
(1992) 06 MP CK 0003
In the Madhya Pradesh High Court
Case No : M. P. No. 467 of 1989 (G.)

Suresh Chandra and Others	Vs	APPELLANT
State of M. P. and Others		RESPONDENT

Date of Decision : 30-06-1992

Acts Referred:

Constitution of India, 1950 — Article 309

Citation : (1993) 1 MPJR 147

Hon'ble Judges : Shacheendra Dwivedi, J; R. C. Lahoti, J

Bench : Division Bench

Advocate : H. N. Upadhyay, for the Appellant; R D Jain and Mr. Madhukar Rao, Amicus Curae, for the Respondent

Final Decision : Dismissed

Judgement

R.C. Lahoti, J.

This order shall govern the disposal of M. P. No. 2022/90 also. Let us notice the relevant facts in the two cases Facts in M. P. No. 467/89 :

A few workers, 10 in number, claiming to be daily rated employees, pray for a writ of mandamus not only restraining the respondents from terminating their services but also commanding them to regularise their services so as to absorb them in the regular service of the respondents, also to make payment of wages at the same rate which the regular employees in the department are being paid.

The averments made in the petition are not perfectly in accord with the several documents annexed with the petition and forming part thereof. To curtail the needless controversy and obviate the way for accuracy in statement of facts, they are culled and collected from the documents which are not disputed.

On different dates in the month of August, 1988, the petitioners were given appointments by the Regional Deputy Director of Harijan and Backward Classes Welfare, Gwalior and Chambal Division. Though the petitioners claim to be daily

rated workers, the contents of the orders of appointment show that they were appointed pursuant to the order dated 9-8-1988 issued by the Directorate of Harijan Development. The petitioners were appointed for performing the specified job, at the prescribed rates, on the post of Investigators. The nature of the appointment was purely temporary, liable to be terminated at any time without any previous notice. It appears that the petitioners continued to work until the month of January, 1989. On 20-3-1989, they made a demand vide Annex. P/12 complaining that salary for the month of February 1989 was not paid to them resulting in financial hardship. The Deputy Director informed the Joint Director of the grievance raised by the petitioners, seeking later's directions because the scheme of "Filling Proforma-II" for which the petitioners were engaged had been discontinued. The petitioners made a further representation on 1-4-1989, simultaneously serving a notice for demand of justice through their advocate.

The petitioners have placed reliance on two circulars orders of G. A. D. (Karmik Prashashanik Sudhar Evam Prasikshan Vibhag) issued respectively on 15-5-1987 and 13-1-1989. The substance of the circular dated 15-5-1987 (Annex. P/14) is that by virtue of Finance Department instruction powers of the departmental heads to make appointment on daily wages were withdrawn except to be exercised with the previous sanction of the State Government: the restriction being not applicable to the appointments made before 1-5-1985, that appointment made on daily wages even after 1-5-1985 should not be liable to be terminated and the period for which the appointment was made would be immaterial and that any daily wage employee terminated should be taken back in employment.

Vide Circular dated 13-1-1989, (Annex. P/15), which is to be read in continuation of the earlier circular dt 15-5-1987, it was directed that the instructions contained in the circular dated 15-5-1987 (Annex. P/14) would not apply to such daily wage employees as were not performing their job or as to which there were serious complaints.

The petitioners have contended that they were covered by the circulars Annexures P/14 and P/15 and hence not only their services could not be dispensed with (which danger they apprehended), they also deserved to be regularised and also to be paid not at the rate of Rs. 30/- per day but at the same rate at which the regular Investigators employed in the department were being paid salary in the grade of Rs. 1290-2040.

On 16-9-1989, return was filed in behalf of the respondents. It is stated therein that the petitioners were not daily wage employees and they were under a misapprehension as to facts when they claimed to be so. They were "piece-workers" engaged only for specified work at specified rates, payable pro-rate with the work done and not as daily-wage employees. The State Government had introduced a scheme for identifying Harijan localities and Harijan families inhabiting in such localities, for surveying their social and financial conditions so

as to create work-schemes. Volunteers were to be engaged for performing such survey-cum-investigation work at the rates prescribed pro-rate with the work done, vide Schedule-I of the Scheme. Schedule-I of the scheme prescribes for payment at different rates varying from 15P. per page to Rs. 2/- per 5 pages of the different types of schedules (proformas) filled up, from Rs 2/- to Rs. 2.50 per page for typing work done and the different rates, minimum Rs. 3/- and not exceeding Rs. 30/- and 35/-, for the interviews taken by such workers. The respondents also filed a statement Annex. R/2 showing the work-days for which each of the petitioners had worked and was entitled for payment (rather paid) between August, 1988 to February, 1989. The Directorate vide order dated 8-3-89 (Annex. R/3) informed all the Deputy Directors that it was not possible to carry on any further the survey work under the scheme. The respondents submit that the petitioners were not "appointed in any service" and hence there was no question of terminating their services. On the contrary, they were engaged as piece-workers under a definite scheme of the Government which having been brought to an end, it was not possible to continue the petitioners with the employment which was given to them.

