

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

**THE HONOURABLE THE CHIEF JUSTICE MR.ASHOK BHUSHAN
&
THE HONOURABLE MR.JUSTICE A.M.SHAFFIQUE**

WEDNESDAY, THE 14TH DAY OF OCTOBER 2015/22ND ASWINA, 1937

WA.No. 386 of 2015 () IN WP(C).8140/2012

**AGAINST THE ORDER/JUDGMENT IN WP(C) 8140/2012 of HIGH COURT OF KERALA
DATED 21-08-2014**

APPELLANT/IST RESPONDENT IN WPC:

**STATE OF KERALA
REPRESENTED BY THE SECRETARY TO GOVERNMENT
INDUSTRIES (K) DEPARTMENT, GOVERNMENT OF KERALA
THIRUVANANTHAPURAM-695001.**

BY ADV. SPL.GOVERNMENT PLEADER SMT.GIRIJA GOPAL

RESPONDENTS/PETITIONER & RESPONDENTS 2 AND 3 IN WPC:

**1. K. MANI
CARPENTER ON DAILY WAGES, KHADI CENTER, BALUSSERY
KOZHIKODE RESIDING AT THARIPALA HOUSE, PANANGAD P.O.
BALUSSERY-673612.**

**2. KERALA KHADI AND VILLAGE INDUSTRIES BOARD
THIRUVANANTHAPURAM
REPRESENTED BY ITS SECRETARY-695006.**

**3. THE PROJECT OFFICER
DISTRICT KHADI AND VILLAGE INDUSTRIES OFFICE
KOZHIKODE-673032.**

**R1 BY SRI.K.S.MADHUSOODANAN
BY SRI.TOM K.THOMAS, SC KERALA KHADI & VILLAGE INDUSTRIES BOARD**

**THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 1/09/2015, THE
COURT ON 14-10-2015 DELIVERED THE FOLLOWING:**

ASHOK BHUSHAN, C.J.

“C.R.”

&

A.M. SHAFFIQUE, J.

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W.A. Nos. 386 & 629 of 2015

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Dated this, the 14th day of October, 2015

J U D G M E N T

Shaffique, J.

State of Kerala, the 1st respondent in WP(C) No.8140/2012, has filed WA No.386/2015, challenging judgment dated 21/8/2014 by which while disposing of the writ petition filed by the 1st respondent herein, direction has been issued to the appellant to consider the case of the 1st respondent for grant of ex-gratia pension taking into account his long and continuous service under the 2nd respondent, Kerala Khadi and Village Industries Board (hereinafter referred to as 'the Board').

2. The short facts involved in the writ petition are;

The 1st respondent herein, who is herein after referred as the petitioner, was engaged as a Carpenter in the Balussery Gramodaya Khadi Sangh w.e.f. 1/1/1976. In 1983, the Gramodaya Khadi Sangh was taken over by the Kerala Khadi and Village Industries Board which was constituted under the Kerala

Khadi and Village Industries Act, 1957. During such take over, the petitioner who was working as daily wage employee was also absorbed as an employee of the Board and thereafter also he was working on daily wage basis. The Board in a resolution directed the Secretary to prepare the list of employees under the Board for submitting a proposal before the Government to regularise such employees working on daily wages. Since no further action was taken in the matter, petitioner filed WP(C) No.19705/2011 before this Court. The said writ petition was disposed of directing the Government to consider the claim of the petitioner for regularisation on the basis of the Government Orders and also the decisions on such issues by this Court as well as the Supreme Court. Thereafter, the Government rejected the claim of the petitioner as per Ext.P5 order dated 9/3/2012 *inter alia* indicating that all appointments in the Board were being made through Kerala Public Service Commission and since the petitioner was engaged only on daily wage basis, which was not a sanctioned post, regularisation cannot be made. Writ petition was filed challenging Ext.P5 order and also seeking for a direction to regularise the petitioner in service as a Carpenter in the light of

Exts.P1 to P3. Ext.P1 was an order dated 30/10/2009 issued by the Government to the Board calling upon the Board to furnish the details of the individuals engaged on daily wage basis and other relevant details. Ext.P2 is the resolution of the Board of Directors with respect to regularisation of certain daily wage employees in the Board. By the said decision, a list of 78 employees who were working on daily wage basis was forwarded to the Government.

