Before Rajiv Narain Raina, J.

KHAJJAN SINGH AND OTHERS—*Petitioner*

versus

STATE OF HARYANA AND OTHERS - Respondents

CWP No.10017 of 2011

May 28, 2014

Constitution of India, 1950 - Art. 14, 16, 226 309 & 310 - Industrial Disputes Act, 1947 - S.10(1)(c) - National Rural Employment Guarantee Act, 2005 - Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practice Act, 1971 - S. 30 - Present bunch of petitions arise out of awards of Labour Courts granting reinstatement with continuity of service, on which the Petitioners have based their claim for regularization - While the Petitioners secured awards in their favour in different years granting reinstatement with continuity of service from the date of illegal termination/retrenchment, many other daily wagers continued in service by reason of non-retrenchment and their services had been regularized - Petitioners' reinstatement in daily wage service only by virtue of Labour Court awards - Some of other daily wagers, whose services were regularized, were junior to the Petitioners - Petitioners based their claim on invidious discrimination and violation of Art.14 of the Constitution - State of Haryana resisted Petitioners' claim for regularization on the ground that initial recruitment was not according to Rules and they were illegally appointed and moreover there was a break in their service disentitling them from counting their period of absence towards employment - High Court held that in the absence of Recruitment Rules not possible to read violation of any Rule in the appointments made many years ago - Further held that reinstatement by Labour Courts related back to the date of retrenchment entitling the Petitioners to count their period of unemployment towards the length of service required for regularization - Court further held that Industrial Disputes Act, 1947 was a piece of beneficial legislation, and unfair

labour practices as contemplated in Entry 10 of the 5th Schedule to the Industrial Disputes Act resulting in invidious discrimination in the present case, deprecated.

Further held, that writ court can well apply industrial law principles for the first time on the principle of expediency - Entry 10 (supra) is a Rule against exploitation and the present bunch of cases eminently fit for exercise of extraordinary jurisdiction for a generous and purposive construction to meet crises of human affairs - Further held that many daily wage workers may not hold posts under the State or in connection with the affairs of the State but they deserve to be looked at with a humanistic view - Petitioners in the present case were employed as daily wagers by the Forest Department in far of places where many people may not be willing to take employment and whose services may not be governed strictly by Rules of recruitment - Their rights deserve to be examined and declared from the vantage point of industrial law principles - In case of arbitrariness, Writ Court could well apply principles of secondary review - Therefore in the present cases equilibrium has to be restored by granting status quo ante and to bring Petitioners at par with their counterparts, who were not retrenched and had secured benefits of regularization by administrative orders without judicial intervention - In view of above, rights of the Petitioners for antedated regularization of service declared in their favour - Writ Petitions allowed.

Held, that the Constitution Bench in Umadevi has authoritatively issued a mandate to the High Courts and to the Supreme Court to desist from issuing mandamus to the employer States to regularize and absorb ad hoc, daily wage and temporary employees in regular service who had secured employment without following the procedure prescribed by the rules applicable for recruitment to posts as that would violate the right of equality of opportunity under articles 14 and 16 of the Constitution of India to those who were available in the job market and were deprived of the opportunity of application and contest to such posts. It was held that such appointments made contrary to the scheme of the Constitution of ensuring equal opportunity in public employment preserved by article 16 cannot be regularized even on the ground of discrimination and neither the Supreme Court nor the High Court would issue any such directions of making permanent such as are rank usurpers of public office on the grounds of discrimination which is contrary to the constitutional scheme of making

appointments to Government service or public employment. The Constitution Bench did not agree with its earlier view taken in Dharwad District Public Works Department v. State of Karnataka, 1990 (1) SCR 544 which was overruled.

(Para 12)

Further held, that the Constitution Bench also found its earlier directions issued in para 50 of State of Haryana v. Piara Singh, 1992 (4) SCC 118 as inconsistent with the conclusions reached in para 45 of the judgment which were held to run counter to the constitutional scheme of employment. Piara Singh was declared bad law. The Court decreed against such employment made de hors the rules of recruitment and directed that such ad hoc, temporary and daily wage employees have no rights but can be given preference on the basis of their experience at the time the same posts are filled on regular basis by open selection and the condition of age bar should be waived off for them. Ten years of irregular ad hoc or daily wage service service was accepted in the formula evolved as sufficient to grant relief. But this was ordered as a one-time measure.It may be added here that the incubation period in the old schemes for rights to mature was three years conceived by Government in its policies.

(Para 13)

Further held, that however, in the preface to the judgment in Umadevi in para 2, the Court observed that 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 offering employment or engaging workers on daily wages to meet the exigencies of administration.

(Para 14)

Further held, that the Court noticed the newly enacted, The National Rural Employment Guarantee Act, 2005 the object of which is to give employment to at least one member of a family for 100 days in a year on paying wages as fixed under the Act. The Court was pre-occupied by the central theme of the judgment that where there are public posts and regular vacancies available, they deservedly require to be filled in terms of rules of recruitment and not de hors them. The vacancies cannot be filled "in a haphazard manner or based of patronage or other considerations. Regular

appointment must be the rule". An alarming situation had arisen in the country, the result of which was Umadevi where the Union and the States, besides the instrumentalities of State had resorted to mass scale irregular appointments especially in the lower rungs of the service against cadre without reference to the duty and constitutional limitations placed upon the exercise of power to appoint by following and ensuring a proper appointment procedure through the Public Service Commissions or otherwise as per the rules prescribed and to permit these irregular appointees or those appointed on contract or on daily wage basis 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. What the Court was preoccupied with was the dilemma of entries through the backdoor and to check service preventing regular recruitment.

(Para 15)

Further held, that the Constitution Bench was conscious that the Courts have not always kept the legal aspects in mind and have occasionally even stayed the regular process of employment as is set in motion and in some cases, even directed that these illegal, irregular and improper entrants be absorbed into service. The Supreme Court called this class of employment as "Litigious employment" which deserved no constitutional protection. The Court noticed its earlier decision in A.Umarani v. Registrar, Cooperative Societies and others; 2004 (7) SCC 112 and re-affirmed its view that the State cannot invoke its powers under article 162 of the Constitution to regularize such appointments regularization is not and cannot be a valid mode of recruitment by any State authority within the meaning of article 12 of the Constitution of India c - by anybody or by any authority governed by a statutory enactment or the rules framed there under. Ad-hoc appointments could earn no regularization. Any length of service put in through the back door of adhocism would not mean that they had acquired a right of regularization.

(Para 16)

Further held, that workmen by definition may or may not hold public posts, their employment may or may not be public employment, their service conditions may or may not be governed by rules, they may or may not be backdoor entries, they may or may not be entries through patronage, recommendation etc. in the public or private sector but the State Government

was empowered in its residuary power to employ them for work on State or Central projects, in offices or in the field run by State Departments in far off places, in the outback of the Forest and the Irrigation Department then their entry was not per se abhorrent in special field conditions. The employment in remote areas of daily wage employees may not necessarily and may often not violate articles 14 and 16 of the Constitution. The labour obtained at site in inaccessible areas may deserve the protection of rights of local labour as easily found and willing to work in remote villages to carry out projects or schemes of State Government by a local arrangement made by offering employment to such people, labour being difficult to import by applying constitutional principles and the impracticality of it that such an exercise may entail and wasteful expenditure to tax payers money. Here, costly advertisements placed in Newspapers may support and represent in themselves money spent on meagre wages for a large number of local labourers which effort may not be worth the candle. A very few if not many would leave hearth and home to take up daily wage service in far off places given the low wage which may hardly be sufficient to offset the displacement overheads. I had occasion to deal with a case of a daily wage employee in the Haryana Forest Department, just as the majority of petitioners are in this case, in Damyanti v. Presiding Officer Industrial Tribunal-cum-Labour Court, Panipat and another, 2012 (4) S.C.T.506 while sitting in Single Bench, I then thought:-

> "A daily wager or seasonal worker too is a workman with industrial rights. No rule was shown to me as to how seasonal workers or daily wagers are recruited. It is inherent that employment in far flung places where the forest department has ongoing works to employ to locally available labour. It is no answer that in such employment opportunity there must be public advertisements to satisfy the tests of Article 14 & 16 of the Constitution. In fact it may violate local labour rights to introduce outsiders for menial, unskilled or semi skilled daily wage work in the hinterland. In this context, I think that Articles 14 & 16 cannot be stretched beyond breaking point for the State to contend, as unfortunately it does in routine in such cases, that the appointment is de hors the rule. I ask which rule is violated after exploiting a low paid worker for 15 years and then citing rule of

appointment of seasonal workers on daily wages and contending that the Forest Department is not an industry. This is a matter of shame for the forest department to ponder over."

(Para 18)

Further held, that labour and industrial rights deserve to be examined on both constitutional principles and industrial law precepts preserved by the special law of the Industrial Disputes Act, 1947 and the foremost question posed in (iv) above has to be answered in the first instance whether Umadevi stands distinguished and explained in the landmark judgment delivered by R.M.Lodha, J. in Casteribe. The two judge Bench of the Supreme Court dealt with the State law of Maharashtra cited as The Maharasthra Recognition of Trade Unions and Prevention of Unfair Labour Practice Act, 1971 (MRTU & PULP Act). The Court dealt with Section 21(1) and its proviso; Schedule IV Items 2, 5, 6 and 9 and especially with Item 6 which is in pari materia with the provisions of Entry 10 of the 5th Schedule to the Industrial Disputes Act, 1947, the commonality being a facet of unfair labour practice to keep workmen as badlis, casuals or temporaries and to continue them as such "for years" with the object of depriving them of the status and privileges of permanent workmen.

(Para 19)

Further held, that the argument raised by the Corporation in Casteribe before the Supreme Court was that, where the Industrial Court has found the Corporation to have indulged in unfair labour practice in employing the complainants as casuals on piece-rate basis, then the only direction which could be given to the Corporation was to cease and desist from indulging in such unfair labour practice and no direction of according permanency to those employees could be given, was rejected by the Supreme Court since it found specific power given to the Industrial/Labour Court under the Act to take affirmative action against the erring employers and orders can well be made to accord permanency to the employees affected by such unfair labour practice. The Court found nothing wrong in the direction of the Bombay High Court granting status and permanency to the complainants employed as cleaners by the Corporation for its buses running public transport. The directions issued in Umadevi were held to be confined to orders passed by the High Courts under article 226 and the

Supreme Court under article 32 not to issue directions regarding absorption/ regularization of daily wage or ad hoc employees unless the recruitment itself was made regular in terms of the constitutional scheme. However, the victims of unfair labour practice of the employer deserve freedom of permanency where facts and circumstances demand in the canvas of Casteribe.

(Para 21)

Further held, that the claim in this bunch of cases arises out of Labour Court awards granting reinstatement with continuity of service. If the petitioners were kept out of service by illegal orders passed by the State Government functionaries, the period of absence would have to be treated as continuous service to be added to the total period of service with a right of protection under Entry 10 of the 5th schedule to the Industrial Disputes Act provided they qualify as 'workmen' within the meaning of section 2 (s) of the Act which ex facie they appear to be without any special proof by way of evidence. There is no dispute that the petitioners stand reinstated to service in compliance of the orders passed by the Industrial adjudicator and they may deserve to be put at par with the "fortunate group" to remove the vice of unfair discrimination, where the "fortunate group" secured orders of regularization or permanency by the administrator and not by the Court. The interim orders passed by the Division Bench of this Court should not put the petitioners to disrepute of a litigious nature and should be understood from the stand point of persons aggrieved having approached the Court for its protection under article 226 of the Constitution to secure justice to themselves. Therefore, the cases in this batch in which persons have continued in service by interim protection or otherwise, can be placed in the same group together with those of the petitioners who approached the Court after their representations for regularization were rejected either before or after the pronouncement of the judgment in Umadevi.

(Para 23)

Further held, that the question arises whether unfair labour practice can be determined and established only through the process of industrial adjudication or can the result be achieved by direct intervention under article 226 of the Constitution or what we may call in extra ordinary jurisdiction exercised by the Writ Court on affidavits without relegating the aggrieved

persons to a less efficacious and protracted alternative remedy available under the machinery of the Industrial DisputesAct, 1947 after such persons have secured reinstatement through industrial adjudication where findings have come that the termination or retrenchment was unlawful or illegal.

(Para 24)

Further held, that entry 10 of the 5th Schedule to the Industrial DisputesAct, to my mind, requires no special adjudication by evidentiary proof to establish a jurisdictional fact of keeping "workmen as badlis, casuals or temporaries and to continue them as such for years, with the object of depriving them of the status and privileges of permanent workmen" where length of service spent in and out of daily wage service stands clubbed by legal fiction obtained through labour court orders which have attained finality, as it requires no special proof to determine the claims of the left out group to bring them at par with the "fortunate group". At this point, it may be appropriate to enter the question of unfair discrimination and therefore to understand the law enunciated by the Supreme Court in Om Kumar and as to how it might come into play on the facts of the present cases.

(Para 25)

Further held, that the issue has been delineated in question (vi) above and requires no further elaboration in search of an answer except to visit the following extracts from the judgment of M.Jagannadha Rao, J. speaking for the Court and surgically separating the two parts of article 14, of arbitrariness and discrimination. Though the decision was rendered in the context of disciplinary proceedings and imposition of higher degrees of punishment for the roles played by the contesting delinquent parties, the general principles laid down apply to all jurisdictions universally so long as administrative action is under judicial review. In para. 51, the Supreme Court observed that in the Indian scene the existence of a Charter of fundamental freedoms from 1950 distinguishes our law and has placed our Courts in a more advantageous position than in England so far as judging the validity of legislative as well as administrative action is concerned. When the principle of arbitrariness is raised, proportionality and unreasonableness comes to be tested on the Wednesbury rule which is well recognized in

India. The administrative decisions have to be tested both on proportionality and on unfair discrimination against alleged arbitrariness where the Court applies the test of secondary review, the administrator playing the primary role in selecting proportionality. However, when the classification based under article 14 is brought in motion against the administrative action, the principles of discriminative classification and arbitrariness arise.

(Para 26)

Further held, that it thus follows that the Writ Court when faced with unfair trade discrimination, it is constitutionally imperative and would remain within its constitutional limitations in removing the vice of hostile and invidious discrimination by putting a person unfairly discriminated to be treated at par and with the "fortunate group" (as tested in this case) bringing about parity in treatment particularly when the "fortunate group" obtained administrative orders of regularization/permanency under policy schemes though those schemes may no longer be available by the State itself without court interference. There is no question of secondary review of administrative action here in this case to be tested on grounds of reasonableness or arbitrariness. The Writ Court becomes the primary adjudicator of unfair discrimination which may arise out of statutory industrial rights but tested on the touchstone of article 14 by transporting Entry 10 of the 5th Schedule to the judicial dais and which is not incapable of decision making in the extra ordinary jurisdiction of the Writ Court, where the State is unable to satisfy the Court that its action is free from discrimination and where the foundational and jurisdictional facts are not disputed. The result can be achieved simply by applying the formula of long service rendered "for years" which is statutorily protected by Entry 10. What is meant by "for years" is not one of art. It is more a question of interpretation applying to it things like intolerable and oppressive duration, point of frustration in service, loss of hope, counterproductive to production of goods and services where the spirit to serve might die, but viewed on principles of pragmatic humanism which all may be difficult to measure. However, only thing is certain that the employer must have long ago conferred permanency to a co-worker. It is difficult to express any opinion which is not necessary in this case and is left open, that is, the numerical question of what is meant by or qualified

to be "for year" in Entry 10. It is not necessary because in these cases the dates of the co-workers, the "fortunate group" is known in their respective determining points. But I would say at least this much that it is a rule against exploitation by a man of man himself.

(Para 28)

Further held, that to put an aggrieved person who has alternative remedies before the Industrial Adjudicator to the throes of a trial only upon an industrial reference where the cause can be espoused by the union alone, would to my mind be adding insult to injury and delaying and postponing the right to non-discriminatory treatment to an unpredictable and unknown point in time in the remote future crystallizing industrial rights. In this many lives may be obliterated. Removing unfair discrimination today is of fundamental value and is not the same thing as removing discrimination after long drawn out litigation. The Court cannot turn a blind eye to this when viewed from the prism of the equality clause. Therefore, the Writ Court in my considered view can well apply industrial law principles, for the first time, on the principle of expediency through Entry 10 of the 5th Schedule of the Act read with the ratio of Casteribe provided the facts are not seriously disputed, but not disputed for the sake of resistance and refutation. A meaning should be given to Entry 10 in such a manner which saves time and expenses of marginalized workers, achieves expedition and saves court's resources as well and avoids the agony of a protracted trial in a labour court so long as the result can be achieved in extraordinary writ jurisdiction acting within the four corners of the law mostly on industrial law principles. The res ipsa loquitur rule can be appropriately applied cautiously and carefully weighed between the competing interests of a weak citizen and the powerful State for localized labour serving in remote areas.

