

HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.5899 of 2011

1. Deo Kant Choudhary, son of late Bhubneshwar Choudhary, resident of Village- Shahpur, Police Station-Pandoul, District- Madhubani.
2. Abhai Kumar, son of Sri Vishwanath Singh, resident of village- Gopalpur, Police Station- Nayagaon, District- Chapra.
3. Om Prakash Singh, son of late Pashupati Singh, resident of village- Dharpura, Police Station- Doriganj, District- Saran.
4. Om Prakash Sehgal, son of Sri Parmanand Singh, resident of village- Samastichak, Police Station-Bhawanganj, District- Patna.
5. Prakash Kumar Verma, son of Sri Dhaneshwar Prasad Sinha, resident of Mohalla-Ramdhanpur (Pipal ki Gali), Police Station- Kotwali, District- Gaya.
6. Shamsheer Bahadur Singh, son of late Ram Sihanshan Singh, resident of village- Kusauri, Police Station- Sahatawar, District- Ballia, Uttar Pradesh.
7. Gajendra Kumar Singh, son of late Ram Prasad Singh, resident of village- Rajapur, Police Station-Koilwar, District-Bhojpur.
8. Satyendra Singh, son of late Bindeshwar Singh, resident of village- Tira, Police Station- Harnaut, District- Nalanda.
9. Anuj Kumar, son of late Kamaladhari Prasad, resident of Muhalla Sanichara More, Dargah Road 2, P.S.-Sultanganj, District- Patna.
10. Birendra Kumar Jha, son of Sri Maheshwar Jha, resident of Barahampur, Police Station-Bausi, District- Banka.
11. Rajesh Kumar Verma, son of late Kalika Prasad Verma, resident of III Flore Pardeshi Instituee Arya Kanya Road, Rajendra Nagar, P.S.-Kadam Kuan, District- Patna.
12. Sanjay Kumar Sinha, son of late Dadan Prasad Sinha, resident of Mohalla- Adarsh Colony, Patel Nagar, Police Station- Shastri Nagar, District- Patna.
13. Vivekanand Trivedi, son of Bindeshwar Trivedi, resident of Bhuptipur, P.S.- Ram Krishna Nagar, District- Patna.
14. Hansmukh Kumar, son of sri Pasupati Nath Singh, resident of Old Bus Stand, P.S.- Kankarbagh, District- Patna.
15. Kaushal Kumar Sinha, son of late Sataydev Prasad Sinha, resident of Muhalla- Devasharam, Nala Road, P.S.-Kadam Kuan, District- Patna.



16. Binod Kumar Singh, son of late Punaydev Singh, resident of Muhalla- People's Co-operative Colony Kankarbagh, P.S.- Kankarbagh, District- Patna.
17. Keshav Prasad Upadhyay, son of Anjani Kumar Upadhyay, resident of Muhalla- Microlab Gali Budhmarg Lodipur, P.S.- Gandhi Maidan, District- Patna.
18. Shyam Sundar Chaudhary, son of Sri Vishavnath Choudhary, resident of village-Raje (Gote), P.S.- Manigachhi, District- Darbhanga.
19. Kamlesh Jha, son of late Jaymod Jha, resident of village- Tatuhaar, P.S.- Manigachhi, District- Darbhanga.
20. Manoj Kumar Jha, son of Lakshman Jha, resident of village- Ghoghardiha, P.S.-Ghoghardiha, District- Madhubani.
21. Bhagirath Jha, son of late Devnath Jha, resident of village- Goimishra Lagama, P.S.-Ghanshyampur, District- Darbhanga.
22. Rakesh Kumar Jyoti, son of Sri Sant Kumar, resident of Muhalla-Gokul Cooperative Colony Naya Chak Golki More, P.S.-Sri Ram Krishana Nagar, District- Patna.
23. Shiv Lal Yadav, son of late Babulal Yadav, resident of Village- Bishath, P.S.-Manigachhi, District- Darbhanga.
24. Shambhu Kumar Jha, son of Trilok Nath Jha, resident of village- Kathra, Police Station- Manigachhi, District- Darbhanga.
25. Madneshwar Jha, son of late Laxmi Kant Jha, resident of village- Kathra, P.S.- Manigachhi, District- Darbhanga.
26. Ram Bahadur Tripathi, son of late Guru Prasad Sharma, resident of village- Suunaha, P.S.-Fluwariya, District- Gopalganj.
27. Manoj Kumar, Son of Sri, Ram Naresh Prasad Sharma, resident of village- Paura, P.S. Sarai, District- Vaishali.
28. Krishna Gopal Ram, son of Raj Ballav Ram, resident of village- Paltubigha, P.S.- Makdumpur, District- Jehanabad.
29. Madan Rajak, son of Sita Ram Rajak, resident of Muhalla- Purandarpur, P.S.-Jakanpur, District- Patna.
30. Prabhakar Mishra, son of late Tejnarayan Mishra, resident of village- Brahman Toli, P.S.-Nauvatta, District- Saharsa.



