Before Sudhir Mittal, J.

GURINDER SINGH AND OTHERS – *Petitioners*

versus

STATE OF PUNJAB AND OTHERS – *Respondents*

CWP No.20333 of 2016

January 21, 2022

Constitution of India, 1950 – Art. 226 – Concept of permanent appointment is different from regularization – Public post must be filled as per constitutional scheme from best available talent – Fact that petitioners did not qualify in open competition demonstration, they are not best – their regularization not property – Set aside.

Held that, the policy dated 18.03.2011 was framed for employees of seven different departments. However, it has been extended only for ADAs belonging to the Prosecution & Litigation Department which is part of the Department of Home Affairs & Justice and also includes the Jails Department and Advocate General's office. The policy was framed for the benefit of employees of the said departments as well, but the ADAs were singled out for preferential treatment. Nothing has been brought on record to show that there was a necessity to extend the policy for granting permanent employment. Process of direct appointment had already been initiated and the posts occupied by the contractual employees could also have been filled up through direct recruitment, may be in a staggered fashion to ensure that the working of the subordinate Courts was not adversely affected. The preferential treatment thus, given to the private respondents and that too on the basis of their own request, is patently arbitrary.

(Para 27)

Further held that, it is clarified that the above finding may not be construed to be contradictory to the finding that the decision of the Cabinet to extend the applicability of policy dated 18.03.2011 to the private respondents was within its jurisdiction. It is reiterated that the action was within its jurisdiction, but there is no material on record to justify the taking of such an action. Accordingly, it is arbitrary and action of regularization on the basis thereof is bad in law. Even though, there is no challenge to the communication dated 04.10.2013, technicalities of pleading cannot come in the way of substantial justice. The communication has been placed on record by the State itself and

the parties should have been alive to the legality or otherwise thereof.

(Para 28)

Further held that, on the date of regularization i.e. 08.10.2013, the 1989 Rules had been repealed by the 2010 Rules. The 1960 Rules would be deemed to have been repealed as two sets of Rules cannot occupy the same space. The 2010 Rules provide for 100% appointment through direct recruitment. It is thus, apparent that the Rules framed in exercise of powers conferred by the proviso to Article 309 of the Constitution of India have been violated. The 2010 Rules also show that the service comprises ADAs only and the said posts are Group-B posts. No regularization on Group-B posts is permissible. If at all, regularization can be done only on Group-C or Group-D posts. Casual appointments and appointments on daily-wage basis are made against such posts only and the entire discussion in Uma Devi (supra) is in the context of such employees only. The tendency needs to be nipped in the bud so that we are not faced with the day when appointments are made to Group-A posts too through the process of regularization. The situation appears to be absurd but not beyond visualization.

(Para 29)

Further held that, the writ petitions are accordingly, allowed. Order dated 08.10.2013 appointing the private respondents against public posts by a mode not envisaged by the Rules framed under proviso to Article 309 of the Constitution of India is set aside. The State may, however, continue them as contract employees subject to initiation of process of direct appointment to the posts within six months. The private respondents would also be eligible to apply for the said posts and keeping in view the facts and circumstances of this case, it is directed that stipulation of upper age limit shall be relaxed for them. The process be completed within one year.

(Para 32)

Anurag Goyal, Advocate and
Shivam Malik, Advocate and
Parth Goyal, Advocate,
for petitioner Nos.6, 12 and 18 in
CWP-20333-2016 and
for the applicants in CM-18224-CWP-2021.

Kapil Kakkar, Advocate,
for the remaining petitioners in CWP-20333-2016.

Amarjit Kaur, Advocate,

*for the petitioners*in CWP-7011-2018.

Ambika Bedi, AAG, Punjab.

G.S. Bal, Sr. Advocate with
D.S. Gill, Advocate,
for respondent No.50
in CWP-20333-2016 and
for respondent No.51 in CWP-7011-2018.

Gurminder Singh, Sr. Advocate with
J.S. Gill, Advocate,
for respondents No.20, 24, 46, 47, 58, 61 to 63, 65, 66, 69, 77 and 81 in CWP-20333-2016.

Mohit Garg, Advocate,
for the applicant
in CM-12790-CWP-2019 and
for respondent No.5in CWP-20333-2016 and CWP-7011-2018.

