

IN THE HIGH COURT OF DELHI AT NEW DELHI

W.P. (C) 7217/2004

Reserved on: July 19, 2011

Decision on: July 29, 2011

NALINI PRABHAKAR

..... Petitioner-in-person.

versus

UNIVERSITY OF DELHI & ANR

..... Respondents

Through: Ms. Beenashaw N. Soni, Advocate.

CORAM: JUSTICE S. MURALIDHAR

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| 1. Whether Reporters of local papers may be allowed to see the judgment? | No |
| 2. To be referred to the Reporter or not? | Yes |
| 3. Whether the judgment should be reported in Digest? | Yes |

JUDGEMENT

29.07.2011

1. This writ petition is by a lecturer in the School of Correspondence Courses and Continuing Education (Respondent No. 2), seeking the quashing of a decision dated 30th September, 2003 whereby the Executive Council ('EC') of the University of Delhi, Respondent No. 1, did not accept the recommendations of the Managing Committee ('MC') of Respondent No. 2 recommending the regularisation of the services of the Petitioner. The further prayer in the writ petition is that a mandamus should be issued to Respondent No. 1 University to reconsider the case of the Petitioner for regularisation as lecturer in English in Respondent No. 2.

2. Pursuant to an advertisement dated 8 August, 1995 the Petitioner applied for appointment to the post of lecturer in English in Respondent No. 2. A regularly constituted Selection Committee which met on 9th February 1996 selected the Petitioner and recommended her name for the panels for permanent as well as temporary posts.

The EC of Respondent No. 1 University at its meeting held on 14 March, 1996 approved both panels. However, since no permanent posts were available at that point in time the Petitioner was appointed on a temporary basis by a letter dated 17 July, 1996 issued by Respondent No. 2. The Petitioner states that she has been working continuously as a lecturer in the post since then.

3. On 20th October 1996 another advertisement was issued for one permanent post and one temporary post of lecturer in English in Respondent No. 2. However, no meeting of the Selection Committee took place as the Chairman of the MC of Respondent No. 2 decided not to proceed with the selection pending restructuring of Respondent No. 2. The applications received by Respondent No. 2 pursuant to the aforementioned advertisement were, therefore, not finalised. No fresh advertisement for filling up any permanent post in English in Respondent No. 2 has been issued since.

4. The Petitioner states that after the meeting of the Selection Committee held on 9th February 1996 approving her selection, several posts in the Department of English fell vacant either due to retirement or death of teachers. However, Respondent No. 2 made no attempt to fill up any of the said posts through a regular process. The Petitioner submitted a representation dated 5th December, 2001 to Respondent No. 2 to consider her case for regularisation in the post of lecturer in English. The Department of English, wrote a letter dated 14th of December 2001 to the Principal of Respondent No. 2 requesting that the Petitioner's application be processed at the earliest. The MC of Respondent No. 2 considered the request in September 2002 but turned it down. The Petitioner then represented to the Chairperson of the MC of Respondent No. 2 on 13th November, 2002. In this she pointed out that her case was no different from that of Dr. Tapan Biswal whose services had been regularised on the recommendation of the MC. The MC of Respondent No. 2 then met in April 2003 and this time unanimously resolved that the Petitioner's services as lecturer in English should be regularised. It referred the matter to the EC of Respondent No. 1 University for approval. However, the EC which met on 30 September, 2003 resolved not to accept the recommendation of the MC.

5. The Petitioner has set out several aspects of similarity between the case of Dr. Tapan Biswal and her own. He was also selected by a duly constituted Selection Committee which met on 30 September, 1988 and was recommended both for temporary as well as permanent posts. Due to non-availability of a permanent post, he too was appointed on temporary basis and was working against a temporary vacancy for over seven years. Subsequently, by a decision of the MC his services were regularised and this was also accepted by the EC.

