

PETITIONER:
ASHWANI KUMAR & ORS. ETC. ETC.

Vs.

RESPONDENT:
STATE OF BIHAR & ORS. ETC. ETC.

DATE OF JUDGMENT 16/11/1995

BENCH:
RAMASWAMY, K.
BENCH:
RAMASWAMY, K.
HANSARIA B.L. (J)

CITATION:
JT 1995 (8) 563 1995 SCALE (6) 779

ACT:

HEADNOTE:

JUDGMENT:

WITH

CIVIL APPEAL NOS. 10760-11058, 11062-66 OF 1995
[Arising out of SLP [C] Nos. 13203-13/94, 13137-40/94, 13933-34/94, 14009-30/94, 14031-36/94, 14037-42/94, 14050-61/94, 16237-38/94, 15281-435/94, 17114/94, 17292-94/94, 17459/94, 19408-94, 21949/94, 22649/94, 23059/94, 22650/69/94, 22671-77/94, 22678-87/94, 22688-92/94, 1041/95, 1243-45/95, SLP [C] No. 26273-74 [CC 255]/95, SLP No. 2/95, 7912/95, [C] No. 26275 [CC 974]/95, SLP [C] No. 7095/95, 7912/95, SLP [C] No. 26276 [CC No. 1557]/95, SLP 66/95, 13548/95 and 8900/95]

J U D G M E N T

K. RAMASWAMY, J.
Leave granted.

This bunch of appeals pertains to 1363 employees, viz., Clerks [Class III] and Attendants [Class IV]. All the cases arise from judgment of Division Bench of the Patna High Court dated May 6, 1994 in C.W.J.C. No. 5163/93 and batch. The principal villain behind the scene is one Dr. A.A. Mallick, Deputy Director, Health Department of the Government of Bihar, in charge of Tuberculosis. He was Director of the Tuberculosis Centre at Patna. Eradication of Tuberculosis was taken up as a part of 20-Point Programme in Planned Expenditure. The activities in the Tuberculosis Centre at Patna were extended to various districts. Since Mallick happened to be the Director of the Centre, he was made Deputy Director of the Scheme. The Government had also issued directions to the District Medical Officers to abide by the instructions of Mallick in implementation of the programme. He was made the Chairman of the Selection Committee constituted by the Government consisting of himself, Assistant Director of Palaria and the senior officer representing Scheduled Castes/Scheduled Tribes to recruit 2250 posts of Class III and Class IV employees created to implement the Scheme in addition to around 800 to 900 staff in Patna Centre in all categories. Taking advantage thereof, the undisputed fact is that, he had

appointed around 6000 [as found by the Committee] while the Government asserts them to be approximately 7000. Be that as it may, not less than 6000 persons were appointed by Mallick without any written orders. He directed many of them to be adjusted by transfer by District Medical Officers and some of them had produced fabricated appointment orders. He shuffled their payment of salaries like musical chairs by turns. Another device adopted in the sordid episode was to make the employees go on strike and when some sensitive M.L.As. raised the question, on the floor of the State Legislative Assembly, of illegal appointments made by Mallick, the Government initially swallowed the appointments to be legal and had justified his action to be valid. Later, when facts themselves proved their faulty admission, they made amends before the Assembly and the Government made an elaborate statement apprising the House that the information furnished earlier was not correct.

Due to the agitation, the Director and Joint Secretary to the Government, Health department had issued directions to regularise the services of daily-rated Class III and Class IV employees. Taking aid thereof, it is claimed that regularisation of many of them including most of the appellants, was made. When alarming bells rang around portals of Patna High Court, filling petition under Article 226 of the Constitution seeking payment of salaries, the High Court, though initially in some cases directed to enquire into the cases and to pay salaries, later found it difficult to cope up with the situation. So it directed the Government to constitute an enquiry committee to find out whether the appointments made by Mallick were valid and if so, to pay salary to such employees.

In the meanwhile, the Government also directed the Vigilance Department to enquire into the matter and on May 7, 1991, the Vigilance department in its report pointed out that Mallick had violated the rules of recruitment and in collusion with other officers had appointed daily-rated Class III and Class IV employees. Pursuant to the direction of the High Court, a Screening Committee was constituted which sought to serve notice on the employees. When the Deputy Director went to the Centre at Patna to serve the notice on the employees, he was man-handled resulting in an ugly law and order situation. In consequence, notices were published on two different dates in different newspapers inviting submission of the claims by all the employees appointed by Mallick, together with supporting material justifying their appointments. Different dates of hearing by the Committee were staggered. About 987 employees appeared before the Committee and submitted their statements. In the meanwhile, relevant records were burnt out. The High Power Committee in the absence of authentic record was constrained to depend upon the statements made by the employees before it. After hearing them and considering the record placed before it, the Committee found that Mallick did not make any order of appointment on daily-wage basis. It found it difficult to accept even the orders of confirmation. In that view, the Committee found that the initial appointments made by Mallick were in violation of the instructions issued by the Government. Therefore, they were found to be illegal appointments. The Committee also found that Mallick circumvented the rules by making adjustment by transfer without verifying the qualifications, eligibility or disclosing previous places whereat the candidates appointed had worked and dates of their appointment and by transferring them to the respective places by cyclostyled orders. He directed the District Medical Officers to verify

their credentials and then to appoint them temporarily. As stated earlier, the 'Committee also noted that the third category of persons appointed were by producing fabricated orders of appointment. Consequently, it directed to cancel all the appointments made by Mallick. On receipt of the report and on its consideration, the Government found them to be invalid and illegal and all the appointments were cancelled. When their legality was questioned in the writ petitions filed under Art.226, the High Court upheld the Government action. Thus these appeals by special leave.

