(2012) 07 JH CK 0068

Jharkhand High Court

Case No: Writ Petition (S) No. 5924 of 2003

Ramesh Mahto		APPELLANT
	Vs	
State of Jharkhand and Others		RESPONDENT

Date of Decision: July 31, 2012

Acts Referred:

- Constitution of India, 1950 - Article 14, 144, 16, 162, 226

Citation: (2012) 4 JCR 1

Hon'ble Judges: Alok Singh, J

Bench: Single Bench

Advocate: V. Shivnath, M.M. Sharma and Lakhan Sharma, for the Appellant; Anil Kumar Sinha, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

Alok Singh, J.
Large number of cases are pending regarding regularization of service. Learned Advocate General was requested to address the Court. On being asked, as to whether, in view of the judgment of the Apex Court in the case of Secretary, State of Karnataka and Others Vs. Umadevi and Others, State Govt. has enacted any Rule or formulated statutory scheme for the regularization of irregularly appointed temporary or casual wage worker who have worked continuously for ten years prior to the decision of the Court of Uma Devi (supra) on 1004.2006.

2. Mr. A.K. Sinha, learned Advocate General submits that since no Rule or statutory scheme has been enacted within six months, therefore, it shall be presumed that State has declined regularization of employees either considering them as back door entrant or thinking that they are no more required in the services.

3. Hon''ble Apex Court in the case of Uma Devi (supra) in paragraphs No. 43, 47, 53, 54 has held as under :--

43. 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 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 appointment. It has also to be (sic) 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 constellational scheme. Merely because, an employee had continued under cover of an order of Court, which we have described as litigious employment in the earlier part of the judgment, he would not be entitled to any right to be absorbed or made permanent in the service. In fact, in such cases, the High Court may not be justified in issuing interim directions, since, alter all, if ultimately the employee approaching it is found entitled to relief, it may be possible for it to mould the relief in such a manner that ultimately no prejudice will be caused to him, whereas an interim direction to continue his employment would hold up the regular procedure for selection or impose on the State the burden of paying an employee who is really not required. The Courts must be careful in ensuring that they do not interfere unduly with the economic arrangement of its affairs by the State or its instrumentalities or lend themselves the instruments to facilitate the bypassing of the constitutional and statutory mandates.

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 recognized 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 concerned cases, 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.

53. One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in S.V. NARAYANAPPA (supra), R.N. NANJUNDAPPA (supra), and B.N. NAGARAJAN (supra), and referred to in paragraph 15 above, of duly qualified persons in duly sanctioned vacant posts might have been made and the employees have continued to work for ten years or more but without the intervention of orders of Courts or of tribunals. The question of regularization of the services of such employees may have to be considered on merits in the light of the principles settled by this Court in the cases above referred to and in the light of this judgment. In that context, the Union of India, the State Governments and their instrumentalities should take steps to regularize as a one time measure, the services of such irregularly appointed, who have worked for ten years or more in duly sanctioned posts but not under cover of orders of Courts or of tribunals and should further ensure that regular recruitments are undertaken to fill those vacant sanctioned posts that require to be filled up, in cases where temporary employees or daily wagers are being now employed. The process must be set in motion within six months from this date. We also clarify that regularization, if any already made, but not sub-judice, need not be reopened based on this judgment, but there should be no further by-passing of the constitutional requirement and regularizing or making permanent, those not duly appointed as per the constitutional scheme.
54. It is also clarified that those decisions which run counter to the principle settled in this decision, or in which directions running counter to what we have held herein, will stand denuded of their status as precedents.

4. Hon''ble Apex Court in the case of State of Karnataka and Others Vs. M.L. Kesari and Others, in para 7, 8, 9, 10, 11 has held as under :--

7. It is evident from the above that there is an exception to the general principles against regularization enunciated in Umadevi, if the following conditions are fulfilled :

(i) The employee concerned should have worked for 10 years or more in duly sanctioned post without the benefit or protection of the interim order of any Court or tribunal. In other words, the State Government or its instrumentality should have employed the employee and continued him in service voluntarily and continuously for more than ten years.

