment and qualifications and criteria of selection etc. are matters which fall within the exclusive domain of the

employer. Although the decision of the employer to create or abolish posts or cadres or to prescribe the source or mode of recruitment and lay down the qualification etc. is not immune from judicial review, the Court will always be extremely cautious and circumspect in tinkering with the exercise of discretion by the employer. The Court cannot sit in appeal over the judgment of the employer and ordain that a particular post or number of posts be created or filled by a particular mode of recruitment. The power of judicial review can be exercised in such matters only if it is shown that the action of the employer is contrary to any constitutional or statutory provisions or is patently arbitrary or vitiated by malafides.

25. In *State of Haryana vs. Navneet Verma* [2008 (2) SCC 65], a Division Bench of two-Judges referred to *M. Ramanatha Pillai vs. State of Kerala* [1973 (2) SCC 650], *Kedar Nath Bahi vs. State of Punjab* [1974 (3) SCC 21], *State of Haryana vs. Des Raj Sangar* [1976 (2) SCC 844], *Dr. N.C. Singhal vs. Union of India* [1980 (3) SCC 29] and *Avas Vikas Sanghathan vs. Engineers Association* [2006 (4) SCC 132] and culled out the following principles :

- "(a) the power to create or abolish a post rests with the Government;
- (b) whether a particular post is necessary is a matter depending upon the exigencies of the situation and administrative necessity;
- (c) creation and abolition of posts is a matter of government policy and every sovereign government has this power in the interest and necessity of internal administration;
- (d) creation, continuance and abolition of posts are all decided by the Government in the interest of administration and general public;
- (e) the court would be the least competent in the face of scanty material to decide whether the Government acted honestly in creating a post or refusing to create a post or its decision suffers from mala fides, legal or factual;
- (f) as long as the decision to abolish the post is taken in good faith in the absence of material, interference by the court is not warranted."

26. In *Secretary, State of Karnataka vs. Uma Devi* (supra), the Constitution Bench adverted its attention to financial implications of creation of extra posts and held that the Courts should not pass orders which impose unwarranted burden on the State and its instrumentalities by directing creation of particular number of posts for absorption of employees appointed on ad hoc or temporary basis or as daily wagers.

27. In *Divisional Manager, Aravali Golf Club and another vs. Chander Hass and another* [(2008) 1 SCC 683] also, a two-Judges Bench considered the issue relating to creation of post and held :-

"15. The court cannot direct the creation of posts. Creation and sanction of posts is a prerogative of the executive or legislative authorities and the court cannot

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

28. The questions whether in exercise of the power vested in it under Article 226 of the Constitution of India, the High Court can issue a mandamus and compel the State and its instrumentalities/agencies to regularize the services of temporary/ad-hoc/daily wage/casual/contract employees and whether direction can be issued to the public employer to prescribe or give similar pay scales to employees appointed through different modes, with different condition of service and different sources of payment have become subject matter of debate and adjudication in several cases.

29. The judgments of 1980s and early 1990s - *Dhirendra Chamoli vs. State of U.P.* [1986 (1) SCC 637], *Surinder Singh and Another vs. Engineer-in-Chief, CPWD and Others* [1986 (1) SCC 639], *Daily Rated Casual Labour vs. Union of India* [1988 (1) SCC 122], *Dharwad District P.W.D. Literate Daily Wage Employees' Association vs. State of Karnataka* [1990 (2) SCC 396], *Bhagwati Prasad vs. Delhi State Mineral Development Corporation (supra)*, *State of Haryana vs. Piara Singh (supra)* are representative of an era when the Apex Court enthusiastically endeavored to expand the meaning of equality clause enshrined in the Constitution and ordained that employees appointed on temporary/ad hoc/daily wage basis should be treated at par with regular employees in the matter of payment of salaries and allowances and that their services be regularized. In several cases, the schemes framed by the governments and public employer for regularization of temporary/ad-hoc/daily wage/casual employees irrespective of the source and mode of their appointment/engagement were also approved. In some cases, the courts also directed the State and its instrumentalities/agencies to frame schemes for regularization of the services of such employees. In *State of Haryana vs. Piara Singh (supra)*, the Court while reiterating that appointment to the public posts should ordinarily be made by regular recruitment through the prescribed agency and that even where ad-hoc or temporary employment is necessitated on account of the exigencies of administration, the candidate should be drawn from the employment exchange and that if no candidate is available or sponsored with the employment exchange, some method consistent with the requirements of Article 14 of the Constitution should be followed by publishing notice in appropriate manner for calling for applications and all those who apply in response thereto should be considered fairly, proceeded to observe that if an ad-hoc or temporary employee is continued for a fairly long spell, the authorities are duty bound to consider his case for regularization subject to his fulfilling the conditions of eligibility and the

