INDIAN DRUGS AND PHARMACEUTICALS LTD. A

v.

WORKMAN, INDIAN DRUGS AND PHARMACEUTICALS LTD.

NOVEMBER 16, 2006

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

Labour Laws:

Industrial Disputes Act, 1947: Sections 10 and 11.

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Industrial dispute—Reference—Daily rate employees—Regularization of—A Public Sector Undertaking, running on hug losses, appointed ten employees as causal workers on daily rate basis—These employees were appointed as casual workers on daily rate basis for the reason that they were dependants of employees dying in harness—Such appointments were made by the company due to the persistent and prolonged agitation by the trade union since the company wanted to maintain industrial harmony, although there was no rule/policy for such compassionate appointments in the service of the company, which was already overstaffed in all its departments—The ten daily rated employees made a claim for their regularization—Labour Court held that although the said employees were employed as "casual daily rated employees" by the company, yet in view of their having continued for a long time, they were entitled to regularization—The High Court upheld the contention of the appellant that the said ten employees were not entitled to regularization—However, the High Court directed the company to continue the said ten employees in its service till their superannuation and that they should be paid wages like the regular employee of the company—Correctness of—Held: Whereas a permanent employees has a right to the post, a temporary employee has no right to the post—It is only a permanent employee who has a right to continue in service till the age of superannuation—As regards a temporary employee, there is no age of superannuation because he has no right to the post at all—Hence, no direction can be passed in the case of any temporary employee that he should be continued till the age of superannuation—in the instant case, the ten employees were appointed on purely casual and daily rate basis without following the relevant service rules—Thus, they had no right to the post at all—High Court judgment set

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A *aside—Constitution of India, 1950, Arts. 21, 37 and 41.*

The appellant, a Public Sector Undertaking, running on huge losses, appointed ten employees as casual workers on daily rate basis for the reason that they were dependants of employees dying in harness. Such appointments were made by the appellant due to the persistent and prolonged agitation by B the trade union since the appellant wanted to maintain industrial harmony, although there was no rule/policy for such compassionate appointments in the service of the appellant-company, which was already overstaffed in all its departments. The said employees were given work in the nature of cleaning window panes, sweeping floors and such sundry jobs on contract basis which C work was not the work of the regular employees of the appellant-company.

The trade union of the appellant-company started pressing and agitating for regularization of the aforesaid ten daily rated employees although a revival proposal was prepared before the Board of Industrial Finance and Reconstruction where the union agreed not to raise any demand which entailed D any liability. On reference of the dispute under the Industrial Disputes Act, 1947, the Labour Court held that although the said employees were employed as "casual daily rated employees" by the appellant-company, yet in view of their having continued for a long time, they were entitled to regularization.

In the writ petition filed by the appellant-company, the High Court upheld E the contention of the appellant that the respondents - employees were not entitled to regularization. However, the High Court directed the appellant-company to continue the respondents-employees in its service till their superannuation. The High Court further directed that the workmen in question should be paid wages like the regular employees of the appellant-company. F Hence the appeal.

Allowing the appeals, the Court

HELD: 1. The High court failed to appreciate that when the appellant is still before the Board of Industrial Finance and Reconstruction, and where G the Government is making an effort to again present a revival proposal, there was no justification to saddle the appellant with liabilities on the basis of compassion when no legal right exists in favour of the concerned respondents. When there was no vacancy and the company was in poor financial condition, the impugned order was wholly uncalled for. [81-D, E]

H 2.1. The distinction between a temporary employee and a permanent

employee is well settled. Whereas a permanent employee has a right to the post, a temporary employee has no right to the post. It is only a permanent employee who has a right to continue in service till the age of superannuation (unless he is dismissed or removed after an injury, or his service is terminated due to some other valid reason earlier). As regards a temporary employee, there is no age of superannuation because he has no right to the post at all. Hence, it follows that no direction can be passed in the case of any temporary employee that he should be continued till the age of superannuation.

[82-B, C]

Madhyamik Shiksha Parishad, U.P. v. *Anil Kumar Mishra,* [2005] 5 SCC 122 and *State of Uttar Pradesh* v. *Kaushal Kishore Shukla,* [1991] 1 SCC 69, relied on.

2.2. Similarly, no direction can be given that a daily wage employee should be paid salary of a regular employee. [82-D]

State of Haryana v. *Tilak Raj,* [2003] 6 SCC 123, relied on.

2.3. The Labour Court and the High Court have passed their orders on the basis of emotions and sympathies, but cases in Court have to be decided on legal principles and not on the basis of emotions and sympathies. [82-D, E]

3. Admittedly, the employees in question had not been appointed by following the regular procedure and instead they had been appointed only due to the pressure and agitation of the union and on compassionate ground. There were not even vacancies on which they could be appointed. Such employees cannot be regularized as regularization is not a mode of recruitment.

[82-E, F]

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

A. Umarani v. *Register, Cooperative Societies,* [2004] 7 SCC 112; *State of M.P.* v. *Yogesh Chandra Dubey,* [2006] 8 SCC 67, *M/s., Indian Drugs and Pharmaceuticals Ltd.* v. *Devki Devi,* AIR (2006) SC 269 and *Officers and Supervisors of IDPL,* v. *Chairman & M.D., IDPL and Ors.,* [2003] 6 SCC 490. relied on.

