

**IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
Appellate Side**

Present :- Hon'ble Justice Amrita Sinha

WPA No. 6896 of 2020

CAN No. 1 of 2020

CAN No. 2 of 2020

Kausik Ghosh & Ors.

Vs.

State of West Bengal & Ors.

For the writ petitioner	:-	Mr. Samim Ahammed, Adv. Ms. Saloni Bhattacharjee, Adv.
For KMC	:-	Mr. Alok Kumar Ghosh, Adv. Mr. Subhrangsu Panda, Adv.
Hearing concluded on	:-	18-12-2020
Judgment on	:-	08-01-2021

Amrita Sinha, J.:-

The petitioners press the application for passing interim order in the matter. After hearing submissions, it appears that the writ petition itself can be disposed of on the basis of arguments advanced by both the parties. Since affidavits are over, by consent of the parties, the main matter is taken up for hearing.

The petitioners are serving as Laboratory Technicians in the Kolkata Municipal Corporation (KMC for short) on contractual basis for more than ten years. They pray for issuance of a writ of mandamus to regularise their service.

Pursuant to an advertisement published by the Municipal Commissioner, KMC for walk-in-interview, for appointment of Laboratory Technicians, on contractual basis, the petitioners reported and participated in the said walk-in-interview held in April, 2010. A list containing candidates, eligible for appointment, was published. The petitioners being successful in the interview were enlisted for appointment.

The petitioners were issued a formal letter of engagement in April, 2010. The contract was for a period of six months, with an option for extension, depending upon satisfactory performance and necessity of KMC. The employees were to receive a consolidated remuneration of Rs. 2,500/- per month and the contract was liable to be terminated by giving one months' notice by either side. In case of leaving the KMC without required notice period, an employee would have to forego one months' remuneration.

As the performance of the petitioners was up to the level of satisfaction of the superiors, their service tenure was extended from time to time. The extensions were made for a period of one year and at times for six months. The remuneration of the contractual Laboratory Technicians was periodically increased to Rs. 10,000/- per month.

The petitioners are presently aggrieved by the issuance of Advertisement No. 14 of 2020 published on 12th August, 2020 whereby applications were invited for recruitment to the post of Laboratory Technicians (Grade-3). The upper age limit to participate in the recruitment process is 40 years, relaxable for SC/ST/OBC-A/OBC-B

and physically challenged persons. The last date for making online application was 4th September, 2020.

The petitioners submit that KMC being a model employer had the obligation to regularise their services, in as much as, there are adequate number of vacant posts. Instead of regularising their services against the existing vacant posts, the respondents have illegally and arbitrarily taken a decision to recruit fresh candidates, thereby depriving their right to be regularised. The petitioners rely upon the following judgments in support of their prayer for regularisation:

1. ***Nihal Singh & Ors. -vs- State of Punjab & Ors; (2013) 14 SCC 65*** paragraphs 20, 22 and 37 wherein the Court directed the State to regularise the services of the appellants by creating necessary posts and further held that the appellants would be entitled to all the benefits of service attached to the post which are similar in nature.
2. ***Amarendra Kumar Mahapatra & Ors. -vs- State of Orissa & Ors.; (2014) 4 SCC 583*** paragraphs 35, 38, 42, 45, 47, 48 and 50 wherein the Court was of the opinion that the appellants were entitled to regularisation in service having regard to the fact that they have rendered long years of service on ad hoc basis for 17 to 18 years in some cases.
3. ***Amarkant Rai -vs- State of Bihar & Ors.; (2015) 8 SCC 265*** paragraphs 2, 3, 13 and 14 wherein the Court directed the University to regularise the service of the appellant as he rendered service for more than 29 years in the post on daily wages.

4. ***Narendra Kumar Tiwari & Ors. -vs- State of Jharkhand & Ors; (2018) 8 SCC 238*** paragraphs 4, 5, 6 and 7 wherein the Court was of the view that the Regularisation Rules must be given a pragmatic interpretation and if the appellants have completed 10 years of service they should be regularised, unless there is some valid objection to their regularisation, like misconduct etc.

