
(2010) 11 GAU CK 0010
In the Gauhati High Court
Case No : W.A. No. 32 of 2009

Subhash Debnath and Others

APPELLANT

Vs

ONGC Ltd. and Others

RESPONDENT

Date of Decision : 30-11-2010

Acts Referred:

Constitution of India, 1950 — Article 136, 14, 15, 16, 17

Citation : (2011) 1 GLT 748 : (2010) 4 SLR 325

Hon'ble Judges : I.A. Ansari, J;C.R. Sharma, J

Bench : Division Bench

Advocate : K.N. Bhattacharjee and D. Sarkar, for the Appellant; S. Deb and R. Dasgupta, for the Respondent

Judgement

I.A. Ansari, J.—Once again, as were raised many a times, in the past, the moot question, which falls for determination in the present appeal, is: Whether in the face of the present case, the High Court ought to have directed by invoking its extra-ordinary jurisdiction, under Article 226 of the Constitution of India, that the services of the writ Petitioners, who are Appellants in this appeal, be regularized ?

2. The material facts, which have given rise to the present appeal, may, in brief, be set out as under:

(i) The Appellants, altogether fourteen in number, have been working as casual/contingent workers under Respondent No. 1, namely, Oil and Natural Gas Corporation Ltd. (in short, "the ONGC), Tripura Asset. As many as thirteen of the Appellants have been working in the manner as aforesaid since the year 1980 and one of them has been so working since the year 1989. On 21.05.99, Respondent No. 2, namely, Manager (Human Resources) published a list of contingent workers indicating therein their respective dates of engagement, educational qualification and the nature of work, which they had been performing.

(ii) On 25.09.1999, a meeting was held between the Workers' Union, which represented the Appellants and persons similarly situated, and the management

of the ONGC. In the meeting, Director (Personnel), ONGC, informed the Workers' Union (hereinafter referred to as "the Union") that in order to be regularized, a contingent worker must be, at least, matriculate; hence, all the contingent workers must join classes and clear their Madhyamik examination at the earliest. The Director (Personnel) also informed the Union that the proposal for creation of posts has been received and it was under process. After detailed discussion, the Director (Personnel) informed the Union that as many as twenty posts of contingent worker would be created by 2000-2001 and almost all contingent workers were, in this manner, likely to be absorbed in regular posts.

(iii) Thereafter, out of thirty-eight contingent/casual workers, as many as twenty casual workers have been absorbed; but out of them, only eight had the requisite qualification, the rest being non-matriculate same as the present Appellants. Though the bio-data of the Appellants too were sent to the ONGC by its office at Agartala, for creation of twenty three posts for the purpose of regularizing the services of the contingent workers including the present Appellants, no further communication was received from the ONGC as regards regularization of casual/contingent workers, such as, the present Appellants.

(iv) The Appellants, then, made a representation to the ONGC stating, inter alia, that all of them had passed Class-VIII and with this qualification, they had been working and that in the process, they had gained sufficient experience and that their services be regularized against Class-IV post inasmuch as persons, with similar qualification, had been absorbed in the past. The Appellants accordingly contended that they were being discriminated. As the Respondents did not regularize the services of the Appellants, the Appellants filed a writ petition under Article 226 of the Constitution, which gave rise to WP (C) No. 204/2009, whereby the Appellants sought for issuance of a writ commanding the Respondents to regularize their services by absorbing them against Class-IV posts.

(v) The Respondents resisted the writ petition by contending, inter alia, thus: The Appellants have no right to be absorbed inasmuch as their engagement had been as contingent workers and the mere fact that they had completed 240 days of work cannot confer, and has not conferred, any right on them to demand absorption against regular posts or regularization of their services. Recruitment to every post, under the Respondent No. 1, is regulated by the recruitment policy of 1980 and the modified Recruitment and Promotion Rules, 1988. None of the Appellants satisfies the eligibility criteria inasmuch as none of them could pass Madhyamik examination, though a person has to clear his Madhyamik examination in order to be appointed even in Class-IV post and this fact had, in fact, been made clear by the ONGC even on 25.09.1999, when a meeting took place between the Union, which represented the Appellants and other similarly situated persons, on the one hand, and the management of the ONGC, on the other. Mere creation of any additional post cannot take away requirement of eligibility criteria for such appointment. The Petitioners have no case inasmuch as they, though not qualified, were seeking to be appointed against regular posts by

creating, if necessary, such posts. Such an appointment, if forced to be made by the ONGC, would be contrary to law. The Respondents accordingly prayed for dismissal of the writ petition.

