## IN THE HIGH COURT FOR THE STATES PUNJAB & HARYANA AT CHANDIGARH

1.	LPA No.1746 of 2012 (O&M)  Date of Decision: February 28, 2013	
State of Haryana and	others	Appellants
	Versus	
Channi		Respondent
2.	LPA No.2024	of 2012(O&M)
The State of Haryana	and others	Appellants
	Versus	
Zile Singh and ors.		Respondents
3.	LPA No.2131	of 2012 (O&M)
The State of Haryana	and others	Appellants
	Versus	
Vijay Kumar and othe	ers	
		Respondents
4.	LPA No. 347	of 2010 (O&M)
The Haryana State Kh	nadi and Village In	dustries Board and another Appellants
Versus		
Jatinder Kumar		Respondent

Present: Mr.Kulvir Narwal, Addl. A.G., Haryana for

appellants in all appeals except LPA-347-

2010

Mr.Siddharth Batra, Advocate for the

appellants in LPA-347-2010

Mr. Deepak Sonak, Advocate for the respondents in LPA Nos.1746, 2024 & 2131

of 2012

Mr. N.D. Achint, Advocate for the respondent

in LPA-347-2010

CORAM: HON'BLE MR.JUSTICE A.K. SIKRI, CHIEF JUSTICE

HON'BLE MR. JUSTICE RAKESH KUMAR JAIN, JUDGE

A.K. SIKRI, C.J.

1. Delay condoned.

2. This common judgment shall disposed of above-mentioned

four appeals involving identical questions of fact and law. For

facility of reference, the facts are noticed from LPA No.1746 of

2012.

3. By impugned judgment dated July 09, 2012, the learned

single Judge had decided three writ petitions. Allowing these

petitions, the learned single Judge directed regularisation of the

services of the respondents herein from the date their juniors have

been regularised. The reason for deciding all the writ petitions by

common order was the similarity of facts as well as legal principles

involved. For the sake of convenience, the learned single Judge had

taken note of facts from CWP-133-2008, out of which the LPA-1746-

2012 arises. It is for this reason that this appeal was treated a lead case and we also propose to take note of material facts therefrom which are necessary to adjudicate the controversy in question.

- 4. The State of Haryana had framed policies for regularisation of daily-wage employees which are dated 7.3.1996, 18.3.1996 and 1.10.2003. As per the respondent, she became entitled to regularisation in terms of policy dated 1.10.2003, more so when her juniors were regularized from that date. As she was not given this relief, she filed CWP-6699-2005 in this Court. In this writ petition, orders dated 20.10.2005 were passed, observing that the claim of the respondent was covered by the judgment of Division Bench of this Court in **Kavita Gandhi** vs. **State of Haryana and others**, **1997(4) RSJ 760** and **Tek Chand** vs. State of Haryana 2002(1) SCT 308. In those judgments, the Division Bench had taken the view that any three years' service would be relevant under the policy dated 1.10.2003 for considering the cases of employees for the purpose of regularisation of services and it was not mentioned specifically that the three years preceding the cut-off date would have to be taken into consideration for the said purpose. The Division Bench, thus, directed for consideration of the case of the respondent in the light of aforesaid decisions, while disposing of the writ petition of the respondent on 20.10.2005.
- 5. The matter was considered by the appellants and the Divisional Forest Officer passed orders dated 28.2.2006 wherein it was accepted that the respondent was entitled for regularisation.

However, the order further stated that necessary order of regularisation would be issued after the creation of Group-D posts by the competent authority, regularising her services with effect from 1.10.2003. No formal order or regularisation could be passed in the absence of any Group-D post available and no posts were created either.

