A R.S. GARG

v.

STATE OF U.P. AND ORS.

JULY 27, 2006

B [S.B. SINHA AND P.P. NAOLEKAR, JJ.]

*Service Law—Regularisation—***Ad hoc** *employee appointed in violation of the Service rules does not hold any post—Such appointment is* **void ab initio** *and cannot be regularized.*

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Service Law—Promotion—Service Rules provided that the candidate for promotion must have been appointed substantively—3rd Respondent was appointed on **ad hoc** *basis* **de'hors** *the Rules—Experience gained by him while acting in* **ad hoc** *capacity would not subserve the requirement of*

D *promotion under the Rules—U.P. Labour Department (Factories and Boilers Division) Officers Service (Second Amendment) Rules, 1992—Rule 5(iii).*

Service Law—Promotion—Promotional post converted with a view to provide promotional avenues for Scheduled Caste candidates—Relaxation accorded in qualifying service for the post so converted and 3rd Respondent,

E *a Scheduled Caste candidate promoted—Promotion challenged—On facts, held: Promotion was granted in undue haste—Documentary evidence showed that concerned authorities had made up their mind to promote 3rd Respondent from the very beginning—Such action smacked of* **mala fide**—*Besides case of 3rd respondent was considered alone although 2 other candidates fulfilled the*

F *same criteria—Even no seniority list was prepared at the time of constitution of the Departmental Promotion Committee—Entire approach of the authorities was only for achieving a private interest—In that sense, the action suffered from the vice of malice in law—Administrative Law—Natural Justice—Malice in law.*

G *Service Law—Promotion—Gross illegalities committed by the State in granting promotion to 3rd Respondent thereby causing deprivation of legitimate right of promotion of more meritorious and senior candidates—In the circumstances, fact that 3rd Respondent is working for about 9 years on the*

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promotional post or that he would retire after one year wholly immaterial— Challenge against the order of promotion upheld—Directions passed by Supreme Court in exercise of its discretionary jurisdiction under Article 136 of the Constitution—Constitution of India, 1950—Article 136. A

Service Law—Reservation—Roster prepared to fill up posts by reserved category candidates—In terms of the 1994 Act, reservation was to be confined to 21%—Conflict between the percentage of reservation and the roster—Held: In that event, the former shall prevail—Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994—Section 3. B

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3rd Respondent, who belonged to the Scheduled Caste, was appointed as Assistant Director of Factories in the State of U.P. on *ad-hoc* basis in 1987. In 1995, the appointment was regularized. Subsequently, in 1997, the post of Deputy Director of Factories (Chemical) was converted to the post of Deputy Director of Factories (Administration) with a view to provide promotional avenues for Scheduled Caste candidates. On the ground that under the provisions of the Uttar Pradesh Public Services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994, relaxation could be given to fulfil reservation quota, relaxation was given in qualifying service for the aforesaid post so converted and 3rd Respondent was promoted as Deputy Director of Factories (Administration). Appellant, a colleague of 3rd Respondent, filed writ petition questioning the order of promotion passed in favour of Respondent No.3. High Court dismissed the petition. Hence the present appeal. D E

In appeal before this Court it was contended (i) that the purported conversion of the post of Deputy Director of Factories (Chemical) to Deputy Director of Factories (Admn.) was contrary to the Uttar Pradesh Labour Department (Factories and Boilers Division) Officers Service (Second Amendment) Rules, 1992 and it having been done with a view to favour the 3rd respondent, was illegal; ii) that the 3rd respondent was not eligible to be promoted, as he did not complete 5 years' substantive service on the date of selection in terms of Rule 5(iii) of the 1992 Rules and iii) that the order of promotion passed in his favour was *malafide*. It was contended that the promotion of 3rd Respondent was also illegal and unjust since by reason thereof the percentage of reservation in promotion F G H

A was raised to 33%, though in terms of the 1994 Act, the reservation was to be confined to 21%.

Allowing the appeal, the Court

HELD: 1.1. Rule 5(iii) of the 1992 Rules requires that on the date of
B selection, the candidate should have been substantively appointed as Assistant Director of Factories and does not speak of experience in the service alone. The said Rule read in its entirety would mean that the candidate for promotion must be appointed substantively and when so appointed, he has to put in at least five years service as such.
C [134-D-E; 135-E]

1.2. An *ad hoc* employee who has been appointed in violation of the service rules did not hold any post. His experience in the post would mean experience gathered by him after his appointment in the substantive capacity. It is trite law that for the purpose of reckoning seniority the *ad*
D *hoc* services would be taken into consideration only if prior to the appointment of the employee the authorities had complied with the statutory requirements of selecting the candidate. At the relevant point of time, the rule provided for selection through Public Service Commission. The same having not been done, the appointment of the 3rd respondent
E was *void ab initio*. The question of regularization of his services, therefore, did not arise. [134-E-G]

1.3. The 3rd respondent, from 1984 to 1995, did not hold even any temporary or any officiating post. He was substantively appointed only in 1995, prior whereto he was not holding any post. The view of the High
F Court, that the experience gained by the 3rd respondent while acting in *ad hoc* capacity would subserve the requirements of Rule 5(iii) of the 1992 Rules, cannot be accepted. [135-C-D]

1.4. Absence of experience in substantive capacity is not a mere irregularity in this case. It would not be a mere irregularity, when a person
G not eligible therefor would be considered for promotion. It may be that for the purpose of direct appointment, experience and academic qualifications are treated to be at par, but when an eligibility criteria has been provided in the Rules for the purpose of promoting to a higher post, the same must strictly be complied with. Any deviation or departure
H therefrom would render the action *void*. [135-F-G]

State of Madhya Pradesh and Anr. **v.** *Laxmishankar Mishra,* **AIR (1979) SC 979 and** *Ram Sarup* **v.** *State of Haryana and Ors.,* **AIR (1978) SC 1536, distinguished.** A