4.1. No doubt, there can be occasions when the State or its instrumentalities employ persons on temporary or daily wage basis in a contingency as Additional hands without following the required procedure, but this does not confer any right on such persons to continue in service or get regular pay. Unless the appointments are made by following the rules,

A such appointees do not have any right to claim permanent absorption in the establishment. [89-C, D]

4.2. A perusal of the record of the present case shows that the respondents were appointed on purely casual and daily rate basis without following the relevant service rules. Thus, they had no right to the post at all.
B [89-E]

4.3. It is well settled that there is no right vested in any daily wager to seek regularization. Regularization can only be done in accordance with the rules and not de hors the rules. [89-G]

State of U.P. v. *Kaushal Kishore,* [1991] 1 SCC 691, *Dehli development*
C *Horticulture Employees' Union* v. *Administration,* Delhi AIR (1992) SC 789; *E. Ramakrishnan* v. *State of Kerala,* [1996] 10 SCC 565, *Dr. Kishore* v. *State of Maharashtra,* [1997] 3 SCC 209, *Union of India* v. *Bishambar Dutt,* [1996] 11 SCC 341; *Dr. Surinder Singh Jamwal* v. *State of Jammu & Kashmir,* AIR (1996) SC 2775 and *Ashwani Kumar* v. *State of Bihar,* AIR (1996) SC 2833, relied on.
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5. The court cannot create a post where none exists. Also, no direction to absorb the respondents or continue them in service, or pay them salaries of regular employees can be issued, as these are purely executive functions. This Court cannot arrogate to itself the powers of the executive or the
E legislature. There is broad separation of powers under the Constitution, and the judiciary, too, must know its limits. [90-D, E]

P.U. Joshi v. *Accountant General, Ahemedabad,* [2003] 2 SCC 632, relied on.

6. The respondents have not been able to point out any statutory rule on
F the basis of which their claim of continuation in service or payment of regular salary can be granted. It is well settled that unless there exists some rule no direction can be issued by the court for continuation in service or payment of regular salary to a casual, *ad hoc,* or daily rate employee. Such directions are executive function, and it is not appropriate for the court to encroach into
G the functions of another organ of the State. The courts must exercise judicial restraint in this connection. The tendency in some courts/tribunals to legislate or perform executive functions cannot be appreciated. Judicial activism in some extreme and exceptional situation can be justified, but resorting to it readily and frequently, as has lately been happening, is not only unconstitutional but it is also fraught with grave peril for the judiciary.
H [90-E, F, G]

7. The courts must, therefore, exercise judicial restraint, and not encroach into the executive or legislative domain. Orders for creation of posts, appointment on these posts, regularization, fixing pay scales, continuation in service, promotions, etc. are all executive or legislative functions and it is highly improper for Judges to step into this sphere, except in a rare and exceptional case. [91-G-H; 92-A]

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Rama Muthuramalingam **v.** *Dy. S.P.,* **AIR (2005) Mad 1, approved.**

7.1. No doubt, in some decisions the Supreme Court has directed regularization of temporary or *ad hoc* **employees but it is well settled that a mere direction of the Supreme Court without laying down any principle of law is not a precedent. It is only where the Supreme Court lays down a principle of law that its will amount to a precedent. Often the Supreme Court issues directions without laying down any principle of law, in which case, it is not a precedent. For instance, the Supreme Court often directs appointment of someone or regularization of a temporary employee or payment of salary, etc. without laying down any principle of law. This is often done on humanitarian considerations, but this will not operate as a precedent binding on the High Court. For instance, if the Supreme Court directs regularization of service of an employee who had put in 3 years' service. This does not mean that all employees who had put in 3 years' service must be regularized. Hence, such a direction is not a precedent. [92-B, C, D]**

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Municipal Committee, Amritsar **v.** *Hazara Singh* **AIR (1975) SC 1097,** *State of Punjab* **v.** *Baldev Singh,* **[1999] 6 SCC 172;** *Dehli Administration* **v.** *Manoharlal,* **AIR (2002) SC 3088;** *Divisional Controller, KSRTC,* **v.** *Mahadeva Shettly,* **[2003] 7 SCC 197 and** *Jammu & Kashmir Public Service Commission* **v.** *Dr. Narinder Mohan,* **AIR (1994) SC 1808, referred to.**

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7.2. Therefore, it has to be held that the rules of recruitment cannot be relaxed and the court/Tribunal cannot direct regularization of temporary appointees *de hors* **the rules, nor can it direct continuation of service of a temporary employee (whether called a casual,** *ad hoc* **or daily rate employee) or payment of regular salaries to them. [94-B, C]**

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7.3 It is well settled that regularization cannot be a mode of appointment. [94-C]

Manager, RBI, Bangalore **v.** *S. Mani,* **AIR (2005) SC 2179 and** *A.*

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A *Umarani* v. *Registrar Cooperative Societies,* **AIR (2004) SC 4504, relied on.**

State of H.P. v. *Suresh Kumar Verma,* **[1996] 7 SCC 562 and** *R.N. Nanjundappa* v. *T. Thimmaiah,* **[1972] 1 SCC 409, referred to.**

9. If the court/tribunal directs that a daily rate or *ad hoc* **or casual** B **employee should be continued in service till the date of superannuation, it is impliedly regularizing such an employee, which cannot be done. [95-C]**

Secretary, State of Karnataka **[2006] 4 SCC 1, followed.**

10. No doubt, Article 41 provides for the right to work, but his had been C **deliberately kept by the founding fathers of our Constitution in the Directive Principles and hence made unenforceable in view of Article 37, because the founding fathers in their wisdom realized that while it was their wish that everyone should be given employment, but the ground realities of our country cannot be overlooked. Article 21 of the Constitution cannot be stretched so** D **far as to mean that everyone must be given a job. The number of available jobs is limited, and hence Courts must take a realistic view of the matter and must exercise self-restraint. [96-C, D]**

Rajendra v. *State of Rajasthan,* **AIR (1999) SC 923,** *Delhi Development Horticulture Employees' Union* v. *Administration,* **Delhi AIR (1992) SC 789;** E *Sandeep Kumar* v. *State of U.P.,* **AIR (1992) SC 713;** *State of Himachal Pradesh* v. *Ashwani Kumar,* **(1996) 1 JT 214 and** *State of U.P.* v. *U.P. Madhyamik Shiksha Parished Sharmik Sangh,* **AIR (1996) SC 708, relied on.**

11. In the present case, the appellant is a sick company which has been F **running on huge losses for many years, and is practically closed down. There are no vacancies on which the respondents could have been appointed. While one may have sympathy with them, one cannot ignore the hard economic realities or the settled legal principles. [97-A]**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4996 of 2006.

