A STATE OF U.P. AND ORS.

*v.*

DESH RAJ

NOVEMBER 23, 2006

B [S.B. SINHA AND MARKANDEY KATJU, JJ.]

*Labour Laws:*

*Appointment of workman on daily wages for specific work—Filing of* C *writ petition for direction to employer for regularization—Single Judge of High Court directing employer to create supernumerary post to consider his claim, till such creation the incumbent shall be paid wages equivalent to minimum of pay scale—Appeal was rejected by Division Bench of High Court as barred by limitation—On appeal, Held: Appointment made in violation of* D *constitutional scheme of equality would be rendered illegal and thus void* **ab initio**—*No regularization rules could be framed by State in derogation to the statutory or constitutional scheme—And it must be made in terms of Proviso to Article 309 of the Constitution of India—Regularisation of the employee in terms of any policy decision by the State is impermissible in law—Order of the High Court suffer from legal error, hence, set aside—A sum* E *of Rs. 10,000/— shall be paid to the incumbent as compensation amount—Constitution of India, 1950—Articles 14, 16 and 309—Right to equality.*

*Words and Phrases:*

*'Irregularity' and 'illegality'—Distinction between in the context of* F *appointment, Service Law.*

**Respondent was appointed on daily wages for specific work on Muster Roll of the Public Works Department. A writ petition was filed by the respondent praying for his regularization. A Single Judge of the High Court directed the opposite parties to examine the petitioner's claim for** G **regularization, till a decision is taken he shall be paid wages equivalent to the minimum pay scale admissible to a Male workman working in the department with effect from 1st January, 2004. A special appeal filed thereagainst was dismissed by the Division Bench of the High Court. Hence the present appeal.**

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Allowing the appeal, the Court A

HELD:1.1. Single Judge of the High Court for all intent and purport had allowed the writ petition on the very first day which was not justified. It is now well-settled that a relief which can be granted only at the final hearing of the matter, should not ordinarily be granted by way of an interim order. It is also doubtful as to whether the impugned directions could have been issued B even at the final hearing of the matter which would amount to creation of supernumerary post in purported compliance of the regularization rules. [355-C-D]

1.2. It is now well-settled that the appointments, if made in violation of the constitutional scheme of equality as enshrined under Article 14 and 16 C of the Constitution of India, would be rendered illegal and, thus *void ab initio.* Furthermore, the State must have made rules in terms of the proviso appended to Article 309 of the Constitution of India, providing for the mode and manner in which recruitments are to be made. Such rules have statutory force. [355-E-F] D

*Secretary State of Karnataka & Ors.* v. *Umadevi & Ors.*, [2006] 4 SCC 1 followed.

2.1. An appointment which was made throwing all constitutional obligations and statutory rules to winds would render the same illegal whereas irregularity pre supposes substantial compliance of the rules. [356-F-G] E

*State of Mysore* v. *S.V. Narayanappa,* [1967] 1 SCR 128; *R.N. Nanjundappa* v. *T. Thimmiah,* [1972] 4 SCC 507 and *National Fertilizers Ltd. & Ors.* v. *Somvir Singh,* [2006] 5 SCC 493, referred to.

2.2. It is not the case of the respondents that they were recruited in F terms of the provisions of the recruitment rules framed under the proviso appended to Article 309 of the Constitution of India. In that view of the matter, *ex facie* their appointments were illegal. [357-F-G]

*National Fertilizers Ltd. & Ors.* v. *Somvir Singh,* [2006] 5 SCC 493, relied on. G

2.3. In any event, the question of regularization of the employees by reason of any policy decision adopted by the State is impermissible in law. The judgment of the High Court suffer from a legal error. It is set aside accordingly. However, the respondents should be compensated, as the appeal preferred by the State was barred by limitation. The amount of compensation H

**is quantified at Rs.10,000/-. It would be open to the State to recover the amount from the officers who may be found responsible for causing the delay in preferring the appeal. [358-A-B]**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5674 of 2006.