Secretary, State of Karnataka & Ors. **v.** *Umadevi & Ors.,* **(2006) 4 SCALE 197;** *Union Public Service Commission* **v.** *Girish Jayanti Lal Vaghela & Ors.,* **(2006) 2 SCALE 115;** *Suraj Parkash Gupta & Ors.* **v.** *State of J & K & Ors.,* **[2000] 7 SCC 561;** *Umarani* **v.** *Registrar, Cooperative Societies & Ors.,* **[2004] 7 SCC 112 and** *National Fertilizers Ltd. & Ors.* **v.** *Somvir Singh,* **[2006] 5 SCC 493, referred to.** B

2.1. Apart from the fact that the concerned authorities had made up their minds to promote the 3rd respondent from the very beginning, as an approval therefor appears to have been obtained from the Chief Minister only on 20.4.1997; the post was in fact created on the next date, i.e., on 21.4.1997 and the order of promotion was issued on 24.4.1997, although, decision thereupon, as would be evident from the note-sheet, had been taken on 15.4.1997 itself. Such an action in undue haste on the part of the respondents smacks of *mala fide.* **[139-C-D]** C D

2.2. Furthermore, for the purpose of promotion to the post in question, cases of at least 5 candidates were required to be considered. The case of 3rd respondent was considered alone, although, there had been 2 other candidates, who fulfilled the same criteria. Even no seniority list was prepared at the time of constitution of the Departmental Promotion Committee. [139-E] E

2.3. The idea of conversion of the promotional post should have been mooted keeping public interest in view and not the interest of an individual. The entire approach of the authorities of the State of U.P was only for achieving a private interest and not the public interest. It was in that sense, the action suffered from the vice of malice in law. It has not been disputed that there were other employees also who belonged to scheduled caste and were senior to the 3rd respondent. [140-B-C] F G

Smt. S.R. Venkataraman **v.** *Union of India & Anr.,* **[1979] 2 SCC 491;** *State of A.P.* **v.** *Goverdhanlal Pitti,* **[2003] 4 SCC 739;** *Chairman & M.D., BPL Ltd.* **v.** *S.P. Gururaja,* **[2003] 8 SCC 567 and** *Punjab SEB Ltd.* **v.** *Zora Singh,* **[2005] 6 SCC 776, referred to.** H

A *Shearer and Anr.* v. *Shields,* (1914) AC 808, referred to.

3.1. Also no relaxation could be granted for promotion in terms of 1994 Act. Five years' experience from the date of substantive requirement, being an essential qualification, no relaxation could have been given in that regard to the 3rd respondent. The 1994 Act was not enacted for B meeting such a contingency. In that view of the matter both the Chief Minister as well as the Principal Secretary did not possess any authority to make any relaxation and in that view of the matter they must be held to have misdirected themselves in law necessitating interference by the superior courts by way of judicial review. When such an illegality is C committed, the superior court cannot shut its eyes. It is one thing to say that conversion of one post to another may be done in accordance with law having regard to the public purpose in mind but a statutory power, it is well-settled, cannot be exercised so as to promote a private purpose. [140-C-E]

D 3.2. In terms of the 1994 Act, the reservation was to be confined to 21%. There were 6 posts. If the roster was to be followed, 2 posts would be reserved for the Scheduled Caste candidates, which is impermissible. In the event of any conflict between the percentage of reservation and the roster, the former shall prevail. Thus, in the peculiar facts and E circumstances of this case, the roster to fill up the posts by reserved category candidates, after every four posts, does not meet the constitutional requirements. [140-H; 141-A; 142-F]

Mohinder Singh Gill & Anr. v. *The Chief Election Commissioner, New Delhi & Ors.,* AIR (1978) SC 851; *Commissioner of Police* v. *Gordhandas* F *Bhanji,* AIR (1952) SC 16; *Hindustan Petroleum Corpn. Ltd.* v. *Darius Shapur Chenai,* [2005] 7 SCC 627; *Kesvananda Bharati* v. *State of Kerala,* [1973] 4 SCC 225; *Waman Rao* v. *Union of India,* [1981] 2 SCC 362; *Maharao Saheb Shri Bhim Singhji, etc.* v. *Union of India & Ors.,* AIR (1981) SC 234; *Minerva Mills Ltd. & Ors.* v. *Union of India & Ors.,* [1980] 3 SCC 625; *T.M.A. Pai* G *Foundation* v. *State of Karnataka,* [2002] 8 SCC 481; *Islamic Academy of Education* v. *State of Karnataka,* [2003] 6 SCC 697; *P.A. Inamdar* v. *State of Maharashtra,* [2005] 6 SCC 537; *Indra Sawhney* v. *Union of India,* [1992] Supp. 2 SCR 454; *Ashoka Kumar Thakur* v. *State of Bihar & Ors.,* [1995] 5 SCC 403 and *Indra Sawhney* v. *Union of India,* [1999] Supp. 5 SCR 229, referred to.

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4.1. The order of promotion was issued on 25.4.1997. The writ petition was filed within a few days thereof, i.e., on 2.5.1997. As the 3rd respondent had joined the post, no stay had been granted by the High Court. He might have been working for about 9 years, but he was holding the post during the pendency of the writ petition. The fact that the 3rd respondent would retire in May, 2007 is again wholly immaterial. It is of not much relevance. [142-H; 143-A-B]

4.2. It is also not correct to contend that the selection was on merit basis. If the post was not reserved, in no way the 3rd respondent could have been promoted. He might not have come within the purview of zone of consideration. This case points out how the illegalities are committed by the State causing deprivation of legitimate right of promotion of more meritorious and senior candidates. [143-C]

4.3. It is not a case, where this Court should refrain itself from exercising its discretionary jurisdiction under Article 136 of the Constitution. The respondents shall bear the costs of the appellant throughout. Such costs would be borne by the State as also the 3rd respondent equally, which is assessed at Rs.50,000/-. [143-D]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2903 of 2001.