(vi) By judgment and order, under appeal, delivered on 20.10.2009, a learned Single Judge, referring to the decision in Secretary, State of Karnataka and Others Vs. Umadevi and Others, has taken the view that though the Petitioners, i.e., the Appellants herein, had worked for almost twenty years, the fact remains that their appointments were not against any sanctioned post and as the Petitioners (i.e., the Appellants herein) do not satisfy the eligibility criteria, their services cannot be directed to be regularized inasmuch as regularization of a person's service, against a post to which he is not eligible to be appointed, cannot be directed by way of an order of regularization or absorption. With the conclusion, so reached, the learned Single Judge has dismissed the writ petition. Aggrieved by the dismissal of their writ petition, the writ Petitioners are, now, before this Court as Appellants.

3. We have heard Mr. K. N. Bhattacharjee, learned Senior Counsel, for the Appellants, and Mr. S. Deb, learned Senior Counsel, for the Respondents.

4. Appearing on behalf of the Appellants, Mr. Bhattacharjee, learned Senior Counsel, submits that though in Uma Devi (supra), the Constitution Bench has held that a contingent or casual worker's service cannot be regularized merely because of the fact that he has been working for a fairly long period of time against a non-existent post, what appears to have escaped the notice of the learned Single Judge is that the Constitution Bench made an exception in this regard, the exception being that the States were directed to undertake, as a one-time measure, an exercise to regularize the services of those employees, who had been working on contractual basis or as contingent employees. In terms of this exception, which the Constitution Bench had carved out and directed, the Appellants, contends Mr. Bhattacharjee, ought to have been regularized against existing or future vacancies in the posts of Class-IV. Support for this submission is sought to be derived by Mr. Bhattacharjee from the case of State of Karnataka and Ors. v. M. L. Kesari and Ors. AIR SCW 4577. On the above aspect of his submission, Mr. Bhattacharjee also places reliance on General Manager, Oil & Natural Gas Commission, Silchar v. Oil & Natural Gas Commission Contractual Workers' Union reported in (2008) 12 SCC 275.

5. It is further contended by Mr. Bhattacharjee that in the case at hand, as many as 12 (twelve) similarly situated persons, who did not fulfil the requisite eligibility criterion of having educational qualification, have been absorbed against regular posts; whereas the Respondents have refused to regularize the services of the Appellants. Thus, the Appellants, according to Mr. Bhattacharjee, are being discriminated against. Such discriminatory treatment, meted out to the Appellants, is not sustainable in law; so contends Mr. Bhattacharjee. In this regard, Mr. Bhattacharjee referred to, and place reliance upon, U.P. State Electricity Board Vs. Pooran Chandra Pandey and Others,

6. Per contra, Mr. Deb concedes that though, in *Uma Devi* (supra), while laying down that regularisation of the service of a person cannot be directed merely because of the fact that the person concerned had been working in a post, or against a post, for a fairly long period of time, the Supreme Court carved out, in this regard, an exception as a one-time measure, the one-time measure being that the States were directed to undertake an exercise, as a one-time measure, for the purpose of regularisation of the services of the employees of the State and its instrumentalities. Having so conceded, Mr. Deb, however, points out that what is important to note, in this regard, is that a person, whose service is sought to be regularized against a post, must have the requisite qualification to be appointed against the post.

7. The Constitution Bench, in *Uma Devi* (supra), contends Mr. Deb, has not directed regularization of services of illegal appointees; what has been directed, according to Mr. Deb, by the Constitution Bench, in *Uma Devi* (supra), is regularisation of the service of a person, whose appointment is not illegal, but merely irregular. A person, contends Mr. Deb, who is not qualified to be appointed to a post, against which he might be working, cannot be regarded as a mere irregular appointee; rather, his appointment, according to Mr. Deb, would be illegal and incurable. Similarly, submits Mr. Deb, if a person works in a non-existent or non-sanctioned post, he cannot be directed to be regularized against such nonexistent or non-sanctioned post. Any direction to regularize the service of an illegal appointee would, contends Mr. Deb, run contrary to what the Supreme Court has laid down, in *Uma Devi* (supra). The Supreme Court has also laid down, in *Uma Devi* (supra), points out Mr. Deb, that any decision, rendered in the past, which run contrary to the decision of the Constitution Bench, in *Uma Devi* (supra), shall stand denuded of its authority as a precedent.