The petitioners do not have any adverse allegation against them and have completed ten years of service, as such they assert their right to be regularized.

5. ***State of Karnataka -vs- Umadevi (3); (2006) 4 SCC 1*** paragraph 53 wherein the Constitution Bench of the Supreme Court laid down the guidelines for regularization of contractual employees.

According to the petitioners their services are liable to be regularized as they fall within the exceptions carved by the Court.

Per contra, the learned counsel appearing on behalf of KMC submits that the petitioners don't have a case at all as they deliberately did not participate in the present recruitment process. The petitioners have straight way filed the instant writ petition to obtain favourable order from the Court.

It has been submitted that as the petitioners were contractual employees their service conditions are bound by the terms and conditions mentioned in their letter of appointment, which provides that the engagement will be for a period not exceeding six months at a time.

It has been further submitted that, in law, there is no provision for regularisation of appointment in a permanent sanctioned post. The vacancy in a permanent sanctioned post has to be filled up by the regular recruitment process conducted by the Municipal Service Commission.

The respondents contend that the petitioners were engaged as stop gap measure till regular candidates are appointed in the sanctioned vacant posts. The petitioners do not have a right to be regularised in service without participating in a proper selection process.

The respondents rely upon the following judgments in support of their contention:

1. ***State of MP & Ors. -vs- Lalit Kumar Verma; (2007) 1 SCC 575*** paragraph 12 wherein the Court held that in the absence of any legal right the writ of mandamus cannot be issued. The Court further held that in the event the appointment was made in total disregard of the constitutional scheme as also the recruitment rules framed by the employer, the recruitment would be an illegal one; whereas in cases where substantial compliance with the constitutional scheme as also the rules have been made, the appointment would be irregular, if some provisions of some rules might not have been strictly adhered to.

It has been submitted that regular recruitment rules have not been followed at the time of giving appointment to the petitioner and accordingly the prayer of the petitioners for regularisation of their service is not maintainable.

2. **Gobinda Chandra Mondal -vs- Principal, Rabindra Mahavidyalaya; 2013(1) CHN (Cal) 9** paragraphs 16 and 25 wherein a three judge Bench of this Court held that no ad hoc or temporary appointee can be absorbed nor be regularised in any post in government or government aided establishment dehors recruitment rules or service rules, ordinarily. If the appointment against sanctioned posts is made without undertaking the selection procedure under rule, on ad hoc or temporary basis, then candidates having requisite qualification namely; age and education, at the time of initial appointment, shall be allowed to compete and/or participate in the selection process along with other eligible candidates at the time of regular recruitment process, condoning the age, as they have acquired the right to be considered.

3. **State of Karnataka -vs- Umadevi (3); (2006) 4 SCC 1** paragraph 53 wherein direction has been passed for regularization of irregularly appointed employees who have served for ten years or more against vacant sanctioned posts.

The respondents pray for dismissal of the writ petition.

I have heard the submissions made on behalf of both the parties.

It appears from records that the advertisement that was published for appointment of Laboratory Technicians by the KMC clearly mentions that the appointment will be made on contractual basis. A merit list for appointment of sixty-five successful candidates was published. Certain terms and conditions mentioned in the offer letter for engagement are set out hereunder for proper appreciation of the case:

- i) The offer of engagement is purely on contractual basis for a period of six months.
- ii) The engagement may be extended for a further period depending upon satisfactory performance and necessity of KMC.
- iii) The contract is liable to be terminated by giving one months' notice by either side or in case of leaving the KMC without the required notice period one months' remuneration would have to be forgone.
- iv) An undertaking to be given at the time of joining that no claim for regularisation or permanent absorption in the KMC in the post of Laboratory Technician would be made in future.

The service tenure of the petitioners stood extended from time to time by the order of the Municipal Commissioner. In one such order of extension of tenure dated 11-10-2012 the Deputy Chief Municipal Health Officer categorically mentions that $51+65+13 = 129$ lab technicians are working sincerely and successfully at different malaria clinics, dispensaries and chest clinics on extension order of Municipal Commissioner. Their performances are satisfactory and required for rendering service at ward level malaria clinics and health establishments. The Health Officer requested for extension of their tenure for another year on the prevailing terms and conditions.