From the Judgment and Order and dated 22.5.2000 of the High Court of Allahabad Lucknow Bench, Lucknow in Writ Petition No. 377 (SB)/1997.

Raju Ramachandran, S. Muralidhar and Amit Sharma for the Appellant.

Dinesh Dwivedi, Prashant Kumar, Rohan Thawani, Pramood Swarup and Pradeep Misra for the Respondents.

The Judgment of the Court was delivered by

S.B. SINHA, J. This appeal is directed against a judgment and order dated 22.5.2000 passed by the High Court of Judicature at Allahabad in Writ Petition No.377(SB)/97, whereby and whereunder the writ petition filed by the appellant herein questioning an order of promotion dated 24.5.1997 passed in favour of respondent No.3 herein was dismissed.

Both the appellants and the said 3rd respondent were appointed on an

A *ad hoc* basis to the post of Inspector, re-designated as Assistant Director of Factories, on or about 3.1.1972 and 17.1.1987 respectively. Whereas the appointment of the appellant herein was in terms of Uttar Pradesh Labour Department (Factories and Boilers Division) Officers Service (Second Amendment) Rules, 1992 ('1992 Rules', for short) indicating selection through Public Service Commission; the 3rd respondent was appointed purely on *ad* B *hoc* basis till the selection of a regular candidate by the Public Service Commission and joining the post or till such time his services were required by the department. The appellant was confirmed in his post on 13.5.1978, whereas the 3rd respondent purported to have been appointed on a regular basis without undergoing the requisite selection process as provided for in C the 1992 Rules and without being recommended therefor by the Public Service Commission. The State of U.P., by an order dated 15.11.1995 appointed the 3rd respondent as Assistant Director Factories on regular basis with effect from the date of issuance of the order providing that he would be on probation for a period of two years. Indisputably, there were six posts of Deputy Director D of Factories in the State of U.P., out of which four posts were designated as Deputy Director of Factories (Administration), one as Deputy Director of Factories (Chemical) and one as Deputy Director of Factories (Engineering). The post of Assistant Director of Factories was the feeder post. As noticed hereinbefore, both the posts of Assistant Director of Factories, formerly known as Inspector of Factories, and Deputy Director of Factories (Admn.) were to E be filled up through the Public Service Commission. It is furthermore not in dispute that the educational qualification required for appointment to the post of Deputy Director (Chemical), *vis-a-vis*, Deputy Director of Factories (Admn.) and Deputy Director of Factories (Engineering) are different. It is also not in dispute that out of the four posts of Deputy Director of Factories (Admn.) F one is to be filled up by an officer belonging to reserved category.

The wife of the 3rd respondent, Smt. Prem Lata, made a representation to the Chief Minister of the State of U.P. that her husband, who belonged to Scheduled Caste, was victimized and was not being promoted to the post of Deputy Director of Factories, whereupon instructions were issued to the G Principal Secretary, Labour, to intimate to her as to why the promotion of 3rd respondent was being delayed. A proposal was made for converting the said post of Deputy Director of Factories (Chemical) to the post of Deputy Director of Factories (Admn.) upon obtaining sanction from the Chief Minister, although, the concurrence of the Finance Department was not obtained therefor. H A note-sheet to the aforementioned effect on 15.4.1997 was drawn which is

to the following effect: A

"The post of Deputy Director Factories (Chemical) in Labour Commissioner organisation is proposed to be converted/created as deputy director, Factories (Administration). Finance Department did not approve the proposal. This conversion will not entail any financial loss and it would provide promotional avenues for candidates of B scheduled castes. Since Finance Department is also with the Chief Minister, therefore, Chief Minister may give approval on this proposal.

2- For the aforesaid post so converted, the candidates available for promotion are not completing qualifying service of five years. Sri C Bharti has been in service since 1987-88 with interruption and since 1989 without interruption and upto 1995 on *adhoc* basis and in regular service since 15.11.95. According to the provisions of U.P. Reservation Act 1994 relaxation may be given to fulfil reservation quota. Therefore, it is proposed to give relaxation in qualifying service for this aforesaid post. Personnel Department is under Hon'ble C.M. Therefore it is D requested that he may approve the proposal to give relaxation."

3- Para 1 and 2 for approval please.

sd/-
15.04.97 E
Chandra Pal
seal
Principal Secretary
Labour Department
U.P. Shasan." F

The said note-sheet was placed before the then Chief Minister, State of U.P. on 20.4.1997 and was approved on 21.4.1997. The Principal Secretary issued a letter to the Labour Commissioner, U.P. that the Governor, after due consideration, directed conversion of one temporary post of Deputy Director of Factories (Chemical) into the post of Deputy Director of Factories (Admn.). G It was stated:

"In pursuance of the above order the necessary amendment in the UP Factories in Boilers Service Rules 1980 shall be issued later on."

The 3rd respondent, pursuant to the purported conversion of the said H

A post, was promoted as Deputy Director of Factories (Administration). The appellant herein filed a writ petition questioning the same before the Lucknow Bench of the High Court of Judicature at Allahabad praying for the following reliefs:

B "(i) to issue a writ, order or direction in the nature of *certiorari* quashing the impugned order dated 25th April, 1997 promoting the Respondent No.3 on the post of Deputy Director of Factories (Administration) as contained in Annexure No.1 to this writ petition;

C (ii) to issue a writ, order or direction in the nature of *certiorari* quashing the order dated 15th November, 1995 by which the Respondent No.3 was appointed on the post of Assistant Director of Factories on regular basis, as contained in Annexure No.5 to this writ petition;

D (iii) to issue a writ, order or direction in the nature of quo-warranto requiring the respondent No.3 to show cause as to how he is holding the post of Deputy Director of Factories (Administration);

(iv) to issue a writ, order or direction in the nature of *Mandamus* commanding the respondents to consider the petitioner for promotion on the post of Deputy Director of Factories (Administration);

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(v) to issue any other writ, order or direction which this Hon'ble Court may deem just and proper in the circumstances of the case;

(vi) to allow this writ petition with all costs in favour of the petitioner."