On 30-3-1990, the petitioners came out with a rejoinder disputing the stand taken in the return and submitting that vide circular dated 19-2-1990 (Annex. P/18) issued by Karmik Prashashanik Sudhar Ewam Prasikshan Vibhag. It was clarified that the benefit of the earlier circulars was available not only to daily wage workers but also to contract employees. The circular dated 9-1-1990 (Annex. P/19) issued by the same department was also filed. The circular running into about five pages has the following material features;-

(i) Daily raters and ad-hoc appointees in Class III and Class IV services, in employment as on 31-12-1988 shall be absorbed by appointment on work-charged and contingency establishment;

(ii) If the daily raters and ad-hoc employees were working against such posts on work charged and contingency establishment, they would be regularised on those posts & if need be additional posts would be created;

(iii) Where work-charged and contingency establishment posts were not available, such employees would be appointed in regular establishment, if need be by creating additional posts.

(iv) The circular proceeds to lay down guidelines for implementation of the scheme. It imposes restriction on requisitioning names from the employment exchange, prescribes that to be entitled to the benefit of the circular the incumbent must be possessed of the qualifications prescribed for holding the post and if not possessed of such qualifications, shall have to wait until he acquires the qualifications. The appointments would be made only in that department and only as against the sanctioned posts and no appointment would be made by transferring employees from other departments. Vide Annex. P/20, a circular dated 30-5-1989, it is sought to be projected that 30 out of 73 posts and

45 out of additional posts of investigators were lying vacant respectively at Indore, Sagar, Hoshangabad/Bhopal and Bilaspur Divisions.

Respondents have not filed any further reply to the rejoinder.

Facts in M. P. No. 2022/90 :--

11 In M. P. No. 2022/90, the relevant facts are that the petitioner is a daily rated Field Worker in the office of Malaria Officer. He claims "regularisation", also payment of wages, equal and at par with the Field Workers regularly appointed.

It is not disputed that vide order dated 4-4-1988 (Annex. P/1) and 26-7-1988 (Annex. P/2), the petitioner was appointed as Field Worker for 89 days each, on wages as fixed by the Collector for payment as daily-wages. On 16-12-1988, vide order Annex P/3, the petitioner was appointed for a period of 60 days. Though the petitioner is continuing with his job, his prayer for claiming regularisation has not been acceded to nor his demand for payment at the same rate at which the regularly appointed employees are seeking paid has been favourably met with.

Though the petitioner claims to have rendered service intermittently, the respondents in their return have disputed this factual position. According to them, there have been several breaks in the service rendered by the petitioner. The stand taken by the respondents in their return has been disputed by the petitioner in his rejoinder stating that though he rendered service continuously, his attendance was not marked. The respondents have also disputed the applicability of the doctrine of equal pay for equal work submitting that the work of daily-wages Field Workers is less responsible and less in hours whereas the regular Field Workers are required to work more, and with more responsibility, and that is why the petitioner is being paid only at the rate sanctioned by the Collector of the district.

14 Though the petitioner has filed a rejoinder but he has not explained as to how he could be treated as rendering equal work compared with the regular employees. If the working hours of the petitioner are less than those of the regular workers, the doctrine of equal pay for equal work may not be attracted. On both these points, the facts are disputed.

The claim for regularisation of the petitioner has also been disputed on the ground that as there was no post vacant in the department nor one sanctioned by the State Government, the petitioner could not be absorbed nor than in the regular cadre.

16 The petitioner has placed reliance on the circular orders of the State Government dated 15-5-1987 and 9-1-1990 (collectively marked Annex. P/4) which orders speak only this much that the services of a daily rater shall not be dispensed with but shall be regularised.

