

HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

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WRIT PETITION No.13917 OF 2001

ORDER:

This Writ Petition, under Article 226 of the Constitution of India, 1949 is filed by the petitioner to issue a writ of *mandamus* by directing the respondent to reckon the petitioner's service from the year in which he has completed 240 days continuous service as per the Government Approach Paper of 1990 and 1st Bi-Partite Settlement (for short, 'B.P.S.') dated 09.04.1996 and to treat the letter bearing No.884/ZOH/PS/AS/513889 dated nil as arbitrary, illegal and in violation of the Rules and quash the same.

The case of the petitioner, in brief, is that he joined as temporary Attender in the respondent-bank on 09.02.1984 at Central Accounts Office, Hyderabad and completed 203 days in that year; 121 days in 1985 and 298 days in 1986; thereby, eligible for absorption as regular employee as per Sastry Award in Para 508 and the Government Approach paper dated 16.08.1990 and as per B.P.S., wherein it is clearly agreed by both the parties that the Government Approach Paper of 1990 will form basis of the agreement, and further agreed to give preference to the temporary attenders over others in absorbing as permanent employees, who completed 240 days in a consecutive period of 12 months between 01.01.1982 to 31.12.1989.

As the petitioner and others were not absorbed in regular vacancies, they filed Writ Petition No.21405 of 1995 and batch and the same was allowed by a learned single Judge of this Court with a direction to the respondent to absorb the petitioner and others as regular employees, to review all the appointments made during 01.01.1982 to 31.12.1989 and place the temporary employees as per seniority. Later, Contempt Case No.545 of 1997 was filed, wherein the

Division Bench of this Court observed as follows:

“We, however, make it clear that this order shall not preclude the petitioners from challenging the appointments made by the respondent-bank, should they wish to do so”

For the simple reason that the learned Standing Counsel appearing for the respondent-bank misled the Court by giving an assurance to the Court that the temporary attenders will be absorbed, within 3-4 years as and when the vacancies arise, the single Judge found that there are serious flaws in the appointments made during 01.01.1982 to 31.12.1989 in violation of Para 20.8 of the B.P.S. and agreement dated 09.04.1996, the Division Bench of this Court, in C.C. No.545 of 1997, made the above remarks that the temporary attenders would have been absorbed long before passing the order but due to arbitrary and adamant action of the respondent, the petitioner and other employees sustained irreparable loss as they were not absorbed, implementing the agreement and approach paper.

On 29.03.1997, the petitioner was appointed on regular basis and his probation was declared by the respondent *vide* letter No.945/ZOH/PS/WW/IF/4742/ATT/APT, dated 29.03.1997 and as such he became permanent employee of the bank on 29.09.1997 *vide* letter No.IF4742/zoh/ps/ww/5153889, dated 17.09.1997. Subsequently, the petitioner made representations to the respondent-bank to pay salary of a regular employee from the date when he completed 240 days in pursuance of B.P.S. but no purpose was served. Later, written representations were sent requesting the respondent-bank to pay his regular salary from the date when he completed his 240 days of service as temporary attender but the same was rejected by the respondent *vide* letter No.884/ZOH/PS/AS/513889/2000 dated nil and such rejection is unfair, unreasonable and against the terms of B.P.S. Thus, the respondent acted in violation of B.P.S., Sastry Award and agreement

between the management and employees and on account of arbitrary and illegal action, the petitioner sustained huge loss; hence, the Writ Petition.

The respondent filed counter, admitting about joining of the petitioner as temporary attender and, denying the alleged failure of the respondent to implement the directions issued by this Court and in B.P.S. dated 09.04.1996 and further denied the total service put up by the petitioner during different years. The respondent admitted that an order dated 29.03.1997 was issued to the petitioner as Attender on regular basis and declared his probation confirming his services on 29.09.1997; where after, the petitioner made representations for fixing his salary but the same was rejected by the respondent-bank.

