

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

+ W.P.(C) No. 471/2015 & conn.

% **22nd January , 2015**

+ **W.P.(C) 471/2015 and C.M.Nos.789-90/2015**

RADHEY SHYAM AND ORS Petitioners

Through: Mr. Sourabh Ahuja, Advocate.

versus

GNCT OF DELHI AND ORS Respondents

Through: Ms. Sangeeta Sondhi, Advocate with
Prof. Dr. N.R.Singh , Incharge
Medical Supt. Of R-2.

+ **W.P.(C) 474/2015 and C.M. Nos.796-97/2015**

SOM DUTT AND ORS Petitioners

Through: Mr. Sourabh Ahuja, Advocate.

versus

GNCT OF DELHI AND ORS Respondents

Through: Ms. Sangeeta Sondhi, Advocate with
Prof. Dr. N.R.Singh , Incharge
Medical Supt. Of R-2.

+ **W.P.(C) 482/2015 and C.M. Nos.812-13/2015**

REKHA YADAV AND ORS Petitioners

Through: Mr. Sourabh Ahuja, Advocate.

versus

Through: Ms. Sangeeta Sondhi, Advocate with
Prof. Dr. N.R.Singh , Incharge
Medical Supt. Of R-2.

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

To be referred to the Reporter or not? **Yes**

VALMIKI J. MEHTA, J (ORAL)

W.P.(C) 471/2015 and C.M.Nos.789-90/2015

1. Petitioners are working with the respondent no.2/Chaudhary Brahm Prakash Ayurved Charak Sansthan as Panchkarma Technicians. Petitioners were appointed for a contractual period of 11 months pursuant to the advertisement issued on 8.6.2012 which itself also specifically stated that the appointments of the petitioners will be only on contractual basis for 11 months.

2. By this writ petition, petitioners seek the relief of they being regularized to their respective posts of Panchkarma Technicians and to which they were appointed in terms of the appointment letters dated 20.6.2012.

3. It is settled law that contractual employees i.e employees who have been appointed for only a specific contractual period, cannot be regularized to their posts much less when there are no vacant sanctioned posts available to which the petitioners were appointed. The Constitution Bench of the Supreme Court in the case of *Secretary, State of Karnataka & Ors. vs. Umadevi & Ors., (2006) 4 SCC 1* has laid down the following ratio:-

“(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. A reading of the counter-affidavit of respondent no.2 shows that there were four sanctioned posts of Panchkarma Technicians and four persons were already appointed as per the recruitment process to the posts of Panchkarma Technicians, prior to the contractual appointments of the present petitioners and which four persons are Sh. Dharmender, Sh. Roopesh, Smt. Shanti Lata Sahani and Smt. Seema Singh who have been also appointed on contract basis. Therefore, there are in fact no sanctioned posts of Panchkarma Technicians at which the petitioners were appointed and seek appointments and there are no vacancies in the existing four sanctioned posts.

5. Learned counsel for the petitioner places reliance upon a Division Bench Judgment of this Court in the case of ***S.K.Chaudhary & Ors. Vs. Govt. of NCT of Delhi & Anr. 2013(1) AD (Delhi) 779*** to argue that the petitioners are liable to be regularized by only putting them through certain tests as was ordered in the case of ***S.K.Chaudhary (supra)*** by a Division Bench of this Court, however, the argument urged on behalf of the petitioner by placing reliance on the judgment in the case of ***S.K.Chaudhary (supra)*** is wholly misconceived for two reasons. The first reason is that in ***S.K.Chaudhary's case (supra)***, the temporary employees were working for

as many as 12 years to 16 years in their posts and therefore, by virtue of this long period they had acquired huge experience in these posts and therefore a specific appointment procedure was carved out by a Division Bench of this Court only with respect to the petitioners in those cases. In the present case, the petitioners have been appointed only in the year 2012 and therefore they have barely an experience of just about two years, and therefore, in my opinion, the direct ratio of the Constitution Bench judgment in *Umadevi's case (supra)* cannot be violated by making contractual employees as regular employees, and which has been frowned upon by the Supreme Court in *Umadevi's case (supra)*.

