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IN THE HIGH COURT OF DELHI AT NEW DELHI

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W.P(C) No.10368/2016 & conn.

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10th November, 2016

+ W.P(C) No. 10368/2016

KUMAR MAYANK

..... Petitioner

Through: Mr. Vivek Chib, Mr. Asif Ahmed,
Mr. Rishabh Kapur and Mr. Kushal
Gupta, Advocates.

versus

DELHI TECHNOLOGICAL UNIVERSITY & ANR Respondents

Through: Ms. Avnish Ahlawat, Adv. with Ms.
Latika Chaudhary, Adv. for R-1.

Mr. Peeyosh Kalra, ASC, GNCTD
with Ms. Sona Babbar, Advocate for
R-2.

+ W.P(C) No.10370/2016

SIKANDER ALI KHAN

..... Petitioner

Through: Mr. Vivek Chib, Mr. Asif Ahmed,
Mr. Rishabh Kapur and Mr. Kushal
Gupta, Advocates.

versus

DELHI TECHNOLOGICAL UNIVERSITY & ANR Respondent

Through: Ms. Avnish Ahlawat, Adv. with Ms.
Latika Chaudhary, Adv. for R-1.

Mr. Peeyosh Kalra, ASC, GNCTD
with Ms. Sona Babbar, Advocate for
R-2.

+ W.P(C) No.10372/2016

SUMAN RANI

..... Petitioner

Through: Mr. Vivek Chib, Mr. Asif Ahmed,
Mr. Rishabh Kapur and Mr. Kushal
Gupta, Advocates.

versus

DELHI TECHNOLOGICAL UNIVERSITY & ANR Respondents

Through: Ms. Avnish Ahlawat, Adv. with Ms.
Latika Chaudhary, Adv. for R-1.

Mr. Peeyosh Kalra, ASC, GNCTD
with Ms. Sona Babbar, Advocate for
R-2.

+ W.P(C) No. 10375/2016

AMRITESH KUMAR

..... Petitioner

Through: Mr. Vivek Chib, Mr. Asif Ahmed,
Mr. Rishabh Kapur and Mr. Kushal
Gupta, Advocates.

versus

DELHI TECHNOLOGICAL UNIVERSITY & ANR Respondents

Through: Ms. Avnish Ahlawat, Adv. with Ms.
Latika Chaudhary, Adv. for R-1.

Mr. Peeyosh Kalra, ASC, GNCTD
with Ms. Sona Babbar, Advocate for
R-2.

+ W.P(C) No.10379/2016

KUMAR VIMAL

..... Petitioner

Through: Mr. Vivek Chib, Mr. Asif Ahmed,
Mr. Rishabh Kapur and Mr. Kushal
Gupta, Advocates.

versus

DELHI TECHNOLOGICAL UNIVERSITY & ANR Respondent

Through: Ms. Avnish Ahlawat, Adv. with Ms.
Latika Chaudhary, Adv. for R-1.

Mr. Peeyosh Kalra, ASC, GNCTD
with Ms. Sona Babbar, Advocate for
R-2.

+ W.P(C) No.10387/2016

SHIKHA

..... Petitioner

Through: Mr. Vivek Chib, Mr. Asif Ahmed,
Mr. Rishabh Kapur and Mr. Kushal
Gupta, Advocates.

Versus

DELHI TECHNOLOGICAL UNIVERSITY & ANR Respondent

Through: Ms. Avnish Ahlawat, Adv. with Ms.
Latika Chaudhary, Adv. for R-1.

Mr. Peeyosh Kalra, ASC, GNCTD
with Ms. Sona Babbar, Advocate for
R-2.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not? **YES**

VALMIKI J. MEHTA, J (ORAL)

1. These writ petitions are filed under Article 226 of the Constitution of India by the petitioners who are working as Assistant Professors with the respondent no.1 as contractual appointees. Petitioner seeks their regularization of their services. The prayers made in the petitions are identical and for the purpose of convenience the relevant prayer clauses of WP(C) No. 10368/2016 are reproduced below:

"PRAYER

In view of the foregoing, it is most respectfully prayed that this Hon'ble Court may be pleased to:-

- i) Pass an appropriate Writ for quashing the Impugned Advertisement dated 17.10.2016, issued by the Respondent No.1 University, for being violative of the Petitioner's Fundamental Rights under Articles 14 and 16 of the Constitution of India;
- ii) Pass an appropriate Writ in the nature of Writ of Mandamus or any other writ directing the Respondents to regularize the services of the Petitioner to the post of Assistant Professor in the Electronics & Communications Engineering Department of the Respondent University in terms of the policy decision of Respondent No.2 vide Order dated 19.10.2015;

- iii) Pass an appropriate Writ in the nature of a Mandamus or any other writ directing the Respondent No.1 University to absorb the Petitioner herein to the post of Assistant Professor in the Electronics & Communications Engineering Department of the Respondent University; and
- iv) Pass such other and further order(s) as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case."

2. It is now over 10 years since the passing of the judgment by the Constitution Bench of the Supreme Court in the case of ***Secretary, State of Karnataka and Others Vs. Umadevi (3) and Others 2006 (4) SCC 1*** and which judgment effectively puts to an end the 'industry' created of temporary appointments and thereafter regularization of such temporary employees. The Supreme Court has made it abundantly clear in ***Umadevi's*** case (*supra*) that before appointing of persons on a regular/permanent basis there have to exist recruitment rules or specific eligibility criteria laid down for the appointments, there must be sanctioned posts, there must be vacancies in the sanctioned posts, and finally there must be issued advertisements for filling the posts; not as temporary or contractual posts but as permanent posts; so that there should be a level playing field of competition with respect to prospective appointees. Candidates can also be called from the lists of employment exchanges. ***Umadevi's*** case (*supra*) has laid down the following ratio:-

"(I) The questions to be asked before regularization are:-

(a)(i) Was there a sanctioned post (court cannot order creation of posts because finances of the state may go haywire), (ii) is there a vacancy, (iii) are the

persons qualified persons and (iv) are the appointments through regular recruitment process of

(b) A court can condone an irregularity in the appointment procedure only if the irregularity does not go to the root of the matter.

(II) For sanctioned posts having vacancies, such posts have to be filled by regular recruitment process of prescribed procedure otherwise, the constitutional mandate flowing from Articles 14, 16, 309, 315, 320 etc is violated.

(III) In case of existence of necessary circumstances the government has a right to appoint contract employees or casual labour or employees for a project, but, such persons form a class in themselves and they cannot claim equality(except possibly for equal pay for equal work) with regular employees who form a separate class. Such temporary employees cannot claim legitimate expectation of absorption/regularization as they knew when they were appointed that they were temporary inasmuch as the government did not give and nor could have given an assurance of regularization without the regular recruitment process being followed. Such irregularly appointed persons cannot claim to be regularized alleging violation of Article 21. Also the equity in favour of the millions who await public employment through the regular recruitment process outweighs the equity in favour of the limited number of irregularly appointed persons who claim regularization.

(IV) Once there are vacancies in sanctioned posts such vacancies cannot be filled in except without regular recruitment process, and thus neither the court nor the executive can frame a scheme to absorb or regularize persons appointed to such posts without following the regular recruitment process.

(V) At the instance of persons irregularly appointed the process of regular recruitment shall not be stopped. Courts should not pass interim orders to continue employment of such irregularly appointed persons because the same will result in stoppage of recruitment through regular appointment procedure.

(VI) If there are sanctioned posts with vacancies, and qualified persons were appointed without a regular recruitment process, then, such persons who when the judgment of *Uma Devi* is passed have worked for over 10 years without court orders, such persons be regularized under schemes to be framed by the concerned organization.

