

(2015) 09 AHC CK 0117
In the Allahabad High Court
Case No : Special Appeal No. 1530 of 2007

State of U.P. and Others

APPELLANT

Vs

Chhiddi and Others

RESPONDENT

Date of Decision : 24-09-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11
Constitution of India, 1950 — Article 136, 14, 141, 142, 16

Citation : (2015) 9 ADJ 218 : (2016) 1 ALJ 226 : (2015) 6 AWC 6167 : (2015) 4 ESC 2331 : (2016) LabIC 486 : (2015) 4 UPLBEC 3141

Hon'ble Judges : D.Y. Chandrachud, C.J. and Dilip Gupta, J.

Bench : Division Bench

Advocate : C.B. Yadav, Additional Advocate General and Shashank Shekhar Singh, Additional Chief Standing Counsel, for the Appellant; Pankaj Srivastava and Siddharth, for the Respondent

Final Decision : Partly Allowed

Judgement

1. This Special Appeal arises out of a judgment dated 17 October 2005 rendered by a learned Judge of this Court in Civil Misc. Writ Petition No. 21137 of 2003 that was filed by the respondents in this Special Appeal. This petition had been connected with Writ Petition No. 48322 of 2000 (Sanjay Kumar Srivastava Vs. Principal, Chief Conservator of Forest, U.P. Lucknow) and a number of other writ petitions. All the petitions have been decided by a common judgment and the decision is reported in Sanjay Kumar Srivastava Vs. Principal Chief Conservator of Forest and Others, .

2. The writ petition was filed by two daily wage employees working in the Forest Department on a Group "D" post for regularisation of their services under the provisions of the U.P. Regularisation of Daily Wages Appointment on Group "D" Posts Rules, 20011. In the batch of writ petitions which were decided by the learned Judge, persons who were working on daily wage basis on Group "C" and Group "D" posts in the Forest Department in the State, had also sought

regularisation under the 2001 Rules which relate to Group "D" posts as also the U.P. Regularisation of Daily Wages Appointment on Group "C" Posts (Outside the Purview of U.P. Public Service Commission) Rules, 19982 which relate to Group "C" posts.

3. While partly allowing the writ petitions, the learned Judge directed the State Government to reconsider the cases of all the writ petitioners for regularisation of their service by ignoring the artificial breaks in their engagements as also the minimum educational qualifications and the physical endurance requirements prescribed by the service Rules. Such petitioners, who were found eligible, were directed to be included in the merit list for being regularised on the existing vacancies or the vacancies which could arise in future in their respective Divisions. It was further directed that until then all the petitioners who were still working should be allowed to continue on daily wages and they should be paid the minimum of the pay scale in view of the decision of the Supreme Court in State of U.P. and Others Vs. Putti Lal, .

4. The learned Judge, however, did not accept the contention of the writ petitioners that the Selection Committee was not constituted in accordance with the Lower Subordinate Forest Service Rules, 19803 or that there was any mala fides in the selection process for regularisation or there was any diversion of the vacancies.

5. The State Government has not challenged the direction issued by the learned Judge for ignoring the artificial breaks while considering the cases of the petitioners for regularisation. The challenge in this Special Appeal is to the directions issued by the learned Judge for ignoring the minimum educational qualifications and the physical endurance test prescribed by the 1980 Service Rules while considering the cases for regularisation of services and for payment of the minimum of the pay scale to the daily wage employees till their cases were considered.

6. It transpires that in the earlier round of litigation, a Division Bench of this Court in State of U.P. and Others Vs. Putti Lal, - (2) allowed the Special Appeal that was filed against the order of a learned Judge directing regularisation of services of daily wage employees. The Division Bench directed the State Government to appoint a Committee to frame a scheme for regularisation/absorption of daily wage employees working in the Forest Department. The State Government, however, filed a Civil Appeal bearing No. 3634 of 1998 which was decided by the Supreme Court on 21 February 2002 and the decision is reported in Putti Lal (1). The Supreme Court, after noticing that the State Government had framed a set of Rules known as 2001 Rules for Group "D" posts and the 1998 Rules for Group "C" posts, directed that both these statutory Rules would govern the cases of all the daily wagers appointed in the Forest Department for regularisation of their services.

7. In compliance of the aforesaid judgment of the Supreme Court, the State

Government initiated the exercise of regularisation. The Principal Conservator of Forests sent a communication dated 30 March 2002 to all the Conservators of Forests and the Project Incharge to compile and send the number of vacancies for Class IV posts in the respective Divisions. Subsequently, by a letter dated 20 May 2002, the Special Secretary in the State Government required the Divisional Forest Officers and the Divisional Project Directors to provide information with regard to the vacancies in their Divisions. The State Government also issued strict instructions for not diverting any vacancies.

8. The writ petitions were filed by such daily wage employees who were found to be ineligible by the Selection Committee for regularisation under the 2001 Rules or the 1998 Rules.

9. In order to appreciate the issues involved in this Special Appeal, it would be necessary to refer to the three set of Rules which are the 2001 Rules, the 1998 Rules and the 1980 Service Rules.

10. The 2001 Rules relate to regularisation of daily wage appointments on Group "D" posts. They came into force on 21 December 2001. The "appointing authority" in relation to Group "D" posts has been defined to mean an authority empowered to make appointments on such posts under the relevant service rules. Rule 4 deals with regularisation of daily wage appointments on Group "D" posts and is as follows:

"4. Regularisation of daily wages appointments on Group "D" posts.-(1) Any person who-

(a) was directly appointed on daily wage basis on a Group "D" post in the Government service before June 29, 1991 and is continuing in service as such on the date of commencement of these rules; and

(b) possessed requisite qualifications prescribed for regular appointment for that post at the time of such appointment on daily wage basis under the relevant service rules, shall be considered for regular appointment in permanent or temporary vacancy, as may be available in Group "D" post, on the date of commencement of these rules on the basis of his record and suitability before any regular appointment is made in such vacancy in accordance with the relevant service rules or orders.

2. In making regular appointments under these rules, reservations for the candidates belonging to the Scheduled Castes, Scheduled Tribes, Other Backward Classes of citizens and other categories shall be made in accordance with the Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994, and the Uttar Pradesh Public Service (Reservation for Physically Handicapped, Dependents of Freedom Fighters and Ex-Servicemen) Act, 1993 as amended from time to time and the orders of the Government in force at the time of regularisation under these rules.

3. For the purpose of sub-rule (1) the appointing authority shall constitute a

Selection Committee in accordance with the relevant provisions of the service rules.

4. The appointing authority shall, having regard to the provisions of sub-rule (1), prepare an eligibility list of the candidates, arranged in order of seniority as determined from the date of order of appointment on daily wage basis and if two or more persons were appointed together, from the order in which their names are arranged in the said appointment order. The list shall be placed before the Selection Committee along with such relevant records pertaining to the candidates, as may be considered necessary, to assess their suitability.

5. The Selection Committee shall consider the cases of the candidates on the basis of their records referred to in sub-rule (4), and if considers necessary, it may interview the candidates also.

6. The Selection Committee shall prepare a list of selected candidates in order of seniority, and forward the same to the appointing authority."