(Para 29)

Further held, that there is a complete statutory prohibition against an employer, workmen or trade union against committing an unfair labour practice. Though the consequences of violating the provisions of Section 25T of the Industrial Disputes Act is punishment with imprisonment but that does not mean that either the Labour Court or the Writ Court is barred to exercise its powers of making declarations and issuing directions where a prima facie case is made out of violation of the law. Where the issues on facts are not found to be complicated ones deserving resolution only by way of evidence and proof before the Labour Court then this Court is

not precluded to act in aid of a person suffering from continued right deprivation due to unfair discrimination and to the contrary would remain under a bounden duty under article 226 to strike down unfair discrimination. Entry 10 is a rule against exploitation. It is a rule against modern day slavery and against unfair domination. Unfair labour practice is akin to unfair discrimination. They both belong to the same family. Entry 10 of the Central Act and Entry 6 of the Maharashtra Act pre-supposes that a body of workers under the same employer and doing the same thing are permanent while others not. Unfair labour practice would thus fall in the same cluster of grounds of challenge of administrative action as those when the Writ Court deals with in cases of malafides, malice in law, malice in fact, bias, colourable exercise of power or abuse of authority and so on and so forth. Merely because the Central Act does not contain specific provisions such as those in MRTU & PULP Act and of Section 30 thereof, it would not deter this Court in writ proceedings to remove unfair discrimination whenever found without resort to remedy before the Labour Court when the question pure and simple to be adjudged is the number of years of service qualifying test of Entry 10 or Entry 6, the latter considered in Casteribe.

(Para 32)

Further held, that then it may be asked: Who knows where merit lies? Who knows where the merit of those who evaluate merit lies? Who knows where the truth lies in abstraction? Let us not sermonize or call Moses to write Tablets for us. Let us endevour to freely, reasonably and generously support such long drawn out exploitative employment of the weak manual worker in a far-off forest nursery (not in offices of a Government department) within the contours of the law and afford the petitioners some semblance of permanency albeit as labourers so that their day does not begin with sunset. Verily, they built the nation brick by brick till the landscape was altered. They built the houses we live in, the restaurants we dine in, the roads we travel on, the tarmac airplanes land in and take off, and the court we sit in to dispense justice. They came to Court before the Judges did. These are theanonymous builders of the nation with neither reward, nor hope nor recompense except the meager daily wages earned by them which may not even be paid at the end of the day before they go home to god-knows-where.

(Para 36)

Further held, that but so long as the word 'socialism' lives in the Preamble to the Constitution, Judges are constitutionally bound to apply distributive justice which postulates: "To each according to his contribution" Who can measure such contribution? Certainly not the Judge. But yes, the Judge can intervene as a surgeon might in case of failure of the physician to cure the disease. The Court may calibrate the pipette of justice if the administrator fails in his constitutional duty to discharge the burdens of measuring that the minimal dose of succour required for comfort calculated on the abacus of a social insurance plan paid with the premium of distributive justice. Fundamental duties enjoined by article 51 A (j) of the Constitution obligate all citizens to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endevour and achievement. Sadly, this part of the Constitution is crippled with thirty eight years of dystrophy from the day when Parliament thought it fit to imprint in the Big Book.

(Para 37)

Further held, that In the face of all this I am inclined to think that the present batch of cases appear to be eminently fit to exercise such extra ordinary jurisdiction for a "generous and purposive construction" and an approach can be adopted to meet the crisis of human affairs. Such view is advised by the Supreme Court in M.Nagaraj for the Courts to emulate and follow which should be the paradigm principle of a dynamic and pragmatic humanism injected by the syringe of article 14 into Court while dealing with daily wage manual workers as distinguished from cases of those persons who are appointed from the back door to public posts, services being strictly governed by statutory rules framed under the proviso to article 309 of the Constitution or by rules framed under statutory enactments creating independent instrumentalities of State, Boards, Corporations etc. It is the constitutional duty of a citizen Judge as it is of every other citizen of India, that it is a duty preserved and instructed by article 51 A (h) of the Constitution introduced by the Forty Second amendment carried out in 1976 by Parliament that it is the fundamental duty of every citizen to develop a spirit of 'humanism'.

(Para 40)

Further held, that humanism became a constitutional word of far-reaching significance for all citizens of India to emulate and feel bound down to honour, including Judges and bureaucrats to temper their judgments and administrative decisions with. A Judge of the High Court is after all a citizen first and then by virtue of holding office, a Judge. If a duty is cast on the Court and on the administrator by the Constitution or by the law to observe such moral duty and ethical standards, it is far greater and more sublime than any of the rights, privileges or powers they may enjoy or exercise for the administration of justice or in governance. The Constitution is a humbling document, an eternal fountain ever sprouting and benignly guiding power and authority to decide fairly, reasonably and proportionately to the cause. This itself works as a self-restraint on its constitutional boundaries. A Court can be perceived as a decision making apparatus sanctioned by the State by virtue of office to make socially just orders in accordance with the law, the decision being binding and the solemn nature of its binding jurisdiction acting on its own as a formidable constraint and check on what it might do or refrain from doing in making an order or a judgment. The duty enjoined on all citizens, which evidently includes the members of the highest judiciary by virtue of office held, stands as a vanguard of the Constitution and which is qualified in the wisdom of Parliament thus in article 51 A (h):-

> "to develop the scientific temper, humanism and the spirit of inquiry and reform".

(Para 41)

Further held, that when the Constitution instructs us on the way forward we must obey and carry out its command. Constitutional duty then becomes a constitutional imperative and the judicial limitation. The Judge must then inform all his decisions with the constitutional mandate. Duty for the Judge then itself becomes the mandate of his business ever staying aloof and disinterested in the cause. The Judge is not an administrator. An administrator may do and be heard on the argument that Fundamental Duties are unenforceable. But the Court cannot discard these principles wherever found necessary to dispense justice if no other absolute legal principle is found to fully justify relief in any other manner. It may not be capable of enforcing this duty through writs but it may temper its opinion, if the need arises on its principles. The duty though can be promoted only by constitutional methods, ref: Mumbai Kamgar Sabha v. Abdulbhai, AIR 1976 SC 1455.

(Para 42)

Further held, that manual daily wage workers may not hold posts under the State or in connection with the affairs of the State but they may deserve to be looked at with a humanistic view to try and understand their problems, their hopes and aspirations to ask the State to help them to ameliorate their lot albeit with a spirit of dynamic humanism as the rich and powerful may not need to truly understand or empathize with them. In the absence of recruitment rules shown by the State in its replies with respect to these set of cases, it may not be possible for this court to read violation of rule in the appointments made long years ago. Neither is it for this Court to make a fishing inquiry to throw out the claims. But when we look at such engagements if not properly called 'appointments' it should be tempered with a spirit of humanism and to be judicially pragmatic about it. The rules should not by themselves in the present cases without anything more become the iron curtains admitting no exception for manual workers. The challenge to illegal appointments by a suffering public is even more regretful in public interest litigation where service law principles do not penetrate to quash an unlawful appointment, citing precedent. The wrongdoer has many protections in law but those protections are only till the conscience of the Court is disturbed when anything becomes possible and that is how we must view what constitutional Judges may do. That is where the insight of Kapadia, J. in the M. Nagaraj throbs. If the administrator implemented and obeyed the law as was designed and meant and had never made an oblique departure from rule, it would be trite to say that thousands and thousands of judgments may not have been written or needed to. Perhaps, Umadevi would not have been written or necessitated, if all was ideally well with the world. The total picture thus has to be holistically painted by the pen of the Court even for one man standing in supplication before the Court asking for relief. This is what I think and may be completely wrong.

(Para 43)

Further held, that in the aforesaid background, the moot question is: are daily wage manual workers, as of whom have been exploited 'for years' by the State by resort to Unfair Labour Practice are they not entitled to a share in the sun, the shade and the moonlight, pray may I ask, for some security of work. Having posed the question there is still an answer, a counter point, permitted by law as an acceptable defence when raised by the State which the State raises routinely and casually when facing litigation

in Court: Why did they accept the engagement to start with, after all? No one forced it on them? Who forces anyone? Who forces the State, expected to be a model employer, to give a job or compel it not to take it away. This is the prerogative of the State traced to article 310, the pleasure doctrine. The right to engage includes the right to disengage. The logic cannot be faulted in Court. But then by applying standards of humanism it then becomes more a matter of judicial sensitivity tempered with the law, in matters of grant of relief, by the constitutional court, where the process of unshackling past judicial burdens is constantly going on to supply blood to the living tissue of the law so that it does no decompose.

(Para 44)

Further held, that Orders were reserved in these cases on 13th December, 2013. At the time I doubtfully thought the principles of law enunciated in the two Division Benches in Channi (2013) and in Rajinder Kumar (2006) may not fully apply to cases of daily wage workers engaged locally and whose services may not be governed strictly by rules of recruitment. There rights deserved to be examined and declared from the vantage point of industrial law principles and as such to group these cases for separate treatment. This line of thinking was influenced by Casteribe which was not brought to the notice of the Division Bench in Channi. The further reason was in line with the principles of law enunciated by the Supreme Court in Om Kumar on the two distinct parts of article 14 of the Constitution, one of arbitrariness and the other of discrimination, which principles may have to be factored into the decision making process for a fair, meaningful and efficacious adjudication of the rights of the respective parties. In a case of arbitrariness, the Writ Court was informed that it could well apply principles of secondary review but when unfair discrimination is pleaded, pressed and practiced and is not seriously disputed on foundational facts, then the Writ Court may be left with little option but to discharge its constitutional duty by applying principles of primary review to strike down unfair discrimination without as much as abdicating that duty, come what may. The principles of law explained in Ganayutham and Om Kumar were also not brought to the notice of the Division Bench in Channi for its consideration on the point of unfair discrimination.

(Para 61)

Further held, that after I had prepared the judgment after reserving orders I had anxiously thought how to proceed with the matter and what to do on the sensitive issues involved and whether I should distinguish Channi and follow Sukhminder Kaur and to distinguish Umadevi by Casteribe or to refer the eight questions formulated above to a larger Bench to resolve the conflict pointed out by Mr. Nehra when the recent verdict of the Supreme Court in Hari Nandan Prasad and another v. Employer I/R to Mangmt. of FCI and another; 2014 (2) SCT 234 came to my notice where the Supreme Court after noticing Casteribe and Umadevi in sharp departure of Channi (both authored by the Hon'ble Mr. Justice A.K.Sikri, one before when His Lordship adorned this Court as its Chief Justice, the other after His Lordship's elevation to the Supreme Court) in para 34 resolved the vexed question of discrimination by holding as next follows : -

> "34. On harmonious reading of the two judgments discussed in detail above, we are of the opinion that when there are posts available, in the absence of any unfair labour practice the Labour Court would not give direction for regularization only because a worker has continued as daily wage worker/adhoc/temporary worker for number of years. Further, if there are no posts available, such a direction for regularization would be impermissible. In the aforesaid circumstances giving of direction to regularize such a person, only on the basis of number of years put in by such a worker as daily wager etc. may amount to backdoor entry into the service which is an anathema to Art. 14 of the Constitution. Further, such a direction would not be given when the concerned worker does not meet the eligibility requirement of the post in question as per the Recruitment Rules. However, wherever it is found that similarly situated workmen are regularized by the employer itself under some scheme or otherwise and the workmen in question who have approached Industrial/Labour Court are at par with them, direction of regularization in such cases may be legally justified, otherwise, non-regularization of the left over workers itself would amount to invidious discrimination qua them in such cases and would be violative of Art. 14 of the Constitution. Thus, the Industrial adjudicator would be achieving the equality by upholding Art. 14, rather than violating this constitutional provision." (emphasis added)
>
> (Para 62)

Further held, that this landmark insight in the judgment has turned the tide. The judgment in para. 34 delivered by a three judge bench eminently extends the frontiers of industrial jurisprudence as hithertofore never before. It is in the same strain as U.P.S.E.B vs. Pooran Chand Pandey, 2007 (11) SCC 92, disapproved by the three judge bench in Official Liquidator v. Dayanand and others which is a decision prior to Casteribe. However.

(Para 63)

Further held, that Umadevi (3) has now to be understood in its application tolabour jurisprudence as one keeping in mind the dictum of both Casteribe and Hari Nandan Prasad, the former from the point of view of unfair labour practice, the latter from the standpoint of unfair discrimination while Umadevi stands beyond the pale of labour law as contradistinguished from mainline service law jurisprudence and their subtle difference. Labour law was delineated in Casteribe. But yet the Supreme Court did not go full throttle and circumscribed its decision on service law principles weighed down by principles of vacancies and the nature of initial appointments bound by the constitution bench principles laid down in Umadevi (3). Nevertheless, the exception carved out in Hari Nandan Prasad (para 34) is where the foothold lies and the take off point of the present batch of cases now rests. The clamour for regularization on principles of unfair discrimination is now louder for passing of favourable office orders of regularization in cases coming via the Industrial Tribunals and Labour Courts giving rise to a demand for application of constitutional law principles re: discrimination. I may say that any minor discrimination is not unfair because it may suffer reasonable restrictions as are permitted by the law. That is why I have dwelt only on unfair discrimination which is judicially unacceptable, but not mere discrimination which may suffer reasonable restrictions. But the position here is unacceptable because it is not legally justified to break a homogenous group asunder artificially. Failing which non-regularization of left over workers/ the unfortunate group as now defined in Hari Nandan Prasad would amount to hostile and invidious discrimination. Therefore the equilibrium has to be restored by granting the status quo ante from the dates counterparts secured benefit of regularization by administrative orders passed without judicial intervention. The Supreme Court holds in Hari Nandan Prasad that "...the Industrial adjudicator would be achieving the equality by upholding Art. 14, rather than violating this constitutional provision".

(Para 64)

Further held, that High Court Judges bound by Constitutional limitations in article 14 as elsewhere in the law are enjoined to erase unfair inequality resulting from adverse State action or inaction and would remain under oath while discharging judicial duties to strike down unfair discrimination the moment they find its ugly head rearing from case papers placed before them. They would remain bound to kill the weed before it grows on the meadow of article 14. Article 14 to say the least is the heart of the law pumping sap into the capillaries of the Constitution so that it grows well nourished and well tended into a Banyan tree with its root system pervading all things. After South Africa won its freedom the emblem of it Constitutional Court became the Banyan Tree.

(Para 65)

Further held, that any unfair discrimination practiced by the State has to be dealt with by the strong arm of the law by firm affirmative action in order to remove unfair discrimination and not to promote it so that rights of no citizen go un-redressed. It would be a crying shame to leave the petitioners deserted and feeling that article 14 was not meant for them and only for the 'haves'. Subverting consciously the equality clause in article 14 would be an anathema to the Constitution. Judges may as well then pack up their bags and go home.

(Para 66)

Further held, that The rights of the petitioners who are daily wage workers accrue and flow from the Labour Court awards made in their favour granting to them a continuity of service. However, where continuity of service is not granted by the Labour Court and such awards have attained finality, the period for which benefit of past service when not granted, would stand deprived of the reckonable period for intents and purposes. In the present cases, the petitioners would be deemed to have been in service as though the adverse retrenchment orders were never passed. The State was not able to show in any of these cases the rules of service applicable to the initial engagement of the petitioners on daily wager in the Forest and in the Irrigation Department. Therefore, the question of their illegal or irregular appointments is not a debatable issue in these batch of cases and a strong presumption would go in favour of the petitioners that their initial appointments were not contrary to law given that power to employ them was posited in the State to offer them daily wage employment albeit through

its local functionaries with power derived from manuals to operate the muster roll system. The Industrial Disputes Act is a piece of beneficial social welfare legislation which stands alone and apart from constitutional service law. However, as time passed and departures were made with India opening up to globalization and free enterprise the axis suffered a paradigm shift towards capital and then the Supreme Court spoke in Harjinder Singh vs. Punjab State Warehousing Corporation, (2010) 3 SCC 192 to turn back the rising tide. A sea change was brought about by a quick series of judgments with Harjinder Singh in the lead.