31. Udan Jha, son of Sri Bache Lal Jha, C/O- hari Narayan Thakur, resident of Nalapar Utari Patel Nagar, House No.06/110, P.S.- Patliputra, District- Patna.
32. Ram Krishna Tiwari, son of late Mahavir Tiwari, resident of village- Kapurchak, P.S.- Naya Goan, District- Chapra.
33. Jai Prakash Singh, son of Sri Sudama Singh, resident of village- Pangibar, P.S.-Pangibar, District- Siwan.
34. Rabinder Prasad Singh, son of Sidheshwar Prasad Sharma, resident of village- Dhelba, P.S.-Barbiga, District- Sheikhpura.
35. Ramesh Tiwari, son of Rajaram Tiwari, resident of village- Atawankarn, P.S.-Kathua, District- Gopalganj.
36. Subhash Chandra Misrha, son of Sri Niwash Mishra, resident of village- Narhan, P.S.- Narhan, District- Siwan.
37. Umesh Tiwari, son of Sri Ram Krishan Tiwari, resident of village- Tarauni, P.S.-Darauli, District- Siwan.
38. Shivji Prasad, son of late Jagarnath Prasad Singh, resident of village- Basilpur, Police Station- Barharia, District- Siwan.
39. Kapildeo Hazara, son of Ramashish Hazara, resident of Mirzapur, Police Station- Pattori, District- Samastipur.
40. Baleshwar Ram, son of Shri Ladhari Ram, resident of village- Farhadda, Police Station- Barahra, District- Arrah.
41. Bimal Kumar Mishra, son of late Tunni Mishra, resident of village- Maubihat, Police Station- Manigachhi District- Darbhanga.
42. Surya Bir Kumar Singh, son of Hirdaya Narayan Singh, resident of village- Bindaul, Police Station- Bihta, District- Patna.
43. Ajay Kumar Singh, son of Shyam Narayan Prasad Singh, resident of village- Khodadpur, Police Station- Gulbara Madhuban, District- Motihari (East Champaran).
44. Bibhakar Chaudhary, son of late Umakant Chaudhary, resident of village- Bhalpatti, P.S.- Darbhanga Sadar, District- Darbhanga.
45. Shulpani Pandey, son of Sri Madhusudan Pandey, resident of village- Bhojchaprar (Ramjitta), P.S.- Bisambharpur, District- Gopalganj.
46. Parmod Kumar, son of Sri Raj Ram Singh, resident of village- Neemna Tola, P.S.- Hilsa, District- Nalanda.
47. Arun Kumar Singh, son of Sri Gariban Singh, resident of Muhalla Batikarpuri, Ambedkar Path, Rukanpura, P.S.-Rupaspur, District- Patna-14.



48. Anil Kumar Sinha, son of Sri Akhileshwar Prasad Sinha, resident of village- Cheriya Bariyarpur, P.S.- Cheriya Bariyarpur, District- Begusarai.

... .. Petitioners

Versus

1. The State of Bihar.
2. The Principal Secretary, Department of Human Resources, New Secretariat, Bihar, Patna.
3. The Bihar School Examination Board through its Secretary, Sinha Library Road, Patna.
4. The Chairman, Bihar School Examination Board, Sinha Library Road, Patna.
5. The Secretary, Bihar School Examination Board, Sinha Library Road, Patna.

... .. Respondents

Appearance :

For the Petitioner/s	:	Mr. Sanjay Kumar, Advocate Mr. Jay Prakash Singh, Advocate
For the Respondents	:	Mr. Manish Kumar, Advocate.

CORAM: HONOURABLE MR. JUSTICE SHIVAJI PANDEY

ORAL JUDGMENT

Date : 27-02-2019

Heard learned counsel for the parties.

2. The petitioners are daily wage employees, making a prayer for quashing the orders contained in memo nos. 569 dated 28.01.2011, memo no.519 dated 19.01.2011, memo no.419 dated 26.10.2010, memo no.517 dated 19.01.2011 and memo no.538 dated 22.01.2011, which have been passed in pursuance of the order passed in different writ petition viz. C.W.J.C. No.17234 of 2011, 17474 of 2010, 11032 of 1998 and other analogous cases as well as C.W.J.C. No. 17315 of 2010, 4171 of 1999 and other analogous cases, thereby the representations of the petitioners have been rejected.



3. The short facts of this case are that the petitioners were appointed as daily wage employees in the Bihar School Examination Board and they have continued to discharge their duties, but a decision was taken vide Annexure-6 to terminate the services of all daily wages employees and in pursuance thereof, the petitioners along with other daily wager employees were terminated with effect from 21.07.1989. Whereafter, an advertisement dated 14.09.1989 was published for recruitment and appointment of class-III and IV posts, which was challenged by the petitioners in C.W.J.C. No.8440 of 1989, but this Court had refused to grant the benefit and directed the Board to accept their application provisionally with the condition that the petitioners would produce their requisition certificate within the employment exchange within a fortnight from the date of passing of the order. While disposing of the writ petition, the Court had directed the respondents to grant relaxation of age with respect to the eligibility of their appearance in the said examination. In pursuance thereof, the examination was conducted, in which the petitioners and others have appeared, they were declared successful along with others, but the authority did not grant any appointment letter to Class-III and IV employees, which compelled them to approach this



Court in C.W.J.C. No. 750 of 1999 and other analogous cases, in which they have taken a plea that though the advertisement was published for appointment of Class-III and IV employees, at the same time, the selection process for appointment of Drivers and Stenos was also started. After the result, the Stenos and Drivers were appointed by the Board, but the petitioners were not appointed. The Court has considered the matter in the light of the report submitted by the Committee constituted by the Court. The said Committee gave its finding that the work of the Board has decreased as well as the Bihar Intermediate Council has already been abolished and their employees has to be adjusted in the Board, additionally recorded that the Board is suffering from over-staffs and as such, the question of granting the appointment letter to the selected candidates of Class III and IV does not arise and finally the Court has refused to issue the *mandamus*. It will be useful to quote relevant paragraphs of the said judgment, which are as follows:-

“To put the record the record straight, it may be pointed out here that this decision of the Board has been termed as statutory in nature by one of the Counsels, but how, has not been explained at all and fall out of this submission to the ultimate prayer made by the petitioners. As observed earlier, the aforesaid decision of the Board is not to make appointment but to



prepare separate merit list for daily wages candidates, which the Board later on changed on consideration of the relevant facts. We do not find any substance in the submission of the learned counsel.

It has also been contended that once the Board has published the advertisement, the same has to be taken to its logical end; meaning thereby that it must culminate in appointment. In support of the aforesaid decision, reliance has been placed on a Bench decision of this Court in the case of Rajendra Sharma v. Bihar State Electricity Board [2008(1) PLJR 679] and our attention has been drawn to paragraph 6 of the judgment, which reads as follows:-

“6. Once an employment notice has been published, the same should be pursued unless the same had been issued erroneously or in violation of any rule governing the same. If the notice is responded by one, there is no just reason not to proceed with the selection pursuant to the notice, unless it is held that the others have been prevented from responding to the notice. Because others did not have the qualification fixed in the notice that is no ground for cancellation of the notice.”