11. Rule 5 deals with appointments and Rule 6 provides that appointments made under these Rules shall be deemed to be appointments under the relevant service rules or orders. Rule 8 deals with termination of service and it provides that the services of a person appointed on daily wage basis who is not found suitable, after consideration under the rules, shall be terminated forthwith and, on such termination, he shall be entitled to receive one month's wages.

12. The 1998 Rules relate to regularisation of daily wage appointments on Group "C Posts. They came into force on 9 July 1998. Rule 4 deals with regularisation of daily wage appointments on Group "C posts and is similar to Rule 4 of the 2001 Rules. Rule 5 deals with appointments and Rule 6 provides that appointments made under these Rules shall be deemed to be appointment under the relevant service rules or orders.

13. It would thus be seen that Rule 4 of the 2001 Rules and Rule 4 of the 1998 Rules, which are similar, provide that any person who was directly appointed on daily wage basis on Group "D" or Group "C posts in Government service before 29 June 1991 and was continuing in service as such on the date of commencement of the Rules and possessed the requisite qualifications prescribed for regular appointment for that post at the time of such appointment on daily wage basis under the relevant service rules was to be considered for regular appointment in a permanent or temporary vacancy, as may be available on the date of commencement of these Rules, on the basis of his record and suitability before any regular appointment was made in such vacancy.

14. The relevant service rules for Group "D" posts are the 1980 Service Rules. They have been framed in exercise of powers conferred by the proviso to Article 309 of the Constitution and regulate the recruitment and the conditions of service of persons appointed to the various categories of posts in the Lower Subordinate Forest Service, namely Group "D" posts. Rule 4(1) deals with Cadre

of Service and provides that there shall be division-wise cadre in various categories of posts in the service. Sub-rule (2) of Rule 4 provides that the strength of the service and of each category of posts shall be such as may be determined by the Governor from time to time. Sub-rule (3) of Rule 4 provides that the strength of service and of each category of posts therein shall, until orders varying the same are passed under sub-rule (1), be as given in Appendix A". Appendix A" deals with sanctioned strength of posts of various categories which include both permanent and temporary posts and is as follows:

15. Rule 8 and Rule 13 which deal with academic qualifications and physical fitness are reproduced:

"8. Academic qualifications- (1) A candidate for direct recruitment to the post of Guards must have passed the High School Examination of the U.P. Board of High School and Intermediate Examination or an examination recognised as equivalent thereto.

(2) In the case of candidates to be recruited from open market, preference will be given to ex-Home Guards who have worked as such for at least one year.

(3) In the case of seasonal workers, weightage shall be given to the total length of service put in as seasonal worker and their record of service.

.....

13. Physical Fitness.-No candidate shall be appointed to a post in the service unless he be in good mental and bodily health and free from any physical defect likely to interfere with the efficient performances of his duties. Before a candidate is finally approved for appointment he shall be required to produce a medical certificate of fitness in accordance with the rules framed under Fundamental Rule 10 contained in Chapter III of Financial Hand Book, Volume II, Part III:

Provided that a medical certificate of fitness shall not be required from a candidate recruited by promotion.

Note:- In the case of a candidate for direct recruitment, the following minimum standard for height and chest measurements shall be necessary:

Provided further that in case of candidates of Gurkha, Nepalese, Assamee, Meghalaya, Ladakh, Nefa, Manipur, Garhwali, Kumaoni, Sikkimese and Bhutanese origin, the minimum height limit will be 158 c.ms."

16. Rule 15 deals with procedure for direct recruitment and is as follows:

"15. Procedure for direct recruitment.-(1) For the purpose of recruitment, there shall be constituted a Selection Committee comprising:

(i) Appointing Authority

(ii) Two officers not below the rank of Assistant Conservator of Forest to be

nominated by the Conservator of Forest having jurisdiction.

Note - Nomination of officers for giving representation to the Scheduled Castes, Scheduled Tribes and other Backward Classes of citizens in the Selection Committee shall be made in accordance with the order made under Section 7 of the Act, as amended from time to time.

(2) The Selection Committee shall scrutinise the applications and require the eligible candidates to appear in a written test.

Note - The syllabus and procedure for written test is given in Appendix "B".

(3) After the marks obtained by the candidates in the written test have been tabulated, the Selection Committee shall having regard to the need for securing due representation of the candidates belonging to the Scheduled Castes, Scheduled Tribes and other categories under rule 6 call for interview such number of candidates as, on the result of the written examination, have come up to the standard fixed by the Committee in this respect. The marks awarded to each candidate in the interview shall be added to the marks obtained by him in the written test.

(4) The Selection Committee shall prepare a list of candidates in order of merit, as disclosed by the aggregate of marks obtained by them in the written test and interview. If two or more candidates obtain equal marks the candidate obtaining higher marks in the written test shall be placed higher. The Selection Committee shall forward the list to the appointing authority."

17. Appendix "B" which deals with the syllabus and procedure for test is as follows:

18. Rule 26 provides that in regard to matters not specifically covered by these rules or special orders, persons appointed to the service shall be governed by the rules, regulations and orders applicable generally to Government servants serving in connection with the affairs of the State.

19. Rule 27 deals with relaxation from the conditions of service and is as follows:

"27. Relaxation from the conditions of service-Where the State Government is satisfied that the operation of any rule regulating the conditions of service of person appointed to the service cause undue hardship in any particular case it may notwithstanding anything contained in the rules applicable to the case, by order, dispense with or relax the requirements of that rule to such extent and subject to such conditions as it may consider necessary for dealing with the case in a just and equitable manner."

20. Having considered the relevant provisions of these rules, we need to revert to the provisions of the 2001 Rules which deal with regularisation of daily wage employees working on Group "D" posts.

21. The first requirement contained in sub-rule (a) of Rule 4(1) of the 2001 Rules

is that a person should have been directly appointed on daily wage basis on a Group "D" post before 29 June 1991. The second requirement is that he should be continuing in service as such on the date of commencement of the rules which is 21 December 2001. It is in connection with these twin requirements that the learned Judge directed that the artificial breaks in service falling between the date of engagement, if it was before 29 June 1991 and 21 December 2001, should be ignored. The State Government has not questioned this direction.

22. The third requirement contained in sub-rule (b) of Rule 4(1) of the 2001 Rules is that a person should have possessed the requisite qualifications prescribed for regular appointment for Group "D" post at the time of such appointment on daily wage basis under the relevant service rules. Only such a person can be considered for regular appointment in a permanent or temporary vacancy available on the date of commencement of the rules on the basis of his record and suitability before any regular appointment is made in such vacancy in accordance with the relevant service rules.

23. The requisite qualifications and the physical endurance test which have been prescribed for regular appointment for Group "D" posts in the 1980 Service Rules have been reproduced in the earlier paragraphs. Rule 8 deals with academic qualifications. It provides that a candidate for direct recruitment on the post of Guard must have passed the High School examination of the U.P. Board of High School and Intermediate Examination or an examination recognized as equivalent thereto. Rule 13 deals with physical fitness. It provides that no candidate shall be appointed to a post in service unless he is in good mental and bodily health and free from any physical defect likely to interfere with the efficient performance of his duties. It further provides for minimum standards for height and chest in the case of a candidate for direct recruitment. The minimum standard prescribed for height is 163 cms., while for chest it is 79 cms. (unexpanded) and 84 cms. (expanded). Appendix "B" also deals with physical test. It provides that a selected candidate will be required to undergo a physical test comprising of a brisk walk of 25 kms. carrying a pack of 10 kg. on their back, to be completed in four hours.