Having summarised the relevant facts of the two petitions, we place on record a

judicially noticeable fact. There has been a rush of such petitions before this Court, specially after the pronouncement of this Court in *Brij Kishore Sharma v. State of M.P.* 1988 J.L.J. 137, the daily wage employees complaining of termination of their services, wrongful in view of several government circulars, also seeking regularisation alleging that the posts being vacant they had acquired a right to be regularised in view of the services rendered earlier by them, also complaining of discrimination in payment of wages seeking protection of the constitutional doctrine of "equal pay for equal work".

18 The following questions have arisen for determination: -

(i) Whether a person can seek employment under departmental circulars amounting to execution instructions in spite of the appointment to the post being governed by statutory rules framed either under a statute or under Art. 309 of the Constitution of India. (ii) Whether the appointments made in breach of the provisions contained in the Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959 can be protected and permitted to be regularised under the Executive instructions ?

(iii) Whether the Court is competent to grant regularisation without regard to the fact whether any vacancy exists in the department or not ?

(iv) What is the nature of the writ to be issued in such cases ?

Looking to the importance of the questions raised in the petitions and their far reaching impact on the matters of public employment, a few members of the Bar volunteered to join in addressing the Court. Of these, Shri R. D. Jain, Advocate addressed the Court formulating the points arising for decision also inviting attention of the Court to several pronouncements of the Apex Court. Shri Madhukar Rao, Advocate assisted the Court by filing a written memorandum of his submissions. We proceed to examine each of the questions arising for decision

Question No. 1 :

Let us first clear the doubts and the confusion if there be any, about the term "regularisation" because it is often used loosely as has been done by the petitioners herein who are seeking "appointment to services by regularisation" The known and recognised modes of appointment to services are (i) by direct recruitment, (ii) by promotion and (iii) by transfer. Appointment by regularisation is unknown to service jurisprudence. Of course, if there be an appointment, pre-existing irregularity, if any, in the appointment is capable of being cured by regularisation, if not impermissible otherwise. We may straightway proceed to refer to *B.N. Nagarajan and Others Vs. State of Karnataka and Others*, wherein their Lordships have observed : -

...the words "regular" or "regularisation" do not connote permanance. They are terms calculated to condone any procedural irregularities and are meant to cure only such defects as are attributable to the methodology followed in making the appointments. They cannot be construed so as to convey an idea of the nature of

tenure of the appointments.

Their Lordships reproduced the following passage from their own pronouncement in *R.N. Nanjundappa Vs. T. Thimmiah and Another*,

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.

Art 309 of the Constitution provides for recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of any State being governed and provided for by appropriate legislation, subject to the provisions of the Constitution. In the absence of such legislation, the President or his delegatee may frame rules on such subjects. The field left unoccupied by Rules or Legislation referred to in Art. 309 may well be covered by executive instructions issued in exercise of the executive power of the State conferred by Art. 162. No executive instructions or the rules made in exercise of the executive power of the State can override the rules or legislation referred to in Art. 309 of the Constitution. Reference may be made to *Baleshwar Dass and Others Vs. State of Uttar Pradesh and Others*, (paras 22 and 28). That is why in *Naniandappa's* case (*supra*) their Lordships also held that any regularisation tantamounting to appointment of a person adopted as a form of recruitment but contravening a rule under Art. 309 of the Constitution would be unacceptable.

To best illustrate the above proposition, we may take the facts of *M. P. No. 467/89* itself. Recruitment on the post of investigators in the Tribal Welfare Department is governed by M.P. Tribal Welfare Subordinate Services (Class III Non-Ministerial Recruitment) Rules, 1970. The constitution of the service includes the persons holding substantively the post in the department at the commencement of the Rules or recruited to the service in accordance with the Rules and no others. The method of recruitment is either by direct recruitment or by promotion as provided in the Rules. In both the matters qualifications for direct entry, as also for promotion, and the detailed procedures therefor are laid down. Everyone directly recruited has to remain on probation, for a period of two years. The rules do not speak of any other mode of inclusion in the service. Needless to say, any entry in service whether by way of regularisation, as claimed, or otherwise would be obnoxious and unacceptable to the Rules.

