

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:27.03.2019

C O R A M

The Honourable Mr. Justice SENTHILKUMAR RAMAMOORTHY

Writ Petition No.11214 of 2006
and
W.P.M.P.No.1966 of 2008

Indian Bank Employees
Association rep. By its
General Secretary,
Chennai-600 001. Petitioner

Vs

1.The Government of India,
Ministry of Labour rep. By
its Secretary, Shram Shakthi
Bhavan, Rafi Marg,
New Delhi-110 001.

2.The Presiding Officer,
Central Government Industrial
Tribunal cum Labour Court,
Shastri Bhavan, Chennai-6.

3.The Management,
Indian Bank, rep. By its
Deputy General Manager,
Zonal Office, 24/2, Ethiraj Salai,
Chennai-600 105.

...Respondents

PRAYER : Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorarified Mandamus calling for the records from the second respondent pertaining to the Award dated 31.10.2002 in I.D.No.635 of 2001, quash the same and direct the first respondent to modify the reference as requested by the petitioner union in the letters dated 20.10.2001 and 22.03.2002 by including the issue regarding termination of the services of Mr.V.Pakkirisamy in the schedule to the reference the second respondent to adjudicate both the issues regarding termination as well as regular absorption afresh, after giving opportunity to both the parties to the dispute to lead oral and documentary evidence.

For Petitioner : Mr.R.Natarajan

For Respondents : No appearance for R1 and R2
Mrs.Rita Chandrasekar
for M/s.Aiyar & Dolia
for R3

O R D E R

This writ petition has been filed by the Indian Bank Employees' Association on behalf of one of its Members, namely, Mr.V.Pakkirisamy, who was admittedly appointed as a temporary sub-staff against sub-staff vacancies of the third respondent at its South Mada Street Branch in Chennai on 10.05.1991. According to the petitioner, V.Pakkirisamy was continuously employed therein without a break except on Sundays and other holidays. It is submitted that although he worked for more than 1200 days, his services were discontinued with effect from July, 1995 and that he was not regularized. Accordingly, the petitioner Union requested the Assistant Labour Commissioner, Chennai, to initiate conciliation proceedings by an application dated 17.07.1995. It is further stated that the conciliation ended in failure and that the second respondent did not come forward for an amicable settlement. On receipt of the failure report, the matter was referred for adjudication to the Principal Labour Court, Chennai, by an order dated 05.01.1998. The said Industrial Dispute was taken on file by the second respondent and it was re-numbered as I.D.No.635 of 2001. According to the petitioner, the services of Mr.V.Pakkirisamy were terminated during the pendency of conciliation proceedings and, therefore, a request was made to the first respondent by letter dated 20.12.2001 to modify the reference so as to include the issue regarding termination of the services of the petitioner. The petitioner further states that a memo was filed informing the second respondent about the facts and requesting that the Industrial Dispute should not be adjudicated until orders are passed with regard to the request for modification of the reference. According to the petitioner, the second respondent refused to grant time and instead listed the case for hearing and passed the Award dated 31.10.2002 (Impugned Award). Accordingly, this writ petition has been filed to quash the Impugned Award and to direct the first respondent to modify the reference as requested by the petitioner Union by letters dated 20.10.2001 and 22.03.2002.

2.At the hearing today, the learned counsel for the petitioner submitted that the workman, Pakkirisamy, was appointed as a sub staff and worked in the said capacity for more than 1200 days but he was not regularized. He also invited

the attention of this Court to the letter dated 20.12.2001 requesting the first respondent to modify the reference so as to include the validity of the alleged termination. He further relied upon the additional typed set of papers containing payment vouchers for the period from 10.05.1991 to 30.07.1995 so as to establish that Mr.Pakkirisamy was employed for an extended period.

3.In response, the learned counsel for the third respondent submitted that the petitioner was unauthorizedly appointed as a casual worker whenever temporary vacancies arose on account of availment of leave by regular staff. The learned counsel further submitted that the petitioner did not appear before the second respondent at the hearing either in person or through his counsel in spite of sufficient opportunity being provided and that, therefore, the case was posted for hearing and only the arguments of the learned counsel for the Management were heard. She further pointed out that no witnesses were examined on behalf of the petitioner and that the petitioner herein did not mark any documents in support of the claim. Therefore, it was the contention of the learned counsel for the third respondent that the additional typed set of papers submitted to this Court should not be taken into account because these documents were not produced before the Labour Court.