We do not find any substance in this submission and the decision relied on has no application in the facts of the present case. Here in the present case, after the advertisement was



made, respondent-Board proceeded with the selection process. Advertisement to fill up the post is in invitation to qualified persons to apply for recruitment. Board later on for bona fide and appropriate reasons decided not to fill up the posts. It is well settled that an employer on valid grounds can refuse to make appointment, even if the vacancy exists. Here, the reasons assigned by the respondents for not filling up the posts have been found to be bona fide and hence refusal to appoint the petitioners cannot be said to be illegal.

It has lastly been contended that when this Court directed to publish the result of the candidates, who have appeared in the examination, it would mean that this Court intended to direct the respondent-Board to make appointment. We cannot read in the order of this court what has not been stated while disposing of the writ application. It is relevant to state here that this Court directed the respondent-Board to publish the result of the test as the Board instead of publishing the result has come out with a fresh advertisement. Issuance of fresh advertisement implies that the Board needed to fill up the posts. In the background of the fact that there was no complaint in regard to the conduct of the examination and further in the face of fresh advertisement having been published to fill up the vacancies, this Court directed the respondent-Board to publish the result. The



direction to publish the result, in our opinion, would not mean that they have to be appointed. Accordingly, we reject this contention of the petitioners.

To put the record straight, it is worth mentioning here that many of the daily wages employees of the Board, who have been declared successful in the examination, have filed writ applications separately and also intervened in some of the writ applications, inter alia, contending that they have the first preference in the appointment. As we have declined to issue mandamus for appointment, we do not consider it expedient to adjudicate this inter se dispute between the daily wages employees and the petitioners, who have been selected for appointment.”

4. This order of the Division Bench was tested before the Hon’ble Supreme Court in Special Leave to Appeal (Civil) Nos-22913-22916 of 2008 and the Hon’ble Supreme Court has refused to interfere with the order and the matter stands concluded by the order of the Hon’ble Supreme Court. Whereafter, the petitioners were appointed as daily wage employees and after that on receipt of the order from the State Government, the services of the daily wage employees including the present petitioners have been dispensed with effect from 16.10.1996. In view of the memorandum issued by



the State Government dated 16.03.2006, the petitioners filed representation for regularization, but the Board did not take cognizance, which compelled the petitioners to file different writ petitions before this Court. The said writ petitions were disposed of with a direction to the respondents to examine the case of the petitioners and take decision in accordance with law. Ultimately, by the impugned order, the representations of the petitioners having been rejected, which is under consideration before this Court.

5. Learned counsel for the petitioners submits that the impugned orders are suffering from illegality as while rejecting the representations of the petitioners, two grounds have been taken by the authority; first, while giving employment as daily wagers the Reservation Policy was not followed; Secondly, the persons named in the impugned order have already been terminated from the service 14 years earlier and the engagement of these petitioners right from the beginning was not legal, hence, the claim of regularization having been rejected. He further submits that the application of Reservation Policy for engagement as daily wagers does not apply as it was not a regular employment, had there been a regular employment, then the application of Reservation Policy would



have come into play.

6. It has further been submitted by learned counsel for the petitioners that in absence of any Rule and Regulations framed by the Bihar School Examination Board, the memorandum dated 16.03.2006 would come into play and those who have worked 240 days prior to 11.12.1990 are required to be regularized in service. It has further been submitted that the petitioners had appeared in the examination and declared successful, but they have not been appointed. It has further been contended that the petitioners have continuously been discharging their duties as daily wagers for a long period, which itself reflect that sufficient work is available for these petitioners, which was/is perennial in nature. Further submits that if the impugned order suffers on a single ground, then the entire order would be bad.

7. It has further been submitted that if the appointment is made without following the Reservation Policy, later on, that appointment cannot be held to be illegal. In support of his submissions, learned counsel for the petitioners has placed reliance on the decision of this Court rendered in the case of *Binay Kumar Singh & Anr. vs. State of Bihar and Ors.* reported in *2001(4) PLJR 352*.



8. It has further been submitted that the averments made by the Board in its counter affidavit that the Circular dated 16.03.2006 (Annexure-13) is not applicable, cannot be taken into consideration in view of the fact that this is not the ground mentioned in the impugned order and further ground cannot be supplemented through counter affidavit. In support of his submissions, learned counsel for the petitioners has placed reliance on the decision of the Hon'ble Supreme Court rendered in the case of *Mohinder Singh Gill and Another vs. The Chief Election Commissioner, New Delhi and Ors.* reported in *A.I.R. 1978 S.C. 851*.

9. It has further been submitted that the other similarly situated persons like Driver and Steno were appointed, so these petitioners should also be given the identical benefit, for that, he has placed reliance on the decisions rendered in the case of *Amarkant Rai vs. State of Bihar and Others* reported in *(2015) 8 SCC 265* and in the case of *Prem Ram vs. Managing Director, Uttarakhand Pey Jal and Nirman Nigam, Dehradun and Others* reported in *(2015) 11 SCC 255*.

10. Learned counsel for the petitioners has drawn the attention of this Court to the order dated 30.03.2009 passed by this Court in C.W.J.C. No.11032 of 1998, wherein the petitioner



relied upon a Government office order of the Human Resources dated 09.01.2009, in turn, the Court has held if the State Government has framed a Policy for regularization, quite naturally which is required to be applied and as such, benefit of regularization should be extended to the petitioners. In pursuance thereof, a Three Men Committee was constituted (Annexure-20), which itself reflects that the said Committee took decision that if the Board will consider the issue of regularization in future then their matter will be considered also.

11. Whereas, learned counsel for the Bihar School Examination Board has submitted the petitioners have already been terminated from the service in the year 1996 and whereafter their services have never been taken by the Board in any manner, so the question of their regularization in service does not arise. He further submits that the question of regularization came for consideration in C.W.J.C. No.8440 of 1989 [Bhavesh Jha vs. The State of Bihar & Ors.], but the Court has out-rightly rejected the claim of the petitioner for regularization, but only granted certain benefits for the purposes of appearing in the recruitment test. It has further been submitted that after the repeal of the Intermediate Council, the employees working in the Intermediate Council have been



absorbed in the Bihar School Examination Board, inasmuch, already excess employees are working in the Board, so the question of regularization and appointment of these petitioners was consciously decided and they have not been engaged.

