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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISIDICTION

WRIT PETITION NO. 1338 OF 2015

1. Union of India, through
The Secretary, Department of
Industrial Policy & Promotion,
IPR-I Section, Udyog Bhavan,
New Delhi 110 001.

2. The Controller General of
Patents, Design & Trademarks,
Boudhik Sampada Bhava,
1st S.M. Road, Antop Hill,
Mumbai – 400 037. .. Petitioners

Versus

Smt. Lalita V. Mertia
Working as Examiner in
Trademarks Registry,
Residing at D-304,
Country Park,
Datta Pada Road,
Borivali (East),
Mumbai – 400 066. .. Respondent

Mr. Ashok D. Shetty a/w Rita K. Joshi & Swapnil P. Kamble for petitioners.

Mr. Sandeep V. Marne a/w Mr. Vishal P. Shirke for respondent.

C0RAM: DIPANKAR DATTA, CJ &
M. S. KARNIK, J.

HEARD ON: SEPTEMBER 15, 2021

JUDGMENT ON: OCTOBER 8, 2021

JUDGMENT [Per DIPANKAR DATTA, CJ.]:

THE CHALLENGE

1. Aggrieved by the judgment and order dated December 4, 2014 passed by the Central Administrative Tribunal, Mumbai Bench at Mumbai (hereafter "the Tribunal", for short) in Original Application No.400 of 2012, the respondents in such application have invoked the writ jurisdiction of this Court by presenting this application under Article 226 of the Constitution of India. The Tribunal allowed the original application by ordering as follows:

> "(a) In the result the Original Application is allowed;
> (b) The impugned order dated 14.03.2011 (Annexure A-1) rejected request of the applicant for regularization of services is set aside;
> (c) Consequently, it is declared that the applicant is entitled to claim regularization of service in the sanctioned vacant post of Examiner of Trade Marks with effect from 01.06.2012, since continuation on contract basis was refused to her after 31.5.2012;
> (d) The Respondent No.2 is, therefore, directed to issue necessary office order regarding appointment of the applicant as Examiner of Trade Marks in regular/sanctioned vacant post by the end of this month and allow her to join on duty latest by 01.01.2015 in the said post;
> (e) The applicant will not however be entitled to get any monetary benefit from 01.06.2012 till the actual date of joining. She will, however, be entitled to receive full pay applicable to the said post as per rules;

(f) Compliance report of the above directions be submitted by Respondent No.2 to this Tribunal within sixteen weeks from the receipt of this order."

2. The legality and validity of the impugned judgment and order is challenged by the petitioners essentially on the ground that despite the Supreme Court in a catena of decisions having ruled that regularization cannot be a source of recruitment, the Tribunal by distinguishing all of them, indeed erroneously, proceeded to grant such relief to the original applicant (hereafter "Smt. Lalita", for short) which was not even prayed by her.

THE FACTS

3. We propose to consider the rival contentions advanced at the Bar after completing the brief factual narrative giving rise to the original application.

4. Smt. Lalita was offered appointment on October 16, 2001 as an 'Examiner of Trade Marks' on contract basis on a temporary post by the petitioner no.2, the Controller General of Patents, Design & Trade Marks (hereafter "the Controller", for short). She accepted the terms and conditions of the offer and joined as Examiner pursuant to an Office Order dated November 5, 2011. This order recorded that she was being

engaged purely on contract basis as 'Examiner of Trade Marks' with effect from October 31, 2001, initially for a period of six months. The said appointment was continued from time to time on the same terms and she continued to work as such examiner. Having rendered more than 10 years of meritorious service, Smt. Lalita prayed in her representation dated December 27, 2010 for regularization in service. It was her assertion that she deserved to be regularized in service on the post of 'Examiner of Trade Marks' since she participated in a process of selection and was selected, and there was no question of she having gained a back-door entry into service. However, her representation was rejected by the Controller by an order dated March 4, 2011, whereafter she approached the Tribunal on March 17, 2012. There was a subsequent order dated May 16, 2012, issued by the Controller continuing her as 'Examiner of Trade Marks' till May 31, 2012 only, and not beyond it, which was also challenged as illegal and void by amending the original application.

5. For facility of appreciation of the petitioners' contention that relief has been granted to Smt. Lalita by the Tribunal

beyond the prayers made, we quote below the prayer clauses in the original application:

> "a. This Hon'ble Tribunal may graciously be pleased to call for the records of the case from the Respondents and after examining the same quash and set aside the order dated 04.03.2011 with all consequential benefits;
> aa. This Hon'ble Tribunal may further be pleased to hold and declare that non-continuation of the Applicant on the post of Examiner of Trademarks beyond 31st May 2012 is illegal and void and that the Applicant is entitled to be continued in service beyond 31st May 2012.
> b. This Hon'ble Tribunal may further be pleased to direct the Respondents to refer the case of the Applicant to UPSC for recommendation for regularization by considering her service record and if recommended by the UPSC, regularize the services of the Applicant w.e.f. the date of her initial appointment with all consequential benefits;
> c. This Hon'ble Tribunal may further be pleased to restrain the Respondents from terminating / not extending the services of the Applicant till consideration of her case for regularization;
> d. This Hon'ble Tribunal may further be pleased to direct the Respondents to grant pay to the Applicant in pay scale admissible to the post of Examiner of Trademarks with annual increments w.e.f. the date of her initial appointment and pay the arrears of salary and allowances arising out of such pay fixation.
> e. Costs of the application be provided for;
> f. Any other and further order as this Hon'ble Tribunal deems fit in the nature and circumstances of the case be passed."