24. The learned Judge, however, while examining these requirements, directed that the minimum educational qualifications and the physical endurance test prescribed by the service rules should be ignored. A direction was, accordingly, issued to the State Government to reconsider the cases of all the petitioners for regularisation and that until then all the writ petitioners who were working on daily wage basis were directed to continue with a further condition that they would be entitled to the minimum pay scale for the reason that such a direction was issued by the Supreme Court in Putti Lal (1).

25. Sri C.B. Yadav, learned Additional Advocate General assisted by Sri Shashank Shekhar Singh, learned Additional Chief Standing Counsel for the State submitted that the learned Judge could not have issued a direction for relaxing the educational qualifications prescribed under the 1980 Service Rules which had

been framed by the State Government in exercise of powers conferred by Article 309 of the Constitution nor could the learned Judge have issued any direction for granting relaxation in the requirement of physical endurance test contained in the 1980 Service Rules, particularly when the 2001 Rules clearly provides that daily wage employees can be considered for regularisation only if they possessed the requisite educational qualifications prescribed under the relevant service rules for regular appointment for the post at the time of such appointment on daily wage basis. In support of his contention, learned Additional Advocate General has placed reliance upon the judgments of the Supreme Court in Secretary, State of Karnataka and Others Vs. Umadevi and Others, ; Ashok Kumar Sonkar Vs. Union of India (UOI) and Others, ; and Veer Kunwar Singh University Ad hoc Teachers Association and Others Vs. The Bihar State University (C.C.) Service Commission and Others, .

26. Learned Additional Advocate General also submitted that the learned Judge was not justified in issuing any direction for payment of the minimum of the pay scale to daily wage employees in view of the decisions of the Supreme Court in State of Haryana Vs. Jasmer Singh and others, ; State of Haryana and Others Vs. Charanjit Singh and Others, etc. etc., and Indian Drugs and Pharmaceuticals Ltd. Vs. Workman, Indian Drugs and Pharmaceuticals Ltd., .

27. Sri Pankaj Srivastava and Sri Siddharth, learned counsel appearing for the respondents, however, submitted that the directions that were issued by the learned Judge were justified in the facts and circumstances of the case. Learned counsel contended that as the writ petitioners had continued in service for a considerable period of time on daily wage basis without any complaints, they cannot at the stage of regularisation of their services in accordance with the statutory rules be excluded from consideration merely because they did not possess the requisite minimum educational qualifications prescribed for regular appointment on the date they were initially engaged. Learned counsel submitted that Rule 27 of the 1998 Rules provides for relaxation from the conditions of service and it is for this reason that the learned Judge had relaxed the conditions. In support of their contention, learned counsel placed reliance on the decision of the Supreme Court in Ghan Sham Sunder and Others Vs. State of Punjab and Others, .

28. Learned counsel for the respondents also contended that for setting aside the judgment rendered in Writ Petition No. 33391 of 2003 which was decided by the common judgment dated 17 October 2005, a Special Appeal bearing Defective No. 620 of 2007 was filed, which was dismissed on 27 February 2012 on the ground that the delay condonation application had been rejected. The Special Leave to Appeal (Civil) filed to assail the said judgment was also dismissed by the Supreme Court on 1 July 2013 on the ground of delay as also on merits. It was, therefore, contended that the present Special Appeal filed by the State should be dismissed. Learned counsel also submitted that the respondents had not filed any Special Appeal against the judgment rendered in the leading Writ

Petition No. 48322 of 2000 filed by Sanjay Kumar Srivastava which was decided on 17 October 2005 by a common judgment and, therefore, this Special Appeal is not maintainable. To support their contention, learned counsel placed reliance on the judgments of the Supreme Court in *Daryao and Others Vs. The State of U.P. and Others*, ; *Devilal Modi, Proprietor, M/s. Daluram Pannalal Modi Vs. Sales Tax Officer, Ratlam and Others*, and *U.P. State Road Transport Corporation Vs. State of U.P. and Another*, .

29. Learned counsel for the respondents also contended that the direction issued by the learned Judge to pay the minimum of the pay scale to the daily wagers is justified in view of the decision of the Supreme Court in *Putti Lal (1)* and paragraph 55 of the decision of the Supreme Court in *Uma Devi (3)*.

30. We have considered the submissions advanced by the learned counsel for the parties.

31. The main issue that arises for consideration in this Special Appeal is whether for consideration of the cases of daily wagers for regularisation of their services, the condition set out in Rule 4 of the 2001 Rules requiring persons directly appointed prior to 29 June 1991 on daily wage basis on Group "D" posts to have possessed the requisite qualifications prescribed for regular appointment for such post under the relevant service rules at the time of engagement can be relaxed by the Courts.

32. In order to appreciate this issue, it would be appropriate to first understand the concept of "regularisation". The Supreme Court has time and again pointed out that a clear distinction between "regularisation" and "conferment of permanence" in service jurisprudence has to be kept in mind. Regularisation, it has been observed, does not mean permanence. Regularisation only condones the procedural irregularities and cures only such defects as are attributable to the methodology followed in making the appointments. On the other hand, illegality cannot be regularised. In this connection, it would be appropriate to reproduce the observations made by the Supreme Court in *R.N. Nanjundappa Vs. T. Thimmiah and Another*, and they are as follows:

"Counsel on behalf of the respondent contended that regularisation would mean conferring the quality of permanence on the appointment whereas counsel on behalf of the State contended that regularisation did not mean permanence but that it was a case of regularisation under the rules framed under Article 309 . Both the contentions are fallacious. 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 regularised. Ratification or regularisation 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. Regularisation 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."

(emphasis supplied)

33. This is what was also observed by the Supreme Court in *B.N. Nagarajan and Others Vs. State of Karnataka and Others*, . The Supreme Court in *S. Narayana Vs. Md. Ahmedulla Khan and Others*, again examined this issue and observed that "closure on this issue must surely be attained after the judgment of the Constitution Bench of the Supreme Court in *Uma Devi (3)*". The Supreme Court held that appointments made without following the due process or the rules relating to appointment does not confer any right on the appointees and the Courts cannot direct their absorption, regularisation or re-engagement nor make their service permanent. The High Court in exercise of jurisdiction under Article 226 of the Constitution should not ordinarily issue directions for absorption, regularisation, or permanent continuance unless the recruitment had been done in a regular manner in terms of the constitutional scheme and that the Courts must be careful in ensuring that they do not interfere unduly with the economic arrangement of the affairs of the State or its instrumentalities. These observations were made by the Supreme Court after referring to its earlier decision in *B.N. Nagarajan*. The legal position enumerated in the decision of the Supreme Court in *S. Narayana* is as follows:-

"16. In *B.N. Nagarajan and Others Vs. State of Karnataka and Others*, , this Court clearly held that the words "regular" or "regularization" do not connote permanence and cannot be construed so as to convey an idea of the nature of tenure of appointments. They are terms calculated to condone any procedural irregularities and are meant to cure only such defects as are attributable to methodology followed in making the appointments. This court emphasized that when rules framed under Article 309 of the Constitution of India are in force, no regularization is permissible in exercise of the executive powers of the Government under Article 162 of the Constitution in contravention of the rules. These decisions and the principles recognized therein have not been dissented to by this Court and on principle, we see no reason not to accept the proposition as enunciated in the above decisions. We have, therefore, to keep this distinction in mind and proceed on the basis that only something that is irregular for want of compliance with one of the elements in the process of selection which does not go to the root of the process, can be regularized and that it alone can be regularized and granting permanence of employment is a totally different concept and cannot be equated with regularization."