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From the final Judgment and Order dated 30-9-2005 of the High Court of Uttaranchal at Nainital in W.P. No. 3360 of 2001 (M/S).

L. Nageshwar Rao and Ms. Meera Mathur for the Appellant.

H Chandra Pal Singh, Respondent-In-Person.

The Judgment of the Court was delivered by A

MARKANDEY KATJU, J. Leave granted.

This appeal has been filed against the impugned judgment and order dated 30.9.2005 passed by the Uttaranchal High Court in W.P. No.3360 of 2001. By that Judgment the High Court has modified the award of the Labour B Court, U.P., Dehradun, to the extent that the workmen, in whose favour the award had been made, were allowed to be continued in the service of the appellant employer till their superannuation, and if their services were not required they should not be terminated except in accordance with Industrial Law. The High Court further directed that the workmen in question should C be paid wages like the regular employees performing the work and duties in the appellant-company.

We have heard the learned counsel for the parties and perused the record.

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The facts of the case are that the appellant is a Public Sector Undertaking which has a plant in Rishikesh where it was manufacturing pharmaceuticals. The present dispute relates to the ten concerned employees who were appointed as casual workers on daily rate basis for the reason that they were dependants of employees dying in harness. Such appointments were made by the appellant due to the persistent and prolonged agitation by the trade E union since the appellant wanted to maintain industrial harmony, although there was no rule/policy for such compassionate appointment in the service of the appellant company, which was already over-staffed. As against 1049 sanctioned posts, there were already 1299 employees working in the company at the relevant time.

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The aforesaid ten persons were paid wages according to the rates of daily wages, declared by the State Government from time to time, as agreed with the union. Since the appellant was already over-staffed in all its departments, the said persons were given work in the nature of cleaning window panes, sweeping floors and such sundry jobs on contract basis G which work was not the work of the regular employees of the appellant-company.

From the year 1986 the financial position of the appellant-company became critical as it was running on huge losses and hence its corporate office issued stop/ban order, banning any fresh recruitment/appointments. H

A The company also applied to the BIFR as it had become sick. The BIFR had also issued directions to the company to reduce its manpower in order to try to revive the company, but despite this situation the union started pressing and agitating for regularization of the aforesaid ten concerned daily rated employees. The failure of talks between the company and the union led to the reference of a dispute under the Industrial Disputes Act before the Labour B Court in the year 1992 in the following terms :

> "Whether the action of the employer in not regularizing 22 workmen and not granting them wage scales and other benefits given to the regular employees is unjustified and/or illegal"

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Before the Labour Court, only 10 out of the 22 workmen appeared and filed written statement and therefore the award was passed only in respect of the said ten persons. The Labour Court held that although the said persons were employed as "casual daily rated employees" by the company, yet in view of their having continued for a long time, they were entitled to D regularization and the action of the management in not regularizing them was unjustified and consequentially they should be paid the wages and benefits as given to other regular employees from the date of the award i.e. 25.7.1996.

In the writ petition filed by the appellant challenging the said award, the High Court upheld the contention of the appellant that the respondents were E not entitled to regularization in view of the well settled law laid down by this Hon'ble Court in the case of *Madhyamik Shiksha Parishad, U.P.* v. *Anil Kumar Mishra & Ors.*, reported in [2005] 5 SCC 122 wherein it has been categorically held that completion of 240 days or more does not entitle/import the right of regularization. The High Court therefore, held that the impugned F award, to the extent it directed for regularization of the respondents, could not be sustained.

It is contended before by the learned counsel for the appellant that the High Court has committed a serious error, in as much as, while holding that the respondents were not entitled to regularization, it directed that company G shall continue such employees in its services till their superannuation and they shall be paid wages like the regular employees of the company. We are inclined to agree with this submission of the learned counsel for the appellant.

It has come in the evidence that the number of sanctioned posts in the company were only 1049, but there were already 1299 employees working in H

the company at the relevant time. We fail to understand how could 1299 employees be appointed when there were only 1049 sanctioned posts? Moreover, the ten concerned employees were over and above the 1299 already working in the company at the relevant time.

It has come on record that the financial position of the appellant-company was going from bad to worse and all the measures taken by them during the critical years from 1988 onwards including a ban on recruitment and other austerity measures did not bear any fruitful result. The company incurred heavy losses and as against the meagre capital of Rs.21 crores for the Rishikesh Unit, the petitioner had incurred an accumulated loss to the tune of Rs.233 crores upto the year 1992-93. The annual accounts for the said year were produced as Exhibit E-11 before the courts below. Subsequently the appellant was declared a sick company by the BIFR. A revival proposal was prepared before the BIFR where the union agreed not to raise any demand which entailed any liability. Hence, in our opinion there could be no justification for grant of parity in wages. The BIFR appointed the IDBI as the operating agency in the year 1986 when the accumulated losses of the company reached an astonishing figure of Rs.624 crores in the year 1995. In our opinion the High Court failed to appreciate that when the appellant is still before the BIFR, and where the Government is making an effort to again present a revival proposal, there was no justification to saddle the appellant with liabilities on the basis of compassion when no legal right exists in favour of the concerned respondents. When there was no vacancy and the company was in poor financial condition, the impugned order was wholly uncalled for.