8. Thus, the sum and substance of the submissions of Mr. Deb is that what the Supreme Court has directed, in *Uma Devi* (supra), as an one-time measure to be undertaken by the State and its instrumentalities, is merely to identify those persons, whose appointments are not illegal, but irregular and that such irregular appointees should be regularized against the posts, which they may be holding, but this one-time measure would not include those, whose appointments are wholly illegal, the illegal appointees being, amongst others, those, who do not qualify for recruitment to posts against which they have had been working or need to be regularized, or those, who were working against no-existent or non-sanctioned posts.

9. In the face of the respective cases of the parties and the submissions made on their behalf, the narrow question, which, thus, surfaces for determination, is, in substance, this: Whether the one-time exercise, which the Constitution Bench has directed, in *Uma Devi* (supra), to be undertaken by the States and its instrumentalities to regularize the service of the employees, contingent, casual or contractual, covers both irregular as well as illegal appointees or only the irregular appointees and not illegal appointees? Another question which surfaces

for consideration in the context of the facts of the present case and the submissions made, is: What is an illegal appointment and how does it differ from an irregular appointment? Yet another question, which this appeal must answer, is: Because of the fact that the Respondents have, in the past, regularized the services of some persons against Class-IV posts, though such persons were not qualified to be appointed to such posts, whether the services of the present Appellants need to be directed to be regularized too, though the present Appellants are not, admittedly, qualified for appointment to the posts of Class-IV ? Whether the omission, on the part of the Respondents, to regularize the services of the present Appellants is discriminatory in nature, because the Respondents had, in the past, regularized the services of persons, similarly situated as the Appellants, though those persons did not have, same as the present Appellants, necessary qualification for being appointed to the post to which they have been appointed and whether, in the name of removing discrimination, regularisation of such an employee can or cannot be ordered?

10. Before dealing with other aspects of the case, it needs to be borne in mind that an illegality cannot be allowed to be perpetuated in the name of removing discrimination. The mere fact that an authority has passed a particular order in the case of another person, similarly situated, cannot be a ground for is suing a writ in favour of a Petitioner on the plea of discrimination if the order, passed in favour of the other person, is found to be contrary to law or not warranted in the facts and circumstances of the case. Noticing that the High Courts, in exercise of their writ jurisdiction, have been passing orders to remove discrimination and thereby asking the authorities concerned to repeat the illegality, the Supreme Court has expressed its anxiety on such approach and has laid down the position of law, in Chandigarh Administration and another Vs. Jagjit Singh and another, in the following words:

8. We are of the opinion that the basis or the principle, if it can be called one, on which the writ petition has been allowed by the High Court is unsustainable in law and indefensible in principle. Since we have come across many such instances, we think it necessary to deal with such pleas at a little length. Generally speaking, the mere fact that the Respondent authority has passed a particular order in case of another person similarly situated can never be the ground for issuing a writ in favour of the Petitioner on the plea of discrimination. The order in favour of the other person might be allowed and valid or it might not be. That has to be investigated first before it can be directed to be followed in the case of the Petitioner. If the order in favour of the other person is found to be contrary to law or not warranted in the facts and circumstances of his case, it is obvious that such illegal or unwarranted order cannot be made the basis of issuing a writ compelling the Respondent authority to repeat the illegality or to pass another unwarranted order. The extraordinary and discretionary power of the High Court cannot be exercised for such a purpose. Merely because the Respondent authority has passed one illegal/unwarranted order, it does not entitle the High Court to compel the authority to repeat the illegality over again

