

N.S. Kamble

REPORTABLE

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 3844 OF 2021**

Yojana Bhagat ...Petitioner
Versus
University of Mumbai, Through Registrar & Ors ...Respondents

**Mr Mihir Desai, Senior Advocate, with Mihir Joshi, for the
Petitioner.**

Mr VP Vaidya , for the Respondent No. 1

Mr NC Walimbe, AGP, for the Respondent No. 2-State.

Mr Rui Rodrigues, for the Respondent No. 3.

**CORAM G.S. Patel &
S.G. Dige, JJ.**

DATED: 5th January 2023

PC:-

1. Rule. Respondents waive service. There are Affidavits in Reply and Rejoinder. Rule is made returnable forthwith and the Petition is taken up for final disposal.

2. The Petitioner seeks directions regarding her service as an Assistant Professor in the Department of Pali in the University of

Bombay, the 1st Respondent. There are consequential prayers regarding pay-scales and wages.

3. At the outset, Mr Desai, learned Senior Counsel for the Petitioner, makes it clear that he is not pressing the second set of reliefs for regularizing the Petitioner's services to the post of an *Associate* Professor in the Department of the Pali. He confines his case to the relief in respect of *Assistant* Professorship, even though the Petitioner has, for many years now, effectively functioned as the Head of the Department or HOD in her field of specialization.

4. The service history of the Petitioner is more compactly stated in the Affidavit in Reply of the 1st Respondent than in the Petition itself. Initially, Pali was a subject that was taught in the Sanskrit Department. From 2005, the Petitioner was working in the Sanskrit Department taking classes and tutorials in Pali. This was on a clock-hour basis. In 2007, the University decided to create a separate Department of Pali on a self-financed basis, based on a 2007 recommendation from the then Head of the Sanskrit Department. On that basis, the Petitioner was appointed — and here is the genesis of the issue — for a “temporary period of six months ad hoc basis as Co-ordinator-cum-Lecturer” at a monthly honorarium of Rs.10,000/- per month. This is so stated in paragraph No. 3(a) of the Affidavit in Reply of the 1st Respondent at Page 232. It is said that the Vice Chancellor had the power to make temporary ad hoc appointments for six-month periods. Regular appointments are made through a Selection Committee duly constituted as provided under various statutes including the Maharashtra Universities Act

(“MUA”). These appointments require prior approval of the State Government. The Petitioner passed her MA in Philosophy and then her MA in Pali by Distance Education from the University of Mumbai. Sub-paragraph (c) of the Reply says that the Petitioner “continued to be appointed for a fixed period of six months with a break in service”. It is also stated that the Management Council did not pass any Resolution to advertise the post in the Department of Pali for a regular appointment.

5. By a letter of 29th September 2009, the Petitioner was once again appointed as a Lecturer-cum-Coordinator in the Pali Department, again with a break in service at a basic salary of Rs. 8000-275-13500/-, plus allowances, with effect from 27th July 2009. This was also for a six-month period or until there was a regular appointment, whichever was later. This system of reappointing the Petitioner continued right until 2021. A summary is conveniently provided in Exhibit “2” to the Affidavit in Reply at pages 238 to 241. It starts from 19 July 2007 and runs all the way to June 2021. Since March 2013, these appointments of the Petitioner were all as *Assistant Professor-cum-Coordinator*. We notice that between these appointments there was a one-day break in many cases. In 2016, it seems to have been a longer break. The designation was changed in 2017. Then there were breaks of various duration between 2018 and 2021. This date of 2021 is relevant from another perspective, as we shall shortly see.

6. On 30 August 2021, a Division Bench of this Court (RD Dhanuka and RI Chagla, JJ) passed the following order:

“ Learned AGP waives service for the respondent no.2. Mr.Rodrigues waive service for the respondent no.3.

2. Issue notice upon the respondent no.1, returnable on 27th September, 2021. Humdast is permitted. In addition to the Court notice, the petitioner is permitted to serve the respondent no.1 by private notice or by all other modes of services, available in law.

3. Affidavit-in-reply shall be filed within two weeks from today insofar as respondent nos.2 and 3 are concerned. Affidavit-in-reply shall be filed by the respondent no.1 within two weeks from the date of service of the papers and proceedings, with a copy to be served upon the petitioner's advocate simultaneously. Rejoinder, if any shall be filed within one week thereafter with a copy to be served upon the respondents' advocate simultaneously.

