

(2004) 08 AHC CK 0323

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 29435 of 1990

Udai Pratan Singh

APPELLANT

Vs

Adhyaksh Nagar Palika and Executive Officer, Nagar Palika

RESPONDENT

Date of Decision : 02-08-2004

Acts Referred:

Constitution of India, 1950 — Article 12, 136, 14, 142, 16
Uttar Pradesh Industrial Disputes Act, 1947 — Section 10, 2, 2(8), 25F, 25J
Uttar Pradesh Regularisation of Ad hoc Appointments (On Posts Within the Purview of the Public Service Commission) Rules, 1979 — Rule 4

Citation : (2004) 08 AHC CK 0323

Hon'ble Judges : R.B. Misra, J

Bench : Single Bench

Advocate : H.S.N. Tripathi, R.M. Singh, Ravindra Rai and S.K. Pandey, for the Appellant; M.L. Srivastava and S.C., for the Respondent

Final Decision : Dismissed

Judgement

R.B. Misra, J.

Heard Sri H.S.N Tripathi learned Counsel for the petitioner and Sri M.L. Srivastava learned Counsel for the respondents.

1. In this petition prayer has been made for quashing the order dated 25.8.1990 (Annexure- 3 to the writ petition) passed by Adhyaksh Nagar Palika, Mahrajganj dismissing the deployment of petitioner as daily wager on disciplinary ground with immediate effect.

2. According to the petitioner he was deployed as a Chungi Muharrir from 5.12.1988 and has continued upto 25.8.1990, on 25.8.1990 he was given experience certificate, however it was on the same day that the petitioner's service was dismissed without any show cause notice, without any rhyme or reason or without affording opportunity of hearing and without complying the provisions of Section 6N of the U.P. Industrial Disputes Act the said order had

imposed stigma on the petitioner.

3. According to the petitioner when he filed the present writ petition he got stay by the order dated 12.11.1990 of this Court and by virtue of this stay he is working and getting salary, however these aspects are being specifically denied by the learned Counsel for the respondents stating that from 30th April, 1990 he is not in deployment, however the petitioner's assertion though denied by the respondents According to the petitioner more-so after completing 240 days in service in the preceding calendar year and by virtue of his continuance in service for long time and by virtue of provisions of Uttar Pradesh Procedure for Direct Recruitment for Group "C" Posts (out side the purview of Uttar Pradesh Public Service Commission) Rules, 1998 (in short called "Rules 1998" hereinafter) the petitioner was deemed to have been regularized, therefore, being regular employee the order dated 25.8.1990 could not have been passed. Mr. Tripathi has contended that in the dismissal order it has not been mentioned that the petitioner is a daily wager.

4. It has been submitted that writ petition and the prayer therein have not been amended and no prayer has been made in respect of regularisation. Counter affidavit has been filed indicating that the petitioner's deployment was purely on daily wager basis and he was deployed for exigency of work and when the work was not available he was not recruited. The deployment of the daily wager commences in the morning and came to an end in the evening as contractual deployment was in the need of work, since the daily wagers have no right to the post, they have no protection of Article 311 of the Constitution as the same is made by back door entry. Non-renewal of contractual deployment is not illegal or retrenchment in view of Escorts Limited v. Presiding Officer, (1997) 11 SCC 521 , therefore, assessing the performance of the petitioner the deployment of petitioner was not renewed and was dispensed with on 25.8.1990. The experience certificate was never issued and the forge and fictitious documents cannot strengthen the case of the petitioner

5. On the other hand learned Counsel for the petitioner has placed reliance on the following judgments:

(i) In 2001 (3) E.S.C. 943 Birbal Sharma v. Chief Medical Officer and Ors. where the termination without affording opportunity of hearing of temporary Assistant Lab Technician at Primary Health Centre was held to be illegal. The case of Birbal Sharma was different as he was a temporary employee.

(ii) In Karnataka State Private College Stop-Gap Lecturers Association Vs. State of Karnataka and Others, where the Supreme Court has observed that the persons deployed on ad-hoc basis were not allowed to continue on ad-hoc basis for being considered for regularization, however this case shall not protect the petitioner,

(iii) In Santosh Kumar Mishra Vs. State of U.P. and Others, which is in respect of giving benefit of appointment on compassionate ground under Dying in Harness

Rules, 1974, by virtue of the person who had continued for several years and despite the rules of regularization available the person could not be regularized and had died in harness during deployment as daily wager. In those circumstances, Sri Santosh Kumar Mishra, writ petitioner: was directed to be considered for appointment on compassionate ground treating his lather deemed to have been regularized. In my respectful consideration the facts of above case were different and could not applicable to the petitioner as the daily wager has not right to the post.

(iv) Learned Counsel for the petitioner Sri Tripathi has also placed reliance on judgement passed on 15.9.1999 by this Court (D.B.) in Special Appeal No. 922 of 1999 Bimal Chand Pandey v. Engineer in Chief, P.W.D., Lucknow and Ors. which too has no relevance as the writ petitioner after having served several years was entitled to be regularized and for equal pay or equal work this case is not covered to the case of the petitioner.

(v) In (1993) 1 UPLBEC 714, Govind Singh v. Presiding Officer, Labour Court, Agra and Ors. the petitioner retrenchment after having served several years was held not to be justified in respect of the U.P. Industrial Dispute Act and in view of Section 25F of Industrial Dispute Act however the facts of above case also cannot be made applicable to the present case. If the petitioner is taking protection of the provisions of Industrial Dispute Act then it was necessary to approach to the Industrial Tribunal or Labour Court, otherwise also daily wagers have no right of protection u/s 25F of Industrial Dispute Act.

(vi) In 2002 (1) E.S.C. 69, Satish Kumar Shukla v. Union of India and Ors. the writ petitioner working as Constable in Railway Protection Force was found to have suppressed information for getting the employment, his termination was found not to be justified on the ground that Sri Satish Kumar Shukla, writ petitioner in above case was recruited on the suppressed information and had no right to the post after being appointed, the petitioner being daily wager, too has no right to the post and therefore, this judgment has no relevance.

(vii) In Raj Pal Vs. State, the appointment of the writ petitioner was said not to be retrenched without provisions of Section 2(8) and Section 6-N of U.P. Industrial Disputes Act, 1947 while on deployment in Rajya Krishi Utpadan Mandi Parishad. In the case of Brijesh Kumar Srivastava specific pleadings were made and were tested in respect of applicability of 6-N of U.P. Industrial Disputes Act. In the facts and circumstances above judgement was passed in the year 1992 by Single Judge of this Court whereas, the said judgment is per incur am, has not considered large number of decisions on the issue.

(viii) In 2002 (1) H.C.L.B. 486, Shashi Bala Sinha and Ors. v. State of U.P. and Ors. the petitioner having worked for more than three years was relieved without given any opportunity of hearing, the termination was held against the principle of natural justice. The facts and circumstances of the case of Shashi Bala Sinha were different as in those cases the juniors were regularized and the writ

petitioner's service was dismissed on the ground of mis-conduct, therefore, the termination was held to be unjustified. Here the petitioner's deployment and service was dismissed as a daily wager. In these circumstances, above judgment does not help the petitioner.

6. To strengthen the cause on behalf of petitioner following submissions have also been made:

(a) The main contention of the learned Counsel for the petitioner is that when the petitioner had been engaged for such a long period and had been working for more than 240 days in each calendar year, then the respondents must regularize his services and that he should not be thrown on roads. In support, he has placed reliance upon Central Welfare Board and Others Vs. Anjali Bepari (Ms) and Others, and Gujarat Agricultural University Vs. Rathod Labhu Bechar and Others,

(b) The learned Counsel, therefore, contended that the policy decision adopted by the respondents is unconscionable in nature and the petitioners had to accept the said appointments, as they have no power to bargaining. It was submitted that appointment having been made according to the prevailing norms and service of the petitioner is entitled to be regularised and the petitioner is entitled to the same scale of pay, which were being paid to the permanent employees.

(c) It has been contended on behalf of petitioner that for sake of argument if treating the petitioner as daily wager since the petitioner was deployed as such irrespective of the fact where there was any vacancy, but his continuous deployment should be reckoned with merits consideration that there is regular need for his service and he is being made to work on daily wage basis with the specific purpose and he is performing duties qua the regular employees and by virtue of the continuous deployment irrespective of the fact whether he is having minimum eligibility criteria and qualification and he is entitled for regularization and for equal pay and equal salary qua regular employees in the Government department.

(d) To strengthen the submission of the cause learned Counsel for the petitioner has placed reliance on the judgment of the Supreme Court in State of Haryana and others Vs. Piara Singh and others etc. etc., ; Khagesh Kumar and others Vs. Inspector General of Registration and others, and State of U.P. and Ors. v. Putti Lal (1988) 1 UPLBEC 313 . Learned Counsel for the petitioner has submitted that in view of the observations made by the .Supreme Court in Khagesh Kumar (supra), the petitioner is entitled to be considered for regularization under the "Rules 1998" Learned Counsel for petitioner pressed for regularizanon especially on the decision of the Supreme Court in the case of The Dharwad Distt. P.W.D. Literate Daily Wages Employees Association and others, etc. Vs. State of Karnataka and others etc., and the decision of this Court in the case of State of U.P. v. Putti Lal (supra).

(e) The learned Counsel in support of the aforementioned contentions has relied upon the decision of Surinder Singh and Another Vs. Engineer-in-chief, C.P.W.D.

and Others, , Sushil Kumar Yadunath Jha Vs. Union of India (UOI) and Others, Jacob M. Puthuparambil and others Vs. Kerala Water Authority and others, and Karnataka State Private College Stop-Gap Lecturers Association Vs. State of Karnataka and Others, as well as the decision of A.K. Jain v. Union of India 2 S.C. Service Law Journal 203 (Sic) and Raj binder v. State of Punjab and Ors. 2 S.C.L J 521 .

(f) The references were made on behalf of the petitioner on Daily Rated Casual Labour Employed under P and T Department Vs. Union of India (UOI) and Others, ; Bhagwati Prasad Vs. Delhi State Mineral Development Corporation, Bharat Petroleum (erstwhile Burmah Shell) Management Staff Pensioners and others Vs. Bharat Petroleum Corporation Ltd. and others, Dhirendra Chamoli and Another Vs. State of U.P., .