F The said writ petition had been dismissed by the impugned judgment. The contentions raised before the High Court as also before us, on behalf of the appellant are:

(i) The 3rd respondent was illegally appointed as Assistant Director of G Factories as his services were regularized without referring the matter to the Public Service Commission as was required by Rule 5(iii) of the 1992 Rules;

(ii) The order of promotion passed in favour of the 3rd respondent was *mala fide*;

H (iii) The purported conversion of the post of Deputy Director of Factories

(Chemical) to Deputy Director of Factories (Admn.) being contrary to the 1992 Rules and having been done with a view to favour the 3rd respondent, was illegal;

(iv) The 3rd respondent was not eligible to be promoted, as he did not complete 5 years' substantive service on the date of selection, i.e., in the year 1997 in terms of Rule 5(iii);

(v) Reservation to the post in favour of a Scheduled Castes was illegal and unjust by reason thereof the percentage of reservation in promotion would be raised from 21% to 33%.

(vi) The post of Deputy Director of Factories (Administration) has already been occupied by a candidate belonging to the reserved category, namely Shri Ghanshyam Singh.

On the other hand, the contentions raised on behalf of the 3rd respondent herein are :

(i) The appointment and regularization of 3rd respondent had never been challenged by the appellant nor any relief was sought for in that behalf in the writ petition and, thus, the same should not be allowed to be raised before this Court. In any event, the same could not have been challenged collaterally after 10 years' of initial appointment and 2 years after the regularization of the services of the said respondent;

(ii) The appellant should have impleaded the Chief Minister and Principal Secretary in their personal capacities as allegation of favoritism was made against them. In any event, the appointment having been made by the State of U.P. in terms of 1992 Rules of business upon selection by the Departmental Promotion Committee; the order of promotion was valid in law;

(iii) Appointment of the 3rd respondent was made *bona fide*;

(iv) No relief having been sought for questioning conversion of the post in the writ petition, no grievance in that behalf can be permitted to be raised herein. Furthermore, the appellant himself having claimed for promotion to the said post, he cannot be permitted to approbate and reprobate;

(v) Rule 5(iii) should be construed in a reasonable manner and read

A fairly. If a broad meaning thereto is given, the same would imply experience of 5 years in the post and not 5 years' experience after having substantively appointed on the post of Assistant Director and so construed, the High Court must be held to have rightly opined that there had been no violation of Rule 5(iii) of the said 1992 Rules;

B (vi) Reservation having been provided in terms of the Government orders issued from time to time, the issue of reservation exceeding 21% of posts in the cadre does not arise and there had, thus, been no breach of Articles 14 and 16 of the Constitution;

C (vii) In any event, it is not a fit case where this Court should exercise its discretionary jurisdiction under Article 136 of the Constitution of India in view of the fact that the 3rd respondent had been working in the promoted post for about 9 years and he is to retire in May, 2007.

The State of Uttar Pradesh, in exercise of its powers conferred by the D Proviso to Article 309 of the Constitution of India enacted the Uttar Pradesh Inspector of Boilers and Factories Service Rules, 1980 ('1980 Rules', for short). Direct recruitment has been defined in Rule 2(g) to mean recruitment otherwise than by promotion, transfer or deputation. Rule 4 provides for strength of service of each category of posts envisaged therein, meaning such E categories as may be determined by the Governor from time to time. Sub-Rule (2) of Rule 4 provides that the strength of service was to be as specified until orders varying the same have been passed under Sub-Rule (1) as specified in Appendix 'A' thereto. Rule 5 of the 1980 Rules provides for source of recruitment; clause (iii) thereof refers to the post of Deputy Chief Inspector of Factories (Administration), which is in the following terms:

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> "By promotion, on the basis of seniority subject to the rejection of unfit, through the Commission from amongst the permanent Inspectors of Factories, who have put in at least five years of continuous service including temporary and officiating service."

G Rule 6 speaks of reservation stating that the same shall be in accordance with the orders of the Government in force at the time of recruitment. Rule 9 provides for academic qualifications and experience, which the candidate for direct recruitment is required to possess, and as specified in Appendix 'B' to the 1980 Rules. Rule 15 provides for procedure for recruitment, whereas H Rule 16 provides for recruitment by promotion, which is in the following

terms:

"16. *Procedure for recruitment by promotion.*—Recruitment by promotion to various categories of posts in the service shall be made in accordance with the general rules made by the Governor laying down the procedure for promotion in consultation with the Commission. The criteria for promotion shall be as indicated against each in rule 5 to these rules.

Note—The rules laying down the procedure in force at the commencement of these rules are "Uttar Pradesh Promotees by Selection in Consultation with Public Service Commission (Procedure) Rules, 1970" as amended from time to time."

In terms of Rule 22, separate seniority lists are to be maintained for each category of posts in the service.

Rule 28 speaks of relaxation, which is in the following terms:

"28. *Relaxation from other conditions of service.*—Where the Governor is satisfied that the operation of any rule regulating the conditions of service of the members of the service causes undue hardship in any particular case, he may, in consultation with the commission where necessary, notwithstanding anything contained in the rules applicable to the case, by order, dispense with or relax the requirements of that rule to such extent and subject to such conditions as he may consider necessary for dealing with the case in a just and equitable manner."