By an office order bearing reference no. H/00/151/16-17 dated 19th November, 2016 the Chief Municipal Health Officer enhanced the remuneration of the contractual laboratory technicians to Rs. 10,000/- per month and extended their service period till 30th June, 2017. Similar office orders have been annexed to the writ petition to show that there has been no break in service of the petitioners and they are in service for more than a decade.

On an apprehension that their service may be terminated due to regular appointment of laboratory technicians, the petitioner filed the instant writ petition praying for regularisation of their service. The genesis of such apprehension is an advertisement published by the West Bengal Municipal Commission on 12th August, 2020 whereby applications have been invited from eligible candidates for recruitment in the post of Laboratory Technicians-III under the KMC.

Citing Umadevi (supra) the petitioners submit that as their case falls within the exception as carved out in para 53 of the said judgment the respondent authorities are liable to regularise their service. They also submit that as due to passage of time they have crossed the maximum age limit prescribed in the advertisement they have become ineligible for participating in the present recruitment process. The judgments relied upon by the petitioners speaks of regularisation taking into account the long period of service rendered by the employees.

The primary contention of the respondents is that the petitioners were well aware, on the very first date of their engagement that their appointment was contractual in nature and their service was limited

only for a particular tenure, which may or may not be extended depending upon the requirement of KMC. However, as the service of the petitioners was necessary for regular functioning of the various health clinics run by KMC, accordingly their service tenure was extended periodically.

According to law, the Municipal Service Commission is the appropriate authority to conduct the recruitment process. As there was immediate requirement of laboratory technicians in the various wards of KMC, accordingly KMC took the initiative to engage laboratory technicians, on contract, for a specified time period.

Though it has been submitted that the Municipal Commissioner may appoint contractual employees for a maximum period of six months, but it appears from records, that the service of the petitioners stood extended for more than six months at a time. Be that as it may, the recruitment process initiated by KMC for appointment on contractual basis cannot be a substitute for the regular recruitment process initiated by the Municipal Service Commission. At the same time continuance in service for a prolonged period do not give any right to the petitioners to claim regularisation.

Had the petitioners been seriously interested in joining regular service they had the option to apply before the authority praying for relaxation of their age limit to participate in the selection process [Gobinda Chandra Mondal (supra)]. As the petitioners have been appointed contrary to law accordingly, their appointments cannot be said to be a legal one. In view of the judgment delivered by the Hon'ble

Supreme Court in the matter of Umadevi (*supra*), KMC is not obliged to regularise their engagement.

From the advertisement it appears that there are eighteen vacancies in the post of Laboratory Technicians-III. In the instant case, fourteen contractual laboratory technicians have come forward praying for regularization, and it has been submitted in Court that other writ petitions are pending on similar lines.

It is not understandable as to why the petitioners are so apprehensive. It is inconceivable that KMC will terminate service of more than one hundred contractual technicians to appoint only eighteen regular technicians. It is an impracticable proposition that KMC will be able to deliver the same level of service as provided by more than one hundred contractual employees with the help of only eighteen regular employees. The contractual laboratory technicians were engaged in different wards of KMC in several health centres, clinics, dispensaries maintained by them. Only eighteen technicians will certainly not be able to effectively handle the work load of the various wards of KMC.

The petitioners at the time of initial appointment had to give an undertaking that they will not claim regularisation or permanent absorption in service in future. The petitioners are bound by the terms and conditions of their letter of engagement.

The selection of the petitioners was made after they were successful in a walk-in-interview in response to an advertisement published by the KMC in the year 2010. The nature of work and the post may be the same, but that does not mean that the service condition

of the two sets of employees, one appointed through a regular recruitment process initiated by the Municipal Service Commission and the other by way of an advertisement by KMC, is the same.

In service jurisprudence the status of a contractual employee and a permanent employee is distinctly different. The financial benefits in respect of the two sets of employees are completely diverse. Permanent employees enjoy certain protection in service which the contractual employees don't. Regularisation of the engagement of contractual employees have varied financial ramification.

