

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K. SURENDRA MOHAN
&
THE HONOURABLE MR. JUSTICE SHAJI P. CHALY

THURSDAY, THE 26TH DAY OF NOVEMBER 2015/5TH AGRAHAYANA, 1937

OP (CAT).No. 2301 of 2011 (Z)

AGAINST THE ORDER IN O.A.NO. 243/2010 of CENTRAL ADMINISTRATIVE
TRIBUNAL, ERNAKULAM BENCH DATED 09.06.2011.

PETITIONER/APPLICANT:

JOLLY P.G., 44 YEARS, DRIVER (NMR),
DEPARTMENT OF EDUCATION, LAKSHADWEEP OFFICE,
WILLINGDON ISLAND, COCHIN - 3.

BY ADVS. SRI. RINNY STEPHEN CHAMAPARAMPIL
SMT. ASHA ELIZABETH MATHEW

RESPONDENTS/RESPONDENTS:

1. UNION OF INDIA,
REPRESENTED BY THE SECRETARY,
DEPARTMENT OF PERSONNEL AND TRAINING,
MINISTRY OF HOME AFFAIRS, NEW DELHI - 110 001.
2. THE ADMINISTRATOR,
UNION TERRITORY OF LAKSHADWEEP,
KAVARATTI - 682 001.
3. DIRECTOR OF EDUCATION,
UNION TERRITORY OF LAKSHADWEEP, KAVARATTI-682 001.
4. EDUCATION OFFICER, EDUCATION DEPARTMENT,
LAKSHADWEEP ADMINISTRATION, COCHIN - 3.

R1 BY ADV. SHRI. S. HARIKRISHNAN, CGC
R1 BY SRI. N. NAGARESH, ASST. SOLICITOR GENERAL
R2 TO R4 BY SRI. S. RADHAKRISHNAN, SC, LAKSHADWEEP ADMN.

THIS OP (CAT) HAVING BEEN FINALLY HEARD ON 26-11-2015, THE COURT ON
THE SAME DAY DELIVERED THE FOLLOWING:

P.T.O.

OP (CAT).No. 2301 of 2011 (Z)

APPENDIX

PETITIONER'S EXHIBITS:

- EXHIBIT P1: A TRUE COPY OF THE CASUAL LABOURERS (GRANT OF TEMPORARY STATUS AND REGULARIZATION) SCHEME.
- EXHIBIT P2: A TRUE COPY OF O.A.NO.243/2010 FILED BY THE PETITIONER BEFORE THE CENTRAL ADMINISTRATIVE TRIBUNAL, ERNAKULAM BENCH.
- EXHIBIT P3: A TRUE COPY OF THE REPLY STATEMENT FILED BY RESPONDENTS 2 TO 4 BEFORE THE CAT, ERNAKULAM BENCH IN O.A.NO.243/2010.
- EXHIBIT P4: A TRUE COPY OF THE REJOINER FILED BY THE APPLICANT BEFORE THE CAT, ERNAKULAM BENCH IN OA.NO.243/2010.
- EXHIBIT P5: A TRUE COPY OF THE ORDER DATED 09.06.2011 OF THE CENTRAL ADMINISTRATIVE TRIBUNAL, ERNAKULAM BENCH IN O.A.NO.243 OF 2010.
- EXHIBIT P6: A TRUE COPY OF THE REPLY DATED 27.07.2015 ISSUED BY THE PUBLIC INFORMATION OFFICER OF THE LAKSHADWEEP ADMINISTRATION OFFICE.
- EXHIBIT P7: TRUE COPY OF THE RELEVANT PAGES OF THE LAKSHADWEEP ADMINISTRATION STAFF CAR DRIVERS (GROUP C) RECRUITMENT RULES, 2004.
- EXHIBIT P8: A TRUE COPY OF THE LETTER DATED 22.07.2015 ISSUED BY THE CENTRAL PUBLIC INFORMATION OFFICER OF THE DIRECTORATE OF FISHERIES, LAKSHADWEEP ADMINISTRATION OFFICE.
- EXHIBIT P9: A TRUE COPY OF THE FIRST PAGE OF THE PETITIONER'S S.S.L.C BOOK.
- EXHIBIT P10: A TRUE COPY OF THE PETITIONER'S DRIVING LICENCE.
- EXHIBIT P11: A TRUE COPY OF THE PETITIONER'S IDENTITY CARD.

RESPONDENTS' EXHIBITS: NIL

//TRUE COPY//

P.S. TO JUDGE

St/-

C.R.

**K. SURENDRA MOHAN
&
SHAJI P. CHALY, JJ.**

O.P.(CAT) No.2301 of 2011

Dated this the 26th day of November, 2015

JUDGMENT

Surendra Mohan, J.

