* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment Reserved on: 14.05.2015
% Judgment delivered on: 18.05.2015

\+ **WP(C)3989/2010**

GOVT SCHOOL TEACHERS ASSOCIATION (MIGRANTS) REGD. AND ORS. ....PETITIONERS

Versus

UNION OF INDIA AND ORS. .....RESPONDENTS

ADVOCATES WHO APPEARED IN THIS CASE:

For the Petitioners : Mr. Rakesh Tiku, Sr. Advocate with Mr. B.L. Wali and Mr. Sandeep Kumar, Advocate

For the Respondents : Mr. Amit Mahajan, CGSC with Mr. Krishnu Barua, Advocate for R-1
Mr. V.K. Tandon and Mr. Naushad Ahmad Khan, Advocates for R-2

CORAM :-
HON'BLE MR JUSTICE RAJIV SHAKDHER

RAJIV SHAKDHER, J

WP(C)3989/2010 & CM No.7948/2010 (stay)

1. The petitioners before me appear to be children of a lesser God. Their mass exodus in 1989, on account of threat to life and liberty caused them, to move to Delhi. The Government of the day facilitated their movement. The scale of the problem was huge. Make shift camps were set up in the Jammu and Delhi and in other neighbouring States.

2. Governments both at the Central and State level grappled with issues relating to housing, health and employment. A very proud set of people were made to ask and survive on State dole. Persons who were kings, in a

manner of speech, in their own houses were overnight turned into paupers. It is a story of riches to rags.

3. It is in these circumstances that respondents reached out to the petitioners – found them employment as teachers in State run schools. These are schools run by the Municipal Corporation, the New Delhi Municipal Council (NDMC) and the Directorate of Education (DOE), Government of National Capital of Delhi (in short GNCTD).

4. The engagement was offered on contractual basis at (approximately) 1/3rd of the salaries paid to regularly employed teachers in these very schools. Faced with the prospect of extreme impecuniosity, petitioners accepted whatever came their way. Small mercies of God could not be declined. There were no alternatives given nor was there any scope for negotiations.

5. Each one of those who moved from the valley believed that it was a temporary phase. They were made to believe that in not too distant in point of time, they would return to their home and hearth. Alas! After nearly two and a half decades, this still seems a nebulous dream. The petitioners continue to offer their services which are identical, if not more, both in terms of quality and length (i.e., number of hours) to that of regular employees; albeit based on unequal recompense and conditions of service.

5.1 The State refuses to bridge the gap – principally on three counts: First, the petitioners are contractual employees, and thus, cannot be equated with those who are regularly employed in matter of pay, allowances and other attendant benefits. Second, the petitioners knew what they were getting into i.e., their terms of engagement. And lastly, the judgment of the Supreme

Court in ***State of Karnakata Vs. Uma Devi, 2006 (4) SCC 1*** stands in the State's way to grant relief both qua regularisation and, in according, parity in pay to the petitioners.

6. Before, I proceed to examine the veracity of the stand taken by the respondents, let me narrate a few facts which would lend greater clarity to the issues at hand.

7. Petitioner no.1, is the Government Schools Teachers Association (Migrant), registered under the Societies Registration Act, 1860. The association has as its members, persons who were displaced from the Kashmir valley in the wake of internal disturbance which, as indicated above, erupted in the late 1980s. The said petitioner obtained its registration, on 03.12.1999.

8. The petitioner no.2 to 199 are those who are directly affected by the acts of omission and / or commission of the respondents herein. During the pendency of the writ petition, I am told, 12 petitioners have retired while two petitioners have expired. I propose to make a specific reference to these petitioners towards the end of my discussion.

9. It appears that on 19.06.1994, DOE under GNCTD had taken out an advertisement for employment of teachers on a regular basis for candidates who were registered with the employment exchange as on 31.05.1994. There were thus, in point of fact, sanctioned posts available even at that point in time.

10. In view of the fact that a large number of qualified teachers such as the petitioners were stationed in Delhi, the Cabinet of the GNCTD took a

decision on 02.04.1994, to appoint, one member in each of the Kashmiri migrant family, who were housed in camps set up in Delhi, as a teacher in schools run by DOE, MCD and NDMC, on contract, on a year to year basis.

10.1 The fact that a pool of trained teachers were available as amongst the Kashmiri migrants, and that, their services could be utilized was reflected in the Cabinet resolution dated 02.04.1994. The advertisement dated 19.06.1994, issued by GNCTD, to which I have made a reference above, would show, that posts were available. Despite which, no mechanism was set forth to offer regular employment. One of the reasons, perhaps, in the immediate aftermath of the exodus was that, there was a thinking, in some sections of the administration, that the problem of displacement, had a temporary character.

10.2. At this stage, it may be noted that employment was offered both to Trained Graduate Teachers (TGT) and Post Graduate Teachers (PGT). The terms of engagement stipulated, initially, offered appointment for a maximum period of six months or till the post was filled on a regular basis. The appointment could be terminated by giving one month's notice or in the alternative one month's salary in lieu thereof. The termination of appointment could be made without affording any reasons. In case the appointee was desirous of dis-engaging himself/ herself from the given assignment, he / she was required to give a month's notice. The terms of engagement, apart from the above, stipulated the following :-

> "..4. The appointee shall take full teaching load as prescribed in the curriculum.
>
> 5. The appointee shall not be entitled to any benefit of provident fund, pension, gratuity, medical attendance and treatment or any

other benefits available to the govt. servants appointed on regular basis.

6. The appointee will not be entitled for Govt. residential accommodation or H.R.A. in lieu thereof.

7. This appointment will not grant the appointee any right or claim for regular appointment to the post.

8. The appointee shall be on the whole time appointment of the school and shall not accept any other appointment paid or otherwise during the currency of the contract. However, he can take up part time assignment without effecting the duties in the school outside working hours.

9. The appointee shall be entitled for casual leave of 12 days with the approval of the principal in a year in addition to Govt. holidays. No other leave / vacation with pay will be admissible."

(emphasis is mine)

10.3 In the appointment, the DOE provided a 5% relaxation, in the marks obtained in Graduation, to those applicants who possessed a Post Graduate Degree in the teaching subject for which he / she had applied. Furthermore, in so far as age was concerned, relaxation of 5 years was accorded. The non-negotiable eligibility conditions were as follows :-

"..A. At least a Second Class Degree involving (sic) more than 45% of marks.

B. Compulsory holding of B.Ed. Degree.

C. Registration as a Kashmiri migrant in Deputy Commissioner's Office.."

10.4 The facility of contractual employment was also extended though, to the spouse of a registered Kashmiri migrant even if, he / she was not registered with the Deputy Commissioner's office.

10.5 It is pertinent to note that the petitioners' engagement took place prior to the constitution of the Delhi Subordinate Services Selection Board (in short the DSSSB). This body was set up only in October, 1996 and commenced functioning in July, 1997.

10.6 As would be evident from the terms and conditions stipulated in the letter of appointment, the petitioners were required to undertake a full teaching load as prescribed in the curriculum without being accorded the usual benefits such as medical facilities, HRA and provident fund. The disparity in engagement extended to, even, failure to accord paid leave during summer vacations. The petitioners were in fact expected to undertake remedial classes and other administrative works, if they wished to earn their wages for the period when, schools, ordinarily remained closed.

10.7 In this background, the petitioners represented to the respondents from time to time, commencing from 1998 onwards. The record though shows that while one wing of the Government was sympathetic to its cause, the other, had doubts, misplaced or otherwise as to whether the petitioners' services could be regularized, and that, they could be paid regular pay scales.