and again. The illegal/unwarranted action must be corrected, if it can be done according to law indeed, wherever, it is possible, the Court should direct the appropriate authority to correct such wrong orders in accordance with law but even if it cannot be corrected, it is difficult to see how it can be made a basis for its repetition. By refusing to direct the Respondent authority to repeat the illegality, the Court is not condoning the earlier illegal act/order nor can such illegal order constitute the basis for a legitimate complaint of discrimination. Giving effect to such plea would be prejudicial to the interests of law and will do incalculable mischief to public interest. It will be a negation of law and the rule of law. Of course, if in case the order in favour of the other person is found to be a lawful and justified one it can be followed and similar relief can be given to the Petitioner if it is found that the Petitioner's case is similar to the other person's case. But then why examine another person's case in his absence rather than examining the case of the Petitioner who is present before the Court and seeking the relief. Is it not more appropriate and convenience to examine the entitlement of the Petitioner before the Court to the relief asked for in the facts and circumstances of his case, than to enquire into the correctness of the order made or action taken in another person's case, which other person is not before the case nor is his case. In our considered opinion, such a course- barring exceptional situations- would neither be advisable nor desirable. In other words, the High Court cannot ignore the law and the well-accepted norms governing the writ jurisdiction and say that because in one case a particular order has been passed or a particular action has been taken, the same must be repeated irrespective of the fact whether such an order or action is contrary to law or otherwise. Each case must be decided on its own merits, factual and illegal, in accordance with relevant legal principles. The orders and actions of the authorities cannot be equated to the judgments of the Supreme Court and High Courts nor can they be elevated to the level of the precedents, as understood in the judicial world. (What is the position in the case of orders passed by authorities in exercise of their quasi-judicial power, we express no opinion. That can be dealt with when a proper case arises.

(Emphasis is added)

11. In the case of State of Madhya Pradesh and Others Vs. Ramesh Chandra Bajpai, , too, the Supreme Court has pointed out that Article 14 of the Constitution carries with it a concept of equality and Article 14 cannot, therefore, be invoked for the purpose of perpetuating an illegality and that an illegal or wrong order, passed in one case, cannot be made the basis for compelling a public authority to pass similar order in other cases. The Supreme Court has also held, in Ramesh Chandra Bajpai (supra), that even if the State implements an erroneous order passed by a Court, it cannot be precluded from challenging similar order passed in another case, simply because appeal was not preferred in the earlier case. (See also State of Jharkhand and Others Vs. Manshu Kumbhkar, , Vice Chancellor, M.D. University, Rohtak Vs. Jahan Singh, , and Bihar Public Service Commission and Ors. v. Kamini and Ors. reported in (2007) 8 SCC

519.

12. While considering the present appeal, what needs to be clearly borne in mind is that in *Keshavananda Bharati v. State of Kerala*, 1973 Sup SCR 1, a twelve-Judge Bench has held that Article 14, which guarantees equality of opportunity in public employment, is a facet of Article 14 and forms part of the basic structure of the Constitution. The decision, so rendered, in *Keshavananda Bharati* (supra), was clearly taken note of by a three-Judge Bench in *Indra Sawhney v. Union of India* 1992 (Supp) 2 SCR 454, wherein it was reiterated that neither the Parliament nor the State legislature can transgress the basic feature of the Constitution, namely, the principle of equality enshrined in Article 14 of which Article 16 is a facet.

13. While pointing out that equality and equal opportunity form the basic feature of our Constitution and equality before the law and equal protection of the laws guaranteed in Article 14 does not remain confined to Article 14 alone, but proceeds further and takes within its sweep Article 15 to 18 too, the Supreme Court, in *Indra Sawhney* (supra), further clarified that in matters of public employment, Article 16 guarantees equality of opportunity.

14. Referring to the decisions in *Keshavananda Bharati* (supra) and *Indra Sawhney* (supra), the Constitution Bench, in *Uma Devi* (supra), has held, in no uncertain words, that adherence to Articles 14 and 16 is mandatory in the process of public employment. The relevant observations, appearing in this regard, in *Uma Devi* (supra), read,

These binding decisions are clear imperatives that adherence to Articles 14 and 16 of the Constitution is a must in the process of public employment.

