

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE THE CHIEF JUSTICE MR.ASHOK BHUSHAN
&

THE HONOURABLE MR.JUSTICE A.M.SHAFFIQUE

FRIDAY, THE 30TH DAY OF OCTOBER 2015/8TH KARTHIKA, 1937

WA.No. 673 of 2015 IN WP(C).5658/2013

AGAINST THE JUDGMENT IN WP(C) 5658/2013 of
HIGH COURT OF KERALA DATED 9.4.2014

APPELLANT(S)/RESPONDENTS 1,2 & 4 IN WPC:

1. STATE OF KERALA
REP. BY THE SECRETARY TO GOVERNMENT
LOCAL SELF GOVERNMENT DEPARTMENT, SECRETARIAT
THIRUVANANTHAPURAM-695001.
2. COMMISSIONER OF RURAL DEVELOPMENT
COMMISSIONERATE OF RURAL DEVELOPMENT, LMS COMPOUND
THIRUVANANTHAPURAM-695033.
3. THE PROJECT DIRECTOR
POVERTY ALLEVIATION UNIT, WAYANAD DISTRICT PANCHAYAT
KALPETTA NORTH P O, WAYANAD-673122.

BY Sr.GOVERNMENT PLEADER SRI.P.I.DAVIS

RESPONDENT(S)/PETITIONER & 3RD RESPONDENT IN WPC:

1. T.K. GANESAN
ROAD ROLLER DRIVER, POVERTY ALLEVIATION UNIT (FORMERELY
DISTRICT RURAL DEVELOPMENT AGENCY),
WAYANAD DISTRICT PANCHAYATH, KALPETTA NORTH P O
WAYANAD-673122.
2. WAYANAD DISTRICT PANCHAYAT
REP. BY THE SECRETARY, KALPETTA NORTH P O
WAYANAD-673122.

R1 BY ADV. SRI.S.PRASANTH (AYYAPPANKAVU)
R1 BY ADV. SMT.VARSHA BHASKAR
BY SRI.GEORGE MATHEWS

THIS WRIT APPEAL HAVING COME UP FOR ADMISSION ON 30-10-2015, THE
COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX

WA.No. 673 of 2015 IN WP(C).5658/2013

APPELLANTS' EXHIBITS : NIL

RESPONDENTS' EXHIBITS :

ANNEXURE-R1(a) : TRUE COPY OF THE LETTER DATED 7.11.2006 SENT BY THE PROJECT DIRECTOR, POVERTY ALLEVIATION UNIT, DISTRICT PANCHAYAT, ALAPPUZHA, TO THE 1st RESPONDENT.

ANNEXURE-R2(b) : TRUE COPY OF D.O.NO.R-20015/26/2007-DRDA DATED 21.7.2008 SENT BY THE SECRETARY, GOVERNMENT OF INDIA, MINISTRY OF RURAL DEVELOPMENT TO THE CHIEF SECRETARY, GOVERNMENT OF KERALA.

ANNEXURE-R2(c) : TRUE COPY OF THE EXTRACT OF THE GUIDELINES ON DRDA ADMINISTRATION.

//TRUE COPY//

P.A.TO JUDGE

ami/

**ASHOK BHUSHAN, C.J. &
A.M.SHAFFIQUE, J.**

W.A.No.673 of 2015

Dated this the 30th day of October, 2015.

J U D G M E N T

SHAFFIQUE, J.

Heard the learned Senior Government Pleader for the appellants and the learned counsel appearing for the 1st respondent.

2. This appeal is filed by the State and its authorities challenging the judgment dated 9.4.2014 in W.P.(C)No.5658 of 2013, by which, the learned Single Judge while allowing the writ petition directed the 1st appellant/1st respondent to regularise the service of the petitioner as 'Road Roller Driver' in the establishment of the third appellant, from the date on which the judgment was delivered in **Secretary, State of Karnataka Vs. Umadevi [(2006)4 SCC 1]**.

3. The writ petition was filed by the 1st respondent herein challenging Ext.P5, an order, by which, the Government had rejected his request for regularising his

service. The petitioner claimed to have been appointed in a sanctioned post as a daily wage worker on 8.2.1994 as a Road Roller Driver in District Rural Development Agency (DRDA), Wayanad. He submits that he continued his service from 8.2.1994 onwards in that post. The Agency was dissolved and its staff, assets and liabilities were transferred to Wayanad District Panchayat, in 2001. He submitted various representations for regularising him in service, but no action has been taken by the Government. The petitioner filed W.P.(C)No.21855/12 before this Court, which was disposed of directing the Government to consider his representation in the light of various similar orders passed by the Government. However, still, the Government without adverting to such orders, has not regularised the petitioner by quoting Umadevi's case (cited supra). The petitioner submits that several similarly placed persons were regularised and therefore the petitioner is also entitled to get the same benefit.

