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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.12597 OF 2017
ALONGWITH
CIVIL APPLICATION NO.1853 OF 2018
IN
WRIT PETITION NO.12597 OF 2017**

1] Shri Mahesh Madhukar Wagh)
Age: 38 years, Occupation: Service)
R/o. 691/B, Flat No.C-8, Rajaram)
Residency, Gajanan Maharaj Nagar)
Kolhapur, PIN – 416012)
)
2] Shri Prashant Pandurang Patil)
Age : 34 years, Occupation : Service)
R/o. At post Walva B. K., Taluka)
Ratnagiri, District–Kolhapur PIN-416221)
)
3] Shri Balasaheb Babasaheb Patil)
Age: 42 years, Occupation: Service)
R/o. At post – Bichud, Tal. - Walwa)
District – Sangli PIN – 415302)
)
4] Miss Rupali Janardhan Dhabade)
Age: 34 years, Occupation: Service)
R/o New S.B.I. Colony, Behind)
Dhuniwale Math, Nagpur Road, Wardha)
PIN – 442001)

Versus

1] The State of Maharashtra)
through the Secretary, Higher and)
Technical Education and Employment)
Department, Mantralaya, Mumbai -)
400032)
)

- 2] **The Vice-Chancellor**)
Shivaji University, Vidyanagar,)
Kolhapur PIN – 416004)
)
- 3] **Registrar, Shivaji University**)
Vidyanagar, Kolhapur PIN – 416004)
)
- 4] **The Director of Technical Education,**)
Maharashtra State, 3, Mahapalika Marg,)
Mumbai – 400001)
)
- 5] **All India Council for Technical**)
Education (A.I.C.T.E.) through Western)
Region Office, Industrial Assurance)
Building, 2nd Floor, Veer Nariman Road,)
Churchgate, Mumbai – 400020) Respondents.

Mr. S.S. Pakale alongwith Ms. Manisha Deokar i/b Mr. Shankar M. Katkar for the Petitioners.

Ms. R.M. Shinde, AGP for the State/Respondent Nos. 1 and 4.

Mr. Amit B. Borkar for Respondent No.3.

Mr. Abhijeet A. Joshi for Respondent No.5.

**CORAM: B. R. GAVAI &
DAMA SESHADRI NAIDU, JJ.**

DATE: 27th MARCH, 2019

ORAL JUDGMENT (Per B.R. Gavai, J.)

1] Rule. Rule is made returnable forthwith. Heard finally by consent of parties.

2] Petitioners who are working as Assistant Professors with Respondent No.3- University, have approached this Court, praying for directions to the Respondents to treat the Petitioners as permanent teachers in the post of Assistant Professor and extend the benefits and facilities, as admissible to the said post and ancillary benefits.

3] Heard Mr. Pakale, learned Counsel appearing on behalf of the Petitioners.

4] Mr. Pakale, learned Counsel for the Petitioners, submitted that the Petitioners have been appointed as Assistant Professors right from the year 2012-13 on 'year to year' basis and, thereafter, have been continued on year to year basis; albeit, showing the same to be fresh appointments. He therefore submitted that perusal of the material placed on record would clearly reveal that the posts are permanent and the Respondent University has illegally and arbitrarily continued the Petitioners on an ad-hoc basis, though the Petitioners are entitled to be treated as permanent employees. Mr. Pakale, learned Counsel, though fairly admitted that the appointments of the

Petitioners are made under the provisions of Section 77 of the erstwhile Maharashtra Universities Act, however submitted that the difference between the appointment under sections 76 and 77 is only a procedural one and not substantial. He submitted that since the appointments are made after due selection process is followed, the Petitioners deserve to be granted relief as prayed by them.

5] Mr Pakale also relies on the Judgment of Division Bench of this Court in the case of *Sachin Ambadas Dawale and others vs State of Maharashtra and another*¹. He submitted that the facts in the present case are almost identical with the facts in the said case and as such, the present Petitioners also deserve to be granted the relief which was granted by Division Bench of this Court in the said case. He further submitted that an SLP filed by the State of Maharashtra, challenging the Judgment of Division Bench of this court in the case of *Sachin Ambadas Dawale* (supra) has also been dismissed and the view taken by this Court in the said case has been upheld.