6. It is noted that a co-ordinate Bench of this Court on February 9, 2017 had admitted the writ petition but refused

interim relief to the petitioners in view of the decision of the Supreme Court reported in (2010) 9 SCC 247 (**State of Karnataka & Ors. v. M.L. Kesari & Ors**.). The petitioners had applied for review of such order, which came to be dismissed by an order dated December 20, 2017.

7. The orders dated February 9, 2017 and December 20, 2017 were subjected to challenge before the Supreme Court in SLP (C) No. 6239 of 2018. On March 19, 2018, the Special Leave Petition was disposed of by the following order:

> "Delay condoned.
>
> In the nature of the order we propose to pass, it is not necessary to issue notice to the respondent, since the interest of the respondent is otherwise protected.
>
> Ms. Indu Malhotra, learned senior counsel appearing for the petitioners, points out that the Judgment of this Court in State of Karnataka Vs. M.L. Kesari & Ors. reported in (2010) 9 SCC 247, is not applicable in the facts of the present case and that would not have stood in the way of the High Court considering the interim application for stay of the order passed by the Tribunal. It is also pointed out that the Tribunal has given a declaration that the respondent was entitled to regularization whereas her case had not been considered by the UPSC since the same was not recommended by the petitioners. The consideration by the UPSC for regularization was the prayer made by the respondent in the Original Application (OA) before the Tribunal and that would have been possible only in case the petitioners had recommended the same to the UPSC. It is also submitted that she was not recommended for

> regularization, as according to the petitioners, she was rated below average.
>
> In view of the above submission, in our opinion, the matter needs to be considered by the High Court. Therefore, we request the High Court to consider the application for stay afresh. We make it clear that the judgment in State of Karnataka (supra) may not stand in the way of the High Court considering the application on merits since on facts, the said Judgment may not apply.
>
> We request the High Court to defer the contempt proceedings till a decision is taken afresh."
>
> (underlined in original)

8. Once the question of grant of interim relief came back to this Court, another co-ordinate Bench by its order dated January 8, 2019 observed that the time to be taken for deciding the application for interim protection would be the same, as would be required for deciding the petition and in view of the same, the learned advocates for the parties had agreed that the matter should be finally heard.

9. Due to the pandemic as well as other reasons, beyond the control of the stakeholders, the writ petition could not be listed for hearing. It has since been listed and finally heard on September 15, 2021 in the physical presence of Mr. Shetty and Mr. Marne, learned advocates for the parties.

SUBMISSIONS OF THE PETITIONERS

10. Referring to the pleaded case of the petitioners before us, it has been urged by Mr. Shetty that the erstwhile Trademarks Registry (Group A & Group B Gazetted Post) Rules, 2000 (hereafter "the RR of 2000", for short) and the Recruitment Rules of 2011 govern appointments on the posts of Examiner of Trade Marks and up to Senior Joint Registrar of Trade Marks. Since Smt. Lalita came to be appointed in 2001, the RR of 2000 was the relevant rule at that point of time. Such appointments in the office of the Controller General of Patents Design and Trade Marks (hereafter "the CGPDTM", for short) are made either by promotion or by direct recruitment through the Union Public Service Commission (hereafter "the UPSC", for short). The posts of 'Examiner of Trade Marks' are created as Non-Plan and Plan posts. Non-Plan posts are regular/permanent posts which are filled up on regular basis as per the RR of 2000 and the salary of those appointed according to the said RR, i.e., the regular Examiners, is paid from "Salary Head". However, the Plan Posts are of two types: (i) temporary posts, which have been created under 'Five-Year Plan' and are filled up through the UPSC on regular basis as

per the RR of 2000 and (ii) contractual posts, created to meet the exigency of work, which are filled up on contract basis by the CGPDTM as per the guidance of the relevant Ministry and without consulting the UPSC, as mandatorily required by the RR of 2000 for appointment on regular basis. The Ministry of Commerce and Industry created 20 posts of Examiners on contract basis vide its letter dated July 27, 2001 for a stipulated period of two years to clear the backlog of examination work under the 9th Five-Year Plan. Therefore, contractual appointments were made by the petitioners and Smt. Lalita was also selected for the post of 'Examiner of Trade Marks' on contract basis after her personal interview, without following the Constitutional scheme of public employment and without following the prescribed procedure for selection mentioned in the RR of 2000. She was offered appointment for a period of two years vide letter dated October 16, 2001, on a consolidated payment of Rs.11,230/- per month, against one of the 20 contractual posts created temporarily. Having accepted the terms and conditions of the offer, Office Order dated November 5, 2011 was issued recording that she was being engaged purely on contract