The matter relating to reservation is governed by The Uttar Pradesh Public services (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994 ('the Act', for short). Section 3 thereof provides for reservation for direct recruitment in terms whereof 21% of the posts is reserved for Scheduled Caste candidates. By a Government order dated 10.10.1994, reservation to the same extent was permitted. However, the roster in regard thereto was prepared stating that the 1st post and the 6th post shall be reserved for the scheduled caste candidate. The seniority list was published on 15.11.1995 wherein the name of the 3rd respondent was shown at serial number 6. It is not in dispute that the name of the appellant figured at serial number 6 in the seniority list published on 28.4.1989. At that

A point of time, the 3rd respondent was out of reckoning. The appointment of the 3rd respondent was on an *ad hoc* basis. It is not in dispute that while making such appointment the provisions of the 1992 Rules have not been complied with. His services were sought to be regularized only in the year 1995.

B Section 8 of the Act reads thus:

> "8. (1) The State Government may, in favour of the categories of persons mentioned in sub-section (1) of section 3, by order, grant such concessions in respect of fees for any competitive examination
> C or interview and relaxation in upper age limit, as it may consider necessary.
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> (2) The Government orders in force on the date of the commencement of this Act, in respect of concessions and relaxations, including concession in fees for any competitive examination or
> D interview and relaxation in upper age limit and those relating to reservation in direct recruitment and promotion, in favour of categories of persons referred to in sub-section (1), which are not in consistent with the provisions of this Act, continue to be applicable till they are modified or revoked, as the case may be."

E It is not disputed that even at the time of regularizing the services of the 3rd respondent the matter was not referred to the Public Service Commissions, although, for the purpose of disposal of this matter, it may not be necessary to delve deep into the question as regards the validity or otherwise of the said action on the part of the State of U.P., we may notice that a
F Constitution Bench of this Court in *Secretary, State of Karnataka & Ors.* v. *Umadevi & Ors.*, (2006) 4 SCALE 197, has emphasized on compliance of requirements of the constitutional scheme in making the appointments as adumbrated in Articles 14 and 16 of the Constitution of India. The Court emphasized that even in the matter of regularization of service the provisions of Articles 14 and 16 of the Constitution cannot be given a complete go-by.
G The extent of the power of the State to make relaxation of the rules also came up for consideration of the Constitution Bench. The Constitution Bench referred to a recent decision of this Court in *Union Public Service Commission* v. *Girish Jayanti Lal Vaghela & Ors.*, (2006) 2 SCLAE 115, wherein it was observed:

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"The main object of Article 16 is to create a constitutional right to equality of opportunity and employment in public offices. The words "employment" or "appointment" cover not merely the initial appointment but also other attributes of service like promotion and age of superannuation etc. The appointment to any post under the State can only be made after a proper advertisement has been made inviting applications from eligible candidates and holding of selection by a body of experts or a specially constituted committee whose members are fair and impartial through a written examination or interview or some other rational criteria for judging the *inter se* merit of candidates who have applied in response to the advertisement made. A regular appointment to a post under the State or Union cannot be made without issuing advertisement in the prescribed manner which may in some cases include inviting applications from the employment exchange where eligible candidates get their names registered. Any regular appointment made on a post under the State or Union without issuing advertisement inviting applications from eligible candidates and without holding a proper selection where all eligible candidates get a fair chance to complete would violate the guarantee enshrined under Article 16 of the Constitution."

In *Suraj Parkash Gupta & Ors.* v. *State of J&K & Ors.*, [2000] 7 SCC 561, this Court opined:

"The decision of this Court have recently been requiring strict conformity with the Recruitment Rules for both direct recruits and promotees. The view is that there can be no relaxation of the basic or fundamental rules of recruitment."

Even the State cannot make rules or issue any executive instructions by way of regularization of service. It would be in violation of the rules made under Article 309 of the Constitution of India and opposed to the constitutional scheme of equality clauses contained in Articles 14 and 16.

{See also *A. Umarani* v. *Registrar, Cooperative Societies & Ors.*, [2004] 7 SCC 112 and *National Fertilizers Ltd. & Ors.* v. *Somvir Singh*, [2006] 5 SCC 493].}

The significant question, which now arises, is interpretation of Rule 5(iii) of the 1992 Rules in terms whereof for the purpose of promotion to the

A post of Deputy Director of Factories (Admn.) at least 5 years service as such from the first day of the year of recruitment is imperative. For the aforementioned purpose, the said rule as was existing prior to 1992 and amendment made in 1992 may be noticed which reads as under:

B	OLD RULE (Existing)	NEW RULE (Substituted)
	5(iii) Deputy Director of Factories (Administration) ---	*5(iii) Deputy Director of Factories (Administration)* ---
C	By promotion on the basis of seniority subject to the rejection of unfit, through the Commission from amongst the Permanent Assistant Director of Factories, who have put in at least five years of continuous service including	By promotion on the basis of seniority subject to the rejection of the unfit, through the Commission from amongst substantively appointed Assistant Director of Factories, who have put in at least five year service as such on the
D	temporary and officiating service.	first day of the year of recruitment.

The aforesaid Rule 5(iii), thus, requires that on the date of selection, the candidate should have been substantively appointed as Assistant Director of Factories. It does not speak of experience in the service alone. The E submission of Mr. Dinesh Dwivedi that the words "as such" referred to 5 years' experience of working in the post and not 5 years' experience in the substantive capacity cannot be accepted. An *ad hoc* employee who has been appointed in violation of the service rules did not hold any post. His experience in the post would mean experience gathered by him after his appointment in the substantive capacity. It is trite law that for the purpose of reckoning F seniority the *ad hoc* services would be taken into consideration only if prior to the appointment of the employee the authorities had complied with the statutory requirements of selecting the candidate. At the relevant point of time, the rule provided for selection through Public Service Commission. The same having not been done, the appointment of the 3rd respondent was void G *ab initio*. The question of regularization of his services, therefore, did not arise.