The Supreme Court on several occasions has deprecated the practice of the Courts to pass order of regularisation of employees engaged dehors the recruitment rules. Admittedly, in the instant case the engagement of the petitioners was made without following the prescribed recruitment rules. KMC without routing the selection process through the Municipal Service Commission adopted a shortcut method and itself published an advertisement inviting applications from eligible candidates. The petitioners applied pursuant to the advertisement published by KMC. Though the petitioners are reeling under an impression that their recruitment was made in a regular manner, through an open selection, but fact remains that the said open selection was not made in accordance with the recruitment rules and accordingly the same cannot be said to be a valid one.

It is always open for the KMC to engage employees on contractual basis in times of need and on emergent basis. Areas with perennial nature of work ought to be manned by regular employees. The health

clinics run by the KMC function on regular basis. They are not meant to be run on temporary occasions. The need being perennial, KMC ought to have engaged employees through the regular recruitment process. However, since there is no bar to engage employees on contractual basis KMC adopted the shortcut method.

The petitioners on the very first date of their appointment were aware of their contractual status. It could have been that their service tenure was not extended. Contractual employees cannot claim regularization on the basis of their long period in service.

It is settled law that regularisation is not a mode of recruitment. In view of the conditions mentioned in the offer letter of engagement and the undertaking given, the petitioners can't even claim regularisation/absorption in regular service in KMC. Any order passed in favour of the petitioners, for regularisation, will be contrary to the provisions of Articles 14 and 16 of the Constitution.

There are several contractual employees of KMC who may not have approached the Court for relief. The petitioners cannot claim to be in a better footing by approaching the Court immediately after the advertisement for regular recruitment was published. It will be iniquitous if order of regularization is passed in favour of the petitioners depriving the other contractual employees who may not have approached the court. The same will lead to multiplicity of proceedings which should not be encouraged, rather, nipped at the bud. The petitioners ought not to harbour any expectation in their mind for regularisation of their service as the same will be contrary to law. It will

create a separate class amongst equals. The petitioners ought not to get any preference only because of the reason that they have approached the court praying for regularisation.

It has been well settled by the Hon'ble Supreme Court that the High Courts, in exercising power under Article 226 of the Constitution will not issue directions for regularisation, unless the employees claiming regularisation had been appointed in pursuance of a regular recruitment process in accordance with the relevant rules in an open competitive process, against sanctioned vacant posts. Sympathy and sentiment cannot be grounds for passing an order of regularisation in the absence of a legal right. [***State of Rajasthan & Ors. -vs- Daya Lal & Ors. (2011) 2 SCC 429***].

The Supreme Court in ***State of J&K -vs- District Bar Association, Bandipora; (2017) 3 SCC 410*** held that regularisation is not a source of recruitment nor is it intended to confer permanency over appointments which have been made without following the due process envisaged by Articles 14 and 16 of the Constitution. Essentially a scheme for regularisation, in order to be held to be legally valid, must be one which is aimed at validating certain irregular appointments which may have come to be made in genuine and legitimate administrative exigencies. It has to be left to the State and its instrumentalities to consider whether the circumstances warrant such a scheme being formulated. The formulation of such a scheme cannot be accorded the status of an enforceable right.

In ***Brij Mohan Lal -vs- Union of India & Ors.; (2016) 6 SCC 502*** the Supreme Court held that it would neither be permissible nor proper for the Court to halt the regular process of selection on the plea that the petitioners have a right to be absorbed against the posts in the regular cadre. Regularisation shall depend upon the facts and circumstances of a given case as well as the relevant rules applicable to such class of persons. There are two different set of Rules, applicable in different situations, to the two different classes of officers and they are governed by different conditions of service. They cannot be placed on par. The process of their appointments is distinct and different.

The decision of Amarkant Rai (supra) in my opinion, will not come to the aid of the petitioner, as the tenure of service of the employee in two of the cases are vastly different. Twenty-nine years of service of Amarkant cannot be equated with ten years' service of the petitioners.