(VII)The aforesaid law which applies to the Union and the States will also apply to all instrumentalities of the State governed by Article 12 of the Constitution”.

3. The aforesaid ratio of the Supreme Court can be culled out from the following paragraphs of the judgment of the Supreme Court in

Umadevi's case (supra):-

“2. Public employment in a sovereign socialist secular democratic republic, has to be as set down by the Constitution and the laws made thereunder. Our constitutional scheme envisages employment by the Government and its instrumentalities on the basis of a procedure established in that behalf. Equality of opportunity is the hallmark, and the Constitution has provided also for affirmative action to ensure that unequals are not treated equals. Thus, any public employment has to be in terms of the constitutional scheme.

3. A sovereign government, considering the economic situation in the country and the work to be got done, is not precluded from making temporary appointments or engaging workers on daily wages. Going by a law newly enacted, The National Rural Employment Guarantee Act, 2005, the object is to give employment to at least one member of a family for hundred days in an year, on paying wages as fixed under that Act. But, a regular process of recruitment or appointment has to be resorted to, when regular vacancies in posts, at a particular point of time, are to be filled up and the filling up of those vacancies cannot be done in a haphazard manner or based on patronage or other considerations. Regular appointment must be the rule.

4. But, sometimes this process is not adhered to and the Constitutional scheme of public employment is by-passed. The Union, the States, their departments and instrumentalities have resorted to irregular appointments, especially in the lower rungs of the service, without reference to the duty to ensure a proper appointment procedure through the Public Service Commission or otherwise as per the rules adopted and to permit these irregular appointees or those appointed on contract or on daily wages, to continue year after year, thus, keeping out those who are qualified to apply for the post concerned and depriving them of an opportunity to compete for the post. It has also led to persons who get employed, without the following of a regular procedure or even through the backdoor or on daily wages, approaching Courts, seeking directions to make them permanent in their posts and to prevent regular recruitment to the concerned posts. Courts have not always kept the legal aspects in mind and have occasionally even stayed the regular process of employment being set in motion and in some cases, even directed that these illegal, irregular or improper entrants be absorbed into service. A class of employment which can only be called 'litigious employment', has risen like a phoenix seriously impairing the constitutional scheme. Such orders are passed apparently in exercise of the wide powers under Article 226 of the Constitution

of India. Whether the wide powers under Article 226 of the Constitution is 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, has to be seriously pondered over. It is time, that 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 High Courts in the scheme of things and their wide powers under Article 226 of the Constitution of India 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.

5. This Court has also on occasions issued directions which could not be said to be consistent with the Constitutional scheme of public employment. Such directions are issued presumably on the basis of equitable considerations or individualization of justice. The question arises, equity to whom? Equity for the handful of people who have approached the Court with a claim, or equity for the teeming millions of this country seeking employment and seeking a fair opportunity for competing for employment? When one side of the coin is considered, the other side of the coin, has also to be considered and the way open to any court of law or justice, is to adhere to the law as laid down by the Constitution and not to make directions, which at times, even if do not run counter to the Constitutional scheme, certainly tend to water down the Constitutional requirements. It is this conflict that is reflected in these cases referred to the Constitution Bench.

6. The power of a State as an employer is more limited than that of a private employer inasmuch as it is subjected to constitutional limitations and cannot be exercised arbitrarily (See **Basu's Shorter Constitution of India**). Article 309 of the Constitution gives the Government the power to frame rules for the purpose of laying down the conditions of service and recruitment of persons to be appointed to public services and posts in connection with the affairs of the Union or any of the States. That Article contemplates the drawing up of a procedure and rules to regulate the recruitment and regulate the service conditions of appointees appointed to public posts. It is well acknowledged that because of this, the entire process of recruitment for services is controlled by detailed procedure which specify the necessary qualifications, the mode of appointment etc. If rules have been made under Article 309 of the Constitution, then the Government can make appointments only in accordance with the rules. The State is meant to be a model employer. The Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959 was enacted to ensure equal opportunity for employment seekers. Though this Act may not

oblige an employer to employ only those persons who have been sponsored by employment exchanges, it places an obligation on the employer to notify the vacancies that may arise in the various departments and for filling up of those vacancies, based on a procedure. Normally, statutory rules are framed under the authority of law governing employment. It is recognized that no government order, notification or circular can be substituted for the statutory rules framed under the authority of law. This is because, following any other course could be disastrous inasmuch as it will deprive the security of tenure and the right of equality conferred on civil servants under the Constitutional scheme. It may even amount to negating the accepted service jurisprudence. Therefore, when statutory rules are framed under Article 309 of the Constitution which are exhaustive, the only fair means to adopt is to make appointments based on the rules so framed.

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11. In addition to the equality clause represented by Article 14 of the Constitution, Article 16 has specifically provided for equality of opportunity in matters of public employment. Buttressing these fundamental rights, Article 309 provides that subject to the provisions of the Constitution, Acts of the legislature may regulate the recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of a State. In view of the interpretation placed on Article 12 of the Constitution by this Court, obviously, these principles also govern the instrumentalities that come within the purview of Article 12 of the Constitution. With a view to make the procedure for selection fair, the Constitution by Article 315 has also created a Public Service Commission for the Union and Public Service Commissions for the States. Article 320 deals with the functions of Public Service Commissions and mandates consultation with the Commission on all matters relating to methods of recruitment to civil services and for civil posts and other related matters. As a part of the affirmative action recognized by Article 16 of the Constitution, Article 335 provides for special consideration in the matter of claims of the members of the scheduled castes and scheduled tribes for employment. The States have made Acts, Rules or Regulations for implementing the above constitutional guarantees and any recruitment to the service in the State or in the Union is governed by such Acts, Rules and Regulations. The Constitution does not envisage any employment outside this constitutional scheme and without following the requirements set down therein.

12. In spite of this scheme, there may be occasions when the sovereign State or its instrumentalities will have to employ persons, in posts which are temporary, on daily wages, as additional hands or taking them in without following the required procedure, to discharge the duties in respect of the posts that are

sanctioned and that are required to be filled in terms of the relevant procedure established by the Constitution or for work in temporary posts or projects that are not needed permanently. This right of the Union or of the State Government cannot but be recognized and there is nothing in the Constitution which prohibits such engaging of persons temporarily or on daily wages, to meet the needs of the situation. But the fact that such engagements are resorted to, cannot be used to defeat the very scheme of public employment. Nor can a court say that the Union or the State Governments do not have the right to engage persons in various capacities for a duration or until the work in a particular project is completed. Once this right of the Government is recognized and the mandate of the constitutional requirement for public employment is respected, there cannot be much difficulty in coming to the conclusion that it is ordinarily not proper for courts whether acting under Article 226 of the Constitution or under Article 32 of the Constitution, to direct absorption in permanent employment of those who have been engaged without following a due process of selection as envisaged by the constitutional scheme.

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14. During the course of the arguments, various orders of courts either interim or final were brought to our notice. The purport of those orders more or less was the issue of directions for continuation or absorption without referring to the legal position obtaining. Learned counsel for the State of Karnataka submitted that chaos has been created by such orders without reference to legal principles and it is time that this Court settled the law once for all so that in case the court finds that such orders should not be made, the courts, especially, the High Courts would be precluded from issuing such directions or passing such orders. The submission of learned Counsel for the respondents based on the various orders passed by the High Court or by the Government pursuant to the directions of Court also highlights the need for settling the law by this Court. The bypassing of the constitutional scheme cannot be perpetuated by the passing of orders without dealing with and deciding the validity of such orders on the touchstone of constitutionality. While approaching the questions falling for our decision, it is necessary to bear this in mind and to bring about certainty in the matter of public employment. The argument on behalf of some of the respondents is that this Court having once directed regularization in the Dharwad case (supra), all those appointed temporarily at any point of time would be entitled to be regularized since otherwise it would be discrimination between those similarly situated and in that view, all appointments made on daily wages, temporarily or contractually, must be directed to be regularized. Acceptance of this argument would mean that appointments made otherwise than by a regular process of selection would become the order of the day completely jettisoning the constitutional scheme of appointment. This argument also highlights the need for this 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 this 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 this 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.