34. In *Umadevi (3)*, the Constitution Bench found no reason not to accept the aforesaid proposition of law and keeping this distinction in mind observed that only something that is irregular for want of compliance with one of the elements in the process of selection which does not go to the root of the process, can be regularised.

35. In *Indian Drugs & Pharmaceuticals Ltd.*, the Supreme Court held that there was no right vested in daily wagers to seek regularisation and that regularisation can be done only in accordance with the rules and not dehors the rules. The

Supreme Court also observed that an appointment made in violation of the mandatory provisions of the Statutes and in particular by ignoring the minimum educational qualifications and other essential qualifications would be wholly illegal and that such an illegality cannot be cured by taking recourse to regularisation. Only irregularity can be regularized which would be when there has been some non-compliance with the procedure which does not go to the root of the appointment.

36. It would also be pertinent to refer to the decision of the Supreme Court in *Mahendra L. Jain and Others Vs. Indore Development Authority and Others*, wherein it was observed that an illegal appointment cannot be regularised by taking recourse to regularisation and that the State must comply with the constitutional requirements of Articles 14 and 16 of the Constitution while offering public service. The observations are as follows:-

"19. The question, therefore, which arises for consideration is as to whether they could lay a valid claim for regularisation of their services. The answer thereto must be rendered in the negative. Regularisation cannot be claimed as a matter of right. An illegal appointment cannot be legalised by taking recourse to regularisation. What can be regularised is an irregularity and not an illegality. The constitutional scheme which the country has adopted does not contemplate any back-door appointment. A State before offering public service to a person must comply with the constitutional requirements of Articles 14 and 16 of the Constitution. All actions of the State must conform to the constitutional requirements. A daily-wager in the absence of a statutory provision in this behalf would not be entitled to regularisation. (See *State of U.P. and Others Vs. Ajay Kumar, and Jawaharlal Nehru Krishi Vishwa Vidyalaya, Jabalpur, M.P. Vs. Bal Kishan Soni and Others*, ."

37. Such observations have also been made by the Supreme Court in *State of U.P. Vs. Neeraj Awasthi and Others*, ; *Municipal Corporation, Jabalpur Vs. Om Prakash Dubey*, ; *National Institute of Technology and Others Vs. Niraj Kumar Singh*, ; *Govt. of A.P. and Others Vs. K. Brahmanandam and Others*, and *State of Bihar Vs. Upendra Narayan Singh and Others*, .

38. The Supreme Court, however, made one exception to the above position of law in paragraph 53 of the judgment in *Uma Devi* (3) and that is that the State should take steps to regularise as a one time-measure, the services of such irregularly appointed persons who have worked for ten years or more in duly sanctioned posts but not under cover of orders of the Court. The observations are reproduced below:-

"53. One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in *State of Mysore and Another Vs. S.V. Narayanappa*, ; *R.N. Nanjundappa Vs. T. Thimmiah and Another*, and *B.N. Nagarajan and Others Vs. State of Karnataka and Others*, and referred to in para 15 above, of duly qualified persons in duly sanctioned

vacant posts might have been made and the employees have continued to work for ten years or more but without the intervention of orders of the courts or of tribunals. The question of regularisation of the services of such employees may have to be considered on merits in the light of the principles settled by this Court in the cases abovereferred to and in the light of this judgment. In that context the Union of India, the State Governments and their instrumentalities should take steps to regularise as a one-time measure, the services of such irregularly appointed, who have worked for ten years or more in duly sanctioned posts but not under cover of orders of the courts or of tribunals and should further ensure that regular recruitments are undertaken to fill those vacant sanctioned posts that require to be filled up, in cases where temporary employees or daily wagers are being now employed. The process must be set in motion within six months from this date."

(emphasis supplied)

39. This exception was, however, subsequently explained by the Supreme Court in *State of Karnataka and Others Vs. M.L. Kesari and Others*, . The Supreme Court pointed out that even when regularisation is proceeded with in terms of paragraph 53 of the judgment of the Supreme Court in *Uma Devi (3)*, only such persons can be regularized who possess the prescribed minimum qualifications. The observations are as follows:-

"7. It is evident from the above that there is an exception to the general principles against "regularisation" enunciated in *Umadevi (3)*, if the following conditions are fulfilled:

(i) The employee concerned should have worked for 10 years or more in duly sanctioned post without the benefit or protection of the interim order of any court or tribunal. In other words, the State Government or its instrumentality should have employed the employee and continued him in service voluntarily and continuously for more than ten years.

(ii) The appointment of such employee should not be illegal, even if irregular. Where the appointments are not made or continued against sanctioned posts or where the persons appointed do not possess the prescribed minimum qualifications, the appointments will be considered to be illegal. But where the person employed possessed the prescribed qualifications and was working against sanctioned posts, but had been selected without undergoing the process of open competitive selection, such appointments are considered to be irregular.

.....

(11) The object behind the said direction in para 53 of *Umadevi (3)* is twofold. First is to ensure that those who have put in more than ten years of continuous service without the protection of any interim orders of courts or tribunals, before the date of decision in *Umadevi (3)* was rendered, are considered for regularisation in view of their long service. Second is to ensure that the

departments/instrumentalities do not perpetuate the practice of employing persons on daily-wage/ad hoc/casual basis for long periods and then periodically regularise them on the ground that they have served for more than ten years, thereby defeating the constitutional or statutory provisions relating to recruitment and appointment. The true effect of the direction is that all persons who have worked for more than ten years as on 10-4-2006 [the date of decision in Umadevi (3)] without the protection of any interim order of any court or tribunal, in vacant posts, possessing the requisite qualification, are entitled to be considered for regularisation. The fact that the employer has not undertaken such exercise of regularisation within six months of the decision in Umadevi (3) or that such exercise was undertaken only in regard to a limited few, will not disentitle such employees, the right to be considered for regularisation in terms of the above directions in Umadevi (3) as a one-time measure."

(emphasis supplied)

40. The salient principles enumerated by the Supreme Court in the aforesaid decisions have to be kept in mind while considering the issues that have come up for consideration in this Special Appeal in connection with regularisation of daily wage employees in terms of the 2001 Rules.