10.8 In this context, it may be relevant to extract the relevant portions of the correspondence exchanged between the high functionaries of the Central and the State Government. The first letter, in the series of correspondence exchanged between the two entities is a letter dated 17.02.2000, of the then, Secretary to the Government of India, Ministry of Human Resources and Development, DOE. This is a letter addressed to the then Special Secretary, in the Ministry of Home Affairs, Government of India. Copies of these

letters were marked to various functionaries in the GNCTD such as the Chief Secretary, the Principal Secretary (Education), the Commissioner, MCD and the Chairman, NDMC. The relevant extract of the letter reads as follows :-

> " ..Dear
>
> I have received a representation from Government School Teacher Association (Migrant) Regd. a copy of which is enclosed for your kind information.
>
> The representation is self-explanatory. The migrant teachers are not being regularized most probably because of some implicit policy decision in the Ministry of Home Affairs that they are here on a **temporary basis and have to be sent back at some stage**.
>
> Most of them have already been serving the Delhi Administration since 1994 and the period of six years has elapsed. The conditions in the Valley are such that it is extremely difficult to foresee return of Kashmiri Pandits to the Valley in the foreseeable future. This is especially so in the case of ladies and the very large proportion of these teachers consists of lady teachers. Meanwhile, the teachers are getting very low salaries as consolidated pay as also have been deprived of all benefits which normal government employees enjoy except for casual leave.
>
> The same situation is applicable to the employees of the Municipal Corporation of Delhi (MCD) and the New Delhi Municipal Council (NDMC) whose migrant employees had also met me in the deputation some time back.
>
> I discussed this matter with you and we both agreed that it is not fair to deny the benefits of regularization to the migrant employees of Delhi Administration, MCD and NDMC on the

> ground that they have to go back some day. We have to recognize the hard reality that Kashmiri Pandits (especially ladies) will not be able to go back to the Valley in the near future. As such, you kindly agree to issue necessary directions to the Delhi Administration (which could also be passed on to MCD, NDMC) to the effect that all the migrant employees working as teachers should be regularized and given full benefit of pay, allowances and other conditions of service against vacancies which already exists in these organizations..”
>
> (emphasis is mine)

10.9 In response to this letter, the Special Secretary, Ministry of Home Affairs wrote to the then Chief Secretary, Govt. of NCT vide letter dated 18/20.04.2000. By this letter, the Special Secretary, Govt. of India removed the misgivings, if any, carried by the GNCTD that the services of the petitioners could not be regularized because of a policy decision of the Union Home Ministry that Kashmiri migrants were stationed in Delhi on a temporary basis and that at some stage, they had to return to their home State. The communication clarifies in no uncertain terms that the regularization of services of the petitioners did not require the approval of the Govt. of India. As a matter of fact, it was stated that the position was no different vis-à-vis migrant employees of MCD and NDMC as well.

11. Apart from the above, in so far as regular pay scales were concerned, the communication made certain crucial observations :-

> “....2. It may be seen from the representation that these migrant teachers are employees of the Delhi Administration appointed on contract basis by the government of Delhi in October, 1994. These migrant teachers are not being regularized and are being paid a consolidated amount and are

also reportedly being denied other benefits which normal Government employees enjoy. Secretary, Education, Government of India has informed that these teachers are not being regularized because of a policy decision in the Union Home Ministry that the Kashmiri migrants are here on a temporary basis and that they have to be sent back at some stage.

3. On this point, I would like to clarify that these teachers are not Central Government employees and their regularization by the Delhi Government does not require any approval from the Government of India. Similar is the case of migrant employees of MCD and NDMC. As far as Central Government employees are concerned, there is a special package of incentives in force since March, 1990. Under the package migrant Central Government employees have been accommodated, as a purely temporary measure, against available vacancies in respective Ministries/ Departments in offices located outside but adjacent to the UT of Delhi. This policy, as such, has no bearing on Kashmiri migrants appointed by the Government of Delhi in its office.

4.. As regards providing regular pay scales to these Kashmiri migrants employed as teachers, this Ministry is of the view that this benefit should not be denied to them merely on the ground that they may return to the Valley once the situation becomes normal since this would negate the principle of equal pay for equal work. The Government of NCT of Delhi and the two local bodies, NDMC/MCD may, therefore, like to consider the representation of the Kashmiri migrants for grant of regular pay scales and other benefits on the principles of "equal pay for equal work". However, it may kindly be ensured that these Kashmiri migrants who may be regularized by the NCT or by NDMC / MCD do not continue to draw salaries as migrants from the Government of J&K as well.."

(emphasis is mine)

11.1 The aforesaid propelled the then Secretary, MHRD to immediately write to the Chief Secretary of Govt. of India with regard to what he construed as a "human problem"; vide letter dated 02.05.2000. Importantly, in this letter the Secretary, MHRD offered solutions to the supposed problems which perhaps were being articulated by GNCTD. The crystallization of the problems and their possible solutions are set out in paragraphs 4 and 5 of the letter. These being relevant are extracted hereinbelow :-

> "..4. During discussions with Secretary, Education, it has transpired that the regularization of these teachers is also pending because of the following reasons.
>
> (i). They were appointed without following the normal procedure of recruitment through the Service Selection Commission.
>
> (ii). Some of them do not fulfil the eligibility criteria.
>
> (iii). It is felt that if they are regularized, other contract teachers in Delhi Schools, some of whom have already gone to the Court, will also ask for parity of treatment.
>
> 5. It is felt that these issues can be addressed in the following manner.
>
> (i). With regard to the formality of regularization through the Service Selection Commission, a one time decision can be taken that all such employees will be screened by the Commission of the (sic) whether they fulfil the eligibility criteria or nor (sic). If they do and if their work and conduct has been satisfactory the Commission can recommend their regularization as a one time measure.
>
> (ii). With regard to those persons who do not fulfil the educational criteria may be seen whether any relaxation can be

> given as a one time measure in order to tackle this human problem. Any ineligibility on the ground a person being over age may be ignored.
>
> (iii). There is no question of other employees employed on contract basis seeking parity with the migrant employees. The concession given to the migrant employees was a deliberate act of policy by the then State Government of Delhi and was given as a one time measure in order to rehabilitate the migrants who had lost all their assets and jobs in the Valley. Other contract employees who do not suffer from similar disabilities cannot seek similar treatment if they go to court, are not likely to receive any relief..”
>
> (emphasis is mine)

11.2 It is perhaps, after several initiatives, which led to the enhancement, in the remuneration of the petitioners. An order dated 08.04.2003, was issued by the GNCTD. The existing remuneration of TGT and PGT set at Rs.6,000/- per month and Rs.7,000/- per month were enhanced to Rs.8,000/- per month and Rs.9,500/- per month, respectively. The tenure of the teachers was extended from 01.04.2003 to 31.03.2004, without change in other terms and conditions. The order specifically adverted to the fact that the appointment was “purely on compassionate grounds”, keeping in view the prevailing situation in Kashmir. The terms set out in the order barred the petitioners from claiming regularization or benefits of pay, leave and other perks which were available to an employee appointed on a regular basis.

11.3 The petitioner knocked on several doors including at the door of the Ministry of Minority Affairs, Government of India. The Minister of the day vide his letter dated 10.11.2006 sought intervention of the then Chief Minister of GNCTD by bringing to fore the harsh and unjustified reality of

disparity in the terms of engagement of the petitioners when, compared with regular employees.

11.4 It appears that, as a matter of fact even though the petitioners were entitled to 12 days casual leave, an attempt was made to reduce it to 8 days as that was what was permissible qua regular employees, without recognizing the fact that no other leave was available to the petitioners, including, as indicated above, summer vacations. This led to a representation being filed by petitioner no.1 association dated 13.12.2006, to the then Secretary (Education), GNCTD.

11.5 The fact that the petitioners were given additional duties apart from their principal duties of teaching is borne out from circular dated 28.04.2007 which, defined the "duties of Kashmiri migrant teachers vis-à-vis INSET Training Programme, for Assistant Teachers, TGTs and newly recruited Principals, conducted during May and June, 2007. Quite naturally, the circular had to be taken out as regular teachers perhaps were not available during the months of May and June, 2007.

11.6 The disparity in engagement seemed so obvious that it got taken up by the Parliamentary Standing Committee on Civil Defence and Rehabilitation of J&K Migrants (in short the PSC) which, while dealing with other problems plaguing the Kashmiri pundits made the following observations in paragraph 4.18 of its 137th Report of February, 2009 with regard to those appointed as teachers amongst them :-

> "18. The services of Kashmiri Displaced Persons who have been appointed as Teachers on ad hoc basis in MCD and Government of NCT of Delhi Schools, should be regularized.

> The Committee was given to understand that there are cases where Kashmiri teachers have been working on contract for the last thirteen years. The Committee is of the view that all such cases should also be **regularized** as soon as possible..."
>
> (emphasis is mine)

11.7 Apart from the above, the PSC also made the following observations in paragraph 20 of its 137th Report with regard to the utilization of funds.

> "...20. The Committee takes a serious note of the fact that the actual expenditure on account of implementation of rehabilitation programmes for J&K displaced persons during 2006-07 was only Rs.69.31 crore as against the allocation of Rs.120 crore and against Rs.120 crore kept for 2007-08 in BE, only Rs.100 crore was provided at RE 2007-08. The Committee once again took serious note that as enough claims were not received from the Government of Jammu and Kashmir, only Rs.110.00 crore was kept in the BE 2008-09. The Committee in its successive Reports, i.e., 119th, 126th and 130th Reports, urged upon the Ministry to impress upon the J&K Government about the necessity of sending schemes expeditiously and implement them in time so that all the J&K Displaced Persons are rehabilitated without further delay. Inspite of those recommendations, it is unfortunate that the Government of J&K has not taken requisite action..."