The main fervent thrust of Shri Shanti Bhushan, learned senior counsel and his colleagues who echoed him with forceful pursuation is that casual appointments are not to any posts. Eradication of tuberculosis urgently required to be done on war-footing which relieved Mallick to dispense with normal procedure of recruitment. Mallick, being exclusive centralised authority to appoint Class III and Class IV casual employees, he had picked up the candidates who applied for appointment pursuant to notification put up on the office notice Board at Patna Centre. They had discharged their duties, many of them meritoriously and were later promoted to higher posts. Security of tenure is a Constitutional right and regularisation of service is inherent in it. The Director of Health Department-cum-Joint Secretary to the Government had directed regularisation of all those who had completed three years' service, and of those with less than two years' service regularisation was to be done to the extent of available vacant posts on seniority basis. The procedure for recruitment prescribed in the instructions dated December 3, 1980 and November 25, 1982 does not apply to regularisation. No statutory rules need to exist for initial appointment. The administrative instructions issued by the Government in 1980, 1982, 1983 and 1986 circulars could be modified by further administrative instructions. The instructions and directions contained in letters dated October 10, 1985, January 19, 1986 and February 12, 1987 were special rules, which are exceptions to general directions for regularisation of the services of daily-rated employees. In compliance therewith, their services were duly regularised. The need, therefore, to follow the procedure prescribed in 1980, 1982 and 1983 circulars would not arise. They would be applicable only for regular recruitment to other posts. Since the appointments by Mallick have been made by regularisation of their services, the same were valid. Pursuant to a notice of motion given by M.L.As, the Government admitted on the floor of the Legislative Assembly, that the appointments made by Mallick were legal and valid. The appellants were in dark as to whether their appointments were in accordance with the prescribed procedure. Even if the instructions are considered mandatory, when their violation would visit with deprivation of employment to the daily-rated employees, the appellants had no control over the procedure for recruitment or regularisation and so the instructions should be construed to be directory. Having accepted the appointments made by mallick as valid, it would not be open to the Government to contend that the appointments or regularisation are invalid or in violation of the procedure of inviting the applications by advertisement or calling the names from employment exchange. The omission to adopt selection process is not invalid. To regularise the service of the appellants and others, the procedure prescribed for initial recruitment does not apply. The respondents were merely required to regularise the services of the appellants and others though the initial appointments were made de

horse the rules. The regularisation of the services of the appellants is, therefore, legal and valid which cannot be given a go-bye and the Court would not countenance the contention of the Government that either the initial appointments or regularisation are invalid and illegal.

Since no notice was served personally on any of the appellants, the procedure of publication of the notice in the daily newspapers informing the appellants to come before the High Committee constituted by the Government for scrutiny of the validity of appointments made by Mallick are violative of the principles of natural justice. Many of the employees might not have read the newspapers and nothing prevented the State to have the notice served individually. Under these circumstances, many an appellant could not appear before the Committee. Those persons whose appointments were regularised had weeded out their previous record of appointment and service record. Statutory presumption under Section 114(e) of the Indian Evidence Act that official acts were regularly performed by Mallick proves that the appointments by regularisation were valid. It is for the Government to establish that all the appointments were not made in accordance with the rules which burden the government had failed to discharge. The appellants cannot be penalised for non-production of the records. They had worked for sufficiently long time which itself creates a right in their favour for regularisation which was done and orders had become final. It is no longer open for the State to contend that the appointments of the appellants were not valid or legal.

When regularisation was to be made, the need to publish the vacancies in a newspaper etc. and advertisement in the newspaper or to call names from the employment exchange was obviated lest it would amount to fresh recruitment which was not contemplated under the instructions issued by the Government. When no procedure was prescribed for appointment of casual employees, mere working for long period as found in the muster rolls, would give them right to regularisation. There is no prescribed form for appointment. There was no need to issue letters of appointment. Appellants having worked for 6 to 8 years, their dismissal would amount to inflicting punishment without following the procedure. It is not the case of the Government that the appellants are neither qualified nor found unfit for appointment. Violation of the procedure for appointment does not render the appointments, even assuming they were illegally made, void. At best, they would be curable irregularity. Regularisation cured the defect. The appellants who worked for long period as clerks and peons would acquire vested right for their regularisation. Government can even suo motto regularise their services which does not violate Articles 14 and 16 (1) of the Constitution. Those who were awaiting regular recruitment could challenge the procedure for appointment adopted by Mallick to be illegal. But the same would not be a ground for the Government to take such a stand. The indoor management between the government and its officers would be known to them and its infraction would be only a ground for the Government to proceed departmentally against concerned erring officers under conduct and discipline rules but the employees should not be penalised nor should the security of service be jeopardised for violation of either the rules or the procedure by the competent officer for making initial appointment or regularisation. Even if rules of reservation were not followed, appropriate directions might be given to follow them and fill the posts reserved for the respective

quota of Scheduled Castes, Scheduled Tribes and Backward Classes. The High Court, therefore, had not considered these Constitutional perspectives in its judgments in that proper compass before dismissing the writ petitions. Sri P.P. Rao and others while supporting the above contentions, highlighted them with reference to the facets of cases in which they appeared.