41. Rule 4(1)(b) of the 2001 Rules, as noticed above, clearly mandates that a person, who was engaged on daily wage basis before 29 June 1991 and who possessed the requisite qualifications prescribed for regular appointment for that post at the time of such engagement under the relevant service rules, could be considered for regular appointment in a permanent or temporary vacancy on the basis of his record and suitability. The relevant service rules are the 1980 Rules. Rule 8 of the 1980 Service Rules deals with the academic qualifications and Rule 13 deals with the physical fitness. When a person is considered for appointment under the 1980 Rules, the two requirements set out in Rule 8 and Rule 13 have to be satisfied. The 2001 Rules also require that a person engaged on daily wage basis who is seeking regularisation should have possessed the requisite qualification prescribed under the relevant service rules at the time of such engagement. The Supreme Court has also time and again observed that the services of only such persons can be regularised who had the requisite qualification at the time of initial engagement as daily wagers. These two requirements cannot, therefore, be ignored while considering the cases for regularisation of daily wage employees.

42. The learned Judge has, however, issued directions for relaxation of these conditions and in this connection the following observations have been made:

"14. The selection committees, however, in my opinion grossly erred in rejecting petitioner"s on the ground of lacking with the minimum educational qualifications and physical fitness, under the Service Rules, at the time of their consideration for regularisation. The Lower Subordinate Forest Service Rules 1980 do not provide for appointment on daily wages. The respondents have not placed on

record any such rules which provide for appointment on daily wages on Group "D" and Group "C" posts in the department. The regularisation Rules are very clear on this point and do not admit any ambiguity. The educational qualifications and physical ability, appointment and recruitment are relevant only for appointment on permanent or temporary posts at the time of initial appointment.

15. It will be wholly unjust and unfair to reject a candidate for regularisation on the ground that he did not possess the minimum educational qualifications and physical fitness at the time when the selection committee considered him for regularisation, after taking work from the same person, on the same post on which he is seeking regularisation without any complaint for about more than two decades. It will be wholly unfair to hold him ineligible for regularisation at such distance of time.....

16. I find substance in the submission of Sri Pankaj Srivastava that where the employees have worked for decades together on the same post and have worked on such posts without any complaint, they should not be denied regularisation on the ground that they do not possess requisite minimum educational qualifications prescribed for regular appointment on that post on the day they are considered for regularisation. The object and purpose of the Rules of 2001, as interpreted by Supreme Court in *State of U.P. vs. Putti Lal* (supra) is not to deprive such candidates from regularisation.

.....

18. The State Government must, therefore, having regard to the facts and circumstances, the regularisation rules and the directions of Supreme Court, give relaxation to all these candidates who have been declared ineligible on the ground of minimum educational qualifications and physical endurance test and to reconsider them for regularisation."

(emphasis supplied)

43. The first reason given by the learned Judge is that the 1980 Service Rules do not provide for appointment on daily wage basis and the educational qualifications and physical ability are relevant only for appointment on permanent or temporary posts at the time of initial appointment. The learned Judge has, therefore, held that a person cannot be denied regularisation for the reason that he did not possess the requisite minimum qualifications and physical fitness at the time the Selection Committee considered his case for regularisation. This finding is clearly contrary not only to the provisions of the 2001 Rules but also contrary to the decisions of the Supreme Court referred to above. A daily wage employee who seeks regularisation of his services must satisfy the conditions enumerated in the Rules framed for regularisation. In the present case, the 2001 Rules clearly require that a daily wage employee must possess the requisite qualifications prescribed under the service rules at the time he was initially engaged as a daily wager. The fact that the 1980 Service Rules do not provide for appointment on daily wage basis does not mean that the

essential requirement set out in the 1980 Service Rules for regular appointment can be ignored while considering the cases of daily wage employees for regularisation under the 2001 Rules. The 2001 Rules specifically provide that a person who is claiming regularisation should have possessed the requisite qualifications contained in the Service Rules at the time he was initially engaged as a daily wager. The Supreme Court has also emphasised that appointment of a person who does not possess the requisite qualifications at the time of initial engagement as a daily wager would be illegal and not irregular and such a person cannot be considered for regularisation. In this connection, it would be appropriate to reproduce the observations made by the Supreme Court in Uma Devi (3) in paragraphs 43, 48 and 49 of the judgment and they are as follows:-

"43. Thus, it is clear that adherence to the rule of equality in public employment is a basic feature of our Constitution and since the rule of law is the core of our Constitution, a Court would certainly be disabled from passing an order upholding a violation of Article 14 or in ordering the overlooking of the need to comply with the requirements of Article 14 read with Article 16 of the Constitution. Therefore, consistent with the scheme for public employment, this Court while laying down the law, has necessarily to hold that unless the appointment is in terms of the relevant rules and after a proper competition among qualified persons, the same would not confer any right on the appointee. If it is a contractual appointment, the appointment comes to an end at the end of the contract, if it were an engagement or appointment on daily wages or casual basis, the same would come to an end when it is discontinued. Similarly, a temporary employee could not claim to be made permanent on the expiry of his term of appointment. It has also to be clarified that merely because a temporary employee or a casual wage worker is continued for a time beyond the term of his appointment, he would not be entitled to be absorbed in regular service or made permanent, merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant rules.....

.....

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. 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.

.....

54. It is also clarified that those decisions which run counter to the principle settled in this decision, or in which directions running counter to what we have held herein, will stand denuded of their status as precedents."

(emphasis supplied)

44. We are, therefore, unable to accept the reasoning of the learned Judge that the essential qualifications prescribed in the 1980 Service Rules for appointment against Group "D" posts would not be applicable to engagements of daily wagers while considering their cases for regularisation of their services since there is no provision dealing with appointment of daily wagers in the 1980 Service Rules.

45. The learned Judge also held that if daily wage employees have worked for decades together without any complaint, they should not be denied regularisation on the ground that they did not possess the requisite minimum qualification at the time of their initial engagement as a daily wager. This aspect has also been considered by the Supreme Court in *Umadevi* (3). It has been held that while considering the cases for regularisation, the Courts should not be swayed by the fact that the concerned persons have worked for a considerable length of time as it would create another mode of appointment which would be contrary to the well established principle of equality in public employment enshrined in Article 14 of the Constitution and the observations are:

"45. While directing that appointments, temporary or casual, be regularized or made permanent, courts are swayed by the fact that the concerned person has worked for some time and in some cases for a considerable length of time. It is not as if the person who accepts an engagement either temporary or casual in nature, is not aware of the nature of his employment. He accepts the employment with open eyes. It may be true that he is not in a position to bargain - not at arm's length - since he might have been searching for some employment so as to eke out his livelihood and accepts whatever he gets. But on that ground alone, it would not be appropriate to jettison the constitutional scheme of appointment and to take the view that a person who has temporarily or casually got employed should be directed to be continued permanently. By doing so. it will be creating another mode of public appointment which is not permissible. If the courts were to void a contractual employment of this nature on the ground that the parties were not having equal bargaining power, that too would not enable the court to grant any relief to that employee. A total embargo on such casual or temporary employment is not possible, given the exigencies of administration and if imposed, would only mean that some people who at least get employment temporarily, contractually or casually, would not be getting even that employment when securing of such employment brings at least some succor to them. After all, innumerable citizens of our vast country are in search of employment and one is not compelled to accept a casual or temporary employment if one is not inclined to go in for such an employment. It is in that context that one has to proceed on the basis that the employment was accepted fully knowing the nature of it and the consequences flowing from it. In other words, even while accepting the employment, the person concerned knows the nature of his employment. It is not an appointment to a post in the real sense of the term. The claim acquired by him in the post in which he is temporarily employed or the interest in that post cannot be considered to be of such a magnitude as to enable the giving up of the procedure established, for making regular appointments to available posts in the services of the State. The argument that since one has been working for some time in the post it will not be just to discontinue him, even though he was aware of the nature of the employment when he first took it up, is not (sic) one that would enable the jettisoning of the procedure established by law for public employment and would have to fail when tested on the touchstone of constitutionality and equality of opportunity enshrined in Article 14 of the Constitution."