In *State of Madhya Pradesh & Anr.* v. *Laxmishankar Mishra,* AIR (1979) SC 979, whereupon Mr. Dwivedi placed strong reliance, the appointment was not required to be made in terms of the rules made under H Article 309 of the Constitution of India. The question raised therein was

governed by the M.P. Local Authorities School Teachers (Absorption in Government Service) Rules, 1964, which provided for absorbing teachers serving in Middle Schools and Primary Schools managed by local authorities in Government service. It was in the aforementioned fact situation this Court opined that every High School or Higher Secondary School must of necessity have the post of Head Master/Principal and it was nowhere suggested that there would not be a post of Head Master/Principal. The appointment by the authorities of the schools which were situate in the area being ruled by a Princely State, no statutory rule required to be complied with. We, therefore, do not subscribe to the views of the High Court that even experience gained by the 3rd respondent while acting in *ad hoc* capacity would subserve the requirements of Rule 5(iii) of the 1992 Rules. The 3rd respondent, from 1984 to 1995, did not hold even any temporary or any officiating post. The rule of seniority would, thus, be the usual rule for promotion to the post of Deputy Director. The only *criteria* which appears to have been laid down by reason of 1992 amendment, is that in stead and place of the term 'permanent', the expression 'substantively appointed' has been inserted. The 3rd respondent was substantively appointed only in 1995, prior whereto he was not holding any post. A person may not be a permanent employee for the purpose of gaining experience as the experience gained by him even during his temporary appointment may also be specific appointment. The expression "as such" clearly is referable to the expression "substantively appointed". It has nothing to do with the period of five years as was submitted by Mr. Dwivedi. The said Rule read in its entirety would mean that the candidate for promotion must be appointed substantively and when so appointed, he has to put in at least five years service as such. The expression "first day of the year of recruitment" is also of significance. By reason of *ad hoc* appointment de'hors the rules, nobody is recruited in the service in the eyes of law. The expression "recruitment" would mean recruitment in accordance with the rules and not *de'hors* the same. Absence of experience in substantive capacity is not a mere irregularity in this case. It would not be a mere irregularity, when a person not eligible therefor would be considered for promotion. It may be that for the purpose of direct appointment, experience and academic qualifications are treated to be at par, but when an eligibility *criteria* has been provided in the Rules for the purpose of promoting to a higher post, the same must strictly be complied with. Any deviation or departure therefrom would render the action void.

In *Ram Sarup* v. *State of Haryana & Ors.*, AIR (1978) SC 1536,

A whereupon Mr. Dwivedi placed strong reliance, the appointment of the appellant therein as Labour-cum-Conciliation Officer was found to be irregular. In that view of the matter, the same was not *void*. This Court opined that the said appointment to be irregular, as he did not possess the requisite experience at the relevant time. His services had been regularized and, thus, he became entitled to be considered from the expiry of the period of five years calculated from the date when he was appointed as Chief Inspector of Shops. The said decision has no application in the instant case as the distinction between an appointment in terms of the Rules and *de'hors* the Rules is well known.

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In *A. Umarani* (supra), it was opined:

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> "Regularisation, in our considered opinion, is not and cannot be the mode of recruitment by any "State" within the meaning of Article 12 of the Constitution of India or any body or authority governed by a statutory Act or the Rules framed thereunder. It is also now well settled that an appointment made in violation of the mandatory provisions of the statute and in particular, ignoring the minimum educational qualification and other essential qualification would be wholly illegal. Such illegality cannot be cured by taking recourse to regularisation. (See *State of H.P.* v. *Suresh Kumar Verma.*)
>
> It is equally well settled that those who come by back door should go through that door. (See *State of U.P.* v. *U.P. State Law Officers Assn.*)
>
> Regularisation furthermore cannot give permanence to an employee whose services are *ad hoc* in nature."

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An appointment *de'hors* the Rules would render the same illegal and not irregular as has been held in *Umadevi* (supra) in the following terms :

> "Thus, it is clear that adherence to the rule of equality in public employment is a basic feature of our constitution and since the rule of law is the core of our Constitution, a Court would certainly be disabled from passing an order upholding a violation of Article 14 or in ordering the overlooking of the need to comply with 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

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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." A

It was further observed:

"It has also to be clarified that merely because a temporary employee or a casual wage worker is continued for a time beyond the term of his appointment, he would not be entitled to be absorbed in regular service or made permanent, merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant rules. It is not open to the court to prevent regular recruitment at the instance of temporary employees whose period of employment has come to an end or of *ad hoc* employees who by the very nature of their appointment, do not acquire any right. High Courts acting under Article 226 of the Constitution of India, should not ordinarily issue directions for absorption, regularization, or permanent continuance unless the recruitment itself was made regularly and in terms of the constitutional scheme." B C D

However, in the case of irregular appointment, the Constitution Bench in *Umadevi* (supra) stated as follows: E

"One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in *S.V. NARAYANAPPA* (supra), *R.N. NANJUNDAPPA* (supra), and *B.N. NAGARAJAN* (supra), and referred to in paragraph 15 above, of duly qualified persons in duly sanctioned vacant posts might have been made and the employees have continued to work for ten years or more but without the intervention of orders of courts or of tribunals. The question of regularization of the services of such employees may have to be considered on merits in the light of the principles settled by this Court in the cases above referred to and in the light of this judgment. In that context, the Union of India, the State Governments and their instrumentalities should take steps to regularize as a one time measure, the services of such *irregularly* appointed, who have worked for ten years or more in duly sanctioned posts but not under cover of orders of courts or of tribunals and should further ensure that regular recruitments are undertaken to fill those vacant sanctioned F G H

A posts that require to be filled up, in cases where temporary employees or daily wagers are being now employed. The process must be set in motion within six months from this date. We also clarify that regularization, if any, already made, but not subjudice, need not be reopened based on this judgment, but there should be no further by-passing of the constitutional requirement and regularizing or making B permanent, those not duly appointed as per the constitutional scheme."