- 6. While the case of the respondent was pending, awaiting the creation of Group-D posts, the Constitution Bench of the Supreme Court rendered decision, deciding the thorny issue of regularisation of the services of daily-wage/ad hoc employees in the case of Secretary, State of Karnataka & Ors. Vs. Uma Devi & Ors. (2006) 4 SCC 1. This order came to be passed on 10.4.2006 wherein the Court held that there was no right of regularization in law in favour of such daily-wage employees. Acting on the dicta laid down therein, the Divisional Forest Officer passed orders dated 15.6.2007, rejecting the case of the respondent for regularisation.
- 7. The respondent challenged this order by filing the aforesaid writ petition, inter alia, pointing out that even after the judgment of the Supreme Court in <u>Uma Devi</u> (supra), a large number of persons junior to the respondent and belonging to the same department as the respondent, were regularised and orders dated 6.7.2007 were passed by the appellants in this behalf. On that basis it was contended that benefit of regularisation could not be denied to the respondent when even juniors to her were regularised as, otherwise, it would amount to hostile and invidious discrimination. The learned

single Judge has set aside the orders dated 15.6.2007vide which case of the respondent for regularisation was rejected on the basis of Supreme Court judgment in <u>Uma Devi</u> (supra). Two reasons can be discerned from the impugned judgment, namely:

(a) the plea based on the judgment in <u>Uma Devi</u> (supra) would not be sustainable in the light of the earlier Division Bench judgments dated 20.10.2005 in CWP-6699-2005 filed by the respondent herself, more so when pursuant to the orders passed, the claim of the respondent had been virtually allowed vide order dated 28.2.2006 by the respondents themselves, accepting that her services were to be regularised after creation of Group-D posts by the competent authority

Nothing had come on record which would suggest that process of creation of posts had been initiated or the said process had ended in non-creation of the said posts;

- (ii) Even after the judgment in <u>Uma Devi</u> (supra) rendered on 10.4.2006, the appellants had regularised 16 persons who were all junior to the respondent. These regularisations took place under the 2003 Policy. Therefore, declining to regularize the respondent's services would amount to discrimination and violation of Articles 14 and 16 of the Constitution.
- 8. Mr. Narwal, learned Additional Advocate General, appearing for the appellants submitted that earlier orders dated 20<sup>th</sup> October, 2005 passed by the Division Bench in CWP-6699-2005 was of no

avail, as only direction given in the case was to consider the case of the respondent on the ground that services of any three years would be relevant under the policy and not necessarily three years service preceding the cut-off date mentioned in the policy of 2003. further submitted that no doubt the Divisional Forest Officer took the view that respondent was entitled to regularisation in terms of 2003 Policy, but there could not be any regularisation without creation of posts. Thus, no formal order of regularisation was issued. In the meantime, judgment of the Supreme Court in <u>Uma Devi</u> (supra) was pronounced and pursuant thereto, policy of regularisation stood withdrawn. It was, thus, incumbent upon the appellants to act on the basis of that judgment and not to grant any regularisation to the respondent. The rejection order dated 15.6.2007 was, therefore, a valid order. It was further submitted that in case of daily-wager, there was no question of any junior or senior as the concept of seniority is unavailable. Also argued that the learned single Judge failed to consider the fact that respondent does not come within the purview of 53 advertised posts of Mali as the posts were cadre posts and were not meant for daily-wagers. The respondent does not even fulfil the basic terms and conditions for appointment to the post of Mali. Thus, in no case, the respondent could be regularized, more so when even the initial appointment of the respondent was not as per rules and no appointment letter was issued to her.

9. The learned counsel for the respondent, on the other hand, submitted that the Division Bench of this Court had denied the relief

on the same grounds, following <u>Uma Devi's</u> case (supra), vide orders dated 10.9.2007 passed in CWP No.14001 of 2007 this order was carried in appeal to the Supreme Court and the Supreme Court allowed the appeal vide its orders dated 14.9.2010, directing the State of Haryana to give all service benefits to the writ petitioners. It is further submitted that it was because of the reason that in <u>Uma Devi</u> (supra) itself, the Supreme Court had observed that those cases where regularisation has already been done, will not be reopened. The learned counsel for the respondent also vehemently argued that appellants could not blow hot and cold and act as per their convenience, inasmuch as, while the case of the respondent for regularization was rejected, at the same time, even after <u>Uma Devi</u> (supra), the appellants had passed order of regularisation in 16 cases. The respondent was thus, clearly discriminated against, as was held by the learned single Judge as well.