In two sets of individual cases, the learned counsel, M/s. Sharan, L.R. Singh, Ranjit Kumar and Parag P. Tripathi argued with reference to the special facts in their cases. In the first set, it was contended that their initial appointments were in accordance with the procedure followed by a committee constituted for selection. They were later regularised. In support of the contention, they filed charts giving the dates of initial appointments, regularisation as open or reserved candidates and among the latter, the prescribed categories thereof. They have also placed on record certain daily-wage muster register said to have been maintained by the Department. Shri Tripathi further stated that in writ petitions filed by 63 appellants, the High Court had directed the Government to enquire whether they were regularly and validly appointed and if they were found to be so appointed, directed the Government to pay salary for the period they had worked. Consequent thereto, another officer had enquired and certified that their appointments were validly made. There was, therefore, no need for them to appear before the Committee to justify the validity of their appointments. The committee or the Government had not gone into this question. Their termination, therefore, is invalid in law. Shri Verma appearing for the State resisted all these contentions. We have given our anxious and deep consideration and carefully scanned the record placed before us.

In *T. Cajee vs. U. Jormanik Siem & Anr.* [(1961) 1 SCR 750 at 764] a Constitution Bench of this Court held that the Government has the power to carry on the administration including the power to appoint and remove the personnel for carrying on the administration. It is not necessary that there should exist statutory regulations so made or the laws so passed. The authorities concerned would at all relevant times have the power to appoint or remove the personnel under the general power of administration vested in them.

In *B.N. Nagarajan & Ors. vs. State of Mysore & Ors.* [(1966) 3 SCR 682], another Constitution Bench of this Court held that it was not obligatory under proviso to Article 309 of the Constitution to make rules of recruitment etc. before a service could be constituted or a post created or filled. Consequently, the State Government has executive power, in relation to all matters with respect to which the Legislature of the State had power to make laws and its power under Article 162, without a law, was not a breach.

In *P.C. Sethi & Ors. vs. Union of India & Ors.* [(1975) 3 SCR 201], a three-Judge Bench of this Court held that in the absence of any statutory rules prior to the Central Secretariat Service Rules, 1962, it was open to the Government, in exercise of its executive power, to issue administrative instructions with regard to constitution and reorganisation of the Service as long as there was no violation of Articles 14 and 16 of the Constitution.

In *Ramesh Prasad Singh vs. State of Bihar & Ors.* [(1978) 1 SCC 37 at 41], a two-Judge Bench of this Court held that in the absence of rules, qualifications for a post can validly be laid down in the self-same executive order creating the service or post and filling it up according to those qualifications.

In Kamal Kanti Dutta & Ors. vs. Union of India & Ors. [(1980) 3 SCR 811 at 849] yet another Constitution Bench observed that the Government would prescribe procedure to fill up any particular vacancy or vacancies as may be required during any particular period. In State of Haryana & Ors. vs. Piara Singh & Ors. [(1992) 4 SCC 118] a three-Judge Bench of this Court held in para 21 at page 134 that "creation and abolition of a post is the prerogative of the Executive. It is the Executive again that lays down the conditions of service subject, of course, to a law made by the appropriate legislature. This power to prescribe the conditions of service can be exercised either by making rules under the proviso to Article 309 of the Constitution or [in the absence of such rules] by issuing rules/instructions in exercise of its executive power. The court comes into picture only to ensure observance of fundamental rights, statutory provisions, rules and other instructions, if any, governing the conditions of service." This Court laid down elaborate procedure for regularisation of ad hoc employees etc.

It would thus be settled law that existence of law or statutory rules made under proviso to Article 309 of the Constitution is not a pre-condition either to create a post or to fill up that post; Government having legislative backing on the subject, has executive power to lay down the conditions of service and prescribe procedure for appointment to the post or vacancies in accordance therewith. Simultaneously, the Government would be entitled to create posts. The instructions and the procedure thus laid down would be subject to law made by the Legislature of rules made under proviso to Article 309. They could be amended by subsequent instructions. They may supplant the rules. But they should be consistent with the rights guaranteed under Articles 14 and 16 (1) of the Constitution.

The forceful contention of Shri Shanti Bhushan that the casual employees of Class III and Class IV: Clerical and Attendant Cadres, are required to be appointed on war-footing to eradicate tuberculosis, does not carry conviction for acceptance for the reason that 20-Point Programme was initiated in 1976 while the appointment of casual employees came to be made in 1981 onwards. Therefore, the emphasis on immediacy and war-footing like floods lost their forward push. The strong wind of the contention that employment of daily-rated employees is not to a post loses from the sail when we peep into the pleadings of the appellants themselves. In Sateyendra Kumar Singh's case, viz., C.A. @ SLP Nos.14009-30 of 1994, in which Shri Shanti Bhushan has appeared, the appellants themselves admitted that they were appointed to the post as casual employees. Similar are the admissions in all the appeals. Therefore, the need to make specific reference is obviated. It is also an admitted position, though sought to be qualified in reply, that no dates were given of creation of existing 2250 Class III and Class IV: Clerical and Attendant posts. As to when they were created was not in issue at any stage. So at this belated stage it is difficult to adjudge as to when the posts were created. So we proceed on the premise that posts in Class III & Class IV do exist when they were filled up by casual employees. Strong reliance was placed by Sri Shanti Bhushan on the Constitution Bench decision of this Court in State of Assam & Ors. vs. Shri Kanak Chandra Dutta [(1967) 1 SCR 679 at 682] where it was held that a post is a service or employment. A person holding a post under a State is a person serving or employed under the State. A post may be created before appointment or simultaneously with it. A post