(g) Learned Counsel for the petitioner has claimed petitioner's regularisation on the strength of judgement of this Court (Hon"ble Om Prakash, J.) in (1991) 1 UPLBEC 401 (Tejpal and Ors. v. Director of Education and Ors.), where this Court has observed that regularisation is imperative under Constitutional philosophy when the daily wagers have put in deployment for several years, however, the decision of this Court in Tejpal (supra) can not be a binding precedence in view of large number of subsequent decisions of this Court and Supreme Court.

(h) In view of three Judges" Bench decision of the Supreme Court in Bhagwati Prasad Vs. Delhi State Mineral Development Corporation, the learned Counsel for the petitioner has submitted that the writ petitioner was having relevant educational qualification and had served for long period, could be considered for regularization.

(i) The petitioner has claimed regularisation on the strength of a judgement of this Court (Hon"ble D.K. Seth, J.) in [1998 (78) FLR 100] (Ram Sundar Yadav and Anr. v. The Regional Sports Officer, Sports Stadium, Meerut and Ors.) where the writ petitioner after having worked about 7-8 years in the sports stadium were directed for being considered for regularisation following the decision of Bhullar Nath Yadav and Ors. v. Mayo Hall Sports Complex Allahabad and Ors. [1990 (61) FLR 68]. The facts of Ram Sundar Yadav (supra) are different and distinguishable and the decision is in per encurium as the same is not taking upto date decision of the Supreme Court on the subject of regularisation while passing above judgement.

(j). In Gujarat Agricultural University Vs. Rathod Labhu Bechar and Others, the Supreme Court observed that daily rated labourers engaged dehors the rules as plumbers, carpenters, sweepers, pump operators, helpers and masons by fully State-aided University were allowed to continue as such for a long period of 10 years, therefore, non-regularising the services of such daily wagers by university was held as an unfair labour practice and the daily rated labourers were indicated to be considered for absorption against existing vacant posts in accordance with the rules and if necessary by relaxing qualification and creating necessary

number of posts. (7) The Supreme Court in *Rattan Singh v. Union of India*, (1997) 11 SCC 396 has held that the service of a daily rated workman, who had continuously served for the requisite statutory minimum period in a year, cannot be terminated without complying the requirement of Section 25F of the Industrial Disputes Act and a lump sum amount of Rs. 25,000/- was directed to be paid to the workman in lieu of reinstatement of back-wages.

8. In *Hindustan Machine Tools and Others Vs. M. Rangareddy and Others*, the Supreme Court following the decisions of *Piara Singh (supra)*; *Raj Narain Prasad and Others Vs. State of U.P. and Others*, and *Niadar and Anr. v. Delhi Administration and Anr.*, (1992) 4 SCC 112, where the casual labourers deployed (3 to 10 years) in such multi unit public sector undertaking of Central Government claiming regularisation while undertaking was facing great financial difficulties, the direction of the High Court to prepare an absorption scheme to such undertaking in the light of the provisions of 38(1), 39(e) and 43 of Constitution was not interfered with, however, the liberty was granted to such undertaking, while framing the scheme, to assess the requirement of regular work force and necessity to alleviate the suffering of such workers and then to fix the strength of force to enable the workers to get the benefit of regularization within a reasonable time and only those, who were fulfilling the conditions of eligibility with relaxation of age in prevailing rules, were directed to be considered for regularization.

9. In addition to what has been stated in the counter affidavit learned Counsel for the respondents has invited attention of this Court on the different decisions of this Court (Single Judge) and (Division Bench) as well as of the Supreme Court passed on the issue of regularization from time to time as under:

(i) Non-renewal of contractual employment and dispensation of engagement at any stage without any reason in terms of appointment does not amount to retrenchment u/s 2(oo) of Industrial Disputes Act as held by the Supreme Court in *Escorts Limited v. Presiding Officer*, (1997) 11 SCC 521 while following an earlier decision of Supreme Court in *M. Venugopal Vs. The Divisional Manager, Life Insurance Corporation of India, Machilipatnam, Andhra Pradesh and another*, . Later on it was considered and followed when similar view was taken by the Supreme Court in *State of Rajasthan and others Vs. Rameshwar Lal Gahlot*, , where termination of appointment after expiry of specified period held valid and not attracting Section 25F of Industrial Disputes Act, 1947 unless the termination was found to be malafide or in colourable exercise of powers. Similar view was also taken by the Supreme Court in *Executive Engineer v. Madhukar Purshottam Kolharkar*, (2000) 2 LLJ 1410SC

(ii) Undisputedly, the petitioner was a daily wager. The daily wagers have no right to the post in view of *Himanshu Kumar Vidyarthi and Others Vs. State of Bihar and Others*, and *Sheo Pujan Vs. Deputy Director of Consolidation and Others*, because appointment of daily wagers are made by not complying or observing the procedural formalities in consonance to any rules, regulations or by

observing the procedures prescribed for the recruitment. The engagement of daily wagger commences in the morning and conies to an end in the evening of every day. There is a contractual deployment for every day. It is upto the employer to allow to continue the employment or disengage the daily wagger at any time in absence of work. The daily wagger has no right or protection under Article 311 of the Constitution of India. State of Assam and Others Vs. Shri Kanak Chandra Dutta, ; 1998 LabIC 1088 para 16 (Jagdev v. State of U.P.) and [1999 (82) FLR 76] para 8 & 10 (Channey Lal v. Director Malaria Research Centre, New Delhi).

(iii) The daily wagers" engaged without any written appointment order could be terminated without any written order also in view of Magarsen v. State of U.P. and Ors. 2002 (2) AWC 1712.

(iv) The daily wagers muster roll employees can not be regularised unless the posts are in existence or the vacancies are available To entertain the claim for regularisation means to provide appointment to a post after regularising the service of an employee. The position of daily wagger is entirely different inasmuch the daily wagger holds no post in view of AIR 2003 SC 3382 (State of Haryana and Anr. v. Tilak Raj and Ors.); Madhyamik Siksha Parishad, U.P. Vs. Anil Kumar Mishra and others etc., ; 1996 (9) SCC 34 (State of U.P. v. U.P. Madhyamik Shiksha Parishad Shramik Scinch and Ors.) (para 3 and 4); as well as State of Orissa v. Dipti Malapatr .

10. The law on the issue of regularisation of daily wagers as settled by the Supreme Court as well as High Courts in catena of decisions from time to time are necessary to be analysed hereinafter.

11. Unfortunately, however, in none of the aforementioned cases, the Supreme Court considered its earlier binding precedents on the question of manner of regularisation, that is, State of Mysore and Another Vs. S.V. Narayanappa, and R.N. Nanjudappa Vs. T. Thimmiah and Another, . The aforementioned judgments of the Supreme Court were followed by a three Judges Bench of the Supreme Court in B.N. Nagarajan and Others Vs. State of Karnataka and Others, .

12. In R. N. Nanjudappa (supra), the Supreme Court held that if an appointment is made in infraction of the rules or if it is in violation of the provisions of the Constitution, such appointments being illegal, the same cannot be regularised. It was further held that 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. It held-- "Regularisation cannot be said to be a mode of recruitment. To accede to such a proposition would be to introduce a new head appointment in defiance of rules or it may have the effect of setting at naught the rules." The Supreme Court in that case negatived the contention that regularisation In employment is possible by taking recourse of Article 162 of the Constitution of India in the following words. :-

In the present case, the contention on behalf of the respondents that the regularisation was itself a mode of appointment under Article 162 of the Constitution is unsound. The Rules came into existence in the present case in 1964. The regularisation was made in the year 1967. The regularisation was made with effect from 1958. Therefore, the Rules became applicable. The regularisation in the present case was also bad because even without specific methods of requirement appointments could be made only by selection or promotion or transfer from equivalent grade. The method of recruitment and qualification for each State Civil Service was to be set forth in the rules of recruitment of such service specially made in that behalf.

13. The Supreme Court held that Article 162 does not confer power to regularise nor does it confer power on the Government to make rules for recruitment or conditions of service. It was further held: --

All that the Public Service Commission did was to regularise the appointment to the post of the Principal. The regularisation by the State of the appointment is with effect from 1958. This regularisation is bad for the following reasons. First, regularisation is not itself a mode of appointment. Secondly, the modes of appointments are direct recruitment or selection or promotion or appointing for reasons to be recorded in writing an officer holding a post of an equivalent grade by transfer from any other service of the State.

14. In *B.N. Nagarajan and Others Vs. State of Karnataka and Others*, it was held:--

It was argued that the regularisation of the promotion gave it the colour of permanence and the appointments of the promotees as Assistant Engineers must therefore be deemed to have been made substantively right from the 1st of November, 1956. The argument, however, is unacceptable to us for two reasons. Firstly the words "regular" or "regularisation" do not connote permanence. 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.

15. Articles 16 of the Constitution of India provides that all citizens of India are entitled to get equal opportunity for the purpose of obtaining employment in State Service.

16. In order to fulfil such a condition, it is necessary to consider the cases of all citizens who are eligible to be appointed. For that purpose, it is not only necessary to call for the names from the Employment Exchange, but the same is some cases also required due advertisement of posts in Newspapers by notifying the vacancies and the requisite qualifications therefore so that all eligible candidates may apply for their appointment in the said posts.

17. Right to work is not a fundamental right but a right to be considered for

appointment is as enshrined under Articles 14 and 16 of the Constitution of India.

18. It cannot, thus, be stated that the petitioner had been appointed upon compliance of the recruitment process as envisaged under the Education Code or upon compliance with the principles enshrined under Article 16 of the Constitution of India.

19. From the decisions of the Supreme Court as also of this Court, as referred to hereinbefore, it will thus be evident that any appointment which was made by a person having no authority to do so or the appointments which have not been made following the mandatory provisions of the Recruitment Rules and Articles 14 and 16 of the Constitution, such appointments should be held to be a nullity. In this view of the matter, in my opinion, this Court in exercise of its writ jurisdiction cannot direct regularisation of the services of the employees when the same would be violative of Articles 14 and 16 of the Constitution.

