

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **W.P.(C) No.6120/2013**

% **25th September, 2013**

SH.BALBIR SINGH

..... Petitioner

Through: Mr. K.C. Dubey, Advocate.

versus

GOVT. OF NCT OF DELHI AND ORS.

..... Respondents

Through: Ms. Sana Ansari, Advocate for
respondent No.1.
Mr. Vivek Narayan, Advocate for
respondent Nos.2 and 4.
Mr. Kirti Uppal, Senior Advocate
with Mr. Sujit Singh, Advocate and
Mr. Anshumaan Sahni, Advocate for
respondent No.6.
Mr. Sandeep Prabhakar, Advocate
with Mr. Amit Kumar, Advocate for
respondent Nos.7 and 8.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This writ petition is filed by one Sh. Balbir Singh who is the General Secretary of DESU Mazdoor Sangh of Trade Union. As per the statement of the counsel for the petitioner made before me petitioner represents about 35,000 contractual workers who are working with the instrumentalities of State represented by respondent Nos.2 to 8 and such

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persons are members of the Trade Union of whom the petitioner is the General Secretary.

2. The following reliefs are claimed in this writ petition:-

“a) direct the Govt. of NCT of Delhi, its instrumentalities and DTL, IPGCL-PPCL, NDPL/TPDDL, BYPL and BRPL to frame an scheme to bring the said workers on their strength of permanent employees.

b) direct the Govt. of NCT of Delhi, its instrumentalities and DTL, IPGCL-PPCL, NDPL/TPDDL, BYPL and BRPL to frame a policy to recruit the required personnel in future.

c) direct the respondent No.1 to issue notification prohibiting contract employment in the power sector companies.

d) pass such any other order which this Hon’ble Court may deem fit and proper in the facts and circumstances of the case.”

3. The first relief which is prayed is that contractual workers should be made permanent employees by bringing in a scheme. Second relief which is claimed is of direction to instrumentalities of State who are the respondents to frame a policy for future recruitment. The third and final relief which is claimed is that instrumentalities of State must not appoint contractual employees.

4. Before I proceed to discuss on the arguments which have been urged, it is necessary at this stage to reproduce the ratio of two Supreme Court judgments. First is the judgment of the Supreme Court in the case of *Secretary, State of Karnataka Vs. Umadevi and Ors. (2006) 4 SCC 1* and second is the judgment in the case of *Indian Drugs and Pharmaceuticals*

Ltd. vs. Workmen, Indian Drugs and Pharmaceuticals Ltd. (2007) 1 SCC 408.

5. In the case of *Umadevi (supra)* the following ratio has been laid down:-

“(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”.

6. In the case of *Indian Drugs and Pharmaceuticals (supra)* Supreme Court has said that Courts have no power to direct creation of sanctioned posts. Courts also have been held to have no power to direct fixing of a particular pay scale as Courts have no power to run organizations and organizations know their financial conditions and therefore how they should be run. Courts cannot sit in the arm-chair of the administrative authority and decide what should be the terms and conditions of service of employees of the organization. The relevant observations of Supreme Court in the case of *Indian Drugs and Pharmaceuticals (supra)* read as under:-

“16. We are afraid that the Labour Court and the High Court have passed their orders on the basis of emotions and sympathies, but cases in court have to be decided on legal principles and not on the basis of emotions and sympathies.

18. In State of M.P. v. Yogesh Chandra Dubey this Court held that a post must be created and/or sanctioned before filling it up. If an employee is not appointed against a sanctioned post he is not entitled to any scale of pay. In our opinion, the ratio of the aforesaid decision squarely applies to the facts of the present case also.

37. Creation and abolition of posts and regularisation are purely executive functions vide P.U. Joshi v. Accountant General. Hence, the court cannot create a post where none exists. Also, we cannot issue any direction to absorb the respondents or continue them in service, or pay them salaries of regular employees, as these are purely executive functions. This Court cannot arrogate to itself the powers of the executive or legislature. There is broad separation of

powers under the Constitution, and the judiciary, to, must know its limits.

40. The Courts must, therefore, exercise judicial restraint, and not encroach into the executive or legislative domain. Orders for creation of posts, appointment on these posts, regularisation, fixing pay scales, continuation in service, promotions, etc. are all executive or legislative functions, and it is highly improper for Judges to step into this sphere, except in a rare and exceptional cases. The relevant case-law and philosophy of judicial restraint has been laid down by the Madras High Court in great detail in *Rama Muthuramalingam v. Dy. Supdt. Of Police* and we fully agree with the views expressed therein.”

7. Counsel for the petitioner essentially placed complete reliance upon the judgment of the Supreme Court in the case of *State of Karnataka and Ors. Vs. M.L. Kesari and Ors. (2010) 9 SCC 247* to argue in favour of grant of reliefs claimed in this writ petition for framing of a scheme and prohibiting contractual employment in future by the power sector companies/instrumentalities of State/respondent Nos.2 to 8.