(ii) The appointment of such employee should not be illegal, even if irregular. Where the appointments are not made or continued against sanctioned posts or where the persons appointed do not possess the prescribed minimum qualifications, the appointments will be considered to be illegal. But where the person employed possessed the prescribed qualifications and was working against sanctioned posts, but had been selected without undergoing the process of open competitive selection, such appointments are considered to be irregular.

8. Umadevi casts a duty upon the concerned Government or instrumentality, to take steps to regularize the services of those irregularly appointed employees who had served for more than ten years without the benefit or protection of any interim orders of Courts or tribunals, as a one-time measure. Umadevi, directed that such one-time measure must be set in motion within six months from the date of its decision (rendered on 10.4.2006).

9. The term one-time measure has to be understood in its proper perspective. This would normally mean that after the decision in Umadevi, each department or each instrumentality should undertake a one-time exercise and prepare a list of all casual, daily-wage or ad hoc employees who have been working for more than ten years without the intervention of Courts and tribunals and subject them to a process verification as to whether they are working against vacant posts and possess the requisite qualification for the post and if so, regularize their services.

10. At the end of six months from the date of decision in Umadevi, cases of several daily-wage/ad-hoc/casual employees were still pending before Courts. Consequently, several departments and instrumentalities did not commence the one-time regularization process. On the other hand, some Government departments or instrumentalities undertook the one-time exercise excluding several employees from consideration either on the ground that their cases were pending in Courts or due to sheer oversight. In such circumstances, the employees who were entitled to be considered in terms of Para 53 of the decision in Umadevi, will not lose their right to be considered for regularization, merely because the onetime exercise was completed without considering their cases, or because the six month period mentioned in para 53 of Umadevi has expired. The one-time exercise should consider all daily-wage/ adhoc/those employees who had put in 10 years of continuous service as on 10.4.2006 without availing the protection of any interim orders of Courts or tribunals. If any employer had held the one-time exercise in terms of para 53 of Umadevi, but did not consider the cases of some employees who were entitled to the benefit of para 53 of Umadevi, the employer concerned should consider their cases also, as a continuation of the one-time exercise.; The one time exercise will be concluded only when all the employees who are entitled to be considered in terms of Para 53 of Umadevi, are so considered.

11. The object behind the said direction in para 53 of Umadevi is twofold. First is to ensure that those who have put in more than ten years of continuous service

without the protection of any interim orders of Courts or tribunals, before the date of decision in Umadevi was rendered, are considered for regularization in view of their long service. Second is to ensure that the departments/instrumentalities do not perpetuate the practice of employing persons on daily-wage/ad-hoc/casual for long periods and then periodically regularize them on the ground that they have served for more than ten years, thereby defeating the constitutional or statutory provisions relating to recruitment and appointment. The true effect of the direction is that all persons who have worked for more than ten years as on 10.4.2006 (the date of decision in Umadevi) without the protection of any interim order of any Court or tribunal, in vacant posts, possessing the requisite qualification, are entitled to be considered for regularization. The fact that the employer has not undertaken such exercise of regularization within six months of the decision in Umadevi or that such exercise was undertaken only in regard to a limited few, will not disentitle such employees, the right to be considered for regularization in terms of the above directions in Umadevi as a one-time measure.

5. Almost in all the pending cases, petitioners are seeking mandamus commanding the State authorities to regularise their services, since they are working for 10-20-25 years.

6. In some cases, petitioners are asserting that some of their similarly situated colleagues have already been regularised under the office order/circular issued by respective Departments, while petitioners were illegally ignored which amounts to discrimination to them hence is in violation of Article 14 of the Constitution of India. Therefore, mandamus be issued in their favour to regularise them pursuant to the office order/circular of the Department as their colleagues, similarly situated employees were regularised.

7. In the firm opinion of this Court, mandamus can be issued to compel an authority to do something, where statute imposes a legal duty on that authority and aggrieved party has a legal right under the statute.

8. Since Govt. has not formulated any statutory scheme or enacted any Law/ Rule/Regulation in the light of the observation made by Apex Court in Uma Devi as well as M.L. Kesari case (supra), therefore, as on day no mandamus can be issued by this Court asking the authority to consider the case of the petitioner for regularization. Right of regularization can be created by the State by enacting Law or Statutory Scheme.