6. In response to the writ petition, a counter affidavit has been filed on behalf of both the Respondents. In the counter affidavit it is stated that Dr Tapan Biswal was appointed on a temporary basis with effect from 9 January, 1989 but his qualifications were different. It is stated that each case is to be considered on the basis of individual merit. On this basis it is stated that there cannot be a comparison between the Petitioner and Dr. Tapan Biswal. In the rejoinder to the counter affidavit the Petitioner referred to the meeting of the MC of 10th April 2003 which noted the similarities between both the cases and that it was on that basis that the MC recommended to the EC that Petitioner's services should be regularised. The Petitioner also enclosed with the rejoinder a copy of the note prepared in Respondent No. 1 University which noted the similarity between the two cases.

7. The Registrar of Respondent No. 1 University filed an additional affidavit in which it was stated that the Petitioner's case can be considered for regularisation only as and when any regular vacancy is advertised in the concerned subject and in the event of the Petitioner applying for the same. It was further stated that the Petitioner cannot escape the process of an open and fair selection process meant for regular appointment. Reference has been made in the said affidavit to the observations of the Supreme Court in the decision in *State of Karnataka v. Umadevi (2006) 4 SCC 1*. It is further stated that "any wrong committed in the past or any appointment made earlier in any circumstances does not give any right to the Petitioner and cannot be repeated again to favour the Petitioner."

8. The Petitioner in reply to the aforementioned affidavit stated that she has always been willing to face any Selection Committee and that she had applied pursuant to the advertisement issued for a regular appointment. It was Respondent No. 2 School which did not proceed with the selection process. She pointed out that there were eight vacant posts in the Department of English of Respondent No. 2 but it had made no attempt in the last 10 years to fill up the posts. She also submitted that some of the observations in *Umadevi* supported her case since her appointment was pursuant to a selection by a properly constituted Selection Committee in terms of the applicable rules.

9. On 8 December, 2009 during the course of arguments this Court was informed by counsel for the Respondents that a letter had been addressed by the University Grants Commission ('UGC') to Respondent No. 2 referring to a ban imposed by the Ministry of Human Resource Development ('HRD Ministry') against the filling up of vacant posts of teaching and non-teaching staff without prior approval of the UGC. This Court required the Respondents to place on record the ban order and also file an additional affidavit specifically dealing with the case of Dr. Tapan Biswal and the Petitioner. Pursuant to the above order the Respondents filed an additional affidavit on 23rd January 2010. Reference was made in this affidavit to an expert committee constituted by the UGC in 2003 under the chairmanship of Prof H.P. Dixit for the purposes of laying down norms for release of maintenance grants to Respondent No. 2. It is stated that the recommendations of the said committee were under consideration and therefore appointments were not being made by Respondent No. 2. In addition, by a letter dated 31st July, 2009 the University had advised all the colleges, including Respondent No. 2, to not conduct any selection to fill up posts of lecturers and assistant professors on permanent basis till further communication from the University. This was followed by an Office Memorandum ('OM') dated 24th November 2009 from Respondent No. 1 further advising colleges to make recruitment and appointment only from candidates who had qualified the NET/SLET as mandated by the UGC Regulations of 2009. Reference was also made to an interim order passed by the High Court in W. P. (C) 16258 of 2006 (*Sambhavana. v. University of Delhi*) on 4 April, 2007 regarding appointment of teaching staff in the physically handicapped ('PH') category. In para 6 of this affidavit it was stated that Mr. Tapan Biswal was regularised since a sanctioned

post was available at the time whereas in the case of the Petitioner there was no such existing sanctioned post. It was submitted that there cannot be any deemed regularisation of the Petitioner's services.

10. The Petitioner filed a response to the above additional affidavit on 26th February 2010. She placed on record the response received by her from Respondent No. 2 to her application under the Right to Information Act, 2005 ('RTI Act') furnishing her the extracts of minutes of the meeting of the MC held on 10 April, 2003. The MC in the said minutes noted that the English Department of Respondent No.2 had in fact been understaffed during the previous two to three years. It noted that during the time when the Petitioner sought regularisation, permanent posts had fallen vacant one after the other. The meeting also noted that "this case is similar to that of Dr. Tapan Biswal whose services had been regularised". The Petitioner also placed on record a letter dated 6th November 2008 of Respondent No. 2 in reply to an application under the RTI Act confirming that nine posts were lying vacant in the Department of English. In another response, Respondent No. 2 informed the Petitioner that nearly 10 posts had fallen vacant in the Department of English since 1st May 1996. The Petitioner was also furnished a copy of an affidavit dated 18th April 2007 filed by Respondent No. 2 in *Sambhavana. v. University of Delhi* in which it was stated that there were 54 vacant posts in Respondent No. 2 School of Open Learning.