is an employment but every employment is not a post. A casual laborer is not the holder of the post. A post under State means a post under the administrative control of the State. The State may create or abolish the post and may regulate the conditions of service of the persons appointed to the post. The emphasis was placed by the counsel on the sentence "a casual laborer is not the holder of a post". Sri Verma contended that in *Union of India & Ors. vs. Deep Chand Pandey & Anr.* [(1992) 4 SCC 432] under Section 14 (1) of the Administrative tribunals Act, it was contended that a typist engaged on casual basis was not holding any civil post under the Union of India and therefore, the Administrative tribunals Act was not attracted. A three-Judge Bench of this Court repelled the contention in paragraph 3 holding that "we do not find any merit in this stand taken on behalf of the respondents." The argument of Shri Shanti Bhushan is that there is no finding there in that the employees were the holders of the civil post but the Court was concerned only with the jurisdiction of the Tribunal who entertained the claims under the Administrative Tribunals Act. In that context, the contention was to be of the power of the Tribunal or the High Court which was negatived. We find no force in the contention of Sri Shanti Bhushan. Unless he is a holder of a post, the power to adjudicate the right to the post by the Tribunal does not arise. The Bench, therefore, arrived at a base finding that he holds a civil post for the purpose of deciding the jurisdiction of the Tribunal.

In *R.N.A. Britto vs. Chief Executive Officer & Ors.* [(1995) 4 SCC 8], Secretaries of Panchayats established under the Karnataka Village and Local Boards Act were held to hold civil posts and were Government servants. It is common knowledge that the system of appointing several persons on ad hoc or casual basis to civil posts has been considerably changed. In fact, the P.W.D. Manual prescribes employment of casual labour, muster roll labour or contingent labour - be it skilled or Manual. The Central Public Works Department Manual itself prescribes such a procedure and the wages to them are paid from contingent fund. The power to engage casual labour is conferred on the Executive Engineer when the need exists for six months and if it is for more than six months and less than a year, prior approval would be taken from the concerned Chief Engineer or the Director General, as the case may be. The employment of the employees shall be of those drawn from employment exchange. That is the common feature in all the State Public Works Departments. It is settled law that part-time extra departmental agents are holder of a civil post vide Superintendent of Post Offices etc. etc. vs. *P.K. Rajamma etc.* etc. [(1977) 3 SCR 678]. In *Kanak Chandra Dutta's case* [supra] casual laborer appears to have meant with reference to the emergent engagement of casual labourers which do not last for more than six months. This Court had dealt with catena of cases in which appointments to countless Class III and Class IV posts under the State and Union Government had been made on daily-wage or casual basis. But in non of the cases this Court came across that there was no posts exist or no initial letters of appointment given to the daily-rated or casual employment. We, therefore, need not burden the judgment with copious citation of all the decisions. Only in a few cases, appointments in accordance with Rules but in excess of the sanctioned posts were made. Appointment on casual or ad hoc basis was a phenomenon of last decade for back door entry into service.

When planned expenditure is required to be spent,

budgetary sanction is mandatory. We have intrinsic evidence in these cases. When some of the employees were sent for one month training, posts were created and budgetary sanction was obtained. The cases at hand are unique and the device adopted by Mallick is in flagrant violation of all norms of administrative procedure known to law. He had given decent burial to procedure prescribed by the Government. Abusing the absolute power secured in his hands, he appointed 6000 persons at his whim and wagery. A ceremonial send off was given to the procedure for appointment to Class III & Class IV posts and resort was taken to their casual employment without any letters of appointment to fill the existing vacancies.

It would, therefore, be difficult to give acceptance to the contention that appointment of Class III and Class IV casual employees was not to a post. It is common knowledge that existence of a post is a condition precedent for appointment whether it is created by statutory rules or under the executive instructions. There cannot be an appointment or employment without pre-existing post. Therefore, we hold that a post is a service or employment under the State and the post may be created before appointment or simultaneously with it. Though, therefore, employment is not a post, the holder must be appointed to a post. A casual laborer who discharges transitory or casual duties for emergent work, therefore, does not hold a post though he may be under the administrative control of the State during the period of his working. We hold that a person appointed, though on casual basis to discharge the duties of the existing post of vacancies, needs to be appointed to the post or vacancy according to rules and, if so, he and he alone is a holder of the post. It is true that Kanak Chandra Dutta's case was not brought to the notice of the bench that decided Deepchand Pandey's case. The learned Judges appear to have drawn the conclusion in Deepchand Pandey's case from the experience this Court had gained in deciding several cases of casual or ad hoc employees.