20. In *Delhi Development Horticulture Employees' Union Vs. Delhi Administration, Delhi and others*, it was observed:--

We may take note of the pernicious consequences to which the direction of regularisation of workmen on the only ground that they have put in works for 240 or more days, has been leading. Although there is Employment Exchange Act which requires recruitment on the basis of registration in Employment Exchange, it has become a common practice to ignore the employment exchange and the person registered in the employment exchange, and to employ and get employed directly those who are either not registered or are lower in the long waiting list in the employment register. The Court can take judicial notice of the fact that such employment is sought and given directly for various illegal consideration including money. The employment is given for temporary periods with technical breaks to circumvent the relevant rules, and is continued for 240 or more days with a view to give the benefit of regularisation knowing the judicial trend that those who have completed 240 or more days are directed to be automatically regularised. A good deal of illegal employment market has developed resulting in a new source of corruption and frustration of those who are waiting at the Employment Exchange for years. Not all those who gain such back door entry in the employment are in need of the particular jobs. Though already employed elsewhere. They join the job for better and secured prospects. That is why most of the cases which come to the Courts are of employment in Government Departments, Public Undertaking or Agencies. Ultimately it is the people who bear the heavy burden of the surplus labour. The other equally injurious effect to indiscriminate regularisation has been that many of the agencies have stopped undertaking casual or temporary works though they are urgent and essential for fear that those who are employed on such works are required to be continued for 240 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 thus jeopardised on both Courts.

21. In Karnataka State Private College Stop-Gap Lecturers Association Vs. State of Karnataka and Others, the Supreme Court again held: -

Adhoc appointments, a convenient way of entry usually from backdoor, at times even in disregard of rules and regulations, are comparatively recent innovation to the service jurisprudence. They are individual problems to begin with, become a family problem in Court of law. It is unjust and unfair to those who are lesser fortunate in society with little or no approach even though better qualified more meritorious and well deserving. The infection is widespread in Govt. or semi-government departments or State financed institutions. It arises either because the appointing authority resorts to it deliberately as a favour or to accommodate someone or for any extraneous reason ignoring the regular procedure provided for recruitment as a pretext under emergency measure or to avoid loss of work etc. or the Rules or circulars issued by the department itself empower the authority to do so as a stop-gap arrangement. The former is an abuse of power. It is unpardonable. Even if it is found to have been resorted to as a genuine emergency measure the Courts should be reluctant to grant indulgence. Latter gives rise to equities which have bothered Courts every now and then.

22. In State of Punjab and others Vs. Surinder Kumar and others, , it has been held: --

There is still another reason why the High Court cannot be equated with this Court. The Constitution has, by Article 142, empowered the Supreme Court to make such orders as may be necessary "for doing complete justice in any case or matter pending before it", which authority the High Court does not enjoy. The jurisdiction of the High Court, while dealing with a writ petition, is circumscribed by the limitations discussed and declared by the judicial decisions, and it cannot transgress the , limits on the basis of whims or subjective sense of justice varying from Judge to Judge.

23. In Sandeep Kumar and others Vs. State of Uttar Pradesh and others, , the Supreme Court held :--

From the facts placed before us, it appears that the scheme under which the petitioners are working is of a very specific nature. There is no permanent need for the work and since it is a project for a particular purpose, it will not be possible to direct that the petitioner may be regularised in service.

24. The Supreme Court again reiterated aforementioned view in Karnataka State Private College Stop-gap Lecturers (supra).

25. The Supreme Court in J.K. public Service Commission Etc. v. Dr. Narinder Mohan and Ors. etc. 1993 4 SCC 597, it was held: --

Existence of Statutory Rules is not a condition precedent to appoint an eligible and fit person to a post. The executive power is co-extensive with legislative power of the State and under Article 162, the State can create civil posts and fill them up according to executive instructions consistent with Articles 14 and 16 of

the Constitution. It is settled law that once statutory rules have been made, the appointment shall be only in accordance with the rules. The executive power could be exercised only to fill in the gaps but the instructions cannot and should not supplant the law, but would only supplement the law.

The Court proceeded to observe: --

A little leeway to make ad hoc appointment due to emergent exigencies does not clothe the executive govt. with power to relax the recruitment or to regularise such appointment nor to claim such appointments to be regular or in accordance with Rules. Back door ad hoc appointments at the behest of power source or otherwise and recruitment, according to rules are mutually antagonistic and strange bed partners. They cannot coexist in the same sheath. The former in negation of fair play. The latter are the product of order and regularity. Every eligible person not necessarily be fit to be appointed to a post or office under the State, selection according to rules by a properly constituted commission and fitment for appointment assures fairness in selection and inhibits arbitrariness in appointments.

26. In Jacob M. Puthuparamhil (supra), there existed statutory rules for regularisation of the services of the writ petitioners.

27. In case of Karnataka State Private College Stop Gap Lecturers" Association (supra), the Supreme Court was considering the practice of the management of the Private Colleges to appoint teachers for a fixed period and then break their services for one day and again reappoint them. In that situation the Supreme Court gave certain directions. The situations in these cases are not the same, inasmuch as herein the petitioners were appointed for a fixed period, their services were terminated for a considerably long time and they were later on appointed in different schools. The circular letter issued by the Kendriya Vidyalaya Sangathan clearly stated that such appointments were made on contractual basis.

28. In Sushil Kumar Yadunath Jha Vs. Union of India (UOI) and Others, the question arose for consideration was whether the writ petitioner appointed to a temporary post as post graduate teacher in Kendriya Vidyalaya Sangathan terminated after three years, after becoming re-appointee would be entitled to the benefit of break in his services.

In the case of Delhi Development Horticulture Employees" Union (supra), the Supreme Court held that back-door appointments are made on various considerations including monetary consideration.

29. In M/s. Angile Insulations Vs. M/s. Davy Ashmore India Ltd. and another, the question regarding regularization of adhoc appointees came up for consideration before the Supreme Court. It was held that normal rule would be regular appointment through the prescribed agency but exigency of administration may sometime call for an adhoc and/ or temporary appointment to be made. Such adhoc or temporary appointee, the Supreme Court held, if allowed to continue

for a fairly long span, the authorities must consider his case for regularization provided he is eligible and qualified according to the rules and service record and appointment does not run counter to the reservation policy of the State. Direction given by the High Court in that case for regularization of every adhoc or temporary employees who had been continued for one year was held to be totally "untenable" and "unsustainable". In the case of Piara Singh (supra) the Court noted that the normal rule is recruitment through the prescribed agency but due to administrative exigencies, an ad hoc or temporary appointment may be made. In such a situation, this Court held that efforts should always be made to replace such ad hoc or temporary appointment by regularly selected employees, as early as possible. The temporary employees also would get liberty to compete along with others for regular selection but if he is not selected, he must give way to the regularly selected candidates. Appointment of the regularly selected candidate cannot be withheld or kept in abeyance for the sake of such an ad hoc or temporary employee. Ad hoc or temporary employee should not be replaced by another ad hoc or temporary employee, he must be replaced by only regularly selected employee. The ad hoc appointment should not be a device to circumvent the rule of reservation.

30. Recently in V. Sreenivasa Reddy and others Vs. Govt. of Andhara Pradesh and others, , the Supreme Court indicated as below: -

It is now well settled law that that appointment/ promotion must be in accordance with the Rules, direct recruitee takes his seniority from the date on which he starts discharging the duty of the post borne on the cadre while a temporary appointee appointed dehors the rules or on ad hoc basis or to a fortuitous vacancy gets seniority from the date of regular appointment.

It also held:--

In A.K. Bhatnagar and Others Vs. Union of India (UOI) and Others, this Court while deprecating the practice of the Government giving a go-by to the statutory rules or regulations, framed under proviso to Article 309 of the Constitution making large scale departure, expressed thus: -

"On more than one occasion this Court has indicated to the Union and the State Government that once they frame rules, their action in respect of matters covered by rules should be regulated by the rules. The rules framed in exercise of powers conferred under the proviso to Article 309 of the Constitution are solemn rules having binding effect. Acting in a manner contrary to the rules does create problem and dislocation. Very often Government themselves get trapped on account of their own mistakes or actions in excess of what is provided in the rules. We take serious view of these lapses and hope and trust that the Government both at the Centre and in the States would take note of this position and refrain from acting in a manner not contemplated by their own rules."

31. This Court (D.B.) in Bhullar Nath Yadav and Ors. v. Mayo Hall Sports Complex and Ors. 1990 A.C.J. Page 429 following the judgement of the Supreme Court in

The Dharwad Distt. P.W.D. Literate Daily Wages Employees Association and others, etc. Vs. State of Karnataka and others etc., has held that by virtue of petitioners working for last several years on daily wages in Mayo Hall Sports Complex cannot be denied regularisation even in absence of sanctioned post and the respondents were expected to devise ways and means to absorb the writ petitioners on permanent basis, specifically those writ petitioners, who had put three years or more in service on daily wages, were entitled to be absorbed and regularised. This Court in Bhullar Nath Yadav (supra) has further observed that paucity of funds and absence of posts can not be a ground for denying the benefit of regularisation to the writ petitioners.

32. In The Dharwad District (supra) it was observed by the Supreme Court that it would be unfair on the part of the State to keep an employee on daily wages for indefinite period and such a treatment is violative of equality clause of Articles 14 and 16 of the Constitution.

33. In [1999 (82) F.L.R. 76] (Channey Lal and Ors. v. Director, Malaria Research Centre, New Delhi and Anr.), where the petitioners deployed on daily wages were orally asked not to come to work even after more than three years of deployment and on their claim for regularisation on the ground that the writ petitioners have acquired right to be considered for regularisation by virtue of having worked more than 240 days without any break in a calendar year and they were entitled to the protection of Article 311 of the Constitution, this Court following the decision of Himanshu Kumar Vidyarthi and Others Vs. State of Bihar and Others, the contentions of the petitioners that the petitioners were appointed on daily wages as Assistant Driver and Peon in Cooperative Training Institute under the State Government, were terminated from service and further their contentions that they were retrenched from service in violation of Section 25F of the Industrial Dispute Act, 1947 were rejected and it was held:

Every department of the Government cannot be treated to be industry. When the appointments are regulated by the statutory rules, the concept of industry to that extent stands excluded. The petitioners were not appointed to the posts in accordance with the rules but were engaged on the basis of need of the work. They are temporary employees working on daily wages. Their disengagement from service cannot be construed to be a retrenchment under the Industrial Disputes Act. The concept of retrenchment therefore cannot be stretched to such an extent as to cover these employees. Since the petitioners are only daily-wage employees have no right to the posts, their disengagement is not arbitrary.