15. In fact, in *Uma Devi* (supra), adherence to the requirements of Article 16 and holding of a selection process enabling all eligible and willing candidates to participate in a selection process, in public employment, has been held to be a basic feature of the Constitution. Logically, therefore, when a person comes to be appointed without any selection process, his appointment is not merely irregular, but wholly illegal, for, no appointment, running contrary to the Constitutional guarantees, can be termed as a mere irregular appointment and not an illegal appointment. Similarly, when a person is appointed against a non-existent post, such an appointment can never be regarded as a mere irregular appointment but has to be treated as an illegal appointment, for, no appointment can be made without an existing vacant post. Logically extended, this would further mean that even those appointees, who are not qualified to hold a given post, cannot be regarded as mere irregular appointees. Consequently, a person cannot be appointed, by way of regularisation, to a post, which he is not qualified to hold. In other words, a person's appointment to a post, which he does not qualify to hold, would be an illegal act of making appointment and not a mere irregular act.

16. Turning to the question as to whether the exercise, which has been directed, in *Uma Devi* (supra), to be adopted, as a one-time measure, by the State and its

instrumentalities, for the purpose of regularisation cover both irregular as well as illegal appointees, we may point out that in *Uma Devi (supra)*, firmly laying down that regularisation of a casual or contractual employee is not possible if the appointment has not been made according to the rules or if the employee is not eligible or does not satisfy the prescribed qualification, the Supreme Court, as an exception, made one-time measure, in respect of those appointees, whose appointments were merely irregular and not illegal. If the appointment was of a duly qualified person in a duly vacant post and if such person has been continued for more than ten years without intervention by orders of Court or of Tribunals, then, such a person's service, though not appointed by resorting to the regular process of selection, was directed to be regularised. This becomes clear from a bare reading of para 53 of *Uma Devi (supra)*, which read as under:

53. One aspect needs to be clarified. There may be cases, where irregular appointments (not illegal appointments) as explained in *S.V. Narayanappa (supra)*, *R.N. Nanjundappa (supra)* and *B.N. Nagrajan (supra)* 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 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 above referred 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 regularize 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 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. We also clarify that regularisation, if any already made, but not subjudice, need not be reopened based on this judgment, but there should be no further by-passing of the constitutional requirement and regularising or making permanent, those not duly appointed as per the constitutional scheme.

(Emphasis is added)

17. From the above observations, made in *Uma Devi (supra)*, it is abundantly clear that the one time exception to the general principle of not permitting regularisation has been carved out only in respect of irregular appointees and not illegal appointees. If an appointment has been made of an unqualified person to a post, such an appointment is not merely irregular, but illegal. Similarly, if appointment has been made against non-sanctioned or non-existent post, the appointment is, again, not irregular, but illegal. A person, whose appointment was illegal due to the fact that he was not qualified to hold the post or no post existed against which he was working, then, such a person cannot be regularized, for, his appointment was illegal and not irregular. If appointment has

been made in denial of constitutional obligation of the State to provide equal opportunity of employment as envisaged by Article 16, which is a facet of Article 14, the same cannot be branded as mere irregular appointment, because such an appointment, being in breach of fundamental structure of the Constitutional governance, cannot be regarded as mere irregular appointment. Such a person's appointment, being illegal, cannot be directed by the Court to be regularized.

18. In the light of the law, laid down in Uma Devi (supra), since no public employment shall be made without giving all eligible candidates a fair chance to participate in the selection process, it logically follows that appointments of the present Appellants, having been made without holding any selection process, and that too, not against any sanctioned vacant post, their appointments were wholly illegal and not irregular. This apart, the present Appellants do not, admittedly, have requisite educational qualification even today; hence, their appointments, if made by the Respondents against the posts, which they are not qualified to hold, would not be irregular but illegal. In short, thus, the Appellants are not mere irregular appointees, but illegal appointees and they cannot be directed to be regularized against the posts, which they are not qualified to hold. This apart, they are also not qualified to be appointed to a Class-IV post, for, the minimum educational qualification, required for appointment to a post of Class-IV, is that the candidate must have passed the Madhyamik examination, but none of the Appellants satisfies this minimum precondition for appointment.

19. By way of regularisation, what the Appellants are, in effect, seeking is that this Court shall direct them to be appointed to Class-IV posts, which they are not qualified to hold. Does the case of M.L. Kesari (supra), which Mr. Bhattacharjee relies upon, supports the case of the Appellants in this regard?