4. The 1st respondent in the writ petition had filed a statement inter alia supporting the stand taken in Ext.P5. It is stated that the Government had examined the matter in detail based on the directions issued by this Court and since the petitioner is a daily waged employee, he cannot claim for a permanent employment based on the Government Order dated 9.1.2013 and therefore his request for regularisation in service was rejected. They also relied upon Umadevi's case (supra) to indicate that the petitioner is not entitled for regularisation.

5. The learned Single Judge, however came to a finding that, since the appointment was made in a sanctioned post, that the petitioner was having valid qualification to hold the post, that he was working continuously for a period of 10 years and his continuation is not on the basis of any court orders and the fact that several similarly placed persons were also regularised as evident from Exts.P6 to P11 orders, by which, services of large number of Roller Drivers/Drivers

and other engaged on daily wages in various DRDAs were regularised, the 1st appellant was directed to regularise the service of the petitioner as Road Roller Driver. The learned Single Judge also made reference to paragraph 53 of the judgment in Umadevi's case to arrive into the said conclusion.

6. Sri.P.I.Davis, the learned Senior Government Pleader, while impugning the judgment, inter alia contended that the appointment of the petitioner was not in a sanctioned post. It is further stated that he was appointed as a daily waged employee in DRDA, Wayanad. Later DRDA has been renamed as 'Poverty Alleviation Unit' and there is no post of 'Road Roller Driver'. It is also stated that road repairing work was done only occasionally and there is no regular work as well. He was paid wages only on the days he had worked. The appellants also contended that the learned Single Judge was not justified in observing that, the appointment of the petitioner was in a sanctioned post.

7. On the other hand, the learned counsel for the 1st respondent contended that the petitioner although doing work in the said post, it is a sanctioned post as well. She relied upon the Government Order dated 4.2.1987, in which it is indicated as under :

"Sanction is accorded for the creation of 22 posts of Roller Roller Drivers in the posts of pay of in the District Rural Development Agencies, as detailed below, till the end of the financial year 1986-87.

<u>District Rural Authorities</u>	<u>Number of posts</u>
.	.
.	.
.	.
Wayanad	2
.	.
.	"

It is also contended on the basis of the judgment in **State of Karnataka and Ors. Vs. M.L.Kesari and Ors. (2010(9) SC 247)** that, it is the 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. The learned counsel also relied upon the judgment in **Prem Ram Vs. Managing Director, Uttarakhand Pwya Jal and Nirman Nigam and Ors. [(2015)II LLJ 717 SC]**, wherein the Supreme Court directed regularisation of service of the appellant therein, after referring to Umadevi's case. Another judgment relied on by the counsel is **Nihal Singh and Ors. Vs. State of Punjab and Ors. (2013(14) SCC 65)**. In the said judgment, the counsel relied upon paragraph 21, which reads as follows :

"But we do not see any justification for the State to take a defence that after permitting the utilisation of the services of large number of people like the Appellants for decades to say that there are no sanctioned posts to absorb the Appellants. Sanctioned posts do not fall from heaven. State has to create them by a conscious choice on the basis of some rational assessment of the need."

It is submitted that since the petitioner had been working as daily wage worker for the last 19 years and the material now relied upon by the 1st respondent clearly indicates that it was a sanctioned post, there is every possibility that the

sanctioned post was continued for a period of time and therefore it is incumbent upon the Government to regularise the petitioner on service.

8. The short question involved in this appeal is whether the learned Single Judge was justified in directing the regularisation of the petitioner in his service. Paragraph 53 of the judgment in Umadevi's case reads as under :

"53. One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in S.V.Narayanappa, R.N.Nanjundappa and B.N.Nagarajan 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 the courts or of tribunals. The question of regularisation 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 regularise 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 the 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 regularisation, if any already made, but not sub judice, need not be reopened based on this judgment, but there should be no further bypassing of the constitutional requirement and regularising or making permanent, those not duly appointed as per the constitutional scheme."