basis as ‘Examiner of Trade Marks’ with effect from October 31, 2001, initially for a period of six months. From time to time, her appointment was extended and she continued as such. The contractual post on which Smt. Lalita came to be appointed was purely temporary and for specific periods only to meet the exigency of work, and as such filled up only on contract basis without consulting the UPSC, which is a mandatory requirement in terms of the RR of 2000 for appointment on substantive basis. The term ‘contract’ and the limited period stipulated in the offer of appointment clearly denoted that Smt. Lalita’s engagement as an Examiner, on contract, was for the purpose of completion of the examination work which had accumulated in the office of the CGPDTM due to insufficient strength of Examiners. Once the contract period was over, the appointment stood automatically terminated and fresh offer with stipulation of the new period during which the contract would subsist was issued. Since Smt. Lalita had submitted a representation on December 27, 2010 for regularization of her service, the same was duly considered by the Controller and rejected by the order dated March 4, 2011. However, On April 18, 2012, the Ministry again

sanctioned continuation of 27 posts of contract Examiners in the Trade Marks Registry for one year from March 1, 2012. A committee came to be constituted by the Controller vide office order dated May 15, 2012 for assessment of the work performance of all the Examiners, working in the Trademarks Registry on contract and such Committee found her work performance not satisfactory. By an order dated May 16, 2012, the contractual period of service of Smt. Lalita was extended only up to May 31, 2012 and not beyond such date. Smt. Lalita was not alone but two other examiners were also found to be deficient upon assessment of work performance. On May 17, 2012, Smt. Lalita and the two other examiners submitted their representations to the Committee to review its report; unfortunately, the Review Committee did not find any merit in the representations and the same stood rejected. It was at or about this stage that Smt. Lalita moved the Tribunal which allowed her original application, giving rise to this writ petition.

11. In support of his contention that the Tribunal grossly erred in law as well as on facts in granting relief to Smt.

Lalita, Mr. Shetty relied on the decisions of the Supreme Court noted hereunder:

(i) **Secretary, State of Karnataka & Anr. v. Umadevi & Ors**., reported in (2006) 4 SCC 1;

(ii) **State of Punjab & Ors. V. Surinder Kumar & Ors**., reported in AIR 1992 SC 1593;

(iii) **Director, Institute of Management Development, U.P. v. Pushpa Srivastava**, reported in AIR 1992 SC 2070;

(iv) **State of Jammu and Kashmir & Ors. v. District Bar Association**, **Bandipora**, reported in AIR 2017 SC 11;

(v) **Zenit Mataplast P. Ltd. v. State of Maharashtra & Ors**., reported in (2009) 10 SCC 388;

(vi) **State of Haryana v. Suman Dutta**, reported in (2010) 10 SCC 311;

(vii) **Deoraj v. State of Maharashtra & Ors**., reported in AIR 2004 SC 1975;

and

(viii) **M.L. Kesari** (supra).

12. Mr. Shetty, thus, prayed that the judgment and order of the Tribunal be set aside and the original application on its file, presented by Smt. Lalita be dismissed.

SUBMISSIONS OF THE RESPONDENT

13. Appearing on behalf of Smt. Lalita, Mr. Marne, learned advocate contended that she possessed the requisite eligibility criteria for being appointed as an 'Examiner of Trade Marks'

on substantive post, that she was appointed pursuant to the advertisement upon being subjected to a proper selection process and that she is not a backdoor entrant. He further submitted that the post against which Smt. Lalita was appointed was a sanctioned post, yet, there was a direction to fill it up on contract basis. Even otherwise, though the appointment was on contract basis, no contract as such was executed. Smt. Lalita continued as examiner for nearly 10 years and 7 months and the only lacunae in her appointment was the absence of consultation with the UPSC for which she ought not to be faulted. Since the appointment of Smt. Lalita is irregular and not illegal, Smt. Lalita is entitled to be regularized in service having regard to the dictum of the Supreme Court in paragraph 53 of the decision in **Umadevi** (supra).

14. In course of his submission, Mr. Marne urged us to take into consideration the peculiar facts and circumstances of the present case. In the year 2000, the development of Intellectual Property Law in India was in its nascent stage and therefore the RR of 2000 provided for only twenty regular posts of Examiner of Trade Marks, with a rider 'subject to

variation dependent on workload'. Immediately in the next year, i.e., in 2001, the workload increased warranting creation of twenty additional posts. However, since there was urgency, twenty newly created posts were directed to be filled up on contract basis. Smt. Lalita was appointed on one such post. By the time Smt. Lalita approached the Tribunal, the workload only increased and more and more posts of Examiner of Trade Marks were sanctioned from time to time. On March 21, 2002, six out of the twenty posts filled on contract basis were converted into permanent ones, but Smt. Lalita was continued on contract basis. As the law developed further and the workload increased, 414 posts were created in the Trade Marks and Patents registry on 22.10.2008 which included 37 posts of Trade Marks Examiner. Thus, the appointment of Smt. Lalita was against sanctioned post. The Tribunal, after repeatedly recorded its finding about sanctioned posts in the impugned judgement (paragraphs 39 and 44) went on to hold that Smt. Lalita should have been regularized in service having regard to the facts that she possessed the requisite qualifications and was appointed after a thorough selection process.