In *Brij Kishore v. State of M. P.* 1988 J.L.J. 137 heavily relied on by the learned counsel for the petitioners, no different law was laid down. Executive instructions under Art. 162 of the Constitution protected daily wage workers only

to the extent that they will not be dispensed with and if dispensed with, shall be taken back, restoring status quo ante. This Court clearly stated that no Mandamus could issue directing reinstatement with retrospective effect because termination of services of such daily wage workers could not be held to be unconstitutional. Entry back as daily raters with effect from the date of the notification, amounting to executive instruction, was allowed because such relief was consistent with the executive policy of the State. In *Bherusingh v. State of M.P. & ors.* 1987 J.L.J. 530, this Court had already stated that appointments without following the rules framed under Art. 309 of the Constitution were illegal and did not confer such appointees with any status much less to assert violation of Art. 311 of the Constitution when they were removed.

In *Dr. Ram Singh Saini Vs. Dr. H.N. Bhargava*, a case arising from Uttar Pradesh, the statutory rule required a post being re-advertised if not filled within a year from the date of nomination by the Selection Committee. The appointment was made without such re-advertisement. Their Lordships upheld the decision of the High Court striking down such appointment made contrary to the statutory rules.

In *B.S. Minhas Vs. Indian Statistical Institute and Others*, the bye-laws required vacancy being published before appointment which bye-law was breached and appointment of Director of Institute was made. Their Lordships held that mandatory provision of the bye-law having been breached, the appointment was invalid.

In *Ram Sarup Vs. State of Haryana and Others*, it was held that if the minimum qualifications required to be fulfilled by the service rules were not capable of being relaxed the appointment made in disregard thereof was not valid. However, an appointment made disregarding the requirement as to minimum experience of holding a particular post was an irregularity and was capable of being regularised on the candidate acquiring the required experience while holding that post. Once the incumbent had acquired that experience he could not then be reverted back on the ground that on the date of appointment by promotion he was not qualified for want of the minimum experience.

Virendra Nath Gupta and another Vs. Delhi Administration and others, was a case where the requirement as to possessing Master's degree in second division was made relaxable in the rules itself and that is why absence of that qualification was not considered fatal to the appointment.

Bhagwati Prasad Vs. Delhi State Mineral Development Corporation, in spite of the absence of requisite qualifications the incumbents were appointed and allowed to work for over three years. Their Lordships held that practical experience always aids the person to effectively discharge the duties and the initial minimum educational qualifications were only a factor to be reckoned with. The petitioners were all workmen performing skilled or semiskilled jobs or work of clerical nature. Their Lordship; further held that the minimum educational qualifications which were required to be seen at the initial entry in service would not come in

the way of the employees being confirmed on the respective "posts held by them as it would be hard and harsh to deny them confirmation after a considerable length of time. It was a case of several workmen serving the State Mineral Development Corporation and it does not appear if the minimum qualifications in question were provided statutorily and were mandatory or non-relaxable.

Surya Narain Yadav and Others Vs. Bihar State Electricity Board and Others, is a case of peculiar facts. The trained engineers were representing from time to time that they should be absorbed in regular employment of the Board. While getting age-barred for government employment when they were leaving the Board they were tempted to get employment and called back to the Board; in the times of strike they had faithfully served the Board under assurance of absorption; and a decision was also taken to absorb them on permanent posts, though initially on the probation of two years. Their Lordships in such circumstances, applied the doctrine of promissory estoppel, holding the Board bound by its assurances and hence directed the appointment of the petitioners to be regularised.

J.C. Yadav and others Vs. State of Haryana and others, was a case of promotion which was irregular because of nonfulfilment of experience qualification by rendering acquired length of service in the junior grade. During the pendency of the writ petition, the promotees completed the required service length. Their Lordships held that the irregular services stood regularised thereby.

In Rattanlal v. State of Haryana AIR 3987 SC 478 their Lordships condemned the practice of appointing ad-hoc teachers for short periods during every year but only directed vacant posts to be filled by making regular appointments, affording the ad-hoc teachers also an opportunity of seeking such appointments.

The D. B. decision of Allahabad High Court in Lata Ram Katiyar v. State of M. P. (1986) (I) SLR 105, is a case of statutory rules providing for regularisation. Still it was held that employees not possessing the requisite qualifications and whose record of services was not satisfactory, were not entitled to be regularised.

In Gendaram v. M. C. D. and others (1988) (1) SLR 32, their Lordships issued directions for regularisation of clerical Beldar who were working against the sanctioned posts on regular basis for the entire year but there was no question of qualifications laid down by any statutory rules to the contrary having been brought before their Lordships.

I. P. Yadav v. Union of India (1985) (2) SLR 248, is a case where the Railway Ministry had itself formulated scheme to treat casual labour in temporary services but the test as to qualifying date was arbitrarily provided.