In the present case it is relevant to state that the Government in effort to revive the company drastically reduced the manpower of the appellant-company from 1991 onwards and the petitioner which at one point of time had a total of about 13000 employees in all its units in India, have at present, in total, only about 9 employees at the Hyderabad plant i.e. supervisors and managers, 29 at Gurgaon in which there are only 4 in the workers category, 15 employees at the Bihar plant i.e. only supervisors and managers, 30 employees at the Tamil Nadu plant i.e. supervisors and managers and about 200 odd employees at the Rishikesh plant including only about 39 regular workers. It is relevant to state the Government is still pursuing the plans of reduction in manpower under a VRS Scheme. Thus, in the scenario as stated above, the impugned directions of the courts below were, in our opinion, wholly uncalled for and in violation of settled legal *principles.*

A It may be mentioned that a daily rated or casual worker is only a temporary employee, and it is well settled that a temporary employee has no right to the post vide State of *Uttar Pradesh & Anr.* v. *Kaushal Kishore Shukla,* [1991] 1 SCC 691. The term 'temporary employee' is a general category which has under it several sub-categories e.g. casual employee, daily rated employee, *Ad hoc* employee, etc.
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The distinction between a temporary employee and a permanent employee is well settled. Whereas a permanent employee has a right to the post, a temporary employee has no right to the post. It is only a permanent employee who has a right to continue in service till the age of superannuation (unless
C he is dismissed or removed after an inquiry, or his service is terminated due to some other valid reason earlier). As regards a temporary employee, there is no age of superannuation because he has no right to the post at all. Hence, it follows that no direction can be passed in the case of any temporary employee that he should be continued till the age of superannuation.

D Similarly, no direction can be given that a daily wage employee should be paid salary of a regular employee vide *State of Haryana* v. *Tilak Raj,* [2003] 6 SCC 123.

We are afraid that the Labour Court and High Court have passed their
E orders on the basis of emotions and sympathies, but cases in Court have to be decided on legal principles and not on the basis of emotions and sympathies.

Admittedly, the employees in question in Court had not been appointed by following the regular procedure, and instead they had been appointed only due to the pressure and agitation of the union and on compassionate ground.
F There were not even vacancies on which they could be appointed. As held in *A. Umarani* v. *Registrar, Cooperative Societies & Ors.,* [2004] 7 SCC 112, such employees cannot be regularized as regularization is not a mode of recruitment. In *Umarani's* case the Supreme Court observed that the compassionate appointment of a woman whose husband deserted her would
G be illegal in view of the absence of any scheme providing for such appointment of deserted women.

In *State of M.P. and Ors.* v. *Yogesh Chandra Dubey and Ors.,* [2006] 8 SCC 67, this Court held that a post must be created and/or sanctioned before filling it up. If an employee is not appointed against a sanctioned post he
H is not entitled to any scale of pay. In our opinion, the ratio of the aforesaid decision squarely applies to the facts of the present case also.

In *M/s. Indian Drugs and Pharmaceuticals Ltd.* v. *Devki Devi & Ors.*, AIR (2006) SC 2691, which is a case relating to the appellant's Rishikesh unit, it has been held in paragraph 10 that "The undisputed position is that appellant company does not have any rule for compassionate appointment". In that decision it has also been noted that the appellant is a sick company which is before the BIFR and the bleak financial position of the company has been considered by this Court in *Officers & Supervisors of IDPL* v. *Chairman & M.D., IDPL and Ors.*, [2003] 6 SCC 490. Originally more than 6500 employees were employed by the appellant but out of them 6171 have taken retirement and only 421 employees are now working throughout the country. The appellant company is not functional and is trying to further reduce the number of employees. In paragraph 15 of the said judgment it has also been noted that no production is going on in the company since 1994. These facts have been completely lost sight of by the Labour Court and the High Court.

Thus, it appears that in the present case the appellant is trying to reagitate the issues which have been already decided by this Court in *M/s. Indian Drugs and Pharmaceuticals Ltd.* v. *Devki Devi & Ors.*, AIR (2006) SC 2691.

In a recent Constitution Bench decision of this Court in *Secretary, State of Karnataka and Ors.* v. *Umadevi & Ors.*, [2006] 4 SCC 1, this Court has exhaustively dealt with a matter similar to that under consideration in the present case, and we may refer to some of the observations made therein.

In paragraphs 4 and 5 of the said judgment, the Constitution Bench this Court observed :

> "The Union, the States, their departments and instrumentalities have resorted to irregular appoints, especially in the lower rungs of the service, without reference to the duty to ensure a proper appointment procedure through the Public Service Commissions 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 the courts, seeking directions to make them permanent in their posts and to prevent regular recruitment

to the posts concerned. The 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. Whether the wide powers under Article 226 of the Constitution are 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 the courts desist from issuing orders preventing regular selection or recruitment at the instance of such persons *and from issuing directions for continuance of those who have not secured regular appointments as per procedure established. The passing of orders for continuance tends to defeat the very constitutional scheme of public employment.* It has to be emphasized that this is not the role envisaged for the High Courts in the scheme of things and their wide powers under Article 226 of the Constitution 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.

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 the 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".

We have underlined the observations made above to emphasize that the Court cannot direct continuation in service of a non-regular appointee. The High Court's direction is hence contrary to the said decision.

Thereafter in paragraph 33 it was observed:

> "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 can an *Ad hoc* appointment 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".