requirement of satisfactory service. The propositions laid down in Piara Singh's case were followed for directing the concerned State Governments and public authorities to regularize the services of ad- hoc/temporary/daily wage employees only on the ground that they have continued for a particular length of time. In some cases, the schemes framed for regularization of the services of the backdoor entrants were also approved.

30. The above noted judgments and orders encouraged the political set up and bureaucracy to violate the soul of Article 14 and 16 as also the provisions contained in the Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959 with impunity and the spoil system which prevailed in the United States of America in sixteenth and seventeenth century got firm foothold in this country. Thousands of persons were employed/engaged throughout the length and breadth of the country by backdoor methods. Those who could pull strings in the power corridors at the higher and lower levels managed to get the cake of public employment by trampling over the rights of other eligible and more meritorious persons registered with the employment exchanges. A huge illegal employment market developed in different parts of the country and rampant corruption afflicted the whole system. This was recognized by the Court in Delhi Development Horticulture Employees Union vs. Delhi Administration, Delhi and others [1992 (4) SCC 99] in the following words:

"23. Apart from the fact that the petitioners cannot be directed to be regularised for the reasons given above, we may take note of the pernicious consequences to which the direction for regularisation of workmen on the only ground that they have put in work for 240 or more days, has been leading. Although there is an Employment Exchange Act which requires recruitment on the basis of registration in the Employment Exchange, it has become a common practice to ignore the Employment Exchange and the persons registered in the Employment Exchanges, and to employ and get employed directly those who are either not registered with the Employment Exchange or who though registered are lower in the long waiting list in the Employment Register. The courts can take judicial notice of the fact that such employment is sought and given directly for various illegal considerations including money. The employment is given first for temporary periods with technical breaks to circumvent the relevant rules, and is continued for 240 or more days with a view to give the benefit of regularization knowing the judicial trend that those who have completed 240 or more days are directed to be automatically regularized. A good deal of illegal employment market has developed resulting in a new source of corruption and frustration of those who are waiting at the Employment Exchanges for years. Not all those who gain such backdoor entry in the employment are in need of the particular jobs. Though already employed elsewhere, they join the jobs for better and secured prospects. That is why most of the cases which come to the courts are of employment in government departments, public undertakings or agencies. Ultimately it is the people who bear the heavy burden of the surplus labour. The other equally injurious effect of indiscriminate regularization has been that many

of the agencies have stopped undertaking casual or temporary works though they are urgent and essential for fear that if those who are employed on such works are required to be continued for 240 or more days they have to be absorbed as regular employees although the works are time-bound and there is no need of the workmen beyond the completion of the works undertaken. The public interests are thus jeopardised on both counts."

31. The menace of illegal and backdoor appointments compelled the Courts to have rethinking and in large number of subsequent judgments the Court declined to entertain the claims of ad-hoc and temporary employees for regularization of services and even reversed the orders passed by the High Courts and Administrative Tribunals - *Director, Institute of Management Development, U.P. vs. Pushpa Srivastava* [1992 (4) SCC 33], *Dr. M.A. Haque and Others vs. Union of India and Others* [1993 (2) SCC 213], *J & K Public Service Commission vs. Dr. Narinder Mohan* [1994 (2) SCC 630], *Dr. Arundhati Ajit Pargaonkar vs. State of Maharashtra* [1994 Suppl. (3) SCC 380], *Union of India vs. Kishan Gopal Vyas* [1996 (7) SCC 134], *Union of India vs. Moti Lal* [1996 (7) SCC 481], *Hindustan Shipyard Ltd. vs. Dr. P. Sambasiva Rao* [1996 (7) SCC 499], *State of H.P. vs. Suresh Kumar Verma* [1996 (7) SCC 562], *Dr. Surinder Singh Jamwal vs. State of J&K* [1996 (9) SCC 619], *E. Ramakrishnan vs. State of Kerala* [1996 (10) SCC 565], *Union of India and Others vs. Bishambar Dutt* [1996 (11) SCC 341], *Union of India vs. Mahender Singh* [1997 (1) SCC 247], *P. Ravindran and Others vs. Union Territory of Pondicherry and Others* [1997 (1) SCC 350], *Ashwani Kumar and Others vs. State of Bihar and Others* [1997 (2) SCC 1], *Santosh Kumar Verma and Others vs. State of Bihar and Others* [1997 (2) SCC 713], *State of U.P. and Others vs. Ajay* [1997 (4) SCC 88], *Patna University vs. Dr. Amita Tiwari* [1997 (7) SCC 198] and *Madhyamik Shiksha Parishad vs. Anil Kumar Mishra* [2005 (5) SCC 122].