R. K. Rama Rao v. State of A. P. (1987) (5) SLR (137); is a case of undertaking as to absorption given by the State Government before the Court being violated.

None of the cases cited by learned counsel for petitioners bears any resemblance with facts of the cases at hand or relevance to the question of law relevant for the disposal of the present petitions.

In Jacob M. Puthuparambil and others Vs. Kerala Water Authority and others, the question of regularisation of such employees who were serving on the establishment for long spells came up for consideration. Their Lordships did not overlook the weighty consideration of the test of requisite qualifications being satisfied by such employees before they could be regularised. Their Lordships directed the employees serving the establishment for long spells and having the requisite qualifications for the job not to be thrown out but to be regularised as far as possible.

No case has been brought to our notice where in the Apex Court might have taken the view that in spite of the petitioners lacking in essential mandatory minimum eligibility qualifications, statutorily provided or provided by rules, they should be regularised or appointed permanently in the services.

Right of employment is not yet a fundamental right guaranteed by the Constitution. Problem of unemployment is spreading like an epidemic and in spite of tremendous increase in the employment opportunities, the problem is still defying solution for two reasons—firstly, phenomenal increase in population and secondly, lack of essentially so qualified, capable and efficient workers as to get recognition. Adhocism and providing intermittent periodical appointments have met with severe criticism and condemnation in judicial pronouncements on numberless occasions from the Apex Court as also from this Court. However, no Court has ventured in laying down law which goes to the extent of holding that merely on account of having rendered service for a length of time, the incumbent would earn the right to absorption or regularisation (as suggested), without regard to other relevant considerations.

It is not difficult to comprehend the dangers with which the plea for such implicit absorption/regularisation is associated. Ad-hoc, casual or daily raters' appointments are not subjected to any scrutiny much less a selection process care and caution. There is no attempt made at choosing the best. The idea working in the mind of the employer while giving such employment is; after all it is a matter of a few days or a few months merely. It is common knowledge that many an employees, working in such type of vacancies, were accommodated just to oblige some one for sometime. If such persons were to be conferred with a right to secure permanency just by a stroke of pen, it will open flood gates for backdoor entries and vacancies being filled up overnight by not-so-efficient and not-so-deserving incumbents though much deserving and efficient alternative hands were available. After all why the public sector alone should suffer and be a place of refuge for third-graders and eliminated ones.

To sum up, the State Govt. cannot in exercise of its executive power issue rules, instructions, directions or circulars, providing for recruitment (entry in service) whether by way of regularisation or absorption (by whatever name called) or otherwise, if there are statutory rules or rules framed under Art. 309 of the constitution governing the field; and even if there be such executive instructions/rules issued, they cannot enable any claim in law or equity being successfully

canvassed in a Court of law in face of the Rules under Art. 309 holding the field. To crystalize

(i) The State Government cannot in exercise of its executive fiat open a channel for entry in public services by issuing instructions or rules providing for regularisation of the ad-hoc/contingency paid/ contractual or other irregularly appointed employees when there are rules or legislation covering the field;

(ii) Executive instructions issued, if conflicting with the Rules under Art. 309 or the Legislation do not confer the employees with any right to absorption or regularisation in the services;

(iii) An absorption or regularisation in the services is permissible;

(a) If the appointment though regular in all other respects, yet was made by such persons as were wanting in minimum eligibility qualifications but have with the lapse of time acquired such qualifications and it would be inequitable or an exercise in futility to terminate the appointment solely on account of lack of qualifications on the date of appointment.

(b) When considerable length of time has lapsed from the date of appointment and/or there are circumstances attracting applicability to the doctrine of promissory estoppel against the employer department so as to estop it from terminating the employment and rather compel it to regularise the appointments.

(c) The appointment was accompanied by such irregularities as are capable of being cured by relaxation of the provisions violated and circumstances exist which render such relaxation being presumed or directed to be made.

Question No. 2--

It is well settled with the pronouncement of the Apex Court in Union of India (UOI) and Others Vs. N. Hargopal and Others, that Employment Exchange Compulsory Notification of Vacancies) Act, 1959 is applicable to Govt. establishments as well. Their Lordships have also laid down in the same case-

The object of the Act is not to restrict, but to enlarge the field of choice so that the employer may choose the best and the most efficient and to provide an opportunity to the worker to have his claim for appointment considered without the worker having to knock at every door for employment. Therefore, the Act does not oblige any employer to employ those persons only who have been sponsored by the employment exchanges.

