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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO.2149 OF 2012

Union of India & anr. ...Petitioners

Vs.

S.N. Kamble & ors. ...Respondents

.....

Mr. Neel Helekar along with Mr. A.M. Sethna, Mr. A.R. Varma,
Mr. S.G. Thakur i/by Mrs. Neeta V. Masurkar, Advocate for the
petitioners / UOI.

Mr. G.K. Masand i/by Mr. Ajeet A. Manwani, Advocate for the
respondents.

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WITH

CIVIL WRIT PETITION NO. 5248 OF 2012

WITH

CIVIL APPLICATION NO. 504 OF 2013

Union of India & ors. ...Petitioners

Vs.

Rajesh P. More ...Respondent

WITH

CIVIL WRIT PETITION NO. 5249 OF 2012

WITH

CIVIL APPLICATION NO. 505 OF 2013

Union of India & ors.

...Petitioners

Vs.

J.S. Ghadigaonkar

...Respondent

WITH

CIVIL WRIT PETITION NO. 5250 OF 2012

WITH

CIVIL APPLICATION NO. 506 OF 2013

Union of India & ors.

...Petitioners

Vs.

P.A. Lotankar

...Respondent

WITH

CIVIL WRIT PETITION NO. 5251 OF 2012

WITH

CIVIL APPLICATION NO. 507 OF 2013

Union of India & ors.

...Petitioners

Vs.

Balasaheb P. Mansukh

...Respondent

.....

Mr. Neel Helekar along with Mr. A.R. Gole, Mrs. Neeta V. Masurkar, Mr. D.A. Dubey and Mr. S.G. Thakur, Advocate for the petitioners / UOI.

Mr. G.K. Masand i/by Mr. Ajeet A. Manwani, Advocate for the respondents.

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**CORAM : SMT. V.K. TAHILRAMANI ACTING C.J.
AND M.S.KARNIK, J.**

RESERVED ON : 25th JANUARY, 2018.

PRONOUNCED ON : 25th APRIL, 2018.

ORDER (PER M.S.KARNIK, J.) :-

The petitioners – Union of India have filed this petition under Article 226 of the Constitution of India challenging the judgment and order dated 19/12/2011 passed by the Central Administrative Tribunal, Bombay Bench, Mumbai ('the Tribunal' for short) in O.A. No.320 of 2006 and O.A. Nos. 569 of 2008 to 572 of 2008.

2. The respondents are working in the office of Directorate of Revenue Intelligence as Waterman/Farash at Walchand Hirachand Marg, Ballard Estate, Mumbai.

3. The respondents were recruited through Employment Exchange as Waterman/Farash in early 90's pursuant to requisition made by the petitioners to the Employment Exchange.

4. Learned Counsel for the petitioners Shri Helekar invited our attention to the pleadings in O.A. filed before the Tribunal. The respondents have pleaded that under the recruitment rules the post of Waterman/Farash is not prescribed. On the other hand, the recruitment rules provide for appointment of peon carrying the pay scale of Rs.2550-3200. Above the post of peon is the post of Sepoy, carrying the pay scale of Rs.2610-4000 and above the post of Sepoy is the Head Hawaldar carrying pay scale of Rs.3050-4590. All the three posts are in Group D service of Government of India. The duties of waterman/farash are attending to the Assistant / Deputy Director/ Joint Director and sometime to attend to the Additional Director General also, xeroxing of the documents, loading and unloading of goods at the time of seizure and in the absence of drivers, to drive the vehicles of the Directorate of Revenue Intelligence. Even according to the respondents though they were appointed in the year 1992/1994 on daily wages, which were initially at Rs.45/- per day, but the salary was paid

at the end of the month. The respondents were subsequently placed in the regular pay scale of Rs.2550-3200 and their pay was fixed at Rs.2610/-. According to the respondents, they have been working in Group D post carrying the pay scale of Rs.2550-3200. According to the respondents, prior to their engagement, the petitioners had engaged various other persons who were appointed as sweepers. All these persons were recruited in the same manner like the respondents. The sweepers have been further promoted as Sepoy. Petitioner No.2 had taken up the case of the respondents for regularization of their service in the post of Waterman/Farash. According to the respondents though their case for regularization was pending with the petitioners, a contractor came to be appointed whereafter the respondents are paid meagre wages by the contractor. It is the case of the respondents in OA that the contractor was appointed from March, 2006 and whereafter they are paid at the rate of Rs.3000/- per month.