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17. We have already indicated the constitutional scheme of public employment in this country, and the executive, or for that matter the Court, in appropriate cases, would have only the right to regularize an appointment made after following the due procedure, even though a non-fundamental element of that process or procedure has not been followed. *This right of the executive and that of the court, would not extend to the executive or the court being in a position to direct that an appointment made in clear violation of the constitutional scheme, and the statutory rules made in that behalf, can be treated as permanent or can be directed to be treated as permanent.*

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26. With respect, why should the State be allowed to depart from the normal rule and indulge in temporary employment in permanent posts? This Court, in our view, is bound to insist on the State making regular and proper recruitments and is bound not to encourage or shut its eyes to the persistent transgression of the rules of regular recruitment. The direction to make permanent -- the distinction between regularization and making permanent, was not emphasized here -- can only encourage the State, the model employer, to flout its own rules and would confer undue benefits on a few at the cost of many waiting to compete. With respect, the direction made in paragraph 50 of **Piara Singh** (supra) are to some extent inconsistent with the conclusion in paragraph 45 therein. With great respect, it appears to us that the last of the directions clearly runs counter to the constitutional scheme of employment recognized in the earlier part of the decision. Really, it cannot be said that this decision has laid down the law that all ad hoc, temporary or casual employees engaged without following the regular recruitment procedure should be made permanent.

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33. It is not necessary to notice all the decisions of this Court on this aspect. By and large what emerges is that regular recruitment should be insisted upon, only in a contingency an ad hoc appointment can be made in a permanent vacancy, but the same should soon be followed by a regular recruitment and that appointments to non-available posts should not be taken note of for regularization. The cases directing regularization have mainly proceeded on the basis that having permitted the employee to work for some period, he should be absorbed, without really laying down any law to that effect, after discussing the constitutional scheme for public employment.

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39. There have been decisions which have taken the cue from the **Dharwad** (supra) case and given directions for regularization, absorption or making permanent, employees engaged or appointed without following the due process or the rules for appointment. The philosophy behind this approach is seen set out in the recent decision in **The Workmen of Bhurkunda Colliery of Central Coalfields Ltd. v. The Management of Bhurkunda Colliery of Central Coalfields Ltd.** MANU/SC/0625/2006 : (2006)ILLJ842SC , though the legality or validity of such an approach has not been independently examined. But on a survey of authorities, the predominant view is seen to be that such appointments did not confer any right on the appointees and that the Court cannot direct their absorption or regularization or re-engagement or making them permanent.

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

continued for a time beyond the term of his appointment, he would not be entitled to be absorbed in regular service or made permanent, merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant rules. It is not open to the court to prevent regular recruitment at the instance of temporary employees whose period of employment has come to an end or of ad hoc employees who by the very nature of their appointment, do not acquire any right. High Courts acting under Article 226 of the Constitution of India, should not ordinarily issue directions for absorption, regularization, or permanent continuance unless the recruitment itself was made regularly and in terms of the constitutional scheme. Merely because, an employee had continued under cover of an order of Court, which we have described as 'litigious employment' in the earlier part of the judgment, he would not be entitled to any right to be absorbed or made permanent in the service. In fact, in such cases, the High Court may not be justified in issuing interim directions, since, after all, if ultimately the employee approaching it is found entitled to relief, it may be possible for it to mould the relief in such a manner that ultimately no prejudice will be caused to him, whereas an interim direction to continue his employment would hold up the regular procedure for selection or impose on the State the burden of paying an employee who is really not required. The courts must be careful in ensuring that they do not interfere unduly with the economic arrangement of its affairs by the State or its instrumentalities or lend themselves the instruments to facilitate the bypassing of the constitutional and statutory mandates.

44. The concept of 'equal pay for equal work' is different from the concept of conferring permanency on those who have been appointed on ad hoc basis, temporary basis, or based on no process of selection as envisaged by the Rules. This Court has in various decisions applied the principle of equal pay for equal work and has laid down the parameters for the application of that principle. The decisions are rested on the concept of equality enshrined in our Constitution in the light of the directive principles in that behalf. But the acceptance of that principle cannot lead to a position where the court could direct that appointments made without following the due procedure established by law, be deemed permanent or issue directions to treat them as permanent. Doing so, would be negation of the principle of equality of opportunity. The power to make an order as is necessary for doing complete justice in any cause or matter pending before this Court, would not normally be used for giving the go-by to the procedure established by law in the matter of public employment. Take the situation arising in the cases before us from the State of Karnataka. Therein, after the **Dharwad** decision, the Government had issued repeated directions and mandatory orders that no temporary or ad hoc employment or engagement be given. Some of the authorities and departments had ignored those directions or defied those directions and had continued to give employment, specifically interdicted by the orders issued by the executive. Some of the appointing officers have even been punished for their defiance. It

would not be just or proper to pass an order in exercise of jurisdiction under Article 226 or 32 of the Constitution or in exercise of power under Article 142 of the Constitution of India permitting those persons engaged, to be absorbed or to be made permanent, based on their appointments or engagements. Complete justice would be justice according to law and though it would be open to this Court to mould the relief, this Court would not grant a relief which would amount to perpetuating an illegality.

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50. It is argued that in a country like India where there is so much poverty and unemployment and there is no equality of bargaining power, the action of the State in not making the employees permanent, would be violative of Article 21 of the Constitution. But the very argument indicates that there are so many waiting for employment and an equal opportunity for competing for employment and it is in that context that the Constitution as one of its basic features, has included Articles 14, 16 and 309 so as to ensure that public employment is given only in a fair and equitable manner by giving all those who are qualified, an opportunity to seek employment. In the guise of upholding rights under Article 21 of the Constitution of India, a set of persons cannot be preferred over a vast majority of people waiting for an opportunity to compete for State employment. The acceptance of the argument on behalf of the respondents would really negate the rights of the others conferred by Article 21 of the Constitution, assuming that we are in a position to hold that the right to employment is also a right coming within the purview of Article 21 of the Constitution. The argument that Article 23 of the Constitution is breached because the employment on daily wages amounts to forced labour, cannot be accepted. After all, the employees accepted the employment at their own volition and with eyes open as to the nature of their employment. The Governments also revised the minimum wages payable from time to time in the light of all relevant circumstances. It also appears to us that importing of these theories to defeat the basic requirement of public employment would defeat the constitutional scheme and the constitutional goal of equality.

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53. One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in S.V. Narayanappa (supra), R.N. Nanjundappa (supra), and B.N. Nagarajan (supra), 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.”