6. The second reason as to why the petitioners cannot claim benefit of the judgment in *S.K.Chaudhary's case (supra)* is because in the present case there are no vacant sanctioned posts of Panchkarma Technicians to which the petitioners are seeking appointments inasmuch as, the sanctioned posts are already filled up by four candidates, *albeit* on contractual basis. These four persons were appointed prior to the petitioners in the year 2010. Therefore, once there are no vacant sanctioned posts and which was the position which prevailed in *S.K.Chaudhary's case (supra)*, the present petitioners have no right to seek their regularization because the

ratio in the case of *S.K.Chaudhary (supra)* would not apply because in the said case there did exist vacant sanctioned posts. Also, it is settled law that courts cannot order that posts be sanctioned.

7. I may state that with respect to the same respondent no.2-institute I have had an occasion to consider the aspect of regularization of certain employees in the case of *Amrish Chanana and Ors. Vs. Govt. Of NCT of Delhi & Anr.* W.P(C) 1045/2013 decided on 3.5.2013. In the facts of that case it was found that the advertisement pursuant to which petitioners in those cases were appointed did not specify the appointment as contractual period posts for a specified period and also that the appointment letters which were issued to the petitioners in those cases were not contractual period appointment letters for a specified period and since the appointments of the petitioners in that case were against vacancies in sanctioned posts, and appointments were not on contract basis but on probationary basis, and that too as per regular recruitment process, this Court held that those petitioners in *Amrish Chanana's case (supra)* were entitled to regularization. With respect to the aspect as to whether petitioners in *Amrish Chanana's case (supra)* were only contractual employees or were actually probationary

employees appointed against sanctioned posts, this was dealt with by me in paras 19 to 23 of the said judgment and which read as under:-

“19. The only issue which now remains to be addressed is as to whether the respondent No.2 is correct in contending that the appointments of the petitioners are contractual in nature and hence appointments cannot be said to be regular appointments. It is argued that once the appointments are only contractual appointments and not regular appointments, the reliefs claimed by the petitioners that no fresh recruitments should take place through advertisements have to be denied/dismissed in view of the ratio of *Umadevi's case (supra)* because *Umadevi's case (supra)* held that contractual appointees cannot be regularized.

20. In my opinion even this argument raised on behalf of respondent No. 2 is quite clearly incorrect. In order to understand whether at all appointments of petitioners were contractual appointments for contractual period, let me reproduce one sample appointment letter qua the petitioners, and which is reproduced below:-

“The Ch. Brahm Prakash Ayurvedic Charak Sansthan

(Government of Delhi Undertaking)

3, Warden Flats, Maulana Azad Medical College complex, New Delhi.

OFFER OF APPOINTMENT

On the basis of the recommendation of the Selection Board, and in anticipation of the approval of Governing Council, Dr. Amrish Chanana is hereby offered the post of Lecturer (Rachna Sarir) in the Ch. Brahm Prakash Ayurved Charak Sansthan in the pay scale of `

15600/-39100/-+grade pay 5400/+NPA 25% + DA +HRA, CCA, etc., as per Govt. of NCT Delhi orders. In case the above pay, etc., is revised or amended by the Govt. of Delhi, the same will be applicable and no representation to this effect will

be entertained. The following terms and conditions shall govern the offer of appointment:

1 The services of Dr. Chanana will be purely on temporary basis initially for a period of two years, which may be extended from time to time.

2 The appointment will be on probation for a period of one year. During the probation period, the appointment can be terminated by the Sansthan or by Dr. Chanana during the currency of the engagement without assigning any reason whatsoever with one month's notice. It is also terminable by either party before the expire of the period of one year by giving one month's notice or payment/deposit of one month's pay in lieu of notice period by either party.

3 Dr. Chanana is required to perform the duties assigned to him by the Sansthan sincerely and to the satisfaction of Sansthan and would mainly be assigned the role of Lecturer in the Medical College of the Sansthan. During this process, he is required to assume a role model for the students and for his colleagues in the Sansthan and to take the necessary responsibilities as well as assume leadership and also to actually perform various tasks and assignments that may be required to set up a State of the Art institute and a Centre of Excellence, best of its kind in India under the guidance and direction of the authorities of the Sansthan.