5. It is the case of the respondents that they were appointed on temporary basis and were paid bonus every year

since 1997 at par with government servants. It was pointed out by them they there are three clear vacancies of Sepoy besides number of vacancies in the post of driver. They are fulfilling the requirements prescribed in the recruitment rules both for the post of Sepoy as well as for the post of driver. As on the date of the filing of O.A. they had more than 10 years of experience and therefore prayed that as they were working on the temporary basis, they are entitled for regularization as government servants and status of regular government servant be conferred on them.

6. Learned Counsel for the petitioners invited our attention to the written statement filed by them before the Tribunal. It was pointed out that the respondents were appointed on daily wages of Rs.29.35 per working day. Even the indent dated 20/7/1992 provides specific stipulation for recruitment of waterman/farash on daily wages basis. The appointment order dated 4/11/1992 of respondent No.1 stipulates that the appointment is purely on temporary basis at the wage rate of Rs.29.35 per working day. It is the petitioners'

case that there are no sanctioned posts of waterman/farash. The government decided to give a contract to M/s. Sneha Enterprises. The respondents are employees of the contractor and not of the petitioners. There is no employer and employee relationship between the petitioners and the respondents. Shri Helekar submits that only when a person is appointed by following the procedure prescribed by the recruitment rules can he claim the status of an employee. Regularization as ordered by the Tribunal would amount to back-door recruitment which has no legal sanction. As the petitioners are not holding any posts they are not entitled to any pay scale. According to Shri Helekar, regularization can only be against sanctioned posts. He relied upon the decision of the Apex Court in the case of **Secretary, State of Karnataka & ors. Vs. Umadevi & ors.** reported in **(2006) 4 SCC 1**. It is the contention of Shri Helekar that the respondents were never placed in any pay scale. However, the case was forwarded to the higher authorities for consideration.

7. In the submission of learned Counsel that the

requisition dated 20/7/1992 to the Employment Exchange indicates that two posts of waterman on daily wages of Rs. 29.35 per working day are lying vacant in the office of the petitioners. It was clearly mentioned that these vacancies are temporary, but are likely to be continued. According to Shri Helekar, the Tribunal misread the clause mentioned in the requisition form. It provides that these are the posts which are temporary but likely to be permanent in near future. In his submission, the requisition provided various categories. The said requisition pertains to temporary posts but which are likely to be continued beyond one year.

8. Learned Counsel pointed out that all the requisitions and orders clearly mention that the respondents were appointed on daily wages as waterman. Shri Helekar pointed out that by an agreement dated 1st March, 2006 a contractor came to be appointed for works to be carried out daily by sweepers/farash/office boys. It was pointed out by the learned Counsel that in view of the ban imposed by Ministry of Finance in 2004 on

recruitment of persons on daily wages, the power of the Head of the department in the said regard stood withdrawn. It was directed that work for which no regular posts have been created/sanctioned be outsourced through service providers/contractor after following the procedure prescribed in the GFRs. It is in these circumstances that from February 2006 the services of the respondents were terminated. Thereafter they were appointed by the contractor and thus, there was no employer-employee relationship between the petitioners and the respondents.

9. As indicated earlier, the main contention of Shri Helekar is that the respondents were not appointed against any duly sanctioned vacant posts. The posts on which the respondents are working are temporary/contractual basis and therefore question of regularization does not arise.

10. It is further pointed out that the case of the respondents does not come under the category of regularization

on the ground of temporary status in OM letter dated 10/9/1993 nor they are working directly or indirectly with the petitioners.

11. Learned Counsel Shri Helekar assailing the order of the Tribunal contends that though the Tribunal confirmed the position that the respondents do not come under the provisions relating to casual laborers entitled to temporary status as per OM dated 10/9/1993, but the Tribunal committed an error in holding that the claim of the respondents for regularization has to be considered in view of the direction of the Apex Court in the case of **Umadevi** (supra).

