IN THE HIGH COURT OF MADHYA PRADESH AT JABALPUR

BEFORE

HON'BLE SHRI JUSTICE GURPAL SINGH AHLUWALIA

ON THE 20th OF JUNE, 2023

WRIT PETITION No. 14366 of 2017

BETWEEN:-

GANESH PRASAD MISHRA S/O LATE SHRI LAXMI PRASAD MISHRA OCCUPATION: CHOWKIDAR UPPER NARMADA ZONE 4, BARGI HILLS (MADHYA PRADESH)

.....PETITIONER

(BY SHRI ADITYA AHIWASI - ADVOCATE)

AND

1. **THE STATE OF MADHYA PRADESH PRINCIPAL SECRETARY MANTRALAYA, VALLABH BHAWAN (MADHYA PRADESH)**
2. **ENGINEER IN CHIEF WATER RESOURCE DEPARTMENT OLD NARMADA BHAWAN, TULSI NAGAR (MADHYA PRADESH)**
3. **VICE CHAIRMAN NARMADA VALLEY DEVELOPMENT AUTHORITY (NVDA) NARMADA BHAWAN, 59 JABALPUR ROAD (MADHYA PRADESH)**
4. **CHIEF ENGINEER UPPER NARMADA ZONE BARGI HILLS (MADHYA PRADESH)**

.....RESPONDENTS

(BY SHRI MOHAN SAUSARKAR – GOVERNMENT ADVOCATE)

WRIT PETITION No. 25696 of 2018

BETWEEN:-

1. **MUNINDRA DUBEY S/O SHRI ROHNI PRASAD DUBEY, AGED ABOUT 52 YEARS, OCCUPATION: W/A PEON DAILY WAGER RANI AWANTI BAI LODHI SAGAR CANAL DIV. NO. 2, BARGI HILLS DISTT. JABALPUR M.P. (MADHYA PRADESH)**

2. **KODI LAL DAHIYA S/O SHRI NONE LAL DAHIYA, AGED ABOUT 56 YEARS, OCCUPATION: PEON DAILY WAGER, RANI AWANTI BAI LODHI SAGAR CANAL, DIV -2 BARGI HILLS, JABALPUR (MADHYA PRADESH)**

3. **SHYAM LAL DUBEY S/O SHRI NAND KUMAR DUBEY, AGED ABOUT 60 YEARS, OCCUPATION: PEON DAILY WAGER RANI AWANTI BAI LODHI SAGAR CANAL, DIV -2 BARGI HILLS, JABALPUR (MADHYA PRADESH)**

4. **RAKESH KUMAR DUBEY S/O SHRI KUNWAR LAL DUBEY, AGED ABOUT 58 YEARS, OCCUPATION: PEON DAILY WAGER, RANI AWANTI BAI LODHI SAGAR CANAL, DIV -2 BARGI HILLS, JABALPUR (MADHYA PRADESH)**

5. **BRAJBHAN SHUKLA S/O SHRI RAMSEWAK SHUKLA, AGED ABOUT 59 YEARS, OCCUPATION: LPEON DAILY WAGER RANI AWANTI BAI LODHI SAGAR CANAL, DIV -2 BARGI HILLS, JABALPUR (MADHYA PRADESH)**

6. **RAM KUMAR BURMAN S/O SHRI BANSILAL BURMAN, AGED ABOUT 53 YEARS, OCCUPATION: PEON DAILY WAGER RANI AWANTI BAI LODHI SAGAR CANAL, DIV -2 BARGI HILLS, JABALPUR (MADHYA PRADESH)**

.....PETITIONERS

(BY SHRI RAJNEESH NAVERIYA AND SHRI RAJENDRA PRASAD GUPTA - ADVOCATE)