The disengagement of deployment of daily wager, who is engaged for a day, is not a termination of service. Since the daily wage labour is engaged only on the basis of a contract lasting for a day and each engagement is a fresh, non-engagement or disengagement is not held to be arbitrary. In view of Pushpa Agarwal v. Regional Inspector of Girls Schools, Meerut [1995 (70) F.I. R 20] the principle of retrenchment as provided under Central Industrial Disputes Act and Rules framed thereunder is also attracted in respect of a workman governed

under the U.P. Industrial Disputes Act and the Rules framed thereunder.

34. In *State of Assam and Others Vs. Shri Kanak Chandra Dutta*, , the Supreme Court (Constitution Bench) has also held that casual labourer is not holder of civil post.

35. This Court (D.B.) in 1992 A.C.J. 1366 (*Zakir Hussain v. Engineer-in-Chief, Irrigation Department, U.P. Lucknow*) has held that daily wager has no right to the post and there must be regular or permanent post and funds must be available for payment of salary and the daily wagers are to be qualified for appointment to the post and by virtue of only having worked for three years they can not claim regularisation as a matter of right and the regularisation cannot be made as a thumb of rule, and this Court relegated the matter for adjudication and avail the alternative remedy for claiming the relief in reference to Section 25F of the Industrial Disputes Act.

36. In *State of U.P. Vs. Labour Court, Haldwani and another*, , it was held that the engagement of daily wager in the Irrigation Department comes to an end every evening. Refusal to employ him from a particular day, his disengagement was not under the provision of Section 25F of Industrial Disputes Act. It was observed in para 6 of the above case as below:-

Employment to government service in the Irrigation Department is regulated by statutory rules. Presently, the respondent No. 2 was not employed in accordance with the rules. For engaging a person casually on day to day basis the statutory rules are not required to be followed under which the posts have to be advertised and only the best from the market have to be picked up keeping in view reservation provided from certain classes. Thus, every eligible person has an opportunity to participate in the recruitment process. This is not so in the case of daily wager in whose case even regularisation regarding age, medical fitness, character roll etc. are not observed. Therefore, daily and casual workers who are engaged in disregard of all rules cannot be allowed to enter government service through the back door and the Labour Court cannot be allowed to be used as a legal means for such back door entry. The anomalous situation that the impugned award creates can be seen from the fact that till before his alleged retrenchment the respondent No. 2 was on engagement from day today. The impugned award makes him a permanent employee with the necessary consequence that he would have to be paid salary for all the 365 days as regular employee and the other benefits of regular employment can also not be denied to him. Thus, the award put him, in as much better position that he was before the alleged retrenchment. Such a result is not conceived.

37. The daily wagers are deployed on temporary assignment only and not on sanctioned post and completion of 240 days work by daily wager can not attribute status of a casual workman under Industrial Disputes Act and as such does not create a right to regularisation in view of *Madhyamik Siksha Parishad, U.P. Vs. Anil Kumar Mishra and others* etc.,

38. In *Ashwani Kumar and Others Vs. State of Bihar and Others*, it was observed by the Supreme Court that if initial entry is itself unauthorised and not against any sanctioned vacancy, the question of regularising the incumbent on such a non-existent vacancy does not arise and even if such purported regularisation or confirmation is given, it would be an exercise in futility.

39. In *State of Orissa and others Vs. Smt. Sukanti Mohapatra and others*, the Supreme Court held that services of the candidates appointed irregularly in total disregard of the rules cannot be regularised in exercise of such powers under the departmental rules.

40. Similarly in case of *Dr. Narinder Mohan (supra)* the Supreme Court reiterated that having made the rules, the executive cannot fall back upon its general power under Article 162 to regularise the ad-hoc appointments under the rules.

41. In *Dr. Surinder Singh Jamwal and another Vs. State of Jammu and Kashmir and others*, the Supreme Court has held that the ad hoc appointments made dehors the rules without following proper procedure of recruitment, would not confer any right of regularization merely on the basis of the length of the service.

42. In *P. Ravindran and Others Vs. Union Territory of Pondicherry and Others*, , the Supreme Court held that regularization of ad hoc appointees by passing the process of recruitment through open competition to be held by the Public Service Commission, is not permissible.

43. In *Santosh Kumar Verma and others Vs. State of Bihar and others*, the Supreme Court held that the posts temporarily filled in contravention of law, cannot be regularized.

44. In case of *Delhi Development Horticulture Employees' Union Vs. Delhi Administration, Delhi and others*, the Supreme Court has gone to the extent of saying that a good deal of illegal appointment market has developed resulting in a new source of corruption and frustration of those who are waiting registered in the Employment Exchange for the years.

45. In *Dr. Arundhati Ajit Pargaonkar Vs. State of Maharashtra and others*, the Supreme Court has held that the post was one, which was to be filled up through Public Service Commissioner, therefore, the claim of regularisation was not worth accepting.

46. In *State of U.P. and Others Vs. Ajay Kumar*, it has been held by the Supreme Court that there must exist a post and there must be Statutory Rules or administrative instructions for appointment to the post and the High Court was in error in directing regularisation of service of the respondents.

47. In *Union of India (UOI) Vs. Uma Maheswari and Others*, the Supreme Court has held that the claim of regularisation by a daily wager is not sustainable if no regular work or regularisation scheme is in operation.

48. In *The State of Karnataka Vs. Mapilla P.P. Soopi*, this Court (D.B.) relying on

various judgements of the Supreme Court rejected the claim of regularisation of daily wage employees of P.W.D. and Minor Irrigation Department holding that public posts are to be filled up after due advertisement. For seeking regularisation, there must exist a post and there should be statutory rules or administrative instructions, in absence of which, the claim of regularisation is unsustainable.

49. Learned Counsel for the respondents has, however, submitted that the rulings cited by the petitioner are riot applicable to the facts and circumstances of the instant case because the case in hand is a case of the nature, where the petitioner was engaged for a particular Project and when the Project itself is over then naturally the question of his regularisation does not arise. In support, reliance has been placed upon a recent ruling of the Supreme Court in 2003 (3) AISLJ 147 (Surendra Knmar Sharma v. Vikas Adhikari and Anr.) where the services of the petitioner engaged for a short duration under a scheme known as Rural Employment Programme were terminated, the Supreme Court had held that "when the scheme itself was over and it was known to him that his requirement was only during the currency of the scheme, then no relief could be granted". The Supreme Court while deciding the aforesaid Surendra Kumar Sharma's case (supra) had the occasion to deal with the following rulings of the Supreme Court on the subject:--

(i) Delhi Development Horticulture Employees" Union (supra) and S.M. Nilajkar and Others Vs. Telecom, District Manager, Karnataka, , where the Court while dealing with such scheme for project employees observed as under:-

It is common knowledge that the Government as a Welfare State floats several schemes and projects generating employment opportunities, though they are short-lived. The objective is to meet the need of the moment. The benefit of such schemes and project is that for the duration they exist, they provide employment and livelihood to such persons as would not have been able to secure the same but for such schemes or projects. If the workmen employed for fulfilling the need of such passing-phase-projects or schemes were to become a liability on the employer- State by too liberally interpreting the labour laws in favour of the workmen, then the same may well act as a disincentive to the State for floating such schemes and the State may opt to keep away from initiating such schemes and projects even in times of dire need, because it may feel that by opening the gates of welfare it would be letting in onerous obligations entailed upon it by extended application of the labour laws.

(ii) Rajendra and Others Vs. State of Rajasthan and Others, , where the termination of the employment had been caused by abolition of posts consequent upon the schemes having been abolished for non-availability of funds, it was held as under-

that when posts temporarily created for fulfilling the needs of a particular project or scheme limited in its duration come to an end because the need for the

project comes to an end either because the need was fulfilled or the project had to be abandoned wholly or partially for want of funds, the employer cannot by a writ of mandamus be directed to continue employing such employees as have been dislodged, because such a direction would amount to requisition for creation of posts though not required by the employer and funding such posts though the employer did not have funds available for the purpose.

(iii) (1998) 3 SCC 354 (Jaipal and Ors. v. State of Haryana), where also the employees of the project of adult and non-formal education, a temporary project, which was a time bound project to last till 1990, were held not entitled for regularising of their services.

50. This Court (Hon"ble Sunil Ambwani, J.) in Chandra Prakash Gupta Vs. Addl. District Magistrate and another, has observed that when the writ petitioner initially appointed as a typist on daily wages in integrated rural development programme had served 34 months with short breaks on the strength of the interim order of this Court, was not said to be holder of appointment letter by virtue of interim order of the Court and the deployment of such daily wagger could be terminated as his initial deployment was made without following the procedure and was by way of back-door entry. In Chadra Prakash Gupta (supra) this Court has observed as below: -

6. The question of regularization of daily wages employees has been subject matter of judicial scrutiny for a long time. In a developing country various schemes are implemented. These schemes are supported by limited financial allocation. The employees appointed on daily wages in such schemes are fully aware of its temporary nature, and also the nature and terms of their appointment. In Daily Rated Casual Labour Employed under Daily Rated Casual Labour Employed under P and T Department Vs. Union of India (UOI) and Others, , the Supreme Court considered the rights of the daily rated casual labour and directed for submission of a scheme to extend permanent status of the workmen. State of Haryana and others Vs. Piara Singh and others etc. etc., , was a case of ad hoc temporary Government employees and consider the validity of the orders of regularisation made by State of Haryana, in which Supreme Court held that eligible and qualified continue in service satisfactorily for a long periods raises presumption of need of regular posts. Later on there has been a marked changed in law relating to regularisation of daily rated employees. In Ghaziabad Development Authority and others Vs. Sri Vikram Chaudhary and others, , it was held that in the absence of availability of posts for regular appointment, regularisation cannot be directed and that the daily rated employees should be given minimum wages under the Statute, if any, or the prevailing wages in the locality. In State of Himachal Pradesh, through the Secretary, Agriculture to the Govt. of Himachal Pradesh Vs. Nodha Ram and others, , it has been held that where a project is completed, and closed due to non-availability of funds, the employees have to go along with its closure. No vested right is created in temporary employments. Directions can not be given to

regularise their services in the absence of any existing vacancies, nor can directions be given to the State to create posts in a non-existing establishment. In this case Supreme Court found that the directions issued by Court for regularisation were illegal warranting interference.