15. Next, it is contended that in paragraph 55 to 64 of the impugned judgment, the Tribunal has held that Smt. Lalita ought to have been continued in service beyond May 31, 2012 as was done in the case of others. The Tribunal has gone into the records relating to performance of Smt. Lalita produced before it by the petitioners and after perusal of the said record, it was held in paragraph 61 that the performance of Smt. Lalita during 2009-10 was satisfactory and that there was no adverse report for the year 2010-11. It is further held that the decision not to continue the services was taken only on the basis of report for the year 2011-12. It is further held that there is nothing on record to indicate that any warning or caution memo was issued to Smt. Lalita to improve her performance.

16. Finally, it has been contended that three contract employees (named in paragraph 56 of the impugned judgment) including Smt. Lalita were not continued on the pretext of unsatisfactory performance. However, Smt. Lalita demonstrated that after refusal to continue her services, Ms. Yakshi Chauhan was reengaged as contract Examiner in July 2012 and was thereafter appointed through the UPSC as

Temporary Examiner of Trade Marks. It is further demonstrated in paragraph 6 of the affidavit in reply that one Ms. Veena Gokarna was found to have underperformed than Smt. Lalita in the so called assessment but her appointment was extended vide order dated June 7, 2012.

DECISION WITH REASONS

17. Any discussion on the contentious issues would be incomplete without reference to the Constitution Bench decision in **Umadevi** (supra) which marks a watershed moment in the development of law in this country by providing a legal foundation for equality of opportunity in the matter of public employment. We propose to quote below certain paragraphs from such decision to guide our decision-making process. The same read thus:

> "3. A sovereign Government, considering the economic situation in the country and the work to be got done, is not precluded from making temporary appointments or engaging workers on daily wages. Going by a law newly enacted, the National Rural Employment Guarantee Act, 2005, the object is to give employment to at least one member of a family for hundred days in a year, on paying wages as fixed under that Act. But, a regular process of recruitment or appointment has to be resorted to, when regular vacancies in posts, at a particular point of time, are to be filled up and the filling up of those vacancies cannot be done in a

haphazard manner or based on patronage or other considerations. Regular appointment must be the rule.

4. But, sometimes this process is not adhered to and the constitutional scheme of public employment is bypassed. 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. It is time, that the courts desist from issuing orders preventing regular selection or recruitment at the instance of such persons and from issuing directions for continuance of those who have not secured regular appointments as per procedure established. The passing of orders for continuance

tends to defeat the very constitutional scheme of public employment. It has to be emphasised that this is not the role envisaged for the High Courts in the scheme of things and their wide powers under Article 226 of the Constitution are not intended to be used for the purpose of perpetuating illegalities, irregularities or improprieties or for scuttling the whole scheme of public employment. Its role as the sentinel and as the guardian of equal rights protection should not be forgotten.

12. In spite of this scheme, there may be occasions when the sovereign State or its instrumentalities will have to employ persons, in posts which are temporary, on daily wages, as additional hands or taking them in without following the required procedure, to discharge the duties in respect of the posts that are sanctioned and that are required to be filled in terms of the relevant procedure established by the Constitution or for work in temporary posts or projects that are not needed permanently. This right of the Union or of the State Government cannot but be recognised and there is nothing in the Constitution which prohibits such engaging of persons temporarily or on daily wages, to meet the needs of the situation. But the fact that such engagements are resorted to, cannot be used to defeat the very scheme of public employment. Nor can a court say that the Union or the State Governments do not have the right to engage persons in various capacities for a duration or until the work in a particular project is completed. Once this right of the Government is recognised and the mandate of the constitutional requirement for public employment is respected, there cannot be much difficulty in coming to the conclusion that it is ordinarily not proper for the Courts whether acting under Article 226 of the Constitution or under Article 32 of the Constitution, to direct absorption in permanent employment of those who have been engaged without following a due process of selection as envisaged by the constitutional scheme.

14. During the course of the arguments, various orders of the courts either interim or final were brought to our notice. The purport of those orders more or less was the issue of directions for continuation or absorption without referring to the legal position obtaining. Learned counsel for the State of Karnataka submitted that chaos has been created by such orders without reference to the legal principles and it is time that this Court settled the law once and for all so that in case the Court finds that such orders should not be made, the courts, especially, the High Courts would be precluded from issuing such directions or passing such orders. The submission of learned counsel for the respondents based on the various orders passed by the High Court or by the Government pursuant to the directions of the Court also highlights the need for settling the law by this Court. The bypassing of the constitutional scheme cannot be perpetuated by the passing of orders without dealing with and deciding the validity of such orders on the touchstone of constitutionality. While approaching the questions falling for our decision, it is necessary to bear this in mind and to bring about certainty in the matter of public employment. The argument on behalf of some of the respondents is that this Court having once directed regularisation in *Dharwad case [(1990) 2 SCC 396]* all those appointed temporarily at any point of time would be entitled to be regularised since otherwise it would be discrimination between those similarly situated and in that view, all appointments made on daily wages, temporarily or contractually, must be directed to be regularised. Acceptance of this argument would mean that appointments made otherwise than by a regular process of selection would become the order of the day completely jettisoning the constitutional scheme of appointment. This argument also highlights the need for this Court to formally lay down the law on the question and ensure certainty in dealings relating to public employment. The very divergence in approach in this Court, the so-called equitable approach made in some, as against those decisions which have insisted on the rules being followed, also justifies a firm decision by

this Court one way or the other. It is necessary to put an end to uncertainty and clarify the legal position emerging from the constitutional scheme, leaving the High Courts to follow necessarily, the law thus laid down.