4. Whatever doubt which could have existed as regards that contractual/temporary employees cannot be regularized becomes clear from the judgment of the Division Bench of Three Judges in the case of ***Official Liquidator Vs. Dayanand & Others. (2008) 10 SCC 1***, wherein the Supreme Court has clearly so stated as under:-

“49. Although neither of the parties to the appeals nor the intervenors have placed before the Court advertisements issued by the Official Liquidators of Bombay, Calcutta, Delhi and Madhya Pradesh or any other High Court for employment of special or additional staff in accordance with the sanction accorded by the concerned Court and we have not been apprised of the specific terms and conditions, subject to which the respondents were employed/engaged by the Official Liquidators but from the tenor of the pleadings and other records, it can be safely inferred that the respondents were appointed on purely temporary basis for fixed period with a stipulation that they shall not be entitled to seek regularization or absorption in the regular cadre against the sanctioned post. Those who applied in response to the advertisements issued by the Official Liquidators must have been aware of the fact that they were being engaged/employed pursuant to the sanction accorded by the Court under Rule 308 of the 1959 Rules in connection with liquidation proceedings; that their appointments will not be against the posts sanctioned by the Government; that they will have no right to claim absorption in the regular cadre and that they will be paid salaries and allowances which may be fixed by the Court. They must have accepted the appointment/engagement knowing

fully well that they will have fixed tenure without any right to continue in service or to seek absorption against the sanctioned posts.

50. It was neither the pleaded case of the respondents before the High Courts nor Shri Bhaskar P. Gupta and other learned counsel appearing on their behalf argued before this Court that their clients were lured into accepting employment as company paid staff by the Official Liquidators by promising absorption in future against the sanctioned posts or that they were coerced by some authority to accept such employment. Therefore, they cannot be heard to complain of the violation of Articles 14 and 16 of the Constitution on the ground that even after having worked for more than one decade, they have not been absorbed in the regular cadres under the Government. In our opinion, after having applied for and accepted employment/engagement as company paid staff with fixed tenure superimposed by a stipulation that they will have no right to continue in service or to be absorbed in the regular cadres, the respondents are estopped from seeking a direction for their absorption against the posts sanctioned by the Government of India and the High Courts committed a serious error in granting their prayer.

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52. As mentioned above, while approving the reasons and conclusions recorded by the two High Courts and dismissing the appeals, this Court not only permitted the Government of India to frame a scheme modeled on the 1978 Scheme but also stayed implementation of the orders impugned in the appeal and the one passed by itself in the transferred writ petition. If the Court intended that all members of the company paid staff working on the date of judgment i.e. 27.8.1999 should be absorbed in the regular cadres against Group 'C' and 'D' posts, then a simple direction to that effect would have been sufficient and there was no occasion to stay the implementation of the orders of the High Courts for six months with liberty to the Government of India to frame a new scheme within the same period. The absence of such a direction shows that the Court was very much conscious of the fact that recruitment to the regular cadres is governed by the rules framed under Article 309 of the Constitution and it would be highly detrimental to public interest to issue direction for wholesale absorption/regularization of the company paid staff and thereby abrogate/stultify opportunity of competition to younger generation comprising more meritorious persons who may be waiting for a chance to apply for direct recruitment. Obviously, the Court did not want to sacrifice the merit by showing undue sympathy with members of the company paid staff who joined service with full knowledge about their status, terms and conditions of their employment and the fact that they were to be paid from the company fund and not Consolidated Fund of India. **In this context, we may also mention that though the Official Liquidators appear to have issued advertisements for appointing the company paid staff and made some sort of selection, more qualified and meritorious persons must have shunned from applying because they knew that the employment will be for a fixed**

term on fixed salary and their engagement will come to an end with the conclusion of liquidation proceedings. As a result of this, only mediocres must have responded to the advertisements and jointed as company paid staff. In this scenario, a direction for absorption of all the company paid staff has to be treated as violative of the doctrine of equality enshrined in Articles 14 and 16 of the Constitution.” (emphasis is mine)

5. Supreme Court has further clarified this position in its subsequent judgments in the following cases:-

- (i) *National Fertilizers Ltd. and Others Vs. Somvir Singh* (2006) 5 SCC 493.
- (ii) *Kendriya Vidyalaya Sangathan and Others Vs. L.V. Subramanyeswara and Another* (2007) 5 SCC 326.
- (iii) *State of Orissa and Another Vs. Mamata Mohanty* (2011) 3 SCC 436.

6. In the judgment in the case of *Keshav Dutt & Ors. Vs. Delhi Tourism & Transport Corporation Limited and Ors.* (2015) 150 DRJ 406, I have referred to the aforesaid three judgments of the Supreme Court which make it clear that if advertisements are issued not for permanent appointment in the regular posts, and advertisements are issued only for contractual appointments or *ad hoc* appointments or temporary appointments, then persons who are appointed by such appointments cannot be regularized because it would amount to a fraud being played upon the ratio of the judgment of the Supreme Court in the case of *Umadevi (supra)*.

The relevant paras of the judgment in the case of *Keshav Dutt (supra)* are paras 2 to 15 and these paras read as under:-

“2. The advertisement pursuant to which petitioners were appointed is dated 26.6.2007 and this advertisement reads as under:-

“
ADVERTISEMENT

DTTDC required Helper/Attendant for short period

Qualification 8th passed, desire experienced qualification is two years, Maximum age 25 years for (General), 30 years for (SC/ST), 28 years for (OBC). Interview shall be take place at Garden of Five Senses, Said-Ul-Ajaib, Mehrauli Badarpur Road, New Delhi on dated 27/06/2007 at 10:30 AM. Aspiring applicants may please bring their educational certificate and experience certificates on the above mention date for the interview.

General Manager”

3. A reference to the aforesaid advertisement shows that by the advertisement appointment was sought to be made of persons as Helper/Attendant only for a short period i.e appointments which were sought to be made were not permanent appointments as distinguished from contractual/short term appointments or casual appointments. The issue is that can these persons claim regularization of their services by seeking permanent employment only on the ground that they were appointed against vacancies in sanctioned posts and they had the necessary eligibility criteria/qualifications and were recruited through the process of advertisement.

4. It is now no longer *res integra* that in terms of the Constitution Bench judgment of the Supreme Court in the case of *Secretary, State of Karnataka and Others Vs. Umadevi (3) and Others 2006 (4) SCC 1* before a person can seek regularization, four aspects must exist viz first of there existing sanctioned posts, second of there existing vacancies in sanctioned posts for which there exists authority/entitlement to fill up, thirdly that the persons who are appointed in vacancies against sanctioned posts are duly qualified persons, and fourthly appointment is made of persons who have been called through advertisements widely circulated so that there is open competition among the eligible persons.

5. The issue in the present case is that whether the advertisement in question reproduced above by which appointments were sought to be made only for a short period, is an advertisement in accordance with the ratio of the judgment of the Supreme Court in the case of *Umadevi (supra)*.

6. I have recently had an occasion to examine this aspect in the bunch of cases with the lead case being ***Radhey Shyam & Ors. Vs. GNCT of Delhi & Ors.*** W.P.(C) No. 471/2015 decided on 22.1.2015 and I have held in this judgment that to allow regularization of contractual employees or short period appointment employees, merely because such persons meet 3 out of 4 criteria in terms of the ratio of ***Umadevi's case (supra)*** being that they are qualified persons and appointed against vacancies in sanctioned posts, the same would result in fraud upon the ratio of ***Umadevi's case (supra)*** as also the general public because the object of ***Umadevi's case (supra)*** was to prevent back-door entry and spoils system in public appointment and there cannot be regularization of employees who have got appointment in terms of the advertisement only for a fixed period. The relevant paras in ***Radhey Shyam's case (supra)*** are paras 14 and 15 and which read as under:-

“14. Petitioners in this case seek appointment as Lab Technicians/Lab Assistants. In the present case, the relief which is claimed by the petitioners of their being regularized cannot be granted because if petitioners are specifically appointed for contractual period in terms of the advertisement which required only contractual employment for 11 months, then, if the petitioners are regularized only because they were appointed against sanctioned posts, the same would be clearly a violation of the ratio of the Constitution Bench judgment in the case of ***Umadevi (supra)*** because if the petitioners are directed to be regularized merely because there existed sanctioned posts, although the advertisement and appointments were only and specifically for 11 months only, then what will happen is that by issuing of an advertisement by the respondent no.2 which was only for contractual appointments of a limited period of 11 months, injustice would be caused to dozens or hundreds of other persons who would not have applied to the posts on the ground that the posts are contractual posts only for 11 months and such persons, being the ordinary citizens, who therefore would seek appointment with other employers who would offer permanent posts. If this Court allows regularization of the petitioners, and merely because petitioners are appointed against sanctioned posts, the spirit of the ratio of ***Umadevi's case (supra)*** would be violated because then in such cases the authorities of the State instead of making regular appointments to sanctioned posts, will advertise and make contractual appointments to sanctioned posts for specified periods, and thereby play a fraud upon general public being persons who would have applied if the posts were advertised as permanent posts. Thus regularization cannot be granted only because petitioners were appointed against sanctioned posts, once the advertisement and appointments were only for a limited period of just 11 months.

