

Item no. 13

IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Hiranmay Bhattacharyya

W.P.A. 15276 of 2021

Debabrata Das

vs.

The Indian Statistical Institute & Ors.

Appearance:

For the Petitioner : Mr. Raghunath Chakraborty
Ms. Sibangi Chattopadhyay

For the respondent : Mr. Debapriya Gupta
Mr. Sourav Mondal

Heard on : 16.05.2023

Judgment on : 16.05.2023

Hiranmay Bhattacharyya, J.:

01. The petitioner claims to have been appointed as Electrical Engineer on November 6, 2007 on temporary basis (adhoc). The petitioner further claims that such appointment, which was initially for a period of one year, was extended from time to time and the petitioner is still performing his duties as an Electrical Engineer under Indian Statistical Institute (for short "the said Institute"). Pursuant to an advertisement dated June 30, 2021 inviting applications from eligible persons for recruitment to several posts including the vacant posts in Engineering Assistant (Electrical), he applied for the said post.

02. The petitioner approached this Court with a prayer to allow him to sit in the examination by relaxing the age bar as provided in the employment notification since the petitioner apprehended that he would not be allowed to sit in the said examination. A prayer for regularisation of the service of the petitioner in the Institute as Electrical Engineer Assistant was also made.
03. Mr. Chakraborty, learned advocate appearing for the petitioner submits that during the pendency of the writ petition the examination was held and the petitioner appeared in the said examination. He submits that the petitioner was not considered for appointment to the said post by the Institute only on the ground that the petitioner was over aged. He further submits that even assuming though not admitting that the petitioner could not be considered for such appointment in view of the age bar, however, taking into consideration the fact that the petitioner was appointed on temporary basis by following the recruitment procedure i.e. by holding interview of the candidates who applied for the post in terms of the notification, which was published in the Bengali daily the Ananda Bazar Patrika on January 23, 2007 and also that he is working as Electrical Engineer since November 2007 the appointment of the petitioner should have been regularised. He submits that since a large number of contractual employees are still working, the Institute ought to have framed a scheme for the

purpose of regularization of the temporary/casual/adhoc workers in terms of the directions passed by the Hon'ble Supreme Court in the case of **Secretary, State of Karnataka & Ors. vs. Uma Devi (3) & Ors.** reported in **(2006) 4 SCC**. He further submits that the Hon'ble Division Bench of this Court in MAT 352 of 2022 **(Madhusudan Pramanick vs. Chief Executive Officer (Administration & Finance), Indian Statistical Institute)** has held that the authorities have the power to condone the age bar. He also refers to an unreported decision of the Hon'ble Supreme Court in the case of **University of Delhi vs. Delhi University Contract Employees Union & Ors.** passed in **Civil Appeal No.1007 of 2021** on March 25, 2021 and submits that the petitioner having performed his duties for a sufficiently long period of time and having acquired considerable experience for performing the duties of Assistant Electrical Engineer, the authority ought to have granted proper weightage for his experience while considering the candidature of the petitioner at time of finalizing the list of candidates pursuant to the employment notification dated June 30, 2021.

04. Per contra Mr. Gupta, learned advocate representing the Institute submits that the writ petitioner was allowed to participate in the said examination and that the petitioner could not come within the zone of consideration for appointment to the post in question. He

further submits that a temporary/casual/adhoc employee cannot claim any right to be regularized in a permanent post.

05. Heard the learned advocates for the parties and perused the materials placed.
06. Prayer (a) of the writ petition wherein the writ petitioner prayed for allowing him to apply for the post and to sit for the examination at the present point of time has become redundant in view of the fact that pursuant to the application submitted by the petitioner for appointment to the post of Assistant Electrical Engineer, he was allowed to sit for the said examination. That apart the candidature of the petitioner does not also appear to have been rejected on the ground that he was over aged. Therefore, the decision of the Hon'ble Division Bench in MAT 352 of 2022 is of no assistance to the petitioner in this case.
07. The petitioner sat for the written test but was not allowed to participate in the skill test as he could not achieve the requisite benchmark for participating in the skill test. Mr. Chakraborty, by placing reliance upon the decision of the Hon'ble Supreme Court in the case of **University of Delhi** (supra), would contend that the authority ought to have given proper weightage to the contractual employees who participated in the said examination including the petitioner by taking into consideration the experience of working at the Institute. After going through the said decision of the Hon'ble

Supreme Court this Court finds that the Hon'ble Supreme Court after taking into consideration the stand of the respondent authority in paragraph 6 and 7 of the affidavit filed in that matter passed the following direction.

“We, therefore, direct that all the concerned contract employees engaged by the University be afforded benefits as detailed in paragraphs 6 and 7 of the affidavit dated 09.03.2021 with following modifications :

- a) The benefit of age relaxation as contemplated in paragraph 6 of the affidavit without any qualification must be extended to all the contract employees.*
- b) In modification of paragraph 7 of the affidavit, those employees who were engaged in the year 2011 be given the benefit of 10 marks in the ensuing selection process while for every additional year that a contract employee had put in, benefit of one more mark subject to the ceiling of 8 additional marks be given. In other words, if a contract employee was engaged for the first time in the year 2010, he shall be entitled to the benefit of 11 marks, while one engaged since 2003 shall be given 18 marks, as against the appointee of 2011 who will have the advantage of only 10 marks. The contract appointees of 2012 and 2013 will have the advantage of 9 and 8 marks respectively.*

c) *The Public Notice inviting applications from the candidates shall specifically state that the advantage in terms of the order passed by this Court would be conferred upon the contract employees so that other candidates are put to adequate notice.*

d) *All the contract employees shall be entitled to offer their candidature for the ensuing selection in next four weeks and in order to give them sufficient time to prepare, the test shall be undertaken only after three months of the receipt of applications from the candidates.*