AND

1. **THE STATE OF MADHYA PRADESH THR ITS DEPUTY SECRETARY MADHYA PRADESH STATE DISTT. BHOPAL M.P. (MADHYA PRADESH)**

2. **THE DIRECTOR (ADMINISTRATION), NARMADA GHATI VIKAS PRADHIKARAN BHOPAL (MADHYA PRADESH)**

3. **THE CHIEF ENGINEER UPPER NARMADA ZONE BARGI HILLS, JABALPUR (MADHYA PRADESH)**

4. **THE SUPERINTENDENT ENGINEER UPPER NARMADA ZONE, NARMADA ZONE, BARGI HILLS, JABALLPUR (MADHYA PRADESH)**

5. **THE EXECUTIVE ENGINEER NARMADA VALLEY DEVELOPMENT DEPARTMENT NARMADA VIKASH DIV. 4, BARGI HILLS,JABALPUR (MADHYA PRADESH)**

6. **SHRI GANESH PRASAD MISHRA S/O LATE SHRI LAXMI PRASAD MISHRA,, AGED ABOUT 54 YEARS, OCCUPATION: PEON, UPPAR NARMADA ZONE4 BARGI HILLS, JABALPUR (MADHYA PRADESH)**

.....RESPONDENTS

(BY SHRI MOHAN SAUSARKAR – GOVERNMENT ADVOCATE)

These petitions coming on for admission this day, the court passed the following:

ORDER

1. By this common order W.P.No.25696/2018 (Munindra Dubey and others Vs. State of M.P. and others) shall also be considered and

decided. For the sake of convenience, facts of W.P.No.14366/2017 shall be taken into consideration.

2. It is the case of the petitioner that in the year 1985 the petitioner was appointed as daily wages employee in the Water Resources Department and since then he has been working as daily rated employee. The seniority list was issued and the name of the petitioner was mentioned at s.no.11 and the date of his initial appointment has been shown as 1.12.1988. The work of the petitioner was found to be satisfactory. A scrutiny Committee was constituted for the purpose of regularization which was required to examine the cases of each and every daily rated employees. Accordingly, the Scrutiny Committee examined the cases of the daily rated employees as well as their seniority and accordingly 10 daily wages employees were found fit for being regularized. In this list the name of the petitioner was not there because service record of the petitioner was not made available to the Scrutiny committee in spite of repeated demands. The Scrutiny Committee submitted its report to the Chief Engineer, Upper Narmada Zone, Jabalpur (respondent no.4) vide letter dated 25.9.1996 and 1.10.1996. It appears that the Chief Engineer Upper Narmada Zone Bargi Hills himself found and realized that in the seniority list prepared by the Chief Engineer Upper Narmada Zone Bargi Hills as it was on 31.3.1996, names of several senior daily rated employees have been left out and accordingly a revised provisional seniority list was prepared by the respondent no.4 and it was sent to the Superintending Engineer, Narmada Valley Division No.4, Mandla by letter dated 5.4.1997. It is submitted that one Shri Mahendra Tiwari who was

junior to the petitioner was regularized vide order dated 5.4.1997. Since juniors were being regularized by ignoring the seniority of the petitioner, therefore, he submitted a representation on 17.10.1996 and also sent successive representations.

3. Once again the matter was placed before the Scrutiny Committee and it was found that since the service record of the petitioner was not placed in the previous meeting, therefore, one Mahendra Tiwari was regularized by wrongly holding that he is senior to the petitioner and after reconsideration it was found that the petitioner is senior to Mahendra Tiwari and accordingly the Scrutiny Committee recommended that the petitioner be regularized w.e.f. 5.4.1997. Accordingly, the petitioner was regularized on the post of Chowkidar against one vacant post by order dated 24.8.2017 and in pursuance to the said order the petitioner also submitted his joining on the very same day. Just after six days of the order for regularization, the respondents have issued impugned order dated 30.8.2017 and the order of regularization of the petitioner dated 24.8.2017 has been cancelled.
4. It is submitted that no opportunity of hearing was given to the petitioner before cancellation of the order of regularization. It is submitted that the order of regularization of the petitioner was cancelled on the ground that the claim of his senior was ignored.
5. Per contra, the petition is vehemently opposed by counsel for the respondents. It is submitted that it is nowhere alleged by the petitioner that what was the mode of his initial appointment. If the appointment of the petitioner was illegal then he was not entitled for the relief of regularization at all, therefore, the question of regularization can be

ascertained only after considering the nature of appointment of the petitioner.