12. It is further pointed out that the Ministry of Finance by their letter dated 1/5/2007 forwarded a copy of OM dated 11/12/2006 issued by DOPT along with a copy of the judgment dated 10/4/2006 of the Hon'ble Supreme Court in the case of **Umadevi** (supra). Para 2 of the OM dated 11/12/2006 is as follows :-

“A Constitution Bench of the Supreme Court in Civil Appeal No.3595-3612/1999 etc. in the case of Secretary, State of Karnataka & Others Vs. Uma Devi has reiterated that any public appointment has to be in terms of the Constitutional scheme. However, in Para 44 of the aforesaid judgement dated 10-04-2006 has directed that the Union of India, the State Governments and their instrumentalities should take steps to regularize as one time measure the services of such irregularly appointed, who were duly qualified persons in terms of the statutory recruitment rules for the post and who have worked for ten years or more in duly sanctioned posts but not under cover of orders or Tribunals. The Apex Court has clarified that if such appointment itself is in infraction of the rules or if it is in violation of the provisions of the Constitution, illegality cannot be regularized.”

13. In the submission of Shri Helekar, letter dated 1/5/2007 issued by the department was meant for implementation of the directions of the Hon'ble Apex Court in the case of **Umadevi** (supra). Learned Counsel submits that the directions in **Umadevi's case** are very clear that as a one time measure, the services of such irregularly (not illegally) appointed casual workers who have worked for ten years or more in duly sanctioned posts but not under cover of orders of the Courts or Tribunals. The respondents were engaged as a

casual worker/farash/waterman/sweeper purely on temporary basis and not against any sanctioned post. As there were no such sanctioned posts, the question of any vacancy against the same does not arise.

14. Learned Counsel Shri Masand for the respondents supported the order passed by the Tribunal. He invited our attention to the findings recorded by the Tribunal. In his submission, the order passed by the Tribunal is a well reasoned order which does not warrant interference in the exercise of writ jurisdiction of this Court. Learned Counsel submits that there was nothing irregular in the appointment of the respondents. He submits that there are vacancies available and that the respondents are appointed in the vacant posts. According to him the petitioners had requisitioned the Employment Exchange. The respondents were recommended by the employment exchange. Upon such recommendation their names were struck off from the Employment Exchange. Learned Counsel submits that it is only against vacant posts the

requisition are called from the Employment Exchange. He invited our attention to the requisition form to be used when calling for application from Employment Exchange for recruitment to Central Government vacancies. Against Column “Temporary but likely to be permanent in near future” the noting is 'Yes'. He therefore submits that this would clearly go to show that vacancies did exist. According to him the continuance of the respondents for so long years is a pointer to the work being permanent in nature. He further submits that a contractor was appointed only to deprive the respondents' status and privileges of regular Government employee. Learned Counsel was at pains to point out that the Tribunal by a well considered reasoned order found the respondents entitled for regularization. Learned Counsel submits that the case of the respondents is squarely covered by the law laid down by the Apex Court in the case of **Umadevi** (*supra*). In his submission, as all the respondents had worked for more than 10 years from the date of initial engagement and were sponsored through the Employment Exchange, are entitled to be regularized.

15. Heard learned Counsel at some length. Undoubtedly the respondents have worked in the post of Waterman/Farash for long number years and admittedly for more than 10 years. The Tribunal was of the opinion that the case of the respondents deserves invoking relaxation power vested with the Administrator and accordingly directed the petitioners to consider relaxation of the qualification requirement in respect of the respondents and similarly situated temporary status casual labourers. The Tribunal was of the opinion that the respondents with nearly 30 years of casual labour service of which twenty years of service was with temporary status may not be left in lurch on the basis of the introduction of the new condition of higher qualification.

