IN THE GAUHATI HIGH COURT
(THE HIGH COURT OF ASSAM, NAGALAND, MEGHALAYA, MANIPUR, TRIPURA, MIZORAM AND ARUNACHAL PRADESH)

(ITANAGAR BENCH)

W.A. 09 (AP)/2010

Sri Monya Taipodia and 24 others,

- Appellants

- Versus –

The State of Arunachal Pradesh and 28 others,

- Opposite party

Advocate present:

For the appellants:

Mr. D. Panging,
Mr. M. Mahanta,
Mr. B. K. Kashyap,

For the Opposite party:

Dr. A. K. Saraf, Advocate General, Arunachal Pradesh,
Ms. R. H. Nabam, Senior Government Advocate,
Ms. G. Deka, Government Advocate,
Mr. K. Jini,
Mr. T. Gadi,
Mr. D. Kamduk,
Mr. D. Loyi,

W.A. 10 (AP)/2010

Shri Tade Dabi,
Govt. H.S.S. Yazali,
Resident of Yazali,
P.O. & P.S. Yazali,
District – Papumpare,
Arnachal Pradesh

- Appellant

- Versus –

The State of Arunachal Pradesh and 27 others,

- Opposite party

Advocates present:

For the appellant:

Mr. C. Baruah, Sr. Advocate,
Mr. U. J. Saikia,
Ms. K. Dabi,

For the Opposite party:

Dr. A. K. Saraf, Advocate General, Arunachal Pradesh,
Ms. R. H. Nabam, Senior Government Advocate,
Ms. G. Deka, Government Advocate,
Mr. P. K. Tiwari,
Mr. K. Jini,
Mr. T. Gadi,
Mr. D. Kamduk,
Mr. D. Loyi,

W.A. 11 (AP)/2010

1. **The State of Arunachal Pradesh**,
Represented through the Chief Secretary,
Government of Arunachal Pradesh, Itanagar,

2. **The Commissioner (Education)**,
Government of Arunachal Pradesh, Itanagar,

2. **The Director of School Education**,
Government of Arunachal Pradesh, Itanagar,

- Appellants

- Versus –

Shri Tabia Chobin and 50 others,

- Opposite party

Advocates present:

For the appellants:

Dr. A. K. Saraf, Advocate General, Arunachal Pradesh,
Ms. R. H. Nabam, Senior Government Advocate,
Ms. G. Deka, Government Advocate,

For the Opposite party:

Mr. P. K. Tiwari,
Mr. R. P. Sharma,
Mr. K. Jini,
Mr. T. Gadi,
Mr. D. Kamduk,
Mr. D. Loyi,

BEFORE
HON'BLE MR JUSTICE IA ANSARI
HON'BLE MR JUSTICE K MERUNO

Date of hearing	**:**	**04.04.2012**
Date of judgment and order	**:**	**30.04.2012**

JUDGMENT & ORDER

(***I A Ansari, J***)

All these appeals, having arisen out of a common judgment and order, dated 03.06.2010, passed in WP(C) 171(AP)/2009, have been heard together and are being disposed of by this common judgment and order.

2. The Recruitment Rules of 1973 (in short, the '1973 Rules') to Class-III (Non-Gazetted) Teachers' posts in the Directorate of Education, Arunachal Pradesh Administration, provide for appointment of **Graduate Teachers**, **Class-III** (**Non-Gazetted**) and also **Senior** (**Post-Graduate**) **Teachers**, **Class-III** (**Non-Gazetted**). The 1973 Rules were framed under the proviso to Article 309 of the Constitution of India and came into force on 29.12.1973.

3. Rule 4 of the 1973 Rules prescribes the method of recruitment. As per this Rule, **50% of** the sanctioned strength of **Post-Graduate Teachers** has to be filled up by *direct recruitment* and the remaining 50% posts of **Post-Graduate Teachers** by *promotion*, on the basis of *seniority-cum-merit,* from amongst the **Graduate Teachers**, who have put in **three years of continuous service** as **Graduate Teachers**.

4. Following the 1973 Rules, the Recruitment Rules, 1983, to (Central Civil Services) (Group 'B') posts under the Department of Education, Government of Arunachal Pradesh (hereinafter referred to as the '1983 Rules') were framed under the proviso to Article 309 and was brought into force by Notification, dated 19.12.1983, which provide for 100% *promotion* to the posts of Headmaster, Secondary School, and Vice-Principal, Higher Secondary School, but 75% of the promotions being from Junior Teacher/ Assistant Headmaster/Lecturer, BSB and Senior Teachers, on the basis of *seniority-cum-merit,* in the cadre of Junior Teachers and 25% from direct recruit Senior Teachers purely on the basis of *seniority-cum-merit* in the cadre of Senior Teachers.