Vipin Mahajan, Advocate,
for respondents No.9, 10, 35 and 36 in CWP-20333-2016.

A.S. Chadha, Advocate,
for respondents No.19, 31, 34, 39, 40, 45, 59 and 71in CWP-20333-2016.

Munish Puri, Advocate,
for respondents No.37 and 38in CWP-20333-2016 and
for respondents No.38 and 39 in CWP-7011-2018.

Akshit Chaudhary, Advocate
for respondents No.4, 6, 11 to 15, 17, 18, 21, 23, 29, 35, 49, 51 to 55, 68, 70, 74, 79, 82 to 86 and 88.

APS Rehan, Advocate,
for respondents No.25, 26, 28 and 44 in CWP-20333-2016.

Ramneek Vasudeva, Advocate,
for respondents No.81 and 82 in CWP-7011-2018.

Shekhar Verma, Advocate,
for respondent No.27 in CWP-20333-2016.

Rakesh Kumar, Advocate,
for respondents No.30 and 32 in CWP-30 and 32 in CWP-20333-2016.

Mukesh Bhatnagar, Advocate,

for respondents No.7 and 8 in CWP-20333-2016 and
for respondent No.8 in CWP-7011-2018

Mohd. Yousuf, Advocate,
for respondents No.17 and 18 in CWP-7011-2018.

Onkar Rai, Advocate,
for respondents No.25 and 44 in CWP-20333-2016 and
for respondents No.25 and 45 in CWP-7011-2018.

G.S. Nahel, Advocate,
for respondent No.75 in CWP-7011-2018.

SUDHIR MITTAL, J.

(1) This judgment shall decide CWP-20333-2016 and CWP-7011-2018 as identical questions of fact and law are involved therein. For ease of disposal, facts are being extracted from CWP-20333-2016 titled as ***Gurinder Singh and others*** versus ***State of Punjab and others.***

(2) The writ petition has been filed for quashing orders of regularization of the private respondents. In CWP-7011-2018, prayer has also been made for quashing order dated 14.06.2017, whereby, the services of the private respondents were confirmed post-regularization as well as for quashing of tentative seniority list dated 21.02.2018. If, the order of regularization is set aside, the subsequent order of confirmation shall automatically be set aside and thus, the legality and validity of the same is not being considered. It is also to be noted that there is no challenge to the legality of regularization policy dated 18.03.2011.

(3) Undisputed facts which have come to light on the basis of the pleadings of the parties are that in the year 2008, CWP-12194-2008 titled as ***Arvind Thakur*** versus ***State of Punjab and others*** was filed for directions to the respondents to fill up the vacant posts of Deputy District Attorneys/District Attorneys/Assistant District Attorneys as the same was affecting the functioning of the subordinate Courts. Vide detailed judgment dated 06.05.2008, the writ petition was disposed of with a direction to the State of Punjab to revive posts which had been abolished on account of austerity measures, review the cadre strength and create additional vacancies as the requirement of Public Prosecutors/Assistant Public Prosecutors was much in excess of the existing sanctioned posts and to appoint candidates on contractual basis till the time regular appointments were made. This direction was

issued as the State had expressed its inability to make wholesale appointments in the year 2009. The State had submitted that 40% appointments would be made in the year 2009 and the remaining 60% appointments would be made in the years 2010-11. This Court permitted the State to fill up the regular posts in the staggered manner as suggested, but issued directions to make stop gap arrangements by appointing contractual employees. It also needs to be highlighted that there was a great shortfall in the availability of Assistant District Attorneys (hereinafter referred to as the more posts of ADAs. Theproposal was reiterated in subsequent communications, the last of which were dated 27.04.2012 and 24.01.2013.

(4) Meanwhile, the Government of Punjab issued an advertisement dated 17.10.2009 inviting applications for 98 posts of ADA on contract basis. Appointment was for a period of one year or till regular recruitment and the same was liable to be terminated without passing any order on completion of the term of contract unless the same had been enhanced. The private respondents i.e. respondents No.6 to 92 applied. Their selection was made by District Level Committees and order of appointment dated 16.02.2010 was issued.The appointment order also contained a provision for extension of the contractual period. Respondents No.4 and 5 had been appointed earlier in the year 2006. On 18.03.2011, a regularization policy was issued by the Government of Punjab, according to which, regularization of contractual employees was to be effected from 01.04.2011 or on completion of three years' service on contract whichever was later.New posts were not to be created for the purposes of regularization nor any of the conditions of regularization were to be relaxed. The action was to be completed within a period of six months from the date of issuance of the policy being a one-time measure.