51. In State of Himachal Pradesh, through the Secretary, Agriculture to the Govt. of Himachal Pradesh Vs. Nodha Ram and others, the Supreme Court has held as under:-

It is seen that when the project is completed and closed due to non-availability of funds, the employees have to go along with its closure. The High Court was not right in giving the direction to regularise them or to continue them in other places. No vested right is created in temporary employment. Directions cannot be given to regularise their services in the absence of any existing vacancies nor can directions be given to the State to create posts in a non-existent establishment. The Court would adopt pragmatic approach in giving directions. The directions would amount to creating of posts and continuing them despite non-availability of the work. We are of the considered view that the directions issued by the High Court are absolutely illegal warranting our interference. The order of the High Court is, therefore, set aside. (Para 4)

52. This Court (Hon"ble Sudhir Narain, J.) in Arvind Kumar Rai Vs. State of Uttar Pradesh and Others, held that the daily wagers can not be treated as ad hoc appointees in view of Rule-4 of the U.P. Regularisation of Ad hoc Appointments (on posts outside purview of the Public Service Commission) Rules, 1979 as the daily wagers are not better than the work-charge, ad hoc or temporary employees and in absence of statutory provisions or rules none of them can be regularised.

53. This Court (Hon"ble M.C. Jain, J.) in Vinod Singh and Others Vs. State of U.P. and Others, has observed that by virtue of working for 240 days in a calendar year a right is not accrued in favour of the writ petitioner for his absorption in the Government department as for absorption the existence of vacancy or post is necessary.

54. This Court (Hon"ble A.K. Yog, J.) in Santosh Kumar Sonkar and others Vs. State of U.P. and others, has observed that the daily wagers deployed in the year 1986 in stop gap arrangement to meet temporary work load and discontinued in the year 1987 on extinction of the work load, however, on their claim could not be regularised or absorbed as they have not vested right for regularisation or absorption.

55. In State of U.P. and Another Vs. Rajendra Prasad and Others, this Court (D.B.) while relying above judgement of State of U.P. and Ors. v. U.P. Madhyamik Shiksha Parishad Shramik Sangh and Ors. (supra) has held that the daily wagers can not be regularised in absence of scheme or rules, neither the State could be directed to frame Rules for regularisation as giving direction to State to frame rules is the function of legislature.

56. In *Ashwani Kumar v. State of Bihar* AIR 1997 SC 1627, the Supreme Court held that the question of confirmation or regularization of an irregularly appointed candidate could arise if the candidate concerned is appointed in an irregular manner or an ad-hoc basis against a possible vacancy which is already sanctioned but if initial entry is itself unauthorized and is not against any sanctioned vacancy, the question of regularizing the incumbent on such non-existent vacancy could never survive for consideration and even if such purported regularization or confirmation is given, it would be an exercise in futility. The Supreme Court held that regularization of such appointment would amount to decorating a still-born baby. In *Delhi Development Horticulture Employees' Union Vs. Delhi Administration, Delhi and others*, the "pernicious consequences" of the direction of regularization of workmen on the only ground that they have put in works for 240 or more days, has been pointed out as under:

Although there is Employment Exchange Act which requires recruitment on the basis of registration in Employment Exchange, it has become a common practice to ignore the Employment Exchange and the person registered in the Employment Exchange, and to employ and get employed directly those who are either not registered or are lower in the long-waiting list in the employment register. The Court can take judicial notice of the fact that such employment is sought and given directly for various illegal consideration including money. The employment is given for temporary periods with technical breaks to circumvent the relevant rules and is continued for 240 days or more days with a view to give the benefit of regularization knowing the judicial trend that those who have completed 240 days or more days are directed to be automatically regularized. A good deal of illegal employment market has developed resulting in a new source of corruption and frustration of those who are waiting at the Employment Exchange for years.

57. In *State of U.P. v. Ajay Kumar* (1997) SCC 88, it has been held that there must exist a post and either administrative instructions or statutory rules must also be in operation to appoint a person to the post. Daily wage appointment, it was further held, would obviously be in relation to contingent establishment in which there cannot exist any post and it continues so long as the work exists.

58. In *Rajendra Prasad and others Vs. State of U.P. and others*, this Court (Hon'ble S.R. Singh, J.) held that in absence of legally vacant post and scheme wholesale regularization cannot be directed, however, direction was made to the State Government to frame rules and schemes for regularization. This Court in *Rajendra Prasad* (supra) held as under:

I am of the considered view that "wholesale" and "unconditional" orders cannot be issued by this Court directing the respondents to regularize the services of the petitioners, and in no case such direction can be issued in the absence of posts and a scheme rules visualizing regularization on certain principles and norms framed in consonance with the related constitutional provisions for "Regularisation" has not been claimed herein in the above sense of the term.

Rather it comprehends induction into the cadre of the service which in the absence of posts and a legally framed scheme cannot be allowed except on pains of violating the Constitution and relevant service Rules. (Para 7)

In the conspectus of the above discussion. I am persuaded to the considered view that the service conditions of the Daily rated employees must be modulated re fixed by making appropriate rules compatible with the constitutional provisions particularly those embodied in Articles 14, 16, 38, 39, 41 and 43 of the Constitution with particular reference to the doctrine of "social justice". (Para 11)

59. The issue of regularisation has been considered by the Supreme Court from time and again and the law has been laid down in very clear terms in the cases, i.e. State of Haryana and Ors. v. Piara Singh and Ors. (Supra); Jacob M. Puthuparambil and others Vs. Kerala Water Authority and others, ; J.K. Public Service Commission etc. v. Dr. Narinder Mohan and Ors. (JT) 1993 (6)593 ; Dr A.K. Jain and Others Vs. Union of India (UOI) and Others, ; E. Ramakrishnan and Others Vs. State of Kerala and Others, and Ashwani Kumar and Ors. v. State of Bihar and Ors. JT 1997 (1) 243 ; and the ratio of all those judgements can be summarized to the extent that the question as to whether the services of certain employees appointed on ad-hoc basis should be regularised relates to the condition of service. The power to prescribe the conditions of service can be exercised either by making Rules under the proviso to Article 309 of the Constitution of India or any analogous provision and in the absence of such Rules, under the instructions issued in exercise of its executive power. The Court comes into the picture only to ensure observance of fundamental rights and statutory provisions, Rules and other instructions, if any, governing the conditions of service. The main concern of the Court in such matters is to ensure the Rules of Law and to see that the executive acts fairly and gives a fair deal to its employees consistent with the requirements of Articles 14 and 16. It also means that the State should not exploit its employees nor should it seek to take advantage of the helplessness and misery of either the unemployed persons or the employees, as the case may be. As is often said, the State must be a model employer. It is for this reason, it is held that equal pay must be given for equal work, which is indeed one of the Directive Principles of the Constitution. It is for this very reason it is held that a person should not be kept in a temporary or ad hoc status for long. A perusal of the authorities would show that appointments are as a rule to be made in accordance with statutory rules, giving equal opportunity to all the aspirants to apply for the posts and following the prevalent policy of reservation in favour of Scheduled Castes/ Scheduled Tribes and other backward classes. Whenever the employees are appointed on adhoc basis to meet an emergent situation, every effort should be made to replace them by the employees appointed on regular basis in accordance with the relevant rules as expeditiously as possible. Where the appointment on ad hoc basis has continued for long and the State has made rules for regularisation, regularisation has to be considered in accordance with the rules. Where, however, no rules are operative, it is open to the employees to show that they have been dealt with arbitrarily and

their work position has been exploited by keeping them on ad hoc for one spell of time. However, it is a question of fact whether in the given situation, they were treated arbitrarily. In *Khagesh Kumar and others Vs. Inspector General of Registration and others*, , the Supreme Court did not issue direction for regularisation of those employees, who had been appointed on ad hoc basis or on daily wages after the cut off date, i.e., 1.10.1986 as was mandatorily required by the provisions of U.P. Regularisation of Ad hoc Appointment (On posts outside the Purview of the Public Service Commission) Rules, 1979 and those who were not eligible under the said Rules were not given regularisation. The same view has been taken by the Supreme Court in *Inspector General of Registration, U.P. and Another Vs. Avdesh Kumar and Others*, . Moreover, the above referred cases further laid down that for the purpose of regularisation, various pre-requisite conditions are to be fulfilled, i.e., the temporary/ ad hoc appointment of the employee should be in consonance with the statutory rules, it should not be a back door entry. The service record of the petitioner should be satisfactory, the employee should be eligible and / or qualified for the post at the time of his initial appointment. There must be a sanctioned post against which the employee seeks regularisation and on the said sanctioned post, there must be a vacancy. Moreover, regularisation is to be made according to seniority of the temporary/ ad hoc employees. The regularisation should not be in contravention to the State policy regarding reservation in favour of Scheduled Castes/ Scheduled Tribes and other backward classes and other categories for which state has enacted any Act or framed rules or issued any Government Order etc.

60. Similar view has been taken in 1996 VIII AD 680 (SC) and *State of U.P. and others Vs. U.P. Madhyamik Shiksha Parishad Shramik Sangh and another*, . In the case of *State of H.P., through The Secretary (Rural Development) to the Govt. of Himanchal Pradesh, Shimla Vs. Ashwani Kumar and Others*, , the Supreme Court has held that if an employment is under a particular Scheme or the employee is being paid out of the funds of a Scheme, in case the Scheme comes to closure or the funds are not available, the Court has no right to issue direction to regularise the service of such an employee or to continue him on some other project, for the reasons that " no vested right is created in a temporary employment."

