

THE HON'BLE SRI JUSTICE M.S.RAMACHANDRA RAO

W.V.M.P.No.3192 of 2015

In

W.P.No.11967 of 2015

and

WRIT PETITION No.11967 of 2015

ORDER :

The petitioners are qualified Graduates, who possessed degree in B.Ed.

2. A paper notification was issued in 2005 by the 1st respondent calling applications from the eligible candidates to work as teachers in the schools run by the Tribal Welfare Department of the 1st respondent through the 4th respondent.

3. Since petitioners are also local tribals, they applied and were appointed as Contract Resident Teachers in Ashram schools and upper primary schools run by respondents. This was pursuant to a policy of the 1st respondent to encourage local tribals to work as teachers in the schools where only tribal children study.

4. The appointment of the petitioners was pursuant to a test conducted and evaluation of their teaching skills by making them to give demonstration of their teaching capacity.

5. Petitioners contend that they were informed at that time that there was a ban in the regular recruitment and therefore they were appointed on contract basis. The details of the petitioners have been

given in the annexure to the Writ Petition and this indicates that they have been working from 2005/2007/2008 in Ashram schools.

CONTENTIONS OF PETITIONERS

6. Petitioners contend that they were working against the sanctioned vacancies of School Assistants and they are entitled for regularisation. They contend that though proposals for regularisation have been sent by the 2nd respondent to the 1st respondent vide proceedings Rc.No.D2/1922/2011 dt.11-04-2011, the 1st respondent has not taken any action thereon. They also contend that in September and October, 2013, they were called to the office of the 4th respondent and their certificates were verified, but they were asked to give an undertaking that they will not ask for arrears and other demands involving financial implications for the past service rendered by them and after they furnished such undertaking, the final list of eligible candidates was prepared and sent in November, 2013 for the purpose of regularisation, but in view of the bifurcation of the State, they were advised to wait till August, 2014. They contended that now respondents are attempting to disengage their services by asking them to stop attending duties after 23-04-2015.

7. Therefore they filed the Writ Petition challenging the inaction of respondents in regularising their services as teachers in Ashram schools run in scheduled areas by respondents as illegal, arbitrary and unconstitutional and consequently direct the respondents to regularise

their services. They filed W.P.M.P.No.46659 of 2015 to continue them in service pending disposal of the Writ Petition.

THE INTERIM ORDER PASSED BY THE COURT

8. On 23-04-2015, this Court directed notice before admission and directed that the petitioners, if they are engaged as teachers during the academic session 2014-2015, they shall be continued; that respondent Nos.1 to 3 should undertake the process of regular recruitment of teaching and non-teaching members by making a realistic assessment of man power requirement in that regard; and that they should ensure that by 31-07-2015, the process of selection is finalised and recruited teachers are posted to the respective institutions so that when the new academic session 2015-2016 commences, responsibility and accountability to improve the standards of education can be fixed on such new team of teachers. It also observed that if petitioners have rendered considerable length of service, respondent Nos.1 to 4 would focus their attention to provide them one opportunity to compete at such selection along with any other candidate from the open market and if the petitioners are selected, there may not arise any occasion for dispensing with their services, and those of the petitioners who are not selected should be replaced by a regularly selected candidate.

THE CONTENTIONS OF THE RESPONDENTS

9. W.V.M.P.No.3192 of 2015 is filed by respondents to vacate the above order.

10. The respondents admitted that petitioners are qualified Graduates and have passed B.Ed. examination, but contended that the paper publication issued in 2005 was only to appoint Contract Resident Teachers and not regular teachers. According to them, the contract tenure was for one academic year, that their services were purely temporary against sanctioned posts on condition that they would not claim any eligibility for continuing in such post or would get any right whatsoever against such posts. According to respondents, the period of contract terminates on the last working day of the academic year. According to them, the petitioners worked as Contract Resident Teachers in Tribal Welfare Ashram schools run by the Tribal Welfare Department in scheduled areas of Visakhapatnam under the jurisdiction of the 4th respondent. They also admitted that G.O.Ms.No.3 Social Welfare (TW.Edn-III) Department dt.10-01-2000 was issued directing that all the posts of teachers in the schools situated in scheduled areas in the state of Andhra Pradesh should be filled in by the local Scheduled Tribe candidates only out of whom 33 1/3% shall be women. It is contended that no test was conducted before engaging the petitioners as Contract Resident Teachers. According to the respondents, a selection committee was constituted by the Director of tribal Welfare, A.P., Hyderabad consisting of