(Para 69)

Further held, that before leaving I would say a few more words on the principles of primary and secondary review of administrative action which was introduced , if I may be correct in saying so, by M.Jagannadha Rao, J. some years before Om Kumar was delivered by his Lordship in Union of India v. G.Ganayutham; (1997) 7 SCC 463. The legal position on the subject was summed up in para 31 of the report which to my mind is capable of universal application in administrative law and subject matter labour law. The question left open in sub para 4 (b) in Ganayutham appears to have been answered exhaustively in Om Kumar after noticing judicial thought processes expounded in judgments by Judges sitting at the apex level in foreign Courts on the subject in the United Kingdom and in the United States of America etc.

(Para 71)

Further held, that Article 19 and 21 were debatable so far as primary review was concerned. Article 14 was impartible. It is not negotiable. In Om Kumar (supra) the question of violation of article 14 was directly answered by the same Hon'ble Judge. This is how both the rulings have to be headed together, the first exploratory and the other explanatory of primary review jurisdiction while dealing with oppressive infractions of article 14. Therefore, the Court when empowered with primary review jurisdiction becomes the administrator and protector of equality before the law and the equal protection of the laws, so as to give meaningful, instant and ameliorative effect to the fundamental freedoms by not postponing such right deprivations for redress through non-constitutional adjudication, when facts demand and evidentiary proof is not found necessary in the facts and circumstances of a given case. By applying these standards of primary

review of administrative action in the present cases where the fortunate ones secured their freedom of regularization without court intervention but which has resulted in hostile and invidious discrimination are declared bad in the eyes of law. The rule of law is clearly against man's inhumanity to man. This kind of deprivation is in contravention of the natural law of equality among citizens who are or have become equally placed in all respects of basic rights possessed by both of them as human beings even if there were no written constitution or statutory law protecting workers against unfair discrimination and unfair labour practice inter se of those who deserve equality of treatment with their counterparts obtained through the tardy process of Labour Court trial resulting in favourable awards by the deeming fiction of law, even then the Court must step in to vanquish subjugation of the spirit. No person aggrieved should be turned away thinking the Court failed in coming to aid by restoring the unfair imbalance created by the administrator.

(Para 72)

Further held, that on the conspectus of the above facts, law and the thread of judgments read together, and for the various reasons stated interconnecting the judicial decisions, the rights of the petitioners for ante-dated regularization of services are declared in their favour and against the State.

(Para 73)

Further held, that the writ petitions are allowed. The orders of the respondent State declining representations of the petitioners for regularization in this batch of cases are nullified and set aside. In cases where regularization has been granted with effect from 2003 they shall be ante-dated in terms of this judgment from the dates such petitioners were separated from their erstwhile juniors and fellow workers. Accordingly, the State of Haryana would pass fresh orders in terms of this judgment in each case after the period of limitation prescribed for calling in question this order has expired.

(Para 74)

J.S.Maanipur, Advocate, for the petitioner(s). (CWPs No.9024 of 2004, 27407 of 2013)

Manoj Chahal, Advocate, for the petitioner(s). (CWPs No.22885, 22886, 23736, 23745 of 2011, 14170 of 2012, 10433, 15068, 26220 of 2013)

Vijay Guleria, Advocate, for the petitioner(s). (CWP No.17351 of 2012)

S.B.Kaushik, Advocate, for the petitioner(s). (CWP No.3901 of 2013)

Rajesh Malik, Advocate, for the petitioner(s). (CWP No.9496 of 2013)

B.S.Rathee, Advocate, for the petitioner(s). (CWP No.23938 of 2013)

Sandeep Thakan, Advocate, for the petitioner(s). (CWP No.27659 of 2013)

Deepak Sonak, Advocate, for the petitioner(s). (CWP No.28074, 28151 of 2013)

K.B.Raheja, Advocate, for the petitioner(s). (CWP No.3526 of 2011)

Harish Rathee, Sr. DAG, Haryana and Sunil Nehra, Sr. DAG, Haryana

RAJIV NARAIN RAINA, J.

(1) This order will dispose of a bunch of 19 petitions* as common questions of law and fact are involved in these cases. They have been heard together and are being disposed of by a common judgment. The facts are taken from CWP No.9024 of 2004 for convenience. Material facts are also taken from CWP 10017 of 2011 (Khajjan Singh v. State of Haryana & others) as both represent two somewhat different facets of the similar mirror, the former are in motion hearing whilst the latter are on remand from Letters Patent Appeals preferred by the State of Haryana against the orders of the Single Bench granting relief of regularization from the dates the juniors were regularized by Government without Court intervention on grounds of discrimination, notwithstanding the decision in ***Secretary, State of Karnataka and others*** **versus** ***Umadevi and others (1)***, {for brevity 'Umadevi' (3)} . Orders passed in CWP 10017 of 2011 are more or less central to this case which I will come to later in the discussion. But before that I would go to:- Facts of CWP No.9024 of 2004:

(1) (2006) 4 SCC 1

(2) CWP No.9024 of 2004 was admitted for regular hearing by the Division Bench on 18th September, 2004 to be listed for final disposal within six months. Earlier, by an interim order dated 29th May, 2004, the Court while issuing notice of motion to the respondents for final disposal of the writ petition, had stayed the operation of the retrenchment notices dated 14th May, 2004 (P-4 & P-5) issued by the Divisional Forest Officer, Production Division, Yamunanagar and served on both the petitioners and was pleased to issue an interim order directing that they shall be allowed to continue on the same post on which they were working on 14th May, 2004. While admitting the matter for regular hearing, the interim order was made to continue till further orders. On the strength of this interim order, these petitioners have continued in service of the Forest Department as dailywagers, *sikarmiks* or *deharidars*.

(3) Briefly stated, petitioner No.1 was engaged on daily-wage basis on 1st October, 1986 while petitioner No.2 was similarly appointed on 1st September, 1988. Their claim for regularization on a Group-D/Class-IV post was rejected by the impugned order dated 11th May, 2004 on the ground that they were not in service prior to 31st January, 1996 and were not on the employment strength of the workforce on 30th September, 2003, the appointed day fixed under the policy circular and thus did not conform to the conditions notified in the scheme of regularization promulgated by the Government of Haryana. They claim that they were both retrenched from service on 14th May, 2004 without circulating any working seniority/ priority list for them to know their position therein *vis-a- vis* their colleagues. In some of these cases the petitioners were protected by stay orders while others were not.

(4) However, in some of the connected cases there are petitioners who were not protected by the orders of this Court and were consequently retrenched from service. They had approached different Labour Courts in Haryana on references made by the appropriate Government under Section 10(1)(c) of the Industrial Disputes Act, 1947 (for short the "Act") to question the validity of their termination orders, issued either in writing or verbally, to be adjudicated before the industrial adjudicator. These set of petitioners secured awards in their favour in different years granting reinstatement with continuity of service from the dates of illegal termination/ retrenchment. In these cases, the awards are not in dispute since they have

attained finality and such petitioners secured reinstatement to daily-wage service in implementation of those awards through administrative orders issued in compliance. All such daily-wage workers have served or are working in different departments of the Government of Haryana, including in the Forest Department and in the Irrigation Department etc.

(5) The cases in which the petitioners were relieved from service by reason of retrenchment or termination had to litigate before succeeding in securing Labour Court awards in their favour resulting in reinstatement with continuity of service retrospectively from the respective dates of their illegal retrenchment. They have been returned to the status of daily-wage employees.

(6) It transpired that while they were litigating, many other dailywage labourers who were engaged during their time or afterward but continued in service by reason of non-retrenchment, meanwhile became recipients of the benefit of policy circulars issued by the State of Haryana from time to time and their services have been regularized by the Government and they continue to serve as regular employees deployed in the departments of the Government. The not so fortunate petitioners who spent time litigating for re-entry to service by reason of adverse orders passed against them are before this court claiming regularization from the respondent departments by virtue of awards granting them continuity of service with effect from the dates of their initial appointments/engagement as daily wage workers. These petitioners claim that they deserve to be treated similarly and on parity with their erstwhile colleagues junior to them from the dates of employment. This parity is sought with reference to the dates of engagement on daily-wage basis of those employed immediately thereafter who had had the benefit of their services regularized under different policy circulars of the Government including the one in operation when retrenchments were made.

(7) The claims of the petitioners have been rejected on various technical grounds prior to 10th April, 2006 when the Supreme Court pronounced the judgment in ***Secretary, State of Karnataka and others*** versus ***Umadevi and others (supra)***, ("*Umadevi*"). In some of the cases, the law laid down in ***Umadevi*** has been cited to deny relief of regularization *in praesenti*. The stand of the State in justification of non-regularization is

based on judicial pronouncements which according to the State have rendered it incapable of granting relief for the reason that their initial entry into service was in conflict with the constitutional scheme of public employment based on limitations imposed on the State by fundamental rights guaranteed under articles 14 and 16 of the Constitution of India, granting equality of opportunity and of non-discrimination.

(8) It is in this background that the petitioners are before this Court in this bunch of cases praying for directions to the respondent State to regularize their services in terms of the policy instructions on regularization issued from time to time prior to ***Umadevi.*** This claim has founded from the back date on the touchstone that the juniors have been regularized in service meanwhile and they were left out litigating in different Labour Courts while their juniors or similarly situated persons stole a march on them by the fortuitous circumstance of not being retrenched and not having suffered the agony of protracted litigation to establish their rights. The central plea raised by the petitioners is based on hostile, invidious and unfair discrimination between similarly situated persons; i.e. one who had the benefit of regularization through administrative orders passed under policy circulars without court intervention, while the 'left out group' by force of circumstances were deprived opportunity of similar treatment. This was due to termination of their services although they eminently satisfy the terms and conditions of the beneficial policies promulgated by the Government from time to time, but their rights of regularization under the then prevalent schemes could not fructify on account of their forced idleness and consequential absence at workplace on the cut off date. The petitioners say that subsequent withdrawing of policies following the ***Umadevi*** decision rendered on 10th April, 2006 would not take away their rights pressed in the cases in hand retroactively.

(9) To put it in a nutshell, all the daily wage labourers can be classified in two categories. The first fortunate category includes daily wage labourers who continued in service, were not retrenched and who were beneficiaries of policy circulars of the Government of Haryana which led to their services being regularized. The second not so fortunate category comprises of daily wage labourers who boarded the same boats but did not sail in them. This category of daily wagers comprises of retrenched labourers who invoked their remedies under the Act and secured reinstatement with continuity of service from the Industrial Tribunal. This did not end their

suffering. The Government of Haryana by administrative orders declined to them the benefit of regularization under the umbrella protection of the Judgment in the case of ***Umadevi***. Though this category of "have nots" have continued in service consequent upon reinstatement but, the benefit of regularization has escaped them like the elusive Albatross. Hence, this section of unregularized daily wage labourers are before this Court to secure what their fortunate compatriots got without raising a whisker or shouting hoarse. That is how we are.

(10) A detailed reference to facts of each case is neither necessary nor required which would needlessly burden this judgment by narrating the facts of each case only to incorporate the dates of engagement as dailywagers; their dates of termination; dates of industrial references made by the appropriate Government under the provisions of Section 10(1)(c) of the Act and the dates of publication of labour court awards in the Gazette. What is of concern for the decision of these cases is that they were all granted continuity of service by the awards passed by the Labour Courts while granting reinstatement which will be deemed to take effect from the dates of termination or retrenchment and therefore their daily-wage services should be counted from the dates of initial appointment/engagement. For the sake of convenience, the group as against whom unfair discrimination is pleaded are referred to as the 'fortunate group', being those who continued in service till regularization and the petitioners, are called the 'left out group'.

(11) The vexed questions which arise for determination in the present set of matters can be crystallized as follows : -

> i. Whether the 'left out group' who were retrenched from daily wage manual service in contravention of the provisions of the Industrial Disputes Act, 1947 on reinstatement with continuity of service granted by the Labour Court would have a right to retroactive parity with the 'fortunate group' whose services were regularized under relevant policy instructions of the Government of Haryana by the department without Court intervention, and similarly situated workmen have been regularized by the employer itself then would they be entitled to regularization/permanency/quasi-permanency of their service tenure at par with their juniors by giving protection of article 14 of the Constitution of India to the deprived lot on ground of unfair discrimination?

ii. Whether the ratio of ***Umadevi*** renders the 'left out group' legally incapable of being granted the concession/benefit of regularization on the strength of the policies of regularization dated 7th March, 1996, 18th March, 1996 and 1st January, 2003 traceable to article 162 of The Constitution which stand was withdrawn vide notification dated 13th April, 2007 following ***Umadevi***, and thereafter under notification dated 29th July, 2011 formulated under article 209 of the Constitution read with clause 6 of the Haryana Government, General Administration Department (General Services) notification dated 28th January, 1970 provided they have completed 10 years of service as on 10th April 1996 counted backward from 10th April 2006, the interpreted and so stated fate of decision in ***Umadevi***?

iii. Whether ***Umadevi*** stands distinguished and explained in **Maharasthra State Road Transport Corporation Ltd.** v. **Casteribe Rajya Parivahan Karamchari Sanghalana**; (2009) 8 SCC 556 (in short "***Casteribe***") which culls out the ratio of ***Umadevi*** and holds it as a verdict not applicable to industrial workers or 'workmen' by definition, to whom the protective rights flowing from Entry 10 of the Fifth Schedule to the Industrial Disputes Act, 1947 employing by way of unfair labour practice: "*workmen as badlis, casuals or* temporaries and to continue them as such for years, with the object of depriving them of the status and *privileges of permanent workmen* "[emphasis supplied] and thus by reason of unfair and hostile exploitation by the State and its organs over an unjustified period of time spent on daily-wages with no security of tenure, then can regularization orders be passed outside Labour Court adjudication?

iv. Whether, the Writ Court would be justified in applying the principles laid down in ***Casteribe*** to the present case by resort to principles of unfair labour practice, which is a species of unfair discrimination, malafides, bias and the like, known to service law which are actionable in writ proceedings and capable of determination in extra ordinary jurisdiction exercised by the Writ Court without relegating aggrieved person to less efficacious and protracted alternative remedy under the Industrial Disputes Act, 1947 obviating the necessity of recording of evidence to prove unfair labour practice in a Labour Court and to

thus direct the State to regularize the services of the 'left out group' retrospectively to remove hostile and invidious discrimination between the 'fortunate group' and the 'left out group' and put them on equal footing to remove inequality of opportunity amongst them in doing justice to the parties.

v. Whether the Court exercising writ jurisdiction against arbitrary and discriminatory administrative orders, rejecting requests for regularization, as in the present case, is constitutionally obliged to treat discrimination as *per se* amenable to primary review as explained by the Supreme Court in **Om Kumar v. Union of India**, in Delhi Development Authority v. Skipper **Construction**; 2001 (2) SCC 386; (for short "***Om Kumar***") and to apply the principle in direct intervention in cases where the Writ Court is confronted with unfair discrimination practiced by State, then should the Court perform its constitutional duty to remove unfair discrimination brought before it by person aggrieved keeping in mind the well recognized parts of article 14 of the Constitution, as explained on ***Om Kumar*** namely; one of arbitrariness and one of unfair discrimination both tested on different parameters, one on proportionality and Wednesbury rules of arbitrariness by applying the test of secondary review of arbitrary administrative action while the other, on principles of primary review in a case of unfair and actionable discrimination and come to the rescue of the person unfairly treated and to restore to them equal protection by affirmative action within the same homogenous group levelling the 'fortunate' and the 'left out group' retroactively due to continuity of service awarded by the Labour Court, to maintain the balance of justice?

vi. Whether those as against whom unfair discrimination is pleaded and practiced i.e. the 'fortunate group' who continued to serve on daily wages then have they to be treated as regular employees the moment orders of regularization were passed in their favour erasing their past illegal or irregular service as daily-wage labourers reckonable from a fresh starting point, then further would such event activate a right on the 'left out group' to affirmatively demand similar treatment retrospectively by deeming that they were never retrenched and now by virtue of Labour Court awards granting continuity of

service would give them the benefit of deemed legal fiction of continuous service assuming them to be working on the cutoff date fixed by policy circulars, when the 'fortunate group' were regularized not by Court orders but by the Department of the Government on their own volition?

vii. Whether daily-wage labour when not holding any public posts can be deprived of their claim to declaration on the plea that their appointments/engagements are 'illegal' and 'irregular' and not in consonance with the constitutional scheme of making appointments, where there are no statutory recruitment rules framed under proviso to article 309 of the Constitution or other recruitment rules and bye laws made by Government or statutory bodies framed in this behalf and such an engagement is an exception to the recruitment rule to public posts governed by rules and therefore, deserve to be dealt with by different standards, one on strict scrutiny of rules, the other on relaxed standards de hors rules?

viii. Whether formal orders of regularization of services can be issued only on availability of Group D cadre posts or on creation of posts and in absence thereof then can the right of the petitioners, the 'left out group' be defeated or postponed in a case of ex facie unfair discrimination, when fundamental principles of nondiscrimination is guaranteed as a fundamental right under article 14 of the Constitution, and further whether the more appropriate course should be adopted to put an end to continued fundamental right deprivation by directing retroactive parity to remove unfair discrimination through a supernumerary arrangement as the only possible method to cure inequality when State acted contrary to article 14 of the Constitution?

