

**HIGH COURT OF TRIPURA
AGARTALA**

WA No.112 of 2022

1. The State of Tripura,

to be represented by Principal Secretary, Food,
Civil Supplies and Consumer Affairs Department,
Govt. of Tripura, P.S. New Capital Complex,
Dist.- West Tripura.

2. The Director of Food, Civil Supplies and Consumer
Affairs Department, Government of Tripura,
Khadya Bhawan, P.O. Agartala, P.S. West Agartala,
District-West Tripura, PIN: 799005.

3. The Principal Secretary, Finance Department,
Government of Tripura, P.O. Kunjaban, P.S. New
Capital Complex, District: West Tripura, PIN: 799006.

4. The Sub Divisional Magistrate,
Kumarghat, P.O. & P.S.- Kumarghat,
District-Unokoti, PIN: 799264.

....Appellant(s)

Versus

Smt. Suprava Debnath,

W/o Lt. Niranjana Debnath, R/o- Kumarghat,
Sukanta Nagar, P.O. & P.S.-Kumarghat,
Dist.- Unakoti, PIN: 799264.

....Respondent(s)

For Appellant(s)	:	Mr. K. De, Addl. GA
For Respondent(s)	:	Mr. A. Bhaumik, Advocate Mr. S. Dey, Advocate
Date of hearing	:	29.08.2023
Date of delivery of judgment & order	:	16.10.2023
Whether fit for reporting	:	Yes

**HON'BLE THE CHIEF JUSTICE MR. APARESH KUMAR SINGH
HON'BLE MR. JUSTICE ARINDAM LODH**

JUDGMENT & ORDER

(Arindam Lodh, J.)

This intra-court appeal preferred by the appellants-State is directed against the judgment and order dated 20.06.2022 passed by a learned Single Judge of this Court in WP(C) No.867 of 2021, whereby and

whereunder the learned Single Judge directed the State-appellants to regularize the service of the respondent-writ petitioner in terms of Memorandum dated 21.01.2009 along with all service benefits including financial benefits.

2. The facts, as projected by the respondent-writ petitioner in the writ petition, are as under:

2.1. The respondent-writ petitioner(here-in-after referred to as the '*writ petitioner*') was engaged as a Contingent Worker in the office of the SDC, Food, Kumarghat in the year 1993. Since her engagement, she had been rendering full-time duty for 8(eight) hours in a day.

2.2. On 03.11.2003, the Sub-Divisional Magistrate, Kailashahar issued a Radiogram Message wherein it was stated that the writ petitioner had been engaged in the office of the SDC, Food at Kumarghat against monthly wage of Rs.950/- which was being paid from the contingency fund.

2.3. Later on in the year 2007, the Sub-Divisional Magistrate, Kailashahar by issuing another letter dated 10.02.2007 informed that the writ petitioner had been engaged as Contingent Worker on 15.05.1990 wherein financial approval was shown given in the year 1993.

2.4. At a later stage in the year 2017, vide letter dated 03.03.2017, the Sub-Divisional Magistrate, Kumarghat, Unakoti Tripura informed the Director, FCS&CA, Agartala that the writ petitioner had been engaged as a Contingent Worker and in the said communication the year of her engagement was shown as 1993.

2.5. It was stated that her engagement was made in the year 1993 which is also evident from the statement/chart issued by one Sri Apurba Roy, the then Under Secretary to the Government of Tripura.

2.6. On the basis of the above communications and the chart/statement, it was contended by the writ petitioner that she had been engaged as a Contingent Worker in the year 1993 and she had been discharging Full-Time duty i.e. 8(eight) hours in a day. So she was entitled to be regularized as Group-D in terms of Memorandum dated 21.01.2009 on the date of her completion of ten years service as Full-Time Contingent Worker. But, the Addl. Secretary & Director, FCS&CA, Government of Tripura vide Memorandum dated 14.09.2017 arbitrarily engaged the writ petitioner as Daily Rated Worker(Group-D) from Part Time Worker(PTW) on her completion of ten years of service as PTW as on 30.11.2012.

3. Being aggrieved by the Memorandum dated 14.09.2017 issued by the appellants the petitioner filed a writ petition before this Court under Article 226 of the Constitution of India for setting aside the impugned Memorandum dated 14.09.2017 and also for issuing direction upon the State-appellants to regularize the service of the writ petitioner on the date of her completion of ten years of service as Full Time Contingent Worker in terms of Memorandum dated 21.01.2009 issued by the Government of Tripura and to grant all service benefits including the arrears of pay.

4. Learned Single Judge after hearing the learned counsel appearing for the parties and having gone through the records, vide judgment and order dated 20.06.2022 allowed the writ petition directing the appellants-State to regularize the service of the writ petitioner along with all

consequential service benefits including arrears of pay within a period of 3(three) months.

5. Being aggrieved by and dissatisfied with the impugned judgment and order passed by the learned Single Judge, the appellants preferred the present appeal praying for the following relief(s):

“(i) Admit the appeal;

(ii) Call for the records of the Judgment & Order dated 20/06/2022 passed in WP(C) 867/2-21 by the learned Single Judge;

(iii) Issue Notice;

(iv) After hearing the parties pleased to set aside the impugned Judgment and Order dated 20/06/2022 passed by the learned Single Judge and be pleased to discuss the writ petition;

(v) Pass such other order or orders as seems fit and proper having regard to the circumstances of the case.”

6. On the aforementioned background facts and circumstances, we have heard Mr. K. De, learned Addl. GA appearing for the appellants as well as Mr. A. Bhaumik and Mr. S. Dey, learned counsel appearing for the writ petitioner.

7. Mr. De, learned Addl. GA for the appellants, at the outset has submitted that the communications dated 05.06.2014(*Annexure/R1* to the writ petition) and 21.03.2015(*Annexure/R2* to the writ petition) issued by the Sub-Divisional Magistrate, Kumarghat would clearly show that the writ petitioner was engaged as Part Time Worker(Wages) without concurrence of the Finance Department. He has further argued with vehemence that the writ petitioner failed to produce any document to show that she had been rendering ‘Full-Time’ duty for 8(eight) hours in a day, which is one of the main conditions for regularization in terms of Memorandum dated 21.01.2009.

7.1. It is also submitted by learned Addl. GA that the radiogram message dated 03.11.2003 issued by the Sub-Divisional Magistrate, Kailashahar clearly indicates that the writ petitioner was engaged for the purpose of office sweeping/cleaning and water carrying, etc. work and for such engagement she was being paid monthly wage from contingency fund and there was no approval of the Finance Department for such engagement. Her engagement also clearly affirms that the service of the writ petitioner was required for a particular time of a working day in the office where she was attached and not on 'Full-Time' basis as claimed by the writ petitioner. Even she was not engaged in a regular vacant post following the established procedure of employment.

7.2. Referring to Memorandum dated 21.01.2009 issued by the Finance Department, Government of Tripura, Mr. De, learned Addl. G.A. has further argued that regularization of the writ petitioner is not covered by the said Memo. dated 21.01.2009 *firstly*, on the ground that she was not engaged on 'Full-Time' basis as contemplated in the said Memo. for regularization, *secondly*, her service of ten years will be completed on 13.09.2027 as she was engaged by the appellants after obtaining concurrence of the Finance Department as DRW(Group-D) w.e.f. 14.09.2017, and *thirdly*, the said Memorandum dated 21.01.2009 on which the writ petitioner relied upon had already been repealed by a subsequent Memorandum dated 31.07.2018 issued by the Government of Tripura.

Learned Addl. G.A. therefore prayed for quashing the impugned order of the learned Single Judge.

8. Refuting the submissions advanced by the learned Addl. G.A. for the appellants, Mr. Bhaumik, learned counsel for the writ petitioner has submitted that the writ petitioner was engaged as “Full-Time” contingent worker in the year 1993 and since after her engagement she had been rendering service for eight hours a day in that capacity. She had completed ten years of continuous service in the year 2003 as “Full-Time” contingent worker.

8.1. It has been further contended by Mr. Bhaumik, learned counsel that though she was entitled to be regularized in the year 2003 on her completion of ten years of continuous service as Contingent Worker, but the appellants most illegally deprived her right of regularization in the service. Thereafter, when the Memorandum dated 21.01.2009 came into existence, which was a policy decision of the Government to regularize the services of DRWs/Casual/Contingent Workers from the next date of completion of ten years of service, then also the appellants, most arbitrarily deprived her from the benefit of that policy. Thereafter, all on a sudden in the year 2017, the appellants vide Memo. dated 14.09.2017 engaged her as Daily Rated Worker(Group-D) instead of regularizing her service as Group-D, which was grossly erroneous and violative of the right of the writ petitioner.

Learned counsel therefore prayed for upholding the judgment and order passed by the learned Single Judge.