6. Heard the learned counsel for the parties.

7. The Supreme Court in the case of **Secretary, State of Karnataka Vs. Umadevi** reported in **(2006)4 SCC 1** has held as under :-

> **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. The concept of "equal pay for equal work" is different from the concept of conferring permanency on those who have been appointed on ad hoc basis, temporary basis, or based on no process of selection as envisaged by the rules. This Court has in various decisions applied the principle of equal pay for equal work and has laid down the parameters for the application of that principle. The decisions are rested on the concept of equality enshrined in our Constitution in the light of the directive principles in that behalf. But the acceptance of that principle cannot lead to a position where the court could direct that appointments made without following the due procedure established by law, be deemed permanent or issue directions to treat them as permanent. Doing so, would be negation of the principle of equality of opportunity. The power to make an order as is necessary for doing complete justice in any cause or matter pending before this Court, would not normally be used for giving the go-by to the procedure established by law in the matter of

public employment. Take the situation arising in the cases before us from the State of Karnataka. Therein, after *Dharwad decision* [(1990) 2 SCC 396 : 1990 SCC (L&S) 274 : (1990) 12 ATC 902 : (1990) 1 SCR 544] the Government had issued repeated directions and mandatory orders that no temporary or ad hoc employment or engagement be given. Some of the authorities and departments had ignored those directions or defied those directions and had continued to give employment, specifically interdicted by the orders issued by the executive. Some of the appointing officers have even been punished for their defiance. It would not be just or proper to pass an order in exercise of jurisdiction under Article 226 or 32 of the Constitution or in exercise of power under Article 142 of the Constitution permitting those persons engaged, to be absorbed or to be made permanent, based on their appointments or engagements. Complete justice would be justice according to law and though it would be open to this Court to mould the relief, this Court would not grant a relief which would amount to perpetuating an illegality.

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.

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53. One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in *S.V. Narayanappa* [(1967) 1 SCR 128 : AIR 1967 SC 1071] , *R.N. Nanjundappa* [(1972) 1 SCC 409 : (1972) 2 SCR 799] and *B.N. Nagarajan* [(1979) 4 SCC 507 : 1980 SCC (L&S) 4 : (1979) 3 SCR 937] 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.

8. The Supreme court in the case of **State of M.P. v. Lalit Kumar Verma, (2007) 1 SCC 575** has held as under :-

> **12.** The question which, thus, arises for consideration, would be: Is there any distinction between "irregular appointment" and "illegal appointment"? The distinction between the two terms is apparent. In the event the appointment is made in total disregard of the constitutional scheme as also the recruitment rules framed by the employer, which is "State" within the meaning of Article 12 of the Constitution of India, the recruitment would be an illegal one; whereas there may be cases where, although, substantial compliance with the constitutional scheme as also the rules have been made, the appointment may be

irregular in the sense that some provisions of some rules might not have been strictly adhered to.

9. The Supreme Court in the case of **Siraj Ahmed Vs. State of U.P. by judgment dated 13.12.2019 passed in Civil Appeal No.9412/2019** has held as under :-

> "**12.** It can thus be seen that this Court has held that the distinction between irregular appointment and illegal appointment is clear. It has been held that in the event appointment is made in total disregard to the constitutional scheme and the recruitment rules framed by the employer, where the employer is "State" within the meaning of Article 12 of the Constitution of India, the recruitment will be illegal one. It has, however, been held that where although, substantial compliance with the constitutional scheme, as also the Rules have been made, the appointment would become irregular inasmuch as some provisions of some rules have been adhered to.
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> **13.** Subsequently, another Bench of this Court in *State of Karnataka* v. *M.L. Kesari* [*State of Karnataka* v. *M.L. Kesari*, (2010) 9 SCC 247 : (2010) 2 SCC (L&S) 826] also had an occasion to consider the issue. The Court observed thus : (SCC p. 250, para 7)
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> "*7.* It is evident from the above that there is an exception to the general principles against "regularisation" enunciated in *Umadevi (3)* [*State of Karnataka* v. *Umadevi (3)*, (2006) 4 SCC 1 : 2006 SCC (L&S) 753] , if the following conditions are fulfilled:
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> (*i*) The employee concerned should have worked for 10 years or more in duly sanctioned post without the benefit or protection of the interim order of any court or tribunal. In other words, the State Government or its instrumentality should have employed the employee and continued him in service voluntarily and continuously for more than ten years.

