

20.04.2023
Sl. No.164(ML)
srm

W.P.A. No. 16451 of 2022

Md. Hadiujjaman

Versus

The State of West Bengal & Ors.

Mr. Partha Sarati Das,
Md. Hafiz Ali,
Ms. Shanta Sarkar

....for the Petitioner.

Mr. Manoj Malhotra,
Mr. Suman Dey

...for the State-respondents.

Mr. Sarbananda Sanyal,
Mr. Soumy Basu Roy Chaudhuri,
Mrs. Poulam Basu Roy Chadhuri

...for the Respondent Nos.7 to 10.

Affidavit-of-service is taken on record.

The petitioner prays for regularization in the post of a panchayat karmee. The petitioner contends that he had been working as a casual worker since 1996 in Giria Gram Panchayat, Murshidabad. It is contended that such prolonged service, entitled the petitioner to be regularized.

The petitioner filed a writ petition being WP No.17079(W) of 2002, claiming regularization. The writ petition was disposed of on March 20, 2003 by a coordinate bench, inter alia, directing the authorities to allow the petitioner to participate in any selection process that may

take place for recruitment of gram panchayat karmees, by condoning the age bar.

The petitioner submits that on the basis of the aforementioned direction of this Court, he once again approached the Pradhan, Giria Gram Panchayat. The Pradhan issued a letter indicating that the petitioner's prayer would be considered when the vacancies were sought to be filled up in terms of the rules and regulations.

The petitioner submits that he was never informed as to whether any recruitment process had been initiated thereafter, for appointment of gram panchayat karmee. However, on the strength of the long service of the petitioner as a casual worker, the petitioner once again seeks regularization.

Regularization as a mode of appointment has always been deprecated by the courts. Regularization is violative of Articles 14 and 16 of the Constitution of India.

Reference is made to the decision of Secretary, State of Karnataka vs. Uma Devi (3) reported in 2006(4) SCC 1. The Apex Court observed that adherence to Articles 14 and 16 of the Constitution was a must in the process of public employment. The plea that ad hoc appointees working for long, should be considered for regularization was rejected. The Court held that such a course would encourage the

State to flout its own rules and confer undue benefits on some, at the cost of many waiting to compete.

The only exception that had been made by the Apex Court was in paragraph 53 of the said judgment. The said paragraph is quoted below:-

“One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in *State of Mysore vs. S.V. Narayanappa*, (1967) 1 SCR 128, *R.N. Nanjundappa Vs. T. Thimmiah*, (1972) 1 SCC 409, and *B.N. Nagarajan vs. State of Karnataka*, (1979) 4 SCC 507, 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.”

Their Lordships directed that all departments in which casual or temporary employees had been

discharging their duties for ten years or more, against sanctioned vacant posts and not on the basis of any interim order or protection granted by courts or tribunals, were entitled to be regularized as a onetime measure. A direction was given to the departments to prepare a scheme for onetime regularization of such employees.

The learned co-ordinate Bench of this Court while disposing of the writ petition being WP No.17079(W) of 2002, found that the petitioner was engaged as a casual worker but not against any sanctioned post.

Thus, in my view, the protection of paragraph 53 of Uma Devi (supra) is not be available to the petitioner.

In the decision of **State of Karnataka vs. M. L. Kesari and others** reported in **(2010) 9 SCC 247**, the Hon'ble Apex Court also held that in case engagements had been made on casual or temporary basis, but against sanctioned posts, a one-time measure should be adopted for regularization of such employees. The relevant paragraph is quoted below:-

“7. It is evident from the above that there is an exception to the general principles against “regularisation” enunciated in Umadevi (3) [(2006) 4 SCC 1], if the following conditions are fulfilled:

(i) The employee concerned should have worked for 10 years or more in duly sanctioned post without the benefit or protection of the interim order of any court or tribunal. In other words, the State Government or its instrumentality should have employed the

employee and continued him in service voluntarily and continuously for more than ten years.

(ii) The appointment of such employee should not be illegal, even if irregular. Where the appointments are not made or continued against sanctioned posts or where the persons appointed do not possess the prescribed minimum qualifications, the appointments will be considered to be illegal. But where the person employed possessed the prescribed qualifications and was working against sanctioned posts, but had been selected without undergoing the process of open competitive selection, such appointments are considered to be irregular."

The Apex Court in the case of ***National Fertilizers Ltd. and Others vs. Somvir Singh***

reported in **(2006) 5 SCC 493**, held as follows:-

"20. The Constitution Bench opined that any appointment made in violation of the Recruitment Rules as also in violation of Articles 14 and 16 of the Constitution would be nullity. The contention raised on behalf of the employees that those temporary or ad hoc employees who had continued for a fairly long spell, the authorities must consider their cases for regularisation was answered, thus: [Umadevi (3) Case (supra), SCC p.29, para 26] "26. With respect, why should the State be allowed to depart from the normal rule and indulge in temporary employment in permanent posts? This Court, in our view, is bound to insist on the State making regular and proper recruitments and is bound not to encourage or shut its eyes to the persistent transgression of the rules of regular recruitment. The direction to make permanent -- the distinction between regularization and making permanent, was not emphasized here -- can only encourage the State, the model employer, to flout its own rules and would confer undue benefits on a few at the cost of many waiting to compete. With respect, the direction made in paragraph 50 of *State of Haryana v. Piara Singh*: (1992) 4 SCC 118 are to some extent inconsistent with the conclusion in paragraph 45 therein. With great respect, it appears to us that the last of the directions clearly runs counter to the constitutional scheme of employment recognized in the earlier part of the decision. Really, it cannot be said

that this decision has laid down the law that all ad hoc, temporary or casual employees engaged without following the regular recruitment procedure should be made permanent."