The underlined observation in the above passage makes it clear that even if an *Ad hoc* or casual appointment is made in some contingency the same should not be continued for long, as was done in the present case.

In paragraph 43, the Court observed:

> "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*

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 B has come to an end or of *ad hoc* employees who by the very nature of their appointment, do not acquire any right. The High Courts acting under Article 226 of the Constitution, should not ordinarily issue directions for absorption, regularization, or permanent continuance unless the recruitment itself was made regularly and in C terms of the constitutional scheme".

The underlined observations above clearly indicate that the casual, daily rated, or *ad hoc* employees, like the respondents in the present appeal, have no right to be continued in service, far less of being regularized and get regular pay.

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In paragraph 45 this Court observed :

"While directing that appointments, temporary or casual, be regularized or made permanent, the courts are swayed by the fact that the person concerned has worked for some time and in some cases E for a considerable length of time. It is not as if the person who accepts an engagement either temporary or casual in nature, is not aware of the nature of his employment. He accepts the employment with open eyes. It may be true that he is not in a position to bargain- not at arm's length - since he might have been searching for some F employment so as to eke out his livelihood and accepts whatever he gets. But on that ground alone, it would not be appropriate to jettison the constitutional scheme of appointment and to take the view that a person who has temporarily or casually got employed should be directed to be continued permanently. *By doing so, it will be creating another mode of public appointment which is not permissible.* If the G court were to void a contractual employment of this nature on the ground that the parties were not having equal bargaining power, that too would not enable the court to grant any relief to that employee. A total embargo on such casual or temporary employment is not possible, given the exigencies of administration and if imposed, would H only mean that some people who at least get employment temporarily,

contractually or casually, would not be getting even that employment when securing of such employment brings at least some succour to them. After all, innumerable citizens of our vast country are in search of employment and one is not compelled to accept a casual or temporary employment if one is not inclined to go in for such an employment. It is in that context that one has to proceed on the basis that the employment was accepted fully knowing the nature of it and the consequences flowing from it. In other words, even while accepting the employment, the person concerned knows the nature of his employment. *It is not an appointment to a post in the real sense of the term.* The claim acquired by him in the post in which he is temporarily employed or the interest in that post cannot be considered to be of such magnitude as to enable the giving up of the procedure established, for making regular appointments to available posts in the services of the State. *The argument that since one has been working for some time in the post, it will not be just to discontinue him, even though he was aware of the nature of the employment when he first took it up, is not (sic) one that would enable the jettisoning of the procedure established by law for public employment* and would have to fail when tested on the touchstone of constitutionality and equality of opportunity enshrined in Article 14 of the Constitution".

The underlined part of the above passage clearly negates the claim of the respondents.

As regards the claim of the workmen concerned for being paid salary or regular employment, this claim has been definitely rejected in paragraph 48 of the aforesaid judgment which states as under:

"It was then contended that the rights of the employees thus appointed, under Article 14 and 16 of the Constitution, are violated. It is stated that the State has treated the employees unfairly by employing them on less than minimum wages and extracting work from them for a pretty long period in comparison with those directly recruited who are getting more wages or salaries for doing similar work. The employees before us were engaged on daily wages in the department concerned on a wage that was made known to them. There is no case that the wage agreed upon was not being paid. *Those who are working on daily wages formed a class by themselves, they cannot claim that they are discriminated as against those who have been*

A *regularly recruited on the basis of the relevant rules.* No right can be founded on an employment on daily wages to claim that such employee should be treated on a par with a regularly recruited candidate, and made permanent in employment, even assuming that the principle could be invoked for claiming equal wages for equal work. There is no fundamental right in those who have been employed B on daily wages or temporarily or on contractual basis, to claim that they have a right to be absorbed in service. As has been held by this Court, they cannot be said to be holders of a post, since, a regular appointment could be made only by making appointments consistent with the requirements of Articles 14 and 16 of the Constitution. The C right to be treated equally with the other employees employed on daily wages, cannot be extended to a claim for equal treatment with those who were regularly employed. That would be treating unequals as equals. It cannot also be relied on to claim a right to be absorbed in service even though they have never been selected in terms of the relevant recruitment rules. The arguments based on Articles 14 of the D Constitution are therefore overruled".

(emphasis supplied)

In paragraph 19 of the aforesaid judgment of the Constitution Bench, an important observation has been made about whether the Court can impose E financial burden on the State in this manner. Paragraph 19 states as under:

" One aspect arises. Obviously, the State is also controlled by economic considerations and financial implications of any public employment. The viability of the department or the instrumentality of F the project is also of equal concern for the State. The State works out the scheme taking into consideration the financial implications and economic aspects. Can the court impose on the State a financial burden of this nature by insisting on regularization or permanence in employment, when those employed temporarily are not needed permanently or regularly? As an example, we can envisage a direction G to give permanent employment to all those who are being temporarily or casually employed in a public sector undertaking. The burden may become so heavy by such a direction that the undertaking itself may collapse under its own weight. It is not as if this had not happened. So, the court ought not to impose a financial burden on the State by H such directions, as such directions may turn counterproductive".

No comment is necessary on the above passage as it is explicit enough. A

In paragraphs 46 to 48 of the judgment, this Court also observed that temporary, contractual, casual or daily wage *Ad hoc* employees appointed de hors the constitutional scheme to public employment have no legitimate expectation to be absorbed or, regularized for granted permanent continuation in service on the ground that they have continued for a long time in service. B It was observed by this Court that non grant of permanent continuation in service of such employees does not violate Article 21 of the Constitution and such employees do not have any enforceable legal right to be permanently absorbed, nor to be paid salary of regular employees. A regular process of recruitment or employment has to be resorted to when regular vacancies and C posts are to be filled up. This Court further observed that public employment must comply with Articles 14 and 16 of the Constitution as the rule of equality in public employment is a basic feature of the Constitution.