(emphasis supplied)

46. This position in law was reiterated by the Supreme Court in *State of M.P. and Others Vs. Lalit Kumar Verma*, and *State of Karnataka and Others Vs. Gadilingappa and Others*, .

47. In this view of the matter, it is also not possible to sustain the direction issued by the learned Judge that the writ petitioners should be considered for regularisation under the 2001 Rules even if they did not possess the requisite

minimum qualifications at the time of their initial engagement merely because they had worked as daily wagers for a considerable period of time.

48. The submission advanced by learned counsel for the respondents that the writ petitioners can be considered for regularisation in view of the directions given by the Supreme Court in paragraph 53 of the judgment in Uma Devi (3) cannot also be accepted. In the subsequent decision in M.L. Kesari, the Supreme Court clarified that even if regularisation is made in terms of paragraph 53 of the judgment in Uma Devi (3), the requirement of possessing the prescribed qualifications at the time of initial engagement cannot be ignored.

49. Learned counsel for the respondents also submitted that Rule 27 of the 1980 Service Rules does provide for relaxation from the conditions of service and, therefore, the direction issued by the learned Judge relaxing the condition relating to minimum qualification and physical endurance condition was justified.

50. We find no merit in this submission of learned counsel for the respondents. Rule 27 provides that where the State Government is satisfied that the operation of any rule regulating the conditions of service causes undue hardship in any particular case, it may notwithstanding anything contained in the rules applicable to the case, by order, dispense with or relax the requirements of that rule to such extent and subject to such conditions as it may consider necessary for dealing with the case in a just and equitable manner. Learned counsel for the respondents have not placed before the Court any order that may have been issued by the State Government for relaxing any of the conditions in Rule 8 or Rule 13 of the 1980 Service Rules. In the absence of such an order of the State Government, the direction for relaxing any of the conditions could not have been issued by a Court under Article 226 of the Constitution.

51. The decision of the Supreme Court in Ghanshyam Sunder, on which reliance has been placed by learned counsel for the respondents, would not help the respondents. The Supreme Court, after observing that it could not be disputed as a proposition of law that while absorbing any person or a group of persons after some years of service their suitability has to be adjudged, directed that the appellants may be required to appear in the test as per the Circular of 1995. It is for this reason that the Supreme Court directed that since they had already rendered service from 1992 for about more than seven years, their suitability may be adjudged at a much lesser standard than what has been indicated in the Circular of 1995.

52. Learned Additional Advocate General also questioned the direction issued by the learned Judge for payment of the minimum of the pay-scale to the writ petitioners till their cases for regularisation were re-determined in accordance with the impugned judgment. It was urged that no direction can be issued for the payment of the minimum of the pay scale to daily wagers and that the principle of "equal pay for equal work" has no application where an employee is not borne on a permanent establishment.

53. On the other hand, learned counsel appearing for the respondents relied upon the decision of the Supreme Court in Putti Lal (1) and on the observations contained in paragraph 55 of the judgment of the Supreme Court in Uma Devi (3), which is to the following effect:

"55...We are, therefore, of the view that, at best, the Division Bench of the High Court should have directed that wages equal to the salary that is being paid to regular employees be paid to these daily-wage employees with effect from the date of its judgment. Hence, that part of the direction of the Division Bench is modified and it is directed that these daily-wage earners be paid wages equal to the salary at the lowest grade of employees of their cadre in the Commercial Taxes Department in government service, from the date of the judgment of the Division Bench of the High Court. Since, they are only daily-wage earners, there would be no question of other allowances being paid to them..."

54. To appreciate the contentions advanced by learned counsel for the parties, it would be appropriate to refer to the judgment of the Supreme Court in State of Haryana and Another Vs. Tilak Raj and Others, , which has been followed in several decisions of the Supreme Court. The Supreme Court held that a scale of pay is attached to a definite post whereas a daily wager does not hold a post. Moreover, it was held that the doctrine of "equal pay for equal work" applies as between equivalents and would have no application where a parity is sought by a daily wager with permanent employees. In that context, the following principles were laid down by the Supreme Court:

"11. A scale of pay is attached to a definite post and in case of a daily-wager, he holds no posts. The respondent workers cannot be held to hold any posts to claim even any comparison with the regular and permanent staff for any or all purposes including a claim for equal pay and allowances. To claim a relief on the basis of equality, it is for the claimants to substantiate a clear-cut basis of equivalence and a resultant hostile discrimination before becoming eligible to claim rights on a par with the other group vis-a-vis an alleged discrimination. No material was placed before the High Court as to the nature of the duties of either categories and it is not possible to hold that the principle of "equal pay for equal work" is an abstract one.

12. "Equal pay for equal work" is a concept which requires for its applicability complete and wholesale identity between a group of employees claiming identical pay scales and the other group of employees who have already earned such pay scales. The problem about equal pay cannot always be translated in a mathematical formula."

55. The decision of the Supreme Court in Uma Devi (3) and more specifically paragraph 55, has been considered in State of Punjab and Another Vs. Surjit Singh and Others, by the Supreme Court. The Supreme Court has considered the observations contained in the said paragraph as constituting directions which are referable to the exercise of jurisdiction under Article 142 of the Constitution.

This is clear from the following extracts contained in paragraphs 29 & 30 of the decision:

"29. It is in the aforementioned factual backdrop, this Court in exercise of its jurisdiction under Article 142 of the Constitution of India, directed: (Umadevi case 8, SCC p. 43, para 55)

"55.....Hence, that part of the direction of the Division Bench is modified and it is directed that these daily-wage earners be paid wages equal to the salary at the lowest grade of employees of their cadre in the Commercial Taxes Department in government service, from the date of the judgment of the Division Bench of the High Court. Since, they are only daily-wage earners, there would be no question of other allowances being paid to them. In view of our conclusion, that the courts are not expected to issue directions for making such persons permanent in service, we set aside that part of the direction of the High Court directing the Government to consider their cases for regularisation. We also notice that the High Court has not adverted to the aspect as to whether it was regularization or it was giving permanency that was being directed by the High Court. In such a situation, the direction in that regard will stand deleted and the appeals filed by the State would stand allowed to that extent. If sanctioned posts are vacant (they are said to be vacant) the State will take immediate steps for filling those posts by a regular process of selection. But when regular recruitment is undertaken, the respondents in CAs Nos. 3595-612 and those in the Commercial Taxes Department similarly situated, will be allowed to compete, waiving the age restriction imposed for the recruitment and giving some weightage for their having been engaged for work in the Department for a significant period of time. That would be the extent of the exercise of power by this Court under Article 142 of the Constitution to do justice to them.