61. If the workmen appointed without following any procedure prescribed under the Act or the Rules by such authority, who had no competence to appoint them, and their appointment was not in accordance with law, the provisions of the Act, 1947 are attracted for the reason that provisions of Section 25J of the Act have over-riding effect on other laws because the Legislature, in its wisdom, thought that the rights and liabilities arising out of the law and retrenchment should be uniform throughout wherever the Act was in force and every State should have its own law in consonance with the Central Law. This view stands fortified by the judgment of the Supreme Court in *P. Virudhachalam and Others Vs. Management of Lotus Mills and Another*, ; *Krishna District Co-operative Marketing Society Limited, Vijayawada Vs. N.V. Purnachandra Rao and Others*, and *Vikramaditya Pandey v. Industrial Tribunal and Anr.* AIR 2001 SC 310.

62. In *Prabhu Dayal Jat v. Alwar Sahkari Khumi Vikas Bank* 1991 Lab. I.C. 944, the Court considered the case of an employee, whose services stood terminated on the ground that he had been appointed without any authorisation of law. This Court held that even in that case the provisions of the Act were attracted.

63. On the contrary, in *Sita Ram Mali Vs. State of Rajasthan and Another*, , Rajasthan High Court held as under:

Making appointment on daily wages without the availability of the post and without following the provisions of Articles 14 and 16 suffers from patent illegality. Apparently for the reasons which are only extraneous, the Officers of the Department "have given appointments on daily wages to few favoured. Those who have waited in queue at the employment exchange have been altogether ignored. In fact, while the length of the queue continuously increase, the back-door entrants got the entry in service as daily wages employee and got the order of appointment on salary in the regular pay scale and ultimately the order of regularisation on the service.

The Court deprecated the practice of making appointments on daily wages and held that even the appointment on daily wages without advertising the vacancy or calling the names from Employment Exchange violates the provisions of Articles 14 and 16 of the Constitution and hence it is violative of the fundamental rights of other eligible persons and, thus, the relief of regularisation cannot be claimed.

64. The question of appointment dehors the Rules has been considered by the Supreme Court from time and again and the Court held that such appointments are unenforceable and inexecutable. It is settled legal proposition that any appointment made dehors the Rules violates the Public Policy enshrined in the rules and, thus, being void, cannot be enforced. (Vide *Smt. Ravinder Sharma and Another Vs. State of Punjab and Others*, ; *Harpal Kaur Chahah (Smt) v. Director, Punjab Instructions; State of M.P. and Others Vs. Shyama Pardhi etc. etc.*, ; AIR 1998 91 (SC); *M.P. Electricity Board Vs. S.S. Modh and Others*, ; *Bhagwan Singh and Another Vs. State of Punjab and Others*, and *Chancellor v. Shankar Rao and Ors.*, (1999) 6 SCC 255 .

65. Appointment dehors the Rules violates the mandate of the provisions of Article 14 and 16 of the Constitution as held by the Supreme Court in *Delhi Development Horticulture Employees' Union v. Delhi Administration* (supra); and *Piara Singh* (supra). In *Delhi Transport Corporation v. D.T.C., Mazdoor Congress and Ors.*(supra) the Supreme Court recognised the public employment as public property and held that all persons similarly situated have a right to share in it thought its enjoyment is subject to the recruitment rules which must be in consonance with the Scheme of the Constitution of India.

66. In *Dr M.A. Haque and Others Vs. Union of India (UOI) and Others*, the Supreme Court observed as under:-

...We cannot lose sight of the fact that the recruitment rules made under Article 309 of the Constitution have to be followed strictly and not in breach. If a disregard of the rules and by passing of the Public Service Commissions are permitted, it will open a back-door for illegal recruitment without limit. In fact this Court has, of late, been witnessing a constant violation of the recruitment rules and a scant respect for the constitutional provisions requiring recruitment to the services through the Public Service Commission. It appears that since this Court has in some cases permitted regularisation of the irregularly recruited employees, some governments and authorities have been increasingly resorted to irregular recruitments. The result had been that the recruitment, rules and the Public Service Commissions have been kept in cold storage and candidate dictated by various considerations are being recruited as a matter of course.

67. Depricating the practice of making appointment dehors the Rules by the State or other State instrumentalities in *Dr. Arundhati Ajit Pargaonkar Vs. State of Maharashtra and others*, , the Court rejected the claim of the petitioner therein for regularisation on the ground of long continuous service observing as under: -

Nor the claim of the appellant, that she having worked as Lecturer without break for 9 years" on the date the advertisement was issued, she should be deemed to have been regularised appears to be well founded. Eligibility and continuous working for howsoever long period should not be permitted to overreach the law. Requirement of rules of selection... cannot be substituted by humane considerations. Law must take its course.

68. The Supreme Court in *State of U.P. and others Vs. U.P. State Law Officers Association and others*, has observed as under:-

This being so those who come to be appointed by such arbitrary procedure can hardly complain if the termination of their appointment is equally arbitrary. Those who come by the backdoor have to go by the same door.... The fact that they are made by public bodies cannot best them with additional sanctity. Every appointment made to a public office, howsoever made, is not. There is, therefore, no public interest involved in saving all appointments irrespective of their mode. From the, inception some engagements and contracts may be the product of the operation of the spoils system. There need be no legal anxiety to save them.

69. Even if there are no Statutory Rules or Bye-laws of the society providing a mode of appointment, the Executive Instructions/ Policy adopted by the respondent- society must be there providing for a mode of appointment. Even if no such Executive Instructions/ Policy/ Guidelines/Circular etc. is in existence then a fair procedure for appointment has to be adopted in consonance with the provisions of Articles 14 and 16 of the Constitution. (*Vide Nagpur Improvement Trust v. Yadaorao Jagarinath Kumhhare* (1998) 8 SCC 99.

70. In *Ramesh Kumar Sharma and Anr. v. Rajashtan Civil Services Appellate Tribunal and Ors.* AIR 2000 SC 4206, the Supreme Court held that "expression

"Service Rules" cannot be given a restrictive meaning in the absence of the definition of the said terms and, therefore, it would include within its sweep, the necessary government order providing the method recruitment."

71. A Constitution Bench of the Supreme Court, in *B.R. Kapoor v. State of Tamil Nadu* : AIR2001SC3435 , (Jayalalitha case) observed that it is the duty of the Court to examine whether the incumbent possesses qualification for appointment and the manner in which the appointment came to be made or the procedure adopted was fair, just and reasonable and if not, appointment should be struck down.

72. The Supreme Court (Constitution Bench) in *Ajit Singh and Others Vs. The State of Punjab and Others* , has held that Articles 14 and 16(1) are basic features of the Constitution. The same view has been reiterated in *Ashok Kumar Gupta and Another Vs. State of U.P. and Others*, and *Indira Sawhney Vs. Union of India and Others* , . Thus, strict adherence is required thereto.

73. In *Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others*, and *A.P. Aggarwal Vs. Govt. of N.C.T. of Delhi and Another* , the Supreme Court held that every State action, in order to survive, must not be susceptible to vice the arbitrariness which is a crux of Article 14 of the Constitution and the very basis of the Rule of Law.

74. Therefore, any appointment made by a Statutory Authority, which may be a State within the meaning of Article 12 of the Constitution, if found to have been made by a person without any competence or without following the procedure prescribed by law and in case the procedure is not prescribed and the procedure adopted by the Authority is not in consonance with Articles 14 and 16 of the Constitution, the incumbent cannot claim any benefit as in such a case the contract of service becomes unenforceable and inexecutable.

If the view contrary to the above is accepted, the same would override the mandate of the Constitution also, it will take away the powers of the High Court to issue a writ of quo warranto, wherein the appointment of an incumbent can be challenged not only by an aggrieved persons but a stranger also.

75. Invalidity of an appointment may arise not only from want of qualification, but also from the violation of such legal conditions or procedure for appointment as mandatory and as a result of which the appointment becomes void. (Vide *M. Pentiah and Others Vs. Muddala Veeramallappa and Others* , ; *The University of Mysore and Another Vs. C.D. Govinda Rao and Another*, and *P.L. Lakhanpal Vs. A.N. Ray and Others* , . There can be no quarrel to issue that the Board is an Authority, which is a "State" within the meaning of Article 12 of the Constitution. Thus, question of saving such an illegal appointment did not arise,

76. The instant cases are squarely covered by the judgement of the Supreme Court in *The Factory Manager, Cimmco Wagon Factory Vs. Virendra Kumar Sharma and Another* , , wherein the Supreme Court, while deciding the similar

case, has observed as under: -

Assuming that the respondent was asked to work in a factory in anticipation of securing appointment, that too by an officer who was not competent to give appointment, that did not make the respondent a workman or regular employee of the appellant company.

77. This Court (Hon'ble Dr. B.S. Chauhan, J.) in (2003) 2 ESC 1007 (State of U.P. v. Presiding Officer, Labour Court, Meerut) has held that the appointment should be made at initial stage in accordance with rules. Incumbent must possess the requisite qualification for the post on the date of appointment and if appointment had been made on temporary adhoc basis, the workman should not be permitted to continue for long rather the vacancies should be filled up on permanent basis in accordance with law only if the statutory provision or executive instruction provides for regularisation after completing a particular period only then regularisation is permissible. In special circumstances, Court may give direction to consider the case for regularisation provided continuation on ad hoc basis is so long that it amounts to arbitrariness and provisions of Article 14 are attracted. There must be sanctioned post against which regularisation is sought. At the same time policy of the State enforcing the reservation for particular classes like S.C.. ST.. O.B.C. etc. and further for women, handicapped and ex-service men cannot be ignored.

78. Following Morinda Co-op. Sugar Mills Ltd. Vs. Ram Krishan and others etc., the Supreme Court in Anil Bapurao Kanasv v. Krishna Sahakari Sakhar Karkhana Ltd. and Anr. (1997) 10 SCC 5999, observed that the termination/ disengagement of seasonal worker deployed in Chemistry section of sugar factory when the work was over could not be treated as retrenchment within the meaning of Section 2(oo) of Industrial Disputes Act irrespective of the claim that such employee had rendered more than 180 days" service, in such situation Section 25F of said "Act" was not attracted:

79. While referring decision of P.V. Papanna and others Vs. K. Padmanabhaiah, the Supreme Court in Himachal Pradesh Housing Board Vs. Om Pal and others, had held that the administrative tribunal without holding termination of retrenched daily wage workers as invalid and holding them to be continuing in service, could not direct their regularisation and payment of enhanced wages to them.