No doubt, there can be occasions when the State or its instrumentalities employ persons on temporary or daily wage basis in a contingency as additional D hands without following the required procedure, but this does not confer any right on such persons to continue in service or get regular pay. Unless the appointments are made by following the rules, such appointees do not have any right to claim permanent absorption in the establishment.

A perusal of the record of the present case shows that the respondents E were appointed on purely casual and daily rate basis without following the relevant service rules. Thus they had no right to the post at all, vide *State of U.P.* v. *Kaushal Kishore,* [1991] 1 SCC 691.

In *Delhi Development Horticulture Employees' Union* v. *Administration, Delhi and Ors.,* AIR (1992) SC 789 while deprecating the tendency of engaging F daily wagers without advertisement this Court held the same to be back door entries in violation of Article 16 of the Constitution. As such this Court refused to give any direction to regularize the petitioners.

Thus, it is well settled that there is no right vested in any daily wager G to seek regularization. Regularization can only be done in accordance with the rules and not de hors the rules. In the case of *E. Ramakrishnan & Ors.* v. *State of Kerala & Ors.,* [1996] 10 SCC 565 this Court held that there can be no regularization de hors the rules. The same view was taken in *Dr. Kishore* v. *State of Maharashtra,* [1997] 3 SCC 209, *Union of India & Ors* v. H

A *Bishambar Dutt* [1996] 11 SCC 341. The direction issued by the services tribunal for regularizing the services of persons who had not been appointed on regular basis in accordance with the rules was set aside although the petitioner had been working regularly for a long time.

In *Dr. Surinder Singh Jamwal & Anr.* v. *State of Jammu & Kashmir &* B *Ors.*, AIR (1996) SC 2775, it was held that *Ad hoc* appointment does not give any right for regularization as regularization is governed by the statutory rules.

In *Ashwani Kumar & Ors. etc.* v. *State of Bihar & Ors etc.* AIR (1996) C SC 2833, the appointment made without following the appropriate procedure under the rules/Government circulars and without advertisement or inviting application from the open market was held to be in flagrant breach of Articles 14 and 16 of the Constitution.

Creation and abolition of posts and regularization are a purely executive D function vide *P.U. Joshi* v. *Accountant General, Ahmedabad & Ors.*, [2003] 2 SCC 632. Hence, the court cannot create a post where none exists. Also, we cannot issue any direction to absorb the respondents or continue them in service, or pay them salaries of regular employees, as these are purely executive functions. This Court cannot arrogate to itself the powers of the executive or legislature. There is broad separation of powers under the E Constitution, and the judiciary, too, must know its limits.

The respondents have not been able to point out any statutory rule on the basis of which their claim of continuation in service or payment of regular salary can be granted. It is well settled that unless there exists some rule F no direction can be issued by the court for continuation in service or payment of regular salary to a casual, *ad hoc*, or daily rate employee. Such directions are executive functions, and it is not appropriate for the court to encroach into the functions of another organ of the State. The courts must exercise judicial restraint in this connection. The tendency in some courts/tribunals to legislate or perform executive functions cannot be appreciated. Judicial activism in G some extreme and exceptional situation can be justified, but resorting to it readily and frequently, as has lately been happening, is not only unconstitutional, it is also fraught with grave peril for the judiciary.

In *Asif Hameed* v. *State of Jammu & Kashmir,* AIR (1989) SC 1899, this Court observed: H

"Before adverting to the controversy directly involved in these appeals we may have a fresh look on the inter se functioning of the three organs of democracy under our Constitution. Although the doctrine of separation of powers has not been recognized under the Constitution in its absolute rigidity but the Constitution makers have meticulously defined the functions of various organs of the State. Legislature, Executive and Judiciary have to function within their own spheres demarcated under the Constitution. *No organ can usurp the functions assigned to another.* The Constitution trusts to the judgment of these organs to function and exercise their discretion by strictly following the procedure prescribed therein. The functioning of democracy depends upon the strength and independence of each of its organs. The legislature and executive, the two facets of people's will, have all the powers including that of finance. The judiciary has no power over the sword or the purse, nonetheless it has power to ensure that the aforesaid two main organs of the State function within the constitutional limits. It is the sentinel of democracy. Judicial review is a powerful weapon to restrain unconstitutional exercise of power by the legislature and executive. The expanding horizon of judicial review has taken in its fold the concept of social and economic justice. While exercise of powers by the legislature and executive is subject to judicial restraint, the only check on our own exercise of power is the self imposed discipline of judicial restraint.

When the State action is challenged, the function of the court is to examine the action in accordance with law and to determine whether the legislature or the executive has acted within the powers and functions assigned under the constitution and if not, the court must strike down the action. While doing so the court must remain within its self imposed limits. The court sits in judgment on the action of a coordinate branch of the Government. While exercising power of judicial review of administrative action, the court is not an appellate authority. The constitution does not permit the court to direct or advise the executive in matters of policy or to *sermonize quo* any matter which under the constitution lies within the sphere of the legislature or executive, provided these authorities do not transgress their constitutional limits or statutory powers".

The courts must, therefore, exercise judicial restraint, and not encroach into the executive or legislative domain. Orders for creation of posts,

A appointment on these posts, regularization, fixing pay scales, continuation in service, promotions, etc. are all executive or legislative functions, and it is highly improper for Judges to step into this sphere, except in a rare and exceptional case. The relevant case law and philosophy of judicial restraint has been laid down by the Madras High Court in great detail in *Rama Muthuramalingam* v. *Dy. S.P.,* AIR (2005) Mad 1, and we fully agree with
B the views expressed therein.