(5) Despite judgment of this Court dated 06.05.2009 referred to hereinabove, the regular appointments had not been made and thus, this Court took *suo moto* notice of the matter through CWP-4902-2013 titled as ***Court on its own motion*** versus ***State of Punjab***. The State had meanwhile, initiated noting dated 02.04.2013 for regularization of the services of the private respondents as it had received a request from them in this regard. Regularization was sought to be made on the basis of policy dated 18.03.2011. A perusal of this noting shows that there were 158 sanctioned posts of ADAs against which only 46 were regularly appointed. On 24.05.2013, order was passed in CWP-4902-2013 recording submissions made on behalf of the State of Punjab that

sanction had been granted for fill up deficient posts of 23 Deputy District Attorneys and 145 Assistant District Attorneys in a phased manner, i.e. 50% posts to be filled up in the year 2013 and remaining 50% to be filled up in the year 2014. Accordingly, requisition dated 04.07.2013 was sent to the Punjab Public Service Commission (hereinafter referred to as the PPSC) for filling up 86 posts of ADAs. An extract of this requisition has been placed on record as Annexure P-8 and a perusal of this gives the impression that the requisition had been sent in respect of posts occupied by the private respondents on contract. Based on this requisition, the PPSC advertized 80 posts vide its advertisement dated 26.07.2013. Last date for application was 16.08.2013. The petitioners submitted applications for regular appointment and while the process of selection was under-way, order dated 08.10.2013 was passed regularizing the services of the private respondents including respondents No.4 and 5. Subsequently, the petitioners were appointed directly vide order dated 22.12.2014. Some applicants were appointed on 04.05.2015. Significantly, the contractual appointees also applied for the selection, but were unsuccessful. Although, there is no pleading in this regard, it was so argued by learned counsel for the petitioners and was not denied by learned counsel representing the private respondents.

(6) As mentioned earlier, policy dated 18.03.2011 was framed for regularization of services of employees of departments mentioned in the list annexed thereto. The employees of Prosecution & Litigation Department were also included and numbered 146 in all. The policy also stated that employees who had been appointed on contract basis by following a transparent procedure were to be regularized w.e.f. 01.04.2011 or on completion of three years' service on contract whichever was later. However, no new posts were to be created for them. Thereafter, conditions of regularization were mentioned which were that the regularization would be effective from the date of issue of the order and employee would not be entitled to any other benefit. Reservation policy was to be strictly complied with and initial pay-scale of the concerned cadre was to be given. Contributory Pension Scheme was made applicable on being made permanent and the judgment of the Supreme Court in Secretary, ***State of Karnataka and others*** versus ***Uma Devi and others***[1] needed to be complied with. That apart, the employee's past work and conduct was required to be satisfactory, medical documents were to be obtained and a verification

[1] 2006 (4) SCC 1

of character & antecedents was to be done. Finally, it was mentioned that the policy was a one-time measure and was applicable only to the employees of the departments mentioned in the list. The action under the policy was to be completed within six months from the date of issuance of letter and no relaxation of any condition was to be given.

(7) Rules governing the appointment of ADA's have changed over the years. Initially, the Punjab District Attorneys Services Rules, 1960 (hereinafter referred to as the 1960 Rules) were in force, according to which, the 'service' meant the Punjab District Attorney Service and comprised all posts of District Attorneys Grade-I, District Attorneys Grade-II and Assistant District Attorneys. Rule 4 thereof provided that appointment to the service shall be made by the Government in consultation with the PPSC, but, temporary appointments could be made for a period not exceeding three months by the Legal Remembrancer. Thereafter, the Punjab Assistant District Attorneys, Grade-II (Class-III) Service Rules, 1989 (hereinafter referred to as the 1989 Rules) were notified on 22.02.1989 in exercise of powers conferred by proviso to Article 309 of the Constitution of India. The 'service' comprised the Punjab District Attorney, Grade-II (Class-III) service and consisted of posts of ADA Grade-II. It provided for 95% appointment through direct recruitment and 5% through promotion and total number of permanent posts comprising the service were 146. These were replaced by the Punjab Prosecution & Litigation (Group-B) Service Rules, 2010 (hereinafter referred to as the 2010 Rules) notified on 17.08.2012. According to the Rules, the service comprised a total of 150 permanent posts of ADAs and appointment was to be made only by way of direct recruitment. The Government was the appointing authority.