4 The employee, initially will have to make his own arrangement for stay at Delhi. However, the employer may, if it is necessary in the interest of the Sansthan, provide the employee with official accommodation within the campus of the Sansthan and my charge reasonable license fee as may be decided.

5 Leave admissibility to the Employee during the employment will be as per Govt. of NCT Delhi

leave entitlement, viz., Casual leave, earned leave, medical leave, etc.

6 The engagement on temporary basis would not confer any right for permanent appointment to any post.

7 Conduct Rules, Service Rules, etc., as applicable to the employees of Govt. of NCT Delhi will be mutandis, applicable to the employee. Any unauthorized absence from duty for more than fifteen days would be sufficient ground for the employer to terminate the employment.

8 Tax, as may be applicable, will be deducted at source from the salary of the employee.

9 The appointment is provisional and is subject to medical fitness and verification of character and antecedents and testimonials/certificates for educational qualifications and other claims.

10 The appointment is also subject to the approval of the competent authority/Governing Council, the appointment will be cancelled.

11 Dr. Chanana may also have to agree to any other terms and conditions that may be mutually agreed upon in due course of time or that may be decided and imposed by the Govt. of NCT Delhi from time to time.

Dr. Chanana is requested to convey his acceptance of the offer immediately and not later than 30 days. On receipt of the acceptance of the offer, the Sansthan will intimate the date, by which the employee is required to join the duties.

(Dr. B.S. Banerjee)

Project Director

Dr. Amrish Chanana,

s/o Sh. K.C. Chanana,

A-165, Deen Dayal nagar,

Nandanpura,

Jhansi-284003

(U.P.)

21. Relying upon paras 1, 2 and 6 of the aforesaid offer of appointment, it is contended on behalf of respondent No. 2 that this Court should hold that appointments of petitioners are only contractual appointments because they were appointments on temporary basis for one year and it was specified that appointment on temporary basis does not confer any right for permanent employment to any posts.

22. In my opinion, there is clearly a difference between the expressions “temporary basis” and “contractual appointment”. If the appointment was contractual appointment then the appointment would be for a particular period i.e from a particular date to a particular date. In the present case, since the appointment letter is not from a particular date to another particular date on which the period expires, merely because it is mentioned that the initial appointment is for two years and the probation period will be of one year cannot mean that the appointments to the post is on contractual basis. In my opinion the very fact that appointment is on probation negates the argument of contractual appointment. The appointment letter nowhere stated that appointments are ‘contractual appointments’. The fact that probation is of one year and only in which first year period employment can be terminated by a month’s notice (i.e not after one year and till the end of second year) is another clear pointer of the employment being not a contractual employment. The period specified of two years is really for the purpose that the maximum period of probation would be of two years. Clause 11 using the expression ‘from time to time’ again shows the employment to be regular employment and not merely a contractual employment.

23. I may note at this stage that when the petitioners were appointed, candidates were called through advertisements which did not mention that appointments of the petitioners are specifically to be

temporary /contractual because no recruitment rules of the respondent No. 2 have been finalized as yet. The advertisement did not use the expression “appointments on contractual basis”. Therefore, taking the advertisements along with the appointment letters into account, in my opinion, the expression “temporary basis” is to be taken along with the aspect that appointments at the initial stage is on probation basis. It is only on a successful completion of probation that the petitioners would be taken as regular appointees. Whatever doubt remains on this aspect is quite clearly removed on the Principal of respondent No. 2 counter signing the affidavits submitted to Central Council of Indian Medicine, and in which affidavits the nature of appointments of the petitioners is specifically stated to be “regular” so far as most of the petitioners are concerned. Affidavits came to be submitted to the Central Council for Indian Medicine stating the appointments of petitioners on regular basis because in the Assessment Visitation Report by the Indian Council of Medicine for the year 2011-12 conducted for the respondent No. 2, it was observed/doubted that the teaching staff of the respondent no.2 is appointed on contractual basis and they should be appointed on regular basis. To deny this observation of the inspection committee affidavits were taken from the petitioners counter signed by the Principal of respondent No. 2 for filing with Indian Council of Medicine to show that most of the petitioners have been appointed as regular appointments. So far as some of the petitioners are concerned, no doubt expression in some affidavits may be “temporary appointments” , however, the same could not mean that expression should be taken as “contractual appointments” because I have already referred to the appointment letters and on reading of the appointment letters as a whole the expression “temporary basis” only means that the petitioners were appointed on probation for a period of one year and to be confirmed/regularized thereafter.”