11.8 This set in motion a flurry of activity at the Central Government level; albeit momentarily. The Director in the Ministry of Home Affairs, Government of India vide letter dated 03.03.2009 sought comments from the Divisional Commissioner in GNCTD. The SDM (HQ) in turn forwarded the letter of Ministry of Home Affairs dated 03.03.2009 to the Director, DOE and Additional Commissioner, MCD to forward their comments in the matter.

11.9 The petitioners realizing that there was no headway in the matter, approached the Public Grievances Commission (PGC). The PGC, it appears, vide its order dated 20.02.2009 directed the DOE, GNCTD to furnish an action taken report in the background of the report of the PSC on the subject, pertaining to the following two aspects : (i). Parity of pay of Migrant Kashmiri Teachers with Regular Teachers; (ii). Regularization of the services of such teachers without being subjected to tests / exams, since many of them were now too old to undertake examinations.

12. The PGC, however, it appears, on 31.08.2009 closed the proceedings before it, based on a decision taken by the cabinet of GNCTD that the petitioners' services would be extended for a further period of three years. The PGC construed this as complete discharge of DOE's obligations. In so far as the revision and enhancement of salary was concerned, the complainant before it, i.e., the All India Kashmiri Samaj Secretary, was advised to take up the matter with GNCTD.

12.1 It is in this background that order dated 13.08.2009, was issued by DOE, GNCTD extending the contractual engagement of the petitioners from 01.04.2009 to 31.03.2012.

12.2 The record, however, does not show as to whether a similar order was taken out vis-à-vis those teachers engaged with the MCD and NDMC.

12.3 In effect, the position which obtained as far back as in 1994 has not changed.

13. Left with no alternative, the petitioners approached this court. Notice in the petition was issued on 03.06.2010. At that stage, the petitioners had

approached the court for interim relief as their salaries for the months of April and May, 2010 had not been paid. While issuing notice, a direction was issued by the court that the same would be paid within two weeks.

14. The petition was admitted vide order dated 02.02.2011, and looking at the fact that it involved a large number of Kashmiri migrants, the hearing was expedited.

15. As a matter of fact, during the pendency of the writ petition, the petitioners had to approach this court by way of an interlocutory application for being given temporary assignments during summer vacations as their non-engagement would obviously have led to non-payment of dues. Consequently, vide order dated 31.05.2011, the court directed that if any such benefit had been granted in the past, the same would be extended during the ensuing summer vacations. This order was passed in CM No.6103/2011. A similar order was passed on 07.05.2013 as well.

15.1 The hearing was finally expedited by an order dated 18.04.2012 by placing it in 'after notice miscellaneous matters'. However, since, the writ petition was again put in the 'regular category' vide order dated 08.08.2013, with a direction that it be listed according to its year of seniority, an application was moved for expediting hearing, being CM No. 2608/2014. Accordingly, vide order dated 24.02.2014 passed in CM No. 2608/2014, directions were issued for expedited hearing. It was submitted before the court that in the hearing held on 08.08.2013, what was not brought to the notice of the court, was that, there was already an order on record dated 18.04.2012, whereby, the matter had been put in the category of 'after notice miscellaneous matters'.

16. It is, in this background that the arguments were advanced before me to begin with, in the captioned application i.e., CM No.7948/2010. In the application, the substantial relief prayed for is that the petitioners be paid salaries and accorded benefits as those which are made available to regularly appointed teachers of respondent no.3 and 4. I may only point out that this is also, one of the reliefs, sought for in the writ petition.

16.1 Initially, after hearing arguments in the application, I had reserved the matter for orders. However, having considered the matter at some length, especially given the fact that pay parity was also one of the final reliefs sought in the petition, I decided to hear further arguments in the matter so that a decision could be taken vis-a-vis the prayers made in the writ petition itself. Accordingly, matter was placed on board, for direction on 06.05.2015, whereupon the writ petition was fixed for further arguments of the counsels. Arguments in the writ petition were heard on 14.05.2015.

17. Continuing with narrative, pertinently, in the counter affidavit filed on behalf of respondent no.1, while briefly adverting to various schemes that have been drawn up for the benefit of Kashmiri migrants, there is a reference to the reply of the concerned department to the report of the PSC. The relevant portion of the averments made in this behalf are extracted hereinbelow :-

> "..MCD has granted extension to teachers upto 30.04.2010. For regularization of teachers, MCD will take action on the analogy of Govt. of NCT of Delhi. Govt. of NCT of Delhi has intimated that at present the Govt. of NCT is not in a position to regularize the services of Kashmiri migrant teachers in view of judgment dated 10.04.2006 of Hon'ble Supreme Court. The Hon'ble Court has clearly expressed itself against regularization of contractual employees.."

17.1 The aforesaid extract would show that one of the impediments in the regularization of the petitioners articulated by the GNCTD is the judgment of the Supreme Court in ***State of Karnataka Vs. Uma Devi***.

17.2 Despite, the aforesaid stand taken by the Department, in the minutes of meeting dated 04.12.2009, held under the aegis of the then Home Secretary, Government of India, the Principal Secretary (Education), in the GNCTD, evidently, conveyed that the cabinet had taken a decision to absorb contractual teachers against regular posts subject to the said persons clearing mandatory recruitment test, and that, having regard to their peculiar circumstances and length of service, they would be extended relaxation in age limit and given "more number of attempts". This aspect quite obviously did not attain fruition, which is why, the petitioners are before me.

17.2 Be that as it may, in so far as the DOE is concerned, it has principally taken the position that since the engagement of the petitioners was made on contractual basis without following any recruitment procedures, they would continue to be governed by their terms of employment. DOE has thus, taken the stand, that the petitioners, could not be absorbed against regular posts, and therefore, the principle of equal pay for equal work would not be applicable in their case. In other words, they would continue to be paid consolidated monthly emoluments.

17.3 The stand of the MCD is no different. It is averred in the counter affidavit that the petitioners like other contractual appointees cannot have a vested right to claim regularization, and that, their engagement would come to an end on the expiry of the contract tenure or the extended period stipulated therein.

17.4 In the rejoinder, the petitioner has not only reiterated its stand in the petition but has also rebutted the assertions made by the respondents.

18. Counsels for parties advanced their arguments, largely, based on the stand taken in their respective pleadings.

REASONS

19. What has emerged from the pleadings and the record is as follows :-

(i). The petitioners claim that at the time when they were engaged in schools run and managed by the DOE, MCD and NDMC, the DSSSB was not constituted, and that, there was no system in place for holding examinations.

(ii). The appointments were made in respect of the applicants, other than the petitioners, who were registered with the Employment Exchange. The fact that regular posts were available, was sought to be demonstrated by placing reliance on the advertisement dated 19.06. 1994, floated by GNCTD.

(iii). The petitioners, claim that since, their displacement took place in circumstances set out above, which were unprecedented, they could not register themselves with Employment Exchange.

(iv). Despite, availability of regular posts, the petitioners were employed on contractual basis; a situation which has continued to date. In case of DOE, the last extension took place on 01.04.2009, which came to an end on 31.03.2012. In case of MCD, the last extension expired on 30.04.2010.

(v). There is no difference in the qualifications held by the petitioners as against those held by regular employees holding permanent posts. The

petitioners have averred that they were qualified in every way to hold regular posts, despite which, they were appointed on contractual basis. It is the petitioners' assertion that their selection, albeit on contractual basis, was on merits.

(vi). It is the assertion of the petitioners that nearly 510 persons applied in 1994 and initially only 143 candidates were found suitable. In other words, a pruning exercise was carried out by the respondents. This aspect is not refuted by the respondents. (See reply to Ground 'Ç'of the writ petition).

(vii).The petitioners also assert that they performed functions and duties which were identical to those entrusted to and / or performed by regularly appointed teachers.

(vii)(a) None of these assertions have been refuted by the respondents before me save and except the fact that the mode of the appointment was pivoted on a contract.

(viii). Despite, long years of service by the petitioners in schools run by DOE, MCD and NDMC, no steps have been taken by the respondents to regularize their appointment. Correspondence referred to above, which stood exchanged between the representatives of the Central Government and the State Government, would show that the Central Government recognized the need for regularizing the services of the petitioners and payment of pay scales and service benefits to them, which were equivalent to those, that were extended to regular employees.

(ix). The nearest that the GNCTD came to providing petitioners an option for regularization was in the meeting held on 04.12.2009. In this meeting,

GNCTD offered to hold examinations for regularizing the services of the petitioners. Despite which, no concrete steps were taken in that behalf by GNCTD.

20. In the background of the aforesaid facts and averments, let me, first, briefly, touch upon the contours of law with regard to the principle of equal pay for equal work as it has been argued before me on behalf of the petitioners that relief qua parity of pay could be sustained independently of the decision on the issue of right to regularization.