15. It is not the ratio of ***Umadevi's case (supra)*** that contractual employees must be regularized only because there are vacant sanctioned posts to which they were appointed to limited contractual

period of mere 11 months, inasmuch as, *Umadevi (supra)* requires that the appointments must be as per the regular recruitment process and rules which will require advertisement for appointments as permanent posts, and much less because in terms of the ratio of the *Umadevi's case (supra)*, the Delhi State Services Selection Board (DSSSB), and who appoints employees for the respondent no.2, has already issued a circular that there should not be appointments to regular posts except in accordance with the law and the process as specified in the regular recruitment rules.”

7. The Supreme Court in the case of *National Fertilizers Ltd. and Others Vs. Somvir Singh (2006) 5 SCC 493* by referring to the ratio of *Umadevi's case (supra)* has held that persons who have been only appointed for temporary periods or are temporary employees in posts, such persons cannot claim regularization. In *National Fertilizers Ltd.'s case (supra)* the Supreme Court has reproduced the relevant paras of *Umadevi's case (supra)* and the relevant paras of *National Fertilizers Ltd.'s case (supra)* are paras 20,21 and 22 and which paras read as under:-

“20. The Constitution Bench opined that any appointment made in violation of the Recruitment Rules as also in violation of Articles 14 and 16 of the Constitution would be nullity. The contention raised on behalf of the employees that those temporary or ad hoc employees who had continued for a fairly long spell, the authorities must consider their cases for regularisation was answered, thus: [*Umadevi (3) Case (supra)*, SCC p.29, para 26]

“26. With respect, why should the State be allowed to depart from the normal rule and indulge in temporary employment in permanent posts? This Court, in our view, is bound to insist on the State making regular and proper recruitments and is bound not to encourage or shut its eyes to the persistent transgression of the rules of regular recruitment. The direction to make permanent -- the distinction between regularization and making permanent, was not emphasized here -- can only encourage the State, the model employer, to flout its own rules and would confer undue benefits on a few at the cost of many waiting to compete. With respect, the direction made in paragraph 50 of *State of Haryana v. Piara Singh: (1992) 4 SCC 118* are to some extent inconsistent with the conclusion in paragraph 45 therein. With great respect, it appears to us that the last of the directions clearly runs counter to the constitutional scheme of employment recognized in the earlier part of the decision. Really, it cannot be said that this decision has laid down the law that all ad hoc, temporary or casual employees engaged without following the regular recruitment procedure should be made permanent.”

21. It was furthermore opined: [*Umadevi (3) Case (supra)*, SCC p.32, para 33]

“33. It is not necessary to notice all the decisions of this Court on this aspect. By and large what emerges is that regular recruitment should be insisted upon, only in a contingency an ad hoc appointment can be made in a permanent vacancy, but the same should soon be followed by a regular recruitment and that appointments to non-available posts should not be taken note of for regularization. The cases directing regularization have mainly proceeded on the basis that having permitted the employee to work for some period, he should be absorbed, without really laying down any law to that effect, after discussing the constitutional scheme for public employment.”

22. Taking note of some recent decisions of this Court, it was held that the State does not enjoy a power to make appointments in terms of Article 162 of the Constitution of India. It further quoted with approval a decision of this Court in *Union Public Service Commission v. Girish Jayanti Lal Vaghela*:(2006) 2 SCC 482 in the following terms: (SCC p. 490, para 12)

“The appointment to any post under the State can only be made after a **proper advertisement** has been made inviting applications from eligible candidates and holding of selection by a body of experts or a specially constituted committee whose members are fair and impartial through a written examination or interview or some other rational criteria for judging the inter se merit of candidates who have applied in response to the advertisement made. A regular appointment to a post under the State or Union cannot be made without **issuing advertisement in the prescribed manner** which may in some cases include inviting applications from the employment exchange where eligible candidates get their names registered. Any regular appointment made on a post under the State or Union without issuing advertisement inviting applications from eligible candidates and without holding a proper selection where all eligible candidates get a fair chance to compete would violate the guarantee enshrined under Article 16 of the Constitution.”

It was clearly held: [*Umadevi (3) case (supra)*, SCC p.35, para 41]

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

8. A reference to para 22 above in the case of *National Fertilizers Ltd. (supra)* makes it abundantly clear that the advertisement which should be issued for inviting applications from eligible candidates has to be a proper advertisement and an advertisement in the prescribed manner. In my opinion, appropriate advertisement or advertisement in the prescribed manner necessarily means that advertisement issued for seeking appointment is advertisement for employment in permanent tenure and not an advertisement which seeks appointments to temporary posts or for temporary period in permanent posts or appointments are to be only contractual appointments. Para 22 above in the case of *National Fertilizers Ltd. (supra)* specifically notes that regular appointment to a post under the State or Union cannot be made without issuing advertisement in the prescribed manner, and prescribed manner necessarily has to mean that the posts have to be advertised as permanent tenure posts for being filled up, inasmuch as, otherwise multitude of people who would otherwise be eligible to apply, may prefer to skip the employment process thinking that it is only for a temporary period or a contractual period since posts are not for permanent employment. Para 22 above in the case of *National Fertilizers Ltd. (supra)* makes it clear that appointments made without issuing requisite advertisement would violate the guarantee under Articles 14 and 16 of the Constitution of India.

9. Supreme Court recently in the judgment in the case of *Kendriya Vidyalaya Sangathan and Others Vs. L.V. Subramanyeswara and Another (2007) 5 SCC 326* has held that if all the eligible candidates are not called by means of the advertisement, then, the process of recruitment will violate the ratio in the case of *Umadevi (supra)* as also Articles 14 and 16 of the Constitution of India. These observations have been made by the Supreme Court in para 10 of the judgment in the case of *Kendriya Vidyalaya Sangathan (supra)* and this para 10 reads as under:-

“10. Had such regular vacancies been created, appellants would have been directed to be appointed on All India Basis. Respondents did not get their names registered in the Central Employment Exchange. Keeping in view the nature of the job and in particular that the posts are transferable throughout the country, an opportunity within the meaning of Articles 14 and 16 of the Constitution of India

would mean an opportunity to all who are eligible therefore. Advertisement was issued for a limited purpose, namely, for leave vacancies, local employment exchanges were contacted only for filling of such posts and not regular posts.” (underlining added)

10. Another recent judgment of the Supreme Court and which in a way lays down the same ratio is the judgment in the case of ***State of Orissa and Another Vs. Mamata Mohanty (2011) 3 SCC 436***. In this judgment the Supreme Court has held that candidates who are not duly qualified if are appointed, the same would cause grave and irreparable injury to other unqualified candidates who would have otherwise applied, and therefore in such a case when unqualified persons seek regularization, that would be violative of the ratio in the case of ***Umadevi (supra)*** as also Articles 14 and 16 of the Constitution of India. The relevant observations of the Supreme Court in the case of ***Mamta Mohanty (supra)*** are made in para 36 of the judgment, and para 35 also is relevant because the same makes the legal position very clear that the object of issuing advertisement is to ensure open competition by calling of all the eligible candidates. These paras 35 and 36 read as under:-