3. Counter affidavits had been filed by the respondents refuting the claim made by the petitioner. It was stated that though there was a proposal for regularising the employees of the Board, the same was not pursued by the Board. The writ petitioner filed a reply as well claiming that certain other persons who were working in similar capacities had been regularised by the Board.

4. After considering the factual and legal issues involved in the matter, learned Single Judge observed that claim for regularisation cannot be made in view of the judgment of the Supreme Court in ***State of Karnataka v. Umadevi*** [(2006) 4 SCC 1]. However, placing reliance on the judgment of the

Supreme Court in ***Hari Nandan Prasad and anr. v. Employer I/R to Management of Food Corporation of India and another*** [(2014) 7 SCC 190] and ***State of Kerala v. Daisy*** (2012 (3) KLT 366), the learned Single Judge directed grant of ex-gratia pension to the petitioner.

5. While challenging the aforesaid judgment, learned Special Government Pleader Smt.Girija Gopal submits that the learned Single Judge while upholding the contention of the appellant that the petitioner was not entitled for regularisation committed serious error of law in directing ex-gratia pension to be granted. It is contended that there is no rule or regulation in force which permits grant of ex-gratia pension to a daily wage worker who was not regularised in service. The obligation to pay pension arises only to employees who had retired from service and in so far as the petitioner was not a person who had joined in “the service of the Government”, the direction to grant ex-gratia pension was absolutely baseless and it is totally against the very concept of grant of pension.

6. The petitioner has also filed a separate appeal as WA No.629/15. Learned counsel appearing for the petitioner Sri.K.S.

Madhusoodanan while supporting the stand taken by the learned Single Judge in the matter of grant of ex-gratia pension to the petitioner further contended that petitioner's service ought to have been regularised by the Government taking into consideration the fact that similarly placed persons had already been regularised.

7. Smt.Girija Gopal relied upon the following judgments to contend that the judgment of the learned Single Judge is liable to be set aside.

(i) ***Daisy's case*** (supra) has been referred to indicate that the Full Bench did not lay down any law in the said case. Only an observation was made in the said judgment stating that the Government should relax the rigour of the rules and sanction pension to the petitioner in the said case taking cue from the stipulations in the Ex-gratia Pension Scheme introduced as per GO (P) No.1851/99/Fin. dated 18.9.1999. It was also observed as an opinion that the Government should relax the provision contained in Rule 7 Part II of KSR and Rule 11 of Part III of KSR and sanction and pay pension to the said claimants. It is contended that the aforesaid judgment does not lay down any law as such and

therefore could not be a precedent to be followed by the learned Single Judge.

(ii) In **Government of Andhra Pradesh v. K.Brahmanandam and others** [(2008) 5 SCC 241], Supreme Court reiterated the position that appointments made in violation of mandatory provisions are illegal and void.

(iii) In **Maharashtra State Road Transport Corporation v. Casteribe Rajya Parivahan Karmchari Sanghatana** [(2009) 8 SCC 556], the Supreme Court has to a certain extent clarified the position as far as power of Industrial Tribunals are concerned, vis-a-vis the judgment of the Supreme Court in **Umadevi's case**. It is held at para 34 to 36 as under:

“34. It is true that Dharwad Distt. PWD Literate Daily Wages Employees’ Assn arising out of industrial adjudication has been considered in Umadevi and that decision has been held to be not laying down the correct law but a careful and complete reading of the decision in Umadevi leaves no manner of doubt that what this Court was concerned in Umadevi was the exercise of power by the High Courts under Article 226 and this Court under Article 32 of the Constitution of India in the matters of public employment where the employees have been engaged as contractual,

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temporary or casual workers not based on proper selection as recognised by the rules or procedure and yet orders of their regularisation and conferring them status of permanency have been passed.

35. Umadevi is an authoritative pronouncement for the proposition that the Supreme Court (Article 32) and the High Courts (Article 226) should not issue directions of absorption, regularisation or permanent continuance of temporary, contractual, casual, daily wage or ad hoc employees unless the recruitment itself was made regularly in terms of the constitutional scheme.

