Delhi High Court Pritpal Singh, Ram Babu ... vs Union Of India (Uoi) And Ors. on 12 August, 2002 Author: S Sinha Bench: S Sinha, A Sikri JUDGMENT S.B. Sinha, C.J. 1. These writ petitions are directed against Orders passed by the Central Administrative Tribunal, Principal Bench, New Delhi (hereinafter referred to as 'the Tribunal') whereby and whereunder the original applications filed by the petitioners herein questioning orders of repatriation to their Parent Departments in substantiative cadre as also directions issued upon the respondents to regularize their services as Material Checking Clerk (in short, 'MCC') in construction division, were dismissed. 2. The basic fact of the matter is not in dispute. We may, however, notice the fact of the matters from the records of C.W.P. No. 2916 of 2002. The original applicant before the Tribunal is the writ petitioner herein. He was appointed as a casual labour (Wiremen) which is a Group 'D' post on 28.04.1978. He was granted temporary status of Office Khalasi / Store Khalasi w.e.f. 01.01.1983. His services were regularized in Group 'D' w.e.f. 30.05.1990 by DPO, UMB on ad hoc basis. He was asked to work as MCC in construction division on ad hoc basis. According to the petitioner, an instruction was issued by the General Manage, Northern Railway on or about 6/7.6.1988 to the effect that those MCCs, who had worked on ad hoc basis for 3 years should be regularized. However, in stead and place of regularizing his services in terms thereof, he was sought to be reverted to the substantive Group 'D' post of Khalasi by an order dated 27.02.2001 by way of repatriation to his parent division. Questioning the said order dated 27.02.2001, the original application was filed, which was marked as O.A. No. 693 of 2001. 3. Before the learned Tribunal, the core question was as to whether the services of the writ petitioner could be regularized in the promotional post in Group'C' in the construction division. Before the learned Tribunal, the writ petitioner relied upon its earlier decision of Sulakhan Singh v. Union of India passed in O.A. No. 781 of 2001 on 06.11.2001, whereas the respondents relied upon a judgment dated 06.09.2001 passed in O.A. No. 860 of 2001 titled Vijay Kumar Singh v. Union of India wherein similar notice was assailed. Before the learned Tribunal, a decision dated 04.12.2000 of the Full Bench of the Tribunal passed in Ram Lubhaya and Ors. v. Union of India and Ors. being O.A. No. 103 of 1997 and connected matters reported in J.S. Kalra's Administrative Tribunal Full Bench Judgments 1997-2001 at 152 had also been relied upon by the respondents wherein it was held:- "(a) Railway servants hold lien in their parent cadre under a division of the Railways and on being deputed to construction organization and there having been promoted on a higher post on an hoc basis and continue to function on that post on ad hoc basis for a very long time would not be entitled to regularization on that post in their parent division/office. They are entitled to regularization in their turn, in the parent division/office strictly in accordance with the rules and instructions on the subject." It appears that the decision of the Full Bench of the Tribunal in Ram Lubhaya's case (Supra) was followed b the Tribunal in several judgments. Following the said Full Bench decision of the Tribunal in Ram Lubhaya's case (Supra) as also the decision of the Tribunal rendered subsequent thereto, the original application filed by the petitioner was dismissed. 4. Ms. Mainee, the learned counsel appearing

on behalf of the petitioner, inter alia, would submit that the learned Tribunal committed a manifest error insofar as it failed to take into consideration that in terms of the directions of the Railway Board dated 19.03.1976, the employees, who had been working in a higher post on ad hoc basis in a satisfactory manner and have passed written examination, should not be declared unsuitable in the interview. As, in the instant case, the learned counsel would contend, the petitioner appeared in the selection for the post of Clerk and he appeared in the written examination and having been declared qualified therein, he should not have, following the aforementioned circular letter dated 19.03.1976 of the Railway Board, declared to have failed in the viva voce test. According to the leaned counsel, the legality of the said circular letter dated 19.03.1976 of the Railway Board had been upheld by the Hon'ble Supreme Court of India in R.C. Srivastava v. Union of India being S.L.P. (Civil) No. 9866 of 1993. 5. Mr. Gangwani, the learned counsel appearing on behalf of the respondents, on the other hand, would submit that the writ petitioner does not have any right of regularization. According to the learned counsel, the instant case is merely a case of repatriation and in that view of the matter the decision of the Apex Court in R.C. Srivastava's case (Supra) will have no application whatsoever. According to the learned counsel, as the learned Tribunal has rightly followed the Full Bench decision of the Tribunal of Ram Lubhaya's case (Supra), the impugned judgment is unassailable. 