32. The shift in the Court's approach became more prominent in *A. Umarani vs. Registrar, Cooperative Societies* [2004 (7) SCC 112], decided by a three-Judges Bench, wherein it was held that the State cannot invoke Article 162 of the Constitution for regularization of the appointments made in violation of the mandatory statutory provisions. In *Secretary, State of Karnataka vs. Uma Devi* (supra), the Constitution Bench again considered the question whether the State can frame scheme for regularization of the services of ad-hoc/temporary/daily wagger appointed in violation of the doctrine of equality or the one appointed with a clear stipulation that such appointment will not confer any right on the appointee to seek regularization or absorption in the regular cadre and whether the Court can issue mandamus for regularization or absorption of such appointee and answered the same in negative. The Court adverted to the theme of constitutionalism in a system established in rule of law, expanded meaning given to the doctrine of equality in general and equality in the matter of employment in particular, multi-facet problems including the one relating to unwarranted fiscal burden on the public exchequer created on account of the directions given by the Court for regularization of the services of persons appointed on purely temporary

or ad hoc basis or engaged on daily wages or as casual labourers, referred to about three dozen judgments including R.N. Nanjundappa vs. T. Thimmiah [1972 (1) SCC 409], Daily Rate Casual Labour vs. Union of India [1988 (1) SCC 122], Bhagwati Prasad vs. Delhi State Mineral Development Corporation [1990 (1) SCC 361], Dharwad District P.W.D. Literate Daily Wage Employees Association and others vs. State of Karnataka and others [1990 (2) SCC 396], State of Haryana vs. Piara Singh [1992 (4) SCC 118] and State of Punjab vs. Surinder Kumar [1992 (1) SCC 489] and held:

"47. 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 recognised by the relevant rules or procedure, he is aware of the consequences of the appointment being temporary, casual or contractual in nature. Such a person cannot invoke the theory of legitimate expectation for being confirmed in the post when an appointment to the post could be made only by following a proper procedure for selection and in cases concerned, in consultation with the Public Service Commission. Therefore, the theory of legitimate expectation cannot be successfully advanced by temporary, contractual or casual employees. It cannot also be held that the State has held out any promise while engaging these persons either to continue them where they are or to make them permanent. The State cannot constitutionally make such a promise. It is also obvious that the theory cannot be invoked to seek a positive relief of being made permanent in the post.

48. It was then contended that the rights of the employees thus appointed, under Articles 14 and 16 of the Constitution, are violated. It is stated that the State has treated the employees unfairly by employing them on less than minimum wages and extracting work from them for a pretty long period in comparison with those directly recruited who are getting more wages or salaries for doing similar work. The employees before us were engaged on daily wages in the department concerned on a wage that was made known to them. There is no case that the wage agreed upon was not being paid. Those who are working on daily wages formed a class by themselves, they cannot claim that they are discriminated as against those who have been regularly recruited on the basis of the relevant rules. No right can be founded on an employment on daily wages to claim that such employee should be treated on a par with a regularly recruited candidate, and made permanent in employment, even assuming that the principle could be invoked for claiming equal wages for equal work. 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. As has been held by this Court, they cannot be said to be holders of a post, since, a regular appointment could be made only by making appointments consistent with the requirements of Articles 14 and 16 of the Constitution. The right to be treated equally with the other employees employed on daily wages, cannot be extended to a claim for equal treatment with those who were regularly employed. That would be treating unequals as equals. It

cannot also be relied on to claim a right to be absorbed in service even though they have never been selected in terms of the relevant recruitment rules. The arguments based on Articles 14 and 16 of the Constitution are therefore overruled.