5. The Director of School Education, Government of Arunachal Pradesh, issued an advertisement, on 13.02.2001, inviting applications for appointment to the posts of, amongst others, 8 (eight) Senior (Post-Graduate) Teachers. The advertisement, dated 13.02.2001, specified that the posts were temporary in nature; but the same were likely to be made permanent. The advertisement stipulated written test and *viva-voce* to be followed by Class-room-teaching as a mode of selection.

6. Before the process, which was set into motion by the advertisement, dated 13.02.2001, could culminate into selection of persons, who had offered their candidature, the Commissioner, Department of Finance, Government of Arunachal Pradesh, conveyed, on 30.05.2001, to the Secretary, Education Department, Government of Arunachal Pradesh, the decision of the State Cabinet, taken on 28.04.2001 and 29.04.2001, to recruit new teachers on

contractual basis. This decision to appoint teachers, on *contractual basis,* was taken, because there was a ban, imposed by the State Government, on regular recruitments. An order was, then, published, on 30.05.2001, by the Commissioner of Finance, Government of Arunachal Pradesh, that the Cabinet, in its meetings, held on 28.04.2001 and 29.04.2001, had taken a decision to appoint new teachers *on contractual basis.*

7. Following the communication, dated 30.05.2001, so received by the Department of Education, Government of Arunachal Pradesh, an advertisement was published, on 03.10.2001, inviting applications for appointment of teachers, on *contractual basis*, for a specified period of two years, the basis of selection being *interview*; and no *written test* was to be resorted to. The advertisement, dated 03.10.2001, however, made it clear that those, who had already applied pursuant to the earlier advertisement, dated 13.02.2001, would be included amongst the candidates for the posts, which were to be filled up, *on contractual basis,* by the advertisement, dated 03.10.2001.

8. Thus, the final appointments were to be made, on *contractual basis,* for a limited period of two years, which, according to the State Government's general policy, could have been extended to a maximum period of one more year.

9. Thereafter, another advertisement was issued, on 07.05.2003, by the Director of School Education, Government of Arunachal Pradesh, inviting applications for 14 posts of Senior (Post-Graduate)) Teachers on *contractual basis*. By a *corrigendum,* dated 18.12.2003, issued by the Director of School Education, Government of Arunachal

Pradesh, the sentence, appearing in the earlier advertisement, dated 07.05.2003, to the effect that the posts were *"likely to be declared permanent"*, was omitted. Thus, appointment to the subsequently advertised 14 posts of senior (Post-Graduate) Teachers were to be made on *contractual basis* and these appointments, in the light of the corrigendum, were not to be declared permanent.

10. Appointment letters, to the successful candidates, 17 in number, including the present appellant Nos. 9 to 25 in WA No. 9(AP) of 2010, and the sole appellant in WA 10(AP)/2010, were issued, on 03.02.2004. All these appellants are hereinafter referred to as the 'private appellants', their appointments being *'contractual'* in nature with a clear indication that their *contractual appointments* would not be declared permanent.

11. Thereafter, on 04.02.2004, a Cabinet note was put up for regularization of teachers, who had been appointed, on *contractual basis*, pursuant to the advertisement aforementioned and the Cabinet decided to lift ban on direct recruitment.

12. Following the Cabinet decision, dated 04.02.2004, abovementioned, a Departmental Promotion Committee (in short, 'DPC') was constituted, in the Department of Education, for considering the cases of Senior (Post-Graduate) Teachers serving on *contractual basis* and the DPC, in course of time, recommended regularization of the services of the teachers, who had been appointed, *on contractual basis,* as Senior (Post-Graduate) Teachers. This was followed by orders, issued by the Office of the Director of School Education, Government of Arunachal Pradesh, regularizing the *contractual appointments* of those, who had been appointed as

teachers, on *contractual basis,* on various dates, as indicated above. The various orders, which had been issued by the Director of School Education, Government of Arunachal Pradesh, were on the basis of the DPC's recommendations made on 26.05.2004 and 05.02.2005.

13. By yet another order, dated 19.08.2005, issued by the Director of School Education, Government of Arunachal Pradesh, the private appellants were promoted to the posts of Senior (Post-Graduate) Teachers from the post of Graduate Teachers/Junior Teachers.

14. Thereafter, on 20.10.2008, the DPC considered promotion for the post of Headmaster/Vice-Principal and the names of respondent Nos. 4 and 5, in the writ petition, were recommended for promotion to the post of Headmaster/Vice Principal and the names of respondent Nos. 7, 10, 11, 13 and 14, in the writ petition, were kept in the penal for making appointments against future vacancies. This was followed by an order, dated 11.11.2008, promoting the respondent Nos. 4 and 5, in the writ petition, to the post of Headmaster/Vice-Principal.