11. In light of the above affidavit and in view of what transpired at the hearing on 21st September 2010, the Court passed the following order:-

“21.09.2010

In response to orders passed by this Court on the last date dated 14th July 2010, an additional affidavit has been filed on behalf of the Respondents stating that there was an inadvertent error of fact in para 6 of its earlier affidavit wherein it is stated that Mr. Tapan Biswas was regularized against a sanctioned post existing at that time whereas in the case of the Petitioner there was no existing post and, therefore, no appointment could be made in that regard.

Ms. Beenashaw Soni learned counsel appearing on behalf of Respondents submits on instructions that the error that has crept up in the additional affidavit referred above was a bonafide

inadvertent error of facts and according to her, Mr. Tapan Biswas was regularized in the year 2000 after he had put in 10 years temporary service but according to Ms. Beenashaw Soni appearing on behalf of Respondents, the Petitioner could not be regularized in view of judgment of the Supreme Court dealing with temporary appointments in *Uma Devi's* case. The Petitioner has been given an opportunity to deal with this stand of the Respondents and file her written synopsis on record within three weeks. The Respondents may also file their written synopsis within the same time period of three weeks.

List on 3rd December 2010.”

12. A further affidavit was filed on behalf of the Respondents on 17th September, 2010 stating that “due to typographical mistake (copy paste) and oversight some incorrect information has come on affidavit, i.e., in para 6 of the affidavit it has inadvertently been stated that there was no existing sanctioned post and therefore, no appointment can be made with respect to the Petitioner”. An unconditional apology was tendered for the mistake that had crept into the affidavit dated 23rd January 2010. It was reiterated that the Petitioner could not claim any automatic right for regularization and that a fresh process of selection needed to be initiated.

13. The Petitioner filed a further rejoinder-affidavit countering the above submissions and pointed out that the Respondents had deliberately tried to mislead this Court by stating that there were no vacancies and that this was not a mere typographical mistake.

14. The Petitioner who appeared in person submitted that at the time when she applied for regularization there were vacant posts in the Department of English of Respondent No. 2. The MC of Respondent No. 2 which met on 10th April 2003 noted that there were at least four vacancies. It was further noted that her case was similar to that of Dr. Tapan Biswal. The stand subsequently taken in the affidavits filed in the present case on behalf of Respondent No. 2 was contrary to the records. She submitted that the Executive Director (‘ED’) of Respondent No. 2, who filed all these affidavits, had misled the Court by making wrong statements and making it appear that there were no vacant posts and that the Petitioner was seeking regularization by avoiding a proper selection process. The Petitioner submitted that after October 1996 no advertisement

was issued for regular selection and even the applications made pursuant to the said advertisement were not processed because the Principal of Respondent No. 2 decided not to proceed with the selection on grounds of restructuring of Respondent No. 2. She further referred to the letter of the UGC which only required the MC to take prior approval of the UGC. There was nothing to show that any prior approval of the University was sought by the MC at any point in time. The Petitioner further submitted that the decision of the Supreme Court in *Umadevi*, particularly, the observations in para 44, fully supported her case. She submitted that she has been working continuously on a temporary post since July 1996 without a break and not on account of any interim order of any Court or Tribunal. By keeping her temporary for over 14 years the Respondents had violated her fundamental rights by denying her the benefit of regularization to which she was entitled in law.