9. We have considered the rival submissions of the learned counsel appearing for the parties and also have gone through the records. Keeping in view the rival contentions of the parties and having gone

through the materials available on record, we feel the main questions which broadly fall for consideration before us are:

- (i) Whether the writ petitioner was engaged as 'Full-Time' Contingent Worker having duty hours of eight hours per day since her engagement?
- (ii) Whether the claim for regularization of the writ petitioner comes within the ambit of the Memorandum dated 21.01.2009 issued by the Finance Department, Government of Tripura?
- (iii) Whether the engagement of the writ petitioner was "irregular" or "illegal"?
- (iv) Whether the learned Single Judge had committed error directing the appellants to regularize the service of the writ petitioner?

10. Before we delve into the questions as formulated above, it would be apposite to reproduce here-under the Memorandum dated 21.01.2009, extract of which reads thus:

*"No.F.10(2)-FIN(G)/2008(Part)
GOVERNMENT OF TRIPURA
DEPARTMENT OF FINANCE*

Dated, Agartala, the 21st January, 2009

MEMORANDUM

Subject: Regularization of services of DRWs/Casual/Contingent Workers on the next date of completion of 10 years of service.

*The undersigned is directed to inform that the Government has taken a policy decision to regularize **services of full-time DRWs/Casual/Contingent Workers** from the next date of completion of 10 years of service and fulfill the following criterion as per Department-wise names and particulars attached herewith:*

- (i) *DRW/Casual/Contingent workers who were engaged **on a full time basis** in different Departments with or without concurrence of Finance*

*Department other than Permanent Labourers, **Part-time workers**, Anganwadi Workers and Helpers, Home Guards, Teachers and Workers engaged under SSA and other Schemes/programmes, may be considered for regularization as per names attached.*

(ii) Requirement of age as per Recruitment Rules will be deemed to be relaxed for the purpose of this regularization.

(iii) Requirement of educational qualification as per Recruitment Rules will be deemed as relaxed for regularization under Group-D only. In case of DRW/and Contingent Workers who were appointed under Group-C category, educational qualification as required under concerned R.R. must be ensured while entertaining their cases for regularization.

*(iv) Except age and educational qualification mentioned in point (ii) & (iii) all other criterion as per relevant Recruitment Rules **including reservation roster will have to be followed strictly for this process of regularization.***

(v) Subject to fulfillment of above conditions, the eligible workers will be provided pay scale in the relevant post on the following day of completion of 10 years of service(without any break) from the date of joining. In the event of revision of pay scales the revised structure will be followed as per Govt. 's decision.

2. To facilitate quick action for implementation of the above decisions, appropriate authorities of the concerned Administrative Department of the State Government are authorized to take following actions:

xxx xxx	xxx	xxx	xxx
xxx xxx	xxx	xxx	xxx

*3. **There shall be a complete ban on engagement of DRW/Casual/Contingent etc. workers after 31.3.2003 without concurrence from Finance Department. Responsibility shall be fixed on the official found responsible for any irregular engagement henceforth. Such irregular engagement shall have to be instantly terminated. The wages, if paid any, shall be recovered from the official concerned.***

4. The undersigned is directed to request all concerned to ensure strict implementation of the above decisions."

(emphasis supplied)

10.1. A bare perusal of the aforesaid Memo. it comes to fore that the Finance Department, Government of Tripura had taken a policy decision to

regularize the services of those DRWs/Casual/Contingent Workers who had rendered service continuously for ten years on “**Full-Time**” basis with certain conditions as mentioned at sub-clauses (i), (ii), (iii), (iv) and (v) of the first para of the said Memo.

10.2. At this stage, we must note that on perusal of the entire records we find no engagement letter, issued in favour of the writ petitioner either as ‘**Part-Time**’ or ‘**Full-Time**’ at any point of time, except the impugned order of engagement of the writ petitioner dated 14.09.2017 as DRW(Group-D). However, what we find is that there are some mentions in the communications(as annexed by the writ petitioner) issued by the appellants stating that she had been engaged as ‘contingent worker’, ‘part-time worker’, etc., but in absence of an order of engagement/appointment issued by a competent authority specifying that she was engaged as “Full-Time” contingent worker, it would be difficult for us to arrive at a definite finding that she was engaged as “Full-Time” contingent worker for which she was entitled to get the benefit of the policy decision of the Government under Memo. dated 21.01.2009.

10.3. It is the contention of the learned counsel for the writ petitioner that she was engaged as ‘contingent worker’ in the year 1993. In support of his contention he has referred to a chart/statement of contingent workers, marked as *Annexure-1* to the writ petition. The content of the chart/statement is reproduced hereunder, in *extenso*:

Sl. No.	CATEGORY OF WORK	NAME OF WORKERS	PLACE OF POSTING	DDO	YEAR OF ENGAGEMENT	EXISTING RATE OF WAGES PER MONTH/DAY	NAME OF TREASURY/SUB-TREASURY

SDM, KAILASHAHAR							
316	CONT INGE NT	SUPRA VA DEBNA TH	KUMAR GHAT GODOW N KUMAR GHAT	SDM, KAILAS HAHAR	1993	900 PM	KAILAS HAHAR
317	CONT INGE NT	SAXMI NAMA SUDRA	KAILAS HAHAR	SDM, KAILAS HAHAR	2001	900 PM	KAILAS HAHAR

(APURBA ROY)
Under Secretary
Govt. of Tripura”

On going through the afore-mentioned statement/chart it appears that the writ petitioner was shown engaged in the year 1993 under the category of “contingent” worker in the office of the Kumarghat Food Go-down at a monthly wage of Rs.900/-. In the chart/statement, we however find nothing to ascertain on which date and from which department the chart was issued. However, we are of the view that the said chart/statement fails to prove that she was engaged as ‘Full-Time’ contingent worker in the year 1993.

10.4. We have next perused the radiogram message dated 03.11.2003(*Annexure-2* to the writ petition) issued by the Sub-Divisional Magistrate, Kailashahar on the basis of which the writ petitioner contended that she was engaged in the year 1993 as ‘Full-Time’ Contingent Worker. The radiogram message clearly stipulates that- *“THERE IS NO PART TIME CONTINGENT/CASUAL/D.R.W. ETC WORKERS ENGAGED.”* The message also clarifies that for the purpose of office sweeping/cleaning and water carrying, the writ petitioner was being paid monthly wage of Rs.950/- from contingency for which there was no approval of Finance Department.

The above statement therefore does not convince us to conclude that she was engaged as 'Full-Time' Contingent worker.

10.5. Thereafter, we have perused letter dated 10.02.2007(Annexure-3 to the writ petition) issued by the Sub-Divisional Magistrate, Kailashahar, wherein the name of the writ petitioner had been shown under the category of 'Contingent Worker' and her engagement date had been shown as 15.05.1990 having financial approval of the year 1993. So, the letter dated 10.02.2007 also does not convince us to hold that the respondent-petitioner was engaged as 'Full-Time' Contingent worker. Different dates of her engagement as mentioned in the writ petition and discussed here-in-above indubitably justifies that the writ petitioner herself is not sure about the actual date of her engagement vis-à-vis the nature of her engagement.

10.6. However, we have also gone through letter dated 05.06.2014(Annexure-R/1 to the writ petition, annexed by the appellants in their counter affidavit) issued by the SDM, Kumarghat. Clauses (1), (4), (5) & (6) of the said letter read thus:

"1. Category of Worker 4. Working since(Date)	: Part-Time Worker(Wages) :1988. The then she was under Kailashahar Sub-Division up to Feb, 2012 and thereafter she has transferred to the office of the SDM(Food Section) Kumarghat after bifurcation of Kailashahar Sub-Division w.e.f. March, 2012 and working in this establishment till date.
5. Details of concurrence of Finance Dept.	:This office has no record regarding concurrence of the Finance Department but as per the LPC issued by the SDM, Kailashahar she is getting her salary under head of Account 2408-01-001-98-21-22-Wages(Non-Plan) Demand No.21@Rs.3055/- per month.
6. If No concurrence was Obtained, Authority who Approved the engagement:	This office has no record regarding concurrence of the Finance Department but as per the LPC issued by the SDM, Kailashahar she is getting her salary

under head of account 2408--01-001-98-21-22- Wages(Non-Plan) Demand No.21@Rs.3055/- per month.”

The statements made in the aforementioned clauses would show that the writ petitioner was engaged as ‘Part-Time Worker(Wages)’ in the year 1988 without concurrence of the Finance Department. So, the claim of the writ petitioner regarding her engagement as ‘Full-Time’ Contingent Worker does not support the statements made in the aforementioned clauses.

10.7. *Annexure-R/2* to the writ petition annexed by the appellants is another letter of communication dated 21.03.2015 containing five vouchers and three bills, wherefrom it is revealed that the writ petitioner was discharging duty as ‘Part-Time’ worker on payment of wages for carrying water and sweeping/cleaning of rooms of the Food Office at Kumarghat.