4.The learned counsel for the third respondent thereafter, relied upon the decision of the Constitution Bench of the Hon'ble Supreme Court in the case of SECRETARY, STATE OF KARNATAKA AND OTHERS V. UMADEVI AND OTHERS reported (2006) 4 SCC Page 1. In particular, the learned counsel invited the attention of this Court to paragraph - 31 of the said judgment, which reads as under:

31.In Ashwani Kumar and others Vs. State of Bihar and others (1996 Supp. (10) SCR 120), this Court was considering the validity of confirmation of the irregularly employed. It was stated: "So far as the question of confirmation of these employees whose entry was illegal and void, is concerned, it is to be noted that question of confirmation or regularization of an irregularly appointed candidate would arise if the candidate concerned is appointed in an irregular manner or on ad hoc basis against an available vacancy which is already sanctioned. But if the initial entry itself is unauthorized and is not against any sanctioned vacancy, question of regularizing the incumbent on such a non-existing vacancy would never survive for

consideration and even if such purported regularization or confirmation is given it would be an exercise in futility."

This Court further stated :

"In this connection it is pertinent to note that question of regularization in any service including any government service may arise in two contingencies. Firstly, if on any available clear vacancies which are of a long duration appointments are made on ad hoc basis or daily-wage basis by a competent authority and are continued from time to time and if it is found that the incumbents concerned have continued to be employed for a long period of time with or without any artificial breaks, and their services are otherwise required by the institution which employs them, a time may come in the service career of such employees who are continued on ad hoc basis for a given substantial length of time to regularize them so that the employees concerned can give their best by being assured security of tenure. But this would require one precondition that the initial entry of such an employee must be made against an available sanctioned vacancy by following the rules and regulations governing such entry. The second type of situation in which the question of regularization may arise would be when the initial entry of the employee against an available vacancy is found to have suffered from some flaw in the procedural exercise though the person appointing is competent to effect such initial recruitment and has otherwise followed due procedure for such recruitment. A need may then arise in the light of the exigency of administrative requirement for waiving such irregularity in the initial appointment by a competent authority and the irregular initial appointment may be regularized and security of tenure may be made available to the incumbent concerned. But even in such a case the initial entry must not be found to be totally illegal or in blatant disregard of all the established rules and regulations governing such recruitment."

5.By way of submissions in rejoinder, learned counsel for the petitioner submitted that the appointment is not unauthorized and, therefore, the petitioner is entitled to be regularized.

6.This Court has carefully examined the affidavit, documents on record including the Impugned Award of the Labour Court and also heard the learned counsel for the petitioner and the third respondent.

7.It is not in dispute that the petitioner was appointed as sub staff on temporary/casual basis in the vacancy that arose as and when the concerned employee was on leave. In the Impugned Award, it has been concluded that Mr.Pakkirisamy was neither in the temporary sub-staff panel nor sponsored by the Employment Exchange. Accordingly, as per the Impugned Award, his appointment was unauthorized and without the approval of the competent Authority.

8.Therefore, the short question that arises for consideration is whether such a person is entitled to be regularized. This issue is no longer res integra and all the uncertainty with regard to regularization of persons employed on casual, temporary or contractual basis has been authoritatively settled by the Constitution Bench in the UMADEVI CASE (cited supra). In addition to paragraph 31, extracted above, paragraphs 43, 45 and 53 of the said judgment are also relevant and read as follows:

43.Thus, it is clear that adherence to the rule of equality in public employment is a basic feature of our Constitution and since the rule of law is the core of our Constitution, a Court would certainly be disabled from passing an order upholding a violation of Article 14 or in ordering the overlooking of the need to comply with the requirements of Article 14 read with Article 16 of the Constitution. Therefore, consistent with the scheme for public employment, this Court while laying down the law, has necessarily to hold that unless the 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. If it is a contractual appointment, the appointment comes to an end at the end of the contract, if it were an engagement or appointment on daily wages or casual basis, the same would come to an end when it is discontinued.

Similarly, a temporary employee could not claim to be made permanent on the expiry of his term of appointment. It has also to be clarified that merely because a temporary employee or a casual wage worker 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 is not open to the court to prevent regular recruitment at the instance of temporary employees whose period of employment has come to an end or of ad hoc employees who by the very nature of their appointment, do not acquire any right. High Courts acting under Article 226 of the Constitution of India, 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. Merely because an employee had continued under cover of an order of Court, which we have described as 'litigious employment' in the earlier part of the judgment, he would not be entitled to any right to be absorbed or made permanent in the service. In fact, in such cases, the High Court may not be justified in issuing interim directions, since, after all, if ultimately the employee approaching it is found entitled to relief, it may be possible for it to mould the relief in such a manner that ultimately no prejudice will be caused to him, whereas an interim direction to continue his employment would hold up the regular procedure for selection or impose on the State the burden of paying an employee who is really not required. The courts must be careful in ensuring that they do not interfere unduly with the economic arrangement of its affairs by the State or its instrumentalities or lend themselves the instruments to facilitate the bypassing of the constitutional and statutory mandates.