15. Appearing on behalf of both Respondent No. 1 University as well as Respondent No. 2 School, Ms. Beenashaw N. Soni, learned counsel vehemently opposed the prayers made by the Petitioner. She reiterated that in the absence of any regular selection taking place, the Petitioner's services could not be regularized. According to her, the terms of appointment of the Petitioner made it clear that the appointment was a purely temporary one. Although she did not dispute that there were regular vacancies available at the time the Petitioner sought regularization, Respondent No. 2 could not go ahead with the regularization on account of the ban imposed by the UGC by the letter dated 17th June, 2004 followed by the continuing ban by the University of Delhi by its letter dated 31st July 2009 and 24th November, 2009. According to her, Respondent No. 2 School had written to the UGC for approval for filling up the vacancies since 2002 but no such clearance had been received. She submitted that the observations in the decision of the Supreme Court in *Umadevi* precluded Respondent No. 2 from regularizing the services of the Petitioner. Moreover, the recommendations of the Expert Committee constituted by the UGC in 2003 for laying down norms for release of maintenance grant to Respondent No. 2 were awaited. She submitted that as and when a regular vacancy would arise it would be filled up through an advertisement and the case of the Petitioner would be considered if she applied pursuant to such advertisement.

16. The first question to be considered is whether the Petitioner has any right to be regularized as a permanent lecturer in English of Respondent No. 2. Learned counsel for Respondent No. 2 has placed considerable reliance on the observations of the Supreme Court in *Umadevi* to contend that the Petitioner had no such right to be regularized. It is submitted that unless the post in question is advertised for regular selection and the Petitioner applies pursuant to such advertisement, her case for regular appointment cannot be considered.

17. In *State of Karnataka v. Umadevi* the Supreme Court was concerned with the problem arising from the appointment of a large number of employees by the State government on *ad hoc* basis without following the applicable rules for appointments. The persons appointed on *ad hoc* basis through the ‘back door’ continued for several years. In this context it was observed in *Umadevi* that the mere continuation of such persons for a large number of years on *ad hoc* basis did not give them an automatic right for regularization. The Supreme Court made a distinction between such backdoor appointments contrary to the rules and appointments made consistent with the applicable rules but to temporary posts or on temporary basis. A clear exception was made in such cases as is evident from the following observations in para 44 of the decision in *Umadevi* (AIR, p. 1826):

“44. One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in *S.V. Narayanappa AIR 1967 SC 1071*, *R.N. Nanjundappa (1972) 1 SCC 409*, and *B.N. Nagarajan (1979) 4 SCC 50*, 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 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 permanent, those not duly appointed as per the constitutional scheme.”

18. It is plain from the above observations in para 44 that the Supreme Court cast an obligation on State and entities of State to take steps to regularize as a one-time measure services of those who had been irregularly appointed and worked on duly sanctioned posts for a large number of years "but not under cover of orders of Courts or Tribunals". Further such process of regularisation had to be “set in motion within six months from now.” The judgment in *Umadevi* was delivered on 10th April 2006 and was binding on all state entities including Respondent Nos 1 and 2. However, they appear to have misconstrued the judgment as preventing them from regularizing the services of the Petitioner. They made no effort to initiate the steps to regularise her services.

19. The Respondents overlooked the fact that the Petitioner was appointed through a process of selection consistent with the rules. A duly constituted Selection Committee found her to be suitable for appointment to both a permanent post as well as a temporary post. It was after this selection that the Petitioner was appointed on a temporary basis in Respondent No. 2 as lecturer in English way back in July 1996. Consequently, this is not a case where the appointment was made contrary to the Rules. The Petitioner was at that stage not appointed to a permanent post only because there were already persons working in permanent posts in the department and there was no vacancy available. The Petitioner continued as such thereafter. She remains a lecturer in English on a temporary basis till date, i.e., more than 15 years after her initial appointment.