It is specifically contended that the petitioner is not a 'workman' as defined under Section 2(s) of the Industrial Disputes Act, 1947 (for short, 'the Act of 1947') and the conditions of service of the award staff like the petitioner in the banking industry including the respondent bank are governed by the provisions of various awards such as Sastry Award, Desai Award and Sen Award *etc.*, and also by way of B.P.S. I to VII signed by the Indian Banks Association representing the managements of the banks in the country and the representatives of trade unions representing the employees working in the banking industry and the above awards and settlements are legally enforceable and got statutory force. If any of the provisions of the awards or settlements referred above are violated by any of the managements of the banks that would amount to an industrial dispute and the same can be termed as unfair labour practice. The Act of 1947 is a special piece of legislation, enacted with the sole intention of maintaining industrial peace, for promoting industrial relations and provide various machineries to handle the situations like industrial disputes and unfair labour practices. If the petitioner was aggrieved by the act of the

management in not absorbing him on regular employment, when he completed 240 days of continuous service as alleged in the petition, he would have raised an industrial dispute immediately after completion of 240 days. When the respondent-management was unable to regularize the services of the petitioner due to the ban imposed by the Government, the petitioner should have questioned the same before the competent authority to get the benefits.

The settlement between the representatives of recognized unions and representatives of the bank before the ALC Mangalore, under Section 12(3) of the Act of 1947 and the petitioner was absorbed in the services of the respondent on the basis of the settlement, and the validity of the settlement was also challenged before this Court in W.P. No.21405 of 1995, this Court upheld the validity of settlement; which did not contain any provision to extend any additional benefit to any of the eligible employees except to regularize their services subject to compliance of conditions therein. When the petitioner accepted the settlement and took up the employment, being a member of recognized union, he now cannot go back to claim any salary. Irrespective of the provisions of the Awards and Settlements dealing with regularising of the employment in the bank, the respondent management and the recognized unions have signed the B.P.S. during 1996 under Section 12(3) of the Act of 1997 and as such all other provisions of the earlier settlements, awards existed prior to the date of the settlements signed during 1996, would automatically become superseded and cannot be enforced, subsequently. In view of the above position, the claim of the petitioner is not tenable and the request of the petitioner is totally contrary to the settlements referred above and, on this ground alone, the Writ Petition is liable to be dismissed. Finally, it is contended that when the petitioner has an alternative and efficacious remedy before Industrial Tribunal, the petitioner is not entitled to claim any relief and prayed for dismissal of

the Writ Petition.

During course of hearing, Sri J. Sudheer, learned counsel for the petitioner, contended that the petitioner's services were absorbed on regular basis, he is entitled to claim salary as a regular employee from the date of completion of 240 days of continuous service and, therefore, denying salary of a regular employee is arbitrary and contrary to B.P.S. and the Sastry Award *etc.*, and, therefore, the act of the respondent is illegal and the same is to be quashed or set-aside while issuing a direction to the respondent for payment of salary to the petitioner as a regular employee, immediately after completion of 240 days as a temporary attender in the 1st respondent-bank, and prayed to allow the Writ Petition.

Per contra, Sri A. Krishnam Raju, learned standing counsel appearing for the respondent-bank, would contend that the petitioner is entitled to salary as a regular employee only when he was appointed on regular basis *i.e.*, by absorption in regular or substantive vacancy and, in the absence of any substantive vacancy, the respondent has no right to absorb the petitioner on regular basis and pay regular salary from the date of completion of 240 days of continuous service in the respondent-bank. Even as per the B.P.S. referred in the counter, the petitioner is entitled to be absorbed in the regular vacancy and not entitled to claim salary as a regular employee from the date when he completed 240 days of continuous service in the respondent-bank and prayed to dismiss the Writ Petition.

Considering rival contentions and perusing the material available on record, the sole point that arises for consideration is:

Whether the petitioner, who was appointed on 29.03.1997 and became approved probationer on 29.09.1997, is entitled to salary of a regular employee, when he completed 240 days of continuous service in

the respondent-bank? If so, whether any direction be issued to the respondent-bank for payment of salary of a regular employee, setting aside the impugned letter?