(8) On the basis of the aforementioned facts, learned counsel for the petitioners have argued that requisition dated 04.07.2013 makes it clear that the posts against which the direct appointments were to be made were occupied by contractual employees, i.e. the private respondents. Thus, the posts had been consumed by virtue of the requisition and the private respondents could not have been regularized against the same. Additional posts were created for regularization of the services of the private respondents which was a clear violation of the policy dated 18.03.2011. The said policy could not have been invoked as the same was in vogue only for a period of six months from the date of its issuance and the policy made it clear that regularization was to be effected w.e.f. 01.04.2011 in respect of employees who had

completed three years of service. The private respondents were appointed only on 16.02.2010 and had not completed three years of service as on 01.04.2011 and were not entitled to the benefit of the policy. The 1989 Rules did not repeal the 1960 Rules, whereas, 2010 Rules repealed the 1989 Rules. On the date of appointment of the private respondents, the 1960 Rules were also in force and Rule 4 thereof made it mandatory for the State to make appointments only after consultation with the PPSC. The same having not been done, the appointments were illegal. Finally, it has been submitted that regularization is violative of the 2010 Rules. The said Rules do not provide for appointment through regularization. Moreover, the judgment in ***Uma Devi's case (supra)*** makes it clear that no regularization can be made on a Class-II post. The post of ADA being Class-II post, the regularization is illegal.

(9) On behalf of the private respondents and the State, it has been submitted that on the date of regularization of the private respondents, the petitioners were not even members of the cadre. Their order of appointment is dated one year and two months after the regularization of the private respondents and thus, they have no *locus standi* to file the writ petition. On merits, it has been submitted that appointments were made following a transparent process as directed by the High Court vide judgment dated 06.05.2009 in ***Arvind Thakur's*** case (supra) and thus, their initial appointment could not be said to be back door entry. Hence, they were entitled to regularization under the policy dated 18.03.2011. The said policy has been framed bythe State and initially, it was kept in force for a period of six months only. However, period of six months was extended by the State itself by virtue of order dated 04.10.2013. The same did not amount to relaxation of the terms of regularization. A perusal of the written statement filed on behalf of the State clearly shows that 220 posts of ADAs were in existence on the date of regularization of the private respondents and thus, there was no question of them occupying the posts of the petitioners. No posts had been created separately for the private respondents for the purposes of regularization and consequently, there was no violation of policy of regularization. The 1989 Rules clearly show that the post of ADA is a Class-III post and thus, there is no illegality in order of regularization. The private respondents having been appointed under 1989 Rules, the said Rules only were applicable. The argument regarding violation of Service Rules, i.e. 2010 Rules cannot be raised as there is no pleading in this regard. The writ petitions accordingly, deserve to be dismissed.

Locus Standi

(10) Since, the issue of *locus standi* has been raised on behalf of the respondents, it would be appropriate to take up the same for consideration first.

(11) The word *'locus'* and the phrase *'loucs standi'* have been defined as follows in the Black's Law Dictionary, Revised 4th Edition, 1968:-

Locus. Lat. a place; a place where a thing is done.

Locus standi. A place of standing; standing in Court. A right to appear in a Court of justice, or before a legislative body, on a given question.