43. Thus, it is clear that adherence to the rule of equality in public employment is a basic feature of our Constitution and since the rule of law is the core of our Constitution, a court would certainly be disabled from passing an order upholding a violation of Article 14 or in ordering the overlooking of the need to comply with the requirements of Article 14 read with Article 16 of the Constitution. Therefore, consistent with the scheme for public employment, this Court while laying down the law, has necessarily to hold that unless the appointment is in terms of the relevant rules and after a proper competition among qualified persons, the same would not confer any right on the appointee. If it is a contractual appointment, the appointment comes to an end at the end of the contract, if it were an engagement or appointment on daily wages or casual basis, the same would come to an end when it is discontinued. Similarly, a temporary employee could not claim to be made permanent on the expiry of his term of appointment. It has also to be clarified that merely because a temporary employee or a casual wage worker is continued for a time beyond the term of his appointment, he would not be entitled to be absorbed in regular service or made permanent, merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant rules. It is not open to the court to prevent regular recruitment at the instance of temporary employees whose period of employment has come to an end or of ad hoc employees who by the very nature of their appointment, do not acquire any right. The High Courts acting under Article 226 of the Constitution, should not ordinarily issue directions for absorption, regularisation, or permanent continuance unless the recruitment itself was made regularly and in terms of the constitutional

scheme. Merely because an employee had continued under cover of an order of the court, which we have described as 'litigious employment' in the earlier part of the judgment, he would not be entitled to any right to be absorbed or made permanent in the service. In fact, in such cases, the High Court may not be justified in issuing interim directions, since, after all, if ultimately the employee approaching it is found entitled to relief, it may be possible for it to mould the relief in such a manner that ultimately no prejudice will be caused to him, whereas an interim direction to continue his employment would hold up the regular procedure for selection or impose on the State the burden of paying an employee who is really not required. The courts must be careful in ensuring that they do not interfere unduly with the economic arrangement of its affairs by the State or its instrumentalities or lend themselves the instruments to facilitate the bypassing of the constitutional and statutory mandates.

44. ***

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

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

46.***

47. When a person enters a temporary employment or gets engagement as a contractual or casual worker and the engagement is not based on a proper selection as recognised by the relevant rules or procedure, he is aware of the consequences of the appointment being temporary, casual or contractual in nature. Such a person cannot invoke the theory of legitimate expectation for being confirmed in the post when an appointment to the post could be made only by following a proper procedure for selection and in cases

concerned, in consultation with the Public Service Commission. Therefore, the theory of legitimate expectation cannot be successfully advanced by temporary, contractual or casual employees. It cannot also be held that the State has held out any promise while engaging these persons either to continue them where they are or to make them permanent. The State cannot constitutionally make such a promise. It is also obvious that the theory cannot be invoked to seek a positive relief of being made permanent in the post.

48. It was then contended that the rights of the employees thus appointed, under Articles 14 and 16 of the Constitution, are violated. It is stated that the State has treated the employees unfairly by employing them on less than minimum wages and extracting work from them for a pretty long period in comparison with those directly recruited who are getting more wages or salaries for doing similar work. The employees before us were engaged on daily wages in the department concerned on a wage that was made known to them. There is no case that the wage agreed upon was not being paid. Those who are working on daily wages formed a class by themselves, they cannot claim that they are discriminated as against those who have been regularly recruited on the basis of the relevant rules. No right can be founded on an employment on daily wages to claim that such employee should be treated on a par with a regularly recruited candidate, and made permanent in employment, even assuming that the principle could be invoked for claiming equal wages for equal work. There is no fundamental right in those who have been employed on daily wages or temporarily or on contractual basis, to claim that they have a right to be absorbed in service. As has been held by this Court, they cannot be said to be holders of a post, since, a regular appointment could be made only by making appointments consistent with the requirements of Articles 14 and 16 of the Constitution. The right to be treated equally with the other employees employed on daily wages, cannot be extended to a claim for equal treatment with those who were regularly employed.

That would be treating unequals as equals. It cannot also be relied on to claim a right to be absorbed in service even though they have never been selected in terms of the relevant recruitment rules. The arguments based on Articles 14 and 16 of the Constitution are therefore overruled.