10.8. The letter of the Sub-Divisional Magistrate, Kumarghat dated 03.03.2017(*Annexure-4* to the writ petition) stipulates that the writ petitioner was working in the office of the Sub-Divisional Magistrate, Kumarghat on her transfer after bifurcation of Kailashahar Sub-Division w.e.f. March, 2012 and she was getting monthly wage @Rs.3940/-. The letter of SDM, Kumarghat, however, clarifies in the manner that no document was available with them with regard to her engagement and concurrence of the Finance Department, except a statement/chart of one Sri Apurba Roy, Under Secretary showing her as a ‘Contingent Worker’ against Sl. No.316 and recording her engagement as 1993.

10.9. Finally, on going through the impugned Memo. dated 14.09.2017 we find the respondent-petitioner was engaged as DRW(Group-D). Extract of the Memo. dated 14.09.2017 reads thus:

“Pursuant to concurrence of the Finance Department vide letter No.F.34(2)-Fin(G)/2016 dated 01-09-2017, the following 6(six) numbers of Part Time Workers(PTW) who have been engaged for 2(Two) hours job prior to 31-03-2003 and have completed 10(Ten) years of service as on 30-11-2012 are hereby engaged as Daily Rated Worker(DRW), Group-D with prospective effect under Food, Civil Supplies & Consumer Affairs Department.

Sl.	Finance Department ID	Name of Worker	Cate gory	Group	Name of Head Of Office
1	856	Smt. Suprava Debnath	UR	D	SDM Kumarghat

.....”

11. The upshot of the aforesaid discussions is that the writ petitioner, though claimed that she had been engaged in the year 1993 as ‘**Full-Time**’ contingent worker basing on the chart/statement(Annexure-1), the radiogram message of SDM, Kailashahar dated 03.11.2003(Annexure-2), subsequent letter of SDM, Kailashahar dated 10.02.2007(Annexure-3) and the letter of SDM, Kumarghat dated 03.03.2017(Annexure-4), but she failed to produce any engagement letter issued in her favour and also failed to justify her claim that she had been engaged as ‘**Full-Time**’ contingent worker to get the benefit of the policy decision of the Government under the Memo. dated 21.01.2009. Moreover, we find no documentary evidence on record to come to a conclusion that her appointment was done after following due procedure of selection or to say the least that she was engaged against any regular vacant post.

11.1. The observation of learned Single Judge that the petitioner was working as ‘Full-Time’ basis since her engagement is, in our opinion, not at

all acceptable as we find not a single document from where we can arrive at a decision that the writ petitioner had been rendering duty on 'Full-Time' basis as contingent worker, rather what we find is that the service of the writ petitioner was required for a particular time of a working day and not on 'Full-Time' basis in the office where she was attached to. In any case, the fact remains that the writ petitioner had been serving as 'part-time' worker and she was being paid from contingent fund. Another aspect necessary to be dealt with herein in respect of the fact that the post in which the writ petitioner was engaged/held is not created and sanctioned by any authority of law and therefore, the directions issued by learned Single Judge by the impugned judgment and order, in our opinion, cannot be sustained.

11.2. Furthermore, the right of the writ petitioner, if any to claim regularization arose during the life of the afore-discussed Memo./Scheme and within the realm of the scheme, but she had approached before the court for the first time in the year 2021 to enforce her claims, that too, under the repealed scheme. Such claim, according to us, by now has become stale, and thus, is absolutely barred by the doctrine of *delay* and *laches*. On this count only, the instant appeal is liable to be allowed. It is reiterated that the scheme made for the purpose of regularization, was existed for more than 10 (ten) years.

11.3. Needless to mention, regularization or absorption is not a matter of right. It is a right to be considered by the employer and subject to availability of sanctioned vacant posts, etc. As we discussed earlier, there is no material before us that the writ petitioner had been working against any regular sanctioned post. Any appointment/engagement made not against

duly sanctioned post must not to be treated as “irregular appointments” but would be treated as “illegal appointments”.

11.4. It is clear that she was not engaged against any regular sanctioned post. That apart, neither in the pleadings nor any submission is made that at present any vacant sanctioned post exists. It is established proposition of law that the courts cannot direct the Government to create posts. According to us, creation of post is a matter of policy, which is absolutely within the domain of the Government itself.

11.5. In the context of the instant case, we may gainfully refer the Constitution Bench judgment rendered in *Secretary, State of Karnataka and others vs. Uma Devi (3) and others*, (2006) 4 SCC 1, where-under it was held that *orders for absorption, regularization or permanent continuance of such employees are passed apparently in exercise of the wide powers under Article 226 of the Constitution. The wide powers under Article 226 are not intended to be used for a purpose certain to defeat the concept of social justice and equal opportunity for all, subject to affirmative action in the matter of public employment as recognized by our Constitution. It is time that the courts desist from issuing orders preventing regular selection or recruitment at the instance of such persons and from issuing directions for continuance of those who have not secured regular appointments as per procedure established. The passing of orders for continuance tends to defeat the very constitutional scheme of public employment. It has to be emphasized that this is not the role envisaged for the High Courts in the scheme of things and their wide powers under Article 226 are not intended to be used for the purpose of perpetuating*

illegalities, irregularities or improprieties or for scuttling the whole scheme of public employment. Its role as the sentinel and as the guardian of equal rights protection should not be forgotten. [SCC p.18 para 4]

It was further held that *this bypassing of the constitutional scheme cannot be perpetuated by the passing of orders without dealing with and deciding the constitutional validity of the interim and final orders of the Supreme Court and High Courts which have issued directions for regularization, permanent continuation or absorption without referring to the legal position obtaining thereby, and which have been relied on by the respondent employees to claim the same relief. While approaching the questions falling for decision before this Constitution Bench, it is necessary to bear this in mind and to bring about certainty in the matter of public employment. The claim to a parity of treatment based on such orders also highlights the need for the Supreme Court to formally lay down the law on the question and ensure certainty in dealings relating to public employment. The very divergence in approach in the Supreme Court, the so-called equitable approach made in some, as against those decisions which have insisted on the rules being followed, also justifies a firm decision by the Supreme Court one way or the other. It is necessary to put an end to uncertainty and clarify the legal position emerging from the constitutional scheme, leaving the High Courts to follow necessarily, the law thus laid down. This Constitution Bench has to lay down the law. It has to approach the question as a constitutional court should. [SCC pp.20, 23-24, paras 10 & 14]*

In para 53 of *Uma Devi (3)(supra)*, it has been held that-

*“53. One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in State of Mysore vs. S.V. Narayanappa, reported in (1967) 1 SCR 128, R.N. Nanjundappa vs. T. Thimmiah, reported in (1972) 1 SCC 409, B.N. Nagarajan vs. State of Karnataka, reported in (1979) 4 SCC 507, and referred to in paragraph 15 above, of duly qualified persons in duly sanctioned vacant posts might have been made and the employees have continued to work for ten years or more but without the intervention of orders of courts or of tribunals. The question of regularization of the services of such employees may have to be considered on merits in the light of the principles settled by this Court in the cases above referred to and in the light of this judgment. In that context, the Union of India, the State Governments and their instrumentalities should take steps to regularize as a one time measure, the services of such irregularly appointed, who have worked for ten years or more in **duly sanctioned posts** but not under cover of orders of courts or of tribunals and should further ensure that regular recruitments are undertaken to fill those vacant sanctioned posts that require to be filled up, in cases where temporary employees or daily wagers are being now employed. The process must be set in motion within six months from this date. We also clarify that regularization, if any already made, but not subjudice, need not be reopened based on this judgment, but there should be no further by-passing of the constitutional requirement and regularizing or making permanent, those not duly appointed as per the constitutional scheme.”*

11.6. In the instant case, there is no averment that the writ petitioner has been working in duly sanctioned vacant post under the appellants. One of the pre-conditions as laid down by the Constitution Bench in *Uma Devi (3)(supra)*, is that the employees concerned apart from due qualification, should have worked for 10 (ten) years or more in a **“duly sanctioned vacant post”** without the benefit or protection of any interim order from any court or tribunal.

11.7. Further, the Constitution Bench directed the Central Government, State Governments and their instrumentalities to take steps to

regularize the services of irregularly appointed temporary employees or daily wagers as “**one-time measure**”. In the line of the directions, the State of Tripura had formulated schemes as stated *supra* to regularize the services of the Full-Time DRWs, Casual/Contingent Workers and the same was continued for long 10(ten) years. During the said period, the employees/workers who had completed 10(ten) years of service were regularized either by the Government or by the order of this Court within the realms of the policy. As stated above, the Government also decided to regularize those classes of irregularly appointed employees who were engaged on or after the cut-off date(31.03.2003) with or without the concurrence of the Finance Department. The scheme was existed for more than 10(ten) years till the same was repealed vide Memorandum dated 31.07.2018.