20. While considering the question posed above, it needs to be noted that, having taken note of the observations made, and the directions given, by the Constitution Bench, at para 53, in Uma Devi (supra), which we have already reproduced above, the Supreme Court, in M.L. Kesari (supra), has observed thus:

5. It is evident from the above that there is an exception to the general principles against regularisation enunciated in Secretary, State of Karnataka and Others Vs. Umadevi and Others, , 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.

Uma Devi casts a duty upon the concerned Government or instrumentality to take steps to regularize the services of those irregularly appointed employees who had served for more than ten years without the benefit or protection of any interim orders of Courts or Tribunals, as a one-time measure. Uma Devi directed that such one-time measure must be set in motion within six months from the date of its decision (rendered on 10.04.2006).

(Emphasis is added)

21. From a bare reading of what have been observed above, it becomes clear that where appointments are not made of continued against sanctioned posts or where persons appointed do not possess the prescribed minimum qualification, the appointments will be considered to be illegal and such appointments cannot be regularized by taking recourse to the one-time measure, which the Supreme Court, in Uma Devi (supra), has carved out.

22. In the backdrop of the law, laid down in M.L. Kesari (supra), which Mr. Bhattacharjee relies upon, there can be no escape from the conclusion that when the Appellants herein have been working against non-existent posts and when they do not even have minimum prescribed criteria to be appointed to a post of Class-IV, no direction can be issued by this Court, and has rightly not been issued by the learned Single Judge, requiring the Respondents to regularize the services of the Petitioners.

23. Is the conclusion, reached above by us, incorrect, because of what has been laid down in Pooran Chandra Pandey (supra) ?

24. While considering the case of Pooran Chandra Pandey (supra), it needs to be noted that a two-Judge Bench, faced with the decision in Uma Devi (supra), observed that the decision, in Uma Devi (supra), is often applied mechanically by the Courts as if it were a Euclid's formula without noting the facts of a particular case, for, a little difference in facts or even additional fact may make lots of difference in the precedential value of a decision.

25. In Pooran Chandra Pandey (supra), the writ Petitioners, i.e., Respondents before the Supreme Court, contended that they should not be allowed to be discriminated against, for, similarly situated persons had been absorbed, in the past, by the Electricity Board. While observing that such discrimination is impermissible even in the light of the decision in Uma Devi (supra), the Supreme Court, in Pooran Chandra Pandey (supra), pointed out that Uma Devi (supra) has to be read in conformity with Article 14 and no judgment, even of the Supreme Court, can violate the Constitution. In this regard, it was also observed by the Supreme Court, in Pooran Chandra Pandey (supra), referring to the case of Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another, , that Government must act in a reasonable and non-arbitrary manner or else, Article 14 would stand

violated and that Maneka Gandhi (supra) is a decision of a Bench of seven Judges, whereas Uma Devi (supra) is a decision of five Judges Bench and, being a smaller Bench, Uma Devi (supra) cannot override the larger Bench decision in Maneka Gandhi (supra).

26. Having taken note of the fact that the writ Petitioners had been working since 1985, the Supreme Court, in Pooran Chandra Pandey (supra), eventually, held that if the writ Petitioners' claim for regularisation was denied, then, it would violate Article 14, when services of persons, similarly situated, had been regularized in the past.

27. What is, now, important to note is that the decision in Pooran Chandra Pandey (supra) fell for consideration in Official Liquidator Vs. Dayanand and Others, wherein a three-Judge Bench has overruled the decision in Pooran Chandra Pandey (supra). In Dayanand (supra), a three-Judge Bench has pointed out that Courts had, at one point of time, enthusiastically endeavoured to extend 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 the regular employees in matters of payment of salaries and allowances and that their services must be regularized, but this, having led to illegal and back door appointments, the Courts had to rethink and, in a large number of subsequent decisions, the Supreme Court declined to entertain the claims of ad hoc or temporary employees for regularization of their services and, at times, reversed the orders passed by the High Courts or Administrative Tribunals directing regularisation of such employees.