8. The petitioners herein therefore cannot be given the benefit of the ratio in *Amrish Chanana’s case (supra)*.

9. On behalf of the petitioners reliance was also placed upon another Division Bench judgment of this Court in the case of ***Sonia Gandhi & Ors. Vs. Govt. of NCT of Delhi & Ors.*** W.P.(C) 6798/2002 decided on 6.11.2013, however, once again that judgment will not apply because in the facts of those cases, it was found that the employees in that case (nursing attendants etc) were working for many many years (for over a decade and a half) in the posts and the need of the employment was found to be perennial in nature and therefore the Division Bench of this Court in the peculiar facts of that case passed the following directions:-

“17. On the subject of regularization the undisputed position which emerges is that over the last two decades i.e. 20 years the Government of NCT of Delhi has not assessed the man power requirement in its various departments and offices resulting in large scale contract appointment being resorted to.

18. With reference to para-medics, as the writ petitioners inform us, more than 50% para-medics working in the hospital to which the writ petitioners are attached are contract appointed para-medics.

19. For the reasons in paragraph 9 to 14 of the decision dated March 20, 2013 in W.P.(C) No.4641/2012, it needs to be highlighted that good governance would require the Government to ensure regular posts being sanctioned commensurate to the public need. It ill serves the interest of the society if requisite number of public posts are not sanctioned.

20. The Constitution Bench decision of the Supreme Court reported as 2006 (4) SCC 1 *Secretary State of Karnataka & Ors. Vs. Uma Devi & Ors.* held that creation of posts falls within the domain of the

executive and Courts cannot issue directions to create post. The Bench also observed that in respect of irregular appointees who have worked for more than 10 years, as a one time measure, the Government should consider regularization.

21. Dealing with a camouflage appointment ostensibly through NGOs, but on lifting the veil, found to be a case of direct appointment by the Government of NCT Delhi of Laboratory Technicians and Radiographers at the Central Jail Tihar, a Division Bench of this Court of which one of us: Pradeep Nandrajog, J. was a Member of had directed the Government to assess requirement of para-medics at Tihar Jail keeping in view the fact that the Original Cadre was sanctioned when in the year 1996 Tihar Jail had a stated capacity of 3600 inmates which grew to 11000 inmates as of the year 2010. The Division Bench directed a one time scheme of regularization to be brought into force on the subject of age bar, the Division Bench noted that the contract appointed employees could not be visited with a disability due to unfair labour policies adopted by the Government.

22. Accordingly, we issue another direction and simultaneously dispose of the two writ petitions. The direction would be that the Government of NCT Delhi would carry out a manpower requirement assessment in all its departments keeping in view the fact that the population in Delhi has crossed 1.7 crores persons. Such number of posts shall be sanctioned as are necessary to provide services to the citizens of Delhi. A one time policy of regularization shall be framed and existing rules pertaining to service in different departments shall be amended. Existing contractual employees shall be considered for appointment to these new posts as per the policy framed.”

10. The facts of the present case are in no manner similar to the facts of *Sonia Gandhi's case (supra)* because petitioners have barely about two years of experience and it is not a case of perennial employment much less, because actually there are only four sanctioned posts of Panchkarma

Technicians which have already been filled in by persons two years prior to the appointment of the petitioners.