POINT: The admitted facts of the case are that the petitioner joined as attender in the Central Accounts Office, Hyderabad on 09.02.1984 and worked for 203 days in that year, 121 days in 1985 and 298 days in 1986. As he was not absorbed in the services of the respondent-bank on regular basis, filed Writ Petition 21405 of 1995 to issue a direction against the respondents therein to absorb the petitioner and other temporary employees on regular basis, wherein this Court allowed the batch of Writ Petitions with a direction to the respondents to absorb the petitioner and other temporary employees on regular basis, and the direction issued by this Court is as follows:

“From the circular dated 13.12.1995 of third respondent, it is seen that the ban imposed way back on 06.11.1984 is still continued though way back in 1990 the Approach Paper prepared by the Central Government directed all the banks to absorb the temporary candidates on regular basis. The action of the respondents is continuing the ban for regular absorption for decades and continuing the temporary employees for long years is deplorable and is nothing but unfair labour practice. Hence, a direction is given to the respondents to lift the ban to the extent to the regular vacancies that have arisen till this date and consider the claims of all eligible candidates for regular absorption as per the settlement entered into between the parties on 09.04.1996 and also consider the cases of other temporary employees keeping in mind the directions given by the Supreme Court in ***State Bank of Haryana and others Vs. Piara Singh and others*** (AIR 1992 SC 2130) wherein their Lordships categorically recorded a finding that continuance of an employee on temporary or *ad hoc* basis for a period of two or three years gives rise to a presumption that the services of the temporary employee is needed and the employer is expected to create regular posts to absorb them on regular basis.

Accordingly, this batch of Writ Petitions is disposed off with the above directions. But, in the circumstances there will

be no order as to costs.”

On close analysis of the direction given by the learned single Judge of this Court in Writ Petition No.21405 of 1995, it is evident that a direction was given to lift ban and consider the claims of eligible candidates who are working on temporary basis and absorb as per the settlement entered between the parties on 09.04.1996; thereafter, Contempt Case No.545 of 1997 was filed; wherein after elaborate discussion this Court directed the Registry to list the matter before the Division Bench and the Division Bench of this Court recording the submission of Sri K. Srinivasa Murthy, learned counsel appearing for the respondent-bank, dismissed the Contempt Case, observing as follows:

“7. While referring the Contempt Case to the Division Bench, the learned single Judge has cast some aspersion against the counsel appearing for the respondent-bank and so also the bank employees. In our considered view, casting of such aspersions was uncalled for and they are accordingly expunged. It is pertinent to mention here that while deciding the *lis*, the Court has to go into the facts and law situation and then adjudicate the matter by assigning reasons and unless *mala fides* are made out clearly without any pale of doubt, no remarks or strictures should be passed against a party and more so against a legal practitioner.

8. The judgment, which has been rendered by the learned single Judge, has merged in the order of the Division Bench passed later and in view of the stand taken by the respondent-bank that they are adhering to the statement made before the Division Bench and there being no material placed before us to come to the conclusion that there is an act of contempt committed by the respondent-bank, we discharge the contemnors from this contempt case. We, however, make it clear that this order shall not preclude the petitioners from challenging the appointments made by the respondent-bank, should they wish to do so.

9. Subject to the above observations, this Contempt Case is dismissed. No costs.”

From the observations made by the Division Bench of this Court, the respondents in the Writ Petition did not violate the order intentionally; even in the Writ Petition before this Court, Sri K. Srinivasa Murthy, learned standing counsel for the respondent-bank, made a submission that the temporary employees will be absorbed in the regular vacancy as per seniority, subject to availability of regular vacancies. Therefore, from the material available on record, this Court gave a direction to the respondents in the Writ Petition No.21405 of 1995 and batch to absorb the temporary employees on regular basis lifting the ban; accordingly, the petitioner was appointed on regular basis, as admitted by both the parties.

