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IN THE HIGH COURT OF DELHI AT NEW DELHI

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W.P.(C) No. 3873/2011 & conn.

17th April, 2013

1. WP(C) No. 3873/2011 & CM No.8061/2011 (Stay)

MADHU SHARMA & ORS.

.....Petitioners

Through: Mr. Mukesh K. Giri and Mr. Rachit Mittal,
Advocates.

VERSUS

GNCTD OF DELHI & ORS.

..... Respondents

Through: Mr. Varun Gupta with Ms. Sonia Arora,
Advs. for GNCTD.

2. WP(C) No. 3422/2010 & CM No.6866/2010 (Stay)

USHA KUMARI & ORS.

.....Petitioners

Through: Mr. Mukesh K. Giri and Mr. Rachit Mittal,
Advocates.

VERSUS

GOVT. OF NCT OF DELHI & ORS.

..... Respondents

Through: Ms. Sangeeta Sondhi, Adv. for R-1,3,4 and
5.

3. WP(C) No. 5726/2010 & CM No.11289/2010 (Stay)

ROMESH DEVI & ORS.

.....Petitioners

Through: Mr. Mukesh K. Giri and Mr. Rachit Mittal,
Advocates.

VERSUS

GOVT. OF NCT OF DELHI & ORS. Respondents
Through: Ms. Sangeeta Sondhi, Adv. for R-1,3,4 and
5.

4. WP(C) No. 3320/2008& CM Nos. 6373/2008 (Stay) & 4455/2010
(directions)

MADHU SHARMA & ORS. Petitioners
Through: Mr. Mukesh K. Giri and Mr. Rachit Mittal,
Advocates.

VERSUS

GOVT. OF NCT OF DELHI & ORS. Respondents
Through: Ms. Sangeeta Sondhi, Adv. for R-1,3,4 and
5.

5. WP(C) No. 3875/2011& CM No.8062/2011(Stay)

NARESH & ORS. Petitioners
Through: Mr. Mukesh K. Giri and Mr. Rachit Mittal,
Advocates.

VERSUS

GOVT. OF NCT OF DELHI & ORS. Respondents
Through: Mr. Varun Gupta, Adv. with Ms. Sonia
Arora, Adv. for GNCTD.
Mr. Abhinav Hansaria , Adv.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

W.P.(C) No. 3873/2011

1. This writ petition is filed by the 7 petitioners who are working as Auxiliary Nurses and Mid Wives (ANMs) under the Government of NCT of Delhi, Directorate of Family Welfare through the Delhi State Health Society. Petitioners were originally appointed by Standing Committee on Voluntary Action (SCOVA) of the Directorate of Family Welfare.

2. Learned counsel for the petitioners urges that since the work of the petitioners is perennial in nature, these petitioners have constitutional rights which flow from Articles 14, 16, 19 and 21 of the Constitution of India so that they should not be given artificial breaks in service. Reliance is placed upon the judgment of the Supreme Court in the case of *Md. Abdul Kadir & Anr. Vs. Director General of Police, Assam & Ors. (2009) 6 SCC 611* which provides that in case of an employment for a project, the employee must not be given artificial breaks till the time the project is completed and such employees have to be considered to be in continuous service for the period of the projects. Head Note B of the said judgment is relied upon and which refers to paras 16 to 18 and 26 of the judgment.

3. The issue in the present case is settled by the Constitution Bench judgment of the Supreme Court in the case of *Secretary State of Karnataka Vs.*

Umadevi & Ors. (2006) 4 SCC 1 which holds that there cannot be regularization of persons unless there are sanctioned posts, there are vacancies in the sanctioned post, the persons who have been employed are qualified as per the recruitment rules and appointment is through a regular recruitment process on insertion of advertisement in newspapers or calling for persons from the employment exchange. Following is the ratio of the Supreme Court in the case of ***Umadevi (supra)***.

(I) The questions to be asked before regularization are:-

(a)(i) Was there a sanctioned post (court cannot order creation of posts because finances of the state may go haywire), (ii) is there a vacancy, (iii) are the persons qualified persons and (iv) are the appointments through regular recruitment process of calling all possible persons and which process involves inter-se competition among the candidates

(b) A court can condone an irregularity in the appointment procedure only if the irregularity does not go to the root of the matter.