28. In Dayanand (supra), it was also pointed out that in Uma Devi (supra), the Court dwelt upon the theme of constitutionalism in a system governed by rule of law and came to the conclusion that Article 16, being a facet of Article 14, cannot be overridden by the State and that no public employment can be made without letting all eligible and willing persons participate in the selection process. Taking note of the fact that Pooran Chandra Pandey (supra) has taken a slightly different view in the sense that when refusal to regularize the service of an employee results into discrimination, regularisation must be ordered, the Supreme Court observed that the two Judge Bench, in Pooran Chandra Pandey (supra), had no occasion to make any adverse comment on the binding character of the Constitution Bench judgment in Uma Devi (supra). The three Judge Bench, in Dayanand (supra) further clarified that the comments and observations, made in Pooran Chandra Pandey (supra), should be read as obiter and the same should neither be treated as binding on the High Courts nor should they be relied upon or be made basis for bypassing the principles laid down by the Constitution Bench in Uma Devi (supra). The relevant observations, made in this regard, in Uma Devi (supra), read:

71. In State of Karnataka v. Uma Devi, the Constitution Bench again considered the question whether the State can frame scheme for regularisation 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 regularisation or absorption in the regular cadre and whether the Court can issue mandamus for regularisation or absorption of such appointee and answered the same in negative. The Court adverted to the theme of constitutionalism in a system established on the rule of law, expanded meaning given to the doctrine of equality in general and equality in the matter of employment in particular, multifaceted problems including the one relating to unwarranted fiscal burden on the public exchequer created on account of the directions given by the High Courts and this Court for regularisation 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 v. T. Thimmiah*, *Daily Rated Casual Labour v. Union of India*, *Bhagwati Prasad v. Delhi State Mineral Development Corpn.*, *Dharwad Distt. PWD Literate Daily Wage Employees Assn. v. State of Karnataka*, *State of Haryana v. Piara Singh* and *State of Punjab v. Surinder Kumar* and held: [Uma Devi (3) case, SCC pp. 39-40, paras 47-49].

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 regularizing 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.

29. From the position of law reiterated in *Dayanand (supra)*, there can be no escape from the conclusion that in the name of removing discrimination, a person, who is, otherwise, not qualified to hold a post, cannot be directed to be regularized against such a post. The contention, therefore, of the Appellants that the Respondents had, in the past, regularized the services of persons, who were qualified to hold the post to which they were appointed, does not hold any water and must be rejected.

30. We may also pause here to point out that subsequent to the decision, in *Dayanand (supra)*, the Supreme Court, in *State of Karnataka and Others Vs. Sri G.V. Chandrashekar*, , relying upon the decision in *Post Master General, Kolkata and Others Vs. Tutu Das (Dutta)*, , and *Punjab Water Supply and Sewerage Board, Hoshiarpur Vs. Ranjodh Singh and Others*, , concludes that service of an illegal appointee cannot be regularized and a slight deviation, which had occurred in *Pooran Chandra Pandey (supra)*, has been given a quietus by a three Judge

Bench in Dayanand (supra). In no uncertain words, the Supreme Court, in G.V. Chandrashekhkar (supra), held that they are bound by the observations made in Dayanand (supra) and when the initial recruitment of a person is wholly illegal and contrary to the constitutional scheme, such a person's service cannot be directed to be regularized.

31. Thus, the reference made by Mr. Bhattacharjee to the case of Pooran Chandra Pandey (supra) is wholly misplaced inasmuch as no direction for regularisation can be made in respect of a person, whose appointment is illegal and not merely irregular, nor can the Court direct regularisation of a person to a post, which the person concerned is not eligible to hold, merely because the State or its instrumentalities had, in the past, appointed to, or regularize appointment of a person to a post, which he was not qualified to hold or be appointed.

32. In yet another decision in Pinaki Chatterjee and Others Vs. Central Administrative Tribunal and Others, , the Supreme Court has held that regularisation of a person, whose initial appointment was illegal, cannot be directed to be ordered.

33. Coupled with the above, it is also noteworthy that in Harmindar Kaur and Others Vs. Union of India (UOI) and Others, , the Apex Court, having taken note of its various decisions on the aspect of working of the State to create posts, has held that creation of post is not within the domain of judicial function and that the status of permanency cannot be granted by a Court, when no such post exists and that executive functions and powers, with regard to creation of posts, cannot be ordained by the Courts.