“35. At one time this Court had been of the view that calling the names from Employment Exchange would curb to certain extent the menace of nepotism and corruption in public employment. But, later on, came to the conclusion that some appropriate method consistent with the requirements of Article 16 should be followed. In other words there must be a notice published in the appropriate manner calling for applications and all those who apply in response thereto should be considered fairly. Even if the names of candidates are requisitioned from Employment Exchange, in addition thereto it is mandatory on the part of the employer to invite applications from all eligible candidates from the open market by advertising the vacancies in newspapers having wide circulation or by announcement in Radio and Television as merely calling the names from the Employment Exchange does not meet the requirement of the said Article of the Constitution. (Vide *Delhi Development Horticulture Employees' Union v. Delhi Admn.*, : AIR 1992 SC 789, *State of Haryana v. Piara Singh* : AIR 1992 SC 2130, *Excise Supdt. v. K.B.N. Visweshwara Rao* : (1996) 6 SCC 216, *Arun Tewari v. Zila Mansavi Shikshak Sangh* : AIR 1998 SC 331, *Binod Kumar Gupta v. Ram Ashray Mahoto* : AIR 2005 SC 2103, *National Fertilizers Ltd. v. Somvir Singh* : AIR 2006 SC 2319, *Telecom District Manager v. Keshab Deb* : (2008) 8 SCC 402, *State of Bihar v. Upendra Narayan Singh* : (2009) 5 SCC 65 and *State of M.P. v. Mohd. Ibrahim* : (2009) 15 SCC 214.)

36. Therefore, it is a settled legal proposition that no person can be appointed even on a temporary or ad hoc basis without inviting

applications from all eligible candidates. If any appointment is made by merely inviting names from the Employment Exchange or putting a note on the Notice Board etc. that will not meet the requirement of Articles 14 and 16 of the Constitution. Such a course violates the mandates of Articles 14 and 16 of the Constitution of India as it deprives the candidates who are eligible for the post, from being considered. A person employed in violation of these provisions is not entitled to any relief including salary. For a valid and legal appointment mandatory compliance of the said Constitutional requirement is to be fulfilled. The equality clause enshrined in Article 16 requires that every such appointment be made by an open advertisement as to enable all eligible persons to compete on merit.”

(underlining added)

11. In *Umadevi's case (supra)* the only exception which was carved out with respect to regularization of persons was those persons whose appointments were irregular as distinguished from illegal. Such irregular appointees who had worked for 10 years prior to passing of the decision in *Umadevi's case (supra)*, if they had worked in their posts without benefit of court orders, such eligible persons who had been appointed against vacancies in sanctioned posts, the government and governmental organizations were to float schemes to regularize appointments of such irregularly appointed persons on account of the fact that appointments made were only irregular i.e the recruitment process was of filling posts from eligible candidates without means of advertisements in newspapers and/or through the employment exchange. Para 53 of the judgment in the case of *Umadevi (supra)* reads as under:-

“53. One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in *State of Mysore v. S.V. Narayanappa : AIR 1967 SC 1071*, *R.N. Nanjundappa v. T. Thimmiah : (1972) 1 SCC 409*, and *B.N. Nagarajan v. State of Karnataka : (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 sub judice, 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.”
(emphasis added)

12. A reference to para 53 above in the case of *Umadevi (supra)* shows that irregular appointments were to be regularized only as a one-time measure. One time measure by its plain and simple language means that only for once at the time of passing of the judgment in *Umadevi's case (supra)* there can be regularization of irregularly appointed employees ie after the decision in *Umadevi's case (supra)*, there cannot be regularization of appointees who are irregularly appointed i.e the appointments may not be illegal and only are irregular in the sense that appointment is not through the means of calling of eligible candidates vide circulations in newspapers for ensuring competition amongst the eligible candidates but even such persons cannot be regularized after the decision in *Umadevi's case (supra)* as even irregular appointments are in violation of recruitment rules and there cannot be violation of recruitment rules post *Umadevi's case (supra)*. Therefore, in my opinion, the ratio of para 53 above of *Umadevi's case (supra)* makes it clear that the issue of regularization of irregularly appointed employees post *Umadevi's case (supra)* is time and again not permissible because that is exactly what the ratio of *Umadevi's case (supra)* prohibits i.e regularization of persons appointed in violation of recruitment rules which will require calling of candidates by proper advertisements through newspapers.

13. I may note that a Division Bench of two judges of the Supreme Court in the case of *U.P. State Electricity Board Vs. Pooran Chandra Pandey and Others (2007) 11 SCC 92* sought to water-down the ratio of the Constitution Bench judgment of the Supreme Court in the case of *Umadevi (supra)*, and this judgment of a Division Bench of the two Judges of Supreme Court was specifically overruled by a Division Bench of three Judges of the Supreme Court in the case of *Official Liquidator Vs. Dayanand and Others (2008) 10 SCC 1*. In *Dayanand's case (supra)* the Supreme Court has made very strong observations that a Division Bench of two or three judges of the Supreme Court cannot be allowed to water-down the categorical ratio of the Constitution Bench judgment of the Supreme Court in the case of *Umadevi (supra)* and made observations with respect to judicial discipline with respect to Benches of similar number of Judges being bound by the judgments passed by a Bench consisting of similar or larger number of judges. These

observations are contained in paras 75 to 77 and 90 to 92 in **Dayanand's case (supra)** and these paras read as under:-

“75. By virtue of Article 141 of the Constitution, the judgment of the Constitution Bench in *State of Karnataka v. Umadevi* (3) (*supra*) is binding on all the courts including this Court till the same is overruled by a larger Bench. The ratio of the Constitution Bench judgment has been followed by different two-Judges Benches for declining to entertain the claim of regularization of service made by ad hoc/temporary/ daily wage/casual employees or for reversing the orders of the High Court granting relief to such employees - *Indian Drugs and Pharmaceuticals Ltd. v. Workmen* : (2007) 1 SCC 408, *Gangadhar Pillai v. Siemens Ltd.* : (2007) 1 SCC 533, *Kendriya Vidyalaya Sangathan v. L.V. Subramanyeswara* : (2007) 5 SCC 326, *Hindustan Aeronautics Ltd. v. Dan Bahadur Singh* : (2007) 6 SCC 207. However, in *U.P. SEB v. Pooran Chandra Pandey* : (2007) 11 SCC 92 on which reliance has been placed by Shri Gupta, a two-Judges Bench has attempted to dilute the Constitution Bench judgment by suggesting that the said decision cannot be applied to a case where regularization has been sought for in pursuance of Article 14 of the Constitution and that the same is in conflict with the judgment of the seven-Judges Bench in *Maneka Gandhi v. Union of India* : (1978) 1 SCC 248.