What was said in Umadevi's case

(12) The Constitution Bench in ***Umadevi*** has authoritatively issued a mandate to the High Courts and to the Supreme Court to desist from issuing mandamus to the employer States to regularize and absorb *ad hoc*, daily wage and temporary employees in regular service who had secured employment without following the procedure prescribed by the rules applicable for recruitment to posts as that would violate the right of equality of opportunity under articles 14 and 16 of the Constitution of India to those

who were available in the job market and were deprived of the opportunity of application and contest to such posts. It was held that such appointments made contrary to the scheme of the Constitution of ensuring equal opportunity in public employment preserved by article 16 cannot be regularized even on the ground of discrimination and neither the Supreme Court nor the High Court would issue any such directions of making permanent such as are rank usurpers of public office on the grounds of discrimination which is contrary to the constitutional scheme of making appointments to Government service or public employment. The Constitution Bench did not agree with its earlier view taken in ***Dharwad District Public Works Department*** versus ***State of Karnataka (2),*** which was overruled.

(13) The Constitution Bench also found its earlier directions issued in para. 50 of ***State of Haryana*** versus ***Piara Singh (3)*** , as inconsistent with the conclusions reached in para. 45 of the judgment which were held to run counter to the constitutional scheme of employment. Piara Singh was declared bad law. The Court decreed against such employment made *de hors* the rules of recruitment and directed that such *ad hoc*, temporary and daily wage employees have no rights but can be given preference on the basis of their experience at the time the same posts are filled on regular basis by open selection and the condition of age bar should be waived off for them. Ten years of irregular ad hoc or daily wage service service was accepted in the formula evolved as sufficient to grant relief. But this was ordered as a one-time measure.It may be added here that the incubation period in the old schemes for rights to mature was three years conceived by Government in its policies.

(14) However, in the preface to the judgment in ***Umadevi*** in para. 2, the Court observed that 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 offering employment or engaging workers on daily wages to meet the exigencies of administration.

(15) The Court noticed the newly enacted, The National Rural Employment Guarantee Act, 2005 the object of which is to give employment to at least one member of a family for 100 days in a year on paying wages

(2) 1990 (1) SCR 544
(3) 1992 (4) SCC 118

as fixed under the Act. The Court was pre-occupied by the central theme of the judgment that where there are public posts and regular vacancies available, they deservedly require to be filled in terms of rules of recruitment and not *de hors* them. The vacancies cannot be filled "in a haphazard manner or based of patronage or other considerations. Regula appointment must be the rule". An alarming situation had arisen in the country, the result of which was ***Umadevi*** where the Union and the States, besides the instrumentalities of State had resorted to mass scale irregular appointments especially in the lower rungs of the service against cadre without reference to the duty and constitutional limitations placed upon the exercise of power to appoint by following and ensuring a proper appointment procedure through the Public Service Commissions or otherwise as per the rules prescribed and to permit these irregular appointees or those appointed on contract or on daily wage basis 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. What the Court was preoccupied with was the dilemma of entries through the backdoor and to check service preventing regular recruitment.

(16) The Constitution Bench was conscious that the Courts have not always kept the legal aspects in mind and have occasionally even stayed the regular process of employment as is set in motion and in some cases, even directed that these illegal, irregular and improper entrants be absorbed into service. The Supreme Court called this class of employment as "Litigious employment" which deserved no constitutional protection. The Court noticed its earlier decision in ***A. Umarani*** versus ***Registrar, Cooperative Societies and others (4)*** and re-affirmed its view that the State cannot invoke its powers under article 162 of the Constitution to regularize such appointments. regularization is not and cannot be a valid mode of recruitment by any State authority within the meaning of article 12 of the Constitution of India or by anybody or by any authority governed by a statutory enactment or the rules framed there under. *Ad-hoc* appointments could earn no regularization. Any length of service put in through the back door of *adhocism* would not mean

(4) 2004 (7) SCC 112

that they had acquired a right of regularization. The Court quoted the observations of Farewell, Lord Justice in ***Latham*** versus ***Richard Johnson & Nephew Ltd. (5)*** :-

> "We must be very careful not to allow our sympathy withthe infant plaintiff to affect our judgment. Sentiment is a dangerous will o' the wisp to take as a guide in the search for legal principles."

In para. 42 and 44 of ***Umadevi***, the Supreme Court ruled :-

> 42. The argument that the right to life protected by Article 21 of the Constitution of India would include the right to employment cannot also be accepted at this juncture. The law is dynamic and our Constitution is a living document. May be at some future point of time, the right to employment can also be brought in under the concept of right to life or even included as a fundamental right. The new statute is perhaps a beginning. As things now stand, the acceptance of such a plea at the instance of the employees before us would lead to the consequence of depriving a large number of other aspirants of an opportunity to compete for the post or employment. Their right to employment, if it is a part of right to life, would stand denuded by the preferring of those who have got in casually or those who have come through the back door. The obligation cast on the State under Article 39(a) of the Constitution of India is to ensure that all citizens equally have the right to adequate means of livelihood. It will be more consistent with that policy if the courts recognize that an appointment to a post in government service or in the service of its instrumentalities, can only be by way of a proper selection in the manner recognized by the relevant legislation in the context of the relevant provisions of the Constitution. In the name of individualizing justice, it is also not possible to shut our eyes to the constitutional scheme and the right of the numerous as against the few who are before the court. The Directive Principles of State Policy have also to be reconciled with the rights available to the citizen under Part III of the Constitution and the obligation of the State to one and all

(5) 1913 (1) KB 398

and not to a particular group of citizens. We, therefore, overrule the argument based on Article 21 of the Constitution.

44. 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."

What was said in Casteribe's case about Umadevi

(17) The Supreme Court made a departure in 2009 in ***Casteribe***. It may be noted that the present bunch of cases deal with rights of daily wagers not protected or burdened by classic service law jurisprudence as developed by Courts but by the principles of both broad service law but to the contrary, on industrial law principles protected by a special enactment found in the Industrial Disputes Act, 1947 and State Industrial laws akin to it.

(18) Workmen by definition may or may not hold public posts, their employment may or may not be public employment, their service conditions may or may not be governed by rules, they may or may not be backdoor entries, they may or may not be entries through patronage, recommendation etc. in the public or private sector but the State Government was empowered in its residuary power to employ them for work on State or Central projects, in offices or in the field run by State Departments in far off places, in the outback of the Forest and the Irrigation Department then their entry was not per se abhorrent in special field conditions. The employment in remote areas of daily wage employees may not necessarily and may often not violate articles 14 and 16 of the Constitution. The labour obtained at site in inaccessible areas may deserve the protection of rights of local labour as easily found and willing to work in remote villages to carry out projects or schemes of State Government by a local arrangement made by offering employment to such people, labour being difficult to import by applying constitutional principles and the impracticality of it that such an exercisemay entail and wasteful expenditure to tax payers money. Here, costly advertisements placed in Newspapers may support and represent in themselves money spent on meagre wages for a large number of local labourers which effort may not be worth the candle. A very few if not many would leave hearth and home to take up daily wage service in far off places given the low wage which may hardly be sufficient to offset the displacement overheads. I had occasion to deal with a case of a daily wage employee in the Haryana Forest Department, just as the majority of petitioners are in this case, in ***Damyanti*** versus ***Presiding Officer Industrial Tribunal-cum-Labour Court, Panipat and another (6)***, while sitting in Single Bench, I then thought:-

> "A daily wager or seasonal worker too is a workman with industrial rights. No rule was shown to me as to how seasonal workers or daily wagers are recruited. It is inherent that employment in far flung places where the forest department has ongoing works to employ to locally available labour. It is no answer that in such employment opportunity there must be public advertisements to satisfy the tests of Article 14 & 16 of the Constitution. In fact it may violate local labour rights to introduce outsiders for menial, unskilled or semi skilled

(6) 2012 (4) S.C.T.506

daily wage work in the hinterland. In this context, I think that Articles 14 & 16 cannot be stretched beyond breaking point for the State to contend, as unfortunately it does in routine in such cases, that the appointment is de hors the rule. I ask which rule is violated after exploiting a low paid worker for 15 years and then citing rule of appointment of seasonal workers on daily wages and contending that the Forest Department is not an industry. This is a matter of shame for the forest department to ponder over."

(19) Labour and industrial rights deserve to be examined on both constitutional principles and industrial law precepts preserved by the special law of the Industrial Disputes Act, 1947 and the foremost question posed in (iv) above has to be answered in the first instance whether ***Umadevi*** stands distinguished and explained in the landmark judgment delivered by R.M.Lodha, J. in ***Casteribe***. The two judge Bench of the Supreme Court dealt with the State law of Maharashtra cited as **The Maharasthra Recognition of Trade Unions and Prevention of Unfair Labour Practice Act, 1971** (MRTU & PULP Act). The Court dealt with Section 21(1) and its proviso; Schedule IV Items 2, 5, 6 and 9 and especially with Item 6 which is in *pari materia* with the provisions of Entry 10 of the 5th Schedule to the Industrial Disputes Act, 1947, the commonality being a facet of unfair labour practice to keep workmen as *badlis,* casuals or temporaries and to continue them as such "for years" with the object of depriving them of the status and privileges of permanent workmen. The Constitution Bench in ***Umadevi*** was explained in para. 35 and 36 in ***Casteribe*** as follows : -

> 35. Umadevi (3) 1 is an authoritative pronouncement for the proposition that the Supreme Court (Article 32) and the High Courts (Article 226) should not issue directions of absorption, regularization or permanent continuance of temporary, contractual, casual, daily wage or ad hoc employees unless the recruitment itself was made regularly in terms of the constitutional scheme.
>
> 36. Umadevi (3)1 does not denude the Industrial and Labour Courts of their statutory power under Section 30 read with Section 32 of the MRTU and PULP Act to order permanency of the workers who have been victims of unfair labour practice on the part of the employer

under Item 6 of Schedule IV where the posts on which they have been working exist. Umadevi (3) cannot be held to have overriden the powers of the Industrial and Labour Courts in passing appropriate order under Section 30 of the MRTU and PULP Act, once unfair labour practice on the part of the employer under Item 6 of Schedule IV is established." (emphasis added)

(20) The Court observed that there can never be any quarrel with the proposition that the Courts cannot direct creation of posts, the principles of which are embedded in ***Mahatma Phule Agricultural University*** versus ***Nasik Zila Sheth Kamgar Union (7), State of Maharasthra*** versus ***R.S.Bhonde (8), Indians Drugs & Pharmaceuticals Ltd.*** versus ***Workmen (9), Aravali Gold Club*** versus ***Chander Hass (10).*** In para. 41, in ***Casteribe*** the Court held : -.

"41. Thus, there is no doubt that creation of posts is not within the domain of judicial functions which obviously pertains to the executive. It is also true that the status of permanency cannot be granted by the Court where no such posts exist and that executive functions and powers with regard to the creation of posts cannot be arrogated by the Courts."

(21) The argument raised by the Corporation in ***Casteribe*** before the Supreme Court was that, where the Industrial Court has found the Corporation to have indulged in unfair labour practice in employing the complainants as casuals on piece-rate basis, then the only direction which could be given to the Corporation was to cease and desist from indulging in such unfair labour practice and no direction of according permanency to those employees could be given, was rejected by the Supreme Court since it found specific power given to the Industrial/Labour Court under the Act to take affirmative action against the erring employers and orders can well be made to accord permanency to the employees affected by such unfair labour practice. The Court found nothing wrong in the direction of the Bombay High Court granting status and permanency to the complainants employed as cleaners by the Corporation for its buses running public

(7) 2001 (3) SCR 1089
(8) (2005) 6 SCC 751
(9) (2007) 1 SCC 408
(10) (2008) 1 SCC 683

transport. The directions issued in ***Umadevi*** were held to be confined to orders passed by the High Courts under article 226 and the Supreme Court under article 32 not to issue directions regarding absorption/regularization of daily wage or *ad hoc* employees unless the recruitment itself was made regular in terms of the constitutional scheme. However, the victims of unfair labour practice of the employer deserve freedom of permanency where facts and circumstances demand in the canvas of ***Casteribe***.

What is unfair labour practice and unfair discrimination in Labour & Industrial law

(22) Though ***Casteribe*** dealt with MRTU & PULP Act enacted by the State of Maharashtra but the provisions of unfair labour practice are identical to Entry 10 of the 5th Schedule to the Industrial Disputes Act, 1947. Entry 10 is a statutory protection against invidious discrimination and exploitation provided the discrimination continues 'for years'. It would follow that short duration of employment is *per se* not violative of Entry 10 of the Act and length of employment becomes relevant consideration to examine unfair labour practice issues. The rule evolved in ***Umadevi*** of 10 years service or more has sufficient approval of the Supreme Court to call upon the Union and the State Governments and their instrumentalities to take steps of regularization as a one-time measure, the services of irregularly appointed but not illegally appointed workers subject to availability of sanctioned posts where such employment is not litigious in nature or under the cover of orders of Courts or of Tribunals. In ***Umadevi*** the Constitution Bench protected regularization done but those appointments which were not sub judice could not be reopened. In terms of ***Umadevi***, a distinction will have to be kept in mind between irregular appointments and illegal ones in view of the directions in para. 44 to para. 46, and thus a distinction would also have to be kept in mind between regularization and giving permanency.

(23) The claim in this bunch of cases arises out of Labour Court awards granting reinstatement with continuity of service. If the petitioners were kept out of service by illegal orders passed by the State Government functionaries, the period of absence would have to be treated as continuous service to be added to the total period of service with a right of protection under Entry 10 of the 5th schedule to the Industrial Disputes Act provided they qualify as 'workmen' within the meaning of section 2 (s) of the Act

which ex facie they appear to be without any special proof by way of evidence. There is no dispute that the petitioners stand reinstated to service in compliance of the orders passed by the Industrial adjudicator and they may deserve to be put at par with the "fortunate group" to remove the vice of unfair discrimination, where the "fortunate group" secured orders of regularization or permanency by the administrator and not by the Court. The interim orders passed by the Division Bench of this Court should not put the petitioners to disrepute of a litigious nature and should be understood from the stand point of persons aggrieved having approached the Court for its protection under article 226 of the Constitution to secure justice to themselves. Therefore, the cases in this batch in which persons have continued in service by interim protection or otherwise, can be placed in the same group together with those of the petitioners who approached the Court after their representations for regularization were rejected either before or after the pronouncement of the judgment in ***Umadevi***.

(24) The question arises whether unfair labour practice can be determined and established only through the process of industrial adjudication or can the result be achieved by direct intervention under article 226 of the Constitution or what we may call in extra ordinary jurisdiction exercised by the Writ Court on affidavits without relegating the aggrieved persons to a less efficacious and protracted alternative remedy available under the machinery of the Industrial Disputes Act, 1947 after such persons have secured reinstatement through industrial adjudication where findings have come that the termination or retrenchment was unlawful or illegal.

(25) Entry 10 of the 5th Schedule to the Industrial Disputes Act, to my mind, requires no special adjudication by evidentiary proof to establish a jurisdictional fact of keeping "workmen as badlis, casuals or temporaries and to continue them as such for years, with the object of depriving them of the status and privileges of permanent workmen" where length of service spent in and out of daily wage service stands clubbed by legal fiction obtained through labour court orders which have attained finality, as it requires no special proof to determine the claims of the left out group to bring them at par with the "fortunate group". At this point, it may be appropriate to enter the question of unfair discrimination and therefore to understand the law enunciated by the Supreme Court in ***Om Kumar*** and as to how it might come into play on the facts of the present cases.