The applicant in O.A.No.243 of 2010 of the Central Administrative Tribunal (CAT, for short), Ernakulam Bench has filed this Original Petition aggrieved by Ext.P5 order, dismissing the Original Application. The petitioner claims that he was being engaged in the Public Works Department, Lakshadweep Administration, Cochin from 1992 onwards on daily wages. During 1993-1994, he was engaged as a Driver. It is his contention that he was engaged as a Jeep Driver against a sanctioned post. Though Ext.P1 Scheme was for granting temporary status to workers similarly engaged, he was not granted the benefit of Ext.P1. As on 01.09.1993, the petitioner had worked for more than 240 days. From 15.03.1995 onwards, the petitioner has been working under the 4th Respondent as an NMR Driver, continuously. Even now, he is working as such, without any break in service. According

to the petitioner, he is entitled to be regularized in service in accordance with the directions of the Supreme Court contained in paragraph 53 of the decision in '**Secretary, State of Karnataka & Ors. v. Uma Devi & Ors.**' [(2006) 4 SCC 1], However, despite submitting a representation seeking regularization, his claim was not considered.

2. It was in the above circumstances that the petitioner had approached the CAT seeking appropriate reliefs, by filing O.A.No.243 of 2010. The O.A. was contested by Respondents 2 to 4 by filing a reply statement, which is Ext.P3. The petitioner filed a rejoinder refuting the contentions in the reply statement, which is Ext.P4. However, without properly appreciating the contentions of the petitioner, the CAT dismissed O.A.No.243 of 2010 by Ext.P5 order. The petitioner is aggrieved by Ext.P5.

3. According to Advocate Sri. Rinny Stephen Chamaparambil, learned counsel for the petitioner, the petitioner had put forward his claim for regularization on the basis of the Scheme that came into force on 01.09.1993, providing for the grant of temporary status to Casual Labourers as well as on the basis of the directions of the

Supreme Court contained in paragraph 53 of the decision in ***Umadevi*** case. However, the CAT has proceeded to consider the claim of the petitioner only on the basis of the Scheme for the grant of temporary status. Since a cut-off date of 10.09.1993 was stipulated for the application of the Scheme for the grant of temporary status, the petitioner was found to be not entitled to the benefit thereof. The CAT has based its finding on the contention of the Respondents that, the petitioner had been appointed as an NMR Driver only on 15.03.1995. The said finding, according to the learned counsel for the petitioner, is unsustainable and liable to be interfered with. It is the further contention of the counsel for the petitioner that, the claim put forward by the petitioner on the basis of the direction of the Supreme Court contained in paragraph 53 of the ***Umadevi*** (3) case has also been disallowed, holding that the same was time barred. The said finding, according to the learned counsel for the petitioner, is unsustainable. A number of decisions are also relied upon in support of the above contention. We shall refer to the said decisions at the appropriate stage.

4. Advocate Sri. S. Radhakrishnan, the learned Standing Counsel who appears for Respondents 2 to 4 seriously contests the arguments put forward by the counsel for the petitioner. According to learned Standing Counsel for Respondents 2 to 4, the petitioner having been appointed as an NMR Driver only on 15.03.1995, long after the cut-off date of 10.09.1993 stipulated by the Scheme for the grant of temporary status to casual employees, he was not entitled to claim temporary status. With respect to his claim for the benefit of paragraph 53 of the decision in **Umadevi**(3) case, it is pointed out by the learned Counsel that the benefit was available only to persons irregularly appointed to a sanctioned post. The petitioner was a mere casual employee, who was not appointed by following any regular method of selection. Nor was a sanctioned post available for his appointment. The above being the position, it is contended that the petitioner is not entitled to claim the benefit of paragraph 53 of **Umadevi** (3). The learned Counsel also places reliance on the decisions of the Supreme Court in support of his contentions.

5. Heard. A copy of the O.A.No.243 of 2010 has been produced in this Original Petition, as Ext.P2. A perusal of the pleadings in Ext.P2 shows that, the case set up by the petitioner in paragraph 3 thereof is as follows:

"3. x x x x x x x x
x x x x x x x x

Though the Government of India, Ministry of Personnel, Public Grievances and Pensions (Department of Personnel and Training) New Delhi by its letter dated 11.12.2006 has directed Union of India, State Governments and their instrumentalities to take steps to regularize as a one time measure the service of incumbents working for more than 10 years in the light of para. 53 of the decision in the case of Secretary, State of Karnataka and others v. Umadevi and others, no steps have been taken by the respondents to regularize the service of applicant and like who have 15 years continuous meritorious and unblemished service and more than 240 days worked in each year of their service with the Lakshadweep Administration."