The original appointment of 3rd respondent being illegal and not irregular, the case would not come within the exception carved out by the Constitution Bench. Furthermore, relaxation, if any, could have been accorded C only in terms of Rule 28 of the Rules, Rule 28 would be attracted when thereby undue hardship in any particular case is caused. Such relaxation of Rules shall be permissible only in consultation with the Commission. It is not a case where an undue hardship suffered by the 3rd respondent could legitimately been raised being belonging to a particular class of employee. No such case, in law could have been made out. It, in fact, caused hardship D to other employees belonging to the same category, who were senior to him; and thus, there was absolutely no reason why an exception should have been made in his case.

The difference in concept of malice in law and malice on fact stand is E well known. Any action resorted to for an unauthorized purpose would construe malice in law. {See *Smt. S.R. Venkataraman* v. *Union of India & Anr.*, [1979] 2 SCC 491 : AIR (1979) SC 49, *State of A.P.* v. *Goverdhanlal Pitti,* [2003] 4 SCC 739, *Chairman & M.D., BPL Ltd.* v. *S.P. Gururaja,* [2003] 8 SCC 567 and see also *Punjab SEB Ltd.* v. *Zora Singh,* [2005] 6 SCC 776.}

F Malice in its legal sense means malice such as may be assumed for a wrongful act intentionally but without just cause or excuse or for one of reasonable or probable cause. The term malice on fact would come within the purview of aforementioned definition. Even, however, in the absence of any malicious intention, the principle of malice in law can be invoked as has been G described by Viscount Haldane in *Shearer and Anr.* v. *Shields,* (1914) AC 808 at p. 813 in the following terms:

"A person who inflicts an injury upon another person in contravention of the law is not allowed to say that he did so with an innocent mind; he is taken to know the law, and he must act within H the law. He may, therefore, be guilty of malice in law, although, so

far the state of his mind is concerned, he acts ignorantly, and in that sense innocently." A

The said principle has been narrated briefly in *Smt. S.R. Venkataraman* v. *Union of India & Anr.,* AIR (1979) SC 49 : [1979] 2 SCC 491, in the following terms: B

> "Thus malice in its legal sense means malice such as may be assumed from the doing of a wrongful act intentionally but without just cause or excuse, or for want of reasonable or probable cause."

Another aspect of the matter cannot also be overlooked. Apart from the fact that the concerned authorities had made up their minds to promote the 3rd respondent herein from the very beginning, as an approval therefor appears to have been obtained from the Chief Minister only on 20.4.1997; the post was in fact created on the next date, i.e., on 21.4.1997 and the order of promotion was issued on 24.4.1997, although, decision thereupon, as would be evident from the note-sheet, had been taken on 15.4.1997 itself. Such an action is undue haste on the part of the respondents smacks of *mala fide.* C D

Furthermore, for the purpose of promotion to the post in question, cases of at least 5 candidates were required to be considered. The case of 3rd respondent was considered alone, although, there had been 2 other candidates, who fulfilled the same criteria. E

Even no seniority list was prepared at the time of constitution of the Departmental Promotion Committee.

The State proceeded on the basis that the act of conversion would require an amendment to the rules. Whether such an amendment was necessary or not, as was argued by Mr. Dwivedi, looses much significance in view of the fact that the State itself was of the opinion that the same was necessary. Despite the same, the Principal Secretary, Labour Department had put up the note, as noticed hereinabove, before the Chief Minister without bringing the same to her notice. The note was not put up only highlighting the necessity therefor. Two views were placed: Firstly, the conversion would not entail any financial loss and provide promotional avenues for candidates of scheduled castes, which by itself cannot be a matter of public interest; and Secondly, the case of the 3rd respondent was highlighted, stating that he had been in service since 1987-88 with interruption and since 1989 without interruption F G H

A and upto 1995 on *ad hoc* basis and in regular service since 15.11.1995. It was also stated that relaxation could be given to fulfil reservation quota under the 1994 Act, in terms whereof relaxation for qualifying service for the aforementioned post could be accorded. Why the Public Service Commission was ignored, has not been explained. The idea of conversion of the post should have been mooted keeping public interest in view and not the interest B of an individual. The entire approach of the authorities of the State of U.P, thus, was only for achieving a private interest and not the public interest. It was in that sense, the action suffered from the vice of malice in law. It has not been disputed that there were other employees also who belonged to scheduled caste and were senior to the 3rd respondent.

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It has also not been disputed that no relaxation could be granted for promotion in terms of 1994 Act. Five years' experience from the date of substantive requirement, thus, being an essential qualification, no relaxation could have been given in that regard to the 3rd respondent. The 1994 Act was not enacted for meeting such a contingency. In that view of the matter D both the Chief Minister as well as the Principal Secretary themselves did not possess any authority to make any relaxation and in that view of the matter they must be held to have misdirected themselves in law necessitating interference by the superior courts by way of judicial review. When such an illegality is committed, the superior court cannot shut its eyes. Contention of E such glaring illegality would create a dangerous trend in future. It is one thing to say that conversion of one post to another may be done in accordance with law having regard to the public purpose in mind but a statutory power, it is well-settled, cannot be exercised so as to promote a private purpose and the same subverts the same.

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A discretionary power as is well known cannot be exercised in an arbitrary manner. It is necessary to emphasize that the State did not proceed on the basis that the amendment to the Rules was not necessary. The action of a statutory authority, as is well known, must be judged on the basis of the norms set up by it and on the basis of the reasons assigned therefor. The G same cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. {See *Mohinder Singh Gill & Anr.* v. *The Chief Election Commissioner, New Delhi & Ors.*, AIR (1978) SC 851, *Commissioner of Police* v. *Gordhandas Bhanji,* AIR (1952) SC 16 and also *Hindustan Petroleum Corpn. Ltd.* v. *Darius Shapur Chenai,* [2005] 7 SCC 627].}

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In terms of the 1994 Act, the reservation was to be confined to 21%.