(II) For sanctioned posts having vacancies, such posts have to be filled by regular recruitment process of prescribed procedure otherwise, the constitutional

mandate flowing from Articles 14,16,309, 315, 320 etc is violated.

(III) In case of existence of necessary circumstances the government has a right to appoint contract employees or casual labour or employees for a project, but, such persons form a class in themselves and they cannot claim equality(except possibly for equal pay for equal work) with regular employees who form a separate class. Such temporary employees cannot claim legitimate expectation of absorption/regularization as they knew when they were appointed that they were temporary inasmuch as the government did not give and nor could have given an assurance of regularization without the regular recruitment process being followed. Such irregularly appointed persons cannot claim to be regularized alleging violation of Article 21. Also the equity in favour of the millions who await public employment through the regular recruitment process outweighs the equity in favour of the limited number of irregularly appointed persons who claim regularization.

(IV) Once there are vacancies in sanctioned posts such vacancies cannot be filled in except without regular recruitment process, and thus neither the court nor the executive can frame a scheme to absorb or

regularize persons appointed to such posts without following the regular recruitment process.

(V) At the instance of persons irregularly appointed the process of regular recruitment shall not be stopped. Courts should not pass interim orders to continue employment of such irregularly appointed persons because the same will result in stoppage of recruitment through regular appointment procedure.

(VI) If there are sanctioned posts with vacancies, and qualified persons were appointed without a regular recruitment process, then, such persons who when the judgment of *Uma Devi* is passed have worked for over 10 years without court orders, such persons be regularized under schemes to be framed by the concerned organization.

(VII) The aforesaid law which applies to the Union and the States will also apply to all instrumentalities of the State governed by Article 12 of the Constitution.

4. When we refer to the appointment letter in the present case, it is found that the petitioners have not been appointed against vacancies in sanctioned post and by means of applications invited through newspaper advertisement or information called from the employment exchange. Petitioners have also not been

appointed for a project. One of the sample letters of appointment to the petitioners reads as under:-

**STANDING COMMITTEE ON VOLUNTERY ACTION
DIRECTORATE OF FAMILY WELFARE
MALKA GANJ:DELHI**

No.:F.1(1.2)/RCH/DFW/99-2000/11/8050

To,
Smt. Suman Devi W/o Sh. Surender Singh
C/o Sh. Ram Chander Yadav
H.No.WZ-303, Village:Shakurpur,
P.O.Rani Bagh, New Delhi-34.

Dated 22.09.2000

Sub: Appointment Letter

Refer your application for the post of A.N.M. on contract basis, initially for one year, at the rate of Rs.4,000+D.A at the prevalent rates per month, Competent Authority has approved your appointment. Consequent upon agreeing to the terms and conditions and signing the agreement to the effect you are directed to report to the Medical Officer Incharge.

Allopathic Dispensary (Govt. of Delhi)
Ranjit Nagar, New Delhi.

for further duty. You will be governed by the terms and conditions mentioned overleaf. You will perform duties annexed with the appointment letter.

Sd./
(M.L.Handa)

Consultant (Fin.Admn.& Personal)

Copy forwarded to:

1. Medical Officer 1/c Allopathic Dispensary, (Govt. of Delhi),
Ranjit Nagar, New Delhi.
2. Director Health Services, E-6, Saraswati Bhawan, Connaught
Place, New Delhi.

(M.L.Handa)

Consultant (Fin.Admn.& Personal)

TERMS AND CONDITIONS OF APPOINTMENT

1. Appointment for the post of A.N.M is on contract for one year, likely to be extended for another one year depending upon the need of the

post and work and conduct of the candidate. Chairperson, SCOVA (Registered Society) can terminate the services of the candidate at any time without assigning any reason and decision of the SCOVA will be final.