15. Feeling aggrieved, the writ petitioners, who had been working as Senior (Post-Graduate) Teachers since 19.08.2005, filed a writ petition, under Article 226 of the Constitution of India, which gave rise to WP(C) No. 171(AP)/2009, wherein the writ petitioners assailed, amongst others, the orders, dated 26.05.2004 and 05.02.2004, whereby the *contractual appointments* of the Post-Graduate Teachers had been regularized, as well as the order, dated 11.11.2008, whereby the respondent Nos. 4 and 5 were promoted as Headmaster/Vice-Principal.

16. By judgment and order, under appeal, the learned Single Judge has allowed the writ petition and set aside the orders regularizing the *contractual appointments* of the private respondents, in the writ petition, who are being referred to, as indicated above, as 'private appellants'. By the judgment and order under appeal, the learned Single Judge also directed the State respondents, in the writ petition, to carry out the exercise of fixing *seniority* of the writ petitioners in terms of the relevant Rules and in accordance with law. The private appellants, who were private respondents in the said writ petition and who stood adversely affected by the directions, so given by the judgment under appeal, as well as the State of Arunachal Pradesh, have preferred the present three appeals.

17. We have heard Dr. A. K. Saraf, learned Advocate General, Arunachal Pradesh, assisted by Ms. G Deka, learned Additional Senior Government Advocate, appearing in Writ Appeal No. 11(AP) of 2010, Mr. D Panging, learned counsel for the private appellants in WA 09(AP)/2010, and Mr. P. K. Tiwari, learned counsel, who has appeared on behalf of the sole private appellant in Appeal No. 10(AP)/2010. We have also heard Mr. K. Jini, learned counsel, appearing on behalf of the writ petitioners, who were writ petitioners, but they are now *private respondents* in these appeals.

18. The thrust of the argument of not only the learned Advocate General, but also of the other learned counsel for the appellants is to the effect that in the case at hand, the regularization of contractual appointments could not have been treated by the learned Single Judge to be against the fundamental guarantees provided by Articles 14 and 16 of the Constitution of India. This argument is sought to be

supported by assigning the reason that the *contractual appointments*, in question, had not been made through backdoor inasmuch as a process of selection had, indeed, been resorted to and the appointments, though *contractual* in nature, were made in terms of merit and in terms of the reservation policy, in force, in the State.

19. The mere fact, therefore, that the regularization had the effect of changing the nature of appointments of the private appellants (i.e., the private respondents in the writ petition) from being *contractual* to *permanent*, the appointments, it is argued, on behalf of the appellants, cannot be said to be in violation of the Constitutional guarantees, in respect of public employment, and ought not to have been held by the learned Single Judge to have run contrary to the law laid down, in **Secretary, State of Karnataka and others vs Uma Devi (3) and others,** reported in **(2006) 4 SCC 1**.

20. The question, thus, which arises for consideration, in the present set of appeals, is: *whether it was permissible for the Government to regularize the services of the contractual appointees and whether such regularization was in tune with, and not contrary to, the Constitutional scheme of public employment, when Article 14 and Article 16 guarantee equality of opportunity in the making of public employment by the State* ?

21. Before proceeding further, it may be noted that broadly speaking, the contention of the appellants is that the learned Single Judge has seriously fallen in error in concluding that by resorting to regularization of the *contractual appointees*, the State has violated the Constitutional guarantees, given by Articles 14 read with Article 16, in the domain of public employment inasmuch as the Government, in

making selections, in the domain of public employment, must keep the process of selection open to all eligible candidates and should not allow any entry from backdoor and, then, regularize, at a later stage, the services of such backdoor entrants.

22. In order to justify that the learned Single Judge has gone wrong in coming to the conclusion, as indicated above, it has been contended, on behalf of the appellants, that in the present case, the State did invite applications from all eligible interested candidates, who were agreeable to receive *contractual appointments* as teachers, and, then, those, who had applied for selection and appointment, were duly interviewed and the appointments were made entirely on merit.

23. The appointments, therefore, it is contended, though *contractual* in nature, cannot be said to be bad in law nor can the regularization thereof be said to be bad in law. According to the learned Advocate General, the State had adhered to the basic requirements of Articles 14 and 16, when it resorted to a selection process, and, then, on the basis of the merit of the candidates determined in the interview/*viva voce,* the candidates were selected for appointments. Hence, in such circumstances, the regularization of the *contractual appointees,* contends the learned Advocate General, ought not to have been, and could not have, been legally interfered with. These arguments of the learned Advocate General have been adopted by the other learned counsel for the remaining appellants concerned.

24. It is also submitted, on behalf of the State, that even **Uma Devi** (supra) recognizes that where the appointments are *irregular* in

nature, such appointments can be regularized and it is only the *illegal* appointments, which cannot be regularized.