9. Hon''ble Apex Court in the case of Punjab Water Supply and Sewerage Board, Hoshiarpur Vs. Ranjodh Singh and Others, in para 14 has held as under :

Once it is held that the terms and conditions of service including the recruitment of employees were to be governed either by the statutory rules or rules framed under the proviso to Article 309 of the Constitution of India, it must necessarily be held that any policy decision adopted by the State in exercise of its jurisdiction under

Article 162 of the Constitution of India would be illegal and without jurisdiction. In A. Umarani Vs. Registrar, Cooperative Societies and Others, , a three-Judge Bench of this Court has opined: (SCC p. 126, para 45)

45. No regularisation is, thus, permissible in exercise of the statutory power conferred under Article 162 of the Constitution if the appointments have been made in contravention of the statutory rules.

It was further held : (SCC pp. 126-27, para 49)

49. It is trite that appointments cannot be made on political considerations and in violation of the government directions for reduction of establishment expenditure or a prohibition on the filling up of vacant posts or creating new posts including regularisation of daily-waged employees. (See Municipal Corporation, Bilaspur and Another Vs. Veer Singh Rajput and Others, .

10. Hon''ble Apex Court in the case of State of Orissa and others v. Prasana Kumar Sahoo, (2007) 15 SCC 129 in para 12, 13 and 14 has held as under :--

12. Even a policy decision taken by the State in exercise of its jurisdiction under article 162 of the Constitution of India would be subservient to the retirement rules framed by the state either in terms of a legislative Act or the proviso appended to Article 309 of the Constitution of India. A purported policy decision issued by way of an executive instruction cannot override the statute or statutory rules far less the constitutional provisions.

13. In A. Umarani Vs. Registrar, Cooperative Societies and Others, , a three-Judge Bench of this Court has opined : (SCC p. 126, para 45)

45. No regularisation is, thus, permissible in exercise of the statutory power conferred under Article 162 of the Constitution if the appointments have been made in contravention of the statutory rules.

14. The Circular Letter dated 21-3-1995 even does not purport to lay a policy decision relating to regularisation or absorption of the census employees. It only provided for relaxation of age, such relaxation was also subject to strict compliance with the recruitment rules. If by reason of some misconception or otherwise, the Tribunal had granted some relief in favour of some census employees, the same by itself, in our opinion, would not confer any legal right upon a person for being absorbed in State services without compliance with the mandatory provisions of the recruitment rules and the constitutional scheme adumbrated under Article 16 of the Constitution of India.

11. In view of the above dictum of the Apex Court, the circular issued by some of the departments for regularisation cannot be said to have statutory force, therefore, simply, because some of the similarly situated employees have been regularized pursuant to such circular shall not give rise any legal right to the petitioner to seek

writ of mandamus for their regularisation, too.

12. There is no valid explanation as to why State has not taken decision as yet despite clear direction issued by the Apex Court. In view of Article 144 of the Constitution of India, all authorities, civil and judicial shall act in aid of the Supreme Court. Therefore, State cannot say that no statutory scheme is required for the regularisation. State of Jharkhand cannot escape from the legal obligation to come out with one time statutory scheme as directed by Apex Court.

13. Learned Advocate General, faced with above, has fairly submitted that State Govt. shall take final decision in the matter of enactment of Rule/Regulations or Statutory Scheme within six months and the enactment/scheme so formulated shall be circulated to all the departments of the State Govt. to consider the case of every individual to find out as to whether such individual is entitled for regularisation. Authority concerned shall complete the exercise within a year from the date of formulation of statutory provisions in the light of the observations made hereinabove in two judgments of the Apex Court.

14. Learned Advocate General further contends that competent authority shall record the findings as to whether initial appointment was legal or irregular and as to whether services of such temporary employee was for a particular project and for specified period and is no more required in view of the completion of the project concerned.

15. In the firm opinion of this Court, learned Advocate General is right in submitting that after enactment of the scheme, competent authority shall examine as to whether particular employee was given appointment strictly following the procedure of public employment, has requisite qualification for the post, was given appointment against the existing sanctioned vacancy and appointment was made by the competent officer.

16. In view of the above discussion, case of the petitioner shall also be considered accordingly. Petition stands disposed of accordingly.