What does Om Kumar tells about article 14

(26) The issue has been delineated in question (vi) above and requires no further elaboration in search of an answer except to visit the following extracts from the judgment of M.Jagannadha Rao, J. speaking for the Court and surgically separating the two parts of article 14, of arbitrariness and discrimination. Though the decision was rendered in the context of disciplinary proceedings and imposition of higher degrees of punishment for the roles played by the contesting delinquent parties, the general principles laid down apply to all jurisdictions universally so long as administrative action is under judicial review. In para. 51, the Supreme Court observed that in the Indian scene the existence of a Charter of fundamental freedoms from 1950 distinguishes our law and has placed our Courts in a more advantageous position than in England so far as judging the validity of legislative as well as administrative action is concerned. When the principle of arbitrariness is raised, proportionality and unreasonableness comes to be tested on the Wednesbury rule which is well recognized in India. The administrative decisions have to be tested both on proportionality and on unfair discrimination against alleged arbitrariness where the Court applies the test of secondary review, the administrator playing the primary role in selecting proportionality. However, when the classification based under article 14 is brought in motion against the administrative action, the principles of discriminative classification and arbitrariness arise. In para. 56 to 59 the law on the difference of review jurisdiction was discussed and it is profitable to read it and to keep in mind the mechanism of how the Court switches roles from one to the other depending on the facts of the case brought for review: -

> "56. Initially, our Courts, while testing legislation as well as administrative action which was challenged as being discriminatory under Article 14, were examining whether the classification was discriminatory, in the sense whether the criteria for differentiation were intelligible and whether there was a rational relation between the classification and the object sought to be achieved by the classification . It is not necessary to give citation of cases decided by this court where administrative action was struck down as being discriminative. There are numerous.

(ii) Arbitrariness test under Article 14:

57. But, in E.P. Royappa v. State of Tamil Nadu, [1974] 4 SCC 31, Bhagwati, J. laid down another test for purposes of Article 14. It was stated that if the administrative action was 'arbitrary', it could be struck down under Article 14. This principle is now uniformly followed in all Courts more rigorously than the one based on classification. Arbitrary action by the administrator is described as one that is irrational and not based on sound reason. It is also described as one that is unreasonable.

> (b) If, under Article 14, administrative action is to be struck down as discriminative, proportionality applies and it is primary review. If it is held arbitrary, Wednesbury applies and it is secondary review: We have now reached the crucial aspect directly arising in the case. This aspect was left open for discussion in future in Ganayutham but as the question of 'arbitrariness' (and not of discriminatory classification) arises here, we wish to make the legal position clear.

59. When does the Court apply, under article 14, the proportionality test as a primary reviewing authority and when does the Court apply the Wednesbury rule as a secondary reviewing authority? From the earlier review of basic principles, the answer becomes simple. In fact, we have further guidance in this behalf."

(27) The Court summed up the legal position in para. 64 to 69 which read : -

"It is clear from the above discussion that in India where administrative action is challenged under Article 14 as being discriminatory, equals are treated unequally or unequals are treated equally, the question is for the Constitutional Courts as primary reviewing Courts to consider correctness of the level of discrimination applied and whether it is excessive and whether it has a nexus with the objective intended to be achieved by the administrator. Here the Court deals with the merits of the balancing action of the administrator and is, in essence, applying

'proportionality' and is a primary reviewing authority. But where, an administrative action is challenged as 'arbitrary' under Article 14 on the basis of Royappa (as in cases where punishments in disciplinary cases are challenged), the question will be whether the administrative order is 'rational' or 'reasonable' and the test then is the Wednesbury test. The Courts would then be confined only to a secondary role and will only have to see whether the administrator has done well in his primary role, whether he has acted illegally or has omitted relevant factors from consideration or has taken irrelevant factors into consideration or whether his view is one which no reasonable person could have taken. If his action does not satisfy these rules, it is to be treated as arbitrary. In G.B. Mahajan v. Jalgaon Municipal Council, [1991] 3 SCC 91, at 111. Venkatachaliah, J, (as he then was) pointed out that 'reasonableness' of the administrator under Article 14 in the context of administrative law has to be judged from the stand point of Wednesbury rules. In Tata's Cellular v. Union of India, [1994] 6 SCC 651 (at PP. 679-680); Indian Express Newspapers v. Union of India, [1985] 1 SCC 641 at 691), Supreme Court Employees' Welfare Association v. Union of India and Anr., [1989] 4 SCC 187, at. 241 and U.P. Financial Corporation v. GEM CAP (India) Pvt. Ltd., [1993] 2 SCC 299, at 307, while Judging whether the administrative action is 'arbitrary' under Article 14 (i.e. Otherwise then being discriminatory, this Court has confined itself to a Wednesbury review always. Thus, when administrative action is attacked as discriminatory under Article 14, the principle of primary review is for the Courts by applying proportionality. However, where administrative action is questioned as 'arbitrary' under Article 14, the principle of secondary review based on Wednesbury principles applies. Proportionality and Punishments in Service Law: The principles explained in the last preceding paragraph in respect of Article 14 are now to be applied here where the question of 'arbitrariness' of the order of punishment is questioned under Article 14. In this context, we shall only refer to these cases. In Ranjit Thakur v. Union of India, [1987] 4 SCC 611, this Court referred to 'proportionality' in the quantum of punishment but the Court observed

that the punishment was 'shockingly' disproportionate to the misconduct proved. In B.C. Chaturvedi v. Union of India, [1995] 6 SCC 749, this Court stated that the court will not interfere unless the punishment awards was one which shocked the conscience of the Court. Even then, the Court would remit the matter back to the authority and would not normally substitute one punishment for the other. However, in rare situations, the Court could award an alternative penalty. It was also so stated in Ganayutham. Thus, from the above principles and decided cases, it must be held that where an administrative decision relating to punishment in disciplinary cases is questioned as 'arbitrary' under Article 14, the Court is confined to Wednesbury principles as a secondary reviewing authority. The court will not apply proportionality as a primary reviewing Court because no issue of fundamental freedoms nor of discrimination under Article 14 applies in such a context. The Court while reviewing punishment and if it is satisfied that Wednesbury principles are violated, it has normally to remit the matter to the administrator for a fresh decision as to the quantum of punishment. Only in rare cases where there has been long delay in the time taken by the disciplinary proceedings and in the time taken in the Courts, and such extreme or rare cases can the Court substitute its own view as to the quantum of punishment."

(28) It thus follows that the Writ Court when faced with unfair trade discrimination, it is constitutionally imperative and would remain within its constitutional limitations in removing the vice of hostile and invidious discrimination by putting a person unfairly discriminated to be treated at par and with the "fortunate group" (as tested in this case) bringing about parity in treatment particularly when the "fortunate group" obtained administrative orders of regularization/permanency under policy schemes though those schemes may no longer be available by the State itself without court interference. There is no question of secondary review of administrative action here in this case to be tested on grounds of reasonableness or arbitrariness. The Writ Court becomes the primary adjudicator of unfair discrimination which may arise out of statutory industrial rights but tested on the touchstone of article 14 by transporting Entry 10 of the 5th Schedule to the judicial dais and which is not incapable of decision making in the extra

ordinary jurisdiction of the Writ Court, where the State is unable to satisfy the Court that its action is free from discrimination and where the foundational and jurisdictional facts are not disputed. The result can be achieved simply by applying the formula of long service rendered "for years" which is statutorily protected by Entry 10. What is meant by "for years" is not one of art. It is more a question of interpretation applying to it things like intolerable and oppressive duration, point of frustration in service, loss of hope, counterproductive to production of goods and services where the spirit to serve might die, but viewed on principles of pragmatic humanism which all may be difficult to measure. However, only thing is certain that the employer must have long ago conferred permanency to a coworker. It is difficult to express any opinion which is not necessary in this case and is left open, that is, the numerical question of what is meant by or qualified to be "for years" in Entry 10. It is not necessary because in these cases the dates of the co-workers, the "fortunate group" is known in their respective determining points. But I would say at least this much that it is a rule against exploitation by a man of man himself.

(29) To put an aggrieved person who has alternative remedies before the Industrial Adjudicator to the throes of a trial only upon an industrial reference where the cause can be espoused by the union alone, would to my mind be adding insult to injury and delaying and postponing the right to non-discriminatory treatment to an unpredictable and unknown point in time in the remote future crystallizing industrial rights. In this many lives may be obliterated. Removing unfair discrimination today is of fundamental value and is not the same thing as removing discrimination after long drawn out litigation. The Court cannot turn a blind eye to this when viewed from the prism of the equality clause. Therefore, the Writ Court in my considered view can well apply industrial law principles, for the first time, on the principle of expediency through Entry 10 of the 5th Schedule of the Act read with the ratio of ***Casteribe*** provided the facts are not seriously disputed, but not disputed for the sake of resistance and refutation. A meaning should be given to Entry 10 in such a manner which saves time and expenses of marginalized workers, achieves expedition and saves court's resources as well and avoids the agony of a protracted trial in a labour court so long as the result can be achieved in extraordinary writ

jurisdiction acting within the four corners of the law mostly on industrial law principles. The res ipsa loquitur rule can be appropriately applied cautiously and carefully weighed between the competing interests of a weak citizen and the powerful State for localized labour serving in remote areas.

(30) Though ***Casteribe*** is a case arising out of industrial adjudication on a complaint made by the Union of workers that the affected employees were engaged by the Corporation as casual labourers for cleaning the buses between 1980-1985 but the contested issue before the labour tribunal was whether the workers could be granted the status of permanency on par with other permanent cleaners. The Industrial Court, Bombay held that the complaint regarding unfair labour practice against the Corporation under Item 6 of Schedule IV was not maintainable. However, the complaints were maintainable in respect of the unfair labour practice under items 5, 9 and 10. A finding was returned that unfair labour practice has been committed under items 5 and 9 of schedule IV. Section 30 of the Maharashtra State Act empowers the Industrial and the Labour Courts to decide on any person named in the complaint if he has engaged in or is engaging in any unfair labour practice. It may in its order give declarations and directions accordingly. Items 5, 6 and 9 of Schedule IV to the MRTU & PULP Acts need to be seen. They read : -

> "5. To show favouritism or partiality to one set of workers, regardless of merits.
>
> 6. To employ employees as "badlis", casuals or temporaries and to continue them as such for years, with the object of depriving them of the status and privileges of permanent employees.
>
> 9. Failure to implement award, settlement or agreement."

(31) Item 6 of Schedule IV is identical to Entry 10 of the 5th Schedule to the Central Act and, therefore, would suffer common interpretation. The expression "unfair labour practice" in Section 2 (ra) of the Industrial Disputes Act, 1947 is defined to mean any of the practices specified in the 5th Schedule. It may be noted that the Industrial Disputes Act, 1947 does not contain a provision like Section 30 of the MRTU &

PULP Act in Maharashtra. Unfair labour practice in the Central Act are placed in Chapter VC. Section 25T and 25U deal with prohibition and penalty for committing unfair labour practice. The provisions read : -

> **"25T. Prohibition of unfair labour practice** No employer or workman or a trade union, whether registered under the Trade Unions Act, 1926 (16 of 1926), or not, shall commit any unfair labour practice.
>
> **25U. Penalty for committing unfair labour practices—** Any person who commits any unfair labour practice shall be punishable with imprisonment for a term which may extend to six months or with fine which may extend to one thousand rupees or with both"

(32) There is a complete statutory prohibition against an employer, workmen or trade union against committing an unfair labour practice. Though the consequences of violating the provisions of Section 25T of the Industrial Disputes Act is punishment with imprisonment but that does not mean that either the Labour Court or the Writ Court is barred to exercise its powers of making declarations and issuing directions where a prima facie case is made out of violation of the law. Where the issues on facts are not found to be complicated ones deserving resolution only by way of evidence and proof before the Labour Court then this Court is not precluded to act in aid of a person suffering from continued right deprivation due to unfair discrimination and to the contrary would remain under a bounden duty under article 226 to strike down unfair discrimination. Entry 10 is a rule against exploitation. It is a rule against modern day slavery and against unfair domination. Unfair labour practice is akin to unfair discrimination. They both belong to the same family. Entry 10 of the Central Act and Entry 6 of the Maharashtra Act pre-supposes that a body of workers under the same employer and doing the same thing are permanent while others not. Unfair labour practice would thus fall in the same cluster of grounds of challenge of administrative action as those when the Writ Court deals with in cases of malafides, malice in law, malice in fact, bias, colourable exercise of power or abuse of authority and so on and so forth. Merely because the Central Act does not contain specific provisions such as those in MRTU & PULP Act and of Section 30 thereof, it would not deter this Court in writ proceedings to remove unfair discrimination whenever found without resort

to remedy before the Labour Court when the question pure and simple to be adjudged is the number of years of service qualifying test of Entry 10 or Entry 6, the latter considered in ***Casteribe***. Section 30 of The MRTU & PULP Act thus deserves attention and is reproduced for ready reference : -

> "**30. Powers of Industrial and Labour Courts** (1) Where a Court decides that any person named in the complaint has engaged in, or is engaging in, any unfair labour practice, it may in its order--
>
> (a) declare that an unfair labour practice has been engaged in or is being engaged in by that person, andspecify any other person who has engaged in, or is engaging in the unfair labour practice;
>
> (b) direct all such persons to cease and desist from such unfair labour practice, and take such affirmative action (including payment of reasonable compensation to the employee or employees affected by the unfair labour practice, or reinstatement of the employee or employees with or without back wages, or the payment of reasonable compensation) as may in the opinion of the Court be necessary to effectuate the policy of the Act;
>
> (c) where a recognized union has engaged in or is engaging in, any unfair labour practice, direct that its recognition shall be cancelled or that all or any of its 11 rights under sub-section (1) of Section 20 or its right under Section 23 shall be suspended.
>
> (2) In any proceeding before it under this Act, the Court, may pass such interim order (including any temporary relief or restraining order) as it deems just and proper (including directions to the person to withdraw temporarily the practice complained of, which is an issue in such proceeding), pending final decision: Provided that, the Court may, on an application in that behalf, review any interim order passed by it.
>
> (3) For the purpose of holding an enquiry or proceeding under this Act, the Court shall have the same powers as are vested in Courts in respect of -- (a) proof of facts by affidavit; (b) summoning and enforcing the attendance of any person, and

examining him on oath. (c) Compelling the production of documents; and (d) Issuing commissions for the examination of witnesses.

(4) The Court shall also have powers to call upon any of the parties to proceedings before it to furnish in writing, and in such forms as it may think proper, any information, which is considered relevant for the purpose of any proceedings before it, and the party so called upon shall thereupon furnish the information to the best of its knowledge and belief, and if so required by the Court to do so, verify the same in such manner as may be prescribed."

(33) Section 30 above, to my mind, may preclude, if not bar, the Writ Court in Bombay to exercise original constitutional authority in substitution of adjudication and findings of the Industrial and Labour Courts but there are no restrictions under the Central Act on exercise of such powers within this jurisdiction only by reason of availability of an alternative remedy which may not be equally efficacious. It is trite to say that the remedies before the Labour Courts and Industrial Tribunal are by themselves alternative remedies for purposes of writ jurisdiction but there is no legal bar in the Writ Court to act in the first instance in a case where unfair discrimination is pleaded and shown existing ex facie and to the satisfaction of the Writ Court, when it may well act in aid of article 14 of the Constitution and remove discrimination and restore the status quo ante.