No doubt, in some decisions the Supreme Court has directed regularization of temporary or *Ad hoc* employees but it is well settled that a mere direction of the Supreme Court without laying down any principle of law
C is not a precedent. It is only where the Supreme Court lays down a principle of law that it will amount to a precedent. Often the Supreme Court issues directions without laying down any principle of law, in which case, it is not a precedent. For instance, the Supreme Court often directs appointment of someone or regularization of a temporary employee or payment of salary, etc. without laying down any principle of law. This is often done on humanitarian
D considerations, but this will not operate as a precedent binding on the High Court. For instance, if the Supreme Court directs regularization of service of an employee who had put in 3 years' service, this does not mean that all employees who had put in 3 years' service must be regularized. Hence, such a direction is not a precedent. In *Municipal Committee, Amritsar* v. *Hazara*
E *Singh,* AIR (1975) SC 1087, the Supreme Court observed that only a statement of law in a decision is binding. In *State of Punjab* v. *Baldev Singh,* [1999] (6) SCC 172, this Court observed that everything in a decision is not a precedent. In *Delhi Administration* v. *Manoharlal,* AIR (2002) SC 3088, the Supreme Court observed that a mere direction without laying down any principle of law is not a precedent. In *Divisional Controller, KSRTC* v.
F *Mahadeva Shetty,* [2003] 7 SCC 197, this Court observed as follows:

> ".....The decision ordinarily is a decision on the case before the Court, while the principle underlying the decision would be binding as a precedent in a case which comes up for decision subsequently. The
G scope and authority of a precedent should never be expanded unnecessarily beyond the needs of a given situation. The only thing binding as an authority upon a subsequent Judge is the principle, upon which the case was decided..."

In *Jammu & Kashmir Public Service Commission* v. *Dr. Narinder*
H *Mohan,* AIR (1994) SC 1808, this Court held that the directions issued by the

court from time to time for regularization of *ad hoc* appointments are not a ratio of this decision, rather the aforesaid directions were to be treated under Article 142 of the Constitution of India. This Court ultimately held that the High Court was not right in placing reliance on the judgment as a ratio to give the direction to the Public Service Commission to consider the cases of the respondents for regularization. In that decision this Court observed:

"11. This Court in *Dr. A.K. Jain* v. *Union of India,* [1988] 1 SCR 335, *gave directions under Article 142 to regularize the services of the ad hoc doctors appointed on or before October 1, 1984. It is a direction under Article 142 on the particular facts and circumstances therein. Therefore, the High Court is not right in placing reliance on the judgment as a ratio to give the direction to the PSC to consider the cases of the respondents. Article 142 power is confided only to this Court. The ratio in Dr. P.C.C Rawani* v. *Union of India,* [1992] 1 SCC 331, *is also not an authority under Article 141.* Therein the orders issued by this Court under Article 32 of the Constitution to regularize the *ad hoc* appointments had become final. When contempt petition was filed for non implementation, the Union had come forward with an application expressing its difficulty to give effect to the orders of this Court. In that behalf, while appreciating the difficulties expressed by the Union in implementation, this Court gave further direction to implement the order issued under Article 32 of the Constitution. Therefore, it is more in the nature of an execution and not a ratio under Article 141. In *Union of India* v. *Gian Prakash Singh,* (1993) 5 JT (SC) 681 this Court by a Bench of three Judges considered the effect of the order in *A.K. Jain's* case and held that the doctors appointed on *Ad hoc* basis and taken charge after October 1, 1984 have no automatic right for confirmation and they have to take their chance by appearing before the PSC for recruitment. In *H.C. Puttaswamy* v. *Hon'ble Chief Justice of Karnataka,* AIR (1991) SC 295: (1991 Lab 1 C 235), this Court while holding that the appointment to the post of clerk etc. in the subordinate courts in Karnataka State without consultation of the PSC are not valid appointments, exercising the power under the Article 142, directed that their appointments as regular, on humanitarian grounds, since they have put in more than 10 years' service. *It is to be noted that the recruitment was only for clerical grade (Class-III post) and it is not a ratio under Article 141.* In *State of Haryana* v. *Piara Singh,* (1992) AIR SC 2130, this Court noted that the normal rule is recruitment through the prescribed agency but due to administrative exigencies, an *Ad hoc* or temporary appointment may be made. In such a situation, this Court held that efforts should always be made to replace such *Ad hoc* or temporary employees by regularly selected employees,

A as early as possible. Therefore, this Court did not appear to have intended to lay down as a general rule that in every category of *ad hoc* appointment, if the *Ad hoc* appointee continued for long period, the rules of recruitment should be relaxed and the appointment by regularization be made. Thus considered, we have no hesitation to hold that the direction of the Division Bench is clearly illegal and the learned single Judge is right in directing the B State Government to notify the vacancies to the PSC and the PSC should advertise and make recruitment of the candidates in accordance with the rules".

In view of the above observations of this Court it has to be held that C the rules of recruitment cannot be relaxed and the court/Tribunal cannot direct regularization of temporary appointees de hors the rules, nor can it direct continuation of service of a temporary employee (whether called a casual, *ad hoc* or daily rate employee) or payment of regular salaries to them.

It is well settled that regularization cannot be a mode of appointment D vide *Manager, RBI, Bangalore* v. *S. Mani & Ors.*, AIR (2005) SC 2179 (para 54).