20.1 A three judge bench of the Supreme Court in the case of ***Randhir Singh Vs. Union of India and Ors., (1982) 1 SCC 618*** explained the earlier Constitution Bench judgment of the Supreme Court in the case of ***Kishori Mohan Lal Bakshi Vs. Union of India, AIR 1962 SC 1139*** whereby, it was held that the said principle was an abstract doctrine which had nothing to do with Article 14.

20.2 The Supreme Court, broadly, observed in ***Randhir Singh***'s case that though the principle 'equal pay for equal work' is not declared under our constitution as a fundamental right, it is certainly a constitutional goal, which is reflected in Article 39 (d) of the Constitution.

20.3 The court, pertinently, emphasised that equality clauses in the constitution must mean something to everyone, and that, it would have no meaning to a vast majority of people if those clauses were unconcerned with the work they do and the pay they get. After taking into account the constitutions of various countries, as also the constitution of the International Labour Organization, it observed as follows :-

> "..Construing Articles 14 and 16 in the light of the Preamble and Article 39(d), we are of the view that the principle 'equal pay for equal work' is deducible from those Articles and may be properly applied to cases of unequal scales of pay based on no classification or irrational classification though those drawing the different scales of pay do identical work under the same employer..."
>
> (emphasis is mine)

20.4 The court, thus proceeded, to grant parity in pay to the drivers employed in the Delhi Police Force qua those who were employed in the Delhi Administration and the Central Government. The court observed that the driver –constables, in the Delhi Police Force, performed no less arduous duties than drivers engaged in other departments. Finding no justification in the classification and holding it to be irrational, directed that the petitioners before it be given pay scales at least at par with drivers of the Railway Protection Force.

20.5 In yet another case which involved engagement of casual workers by ***Nehru Yuvak Kendra***, a two-judge bench of the Supreme Court directed payment of same salary and conditions of service which were received by Class-IV employees. The Court stopped short of directing regularization as no sanctioned posts were available though it expressed the hope and trust that posts will be sanctioned by the Central Government in different Nehru Yuvak Kendras so that the petitioners before them could be regularized. This was a case where the court registered letters addressed to it as writ petitions. The judgment of the court is entitled as : ***Dhirendra Chamoli and Anr. Vs. State of U.P., (1986) 1 SCC 637***. Justice Bhagwati, as he then was, speaking for a bench made the following telling observations at pages 638-639 :-

"..But while raising this argument, it is conceded in the counter affidavit that "the persons engaged by the Nehru Yuvak Kendras perform the same duties as is performed by Class IV employees appointed on regular basis against sanctioned posts". If that be so, it is difficult to understand how the Central Government can deny to these employees the same salary and conditions of service as Class IV employees regularly appointed against sanctioned posts. It is peculiar on the part of the Central Government to urge that these persons took up employment with the Nehru Yuvak Kendras knowing fully well that they will be paid only daily wages and therefore they cannot claim more. This argument lies ill in the mouth of the Central Government for it is an all too familiar argument with the exploiting class and a Welfare State committed to a socialist pattern of society cannot be permitted to advance such an argument. It must be remembered that in this country where there is so much unemployment, the choice for the majority of people is to starve or to take employment on whatever exploitative terms are offered by the employer. The fact that these employees accepted employment with full knowledge that they will be paid only daily wages and they will not get the same salary and conditions of service as other Class IV employees, cannot provide an escape to the Central Government to avoid the mandate of equality enshrined in Article 14 of the Constitution. This Article declares that there shall be equality before law and equal protection of the law and implicit in it is the further principle that there must be equal pay for work of equal value. These employees who are in the service of the different Nehru Yuvak Kendras in the country and who are admittedly performing the same duties as Class IV employees, must therefore get the same salary and conditions of service as Class IV employees. It makes no difference whether they are appointed in sanctioned posts or not. So long as they are performing the same duties, they must

> receive the same salary and conditions of service as Class IV employees…"
>
> (emphasis is mine)

20.6 In another decision of a two-judge bench of the Supreme Court, in the case titled : ***Surender Singh and Anr. Vs. Engineer in Chief, CPWD***, ***(1986) 1 SCC 639*** parity was directed vis-a-vis petitioners, who had been working on a daily wage basis for several years with permanent employees; once again, on the principle of 'equal pay for equal work'. The court followed its own judgment in ***Randhir Singh***'s case and ***Dhirender Chamoli***'s case. The court deprecated the stand of the Central Government that the principle of 'equal pay for equal work' was an abstract doctrine and while doing so, it made the following crucial observations :

> "..We are not a little surprised that such an argument should be advanced on behalf on the Central Government 36 years after the passing of the Constitution and 11 years the Forty-Second Amendment proclaiming India as a socialist republic. The Central Government like all organs of the State is committed to the Directive Principles of State Policy and Article 39 enshrines the principle of equal pay for equal work. In Randhir Singh v. Union of India this Court had occasion to explain the observations in Kishori Mohan Lal Bakshi v. Union of India (supra) and to point out how the principle of equal pay for equal work is not an abstract doctrine and how it is a vital and vigorous doctrine accepted through out the world, particularly by all socialist countries. For the benefit of those that do not seem to be aware of it, we may point out that the decision in Randhir Singh's case has been followed in any number of cases by this Court and has been affirmed by a Constitution Bench of this Court in D.S. Nakara v. Union of India. The Central Government, the State Governments likewise, all public sector

> undertakings are expected to function like model and enlightened employers and arguments such as those which were advanced before us that the principle of equal pay for equal work is an abstract doctrine which cannot be enforced in a court of law should ill-come from the mouths of the State and State Undertakings. We allow both the writ petitions and direct the respondents, as in the Nehru Yuvak Kendras case (supra) to pay to the petitioners and all other daily rated employees, to pay the same salary and allowances as are paid to regular and permanent employees with effect from the date when they were respectively employed…"
>
> (emphasis is mine)

20.7 In 2003 in the case titled: ***State of Punjab Vs. Talwinder Singh and Ors., (2003) 11 SCC 776***, the court again granted parity to daily wagers, and, in this behalf, sustained the finding of the High Court that they be granted minimum scale of pay as was available to their counter parts in regular establishment. As a matter of fact, the direction of the High Court to pay arrears for the period 3 years prior to date of filing of the writ petition was also sustained. The two-judge bench decision in ***Talwinder Singh***'s case relied upon its own judgment in the case of ***State of Punjab Vs. Devender Singh, (1998) 9 SCC 595***. The court distinguished the judgment in the case of ***State of Haryana Vs. Jasmer, (1996) 11 SCC 77***.

20.7 A three-judge bench of the Supreme Court in the case of ***State of Haryana Vs. Charanjeet Singh, (2006) 9 SCC 321***, considered amongst others the judgments in the case of ***Devender Singh, Talwinder Singh and Jasmer Singh***. In so far as the observations in ***Devender Singh*** is concerned that the principle of 'equal pay for equal work' would apply to "***similar work***", the bench dis-agreed with the same and while doing so,

observed that : "***Equal pay can only be given for equal work of equal value***". Justice Variava, as he then was, spoke for the bench.

20.9 It is pertinent to note that in a judgment rendered by a three judge bench of the Supreme Court in the case of ***State of U.P. and Ors. Vs. Putti Lal, (2006) 9 SCC 337***, a three-judge bench of which Justice Variava was a member, ruled otherwise and granted pay parity to daily wagers. Directions were issued that daily wagers would be entitled to draw the minimum of the pay scales being received by their counter parts in the Government. The observations in paragraph 6 at page 340 of the judgment hold some significance for the present case and therefore, are extracted hereinbelow :-

> "..6. So far as the State of Uttaranchal is concerned, a scheme for regularisation of daily workers has been produced before us which prima facie does not appear to be objectionable excepting the provision regarding qualification for regularisation. Be it stated that the qualification essential for being regularised would be the qualification as was relevant on the date a particular employee was taken in as a daily-wager and not the qualification which is being fixed under the scheme. The fact that the employees have been allowed to continue for so many years indicates the existence or the necessity for having such posts. But still, it would not be open for the Court to indicate as to how many posts would be created for the absorption of these daily-wages workers. Needless to mention that the appropriate authority will consider the case of these daily-wagers sympathetically who have discharged the duties for all these years to the satisfaction of their authority concerned. So far as the salary is concerned, as we have stated in the case of State of Uttar Pradesh, a daily-wager in the State of Uttaranchal would be also entitled to the minimum of the pay-scale as is available to his counter-part in the Government

> until his services are regularised and he is given regular scale of pay..”

21. This judgment was noticed in ***Charanjit Singh***’s case and was not distinguished based on the observation that every aspect as between the daily wagers and their counter parts in Government being equal, the principle of ‘equal pay for equal work’, applied. (See paragraph 14 at page 334 of the judgment in ***Charanjit Singh***’s case).