76. The facts of *U.P. SEB v. Pooran Chandra Pandey (supra)* were that the respondents (34 in number) were employed as daily wage employees by the Cooperative Electricity Supply Society in 1985. The Society was taken over by Uttar Pradesh Electricity Supply Board in 1997 along with daily wage employees. Earlier to this, the Electricity Board had taken a policy decision on 28-11-1996 to regularize the services of its employees working on daily wages from before 4-5-1990, subject to their passing the examination. The respondents moved the High Court claiming benefit of the policy decision dated 28-11-1996. The learned Single Judge of the High Court held that once the employees of the society became employees of the Electricity Board, there was no valid ground to discriminate them in the matter of regularization of service. The Division Bench approved the order of the Single Bench. A two-Judges Bench of this Court dismissed the appeal of the Electricity Board. In para 11 of its judgment, the two-Judges Bench distinguished *State of Karnataka v. Umadevi* (3) (*supra*) by observing that the ratio of that judgment cannot be applied to a case where regularization has been sought for in pursuance of Article 14 of the Constitution. The two-Judges Bench then referred to *State of Orissa v. Sudhansu Sekhar Misra* AIR 1968 SC 647, *Ambica Quarry Works v. State of Gujarat* : (1987) 1 SCC 213, *Bhavnagar University v. Palitana Sugar Mill (P) Ltd.* : (2003) 2 SCC 111, *Bharat Petroleum*

Corpn. Ltd. v. N.R. Vairamani (2004) 8 SCC 579 and observed: (*Pooran Chandra Pandey case (supra)*, SCC pp. 98-99, paras 16 & 18)

“16. We are constrained to refer to the above decisions and principles contained therein because we find that often *Umadevi* (3) case (*supra*) is being applied by courts mechanically as if it were a Euclid's formula without seeing the facts of a particular case. As observed by this Court in *Bhavnagar University (supra)* and *Bharat Petroleum Corpn. Ltd (supra)* a little difference in facts or even one additional fact may make a lot of difference in the precedential value of a decision. Hence, in our opinion, *Umadevi* (3) case (*supra*) cannot be applied mechanically without seeing the facts of a particular case, as a little difference in facts can make *Umadevi* (3) case (*supra*) inapplicable to the facts of that case.

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18. We may further point out that a seven-Judge Bench decision of this Court in *Maneka Gandhi v. Union of India (supra)* has held that reasonableness and non-arbitrariness is part of Article 14 of the Constitution. It follows that the Government must act in a reasonable and non-arbitrary manner otherwise Article 14 of the Constitution would be violated. *Maneka Gandhi case (supra)* is a decision of a seven-Judge Bench, whereas *Umadevi* (3) case is a decision of a five-Judge Bench of this Court. It is well settled that a smaller Bench decision cannot override a larger Bench decision of the Court. No doubt, *Maneka Gandhi case (supra)* does not specifically deal with the question of regularisation of government employees, but the principle of reasonableness in executive action and the law which it has laid down, in our opinion, is of general application.”

(emphasis supplied)

77. We have carefully analyzed the judgment of the two-Judges Bench (in *Pooran Chandra Pandey case (supra)*) and are of the considered view that the above reproduced observations were not called for. The only issue which fell for consideration by two-Judges Bench was whether the daily wage employees of the society, the establishment of which was taken over by the Electricity Board along with the employees, were entitled to be regularized in terms of the policy decision taken by the Board and whether the High Court committed an error by invoking Article 14 of the Constitution for granting relief to the writ petitioners. The question whether the Electricity Board could frame such a policy was neither raised nor considered by the High Court and this Court. The High Court simply adverted to the facts of the case and held that once the daily wage

employees of the society became employees of the Electricity Board, they could not be discriminated in the matter of implementation of the policy of regularization. Therefore, the two-Judges Bench had no occasion to make any adverse comment on the binding character of the Constitution Bench judgment in *State of Karnataka v. Umadevi* (3) (*supra*).

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90. We are distressed to note that despite several pronouncements on the subject, there is substantial increase in the number of cases involving violation of the basics of judicial discipline. The learned Single Judges and Benches of the High Courts refuse to follow and accept the verdict and law laid down by coordinate and even larger Benches by citing minor difference in the facts as the ground for doing so. Therefore, it has become necessary to reiterate that disrespect to constitutional ethos and breach of discipline have grave impact on the credibility of judicial institution and encourages chance litigation. It must be remembered that predictability and certainty is an important hallmark of judicial jurisprudence developed in this country in last six decades and increase in the frequency of conflicting judgments of the superior judiciary will do incalculable harm to the system inasmuch as the courts at the grass root will not be able to decide as to which of the judgment lay down the correct law and which one should be followed.

91. We may add that in our constitutional set up every citizen is under a duty to abide by the Constitution and respect its ideals and institutions. Those who have been entrusted with the task of administering the system and operating various constituents of the State and who take oath to act in accordance with the Constitution and uphold the same, have to set an example by exhibiting total commitment to the Constitutional ideals. This principle is required to be observed with greater rigour by the members of judicial fraternity who have been bestowed with the power to adjudicate upon important constitutional and legal issues and protect and preserve rights of the individuals and society as a whole. Discipline is sine qua non for effective and efficient functioning of the judicial system. If the Courts command others to act in accordance with the provisions of the Constitution and rule of law, it is not possible to countenance violation of the constitutional principle by those who are required to lay down the law.

92. In the light of what has been stated above, we deem it proper to clarify that the comments and observations made by the two-Judges Bench in *U.P. SEB v. Pooran Chandra Pandey* (*supra*) should be read as obiter and the same should neither be treated as binding by the High Courts, Tribunals and other judicial foras nor they should be relied

upon or made basis for bypassing the principles laid down by the Constitution Bench.”
(emphasis added)

14. The ethos with respect to the ratio of *Umadevi's case (supra)* stating that the entire object was to prevent the spoils system in public employment which was existing prior to the Constitution Bench judgment in *Umadevi's case (supra)* has been further clarified by the Supreme Court in paras 66 to 68 in *Dayanand's case (supra)* and these paras read as under:-

“66. The judgments of 1980s and early 1990s - *Dhirendra Chamoli v. State of U.P.* : (1986) 1 SCC 637, *Surinder Singh v. CPWD* : (1986) 1 SCC 639, *Daily Rated Casual Labour v. Union of India* : (1988) 1 SCC 122, *Dharwad Distt. P.W.D. Literate Daily Wage Employees' Assn. v. State of Karnataka* (1990) 2 SCC 396, *Bhagwati Prasad v. Delhi State Mineral Development Corpn.* : (1990) 1 SCC 361 and *State of Haryana v. Piara Singh (supra)* are representative of an era when this Court enthusiastically endeavored to expand the meaning of equality clause enshrined in the Constitution and ordained that employees appointed on temporary/ad hoc/daily wage basis should be treated at par with regular employees in the matter of payment of salaries and allowances and that their services be regularized. In several cases, the schemes framed by the governments and public employer for regularization of temporary/ad- hoc/daily wag/casual employees irrespective of the source and mode of their appointment/engagement were also approved. In some cases, the courts also directed the State and its instrumentalities/agencies to frame schemes for regularization of the services of such employees.

67. In *State of Haryana v. Piara Singh (supra)*, this Court while reiterating that appointment to the public posts should ordinarily be made by regular recruitment through the prescribed agency and that even where ad-hoc or temporary employment is necessitated on account of the exigencies of administration, the candidate should be drawn from the employment exchange and that if no candidate is available or sponsored with the employment exchange, some method consistent with the requirements of Article 14 of the Constitution should be followed by publishing notice in appropriate manner for calling for applications and all those who apply in response thereto should be considered fairly, proceeded to observe that if an ad-hoc or temporary employee is continued for a fairly long spell, the authorities are duty bound to consider his case for regularization subject to his fulfilling the conditions of eligibility and the requirement of satisfactory service. The propositions laid down in *Piara Singh case (supra)* were followed by almost all High Courts for directing the concerned State Governments and public authorities

to regularize the services of ad- hoc/temporary/daily wage employees only on the ground that they have continued for a particular length of time. In some cases, the schemes framed for regularization of the services of the backdoor entrants were also approved.