49. It is contended that the State action in not regularising the employees was not fair within the framework of the rule of law. The rule of law compels the State to make appointments as envisaged by the Constitution and in the manner we have indicated earlier. In most of these cases, no doubt, the employees had worked for some length of time but this has also been brought about by the pendency of proceedings in tribunals and courts initiated at the instance of the employees. Moreover, accepting an argument of this nature would mean that the State would be permitted to perpetuate an illegality in the matter of public employment and that would be a negation of the constitutional scheme adopted by us, the people of India. It is therefore not possible to accept the argument that there must be a direction to make permanent all the persons employed on daily wages. When the court is approached for relief by way of a writ, the court has necessarily to ask itself whether the person before it had any legal right to be enforced. Considered in the light of the very clear constitutional scheme, it cannot be said that the employees have been able to establish a legal right to be made permanent even though they have never been appointed in terms of the relevant rules or in adherence of Articles 14 and 16 of the Constitution."

33. In paragraph 25, the Constitution Bench specifically referred to the conclusions recorded in paragraphs 45 to 50 of the judgment in *State of Haryana vs. Piara Singh* (supra) and observed:

"26. With respect, why should the State be allowed to depart from the normal rule and indulge in temporary employment in permanent posts? This Court, in our view, is bound to insist on the State making regular and proper recruitments and is bound not to encourage or shut its eyes to the persistent transgression of the rules of regular recruitment. The direction to make permanent--the distinction between regularisation and making permanent, was not emphasized here--can only encourage the State, the model employer, to flout its own rules and would confer undue benefits on a few at the cost of many waiting to compete. With respect, the direction made in para 50 (of SCC) of *Piara Singh* is to some extent inconsistent with the conclusion in para 45 (of SCC) therein. With great respect, it appears to us that the last of the directions clearly runs counter to the constitutional scheme of employment recognised in the earlier part of the decision. Really, it cannot be said that this decision has laid down the law that all ad hoc, temporary or casual employees engaged without following the regular recruitment procedure should be made permanent."

34. In paragraph 54, the Constitution Bench clarified that the earlier decisions which run counter to the principles settled by it will stand denuded of their status as precedents.

35. In *Jawaharlal Nehru Technological University vs. T. Sumalatha (Smt.) and others* [2003 (10) SCC 405], it was held:-

"7. Can it be said that by virtue of this provision, the State Government assumes the responsibility of absorbing the staff employed in the organizations or establishments with which it has no administrative or financial nexus, merely because an instrumentality of the State is involved in managing it, that too, in a limited sense? The answer could only be in the negative. When the State Government or its instrumentalities have not created the posts on their own and do not bear any part of the financial burden, the question of getting the clearance from the Finance and Planning Department of the Government for the purpose of regularization or absorption does not arise. Viewed from any angle, GO No. 212 would be wholly out of place for those working in the nodal centre which is created and nurtured by the Central Government. It is not within the domain of the State Government or even the University to regulate the staff pattern or the monetary benefits of the staff working therein, without the approval of the Central Government. Therefore, no directions should have been issued to the State Government or to the University to regularize the services of Respondents 1 to 5, if necessary, by creating additional posts."

36. By virtue of Article 141 of the Constitution, the judgment of the Constitution Bench in *Secretary, State of Karnataka vs. Uma Devi* (supra) is binding on all the courts including this Court till the same is overruled by a larger Bench. The ratio of the Constitution Bench judgment has been followed for declining to entertain the claim of regularization of service made by ad hoc/temporary/ daily wage/ casual employees or for reversing the orders of the High Court granting relief to such employees - *Indian Drugs and Pharmaceuticals Ltd. vs. Workmen* [2007 (1) SCC 408], *Gangadhar Pillai vs. Siemens Ltd.* [2007 (1) SCC 533], *Kendriya Vidyalaya Sangathan vs. L.V. Subramanyeswara* [2007 (5) SCC 326], *Hindustan Aeronautics Ltd. vs. Dan Bahadur Singh* [2007 (6) SCC 207].