30. We, therefore, do not see that any law has been laid down in para 55 of the judgment in Umadevi (3) case. Directions were issued in view of the limited controversy. As indicated, the State's grievances were limited."

(emphasis supplied)

56. In several judgments of the Supreme Court, it has been held that the principle of "equal pay for equal work" cannot be attracted merely on the nature of the work, irrespective of the educational qualifications attached to a post or irrespective of the source of recruitment and other relevant considerations. Hence, it is now a well settled principle of law that the doctrine of "equal pay for equal work" is not a matter of abstract application or a mathematical formula that can be applied to a case.

57. In this regard it would also be appropriate, at this stage, to refer to the decisions of the Supreme Court in Orissa University of Agriculture and Technology and Another Vs. Manoj K. Mohanty, ; Government of West Bengal Vs. Tarun K. Roy and Others, and Charanjit Singh.

58. A Division Bench of this Court consisting of one of us (Dr. D.Y. Chandrachud, C.J.) in State of U.P. and 3 Ors., Vs. Mahipal Singh & Ors. Special Appeal Defective No. 861 of 2014, decided on 17 October 2014 while deciding a Special Appeal, after referring to the aforesaid decisions, held that a general direction of the nature which was issued by the learned Judge for payment of minimum of the pay-scale cannot be issued in exercise of the writ jurisdiction under Article 226 of the Constitution and, accordingly, set aside the direction to the extent it directed the State to grant to the respondents salary equivalent to the salary payable to the lowest grade of an employee holding the post of a Sweeper in the State.

59. Reliance on the decision of the Supreme Court in Putti Lal (1) by the learned counsel for the respondents in support of the contention that the daily wagers are entitled for minimum of the pay-scale would, therefore, be of no benefit in view of the subsequent decisions of the Supreme Court wherein it has been categorically held that a daily wage employee would not be entitled to the minimum of the pay-scale.

60. Learned counsel for the respondents submitted that this Special Appeal would not be maintainable for the reason that the State did not file an Appeal against the judgment dated 17 October 2005 rendered in the leading petition filed by Sanjay Kumar Srivastava bearing Writ Petition No. 48322 of 2000 which was also decided by the common judgment.

61. Though it has not been controverted by the learned Additional Advocate General that a Special Appeal had not been filed against the judgment rendered by the learned Judge in the leading writ petition filed by Sanjay Kumar Srivastava, but that would not mean that Special Appeals which have been filed to assail the judgment rendered in the connected petitions decided by a common judgment would not be maintainable. No principle of law has been pressed to support this contention and only a casual submission was advanced. It is, therefore, not possible to accept the contention of learned counsel for the respondents.

62. Learned counsel also submitted that since Special Appeal Defective No. 620 of 2007 that had been filed against the judgment dated 17 October 2005 in Writ Petition No. 33391 of 2003 had been dismissed and the Special Leave Petition bearing Civil Appeal No. 7708-7709 of 2013 was dismissed on 1 July 2013 by the Supreme Court on the ground of delay as well as on merits, this Special Appeal would not be maintainable.

63. It is true that Special Appeal Defective No. 620 of 2007 was filed by the State against the judgment rendered on 17 October 2005 by a learned Judge in Writ Petition bearing No. 33391 of 2003, but this Special Appeal was not dismissed on merits but on the ground of limitation as no satisfactory explanation had been offered to explain the delay in filing the Special Appeal. This is apparent from a perusal of the judgment dated 27 February 2012 passed

by the Division Bench in the Special Appeal. The order is reproduced below:-

"Order on delay condonation application

Heard learned counsel for the parties and perused the record.

Learned counsel for the respondents states that the special appeal suffers from latches by one year and 162 days. Counter affidavit to the delay condonation has been filed but no rejoinder affidavit thereto, despite 4 weeks" time having been granted to the learned Standing counsel, has been filed as yet. Therefore, the averments made in the counter affidavit having unrebutted, are taken to be correct.

In the circumstances, we find that the cause shown for delay is not sufficient. In view of the judgment dated 3.7.2010 rendered in Second Appeal (Defective) No. 250 of 2010, State of U.P. through Collector, Azamgarh versus Keshav Murari Rai and the judgment dated 14.5.2010 rendered in Second Appeal (Defective) No. 1189 of 2010, State of U.P. through Collector & another versus Sanjay & others, the delay condonation application is rejected.

Order on Special Appeal

Heard learned counsel for the parties and perused the record.

As a consequence of rejection of delay condonation application, the special appeal also stands dismissed."

64. The State filed a Special Leave to Appeal in the Supreme Court with a delay condonation application to assail the aforesaid judgment of the Division Bench of the High Court. The Supreme Court dismissed the Special Leave Petition on the ground of delay as well as on merits by an order dated 1 July 2013. The order is reproduced below:-

"The special leave petitions are dismissed on the ground of delay as well as on merits."

65. The Supreme Court had dismissed the Special Leave Petition not only on the ground of delay but also on merits. This would mean that the Supreme Court did not accept the explanation offered by the State to condone the delay in filing the Special Leave Petition nor there was any merit in the Special Leave Petition. Thus, the order passed by the High Court by which the Special Appeal was dismissed for the reason that the delay condonation application was rejected, was not interfered with. This would not mean that the order of the learned Judge on merits merged in the order of the Division Bench of the High Court or the Supreme Court. Neither the Division Bench of the High Court in the Special Appeal nor the Supreme Court in the Special Leave Petition dwelt on the merits of the order passed by the learned Judge. The dismissal of the Special Leave Petition without detailed reasons in limine, therefore, would not constitute any declaration of law by the Supreme Court or a binding precedent as has been observed by the Supreme Court in Commissioner of Police, New Delhi and

Another Vs. Mehar Singh, .

66. In Kunhayammed and Others Vs. State of Kerala and Another, , the Supreme Court explained the concept underlying the doctrine of merger in the following words:

"12. The logic underlying the doctrine or merger is that there cannot be more than one decree or operative orders governing the same subject-matter at a given point of time. When a decree or order passed by inferior court, tribunal or authority was subjected to a remedy available under the law before a superior forum then, though the decree or order under challenge continues to be effective and binding, nevertheless its finality is put in jeopardy. Once the superior court has disposed of the lis before it either way - whether the decree or order under appeal is set aside or modified or simply confirmed, it is the decree or order of the superior court, tribunal or authority which is the final, binding and operative decree or order wherein merges the decree or order passed by the court, tribunal or the authority below. However, the doctrine is not of universal or unlimited application. The nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenged laid or which could have been laid shall have to be kept in view."