6. We may notice that the writ petitioner either before the learned Tribunal or before us had not produced the main order is terms whereof he was repatriated from the construction division to his parent division for reasons best known to him. The petitioner before the learned Tribunal had not only questioned the correctness or otherwise of the said letter dated 27.02.2001 but also prayed for regularization of his services. However, no prayer was made to the effect that he should have been appointed in the post of MCC in terms of the purported circular dated 19.03.1976 of the Railway Board. From a perusal of the impugned order of the Tribunal, it does not appear that such a contention had even been raised before it. 7. In the aforementioned situation, in our opinion, the question, which is sought to be raised here in the writ petition for the first time, should be permitted to be raised. Even before us, the writ petitioner has not placed his original application so as to enable us to ascertain as to whether such a plea had been taken therein or not. 8. In the instant case, the petitioner was appointed as a casual labour Wireman. He was granted temporary status as Office Khalasi/Store Khalasi w.e.f. 01.01.1983 and his services had been regularized w.e.f. 30.05.1990 as a Group 'D' employee. The petitioner admittedly was sent on deputation to the construction division. He accepted the said assignment without any demur. Only in the construction division, he was asked to work on an ad hoc basis as MCC and by reason thereof he did not derive any right to continue therein. He having regard to the fact that his services had already been regularized, could not have asked for regularization for the second time. Once a person is appointed on a regular basis, he can only be promoted in accordance with law. Any promotion given to a regular employee in a regular course must be in terms of the statutory rules. In the instant case, even it is not clear as to who had initiated the re-

cruitment process; the construction division or the Railway Administration. 9. Whether the circular letter dated 19.03.1976 of the Railway Board would be binding upon the construction division or not would depend upon the answer to the question as to whether the construction division is a part of the Railway Administration and/or whether it is permanent or a temporary division. The said question is pending consideration before the Apex Court of India. 10. We, however, may note that Rule 189 of Indian Railway Establishment Manual(in short, 'IREM') Vol. I pertaining to promotions in the higher grade in Group 'C' is in the following terms:- "189. Promotion to higher grades in Group C- (a) Railway servants in Gp D categories for whom no regular avenue of promotion exists 33-1/3% of the vacancies in the lowest grade of Commercial Clerks, Ticket Collectors, Trains Clerks, Number Takers, Time Keepers, Fuel Checkers, Office Clerks, Typist and Store Clerks etc. should be earmarked for promotion. The quota for promotion of Gp D staff in the Accounts Departments to Gp C post of Accounts Clerks will be 25%. Promotion to Gp C will be subject to the following conditions: (i) All promotion should be made on the basis of selection. There should be written tests to assess the educational attainments of candidates followed by interviews where considered necessary. Gip C categories referred to above should be suitably linked with specified categories in the lower grades on broad affinity of work to form groups for promotion but it should be ensured that the prospects are made regularly equal in the different groups. The test should be correlated to the standards of proficiency that can reasonably be expected from railway servant who are generally non- matriculates. The aim of the examinations should be to assess the general suitability of the Class IV railway servants offering themselves for promotion to Class III posts from the point of view of their knowledge of English and their general standard of intelligence. (1) Written test should consist of one paper of 3 hours duration divided into two parts - Part A to test the working knowledge of the railway servant of the English language and Part b his general standard of intelligence and proficiency through questions in Arithmetic, General knowledge mainly pertaining to Railway matters and matters immediately pertaining to the work he has been acquainted with during his Railway service. In drawing up the question it must be ensured that they are not set as such a standard as to made it impracticable for a Gp D railway servant of average intelligence and normal standards of efficiency to qualify in the test. (2) Oral test should adjudge other factors of suitability if so considered necessary by the General manager. (3) Selections may not be restricted to three times the number of vacancies but kept open to all eligible candidates who would like to be considered for such selection. (4) All those who qualify in written and oral test, the qualifying percentage of marks being prescribed by the General Manager, should be arranged in the order of their seniority for promotion against the yearly vacancies available for them in Gp C categories. (iii) Gp. D railway servants to be eligible for promotion to Gp D posts should have put in a minimum 3 years of continuous service. This does not apply to Schedule Castes and Scheduled Tribes candidates. . . .." 