11.8. In *Uma Devi (3)*(*supra*), Hon’ble Supreme Court had extended the benefit of regularization as “**one-time measure**” to the employees who were appointed irregularly, but, not illegally against duly sanctioned posts. In *State of Karnataka vs. M.L. Kesari*, reported in (2010) 9 SCC 247, the distinction between the illegal appointment and irregular appointment was made in the manner as under:

“7. It is evident from the above that there is an exception to the general principle against regularization enunciated in Uma Devi (3) 1, if the following conditions are fulfilled:

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

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

8. Umadevi (3) casts a duty upon the Government or instrumentality concerned to take steps to regularize the services of those irregularly appointed employees who had served for more than ten years without the benefit or protection of interim orders of courts or tribunals, as a one time-measures, Umadevi (3) directed that such one time-measure must be set in motion within six months from the date of its decision.

9. The term 'one time-measure' has to be understood in its proper perspective. This would normally mean that after the decision in Umadevi (3), each department or instrumentality should undertake a one-time exercise and prepare a list of all casual, daily wage or ad-hoc employees who have been working for more than ten years without the intervention of courts and tribunals and subject them to a process verification as to whether they are working against vacant posts and possess the requisite qualification for the post and if so, regularize their service."

11.9. We noted in the preceding paragraphs that there is no material before us that the writ petitioner was engaged against duly sanctioned regular post and the said post was vacant at the time of her engagement or is still lying vacant. That apart, since the engagement of the writ petitioner was not made in duly sanctioned post, her appointment/engagement cannot be said to be irregular appointment/engagement, but, as per *Uma Devi (3)(supra)* and *M.L. Kesari(supra)*, her appointment/engagement was illegal appointment/engagement.

12. Another interesting feature surfaced in the present appeal is that the writ petitioner has not been able to produce any document that she was appointed/engaged as 'Full-Time' Contingent Worker under any order

of the competent authority of the appellants. Only she had annexed some communications, as referred to above from which it can hardly be ascertained that she had been appointed/engaged as “Full-Time” contingent worker as required under the Memo. dated 21.01.2009. So, on this score also, the appointment/engagement of the writ petitioner under the appellants was/is *per se* illegal.

13. The Hon’ble Supreme Court in ***State of Rajasthan & Ors. vs. Daya Lal & Ors.*** reported in (2011) 2 SCC 429, while dealing a case in respect of regularization or absorption of some of the temporarily appointed employees under the State of Rajasthan, had recast the well-settled principles relating to regularization, which is as under: [SCC pp. 435, 436, para 12]

“12. We may at the outset refer to the following well settled principles relating to regularization and parity in pay, relevant in the context of these appeals:

(i) The High Courts, in exercising power under Article 226 of the Constitution will not issue directions for regularization, absorption or permanent continuance, unless the employees claiming regularization had been appointed in pursuance of a regular recruitment in accordance with relevant rules in an open competitive process, against sanctioned vacant posts. The equality clause contained in Articles 14 and 16 should be scrupulously followed and courts should not issue a direction for regularization of services of an employee which would be violative of constitutional scheme. While something that is irregular for want of compliance with one of the elements in the process of selection which does not go to the root of the process, can be regularized, back door entries, appointments contrary to the constitutional scheme and/or appointment of ineligible candidates cannot be regularized.

(ii) Mere continuation of service by an temporary or ad hoc or daily-wage employee, under cover of some interim orders of the court, would not confer upon him any right to be absorbed into service, as such service would be ‘litigious employment’. Even temporary, ad hoc or daily- wage service for a

long number of years, let alone service for one or two years, will not entitle such employee to claim regularization, if he is not working against a sanctioned post. Sympathy and sentiment cannot be grounds for passing any order of regularization in the absence of a legal right.

(iii) Even where a scheme is formulated for regularization with a cut-off date (that is a scheme providing that persons who had put in a specified number of years of service and continuing in employment as on the cut-off date), it is not possible to others who were appointed subsequent to the cut-off date, to claim or contend that the scheme should be applied to them by extending the cut-off date or seek a direction for framing of fresh schemes providing for successive cut off dates.

(iv) Part-time employees are not entitled to seek regularization as they are not working against any sanctioned posts. There cannot be a direction for absorption, regularization or permanent continuance of part time temporary employees.

(v) Part time temporary employees in government run institutions cannot claim parity in salary with regular employees of the government on the principle of equal pay for equal work. Nor can employees in private employment, even if serving full time, seek parity in salary with government employees. The right to claim a particular salary against the State must arise under a contract or under a statute.

(See : Secretary, State of Karnataka vs. Uma Devi - 2006 (4) SCC 1, M. Raja vs. CEERI Educational Society, Pilani - 2006 (12) SCC 636, S.C. Chandra vs. State of Jharkhand - 2007 (8) SCC 279, Kurukshetra Central Co-operative Bank Ltd vs. Mehar Chand - 2007 (15) SCC 680, and Official Liquidator vs. Dayanand - 2008 (10 SCC 1)''

13.1. What emerges in *Daya Lal (supra)* is that the appointments even if irregular must be against sanctioned posts. Sympathy and sentiment cannot be a ground for passing any order of regularization in the absence of a legal right. Further, ***where the scheme is formulated for regularization with cut-off date(i.e. a scheme providing that persons who have put in a specified number of years and continuing in employment as on cut-off date), it is not possible for others who were appointed subsequent to the***

cut-off date, to claim or contend that the scheme should be applied to them by extending the cut-off date.

(Emphasis supplied)

As we have already discussed that in the instant appeal, the writ petitioner had failed to assert, or in other words, could not substantiate that she was engaged against “sanctioned vacant posts” in terms of the recruitment rules applicable to the concerned department. Moreover, in terms of communication dated 14.09.2017 her term of continuous ten years will be completed on 13.09.2027.

14. However, we are not unoblivious of the decisions and directions of the two-Judge Bench of the Hon’ble Supreme Court in *Narendra Kumar Tiwari & Ors. vs. State of Jharkhand & Ors.* reported in (2018) 8 SCC 238, where the Hon’ble Supreme Court directed the State of Jharkhand to take necessary steps for regularization of the irregularly appointed employees in the spirit of the decisions of the Constitution Bench in *Uma Devi (3)(supra)*. In the case of *Narendra Kumar Tiwari(supra)*, the Hon’ble supreme Court had referred and discussed the cases of *Uma Devi (3)(supra)* and *M.L. Keshari(supra)*. To evaluate the distinguishing features of the case at hand, with that of the case of *Narendra Kumar Tiwari (supra)*, it is necessary to extract the relevant paragraphs of the case of *Narendra Kumar Tiwari(supra)*:-[SCC pp.240,241, 242, paras 5,6,7,8,9,10,11 & 12]

“5. The decision in Umadevi (3) was intended to put a full stop to the somewhat pernicious practice of irregularly or illegally appointing daily wage workers and continuing with them indefinitely. In fact, in paragraph 49 of the Report, it was pointed out that the rule of law requires appointments to be made in a constitutional manner and the State cannot be

permitted to perpetuate an irregularity in the matter of public employment which would adversely affect those who could be employed in terms of the constitutional scheme. It is for this reason that the concept of a one-time measure and a cut-off date was introduced in the hope and expectation that the State would cease and desist from making irregular or illegal appointments and instead make appointments on a regular basis.

6. The concept of a one-time measure was further explained in Kesari in paragraphs 9, 10 and 11 of the Report which read as follows: (SCC pp.250-51, paras 9-11)

“9. The term “one-time measure” has to be understood in its proper perspective. This would normally mean that after the decision in Umadevi (3), each department or each instrumentality should undertake a one-time exercise and prepare a list of all casual, daily-wage or ad hoc employees who have been working for more than ten years without the intervention of courts and tribunals and subject them to a process verification as to whether they are working against vacant posts and possess the requisite qualification for the post and if so, regularise their services.

10. At the end of six months from the date of decision in Umadevi (3), cases of several daily-wage/ad hoc/casual employees were still pending before courts. Consequently, several departments and instrumentalities did not commence the one-time regularisation process. On the other hand, some government departments or instrumentalities undertook the one-time exercise excluding several employees from consideration either on the ground that their cases were pending in courts or due to sheer oversight. In such circumstances, the employees who were entitled to be considered in terms of para 53 of the decision in Umadevi (3), will not lose their right to be considered for regularisation, merely because the one-time exercise was completed without considering their cases, or because the six-month period mentioned in para 53 of Umadevi (3) has expired. The one-time exercise should consider all daily-wage/ad hoc/casual employees who had put in 10 years of continuous service as on 10-4-2006 without availing the protection of any interim orders of courts or tribunals. If any employer had held the one-time exercise in terms of para 53 of Umadevi (3), but did not consider the cases of some employees who were entitled to the benefit of para 53 of Umadevi (3), the employer concerned should consider their cases also, as a continuation of the one-time exercise. The one-time exercise will be concluded only when all the employees who are entitled to be considered in terms of para 53 of Umadevi (3), are so considered.