There were 6 posts. If the roster was to be followed, 2 posts would be reserved for the Scheduled Caste candidates, which is impermissible. A

Mr. Dwivedi submitted that the post of Deputy Director of Factories (Engineering) would be forming separate cadre. We do not agree. It is not disputed that the said post has also been considered at par with the post of Deputy Director of Factories (Administration), as the qualification for holding the said post was the same. B

In a case of this nature, the rule of strict construction is required to be applied and the action on the part of the State must be judged in terms thereof. C

Equality clauses contained in Articles 14, 15 and 16 of the Constitution of India may in certain situations have to be considered as the basic structure/ features of the Constitution of India. We do not mean to say that all violations of Article 14 or 16 would be violative of the basic features of the Constitution of India as adumbrated in *Kesvananda Bharati* v. *State of Kerala,* [1973] 4 SCC 225 : [1973] Supp. SCR 1. But, it is trite that while a law is patently arbitrary, such infringement of the equality clause contained in Article 14 or Article 16 may be held to be violative of the basic structure of the Constitution. {See *Waman Rao* v. *Union of India,* [1981] 2 SCC 362, *Maharao Saheb Shri Bhim Singhji, etc.* v. *Union of India & Ors.,* AIR (1981) SC 234 and *Minerva Mills Ltd. & Ors.* v. *Union of India & Ors.,* [1980] 3 SCC 625].} A statute professing division amongst citizens, subject to Articles 15 and 16 of the Constitution of India must pass the test of strict scrutiny. Article 15(4) and Article 16(4) profess to bring the socially and educationally backward people to the forefront. Only for the purpose of invoking equality clause, the makers of the Constitution thought of protective discrimination and affirmative action. Such recourse to protective discrimination and affirmative action had been thought of to do away with social disparities. So long as social disparities among groups of people are patent and one class of citizens in spite of best efforts cannot effectively avail equality of opportunity due to social and economic handicaps, the policy of affirmative action must receive the approval of the constitutional courts. For the said purpose, however, the qualifications laid down in the Constitution for the aforementioned purpose must be held to be the *sine qua non.* Thus, affirmative action in essence and spirit involves classification of people as backward class of citizens and those who are not backward class of citizens. A group of persons although are not as such backward or by passage of time ceased to be so would come within the D E F G H

A purview of the creamy layer doctrine evolved by this court. The court by evolving said doctrine intended to lay a law that in terms of our constitutional scheme no group of persons should be held to be more equal than the other group. In relation to the minorities, a 11-Judge Bench of this Court in *T.M.A. Pai Foundation* v. *State of Karnataka,* [2002] 8 SCC 481 categorically held
B that protection is required to be given to the minority so as to apply the equality clauses to them *vis-a-vis* the majority. In Islamic *Academy of Education* v. *State of Karnataka,* [2003] 6 SCC 697, it was opined that the minority have more rights than the majority. To the said extent *Islamic Academy of Education* (supra) was overruled by a 7-Judge Bench of this Court in *P.A. Inamdar* v. *State of Maharashtra,* [2005] 6 SCC 537].

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An executive action or a legislative Act should also be commensurate with the dicta laid down by this Court in *Indra Sawhney* v. *Union of India,* [1992] Supp. 2 SCR 454 ('Indra Sawhney-I') and followed in *Ashoka Kumar Thakur* v. *State of Bihar & Ors.,* [1995] 5 SCC 403 and *Indra Sawhney* v. *Union of India,* [1999] Supp. 5 SCR 229 ('Indra Sawhney-II').

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In *Umadevi* (Supra), the Constitution Bench referring to *Kesavananda Bharati* (supra), *Indra Sawhney-I* (supra) and *Indra Sawhney-II* (supra), opined:

> "These binding decisions are clear imperatives that adherence to Articles 14 and 16 of the Constitution is a must in the process of
E public employment."

We are not concerned with the reasonableness or otherwise of the percentage of reservation. 21% of the posts have been reserved for Scheduled Tribe candidates by the State itself. It, thus, cannot exceed the quota. It is not disputed that in the event of any conflict between the percentage of reservation
F and the roster, the former shall prevail. Thus, in the peculiar facts and circumstances of this case, the roster to fill up the posts by reserved category candidates, after every four posts, in our considered opinion, does not meet the constitutional requirements.

For the reasons aforementioned, the impugned judgment cannot be
G sustained.

The question, which now arises for consideration, is as to whether this Court, despite gross illegalities committed by the State, would refuse to exercise its discretionary jurisdiction under Article 136 of the Constitution of India. The order of promotion was issued on 25.4.1997. The writ petition was filed
H within a few days thereof, i.e., on 2.5.1997. As the 3rd respondent had joined

the post, no stay had been granted by the High Court. He might have been working for about 9 years, but he was holding the post during the pendency of the writ petition. The appellant was promoted only in the year 2001. He had to suffer the ignominy of working under a junior for a long time. The fact that the 3rd respondent would retire in May, 2007 is again wholly immaterial. It is of not much relevance.

It is also not correct to contend that the selection was on merit basis. If the post was not reserved, in no way the 3rd respondent could have been promoted. He might not have come within the purview of zone of consideration. This case points out how the illegalities are committed by the State causing deprivation of legitimate right of promotion of more meritorious and senior candidates.

It is not a case, where we should refrain ourselves from exercising our discretionary jurisdiction. For the reasons aforementioned, the impugned judgment cannot be sustained. It is set aside accordingly. The appeal is allowed. The respondents shall bear the costs of the appellant throughout. Such costs would be borne by the State as also the 3rd respondent equally, which is assessed at Rs.50,000/-.

B.B.B. Appeal allowed.