45. While directing that appointments, temporary or casual, be regularized or made

permanent, courts are swayed by the fact that the concerned person has worked for some time and in some cases for a considerable length of time. It is not as if the person who accepts an engagement either temporary or casual in nature, is not aware of the nature of his employment. He accepts the employment with eyes open. It may be true that he is not in a position to bargain -- not at arms length -- since he might have been searching for some employment so as to eke out his livelihood and accepts whatever he gets. But on that ground alone, it would not be appropriate to jettison the constitutional scheme of appointment and to take the view that a person who has temporarily or casually got employed should be directed to be continued permanently. By doing so, it will be creating another mode of public appointment which is not permissible. If the court were to void a contractual employment of this nature on the ground that the parties were not having equal bargaining power, that too would not enable the court to grant any relief to that employee. A total embargo on such casual or temporary employment is not possible, given the exigencies of administration and if imposed, would only mean that some people who at least get employment temporarily, contractually or casually, would not be getting even that employment when securing of such employment brings at least some succor to them. After all, innumerable citizens of our vast country are in search of employment and one is not compelled to accept a casual or temporary employment if one is not inclined to go in for such an employment. It is in that context that one has to proceed on the basis that the employment was accepted fully knowing the nature of it and the consequences flowing from it. In other words, even while accepting the employment, the person concerned knows the nature of his employment. It is not an appointment to a post in the real sense of the term. The claim acquired by him in the post in which he is temporarily employed or the interest in that post cannot be considered to be of

such a magnitude as to enable the giving up of the procedure established, for making regular appointments to available posts in the services of the State. The argument that since one has been working for some time in the post, it will not be just to discontinue him, even though he was aware of the nature of the employment when he first took it up, is not one that would enable the jettisoning of the procedure established by law for public employment and would have to fail when tested on the touchstone of constitutionality and equality of opportunity enshrined in Article 14 of the Constitution of India.

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.'"

9. In view of the authoritative and binding pronouncement by the Hon'ble Supreme Court in the case of UMADEVI, cited above, there is no longer any scope for regularization of persons such as the petitioner. Even the observation in paragraph-53 with regard to the regularization of persons who have worked for 10 years or more in duly sanctioned posts would not apply in the instant case because the appointment is not against a duly sanctioned post and the petitioner has not, admittedly, worked for ten or more years.

10. For the reasons set out above, this Court does not find any infirmity in the Impugned Award passed by the Labour Court. Accordingly, this writ petition is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

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Sd/-

Assistant Registrar (CS VIII)

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Sub Assistant Registrar

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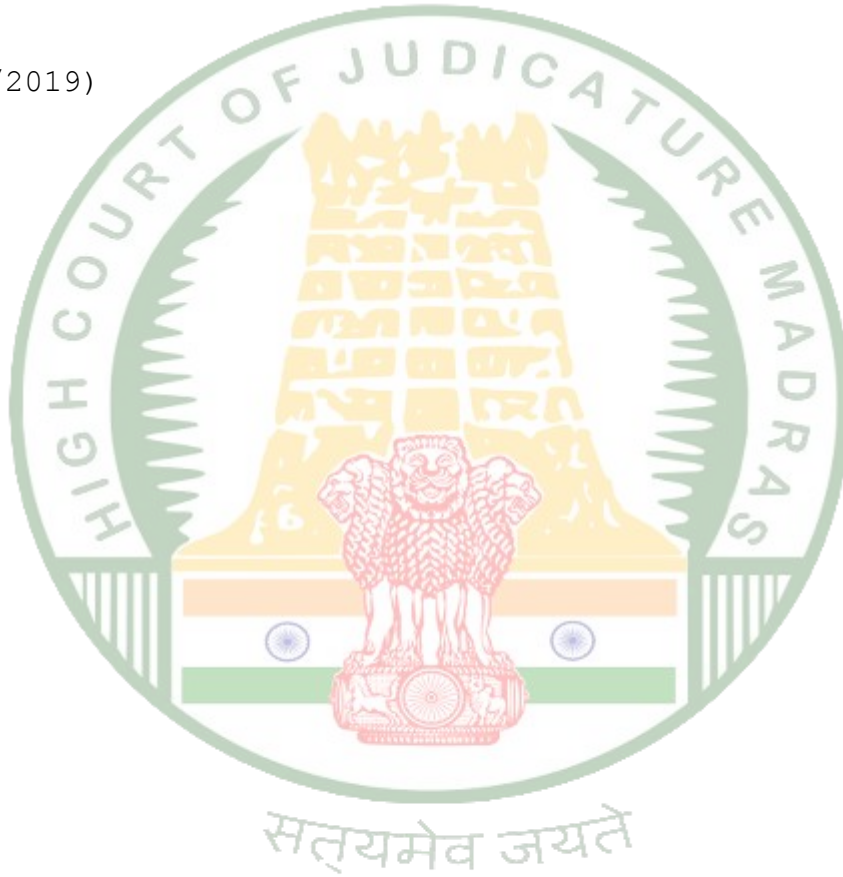
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+1cc to Mr.R.Natarajan, Advocate, SR.No.29050

+1cc to M/s.Aiyar & Dolia, Advocate, SR.No.30554

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