From the final Judgment/Order dated 22.8.2005 of the High Court of Judicature at Allahbad, Lucknow Bench, Lucknow in Special Appeal No.487 of 2005.

Dr. R.G. Padia, Ashok K. Srivastava, Praveen Swarup and Jatinder Kumar Bhatia for the Appellants.

Praveen Agrawal for the Respondent.

The Judgment of the Court was delivered by

**S.B. SINHA, J.** Leave granted.

The State of U.P has herein questioned an interim order dated 15.1.04 passed by the learned Single Judge of the Allahabad High Court as also order dated 22.8.2005 passed by a Division Bench of the said Court affirming the same.

The respondent was said to have been appointed on daily wages for specific work on Muster Roll purported to be under the provisions of paragraphs 429, 430 and 431 of the Financial Hand Book Volume-VI read with paragraph 476 of the Part-I of the Public Works Department of Manual of orders in local arrangements.

A writ petition was filed by the respondent herein, *inter alia*, praying for his regularization. A learned Single Judge of the Lucknow Bench of the Allahabad High Court on the day of preliminary hearing while issuing rule passed the following order:

> "In the meantime, the opposite parties no.3 to 5 shall examine the petitioner's claim for regularization under the Regularization Rules 2001 and pass appropriate orders. However, his claim shall not be rejected on the ground of the post being not available. Supernumerary posts have to be created to comply with the provisions of the Regularization Rules and kept alive until regular posts fall vacant. Till a decision is taken, the petitioner shall be paid wages equivalent to

the minimum of pay scale admissible to a Mate working in the department with effect from 1st January, 2004." A

A special appeal filed thereinagainst but the same was barred by limitation. The Division Bench, *inter alia*, on the said premise refused to interfere with the order passed by the learned Single Judge stating:

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"In these circumstances, the appeal Court should not interfere but leave the matter to be decided by the Hon'ble single Judge on a final basis. The appeal is thus dismissed on merits and also on the ground of delay which we are not minded to condone, although this is illogical, we thought it better to make our minds known."

C

A bare perusal of the impugned order could show that the learned Single Judge for all intent and purport had allowed the writ petition on the very first day, which in our opinion, was not justified. It is now well-settled that a relief which can be granted only at the final hearing of the matter, should not ordinarily be granted by way of an interim order. It is also doubtful as to whether the impugned directions could have been issued even at the final hearing of the matter which would amount to creation of supernumerary post in purported compliance of the regularisation rules. D

Whatever may be the import and purport of such regularization rules, in view of the recent Constitution Bench decision of this Court in *Secretary, State of Karnataka & Ors.* v. *Umadevi & Ors.*, [2006] 4 SCC 1, it is now well-settled that the appointments, if made in violation of the constitutional scheme of equality as enshrined under Articles 14 and 16 of the Constitution of India, would be rendered illegal and, thus *void ab initio*. No regularization rules, therefore, could have been made by the State of Uttar Pradesh in derogation to the statutory or constitutional scheme. E F

Furthermore, the State of Uttar Pradesh must have made rules in terms of the proviso appended to Article 309 of the Constitution of India, providing for the mode and manner in which recruitments are to be made. Such rules have statutory force.

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The learned counsel for the respondents, however, drew our attention to paragraphs 53 of *Umadevi* (supra), which reads as under:

"One aspect needs to be clarified. There may be cases where irregular appointments [not illegal appointments] as explained in S.V. H

A Narayanappa, R.N. Nanjundappa and B.N. Nagarajan and referred to in para 15 above, of duly qualified persons 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 the courts or of tribunals. The question of regularization of the services of such employees may have to be B considered on merits in the light of the principles settled by this Court in the cases abovereferred 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 one time measure, the services of said irregularly appointed, who have worked for ten C years and more in duly sanctioned post but not under cover of orders of the Courts or of Tribunals and should further ensure that regular recruitments are undertaken to fill that vacant sanctioned posts that required 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, D if any already made, but not subjudice, need not be reopened based on this judgment, but there should be no further byepassing of the constitutional requirement and regularizing or making permanent, those not duly appointed as per the constitutional scheme."