80. After considering its own judgement in Piara Singh (supra) and decision in Satyanarayan Sharma and others Vs. National Mineral Development Corporation Ltd. and others, , the Supreme Court has observed in Municipal Corporation, Bilaspur and Another Vs. Veer Singh Rajput and Others, that the direction of High Court to regularise the service of casual labourer was unwarranted, being contrary to the administrative directions, instructions, circulars and orders of Government when the Municipal Corporation found that the administrator had made deployment of daily rated/ muster roll/ casual labour irregularly and on

extra political consideration and municipal corporation intended to reduce the establishment expenditure and the Government had prohibited to fill up the vacant posts and creation of new posts including regularisation, however, the Supreme Court acknowledged the liberty for the municipal corporation, in case, it was making further appointment of casual or daily rated workers and to consider the said retrenched persons on daily wages in preference by waiving age bar if necessary, provided they were otherwise qualified and eligible to the post.

81. The Supreme Court in (1998) 9 SCC 709 (State of Punjab and Ors. v. Sardara Singh) held that the High Court could not direct regularisation of daily wager, however, a direction could be given to the State Government to frame scheme of regularisation and if the scheme is already framed, a direction may be given to the State for considering the matter of regularisation in accordance with the scheme.

82. Following its own decision in 1990 SCC 191 (M.M.R. Khan v. Union of India) and Employers in relation to the Management of Reserve Bank of India Vs. Their Workmen, and in reference to decision of Parimal Chandra Raha v. L.I.C. 1995 Supp. (2) SCC 611 the Supreme in Indian Petrochemicals Corpn. Ltd. and Another Vs. Shramik Sena and Others, has held that relation of workmen of statutory canteen managed by contractor with the establishment maintaining such canteen are question of fact on the basis of material on record and such persons were said to be workmen of the establishment for the purpose of Factory Act only and not ipso facto workmen of the establishment for the other purposes, like, recruitment, seniority, promotion, retirement benefits etc., however, on their claim direction of High Court granting relief of regularisation was held to be justifiable in the light of provisions of Articles 14 and 16 of the Constitution in that undertaking was not as a matter of statutory right of the workmen but to eradicate unfair labour practice and to undo social injustice and as a measure of labour welfare and imposition of certain conditions as to eligibility for the benefit of the relief.

83. The Supreme Court in Executive Engineer (State of Karnataka) Vs. K. Somasetty and others, relying on its earlier decisions in Union of India v. Jai Narain Singh 1995 (4) SCC 672; State of H.P. v. Suresh Kumar Verma (supra) has held that State while discharging " public welfare function can not be said to be an Industry and the decision of the labour Court made in reference to Section 10 of Industrial Disputes Act, 1947 reinstating the daily wagers discharged from the project was said to have been no right to the post and the reinstatement of such daily wagers was held unjustifiable.

84. The Supreme Court in Haryana State F.C.C.W. Store Ltd. and Another Vs. Ram Niwas and Another, while following its earlier decisions in Uptron India Limited Vs. Shammi Bhan and Another, and Harmohinder Singh Vs. Kharga Canteen, Ambala Cantt., , has observed that disengagement of workers deployed on a particular project in terms of contract of service when the work and procurement and supply of wheat in the said project was over, then the

deployment of such daily wager as watchman/ Chaukidar on contractual basis, could not be said to be retrenchment within the meaning of Section 2(oo)(bb) and 25F of Industrial Disputes Act.

85. Following its own decision in (2002) 9 SCC 693 *Sufal Jha v. Union of India*, the Supreme Court in another decision of *Ircon International Ltd. Vs. Daya Shankar and Another*, has observed that the work-charge employee appointed on a particular Railway Ballast Project as a Khalasi for the duration of continuation of project could not automatically continue in deployment thereafter when the project is over and the work-charge employee became surplus and was retrenched after being paid compensation under Industrial Disputes Act and the direction of High Court to consider such retrenched employee as permanent employee was said to be erroneous, however, in peculiar facts and circumstances the said retrenched employee could be considered in accordance with the seniority against the vacancy arising in future.

86. The Supreme Court in *APSRTC, Cuddapah v. K. Bajjanna*, (2002) 9 SCC 739 observed that the workman under the same employer at the time of reinstatement at the direction of the labour Court are to be treated harmoniously in respect of payment of back-wages and the burden- shall be on workman to show that he was not gainfully employed during the period of non-employment.

87. The Supreme Court further in AIR 2002 SC 2343 has observed that disability of workman/ employee being underage at the time of appointment does not stand subsequently removed and regularisation based on such appointment could not be upheld, more so, when there was specific provision barring underage persons from working in mines.

88. The Supreme Court relying on its earlier decisions of *Gammon India Ltd. and Others Vs. Union of India (UOI) and Others*, ; *B.H.E.L. Workers Association, Hardwar and Others Vs. Union of India and Others*, ; *Mathura Refinery Mazdoor Sangh through its Secretary Vs. Indian Oil Corporation Ltd., Mathura Refinery Project, Mathura and Another*, and *Dena Nath and others Vs. National Fertilisers Ltd. and others*, in *R.K. Panda and Others Vs. Steel Authority of India and Others*, has indicated that regularisation of contract labour engaged at Rourkela Plant of Steel Authority of India on the ground that they continued for long periods (10 to 20 years) through contractor shall involve question of fact, therefore, normally assessment of period could be determined by the labour Court and industrial tribunal on evidence and not by the High Court or Supreme in writ jurisdiction or under Article 136 of Constitution respectively, however, on the basis of the interim orders of Supreme Court many contract labourer had continued in employment for several years, were directed to be considered for absorption or for voluntary retirement by the management under a guideline.

89. The Supreme Court in *Union of India and Others Vs. Dharma Pal and Others*, directed for enforcement of a scheme for regularisation in absence of any existing rules of casual/ daily wagers/ work charge employees engaged in

construction/ execution of maintenance work under Chandigarh Administration, whereas, the Supreme Court way back in 1991 (2) SCC 338 (V.B. Rao v. Steel Authority of India Limited and Anr.) had indicated that reinstatement of an employee can not be insisted upon where the employer had lost confidence in the employee owing to his involvement in criminal cases in connection with appropriation of certain funds, however, the High Court was said not to be incorrect in substituting reinstatement by compensation to cover both backwages and entitlement for loss of future services.

90. S.M. Nilajkar (supra) in special facts and circumstances when the burden of deployment was on the employer to show that the deployment of workman in Government project or scheme was under a stipulated contractual manner and the workman/ employee was made aware of such stipulation at the commencement of his deployment otherwise mere prove of employment of casual worker or daily wager in a project or scheme and termination of service from the project or scheme coming to an end was not enough to attract the Section 2(oo)(bb) of Industrial Disputes Act and the termination was said to be retrenchment.

91. Following Union of India (UOI) and Others Vs. K.V. Baby and Another, ; Silver Jubilee Tailoring House and Others Vs. Chief Inspector of Shops and Establishments and Another, and Dharangadhara Chemical Works Ltd. Vs. State of Saurashtra, , the Supreme Court in (2001) 3 SCC 36 (Indian Banks Association v. Workmen of Syndicate Bank and Ors.) has held that commission agents/ deposit collectors of banks though not regular employees nonetheless were having relationship of master and servant between the bank and such workmen, could be deployed on commission basis and not entitled to absorption as regular workmen and not entitled to pay scale, allowances and service conditions of regular bank employees.

92. In State of Haryana and Another Vs. Tilak Raj and Others, , the Supreme Court pointed out that the principle of equal pay for equal work is not always easy to apply. There are inherent difficulties in comparing and evaluating the work done by different persons in different organisations or even in the same organization. In State of Haryana v. Tilak Raj (supra), the Supreme Court observed that a scale of pay is attached to a definite post and in case of a daily wager, he holds no post, hence he cannot be compared with the regular and permanent staff for any or all purposes including a claim for equal pay for equal allowances. Equal pay for equal work is a concept which requires for its applicability complete and wholesale identity between a group of employees claiming identical pay scale and the other group of employees who have already earned such pay scales. The problem about equal pay cannot always be translated into a mathematical formula.

In Tilak Raj (supra) the Supreme Court has held that the claim of equal pay for equal work by a daily wager quay the regular and permanent staff are not tenable. Since the daily wager holds no post and scale of pay is attached to a

definite post, however, the State Government was directed to ensure that minimum wages are prescribed for daily wagers and the same to be paid to them. While reversing the judgement of 2002 (2) SCT 349 (P&H.), it was held in *Tilak Raj* (supra) as below:-

A scale of pay is attached to a definite post and in case of a daily wager, he holds no posts. The respondent workers on daily wages in Haryana Roadways cannot be held to hold any posts to claim even any comparison with the regular and permanent staff for any or all purposes including a claim for equal pay and allowances. To claim a relief on the basis of equality, it is for the claimants to substantiate a clear cut basis of equivalence and a resultant hostile discrimination before becoming eligible to claim rights on a par with the other group vis-a-vis an alleged discrimination. No material was placed before the High Court as to the nature of the duties of either categories and it is not possible to hold that the principle of "equal pay for equal work" is an abstract one. However, the appellant- State has to ensure that minimum wages are prescribed for such workers and the same is paid to them. "Equal pay for equal work" is a concept which requires for its applicability complete and wholesale identity between a group of employees claiming identical pay scales and the other group of employees who have already earned such pay scale. The problem about equal pay cannot always be translated into a mathematical formula.

93. To enforce his submissions, the learned Counsel for the petitioner placed credence on a decision in *The Dharwad District P.W.D. Literate Daily Wage Employees' Association and Ors. v. State of Karnataka and Anr.* 1990 (2) SLR 43 and *State of U.P. and Others Vs. Putti Lal*, In *Putti Lal's* case, the Supreme Court has directed to consider the case of regularization according to the relevant prevailing rules and for payment of minimum of the pay scale as applicable to their counter part in the government until services of such daily wage employees are regularized. The other decisions relied upon by the learned Counsel are *Gujarat Agricultural University Vs. Rathod Labhu Bechar and Others*, ; *Jayanta Biswas v. University of Calcutta and Ors.* (2001) 1 UPLBEC 74 and *Daily Rated Casual Labour Employed under P and T Department Vs. Union of India (UOI) and Others*, , to hammer home the submissions aforesaid.