12. It has further been submitted that the petitioners have already been terminated in the year 1996 and after long lapse of time, regularization cannot be offered to the petitioner. Further submitted that the entry of the petitioners itself is completely illegal, so they have no right to claim for regularization. In support of his submission, learned counsel for the petitioners has placed reliance on the decision rendered in the case of *Ram Sevak Yadav & Anr. vs. State of Bihar and Ors.* reported in *2013(1) PLJR 964* and in the case of *Nand Kumar vs. State of Bihar and Ors.* reported in *(2014) 5 SCC 300*, wherein it has been held that regularization can only be claimed when the employment is subsisting. He further placed reliance on the decision rendered in the case of *Upendra Singh vs. State of Bihar and Ors.* reported in *A.I.R. 2018 S.C. 1315*, wherein the Court has decided that the regularization cannot be done in the event of illegal appointment.

13. Learned counsel for the Bihar School Examination Board has further placed reliance on the decision rendered in the



case of *Rita Mishra and Others vs. Director, Primary Education, Bihar and Others*, reported in *AIR 1988 PATNA 26* and submits that for issuance of writ of *mandamus* it is required that there must be an existence of statutory or public duty devolving upon the person or body against whom the said writ petition is directed. So, he submits that there is no public duty of the Board to give regularization to these persons when their services has already come to an end much earlier and at the same time, the entry of the petitioners itself is bad and illegal, they have to show that they have a corresponding right to get regularization in service. It has further been submitted that regularization is purely an executive function and the Court cannot give a direction for regularization of the employees working therein. In support of his submission, he placed reliance on *Union of India & Anr. vs. Ram Singh Thakur & Ors.* reported in *AIR 2012 SC (Supp) 436*.

14. After considering the argument of both the sides, this Court has to decide whether these petitioners, who were earlier appointed as daily wagers, whereafter an advertisement was published for recruitment of Class-IV employees substantively, which these petitioners challenged unsuccessfully, can be granted the relief of regularization or the



Court should not interfere with the order of termination. The Court had earlier granted the benefit of age relaxation, they appeared in the examination, declared successful, but ultimately, the Board refused to appoint even a single person from his category, which has been approved by this Court in a writ petition, in turn, by the Hon'ble Supreme Court. Later on, the petitioners were engaged on daily wage basis, terminated from service in the year 1996. Now the question of regularization in service has come for consideration. Question of regularization in service can be considered when the person, who is claiming regularization, is in service, when the person, who is claiming regularization is no longer in service, has been terminated, unless the order of termination is set aside and the person is declared in continuous in service, only in such a situation, the relief for grant of regularization can be considered. So, first step, the entry of these petitioners as daily wagers must create some semblance of right to claim regularization in service, only in the next step the same may be considered. But, in the present case, subsequent engagement of these petitioners does not satisfy the condition of proper procedure followed for the selection and recruitment of class-IV employees. In the event of entry in service *de hors* to the



proper procedure does not create any right. Identical issue has come for consideration from time to time, so it will be appropriate to deal with the judgments cited by the parties on this point.

15. In the case of *Vinay Kumar Singh & Anr. vs. State of Bihar and Ors. (supra)*, the petitioners were appointed by the Divisional Establishment Committee after following the normal procedure and their selection was made after due advertisement and there was no allegation of plying fraud in the matter of appointment nor there was any allegation of appointment on account of extraneous consideration. However, roster clearance was not observed and compliance of Reservation Rules was also not observed and on that ground the Court has arrived to a finding that the petitioners should not be made to suffer after several years of appointment for the fault of the authorities in not observing these formalities and in any view of the matter, it cannot be a sufficient justification to terminate their services. So, in this case, it is very much clear that the selection was made after due advertisement and all the formalities were followed save and except the Reservation Policy, the Court has held that it will not be justify to terminate their services and accordingly, the Court interfered with the



order in favour of the petitioners.

16. It will be relevant to quote paragraph no.7 of the aforesaid judgment, which reads as under:-

“7. Prima facie, it appears that the petitioners were appointed by the Divisional Establishment Committee after following the normal procedures and their selection was made after due advertisement. From the facts enumerated in the writ applications and also in the counter-affidavit, it appears that the petitioners are not alleged to have played any fraud in the matter of appointment nor it is alleged that appointments were made on extraneous consideration. However, it appears that the roster clearances etc. are not said to have been observed and compliance of reservation Rules was also not observed. However, for these, the petitioners should not be made to suffer after several years of appointment for the fault of the authorities in not observing these formalities and in any view of the matter, it cannot be a sufficient justification to terminate their services.”

17. In the case of ***Satya Prakash and Ors. vs. State of Bihar and Others*** reported in ***(2010) 4 SCC 179***, daily-rated employees of the Bihar Intermediate Education Council, had approached the Court taking plea that they had worked for more than 10 years on daily-rated basis, claimed for regularization of their services. The Division Bench of this Court has taken a view that mere because they had worked as



daily-wage employees with the Council would not confer any right for regularization as no public appointment is permissible *de hors* the recruitment rules, as such every person has equal right over the same as it is a public property. The matter went to the Hon'ble Supreme Court and the Hon'ble Supreme Court has considered several judgments especially the decision rendered in the case of *State of Karnataka v. Umadevi reported in (2006) 4 SCC 1* and held that the employees are not entitled to get the benefit of regularization of their services since they were never appointed on any sanctioned posts rather they were only engaged as daily wage employees in the Bihar Intermediate Education Council. The Hon'ble Supreme Court has made a distinction between irregular and illegal appointment, illegal appointment does not confer any right of any nature to the Government servant and after considering the different judgments it has been held that there is a clear distinction between the illegal and irregular employment, persons who have been appointed wrongly in the sense non-compliance of certain procedure, which does not go to the root of the selection process, is irregular and those does not fall in that category rather failure of observe procedure goes to the root of the matter will be treated to be an illegal appointment.



The illegal appointment cannot be regularized. The status of such appointment is nothing, but a back door entry, which cannot be in any manner said to be a valid appointment.

18. It will be relevant to quote paragraph nos. 7 and 14 of the said judgment, which read as under:-

“7. We are of the view that the appellants are not entitled to get the benefit of regularization of their services since they were never appointed in any sanctioned posts. The Appellants were only engaged on daily wages in the Bihar Intermediate Education Council.