(12) The plain meaning of the phrase is the entitlement of a person to appear before a Court of law. In earlier times, most of the litigation was between private parties. To deny a busybody or an inter loper, the right to approach a Court without any harm having been caused to him, this concept was developed. Only a person whose legal right had been violated or was likely to be violated was permitted to do so. This also curtailed unnecessary litigation. The concept has been considered in great detail by the Supreme Court in ***S.P Gupta*** versus ***President of India***[2]. Writ petitions were filed in various High Courts challenging a letter issued by the then Law Minister asking Chief Ministers of the States of India to obtain consent from additional Judges of the High Courts for transfer to other High Courts as a move was afoot to have 1/3rd strength of Judges of High Courts from outside the States. A similar consent was also required to be submitted by persons recommended to be elevated as additional Judges. Senior lawyers of various High Courts had filed the writpetitions which were ultimately transferred to the Supreme Court and on behalf of the respondents therein, preliminary objection of *locus standi* was raised as none of the writ petitioners had been adversely affected in any manner by the communication nor any of their rights had been violated. If at all, it was submitted, rights of additional Judges had been violated who were not the writ petitioners. The concept was discussed thus, by the Constitution Bench.

'14. The traditional rule in regard to locus standi is that judicial redress is available only to a person who has suffered a legal injury by reason of violation of his legal right or legal protected interest by the

[2] 1981 (Sup.) SCC 87

impugned action of the State or a public authority or any other person or who is likely to suffer a legal injury by reason of threatened violation of his legal right or legally protected interest by any such action. The basis of entitlement to judicial redress is personal injury to property, body, mind or reputation arising from violation, actual or threatened, of the legal right or legally protected interest of the person seeking such redress. This is a rule of ancient vintage and it arose during an era when private law dominated the legal scene and public law had not yet been born. The leading case in which this rule was enunciated and which marks the starting point of almost every discussion on locus standi is Ex parte Sidebotham (1980) 14 Ch D 458. There the Court was concerned with the question whether the appellant could be said to be a 'person aggrieved' so as to be entitled to maintain the appeal. The Court in a unanimous view held that the appellant was not entitled to maintain the appeal because he was not a 'person aggrieved' by the decision of the lower Court. James, L.J. gave a definition of 'person aggrieved' which, though given in the context of the right to appeal against a decision of a lower Court, has been applied widely in determining the standing of a person to seek judicial redress, with the result that it has stultified the growth of the law in regard to judicial remedies. The learned Lord Justice said that a 'person aggrieved' must be a man "who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something or wrongfully refused him something or wrongfully affected his title to something." Thus definition was approved by Lord Esher M. R. in In Re Reed Bowen & Co. (1887) 19 QBD 174 and the learned Master of the Rolls made it clear that when James L. J. said that a person aggrieved must be a man against whom a decision has been pronounced which has wrongfully refused him of something, he obviously meant that the person aggrieved must be a man who has been refused something which he had a right to demand. There have been numerous subsequent decisions of the English Courts where this definition has been applied for the purpose of determining whether the person seeking judicial redress had locus standi to maintain the action. It will be seen that, according to this rule, it is only a person who has suffered a specific legal injury by reason of actual or threatened violation of his legal right or legally protected interest who can bring an action for judicial redress. Now obviously where an applicant has a legal right or a legally protected interest, the violation of which would result in legal injury to him, there must be a corresponding duty owed by the other party to the applicant. This rule

in regard to locus standi thus postulates a right-duty pattern which is commonly to be found in private law litigation. But, narrow and rigid though this rule may be, there are a few exceptions to it which have been evolved by the Courts over the years.'

(13)Exceptions to the aforementioned rule have been created. A person who has substantial interest in the subject matter can also approach the Court. Even a person entitled to participate in decision making process which has resulted in a decision challenged before the Court has been held to possess *locus standi*. Persons having statutory rights also possess *locus standi*. The rule has further been diluted so as to permit judicial redress for persons unable to approach the Court on account of some disability or being under a social or economic disadvantage. In cases of public interest also, where, public injury is caused on account of failure to carry out constitutional or statutory obligations strict application of the rule is not enforced, provided the person approaching the Court does not have any ulterior motive in doing so. While examining the various exceptions, reference has been made to a large number of judgments and publications. One such reference is as follows:-

> 'This view also found expression in office of ***Communication of United Church of Christ Vs. FCC 123, US App. DC 328***, where the standing of television viewers was upheld with the following observations: Since the concept of standing is 'one designed to assure that only one with a genuine and legitimate interest can participate in a proceeding, we can see no reason to exclude those with such an obvious and acute concern as the listening audience." Vide article on "Evolving Trends in Locus Standi: Models For Decision-Making" by D.Y. Chandrachud'

(14)Having found that strict rule of personal injury had been watered down over the years in view of the development of law, thewrit petitioners were held to possess *locus standi*.