- 10. We have given due consideration to the submissions made by learned counsel for the parties.
- 11. At the outset, we would like to point out that the effect of Constitution Bench judgment of the apex court in the case of <u>Uma Devi</u> (supra) and how the cases are now to be dealt with has been explained by a Division Bench of this Hon'ble Court in its judgment on 25.4.2006 in CWP-7563-2005 titled as <u>Rajinder Kumar</u> vs. <u>State of Haryana</u>. The laborious exercise undertaken in the said Division Bench judgment has made our task easier, insofar as impact of <u>Uma Devi</u> (supra) is concerned. A perusal of that judgment of the Division

Bench in <u>Rajinder Kumar's</u> case (supra) would show that it has noticed the fundamental distinction between 'illegality and irregularity' and that rule of equality in public is a basic feature of our Constitution. This view can be found in Para-3 of the judgment in <u>Uma Devi</u> (supra) which reads as under:-

"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. High Courts acting under Article 226 of the Constitution of India, should not ordinarily issue directions for absorption, regularization, or permanent continuance unless the recruitment itself was made regularly and in terms of the constitutional scheme....."

The Constitution Bench in <u>Uma Devi</u> (supra) took the view that no mandamus can be issued to legalise which was initially not

permissible by the Constitution or the Rules of Service regulating the recruitment. In other words, the employees, who have entered into service on ad hoc basis for a period of 89 days, as a daily-wager or on contract basis or by any other mode not supported by the basic feature of the Constitution as enshrined under Article 14 and 16(1) of the Constitution, would not be entitled to seek the equitable relief of regularisation because it would amount to condoning the violation of the basic feature of the Constitution. Moreover, an employee who has been engaged either on temporary basis or casual basis or on contract basis, is fully aware what he has accepted and, therefore, he has no legitimate expectation to continue in service the way a regularly recruited employee would expect. The fine distinction made by the Constitution Bench in Uma Devi (supra) between illegal and irregular appointments needs a special mention. The Supreme Court held it is mandatory that the posts are advertised by the competent authority/the State or authorized selection body. After considering all the competing claims in accordance with the criteria which answers the requirement of Articles 14 and 16(1) of the Constitution, the candidates are required to be selected and then appointed to the post. Any entry into service by a method contrary to the provisions of Articles 14 and 16(1) of the constitution have been considered to be illegal. (see para 15 and 53 of that judgment).

12. Thus, if the appointment made is in infraction of the rules or any violation of the Constitution, it would be treated as illegal appointment and such an illegal appointment cannot be regularized.

Regularisation is possible only when the appointment was in accordance with the rules and within the power and province of the authority. But, there has been some non-compliance of the procedure or manner which does not go to the root of the appointment. In such a case, it would be an irregular appointment. Commenting upon these irregular appointments and clarifying the position in this behalf, the Supreme Court observed as under in Para-53 of that judgment:

"One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in S.V. Narayanappa (supra), R.N. Nanjundappa (supra), and B.N. Nagarajan (supra), and referred to in paragraph 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 courts or of tribunals. The question of regularization 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 regularize 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 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 regularization, if any already made, but not subjudice, need not be reopened based on this judgment, but there should be no further by-passing of the constitutional requirement and regularizing or making permanent, those not duly appointed as per the constitutional scheme."