The next contention is whether the appointment should be in accordance with the procedure prescribed under the instructions issued by the Government in 1980, 1982, 1983 and 1986. Admittedly, these are administrative instructions and no statutory rules are operating in the field. Therefore, the administrative instructions consistent with the rights guaranteed under Articles 14 and 16 (1) of the Constitution should regulate the procedure for appointment to the posts. Admittedly, two circulars issued on December 3, 1980 regulate recruitment to Class III and Class IV employees. They also envisage drawing the names of the candidates from the employment exchange and also following the rules of reservation prescribed by the State Government to the Scheduled Castes and Scheduled Tribes and the backward classes. The 25th March, 1982 circular prescribed constitution of a committee consisting of the Deputy Director, Tuberculosis, the Assistant Director, Palaria and a senior officer in the Department belonging to Scheduled Castes or Scheduled Tribes to be its members to select the candidates in the order of merit on the basis of the marks secured in the qualifying examination etc. and that appointments be made by the appointing authority, viz., the Deputy Director from the merit list prepared by the Committee following the roster points. Admittedly, no appointment orders were issued for initial appointment for casual Class III or class IV employees. In appeals arising out of S.L.P (C) NOs.12934-12935 of 1994, according to the appellants' own case, a committee was constituted and

recruitment was made from amongst the candidates who had applied pursuant to the publication of vacancies on the notice Board of the office at Patna Central and the rules were followed. Here itself we would clear one ground, viz., a contention was raised that recruitment was made at different places in the Districts and those records were not produced. Pursuant to our direction, an affidavit was filed stating that the appointments were made only at Patna Central. Thus it fortifies the stand of the State that for appointment to Class III and Class IV posts, the procedure prescribed in the circulars of December 3, 1980 etc. should be followed and any appointment made in violation thereof was clearly in negation of the rules and such action is per se not only arbitrary but defeats the very object of recruitment offending Articles 14 and 16 (1) of the Constitution. The contention, therefore, of Shri Shanti Bhushan that the procedure prescribed in the said circulars does not apply for initial recruitment is without any substance and clearly is untenable. Any action taken by Mallick in violation of the procedure prescribed in the aforementioned circulars is not only illegal but also subversive of the discipline.

It is true that Illustration [e] of Section 114 of the Indian Evidence Act permits the court to presume that official acts have been regularly performed. But it is only rebuttable presumption. It could be rebutted by adduction of evidence or by attending refutable circumstances. In view of the admitted fact that no letters of appointment were issued to as many as 6000 odd employees by Mallick including all the appellants to fill up 2250 posts, itself is a positive fact which would conclusively establish that he had not kept up vacancy position in mind nor followed the procedure prescribed in the aforementioned circulars. the presumption under Section 114, Illustration [e] does not get attracted to the facts of these cases.

Where a statute imposes a public duty and lays down the manner in which the duty shall be performed, injustice or inconvenience resulting from rigid adherence to the statutory prescription to those who have no control over the procedure, may be relevant factor to hold such prescription as directory. Application of this rule to recruitment for appointment to a post under the State would be fraught with grave danger and would be a field day for flagrant violation of the rules and would seek legitimacy under the carpet of Section 114, Illustration (e) of the Evidence Act.

The next question is whether regularisation said to have been made by Mallick is in accordance with the prescribed procedure. We have already noted the contentions. It is settled law that there are two modes of recruitment. One is by direct recruitment and the other by promotion. This Court in J.K. Public Service Commission etc. vs. Dr. Narinder Mohan & Ors. etc. etc. [(1993) 4 SCALE 597] considered whether regularisation by Court's direction to Public Service Commission was a mode of recruitment provided under the statutory rules or the Constitution. This Court held that direct recruitment and promotion are the two modes and regularisation by placing the service record of the ad hoc employees before the Public Service Commission and their selection is a hybrid procedure not contemplated under the rules. The contention that the procedure prescribed in the aforementioned circulars would not apply to the regularisation, is also devoid of substance. We can understand that if initial appointments were made in accordance with the procedure prescribed under the rules or instructions following the rule of reservation etc. and

posts were filled up with temporary or ad hoc or daily-wage employees and when their services are regularised, the need to follow the self-same procedure would obviously be redundant. When initial appointments are in violation or in negation of the rules, in other words, in the eyes of law there is no order for appointment, for regularisation also if the procedure prescribed also is not followed, it would be a field day for the appointing authority to buttress his arbitrary, corrupt and illegal acts of appointment without letters or orders of appointments and regularisation would be taken as a shield to cover up illegal or void actions or to perpetrate further corrupt actions To confer permanency of appointment to the posts by regularisation in violation of the executive instructions or rules is itself subversive of the procedure. It would, therefore, be mandatory that the procedure prescribed in the circulars should be followed for regularisation of the services of the daily-rated employees.

The question then is whether the regularisation of the appellants is in accordance with the procedure prescribed under the aforementioned circulars. Though some of the appellants have placed on record charts said to have been signed by three members of the committee including Mallick, on their own admission, the appellants have prepared those charts on the basis of alleged official record. It is seen that admittedly that part of the Secretariat was burnt out. In consequence, the Government claimed that no authentic record was available. What was the cause for the fire is not material. Another contention raised was that records in the District Offices could have been produced but the same have not been placed on record. The affidavit now filed pursuant to our directions belies that stand. No recruitment at District Head-quarters appears to have been made to fill up these vacancies. It would be a matter for investigation for cause of the fire. No one had raised this contention either before the Screening Committee or before the High Court. It would, therefore, be difficult for us at this stage, to investigate into this factual controversy.