25. In the present case, according to the appellants, the State having followed an appropriate selection process, the appointments made, though on *contractual basis,* can, at best, be described as *irregular* and must not be treated, or ought not to have been treated by the learned Single Judge, as illegal and, hence, the learned Single Judge has fallen in error in treating the appointments, in question, as illegal and in setting aside and quashing the same by placing reliance on the case of **Uma Devi** (supra).

26. Are the arguments, so advanced on behalf of the appellants, tenable in law ?

27. While considering the present appeal, what needs to be clearly borne in mind is that in **Keshavananda Bharati Vs. State of Kerala (1973 Sup SCR 1),** a twelve-Judge Bench has held that Article 16, which guarantees equality of opportunity in public employment, is a facet of Article 14 and forms part of the basic structure of the Constitution. The decision, so rendered, in **Keshavananda Bharati** (supra), was clearly taken note of by a three-Judge Bench in **Indra Sawhney Vs. Union of India**, reported in (**2001**) **1 SCC 168**, wherein it was reiterated that neither the Parliament nor the State legislature can transgress the basic feature of the Constitution, namely, the principle of equality enshrined in Article 14 of which Article 16 is a facet.

28. While pointing out that equality and equal opportunity form the basic feature of our Constitution and equality before the law and

equal protection of the laws guaranteed by Article 14 do not remain confined to Article 14 alone, but proceed further and take, within its sweep, Article 15 to Article 18 too, the Supreme Court, in **Indra Sawhney** (supra), further clarified that in matters of public employment, Article 16 guarantees equality of opportunity.

29. Referring to the decisions in **Keshavananda Bharati** (supra) and **Indra Sawhney** (supra), the Constitution Bench, in **Uma Devi** (supra), has held, in no uncertain words, that adherence to Article 14 and 16 is *mandatory* in the process of public employment. The relevant observations, appearing in this regard, in **Uma Devi** (supra), read thus, *"These binding decisions are clear imperatives that adherence to Articles 14 and 16 of the Constitution is a must in the process of public employment."*

30. The Constitution Bench, in **Uma Devi** (supra), has made it clear that adherence to the rule of equality, in public employment, is a basic feature of our Constitution and since the rule of law is the core of our Constitution, a Court cannot uphold the violation of Article 14 nor can it overlook the non-compliance of Article 14 read with Article 16. The Supreme Court has, therefore, held, in **Uma Devi** (supra), that unless an appointment is made in terms of the relevant Rules and after a proper competition amongst the qualified persons, the appointment would not confer any right on the appointee. The relevant observations, appearing, in this regard, at Para 43 of **Uma Devi** (supra), read as under:

> "43. ***Thus, it is clear that adherence to the rule of equity in public employment is the basic feature of our Constitution and since the rule of law is the core of our Constitution, a court***

> ***would certainly be disabled from passing an order upholding a violation of Article 14 or in ordering the overlooking of the need to comply with the requirements of Article 14 read with Article 16 of the Constitution****. Therefore, consistent with the scheme for public employment, this court while laying down the law, has necessarily to hold that* ***unless the appointment is in terms of the relevant rules and after a proper competition among qualified persons, the same would not confer any right on the appointee. If it is a contractual appointment, the appointment comes to an end at the end of the contract****; if it were an engagement or appointment on daily wages or casual basis, the same would come to an end, when it is discontinued. Similarly, a temporary employee could not claim to be made permanent on the expiry of his term of temporary appointment. It has also to be clarified that merely because a temporary employee or a casual worker is continued for a time beyond the term of his appointment, he would not be entitled to be absorbed in regular service or made permanent, merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant rules."*
>
> (Emphasis supplied)

31. The Supreme Court has further clarified, in **Uma Devi** (supra), at Para 47, that when a person enters into a *temporary appointment* or gets engaged as *contractual* or *casual* worker and the engagement is not based on a proper selection as recognized by relevant rules or procedure, he is aware of the consequences of the appointment being made and, hence, such a person cannot invoke the *theory of legitimate expectation* for being confirmed in the post. The relevant observations, made in this regard, at paragraph 47, in **Uma Devi** (supra), are reproduced below:

> *"47.* ***When a person enters a temporary employment or gets engagement as a contractual or casual worker and the engagement is not based on a proper selection as recognised by***

the relevant rules or procedure, he is aware of the consequences of the appointment being temporary, casual or contractual in nature. Such a person cannot invoke the theory of legitimate expectation for being confirmed in the post when an appointment to the post could be made only by following a proper procedure for selection and in cases concerned, in consultation with the Public Service Commission. Therefore, the theory of legitimate expectation cannot be successfully advanced by temporary, contractual or casual employees*. It cannot also be held that the State has held out any promise while engaging these persons either to continue them where they are or to make them permanent. The State cannot constitutionally make such a promise. It is also obvious that the theory cannot be invoked to seek a positive relief of being made permanent in the post.*

48. *** *** ***

There is no fundamental right in those who have been employed on daily wages or temporarily or on contractual basis, to claim that they have a right to be absorbed in service. As has been held by this Court, they cannot be said to be holders of a post, since, a regular appointment could be made only by making appointments consistent with the requirements of Articles 14 and 16 of the Constitution*.