14. *We hasten to add that these directions are premised on two basic submissions advanced by Mr. Santosh Kumar, learned advocate for the University that;*

(i) *the total marks for the test will be 300 marks and thus the maximum advantage which a contract employee will have is of 18 marks which in turn is relatable to advantage of 6% as against other participants in the selection process;*

(ii) *all the contract employees are otherwise entitled and eligible to participate in the selection process.*

15. *In our view, paragraphs 6 & 7 of the affidavit with the modifications as directed hereinabove will subserve the purpose. Such directions will not only afford chance to the contract employees to participate in the selection process*

regardless of their age but will also entitle them to some advantage over the other participants. Similarly, those contract employees who have put in more number of years as against the other contract employees, will also have a comparative advantage.”

08. The Hon’ble Supreme Court directed weightage to be given in view of the specific stand taken by the authorities in the affidavit in that regard. In the said decision, the University in paragraph 7 of its affidavit placed on record its decision to the effect that a maximum of upto 10 extra marks depending on the number of years of service of the contract employees would be given to them while finalizing the merit. The facts of the said case is distinguishable from the facts of the case on hand. This Court is, therefore, of the considered view that no direction can be passed upon the authority to consider the candidature of the petitioner by giving due weightage to the experience of the petitioner for performing his duties as an Assistant Electrical Engineer as the same would amount to modifying the criteria for selection by the Court which the Court cannot.
09. This Court, therefore, holds that the petitioner failed to make out a case for issuance of a direction upon the Institute to consider his candidature for appointment to the post of Assistant Electrical Engineer.

10. Now this Court is to consider whether the petitioner having performed his duties in the jobs of electrical engineering on temporary basis has a right to be regularized in the permanent post of Assistant Electrical Engineer under the said Institute. In order to decide the said issue it would be profitable to take note of the decision of the Hon'ble Supreme Court in the case of **Uma Devi (3)** (supra) wherein it has been held that a mandamus could not be issued in favour of the employees directing the government or its instrumentality to make them permanent since the employees cannot show that they have enforceable legal right to be permanently absorbed or that the State or its instrumentality has a legal duty to make them permanent. The Hon'ble Supreme Court in paragraph 52 of the said judgment held as follows :

“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 Constitutional Bench of this Court in Rai Shivendra Bahadur (Dr.) v. Governing Body of the Nalanda College. The 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.”

This Court therefore holds that the petitioner, who is working as a temporary employee, does not have any legal right to be absorbed in a permanent post. Therefore, no mandamus can be issued directing the Institute to make him permanent.

11. Mr. Chakraborty would vehemently contend that that a direction should be passed upon the Institute to frame a scheme for regularizing the temporary employees as a one time measure as directed by the Hon’ble Supreme Court in Uma Devi (3) (supra). In order to consider such contention of Mr. Chakraborty it would be

relevant to take note of paragraph 53 of the said report which runs thus

“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 the courts or of tribunals and should further ensure that regular recruitment is 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 sub judice, need not be reopened based on this judgment, but there should be no further bypassing of the constitutional requirement and regularizing or making permanent, those not duly appointed as per the constitution scheme.”

12. After going through the paragraph 53 of the said decision this Court is of the considered view that the Hon’ble Supreme Court after considering the fact that there may be cases where irregular appointment of duly qualified persons in duly sanctioned vacant post have been made and they

have continued to work for 10 years or more but without intervention of the orders of the courts or tribunals directed the Government to regularise the service of such employees who have been irregularly appointed. Mr. Chakraborty could not satisfy this Court that the petitioner was appointed in a duly sanctioned post. Therefore, the petitioner cannot take the advantage of the observations made by the Hon'ble supreme Court in the first part of paragraph 53 of the said reports. Mr. Chakraborty would contend that a direction be passed upon the authorities to frame a scheme for regularizing the temporary/contractual/adhoc employees as one-time measure as directed by the Hon'ble Supreme Court in paragraph 53 of the said judgment. Such contention of Mr. Chakraborty cannot be accepted for the following reasons.

13. It is now well settled that the use of the expression "one time measure" used in paragraph 53 of Uma Devi (3) (supra) would apply to cases of such irregularly appointed employees who have put in more than 10 years of continuous service without availing the protection of any interim order of courts or tribunals before the date of decision of Uma Devi (3) (supra). Petitioner was appointed by the Institute after the decision on Uma Devi (3) (supra) was delivered on April 10,

2006. It would be relevant to point out here that the appointment of the petitioner on temporary post was made vide office order dated November 6, 2007 and also that the petitioner accepted such appointment with his eyes wide open. That apart no mandamus can be issued by the Court directing the authorities to frame a policy/scheme for absorption or for regularization of the temporary/contractual/adhoc employees.

14. For all the reasons as aforesaid, this Court is not inclined to grant any relief in favour of the writ petitioner. The writ petition accordingly stands dismissed without, however, any order as to costs.
15. Urgent Photostat certified copy of this order, if applied for, be delivered to the learned advocates for the parties, upon compliance of all formalities.

(Hiranmay Bhattacharyya, J.)