Project Officer, Integrated Tribal Development Agency as Chairman and District Tribal Welfare Officer as Member Convenor and District Educational Officer (Agency)/Deputy District Educational Officer in Integrated Tribal Development Agency as Member and that the selection process adopted was as under:

- “1. The notification to be issued in widely circulated local Telugu newspaper inviting applications from qualified, eligible and interested people.*
- 2. A copy of notification shall also be sent to the Employment Exchange for sponsoring eligible candidates registered in the Employment Exchange.*
- 3. In either case, only those candidates with requisite qualifications having registered in Employment Exchange shall be considered for selection process to work on contract basis.”*

11. The respondents contend that since the petitioners were appointed as Contract Resident Teachers and their appointment was purely temporary basis against the sanctioned posts, they cannot claim any eligibility for continuing or right whatsoever against any such posts. According to them, the period of contract automatically terminates on the last day of the academic year. They admit that the remuneration payable to the Contract Resident Teachers in scheduled areas is Rs.5,000/- for SGTs/Pandits Gr.II/PETs with increase of Rs.100/- per annum and Rs.6,000/- for School Assistants with increase of Rs.150/- per annum. It is also admitted that the 2nd respondent by proceedings dt.10-09-2013 requested the District Officers to furnish the details of Contract Resident Teachers, who

have completed minimum 3 years of service through online system developed for this purpose and that the said details were submitted. Reliance is also placed on Act-2 of 1994 and it is contended that the petitioners do not fulfil any of the conditions stipulated therein and therefore their services cannot be considered for appointment as regular teachers. It is also stated that the 2nd respondent, by proceedings Memo No.07-10-2013, communicated a list of 42 Contract Resident Teachers and directed to examine the details of Contract Resident Teachers case by case and furnish report with local Schedule Tribe status of Contract Resident Teachers duly certified by the Tahsildar and such a report was submitted on 12-11-2013.

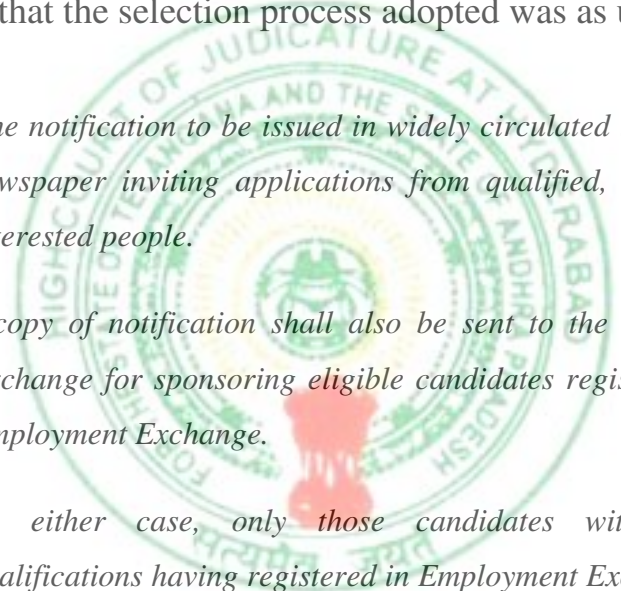
12. The point for consideration is:

“ whether the petitioners are entitled to seek regularization of their services as teachers in the Ashram schools run in the scheduled areas of Visakhapatnam District by the respondents ?”

13. From the facts narrated above, it is clear that the petitioners were appointed as Contract Resident Teachers in the Tribal Welfare Ashram schools run by the Tribal Welfare Department in scheduled areas of Visakhapatnam District under the jurisdiction of the 4th respondent. It is admitted by the respondents that they are qualified graduates and possess B.Ed qualification. It is also not in dispute that petitioners are all schedule Tribes and are locals to the areas where the schools are located and their engagement as Contract Resident Teachers is in conformity with G.O.Ms.No.3 dt.10-01-2000.

It is not in dispute that their services are taken on contract basis against sanctioned posts.