22. I may only note that in paragraph 22 of the judgment in ***Charanjit Singh***’s case the court held that in the case of persons employed on contract, the principle of ‘equal pay for equal work’ had no application and that they were governed only by the terms of the contract. This observation, however, has to be read with the observations made in paragraph 24 of the very same judgment where the court took into account the stand taken by some of the petitioners before them that their appointments were regular appointments under the regular process and that instead of being regularly appointed, they were appointed on a contractual basis with the intention of not paying them salaries payable to a regular employee. On this aspect, the court, ultimately, remanded the matter to the High Court for disposal with a caveat that the High Court will permit the petitioners to amend their writ petitions.

23. In nutshell the dominant view of the court in the recent post seems to be that:

(i) The principle of equal pay for equal work is well and truly entrenched in our constitutional scheme.

(ii) In applying the said principle one must look for “***equal work of equal value***”.

(iii) Contractual employment cannot be used as a ploy to shy away from making regular appointments. Though the Supreme Court in the past has segregated the issue of pay parity from regularisation.

23.1 Therefore, to answer the first question whether petitioners can be given pay parity, one needs to deal with the related issue of regularization as well since in some judgements the court examined the nature of engagement in coming to a conclusion in this aspect of the matter. Therefore, let me move to the aspect of regularization.

24. As noticed hereinabove, in the present case, it is the assertion of the petitioners that their appointment is a regular appointment (as distinguished from an irregular appointment), and that, despite, the fact that vacancies were available, GNCTD chose to take the route of contractual employment. In other words, the petitioners claim that, they were not only fully qualified for appointment on their date of engagement, but that, appointments were neither irregular nor illegal or for that matter back-door appointments.

24.1 Pertinently, there is no dispute, whatsoever, raised in the pleadings before me that the work performed by the petitioners is not "identical" to that which is performed by regularly employed teachers. There is also no dispute raised before me by the respondents, in particular, GNCTD, that the petitioners do not have the same qualifications as those, which are, held by regularly employed teachers. Undoubtedly, despite, nearly two decades having passed, GNCTD has taken no steps to regularize the appointments of the petitioners.

25. In these circumstances, can the petitioners be asked to discharge duties as teachers by GNCTD without being regularized and accorded parity in pay and allowances. In my view, it cannot be done for the following reasons :-

(i) The petitioners appointment took place pursuant to a decision taken by the Cabinet of the GNCTD at its meeting held on 02.04.1994. The decision being crucial is extracted hereinafter:

> "...The Council of Ministers considered the following subject and took decisions indicated against each:-
>
> Employment of Kashmir Migrants in the Education Deptt:
>
> It was pointed out that some of the migrants were trained teachers and their services should be ***utilized*** on contractual basis. It was further mentioned that the number of such trained teachers amongst the Kashmir migrants was comparatively small and there should be no difficulty in offering them employment on contract on a year to year basis.
>
> It was decided after brief discussion that one member from each migrant family may be appointed as teacher depending on his/her ***suitability*** for different categories of jobs. Such persons may be employed in the schools run by the Directorate of Education, MCD and NDMC. This benefit will be available only to the migrants presently living in camps run by the Government...."
>
> (emphasis is mine)

(i)(a) The decision taken on 02.04.1994 demonstrates that following factors were taken into consideration by the Cabinet:

(a) Availability of trained Kashmiri migrant teachers.

(b) Possibility of such teachers being utilized in schools run by DOE, MCD and NDMC.

(c) Appointments to be made as per suitability qua the job at hand.

(ii). The petitioners assertion that they were regularly appointed, albeit by using the device of a contractual employment when, regular posts were available, is an aspect which the respondents should have met, if at all, with appropriate facts and figures placed on record. There is no traverse or a pleading made in the affidavits filed on behalf of the respondents.

(iii). The misgiving that the GNCTD had that it could not regularize the appointment of the petitioners on account of the policy of the Ministry of Home Affairs, Union of India as they were required to be sent back, at some stage, was put to rest by the Special Secretary in the Ministry of Home Affairs in this letter dated 18/20.04.2000.

(iii)(a) In the very same letter, the Central Government emphasised the fact that pay parity should not be denied to the petitioners by GNCTD and other two local bodies i.e., NDMC/MCD only on the ground that they may have to return to the Valley, once, the situation normalizes.

(iv). The elapse of a vast period of time, and given the existing situation, of which, the court can take judicial notice, only supports the view that there is no likelihood of the petitioners being sent back to the Valley.

(v). The State being a model employer cannot ignore the principles of socialism which, intrinsically form part of our Constitution.

(vi). The argument that regularization could not be accorded to the petitioners in view of a judgment of the Supreme Court, in the facts of this case, misses several important aspects. The judgement of the Supreme Court in ***Uma Devi's*** case dealt with appointments made by State and its

instrumentality without adhering to the established appointment procedure. The court frowned upon rules and regulations being side-stepped by engagement of personnel on daily wages or via contractual engagement, thereby depriving a large section of duly qualified persons, an opportunity to compete. The thrust of the judgement was to strike down all such appointments to posts sanctioned by the State which were illegal or irregular. The continued engagement of such personnel in the employment of the State and its instrumentalities with the assistance of court orders was categorized as "litigious employment", which the court ruled was against the constitutional scheme, being violative of provisions of Article 14 and 16.

(vi)(a). The question, therefore, arises in each such case, where principles set forth in ***Uma Devi's*** case are sought to be applied, is: are the petitioners before the court employed "illegally" or "irregularly"?

(vi)(b) If the employment falls in the category of a irregular employment does it fall within the exception carved out in paragraph 53 at page 42 of the said judgement?

(vi)(c) Before I get to the point as to whether the employment of the petitioners is illegal or irregular apropos ***Uma Devi's*** case, there are two recent judgements of the Supreme Court, that I would like to advert to, which have squarely dealt with and distinguished the said judgement.

(vi)(c.1) The first judgement is titled: ***Nihal Singh & Ors. vs State of Punjab & Ors,. (2013) 14 SCC 65***. This was a case where 27 petitioners approached the court for regularization; a relief, which was denied to them by the Division Bench of the Punjab & Haryana High Court.

(vi)(c.2) The facts obtaining in the case, broadly, were as follows. On account of large scale disturbance in the State of Punjab, in 1980s, in the wake of terrorism, the State, was unable to handle the law and order situation, with the available police personnel. The position was, particularly acute, vis-a-vis, provisioning of security to the banks located within the State of Punjab. In a high level meeting held by the State functionaries, which included the Governor, and the police personnel, the provisions of Section 17 of the Police Act, 1861, were taken recourse to, for engaging ex-servicemen as Special Police Officers (in short SPOs).

(vi)(c.3) Section 17 of the said Act, generally provides, that where police is unable to control an unlawful assembly, or a riot or disturbance of peace, with the force available with it, an officer, not below the rank of Inspector, has the power to apply to the nearest Magistrate to appoint any number of residents of the neighbourhood as police officers. These residents then act as SPOs, for such time as it is deemed necessary. The Magistrate is required to comply with such application, when made, unless he sees cause to the contrary.

(vi)(c.4) Based on the aforesaid provisions, the petitioners before the court were employed as SPOs, and they were paid, to begin with, an honorarium of Rs. 15 per day, which was enhanced to Rs. 30 per day. The SPOs, so appointed, functioned as guards for the banks, which paid their remuneration.

(vi)(c.5) The appellants before the Supreme Court, as also persons similarly placed, approached the High Court seeking directions for regularization of their services. The writ petitions were dismissed vide

order dated 12.12.2001, directing consideration of the cases of the petitioners and other similarly placed, for regularization, in accordance with law.

(vi)(c.6) The SSP, Amritsar, vide order dated 23.04.2002, rejected the claims of the appellants before the Supreme Court. The burden of the order passed by the SSP, Amritsar, was that, wages were paid, to the SPOs by the banks; no seniority of the SPOs was maintained in Amritsar district; and therefore, if at all, the appellants could lay a claim, they could do so only with the bank authorities, as against, the police authorities.

(vi)(c.7) Consequently, a second round of writ petitions followed, which also met the same fate. The matter was carried to the Division Bench, which, while holding that there was a Master-Servant relationship between the SPOs and the State Government, refused to grant the relief of regularization sought by the petitioners on the ground that the very nature of their employment, was such, which did not warrant regularization. It was stressed that there was no regular cadre created for such posts, nor were there any, particular, number of posts created for this purpose.