11. The petitioners heavily relied upon minutes of the meeting held on 7th & 8th May, 1987, the relevant extract of the same is in the following terms:- "2. Item

No. 53/86 - Cancellation of selection for the post of Material Checking Clerk on Delhi Division After discussing, it was decided by the General Manager that all those staff who are working continuously as Material Checking Clerks on ad hoc basis for the period of three years on more may be regularized on the basis of their service record and viva-voce duly observing the extant instructions on the subject as a special case not to be quoted as a precedent in future. If there are still more vacancies after regularizing the said staff, as per para 1 above, to fill up those, normal selection may be held and completed very early." Allegedly, the General Manager clarified that the aforementioned circular could also be applicable to the construction organization vide letter dated 11.02.1991, which is in the following terms:- "The above issue has been examined in detail and it is advised that the MCCs who are working on ad hoc basis for more than 3 years in construction organization will be regularized as such by their respective parent deptt. where they hold their lien, i.e., from where they have been drafted to const. organization further action in this regard may, therefore, please be taken accordingly." 12. The contention of the learned counsel appearing for the petitioners appears to be that in a large number of cases, persons working as MCC for a period of three years had been directed to be regularized by the Tribunal and in some of the matters the Supreme Court has also refused to interfere. So far as judgments of the learned Tribunal are concerned, the same are not binding on this Court. We may notice that in most of its judgments, the learned Tribunal had not considered the core issue nor had referred to the fact that regularisation cannot be a mode of recruitment. The Tribunal failed to notice a large number of decisions of the Apex Court wherein it has clearly been held that an order of regularisation must be based upon the relevant provision of the statute or statutory rules, which may be framed therefore. 13. We may, however, notice that before us only one Order dated 25.10.1996 of the Supreme Court has been placed, which is in the following terms:- "Delay condoned. In the facts and circumstances of the case including the fact that the concerned employees have all worked in that capacity for over a decade, the direction given by the Tribunal for regularisation of those suitable found fit after screening is just and does not call for any interference under Article 136 of the Constitution. The question of law raised in the Special Leave Petition is not required to be considered on those facts and is therefore left open for decision in appropriate case. The special leave petition is dismissed." By reason of the said directions therefore no law has been laid down and the Supreme Court only refused to exercise its discretionary jurisdiction in view of the facts involved therein. The Supreme Court admittedly did not consider the question of law raised in the special leave petition. Thus, the said decision does not have any precedential value. 14. We may also notice that the circular letter dated 08.05.1987 was issued as a result of negotiation with the recognized Union wherefor a settlement was arrived at on 07/08.05.1987 that those staff who had been working continuously as MCC on ad hoc basis for a period of 3 years or more may be regularized as Clerks on the basis of their service records and viva voce keeping in view the said instructions on the subject, but the same was done as a special case, which was not to be treated as a precedent in future. All vacancies, which