37. It has further been submitted by learned State counsel that an important factor in exercise of discretionary relief under Article 226 of the Constitution of India is laches and delay. When a person who is not vigilant of his right and acquiesces into the situation, his writ petition cannot be heard after a lapse of years.

38. It is settled law that fence-sitters cannot be allowed to raise the dispute or challenge the validity of the order after its conclusion. (Vide *Aflatoon & ors. Vs. Lt. Governor, Delhi & ors.*, AIR 1974 SC 2077; *State of Mysore Vs. V.K. Kangan & ors.*, AIR 1975 SC 2190; *Pt. Girdharan Prasad Missir Vs. State of Bihar & ors.*, (1980) 2 SCC 83; *H.D. Vora Vs. State of Maharashtra*, AIR 1984 SC 866; *Bhoop Singh Vs. Union of India*, AIR 1992 SC 1414; *The Ramjas Foundation & ors. Vs. Union of India & ors.*, AIR 1993 SC 852; *Ram Chand Vs. Union of India*, (1994) 1 SCC 44; *State of Maharashtra Vs. Digambar*, AIR 1995 SC 1991; *Municipal Corporation of Greater Bombay Vs. Industrial Development Investment Co. (P) Ltd. & ors.*, (1996) 11 SCC 501; *Padma Vs. Dy. Secy. to the Govt. of Tamil Nadu*,

(1997) 2 SCC 627; Hindustan Petroleum Corp. Ltd. Vs. Dolly Das, (1999) 4 SCC 450; Life Insurance Corporation of India Vs. Jyotish Chandra Biswas, (2000) 6 SCC 562; L. Muthu Kumar & Anr. Vs. State of Tamil Nadu & ors., (2000) 7 SCC 618; Municipal Council, Ahmednagar & Anr. Vs. Shah Hyder Beig & ors., AIR 2000 SC 671; and Inder Jit Gupta Vs. Union of India & ors., (2001) 6 SCC 637.

39. The issue of delay in filing the writ petition was considered by the Hon''ble Apex Court in Smt. Sudama Devi Vs. Commissioner & ors., (1983) 2 SCC 1, wherein the Apex Court has observed as under:-

"There is no period of limitation prescribed by any law for filing the writ petition under Article 226 of the Constitution. It is, in fact, doubtful whether any such period of limitation can be prescribed by law. In any event, one thing is clear and beyond doubt that no such period of limitation can be laid down either under the rules made by the High Court or by practice. For every case, it would have to be decided on the facts and circumstances whether the petitioner is guilty of laches and that would have to be done without taking into account any specific period as period of limitation. There may be cases where even short delay may be fatal while there may be cases where even a long delay may not be evidence of laches on the part of the petitioner."

40. Similarly, in State of U.P. Vs. Raj Bahadur Singh & Anr., (1998) 8 SCC 685; the Hon''ble Apex Court held that "there is no time limit for filing the writ petition. All that the Court has to see is whether the laches on the part of the petitioner are such as to disentitle him to the relief claimed by him."

41. In S.K. Mastanee Bee Vs. General Manager, South Central Railways & ors., (2003) 1 SCC 184, the Hon''ble Supreme Court held that entitlement of a particular right guaranteed under hapness condition of a party may be a ground to entertain a petition even at a belated stage. But that was a case where third party's interest had not crystallized.

42. In Northern Indian Glass Industries Vs. Jaswant Singh & ors., (2003) 1 SCC 335, the Hon''ble Apex Court held that the High Court cannot ignore the delay and laches in approaching the writ court and there must be satisfactory explanation by the petitioner as how he could not come to the Court well in time.

43. Similarly in Jagdish Lal v. State of Haryana, (1997) 6 SCC 538, this Court reaffirmed the rule if a person chose to sit over the matter and then woke up after the decision of the court, then such person cannot stand to benefit. In that case it was observed as follows: (SCC p. 542) "The delay disentitles a party to discretionary relief under Article 226 or Article 32 of the Constitution. The appellants kept sleeping over their rights for long and woke up when they had the impetus from Union of India v. Virpal Singh Chauhan, (195) 6 SCC 684. The appellants' desperate attempt to redo the seniority is not amenable to judicial review at this belated stage."