2. Candidate will be paid fixed Rs. 4,000/-P.M.+D.A .(prevalent at the time) every month.
3. Candidate can avail 8 casual and 2 restricted holidays in the calendar year. No leave of any other kind is permissible.
4. No other allowance claim by whatsoever name is permissible.
5. Working hours will be same as observed at the place of posting or as decided by SCOVA.
6. The work will be assigned by SCOVA/Incharge of the Centre.
7. Candidate will work under the administrative control of SCOVA.
8. Medical Officer I/c or any other officer on his behalf will supervise the work.
9. Medical Officer I/c or any other officer on his behalf will send the monthly attendance certificate to SCOVA at Directorate of Family Welfare, Malka Ganj, after completion of the month for release of salary.
10. Duties of A.N.M. are given separately with appointment letter.”

5. I do not find any averment in the writ petition that there were sanctioned posts and the petitioners have been appointed against vacancies in such sanctioned posts after an open competition of candidates who have been called through advertisement in newspapers and/or through employment exchange. Therefore, the petitioners cannot claim regularization or benefits which flow only

from regularization or to regular employees in view of the ratio of the judgment of the Constitution Bench in the case of *Umadevi (supra)*.

6. The judgment in the case of *Md. Abdul Kadir (supra)* relied upon by the petitioners does not apply to the facts of the present case because in the case of *Md. Abdul Kadir (supra)* the appointment of persons was for a specific project. The Supreme Court observed that for the period the project continues there cannot be given artificial breaks in service to the employees. The Supreme Court however, in the said judgment has observed that there cannot be regularization of persons how so ever long was the period of non-regular service because the existence and employment to post in a temporary scheme is only coterminous with the scheme. In the present case the petitioners do not claim to have been employed against for a project or a scheme. Once there is no specific project or scheme, there does not arise the question of application of the judgment of *Md. Abdul Kadir (supra)*.

7. In view of the above, petitioners cannot be granted the reliefs as prayed for in the writ petition that they should not be given breaks in service.

8. So far as the prayer to declare the Delhi Health Society as the State Instrumentality under Article 12 of the Constitution of India is concerned, I need not pronounce on the same because I am proceedings on the basis that the Delhi

Health Society is an instrumentality of the State as per Article 12 of the Constitution of India. The issue of further elaboration on this aspect is not necessary inasmuch as theoretical declarations need not be given, and the declaration in this case was related to the entitlement of the petitioners not being subjected to artificial breaks and which main relief I have already held above cannot be granted to the petitioners.

9. The writ petition is accordingly dismissed, leaving the parties to bear their own costs.

W.P.(C) 3422/2010

In this writ petition, the following reliefs are claimed:-

- “i. Issue Writ order or Direction to declare The Delhi Health Society as State Instrumentality under Article 12 of the Constitution of India; And
- ii. Issue Writ order or Direction in the nature of Mandamus directing the respondents to confer to the Petitioners who are eligible and qualified as ANMs working satisfactorily since 2000, for approximately 10 years be conferred the benefits/perks, Leave and other Monetary consequential benefits admissible to other incumbents of the same post with equal value and responsibility, working in different hospitals and dispensaries in Delhi under the Government of NCT of Delhi; And
- iii. The Petitioners be conferred preferential treatment with age relaxation taking into account their past services in regular selection or direct the respondents to treat the Petitioners at par with the regular employees with all monetary consequential benefits, i.e. equal pay for equal work provident fund, gratuity, seniority the benefits; and

- iv. Issue Writ Order or Direction in the nature of Prohibition restraining the respondents not to disengage/in assigning the work of the temporary projects i.e. NRHM in view of the fact that the petitioners are appointed by DELHI STATE HEALTH SOCIETY which is perennial in nature;AND
- v. Issue Order of Direction directing the respondents that one day technical/artificial break is unconstitutional and contrary to the Articles 14,19 & 21 and in light of the law laid down by the Hon'ble Supreme Court of India; And
- vi. Pass such other order or orders as this Hon'ble Court may deem fit and proper in the facts and circumstances of the present case;”

10. A reading of the aforesaid prayer clauses shows that petitioners claim equality with regular employees. Petitioners also seek age relaxation for being treated at par with the regular employees and are seeking all monetary consequential benefits. There is also a relief claimed of restraining the respondent not to terminate the services of the petitioners ie effectively to regularize the petitioners.