were left after regularizing those ad hoc staff, were allegedly required to be filled up by normal selection procedure by the divisions. The petitioner evidently did not come within the purview thereof. 15. A settlement or agreement arrived at in terms of the provisions of the Industrial Disputes Act do no lay down a policy decision. The settlement was arrived at on the basis of negotiations held on 07/08.05.1987. Such a settlement does not reflect the policy decision of the State. Such a settlement cannot be equated with Executive instructions within the meaning of Article 77 of the Constitution of India. Railway employees are governed by the provisions of a statute or statutory rules and only the blanks left in the statutory rules can be filled up with Executive instructions. A settlement would only be binding in terms of the provisions of the Industrial Disputes Act. The effect of such settlement, as would appear from the plain language expressed therein, would be applicable to those who had been working at the relevant point of time. A bare perusal of the said settlement would clearly go to show that a decision had only been taken to regularize services of those who had thence been working continuously as MCC on ad hoc basis. It does not bring within its fold those who had been sent on deputation. It does not take within its ambit all those who would be joining later. Even in terms of the said settlement, the order of regularisation was to be issued only on the basis of their service records and viva voce test, which may be held upon observing the extant instructions on the subject. Such a step was to be taken as a special case and the same was not to be quoted as a precedent in future. Thus, the selection therefore was required to be done in normal course. It is not the case of the parties that the said settlement had not been given effect to. The question, which was required to be raised and answered, was as to whether the petitioners came within the purview of the said settlement. The obviously were not. If they were not covered by the settlement, a writ petition would not be maintainable to give them the similar benefit, which might have been given to those who were covered by such settlement. Even in the event, some workmen who were entitled the benefit of the said settlement had not been given the same, a writ petition would not lie as the dispute was required to be resolved in terms of the provisions of the Industrial Disputes Act. Assuming that the Railway Administration by themselves or pursuant to the directions issued by the learned Tribunal give benefit of the said settlement to the workmen, who were not covered thereby, only a mistake thereby has been committed. The petitioner cannot take benefit of such a wrong order, as it is well known that illegality cannot be perpetuated. It is now trite that nobody can derive any benefit out of an illegal order, as Article 14 is a positive concept. A writ petition in the nature of Mandamus, as is well known, can only be issued if the petitioner demonstrates existence of a legal right in himself and corresponding legal duty on the respondent. Thus, the illegality committed by the authorities or a wrong order passed by the Tribunal cannot clothe the petitioners with a legal right, which cannot be enforced in law. A citizen is entitled to the benefit of a judgment provided the same is correct. Article 14 is a positive concept and by reason thereof nobody can claim a fundamental right on the basis of an illegal order. 16. In Shri Jagannath Temple Puri Management Committee and Anr.

v. Chintamani Khuntia and Ors., , it was held:- “30. The Sevaks cannot also invoke Article 300-A in the facts of this case. The offerings that are made to the deities are not the properties of the Sevaks. The Sevaks are given a share in these offerings as remuneration for guarding and collecting the offerings. They do not have to discharge these duties in regard to the monies deposited in the Hundis. They are not entitled to any share in these monies as of right. There cannot be any question of deprivation of any right to property of the Sevaks in the facts of this case. Merely because by mistake some monies were paid to”Dwaitatapatis" as compensation will not confer any right on the Sevaks to get any such compensation. No right can be founded on a mistake committed by the Temple Committee." 17. In State of Bihar and Ors. v. Kameshwar Prasad Singh and Anr., the law operating in the field is stated in the following terms: “30. The concept of equality as envisaged under Article 14 of the Constitution is a positive concept which cannot be enforced in a negative manner. When any authority is shown to have committed any illegality or irregularity in favor of any individual or group of individuals other cannot claim the same illegality or irregularity on ground of denial thereof to them. Similarly wrong judgment passed in favor of one individual does not entitle others to claim similar benefits. In this regard this Court in Gursharan Singh and Ors. v. NDMC and Ors. held that citizens have assumed wrong notions regarding the scope of Article 14 of the Constitution, which guarantees equality before law to all citizens. Benefits extended to some persons in an irregular or illegal manner cannot be claimed by a citizen on the plea of equality as enshrined in Article 14 of the Constitution by way of writ petition filed in the High Court. The Court observed:-”Neither Article 14 of the Constitution conceives within the equality clause this concept nor Article 226 empowers the High Court to