> (*ii*) The appointment of such employee should not be illegal, even if irregular. Where the appointments are not made or continued against sanctioned posts or where the persons appointed do not possess the prescribed minimum qualifications, the appointments will be considered to be illegal. But where the person employed possessed the prescribed qualifications and was working against sanctioned posts, but had been selected without undergoing the process of open competitive selection, such appointments are considered to be irregular."
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> **14.** This Court held in *M.L. Kesari case* [*State of Karnataka* v. *M.L. Kesari*, (2010) 9 SCC 247 : (2010) 2 SCC (L&S) 826] that where the appointments are not made or continued against sanctioned posts or where the persons appointed do not possess the prescribed minimum qualifications, the appointment will be considered to be illegal. However, when the person employed possessed the prescribed qualifications and is working against the sanctioned posts, but had been selected without undergoing the process of open competitive selection, such appointments are considered to be irregular.

10. Therefore, the crux of the matter is as to whether appointment of the petitioner was in accordance with the mandate of the Constitution of India or not. It is submitted by counsel for the petitioner that since the petitioner is holding the prescribed minimum qualification and his appointment was made against the sanctioned post, therefore, at the most his appointment can be said to be irregular but the counsel for the petitioner was not in a position to point out as to whether initial appointment was made after due advertisement, thereby giving equal opportunity to similarly situated persons to participate in the recruitment as enshrined under Article 16 of the Constitution of India.

11. Be that whatever it may be.

12. A coordinate Bench of this Court in the case of **Irfan Qureshi and others Vs. State of Madhya Pradesh and others, decided on 8.2.2012 in W.P.No.29853/2022** has held as under :-

> "With consent of parties, this case is taken up and disposed of finally.
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> Petitioners' contention is that they were initially appointed in the year 1988 as daily wagers. After their initial appointment, they continued to work upto 2000 when abruptly their services were dispensed with. They approached the High Court and with the intervention of the High Court and thereafter in light of the circular issued by the State Government on 12/04/2004, their services were reinstated as daily wagers. Since they had put in more than ten years of service as daily wagers, their cases were required to be considered for regularization in terms of the law laid down by Hon'ble Supreme Court in the case of **Secretary, State of Karnataka Vs. Uma Devi (2006) 4 SCC 1** and the circular issued thereafter by the State on 16/5/2007 and other similar circulars.
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> Instead of considering petitioners' case in terms of the decision of Hon'ble Supreme Court in the case of **Uma Devi (supra),** and circulars issued in that behalf on 16/5/2007 with its subsequent clarifications, respondents adopted an approach of pick and choose without preparing a seniority list as per the date of initial appointment and considering cases of each of the persons so find mention in the list, in a pick and choose manner, they regularized some and left others including the petitioners.
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> In the year 2016, State came out with a new circular dated 07/10/2016 providing for classification of daily wagers as unskilled, semi-skilled and skilled prescribing pay scales for them and also provisions for grant of increments etc.
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> It is submitted that the petitioners were chosen for this classification and had been given that benefit. But, the bone of contention is that petitioners' case should have been considered in light of the law laid down by Hon'ble

Supreme Court in the case of **Uma Devi (supra)** specially when several persons junior to the petitioners i.e. ones who came in employment after the petitioners were regularized in terms of the ratio of law laid down by Hon'ble Supreme Court in the case of **Uma Devi (supra)**. It is submitted that this discrimination is the cause for filing the present petition. It is also submitted that petitioners' case for regularization should be first considered in the light of the decision of Hon'ble Supreme Court in the case of **Uma Devi (supra)** after preparing a proper seniority list and sequentially considering the cases of the daily rated employees in order of their seniority against vacant posts and in light of the law laid down by Hon'ble Supreme Court in the case of **Uma Devi (supra)** rather than adopting a haphazard and arbitrary approach. It is further submitted that now State is taking a stand that since petitioners have been classified as permanent in terms of the circular dated 07/10/2016, they have no claim for regularization.