(vi)(c.8) It is in these circumstances, that the matter reached the Supreme Court. The Supreme Court not only sustained the finding that SPOs were the employees of the State, i.e., the Police department, but also directed their regularization and in this process distilled the ratio of the judgement in ***Uma Devi's*** case. The observations made by the court, in the following paragraphs are apposite and closest, to my mind, to the facts obtaining in the instant case. For the sake of convenience, the same are extracted hereinbelow:

"..... 18. Coming to the judgment of the division bench of the High Court of Punjab & Haryana in LPA No.209 of 1992 where the claims for regularization of the similarly situated persons were rejected on the ground that no regular cadre or sanctioned posts are available for regularization of their services, the High Court may be factually right in recording that there is no regularly constituted cadre and sanctioned posts against which recruitments of persons like the appellants herein were made. However, that does not conclusively decide the issue on hand. The creation of a cadre or sanctioning of posts for a cadre is a matter exclusively within the authority of the State. That the State did not choose to create a cadre but chose to make appointments of persons creating contractual relationship only demonstrates the arbitrary nature of the exercise of the power available under section 17 of the Act. The appointments made have never been terminated thereby enabling various banks to utilize the services of employees of the State for a long period on nominal wages and without making available any other service benefits which are available to the other employees of the State, who are discharging functions similar to the functions that are being discharged by the appellants.

19. No doubt that the powers under section 17 are meant for meeting the exigencies contemplated under it, such as, riot or disturbance which are normally expected to be of a short duration. Therefore, the State might not have initially thought of creating either a cadre or permanent posts.

20. But we do not see any justification for the State to take a defence that after permitting the utilisation of the services of large number of people like the appellants for decades to say that there are no sanctioned posts to absorb the appellants. Sanctioned posts do not fall from heaven. The State has to create them by a conscious choice on the basis of some rational assessment of the need.

21. The question is whether this court can compel the State of Punjab to create posts and absorb the appellants into the services of the State on a permanent basis consistent with the Constitution Bench decision of this court in Umadevi's case. To answer this question, the ratio decidendi of the Umadevi's case is required to be examined. In that case, this Court was considering the legality of the action of the State in resorting to irregular appointments without reference to the duty to comply with the proper appointment procedure contemplated by the Constitution.

> "4. … The Union, the States, their departments and instrumentalities have resorted to irregular appointments, especially in the lower rungs of the service, without reference to the duty to ensure a proper appointment procedure through the Public Service 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 recognised by our Constitution, has to be seriously pondered over." (emphasis supplied)

It can be seen from the above that the entire issue pivoted around the fact that the State initially made appointments without following any rational procedure envisaged under the Scheme of the Constitution in the matters of public appointments. This court while recognising the authority of the State to make temporary appointments engaging workers on daily wages declared that the regularisation of the employment of such persons which was made without following the procedure conforming to the requirement of the Scheme of the Constitution in the matter of public appointments cannot become an alternate mode of recruitment to public appointment.

22. It was further declared in Umadevi case that the jurisdiction of the Constitutional Courts under Article 226 or Article 32 cannot be exercised to compel the State or to enable the State to perpetuate an illegality. This court held that compelling the State to absorb persons who were employed by the State as casual workers or daily-wage workers for a long period on the ground that such a practice would be an arbitrary practice and violative of Article 14 and would itself offend another aspect of Article 14 i.e. the State chose initially to appoint such persons without any rational procedure recognized by law thereby depriving vast number of other eligible candidates who were similarly situated to compete for such employment.

23. Even going by the principles laid down in Umadevi's case, we are of the opinion that the State of

Punjab cannot be heard to say that the appellants are not entitled to be absorbed into the services of the State on permanent basis as their appointments were purely temporary and not against any sanctioned posts created by the State.

24. In our opinion, the initial appointment of the appellants can never be categorized as an irregular appointment. The initial appointment of the appellants is made in accordance with the statutory procedure contemplated under the Act. The decision to resort to such a procedure was taken at the highest level of the State by conscious choice as already noticed by us.....

..... 30. It can also be noticed from the written statement of the Assistant Inspector General of Police (Welfare & Litigation) that preference was given to persons who are in possession of licensed weapons. The recruitment of the appellants and other similarly situated persons was made in the background of terrorism prevailing in the State of Punjab at that time as acknowledged in the order dated 23.4.2002 of the SSP. The procedure which is followed during the normal times of making recruitment by inviting applications and scrutinising the same to identify the suitable candidates would itself take considerable time. Even after such a selection the selected candidates are required to be provided with necessary arms and also be trained in the use of such arms. All this process is certainly time consuming. The requirement of the State was to take swift action in an extra-ordinary situation.

31. Therefore, we are of the opinion that the process of selection adopted in identifying the appellants herein cannot be said to be unreasonable or arbitrary in the sense that it was devised to eliminate other eligible candidates. It may be worthwhile to note that in Umadevi's case, this Court was dealing with appointments made without following any rational procedure in the lower rungs of various services of the Union and the States.....”

(emphasis is mine)

(vi)(c.9) In the very same judgement, the Supreme Court also dealt with the other aspect of the matter, which is, whether in the absence of the sanctioned post, could the State could be compelled to absorb persons, like the appellants before it. The court, in this context, noted that posts are required to be created by the State depending on the "***need***" to employ persons having regard to various functions that the State undertakes to discharge. The court observed, while the assessment of the need is within the domain of the executive of the day, subject to overall control of the legislature, the constitutional court is not bereft of its power to examine the accuracy of the "***assessment***" of the "***need***" so portrayed by the State. It held, in the facts of that case, that there was a need for creation of the post and the failure of the executive government to apply its mind as also to take a decision to create post or, in the alternative stop extracting work from the persons, i.e., the appellants before it, for decades together, would result in its inaction in the matter being treated as capricious and arbitrary.

(vi)(c.10) Accordingly, the court directed regularization of the services of the appellants before it, within a period of three months, with a direction, that they would be entitled to all benefits of service attached to the post which are similar in nature to those who were already in the cadre of the Police Services of the State. As a matter of fact, costs in the sum of Rs. 10,000/- was also directed to be paid to each of the appellants. The observation of the court, on this aspect of the matter, are contained in paragraphs 32 to 39 of the judgement. The same being relevant are extracted hereinbelow:

> "....32. Coming to the other aspect of the matter pointed out by the High Court - <u>that in the absence of sanctioned</u>

posts the State cannot be compelled to absorb the persons like the appellants into the services of the State, we can only say that posts are to be created by the State depending upon the need to employ people having regard to various functions the State undertakes to discharge.

> "Every sovereign government has within its own jurisdiction right and power to create whatever public offices it may regard as necessary to its proper functioning and its own internal administration."

33. It is no doubt that the ***assessment of the need*** to employ a certain number of people for discharging a particular responsibility of the State under the Constitution is always with the executive government of the day subject to the overall control of the legislature. That does not mean that an examination by a Constitutional Court regarding the accuracy of the assessment of the need is barred.

34. This Court in S.S. Dhanoa v. Union of India, (1991) 3 SCC 567, did examine the correctness of the assessment made by the executive government. It was a case where Union of India appointed two Election Commissioners in addition to the Chief Election Commissioner just before the general elections to the Lok Sabha. Subsequent to the elections, the new government abolished those posts. While examining the legality of such abolition, this Court had to deal with an argument whether the need to have additional commissioners ceased subsequent to the election. It was the case of the Union of India that on the date posts were created there was a need to have additional commissioners in view of certain factors such as the reduction of the lower age limit of the voters etc. This Court categorically held that

> "27…. The truth of the matter as is apparent from the record is that …….there was no need for the said appointments…..".

35. Therefore, it is clear that the existence of the need for creation of the posts is a relevant factor with reference to which the executive government is required to take rational decision based on relevant consideration. In our opinion, when the facts such as the ones obtaining in the instant case demonstrate that there is need for the creation of posts, the failure of the executive government to apply its mind and take a decision to create posts or stop extracting work from persons such as the appellants herein for decades together itself would be arbitrary action (inaction) on the part of the State.

36. The other factor which the State is required to keep in mind while creating or abolishing posts is the financial implications involved in such a decision. The creation of posts necessarily means additional financial burden on the exchequer of the State. Depending upon the priorities of the State, the allocation of the finances is no doubt exclusively within the domain of the legislature. However in the instant case creation of new posts would not create any additional financial burden to the State as the various banks at whose disposal the services of each of the appellants is made available have agreed to bear the burden. If absorbing the appellants into the services of the State and providing benefits at par with the police officers of similar rank employed by the State results in further financial commitment it is always open for the State to demand the banks to meet such additional burden. Apparently no such demand has ever been made by the State. The result is – the various banks which avail the services of these appellants enjoy the supply of cheap labour over a period of decades. It is also pertinent to notice that these banks are public sector banks.