52. Normally, what is sought for by such temporary employees when they approach the court, is the issue of a writ of mandamus directing the employer, the State or its instrumentalities, to absorb them in permanent service or to allow them to continue. In this context, the question arises whether a mandamus could be issued in favour of such persons. At this juncture, it will be proper to refer to the decision of the Constitution Bench of this Court in *Rai Shivendra Bahadur (Dr.)* v. *Governing Body of the Nalanda College (AIR 1962 SC 1210)*. That case arose out of a refusal to promote the writ petitioner therein as the Principal of a college. This Court held that in order that a mandamus may issue to compel the authorities to do something, it must be shown that the statute imposes a legal duty on the authority and the aggrieved party had a legal right under the statute or rule to enforce it. This classical position continues and a mandamus could not be issued in favour of the employees directing the Government to make them permanent since the employees cannot show that they have an enforceable legal right to be permanently absorbed or that the State has a legal duty to make them permanent.

53. One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in *S.V. Narayanappa (AIR 1967 SC 1071)*, *R.N. Nanjundappa [(1972) 1 SCC 409]* and *B.N. Nagarajan [(1979) 4 SCC 507]* 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 abovereferred to and in the light of this judgment. In that context, the Union of India, the State Governments and their instrumentalities should take steps to 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."

18. Despite the law on regularization having been authoritatively laid down by the Constitution Bench in **Umadevi** (supra), a Division Bench of two Judges of the Supreme Court struck a somewhat discordant note in **Uttar Pradesh State Electricity Board vs. Pooran Chandra Pandey**, reported in (2007) 11 SCC 92. Not too long thereafter, a Bench of three Judges in **Official Liquidator vs. Dayanand**, reported in (2008) 10 SCC 1, considered the permissibility of the attempt in **Pooran Chandra Pandey** (supra) to dilute the binding effect of **Umadevi** (supra) and remedied the situation by declaring that the decision in

Pooran Chandra Pandey (supra) should neither be treated as binding by any fora nor should it be relied upon or made the basis for bypassing the principles laid down in **Umadevi** (supra). It was also held that the decision in **Umadevi** (supra), by virtue of Article 141 of the Constitution, is binding on all courts including the Supreme Court till it is overruled by a larger bench. **Umadevi** (supra) was again followed by a three-Judge Bench in **Renu vs. District and Sessions Judge**, reported in (2014) 14 SCC 50. It was emphasized that all appointments, even by the Chief Justices of the High Courts, ought to be made on the touchstone of equality of opportunity which is the cornerstone of the Constitution and under no circumstances should illegal/irregular appointments in the judiciary be saved.

19. This being the sound exposition of law by the Supreme Court, let us now take note of how the Tribunal addressed the issue before it. It did take note of **Umadevi** (supra) but not **Dayanand** (supra) and **Renu** (supra). We do not for a moment take exception to non-consideration of the last two decisions since the same may not have been placed before

the Tribunal. However, paragraphs 46 and 47 of the Tribunal's decision being relevant are quoted below:

> "46. In **Umadevi's** case referred supra, the concept of appointment regularization for permanent continuance of temporary, contractual, casual, daily wage or ad hoc employee appointed/recruited and continued for long in public employment was considered. It is clearly held that merely because an employee had continued under cover of an order of the Court, under litigious employment or had been continued beyond term of his appointment he would not be entitled to any right to be absorbed or made permanent in service, merely on the strength of such continuance, if the original appointment was not made by following due process of selection as envisaged by the relevant rules. It is however not open to the Court to prevent regular recruitment at the instance of such employees.
>
> 47. It is, thus, obvious that the persons who are employed without following selection process and as back door entrant have no right to claim regularization in service. In the present case the applicant cannot be said to be back door entrant since she was appointed by following due process and in temporary sanctioned post of Examiner of Trade Marks. Hence it cannot be said that by virtue of the decision in the **Umadevi's** case a request of the applicant for regularization cannot be considered."

20. What weighed with the Tribunal is that Smt. Lalita was not appointed on a post which was unsanctioned and also that she went through a regular selection process. However, there is an apparent fallacy in the Tribunal's reasoning which we

propose to point out hereunder by first taking note of certain basic principles of service jurisprudence.

21. **Union of India vs. Tulsiram Patel**, reported in (1985) 3 SCC 398, is the authority for the proposition that the origin of government services is contractual, since there is an offer and acceptance in every case; however, once appointed to his post or office, the government servant acquires a status and his rights and obligations are no longer determined by the consent of both the parties, but by the statute or statutory rules, as framed, and unilaterally altered by the Government. In other words, the legal position of a government servant is more of status than that of contract.

22. Is it the law that all appointments made by the Government, having its origin in contracts, result in acquisition of a status by the appointees? The answer is 'no'. The law laid down in **Tulsiram Patel** (supra) would apply to a permanent employee, who by reason of appointment acquires a right to post and hence would be entitled to Constitutional and statutory safeguards in relation to his service. Also, temporary employees ~ to the extent their conditions of service are regulated by statutory rules framed in exercise of

the power conferred by the proviso to Article 309 of the Constitution ~ could also claim protection of such rules. However, those like Smt. Lalita, who are appointed on the specific agreement that they are being engaged on contractual basis, would continue in service till such time the contract subsists and on renewal thereof, till its validity.