enforce such claim of equality before law. If such claims are enforced, it shall amount to directing to continue and perpetuate an illegal procedure or an illegal order for extending similar benefits to others. Before a claim based on equality clause is upheld, it must be established by the petitioner that his claim being just and legal, has been denied to him, while it has been extended to others and in this process there has been a discrimination." Again in Secretary, Jaipur Development Authority, Jaipur v. Daulat Mal Jain and Ors. this Court considered the scope of Article 14 of the Constitution and reiterated its earlier position regarding the concept of equality holding: “Suffice it to hold that the illegal allotment founded upon ultra vires and illegal policy of allotment made to some other persons wrongly, would not form a legal premise to ensure it to the respondent or to repeat or perpetuate such illegal order, not could it be legalized. In other words, judicial process cannot be abused to perpetuate the illegalities. Thus considered, we hold that the High Court was clearly in error in directing the appellants to allot the land to the respondents.” 18. There cannot be any doubt whatsoever that even an order of regularization can be issued by the parent department only and not by the borrowing department. Such an order of regularization cannot be permitted to be made by the borrowing department as thereby it, would amount to their permanent absorption therein, which would be contrary to law as in relation thereto consent of the parent department is imperative in nature.

19. In Ram Lubhaya's case (supra), the following questions were referred:- "(a) Whether a person who is holding lien in parent cadre under a Division of the Railways and on being deputed to a Construction Organisation and there having been promoted on a higher post on ad hoc basis, continue to function on that post on ad hoc basis, for a very long time, will be entitled to regularisation on that post in this parent cadre of the Division, and also from the date he is continuously working on that post on ad hoc basis. (b) Whether such person should be regularized in Construction Division from the date of continuously working on ad hoc basis, treating the post on which he is working as a regular post since the post continues to exist for about 15 years, not withstanding the contention of the respondent that the Construction Organisation is a temporary organisation and persons are appointed against work charged posts." The aforementioned questions were answered in the following terms:- "(a) Railway servants hold lien in their parent cadre under a division of the Railways and on being deputed to Construction Organisation, and there having promoted on a higher post on ad hoc basis and continue to function on that post on ad hoc basis for a very long time would not be entitled to regularisation on that post in their parent division/office. They are entitled to Regularisation in their turn, in the parent division/office strictly in accordance with the rules and instructions on the subject. (b) This is answered in the Negative." 20. However, we may notice that in Aslam Khan v. Union of India and Ors. reported in J.S. Kalra's Administrative Tribunal Full Bench Judgments 1997-2001 at 157, a Full Bench of Central Administrative Tribunal, Jaipur in O.A. No. 57 of 1996 held that a person engaged in Group 'C' post, which is a promotional post on casual basis and has been subsequently granted temporary status would be liable to be regularized in the feeder cadre in Group 'D' post only. However, his pay, which he drew in the Group 'C' post, will be liable to be protected. We agree with the said view. 21. We may further notice that in Union of India and Ors. v. Kishan Gopal Vyas , it has been held:- "7. Appointment to the post of a Storekeeper/Store Issuer/Clerk is regulated by certain rules governing recruitment to the post in the Department. The respondent, if eligible, is entitled to be considered for the same along with all others who may be candidates for the appointment. That is the only correct way of filling these posts which would ensure equal opportunity in the matter of employment as required by Articles 14 and 16 of the Constitution of India to all eligible persons who are candidates for these posts. A direction like the one given by the Tribunal in favor of the respondent or anyone like him has the effect of denying equal opportunity to the other eligible candidates by appointing a persons not in accordance with the rules. Any order for absorption and regularisation of a person not appointed in accordance with the rules, given in the manner contained in the impugned order of the Tribunal would result in denial of equal opportunity in the matter of employment to the other eligible candidates for the public offices. Such a course must obviously be eschewed. The Tribunal's order is, therefore, set aside." 22. Recruitment in the Railway Administration must be made in terms of the statutory rules. No appointment can be made in violation of the statutory rules or in violation of the provisions contained in Articles 14 and