Shri Shivam Hazare, learned Panel Lawyer, supports the action of the State and submits that once petitioners have been classified as permanent, they have no subsisting grievance and petition may be dismissed as not maintainable.

After hearing learned counsel for the parties and going through the record, it is evident that permanent classification and regularization, they are two different aspects of Service Jurisprudence. Permanent classification is a concept borrowed from Labour Jurisprudence where an employee after putting 240 days of regular employment in a calendar year is deemed to be permanently classified as it is presumed that employer was not requiring services of such employee on seasonal basis but on regular basis. Regularization is a concept in Service Jurisprudence which has several connotations including different forms of service benefits etc. For regularization of such daily rated employees, Hon'ble Supreme Court has laid down exhaustive guidelines in the case of **Uma Devi (supra)**. It has carved out a category of irregular appointment and

illegal appointment and has held that irregular appointees are entitled to for consideration whereas the same treatment cannot be meted out to illegal appointees.

It is the petitioners fundamental right to be considered for regularization in terms of the circular of the State Government dated 16/5/2007 issued in light of the judgment of Hon'ble Supreme Court in the case of **Uma Devi (supra)**. There is no material available on record to show that petitioners' case was considered by the respondent authorities in light of the guidelines laid down by Hon'ble Supreme Court in the case of **Uma Devi (supra)**. Thus, *prima facie*, there is violation of their rights to be considered for regularization.

Thus, this petition can be disposed of with a direction that without taking into consideration the factum of permanent classification of the petitioners in terms of GAD circular dated 07/10/2016, respondent No.4 and 6 shall get a seniority list prepared showing the date of initial appointment of each of the workmen including those who have already been regularized if they are subsequent appointees than the petitioners, then consider each case on the basis of the guidelines laid down by Hon'ble Supreme Court in the case of **Uma Devi (supra)**. They shall complete this exercise within a period of 120 days from the date of receipt of certified copy of this order being passed today. If petitioners are found to be suitable on the touchstone of the guidelines laid down by Hon'ble Supreme Court in the case of **Uma Devi (supra)** and as contained in the circular dated 16/05/2007, then shall pass appropriate order strictly in the order of their inter se seniority and if they are not found suitable, then shall communicate the reasons for not granting the benefit of regularization to the petitioners within the aforesaid time.

In above terms, this writ petition is disposed of".

13. Thus, this Court is of the considered opinion that the matter for regularization of service of the petitioner shall be reconsidered by the

respondents. The respondents shall be under obligation to give a clear finding with regard to the nature of his original appointment. If the appointment was made in accordance with the provisions of Article 14 and 16 of the Constitution of India as well as if the petitioner was appointed against a clear sanctioned vacant post and if the petitioner was holding the minimum qualification only then it can be held that the appointment of the petitioner was irregular. **But, if the petitioner was appointed without following the mandate of Articles 14 and 16 of Constitution of India and the appointment was made without issuing advertisement thereby giving equal opportunity to all the similarly situated persons to participate, then by no stretch of imagination it can be held that the appointment of the petitioner was irregular and not illegal.**

14. Let the entire exercise be completed within a period of three months from the date of receipt of certified copy of this order. The petitioner is directed to make a fresh representation thereby covering all the basic requirements to claim his regularization on the post of Chowkidar. Needless to mention that this Court has not considered the entitlement of the petitioner for his regularization but has merely reiterated the law which has been laid down by the Supreme Court in the case of Uma Devi (supra) and, therefore, the case of the petitioner shall be considered without getting influenced or prejudice by this order.

15. Needless to mention that since the interim order is already in operation in favour of the petitioner, therefore, the same shall continue till the final decision is taken by the authorities. It is made clear that in case if detailed fresh representation along with all details regarding mode of

his appointment along with certified copy of this order is not made within a period of 15 days from today, then this interim protection granted to the petitioner shall automatically stand recalled.

16. With the aforesaid observation, the petition is finally **disposed of**.

(G.S. AHLUWALIA)
JUDGE

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