36. Umadevi does not denude the Industrial and Labour Courts of their statutory power under Section 30 read with Section 32 of the MRTU and PULP Act to order permanency of the workers who have been victims of unfair labour practice on the part of the employer under Item 6 of Schedule IV where the posts on which they have been working exist. Umadevi cannot be held to have overridden the powers of the Industrial and Labour Courts in passing appropriate order under Section 30 of the MRTU and PULP Act, once unfair labour practice on the part of the employer under Item 6 of Schedule IV is established."

(iv) In **Mohammed Ashif v. State of Bihar and others** (2010) 5) SCC 475), the Supreme Court held that if the initial appointment itself is illegal and being violative of the law laid

down in **Umadevi**, termination after 15 years cannot be faulted with.

(v) In **Brij Mohan Lal v. Union of India** [(2012) 6 SCC 502], the Supreme Court held that normally there are three kinds of posts that exists in a cadre viz., permanent posts, temporary posts and quasi-permanent posts. If a temporary employee is appointed against a permanent post, he could get a right to post, provided he had acquired the status of a quasi permanent employee under the Rules. If the post is not sanctioned nor is permanent, the entire arrangement is *ad hoc* or is for an uncertain duration, it cannot create any rights and obligations in favour of appointees akin to those of permanent employees. Para 78 , 80 and 85 of the said judgment are relevant, which read as under;

"78. Normally, there are three kinds of posts that may exist in a cadre—(1) permanent posts; (2) temporary posts; and (3) quasi-permanent posts. Accordingly, there can be a temporary employee, a permanent employee or an employee in quasi-permanent capacity.

80. Thus it follows that for a person to have a right

to the post, the post itself has to be a permanent post duly sanctioned in the cadre. The person should be permanently appointed to that post. Normally, it is only under these circumstances that such an employee gets a right to the post, but even when a temporary employee is appointed against a permanent post, he could get a right to the post provided he had at least acquired the status of a quasi-permanent employee under the relevant Rules. Where neither the post is sanctioned nor is permanent and, in fact, the entire arrangement is ad hoc or is for an uncertain duration, it cannot create any rights and obligations in favour of the appointees, akin to those of permanent employees.

85. Therefore, the above principles clearly show that there should be a right vested in an employee, which is duly recognised and declared in accordance with the Rules governing the conditions of service of such employee before such relief is granted. Unless the government employee holds any status as aforeindicated, it may not be possible to grant relief to the government employee, particularly when such relief is not provided under the relevant Rules."

(vi) In ***Rajkumar v. Jalagaon Municipal Corporation*** [(2013) 2 SCC 751], the Supreme Court while considering the question of regularization of a casual labourer, after referring to

the judgment in **Umadevi** held that since the appellants were temporarily employed on daily wages as and when work was available and as they were not posted on regular basis against sanctioned posts, there is no justification to direct regularization. However, the matter had arisen out of an award passed by the Labour Court holding that their termination was illegal and direction was given to reinstate the appellants. The direction of the Labour Court was set aside by the learned Single Judge of the High Court as well as the Division Bench. However, the Supreme Court directed compensation to be paid taking into account the facts and circumstances involved in the matter.

(vii) In **Union of India and another. v. Arulmozhi Iniarasu and Ors.** [(2011) 7 SCC 397], Supreme Court held that a person who had worked for long number of years cannot claim any pension as the principle of doctrine of legitimate expectation was inapplicable which is clear from the terms of appointment itself. Further, it was held that when there is no legal right vested in a petitioner and corresponding legal obligation on the State, no mandamus could be issued. Reference is made to para 26 of the judgment which reads as under;

“26. Lastly, as regards the submission that the action of the appellants is highly discriminatory inasmuch as some similarly situated persons have been appointed/absorbed as Sepoys, the argument is stated to be rejected. It is well settled that a writ of mandamus can be issued by the High Court only when there exists a legal right in the writ petitioner and corresponding legal obligation in the State. Only because an illegality has been committed, the same cannot be directed to be perpetuated. It is trite law that there cannot be equality in illegality. (Ref.: Sushanta Tagore and Ors. v. Union of India and Ors.; U.P. State Sugar Corpn. Ltd. and Anr. v. Sant Raj Singh and Ors.; State, CBI v. Sashi Balasubramanian and Anr. and State of Orissa and Ors. v. Prasana Kumar Sahoo.)