94. In *Orissa University of Agriculture and Technology and Another Vs. Manoj K. Mohanty*, the Supreme Court relying on the decisions in *Jasmer Singh* (supra), *M.R. Ganesh Bahu* (supra) and *Pradip Kumar Dey* (supra) has held that the writ petitioner employed in the university on temporary basis as a typist continued for more than five years with an artificial break while working as Junior Assistant was not entitled for regularisation by applying principle of equal pay for equal work and in the said case the Supreme Court in para 11 observed as under:-

11. This Court in *Union of India and Others Vs. Pradip Kumar Dey*, , after referring to various decisions dealing with the similar question in Para 8 has held thus-

In our considered view, the Division Bench of the High Court was not right and justified in straightway giving direction to grant pay scale to the respondent when there was no material placed before the Court for comparison in order to apply the principle of "equal pay for equal work" between the radio operators of CRPF and the radio operators working in civil side in the central water commission and the directorate of police wireless. In the absence of material relating to other comparable employees as to the qualifications, method of recruitment, degree of skill, experience involved in the performance of job, training required, responsibilities undertaken and other facilities in addition to pay scales, the learned Single Judge was right when he stated in the order that in the absence of such material it was not possible to grant relief to the respondent. No doubt, the directorate of CRPF made recommendations to the Pay Commission for giving higher pay scales on the basis of which claim is made by the respondent for grant of pay scale. The factual statements contained in the recommendation of a particular department alone cannot be considered per se proof of such things or then cannot by themselves vouch for the correctness of the same. The said recommendation could not be taken as a recommendation made by the Government. Even otherwise a mere recommendation did not confer any right on the respondent to make such a claim for writ of mandamus.

95. This Court (D.B.) in *State of U.P. and Others Vs. U.P. Madhyamik Shiksha Parishad Shramik Sangh and Others*, has held that writ petitioners while working as daily wagers for several years could not claim same pay scale as regular Class-III employees nor other benefits admissible to other regular employees and for regularisation the daily wagers have to face regular selection in accordance with the rules as they cannot be regularised without such selection, and in said case this Court in para 47 has held as under:--

47. No doubt in certain decisions the Courts have given directions for regularising daily wagers or casual/ temporary employees but in our opinion such directions do not amount to a precedent vide *Indian Council of Agricultural Research v. Raja Balwant Singh College* 2003 (1) ESC 424 ; *Delhi Administration (Now N.C.T. of Delhi) Vs. Manohar Lal, , etc.* What is a binding precedent is a principle of law, which has been laid down in a decision of the Court and a mere direction without laying down any principle of law not a precedent. A case is an authority for what it actually decides Vide *Goodyear India Ltd., Gedore (India) Pvt. Ltd., Kelvinator of India Ltd. and the Food Corporation of India and Another Vs. State of Haryana and Another, ; Sreenivasa General Traders and Others Vs. State of Andhra Pradesh and Others, ; Union of India (UOI) and Others Vs. Dhanwanti Devi and Others, ; Amar Nath Om Prakash and Others Vs. State of Punjab and Others, , etc.* Everything in a decision is not a precedent vide *State of Punjab v. Baldeo Singh* 1999 SCC 1080.

96. There can be no quarrel on the legal proposition that no party can suffer by the action of the Court and when the High Court is exercising its powers Under Article 226 of the Constitution of India, the interest of justice requires that any

undeserved or unfair advantage gained by a party invoking the jurisdiction of the Court must be neutralized. The institution of litigation by a party should not be permitted to confer an unfair advantage on the party responsible for it. (Vide *Grindlays Bank Limited Vs. Income Tax Officer, Calcutta and Others*, ; *Ram Krishna Verma and Others Vs. State of U.P. and Others*, ; AIR 1997 993 (SC) and *Smt. Rampati Jaiswal Vs. State of U.P. and others*,).

97. No litigant can derive any benefit from mere pendency of case in a Court of Law, as the interim order always merges in the final order to be passed in the case and if the writ petition is ultimately dismissed, the interim order stands nullified automatically. A party cannot be allowed to take any benefit of its own wrong by getting interim order and thereafter blame the Court. The fact that the writ is found, ultimately, devoid of any merit, shows that a frivolous writ petition had been filed. The maxim "*Actus Curie neminem grabavit*" is applicable in such a case, which means that the act of the Court shall prejudice no-one. In such a situation the Court is under an obligation to undo the wrong done to a party unfair advantage gained by a party invoking the jurisdiction of the Court must be neutralized as institution of litigation cannot be permitted to confer any advantage on a suitor from delayed action by the act of the Court. (Vide *Dr. A.K. Sircar v. State of Uttar Pradesh and Ors. v. Board of directors, Uttar Pradesh State Road Transport Corporation and Anr.* 1995 (2) SCC 726 ; *Kanoria Chemicals and Industries Ltd. and Others Vs. U.P. State Electricity Board and Others*, ; the *Committee of Management, Arya Nagar Inter College, Arya Nagar, Kanpur, through its Manager and another Vs. Sree Kumar Tiwary and another, M/ S. GTC Industries Limited Vs. Union of India and Others*, .

98. The same view has been taken by the Supreme Court in the case of *The Commissioner of Police, Bombay and another Vs. Bhagwan V. Lahane*, ; *Bileshwar Khan Udyog Khedut Shahakari Mandali Ltd. v. Union of India and Ors.* AIR 1999 SC 1198 ; and *South Eastern Coalfields Ltd. Vs. State of M.P. and Others*, , wherein it has been held that the appointment/ continuation in service by interim order, does not create any legal right in favour of the appointee.

99. So far as the issue of regularisation is concerned, the petitioner-appellant cannot claim that he was entitled to be considered for regularisation, for the reason that as he had been working under the interim order of the Court and his writ petition had been dismissed, he cannot take the benefit of continuation of service for that period and the Rules for regularisation are not applicable in his case as held by the Supreme Court in *H.P. Housing Board v. Om Pal and Ors.* (1997) 1 SCC 183 ; and *Ramchander and Others Vs. Additional District Magistrate and Others*, .

100. In *State of U.P. and Others Vs. Raj Karan Singh*, , the Supreme Court has categorically held that interim order cannot disturb the position in law and if a person is in service by virtue of the interim order of the Court, he cannot agitate the issue that his continuation in service in such a condition has improved his claim to regularisation.

101. It is well settled that the nature of employment has to be seen for determining as to which category a person is working and not in the wordings mentioned in the appointment letter. This Court in *Rama Kant Dwivedi Vs. Presiding Officer, Industrial Tribunal (I) and Another*, has also taken the same view.

In *Reptakos Brett and Co. Vs. Labour Court (Vth), U.P., Kanpur and another*, ; it was held by this Court that the nature of employment is not judged by the terms of the letter issued by the employer but by the nature of duty performed.

In *Dharangadhara Chemical Works Ltd. Vs. State of Saurashtra*, ; it was held by Supreme Court that the essential condition of a person being a workman within the terms of the definition in Section 2(s) is that he should be employed to do the work in the industry, that there should be, in other words, an employment of his by the employer that there should be the relationship between the employer and him as between employer and employee or master and servant. Unless a person is thus employed there can be no question of his being a workman within the definition of the term as contained in the Act. The prima facie test for the determination of relationship between master and servant is the existence of the right in the master to supervise and control the work done by the servant not only in the matter of directing what work the servant is to do but also the manner in which he shall do his work. The nature or extent of control, which is requisite to establish the relationship of employer and employee must necessarily vary from business to business and is by its very nature incapable of precise definition. The correct method of approach, therefore, would be to consider whether having regard to the nature of the work there was due control and supervision by the employer. A person can be a workman even though he is paid not per day but by the job. The fact that Rules regarding hours of work, etc., applicable to other workmen may not be conveniently applied to them and the nature as well as the manner and method of their work would be such as cannot be regulated by any directions given by the Industrial Tribunal, is no deterrent against holding the persons to be workmen within the meaning of the definition if they fulfill its requirement. The Industrial Tribunal would have to very well consider what relief, if any, may possible be granted to them having regard to all the circumstances of the case and may not be able to regulate the work to be done by the workmen and the remuneration to be paid to them by the employer in manner it is used to do in the case of other industries where the conditions of employment and the work to be done by the employees is of a different character.

In *S.K. Maini Vs. M/s. Carona Sahu Company Limited and others*, : it was held by Supreme Court that the designation of an employee is not of much importance and what is important is the nature of duties being performed by the employee. The determinative factor is the main duties of the concerned employee and not some works incidentally done. In other words, what is, in substance, the work which employee does or what in substance he is employed to do. Viewed from this angle, if the employee is mainly doing supervisory work but incidentally or

for a fraction of time also does some manual or clerical work, the employee should be held to be doing supervisory works. Conversely, if the main work is of manual, clerical or of technical nature, the mere fact that some supervisory or other work is also done by the employee incidentally or only a small fraction of working time is devoted to some supervisory works, the employee will come within the purview of workman as defined in Section 2(s) of the Industrial Dispute Act.

102. I have heard learned Counsel for the parties. I find that in view of the decision of Supreme Court in Himanshu Kumar Vidyarthi (supra) disengagement/ termination of petitioner cannot be said to be retrenchment from service in violation of Section 25F of the Industrial Dispute Act, 1947 or in violation of Section 6-N of the Industrial Dispute Act. The petitioner was undisputedly daily wager and non-mentioning of daily wager in the dismissal order is not fatal.

Since the petitioner was a daily wager as such has no right to the post and no opportunity of hearing was necessary to be given to the daily wager while dispensing his engagement. In the manner the order has been passed no stigma could be said to have been reflecting from the termination order, as the daily wager was not protected by any rules or under the provisions of Article 311 of the Constitution. The petitioner has not prayed in the writ petition for regularization and no amendment to that effect has also been filed for and on behalf of the petitioner and since by rendering service on the strength of the interim order cannot be recognized as a continuous service for the purpose of consideration for regularization. This Court (D.B) In Ram Asray Vs. District Judge, has also taken the same view that the appointment or continuance of service on the strength of interim order creates no legal right for the appointee.

103. In view of the above observations, facts and circumstances, the petitioner cannot be given relief as prayed for.

In these circumstances, the writ petition is dismissed.