When we refer to the different paragraphs of the judgment of the Supreme Court relied upon by the petitioner in the case of *M.L. Kesari (supra)* the said judgment of Division Bench of two Judges simply relies upon and follows the ratio of the Constitution Bench judgment of the Supreme Court in the case of *Umadevi (supra)*. Para 53 in the case of *Umadevi (supra)* carves out an exception to the general rules. The general rule laid down in the case of *Umadevi (supra)* was that there cannot be

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public employment unless there are sanctioned posts, there are vacancies in the sanctioned posts, duly qualified persons are appointed and for appointing of such persons in public employment there is an open competition where candidates are invited through newspaper advertisement and/or through the employment exchange. Unless and until the aforesaid four requirements are satisfied, appointments with Government or instrumentalities of State, are to be illegal.

With respect to irregular employees who had worked for 10 years prior to the passing of judgment in the case of *Umadevi (supra)* Supreme Court carved out an exception limited to the fact that if qualified persons were appointed against vacancies in sanctioned posts, however without open competition, then, if such persons had worked for 10 years without benefit of any interim orders of the Court, then, the instrumentalities of the State were asked to frame a scheme for regularization of only such persons. Para 53 of the judgment in the case of *Umadevi (supra)* cannot be read to mean that there have to be schemes for regularization of other persons who do not fall within the strict exception carved out in para 53 of *Umadevi (supra)*.

8. A reading of the present writ petition shows that there is no averment as to how about 35000 contractual employees, which the counsel

for the petitioner states that are working with the respondent Nos.2 to 8, were appointed as duly qualified persons in vacant sanctioned posts. In fact, para 53 cannot even be relied upon because admittedly the petitioners are only contractual employees i.e appointments are not to vacancies in sanctioned posts and such contractual employees do not fall within the exception carved out in para 53 in the case of *Umadevi (supra)*.

9. In fact, Supreme Court as per the ratio in the case of *Umadevi (supra)* entitled and permitted in necessary circumstances the Government and instrumentalities of the State to have casual labourers, contractual workers or temporary employees and therefore relief prayed in para (c) of the prayer cannot be granted. In the case of *Umadevi (supra)* Supreme Court said that Government cannot be denuded of its power as per circumstances existing to have casual labourers or have contractual employees or temporary workers. This is stated in the following paragraphs in the case of *Umadevi (supra)*:-

“12. In spite of this scheme, there may be occasions when the sovereign State or its instrumentalities will have to employ persons, in posts which are temporary, on daily wages, as additional hands or taking them in without following the required procedure, to discharge the duties in respect of the posts that are sanctioned and that are required to be filled in terms of the relevant procedure established by the Constitution or for work in temporary posts or projects that are not needed permanently. This right of the Union or of the State Government cannot but be recognized and there is nothing in the Constitution which prohibits such engaging of persons temporarily or

on daily wages, to meet the needs of the situation. But the fact that such engagements are resorted to, cannot be used to defeat the very scheme of public employment. Nor can a court say that the Union or the State Governments do not have the right to engage persons in various capacities for a duration or until the work in a particular project is completed. Once this right of the Government is recognized and the mandate of the constitutional requirement for public employment is respected, there cannot be much difficulty in coming to the conclusion that it is ordinarily not proper for courts whether acting under Article 226 of the Constitution or under Article 32 of the Constitution, to direct absorption in permanent employment of those who have been engaged without following a due process of selection as envisaged by the constitutional scheme.

19. One aspect arises. Obviously, the State is also controlled by economic considerations and financial implications of any public employment. The viability of the department or the instrumentality or of the project is also of equal concern for the State. The State works out the scheme taking into consideration the financial implications and the economic aspects. Can the court impose on the State a financial burden of this nature by insisting on regularization or permanence in employment, when those employed temporarily are not needed permanently or regularly? As an example, we can envisage a direction to give permanent employment to all those who are being temporarily or casually employed in a public sector undertaking. The burden may become so heavy by such a direction that the undertaking itself may collapse under its own weight. It is not as if this had not happened. So, the court ought not to impose a financial burden on the State by such directions, as such directions may turn counterproductive.”

10. Therefore, in my opinion, the writ petition is completely and wholly misconceived. Firstly, the contractual employees do not fall in the exception carved out in para 53 of the judgment of the Supreme Court in the case of *Umadevi (supra)* inasmuch as such contractual employees are not appointed against sanctioned posts. The only exception as per para 53 was

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that employees who were appointed against vacancies in sanctions posts, were duly qualified and they had worked for 10 years prior to passing of the judgment in the case of *Umadevi (supra)*, only such persons were to be regularized on the employers drawing out schemes.

11. In the present case, I do not find that there is any specific averment of any specific person having worked for 10 years prior to passing of the judgment in the case of *Umadevi (supra)* for claiming that such person will as per the relevant facts fall within the exception carved out in para 53 of *Umadevi's* case (supra). In view of the above, if I allow the prayers in the writ petition I would in fact be violating the categorical ratio of the Constitution Bench judgment of the Supreme Court in the case of *Umadevi (supra)*.

12. The Writ petition therefore being without any merit whatsoever is accordingly dismissed with costs of ₹25,000/-. Costs can be recovered by the respondents in accordance with law.

SEPTEMBER 25, 2013
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VALMIKI J. MEHTA, J.