68. The above noted judgments and orders encouraged the political set up and bureaucracy to violate the soul of Article 14 and 16 as also the provisions contained in the Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959 with impunity and the spoil system which prevailed in the United State of America in sixteenth and seventeenth century got firm foothold in this country. Thousands of persons were employed/engaged throughout the length and breadth of the country by backdoor methods. Those who could pull strings in the power corridors at the higher and lower levels managed to get the cake of public employment by trampling over the rights of other eligible and more meritorious persons registered with the employment exchanges. A huge illegal employment market developed in different parts of the country and rampant corruption afflicted the whole system. This was recognized by the Court in *Delhi Development Horticulture Employees' Union v. Delhi Admn. : (1992) 4 SCC 99* in the following words: (SCC pp. 111-12, para 23)

“23. Apart from the fact that the petitioners cannot be directed to be regularised for the reasons given above, we may take note of the pernicious consequences to which the direction for regularisation of workmen on the only ground that they have put in work for 240 or more days, has been leading. Although there is an Employment Exchange Act which requires recruitment on the basis of registration in the Employment Exchange, it has become a common practice to ignore the Employment Exchange and the persons registered in the Employment Exchanges, and to employ and get employed directly those who are either not registered with the Employment Exchange or who though registered are lower in the long waiting list in the Employment Register. The courts can take judicial notice of the fact that such employment is sought and given directly for various illegal considerations including money. The employment is given first 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 regularization knowing the judicial trend that those who have completed 240 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 Exchanges for years. Not all those who gain such backdoor entry in the employment are in need of the particular jobs. Though already employed elsewhere, they join the jobs for better and secured prospects. That is why most of the cases which come to the courts are of employment in government departments,

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

15. It is therefore clear that the ratio of the judgment in the case of *Umadevi (supra)* really prevents regularization of persons who have been appointed pursuant to such an advertisement and which advertisement itself required employment only for a limited period, and therefore such persons who have been appointed for a limited period in terms of the advertisement requiring their appointments for limited periods, cannot seek regularization.” (emphasis is mine)

7. A reading of the ratios of various Supreme Court judgments which have been reproduced, as also relevant paras in the judgment delivered by this Court in the case of *Keshav Dutt (supra)*, leaves no manner of doubt that unless and until the four essential ingredients exist, the appointments cannot be made in a regular/permanent basis and which four ingredients are:- sanctioned posts existing, vacancies existing in such sanctioned posts, eligibility criteria being fulfilled by the candidates as specified in the recruitment rules or other applicable guidelines/circular, and finally of competition between the candidates by calling the candidates by advertisements in newspapers and through employment exchange.

8. It is not and cannot be disputed that the petitioners were selected and appointed pursuant to such advertisement which advertisement was not for appointments on permanent basis and petitioners were to be appointed and actually appointed only for contractual terms. Once that is so, such persons cannot seek regularization to the posts as held in various judgments of the Supreme Court and which ratios of which have been encapsulated in the judgment in the case of *Keshav Dutt (supra)*.

9. Petitioners by placing reliance upon a Circular issued by the respondent no.2/Govt. of NCT of Delhi dated 19.10.2015 have argued that as per this circular either petitioners must get regularization or at least their experience of working with the respondent no.1 must be considered for appointments to the posts of Assistant Professors which have to be made pursuant to the impugned Advertisement dated 17.10.2016. The Circular of the respondent no.2/Govt. of NCT of Delhi dated 19.10.2015 reads as under:-

“GOVERNMENT OF NATIONAL CAPITAL TERRITORY
(SERVICES DEPARTMENT-BRANCH-IV)
LEVEL,B-WING, DELHI SECRETARIAT,
I.P.ESTATE, NEW DELHI-110002

No.F.19(11)/2015/S.IV/1890-96

Dated:19/10/2015

ORDER

The Government of National Capital Territory of Delhi has considered the issue of regularization of the Contractual employees working in various departments of Govt. of N.C.T of Delhi and approved the following general

policy for regularization of the contractual employees vide Cabinet Decision No.2223 dated 06.10.2015:-

In line with the Uma Devi Judgment, Government of National Capital Territory of Delhi makes the following policy for contractual employees working against regular posts:-

1. *Every department should formulate a scheme to fill up all vacant posts.*

2. *Contractual employees working against these posts should be allowed to apply with following conditions:-*

(a) *They should be given age relaxation.*

(b) *They should be given appropriate and adequate weightage of experience for that post in evaluation.*

(c) *Any contractual employee, whose service was terminated due to unsatisfactory work during their contractual employment, shall be treated as ineligible, under the scheme.*

3. *Policy in para-2 shall also be applicable to the contractual employees who have worked against these posts for an aggregate period of 6 months or more after 01.04.2013.*

It is, therefore, requested that the necessary action with regard to implementation of above decisions may be initiated at the earliest.

Sd/-

(ANUPAMA CHAKRAVORTY)

DY. SECRETARY (SERVICES)”

10. Two issues arise with respect to this Circular dated 19.10.2015 as to whether the said circular allows regularization of contractual appointees in permanent posts and secondly as to whether experience of persons who have been working in contractual posts should be considered as

a factor for giving appointments to the persons in permanent posts/regular posts which are now advertised.

11. Though the Circular of the respondent no.2 dated 19.10.2015 is not too happily worded, but the circular in fact directs appointments in terms of the Constitution Bench judgment of the Supreme Court in *Umadevi's* case (*supra*). Therefore, this circular has to be read in accordance with the ratio of the judgment in *Umadevi's* case (*supra*) and nothing of the circular which is violative of the ratio of the judgment in *Umadevi's* case (*supra*) can give any rights to any parties on the basis of the Circular dated 19.10.2015 as would be against the ratio of *Umadevi's* case (*supra*). Therefore, on the basis of this circular there cannot be regularization of persons who have been appointed only on contractual basis for a contractual period.

12. So far as condition that persons who are already working should get benefit of their experience in the existing posts with respect to which advertisements were issued for appointment/employment on regular/permanent basis, this Court would like to observe that appointments which are made to regular/permanent posts have necessarily to be only in accordance with the eligibility criteria for that posts. If there is no requirement in the eligibility criteria of such a post of requirement of any

particular type of experience, then the subject circular cannot be deemed to have amended the recruitment rules or the eligibility criteria which are prescribed by circular/guidelines in the absence of framing of recruitment rules, and if that is done the action of the respondent no.2 will be arbitrary and violative of the Constitution Bench judgment in *Umadevi's* case (*supra*) because discrimination will be sought to be created between persons although there is no valid basis for such a discrimination. Putting it in other words if eligibility criteria does not require a particular experience portion then giving benefit of experience to the petitioners for appointment to the posts in question will create a discrimination in their favour and it will be violative of Article 14 of the Constitution of India. Benefit can be given of a particular criteria only after such criteria is a criteria applicable/provided for appointment to the post, otherwise in spirit the ratio of *Umadevi's* case (*supra*) will be violated because contractual employees who do not have a right to be regularized will effectively (but illegally) seek a right of “pre-emption” for appointment to the posts which have been advertised (in the regular manner for permanent employment) by claiming benefit of experience in the contractual posts in which they have worked. I therefore reject the argument urged on behalf of the petitioner that the experience of the petitioners working as Assistant Professors should be considered in their favour for appointment to the posts in question and it is held that

appointments can only be in accordance with the laid down criteria and not the criteria which is not prescribed in the relevant recruitment rules or the applicable circulars and the guidelines laying down the eligibility criteria.

13. In view of the above, these writ petitions are completely misconceived and therefore dismissed.

NOVEMBER 10, 2016
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VALMIKI J. MEHTA, J