37. We are of the opinion that neither the Government of Punjab nor these public sector banks can continue such a practice consistent with their obligation to function in accordance with the Constitution. Umadevi's judgment cannot become a licence for exploitation by the State and its instrumentalities.

> 38. For all the abovementioned reasons, we are of the opinion that the appellants are entitled to be absorbed in the services of the State. The appeals are accordingly allowed. The judgments under appeal are set aside.
>
> 39. We direct the State of Punjab to regularise the services of the appellants by creating necessary posts within a period of three months from today. Upon such regularisation, the appellants would be entitled to all the benefits of services attached to the post which are similar in nature already in the cadre of the police services of the State. We are of the opinion that the appellants are entitled to the costs throughout. In the circumstances, we quantify the costs to Rs.10,000/- to be paid to each of the appellants....."
>
> (emphasis is mine)

(vi)(d) This brings me to the second judgement of the Supreme Court in the case of ***Amarkant Rai vs State of Bihar & Ors., 2015 (3) SCALE 505***. This was a case where the appellant before the Supreme Court had served as a "Night Guard" on daily wages, for 29 years. The appellant was appointed for the first time, albeit temporarily, as a Night Guard on daily basis vide order dated 04.06.1983, issued by the principal of the college affiliated to the Lalit Narayan Mithila University (in short the University).

(vi)(d.1) The University vide order dated 04.07.1985 took a decision to regularize in service all those persons who had worked for more than 240 days. It appears that the Addl. Commissioner-cum –Secretary passed a settlement order dated 11.07.1989; a copy of which was forwarded to the Vice-Chancellor of various Universities, wherein it was stated that services of employees working in educational institutions, as per staffing pattern, should be regularized, with a caveat, that new appointments should not be

made. The principal of the concerned college vide order dated 07.10.1993 regularized the services of the appellant.

(vi)(d.2) The registrar, however, passed an order of termination on 01.03.2001. Consequent thereto, a writ petition was preferred by, similarly, placed daily wagers with the concerned High Court, upon the orders passed therein, the Registrar of the University, allowed all daily wagers, including the appellant, to resume their employment from 03.01.2002. The principal recommended the absorption of the appellant against two vacant posts vide letter dated 08.01.2002 and 12.07.2004.

(vi)(d.3) In pursuance of an order passed in another writ petition, the appellant was asked to appear before a three-member committee, constituted by the Vice-Chancellor for consideration of his case of regularization of service. The claim of the appellant was rejected on the ground it was not in consonance with the recruitment rule. The judgement of the Supreme Court in ***Uma Devi's*** case was relied upon in support of the conclusion reached.

(vi)(d.4) The appellant approached the High Court, once again, whereupon his writ petition was dismissed. The High Court observed that his appointment was in violation of Section 10(6) and Section 35 of the Bihar State Universities Act, 1976. The High Court sustained the order of the three-member committee. Aggrieved, the appellant preferred an appeal with the Division Bench, which met the same fate. This is how the matter reached the Supreme Court.

(vi)(d.5) The Supreme Court made the following crucial observations in paragraph 8, 9, 11, 12, 13, 15 & 16.

"..... 8. We have carefully considered the rival contentions and also perused the impugned order and material on record.

9. Insofar as contention of the respondent that the appointment of the appellant was made by the principal who is not a competent authority to make such appointment and is in violation of the Bihar State Universities Act and hence the appointment is illegal appointment, it is pertinent to note that the appointment of the appellant as Night Guard was done out of necessity and concern for the college. As noticed earlier, the Principal of the college vide letters dated 11.03.1988, 07.10.1993, 08.01.2002 and 12.07.2004 recommended the case of the appellant for regularization on the post of Night Guard and the University was thus well acquainted with the appointment of the appellant by the then principal even though Principal was not a competent authority to make such appointments and thus the appointment of the appellant and other employees was brought to the notice of the University in 1988. In spite of that, the process for termination was initiated only in the year 2001 and the appellant was reinstated w.e.f. 3.01.2002 and was removed from services finally in the year 2007. As rightly contended by the learned counsel for the appellant, for a considerable time, University never raised the issue that the appointment of the appellant by the Principal is ultra vires the rules of BSU Act. Having regard to the various communications between the Principal and the University and also the education authorities and the facts of the case, in our view, the appointment of the appellant cannot be termed to be illegal, but it can only be termed as irregular.....

.....11. As noticed earlier, the case of the appellant was referred to Three Members Committee and Three Members Committee rejected the claim of the appellant declaring that his appointment is not in consonance with the ratio of the decision laid down by this Court in ***Umadevi***'s case (supra). In Umadevi's case, even though this Court has held that the appointments made against temporary or ad-hoc are not to be regularized, in para 53 of the judgment, it provided that irregular appointment of duly qualified persons in duly

sanctioned posts who have worked for 10 years or more can be considered on merits and steps to be taken one time measure to regularize them. In para 53, the Court observed as under:-

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

The objective behind the exception carved out in this case was prohibiting regularization of such appointments, appointed persons whose appointments is irregular but not illegal, ensure security of employment of those persons who

served the State Government and their instrumentalities for more than ten years.

12. Elaborating upon the principles laid down in Umadevi's case (supra) and explaining the difference between irregular and illegal appointments in State of Karnataka & Ors. v. M.L. Kesari & Ors., (2010) 9 SCC 247, this Court held as under:

> "7. It is evident from the above that there is an exception to the general principles against "regularisation" enunciated in Umadevi, if the following conditions are fulfilled:
>
> > (i) The employee concerned should have worked for 10 years or more in duly sanctioned post without the benefit or protection of the interim order of any court or tribunal. In other words, the State Government or its instrumentality should have employed the employee and continued him in service voluntarily and continuously for more than ten years.
> >
> > (ii) The appointment of such employee should not be illegal, even if irregular. Where the appointments are not made or continued against sanctioned posts or where the persons appointed do not possess the prescribed minimum qualifications, the appointments will be considered to be illegal. But where the person employed possessed the prescribed qualifications and was working against sanctioned posts, but had been selected without undergoing the process of open competitive selection, such appointments are considered to be irregular."

13. Applying the ratio of Uma Devi's case, this Court in ***Nihal Singh & Ors. v. State of Punjab & Ors., (2013) 14 SCC 65*** directed the absorption of the Special Police Officers in the services of the State of Punjab holding as under:

"35. Therefore, it is clear that the existence of the need for creation of the posts is a relevant factor with reference to which the executive government is required to take rational decision based on relevant consideration. In our opinion, when the facts such as the ones obtaining in the instant case demonstrate that there is need for the creation of posts, the failure of the executive government to apply its mind and take a decision to create posts or stop extracting work from persons such as the appellants herein for decades together itself would be arbitrary action (inaction) on the part of the State.

36. The other factor which the State is required to keep in mind while creating or abolishing posts is the financial implications involved in such a decision. The creation of posts necessarily means additional financial burden on the exchequer of the State. Depending upon the priorities of the State, the allocation of the finances is no doubt exclusively within the domain of the legislature. However in the instant case creation of new posts would not create any additional financial burden to the State as the various banks at whose disposal the services of each of the appellants is made available have agreed to bear the burden. If absorbing the appellants into the services of the State and providing benefits on a par with the police officers of similar rank employed by the State results in further financial commitment it is always open for the State to demand the banks to meet such additional burden. Apparently no such demand has ever been made by the State. The result is-the various banks which avail the services of these appellants enjoy the supply of cheap labour over a period of decades. It is also pertinent to notice that these banks are public sector banks."

.....

> ..... 15. 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).
>
> 16. The impugned order of the High Court in LPA No.1312 of 2012 dated 20.02.2013 is set aside and this appeal is allowed. The authorities are directed to notionally regularize the services of the appellant retrospectively w.e.f. 03.01.2002, or the date on which the post became vacant whichever is later and without monetary benefit for the above period. However, the appellant shall be entitled to monetary benefits from 01.01.2010. The period from 03.01.2002 shall be taken for continuity of service and pensionary benefits....."
>
> (emphasis is mine)

(vi)(e) The facts in the instant case, seen in the light of the judgement in the case of ***Nihal Singh*** and ***Amarkant Rai***, would show that the respondent's stand that the services of the petitioners were contractual and hence could not be regularized, is unsustainable.

(vi)(e.1) The reason for the same is that recruitment of the petitioners took place, in peculiar circumstances, due to mass exodus from the Kashmir Valley in the wake of terrorism in the State of Jammu & Kashmir. The respondents sought to engage the petitioners and other persons, similarly placed, on contractual basis, despite the fact that sanctioned posts were available in and around the same time. The petitioners have worked for nearly two decades at 1/3rd of the emoluments paid to regular/ permanently employed teachers. It is not as if the respondents do not "need" the teachers to work in their school. There is also, no case made out, by the respondents, that the petitioners are not qualified, and that, their selection was not made

on merits and/or based on suitability. Having regard to these facts, I can only say that the circumstances obtaining in the petitioners' case, are no different from those that obtained in the ***Nihal Singh*** case.