*** *** ***

It cannot also be relied on to claim a right to be absorbed in service even though they have never been selected in terms of the relevant recruitment rules. The arguments based on Articles 14 and 16 of the Constitution are therefore overruled.

49. It is contended that the State action in not regularising the employees was not fair within the framework of the rule of law. The rule of law compels the State to make appointments as envisaged by the Constitution and in the manner we have indicated earlier. In most of these cases, no doubt, the employees had worked for some length of time but this has also been brought about by the pendency of proceedings in tribunals and courts initiated at the instance of the employees. Moreover, accepting an argument of this nature would mean that the State would be permitted to perpetuate an illegality in the matter of

> *public employment and that would be a negation of the constitutional scheme adopted by us, the people of India. It is therefore not possible to accept the argument that there must be a direction to make permanent all the persons employed on daily wages.* ***When the court is approached for relief by way of a writ, the court has necessarily to ask itself whether the person before it had any legal right to be enforced****. Considered in the light of the very clear constitutional scheme, it cannot be said that the employees have been able to establish a legal right to be made permanent even though they have never been appointed in terms of the relevant rules or in adherence of Articles 14 and 16 of the Constitution."*
>
> (Emphasis supplied)

32. In the present case, there is no doubt that though the appointments of the teachers had been made by holding interview, the fact remains that the process of selection was hedged by **3** (**three**) explicit conditions, namely, (**i**) the appointments would not be *regular*, but *contractual* in nature; (**ii**) that the period of contractual appointment would be two years, which is extendable, in terms of the relevant Government policy, by a maximum period of one more year; and (**iii**) that the emoluments, for the service rendered on contractual appointment, would be a fixed amount of money.

33. When the State makes the kind of *contractual appointments*, as indicated above, everyone, who is, otherwise, eligible for appointment, may not be interested in accepting a *contractual appointment*. In fact, the writ petitioners, reacting to the submissions made by the appellants, that a regular selection process had taken place for making the *contractual appointments,* have pointed out that some of the writ petitioners, who had got selected, did not join, because the appointments were *contractual* in nature. Whether this plea of the

writ petitioners is or is not factually correct is immaterial. What is material is the fact, as already indicated hereinbefore, that everyone, who is eligible for appointment, may not be interested in accepting a *contractual appointment* and, in the present case, when the State declared that it would make *contractual appointment,* which would be valid for a period of two years, and, particularly, when it specifically omitted, in the subsequent advertisement, dated 18.12.2003, the sentence, *"likely to be declared permanent",* appearing in the earlier advertisement, dated 07.05.2003, it could not have, subsequently, regularized the services of such *contractual appointees,* because such appointments, in the light of the clearly laid down position of law, in **Uma Devi** (supra), comes to an end at the end of the term of the *contractual* appointment. Allowing the State to make, initially, *contractual appointments* and, then, make such *contractual* appointments permanent would amount to permitting the State play fraud on the Constitution, because this would be, in the ultimate analysis, a negation of Article 16(1), which is, as already pointed out above, an integral facet of Article 14, which is the core of our Constitution inasmuch as it guarantees equality of treatment to all by the State, particularly, when the State had made it clear by issuing *'corrigendum'*, dated 18.12.2003, that it would not make permanent the proposed *contractual appointments,* which it had invited applications for.

34. What the Government has done, in the present case, by way of regularization of the *contractual appointees,* is that it has changed the nature of employment from a *contractual* one to a *permanent* one. If, in a case of present nature, a contractual appointee files a writ petition under Article 226 and seeks issuance of *mandamus* to the

State Government to regularize his appointment, the straight answer of the Court, in the light of Para 43 of **Uma Devi** (supra), would be that such a petitioner knew the nature of his appointment and since his appointment was inherently *'contractual'* and *'temporary'* in nature, the appointment came to end at the end of the contract and such a *contractual employee* cannot seek a direction from the Court to the State to convert his *contractual appointment* into a *regular appointment.* This apart, as the appointment of such a person is *contractual* in nature, such a person also cannot be said to have *legitimate expectation* that his *contractual appointment* would be made *permanent*. When such a contractual employee cannot get a *mandamus* issued to the State to regularize his contractual employment and make him a permanent teacher, the converse would not be possible in the sense that the State cannot regularize such an appointee, when such an appointee has no right to seek regularization.