8. The learned counsel for the respondent Sri.K.S.Madhusoodanan however relied upon the judgment in ***State of Haryana and Ors. v. Piara Sigh and others*** (AIR 1992 SC 2130) and contended that though the normal rule is regular recruitment through the prescribed agency, an *ad hoc* or temporary employee should not be replaced by another *ad hoc* or temporary employee. Further, if an *ad hoc* or temporary employee is continued for a fairly long spell, the authorities must consider his case for regularisation provided he is eligible and

qualified according to the rules and his service record is satisfactory and his appointment does not run counter to the reservation policy of the State. In such events, the State has to prepare a scheme for regularisation of such employees consistent with its reservation policy. Para 25 of the judgment is relied upon, which reads as under;

“25. Before parting with this case, we think it appropriate to say a few words concerning the issue of regularisation of ad hoc/temporary employees in government service.

The normal rule, of course, is regular recruitment through the prescribed agency but exigencies of administration may sometimes call for an ad hoc or temporary appointment to be made. In such a situation, effort should always be to replace such an ad hoc/temporary employees by a regularly selected employee as early as possible. Such a temporary employee may also compete along with others for such regular selection/ appointment. If he gets selected, well and good, but if he does not, he must give way to the regularly selected candidate. The appointment of the regularly selected candidate cannot be withheld or kept in abeyance for the sake of such an ad hoc /temporary employee.

Secondly, an ad hoc or temporary employee should not be replaced by another ad hoc or temporary employee should not be replaced only by a regularly selected employee. This is necessary to

avoid arbitrary action on the part of the appointing authority.

Thirdly, even where an ad hoc or temporary employment is necessitated on account of the exigencies of administration, he should ordinarily be drawn from the employment exchange unless it cannot brook delay in which case the pressing cause must be stated on the file. If no candidate is available or is not sponsored by the employment exchange, some appropriate method consistent with the requirements of Article 16 should be followed. In other words there must be a notice published in the appropriate manner calling for applications and all those who apply in response there to should be considered fairly.

An unqualified person ought to be appointed only when qualified persons are not available through the above processes.

If for any reason, an ad hoc or temporary employee is continued for a fairly long spell, the authorities must consider his case for regularisation provided he is eligible and qualified according to rules and his service record is satisfactory and his appointment does not run counter to the reservation policy of the State.

The proper course would be that each State prepares a scheme, if one is not already in vogue, for regularisation of such employees consistent with its reservation policy and if a scheme is already framed, the same may be made consistent with our observations herein so as to reduce avoidable

litigation in this behalf. If and when such person is regularised he should be placed immediately below the last regularly appointed employee in that category, class or service, as the case may be.

So far as the work-charged employees and casual labour are concerned, the effort must be to regularise them as far as possible and as early as possible subject to their fulfilling the qualifications, if any, prescribed for the post and subject also to availability of work. If a casual labourer is continued for a fairly long spell - say two or three years -- a presumption may arise that there is regular need for his services. In such a situation, it becomes obligatory for the concerned authority to examine the feasibility of his regularisation. While doing so, the authorities ought to adopt a positive approach coupled with an empathy for the person. As has been repeatedly stressed by this court, security of tenure is necessary for an employee to give his best to the job. In this behalf, we do commend the orders of the Government of Haryana (contained in its letter dated 6-4-90 referred to hereinbefore) both in relation to work charged employees as well as casual labour.

We must also say that the orders issued by the Governments of Punjab and Haryana providing for regularisation of ad hoc/temporary employees who have put in two years/ one year of service are quite generous and leave no room for any legitimate grievance by any one.

These are but a few observations which we

thought it necessary to make, impelled by the facts of this case, and the spate of litigation by such employees. They are not exhaustive nor can they be understood as immutable. Each Government or authority has to devise its own criteria or principles for regularisation having regard to all the relevant circumstances, but while doing so, it should bear in mind the- observations made herein."