(15)In the instant case, even though, the writ petitioners were appointed after the regularization of the private respondents, they possess sufficient interest in the matter of regularization as their advancement in service would be directly and substantially affected by the same. The writ petition also raises the issue of violence to the Constitution and rights conferred thereby and thus, it would be a travesty of justice to throw out the writ petition at the threshold on the ground of '*locus standi'*. The objection is thus, rejected.

Uma Devi (supra)

(16)An analysis of this case is essential before dealing with any matter involving regularization of service. This case reached the Supreme Court as certain temporarily engaged daily wagers demanded regularization on the ground that they had continued in service for more than ten years. A recommendation for their absorption was made to the Government, but it did not acceed to the same. The aggrieved workmen thus, approached the Administrative Tribunal who rejected their claim. A writ petition was filed against the decision of the Administrative Tribunal which was allowed and the State was commanded to consider their cases for regularization within four months. Thus, the State of Karnataka approached the Supreme Court. In another matter, members of an association approached the High Court challenging the order of the Government directing cancellation of appointments as well as regularization of all casual workers/daily rated workers made after 01.07.1984 and also sought regularization. The writ petition was disposed of by a learned single Judge of the High Court with liberty to approach the employers for absorption and regularization within a fixed time frame. Appeals filed by the State succeeded leading to the association approaching the Supreme Court. The matter was referred to a larger Bench as there was conflict of opinion in various judgments of the Supreme Court and the matter was heard and decided by a Bench comprising five Hon'ble Judges. After examining the law on the subject, it was held that the Constitution permitted employment in public service in accordance with the Rule of Equality only. All citizens of India had an equal right to compete for public employment and any employment granted in violation of the Rule of Equality was illegal. The mode of appointment through 'regularization' was a clear violation of the Constitutional scheme and was illegal. Thus, neither the Executive nor the Courts could direct 'regularization' of persons appointed in violation of the relevant rules. The term 'regularization' and 'permanence' were distinguished and it was held that 'regularization' refers to removal of an irregularity occurring in the process of appointment which was not fundamental in nature. It did not connote granting of permanent appointment which was a concept totally different from that of 'regularization'. In this regard, Para No.15 of the judgment is reproduced below:-

> '15. We have already indicated the constitutional scheme of public employment in this country and the executive, or for that matter the Court, in appropriate cases, would have only the right to regularize

an appointment made after following the due procedure, even though a non- fundamental element of that process or procedure has not been followed. This right of the executive and that of the Court, would not extend to the executive or the Court being in a position to direct that an appointment made in clear violation of the constitutional scheme, and the statutory rules made in that behalf, can be treated as permanent or can be directed to be treated as permanent.'

(17)The right of the State to grant temporary appointments for special projects or to tide over emergent situations was, however, recognized with the rider that such appointments would come to an end on the project coming to an end or the cessation of the emergent situation necessitating appointment of temporary employees. Such appointments would also come to an end on conclusion of the time period for which appointments were made. It was also held that theory of legitimate expectation, Right to Life under Article 21 of the Constitution and sympathetic considerations would not get attracted in such cases.

(18)It is thus, evident that after the decision in ***Uma Devi*** (supra), appointment to public posts through the mode of regularization is to be frowned upon. If, the Executive does so, the action is patently illegal, even though, it may have been done in pursuance of a policy framed in this regard.

Whether, the private respondents were regularized against posts occupied by the petitioners ?

(19)An argument has been raised on behalf of the petitioners that a total of 158 posts of ADAs were available at the time of issuance of requisition dated 04.07.2013. This is evident from the noting dated 02.04.2013 initiated by the Department of Prosecution & Litigation. Only 46 ADAs had been regularly appointed leaving 112 posts unfilled. Out of these posts, 98 had been occupied by the private respondents as contractual employees leaving only 14 regular posts. Requisition was sent for 86 posts and advertisement was issued for 80 posts. The requisition itself records that the posts for which the same had been sent were occupied by contractual appointees. Once, the requisition had been sent, 80 posts stood reserved for the direct appointees. It is thus, obvious that the private respondents have been regularized by creating additional posts for them which was a clear violation of the policy dated 18.03.2011. In the alternative, it is submitted that posts having already been consumed by the direct

appointees, the private respondents could not have been regularized.