14. Even the respondents admit that a selection committee was constituted by the Director of tribal Welfare, A.P., Hyderabad consisting of Project Officer, Integrated Tribal Development Agency as Chairman and District Tribal Welfare Officer as Member Convenor and District Educational Officer (Agency)/Deputy District Educational Officer in Integrated Tribal Development Agency as Member and that the selection process adopted was as under:

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 - 3. In either case, only those candidates with requisite qualifications having registered in Employment Exchange shall be considered for selection process to work on contract basis.”*

15. Though their contracts provided for a period of only one year, and mentioned that their services were purely temporary, and that the contract terminates on the last working day of the academic year, in para-14 of the counter affidavit, reference is made to procedure for re-engagement of the Contract Resident Teachers for subsequent year.

16. It is not disputed that the petitioners have continued as Contract Resident Teachers from the respective dates of their initial

appointment without termination of their services and some of the petitioners have completed by now about 8 years of service while others have put in up to 10 years of service. Thus it cannot be disputed that the work of the petitioners is permanent in nature.

17. In the decision of the Supreme Court in **Secretary, State of Karnataka and others Vs. Umadevi (3) and others**¹, the Supreme Court held that the State should act as a model employer and while it has power to make temporary appointments, a regular process of recruitment has to be resorted to. It observed that regular recruitment should be insisted upon and only in a contingency can an *ad hoc* appointment be made in a permanent vacancy, but the same should soon be followed by a regular recruitment.

18. Unfortunately, even though 10 years have elapsed since the said judgment, the respondents have chosen to conveniently ignore their obligation to fill up the posts of Teachers in these Ashram schools run by 4th respondent by regular process of recruitment but have chosen to continue the petitioners on contract basis for varying period of 8 to 10 years.

19. No valid reason is assigned by respondents as to why they have resorted to unfair labour practice of terminating the services of petitioners at the end of every academic year and reengaging them in the next academic year.

¹ (2006) 4 SCC

20. No doubt the Supreme Court in **Umadevi (3)** (1 supra) observed that *ordinarily* it is not proper for the Courts acting under Article 226 of the Constitution of India to direct absorption in permanent employment of those who have been engaged without following due process of selection as envisaged by the constitutional scheme, and there is only a limited role of equity in such matters. It emphasised that unless an appointment is in terms of the relevant rules and after a proper competition among qualified persons, the same would not confer any right on the appointee and that if it is a contractual appointment, the appointment comes to an end at the end of the contract and merely because a contractual employee is continued for a time beyond the term of his appointment, he would not be entitled to be absorbed in regular service or made permanent, merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant rules. It held that the High Courts acting under Article 226 of the Constitution, *should not ordinarily* issue directions for absorption, regularization, or permanent continuance unless the recruitment itself was made regularly and in terms of the constitutional scheme. Therefore that would mean that there can be exceptions and that there is *no absolute bar on exercise of jurisdiction of the High Court and if circumstances warrant, it can grant such reliefs.*

21. This decision was considered in **Nihal Singh and others Vs. State of Punjab and others**². The Supreme Court considered the case of absorption of Special Police Officers appointed by the State, whose wages were paid by Banks at whose disposal their services were made available. It held that the mere fact that wages were paid by the Bank did not render the appellants 'employees' of those Banks since the appointment was made by the State and disciplinary control vested with the State. It held that *the creation of a cadre or sanctioning of posts for a cadre is a matter exclusively within the authority of the State, but if the State did not choose to create a cadre but chose to make appointments of persons creating contractual relationship, its action is arbitrary*. It also refused to accept the defence that there were no sanctioned posts and so there was justification for the State to utilise services of large number of people like the appellants for decades. It held that "*sanctioned posts do not fall from heaven*" and that the State has to create them by a conscious choice on the basis of some rational assessment of need. Referring to **Umadevi (3)**, it held that the appellants before them were not arbitrarily chosen, their initial appointment was not an 'irregular' appointment as it had been made in accordance with the statutory procedure prescribed under the Police Act, 1861, and the State cannot be heard to say that they are not entitled to be absorbed into the services of the State on permanent basis as, according to it, their appointments were purely temporary and not against any sanctioned

² (2013) 14 SCC 65.

posts created by the State. *It held that the judgment in Umadevi (3) cannot become a licence for exploitation by the State and its instrumentalities and neither the Government of Punjab nor those public sector Banks can continue such a practice consistent with their obligation to function in accordance with the Constitution.* This decision is an apt answer to the contentions raised by the respondents.