The main basis for the claim of the petitioner is B.P.S. arrived under Section 12(3) of the Act of 1947 at Mangalore. As per the terms of B.P.S, earlier settlements/undertakings in the matter of absorption of temporary attenders are superseded and on the basis of Approach Paper of 1990, temporary attenders who had worked for more than 240 days in a consecutive period of 12 months from 01.01.1982 to 31.12.1989 in any branch of the bank, and who are entitled to the benefits of Section 25(F) and (H) of the Act of 1947 will be given preference over others in the matter of absorption as regular attenders. Such of those candidates who have put in less than 240 days of continuous service as temporary attenders but more than 90 days between 01.01.1982 and 31.12.1989 will be considered for absorption after the candidates who completed 240 days continuous service have been absorbed. None of the terms and conditions of B.P.S. states that the temporary employee who got absorbed in the regular vacancy are entitled to claim salary of a regular employee after completion of 240 days of continuous service. Therefore, from the B.P.S. dated 09.04.1996, it is clear that the temporary employees who have completed 240 days of continuous service in a consecutive period of 12 months stated hereinabove are entitled for absorption as regular

attenders and no other benefit is given to reckon their services from the date when they completed 240 days and to claim salary from the date of completion of 240 days. In the absence of any condition either in B.P.S. or in the direction given by the learned Single Judge of this Court in W.P. No.21405 of 1995 and batch, it is difficult to accept the contention of the petitioner that he is entitled to claim salary of a regular employee immediately after completion of 240 days.

As seen from the material available on record including the order in Contempt Case No.545 of 1997 by the Division Bench, the order in Writ Petition No.21405 of 1995 and batch by the learned single Judge and the B.P.S. between the parties, it would go to show that the temporary attenders shall be absorbed as regular employees only when there is a substantive vacancy or a sanctioned post and the learned counsel appearing for the respondent-bank before the Division Bench in Contempt Case assured that temporary attenders will be absorbed within 3-4 years as and when regular vacancies arise; accordingly, the petitioner was absorbed as a regular attender; thus, the petitioner became a regular employee from the date of his appointment and entitled to all benefits as a regular employee, he is not entitled to claim any benefits as a regular employee from the date when he completed 240 days during the years 1984-1986 within 12 months as no sanctioned vacancy or a substantive post was available by the Government.

The petitioner who was initially appointed as temporary employee not against a substantive or sanctioned post, the respondent is not under obligation to pay salary of the regular employee since temporary appointment was only to meet the contingencies not to discharge the duties of a substantive post. Merely because the petitioner was appointed as per the directions of this Court in W.P. No.21405 of 1995 and batch and the Division Bench of this Court in C.C. No.545 of 1997 accepted the contention of the respondent that as

and when the vacancies arise, the petitioner and other temporary employees will be regularised as per seniority, dismissed the Contempt Case. In such case, regularization of the petitioner was only in a substantive or sanctioned post in the respondent-bank and his services were regularized with effect from 29.09.1997 as he was initially appointed on probation. Therefore, from the date of his appointment in a substantive vacancy or sanctioned post, the petitioner is entitled to claim salary as a regular employee, as his appointment prior to his regularization was not in accordance with the constitutional scheme of the appointment as his appointment as temporary attender was without inviting applications from the eligible candidates. Hence, the case of the petitioner does not come within the expression of continuous service and as such he is not entitled to regular scale of pay. In any view of the matter, the basis for claim of the petitioner is B.P.S. dated 09.04.1996 arrived between the management and the unions and none of the terms of B.P.S stipulate the employer to pay regular pay scale on completion of 240 days of continuous service of a temporary attender. On the other hand, clause 7 of 9th Para of B.P.S. says that the candidates from the panel shall be absorbed in a phased manner subject to availability of substantive vacancies and subject to the prior approval from the Government of India/Reserve Bank of India as required by the Memorandum of Understanding signed by the bank with the Reserve Bank of India. Therefore, it is evident from the terms of B.P.S., the temporary attenders have to be absorbed in a phased manner against substantive vacancy and with the prior approval of the Government of India or Reserve Bank of India. In such case, the services of the petitioner cannot be reckoned as regular employee from the date when he completed 240 days of continuous service. In the absence of any specific term in B.P.S. for payment of salary of a regular employee to the temporary attender from the date when the employee completed 240 days of continuous service in a span of 12 months, the petitioner is

disentitled to claim scale of regular employee from the date of completion of 240 days of continuous service in the respondent-bank.