11. Learned counsel for the petitioners relied upon the Minutes of Meeting of the Governing Council of respondent no.2 which states that petitioners' cases should be considered for regularization, however Governing Council of respondent no.2 cannot act against law and which is also the ratio of the Supreme Court in the case of *Umadevi (supra)*. Governing Council of respondent no.2 cannot direct regularization of petitioners who are only contractual employees, and that too of such contractual employees with respect to whom as stated above there are no vacant sanctioned posts of Panchkarma Technicians because in fact the four sanctioned posts of Panchkarma Technicians have already been filled in by four persons around 2 years prior to the date when petitioners were appointed on contractual basis with the respondent no.2. Further, the employer/respondent no.2 in its counter-affidavit has rightly referred to the standing instructions of the Government of NCT of Delhi/respondent no.1 dated 9.5.2008 that appointments to the posts to which the petitioners claim regularization can only be through Delhi State Services Selection Board (DSSSB) and not otherwise.

12. After conclusion of arguments I put it to the counsel for the petitioners that instead of regularization, this Court can grant the relief that contractual employees such as the petitioners should not be replaced by other contractual employees, but the counsel for the petitioners after taking instructions states that petitioners insist only on regularization, but this relief of regularization this Court cannot grant as discussed above.

13. In view of the above, since there are no vacant sanctioned posts against which petitioners were appointed, petitioners were appointed against advertisement which specifically mentioned the posts as contractual posts for a period of 11 months, petitioners were appointed in terms of their appointment letters at the contractual posts for the specific period of 11 months, petitioners cannot seek and be granted regularization in view of the direct ratio of the Constitution Bench judgment of the Supreme Court in the case of *Umadevi (supra)*.

Dismissed.

W.P.(C) No. 474/2015

14. Petitioners in this case seek appointment as Lab Technicians/Lab Assistants. In the present case, the relief which is claimed by the petitioners of their being regularized cannot be granted because if

petitioners are specifically appointed for contractual period in terms of the advertisement which required only contractual employment for 11 months, then, if the petitioners are regularized only because they were appointed against sanctioned posts, the same would be clearly a violation of the ratio of the Constitution Bench judgment in the case of *Umadevi (supra)* because if the petitioners are directed to be regularized merely because there existed sanctioned posts, although the advertisement and appointments were only and specifically for 11 months only, then what will happen is that by issuing of an advertisement by the respondent no.2 which was only for contractual appointments of a limited period of 11 months, injustice would be caused to dozens or hundreds of other persons who would not have applied to the posts on the ground that the posts are contractual posts only for 11 months and such persons, being the ordinary citizens, who therefore would seek appointment with other employers who would offer permanent posts. If this Court allows regularization of the petitioners, and merely because petitioners are appointed against sanctioned posts, the spirit of the ratio of *Umadevi's case (supra)* would be violated because then in such cases the authorities of the State instead of making regular appointments to sanctioned posts, will advertise and make contractual appointments to sanctioned posts for specified periods, and thereby play a fraud upon general public being

persons who would have applied if the posts were advertised as permanent posts. Thus regularization cannot be granted only because petitioners were appointed against sanctioned posts, once the advertisement and appointments were only for a limited period of just 11 months.

15. It is not the ratio of *Umadevi's case (supra)* that contractual employees must be regularized only because there are vacant sanctioned posts to which they were appointed to limited contractual period of mere 11 months, inasmuch as, *Umadevi (supra)* requires that the appointments must be as per the regular recruitment process and rules which will require advertisement for appointments as permanent posts, and much less because in terms of the ratio of the *Umadevi's case (supra)*, the Delhi State Services Selection Board (DSSSB), and who appoints employees for the respondent no.2, has already issued a circular that there should not be appointments to regular posts except in accordance with the law and the process as specified in the regular recruitment rules.

This writ petition is also therefore dismissed.

W.P.(C) No. 482/2015

16. Petitioners seek appointment as Museum Keepers. The facts of the case are identical to the facts in W.P.(C) No. 474/2015. This writ petition is also therefore dismissed.

JANUARY 22, 2015
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VALMIKI J. MEHTA, J.