Pursuant to the direction issued by this Court, letters of appointments by regularisation have been placed before us. A casual look at the contents of the cyclostyled letters clearly shows that there is no reference [1] of the dates on which the candidate were first appointed and the place at which they were working; length of service put in by the candidates, [2] whether the committee constituted had selected the candidates, and if so, on what date they were regularised, [3] whether those appointments were in furtherance of the regularisation of the Committee. Their suitability was not mentioned. We find an admission therein that the material placed by the candidates was not scrutinised. On the other hand, there is a direction by Mallick to the District Medical Offices to verify the qualifications etc. and if found acceptable, to appoint them on temporary basis. When the regularisation was made in furtherance of the procedure prescribed in the aforementioned circulars, where was the need to appoint them temporarily? Where would be the need to the District Medical Officer to further scrutinise the record of qualifications etc. before appointing them. Where was the need for further appointment by the District Medical Officer when Mallick himself was the appointing authority? They should have been regularised on permanent basis. The contents of the order is antithesis of regularisation and was in negation of the procedure prescribed. From this intrinsic evidence and in the absence of any authentic record of the Government, it would be highly difficult and hazardous to countenance the

contentions raised by the counsel for the appellants that appointments of the appellants, though initially not in writing, got crystallised into confirmation by regularisation; a right thus got vested in them and cannot be taken away by arbitrary exercise of the power of termination on the solitary ground that all those appointments were made by Mallick.

The contention that after the regularisation the appellants must have weeded out their record and the burden of proof to show that regularisation was not in accordance with the rules heavily lies on the State, cannot be given acceptance. It is not the case of any of the appellants that after the regularisation of their services, they had weeded out their previous records. On the other hand, some of them placed it before the Committee and this Court. The presumption that regularisation was in accordance with the procedure and is valid cannot be drawn for the reasons given supra.

Admittedly, except putting up the vacancies on the notice Board of the Tuberculosis Centre at Patna, no advertisement inviting applications from the open market was made nor were the names called from the employment exchange. In Piara Singh's case [supra], this Court reiterated that regularisation should also be in accordance with the procedure prescribed and after calling the names from employment exchange and that the selection should be made by duly constituting committee or by an open competition. The ad hoc employees should give place to the candidates recruited and appointed from the open market. One ad hoc employee cannot be replaced by another ad hoc employee. Regularisation of the casual labour was also directed to be done in accordance with the procedure prescribed in the circulars issued by the Government. In other words, this Court had not given countenance to any regularisation other than the one done in accordance with the procedure prescribed in the appropriate circulars or executive instructions. The procedure adopted by Mallick either appointing or directing to appoint persons who had applied for appointment pursuant to the notification of vacancies put up on the notice Board was stage-managed by him and is in flagrant breach of Articles 14 and 16 [1] of the Constitution.

The next question is whether the procedure adopted by the Committee, viz., publication in the newspapers on two different dates informing all candidates appointed by Mallick to appear before it, is in violation of the principles of natural justice. A few admitted facts, at the cost of repetition, require to be reiterated.

More than 6000 persons [7000 as per the respondents' stand] were appointed to hold 2250 posts. The Scrutiny Committee recorded three crucial facts. Initially, no letters of appointments were made on daily-wage basis; secondly, adjustment by transfer did not mention previous place of posting but directed the District Medical Officers to post the candidates after verification of qualifications; and thirdly, fabricated orders of appointment were produced. The record in the custody of the Government was found burnt. When the Committee sought to serve the notices on the Daily-rated employees at Patna Centre, the Deputy Director, Health Services was mandhandled and Law and order situation had developed. Resultantly, wide publicity was given in the press. the sittings of the Committee on different dates were staggered to 10 days and large number of employees to whom salaries were not paid had approached the High Court. In other words, the constitution of the Committee and the

enquiry made by it into the legality and validity of the appointments made by Mallick were obviously facts widely known to everyone. It is claimed that apart from the Centre at Patna, the other Centres are situated at the respective District Headquarters. It is, therefore, difficult to accept the appellants' contention that some of them had not seen the newspapers and had thus not appeared before the Committee. Admittedly, only 987 persons had appeared before it. In other words, even many among the appellants did not appear before the Committee. The appellants had an opportunity to place all their records before the High Court when they had challenged their orders of termination issued by the Government in letters dated April 30, 1993 which the High Court was not prepared to accept them to be authentic and acted upon.

These facts give rise to the question whether the termination orders are violative of the principles of natural justice and if so, what purpose would it serve?. With the aid of principles of natural justice, the courts preserve rule of law keeping arbitrary action by the executive or the legislature within the confines of law. Courts have to examine in each case the balance of fairness, whether the violation of the principle of audi alteram partem visits with irremediable civil consequences and its incursion on administration, if action is invalidated. No set rule or standard of universal application can possibly be laid for application to all sets of cases. Courts exercise their power of judicial review with circumspection to weigh in balance the fairness of action. Therefore, though the principles of natural justice are omnipervasive, in given circumstances their non-application may also advance cause of justice to prevent misuse or abuse of power or of the judicial process. It is settled law that post-decisional opportunity is valid to cure the illegality complained of. Though been role of precedents have copiously been cited by the counsel on either side, we are relieved of referring them in extensor on the ultimate test: what purpose the doctrine of audi alteram partem would ultimately serve to advance the cause of justice. One decision of this Court is of necessity to be referred. In Bihar School Examination Board vs. Subhas Chandra Sinha & Ors. [(1970) 3 SCR 963 at 967] this Court held that when the impugned direction did not concern a single individual but at least large majority of them were involved in adopting unfair means in writing the examinations, the question arose whether cancellation of the examinations without giving an opportunity was violation of principles of natural justice.