14. Allowing the appeal preferred by the Commercial Taxes Department, this Court set aside the directions given by the High Court for regularization of services of those daily wage employees who had more than 10 years of service. The Court held as follows:-

"We are, therefore, of the view that, at best, the Division Bench of the High Court should have directed that wages equal to the salary that is being paid to regular employees be paid to these daily wage employees with effect from the date of its judgment. Hence, that part of the direction of the Division Bench is modified and it is directed that these daily-wage earners be paid wages equal to the salary at the lowest grade of employees of their cadre in the



Commercial Taxes Department in Government service, from the date of the judgment of the Division Bench of the High Court. Since, they are only daily wage earners, there would be no question of other allowances being paid to them. In view of our conclusion, that the Courts are not expected to issue directions for making such persons permanent in service, we set aside that part of the direction of the High Court directing the Government to consider their cases for regularization. We also notice that the High Court has not adverted to the aspect as to whether it was regularization or it was giving permanency that was being directed by the High Court. In such a situation, the direction in that regard will stand deleted and the appeals filed by the State would stand allowed to that extent. If sanctioned posts are vacant (they are said to be vacant) the State will take immediate steps for filling those posts by a regular process of selection. But when regular recruitment is undertaken, the respondents in Civil Appeal No. 3595-612 and those in Commercial Tax Departments similarly situated will be allowed to compete, waiving the age restriction imposed for the recruitment and giving some weightage for their



having been engaged for work in the Department for a significant period of time. (Emphasis supplied)

19. Same issue came for consideration before the Full Bench of this Court in the case of ***Ram Sevak Yadav & Anr. vs. State of Bihar and Ors. (supra)***, wherein the Full Bench after considering large number of judgments of the Hon'ble Supreme Court, conclusively arrived to a finding that *Uma Devi case (supra)* prohibits regularization of daily wage, casual, adh-hoc and temporary appointments and the period of service being irrelevant. An illegal appointment is void ab initio as made contrary to the mandate of Article 14 without open competitive selection cannot be regularized under any circumstances. Irregular appointments can be regularized if the appointment was made by an authority competent to do so, it was made on a vacant sanctioned post in accordance with Article 14 of the Constitution of India with equal opportunity for participation of eligible candidates by competitive selection and the candidates must possess the eligibility qualifications for a regular appointment to the post. The appointment must not have been doled out to the appointee alone and the person must have continued in service over ten years without intervention of any courts' order.



20. It will be relevant to quote paragraph nos. 41 and 43 of the said judgment, which are as follows:-

“41. The public power to make appointment on public posts is conferred for public good. The power is given to the officer concerned by the Government in trust, that it shall be used and not abused. If the trust is belied, the protection conferred upon a Government servant stands denuded. The answerability and accountability is then individual of the officer. The Government is duty bound to take appropriate civil/ criminal action against the officer. The illegality in the appointment is not a one way street. If there was someone willing to pay a price for the job, there was another waiting to take advantage of the same by fixing a price. It is not without reason that majority of such appointments relate to class III and IV posts. The standard by which the Government professes to act is the same standard by which its actions shall be judged. Therefore whenever the Government terminates an appointment being illegal, it is the constitutional duty of the Government to simultaneously take action against the officials who belied the trust of the government. Those who made hay while the sun shined must see the darker cloudy days also. In 1995(2) PLJR 573(DB) (Bimal Kishore Rai v. State of Bihar) it was directed :

"16. In cases where an appointment is found to have been illegally made, the



courts quash the appointment and, therefore the appointee suffers the consequence. However, the real guilty person, namely, the appointing authority does scot free. The result is that even though large number of such appointments have been quashed by the courts, the appointing authorities have showed total indifference to the orders passed by the courts, and they continue to make such appointments. It is a well-known fact, so far as this state is concerned, that appointment in majority of cases has to be bought. The ordinary citizen who has concern for the law and morality, must suffer, even if in terms of capability and merit he is far superior to the unscrupulous ones, who managed the appointments. We have, therefore, felt the need to issue some directions in this regard, so that the appointing authorities, who are primarily guilty in such matters, and who exploit the jobseekers taking advantage of their hardship, are equally punished when such illegal appointments are brought to the notice of the Government. I, therefore direct that in each and every case where an appointment is said to have been illegally made, in the sense that the rules governing the appointment have not been followed, and the appointment is made



by flouting the law in such a manner that the motive of the appointing authority becomes suspect, simultaneously with the cancellation of such illegal appointment, action must be initiated against the appointing authority, and in appropriate cases they should be immediately suspended pending departmental proceedings. If such action is not taken, courts will doubt the genuineness of the reason shown by the government for cancellation of such appointment. I direct that this should be complied with by the Government in each and every case where an appointment is sought to be cancelled on the ground that it was illegally made in circumstances which give rise to a suspicion that the appointment was made on extraneous consideration, including money."

43. We therefore sum up our conclusions and answer the reference as follows :-

A) Uma Devi (supra) prohibits regularisation of daily wage, casual, ad-hoc and temporary appointments, the period of service being irrelevant;

B) An illegal appointment void ab-initio made contrary to the mandate of Article 14 without open competitive selection cannot be regularised under any circumstances.



C) Irregular appointments can be regularised if the appointment was made by an authority competent to do so, it was made on a vacant sanctioned post, in accordance with Article 14 of the Constitution with equal opportunity for participation to others eligible by competitive selection and the candidate possessed the eligibility qualifications for a regular appointment to the post.

D) The appointment must not have been an individual favour doled out to the appointee alone and the person must have continued in service for over ten years without intervention of any court orders.

21. In the case of ***Nand Kumar vs. State of Bihar and Others. (supra)*** also the question of regularization of service of daily wager or casual workers, who were not appointed through proper procedure, came for consideration before the Hon'ble Supreme Court, wherein it has been held that they were not appointed properly in strict sense following the procedure of the appointment and as such, cannot claim any right over the post. The appointment on daily wage basis is not a mode of appointment strictly in accordance with law and does not confer any right to claim equivalence as that of the regular appointed Government employee. The status of daily wagers and the regular employees is not comparable and any



appointment dehors to the procedure does not create any semblance of right for regularization.