9. The first issue to be considered in the present writ appeal is whether the petitioner was appointed in a sanctioned post. The argument of the writ petitioner is that since he was working on daily wages since 1/1/1976 in the former Gramodaya Khadi Sangh and thereafter from 1983 onwards in the Kerala Khadi and Village Industries Board, it has to be assumed that it was a sanctioned post. The learned Special Government Pleader however relied upon the Kerala Khadi Board Act and the Rules framed thereunder especially Kerala Khadi and Village Industries Board (Classification and Conditions of Recruitment of Staff) Regulations, 1967 to contend that there is no post for Carpenter created under the provisions of the Act. There is only one post of Supervisor (Carpentry and Blacksmithy) and that certain qualifications are prescribed which has to be made only by direct

recruitment on the advice of Kerala Public Service Commission. The qualification is pass in SSLC or equivalent examination with ITI certificate in Carpentry or Blacksmithy approved by the Government. Since there is no post of Carpenter in the Khadi Board, the appointment of the petitioner on daily wages is not against any sanctioned post and therefore, no claim can be made for regularisation.

10. Having heard the learned counsel on either side, we are also of the view that in so far as the appointment of the petitioner as a daily wage employee was not to a sanctioned post, Khadi Board could not have regularized any person in service when the rules itself provide for direct recruitment through Kerala Public Service Commission, and that too to the post of Supervisor (Carpenter). As rightly held by the learned Single Judge, judgment in ***Umadevi*** (supra) would stand in the way of the petitioner's claim for regularisation as there was no material to indicate that the appointment of the petitioner was against a sanctioned post of Carpenter. In that view of the matter, we do not think that the appeal filed by the writ petitioner can be entertained.

11. The next question is whether any direction can be

issued to the Government to consider the grant of ex-gratia pension to the petitioner. First of all, the question is whether there is any such provision enabling the grant of ex-gratia pension. Chapter II of Part III Kerala Service Rules (KSR) relates to qualifying services for the grant of pension. Rule 10 indicates that service of an employee does not qualify for pension unless he is appointed, his duties regulated and paid by the Government or under conditions determined by the Government. Rule 11 starts with a *non obstante* clause, which reads as under;

*“11. Notwithstanding the provisions of Rule 10, the Government may,
(1) declare that any specified kind of service rendered shall qualify for pension; and
(2) in individual cases, and subject to such conditions as they may think fit to impose in each case, allow service rendered by an employee to count for pension.”*

12. It is argued by the learned Special Government Pleader that though the aforesaid provision exists and it is open for the Government to declare any specified kind of service to qualify for pension and to allow service rendered by an employee to count for pension, it is argued that the word 'service' and 'employee'

used in Rule 11(2) denotes regular service and an employee appointed in accordance with the prescribed procedure. It is therefore argued that Rule 11 has no application to the facts of the present case.

13. The argument is that in so far as there is no statutory provision enabling the grant of ex-gratia pension, the learned Single Judge was not justified in directing the Government to pay ex-gratia pension. It is also argued that the decision of the Full Bench in ***Daisy's case*** (supra) cannot be taken as a precedent to enable the learned Single Judge to direct the State Government to consider payment of ex-gratia pension. On a perusal of the judgment in ***Daisy's case*** (supra), it is rather clear that the Full Bench was aware of the fact that the petitioner in that case was not qualified for any pension, but the Full Bench observed that the Government should relax the rigour of the Rules taking into account Government Order dated 18/9/1999. But it is relevant to note that the said judgment applies to a regular employee and not a person who cannot be treated as a member of service or an employee of the Government. Ex-gratia pension may be allowable only by relaxing the rules in respect of persons who were not

eligible to get the regular pension. This judgment cannot be made applicable to the factual circumstances of the present case.

14. Learned Single Judge further referred to the judgment of the Supreme Court in ***Hari Nandan Prasad's case*** (supra) wherein the Supreme Court held that where an order of reinstatement, if issued, would result in regularisation of the service of an employee which could not be legally justifiable, Court can direct suitable compensation to be paid. The compensation and pension stand on two different concepts. The said principle cannot have application to all factual circumstances. This is an instance where a person was working as Carpenter on daily wages for a considerably long period. He was never in regular service and was not appointed as a regular employee at any point of time. In such circumstances, the question is whether the rules could be relaxed in such a manner to enable the daily wage worker to claim pension or even ex-gratia pension.