13. After taking note of the aforesaid ratio in <u>Uma Devi</u> (supra), the Division Bench in <u>Rajinder Kumar's</u> case (supra) rejected the

prayer of regularisation on the ground that initial appointment to the post of Water-Pump Operator, Grade-II, which is a Group-C post, was not in accordance with the procedure envisaged by the rules, inasmuch as, such an entry into service itself has been held to be against the basic structure of Constitution, as envisaged by Articles 14 and 16(1) of the Constitution. The Division Bench, thus, specifically rejected the contention holding that no right had accrued in favour of the petitioner in that case on completing three years of service on the specified date i.e. 30.9.2003, as laid down in the policy of regularisation dated 1.10.2003. We would like to reproduce the following pertinent observations of the Division Bench in Rajinder Kumar's case (supra), in that behalf:

"In view of the above, we have no hesitation to observe that the policy of regularisation issued under Article 309 of the Constitution dated 1.10.2003 or any other such policy would not confer an enforceable right on the employees for the purpose of regularisation. The benefits already acquired pursuant to the said policies and schemes would remain un-effected.

In view of the principles laid in the aforementioned judgments, we are unable to condone the violation of basic features of the Constitution because various policies and the rules framed by the State permit regularisation as a mode of recruitment at the cost of those who are fully qualified and unable to exert any influence to gain back door entry into service. It is not possible to accept the argument that the mode of recruitment while entry into service cannot be taken into consideration at the time of regularisation as ample time has passed, mainly because it would be unjust and unfair. For satisfying the basic features of the Constitution as envisaged under Articles 14 and 16(1) this would be a small price to be paid and the people of the country who are fully entitled to be considered for regular recruitment should not be deprived of their right of consideration by competing with those who have grabbed the Government employment through back door entries.

Their fundamental rights to be considered for, public employment, which has been held to be basic structure of the Constitution, must be upheld. On the altar of the policy of regularisation issued either under Article 162 or any rule framed under proviso to Article 309 such type of back door entrant cannot seek regularisation of his service from the Courts. Therefore, on the basis of such policies or rules no writ of mandamus could be issued because, at the first place no right would accrue in favour of the petitioners, which could be enforced by the issuance of a writ in the nature of mandamus."

- 14. Having regard to the aforesaid dicta, when the initial appointment of the respondent itself was without following the rules, as she does not fulfil the eligibility conditions for the post of Mali, the order of regularisation cannot be passed in her case.
- 15. Insofar as argument of discretion is concerned, based on the ground that orders of regularisation have been passed even after the judgment of <u>Uma Devi</u> (supra) and others and juniors have been regularized, that stands answered by the aforesaid judgment itself. As far as regularising some persons even after the judgment in <u>Uma Devi</u> (supra) is concerned, this exercise is perhaps undertaken because of the direction contained in Para-53 of the judgment in <u>Uma Devi</u> (supra) to regularize the services of such irregularly appointed who have worked for 10 years or more in duly sanctioned posts. Directions in this behalf were given by the Division Bench even in <u>Rajinder Kumar's</u> case (supra), as is clear from the concluding para of the said judgment, to the following effect:

"We would be failing in our constitutional obligations in case we do not reiterate the directions of the Hon'ble Supreme Court in Umadevi's case. Giving a respite to the irregular appointments (no illegal appointments) of duly qualified persons in duly sanctioned vacant posts which might have

already been made and the employees having continued to work for 10 years or more with the intervention of the orders of the Court or Tribunals. The question of regular appointment of such employees may have to be considered on merits in the light of the principles settled by the Hon'ble Supreme Court in Umadevi's case (supra). The directions issued in para 53 of the judgment are that the State Government and their instrumentalities may take steps to regularise the services of such irregularly appointed persons who have worked for 10 years or more in duly sanctioned posts. It has further been directed by the Supreme Court that the process of regular recruitment be undertaken to fill up those sanctioned posts where temporary or daily wagers are being now employed. The process must be set in motion within six months from the date of judgment, which is 10.4.2006, in Umadevi's case (supra). Accordingly, we direct the respondent - State of Haryana to ensure that process of regular recruitments are undertaken to fill up those vacant sanctioned posts where temporary employees or daily wagers are being now employed. It is further directed that the State of Haryana and its instrumentalities shall take steps to regularise as one time measure the services of such employees who have been appointed regularly in accordance with the mandate of the Supreme Court in para 53 read with para 15 of the judgment. The respondent State is further directed to grant exemption to the employees who are working on ad hoc basis in relaxation of the rules when recruitment on permanent posts is to be made.