35. It has been submitted by Mr. P. K. Tiwari, learned counsel for the sole appellant, in Writ Appeal No. WA 10(AP)/2010, that in the case of a *contractual employee,* since the employee has no right to seek permanency of his employment, the High Court is debarred from issuing *mandamus* to the State to regularize the service of such a contractual employee, but there would be no impediment, on the power of the State, to, otherwise, regularize the *contractual appointment* of such an employee.

36. Though the argument, so advanced by Mr. Tiwari, is, undoubtedly, attractive, it is devoid of substance, because what cannot be done directly, it is also not possible to be done indirectly.

When a *contractual appointee* cannot seek, against the State, a writ, in the nature of *mandamus,* to convert his *contractual appointment* into *permanent appointment*, the State cannot, even if it so wishes, make a *contractual* employee a *permanent* employee; if it is so done, it would be nothing, but arbitrary and denial of the right of equal opportunity in the domain of public employment inasmuch as a person may not be interested in accepting a *contractual appointment,* whereas he may be interested in accepting a regular appointment. Consequently, such a person may not participate, as already pointed out above, in the selection process meant for *contractual appointment,* but the same person would participate in the process of selection for regular appointment. The nature of appointment, in the two cases, being entirely different from each other, it will be wholly unfair and arbitrary, on the part of the State, to, first, make *contractual appointment* and, then, convert such *contractual appointment* into permanent/regular appointment without having made it known, at the time of initiating the selection process itself, that the *contractual appointment* would be made, in course of time, *permanent/regular* or, at least, were likely to be made, in course of time, *permanent/regular*. On the contrary, the State, in the present case, had made its intention clear by mentioning in the advertisement, in specific terms, that it would not make the *contractual appointments* permanent in the sense that the term of the *contractual appointments* would be merely for two years and that these *contractual appointments* would not be made permanent.

37. The argument, advanced by learned Advocate General, that since there was a due selection process for appointment of teachers,

though *contractual* in nature, the requirements of Articles 14 and 16 have been satisfied, cannot, in the firm view of this Court, be acceded to, for, Article 14 strikes at arbitrariness. When the State had made *contractual* appointments, it would be arbitrary, on the part of the State, to change subsequently the nature of *contractual appointments* into *permanent appointments,* particularly, when it had made its intention clear that the *contractual appointments,* so made, would be for a period of two years, which would not be made permanent. Hence, permitting the State to do, what it has done, would amount to permitting the State to play fraud on the Constitution. Article 14 and/or Article 16 are not to be applied merely in letter, but in spirit too.

38. If the letter and spirit of Articles 14 and 16 are borne clear in mind, there can be no impediment in coming to the conclusion that the State cannot, having made *contractual* appointments, convert the same into permanent appointments, particularly, when it had made it very clear that the *contractual appointments* would be only for a period of two years and it (the State) gave no indication, in the advertisement, that the *contractual appointment* would, at any stage, be made permanent in nature; rather, the indication given was to the contrary in the sense that the Corrigendum, dated 18.12.2003, had the effect of informing the intending applicants that their *contractual appointments* would not be made permanent. Permitting, in such circumstances, the State to regularize the *contractual appointments* in the manner as it has been done, in the present case, would amount to denial of equality of opportunity to those people, who were not aware of the State's hidden agenda or its intention that it (the State) would, one day, convert the *contractual appointments* into *permanent*

appointments. Putting stamp of approval on the State Government's action in making regular the *contractual appointees,* by way of regularization, would certainly defeat and undermine the very core of the decision rendered by the Constitution Bench in **Uma Devi** (supra).

39. Relevant it is to point out here that when the State advertises a process of selection for appointment and announces that the appointments would be *temporary* or *contractual* in nature, such a condition cannot, later on, be waived by the State or be allowed to be waived by the State, for, allowing the State to do so would amount to permitting the State to initially make an appointment on *contractual basis* and, then, make the *contractual appointment* permanent and the defence of such an action would be that there was a regular selection process resorted to for making such a *contractual appointment*. Such an approach, if allowed, would ignore the fact that out of the total number of persons eligible for appointments, many of them may not be interested in applying for *contractual* appointment. The State, in such a case, cannot be allowed to convert, at a subsequent stage, such *contractual appointments* into *permanent appointments*.