6] Mr. Borkar, learned Counsel appearing for Respondent

¹ 2014(2) Mh.L.J. 36

University, on the other hand, submitted that the appointments of the Petitioners are made purely on temporary basis, inasmuch as the posts are created for the Courses which are conducted by the University on self financing basis. He submitted that unless and until the University is confident that it will get a particular number of students available per year, so as to make the Courses viable, it cannot take a decision to make the posts permanent. He submitted that decision to make the posts permanent and fill them up in accordance with the provisions of Section 76 of the said Act would arise only in the event the University decides to continue the said Courses permanently.

7] Perusal of Sections 76 and 77 would reveal that both these provisions are totally different. No doubt, the constitution of Selection Committee in both the said Sections is somewhat similar, however, the procedure prescribed is totally different. Insofar as Section 76 is concerned, the post to be filled-in has to be widely advertised according to the draft approved by the Vice Chancellor together with particulars of minimum and additional qualifications etc. As has been stated in the affidavit filed by Dr. Vilas Dattu

Nandavadekar, the advertisements for filling up permanent posts are given in National Newspapers, so also in various Science Journals. Per contra, Section 77 provides for filling up of temporary vacancies of University Teacher. It could be seen that in contradistinction to the provisions of Section 76, the appointments made under Section 76 are also amenable to challenge before the Hon'ble Chancellor. A person aggrieved can approach the Hon'ble Chancellor under sub-section (7) of Section 76 of the said Act and a decision taken by the Hon'ble Chairman is final. No such requirement is to be found in Section 77.

8] It will further be relevant to refer to the following part of the advertisement :-

“Tenure: Above posts are on purely temporary basis for the academic year 2012-13 (i.e. up to the end of the second term of academic year 2012-13) or up to the filling of said posts under Section 76 of Maharashtra Universities Act, 1994 whichever will be earlier.”

It could be seen that the advertisement clearly states that the posts are to be filled-in on purely temporary basis for the academic year

2012-13 or up to the filling up of the said posts under section 76 of the said Act. It will also be relevant to refer to the following part of one of the appointment orders :-

“Your appointment is purely temporary for the period up to 31/5/2013 or up to the filling of said post under Section 76 of Maharashtra Universities Act, 1994 whichever will be earlier.”

It could thus be seen that the appointment order clearly stipulates that the post is purely temporary post for a period upto 31/05/2013 or upto filling up of the said post under the provisions of Section 76 of the said Act. It could thus be seen that, firstly, University has not yet taken a decision to run the said 'self financed Courses' permanently. They are still on a trial basis and decision to run the said Courses permanently or not will have to be taken by the University on the basis of its assessment with regard to availability of students, finances etc. Secondly, the advertisement as well as the appointment orders clearly stipulate that they are for a particular period clearly on a temporary basis. It also provided that, in the event, the candidate after following the process under Section 76 is available, services of

temporary candidate would be liable to be terminated.

9] No doubt that, Mr. Pakale, learned Counsel for the Petitioners, has relied upon the judgment of Division Bench of this Court in the case of *Sachin Ambadas Dawale and others vs. State of Mharashtra and another*², to which one of us (Gavai, J.) is a party. It is further to be noted that the Special Leave Petition, challenging the said Judgment, has also been dismissed by the Hon'ble Apex Court.

10] Perusal of the judgment of this Court in the case of *Sachin Ambadas Dawale (supra)* would reveal that the facts in the said case were totally different. In the said case, the posts of Lecturers in the Polytechnic run by the State of Maharashtra were lying vacant for years together. The State found it difficult to fill the said posts through the competent authority i.e. Maharashtra Public Service Commission (MPSC). As such, the State Government had issued a Government Resolution dated 02/08/2003 vide which, it constituted a Selection Committee consisting of the following highly expert technical persons :-

² 2014(2) Mh.L.J. 36

- (i) Joint Director, Technical Education Department,
- (ii) Representative of women,
- (iii) Principal of the concerned Institution,
- (iv) Representative of backward class, and
- (v) Two experts of concerned subject.