11. The object behind the said direction in para 53 of Umadevi (3) is twofold. First is to ensure that those who have put in more than ten years of continuous service without the protection of any interim orders of courts or tribunals, before the date of decision in Umadevi (3) was rendered, are considered for regularisation in view of their long service. Second is to ensure that the departments/instrumentalities do not perpetuate the practice of employing persons on daily-wage/ad hoc/casual basis for long periods and then periodically regularise them on the ground that they have served for more than ten years, thereby defeating the constitutional or statutory provisions relating to recruitment and appointment. The true effect of the direction is that all persons who have worked for more than ten years as on 10-4-2006 [the date of decision in Umadevi (3)] without the protection of any interim order of any court or tribunal, in vacant posts, possessing the requisite qualification, are entitled to be considered for regularisation. The fact that the employer has not undertaken such exercise of regularisation within six months of the decision in Umadevi (3) or that such exercise was undertaken only in regard to a limited few, will not disentitle such employees, the right to be considered for regularisation in terms of the above directions in Umadevi (3) as a one-time measure.”

7. The purpose and intent of the decision in Umadevi (3) was therefore two-fold, namely, to prevent irregular or illegal appointments in the future and secondly, to confer a benefit on those who had been irregularly appointed in the past. The fact that the State of Jharkhand continued with the irregular appointments for almost a decade after the decision in Umadevi (3) is a clear indication that it believes that it was all right to continue with irregular appointments, and whenever required, terminate the services of the irregularly appointed employees on the ground that they were irregularly appointed. This is nothing but a form of exploitation of the employees by not giving them the benefits of regularisation and by placing the sword of Damocles over their head. This is precisely what Umadevi (3) and Kesari sought to avoid.

8. If a strict and literal interpretation, forgetting the spirit of the decision of the Constitution Bench in Umadevi (3), is to be taken into consideration then no irregularly appointed employee of the State of Jharkhand could ever be regularised since that State came into existence only on 15th November, 2000 and the cut-off date was fixed as 10 th April, 2006. In other words, in this manner the pernicious practice of indefinitely continuing irregularly appointed employees would be perpetuated contrary to the intent of the Constitution Bench.

9. *The High Court as well as the State of Jharkhand ought to have considered the entire issue in a contextual perspective and not only from the point of view of the interest of the State, financial or otherwise – the interest of the employees is also required to be kept in mind. What has eventually been achieved by the State of Jharkhand is to short circuit the process of regular appointments and instead make appointments on an irregular basis. This is hardly good governance.*

10. *Under the circumstances, we are of the view that the Regularisation Rules must be given a pragmatic interpretation and the appellants, if they have completed 10 years of service on the date of promulgation of the Regularisation Rules, ought to be given the benefit of the service rendered by them. If they have completed 10 years of service they should be regularised unless there is some valid objection to their regularisation like misconduct etc.*

11. *The impugned judgment and order passed by the High Court is set aside in view of our conclusions. The State should take a decision within four months from today on regularisation of the status of the appellants.*

12. *We may add that that it would be worthwhile for the State of Jharkhand to henceforth consider making regular appointments only and dropping the idea of making irregular appointments so as to short circuit the process of regular appointments.”*

14.1. On meticulous reading of the above paragraphs, it is clear that the two-Judge Bench of the Hon'ble Supreme Court in *Narendra Kumar Tiwari(supra)* had approved the interpretation of the term “**one-time measure**” as explained in *M.L. Keshari (supra)* that the State or its instrumentalities had to undertake one-time exercise for regularization of all casual, daily wagers or *ad-hoc* employees who had been working for more than ten years without the intervention of the courts or tribunals and subject to a process of verification as to whether such employees were working against sanctioned vacant posts, and possess requisite qualification for the post they were holding. In the process of such regularization, if any employer had held the ‘one-time exercise’ in terms of para 53 of *Uma Devi*

(3)(supra), but did not consider the cases of some employees who were entitled to the benefit of para 53 of *Uma Devi (3)(supra)*, the employer concern was to consider their cases also as a continuation of 'one-time exercise'. Furthermore, the said 'one-time exercise' would be concluded only when all the employees who were entitled to be considered in terms of para 53 of *Uma Devi (3)(supra)* were considered.

15. In our opinion, the object behind the directions passed by the Constitution Bench in *Uma Devi (3)(supra)* was to save all daily-wagers, *ad-hoc*, casual employees from exploitations by the State and their instrumentalities and to bind the States and their instrumentalities to stop irregular appointments ignoring the established norms of employment as enshrined in Articles 14 and 16 of the Constitution of India. There are conditionalities. *Firstly*, the employees must have completed at least ten years of continuous service as on 10.04.2006 [the date of decision in *Uma Devi (3) (supra)*] without the protection of any interim orders of courts or tribunals; *Secondly*, those engagement/appointments, though irregular, but not illegal; *Thirdly*, the engagements/appointments must be against **sanctioned vacant posts**; and, *Fourthly*, they must possess requisite qualification commensurate the posts they held.

16. In the case of *Narendra Kumar Tiwari(supra)*, the Hon'ble Supreme Court had observed that the State of Jharkhand continued with the irregular appointments for almost a decade after the decision of *Uma Devi (3)(supra)*. It was further observed that the State of Jharkhand had taken it granted that it is all right to continue with irregular appointments, and whenever required, could terminate the services of the irregularly appointed

employees on the ground that they were irregularly appointed, and in that context, it was held that the said process was nothing but a form of exploitation of the employees by not giving them the benefits of regularization and by placing the sword of Damocles over their head, contrary to the object the Hon'ble Supreme Court wanted to achieve in the case of *Uma Devi (3)(supra)* and *M.L. Keshari(supra)*.

17. The facts and circumstances in *Narendra Kumar Tiwari(supra)* was completely different. Noticeably, unlike the Government of Jharkhand, the Government of Tripura, being a policy maker, vide Memorandum dated 21.01.2009 had declared a complete ban on engagement of DRWs/Casual/Contingent workers after 31.03.2003 without concurrence from the Finance Department. Even it was declared that the responsibilities would be fixed on the officials found responsible for any irregular employments henceforth, and such irregular engagement would have to be instantly terminated. It was further decided that the wages, if paid, would be recovered from the official concerned (Clause 3 of the Memorandum dated 21.01.2009).

18. In the instant case, according to the writ petitioner, she was engaged in the year 1993 and there is no material or evidence that she was engaged with concurrence from the Finance Department, Government of Tripura. The Government of Tripura had undertaken exercise to regularize the services of the DRWs/Casual/ Contingent etc. workers having noticed that in some departments such workers were engaged without prior approval of the Finance Department on Full Time basis after 31.03.2003, and some of them by that time had completed 10 (ten) years of continuous

service, and in this regard, a policy decision was taken by the Government of Tripura directing the Heads of all the Departments to send the names of DRWs/Casual/Contingent workers to Finance Department who were engaged after 31.03.2003 with or without prior approval of the Finance Department, in prescribed format within 10th January, 2014.

19. On reading of the policy decision under Memorandum dated 21.01.2009, we find two factors for the purpose of regularization of DRWs/Casual/Contingent workers. *Firstly*, the Government of Tripura had declared complete ban on engagement of such workers after 31.03.2003 without concurrence from the Finance Department and responsibility was also fixed on the erring officials. *Secondly*, the then existing policy being reviewed, the Government of Tripura found that in some departments the DRWs/Casual/Contingent workers were engaged without prior approval of the Finance Department with Full Time basis after 31.03.2003 and some of them by that time had completed 10(ten) years of continuous services.

20. As a matter of further exercise, the Government had decided to regularize the services of such workers and the Heads of the Department were directed to submit the list of the workers who fulfilled the above criteria within a stipulated date, i.e., within 10th January, 2014 in a prescribed format. On perusal of the appeal and having heard learned counsel appearing for the parties, we find no evidence that competent authority of the concerned department had ever considered to send the name of the writ petitioner to the Government of Tripura for the purpose of her regularization as Group-D, though the process continued for a considerable period.