23. To acquire a right to post, it is imperative that the appointee is recruited according to law ~ meaning thereby, that (i) he is eligible, as per recruitment rules, to offer his candidature for selection and consequent appointment on a post that is appropriately advertised, (ii) he is made to face a selection process conducted by the authority constituted therefor; and (iii) upon his selection, he is appointed on a duly sanctioned post, and thereafter, confirmed in service after the period of probation, if any. It is bearing in mind these imperatives of a valid appointment that one needs to proceed to decide a claim for regularization in service which, as the Supreme Court has time and again observed, is not and cannot be a source of recruitment.

24. Nowadays, the expression 'back-door entrant' has become synonymous with public appointments not made

legally. However, the expression 'front-door entrant' for an appointee who is validly appointed in public service is not usually used; understandably so, because appointments made according to law in public service conforming to Constitutional principles of equality in matters of public employment speak for themselves and are not part of 'litigious employment' deserving any castigation.

25. Be that as it may, a claim for regularization could arise for consideration if, despite the appointee fulfilling three conditions : viz. first, he satisfies the eligibility criteria for appointment; secondly, he has faced a process of selection which, though not illegal, can at best be viewed as irregular; and thirdly, despite there being a sanctioned post on which he could have been appointed on substantive basis is not so appointed, but is engaged either on an *ad hoc* or casual or temporary basis, or even on a contract, and continues for years together, with the ill-motive to deny him the Constitutional/statutory safeguards. These being the tests, it is necessary to examine how far Smt. Lalita succeeded in setting up a claim for regularization in service.

26. As has been noted above, contractual posts were created by the relevant Ministry to meet the exigency arising out of huge load of applications requiring examination which was not possible with the available strength of staff. No doubt, posts for making contractual appointments were sanctioned but they were not required to be filled up following the same process by which the permanent posts in the office of the CGPDTM were required to be filled up in terms of the RR of 2000 upon consultation with the UPSC or on its advice. Since such consultation or advice was not required for filling up the contractual posts, obviously the question of considering Smt. Lalita for appointment was never considered by the UPSC. It could not have been and, in fact, has not been disputed before us that Smt. Lalita in her original application prayed that her case ought to be referred to the UPSC by the Controller. She was, therefore, aware that consultation with the UPSC or having its advice was a *sine qua non* for her appointment on substantive basis. The Tribunal, in spite of a prayer made by Smt. Lalita for a direction upon the Controller to refer her case to the UPSC, straight away directed her regularization in service which

appears to be plainly illegal. This is one ground for which we propose to interfere.

27. The second ground is this. Smt. Lalita contended with success before the Tribunal that since the post on which she came to be appointed was a sanctioned post and she had faced a process of selection prior to her engagement on contract, her entry in service can by no stretch of imagination be called a back-door entry. Admittedly, she was not required to face the selection process of the UPSC since she was being considered for a contractual post and engagement on such contractual posts was beyond the scope of the RR of 2000. Smt. Lalita may not have sneaked in through the back-door; in fact, we would go to this extent of holding that she did enter service in the office of the CGPDTM through the front-door, to the notice of all and sundry, with such door being completely ajar but for a contractual post (a plan-post) and not for appointment on any of the non-plan posts. What was required for appointment on a plan-post may have been complied with but we cannot accept that the process in which Smt. Lalita participated could be a real substitute for the process conducted by the UPSC for filling up non-plan posts.

Not much can, thus, be gained by her with reference to the selection process in which she participated because of the simple reason that the post was different which necessitated a different selection process. The Tribunal, in our opinion, missed the trees for the woods.

28. There is a third ground for interference; and, that is referable to Mr. Marne's contention that Smt. Lalita was appointed on a sanctioned post albeit on contract. The advertisement to which Smt. Lalita responded was a clear representation to the public that applications were being invited from eligible candidates to fill up contractual posts. No promise was held out that those selected and appointed on contract would ultimately be considered for substantive appointment by dint of their performance or tenure in the office of the CGPDTM. There could be candidates having equal or better qualifications than Smt. Lalita but who may have decided against offering their candidature noticing that the Controller proposed to make appointments on contract only for a short period and that there was no rule which permitted contractual appointees to be granted permanence in service. If indeed, Smt. Lalita's service is to be regularized on the

grounds urged by her, which were neither part of the recruitment rules nor the advertisement, the aggrieved would be all those who had equal or even better qualifications than Smt. Lalita but might not have applied for the post because, firstly, they were not interested in any short time appointment on contract, which has no security of service, and secondly, there was no promise held out that the contractual appointees could subsequently stake a claim for regularization based on continuous contractual service. If regularization as claimed by Smt. Lalita is allowed, that would amount to a fraud on public, running counter to the advertisement itself being a representation to the public inviting applications for appointment on contract and no Court, far less this Court, should be a party to it.

29. We are, at this stage, reminded of the decision of the Supreme Court in **District Collector & Chairman, Vizianagaram Social Welfare Residential School Society vs. M. Tripura Sundari Devi**, reported in (1990) 3 SCC 655. Paragraph 6 contains an instructive passage on appointments made in disregard of an advertisement on a public post, reading thus:

> "6. It must further be realised by all concerned that when an advertisement mentions a particular qualification and an appointment is made in disregard of the same, it is not a matter only between the appointing authority and the appointee concerned. The aggrieved are all those who had similar or even better qualifications than the appointee or appointees but who had not applied for the post because they did not possess the qualifications mentioned in the advertisement. It amounts to a fraud on public to appoint persons with inferior qualifications in such circumstances unless it is clearly stated that the qualifications are relaxable. No court should be a party to the perpetuation of the fraudulent practice. We are afraid that the Tribunal lost sight of this fact."