(20)In response, the State has pleaded that the matter regarding creation of more posts pursuant to the judgment of this Court dated 06.05.2009 was initiated vide the communication dated 30.06.2009. Vide memo dated 31.05.2013, 61 posts of ADAs were created and one post was revived. This letter was substituted under the same memo number and date reviving 12 posts instead of 01. Thus, there were 220 posts existing on the date advertisement for 80 posts was issued (later revised to 231 posts). Even after regularizing the services of the private respondents, there were sufficient number of posts available for direct appointees. Thus, the argument that additional posts were created for the private respondents is without any basis nor can it be said that their regularization was against posts occupied by the direct appointees. Regarding the requisition sent to the PPSC, the reply is the same. In the replication filed on behalf of the writ petitioners, reliance has once again been placed on the noting dated 02.04.2013.

(21)The noting dated 02.04.2013 was initiated by the Department of Prosecution & Litigation, whereas, written statement has been filed under the signatures of the Special Secretary, Department of Home Affairs & Justice. The Special Secretary is the top official of the Government and represents the Government and his statement duly verified has to be considered more authentic than the contents of the noting. On creation of 61 posts and revival of 01 post on 31.05.2013, the total number adds up to 220, taking 158 to be the basic figure. Requisition dated 04.07.2013 cannot be made the basis for determining the vacancy position as only an extract thereof has been placed on record. Thus, it has to be held that there were adequate number of vacancies available as on date of inviting applications for direct appointment. Consequently, the argument that additional posts were created for the purposes of regularization and that there could not have been any regularization against posts consumed by the direct appointees, has to be rejected.

Violation of Policy dated 18.03.2011

(22)The terms of the policy have been referred to in the preceding paragraphs. At the expense of repetition, it is stated that regularization was to be done w.e.f. 01.04.2011 or on completion of 03 years of service whichever was later and that the directions issued in the policy were to be implemented within six months of the date thereof. Relevant extracts of the policy are reproduced below:-

2. 'On the basis of the information received in respect of employees working on contract basis in these departments (as mentioned in the enclosed list) the matter was considered by the Cabinet in its meeting held on 09.03.2011 and as per the under noted decision of the Council of Ministers, the employees who are included in the list sent by you (who fulfills the prescribed qualification and eligibility as per the rules/instructions) are required to be appointed on regular basis.

(i) Those employees who are working on contract basis and who were recruited by following the transparent procedure with regard to the prescribed qualification/eligibility, there services are to be regularized w.e.f. 01.04.2011 or on completion of 03 years service on contract basis, whichever is later but for them new posts will not be created.'

(4) 'As these regular appointments are being made on the aforesaid conditions in view of the legal opinion, administrative requirements and in public interest. Therefore, if any employee fails to get regularappointment due to non-fulfillment of the above conditions, then he cannot claim his right for regular appointment. This action is being taken as a one time measure and this is applicable only in the case of the departments included in the enclosed list. Action regarding regularization of services shall be completed within six months of the issuance of this letter. No relaxation of any condition shall be given in any case.'

(23)The aforementioned extracts show that regularization could be done even after 01.04.2011, however, the action had to be completed within six months of the issuance of the letter. Thus, the policy dated 18.03.2011 had ceased to exist after expiry of six months from the date of issuance thereof. This is how the State had also understood the same as the noting dated 02.04.2013 requests for a relaxation of the stipulation of six months.

(24)On behalf of the respondents, it has been submitted that the Cabinet had relaxed the period of six months and the same was communicated vide letter dated 04.10.2013. There being no challenge to this decision of the Cabinet, it can't be argued that regularization was done after the policy has ceased to exist.