21. Thereafter, the Government of Tripura had come up with a Memorandum dated 31.07.2018 whereunder all the policy decisions formulated for regularization of DRWs/Casual/Contingent workers had been repealed. We have an opportunity to go through the Memorandum dated 31.07.2018(though it was not annexed by either parties) issued by the Finance Department, Government of Tripura by which all the existing schemes for regularization have been repealed. We deem it fit to reproduce here-under the said Memorandum, for the sake of convenience, in *extenso*:

**“GOVERNMENT OF TRIPURA
DEPARTMENT OF FINANCE**

Dated:- The 31st July, 2018

MEMORANDUM

Subject: Policy decision of regularization of service of DRWs/Casual/Contingent/PTW etc. Workers in Government Establishment and State PSUs and Autonomous bodies including AMC/NPS Finance Department has issued instructions from time to time as given for regularization of service of DRWs/Casual/Contingent/PTW etc. workers on the date completion of 17 years/15 years/10 years of services. The memorandums are as follows:

Sl.No.	Memo No.	Issues
1	No.F.10(2)-Fin(G)/05, Dated 04.03.2006	Regularization of DRWs/Contingent etc. workers on completion of 17 years of service as on 31.03.2005 allowing effect from 01.02.2006
2	No.F.10(2)-Fin(G)/05, Dated 22.02.2007	Regularization of DRWs/Casual/Contingent etc. workers on completion of 15 years of service as on 31.03.2006 allowing effect from 01.01.2007
3	No.F.10(2)- Fin(G)/08(part), Dated 01.09.2008	Regularization of DRWs/Casual/Contingent etc. workers on completion of 10 years of service as on 31.03.2008 allowing effect from 01.07.2008
4	No.F.10(2)-Fin(G)/ 08(part), Dated 21.01.2009	Regularization of DRWs/Casual/Contingent etc. workers from the next date of completion of 10 years of service
5	No.F.34(3)- Fin(G)/2012, Dated 04.09.2012	Regularization of DRWs/Casual/Contingent etc. workers working in State PSUs and Autonomous bodies including AMC/NPs on completion of 10 years of service
6	No.F.10(12)- Fin(G)/7(part-1),	Engagement of PTWs etc. as DRWs (Group-D) working in different

	Dated 07.11.2012	Departments of the Government for 2/3/4 hours who were engaged on or prior to 31.03.2003 and have completed 10 years of service w.e.f. 01.12.2012
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2. Recently, the matter has been further reviewed it has been observed that there are some shortcoming in these instructions for regularization of the service of DRWs/Casual/contingent staff affecting institutional efficiency and individual productivity due to different reasons.
3. With a view to ensure transparent public employment policy for engagement of staff for such services, all the memorandums as mentioned above is repealed.
4. All the concerned are required to ensure the implementation of above decision with immediate effect.

Under Secretary to
Government of Tripura
Finance Department”

22. Now, reverting to the facts of the case of **Narendra Kumar Tiwari (supra)**, it comes to fore that the Hon’ble Supreme Court had noticed that the exercise undertaken by the State of Jharkhand for regularization of irregularly appointed employees suffers from *doctrine of impossibility*. The State of Jharkhand came into existence only on 15.11.2000, but the cut-off date for the purpose of regularization of the irregularly appointed employees under the State of Jharkhand was fixed as 10.04.2006. It was noticed that the State of Jharkhand preferred to continue with irregular appointments. In that context, the Hon’ble Supreme Court had held that when the State of Jharkhand came into existence only on 15.11.2000 it was impossible for any of the employees to complete 10 (ten) years of continuous service as on 10.04.2006, further holding that, such pernicious practice of indefinitely continuing irregularly appointed employees would be perpetuated contrary to the spirit and intent of the decision of the Constitution Bench in **Uma Devi (3)(supra)** and directed the State of Jharkhand to take a decision within four months from the date of the judgment (decided on August, 1, 2018) for regularization of the services

of the irregularly appointed employees who have completed 10 (ten) years of service.

23. In our opinion, any direction for regularization *dehors* the directions passed by the Constitution Bench in ***Uma Devi (3)(supra)***, will tantamount to show disrespect to the Constitution as well as the directions passed in ***Uma Devi(3)(supra)*** that the Central Government, the States and their instrumentalities should desist from appointing any person inconsistent to the constitutional schemes as enshrined under Articles 14 and 16 of the Constitution of India. According to us, the Constitution Bench judgment in ***Uma Devi (3)(supra)*** is *ratio decidendi* upon all the courts.

24. We have also taken note of the decision of the Hon'ble Supreme Court in ***Nihal Singh & Ors. vs. State of Punjab & Ors.***, reported in ***(2013)14 SCC 65***, where the State of Punjab was directed to regularize the services of the Special Police Officers by creating necessary posts within a certain period. After perusal of the said judgment, in our opinion, in the said case, the Hon'ble Supreme Court had directed the Government of Punjab to regularize the services of the SPOs on consideration of the fact that requisition for engagement of SPOs was given by the bank authorities to guard and protect the banks operating in the State and expenditures including their salaries would be borne by those banks only, and not by the State Government. So, it was a direction passed merely on facts.

Added to it, the Hon'ble Supreme Court in ***Nihal Singh(supra)*** categorically held that "*the creation of posts necessarily means additional financial burden on the exchequer of the State. Depending upon the priorities of the State, the allocation of the finances is*

no doubt exclusively within the domain of the legislature. However in the instant case creation of new posts would not create any additional financial burden to the State as the various banks at whose disposal the services of each of the appellants is made available have agreed to bear the burden.”[SCC p.80, para 36].

25. More importantly, in ***Divisional Manager, Aravali Golf Club & Anr. Vs. Chander Hass & Anr.***, reported in (2008) 1 SCC 683, the Hon’ble Supreme Court has settled the proposition that the courts cannot direct the creation of posts. Creation and sanction of posts is a prerogative act of the legislatures and executives. The Apex Court held thus:

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

26. In a later case, in ***Maharashtra State Road Transport Corporation & Anr. vs. Casteribe Rajya Parivahan Karmchari Sanghatana*** reported in (2009)8 SCC 556, the Hon’ble Supreme Court held thus:

“41. Thus, there is no doubt that creation of posts is not within the domain of judicial functions which obviously pertains to the executive. It is also true that the status of permanency cannot be granted by the Court where no such posts exist and that executive functions and powers with regard to the creation of posts cannot be arrogated by the courts.”

27. We have also kept in mind the case of *Amarkant Rai vs. State of Bihar & Ors.*, reported in (2015) 8 SCC 265, where the Hon'ble Supreme Court directed the Government of Bihar to regularize the services of the petitioner, Amarkant Rai. In the said decision the Hon'ble Supreme Court had found that the petitioner/appellant Amarkant fell in exception carved out in *Umadevi(3)(supra)*. A two-Judge Bench of the Hon'ble Supreme Court in *Amarkant (supra)* had considered the fact that the engagement of Amarkant was irregular but not illegal. He served for 29 years. There were two sanctioned vacant posts of Class IV employees in the concerned college and Amarkant was appointed against the same. It was found that the Human Resources Development, Department of Bihar Government, vide its Letter dated 11.7.1989 intimated to the Registrar of all the Colleges that as per the settlement dated 26.4.1989 held between Bihar State University and College Employees' Federation and the Government, it was agreed that the services of the employees working in the educational institutions on the basis of prescribed staffing pattern are to be regularized. Besides, in terms of Resolution No. 989 dated 10.5.1991 issued by the Human Resources Development Department, employees working upto 10.5.1986 had to be adjusted against the vacancies arising in future. It was noticed that the petitioner was appointed in 1983 temporarily. In the context of the said case, the Hon'ble Supreme Court held that though the initial engagement of the appellant was not against a sanctioned post, but, he was entitled to regularization pursuant to said resolution in one of the sanctioned posts subsequently fell vacant.[SCC p. 269, para 9].

In the instant case, the writ petitioner could not make out a case that she falls within the exception carved out in *Uma Devi(3)(supra)*. As we said earlier, the writ petitioner has neither pleaded nor the learned counsel appearing on her behalf, has submitted that any sanctioned vacant post exists at present.

28. In *State of M.P. & Ors. vs Yogesh Chandra Dubey & Ors.*, reported in (2006) 8 SCC 67, the Hon'ble Supreme Court while dealing with a claim of regularization and minimum of pay scale has held that the State within the meaning of Article 12 of the Constitution of India, while offering public employment, must comply with the constitutional as also statutory requirements. Appointments to the posts must be made in terms of the existing Rules. A person, who had been appointed by State upon following the Recruitment Rules, enjoys a status. A post must be created and/or sanctioned before filling it up. As the respondents did not hold any post, they are not entitled to any scale of pay. It has further been held that regularization is not a mode of appointment. If any recruitment is made by way of regularization, the same would mean a back door appointment, which does not have any legal sanction [Ref. paras 9, 11 and 14].

29. In *M.P. State Coop. Bank Ltd. Bhopal vs Nanuram Yadav & Ors.* reported in (2007) 8 SCC 264, the Hon'ble Supreme Court delineated the principles of regularization as under: [SCC pp. 274, 275, Para 24]

“24) It is clear that in the matter of public appointments, the following principles are to be followed:

1) The appointments made without following the appropriate procedure under the Rules/Government Circulars and without advertisement or inviting applications from the open market would amount to breach of Arts. 14 & 16 of the Constitution of India.