It is clear that it is the desire of the Government of India that all Government Departments, Government Organisations and statutory bodies should adhere to the rule that not merely vacancies should be notified to the employment exchanges, but the vacancies should also be filled by candidates sponsored by the Employment Exchanges. It was only when no suitable candidates were available, then other sources of recruitment were to be considered.

In short, while making recruitment to the services, it is mandatory to notify the vacancies to the Employment Exchanges but it is not necessary that the appointments must be made out of the names forwarded by the employment exchange (see-- Vijay Kumar v. Director V. S. 1986 2 MPWN 249 unless there be a rule or instruction to the contrary, binding on the Government Department, making it mandatory to do so.

Question No. 3--

To be entitled to an appointment, there must be a post available. In *Catering Cleaners of Southern Railways Vs. Chief Commercial Supdt., Southern Railway*, their Lordships observed-

The question of making a particular employee permanent will arise only after a permanent post has become available.

In *Bhagwan Dass and Others Vs. State of Haryana and Others*, there were supervisors in the education department appointed under an Adult Education Scheme. Their Lordships turned down their prayer to absorb them as regular employees on a permanent basis as having "no justification." The petitioners therein were appointed in the context of scheme, transient and temporary in the very nature of things, and once the objective of scheme was accomplished, the need for adult education would diminish progressively and ultimately cease.

It is well settled that a casual labourer is not holder of a post. Such posts can be created and abolished depending on the administrative exigencies. In the *State of Assam v. Kanak Chandra Dutt* AIR 1967 SC 184 their Lordships held--

"In the context of Articles 309, 310 and 311, a post denotes an office. A person who holds a civil post under a State holds "office" during the pleasure of the Governor of the State, except as expressly provided by the Constitution, See Art. 310. A post under the State is an office or a position to which duties in connection with the affairs of the State are attached, an office or a position to which a person is appointed and which may exist apart from and independently of the holder of the post. Article 310 (2) contemplates that a post may be abolished and a person holding a post may be required to vacate the post, and it emphasises the idea of a post existing apart from the holder of the post. A post may be created before the appointment or simultaneously with it. A post is an employment, but every employment is not a post. A casual labourer is not the holder of a post. A post under the State means a post under the administrative control of the State. The State may create or abolish the post and may regulate the candidates of service of persons appointed to the post".

(Inverted commas by us)

When there is no job left to be performed and the regular staff is enough to satisfy the regular requirements of the department, forced entry of workers in the department in the name of regularisation, by compelling retention of such workers as were brought in casually to fulfil casual needs of the department is

sure to bring inefficiency and demoralisation in the public services for there would be a number of persons being paid without any work being taken from them Surplus staff is sure to be counter productive in the department spoiling the work-culture, also entailing heavily on the public exchequer. No doubt, employees in the public sector must have security of tenure and the feeling of safety by permanence in employment but at the same time in the larger interest of society, weighty considerations on the other side cannot just be blinked at.

Casual and contingency employment such as under scheme do provide employment and warning to the needy, may be for short duration. If service jurisprudence is so developed as would completely prevent the employer from getting rid of the casual workers in spite of the expiry of the casual work then the employer would be compelled not to provide even casual and temporary employment, a policy trend which has already set in. This would be detrimental to the interest of both, the employers and the employees. Far from contributing to welfare of unemployed it would boomerang at that.

We drop the curtain on the controversy touching this issue by noticing the law recently laid down by the Apex Court in *Delhi Development Horticulture Employees' Union Vs. Delhi Administration, Delhi and others*, The petitioners therein were given employment under certain schemes. However, on the discontinuation of the scheme there were no posts available or sanctioned, and administratively and financially. The employees under the schemes were dispensed with on the limited object of the scheme having been fulfilled. Their Lordships held that no fault could be found therewith. Their Lordships further held : -

"This country has so far not found it feasible to incorporate the right to livelihood as a fundamental right in the Constitution. This is because the country has so far not attained the capacity to guarantee it, and not because it considers it any the less fundamental to life. Advisedly, therefore, it has been placed in the Chapter on Directive Principles Art. 41 of which enjoins upon the State to make effective provision for securing the same "with in the limits of its economic capacity and development." Thus, even while giving the direction to the State to ensure the right to work, the Constitution-makers thought it prudent not to do so without qualifying it"