11. I have already reproduced the ratio of the Constitution Bench judgment in the case of *Umadevi (supra)* while disposing of W.P.(C) 3873/2011.

12. Since the petitioners are not regular employees, therefore, they cannot claim equality with regular employees, who fall in a totally separate class. Benefits which are given to regular employees cannot be given to persons who are not regularly appointed against vacancies in sanctioned post. The prayer for restraining the respondents for not terminating the services of the petitioners

cannot be granted in view of the ratio of the judgment in the case of *Umadevi (supra)*.

13. In view of the above, the writ petition is dismissed, leaving the parties to bear their own costs.

W.P.(C) No. 5726/2010

14. This writ petition seeks identical reliefs as claimed in W.P.(C) No. 3422/2010. This writ petition is also dismissed in view of the aforesaid writ petitions having been dismissed.

W.P.(C) No. 3320/2008

15. In this writ petition, the following reliefs are claimed:-

“i. Petitioners who are eligible and qualified as ANMs working satisfactorily for more than seven years be conferred the benefits/perks Leave and other Monetary consequential benefits admissible to other incumbents of the same post with equal value and responsibility, working in different hospitals and dispensaries in Delhi under the Government of NCT of Delhi; and

ii. The Petitioners be conferred preferential treatment with age relaxation taking into account their past services in regular selection as per advertisement for the post of Auxiliary Nurse (Midwife) vide post code-171/07 in advertisement No.09/2007 issued Public Selection Board to be conducted 3-5-2008; and

iii. Direct the respondents to treat the Petitioners at par with regular employees with all monetary consequential benefits i.e. equal pay for equal work provident fund, gratuity seniority the benefits; and

iv. Pass such other order or orders as this Hon'ble Court may deem fit and proper in the facts and circumstances of the present case;”

16. The reliefs in the present case though worded differently from the reliefs in W.P.(C) No.3422/2010, however, effectively the prayers are same. This writ petition is also dismissed in view of the conclusions given above.

W.P.(C) No. 3875/2011

17. In this writ petition, the following prayers are made:-

- i. Issue Writ order or Direction in the nature of certiorari to quash the Office Memo vide D.O.No.F.No.(20(20.37) /RCH-II/DFW/2007/10558 dated 30.7.2009 and Office Memo No.F.20(20.116)/RCH-II/DFW/2007/19141 dated 4.3.2010, issued by Government of NCT of Delhi and to quash technical break in current year, April 2011 or any other office order giving Artificial break in service based on these circulars;
- ii. Issue Writ Order or Direction declaring the Artificial one day deliberate Break and deduction of salary of that break between the two consecutive contacts i.e. disengagement and engagement as illegal, unconstitutional, invalid and in violation of Article 14,16,19 and 21 of the Constitution of India;
- iii. Issue Writ order or Direction to declare The Delhi Health Society as State Instrumentality under Article 12 of the Constitution of India; And
- iv. Issue Writ order or Direction in the nature of Mandamus directing the respondents to confer to the Petitioners who are eligible and qualified as ANMs working satisfactorily since 2007, for approximately 4 years be conferred the benefits/perks, Leave and other Monetary consequential benefits admissible to other incumbents of the same post with equal value and responsibility, working in different hospitals and dispensaries in Delhi under the Government of NCT of Delhi; And

v. The Petitioners be conferred preferential treatment with age relaxation taking into account their past services in regular selection or direct the respondents to treat the Petitioners at par with the regular employees with all monetary consequential benefits, i.e. equal pay for equal work provident fund, gratuity, seniority the benefits; and

vi. Issue Writ Order or Direction in the nature of Prohibition restraining the respondents not to disengage/in assigning the work of the temporary projects i.e. NRHM in view of the fact that the petitioners are appointed by DELHI STATE HEALTH SOCIETY which is perennial in nature; AND

vii. Pass such other order or orders as this Hon'ble Court may deem fit and proper in the facts and circumstances of the present case;”

18. The aforesaid prayer clauses are the same which are the subject matter of the writ petitions which have been dismissed above, and accordingly this writ petition is also dismissed.

19. No costs.

APRIL 17, 2013

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VALMIKI J. MEHTA, J.