44. In Union of India v. C.K. Dharagupta, (1997) 3 SCC 395, it was observed as

follows:

"9. We, however, clarify that in view of our finding that the judgment of the Tribunal in R.P. Joshi v. Union of India, OA No. 497 of 1986 decided on 17-3-1987, gives relief only to Joshi, the benefit of the said judgment of the Tribunal cannot be extended to any other person. The respondent C.K. Dharagupta (since retired) is seeking benefit of Joshi case. In view of our finding that the benefit of the judgment of the Tribunal dated 17-3- 1987 could only be given to Joshi and nobody else, even Dharagupta is not entitled to any relief."

45. In Govt. of W.B. v. Tarun K. Roy, (1997) 3 SCC 395, their Lordships considered delay as serious factor and have not granted relief. Therein it was observed as follows: (SCC pp. 359-60, para 34) "34. The respondents furthermore are not even entitled to any relief on the ground of gross delay and laches on their part in filing the writ petition. The first two writ petitions were filed in the year 1976 wherein the respondents herein approached the High Court in 1992. In between 1976 and 1992 not only two writ petitions had been decided, but one way or the other, even the matter had been considered by this Court in State of W.B. v. Debdas Kumar, 1991 Supp (1) SCC 138. The plea of delay, which Mr. Krishnamani states, should be a ground for denying the relief to the other persons similarly situated would operate against the respondents. Furthermore, the other employees not being before this Court although they are ventilating their grievances before appropriate courts of law, no order should be passed which would prejudice their cause. In such a situation, we are not prepared to make any observation only for the purpose of grant of some relief to the respondents to which they are not legally entitled to so as to deprive others therefrom who may be found to be entitled thereto by a court of law."

46. The Court also quoted following passage from the Halsbury's Laws of England (para 911, p.395):

"12.....In determining whether there has been such delay as to amount to laches, the chief points to be considered are:

(i) acquiescence on the claimant's part; and

(ii) any change of position that has occurred on the defendant's part.

Acquiescence in this sense does not mean standing by while the violation of a right is in progress, but assent after the violation has been completed and the claimant has become aware of it. It is unjust to give the claimant a remedy where, by his conduct, he has done that which might fairly be regarded as equivalent to a waiver of it; or where by his might fairly be regarded as equivalent to a waiver of it; or where by his conduct and neglect, though not waiving the remedy, he has put the other party in a position in which it would not be reasonable to place him if the remedy were afterwards to be asserted. In such cases lapse of time and delay are most material. Upon these considerations rests the doctrine of laches."

47. The similar question was raised before Hon"ble Supreme Court in Civil Appeal No. 36084 of 2016 (State of Jammu & Kashmir Vs. District Bar Association Bandipur) and was decided on 08.12.2016, reported in 2016 (12) scale, page 534. It was held as under :-

All recruitment in matters of public employment must be made in accordance with prevailing Rules and orders. The date on which the vacancies are likely to occur are foreseeable with a reasonable amount of clarity and precision. An exercise to fill up vacancies must be undertaken in advance so as to ensure that there is no occasion to appoint persons on an ad hoc basis. Fourthly, while the High Court is an autonomous constitutional authority whose status cannot be undermined, it is equally necessary for it to strictly comply with the Rules framed in making recruitments. The judgment the importance of the High Court complying with statutory Rules in matters of recruitment. The judgment also emphasises the need to abide by the principles of equality and equal opportunity in Articles 14 and 16.

Regularization is not a source of recruitment nor is it intended to confer permanency upon appointments which have been made without following the due process envisaged by Articles 14 and 16 of the Constitution. Essentially a scheme for regularization, in order to be held to be legally valid, must be one which is aimed at validating certain irregular appointments which may have come to be made in genuine and legitimate administrative exigencies. In all such cases it may be left open to Courts to lift the veil to enquire whether the scheme is aimed at achieving the above objective and is a genuine attempt at validating irregular appointments. The State and its instrumentalities cannot be permitted to use this window to validate illegal appointments. The second rider which must necessarily be placed is that the principle as formulated above is not meant to create or invest in a temporary or ad hoc employee the right to seek a writ commanding the State to frame a scheme for regularization.