15. As rightly contended by the learned Special Government Pleader, the very concept of pension arises only in respect of regular employees and ex-gratia pension in respect of

persons who did not have the qualifying service. But still, regular appointment in the appropriate method of appointment is a precondition. Hence, we do not think that the learned Single Judge was justified in directing the grant of ex-gratia pension to the petitioner.

16. The Supreme Court in ***Hari Nandan Prasad's case*** (supra) was considering the validity of an award passed by the Industrial Tribunal, which is on a different set of facts and the said judgment cannot have application to the facts of this case. It is held at paragraphs 2, 3, 17, 39 and 40 as under:

“2. The two appellants were working on casual basis with FCI. After certain time, their services were dispensed with. Both of them raised industrial dispute alleging wrongful termination which was referred to the Central Government-cum-Industrial Tribunal (CGIT). These proceedings culminated in two awards dated 12-12-1996 and 18-12-1996 respectively passed by CGIT. In both these awards, termination of both the appellants was held to be illegal and they were directed to be reinstated with 50% back wages. CGIT also ordered their regularisation in service.

3. FCI filed writ petitions in both the cases challenging these awards which were initially

admitted sometime in the year 1988 and the operation of the awards was stayed. However, orders were passed under Section 17-B of the Industrial Disputes Act (ID Act) directing payment of full wages as last wages drawn to the appellants from the date of the award in each case. These writ petitions were ultimately dismissed by the learned Single Judge vide common judgment and order dated 19-5-2005. As pointed out above, this judgment of the learned Single Judge was challenged by FCI by filing LPAs. These LPAs have been allowed by the Division Bench, thereby setting aside the orders of the learned Single Judge as well as awards passed by CGIT. This is how the two appellants are before us in this appeal.

17. This issue hardly poses any problem. The admitted facts are that both the appellants had worked for more than 240 days continuously preceding their disengagement/termination. At the time of their disengagement, even when they had continuous service for more than 240 days (in fact about 3 years) they were not given any notice or pay in lieu of notice as well as retrenchment compensation. Thus, the mandatory precondition of retrenchment in paying the aforesaid dues in accordance with Section 25-F of the ID Act was not complied with. That is sufficient to render the termination as illegal. Even the High Court in the impugned judgment has accepted this position and there was no quarrel on this aspect before us as

well. With this, we advert to the issue of relief which should be granted in such cases, as that was the topic of hot debate before us as well.

39. On a harmonious reading of the two judgments discussed in detail above, we are of the opinion that when there are posts available, in the absence of any unfair labour practice the Labour Court would not give direction for regularisation only because a worker has continued as daily-wage worker/ad hoc/temporary worker for number of years. Further, if there are no posts available, such a direction for regularisation would be impermissible. In the aforesaid circumstances giving of direction to regularise such a person, only on the basis of number of years put in by such a worker as daily-wager, etc. may amount to back door entry into the service which is an anathema to Article 14 of the Constitution. Further, such a direction would not be given when the worker concerned does not meet the eligibility requirement of the post in question as per the recruitment rules. However, wherever it is found that similarly situated workmen are regularised by the employer itself under some scheme or otherwise and the workmen in question who have approached the Industrial/Labour Court are on a par with them, direction of regularisation in such cases may be legally justified, otherwise, non-regularisation of the left-over workers itself would amount to invidious discrimination qua them in such cases and would be violative of Article 14 of the Constitution. Thus, the industrial adjudicator would be achieving the

-:23:-

equality by upholding Article 14, rather than violating this constitutional provision.

40. The aforesaid examples are only illustrative. It would depend on the facts of each case as to whether the order of regularisation is necessitated to advance justice or it has to be denied if giving of such a direction infringes upon the employer's rights."

17. In the light of the aforesaid factual and legal issues involved in the matter, we do not think that the learned Single Judge was justified in directing grant of ex-gratia pension to the writ petitioner.

Under such circumstances, WA No.386/2015 is allowed setting aside the judgment of the learned Single Judge and WA No.629/15 is dismissed.

Sd/-

ASHOK BHUSHAN, CHIEF JUSTICE

Sd/-

A.M. SHAFFIQUE, JUDGE

Rp