20. It is not as if the Petitioner has avoided any process of selection for appointment as a lecturer on a regular basis. It is not denied that applications received by Respondent No. 2 pursuant to an advertisement issued in October 1996 for appointment on regular

basis to the permanent post were not processed only because Respondent No. 2 decided that it should await the restructuring of Respondent No. 2. This reason was not known to the Petitioner till she was provided with the minutes of the MC which met in October 2003. However, the documents produced reveal that the MC as well as the Department of English were supporting the Petitioner's case for regularization. Way back on 14th December 2001, the Teacher In-charge of the Department (English) made a strong recommendation for regularization of the services of the Petitioner. The In-charge informed the Principal that the Petitioner had worked in the Department for more than five years and had performed her duties "efficiently and with a rare commitment in spite of being under tremendous mental strain due to uncertainty concerning her career". The Teacher In-charge further noted, "the Department noted the fact that there have been many precedents in the University where the services of temporary Lecturers have been regularized through the circulation of papers including that of Dr. Tapan Biswal whose services were regularized in the Department of Political Science of Correspondence Courses through the circulation of papers in 1999-2000." The MC which met on 27th September 2002 also considered the Petitioner's case sympathetically and decided that the Petitioner would nevertheless have to face a new selection committee. It recommended that all the posts of lecturers lying vacant in the School be advertised immediately. Yet the post was not advertised. In the meeting of the MC on 10th April 2003, it was noted that the Chairman of the MC had stayed the selection process midway "in view of the pending restructuring of the set up of the School of Correspondence Courses". Therefore, for no fault of the Petitioner's she could not apply for appointment on a regular basis to a permanent post.

21. Ms. Soni, learned counsel for the Respondents was unable to inform this Court when exactly this process of restructuring, which began sometime in October 1996, would come to an end. It seems unreasonable that on the pretext of restructuring Respondent No. 2 all appointments to permanent posts that have been falling vacant over the years in the various departments of Respondent No. 2 would not be filled up indefinitely. This by itself renders arbitrary the omission of Respondent No. 2 to keep its teachers on a temporary basis for a long number of years. Respondent No. 2 has been unable to deny that over the years several posts have fallen vacant in the

Department of English. As is clear from the reply of Respondent No. 2 to the Petitioner, pursuant to her application dated 11th February 2010 under the RTI Act, ten posts had fallen vacant since 1st May, 1996 due to retirement, resignation or death. It is indeed inexplicable why Respondent No. 2 would not want to fill up the vacant posts. In the affidavit filed by Respondent No. 2 in *Sambhavana v. Delhi University* it was admitted that of the total sanctioned strength of 95 teachers, there were only 41 teachers in place and there were 54 vacant posts. Even accounting for the quota meant for the disabled, it is inconceivable that none of these vacant posts could be filled up by Respondent No. 2. The non-availability of vacancies was clearly, therefore, an incorrect premise as has been rightly pointed out by the Petitioner. The statements made earlier by the ED of Respondent No. 2 in the affidavit dated 23rd January 2010 did not give the correct picture. The explanation offered by Respondent No. 2 in the affidavit dated 17th September, 2010 that the statements made in paras 5 and 6 of the affidavit dated 23rd January, 2010 were typographical mistakes is not at all convincing. The excuse of non-availability of vacant posts was factually incorrect and, therefore, not acceptable.

22. It has been urged by learned counsel for the Respondents that in view of the ban imposed by the UGC and the orders of Respondent No. 1 University, no advertisement for filling up of regular vacancies has been issued by Respondent No. 2. Reference has been drawn to a letter dated 6th November, 2008 written by the Assistant Registrar of Respondent No. 2 in which while admitting that nine posts were lying vacant in the Department of English, a statement has been made that "correspondence has been going on since 2002 with the UGC regarding filling-up of posts." It is not clear if in terms of the letter dated 17th June 2004, prior approval of the UGC was in fact sought by Respondent No. 2. Such ban on appointment of persons to vacant posts could not continue indefinitely. The UGC could not have intended that for over seven years none of the regular vacancies in the posts of teaching and non-teaching staff and in particular the posts of lecturer in the Department of English in Respondent No. 2 should be filled up. The Petitioner has produced a copy of a letter dated 16th November 2009 from the Respondent No.2 informing the Secretary of the Staff Council of Respondent No.2 that since 2004 three persons had been appointed to the posts of non-teaching staff after obtaining approval from the University. Likewise, the Expert Committee which was