In the aforesaid decision the Supreme Court referred to its own earlier decision in *A Umarani* v. *Registrar, Cooperative Societies & Ors.*, AIR (2004) SC 4504 wherein it was observed: "Regularization, in our considered opinion, E is not and cannot be a mode of recruitment by any "State" within the meaning of Article 12 of the Constitution of India or any body or authority governed by a Statutory Act or the Rules framed thereunder. It is also now well-settled that an appointment made in violation of the mandatory provisions of the Statute and in particular ignoring the minimum educational qualification and F other essential qualifications would be wholly illegal. Such illegality cannot be cured by taking recourse to regularization. (See *State of H.P.* v. *Suresh Kumar Verma and Anr.*, [1996] 7 SCC 562"). This Court in *R.N. Nanjundappa* v. *T. Thimmiah*, [1972] 1 SCC 409 held:

> G "If the appointment itself is in infraction of the rules or if it is in violation of the provisions of the Constitution the illegality cannot be regularized. Ratification or regularization is possible of an act which is within the power and province of the authority but there has been some noncompliance with procedure or manner which does not go to the root of the appointment. Regularization cannot be said to be a H mode of recruitment. To accede to such a proposition would be to

introduce a new head of appointment in defiance of the rules or it may have the effect of setting at naught the rules. A

The decision in the case of *R.N. Nanjundappa* (supra) has been followed by the Supreme Court in several decisions viz. *Ramendra Singh* v. *Jagdish Prasad,* [1984] Supp SCC 142; *K. Narayanan* v. *State of Karnataka,* [1994] Supp 1 SCC 44, and *V. Sreenivasa Reddy* v. *Government of A.P.,* [1995] Supp 1 SCC 572. These decisions have also been noticed by the Supreme Court in *Sultan Sadik* v. *Sanjay Raj Subba,* [2004] 2 SCC 377 and *A. Umarani* v. *Registrar, Cooperative Societies and Ors.,* [2004] 7 SCC 112". B

We are of the opinion that if the court/tribunal directs that a daily rate or *ad hoc* or casual employee should be continued in service till the date of superannuation, it is impliedly regularizing such an employee, which cannot be done as held by this Court in *Secretary, State of Karnataka* v. *Umadevi* (supra), and other decisions of this Court. C

In view of the above discussion, we are of the opinion that the orders of the Labour Court as well as the High Court were wholly unjustified and cannot be sustained for the reasons already mentioned above. The appeal is, therefore, allowed. The impugned judgment of the High Court and the Labour Court are set aside and the Reference made to the Labour Court is answered in the negative. There shall be no order as to costs. D E

Before parting with this case, we would like to state that although this Court would be very happy if everybody in the country is given a suitable job, the fact remains that in the present state of our country's economy the number of jobs are limited. Hence, everybody cannot be given a job, despite our earnest desire. F

It may be mentioned that jobs cannot be created by judicial orders, nor even by legislative or executive decisions. Jobs are created when the economy is rapidly expanding, which means when there is rapid industrialization. At present, the state of affairs in our country is that although the economy has progressed a little in some directions, but the truth is that this has only benefited a handful of persons while the plight of the masses has worsened. Unemployment in our country is increasing, and has become massive and chronic. To give an example, for each post of a Peon which is advertised in some establishments there are over a thousand applicants, many of whom have MA, M.SC., M.Com or MBA degrees. Recently, about 140 posts of G H

A Primary School Teachers were advertised in a District in Western Madhya Pradesh, and there were about 13000 applicants i.e. almost 100 applicants for each post. Large scale suicides by farmers in several parts of the country also shows the level of unemployment. These are the social and economic realities of the country which cannot be ignored.

B One may be very large hearted but then economic realities have also to be seen. Giving appointments means adding extra financial burden to the national exchequer. Money for paying salaries to such appointees does not fall from the sky, and it can only be realized by imposing additional taxes on the public or taking fresh loans, both of which will only lead to additional C burden on the people.

No doubt, Article 41 provides for the right to work, but this has been deliberately kept by the founding fathers of our Constitution in the Directive Principles and hence made unenforceable in view of Article 37, because the founding fathers in their wisdom realized that while it was their wish that D everyone should be given employment, but the ground realities of our country cannot be overlooked. In our opinion, Article 21 of the Constitution cannot be stretched so far as to mean that everyone must be given a job. The number of available jobs are limited, and hence Courts must take a realistic view of the matter and must exercise self-restraint.

E In *Rajendra* v. *State of Rajasthan,* AIR (1999) SC 923 this Court following its own decision in *Delhi Development Horticulture Employees Union* v. *Delhi Administration, Delhi,* AIR (1992) SC 789 held that the right to livelihood was found not feasible to be incorporated as a fundamental right in the Constitution and therefore employment was also not guaranteed under the F Constitutional scheme. In *Sandeep Kumar* v. *State of U.P.,* AIR (1992) SC 713 this Court observed that where there was no work in the project the employees cannot be regularized. In *State of Himachal Pradesh* v. *Ashwani Kumar,* (1996) 1 J.T. 214 this Court held that where a project has to be closed down for non-availability of funds a direction to regularize the displaced employees of the project could not be given because such direction would amount to G creating posts and continuing them in spite of non-availability of work. The same view was taken in *State of U.P.* v. *U.P. Madhyamik Shiksha Parished Shramik Sangh,* AIR (1996) SC 708. It follows from these decisions that there is no legal right in temporary employees (whether called casual, *ad hoc*, or daily rated workers) to get absorption, or to be continued in service or get H regular pay.

In the present case, the appellant is a sick company which has been running on huge losses for many years, and is practically closed down. There are no vacancies on which the respondents could have been appointed. While we may have sympathy with them, we cannot ignore the hard economic realities, nor the settled legal principles. The appeal is allowed. A

V.S.S. Appeal allowed. B