Given the present circumstances, it would amount to a subversion of the rule of law (which we are bound by our oath to uphold) if the order of the Tribunal were left untouched.

30. What remains is dealing with the decisions cited by Mr. Marne.

31. **M.L. Kesari** (supra) after considering paragraph 53 of **Umadevi** (supra) held that the 'one-time measure' referred to therein must be considered as concluded only when all the employees who were entitled for regularization had been considered. For the reasons we have assigned above, Smt. Lalita cannot be held entitled to regularization and hence the decision in **M.L. Kesari** (supra) is of no assistance to her.

Incidentally, the Supreme Court in its order dated March 19, 2018 (supra) recorded *prima facie* satisfaction that **M.L. Kesari** (supra) may not apply here. We respectfully share such opinion while recording our conclusive view on its applicability.

32. Paragraph 20 of the decision in **Union of India vs. Central Administrative Tribunal**, reported in (2019) 4 SCC 290, was relied on by Mr. Marne. We reproduce the same hereunder:

> "20. The judgment of this Court in *Umadevi (3)* does not preclude the claims of employees who seek regularisation after the exercise has been undertaken with respect to some employees, provided that the said employees have completed the years of service as mandated by *Umadevi (3).* The ruling casts an obligation on the State and its instrumentalities to grant a fair opportunity of regularisation to all such employees which are entitled according to the mandate under *Umadevi (3)* and ensure that the benefit is not conferred on a limited few. The subsequent regularisation of employees who have completed the requisite period of service is to be considered as a continuation of the one-time exercise."

This decision emphasizes on fair opportunity to all who are entitled to be regularized. Once again, Smt. Lalita not being entitled to regularization, as held above, cannot claim any benefit of this decision.

33. Since **Narendra Kumar Tiwari vs. State of Jharkhand**, reported in (2018) 8 SCC 238, has also been relied on by Mr. Marne, we have considered it. In paragraph 7, the Court clearly held that the purpose and intent of **Umadevi** (supra) was twofold, namely, to prevent irregular and or illegal appointments in future and secondly, to confer a benefit on those irregularly appointed in the past. We have failed to comprehend how this decision would help Smt. Lalita. As on date of pronouncement of the decision in **Umadevi** (supra), i.e., April 10, 2006, Smt. Lalita had not completed even six years of service. The direction in paragraph 53 of extending an opportunity to irregular but duly qualified appointees working on duly sanctioned posts was made keeping in mind those, who without intervention of Court, had worked for ten years or more. Such direction cannot apply to those who had not worked for ten years or more as on April 10, 2006. It was never the intention of the Court to permit even those, who had not completed at least ten years, to be considered for regularization, after completing the balance period.

34. The decision in **Sachin Ambadas Dawale vs. State of Maharashtra**, reported in 2014(2) Mh.L.J. 36, has been considered in a subsequent Division Bench decision in **Mahesh Madhukar Wagh vs. State of Maharashtra and Ors.,** reported in 2019 (6) Mh. L. J. 8. Hon'ble B.R. Gavai, J. (as His Lordship then was) after extracting relevant passages from the decision in **Umadevi** (supra) observed therein as follows:

> "14. It could thus be seen that the Hon'ble Supreme Court has clearly held that theory of legitimate expectation cannot be successfully advanced by temporary, contractual or casual employees. It cannot be held that the State had held out any promise while engaging these persons either to continue them or to make them permanent. It has been equally held that there is no fundamental right in those who have been employed on daily wages or temporary or contractual basis to claim that they have a right to be absorbed in service. It has been held that a regular appointment could be made only by making appointments consistent with the requirement of Articles 14 and 16 of the Constitution. The employees appointed on contractual or temporary basis cannot claim to be treated equally with those who are regularly employed. It has been held in an unequivocal terms that the mandamus could not be issued in favour of employees, directing Government to make them permanent since the employees, not selected through regular selection process, cannot have a legal right to be permanently absorbed."

Before concluding, His Lordship lamented that the decision in **Sachin Ambadas Dawale** (supra) was being widely

misquoted and that such decision was rendered in a different fact situation. Since His Lordship was a member of the Division Bench that decided the case, it had become necessary to give an elaborate reasoning.

35. In view thereof, the decision in **Sachin Ambadas Dawale** (supra) must be held to be a decision which turns on its own facts.

CONCLUSION

36. In the result, we find the judgment and order of the Tribunal indefensible. The same stands set aside. The original application before the Tribunal shall stand dismissed. The writ petition is allowed. No costs.

37. However, we grant liberty to Smt. Lalita to participate in any process of recruitment of examiner in the CGPDTM for appointment on substantive basis pursuant to any advertisement that may be issued and if she otherwise satisfies the eligibility criteria, she may be considered for recruitment condoning her age bar, if any.

(M. S. KARNIK, J.) **(CHIEF JUSTICE)**