22. It will be relevant to quote paragraph nos. 23 to 25 of the said judgment, which are as follows:-

“23. We have heard learned counsel for the parties. We have also perused the records placed before us. We find that the status of the appellants was continuing to be as daily wagers. They cannot be treated as permanent Government employees. They all worked as employees of the Board. We have also found that no steps were followed by the Board to safeguard the service of these appellants. We have not been able to find out whether any advertisement was issued by the Government to regularise them. In these circumstances, in view of the submission which has been advanced on behalf of the appellants, we do not find that there is any substance in the matter/arguments put forwarded before us on behalf of the appellants as we have been able to find out that the appellants have served as daily wagers and we do find that Section 6(i) makes it clear that after the repeal of the Agriculture Produce Act, 1960, all officers and employees of the Board are to continue in employment and they shall continue to be paid what they were getting earlier as salary and allowance till such time the State Government takes an official decision as per the further



provisions of Section 6. Such provision certainly allows continuance of the officers and employees of the Board to continue in employment in the same status. The status of the daily wage employees and regular employees of the Board is eminent from the said provision. It cannot be said that the status of the daily wage employees can enjoy or acquire the same status as that of the regular employees. In these circumstances, we do not find that there was any discrimination between the daily wage employees and the regular employees as is tried to be contended before us. Therefore, such submission has no substance, in our opinion, for the reason that the difference continues and is recognised under the said provision of the Repeal Act. So far as the power of the Committee of Secretaries constituted in terms of Section 6(ii) of the Repeal Act is concerned, it is to prepare a scheme of absorption as well as of retirement, compulsory retirement or voluntary retirement and other service conditions of officers and employees of the Board. In our opinion, the scheme which was prepared by the Committee of Secretaries is only in the nature of recommendation and the State has the power either to accept, modify or amend the same before granting its official approval. Therefore, after the sanction is granted by the Government in respect of the said scheme, it would gain the status of statutory scheme



framed under the said Act and would be enforced within the time to be indicated in section 6(iii) of the Repeal Act, 2006.

24. Therefore, in the light of the said provision, we do not find that the Committee of Secretaries can be faulted in treating the daily wage employees on a different footing and deciding for removal of their services.

25. We have consciously noted the aforesaid decisions of this Court. The principle as has been laid down in Umadevi (supra) has also been applied in relation to the persons who were working on daily wages. According to us, the daily wagers are not appointees in the strict sense of the term 'appointment'. They do not hold a post. The scheme of alternative appointment framed for regular employees of abolished organisation cannot, therefore, confer a similar entitlement on the daily wagers of abolished organisation to such alternative employment. [See Avas Vikas Sansthan v. Engineers Assn.]. Their relevance in the context of appointment arose by reason of the concept of regularisation as a source of appointment. After Umadevi (supra), their position continued to be that of daily wagers. Appointment on daily wage basis is not an appointment to a post according to the rules. Usually, the projects in which the daily wagers were engaged, having come to an end, their appointment is necessarily terminated for want of work. Therefore, the



status and rights of daily wagers of a Government concern are not equivalent to that of a Government servant and his claim to permanency has to be adjudged differently.”

23. In the case of *Amarkant Rai vs. State of Bihar and Others (supra)*, the petitioner was appointed in Class-IV post by the Principal of the College, who was not competent authority to make such appointment. The University took a decision to regularize the person who had worked for 240 days and thereafter the Additional Commission-cum- Secretary, Bihar, passed a settlement dated 11.07.1989 and forwarded a copy of the same to the Vice Chancellors of the Universities, wherein it was stated that the services of employees working in educational institutions as per the staffing pattern, can be regularized, further imposing a condition that new appointments against the vacancies present and in future should not at all be done. The Principal of the College wrote a letter to the Registrar of the University to regularize the services of Amarkant Rai, an employee of the college, but the Registrar terminated the services of Amarkant Rai, which came for consideration before this Court. As per direction of this Court, the Registrar of the Universities allowed Amarkant Rai to join the services. Accordingly, he joined his duty and whereafter



recommendation was given for absorption against the vacant post, but the same was rejected as the same was not as per recruitment Rule. The action of University was challenged before this Court unsuccessfully, the matter went to the Hon'ble Supreme Court, the Hon'ble Supreme Court finally placing reliance on several judgments has held that there is no material to show that Amarkant Rai was lacking any qualification or bore any blemish record during his employment for over two decades. Similarly situated person, who was also appointed on daily wages on the post of clerk, was regularized and there was no material to show that any other persons was working against the sanctioned post of Night Guard, accordingly, direction was given to regularize the service of Amarkant Rai on the score of length of service of more than 29 years.

24. It will be relevant to quote paragraph nos. 13 and 14 of the said judgment, which read as under:-

“13. In our view, the exception carved out in para 53 of Umadevi (3) is applicable to the facts of the present case. There is no material placed on record by the respondents that the appellant has been lacking any qualification or bore any blemish record during his employment for over two decades. It is pertinent to note that services of similarly



situated persons on daily wages for regularization viz. one Yatindra Kumar Mishra who was appointed on daily wages on the post of Clerk was regularized w.e.f. 1987. The appellant although initially working against unsanctioned post, the appellant was working continuously since 03.1.2002 against sanctioned post. Since there is no material placed on record regarding the details whether any other night guard was appointed against the sanctioned post, in the facts and circumstances of the case, we are inclined to award monetary benefits to be paid from 01.01.2010.

14. Considering the facts and circumstances of the case that the appellant has served the University for more than 29 years on the post of Night Guard and that he has served the College on daily wages, in the interest of justice, the authorities are directed to regularize the services of the appellant retrospectively w.e.f. 03.01.2002 (the date on which he rejoined the post as per direction of Registrar)."