40. Because of what have been discuss and pointed out above, we are firmly of the view that the State's action, in regularizing the contractual appointments, in the present case, was wholly illegal and cannot be sustained. We would have, therefore, ordinarily, sustained the learned Single Judge's direction setting aside and quashing the impugned order of regularization of the *contractual employees*. What has, however, gone unnoticed by learned Single Judge is that the regularization was made as far back as on 04.02.2004; but the writ

petitioners put to challenge this regularization in the year 2009, when various orders of promotion to the post of Headmaster/Vice Principal were made on 11.11.2008. There is substance in what is contended, on behalf of writ petitioners (who are the private respondents in the present appeals) that the writ petitioners had not challenged the regularization of the *contractual appointments*, because it had not affected them, and when the illegally regularized employees were sought to be made senior to them by granting promotion to the posts of Headmaster/Vice-Principal, the writ petitioners were left with no option but to challenge the legality of the very regularization of those *contractual appointees.*

41. Be that as it may, as the contractual appointees, whose appointments had been made permanent, remained working as regular teachers until the time they were promoted by various orders passed in the year 2008, we are of the view that it would not be proper to interfere belatedly with the regularization of the appointments concerned and it would be in the fitness of things, in the peculiar circumstances of the present case, to make the regularised employees (i.e., the private appellants in these appeals) rank, in the gradation list of Post Graduate Teachers, junior to the writ petitioners, who are private respondents in the present appeals.

42. The situation, in the present case is, to a great degree, akin to the case of **State of UP vs. Raffiquddin** (**AIR1988 SC 162**). In **Raffiquddin** (supra), the Supreme Court was confronted with a situation in which, while, on the one hand, a batch of persons was appointed in the judicial service of the State in violation of the relevant Rules of recruitment, another batch of persons was, on the

other hand, appointed in the same service in accordance with the Rules, the irregular appointees having, however, been accorded seniority over the regular appointees on the ground that the irregular appointees were selected from the selection test held in the year 1970, whereas the regular appointees were selected from the selection test held in the year 1972. Dealing with such a situation, the Supreme Court observed and held as follows:

> *"13.* ***...*** *The appointment of unplaced candidates made in pursuance of the decision taken by the high level committee is not countenanced by the Rules. There is no escape from the conclusion that the unplaced candidates were not appointed to the service on the basis of the result of the competitive examination of 1970.* ***Their appointment was made in breach of the Rules, in pursuance to the decision of the high level committee. It is well settled that where recruitment to service is regulated by the statutory rules, recruitment must be made in accordance with those Rule, any appointment made in breach of rules would be illegal****. The appointment of 21 'Unplaced candidates' made out of the third list was illegal as it was made in violation of the provisions of the Rules. The high level committee which took decision for recruitment of candidates to the service on the basis of the 40 per cent aggregate marks disregarding the minimum marks fixed by the Commission for viva voce test had no authority in law, as the Rules do not contemplate any such committee and any decision taken by it could not be implemented.*
>
> *14.* ***We are surprised that the Chief Justice, Chief Minister or as well as the Chairman of the Commission agreed to adopt this procedure which was contrary to the Rules. The high level committee even though constituted by highly placed persons had no authority in law to disregard the Rules and to direct the Commission to make recommendation in favour of unsuccessful candidates disregarding the minimum marks prescribed for the viva voce test****. The high level committee's view that after the amendment of R.19, the minimum qualifying*

marks fixed for viva voce could be ignored was wholly wrong. Rule 19 was amended in January,1972, but before that 1970 examination had already been held. Since the amendment was not retrospective the result of any examination held before January, 1972 could not be determined on the basis of amended Rules. ***The Public Service Commission is a constitutional and independent authority. It plays a pivotal role in the selection and appointment of persons to public services. It secures efficiency in the public administration by selecting suitable and efficient persons for appointment to the services. The Commission has to perform its functions and duties in an independent and objective manner uninfluenced by the dictates of any other authority****. It is not subservient to the directions of the Government unless such directions are permissible by law. Rules vest power in the Commission to hold the competitive examination and to select suitable candidates on the criteria fixed by it. The State Government or the high level committee could not issue any directions to the Commission for making recommendation in favour of those candidates who failed to achieve the minimum prescribed standards as the Rules did not confer any such power on the State Government. In this view even if the Commission had made recommendation in favour of the unplaced candidates under the directions of the Government the appointment of the unplaced candidates was illegal as the same was made in violation of the Rules.*

15 ***... But even if the Commission had agreed to the Government's suggestion, their appointments continued to be illegal, as the same were made in breach of Rules. There was no justification for the appointment of the unsuccessful candidates in 1975, because by that time result of 1972 examination had been announced and duly selected candidates were available for appointment."***

16. ***...*** *If selected candidates are available for appointment on the basis of the competitive examination of subsequent years, it would be unreasonable and unjust to revive the list of earlier examination by changing norms to fill up the vacancies as that would adversely affect the right of those selected at the*

subsequent examination in matters relating to their seniority under Rule 22. The 1970 examination could not be utilized as a perennial source or inexhaustible reservoir for making appointments indefinitely.