9. Thus, the Constitution Bench clearly indicates the parameters under which the irregularly appointed daily waged employees were regularised in service. The first requirement is that the appointment must be in a sanctioned post. Though the learned counsel contended that the petitioner's appointment was on a sanctioned post, no material is available to indicate that there was a sanctioned post as on the date of petitioner's appointment. Government Order dated 4.2.1987 relied upon by the petitioner, was confined to the financial year 1986-87. There is also no material to indicate that, sanctioned posts existed subsequent to 1986-87 or on the date he was engaged or even as on today. Under such circumstances, the finding of the learned Single Judge, that the petitioner was appointed

against the sanctioned post, is prima facie incorrect. Once such a sanctioned post is not available, we do not think that the learned Single Judge was justified in directing the regularisation of the petitioner in service in the aforesaid establishment. The learned Single Judge further referred to Exts.P6 to P11 orders regularising the services of large number of Roller Drivers/Drivers and others engaged on daily wages in various DRDAs. Of course, the Supreme Court has given direction to regularise the service of daily-wagers on certain conditions. Most of the orders relied on by the petitioner are prior to Umadevi's case and after Umadevi's case, it appears that it was open for the Government to regularise the service of such employees on certain conditions and even to create posts. It is also borne out that, most of the orders had been passed on the basis of the judgment of this Court.

10. When coming to the judgments relied upon by the learned counsel for the petitioner/1st respondent, in

M.L.Kesari (supra), the Apex Court held that the respondents who had continued as daily wages for more than 15 years were entitled for regularisation depending upon the terms and conditions of appointment, availability of existing substantive vacancies, eligibility, qualifications, continuity of service, seniority and prevailing rules. After referring to the judgment in **Umadevi** (supra), it is held that **Umadevi** (supra) casts a duty upon the concerned Government to take steps for regularisation of service of those irregularly appointed employees who have served for more than ten years as a one-time measure. The one-time exercise should concern all daily wage employees who have put in 10 years continuous service as on 10/04/2006, without availing the protection of any interim orders of the Courts or Tribunals. In that case, the Supreme Court, while confirming the view expressed by the Division Bench of the High Court, directed the Zila Panchayat to undertake the exercise within a period of six months. This judgment does

not give any support to the contention urged on behalf of the petitioners. In **Prem Ram** (supra), Supreme Court has directed the Government of Uttarakhand to regularise the service of the daily wagers in the said case taking into consideration the Regularisation Rules, 2011, framed by the Government, which, of course, has no application to the factual situation in the present case. That was a case where the termination was challenged before the Labour Court and a direction was issued to reinstate the appellant in service. Orders under challenge was the award passed by the Labour Court. It was also observed that there was no impediment in directing regularisation of service of the appellant on the analogy of his juniors, with effect from the date his juniors who were regularised. This judgment therefore has no application to the facts of the present case.

11. In **Nihal Singh** (supra), direction was issued by the Court to the State of Punjab to regularise the service of appellants by creating necessary posts. In that case, the

Supreme Court observed that the facts of the case demonstrate that there is need for creation of posts and there is failure on the part of the Executive Government to apply its mind and take a decision to create posts. In the case on hand, the specific contention urged on behalf of the appellants is that the work is only occasional in nature and that the petitioner was paid only for those days in which the road roller actually worked. There is no material to indicate that deliberately a post has not been created and there is requirement for the same. A ground has been raised by the appellants, indicating that the number of days the petitioner had worked from 1996-2014 based on the log sheet/log book are only 837 days. Under such circumstances, it cannot be said that there existed a reason for creating a post for the petitioner. Hence, this judgment also cannot be applied to the facts of the case.

12. The learned counsel for the petitioner had also contended that the juniors of the petitioner were regularised

in service. As already narrated, most of them were regularised based on the directions issued by this Court and on its own separate set of facts which, by itself, cannot be imported to this case especially in the absence of any material to indicate, under what circumstances such regularisation had been effected.

13. Hence the petitioner being a daily waged employee, was not regularised, on the basis of Umadevi's case, as his appointment was not in a sanctioned post. Under such circumstance, we do not think that the learned Single Judge was justified in quashing Ext.P5. However, having regard to the fact, that several persons who were Road Roller Drivers were regularised in service for a period of time, we only observe that the Government may consider the case of the petitioner, in the event any vacancy arises in a sanctioned post.

We therefore allow the appeal setting aside the judgment of the learned Single Judge and direct the

Government to consider the claim of the petitioner for regularisation, if any vacancy arises in a sanctioned post.

Sd/-
ASHOK BHUSHAN,
CHIEF JUSTICE.

Sd/-
A.M.SHAFFIQUE,
JUDGE.

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//True copy//

P.A. to Judge