22. In **Sudarshan Rajpoot V. UPSRTC**³ decided in 2015, the Supreme Court held that extracting work of permanent nature continuously for more than 3 years on the plea that the employment is on contract basis is wholly impermissible and this amounts to an “unfair labour practice” as defined under Section 2(ra) of the Act r/w Section 25-T which is prohibited under Section 25-U and Chapter V-C of the Act. It held that **Umadevi (3)** cannot apply in such a situation.

23. The respondents also sought to contend that the appointment of petitioners are contrary to A.P.(Regulation of Appointments to Public Services and Rationalisation of Staff Pattern and Pay Structure Act, 1994 (Act 2 of 1994) and that petitioners do not fulfil the conditions set out therein. Sec.4 of the said Act states:

“4. Regulation of recruitment.—No recruitment in any public service to any post in any class, category or grade shall be made except,—

(a) from the panel of candidates selected and recommended for appointment by the Public Service Commission/College

³ (2015)2 SCC 317

Service Commission where the post is within the purview of the said Commission;

(b) from a panel prepared by any Selection Committee constituted for the purpose in accordance with the relevant rules or orders issued in that behalf; and

(c) from the candidates having the requisite qualification and sponsored by the employment exchange in other cases where recruitment otherwise than in accordance with clauses (a) and (b) is permissible.

Explanation.— For the removal of doubts it is hereby declared that nothing in this section shall apply to compassionate appointments made in favour of son/daughter/spouse of any person employed in public service who dies in harness or who retires from service on medical grounds, in accordance with the relevant orders issued from time to time.”

24. Sec.7 of the said Act states:

“7. Bar for regularisation of services.—No person who is a daily wage employee and no person who is appointed on a temporary basis under Section 3 and is continuing as such at the commencement of this Act shall have or shall be deemed ever to have a right to claim for regularisation of services on any ground whatsoever and the services of such person shall be liable to be terminated at any time without any notice and without assigning any reasons:

Provided that in the case of workmen falling within the scope of Section 25-F of the Industrial Disputes Act, 1947, one month's wages and such compensation as would be payable under the said section shall be paid in case of termination of services:

Provided further that nothing in this section shall apply to the workmen governed by Chapter V-B of the Industrial Disputes Act, 1947.

Explanation.—For the removal of doubts it is hereby declared that the termination of services under this section shall not be deemed to be dismissal or removal from service within the meaning of Article 311 of the Constitution or of any other relevant law providing for the dismissal or removal of employees

but shall only amount to termination simpliciter, not amounting to any punishment.”

25. It is not in dispute that Sec.15 of the said Act even envisages the imposition of a penalty of imprisonment on the officers of the companies acting against the provisions of the Act.

26. No doubt constitutionality of Act 2 of 1994 was upheld by the Supreme Court of India in **A. Manjula Bhashini v. A.P.Women’s Coop Finance Corpn. Ltd**⁴.

27. But why the respondents have chosen to make such appointments in violation of Act 2 of 1994 is not explained.

28. In my opinion, the respondents cannot plead ignorance of Act 2 of 1994 in 2005 when they selected and appointed the petitioners on contract basis and thereafter when they continued them in service for 8-10 years. This is clearly in the nature of an ‘unfair labour practice’ and contrary to the constitutional scheme as held in **Umadevi**(3).

29. In **Rattan Lal v. State of Haryana**⁵, the Supreme Court of India strongly deprecated the practice of State Governments to appoint teachers for short periods, give a gap during summer vacation and re-engage them again as in the present case. It held:

“ In all these petitions the common question which arises for decision is whether it is open to the State Government to appoint teachers on an ad hoc basis at the commencement of an academic year and terminate their services before the commencement of the next summer vacation, or earlier, to