- 2) Regularisation cannot be a mode of appointment.
- 3) An appointment made in violation of the mandatory provisions of the statute and in particular, ignoring the minimum educational qualification and other essential qualification would be wholly illegal. Such illegality cannot be cured by taking recourse to regularization.
- 4) Those who come by back door should go through that door.
- 5) No regularization is permissible in exercise of the statutory power conferred under Art. 162 of the Constitution of India if the appointments have been made in contravention of the statutory Rules.
- 6) The Court should not exercise its jurisdiction on misplaced sympathy.
- 7) If the mischief played so widespread and all pervasive, affecting the result, so as to make it difficult to pick out the persons who have been unlawfully benefited or wrongfully deprived of their selection, it will neither be possible nor necessary to issue individual show-cause notice to each selectee. The only way out would be to cancel the whole selection.
- 8) When the entire selection is stinking, conceived in fraud and delivered in deceit, individual innocence has no place and the entire selection has to be set aside.”

30. Again, the Hon’ble Supreme Court in ***Vibhuti Shankar Pandey vs. State of Madhya Pradesh & Ors.***, reported in (2023)3 SCC 639 had set aside the order of learned Single Judge of Madhya Pradesh High Court directing the State to regularize the service of the petitioner who was appointed on daily rated basis under a project and not against any sanctioned post as it was noticed that the initial appointment of the petitioner/appellant was not made by the competent authority and the appointment was not made against a sanctioned post. The Hon’ble Supreme Court in ***Vibhuti Shankar Pandey(supra)*** has reiterated the principle laid down in ***Umadevi (supra)***. [SCC p 640 para 4]. As we discussed earlier, in the case in hand, the initial engagement/appointment of the writ petitioner was not made by the competent authority of the

appellants and there is no evidence that she was engaged/appointed against any sanctioned vacant post.

(emphasis supplied)

31. In a recent decision, the Hon'ble Supreme Court in ***Government of Tamil Nadu & Anr. vs. Tamil Nadu Makkal Nala Paniyalargal & Ors., 2023 SCC Online SC 393***, relying upon the judgments of the Supreme Court in ***Chander Hass(supra)*** and ***Maharashtra State Road Transport Corporation(supra)*** reiterated the principles that the creation of posts is not within the domain of judicial functions and it pertains to the executive or legislature. In the case of ***Government of Tamil Nadu(supra)***, the Hon'ble Supreme Court has categorically held that in absence of sanctioned posts, the State cannot be compelled to create the post and absorb the persons who are continuing in service of the State.

32. We have also taken into consideration the decision of the Hon'ble Supreme court in ***Raman Kumar & Ors. vs. Union of India & Ors. [decided on July 03, 2023 in SLP(C) No.7898/2020]***, wherein the Supreme Court has directed the regularization of 35 Group-D employees considering the fact that the Chief Commissioner of Income Tax had found that 65 persons were entitled to be regularized, but, the act of regularizing the services of only 35 employees and not regularizing the services of other employees including the petitioners was blatantly discriminatory or violative of Article 14 of the Constitution of India on the ground that some of the Group-D posts had been abolished. This case is clearly distinguishable from the facts of the instant case.

33. The present case is clearly distinguishable from the cases of *Nihal Singh(supra)*, *Amarkant Rai(supra)*, *Narendra Kumar Tiwari(supra)* and *Raman Kumar(supra)* as regards the factual aspects are concerned.

34. On analysis of the above narrations of facts and the law enunciated in the decisions cited above, the following ratios have emerged out in matters related to regularization.

- (i) *The engagement/appointment must be made by a competent authority;*
- (ii) *The appointment must be against duly sanctioned vacant post;*
- (iii) *Regularization, if any, has to be made within the realm of the Government Rules/Circulars;*
- (iv) *The appointment should be irregular, but not illegal, to justify his/her claim that he/she falls within the exception carved out in para 53 of Uma Devi (3) (supra);*
- (v) *The court cannot direct the State or its instrumentalities in regard to creation of post/s;*
- (vi) *Such irregularly appointed employees must have requisite qualification for the posts they hold;*
- (vii) *The Courts should not be swayed with emotion and sympathy;*
- (viii) *Budgetary provision and sanction thereto against the post/s must be taken into consideration before passing any direction for regularization;*
- (ix) *If there is any cut-off date, such date cannot be elongated or extended;*

35. *In the instant case, the writ petitioner was neither appointed by the competent authority nor was she able to justify that she was engaged*

against any **duly sanctioned vacant post**. Even the writ petitioner failed to justify that she had requisite qualification to hold any post under the respondents.

(emphasis supplied)

36. There is yet another aspect. After perusal of the scheme dated 21.01.2009, it appears that sub-clause (iv) of the said scheme mandates that *except age and educational qualification mentioned in point (ii) & (iii) all other criterion as per relevant Recruitment Rules including reservation roster will have to be followed strictly for this process of regularization*. In the instant case, the writ petitioner has not come out with a case that at the time of her appointment, reservation roster as embodied in Tripura Scheduled Castes and Scheduled Tribes Reservation Act, 1991 and the Rules thereto was followed or not. It is reiterated that to claim regularization, all the parameters mentioned in the regularization scheme have to be strictly followed and the appointment has to be made within the realm of the scheme. On this score also, the claim of regularization made by the writ petitioner in the present appeal cannot be entertained.

36.1. Undoubtedly, we have noticed that there had been a divergent opinion formed by different Benches of this Court in the matter of regularization of DRWs/Contingent/Casual Workers, etc. In this situation, in the opinion of this Court, there is no concept of negative equality under Article 14 of the Constitution of India. In a case, where a person has a right he has to be treated equally but where right is not available, a person cannot claim as a matter of right to be treated equally as the right does not exist, i.e. when the right does not exist, negative equality cannot be claimed.

We may gainfully refer the case of ***Basawaraj & Anr. vs. Special Land Acquisition Officer***, reported in (2013) 14 SCC 81 wherein the Hon'ble Supreme Court held as under:

“8. It is a settled legal proposition that Article 14 of the Constitution is not meant to perpetuate illegality or fraud, even by extending the wrong decisions made in other cases. The said provision does not envisage negative equality but has only a positive aspect. Thus, if some other similarly situated persons have been granted some relief/benefit inadvertently or by mistake, such an order does not confer any legal right on others to get the same relief as well. If a wrong is committed in an earlier case, it cannot be perpetuated. Equality is a trite, which cannot be claimed in illegality and therefore, cannot be enforced by a citizen or court in a negative manner. If an illegality and irregularity has been committed in favour of an individual or a group of individuals or a wrong order has been passed by a judicial forum, others cannot invoke the jurisdiction of the higher or superior court for repeating or multiplying the same irregularity or illegality or for passing a similarly wrong order. A wrong order/decision in favour of any particular party does not entitle any other party to claim benefits on the basis of the wrong decision. Even otherwise, Article 14 cannot be stretched too far for otherwise it would make functioning of administration impossible. (Vide Chandigarh Admn. v. Jagjit Singh [(1995) 1 SCC 74 5: AIR 1995 SC 705], Anand Buttons Ltd. v. State of Haryana [(2005) 9 SCC 164 : AIR 2005 SC 565] , K.K. Bhalla v. State of M.P. [(2006) 3 SCC 581 : AIR 2006 SC 898] and Fuljit Kaur v. State of Punjab [(2010) 11 SCC 455 : AIR 2010 SC 1937] .)”

36.2. Again, in the case of ***Chaman Lal vs. State of Punjab & Ors.*** reported in (2014) 15 SCC 715, the Hon'ble Supreme Court had observed thus:

“16. More so, it is also settled legal proposition that Article 14 does not envisage for negative equality. In case a wrong benefit has been conferred upon someone inadvertently or otherwise, it may not be a ground to grant similar relief to others. This Court in Basawaraj v. Land Acquisition Officer, (2013) 14 SCC 81 considered this issue and held as under : (SCC p. 85, para 8)

“8. XXX XXX XXX”

36.3. In the case of *Fuljit Kaur vs. State of Punjab & Ors.* reported in (2010) 11 SCC 455, it was held by the Apex Court thus:

“11 The respondent cannot claim parity with D.S. Laungia [AIR 1993 P&H 54] in view of the settled legal proposition that Article 14 of the Constitution of India does not envisage negative equality. Article 14 is not meant to perpetuate illegality or fraud. Article 14 of the Constitution has a positive concept. Equality is a trite, which cannot be claimed in illegality and therefore, cannot be enforced by a citizen or court in a negative manner. If an illegality and irregularity has been committed in favour of an individual or a group of individuals or a wrong order has been passed by a judicial forum, others cannot invoke the jurisdiction of the higher or superior court for repeating or multiplying the same irregularity or illegality or for passing a wrong order. A wrong order/decision in favour of any particular party does not entitle any other party to claim the benefits on the basis of the wrong decision. Even otherwise Article 14 cannot be stretched too far otherwise it would make function of the administration impossible. (Vide Coromandel Fertilizers Ltd. v. Union of India [1984 Supp SCC 457 : 1984 SCC (Tax) 225 : AIR 1984 SC 1772] , Panchi Devi v. State of Rajasthan [(2009) 2 SCC 589 : (2009) 1 SCC (L&S) 408] and Shanti Sports Club v. Union of India [(2009) 15 SCC 705] .)”