The petitioner in the representations made to the respondent referred several observations of the single Judge in the order in W.P. No.21405 of 1995 and batch dated 31.12.1996. The observations made in various paragraphs of the order are only for arriving at a conclusion to direct the respondents therein to absorb the petitioner on regular basis against a substantive vacancy. Even such direction is only based on the terms of B.P.S. dated 09.04.1996, wherein the learned single Judge of this Court did not direct the respondent to pay regular pay scale to the petitioner or other temporary attenders from the date of completion of their continuous service of 240 days in a span of 12 months. In the absence of any such term in B.P.S. or direction in the order of this Court, the petitioner is disentitled to claim the relief in the present Writ Petition to reckon his service from the date of completion of 240 days of consecutive service as a regular employee and claim salary of a regular employee from that date.

The petitioner sought a direction against the respondent-bank for payment of salary of a regular employee from the date of completion of 240 days of continuous service within a span of 12 months by issuing a writ of *mandamus*. The issuance of writ of *mandamus* is purely discretionary in nature and merely because it is lawful to do so, the Court cannot issue a writ of *mandamus* while exercising power of judicial review, when the petitioner did not approach the Court with clean hands. The writ of *mandamus* can be issued only when there is violation of any statutory rule or provision in passing any order. In the present facts of the case, the petitioner sought for quashing the letter No.884/ZOH/PS/AS/513889/2000 dated nil but no statutory violation of any rule or provision is pointed in any of the representations addressed by the petitioner to the respondent or even in the Writ Petition. No specific violation of any statutory rule or

provision is pointed out except contending that the order passed by the respondent is against the guidelines in Sastry Award and terms of B.P.S., on close analysis of the terms of settlement or the Sastry Award. On consideration of both Sastry Award and B.P.S., I find no material to conclude that the respondent-bank violated any statutory rule or provision to issue a writ of *mandamus* in favour of the petitioner; in the absence of any such violation, this Court cannot exercise the discretion to issue a writ of *mandamus* while exercising power of judicial review under Article 226 of the Constitution.

As discussed in the earlier paragraphs, the petitioner was initially appointed as temporary attender in the respondent-bank and, in view of the B.P.S. dated 09.04.1996, the petitioner claimed regularization and, filed W.P. No.21405 of 1995 and obtained an order or direction against the respondent to absorb the temporary attenders working in the respondent-bank lifting the ban for appointment on regular basis; later, filed Contempt Case which was referred to the Division Bench of this Court and on receiving an undertaking, from the learned senior counsel Sri K. Srinivasa Murthy, that the temporary attenders working in the respondent-bank will be absorbed in a phased manner as and when vacancies arise, dismissed the Contempt Case. Accordingly, the petitioner was absorbed in service on regular basis as per seniority list in terms of B.P.S subject to approval by the Government or Reserve Bank of India. Therefore, he is deemed to be a regular employee from the date when he was appointed as probationer and not from the date of his initial appointment as temporary attender, without any statutory basis and his initial appointment was without any sanction and inviting any application from the eligible candidates; such appointment cannot be said to be a regular appointment and the petitioner would not acquire the status of a regular employee on completion of continuous service of 240 days. Therefore, the petitioner is disentitled to claim salary as a

permanent employee on completion of 240 days of continuous service, within a span of 12 months. Accordingly, the point is answered against the petitioner and in favour of the respondent.

In the result, the Writ Petition is dismissed.

In consequence, miscellaneous petitions, if any, pending in this Writ Petition shall stand dismissed. No order as to costs.

**M. SATYANARAYANA MURTHY,
J**

Date: 12-02-2016.
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HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

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WRIT PETITION No.13917 OF 2001

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Date. 12-02-2016

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