It was held that "if it was not the case of charging any one individual with unfair means but to condemn the examination as ineffective for the purpose it was held, must the Board give an opportunity to all the candidates to represent their cases. We think not. It was not necessary for the Board to give an opportunity to the candidates if the examinations as a whole were being cancelled." It is seen that the committee scrutinised the appointment letters made by Mallick to Class III and Class IV posts in the tendency on the part of the employees.

Notices terminating the services of daily-rated employees were served on all of them. Those who felt aggrieved had approached the High Court and placed before the Court their cards and sought relief on that basis. The High Court did not accept them nor acted upon. What purpose, thereafter, would it serve to extend the principles of natural justice is the question. In S.L. Kapoor vs. Jagmohan & Ors. [AIR 1981 SC 136 at 147] without giving an

opportunity, the Municipal Committee was superseded on diverse grounds for violation of the law. While holding that the law was violated as individual notices had not been given to the members, this Court in para 16 held that requirements of natural justice are met only if opportunity to represent is given in view of proposed action. In paragraph 17 it was held that "whether the failure to observe natural justice does at all matter if the observance of natural justice would have made no difference when the admitted or indisputable facts speak for themselves. Where on the admitted or indisputable facts only one conclusion is possible and under the law only one penalty is permissible, the Court may not issue its writ to compel the observance of natural justice, not because it approves the non-observance of natural justice but because Courts do not issue futile writs". At page 147 it was reiterated that "principles of natural justice know of no exclusionary rule dependent on whether it would have made any difference if natural justice had been observed". This Court in several cases applied the rule appropriate to the facts of each case.

It is seen that for 2250 posts more than 6000 appointments were made. In order words, for each post at least three persons had been appointed. There are no letters of appointment and we find that the so-called letters of regularisation are obviously illegal. The Government records were destroyed in fire. The materials in the possession of the respective candidates were placed before the Committee and the High Court but the same were not found acceptable. Under these circumstances, what purpose the direction to issue notice would service those who did not appear before the Committee. On a deeper consideration of the factual matrix and after giving our most anxious consideration to the respective contentions, we are of the considered view that principles of natural justice were not violated. We are inclined to uphold the view taken by the Committee and accepted by the Government as correct. All the appointments were made in flagrant breach of the procedure and the executive instructions and amounted to latent abuse of the centralised power had by Mallick - and subversive of discipline. It is, therefore, futile to issue writ as prayed for.

It is next contended that security of service to an employee is a Constitutional right, as declared by this Court, in socialistic polity and that regularisation of services of daily-rated employees who have put in at least two years; continuous service, is the law laid down by this Court under Article 141 of the Constitution. Only 1369 appellants as against 2250 posts are before the Court. Therefore, directions may be issued to treat the appellants as regularised Government employees. It was stated that they have put in more than 7 to 8 years of service. Shri Shanti Bhushan very fervently has pleaded for justice tempered with mercy to regularize their services. We have given very anxious consideration to the contention of Shri Shanti Bhushan. True, in given circumstances when there existed permanent posts or even temporary posts for long years, an inference could be drawn as to the existence of the need to continue such posts. But whether Court would be justified in directing the Government to regularise the services of the daily-rated or ad hoc employees. In this behalf, it is apposite to recall the pertinent observations made by this Court in Delhi Development Horticulture Employees' Union vs. Delhi Administration, Delhi & Ors. [(1992) 4 SCC 99] at pages 111-12 in paragraph 23 to the following effect:

"... The courts can take judicial notice

of the fact that such employment is sought and given directly for various illegal considerations including money. The employment is given first for temporary periods with technical breaks to circumvent the relevant rules, and is continued for 240 or more days with a view to give the benefit of regularisation knowing the judicial trend that those who have completed 240 or more days are directed to be automatically regularised. A good deal of illegal employment market has developed resulting in a new source or corruption and frustration of those who are waiting at the Employment Exchanges for years. Not all those who gain such back door entry in the employment are in need of the particular jobs. Though already employed elsewhere, they join the jobs for better and secured prospects. That is why most of the cases which come to the courts are of employment in government departments, public undertakings or agencies. Ultimately, it is the people who bear the heavy burden of the surplus labour. The other equally injurious effect of indiscriminate regularisation has been that many of the agencies have stopped undertaking casual or temporary works though they are urgent and essential for fear that if those who are employed on such works are required to be continued for 240 or more days they have to be absorbed as regular employees although the works are time-bound and there is no need of the workmen beyond the completion of the works undertaken. The public interests are thus jeopardised on both counts."