The Supreme Court in Umadevi (3) (supra) clearly laid down that the government and their instrumentalities should take steps to regularise as a one-time measure, the services of irregularly appointed employees who have worked for ten years or more in duly sanctioned posts and to ensure that regular recruitments are undertaken to fill the vacant sanctioned posts in cases where temporary employees are now being employed. The Court clarified that there should be no bypassing of the constitutional requirement and regularising or making permanent, those not duly appointed as per the constitutional scheme.

In Nihal Singh (supra) the Supreme Court was of the considered opinion that the initial appointment of the employees was made in

accordance with the statutory procedure contemplated under the Act and the decision to resort to such a procedure was taken at the highest level of the State by conscious choice. Such a procedure making recruitments through the employment exchanges was held to be consistent with the requirement of Articles 14 and 16 of the Constitution. The process of selection was sanctioned by law. The recruitment of the employees was made in the background of terrorism prevailing in the State of Punjab at that time. The procedure for recruitment followed during the normal time is a time consuming one, whereas the requirement of the State was to take swift action in an extraordinary situation.

The Court clearly laid down that the assessment of the need to employ certain number of people for discharging a particular responsibility of the State is always with the executive government subject to the overall control of the legislature. The Court further held depending upon the priorities of the State, the allocation of the finances is no doubt exclusively within the domain of the legislature. The Court though directed the State to regularise the service of the employees but at the same time held that the creation of new posts would not create any additional financial burden upon the State.

In *Amarendra Kumar Mahapatra (supra)* the Court was deciding the constitutional validity of the Orissa Service of Engineers (Validation of Appointment) Act, 2002 by which appointment of ad hoc engineers have been validated. In the instant case the issue is not of validation of the act of the respondent but for regularisation of the service of the employees, appointed dehors the recruitment rules. Accordingly, the

ratio decidendi of the said case will not be applicable in case of the petitioners.

The prescribed mode of recruitment ought to have been initiated by the Municipal Service Commission, which was not followed. There is no order/notification/circular showing relaxation of the aforesaid recruitment rules. Law is well settled that once statutory rules have been made, the appointment shall be made only in accordance with the said rules and not otherwise. The executive power can be exercised only to fill in the gaps as a short term measure but not in perpetuity. The same cannot and should not supplant the law.

In the instant case the initial appointment of the petitioners was not in accordance with the recruitment rules and as such the prayer of the petitioner for regularisation of their service cannot be accepted by the Court and the same is hereby rejected. Moreover, regularizing employees not employed in accordance with the recruitment rules, will thrust an extra financial burden upon the employer.

From the facts of this case it is clear that the effect of the directives passed in Umadevi (3) is still to percolate to the lower rungs of the executive. The State and its instrumentalities are yet to act in accordance with the said directives and ensure that regular recruitments are undertaken to fill the vacant sanctioned posts that require to be filled up, in cases where temporary employees are now employed. Instead of appointing regular employees by way of the prescribed recruitment rules, the authorities are still going on employing persons on temporary contract basis, even when vacant sanctioned

posts are available. Their contractual tenure is also being extended for years together. The said practice is blatantly contrary to the direction of the Supreme Court. There is hardly any option left to an unemployed youth but to grab the offer of contractual employment whenever available. The pangs of hunger and the urge to survive lure the unemployed to accept such employment.

Keeping in mind that the petitioners were appointed through a selection process, albeit not in accordance with law, and their services are utilised by KMC on regular basis over a prolonged period of time, it will be open for KMC to frame a scheme for regularization of all contractual employees, strictly in accordance with the guidelines laid down by the Hon'ble Supreme Court. The observation of the Court will, however, not be treated as a mandate upon KMC to frame the scheme for regularization. The scheme will be adopted as per the necessity, requirement and administrative exigencies of the employer.

WPA No 6896 of 2020 along with CAN 1 of 2020 and CAN 2 of 2020 are disposed of..

No costs.

Urgent certified photocopy of this judgment, if applied for, be supplied to the parties or their advocate(s) on record expeditiously, on compliance of usual legal formalities.

(Amrita Sinha, J.)