For the reasons mentioned above, we dismiss these petitions. However, we once again made it clear that the orders of regularisation which have already been issued before the judgment of the Hon'ble Supreme Court in Umadevi's case (supra) would remain intact and cannot be reopened, as has been laid down in para 53 of the judgment of the Constitution Bench, which has been extracted above."

The nature of binding precedent of <u>Uma Devi's case</u> (supra) is impressed upon by the Supreme Court much strongly in the subsequent judgment in the case of <u>Official Liquidator</u> Vs. <u>Dayanand and others</u> 2008(10) Supreme Court Cases 1, in the following words:-

"57. By virtue of Article 141 of the Constitution, the judgment of the Constitution Bench in Secretary, State of Karnataka vs. Uma Devi (supra) is binding on all the courts including this Court till the same is overruled by a larger Bench. The ratio of the Constitution Bench judgment has been followed by different two-Judges Benches for declining to entertain the claim of regularization of service made by ad hoc/temporary/ daily wage/casual employees or for reversing the orders of the High Court granting relief to such employees -Indian Drugs and Pharamaceuticals Ltd. vs. Workmen [2007 (1) SCC 408], Gangadhar Pillai vs. Siemens Ltd. [2007 (1) SCC 533], Kendriya Vidyalaya Sangathan vs. L.V. Subramanyeswara [2007 (5) SCC 326], Hindustan Aeronautics Ltd. vs. Dan Bahadur Singh [2007 (6) SCC 207]. However, in U.P. SEB vs. Pooran Chand Pandey [2007 (11) SCC 92] on which reliance has been placed by Shri Gupta, a two-Judges Bench has attempted to dilute the Constitution Bench judgment by suggesting that the said decision cannot be applied to a case where regularization has been sought for in pursuance of Article 14 of the Constitution and that the same is in conflict with the judgment of the seven-Judges Bench in Maneka Gandhi vs. Union of India [1978 (1) SCC 248].

XX XX ХΧ XX 70. We are distressed to note that despite several pronouncements on the subject, there is substantial increase in the number of cases involving violation of the basics of judicial discipline. The learned Single Judges and Benches of the High Courts refuse to follow and accept the verdict and law laid down by coordinate and even larger Benches by citing minor difference in the facts as the ground for doing so. Therefore, it has become necessary to reiterate that disrespect to constitutional ethos and breach of discipline have grave impact on the credibility of judicial institution and encourages chance litigation. It must be remembered that predictability and certainty is an important hallmark of judicial jurisprudence developed in this country in last six decades and increase in the frequency of conflicting judgments of the judiciary will do incalculable harm to the system inasmuch as the courts at the grass root will not be able to decide as to which of the judgment lay down the correct law and which one should be followed. We may add that in our constitutional set up every citizen is under a duty to abide by the Constitution and respect its ideals and institutions. Those who have been

entrusted with the task of administering the system and operating various constituents of the State and who take oath to act in accordance with the Constitution uphold the same, have to set an example by exhibiting total commitment to the Constitutional ideals. This principle is required to be observed with greater rigour by the members of judicial fraternity who have been bestowed with the power to adjudicate upon important constitutional and legal issues and protect and preserve rights of the individuals and society as a whole. Discipline is sine qua non for effective and efficient functioning of the judicial system. If the Courts command others to act in accordance with the provisions of the Constitution and rule of law, it is not possible to countenance violation of the constitutional principle by those who are required to lay down the law.

71. In the light of what has been stated above, we deem it proper to clarify that the comments and observations made by the two-Judges Bench in U.P. State Electricity Board v. Pooran Chandra Pandey (supra) should be read as obiter and the same should neither be treated as binding by the High Courts, Tribunals and other judicial foras nor they should be relied upon or made basis for bypassing the principles laid down by the Constitution Bench."