Mallick who had centralised power in his hands blatantly abused the power and appointed more than three persons to each post and the reasons are not far to seek. Direction to regularise the services of those who approached the Court would generate impetus for others who gain illegal and backdoor entry into the service with the connivance of appointing authority and to remain in such employment for considerable period to seek judicial process to c their illegitimate entry into the Government service. They would in turn perpetrate the same corrupt practice more vigorously, jeopardising public service and public interests. Therefore, courts would be circumspect and chary to direct regularisation of the service of casual employees in given circumstances. Each case requires to be examined in the backdrop of its own facts. Mere their approaching the court and continuing the litigation would not be considered to be a factor to c the illegal actions. It is true that this Court in *Dharwad Distt. P.W.D. Literate Daily Wage Employees Association & Ors. vs. State of Karnataka & Ors.* [(1990) 2 SCC 396] while holding that security of service by regularising casual employee within a reasonable period is an acceptable horn to achieve Constitutional goal in socialistic polity, gave directions to the State to absorb all the daily-rated employees in different Departments of

the Government who worked for several years. There is no finding that their initial appointments were tainted with illegality or abuse of the power or not according to rules and yet the directions were given. In H.C. Puttaswamy vs. Chief Justice of Karnataka High Court, Bangalore & Ors. [(1990) Supp. 2 SCR 552], this Court directed the excess staff to be regularised. But that was also not a case that there was no letters of initial appointments. The appointments were not tainted with flagrant violation of the rules. Equally in Sardara Singh & Ors. vs State of Punjab & Ors. [(1991) 4 SCC 555], this Court did not approve of putting up on the notice Board in the office of the Deputy Collector but yet it was held that the unsuccessful party could not challenge the procedure. The respondent did not suo motto take up the action for cancelling massive illegal appointments. Equally in Probodh Verma & Ors. etc. vs. State of Uttar Pradesh & Ors. etc. [(1985) 1 SCR 216] the U.P. Legislature recognised good service rendered by untrained teachers during the period of strike; law was made treating them regular employees without the process of selection. Though the High Court declared it to be ultra vires under Articles 14 and 16 (1) of the Constitution, this Court upheld the class legislation as valid. But in view of the finding on facts of this case, it is difficult to temper justice with mercy to direct the Government to regularise the services of the appellants on humanitarian ground. We are, therefore, constrained to reject the prayer.

In Appeals arising out of SLP Nos.12934-35, 14050-67 of 1994 and 21949 of 1995, the counsel have placed before us the charts of the initial appointments and the subsequent regularisation stated to be made by following the procedure prescribed in Circulars dated December 3, 1980 etc. and also following the rule of reservation and appointments to various categories were said to have been made. Though initially, we were impressed with the argument, on deeper consideration we find it difficult to give acceptance to their contention. It is seen that the documents placed before us except letters of appointments, are only the charts prepared by them. Some of the monthly acquittance registers showing payment of the salary have been placed on record. This Court has come across in some cases, attendance registers placed on record in support of proof of their working on casual basis in Gopal Gunj District Collector's office, Bihar. When this Court summoned the originals of the attendance registers, to its utmost surprise, this Court found the attendance register placed before the Court to be fabricated. In the absence of official record, it is difficult to rely on the material prepared by the appellants and placed before this Court. Under these circumstances, it is also difficult to countenance the contention that their appointments were made in accordance with the prescribed procedure. In appeals arising out of SLP Nos. 15281-15435 of 1995, for about 63 persons, the High Court had directed the Deputy Director to verify whether appointments were validly made and on recording positive finding, directed the respondents to pay the salary. The learned counsel, Shri Tripathi had placed before us a copy of the report given by the Deputy Director with the finding that they were legally appointed. Their appointments were also cancelled since they had not appeared before the committee. Though prima facie we are satisfied that the contention of Shri Tripathi is plausible, it is not possible to accept the same since they failed to avail of the opportunity to appear before the Committee which could have got verified and examined the matter on merits. Some of them appeared before the

Committee. Now the affidavit filed on behalf of the State shows that there was no record of any such enquiry. We are constrained to hold that it is difficult to give the relief of regularisation of their services.

But that is not the end of the journey. The question is what would be the appropriate direction that could be issued, in these given facts and circumstances. Since we have held that all the appointments or so-called regularisations have been made by Mallick in flagrant breach of the instructions which persuaded us not to accede to the fervent appeals made by Shri Shanti Bhushan and his colleagues to direct the respondents to regularise their services to the extent of the available posts within the limit, we decline to accede to the same. We direct as under:

- [i] the respondent-State will publish a notice in all the newspapers inviting applications for direct recruitment as well as to call names from the concerned employment exchanges;
- [ii] if no statutory body composed of high-rank officials for recruitment to Class III and Class IV employees is in vogue, the State is directed to constitute a committee consisting of three members, viz., (a) a member of the Public Servicers, i.e., the Additional or Joint Secretary of the Health Department; and (c) a senior officer, i.e., the Director or Additional Director of Health Services, to select the candidates;
- [iii] the respondent-Government will constitute the Committee within six weeks from the date of the receipt of this order;
- [iv] it would be open to all the appellants or all those appointed by Mallick to apply for selection. The Committee would, in their case, as first step verify and satisfy itself of the credentials of such candidates whether they were appointed by Mallick and had worked at least for three years continuously. The in the appropriate circulars and follow rule of reservation as is in vogue and prepare the merit list and should submit it to the Government;
- [xi] the committee will complete the process of selection within six months from the date of its sitting for selection.
- [x] within four months from the date of receipt of the merit list, the appropriate appointing authority or the Government, as the case may be, will appoint the candidates as per roster and the merit list after due verification of the credentials as per its procedure; and
- [xi] in the event of selection and appointment of erstwhile daily-rated employee or employees, the entire proved period during which they have worked as daily-waged employees will be computed for purpose of pensionary and other benefits but they would not be entitled to claim any inter se higher seniority in the selection made by the committee or for any promotion on the basis of their previous service.

The appeals are accordingly disposed of in the above terms. In the circumstances, however, there will be no order as to costs.