⁴ (2009) 8 SCC 431

⁵ (1985) 4 SCC 43

appoint them again on an ad hoc basis at the commencement of next academic year and to terminate their services before the commencement of the succeeding summer vacation or earlier and to continue to do so year after year. A substantial number of such ad hoc appointments are made in the existing vacancies which have remained unfilled for three to four years. It is the duty of the State Government to take steps to appoint teachers in those vacancies in accordance with the rules as early as possible. The State Government of Haryana has failed to discharge that duty in these cases. It has been appointing teachers for quite some time on an ad hoc basis for short periods as stated above without any justifiable reason. In some cases the appointments are made for a period of six months only and they are renewed after a break of a few days. The number of teachers in the State of Haryana who are thus appointed on such ad hoc basis is very large indeed. If the teachers had been appointed regularly, they would have been entitled to the benefits of summer vacation along with the salary and allowances payable in respect of that period and to all other privileges such as casual leave, medical leave, maternity leave etc. available to all the Government servants. These benefits are denied to these ad hoc teachers unreasonably on account of this pernicious system of appointment adopted by the State Government. These ad hoc teachers are unnecessarily subjected to an arbitrary "hiring and firing" policy. These teachers who constitute the bulk of the educated unemployed are compelled to accept these jobs on an ad hoc basis with miserable conditions of service. The Government appears to be exploiting this situation. This is not a sound personnel policy. It is bound to have serious repercussions on the educational institutions and the children studying there. The policy of "ad hocism" followed by the State Government for a long period has led to the breach of Article 14 and Article 16 of the Constitution. Such a situation cannot be permitted to last any longer. It is needless to say that the State Government is expected to function as a model employer."

(emphasis supplied)

30. When an employer resorts to ‘unfair labour practice’ , the Supreme Court has held in **Hari Nandan Prasad and another v. Employer I/R to Management of Food corporation of India and another⁶** and in **Oil and Natural Gas Corporation Limited v. Petroleum Coal Labour Union and another⁷** that Industrial adjudicators under the Industrial Disputes Act,1947 can grant relief of regularization notwithstanding the decision in **Umadevi(3)**.

31. Though the said Act may not be apply to the case of the petitioners, still the power of this Court under Art.226 of the Constitution of India can be exercised to grant such relief of regularisation where the State adopts practices which are exploitative and which are akin to ‘unfair labour practice’.

32. I am also of the view that the respondents cannot be allowed to take advantage of their own wrong and seek to deny the relief of regularisation.

33. In **Union of India v. Maj. Gen. Madan Lal Yadav⁸**, the Supreme Court explained this principle in the following terms:

*“In this behalf, the maxim **nullus commodum capere potest de injuria sua propria** — meaning no man can take advantage of his own wrong — squarely stands in the way of avoidance by the respondent and he is estopped to plead bar of limitation contained in Section 123(2). In Broom’s Legal Maxim (10th Edn.) at p. 191 it is stated:*

“... it is a maxim of law, recognised and established, that no man shall take advantage of his own wrong; and this maxim, which is

⁶ (2014)7 SCC 190

⁷ (2015)6 SCC 494

⁸ (1996) 4 SCC 127

based on elementary principles, is fully recognised in courts of law and of equity, and, indeed, admits of illustration from every branch of legal procedure.”

*The reasonableness of the rule being manifest, we proceed at once to show its application by reference to decided cases. It was noted therein that a man shall not take advantage of his own wrong to gain the favourable interpretation of the law. In support thereof, the author has placed reliance on another maxim **frustra legis auxilium invocat quaerit qui in legem committit**. He relies on **Perry v. Fitzhowe**⁹. At p. 192, it is stated that if a man be bound to appear on a certain day, and before that day the obligee puts him in prison, the bond is void. At p. 193, it is stated that “it is moreover a sound principle that he who prevents a thing from being done shall not avail himself of the non-performance he has occasioned”. At p. 195, it is further stated that “a wrong doer ought not to be permitted to make a profit out of his own wrong”. At p. 199 it is observed that “the rule applies to the extent of undoing the advantage gained where that can be done and not to the extent of taking away a right previously possessed”.*

*29. The Division Bench of the High Court has recorded the finding that the respondent has absconded from open military detention. From the narration of the facts it is clear that the respondent was bent upon protracting preliminary investigation. Ultimately, when the GCM was constituted, he had challenged his detention order. When he was unsuccessful and the trial was to begin he escaped the detention to frustrate the commencement of the trial and pleaded bar of limitation on and from 1-3-1987. The respondent having escaped from lawful military custody and prevented the trial from being proceeded with in accordance with law, the maxim **nullus commodum capere potest de injuria sua propria** squarely applies to the case and he having done the wrong, cannot take advantage of his own wrong and plead bar of limitation to frustrate the lawful trial by a competent GCM. Therefore, even on the narrow interpretation, we hold that continuation of trial from 2-3-1987 which commenced on 25-2-1987 is not a bar and it is a valid trial.”*

⁹ (1846)8 QB 757

34. This principle was recently reiterated in **Mackinnon Mackenzie & Co. Ltd. v. Mackinnon Employees Union**¹⁰. The Court held:

*“53. Further, it is urged by the learned Senior Counsel on behalf of the appellant Company that there is no question of reinstatement of the workmen concerned and payment of back wages to them since the department/unit concerned of the appellant Company in which they were employed no longer exists and therefore, requested this Court to mould the relief granted by the courts below. The said contention is rightly rebutted by the learned Senior Counsel on behalf of the respondent Union by placing reliance on **Workmen of Sudder Workshop**¹¹, wherein this Court held that the Court cannot sympathise with a party which gambles in litigation to put off the evil day, and when that day comes, prays to be saved from its own gamble. The said contention urged on behalf of the respondent Union must be accepted by us as the same is well founded. Therefore, we hold that moulding of the relief is not permissible in this case at this stage when the matter has reached this Court keeping in mind the legal principle laid down by this Court on this aspect of the matter in the case referred to *supra*.”*

35. In **Umadevi (3)** (1 *supra*) itself, the Supreme Court in para-53 of its judgment held that direct appointment of duly qualified persons in duly sanctioned vacant posts were made by the employer and the employees have continued to work for 10 years or more but without intervention of orders of Courts or of Tribunals, as a one time measure, steps for regularisation of their services would have to be considered on merits while ensure that regular recruitments are undertaken to fill those vacant sanctioned posts that required to be filled up.

¹⁰ (2015) 4 SCC 544

¹¹ AIR 1980 SC 1454

36. In my considered opinion, since the petitioners are all tribals and are eligible for such appointment, since they possess the B.Ed. qualification, and also as per G.O.Ms.No.3 referred to above, their appointment cannot be termed as 'illegal' particularly when even according to respondents their appointment was made through a selection Committee consisting of high officials of the Tribal Welfare Department in 2005. So it has to be held that their appointment is at best 'irregular' and not 'illegal'.

37. It is to be kept in mind that normally, it would be very difficult to find people to work in the schools located in the interior tribal areas. When petitioners, who are locals to such areas, agreed to teach in those schools and have put in considerable service, there is no valid justification for respondents to deny the relief of regularisation.

38. It is also not the case of respondents that pursuant to the interim order passed by this Court on 23-04-2015 any attempt was made by respondents at all to make regular recruitment.

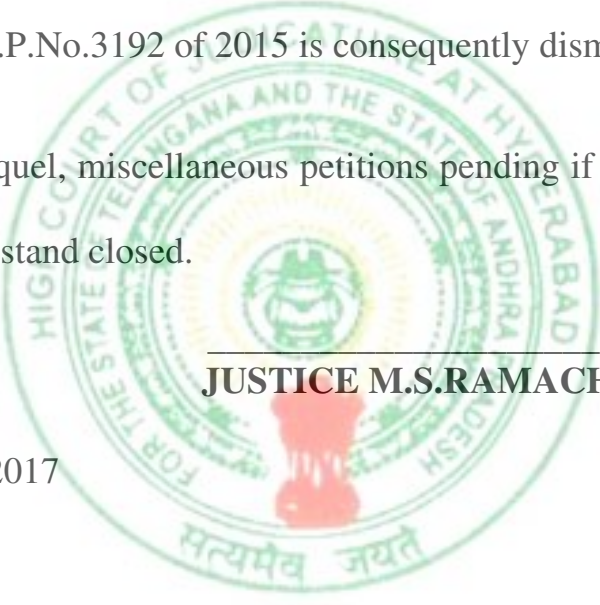
39. Therefore, as held in **Nihal Singh** (2 supra), I hold that the State cannot take the defence, after permitting the utilisation of the services of petitioners for a long period of time, that it will continue to exploit them and pay them a consolidated salary without regularising their services; that **Umadevi** (3) case or Act 2 of 1994 cannot become a licence for exploitation by the State; and the State cannot continue a

practice inconsistent with its obligation to function in accordance with the Constitution.

40. Accordingly, the Writ Petition is allowed and respondents are directed to regularise the services of petitioners in Ashram schools where they were employed and consequently give them benefits of scale of pay, seniority and other benefits within eight (08) weeks from the date of receipt of a cop of this order. The respondents shall also pay costs of Rs. 1000/- to each of the petitioners.

41. W.V.M.P.No.3192 of 2015 is consequently dismissed.

42. As a sequel, miscellaneous petitions pending if any in this Writ Petition, shall stand closed.



JUSTICE M.S.RAMACHANDRA RAO

Date : 04-01-2017

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