constituted way back in 2003 to examine the question of release of grants to Respondent No. 2 appears to have not submitted its report for over eight years. The failure of that Expert Committee to make its recommendations cannot indefinitely prevent Respondent No. 2 from appointing teaching staff on regular basis to fill up the vacant posts. Moreover, the connection between recommendations for release of grants and filling up of regular vacancies in permanent posts of teaching staff has not been explained by Respondent No. 2. All these factors have resulted in an avoidable situation of a large number of vacancies in the teaching posts in the Department of English in Respondent No. 2 remaining unfilled. If indeed, Respondent No. 2 wants to offer quality education, there cannot be a situation where a large number of permanent posts of teaching staff remain vacant for a large number of years. It appears to be the collective failure of Respondents 1 and 2 as well as the UGC that has brought about this unfortunate situation. Meanwhile, teachers duly selected by a selection committee, like the Petitioner, have served for more than 15 years on a temporary basis, and have been denied the benefits of regularization.

23. There is merit in the contention of the Petitioner that for no fault of hers she has been unable to seek regular appointment. When there are no advertisements for filling up of regular vacancies/permanent posts, the Petitioner has little choice but to seek regularization on the basis of long years of temporary service. The failure to advertise the permanent posts for being filled up through a process of regular selection is attributed variously to the ban imposed by the UGC, the non-submission of report of the Expert Committee and the non-conclusion of the process of restructuring of Respondent No.2. As already noticed, these processes cannot possibly continue indefinitely. Keeping a person who was fully qualified on a temporary post for over 15 years is apart from being arbitrary also unreasonable as it obviously denies such person the benefits of a regular pay scale, the security of tenure, and all other attendant benefits. Further, as the Petitioner pointed out, since she was not a permanent lecturer, she could not avail of study leave for doing further research and perhaps a Ph.D. Consequently, the failure of the Respondents to regularize her services for over 15 years by their own inaction as explained hereinbefore has resulted in the violation of the Petitioner's fundamental rights under Articles 14 and 21 of the Constitution.

24. As regards the case of Dr. Biswal, the explanation offered by Respondent No. 2 is not convincing at all. If indeed the services of Dr. Biswal who was also appointed on a temporary basis could have been regularized on the recommendation of the MC which was accepted by the University, it is not understood why the case of the Petitioner should be treated any differently. At the time when she applied for regularisation, there were permanent vacancies in the Department of English. The excuse of there being no vacancy was, as explained hereinbefore, factually incorrect. The other excuse of Respondent No. 2 being restructured could not have indefinitely postponed the decision to regularize the services of the Petitioner. Despite the MC's recommendation the post was not re-advertised. The ban of the UGC came only sometime in April 2004. Consequently, the denial of regularisation of the Petitioner's services was also discriminatory.

25. For the aforementioned reasons, this petition succeeds. A direction is issued to Respondent No. 2 to convene a meeting of its MC and consider the case of the Petitioner for being regularized in terms of the observations of the Supreme Court in para 44 in *State of Karnataka v. Umadevi* within a period of four weeks from today. The Petitioner's regularization without any benefit of arrears of pay or allowances will be from the date on which the first vacancy for a permanent post in the Department of English in Respondent No. 2 occurred after her appointment. This will also be the date for the purposes of her seniority and calculation of qualifying service for pension, if any. The MC will proceed on the basis that the Petitioner's initial appointment was properly made and that she continued as a temporary lecturer for over 15 years not on account of any interim order of a Court or Tribunal. Within a period of two weeks thereafter, the MC will forward the Petitioner's case to the EC for approval. The EC will take a decision on the said recommendation in accordance with law within a period of four weeks thereafter and convey it forthwith to Respondent No.2 with a copy to the Petitioner. The consequential orders will be issued by Respondent No.2 within a further period of two weeks.

26. The writ petition is disposed of with the above directions with costs of Rs.5,000/- which will be jointly paid by Respondents 1 and 2 to the Petitioner within four weeks.

JULY 29, 2011
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S. MURALIDHAR, J