"Those employed under the scheme, therefore, could not ask for more than what the scheme "intended to give them To get an employment under such scheme and to claim on the basis of the said employment, a right to regularisation is to frustrate the scheme itself. No Court can be a party to such exercise. It is wrong to approach the problem of those employed under such scheme with a view to providing them with full employment and guaranteeing equal pay for equal work. These concepts in the context of such schemes are but unwarranted and misplaced. They will do more harm than good by depriving the many of the little income that they may get to keep them from starvation They would benefit a few at the cost of the many starving poor for whom the schemes are meant. That

would also force the State to wind up the existing schemes and forbid them from introducing the new ones, for want of resources "

"Ultimately it is the people who bear the heavy burden of the surplus labour. The other equally injurious effect of indiscriminate regularisation has been that many of the agencies have stopped undertaking casual or temporary works though they are urgent and essential works that if those who are employed on such works are required to be continued for 240 or more days have to be absorbed as regular employees although the works are time bound and there is no need of the workmen beyond the completion of the works undertaken. The public interests are thus jeopardised on both counts "

(Inverted commas by us)

There can be no regularisation if there are no vacancies. Question No. 4 :--

Wherever it has been found that the employee/petitioner had stood regularised or absorbed in service, the status of the employee having been recognised and declared by the Court, impugned action to the contrary has been struck down (see J.C. Yadav and others Vs. State of Haryana and others, and Ram Sarup Vs. State of Haryana and Others,

In Rattan Lal and Others Vs. State of Haryana and Others, their Lordships directed that if any of the petitioners under the existing rules had acquired the rights to be considered as regularly appointed teacher, his case shall be considered by the State Government and an appropriate order passed. In Bherusingh's case (supra) a Division Bench of this Court, on an undertaking of the Dy. Advocate General, directed such of the ad-hoc teachers so appointed earlier to be interviewed by the statutory Selection Committee and only those, who would be found fit to be appointed, to become regular appointees. Thus the nature of writ to be issued shall depend on the facts and circumstances of each case.

Question as to equal pay for equal work --

In Grih Kalyan Kendra Workers' Union Vs. Union of India and others, their Lordships have held that for the purpose of applying the principle of "equal pay for equal work" similarity by mathematical formula was not to be found out, but there must be a reasonable similarity in--(1) the matter of work, (2) the performance of duties, (3), the qualifications and (4) the quality of work performed by the two classes. Their Lordships have held that it was permissible to have classification in services based on (1) hierarchy of posts, (2) pay-scales, (3) value of work and (4) responsibility and experience.

In Mew Ram Kanojia Vs. All India Institute of Medical Sciences and Others, their Lordships have held :--

The doctrine of "Equal pay for equal work" is not expressly declared a fundamental right under the Constitution But Art. 39 (d) read with Arts. 14 and

16 of the Constitution declares the constitutional goal enjoining the State not to deny any person equality before law in matters relating to employment including the scales of pay Art. 39 (d) read with Arts. 14 and 16 or the Constitution enjoins the State that where all things are equal and person holding identical posts, performing identical and similar duties under the same employer should not be treated differently in the matter of their pay. "The doctrine of "Equal pay for equal work" is not abstract one, it is open to the State to prescribe different scales of pay for different posts having regard to educational qualifications, duties and responsibilities of the post. The principle of "Equal pay for Equal work" is applicable when employees "holding the same rank perform similar functions" and discharge similar duties and responsibilities are treated differently." The application of doctrine would arise where employees "are equal in every respect" but they are denied equality in matters relating to the scale of pay. While considering the question of application of principle of "Equal pay for Equal work" it has to be borne in mind that it is open to the State to classify employees on the basis of "qualifications, duties and responsibilities of the posts" concerned. If the classification has reasonable nexus with the objective sought to be achieved, efficiency in administration, the State would be justified in prescribing different pay scale but if the classification does not stand the test of reasonable nexus and the classification is founded on unreal, and unreasonable basis it would be violative of Arts. 14 and 16 of the Constitution

(Inverted commas by us)

In C.R. Seshan and Another Vs. State of Maharashtra and Others, their Lordships have approved difference in pay-scales being maintained on the basis of seniority-cum-merit though the two perform similar duties and functions.

In V. Markendeya and Others Vs. State of Andhra Pradesh and Others, their Lordships have held that it is for the aggrieved employee to demonstrate discrimination practised by State in prescribing two different scales for two classes of employees, for principle of equal pay for equal work cannot be enforced by Court in abstract

Now we revert back to the facts of cases before us.