16. No doubt, the respondents are working in the said post for long period from the date of their initial appointment. We notice that the Tribunal has not granted relief to the respondents in view of any scheme for regularization. The Tribunal, however, has granted the relief of regularization in

view of the law laid down by the Apex Court in Umadevi's case. The Tribunal held that para 53 of the decision in Umadevi's case mandated the petitioners to formulate the scheme calendaring certain time period and that "The process must be set in motion within six months". We may usefully refer to para 52, 53 and 54 of the decision of the Hon'ble Supreme Court in the case of Umadevi which reads thus :-

52. Normally, what is sought for by such temporary employees when they approach the court, is the issue of a writ of mandamus directing the employer, the State or its instrumentalities, to absorb them in permanent service or to allow them to continue. In this context, the question arises whether a mandamus could be issued in favour of such persons. At this juncture, it will be proper to refer to the decision of the Constitution Bench of this Court in *Dr. Rai Shivendra Bahadur Vs. The Governing Body of the Nalanda College* [(1962) Supp. 2 SCR 144]. That case arose out of a refusal to promote the writ petitioner therein as the Principal of a college. This Court held that in order that a mandamus may issue to compel the authorities to do something, it must be shown that the statute imposes a legal duty on the authority and the aggrieved party had a legal right under the statute or rule to enforce it. This classical position continues and a mandamus could not be issued in favour of the employees directing the government to make them permanent since the employees cannot show that they have an enforceable legal right to be permanently absorbed or that the State has a legal duty to

make them permanent.

53. One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in S.V. NARAYANAPPA (supra), R.N. NANJUNDAPPA (supra), and B.N. NAGARAJAN (supra), 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 courts or of tribunals. The question of regularization 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 regularize 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 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 regularization, if any already made, but not subjudice, need not be reopened based on this judgment, but there should be no further by-passing of the constitutional requirement and regularizing or making permanent, those not duly appointed as per the constitutional scheme.

54. It is also clarified that those decisions which run counter to the principle settled in this decision, or in which directions

running counter to what we have held herein, will stand denuded of their status as precedents.

17. The Tribunal has not recorded any finding that the respondents were working for 10 years or more in duly sanctioned vacant posts. In fact it is the specific stand of the petitioners that there are no sanctioned post of Waterman/Farash. The Apex Court in the case of Umadevi has clearly laid down that the Union of India, the State Governments and their instrumentalities should take steps to regularize as a one time measure, the services of such irregularly appointed employees, who have worked for ten years or more in duly sanctioned posts but not under cover of orders of courts or of tribunals.

18. It may be that the respondents were recommended by the Employment Exchange upon requisitions made by the petitioners. In fact the requisition itself indicates that the vacancies for which the requisitions are called are temporary but are likely to be continued beyond one year. The respondents

were thus appointed and continued to work in vacancies which are temporary in nature. The vacancies continued to be temporary for years together in which vacancy the respondents worked. Later on, as indicated earlier, the employees were engaged through a contractor. The respondents in effect seek a direction that these temporary vacancies which have continued as such for so long number of years may be treated as permanent posts thereby regularising their services in these posts. We are afraid that it is not possible for us to direct the respondents to treat these temporary vacancies as permanent sanctioned posts. The respondents contended that there is an employer-employee relationship between the petitioners and the respondents and that the contractor is appointed only to deprive the respondents the benefits of regularization. In view of the law laid down by the Apex Court in the case of Umadevi, once we come to the conclusion that the appointment of the respondents are not against vacant sanctioned posts, the question of regularization of their services in accordance with the directions contained in para 53 of Umadevi's case does not arise.

19. No doubt the temporary vacancies on which the respondents are working have continued as such for almost 30 years. In the interest of justice we are inclined to direct the petitioners to consider creation of sanctioned posts as the temporary vacancies on which the respondents are working exist for almost thirty years. The respondents may be considered for regularisation in terms of the order passed by the Tribunal in the event the sanctioned posts are created.

20. We are therefore inclined to interfere with the order of the Tribunal. Accordingly, the order dated 19th December, 2011 passed by the Central Administrative Tribunal, Bombay Bench, Mumbai in O.A. No.320 of 2006 and O.A.Nos. 569 of 2008 to 572 of 2008 is quashed and set aside.

21. The Writ Petitions are allowed subject to what is observed in para 19 of this order. All Civil Applications disposed of.

(M.S.KARNIK, J.)

(ACTING CHIEF JUSTICE)