(34) In the modern day context and living in the times we do where the teeming multitude is struggling for sheer survival, I then wonder how one can easily rubbish the cancerous perception and belief that has grown in the mind of the general public that the celebrated front door to employment is really the backdoor. It is very easy to pontificate on backdoor entries and evolve a legal principle of absolute merit capable of universal application in India in all kinds of recruitment situations paying lip service to articles 14 and 16 of the Constitution hiding behind those provisions as a fortress and shield of pure merit. When we look down the ramparts of public employment one can find serpentine queues of candidates seeking jobs. All of them willing to be tried and tested on principles of merit, if given a chance. They all are looking fixedly at the front door of public employment, unaware that from the tall ramparts one can see below the by-lanes to the fort closed to public view from where employment letters will be issued, whilst the queues are building up. There is no hope left except for the privileged few

armed with recommendations of recruiting agencies where often cadre posts are handpicked and taken out from the purview of Boards and Commissions by meticulously abiding by rules and regulations protected by the shield of article 14 and 16 of the Constitution. Could this ever have been dreamt of by the framers of the Constitution in their wildest dreams, is the question. Merit would have to be reinvented. This perception is throughout India and across board by what is commonly perceived, as ones' gaze shifts from Staff Selection Committee to Staff Selection Committee, Recruitment Board to Recruitment Board, Public Service Commission to Public Service Commission and so on and so forth. The Supreme Court is disturbed. It has minced no words. It has spoken time and again and come down heavily on corrupt appointments. But the administrator is past reform. I would only refer to admonishments of the Supreme Court on the working of the Haryana Public Service Commission in ***In Re: Mehar Singh Saini, Chairman, Haryana Public Service Commission and others (11),*** where the Supreme Court came down heavily on the conduct of the Chairman and Members of the Haryana Public Service Commission on a reference made by the President of India under article 317 of the Constitution of India on the request made by the Governor of Haryana, acting on the advice of the State Government to the Supreme Court to opine on their 'misbehaviour' and whether they were fit to hold constitutional office. Members of the Public Service Commissions hold constitutional office, but can only be removed on 'misbehaviour' whilst other constitutional office holders are held on higher standards of 'proved misbehaviour'. These issues were considered in depth by the Supreme Court while recommending removal of the Chairman and Members from office for making corrupt appointments to public office. The Court held that 'serious suspicion' cast on the selection process which is attributable to the functioning of the Commission and its members 'is sufficient' when such conduct does not meet standards of behaviour, integrity and rectitude required to be maintained by the office they were holding and as such falls within the ambit of 'misbehaviour' justifying removal. The Court observed:-

> "Great powers are vested in the Commission and therefore, it must ensure that there is no abuse of such powers. The principles of public accountability and transparency in the functioning of an institution are essential for its proper governance. The necessity of sustenance

(11) (2010) 13 SCC 586

of public confidence in the functioning of the Commission may be compared to the functions of judiciary in administration of justice which was spelt out by Lord Denning in Metropolitan Properties Co. vs. Lannon (1968) 3 All ER 304) in following words: "Justice must be rooted in confidence; and confidence is destroyed when rightminded people go away thinking: 'The Judge was biased."

> "The conduct of the Chairman and Members of the Commission, in discharge of their duties, has to be above board and beyond censure. The credibility of the institution of Public Service Commission is founded upon faith of the common man on its proper functioning. Constant allegations of corruption and promotion of family interests at the cost of national interest resulting in invocation of constitutional mechanism for the removal of Chairman/Members of the Commission erode public confidence in the Commission. Profs. Brown and Garner's observation in their treatise French Administrative Law, 3rd ed. (1983) in this regard can be usefully referred to. They said "the standard of behaviour of an administration depends in the last resort upon the quality and traditions of the public officials who compose it rather than upon such sanctions as may be exercised through a system of judicial control." Regrettably, the present case is one of many References made to this Court where serious allegations and imputations have been made against the Chairman and Members of the Commission in regard to performance of their constitutional duties. The omissions and commissions amounting to misbehaviour, allegedly committed by the Chairman/Members of the Haryana Public Service Commission have led to the Presidential Reference dated 31st July, 2008 in exercise of the powers vested in the President under Article 317 of the Constitution of India to this Court."

(35) There were other such Presidential references in the past and cases where conduct of Public Service Commissions came tellingly under judicial scrutiny. See, Reference No 1 of 1997 in ***Ram Ashrey Yadav (Dr.), In re. (12)***, ***Inderpreet Singh Kahlon v. State of Punjab (13)*** etc..

(12) (2000) 4 SCC 309

(13) (2006) 11 SCC 356

(36) Then it may be asked: Who knows where merit lies? Who knows where the merit of those who evaluate merit lies? Who knows where the truth lies in abstraction? Let us not sermonize or call Moses to write Tablets for us. Let us endevour to freely, reasonably and generously support such long drawn out exploitative employment of the weak manual worker in a far-off forest nursery (not in offices of a Government department) within the contours of the law and afford the petitioners some semblance of permanency albeit as labourers so that their day does not begin with sunset. Verily, they built the nation brick by brick till the landscape was altered. They built the houses we live in, the restaurants we dine in, the roads we travel on, the tarmac airplanes land in and take off, and the court we sit in to dispense justice. They came to Court before the Judges did. These are the anonymous builders of the nation with neither reward, nor hope nor recompense except the meager daily wages earned by them which may not even be paid at the end of the day before they go home to god-knows-where.

(37) But so long as the word 'socialism' lives in the Preamble to the Constitution, Judges are constitutionally bound to apply distributive justice which postulates: "To each according to his contribution" Who can measure such contribution? Certainly not the Judge. But yes, the Judge can intervene as a surgeon might in case of failure of the physician to cure the disease. The Court may calibrate the pipette of justice if the administrator fails in his constitutional duty to discharge the burdens of measuring that the minimal dose of succour required for comfort calculated on the abacus of a social insurance plan paid with the premium of distributive justice. Fundamental duties enjoined by article 51 A (j) of the Constitution obligate all citizens to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endevour and achievement. Sadly, this part of the Constitution is crippled with thirty eight years of dystrophy from the day when Parliament thought it fit to imprint in the Big Book.

(38) In ***M. Nagaraj and others*** versus ***Union of India and others (14),*** Kapadia, J. spoke for the Constitution Bench as were never

(14) (2006) 8 SCC 212

spoken before from the highest judicial altitude and in such weighty words:-

> "Constitutional adjudication is like no other decision-making. There is a moral dimension to every major constitutional case; the language of the text is not necessarily a controlling factor. Our constitution works because of its generalities, and because of the good sense of the Judges when interpreting it. It is that informed freedom of action of the Judges that helps to preserve and protect our basic document of governance"

(39) His Lordship, then a puisne Judge of the Supreme Court, went further afield in observing with such penetrating incisiveness gained obviously from astute judicial experience on the Bench while dealing with constitutional issues in upholding the spirit and philosophy of the *suprema lex*, and if I may take the liberty to paraphrase in the fewest words the quintessence of what the Court advised is the welfare of the people and which should be the supreme law. It was ruled:-

> "Constitution is not an ephemal legal document embodying a set of legal rules for the passing hour. It sets out principles for an expanding future and is intended to endure for ages to come and consequently to be adapted to the various crisis of human affairs. Therefore, a purposive rather than a strict literal approach to the interpretation should be adopted. A Constitutional provision must be construed not in a narrow and constricted sense but in a wide and liberal manner so as to anticipate and take account of changing conditions and purposes so that constitutional provision does not get fossilized but remains flexible enough to meet the newly emerging problems and challenges.
>
> This principle of interpretation is particularly apposite to the interpretation of fundamental rights. It is a fallacy to regard fundamental rights as a gift from the State to its citizens. Individuals possess basic human rights independently of any constitution by reason of basic fact that they are members of the human race. These fundamental rights are important as they possess intrinsic value. Part-III of the Constitution does not confer fundamental rights. It confirms their existence and gives them protection. Its purpose is to withdraw certain

subjects from the area of political controversy to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. Every right has a content. Every foundational value is put in Part-III as fundamental right as it has intrinsic value. The converse does not apply. A right becomes a fundamental right because it has foundational value. Apart from the principles, one has also to see the structure of the Article in which the fundamental value is incorporated. Fundamental right is a limitation on the power of the State. A Constitution, and in particular that of it which protects and which entrenches fundamental rights and freedoms to which all persons in the State are to be entitled is to be given **a generous a nd purposive construction**. In the case of Sakal Papers (P) Ltd. & Others v. Union of India and others this Court has held that while considering the nature and content of fundamental rights, the Court must not be too astute to interpret the language in a literal sense so as to whittle them down. The Court must interpret the Constitution in a manner which would enable the citizens to enjoy the rights guaranteed by it in the fullest measure. An instance of literal and narrow interpretation of a vital fundamental right in the Indian Constitution is the early decision of the Supreme Court in the case of A.K. Gopalan v. State of Madras . Article 21 of the Constitution provides that no person shall be deprived of his life and personal liberty except according to procedure established by law. The Supreme Court by a majority held that 'procedure established by law' means any procedure established by law made by the Parliament or the legislatures of the State. The Supreme Court refused to infuse the procedure with principles of natural justice. It concentrated solely upon the existence of enacted law. After three decades, the Supreme Court overruled its previous decision in A.K. Gopalan (10) and held in its landmark judgment in Maneka Gandhi v. Union of India and another that the procedure contemplated by Article 21 must answer the test of reasonableness. The Court further held that the procedure should also be in conformity with the principles of natural justice. This example is given to demonstrate an instance of expansive interpretation of a fundamental right. The expression 'life' in Article 21 does not connote merely physical or animal existence. The right to life includes right to live with human dignity. This Court has in

numerous cases deduced fundamental features which are not specifically mentioned in Part-III on the principle that certain unarticulated rights are implicit in the enumerated guarantees. For example, freedom of information has been held to be implicit in the guarantee of freedom of speech and expression. In India, till recently, there is no legislation securing freedom of information. However, this Court by a liberal interpretation deduced the right to know and right to access information on the reasoning that the concept of an open government is the direct result from the right to know which is implicit in the right of free speech and expression guaranteed under Article 19(1)(a). The important point to be noted is that the content of a right is defined by the Courts. The final word on the content of the right is of this Court. Therefore, constitutional adjudication plays a very important role in this exercise. The nature of constitutional adjudication has been a subject matter of several debates. At one extreme, it is argued that judicial review of legislation should be confined to the language of the constitution and its original intent. At the other end, noninterpretivism asserts that the way and indeterminate nature of the constitutional text permits a variety of standards and values. Others claim that the purpose of a Bill of Rights is to protect the process of decision making"

(40) In the face of all this I am inclined to think that the present batch of cases appear to be eminently fit to exercise such extra ordinary jurisdiction for a "generous and purposive construction" and an approach can be adopted to meet the crisis of human affairs. Such view is advised by the Supreme Court in ***M. Nagaraj*** for the Courts to emulate and follow which should be the paradigm principle of a dynamic and pragmatic humanism injected by the syringe of article 14 into Court while dealing with daily wage manual workers as distinguished from cases of those persons who are appointed from the back door to public posts, services being strictly governed by statutory rules framed under the proviso to article 309 of the Constitution or by rules framed under statutory enactments creating independent instrumentalities of State, Boards, Corporations etc. It is the constitutional duty of a citizen Judge as it is of every other citizen of India, that it is a duty preserved and instructed by article 51A (h) of the Constitution

introduced by the Forty Second amendment carried out in 1976 by Parliament that it is the fundamental duty of every citizen to develop a spirit of 'humanism'.

(41) Humanism became a constitutional word of far-reaching significance for all citizens of India to emulate and feel bound down to honour, including Judges and bureaucrats to temper their judgments and administrative decisions with. A Judge of the High Court is after all a citizen first and then by virtue of holding office, a Judge. If a duty is cast on the Court and on the administrator by the Constitution or by the law to observe such moral duty and ethical standards, it is far greater and more sublime than any of the rights, privileges or powers they may enjoy or exercise for the administration of justice or in governance. The Constitution is a humbling document, an eternal fountain ever sprouting and benignly guiding power and authority to decide fairly, reasonably and proportionately to the cause. This itself works as a self-restraint on its constitutional boundaries. A Court can be perceived as a decision making apparatus sanctioned by the State by virtue of office to make socially just orders in accordance with the law, the decision being binding and the solemn nature of its binding jurisdiction acting on its own as a formidable constraint and check on what it might do or refrain from doing in making an order or a judgment. The duty enjoined on all citizens, which evidently includes the members of the highest judiciary by virtue of office held, stands as a vanguard of the Constitution and which is qualified in the wisdom of Parliament thus in article 51 A (h):-

> "to develop the scientific temper, humanism and the spirit of inquiry and reform"

(42) When the Constitution instructs us on the way forward we must obey and carry out its command. Constitutional duty then becomes a constitutional imperative and the judicial limitation. The Judge must then inform all his decisions with the constitutional mandate. Duty for the Judge then itself becomes the mandate of his business ever staying aloof and disinterested in the cause. The Judge is not an administrator. An administrator may do and be heard on the argument that Fundamental Duties are unenforceable. But the Court cannot discard these principles wherever found necessary to dispense justice if no other absolute legal principle is found to fully justify relief in any other manner. It may not be capable of

enforcing this duty through writs but it may temper its opinion, if the need arises on its principles. The duty though can be promoted only by constitutional methods, ref: ***Mumbai Kamgar Sabha v. Abdulbhai (15)***.

(43) Manual daily wage workers may not hold posts under the State or in connection with the affairs of the State but they may deserve to be looked at with a humanistic view to try and understand their problems, their hopes and aspirations to ask the State to help them to ameliorate their lot albeit with a spirit of dynamic humanism as the rich and powerful may not need to truly understand or empathize with them. In the absence of recruitment rules shown by the State in its replies with respect to these set of cases, it may not be possible for this court to read violation of rule in the appointments made long years ago. Neither is it for this Court to make a fishing inquiry to throw out the claims. But when we look at such engagements if not properly called 'appointments' it should be tempered with a spirit of humanism and to be judicially pragmatic about it. The rules should not by themselves in the present cases without anything more become the iron curtains admitting no exception for manual workers. The challenge to illegal appointments by a suffering public is even more regretful in public interest litigation where service law principles do not penetrate to quash an unlawful appointment, citing precedent. The wrongdoer has many protections in law but those protections are only till the conscience of the Court is disturbed when anything becomes possible and that is how we must view what constitutional Judges may do. That is where the insight of Kapadia, J. in the ***M. Nagaraj*** throbs. If the administrator implemented and obeyed the law as was designed and meant and had never made an oblique departure from rule, it would be trite to say that thousands and thousands of judgments may not have been written or needed to. Perhaps, ***Umadevi*** would not have been written or necessitated, if all was ideally well with the world. The total picture thus has to be holistically painted by the pen of the Court even for one man standing in supplication before the Court asking for relief. This is what I think and may be completely wrong.

(44) In the aforesaid background, the moot question is: are daily wage manual workers, as of whom have been exploited 'for years' by the State by resort to Unfair Labour Practice are they not entitled to a share in the sun, the shade and the moonlight, pray may I ask, for some security

(15) AIR 1976 SC 1455

of work. Having posed the question there is still an answer, a counter point, permitted by law as an acceptable defence when raised by the State which the State raises routinely and casually when facing litigation in Court: Why did they accept the engagement to start with, after all? No one forced it on them? Who forces anyone? Who forces the State, expected to be a model employer, to give a job or compel it not to take it away. This is the prerogative of the State traced to article 310, the pleasure doctrine. The right to engage includes the right to disengage. The logic cannot be faulted in Court. But then by applying standards of humanism it then becomes more a matter of judicial sensitivity tempered with the law, in matters of grant of relief, by the constitutional court, where the process of unshackling past judicial burdens is constantly going on to supply blood to the living tissue of the law so that it does no decompose.

(45) This is where I would need to repeat the words of wisdom in ***M. Nagaraj***, already quoted supra, and to re-emphasize them with admirable profit to stress the moot point: The *"Constitution is not an ephermal legal document embodying a set of legal rules for the passing hour. It sets out principles for an expanding future and is intended to endure for ages to come and consequently to be adapted to the various crisis of human affairs. Therefore, a purposive rather than a strict literal approach to the interpretation should be adopted. A Constitutional provision must be construed not in a narrow and constricted sense but in a wide and liberal manner so as to anticipate and take account of changing conditions and purposes so that constitutional provision does not get fossilized but remains flexible enough to meet the newly emerging problems and challenges".* (underlined for emphasis)

The views expressed by this Court on discrimination with respect to labourers.

(46) The learned single Judge of this Court in CWP No.1169 of 2009; ***Ved Pal and others v. State of Haryana and others***; (in short "Ved Pal") was called upon to decide whether the petitioners could claim regularization of services from the dates their juniors were regularized as per the policy prevalent at the time. They had earlier approached this Court through CWP No.6341 of 2005 in which directions were issued to the State to decide the claim for regularization. The claim was considered and

recommended but was ultimately rejected as said in the pleadings "simply because of the judgment of the Supreme Court in Uma Devi's case." The learned Single Judge took a view on facts presented before him finding that if the petitioners remain senior to the private respondents they had a prior right of regularization. Their claim should have been considered in the same terms in the case of private respondents but the same having not been done, the petitioners have been discriminated against and therefore the order rejecting the claim of the petitioners passed in 2007 cannot sustain and were accordingly quashed. A direction was issued that the petitioners beregularized in service from the date when their juniors were regularized and to do so in the same terms. This order was appealed against by the State.