The petitioner has also sought for his regularization in service as Driver finding him fit and suitable for the said post.

6. The Reply Statement filed by Respondents 2 to 4 has been produced before us as Ext.P3. It is admitted in the reply statement that the petitioner was engaged as an NMR

Driver from 1995 onwards. The case set up in the reply statement is that, the petitioner was not entitled to claim temporary status for the reason that he had been engaged only after 10.09.1993, which is stated to be the cut-off date. The reply statement does not contain any pleading disputing the claim of the petitioner for the benefit of paragraph 53 of the decision in **Umadevi** (3). However, it is contended before us by the learned Counsel that the petitioner had not been appointed after complying with a proper selection process, to a sanctioned post. No such pleading is available in the reply statement. Equally conspicuous in the reply statement is the answer to the contention of the petitioner, that no exercise as directed by paragraph 53 of the decision in **Umadevi** (3) had been undertaken by Respondents 2 to 4. A perusal of Ext.P5 order of the CAT shows that, the above case pleaded by the petitioner has not been considered by the CAT also. Therefore, the petitioner is justified in contending that the relief of regularization has been declined to him only on the basis of a finding that he had been appointed after the alleged cut-off date of 10.09.1993. Anyhow, Respondents 2 to 4 have no case that they have undertaken the exercise that is

contemplated by and directed to be undertaken by the Supreme Court in paragraph 53 of the judgment in ***Umadevi*** (3).

7. In view of the above, it has to be held that the petitioner's claim for regularization in terms of the directions contained in paragraph 53 of ***Umadevi*** (3) has not been considered by either Respondents 2 to 4 or the CAT. Therefore, it is only appropriate that his claim is considered at the earliest. It is not in dispute that, the petitioner has been working continuously and is working even to this date.

8. According to the learned Standing Counsel for Respondents 2 to 4, the directions contained in paragraph 53 of the decision in ***Umadevi*** (3) has subsequently been explained and clarified by the Apex Court in the decision of '***Satya Prakash and Others v. State of Bihar and Others***' [(2010) 4 SCC 179]. Placing reliance on paragraphs 7 to 9 of the said judgment, it is contended that the Apex Court has clearly drawn a distinction between temporary employees, daily wagers and those who had been appointed irregularly for the reason of non-compliance with some procedure in the selection process which did not go to the root of the selection

process. According to the learned Counsel, the benefit of the directions in paragraph 53 of **Umadevi** (3) is not available to Casual Labourers, temporary employees and persons who have not been appointed to sanctioned posts. The learned Standing Counsel for Respondents 2 to 4 has also placed reliance on the decision in '**State of Rajasthan and Others v. Daya Lal and Others**' [(2011) 2 SCC 429]. Reliance is placed on paragraph 12 of the judgment wherein the Court has summarised the principles subject to which the regularization and parity in pay could be granted. Paragraph 12 reads as follows:

"12. We may at the outset refer to the following well-settled principles relating to regularisation and parity in pay, relevant in the context of these appeals:

(i) The High Courts, in exercising power under Article 226 of the Constitution will not issue directions for regularisation, absorption or permanent continuance, unless the employees claiming regularisation had been appointed in pursuance of a regular recruitment in accordance with relevant rules in an open competitive process, against sanctioned vacant posts. The equality clause contained in Articles 14 and 16 should be scrupulously followed and Courts should not issue a direction for regularisation of services of an employee which would be violative of the constitutional scheme. While something that is irregular for want of compliance with one of the elements in the process of selection

which does not go to the root of the process, can be regularised, back door entries, appointments contrary to the constitutional scheme and/or appointment of ineligible candidates cannot be regularised.

(ii) Mere continuation of service by a temporary or ad hoc or daily-wage employee, under cover of some interim orders of the court, would not confer upon him any right to be absorbed into service, as such service would be "litigious employment". Even temporary, ad hoc or daily-wage service for a long number of years, let alone service for one or two years, will not entitle such employee to claim regularisation, if he is not working against a sanctioned post. Sympathy and sentiment cannot be grounds for passing any order or regularisation in the absence of a legal right.

(iii) Even where a scheme is formulated for regularisation with a cut-off date (that is a scheme providing that persons who had put in a specified number of years of service and continuing in employment as on the cut-off date), it is not possible to others who were appointed subsequent to the cut-off date, to claim or contend that the scheme should be applied to them by extending the cut-off date or seek a direction for framing of fresh schemes providing for successive cut-off dates.