34. As regards the case of General Manager, Oil and Natural Gas Commission, Silchar v. Oil and Natural Gas Commission Contractual Workers' Union reported in (2008) 12 SCC 275 , which too is relied upon by Mr. Bhattacharjee, suffice it to point out that this was a case, where the issue was not as regards regularisation simpliciter; rather the question was regarding the status of the employee inasmuch as the basic issue was as to whether the workmen, in question, were employees of the contractors or of the Oil and Natural Gas Commission. It is, in this perspective, that the decision, in General Manager, Oil and Natural Gas Commission, Silchar (supra), has been rendered. The decision, in General Manager, Oil and Natural Gas Commission, Silchar (supra), has, therefore, no bearing on a case of present nature. The relevant observations, which bear this conclusion, read as under:

18. There are several observations which do suggest that a workman who has put in 240 days or is a contractual worker, is not entitled automatically to regularisation. We, however, believe that the present case is not one of regularisation simpliciter such as in the case of an ad hoc or casual employee claiming this privilege. The basic issue in the present case is the status of the workmen and whether they were the employees of ONGC or the contractor and

in the event that they were employees of the former, a claim to be treated on a par with other such employees. As would be clear from the discussion a little later, this was the basic issue on which the parties went to trial, notwithstanding the confusion created by the ill worded reference. The Division Bench has examined the evidence on this aspect and has endorsed the finding of the Industrial Tribunal. We also find that the observations in R.K. Panda Case" are significant: (SCC p. 310, para 7).

7. It is true that with the passage of time and purely with a view to safeguard the interests of workers, many principal employers while renewing the contacts have been insisting that the contractor or the new contractor retains the old employees. In fact such a condition is incorporated in the contract itself. However, such a clause in the contract which is benevolently inserted in the contract to protect the continuance of the source of livelihood of the contract labour cannot by itself give rise to a right to regularisation in the employment of the principal employer. Whether the contract labourers have become the employees of the principal employer in course of time and whether the engagement and employment of labourers through a contractor is a mere camouflage and a smokescreen, as has been urged in this case, is a question of fact and has to be established by the contract labourers on the basis of the requisite material. It is not possible for the High Court or this Court, while exercising writ jurisdiction or jurisdiction under Article 136 to decide such questions, only on the basis of the affidavits. It need not be pointed out that in all such cases, the labourers are initially employed and engaged by the contractors. As such at what point of time a direct link is established between the contract labourers and the principal employer, eliminating the contractor from the scene, is a matter which has to be established on material produced before the Court. Normally, the Labour Court and the Industrial Tribunal, under the Industrial Disputes Act are the competent for a to adjudicate such disputes on the basis of the oral and documentary evidence produced before them.

35. As far as the case of Maharashtra State Road Transport Corporation and Another Vs. Casteribe Rajya P. Karmchari Sanghatana, , is concerned, it may be noted that this case arose out of an award passed by an Industrial Tribunal directing regularisation of the services of the workmen. The award was resisted on the principles of public employment, which have been noticed and clearly laid down in Uma Devi (supra). As the dispute arose out of an award passed by an Industrial Tribunal, whereby regularisation of the services of the workmen was ordered on the ground that the employer had, by omitting to regularize the services of the aggrieved employees, had been indulging in unfair labour practice, the Supreme Court declined to interfere with the award of the Tribunal. In the case at hand, there was no reference made to, and no award has been given by, any Industrial Tribunal or Labour Court. The present one is not a case, which has arisen out of any dispute under the Industrial Tribunal Act, 1947. This apart, it may also be noted that the Industrial Tribunal Act, 1947, deals with both public as well as private employment. As far as private employment is

concerned, the employer, not being a State or its instrumentality, is not, strictly speaking, bound by the Constitutional scheme of public employment; but when employment is made in an industry, which is set up, and/or run by, the State or its instrumentality, such an employment must adhere to the mandatory requirements of Article 16, for, no employment, in public domain, can be made, in the light of the decision, in *Uma Devi (supra)*, without adhering to the guarantee of equal opportunity enshrined in Article 16. As the present case does not arise out of an award given by any Industrial Tribunal or Labour Court for regularisation of the present Appellants, the case of *Casteribe Rajya Parivahan Karmachari Sangathana (supra)* has no application.

36. Because of what have been discussed and pointed out above, this Court does not find that the Appellants have been able to make out any case warranting interference with the conclusions reached in the writ petition. We, therefore, uphold the dismissal of the writ petition and, taking the view that this appeal is wholly without merit, we hereby dismiss the appeal.

37. No costs.