4. Till next date, the respondent no.1 shall not terminate the services of the petitioner.”

7. The protection of the Petitioner under the order of this Court ran from 30th August 2021 and not from any time before.

8. Mr Desai informs us that the Petitioner has fulfilled her services continuously under these various appointments. There is no adverse remark against her. There have been no disciplinary proceedings at any time. She has effectively functioned as the Head of the Department of the Pali. There are as many as 12 doctoral candidates. She is the only one to guide them. This is important in the context of the statement made on behalf of the 1st Respondent-University that there is now an ongoing process for filling up vacancies in two posts in the Department of Pali.

9. Very shortly stated this is the factual conspectus for which the Petitioner seeks the following reliefs as set out in prayer clauses (a), (b) and (c) noted below.

- a) That this Hon'ble Court may be pleased to issue a Writ of Mandamus and/or any other appropriate Writ/ Order in the nature of Mandamus under Article 226 of Constitution of India, thereby directing the Respondent No.1 to absorb the Petitioner's services to the vacant post of Assistant Professor & Associate Professor in the Department of Pali w.e.f. 13.07.2007 to 12.07.2015 as an Assistant Professor and w.e.f. 13.07.2015 to till date as an Associate Professor, and further to direct the Respondent No.1 to extend and allow service benefits of a permanent teacher to the Petitioner at par with the other permanent teachers in the grade of Assistant Professor & Associate Professor working in the Respondent University;
- b) That this Hon'ble Court may be pleased to issue a Writ of Mandamus and/or any other appropriate Writ/Order in the nature of Mandamus under Article 226 of Constitution of India, thereby holding the Petitioner as deemed permanent for the post of Assistant Professor & Associate Professor in the Department of Pali w.e.f. 13.07.2007 to 13.07.2015 & 13.07.2015 to till date respectively, and accordingly, extend and allow all the consequential service benefits of the permanent teachers to the Petitioner at par with the other permanent teachers in the grade of Assistant Per & Associate Professor working in the Respondent University and make applicable the pay sales prescribed under the 5th, 6th and 7th pay commission and revise/restructure of the Petitioner's pay sales accordingly, and further to pay the difference of salary and other emoluments within a period of 4 weeks along

with interest @ 18% p.a. thereon and continue to pay the regular salary as per such revised pay-scales;

- c) That this Hon'ble Court may be pleased to issue a Writ of Mandamus and/or any other appropriate Writ/ Order in the nature of Mandamus under Article 226 of Constitution of India, thereby directing the Respondent No.1 to regularize the appointment of the Petitioner w.e.f. 13 July 2007 as Assistant Professor and w.e.f. 13.07.2015 as an Associate Professor with a consequent placement on a regular pay scale in accordance with 5th pay, 6th pay and 7th pay scales of salaries, with consequential benefits including payment of the differential amounts towards arrears of the salaries; from 13.07.2007 to 12.07.2015 as an Assistant Professor and from 13.07.2015 to till date as an Associate Professor; with interest of 18% p.a., till the date of its payment.

10. Once again, we note that Mr Desai restricts his reliefs to Assistant Professorship and not to Associate Professorship.

11. The question that Mr Vaidya for the 1st Respondent-University poses is this: given that there have been these ad hoc, temporary, six-month appointments with breaks in service of various durations, can such a Petition be allowed, if it would have the effect of nullifying a regular appointment process by selection as required by the statute and the governing regulations?

12. We must express our appreciation when Mr Desai, in complete fairness, draws our attention to the five-Judge decision of the Supreme Court in *Secretary, State of Karnataka and Others v*

*Umadevi (3) and Ors.*¹ The Supreme Court had before it an important question of public law regarding public employment and a plea for absorption, regularization or permanent continuance of temporary, contractual, casual, daily wage or ad hoc employees appointed/recruited and continued for long period of time in public employment outside what the Supreme Court described as the Constitutional scheme of public employment. In the course of the discussion that followed, the Supreme Court in *Umadevi (3)* deprecated the practice of staying regular recruitment processes for the posts concerned. This, the *Umadevi (3)* Court said, was impermissible. Courts have to address the concerns of equity for all, and not just for the litigious few who are able to approach Courts. The fundamental feature of the Constitutional scheme of public employment is equality of opportunity. Therefore, directions by Constitutional courts staying regular recruitment processes were impermissible. It simply could not be that the equities of the handful of people who approached the Court would override the equities of what the Supreme Court described as “the teeming millions” seeking employment. Paragraph 53 of *Umadevi (3)* must be quoted in full:

“53. One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in *S.V. Narayanappa*, *R.N. Nanjundappa* and *B.N. Nagarajan* 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

1 (2006) 4 SCC 1.

merits in the light of the principles settled by this Court in the cases aboveresferred 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 by passing of the constitutional requirement and regularising or making permanent, those not duly appointed as per the constitutional scheme.”