36.4. It would be apposite to refer the decision rendered in *Kulwinder Pal Singh & Anr. vs. State of Punjab & Ors.* reported in (2010) 11 SCC 455, wherein the Apex Court while relying upon the case of *State of U.P. vs. Rajkumar Sharma* reported in (2006) 3 SCC 330 had observed as under:

“16. The learned counsel for the appellants contended that when the other candidates were appointed in the post against dereserved category, the same benefit should also be extended to the appellants. Article 14 of the Constitution of India is not to perpetuate illegality and it does not envisage negative equalities. In State of U.P. v. Rajkumar Sharma, (2006) 3 SCC 330 it was held as under : (SCC p. 337, para 15)

“15. Even if in some cases appointments have been made by mistake or wrongly, that does not confer any right on another

person. Article 14 of the Constitution does not envisage negative equality, and if the State committed the mistake it cannot be forced to perpetuate the same mistake. (See *Sneh Prabha v. State of U.P.* [*Sneh Prabha v. State of U.P.*, (1996) 7 SCC 426] ; *Jaipur Development Authority v. Daulat Mal Jain* [*Jaipur Development Authority v. Daulat Mal Jain*, (1997) 1 SCC 35] ; *State of Haryana v. Ram Kumar Mann* [*State of Haryana v. Ram Kumar Mann*, (1997) 3 SCC 321 : 1997 SCC (L&S) 801] ; *Faridabad CT Scan Centre v. DG, Health Services* [*Faridabad CT Scan Centre v. DG, Health Services*, (1997) 7 SCC 752] ; *Jalandhar Improvement Trust v. Sampuran Singh* [*Jalandhar Improvement Trust v. Sampuran Singh*, (1999) 3 SCC 494] ; *State of Punjab v. Rajeev Sarwal* [*State of Punjab v. Rajeev Sarwal*, (1999) 9 SCC 240 : 1999 SCC (L&S) 1171] ; *Yogesh Kumar v. Govt. (NCT of Delhi)* [*Yogesh Kumar v. Govt. (NCT of Delhi)*, (2003) 3 SCC 548 : 2003 SCC (L&S) 346] ; *Union of India v. International Trading Co.* [*Union of India v. International Trading Co.*, (2003) 5 SCC 437] and *Kastha Niwarak Grahnirman Sahakari Sanstha Maryadit v. Indore Development Authority* [*Kastha Niwarak Grahnirman Sahakari Sanstha Maryadit v. Indore Development Authority*, (2006) 2 SCC 604] .)”

Merely because some persons have been granted benefit illegally or by mistake, it does not confer right upon the appellants to claim equality.”

36.5. In *Arup Das & Ors. vs. State of Assam & Ors.*, reported in (2012) 5 SCC 559, the ratio was followed by the Apex Court thus:

“19. In a recent decision rendered by this Court in *State of U.P. v. Rajkumar Sharma* [(2006) 3 SCC 330 : 2006 SCC (L&S) 565] this Court once again had to consider the question of filling up of vacancies over and above the number of vacancies advertised. Referring to the various decisions rendered on this issue, this Court held that filling up of vacancies over and above the number of vacancies advertised would be violative of the fundamental rights guaranteed under Articles 14 and 16 of the Constitution and that selectees could not claim appointments as a matter of right. It was reiterated that mere inclusion of candidates in the select list does not confer any right to be selected, even if some of the vacancies remained unfilled. This Court went on to observe

further that even if in some cases appointments had been made by mistake or wrongly, that did not confer any right of appointment to another person, as Article 14 of the Constitution does not envisage negative equality and if the State had committed a mistake, it cannot be forced to perpetuate the said mistake.”

36.6. In the case of *State of Orissa & Anr. vs. Mamata Mohanty*, reported in (2011) 3 SCC 436, it was observed by Hon’ble Supreme Court thus:

“56. It is a settled legal proposition that Article 14 is not meant to perpetuate illegality and it does not envisage negative equality. Thus, even if some other similarly situated persons have been granted some benefit inadvertently or by mistake, such order does not confer any legal right on the petitioner to get the same relief. (Vide Chandigarh Admn. v. Jagjit Singh [(1995) 1 SCC 745 : AIR 1995 SC 705] , Yogesh Kumar v. Govt. of NCT of Delhi [(2003) 3 SCC 548 : 2003 SCC (L&S) 346 : AIR 2003 SC 1241] , Anand Buttons Ltd. v. State of Haryana [(2005) 9 SCC 164 : AIR 2005 SC 565] , K.K. Bhalla v. State of M.P. [(2006) 3 SCC 581 : AIR 2006 SC 898] , Krishan Bhatt v. State of J&K [(2008) 9 SCC 24 : (2008) 2 SCC (L&S) 783] , Upendra Narayan Singh [(2009) 5 SCC 65 : (2009) 1 SCC (L&S) 1019] and Union of India v. Kartick Chandra Mondal [(2010) 2 SCC 422 : (2010) 1 SCC (L&S) 385 : AIR 2010 SC 3455] .)

37. In view of the aforesaid exposition of law, *it is abundantly clear that in case of undue benefit conferred on someone inadvertently or by ignoring the provision laid down in law, others similarly situated persons cannot claim granting of similar benefit as a matter of right. Apart from what we have discussed in the preceding paragraphs on the subject in issue we are of the firm opinion that if a wrong committed in an earlier*

case or cases, the same cannot be perpetuated by treating the same as precedent.

(emphasis supplied)

38. Before concluding, we must deal with the arguments advanced by learned counsel appearing for the writ petitioner that since she was engaged in the year 1993 her right to claim regularization was ripened in the year 2003 or at least 2009 when the scheme for regularization was existed before its repeal in the year 2018. We have considered the submission of learned counsel. As we discussed earlier, the writ petitioner herein has filed the writ petition on 29.11.2021. The scheme for regularization has been repealed on 31.07.2018. In the opinion of this court, the argument advanced by learned counsel for the writ petitioner would have some force if the writ petitioner would have approached the court during the existence of the scheme because regularization must be made within the realm of the scheme.

39. In our opinion, a person who enters into service in an irregular manner at the whims of certain officers, and the Government made provision to regularize the services of such irregularly appointed employee under certain Schemes, then, he/she undoubtedly acquire right for consideration of regularization of his/her services. However, in case of non-consideration or discrimination, he/she must agitate their right and claim the benefit of regularization before such scheme is repealed. The delayed approach and lackadaisical attitude should not be given a liberal view. As is well-known- "*vigilantibus non dormientibus jura subveniunt*"- equity helps the vigilant and not the indolent i.e. equity comes to the rescue of those

who approach the court for their rights within time and not to the rescue of those who slumber over their rights. In the instant case, according to the writ petitioner, her right ought to have been considered in the year 2003 or at least in the year 2009 after completion of 10(ten) years of services as per the regularization schemes. But she has not agitated her rights till the schemes are repealed in the year 2018. Repealing the schemes was a policy decision of the Government and it is absolutely within their domain because they know the ground realities as regards the requirements and continuation of the scheme, which the courts do not have. Even she approached the court, as we said earlier, in the year 2021 to get the benefit of the repealed scheme, which according to this court, cannot be entertained at all.

40. The persons appointed irregularly or illegally at the behest of some officers depriving large number of eligible and competent job aspirants are none but the offenders of committing wrongs against societal as well as constitutional ethos, which, according to us, should not be allowed to be perpetuated for an indefinite period, and after long ten years of continuation of such schemes, thousands of job aspirants must expect to see it's end in line with the constitutional mandates as enshrined under Articles 14 and 16 of the Constitution of India in the matter of public employment. Here, it is noticed that the Government of Tripura had declared total ban on engagement of DRWs/ Casual/Contingent, etc. workers under the Policy dated 21.01.2009 *supra* in the line of the Constitutional scheme for employment and following the directives in *Uma Devi(3)(supra)*, the schemes for regularization of irregularly appointees have been repealed under Notification dated 31st July, 2018.

41. For the reasons stated and discussed here-in-above, we allow the instant appeal preferred by the State. Consequently, we set aside the impugned judgment and order dated 20.06.2022 passed by the learned Single Judge in WP(C) No.867 of 2021.

(ARINDAM LODH, J)

(APARESH KUMAR SINGH, CJ)

Nihar/Snigdha

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GHOSH

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