(vi)(e.2) At best, the petitioners engagement could be, if at all, termed as irregular. Though I must state that the petitioners dispute this aspect of the matter. Even if they are termed as irregular, the respondents were required to act in accordance with paragraph 53 of the judgement of the Supreme Court in ***Uma Devi's*** case which required all those, who had worked for more than ten years, to be absorbed in employment. The respondents did neither and have instead continued to engage the petitioners on contractual basis, much to their detriment.

(vi)(e.3) In a recent judgment of this court dated 30.04.2015, passed in LPA No. 260/2015, titled: ***State Bank of India & Anr. vs Dharmendra Prasad Singh & Ors.***, the Division Bench was examining the policy of the State Bank of India, whereby it had absorbed personnel who were engaged on contractual basis, as Officer Marketing and Recovery (Rural), qua their *gramin* branches.

(vi)(e.4) The Single Judge, struck down the policy with the observation that the board of the SBI had brazenly breached the law declared by the Supreme Court in ***Uma Devi's*** case. A further direction was issued by the learned Single Judge, that the matter be placed before the secretaries in the Ministry of Finance and Law.

(vi)(e.5) The Division Bench, however, set aside the directions issued by the learned Single Judge, and while, doing so, made the following

observations, even while it noted that in the impugned judgement the facts in issue had not been dealt with:

> ".....28. As noted above the appellant Bank had to experiment before sanctioning permanent posts of Officers Marketing and Recovery (Rural). The banking sector had to penetrate the rural market to give a fillip to the financial inclusion policy of the Government of India and to increase the level of business in agriculture and simultaneously recover the outstanding debts which otherwise would have been written off as non-performing assets. A fair and a transparent policy of recruitment by prescribing eligibility criteria was notified and the age limit was fixed. Public advertisements were issued inviting applications from all eligible candidates and all those who applied were subjected to the selection process. Those found meritorious were offered appointment on contract basis. They were trained and assigned jobs. Their work profiles were recorded. What started as an experiment in the year 2004 was appraised in the year 2009 and in the year 2010 a decision was taken that since the experiment had succeeded, it was time to crystallized the mother solution. Decision was taken to regularize the contractual employees but after subjecting them to a proper scrutiny. A bench mark of achieving 60% targets was fixed. A proforma was devised containing the evaluation matrix as advised by the concerned SBUs. The performance of the officers was evaluated on said matrix and only those who secured the bench mark were regularized. For that, permanent posts were sanctioned...."

(vi)(e.6) In somewhat similar case involving employment of Auxiliary Nurses Midwife, whose engagement was also on contractual basis, a Single Judge of the Rajasthan High Court in a batch of petitions, the lead petition being: S.B. Civil Writ petition No. 2329/2014, dated 28.07.2014, titled: ***Smt. Nisha Mathur & Ors. vs State of Rajasthan & Ors***., directed their regularization with consequential benefits. Here again, in this case as well,

the petitioners had been working on contractual basis, on continuous period, for periods exceeding ten years.

(vi)(e.7) Similarly, the Division Bench of the Himachal Pradesh High Court vide a judgement dated 09.12.2014, passed in a batch of petitions, the lead petition being: CWP No. 6916/2011, titled: ***Pankaj Kumar vs State of Himachal Pradesh***, repelled the challenge made to the decision of the State to regularize the **Gram Vidya Upasaks** and ***Para Teachers***. Here again, the appointments/ engagements were made subject to condition that the appointees will not seek regularization/ absorption. The fact that, in the meanwhile, teachers had worked for a decade or so, and had acquired the necessary qualification, the State decided to regularize the services of the petitioners as *Gram Vidya Upasaks*. The Division Bench, after examining the several precedents, held that the appointments could not be held as illegal, and thus, could be regularized as per the mandated policy of the State.

26. Therefore, having regard to the discussion above, the judgement of the Supreme Court in ***Uma Devi's*** case cannot come in the way of the petitioners' entitlement to claim regularization and for this very reason the petitioners claim for pay parity is legally valid. The petitioners, to my mind, without doubt are performing "equal work of equal value". Despite which, there is a deep disparity in the pay and emoluments of the petitioners in comparison to their counter parts holding regular posts.

26.1 It is also for all these reasons, that the judgement of another Single Judge dated 05.04.2013, passed in WP(C) 2574/2010, titled: ***Indu Munshi & Ors. vs Union of India & Ors.***, cannot come in the way of the present

petitioners as the judgement in ***Nihal Singh*** case and ***Amarkant Rai*** were delivered after the pronouncement in the aforementioned judgement. The judgment in ***Nihal Singh's*** case was delivered on 07.08.2013 while the judgement in ***Amarkant Rai's*** case was pronounced on 13.03.2015. Furthermore, I am informed that an appeal against the said judgment, being: LPA No.286/2015 is pending consideration before the Division Bench.

27. Before I conclude, I may only note that when the matter was put up for further hearing on 14.05.2015, Mr. Naushad Ahmad Khan, who appeared for respondent no.2 made two additional submissions. First, that the writ petition was filed by the petitioner association and therefore, could not be maintained. Second, that no consent of the persons qua whom contracts had been executed, had been taken.

27.1 According to me, both these submissions are factually incorrect. Apart from the petitioner association, the persons who are directly impacted are also arrayed as the petitioners.

27.2 In so far as the second submission is concerned, that is also clearly untenable as the writ petition is accompanied by separate affidavits of all the individuals.

27.3 On the aspect of disparity, as per the information supplied to me by the counsels for the petitioners, to which no objection was taken by the respondents, the difference in pay, as it obtains today, is substantial, which is demonstrable from the following table pertaining to TGTs and PGTs.

27.4 The table would show that though, there have been enhancements in the salaries of the Kashmiri Migrants Teachers (KMTs), it has not kept pace

with those, which are offered, to regularly employed teachers of DOE, NDMC and MCD.

"DOE/GNCTD

PGTs

Year	1994	1996	1998	2000	2008	2011	2015
KMT	3000	3500	7000	9500	13160	21389	29187
REGULAR	4350	9900	12450	21286	44000	55000	70401

TGTs

Year	1994	1996	1998	2000	2008	2011	2015
KMT	2500	3000	6000	8000	11140	20989	28773
REGULAR	3700	8300	10350	18184	38000	48000	60496

MCD

Year	1994	1996	1998	2000	2008	2011	2015
KMT	2000	2400	5000	7600	9500	13500	25000
REGULAR	3000	3900	8000	16000	26000	38000	49900

27.5 Furthermore, the teachers in regular employment, I am told are given following allowances :

"..1. 10% of School Fees, for the child education.
2. Medical Benefit for the entire family.
3. Bonus = Rs.3454/- year
4. LTC = Rs.1,50,000/- above once in every 4 years
5. Two months summer vacation."

27.6 As against this, KMTs / petitioners are allowed only 8 days casual leave.

28. I am informed, during pendency of the writ petition, the engagement of 12 petitioners came to an end as they crossed the age for retirement fixed qua permanent employees, while two petitioners, in the meanwhile have expired. The names of those who are no longer engaged with the respondents are as follows : Rita Kachroo (petitioner no.7), Pyari Raina (petitioner no.48), Shama Sapru (petitioner no. 50), Vijay Kumari Koul (petitioner no.52), Vijay Khurdi (petitioner no.79), Vijay Razdan (petitioner no.109), Kundan Bhat (petitioner no.124), Sukreeti Sapru (petitioner no.186), Raj Kumari (petitioner no.188), Veena Jalali (petitioner no.191), Kasum Lata (petitioner no.23), Sarojni Tikoo (petitioner no.39).

28.1 Similarly, the two persons, who have expired are : Basanti Raina (petitioner no.123) and Neeru Matoo (petitioner no.168).

29. Having regard to the above, following directions are issued:-

(i). Petitioners, presently, employed in schools under DOE, MCD and NDMC would be given emoluments and benefits which are paid and extended to regular employees falling in the same category, i.e., TGT and PGT.

(ii). Petitioners, presently, employed will be regularized and for this purpose necessary posts will be created within three months from today.

(iii) In respect of those, amongst petitioners, who have been disengaged from employment, or have expired during the pendency of the writ petition,

GNCTD shall treat them as regular employees and grant them suitable benefits as would be available to permanent/ regular employees.

30. The Writ petition and the application are disposed of in the aforesaid terms. There will be, however, no order as to costs.

RAJIV SHAKDHER, J.

MAY 18, 2015
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