(Emphasis added)

13. The principles enunciated by the *Umadevi* (3) Court, to our mind, are abundantly clear. But Mr Desai goes a step further. These principles, he submits, were assessed and culled out by a two-Judge Bench of the Supreme Court in *State of Karnataka and Others v ML Kesari*.² The decision in *Kesari* is important from our perspective for three separate reasons. *First*, it sets out the Constitutional principle enunciated in *Umadevi* (3). *Second*, on this basis it then explains what the constitutional rights of an applicant are. *Third*, it sets out in the clearest possible language the constitutional duty of the employer providing public employment. We reproduce paragraphs Nos. 7, 8 and 11 of *Kesari*.

² (2010) 9 SCC 247.

“7. It is evident from the above that there is an exception to the general principles against ‘regularization’ enunciated in *Umadevi*, 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.**

8. *Umadevi* casts a duty upon the concerned Government or instrumentality, to take steps to regularize the services of those irregularly appointed employees who had served for more than ten years without the benefit or protection of any interim orders of courts or tribunals, as a one-time measure. *Umadevi*, directed that such one-time measure must be set in motion within six months from the date of its decision (rendered on 10.4.2006).

9.

11. **The object behind the said direction in para 53 of *Umadevi* is two- fold. First is to ensure that those who have put in more than ten years of continuous service without the protection of any interim orders of courts or**

tribunals, before the date of decision in *Umadevi* was rendered, are considered for regularization in view of their long service. Second is to ensure that the departments/instrumentalities do not perpetuate the practice of employing persons on daily-wage/ad-hoc/casual for long periods and then periodically regularize them on the ground that they have served for more than ten years, thereby defeating the constitutional or statutory provisions relating to recruitment and appointment. The true effect of the direction is that all persons who have worked for more than ten years as on 10.4.2006 (the date of decision in *Umadevi*) without the protection of any interim order of any court or tribunal, in vacant posts, possessing the requisite qualification, are entitled to be considered for regularization. The fact that the employer has not undertaken such exercise of regularization within six months of the decision in *Umadevi* or that such exercise was undertaken only in regard to a limited few, will not disentitle such employees, the right to be considered for regularization in terms of the above directions in *Umadevi* as a one-time measure.”

(Emphasis added)

14. The present Petitioner meets both the qualifying conditions. She has worked for more than 10 years in a duly sanctioned post without the benefit of protection of an any order of Court or Tribunal. The University has continued her in service voluntarily and continuously for more than 10 years. Her appointment is not illegal. That is not even Mr Vaidya’s case today. The Petitioner undoubtedly possessed the prescribed qualifications, but she has simply been nominated to the post without an open competitive

selection process. That is the ‘irregularity’ contemplated by paragraph 7(ii) of *Kesari*.

15. Paragraph 11 then tells us that the object of the direction in *Umadevi (3)*, quoted above, is two-fold. The first is to ensure that those who put a substantial service of 10 years without having done so under protective Court orders are considered for regularization in view of the long years of service. But the second is equally important, and it is to ensure that the Departments and instrumentalities do not perpetuate the practice of employing persons on a daily wages/ad hoc/casual basis for long periods, defeating Constitutional or Statutory provisions. As we have noted above, the only protection to the Petitioner came long after she had completed nearly 12 years of service or more on 30th August 2001. Paragraph 8 of *Kesari* tells us there is duty cast on the Government and its instrumentalities to take steps to regularize those whose services have been obtained or whose appointments are irregular and who have served for more than 10 years without protective judicial orders. The Petitioner undoubtedly meets these jurisprudentially mandated standards.

16. Mr Desai then draws our attention to the next decision of the Supreme Court in *Narendra Kumar Tiwari & Ors v State of Jharkhand & Others*³. The *Narendra Kumar Tiwari* decision considered both *Umadevi (3)* as also *Kesari*. Paragraphs 7 and 8 of *Narendra Kumar Tiwari* read thus:

“7. The purpose and intent of the decision in

3 (2018) 8 SCC 238.