E The observations made in the said paragraph must be read in the light of the observations made in paragraphs 15 and 16 of the judgment. The Constitution Bench referred to the decisions of this Court in *State of Mysore* v. *S.V. Narayanappa,* [1967] 1 SCR 128, *R.N. Nanjundappa* v. *T. Thimmiah,* [1972] 1 SCC 409 and *B.N. Nagarajan* v. *State of Karnataka,* [1979] 4 SCC 507, B.N. Nagarajan is a decision rendered by a three judge bench of this F Court in which it has clearly been held that the regularisation does not mean permanence. A distinction has clearly been made in those decisions between 'irregularity' and 'illegality'. An appointment which was made throwing all constitutional obligations and statutory rules to winds would render the same illegal whereas irregularity pre supposes substantial compliance of the rules.

G Distinction between irregularity and illegality is explicit. It has been so pointed out in *National Fertilizers Ltd. & Ors.* v. *Somvir Singh,* [2006] 5 SCC 493 in the following terms:

"the contention of the learned counsel appearing on behalf of the respondents that the appointments were irregular and not illegal, H cannot be accepted for more than one reason. They were appointed

only on the basis of their applications. The Recruitment Rules were not followed. Even the Selection Committee had not been properly constituted. In view of the ban on employment, no recruitment was permissible in law. The reservation policy adopted by the appellant had not been maintained. Even cases of minorities had not been given due consideration. A B

The Constitution Bench thought of directing regularization of the services only of those employees whose appointments were irregular as explained in *State of Mysore* v. *S.V. Narayanappa, R.N. Narayandappa* v. *T. Thimmiah and B.N. Nagarajan* v. *State of Karnataka,* wherein this Court observed: [ Umadevi (3) case 1, SCC p.24. para 16[ C

"16. In *B.N. Nagarajan* v. *State of Karnataka* this Court clearly held that the words 'regular' or 'regularization' do not connote permanence and cannot be construed so as to convey an idea of the nature of tenure of appointments. They are terms calculated to condone any procedural irregularities and are meant to cure only such defects as are attributable to methodology followed in making the appointments." D

Judged by standards laid down by this Court in the aforementioned decisions, the appointments of the respondents are illegal. They do not thus, have any legal right to continue in service." E

[See also *State of Madhya Pradesh & Ors.* v. *Yogesh Chandra Dubey & Ors.*, [2006] 8 SCC 67]

It is not the case of the respondents that they were recruited in terms of the provisions of the recruitment rules framed under the proviso appended to Article 309 of the Constitution of India. In that view of the matter *ex facie* their appointments were illegal. We, however, must observe that we have not been taken through the purport and import or the various provisions of the PWD rules to which we have made reference heretobefore. But in any event, the question of regularisation of the employees by reason of any policy decision adopted by the State is impermissible in law. The learned Division Bench could have dismissed the special appeal filed by the appellant on the ground of delay. It did not do so. It purported to uphold the order of the learned Single Judge even on merits. F G

In that view of the matter only we had to enter into the merits of the H

A matter. The judgment of the High Court, for the reasons stated hereinbefore, suffer from a legal error. It is set aside accordingly. We are however of the opinion that the respondents should be compensated, as the appeal preferred by the State of Uttar Pradesh was barred by limitation. We quantify the same at Rs.10,000/- (Rupees ten thousands only). We, however, may observe that it would be open to the State to recover the said amount from the officers B who may be found responsible for causing the delay in preferring the appeal.

With the aforementioned directions, the impugned orders are set aside. The appeal is allowed. No costs.

C. S.K.S. Appeal dismissed.