(47) The Division Bench of this Court in ***State of Punjab*** versus ***Sukhminder Kaur and others (16);*** speaking through brother Surya Kant, J. in a case arising out of discrimination following thedirections issued by the Supreme Court in *State of Haryana v. Piara Singh* but after noticing ***Umadevi*** held as under : -

> "There is no denial to the fact that hundreds of workcharged/daily wagers were brought on regular establishment on implementation of the aforesaid policy but the private respondents have been denied such benefit on the solitary ground that their appointments were on contract basis. Such a plea taken before the learned Single Judge has been repelled and in our considered view rightly so for thereason that after the initial appointment on contract basis for a period of 89 days, the private respondents were appointed on temporary basis and in the regular pay scale (with minimum of the pay scale). Learned Single Judge has also found that they were appointed against duly sanctioned posts on temporary basis.
>
> It may be true that a Writ Court would not ordinarily issue a mandamus for regularization of services of an employee as such an exercise falls within the domain of Executive as ruled by the Hon'ble Supreme Court in State of Haryana and others versus Piara Singh and others (1992 SCC (4) 118 and other later decisions. However, when the question of implementation of a conscious decision taken by the State or its instrumentalities arises, the Constitutional Court

(16) 2013 (3) SCT 801

shall be well within its rights to issue the desired directions for the implementation of such a policy in a nondiscriminatory manner so that all the employees are granted its benefit without any artificial classification. This is what has been done by the learned Single Judge also."

(48) This decision was rendered on 2nd July, 2013 after noticing the Constitution Bench decision in ***Umadevi***. The same Bench reiterated the principle in LPA No.1214 of 2013; State of Haryana and others v. Chet Ram and others decided on 12th July, 2013. It is now the turn of the remand order in CWP No. 10017 of 2011 placing those cases before me.

Facts of CWP No. 10017 of 2011:

(49) The view of the learned Single Judge in ***Ved Pal's*** case was upheld in appeal and the SLP carried by the State of Haryana to the Supreme Court was dismissed on 2nd May, 2014 in ***SLP (Civil) No.36871 of 2012*** against the judgment in LPA No.1037 of 2012 decided on 25th July, 2012. However, at about the same time the learned Single Judge had taken the same view as in ***Ved Pal*** in CWP No.10017 of 2011, ***Khajjan Singh and others v. State of Haryana*** and others decided on 19th September, 2012 which was appealed against in the intra court appeal. This appeal came up before the Division Bench presided over by Brother Surya Kant, J. in LPA No.1965 of 2012 and cross LPA No.643 of 2013 when the decision in ***Channi*** was brought to the notice of the Division Bench. Since the coordinate Bench in ***Channi*** had already set aside similar orders of the learned Single Judge and remanded the case for fresh decision, the Bench in *Khajjan Singh's* case allowed the appeal, set aside the order of the learned Single Judge dated 19th September, 2012 and remanded the case for fresh decision. That is how CWP No.10017 of 2011, *Khajjan Singh and others v. State of Haryana and others*, has been placed before me to take a fresh decision. I would, therefore, cull out the few necessary facts from CWP No.10017 of 2011.

(50) Briefly stated, the claim of the petitioners in Khajjan Singh's case is for directions to regularize the petitioning daily wage labourers as per the policy decisions of 31st January, 1996 and 1st October, 2003 as modified by the policy letter dated 10th February, 2004 which protected

the daily wage employees who have completed 3 years of service on 30th September, 2003 and were in service on 30th September, 2003 and entitled them for regularization. Here also, the petitioners had awards in their favour granting continuity of service from back dates. The award is dated 4th January, 2006 in the case of Khajjan Singh petitioner No.2. The State have contested the petition.

(51) It is stated that the Forest Department engaged labourers mostly for plantation activities which are seasonal in nature which continued for 2-3 months during the monsoon season i.e. July to September. When the season is over, only a few labourers are retained for maintenance of nurseries etc. A few of them are recalled in October and November for cleaning and hoeing operations in plantations. It is explained that the Forest Department executes forestry work through muster rolls system. For sometime past, it was felt that the muster roll has become ineffective, inefficient and uneconomical. Paragraph 13.70 of the Haryana Forest Manual provides that Forest Guards are Officers in charge of the works and are empowered to engage labour on daily wages; take roll call in the morning and evening and prepare a daily sheet of work done everyday. The area under the control of forest guard is generally at distant places. It was experienced that practically, it became impossible for him to take roll call twice at every place daily, not to speak of supervising the work at all places under his control. This was resulting in shortage of work by the labourers due to which the Forest staff becomes liable to pay for less efficiency of the labourers. However, the Government recognised its duty to carry out various forest activities in terms of the constitutional mandate enshrined under the Directive Principles and the Fundamental Duties (article 48 A of Part IV and article 51 A (g) of Part IV A of the Constitution of India to protect and improve forests, lakes, rivers and wildlife of the country in consonance with National Forest Policy, 1988 ensuring environmental stability and maintenance of the ecological balance including atmospheric equilibrium which are vital for sustenance of all life forms like humans, plants and animals and with no profit motive or a desire to generate income as one expects from an industrial activity. The Forest Department has to depend on State Government and external agencies for financial help. Most of the activities are being done under various projects aided by the Government of India, European Union, World Bank etc. It was urged that if it were an engagement or appointment

on daily wages on casual basis, the same would come to an end when it is discontinued. If a temporary employee or a causal worker is continued for a time beyond the term of his appointment, he would not be entitled to be absorb 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 was stated that Government of Haryana had withdrawn the earlier policies in relation to regularization of 17th June 1997, 5th November 1999, 1st October 2003 and 10th February 2004 vide notification dated 13th April, 2007 in the light of the judgment in ***Umadevi***. It may be mentioned that this notification "...shall not adversely affect the cases where regularization have already been made but are not sub-judice."

(52) The defense of the respondent State was that the petitioners were engaged as daily wage labourers by the lowest field functionary of the Forest Department i.e. the Forest Guard. The work of such labour is for raising of seedlings in nurseries, digging of pits, planting, watering of plants, weeding and hoeing of plants and their engagement for specific work was for a specific period.

(53) Nevertheless, the Forest Department admitted in the written statement that there is no provision under the rules that the appointments/ employment can be made on daily wage basis. Therefore, it is urged that the employment of the petitioners are contrary to the rules and are in violation of articles 14 and 16 of the Constitution of India. Therefore, a daily wager has no right to continue or being regularized in service as they are not the holder of any post. The petitioners had asserted and it is not disputed that they had been engaged in 1980s and in the early 1990s and their subordinate counter parts who continued working were regularized on 14th October, 2006 after the pronouncement in ***Umadevi*** and their services remain protected by permanency. They have put in number of years of work of 7 to 10 years (9 petitioners) before they were terminated while one of them i.e. Pawan Kumar petitioner No.2 has served from 1st August, 1999 to 16th March, 2000 when he was terminated but returned with a Labour Court award dated 18th April, 2006. Some of them had put in as much as 10 or more of continuous service before dates of retrenchment. The awards in their favour have come from the period from 4th January, 2006 to 12th November, 2008. The worker who was awarded reinstatement and

continuity of service on 12th January, 2008 was Om Parkash who had served in the Forest Department from 15th July, 1986 to 31st October, 1999 when his services were terminated. There can, therefore, be persons like Pawan Kumar, petitioner No.2, who have acquired continuity of service as a result of labour awards accumulating by legal fiction about 6½ years of total service after a short spell of actual engagement, and in such cases Government would remain free to take a conscious decision of whether to regularize them or not keeping in view rule of 10 years of service prior to *Umadevi* and if that meets the standards of law fit for consideration for relief.

(54) In the Letters Patent Appeal against the order passed in *Ved Pal's* case (supra), the view of the learned Single Judge was affirmed by the Division Bench again presided over by brother Surya Kant, J. observing as follows : -

> ".....There is no denial to the fact that claim of the juniors was considered first and they were made regular. However, the recommendations made by the Divisional Forest Officer in favour of private respondents for regularization of their services were not accepted by the Head Office on the plea that meanwhile the Hon'ble Supreme Court in State of Karnataka versus Uma Devi, 2006 (4) SCC-1 had annulled the Government Policies leaving no right to seek regularization. The same argument was advanced before the learned Single Judge which has been turned down while observing that the private respondents have been subjected to discrimination. In the peculiar facts and circumstances, the solitary question that arises for consideration is whether the private respondents have sought regularization of their services in terms of the Government Policy or on the plea of discrimination and violation of Articles 14 & 16 of the Constitution? Since it stands admitted on record that juniors to the private respondents were made regular and no effort to de-regularize their services was made even after noticing the fact that seniors have been overlooked and ignored without any reasonable classification, in our considered view, the private respondents have made out a case of hostile discrimination within the ambit of Articles 14 & 16 of the Constitution. It would necessarily mean that even if the Government

Policy is not in existence and deemed to have been annulled, the private respondents shall be entitled to seek regularization of their services from the date such a benefit was granted to their juniors..."

(55) Mr. Sunil Nehra learned Sr. Deputy Advocate General, Haryana appearing for the State places reliance on a Division Bench judgment in ***Rajinder Kumar*** versus ***State of Haryana and others (17);*** to submit that the plea of discrimination was turned down for the reason that the ratio of ***Umadevi*** clearly intended to overrule all past precedents which run counter to the principles of law enunciated by the Supreme Court leaving the High Courts to follow necessarily the law laid down. In para. 14, this Court held *"we* have no hesitation to observe that the policy of regularization 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 regularization. The benefits already acquired pursuant to the said policies *and schemes would remain un-effected"*. The only way for employees who have been appointed in accordance with mandate of the Supreme Court in para. 53 read with para. 15 of the judgment was the one-time-measure scheme proposed therein for those who had completed 10 years or more of service. It may be noted that the Division Bench dealt with posts occupied by rules and the appointments made contrary to the rules were not enforceable in the context of regularization or permanency.

(56) Counsel refers to ***U.P.Power Corporation Limited*** versus ***Rajesh Kumar and others (18);*** the Supreme Court case dealt with reservation in promotion for Scheduled Castes and Scheduled Tribes in the context of the 77th, 81st, 82nd and 85th amendments to the Constitution and their constitutional validity and the dicta laid down in ***M. Nagaraj*** versus ***Union of India (19).*** I would need to refer to para. 12 to 14 where the Supreme Court observes : -

"12. We have reproduced the paragraphs from both the decisions in extenso to highlight that the Allahabad Bench was apprised about the number of matters at Lucknow filed earlier in point of time which were being part heard and the hearing was in continuum. It would

(17) 2006 (3) SCT 838 = 2006 (4) RSJ 290
(18) 2012 (7) SCC 1
(19) (2006) 8 SCC 212

have been advisable to wait for the verdict at Lucknow Bench or to bring it to the notice of the learned Chief Justice about the similar matters being instituted at both the places. The judicial courtesy and decorum warranted such discipline which was expected from the learned Judges but for the unfathomable reasons, neither of the courses were taken recourse to. Similarly, the Division Bench at Lucknow erroneously treated the verdict of Allahabad Bench not to be a binding precedent on the foundation that the principles laid down by the Constitution Bench in ***M. Nagaraj*** (supra) are not being appositely appreciated and correctly applied by the Bench when there was reference to the said decision and number of passages were quoted and appreciated *albeit* incorrectly, the same could not have been a ground to treat the decision as *per incuriam* or not a binding precedent. Judicial discipline commands in such a situation when there is disagreement to refer the matter to a larger Bench. Instead of doing that, the Division Bench at Lucknow took the burden on themselves to decide the case. In this context, we may profitably quote a passage from **Lala Shri Bhagwan and another v. Ram Chand and another, AIR 1965 SC 1767 : -**

"18. .. It is hardly necessary to emphasise that considerations of judicial propriety and decorum require that if a learned single Judge hearing a matter is inclined to take the view that the earlier decisions of the High Court, whether of a Division Bench or of a single Judge, need to be reconsidered, he should not embark upon that enquiry sitting as a single Judge, but should refer the matter to a Division Bench or, in a proper case, place the relevant papers before the Chief Justice to enable him to constitute a larger Bench to examine the question. That is the proper and traditional way to deal with such matters and it is founded on healthy principles of judicial decorum and propriety. It is to be regretted that the learned single Judge departed from this traditional way in the present case and chose to examine the question himself."

14. In **Sundarjas Kanyalal Bhathija and others v. The Collector,**

Thane, Maharashtra and others, 1989 (2) R.R.R. 111 : AIR 1991 SC 1893 while dealing with judicial discipline, the two-Judge Bench has expressed thus:-

> "One must remember that pursuit of the law, however, glamorous it is, has its own limitation on the Bench. In a multi-Judge Court, the Judges are bound by precedents and procedure. They could use their discretion only when there is no declared principle to be found, no rule and no authority. The judicial decorum and legal propriety demand that where a learned single Judge or a Division Bench does not agree with the decision of a Bench of co-ordinate jurisdiction, the matter shall be referred to a larger Bench. It is a subversion of judicial process not to follow this procedure."

The aforesaid pronouncements clearly lay down what is expected from the Judges when they are confronted with the decision of a Co-ordinate Bench on the same issue. Any contrary attitude, however adventurous and glorious may be, would lead to uncertainty and inconsistency. It has precisely so happened in the case at hand. There are two decisions by two Division Benches from the same High Court. We express our concern about the deviation from the judicial decorum and discipline by both the Benches and expect that in future, they shall be appositely guided by the conceptual eventuality of such discipline as laid down by this Court from time to time. We have said so with the fond hope that judicial enthusiasm should not obliterate the profound responsibility that is expected from the Judges."

(57) This judgment is cited by the learned State counsel in the context of a decision rendered by the Division Bench of this Court in LPA No.1746 of 2012 decided on 28.2.2013; **State of Haryana and others** v. **Channi and connected cases** (hereinafter referred to a Channi). The appeal arose out of the order of the learned Single Judge against the judgment delivered on July 9th, 2012. The learned Single Judge had directed regularization of services of the respondents from the date their juniors were regularized as daily wage employees. The Division Bench applied the law laid down in ***Umadevi.*** The claim of the respondents in ***Channi*** for regularization was granted by the learned Single Judge but was overruled

in appeal by the State was made by *Malis* by definition when 53 cadre posts were advertised which were not meant for daily wagers to fill. The Division Bench noted that laborious exercise undertaken in Rajinder Kumar's case (supra) which had made their task easier insofar as the impact of ***Umadevi*** is concerned. The Bench noted the fine distinction made by the Constitution Bench in ***Umadevi*** between illegal and irregular appointments, the first could not be saved but the irregular appointments could come through the exception carved out in para. 53. Reliance was placed on para. 53 of ***Umadevi*** which reads : -

> "One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in S.V.Narayayanappa (supra), R.N. Nanjundappa (supra), and B.N.Nagararajan (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."

(58) In *Rajinder Kumar's* case, it may be pointed out, that the post in question was of Water Pump Operator Grade-II which is a Group-C post and the judgment is therefore distinguishable on facts from these set

of cases which deals with daily wagers and not holders of public posts. In ***Channi*** the Hon'ble Division Bench noticed the words of distress of the Supreme Court in ***Official Liquidator*** versus ***Dayanand and others (20);*** lamenting:-

> "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].
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> 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

(20) 2008 (10) SCC 1

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 superior 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 and 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." (emphasis added)

(59) Not often does the Supreme Court refer to its past constitution bench decisions, while enforcing them under article 141 of the Constitution, by guarded and precautionary words that *"By virtue of article 141..."* it "...is binding on all the courts including this Court till the same is *overruled by a larger Bench*". One would have thought that constitution benches of the Supreme Court are binding by virtue of their *ratio decidendi* and not be binding other than by reason of article 141. There is much to learn here.

(60) For a variety of reasons, the order of the learned Single Judge was held unsustainable in **Channi.** The appeals were allowed and the order of the learned Single Judge was set aside. The matter was remanded. The issue of discrimination was touched and dealt with in terms of *Umadevi* and *Dayanand* verdicts of the Supreme Court. It is urged by Mr.Nehra that there are two conflicting opinions of two Division Benches in *State of Haryana v. Channi* and the other in *State of Punjab v. Smt.Sukhminder Kaur* (supra) and thus the matter deserves to be placed before a larger bench for resolving the apparent conflict.