67. In regard to the dismissal of the Special Leave Petition without reasons or by a speaking order, the Supreme Court pointed out in Kunhayammed that in either case the doctrine of merger would not be attracted and the observations are:-

"27. A petition for leave to appeal to this Court may be dismissed by a non-speaking order or by a speaking order. Whatever be the phraseology employed in the order of dismissal, if it is a non-speaking order, i.e., it does not assign reasons for dismissing the special leave petition, it would neither attract the doctrine of merger so as to stand substituted in place of the order put in issue before it nor would it be a declaration of law by the Supreme Court under Article 141 of the Constitution for there is no law which has been declared. If the order of dismissal be supported by reasons then also the doctrine of merger would not be attracted because the jurisdiction exercised was not an appellate jurisdiction but merely a discretionary jurisdiction refusing to grant leave to appeal. We have already dealt with this aspect earlier. Still the reasons stated by the Court would attract applicability of Article 141 of the Constitution if there is a law declared by the Supreme Court which obviously would be binding on all the courts and tribunals in India and certainly the parties thereto. The statement contained in the order other than on points of law would be binding on the parties and the court or tribunal, whose order was under challenge on the principle of judicial discipline, this Court being the Apex Court of the country. No court or tribunal or parties would have the liberty of taking or canvassing any view contrary to the one expressed by this Court. The order of Supreme Court would mean that it has declared the law and in that light the case was considered not fit for grant of leave. The declaration of law will be governed by Article 141 but still, the case not being one where leave was granted, the doctrine of merger does not apply.

The Court sometimes leaves the question of law open. Or it sometimes briefly lays down the principle, may be, contrary to the one laid down by the High Court and yet would dismiss the special leave petition. The reasons given are intended for purposes of Article 141 . This is so done because in the event of merely dismissing the special leave petition, it is likely that an argument could be advanced in the High Court that the Supreme Court has to be understood as not to have differed in law with the High Court."

(emphasis supplied)

68. Moreover, even a judgment in a Civil Appeal arising out of a judgment of a Division Bench of the High Court would not result in the statement of law or the reasons recorded by the Division Bench of the High Court merging in the decision of the Supreme Court, if neither the merits of the order of the High Court nor the reasons which were reduced by the High Court or the law laid down therein had been gone into.

69. This is what was observed by the Supreme Court in *S. Shanmugavel Nadar Vs. State of Tamil Nadu and Another*, . The Supreme Court held that though the operative part of the order of the Division Bench merged in the decision of the Supreme Court, the reasons had not merged nor had the Supreme Court made any declaration of law under Article 141 of the Constitution. The statement of the law as contained in the judgment of the Division Bench of the High Court continued to remain the decision of the High Court, binding as a precedent on subsequent Benches of coordinate or lesser strength but open to reconsideration by a Larger Bench.

70. A Full Bench of this Court in *Paresh Yadav Vs. State of U.P.*, also examined this issue. Of the three questions that were referred to the Full Bench, one was regarding the effect of the order of the Supreme Court dismissing the Appeal filed by the State of U.P. against the judgment of the Division Bench of the Court. After referring to the aforesaid decision of the Supreme Court in *S. Shanmugavel Nadar*, the Full Bench ultimately observed as follows:-

"These principles are clearly applicable here. The judgment of the Division Bench of this Court at Lucknow in *Prem Chandra Srivastava* was challenged before the Supreme Court by the State of U.P. which had filed a Special Leave Petition under Article 136 of the Constitution. The Supreme Court granted leave. The order of the Supreme Court dated 4 September 2013 indicates that the only aspect which was dealt with in the order was the costs of Rs. 2 lacs which had been imposed by the Division Bench of this Court. Finding the costs excessive, the quantum of costs was reduced to Rs. 10,000/- and subject to the reduction of the quantum of costs awarded, the appeal was dismissed. The order dated 4 September 2013 of the Supreme Court did not result in a merger of the order passed by this Court as regards the statement of law or the reasons indicated in the judgment of the Division Bench at Lucknow. On the contrary, the contents of the order of the Supreme Court dated 4 September 2013 clearly indicate that the merits of the

order of the High Court, the reasons recorded therein and the law laid down were not the subject matter of the decision. As the Supreme Court has held in a consistent line of authority, the doctrine of merger is not a doctrine of rigid and universal application. The doctrine depends upon the nature of the jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or which could have been laid in a given case. What merges is the operative part, i.e. the mandate or decree issued by the superior court. However, in certain cases, the reasons for the decision may also be said to have merged in the order of the superior court, if the superior court, while formulating its judgment or order has adopted or reiterated the reasoning or recorded an express approval of the reasoning incorporated in the decision of the inferior forum. Considering the matter from this perspective, it is clear that the reasons which were indicated in the judgment of the Division Bench at Lucknow have not merged in the order of the Supreme Court for the simple reason that the order dated 4 September 2013 of the Supreme Court only dealt with the quantum of costs which were awarded by this Court. Considering the matter from a different perspective, it is also well settled that it is the speech, express or necessarily implied, which only is the declaration of law laid down under Article 141 of the Constitution."

(emphasis supplied)

71. Thus, the judgment of the learned Judge delivered on 17 October 2005 in the batch of writ petitions did not merge in the order of the Division Bench of the High Court or the order of the Supreme Court.

72. Learned counsel for the respondents have, however, relied upon the decisions of the Supreme Court in *Daryao, U.P. State Road Transport Corporation and Devilal Modi*. The principle of law laid down in these decisions would not be applicable to the facts of the present case.

73. In *Daryao*, the Supreme Court dwelt on the rule of *res-judicata* as indicated in Section 11 of the Code of Civil Procedure, 1908 and it is in this context that it observed that a finality should attach to the binding decisions pronounced by Courts of competent jurisdiction. It was also observed that if a writ petition filed by a party under Article 226 of the Constitution is considered on the merits as a contested matter and is dismissed, the decision would continue to bind the parties unless it is otherwise, modified or reversed in an Appeal or any other appropriate proceeding.

74. In *Devilal Modi*, the Supreme Court examined the consequences of a decision rendered by it in an earlier Appeal brought by the Assistant Commissioner wherein it was held that the assessee was liable to pay the tax and penalty imposed upon him. It is in this context that the Supreme Court observed that it would be unreasonable to suggest that after the judgment was pronounced by the Supreme Court, it was still open to the assessee to file a subsequent writ petition before the Court and urge that the said impugned order was invalid for some additional grounds.

75. In U.P. State Road Transport Corporation, the Supreme Court observed that the High Court cannot examine and re-decide the issue already decided by the Supreme Court in an earlier proceeding.

76. Thus, for all the reasons stated above, the directions issued by the learned Judge on 17 October 2005 to the State Government, while partly allowing the writ petitions, to reconsider the cases of the writ petitioners for regularisation of their services by ignoring the minimum educational qualifications or the physical endurance requirement prescribed in the service rules with a further direction that until then all the petitioners who were still working should be allowed to continue on a daily wage basis and be paid the minimum of the pay-scale, cannot be sustained and are, accordingly, set aside. The State Government shall consider the cases of the daily wagers in the light of the observations made above and by ignoring the artificial breaks in their engagement as daily wagers.

77. The Special Appeal is, accordingly, partly allowed. The writ petition shall also stand partly allowed to the extent indicated above.

1the 2001 Rules

21998 Rules

31980 Service Rules