The State Government also provided a detailed procedure in the said Government Resolution of 2003, prescribing therein the manner in which the selection process would be conducted and the candidates would be appointed after selection. Though the appointments were initially for a period of two years, finding it difficult that it was still not possible to get candidates selected through MPSC, the Government issued another Resolution dated 26/10/2005 and continued the said candidates who were selected as per the earlier Government Resolution of 2003 for further period of two years. Not only that, even thereafter, since it was not possible for the State to get the recruitment done through MPSC, they were continued continuously and the Government also decided to give them the facilities which were given to the regular employees including leave etc.

11] Considering all these aspects and particularly taking into consideration that there were about 4500 sanctioned posts lying vacant for a long time on account of inability of the State Government to get the said posts filled-in through the MPSC, the aforesaid judgment in the case of *Sachin Ambadas Dawale* (supra) came to be delivered in the peculiar facts and circumstances. It is further to be noted that, even on the date on which the judgment in the said case was delivered, the Court has noted that, on the date of the judgment there were more than 4000 vacancies of Lecturers in the Government Polytechnics still lying vacant and the advertisement that was issued by the State Government was only for 400 posts. The Court further took into consideration that on account of inaction on the part of the State Government in getting the selection done through MPSC for period of more than a decade, the Petitioners, in the said case, were continued for more than a decade and, by passage of time, many of them had become overage.

12] While considering the law laid down by the Constitution Bench in the case of *Secretary, State of Karnataka and Others vs. Umadevi* (3)

*and Others*³, this Court found that entry of the Petitioners in the case of *Sachin Ambadas Dawale* (supra) could not be said to be a back door entry, inasmuch as their appointments were made on the basis of Government Resolutions, which were issued to meet the peculiar exigency and the candidates appointed were appointed after the due advertisements were published and all interested candidates were made aware about the same and they were appointed after selection process, as prescribed under the said Government Resolution of 2003 . As such, it could be seen that the said judgment does not, in any way, take a stand contrary to the law laid down by the Constitution Bench in the case of *Umadevi* (supra).

13] It is more than well settled that adherence to Article 14 and Article 16 in the matter of public employment cannot be in any way permitted to be diluted. It will be relevant to refer to following paras of the judgment of Constitution Bench in the case of *Umadevi* (supra), which read thus :-

“47. When a person enters a temporary employment or gets engagement as a contractual or casual worker and the

³ (2006) 4 SCC 1

engagement is not based on a proper selection as recognised by the relevant rules or procedure, he is aware of the consequences of the appointment being temporary, casual or contractual in nature. Such a person cannot invoke the theory of legitimate expectation for being confirmed in the post when an appointment to the post could be made only by following a proper procedure for selection and in cases concerned, in consultation with the Public Service Commission. Therefore, the theory of legitimate expectation cannot be successfully advanced by temporary, contractual or casual employees. It cannot also be held that the State has held out any promise while engaging these persons either to continue them where they are or to make them permanent. The State cannot constitutionally make such a promise. It is also obvious that the theory cannot be invoked to seek a positive relief of being made permanent in the post.”

“48. It was then contended that the rights of the employees thus appointed, under Articles 14 and 16 of the Constitution, are violated. It is stated that the State has treated the employees unfairly by employing them on less than minimum wages and extracting work from them for a pretty long period in comparison with those directly recruited who are getting more wages or salaries for doing similar work. The employees before us were engaged on daily wages in the department concerned on a wage that was made known to them. There is no case that the wage agreed upon was not being paid. Those who are working on daily wages formed a class by themselves, they cannot claim that they are discriminated as against those who have been regularly recruited on the basis of the relevant rules. No right can be founded on an employment on daily wages to claim that such employee should be treated on a par with a regularly recruited candidate, and made permanent in employment, even assuming that the principle could be invoked for claiming equal wages for equal work. There is no fundamental right in those who have been employed on daily wages or temporarily or on contractual basis, to claim that they have a right to be absorbed in service. As has been held by this Court, they cannot be said to be holders of a post, since, a regular appointment could be made only by making