Umadevi (3) was therefore two-fold, namely, to prevent irregular or illegal appointments in the future and secondly, to confer a benefit on those who had been irregularly appointed in the past. The fact that the State of Jharkhand continued with the irregular appointments for almost a decade after the decision in *Umadevi (3)* is a clear indication that it believes that it was all right to continue with irregular appointments, and whenever required, terminate the services of the irregularly appointed employees on the ground that they were irregularly appointed. **This is nothing but a form of exploitation of the employees by not giving them the benefits of regularisation and by placing the sword of Damocles over their head. This is precisely what *Umadevi (3)* and *Kesari* sought to avoid.**

8. If a strict and literal interpretation, forgetting the spirit of the decision of the Constitution Bench in *Umadevi (3)*, is to be taken into consideration then no irregularly appointed employee of the State of Jharkhand could ever be regularised since that State came into existence only on 15th November, 2000 and the cut-off date was fixed as 10th April, 2006. **In other words, in this manner the pernicious practice of indefinitely continuing irregularly appointed employees would be perpetuated contrary to the intent of the Constitution Bench.**”

(Emphasis added)

17. These are strong words. The Supreme Court described this as a form of exploitation of employees by denying them the benefits of the regularization and by holding over the heads the proverbial sword of Damocles. This, the *Narendra Kumar Tiwari* Court said, was precisely what *Umadevi (3)* and *Kesari* deprecated and sought to avoid.

18. We note paragraph 8 of *Narendra Kumar Tiwari* because this seems to us precisely the consequence of the last submission made by Mr Vaidya when he asks whether we are requiring the University to regularize or are confirming by our order the Petitioner in the post of Assistant Professor. We take the opportunity to draw attention to paragraph 8 of *Narendra Kumar Tiwari* and to highlight that the University is bound by judgments and decisions of the Supreme Court and such questions really ought not to be put to the High Court at all. *Kesari* and *Narendra Kumar Tiwari* make the position abundantly clear. The University would be failing in its Constitutional duty and would be acting directly contrary to three judgments of the Supreme Court if it did not regularize the Petitioner in the post of Assistant Professor in Department of Pali.

19. Indeed, in *Narendra Kumar Tiwari* the Supreme Court described the indefinite continuance of irregularly appointed employees as a pernicious practice that cannot be allowed to be perpetuated contrary to the intent of the Constitutional Bench in *Umadevi* (3). We trust that this fully answers to the question that Mr Vaidya poses.

20. As to whether the University is now required to fill in one or more posts is for the University to decide, and we have nothing to say on that aspect of the matter. The prayers that we have extracted above also reveal that there are claims in regard to emoluments, wages, benefits etc. These are the subject matter of the prayer clauses (b) and (c) and in this context we only need to note the reliance by Mr Desai on the decision of the Supreme Court in *State*

*of Punjab & Ors v Jagjitsingh & Ors*⁴ reaffirming and reiterating the principle of equal pay for equal work and its applicability even to temporary employees. This is a question of parity in pay and pay-scales since even such temporary employees are temporary by description alone. There is no diminution of their workload or job description. In the words of the Supreme Court they are performing the same duties as would be discharged by regular employees against the sanctioned post. The Supreme Court in *Jagjitsingh* affirmed the principle and this is binding on all. We do not of course need to make any computation as to service benefits. It is self-evident that once prayer clause (a) is granted and Rule is made absolute in favour of the Petitioner for absorption to the vacant post of an Assistant Professor with effect from 13th July 2007 to 12th July 2015 and continuing thereafter in that post, all attendant pay, pay-scales, wages and other benefits must be computed accordingly and made available to the Petitioner.

21. Any amounts that are to be computed as payable to the Petitioner in view of this order are to be completed within a period of 60 days from today and the amounts are to be released within 15 days thereafter.

22. It is true that Mr Desai has not pressed before us the prayer for being appointed as an Associate Professor. But this not to be read to mean that the Petitioner does not seek to be appointed as an Associate Professor in the regular course of selection to that post. It

4 (2017) 1 SCC 148.

only means that Mr Desai has not invited a mandamus of this Court for that purpose.

23. It is at this stage that Mr Walimbe for the State Government points out that the State Government bears no financial responsibility since this is admittedly said to be a 'self-financing department'. His submission is noted.

24. Rule is made absolute in above terms. There will be no order as to costs.

25. We regret the inadvertent delay, caused by some miscommunication regarding soft copies of the transcribed draft, in releasing this order.

(S. G. Dige, J)

(G. S. Patel, J)

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