21. It was furthermore opined: [Umadevi (3) Case (supra), SCC p.32, para 33] "33. It is not necessary to notice all the decisions of this Court on this aspect. By and large what emerges is that regular recruitment should be insisted upon, only in a contingency an ad hoc appointment can be made in a permanent vacancy, but the same should soon be followed by a regular recruitment and that appointments to non-available posts should not be taken note of for regularization. The cases directing regularization have mainly proceeded on the basis that having permitted the employee to work for some period, he should be absorbed, without really laying down any law to that effect, after discussing the constitutional scheme for public employment."

22. Taking note of some recent decisions of this Court, it was held that the State does not enjoy a power to make appointments in terms of Article 162 of the Constitution of India. It further quoted with approval a decision of this Court in Union Public Service Commission v. Girish Jayanti Lal Vaghela:(2006) 2 SCC 482 in the following terms: (SCC p. 490, para 12) "The appointment to any post under the State can only be made after a proper advertisement has been made inviting applications from eligible candidates and holding of selection by a body of experts or a specially constituted committee whose members are fair and impartial through a written examination or interview or some other rational criteria for judging the inter se merit of candidates who have applied in response to the advertisement made. A regular appointment to a post under the State or Union cannot be made without issuing advertisement in the prescribed manner which may in some cases include inviting applications from the employment exchange where eligible candidates get their names registered. Any regular appointment made on a post under the State or Union without issuing advertisement inviting applications from eligible candidates and without holding a proper selection where all eligible candidates get a fair chance to compete would violate the guarantee enshrined under Article 16 of the Constitution."

In ***M.P. State Coop. Bank Ltd., Bhopal vs. Nanuram Yadav & ors.*** reported in **(2007) 8 SCC 264**, the Hon'ble Apex Court held as follow:-

- “(1) The appointments made without following the appropriate procedure under the rules/government circulars and without advertisement or inviting applications from the open market would amount to breach of Articles 14 and 16 of the Constitution of India.
- (2) Regularisation cannot be a mode of appointment.
- (3) An appointment made in violation of the mandatory provisions of the statute and in particular, ignoring the minimum educational qualification and other essential qualification would be wholly illegal. Such illegality cannot be cured by taking recourse to regularisation.
- (4) Those who come by back-door should go through that door.”

In ***State of Orissa & Anr. v. Mamata Mohanty*** reported in **(2011) 3 SCC 436**, the Hon'ble Apex Court held as follows:-

“Therefore, it is a settled legal proposition that no persons can be appointed even on a temporary or ad hoc basis without inviting applications from all eligible candidates. If any appointment is made by merely inviting names from the employment exchange or putting a note on the notice board, etc. that will not meet the requirement of Articles 14 and 16 of the Constitution. Such a course violates the mandates of Articles 14 and 16 of the Constitution of India as it deprives the candidates who are eligible for the post, from being considered. A person employed in violation of these provisions is not entitled to any relief including salary. For a valid and legal appointment mandatory compliance with the said constitutional requirement is to be fulfilled. The equality clause enshrined in Article 16 requires that every such appointment be made by an open advertisement as to enable all eligible persons to compete on merit.”

The petitioner has also not been able to satisfy the Court that he had ever sought to participate in any recruitment process since 2003, pursuant to the liberty granted by this court. There are no documents in proof of the fact that the petitioner had been continued as a casual employee, except a few certificates issued by the Pradhan, lastly on January 2, 2009. The petition has been filed in 2022.

It appears that sometime in 2006, the Block Development Officer, Raghunathganj-II Development Block, asked the petitioner to appear with all relevant documents. There is nothing on record to show whether the petitioner had at all appeared before the said authority, with relevant documents.

The petitioner worked as a casual employee in the Giria Gram Panchayat on no work no pay basis, for some time, on the basis of a resolution passed by the gram panchayat, but not against any vacant sanctioned post.

Under such circumstances, the question of regularization does not arise. However, the petitioner is at liberty to approach the competent authority with a prayer for security of tenure and for enhancement of remuneration in terms of memorandum No. 9008F(P), dated September 16, 2011 and all subsequent memoranda

issued from time to time, provided the petitioner is still engaged and fulfils all other eligibility criteria. If such application is filed, the same shall be disposed of in accordance with law and the eligibility criteria prescribed in the said memoranda.

The District Panchayat and Rural Development Officer, Murshidabad, will decide the matter upon hearing the petitioner and all other interested parties including the Pradhan of Giria Gram Panchayat, Murshidabad. A reasoned order will be passed and communicated to the petitioner.

The entire exercise shall be completed within a period of four months from the date of petitioner's application.

The writ petition is, thus, disposed of.

There shall be no order as to costs.

Parties are to act on the basis of the server copy of this order.

(Shampa Sarkar, J.)