appointments consistent with the requirements of Articles 14 and 16 of the Constitution. The right to be treated equally with the other employees employed on daily wages, cannot be extended to a claim for equal treatment with those who were regularly employed. That would be treating unequals as equals. It cannot also be relied on to claim a right to be absorbed in service even though they have never been selected in terms of the relevant recruitment rules. The arguments based on Articles 14 and 16 of the Constitution are therefore overruled.”

“49. It is contended that the State action in not regularising the employees was not fair within the framework of the rule of law. The rule of law compels the State to make appointments as envisaged by the Constitution and in the manner we have indicated earlier. In most of these cases, no doubt, the employees had worked for some length of time but this has also been brought about by the pendency of proceedings in tribunals and courts initiated at the instance of the employees. Moreover, accepting an argument of this nature would mean that the State would be permitted to perpetuate an illegality in the matter of public employment and that would be a negation of the constitutional scheme adopted by us, the people of India. It is therefore not possible to accept the argument that there must be a direction to make permanent all the persons employed on daily wages. When the court is approached for relief by way of a writ, the court has necessarily to ask itself whether the person before it had any legal right to be enforced. Considered in the light of the very clear constitutional scheme, it cannot be said that the employees have been able to establish a legal right to be made permanent even though they have never been appointed in terms of the relevant rules or in adherence of Articles 14 and 16 of the Constitution.”

“50. It is argued that in a country like India where there is so much poverty and unemployment and there is no equality of bargaining power, the action of the State in not making the employees permanent, would be violative of Article 21 of the Constitution. But the very argument indicates that there are so many waiting for employment and an equal opportunity for competing for employment and it is in that

context that the Constitution as one of its basic features, has included Articles 14, 16 and 309 so as to ensure that public employment is given only in a fair and equitable manner by giving all those who are qualified, an opportunity to seek employment. In the guise of upholding rights under Article 21 of the Constitution, a set of persons cannot be preferred over a vast majority of people waiting for an opportunity to compete for State employment. The acceptance of the argument on behalf of the respondents would really negate the rights of the others conferred by Article 21 of the Constitution, assuming that we are in a position to hold that the right to employment is also a right coming within the purview of Article 21 of the Constitution. The argument that Article 23 of the Constitution is breached because the employment on daily wages amounts to forced labour, cannot be accepted. After all, the employees accepted the employment at their own volition and with eyes open as to the nature of their employment. The Governments also revised the minimum wages payable from time to time in the light of all relevant circumstances. It also appears to us that importing of these theories to defeat the basic requirement of public employment would defeat the constitutional scheme and the constitutional goal of equality.”

“51. The argument that the right to life protected by Article 21 of the Constitution would include the right to employment cannot also be accepted at this juncture. The law is dynamic and our Constitution is a living document. May be at some future point of time, the right to employment can also be brought in under the concept of right to life or even included as a fundamental right. The new statute is perhaps a beginning. As things now stand, the acceptance of such a plea at the instance of the employees before us would lead to the consequence of depriving a large number of other aspirants of an opportunity to compete for the post or employment. Their right to employment, if it is a part of right to life, would stand denuded by the preferring of those who have got in casually or those who have come through the backdoor. The obligation cast on the State under Article 39(a) of the Constitution is to ensure that all citizens equally have the right to adequate means of livelihood. It will be

more consistent with that policy if the courts recognise that an appointment to a post in government service or in the service of its instrumentalities, can only be by way of a proper selection in the manner recognised by the relevant legislation in the context of the relevant provisions of the Constitution. In the name of individualising justice, it is also not possible to shut our eyes to the constitutional scheme and the right of the numerous as against the few who are before the court. The directive principles of State policy have also to be reconciled with the rights available to the citizen under Part III of the Constitution and the obligation of the State to one and all and not to a particular group of citizens. We, therefore, overrule the argument based on Article 21 of the Constitution.”