(iv) Part-time employees are not entitled to seek regularisation as they are not working against any sanctioned posts. There cannot be a direction for absorption, regularization or permanent continuance of part-time temporary employees.

(v) *Part-time temporary employees in Government-run institutions cannot claim parity in salary with regular employees of the Government on the principle of equal pay for equal work. Nor can employees in private employment, even if serving full time, seek parity in salary with Government employees. The right to claim a particular salary against the State must arise under a contract or under a statute.*

[See State of Karnataka v. Umadevi (3), M. Raja v. CEERI Educational Society, S.C. Chandra v. State of Jharkhand, Kurukshetra Central Coop. Bank Ltd. v. Mehar Chand and Official Liquidator v. Dayanand]."

9. *Per contra*, learned counsel for the petitioner places reliance on the decision of the Apex Court in '**State of Karnataka and Others v. M.L.Kesari and Others**' [(2010) 9 SCC 247]. Paragraphs 5, 6 and 7 relevant in the context are extracted below:

"5. *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.

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 10.04.2006).

6. 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.

7. 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 one-time 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."

10. In '**Nihal Singh and Others v. State of Punjab and Others**' [(2013) 14 SCC 65], a claim for regularization of Police Personnel recruited under Sec.17 of the Police Act, 1861 in the State of Punjab was at issue. The persons who claimed regularization had been appointed as Special Police Officers. After considering the claims in the background of the directions contained in **Umadevi**(3), the employees were directed to be

regularized after creating necessary posts within a period of three months from the date of the said judgment.

11. The question as to whether an appointment made out of necessity could be regularized, came up for consideration in '**Amarkant Rai v. State of Bihar and others**' [(2015) 8 SCC 265]. In the said case, an employee had been appointed temporarily in a Class-IV post of Night Guard on daily wages by an office order dated 04.06.1983 by the Principal of a College. He was not the person competent to make the appointment. It was found in paragraph 8 of the said judgment that the appointment was made out of necessity and concern for the College. Paragraph 13 of the judgment reads as follows:

"13. In our view, the exception carved out in para 53 of Umadevi (3) is applicable to the facts of the present case. There is no material placed on record by the respondents that the appellant has been lacking any qualification or bore any blemish record during his employment for over two decades. It is pertinent to note that services of similarly situated persons on daily wages on the post of clerk was regularised w.e.f. 1987. The appellant although initially working against unsanctioned post, the appellant was working continuously since 3-1-2002 against sanctioned post. Since there is no material placed on record regarding the details whether any other night guard was appointed

against the sanctioned post, in the facts and circumstances of the case, we are inclined to award monetary benefits to be paid from 1-1-2010."

12. Learned counsel for the petitioner has also placed reliance on the decision in '**State of Jharkhand and others v. Kamal Prasad and others**' [(2014) 7 SCC 223], to contend that the relief of regularization sought for by the petitioner is also a concomitant of the right to livelihood being part of right to life under Article 21 of the Constitution. It is held that, right to regularization also enjoys the protection of the said provision.

13. What emerges from an examination of the above decisions is that, in view of the direction of the Apex Court contained in paragraph 53 of **Umadevi** (3) , it is the obligation of each Department of the State or each of its instrumentalities to 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 10 years without the intervention of the Courts and Tribunals and subject them to the process of verification to determine whether they were working against vacant posts and possess the requisite qualification for the post, for the purpose of regularisation of their services.

Absolutely no material or evidence has been placed before us to warrant a conclusion that the said exercise mandated by the above decisions has been undertaken by the Respondents in this case. Therefore, it is imperative that the said exercise is undertaken in the case of the petitioner, expeditiously and without further delay.

14. In the above view of the matter, the petitioner is entitled to succeed. Ext.P5 order of the CAT to the extent it has held the petitioner disentitled to the relief of regularization in service is set aside. The 2nd Respondent is directed to undertake the one-time exercise of regularization contemplated by paragraph 53 of the judgment in ***Umdadevi*** (3), in relation to the petitioner and to pass necessary orders on the claim of the petitioner after affording an opportunity of being heard to him, in accordance with the principles laid down by the Hon'ble Supreme Court in the decisions referred to above. Appropriate orders in the matter shall be passed as expeditiously as possible, at any rate, within a period of two months from the date of receipt of a copy of this judgment. The petitioner shall be at liberty to submit any further representation, if necessary, to the 2nd Respondent or to

produce any documents in support of his case as deemed necessary.

This Original Petition is allowed as above.

Sd/-
K. SURENDRA MOHAN
JUDGE

Sd/-
SHAJI P. CHALY
JUDGE

//true copy//

P.S. to Judge

St/-
26.11.2015