The High Court proceeded to issue directions for regularization without considering either the legal position enunciated in the judgments of the present Court and without considering the prevailing Rules and Regulations on the subject. It was thought appropriate and proper to set aside the order of the High Court which directs the regularization en masse of ad hoc employees.

48. The question which was raised before the Court are :-

- (i) The right of employees seeking regularization on the strength of long and continuous work.
- (ii) The direction in nature of mandamus issued by the Courts for regularization of employees under Article 226 of the Constitution.

49. The question of regularization of the services of such employees may have to be considered on merits in the light of the principles settled by the Court subject to condition that the appointment was regularized from among the duly qualified

persons in duly sanctioned vacant post but the services should be without the intervention of orders of the courts or of tribunals. This is subjected to condition further that State should ensure that regular recruitment are undertaken to fill the vacant sanctioned posts, in cases where temporary employees or daily wagers are being employed. There should be transparency in the public appointment and what has been deprecated by the Court since long time and time again is "back-door appointments or appointments dehors the rules.

50. The second principle is that all recruitment in matters of public employment must be made in accordance with prevailing Rules and orders. In today's system, daily labourers and casual labourers have been conveniently introduced which are followed by attempts to regularise them at a subsequent stage. Therefore, most of the times the issue raised is about the procedure adopted for making appointments indicating an improper exercise of discretion even when the Rules specify a particular mode to be adopted. There can be no doubt that the employment whether of Class IV, Class III, Class II or any other class falls within the definition of "public employment". Such an employment, therefore, has to be made under Rules and under orders of the competent authority.

51. Thirdly, the date on which the vacancies are likely to occur are foreseeable with a reasonable amount of clarity and precision. An exercise to fill up vacancies must be undertaken in advance so as to ensure that there is no occasion to appoint persons on an ad hoc basis. In a democratic set-up like ours, which is governed by Rule of law, the supremacy of law is to be acknowledged and absence of arbitrariness has been consistently described as essence of Rule of law. Thus, the powers have to be canalised and not unbridled so as to breach the basic structure of the Constitution. Equality of opportunity in matters of employment being the constitutional mandate has always been observed. The unquestionable authority is always subject to the authority of the Constitution. The higher the dignitary, the more objectivity is expected to be observed. We do not say that powers should be curtailed. What we want to say is that the power can be exercised only to the width of the constitutional and legal limits. The date of retirement of every employee is well known in advance and therefore, the number of vacancies likely to occur in near future in a particular cadre is always known to the employer. Therefore, the exercise to fill up the vacancies at the earliest must start in advance to ensure that the selected person may join immediately after availability of the post, and hence, there may be no occasion to appoint any person on ad hoc basis for the reason that the problem of inducting the daily labourers who are ensured of a regular appointment subsequently has to be avoided and a fair procedure must be adopted giving equal opportunity to everyone.

52. The reply to the question regarding right of employees seeking regularization and direction in the nature of mandamus for regularization has been raised in case of State of Jammu & Kashmir Vs. District Bar Association Bandipur referred above and replied in negative and held to be not proper to the court to direct for

regularization as well as issue any of direction in the nature of mandamus for regularization of employees whose services are temporary or ad hoc nature. On the basis that there is no vested right to seek regularization, the State and its instrumentalities cannot be permitted to use this window to validate illegal appointments.

53. It is true that the petitioner had worked for a long time, it is also true that he had been paid, paid wages but he did not hold any post. Therefore, the petitioner is not entitled to be paid pensionary benefits except in accordance with service Rule. Only because the petitioner had worked for a time as narrated in the petition, the same by itself would not be a ground for directing regularization for services, in view of the decision of Uma Devi Case.

54. In light of above proposition of law the order of regularization cannot be made by the Court by filing petition under Article 226 of the Constitution of India or the platform of the Court cannot be made second mode of appointment in public post. The appointment should be made strictly in accordance with rules and back door entry in public services, as a matter of policy, be not permitted to continue. The mandate of Article 226 of the Constitution of India is not meant or not be applied to legalize the illegalities. Thus, the petition lacks merit.

55. Having gone through the order impugned, we are of the view that no interference in the order in question is required. Thus, the review petition is dismissed. No order as to costs.