“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 *Rai Shivendra Bahadur (Dr.) v. Governing Body of the Nalanda College* [1962 Supp (2) SCR 144 : AIR 1962 SC 1210] . 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* [(1967) 1 SCR 128 : AIR

1967 SC 1071] , *R.N. Nanjundappa* [(1972) 1 SCC 409 : (1972) 2 SCR 799] and *B.N. Nagarajan* [(1979) 4 SCC 507 : 1980 SCC (L&S) 4 : (1979) 3 SCR 937] and referred to in para 15 above, of duly qualified persons in duly sanctioned vacant posts might have been made and the employees have continued to work for ten years or more but without the intervention of orders of the courts or of tribunals. The question of regularisation of the services of such employees may have to be considered on merits in the light of the principles settled by this Court in the cases abovereferred to and in the light of this judgment. In that context, the Union of India, the State Governments and their instrumentalities should take steps to regularise as a one-time measure, the services of such *irregularly* appointed, who have worked for ten years or more in duly sanctioned posts but not under cover of orders of the courts or of tribunals and should further ensure that regular recruitments are undertaken to fill those vacant sanctioned posts that require to be filled up, in cases where temporary employees or daily wagers are being now employed. The process must be set in motion within six months from this date. We also clarify that regularisation, if any already made, but not sub judice, need not be reopened based on this judgment, but there should be no further bypassing of the constitutional requirement and regularising or making permanent, those not duly appointed as per the constitutional scheme.”

14] It could thus be seen that the Hon'ble Supreme Court has clearly held that theory of legitimate expectation cannot be successfully advanced by temporary, contractual or casual employees. It cannot be held that the State had held out any promise while engaging these persons either to continue them or to make them permanent. It has been equally held that there is no fundamental right in those who have been employed on daily wages or temporary or contractual basis

to claim that they have a right to be absorbed in service. It has been held that a regular appointment could be made only by making appointments consistent with the requirement of Articles 14 and 16 of the Constitution. The employees appointed on contractual or temporary basis cannot claim to be treated equally with those who are regularly employed. It has been held in an unequivocal terms that a mandamus could not be issued in favour of employees, directing Government to make them permanent since the employees, not selected through regular selection process, cannot have a legal right to be permanently absorbed.

15] In the present case, advertisement clearly states that the applications are invited for the posts which are purely temporary posts and also specifying the period therein. They also specify that, in the event, regularly selected candidates are available through the mode of Section 76, the appointments of the temporary candidates would be liable to be terminated, so also there is a specific stipulation in the appointment orders to that effect. We therefore find that if the stand, as taken by the Petitioners, is accepted, then we would be

endorsing an argument which runs contrary to the mandate of Articles 14 and 16. The advertisement clearly states that the appointments would be only for a specific period. Had it been made known to the candidates that the appointments, that would be made for temporary period, in normal course, would be continued in eternity, many otherwise eligible candidates who have not applied, could have very well applied for the said posts. We are therefore of the considered view that if the arguments, as are advanced by the Petitioners, are to be accepted, we will have to hold contrary to the principle of law laid down by the Hon'ble Apex Court in the case of *Umadevi* (supra).

16] In ordinary course, we would not have given such an elaborate reasoning. However, it has been noticed that decision of Division Bench of this Court in the case of *Sachin Ambadas Dawale* (supra), to which one of us (Gavai, J.) is a party, is being widely misquoted. Since we got an opportunity to explain as to in what circumstances the Judgment in the case of *Sachin Ambadas Dawale* (supra) was rendered, we thought it fit to give our elaborate reasons explaining as

to under what circumstances *Sachin Ambadas Dawale* (supra) was rendered and why the present Petition is liable to be dismissed.

17] In the result, Petition is dismissed. Rule stands discharged with no order as to costs. In view of dismissal of the Petition, Civil Application taken out therein does not survive and the same is also dismissed.

(DAMA SESHADRI NAIDU, J.)

(B. R. GAVAI, J.)