*** *** *** *** *** *** *** *** ***

19. ***The unplaced candidates were appointed to the service in breach of the Rules and they form a separate class.*** *They cannot be equated with those who were appointed to the service from the first and second list of 1970 examination as their appointment was made on the recommendation of the Public Service Commission. They remain unchallenged.* ***Similarly, candidates appointed to the service on the basis of the result of the competitive examination of 1972 before the unplaced candidates were appointed, formed separate class as they were also appointed in accordance with the Rules. The " unplaced candidates" of 1970 examination cannot claim seniority over them on the basis of R.22 as their appointment was not made on the basis of the list approved by the Commission under Rule 19. In Shitala Prasad Shukla v. State of U.P, 1986 Supp SCC 185: (AIR 1986 SC 1859) this Court held that an employee must belong to the same stream before he can claim seniority vis-a-vis others. Those appointed irregularly belong to a different stream and they cannot claim seniority vis-à-vis those who may have been regularly and properly appointed.***

20. ***... But we are also of the view that having regard to the period of 12 years that have elapsed, we do not propose to strike down their appointments.***

21. Now the question arises as to when seniority should be assigned to the unplaced candidates. Their claim for assigning them seniority on the basis of the competitive examination of 1970 is not sustainable in law as discussed above. They were appointed to service after five years of the examination and before their appointment, competitive examination of 1972 had taken place and candidates selected under that examination had been appointed to service prior to their appointment. The directions issued by the High Court for rearranging the merit list of 1970 examination seriously affect the seniority of those who were regularly selected in accordance with the norms prescribed

*by the Commission**.*** ***Having regard to these facts and circumstances of the case we are of the opinion that the view taken on by the High Court on its administrative side and the State Government that the unplaced candidates of 1970 examination should be assigned seniority below the last candidate of 1972 examination appointed to the service is just and reasonable.*** *In our opinion it would be just and proper to assign seniority to the unplaced candidates of 1970 examination at the bottom of the line of 1972 candidates. There were 37 unplaced candidates of 1970 examination who were included in the third list, of them 16 candidates appeared in the 1972 examination and they were successful and their names were approved by the Commission in the list prepared under Rule 19. The State Government appointed them in service. Under R.22 they are entitled to seniority of 1972 examination but in view of the judgment of the High Court in Rafiquddin's case their seniority has been determined on the basis of their recruitment to service under the 1970 examination. We have already recorded findings that unplaced candidates of 1970 examination (as included in the third list) have not been recruited in service according to the Rules and their recruitment to service cannot be treated under 1970 examination for purposes of determining their seniority under Rule 22. We have further directed that 21 unplaced candidates of 1970 examination should be placed below the candidates of 1972 examination. But so far as 16 remaining candidates are concerned, they were appointed to the service on the result of 1972 examination and their appointment does not suffer from any legal infirmity. They are therefore entitled to seniority of 1972 examination on the basis of their position in the merit list of that examination. They are however not entitled to the seniority of 1970 on the basis of the examination of that year as held by the High Court".*

(Emphasis supplied)

43. An important underlying principle of the decision, in **Rafiquddin** (supra), is that even when, on account of lapse of a long period of time, appointment, made to a service in breach of the

relevant recruitment rules, is not set aside and quashed, such irregular appointee shall not be allowed to steal a march over the regular appointees, for, as reiterated in **Rafiquddin** (supra), ***"an employee must belong to the same stream before he can claim seniority*** *vis-à-vis* ***others. Those appointed irregularly belong to a different stream and they cannot claim seniority vis-à-vis those, who may have been regularly and properly appointed"***.

44. Following the principle of law, as indicated hereinabove, it is possible that without setting aside and quashing the appointment of an irregular appointee, the Court or Tribunal may direct the appointing authority to treat a regular appointee, in service, though appointed later, in point of time, than the irregular appointee, as senior to the irregular appointee. In other words, an irregular appointee, particularly, if his appointment suffers from arbitrariness, *malafide* and colourable exercise of powers, cannot be allowed to gain seniority over the regular appointee, for, he cannot be said to belong to the same stream even if the appointment of the irregular appointee is prior in point of time and is not disturbed on account of long period of service, which the irregular appointee might have put in.

45. In the result and for the foregoing reasons, the judgment and order, under appeal, are hereby upheld subject to the modification that the appointments of those, who were impleaded as private respondents in the writ petitions, would remain undisturbed, but they would be made to rank, in the gradation list of Senior (Post-Graduate) Teachers, junior to the writ petitioners (i.e., the private respondents in these appeals) inasmuch as this would meet, to our mind, the ends of justice and would not adversely affect the rights of the writ petitioners.

46. With the limited modification as directed hereinabove, all these three appeals shall stand disposed of.

47. No order as to costs.

JUDGE JUDGE

Paul/rk