Post script.

(61) Orders were reserved in these cases on 13th December, 2013. At the time I doubtfully thought the principles of law enunciated in the two Division Benches in ***Channi*** (2013) and in ***Rajinder Kumar*** (2006) may not fully apply to cases of daily wage workers engaged locally and whose services may not be governed strictly by rules of recruitment. There rights deserved to be examined and declared from the vantage point of industrial law principles and as such to group these cases for separate treatment. This line of thinking was influenced by ***Casteribe*** which was not brought to the notice of the Division Bench in ***Channi***. The further reason was in line with the principles of law enunciated by the Supreme Court in ***Om Kumar*** on the two distinct parts of article 14 of the Constitution, one of arbitrariness and the other of discrimination, which principles may have to be factored into the decision making process for a fair, meaningful and efficacious adjudication of the rights of the respective parties. In a case of arbitrariness, the Writ Court was informed that it could well apply principles of secondary review but when unfair discrimination is pleaded, pressed and practiced and is not seriously disputed on foundational facts, then the Writ Court may be left with little option but to discharge its constitutional duty by applying principles of primary review to strike down unfair discrimination without as much as abdicating that duty, come what may. The principles of law explained in ***Ganayutham*** and ***Om Kumar*** were also not brought to the notice of the Division Bench in ***Channi*** for its consideration on the point of unfair discrimination.

(62) After I had prepared the judgment after reserving orders I had anxiously thought how to proceed with the matter and what to do on the

sensitive issues involved and whether I should distinguish ***Channi*** and follow ***Sukhminder Kaur*** and to distinguish ***Umadevi*** by ***Casteribe*** or to refer the eight questions formulated above to a larger Bench to resolve the conflict pointed out by Mr. Nehra when the recent verdict of the Supreme Court in ***Hari Nandan Prasad and another*** versus ***Employer I/R to Mangmt. of FCI and another (21);*** came to my notice where the Supreme Court after noticing ***Casteribe*** and ***Umadevi*** in sharp departure of ***Channi*** (both authored by the Hon'ble Mr. Justice A.K.Sikri, one before when His Lordship adorned this Court as its Chief Justice, the other after His Lordship's elevation to the Supreme Court) in para. 34 resolved the vexed question of discrimination by holding as next follows : -

> "34. On harmonious reading of the two judgments discussed in detail above, we are of the opinion that when there are posts available, in the absence of any unfair labour practice the Labour Court would not give direction for regularization only because a worker has continued as daily wage worker/adhoc/temporary worker for number of years. Further, if there are no posts available, such a direction for regularization would be impermissible. In the aforesaid circumstances giving of direction to regularize such a person, only on the basis of number of years put in by such a worker as daily wager etc. may amount to backdoor entry into the service which is an anathema to Art.14 of the Constitution. Further, such a direction would not be given when the concerned worker does not meet the eligibility requirement of the post in question as per the Recruitment Rules. **However, wherever it is found that similarly situated workmen are regularized by the employer itself under some scheme or otherwise and the workmen in question who have approached Industrial/Labour Court are at par with them, direction of regularization in such cases may be legally justified, otherwise, nonregularization of the left over workers itself would amount to invidious discrimination qua them in such cases and would be violative of Art.14 of the Constitution. Thus, the Industrial adjudicator would be achieving the equality by upholding Art. 14, rather than violating this constitutional provision."** (emphasis added)

(21) 2014 (2) SCT 234

(63) This landmark insight in the judgment has turned the tide. The judgment in para. 34 delivered by a three judge bench eminently extends the frontiers of industrial jurisprudence as hithertofore never before. It is in the same strain as ***U.P.S.E.B*** versus ***Pooran Chand Pandey (22),*** disapproved by the three judge bench in **Official Liquidator** v. **Dayanand and others** which is a decision prior to ***Casteribe.*** **However,**

(64) ***Umadevi (3)*** has now to be understood in its application to labour jurisprudence as one keeping in mind the dictum of both ***Casteribe*** and ***Hari Nandan Prasad,*** the former from the point of view of unfair labour practice, the latter from the standpoint of unfair discrimination while ***Umadevi*** stands beyond the pale of labour law as contradistinguished from mainline service law jurisprudence and their subtle difference. Labour law was delineated in ***Casteribe.*** But yet the Supreme Court did not go full throttle and circumscribed its decision on service law principles weighed down by principles of vacancies and the nature of initial appointments bound by the constitution bench principles laid down in ***Umadevi (3)***. Nevertheless, the exception carved out in ***Hari Nandan Prasad*** (para 34) is where the foothold lies and the take off point of the present batch of cases now rests. The clamour for regularization on principles of unfair discrimination is now louder for passing of favourable office orders of regularization in cases coming via the Industrial Tribunals and Labour Courts giving rise to a demand for application of constitutional law principles re: discrimination. I may say that any minor discrimination is not unfair because it may suffer reasonable restrictions as are permitted by the law. That is why I have dwelt only on unfair discrimination which is judicially unacceptable, but not mere discrimination which may suffer reasonable restrictions. But the position here is unacceptable because it is not legally justified to break a homogenous group asunder artificially. Failing which non-regularization of left over workers/ the unfortunate group as now defined in ***Hari Nandan Prasad*** would amount to hostile and invidious discrimination. Therefore the equilibrium has to be restored by granting the status quo ante from the dates counterparts secured benefit of regularization by administrative orders passed without judicial intervention. The Supreme Court holds in ***Hari Nandan Prasad*** that "...the Industrial adjudicator would be achieving the equality by upholding Art. 14, rather than violating this constitutional provision".

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(22) 2007 (11) SCC 92,

(65) High Court Judges bound by Constitutional limitations in article 14 as elsewhere in the law are enjoined to erase unfair inequality resulting from adverse State action or inaction and would remain under oath while discharging judicial duties to strike down unfair discrimination themoment they find its ugly head rearing from case papers placed before them. They would remain bound to kill the weed before it grows on the meadow of article 14. Article 14 to say the least is the heart of the law pumping sap into the capillaries of the Constitution so that it grows well nourished and well tended into a Banyan tree with its root system pervading all things. After South Africa won its freedom the emblem of it Constitutional Court became the Banyan Tree.

(66) Any unfair discrimination practiced by the State has to be dealt with by the strong arm of the law by firm affirmative action in order to remove unfair discrimination and not to promote it so that rights of no citizen go un-redressed. It would be a crying shame to leave the petitioners deserted and feeling that article 14 was not meant for them and only for the 'haves'. Subverting consciously the equality clause in article 14 would be an anathema to the Constitution. Judges may as well then pack up their bags and go home.

(67) However, I may add a word of caution here, I have not touched upon in this judgment the issue of regularization arising in cases of questionable appointments to posts sanctioned on the cadre strength of units of service in the departments of Government, besides the instrumentalities of State and nothing said here would apply to the other set of pending cases involving claims of regularization made by holders of posts in Class III service which are to be decided on their own facts and the laws applicable.

(68) Since the Judgment of the Supreme Court in ***Hari Nandan Prasad*** in paragraph 34 now holds the roost, the apparent conflict caused by the verdict of ***Channi***, in following ***Uma Devi*** and ***Rajinder Kumar*** overlooking the subsequent view of the Supreme Court in ***Casteribe***, pales into insignificance. Accordingly, the already formulated view of this Court, which is now reflected in the Supreme Court Judgment of ***Hari Nandan Prasad***, stands fortified and buttressed. This obviates any necessity of any alleged conflict between earlier views of this Court to be reconciled. Having drawn strength from the latest view of the Supreme Court in ***Hari Nandan***

Prasad, it may be safe for me to conclude that there no longer exists any conflict of opinion in the interpretation of ***Umadevi.*** Therefore, I find no reason to accede to the request of Mr. Nehra for the matter to be placed before a larger bench of this Court as the issue seems resolved by the Supreme Court itself in the illuminating view in ***Hari Nandan Prasad.***

(69) The nine questions crystallized above indicate internally what their answers might be but with one broad thread running through all of them indicating a case for grant of positive retroactive parity and to answer if this relief at all deserves to be given to the petitioners to remove the vice of unfair discrimination even if it is through the process of making a supernumerary arrangement to give effect to the cardinal principle of equality under the law and of equal protection of the laws. A parity which is measured by the laws founded on State policies of which the beneficiaries were the fortunate group, then could the petitioners be lawfully deprived of those social and material benefits. The rights of the petitioners who are daily wage workers accrue and flow from the Labour Court awards made in their favour granting to them a continuity of service. However, where continuity of service is not granted by the Labour Court and such awards have attained finality, the period for which benefit of past service when not granted, would stand deprived of the reckonable period for intents and purposes. In the present cases, the petitioners would be deemed to have been in service as though the adverse retrenchment orders were never passed. The State was not able to show in any of these cases the rules of service applicable to the initial engagement of the petitioners on daily wager in the Forest and in the Irrigation Department. Therefore, the question of their illegal or irregular appointments is not a debatable issue in these batch of cases and a strong presumption would go in favour of the petitioners that their initial appointments were not contrary to law given that power to employ them was posited in the State to offer them daily wage employment albeit through its local functionaries with power derived from manuals to operate the muster roll system. The Industrial Disputes Act is a piece of beneficial social welfare legislation which stands alone and apart from constitutional service law. However, as time passed and departures were made with India opening up to globalization and free enterprise the axis suffered a paradigm shift towards capital and then the Supreme Court spoke in ***Harjinder Singh*** versus ***Punjab State Warehousing Corporation (23),*** to turn back the

(23) (2010) 3 SCC 192

rising tide. A sea change was brought about by a quick series of judgments with ***Harjinder Singh*** in the lead. The Court's deep anguish in Courts contributing to emasculating the original scheme of labour laws could not have been expressed with greater pathos than in para. 30-31 which observations are significant in the present context and can be profitably noticed:-

> "30. Of late, there has been a visible shift in the courts approach in dealing with the cases involving the interpretation of social welfare legislations. The attractive mantras of globalization and liberalisation are fast becoming the raison d'etre of the judicial process and an impression has been created that the constitutional courts are no longer sympathetic towards the plight of industrial and unorganized workers. In large number of cases like the present one, relief has been denied to the employees falling in the category of workmen, who are illegally retrenched from service by creating by-lanes and side-lanes in the jurisprudence developed by this Court in three decades. The stock plea raised by the public employer in such cases is that the initial employment/engagement of the workmanemployee was contrary to some or the other statute or that reinstatement of the workman will put unbearable burden on the financial health of the establishment. The courts have readily accepted such plea unmindful of the accountability of the wrong doer and indirectly punished the tiny beneficiary of the wrong ignoring the fact that he may have continued in the employment for years together and that micro wages earned by him may be the only source of his livelihood.
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> 31. It need no emphasis that if a man is deprived of his livelihood, he is deprived of all his fundamental and constitutional rights and for him the goal of social and economic justice, equality of status and of opportunity, the freedoms enshrined in the Constitution remain illusory. Therefore, the approach of the courts must be compatible with the constitutional philosophy of which the Directive Principles of State Policy constitute an integral part and justice due to the workman should not be denied by entertaining the specious and untenable grounds put forward by the employer - public or private."

(70) This statement of law is, or what I may call, the re-statement and re-visit of the law, is effectively the *summum bonum* of humanism in action from the last Court of judicial resort.

(71) Before leaving I would say a few more words on the principles of primary and secondary review of administrative action which was **introduced**, if I may be correct in saying so, by M.Jagannadha Rao, J. some years before ***Om Kumar*** was delivered by his Lordship in ***Union of India*** versus ***G.Ganayutham (24).*** The legal position on the subject was summed up in para. 31 of the report which to my mind is capable of universal application in administrative law and subject matter labour law. The question left open in sub para. 4 (b) in ***Ganayutham*** appears to have been answered exhaustively in ***Om Kumar*** after noticing judicial thought processes expounded in judgments by Judges sitting at the apex level in foreign Courts on the subject in the United Kingdom and in the United States of America etc. Para. 31 enlightens with these guiding words:-

> "31. The current position of proportionality in administrative law in England and India can be summarised as follows :
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> (1) To judge the validity of any administrative order or statutory discretion, normally the Wednesbury test is to be applied to find out if the decision was illegal or suffered from procedural improprieties or was one which no sensible decision-maker could, on the material before him and within the framework of the law, have arrived at. The Court would consider whether relevant matters had not been taken into account or whether irrelevant matters had been taken into account or whether the action was not bonafide. The Court would also consider whether the decision was absurd or perverse. The Court would not however go into the correctness of the choice made by the administrator amongst the various alternatives open to him. Nor could the Court substitute its decision to that of the administrator. This is the Wednesbury test.
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> (2) The Court would not interfere with the administrator's decision unless it was illegal or suffered from procedural impropriety or was irrational in the sense that it was in

(24) (1997) 7 SCC 463

outrageous defiance of logic or moral standards. The possibility of other tests, including proportionality being brought into English Administrative Law in future is nor ruled out. These are the CCSU principles.

(3)(a) As per Bugdaycay, Brind and Smith, as long as the Convention is not incorporated into English Law, the English Courts merely exercise a secondary judgment to find out if the decision maker could have, on the material before him, arrived at the primary judgment in the manner he had done.

(3)(b) If the Convention is incorporated in England making available the principle of proportionality, then the English Courts will render primary judgment on the validity of the administrative action and find out if the restriction is disproportionate or excessive or is not based upon a fair balancing of the fundamental freedom and the need for the restriction thereupon.

(4)(a) The position in our country, in administrative law, where no fundamental freedoms as aforesaid are involved, is that the Courts/ Tribunals will only play a secondary role while the primary judgment as to reasonableness will remain with the executive or administrative authority. The secondary judgment of the Court is to be based on Wednesbury and CCSU principles as stated by Lord Greene and Lord Diplock respectively to find if the executive or administrative authority has reasonably arrived at his decision as the primary authority.

(4)(b) Whether in the case of administrative or executive action affecting fundamental freedoms, the Courts in our country will apply the principle of 'proportionality' and assume a primary role, is left open, to be decided in an appropriate case where such action is alleged to offend fundamental freedoms. It will be then necessary to decide whether the Courts will have a primary role only if the freedoms under Article 19, 21 etc. are involved and not for Article 14." (emphasis added)

(72) The tone had been set. Article 19 and 21 were debatable so far as primary review was concerned. Article 14 was impartible. It is not negotiable. In ***Om Kumar*** (supra) the question of violation of article 14 was directly answered by the same Hon'ble Judge. This is how both the

rulings have to be headed together, the first exploratory and the other explanatory of primary review jurisdiction while dealing with oppressive infractions of article 14. Therefore, the Court when empowered with primary review jurisdiction becomes the administrator and protector of equality before the law and the equal protection of the laws, so as to give meaningful, instant and ameliorative effect to the fundamental freedoms by not postponing such right deprivations for redress through non-constitutional adjudication, when facts demand and evidentiary proof is not found necessary in the facts and circumstances of a given case. By applying these standards of primary review of administrative action in the present cases where the fortunate ones secured their freedom of regularization without court intervention but which has resulted in hostile and invidious discrimination are declared bad in the eyes of law. The rule of law is clearly against man's inhumanity to man. This kind of deprivation is in contravention of the natural law of equality among citizens who are or have become equally placed in all respects of basic rights possessed by both of them as human beings even if there were no written constitution or statutory law protecting workers against unfair discrimination and unfair labour practice *inter se* of those who deserve equality of treatment with their counterparts obtained through the tardy process of Labour Court trial resulting in favourable awards by the deeming fiction of law, even then the Court must step in to vanquish subjugation of the spirit. No person aggrieved should be turned away thinking the Court failed in coming to aid by restoring the unfair imbalance created by the administrator.

(73) On the conspectus of the above facts, law and the thread of judgments read together, and for the various reasons stated interconnecting the judicial decisions, the rights of the petitioners for ante-dated regularization of services are declared in their favour and against the State.

(74) The writ petitions are allowed. The orders of the respondent State declining representations of the petitioners for regularization in this batch of cases are nullified and set aside. In cases where regularization has been granted with effect from 2003 they shall be ante-dated in terms of this judgment from the dates such petitioners were separated from their erstwhile juniors and fellow workers. Accordingly, the State of Haryana would pass fresh orders in terms of this judgment in each case after the period of limitation prescribed for calling in question this order has expired. Order dasti.

P.S. Bajwa