16. For all these reasons, the order of the learned single Judge is unsustainable. We accordingly, allow these appeals and set aside the impugned orders. As a result, the appeals filed by the State of Haryana, etc. are allowed and the writ petitions filed by the respondents stand dismissed.

## LPA-347-2010:

17. This appeal was heard along with the aforesaid appeals which arises out of the judgment dated 30.8.2007 passed by the learned single Judge. In the impugned judgment, the learned single Judge has taken into consideration the policy of regularisation dated 7.3.1996 (the 1996 Policy) which entailed that those casual/daily-

wage employees and also the work-charge employees who have completed five years or more continuous service as on 31.1.1996 and were in service on 31.1.1996 shall be regularized. The learned single Judge simply held that the case of the respondent herein was covered by that policy and ordered regularization as well as entitlement of the respondent to wages equal to that of regular employees. The implications of the Constitution Bench in <u>Uma Devi</u> (supra) are not discussed and that judgment is not even noticed.

18. In this appeal, the appellants have referred to the judgment in <u>Uma Devi</u> (supra) as well as <u>Official Liquidator</u> (supra) and submitted that respondent would not be entitled to regularisation of his services on the post of clerk. It is stated that he was appointed on daily-wages as Clerk for one month with effect from 24.10.1991 vide office order dated 18.10.1991. However, he did not qualify the type-test as required under the recruitment rules which was the condition precedent for the post of Clerk. It is stated that since the respondent failed to qualify the type-test in English and Hindi, he could not be appointed as Clerk in the regular grade. It is also alleged that the work and conduct of the respondent was far from satisfactory and in spite of various warnings given to him, he did not mend his ways. Because of this reason, his services were terminated vide order dated 9.10.1995. He again gave representation and apologized his conduct and acceding to his request, he was freshly engaged on daily-wage basis for two months vide office orders dated 20.10.2005. After this engagement he filed the writ petition for regularisation which was dismissed as withdrawn. He again made request for further extension of service. He was appointed as daily-waged clerk for two months vide letter dated 8.1.1996 and on the expiry of this period he was not granted further extension. He made representation which was also rejected on 15.3.1996. It is at this stage that he filed writ petition bearing CWP No.4738 of 1996 in which the impugned judgment has been rendered.

- 19. After the impugned judgment, the respondent was allowed to re-join the duties. In compliance with those orders, he has also been paid minimum of the scale along with D.A. admissible to regular Clerks with effect from the date of his re-instatement. As far as direction for arrears of wages and salary for the past period is concerned that was stayed by the Division on 6.10.2010.
- 20. As noted above, the learned single Judge has simply gone by the regularisation policy dated 18.3.1996, holding that the case of the respondent is covered by the said policy and, therefore, he is entitled to regularisation. He is also held entitled to wages equal to that of regular employees on the principle of equal pay equal work and for this the learned single Judge has relied on the Division Bench orders dated 14.12.1995 passed in CWP-17846-1995 which was preferred by the respondent himself, earlier. Therefore, insofar as direction for payment of minimum of the salary as payable to regular staff is concerned, that is not to be interfered with. However, as far as regularisation is concerned, the matter needs to be examined in the light of <u>Uma Devi</u> (supra), as discussed in

LPA-1746-2012, etc.

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Rajinder Kumar's case (supra). The focus has to be on whether the appointment of the respondent herein was irregular or illegal and on that basis only it can be decided whether he would be entitled to regularisation or not. However, that aspect is not considered by the learned single Judge. We also do not have any pleadings on this aspect before us. Therefore, on this ground, we set aside the impugned order and remand the case back to the learned single Judge for fresh decision.

(A.K. SIKRI) CHIEF JUSTICE

(RAKESH KUMAR JAIN)
JUDGE

February 28, 2013 pc