25. In the case of ***Prem Ram vs. Managing Director, Uttarakhand Pey Jal and Nirman Nigam, Dehradun and Others (supra)***, the juniors were regularized in service leaving the seniors in high and dry and the Hon'ble Supreme Court has given direction for regularization of service of Prem Ram from the date the juniors to him were regularized in service and also



directed to pay all retiral benefits by treating him to be in continuous service till the date of his superannuation. It will be relevant to quote paragraph nos. 9 and 10 of the said judgment, which are as follows:-

“9. From the affidavits it is further evident that five persons named by the appellant appearing at serials no.78 to 82 of the list of juniors have been regularized in service. It is not in dispute that all these persons were appointed on dates subsequent to the date of appointment of the appellant. The respondent, however, has attempted to justify the regularization of juniors mentioned above on the ground that they had been appointed in work-charge establishment whereas the appellant herein was a daily-wager. We asked learned counsel for the respondent as to whether daily-wagers on the basis of their seniority or otherwise were brought on to the work-charged establishment and if there was no such practice or procedure followed, what was the basis on which the department would decide whether the person has to be engaged on a work-charged establishment or as a daily-wager. We must regretfully say that we did not get a satisfactory answer to that question nor do any of the several affidavits filed in these proceedings by the respondent- Jal Nigam point out a qualitative difference between daily-wager on the one hand and a temporary



engagement on work-charged establishment on the other. If engagement in a work- charged establishment rest on a criterion, no better than the absolute discretion of the authority engaging them or the fortuitous circumstances of a vacancy or need in a work-charged establishment, then, there is indeed no difference between a daily-wager on the one hand and work-charged employees on the other. No distinction can resultantly be made between these two categories of employees for in essence, the nature of their engagement remains the same except that in the case of work-charged employees, the wages/emoluments appear to be borne from out of the allocation for the project in which they are employed while in the other case there is no such specific allocation of funds. The classification of work- charged and other employees to say the least remains wholly unsatisfactory at least for the purposes of the case in hand leaving no option for us but to treat the case of the daily-wagers and work-charge employees on the same footing when it comes to granting regularization to them.

10. If that be so, there is no denying the fact that the persons who were junior to the appellant, having been engaged much later than him, steal a march over him in terms of regularization in service while the appellant remained embroiled in litigation over what was eventually found to be an illegal termination of



his service. It is true that the appellant has already superannuated. That does not, however, make any difference. What is important is that the appellant had been appointed as early as in the year 1988 and had, by the time the decision of this Court in Umadevi's (3) case (supra) pronounced, already completed more than 10 years service. Government has formulated rules for regularization of such daily-wagers, no matter the same are the subject matter of a challenge before the High Court. What is noteworthy is that neither the State Government nor the Jal Nigam has resented the idea of regularization of those who have served for over a decade. The rules providing for regularization are a sufficient enough indication of that fact. We do not, therefore, see any impediment in directing regularization of the services of the appellant on the analogy of his juniors with effect from the date his juniors were regularized and for the release of all retiral benefits in his favour on that basis by treating him to be in continuous service till the date of his superannuation. We make it clear that this direction will not entitle the appellant to claim any amount towards arrears of salary based on such regularization."

26. In the case of ***Upendra Singh vs. State of Bihar and Ors. (supra)***, the question of regularization came for consideration before the Hon'ble Supreme Court, having found



that the appointment has been made by incompetent authority without advertisement not on the sanctioned post, accordingly, it has been held that Upendra Singh is not entitled to relief of regularization in service and approved the judgment of Ram Sevak Yadav (supra). It will be useful to quote paragraph no.7 and relevant portion of paragraph no.8 of the said judgment, which read as under:-

“7. After considering the respective arguments, we are of the view that the impugned judgment is without any blemish and no interference is called for. In fact, whole premise on which the case is founded by the appellant seems to be incorrect. We note that the cases of these persons, including the appellant, were duly considered by the University, on the basis of which order dated August 13, 2003 were passed refusing regularisation. This order specifically states that the initial appointment of the appellant and others was not in accordance with law. It was made without advertisement and there was no recommendation of panel by the Selection Committee. So much so, the appointments were not made by the competent authority. We find that the University, or for that matter, the Government had agreed to regularise the services of those employees of the colleges, which had become the Constituent Colleges, only on the condition that their initial



appointment was after following the due procedure and that too against the sanctioned post. A statement was made at the Bar by learned counsel for the respondent that there were no sanctioned posts even now.

8. Law pertaining to regularisation has now been authoritatively determined by a Constitution Bench judgment of this Court in Secretary, State of Karnataka & Ors. v. Umadevi & Ors., (2006) 4 SCC 1: (AIR 2006 S.C. 1806). On the application of law laid down in that case, it is clear that the question of regularisation of daily wager appointed contrary to law does not arise. This ratio of the judgment could not be disputed by the learned counsel for the appellant as well. That is why she continued to plead that the appointment of the appellant was made after following due procedure and in accordance with law. However, that is not borne from the records. Pertinently, order dated August 13, 2003, vide which the appellant was refused regularisation on the aforesaid ground was not even assailed by the appellant at that time. It may be mentioned that in Uma Devi, the Court left a small window opened for those who were working on ad hoc/ daily wage basis for more than ten years, to regularise them as a one-time measure. However, that was also subject to the condition that they should have been appointed in duly sanctioned post...”



27. In the case of *State of Bihar and Ors. Vs. Kirti Narayan Prasad* reported in *2019 (1) PLJR 102 (S.C.)*, also the question of proper entry in the service came for consideration. The court has held that in case of illegal appointment, the question of regularization of service does not arise. If the appointment is bad at the initial stage, cannot be sanctified at a later stage. It will be relevant to quote paragraph no.16 and 17 of the said judgment, which read as under:-

“16. In State of Orissa and Anr. v. Mamata Mohanty, (2011) 3 SCC 436, this Court has held that once an order of appointment itself had been bad at the time of initial appointment, it cannot be sanctified at a later stage. It was held thus: "68(i) The procedure prescribed under the 1974 Rules has not been followed in all the cases while making the appointment of the respondents/ teachers at initial stage. Some of the persons had admittedly been appointed merely by putting some note on the notice board of the College. Some of these teachers did not face the interview test before the Selection Board. Once an order of appointment itself had been bad at 15 the time of initial appointment, it cannot be sanctified at a later stage.