In M. P. No, 467/89, Suresh Chand and others are contract employees under a scheme temporary and transient in nature, which has exhausted itself, leaving out no vacancies against which the petitioners' case might be considered for regularisation. There is no similarity in the matter of nature of work, performance of duties, the responsibility and experience of the petitioners with the regular investigators in the department. The averments in the petition do not make out any case of similarity in the matter of the qualifications of the petitioners and of regular appointees in the department as also in the matter of quality of the work performed by the classes. The petitioners have utterly failed in satisfying the test of similarity so as to be entitled to equal pay with regular incumbent in the department.

So is the case with the petitioners in M. P. No. 2022/90 On the material available, we are not satisfied that there are posts-vacant and sanctioned-available in the department, against which the petitioners' claim for being accommodated could be considered legitimately So also they have utterly failed in satisfying the tests laid down by the Apex Court for attracting the applicability of "equal pay for equal work" doctrine. Certainly the job assigned to the petitioner is lesser in responsibility as also in working hours. The petitioner who is a daily rater does not allege that his service has been dispensed with or is going to be dispensed with so as to attract applicability of Brijkishore's case (supra). He has claimed only twin reliefs regularisation and equal pay with regular incumbents

We have held the petitioners in both the petitions not entitled to any relief in exercise of our writ jurisdiction. Before parting, we would like to make a few observations attracting the attention of the State Government. Several circular orders issued by the General Administration Department (Vetan Ayog Prakoshtha and Karmik Prashashnik Sudhar Ewam Prashikshan Vibhag (Vetan Ayog Prakostha) and relied on by the petitioners in these petitions appear to be orders issued in haste and do not lay down any well defined policies preceded by a really deep policy-making thought. To some extent these circulars, general in nature, and intended to apply to all the departments of the State Government, conflict with statutory rules and the rules framed under Art. 309 of the Constitution governing several departments of the State where such rules exist. These circulars have far from giving relief to their subjects have proved to be a source of litigation. The hopes conceived out of the circulars, but denied by the Government departmental heads, force the poor employees and workers to indulge in writ litigation. In several cases, we have noticed the high officials in serious predicament who feel themselves bound by the circulars but at the same time feel helpless in implementing the circulars for want of vacancies, availability of budget funds, administrative and financial sanctions which would only enable workers claiming benefit of the circulars being accommodated Depending on the pleadings and the material before the Court, the fortunate petitioners do get the expected relief in the shape of writ issued by this Court and in most of such cases the departmental heads have to face contempt proceedings because if they accommodate such workers they do not have posts against which to take work and funds out of which to make the payments. It is high time that the State Government should give a serious thought to the several circulars, reconsider and revise them and lay down a well considered policy so that litigation is avoided and if any hopes are held out they are real and capable of materialising Before the casual, daily rated, and contract workers are held out with any hopes, the State Government must collect the statistics as to such workers and open avenue of employment, create the posts, followed by the administrative and financial sanctions, in the absence whereof, the criticism is justified that such circulars are issued merely to gain popularity without meaning any real relief to the subjects.

In an establishment governed by statutory rules, it common knowledge that,

temporary government servants have to wait for years to be permanent, probationers selected through rigorous process of selection, amidst, tough competition, have to wait usually for two years to be confirmed. In such a state, directing "regularisation" of casual workers and daily raters by stroke of pen, simply by reference to a date of appointment, without subjecting their individual cases to any test or scrutiny itself smacks of arbitrariness. The circulars dt. 15-5-87 and 13-1-89 (Annexure P/14 and P/15 in M. P. No. 467/89) speak of regularising all incumbents recruited before 1-5-85 or thereafter that is, even a day before Casual labourers and daily raters serving for years and those having served only for a day or a few days are all treated alike. There is no scheme provided for giving weightage to length of emplotment. Unequals are treated equals. There is no scheme or procedure provided for scrutinising cases of individuals and testing their suitability for the jobs against which they are to be regularised. They appear to have been assigned a better footing than the probationers and temporary employees already serving the departments. To say the least, such circulars are prima facie violative of Arts. 14 and 16 of Constitution.

With the abovesaid observations, both the petitions are dismissed, though without any order as to costs. We place on record our appreciation of the valuable assistance rendered by Shri R. D. Jain, Advocate appearing amicus curiae, as also the learned counsel representing the parties.

Copies of this order shall be communicated to Secretary. G. A. D., Govt. of M. P. with reference to observations made in paras 59 and 60 above.