(25)The decision of the Cabinet is reproduced in the communication dated 04.10.2013 and the same is extracted below:-

> 'After discussing memo dated 24.09.2013 of the Department of Home Affairs & Justice proposal mentioned in its para No.2 has been approved. It was also decided that Assistant District Attorneys who will complete 03 year's experience on 05.10.2013 and 06.10.2013 shall be were regularized from the said dates (05.10.2013 and 06.10.2013)'

(26)The decision does not explicitly extend the duration of the policy, but it states that the ADAs who had completed 03 years' experience on 05.10.2013 and 06.10.2013 were to be regularized. Impliedly, this decision extended the applicability of the policy dated 18.03.2011. The policy having been framed by the State Government, it was entitled to amend the same also. Letter dated 04.10.2013 itself not being under challenge, there is no escape from the conclusion that the policy had been extended for the private respondents.

Whether, the action of extension of policy dated 18.03.2011 was arbitrary.

(27)The policy dated 18.03.2011 was framed for employees of seven different departments. However, it has been extended only for ADAs belonging to the Prosecution & Litigation Department which is part of the Department of Home Affairs & Justice and also includes the Jails Department and Advocate General's office. The policy was framed for the benefit of employees of the said departments as well, but the ADAs were singled out for preferential treatment. Nothing has been brought on record to show that there was a necessity to extend the policy for granting permanent employment. Process of direct appointment had already been initiated and the posts occupied by the contractual employees could also have been filled up through direct recruitment, may be in a staggered fashion to ensure that the working of the subordinate Courts was not adversely affected. The preferential treatment thus, given to the private respondents and that too on thebasis of their own request, is patently arbitrary.

(28)It is clarified that the above finding may not be construed to be contradictory to the finding that the decision of the Cabinet to extend the applicability of policy dated 18.03.2011 to the private respondents was within its jurisdiction. It is reiterated that the action was within its jurisdiction, but there is no material on record to justify the taking of such an action. Accordingly, it is arbitrary and action of

regularization on the basis thereof is bad in law. Even though, there is no challenge to the communication dated 04.10.2013, technicalities of pleading cannot come in the way of substantial justice. The communication has been placed on record by the State itself and the parties should have been alive to the legality or otherwise thereof.

Validity of regularization

(29)On the date of regularization i.e. 08.10.2013, the 1989 Rules had been repealed by the 2010 Rules. The 1960 Rules would be deemed to have been repealed as two sets of Rules cannot occupy the same space. The 2010 Rules provide for 100% appointment through direct recruitment. It is thus, apparent that the Rules framed in exercise of powers conferred by the proviso to Article 309 of the Constitution of India have been violated. The 2010 Rules also show that the service comprises ADAs only and the said posts are Group-B posts. No regularization on Group-B posts is permissible. If at all, regularization can be done only on Group-C or Group-D posts. Casual appointments and appointments on daily-wage basis are made against such posts only and the entire discussion in ***Uma Devi*** (supra) is in the context of such employees only. The tendency needs to be nipped in the bud so that we are not faced with the day when appointments are made to Group-A posts too through the process of regularization. The situation appears to be absurd but not beyond visualization.

(30)The argument raised on behalf of the private respondents that the 1989 Rules were applicable to them cannot be accepted. The said Rules were in force when they were appointed on contract basis. As on date of regularization, the 1989 Rules stood repealed and thus,the argument is fallacious.

(31)In ***Uma Devi*** (supra), it has been held that neither the Executive nor the Courts can accept a request for appointment on public posts through a mode violative of the Constitutional scheme. It has also been held that making an employee permanent is a concept different from that of regularization and no employee can be permanently appointed on a public post except in accordance with the Constitutional scheme. The best available talent must be brought into public service and the fact that the private respondents failed to qualify in the open competition establishes that they are not the best. For these reasons, the regularization of the private respondents cannot be held to be legal and valid.

(32)The writ petitions are accordingly, allowed. Order dated

08.10.2013 appointing the private respondents against public posts by a mode not envisaged by the Rules framed under proviso to Article 309 of the Constitution of India is set aside. The State may, however, continue them as contract employees subject to initiation of process of direct appointment to the posts within six months. The private respondents would also be eligible to apply for the said posts and keeping in view the facts and circumstances of this case, it is directed that stipulation of upper age limit shall be relaxed for them. The process be completed within one year.

(33)A photocopy of this judgment be placed on the file of other connected case.

Sanjeev Sharma, Editor , ILR