17. In the instant cases the writ petitioners have filed the petitions before the High Court with a specific prayer to regularize their service and to



set aside the order of termination of their services. They have also challenged the report submitted by the State Committee. The real controversy is whether the writ petitioners were legally and validly appointed. The finding of the State Committee is that many writ petitioners had secured appointment by producing fake or forged appointment letter or had been inducted in Government service surreptitiously by concerned Civil Surgeon-cum-Chief Medical Officer by issuing a posting order. The writ petitioners are the beneficiaries of illegal orders made by the Civil Surgeon-cum-Chief Medical Officer. They were given notice to establish the genuineness of their appointment and to show cause. None of them could establish the genuineness or legality of their appointment before the State Committee. The State Committee on appreciation of the materials on record has opined that their appointment was illegal and void ab initio. We do not find any ground to disagree with the finding of the State Committee. In the circumstances, the question of regularisation of their services by invoking para 53 of the judgment in Umadevi (supra) does not arise. Since the appointment of the petitioners is ab initio void, they cannot be said to be the civil servants of the State. Therefore, holding disciplinary proceedings envisaged by Article 311 of the Constitution or under any other disciplinary rules shall not arise.”



28. In view of the aforesaid discussions, it is very much clear that the person, who is working as daily wager does not hold a post that too in an event when the engagement has not been made after following the proper procedure, hence, the question of regularization does not arise, inasmuch as, in the case of ***Union of India & Anr. vs. Ram Singh Thakur & Ors. (supra)***, it has been held that direction regarding regularization in service is a purely an executive function and such a direction cannot validly be given by the judiciary. It is also very much clear that *mandamus* can be issued when there is a public duty devolving upon the person or the body against whom the said writ is said to be directed and along with this there must co-exist a corresponding right in the persons who were entitled to claim the enforcement of the said statutory public duty. Unless these two pre-conditions are satisfied, the requisite foundation for the issuance of a writ of *mandamus* can hardly be said to exist. Reliance can be placed on the decision rendered in the case of ***Rita Mishra and Others vs. Director, Primary Education, Bihar and Others (supra)***.

29. It will be relevant to quote paragraph nos. 26 and 27 of the said judgment, which are as follows:-

“26. It is evident from the authoritative



exposition of the law that the sine qua non for the issuance of a writ of mandamus is the existence of a statutory or a public duty devolving upon the person or the body against whom or which the said writ is directed. Equally settled it is that along with this must co-exist a corresponding right in the petitioners who were entitled to claim the enforcement of the said statutory public duty. Unless these two pre-conditions are satisfied, the requisite foundation for the issuance of a writ of mandamus can hardly be said to exist Applying the twin test in the present context, I am of the view that neither one stands satisfied. The learned counsel for the petitioners were wholly unable to pinpoint even a single statutory provision which imposed upon the respondents any statutory public duty to pay the salary, where the very appointment of the petitioners may well be forged, fraudulent or illegal Equally no provision can possibly be pointed out which would inhere in the petitioners an established enforceable right to the relief which they seek to claim.

27. I would refrain from enlarging the examination of the issue on principle because it seems to me that the matter is equally well covered by binding precedent. On the scope and nature of the jurisdiction in a writ of mandamus it would suffice to recall the following observations of their Lordships in Lekhraj Sathramdas Lalvani v. Dy. Custodian-cum-



Managing Officer, Bombay, AIR 1966 SC334 :-

"But even on the assumption that the order of the Deputy Custodian terminating the management of the appellant is illegal, the appellant is not entitled to move the High Court for grant of a writ in the nature of mandamus under Article 226 of the Constitution. The reason is that a writ of mandamus may be granted only in a case where there is a statutory duty imposed upon the officer concerned and there is a failure on the part of that officer to discharge that statutory obligation. The chief function of the writ is to compel the performance of public duties, prescribed by statute and to keep the subordinate tribunals and officers exercising public functions within the limits of their jurisdiction. In the present case, the appointment of the appellant as a Manager by the Custodian by virtue of his power under Section 10(2)(b) of the 1950 Act is contractual in its nature and there is no statutory obligation as between him and the appellant. In our opinion, any duty or obligation falling upon a public servant out of a contract entered into by him as such public servant cannot be enforced by the machinery of a writ under Article 226 of the Constitution."



It would be manifest from the aforesaid authoritative enunciation that herein the two basic conditions precedent for the issuance of a writ of mandamus are, thus, nonexistent.

30. Furthermore, the order of regularization may be directed in the event the person is still in service and once it comes to an end either by efflux of time or as per the terms of the contract of employment or termination effected by the employer, then in such event, the relationship of employee and employer comes to an end, no longer subsists, except for the limited purpose to examine the legality and correctness of termination order. Reliance can be placed on the decision rendered in the case of ***Oshiar Prasad and Others vs. Employers in Relation to Management of Sudamdih Coal Washery of M/s. Bharat Coking Col Limited, Dhanbad, Jharkhand*** reported in (2015) 4 SCC 71. It will be relevant to quote paragraph no.25 of the said judgment, which is as follows:-

“25. It is a settled principle of law that absorption and regularization in the service can be claimed or/and granted only when the contract of employment subsists and is in force inter se employee and employer. Once it comes to an end either by efflux of time or as per the



terms of the Contract of employment or by its termination by the employer, then in such event, the relationship of employee and employer comes to an end and no longer subsists except for the limited purpose to examine the legality and correctness of its termination.”

31. This view has been followed in the case of ***Management of the Barara Cooperative Marketing cum Processing Society Ltd. v. Workman Pratap Singh*** reported in ***2019 (1) PLJR (S.C.) 353***.

32. In view of aforesaid discussions, it is very much clear that the effort of the petitioners for regularization in service was not accepted by this Court, were asked to appear in the regular recruitment process, they have successfully appeared in the test, but on account of Policy decision of the Bihar School Examination Board in the background of fact that Bihar Intermediate Education Council was abolished and their employees were absorbed in the Bihar School Examination Board, inasmuch, there were extra employees already working the Bihar School Examination Board, which was recorded by the Three Men Committee, accepted by this Court and remain un- altered upto the Apex Court, but they were engaged for



certain period as daily wagers and were terminated in the year 1996, so after such a long period, there cannot be a direction for regularization of their services, inasmuch as, their entry as daily wagers was not in terms of Article 14 and 16 of the Constitution of India, cannot be said to be a legal or regular appointment, but out and out it is an illegal appointment, does not confer any right to claim for regularization.

33. For the foregoing reasons, this Court does not find any merit in this writ petition, accordingly, the same is dismissed.

(Shivaji Pandey, J)

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