16 of the Constitution of India. Once an appointment is made in violation of the statutory rules, the same would contravene the provisions of the Article 309 of the Constitution of India. 23. In R.N. Nanjundappa v. T. Timmaiah and Anr. , it has been held:- "... Regularization cannot be said to be a form of appointment. Counsel on behalf of the respondent contended that regularization would mean conferring the quality of permanence on the appointment whereas counsel on behalf of the State contended that regularization did not mean permanence but that it was a case of regularization of the rules under Article 309. Both the contentions are fallacious. If the appointment itself is in infraction of the rules or if it is in violation of the provisions of the Constitution, 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 non-compliance with procedure or manner, which does not go to the root of the appointment. Regularization cannot be said to be a mode of recruitment. To accept to such a proposition would be to introduce a new head of appointment in defiance of rules or it may have the effect of setting at naught the rules." 24. Yet again in B.N. Nagarajan and Ors. etc. v. State of Karnataka and Ors. etc. , the Apex Court in no uncertain terms has held that regularization cannot be a mode of recruitment in absence of a Statute or statutory rules. It was observed:- "...It was argued that the regularisation of the promotion gave it the colour of permanence and the appointments of the promotees as Assistant Engineers must therefore be deemed to have been made substantively right from the 1st November 1956. The argument however is unacceptable to us for two reasons. Firstly, the words"regular" or "regularization" do not connote permanence. They are terms calculated to condone any procedural irregularities and are meant to cure only such defects as are attributable to the methodology followed in making the appointments. They cannot be construed so as to convey an idea of the nature of tenure of the appointments. In this connection reference may with advantage be made to State of Mysore v. S.V. Narayanappa, and R.N. Nanjundappa v. T. Thimmaiah, . In the former, this Court observed: "Before we proceed to consider the construction placed by the High Court on the provisions of the said order, we may mention that in the High Court both the parties appear to have proceeded on an assumption that regularization meant permanence. Consequently, it was never contended before the High Court that the effect of the application of the said order would mean only regularizing the appointment and no more and that regularization would not mean that the appointment would have to be considered to be permanent as an appointment to be permanent would still require confirmation. It seems that on account of this assumption on the part of both the parties, the High Court equated regularization with permanence." Furthermore, the petitioner is a 'State' within the meaning of Article 12 of the Constitution. It, thus, in the matter of recruitment was bound to comply with the constitutional mandates as adumbrated under Articles 14 and 16 of the Constitution. The respondents herein were appointed for a specific purpose and for performing peculiar nature of duties, which cannot be performed by a holder of a civil post. Their status in absence of any Statute or statutory rules cannot be changed. 25. In V. Sreeni-

vasa Redd and Ors. v. Govt. of Andhra Pradesh and Ors. , the Apex Court followed its earlier decisions of R.N. Nanjundappa (Supra) and B.N. Nagarajan and Ors. (Supra). 26. In any event, in these cases, as indicated hereinbefore, the petitioner had already been regularized in service in Grade 'D' and, thus, there cannot be any further regularisation. Recently, the Apex Court in Anis Parvez and Ors. v. The Director General, Council of Scientific & Industrial Research and Ors. 97 (2002) DLT 908 (SC), held:- "...It is clear that so far as respondents 3 to 12 are concerned, they had already been absorbed six years earlier against Group 'D' posts according to their seniority and therefore, the question of considering them again for absorption under the later scheme did not arise. In fact when the appellants were sought to be absorbed against available posts in the establishment in the year 1991, respondents 3 to 12 already stood absorbed in service and hence could not claim benefit under the scheme framed pursuant to the order of this Court." 27. The Apex Court recently in S. Renuka and Ors. v. State of A.P. and Anr. categorically held that any appointment made in contravention to the recruitment rules would be nullity. 28. For the reasons foregoing, we are of the opinion that the writ petitions being devoid of any merit are liable to be dismissed but without any order as to costs.