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W.A. No. 2660 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 07.03.2023

CORAM

THE HON'BLE MR. JUSTICE S. VAIDYANATHAN

AND

THE HON'BLE MRS. JUSTICE R. KALAIMATHI

W.A. No. 2660 of 2022

T. Viji

..Appellant

Vs.

The Director,
King Institute of Preventive Medicine,
Guindy, Chennai 600 032.

..Respondent

Prayer: Writ Appeal as against the order dated 25.04.2022 in W.P. No.
33758 of 2019.

For Appellant :: Mr. Balan Haridas

For Respondent :: Mrs. R. Sangamithirai,
Special Government Pleader



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JUDGMENT

S. VAIDYANATHAN,J.

AND

R. KALAIMATHI,J.

The present appeal has been preferred against the order dated 25.04.2022 passed in W.P. No. 33758 of 2019 setting aside the award of the Labour Court dated 09.07.2018 in I.D. No. 72 of 2015.

2. On account of total ban on recruitment imposed in 2003 in all departments of the Government, many posts were lying vacant in those Departments including those relating to essential services such as Education, Police and Health. Instead of lifting the ban on recruitment and filling up the vacancies thorough regular recruitment, the Health and Family Welfare Department was permitted to appoint persons on contract basis through outsourcing with private agencies vide GO.(D) No. 15, Health and Family Welfare Department dated 22.03.2005. Pursuant to the same, the Director of Medical Education, Chennai entered into a contract with an outsourcing agency, namely, METC, Chennai, for a period of one year from 01.05.2005 to 30.04.2006 and the appellant had been engaged as Lab



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Technician Grade II in the respondent Institute from 27.05.2005 and was paid monthly wages of Rs.2000/- and the wages were disbursed by the respondent through METC till July, 2008. While so, persons working through outsourcing agency had made representations for their regular absorption in Government Service and the Government, vide G.O.Ms. No. 59 Health and Family Welfare (C2) Department dated 15.02.2008 had issued orders to repeal outsourcing of paramedical posts and to fill up those posts in the time scale of pay through employment exchange by following usual procedure and the rule of reservation. Against the said order, W.P. No. 13001 of 2008 was filed by outsourced paramedical personnel and pursuant to the interim orders granted by this Court, the appellant had continued to work as outsourced Lab Technician Grade II in the establishment of the respondent till 2012 and ultimately, when final orders were passed dismissing the said writ petition, the service of the appellant was terminated with effect from 26.07.2012. On receipt of the failure report dated 08.12.2014 in the conciliation proceedings, the appellant had raised an industrial dispute in I.D. No. 72 of 2015 before the III Additional Labour Court, Chennai seeking reinstatement in service with continuity of service



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and backwages. The Labour Court, by its award dated 09.07.2018, while holding that the agreement entered into between the Director of Medical Education and the outsourcing agency METC was sham and nominal and that the termination of the appellant was in violation of Section 25-F of the Act, had directed reinstatement of the appellant with continuity of service and backwages. Challenging the same, the respondent filed the writ petition and the learned Single Judge, while holding that the manner of recruitment made by the outsourcing agency through which the services of the appellant had been engaged as contract labourer was not in accordance with the constitutional scheme and that the appellant cannot claim any benefit of permanent absorption in service, set aside the award passed by the Labour Court. Hence, the present writ appeal, at the instance of the employee.

3. According to the appellant, the Labour Court had held that the outsourcing agreement between the Director of Medical Education and METC is a sham and nominal one and such a finding has been rendered by the Labour Court after adjudication. That being so, the learned Single Judge erred in setting aside the award. Further, it is contended by the



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appellant that her recruitment was for the purpose of the respondent and only on being satisfied with the qualification and the quality of work discharged, she was retained for 7 years. It is also submitted that having utilised the services of the appellant for 7 years, her termination on the ground that the outsourcing agreement between the Director of Medical Education and METC came to an end, is arbitrary and unsustainable and the Labour Court was right in passing an award ordering reinstatement with backwages and continuity of service, which ought not to have been interfered with by the learned Single Judge. The learned counsel for the appellant has also referred to the judgment of the Hon'ble Supreme Court in ***Steel Authority of India Limited V. National Union Waterfront Workers (2001 (7) SCC Pg.1)***

4. Two issues were raised by the respondent namely, that the King Institute of Preventive Medicine is a Government Institution and it is not an “industry” as defined under Section 2(j) of The Industrial Disputes Act, 1947 and that when the employee was engaged through a private agency for the purpose of carrying out paramedical work and when there is privity of contract, the Tribunal erred in holding that the contract was sham



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and nominal. It is also contended on behalf of the respondent that the recruitment of the appellant through an outsourcing agency for a limited period was according to the policy decision taken by the Government to outsource paramedical staff and the appellant was terminated as per the orders of the Government. Learned counsel for the respondent/ Management has relied upon the judgment of the Constitution Bench of the Hon'ble Supreme Court in *State of Karnataka V. Uma Devi [2006] 4 SCC 1* in support of her contentions.

5. Heard both sides.

6. As narrated supra, the appellant had been initially engaged as Lab Technician Grade II in the respondent Institute in May, 2005 in accordance with the agreement between the Director of Medical Education, Chennai and METC dated 27.04.2005. The wages were disbursed by the respondent through METC till the termination of the agreement in 2008. Ex.W4 is the said agreement between the Director Medical Education and METC for providing the services of Lab Technician Grade II (Category of manpower) and the period of providing the service to the Directorate had



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been fixed from 01.05.2005 to 30.04.2006. Though there was no fresh agreement extending the period of operation of Ex.W4 agreement, yet, admittedly, the appellant was paid wages through the outsourcing agency upto July, 2008, thereafter which the agreement between Director of Medical Education and the agency ended and this shows that the appellant worked in the respondent Institute through METC for the period from 27.05.2005 to July, 2008. Subsequent thereto, according to the appellant, she was allowed to continue her service in the respondent Institute till 26.07.2012 and after July, 2008, her wages were paid by the respondent Institute. The appellant's stand is that thereafter she became a direct employee of the respondent Institute on or from the date of termination of the agreement between the Director of Medical Education and METC and therefore, she is entitled to all the benefits. However, the respondent Institute would refute the same stating that the Government had issued orders to repeal outsourced paramedical services, against which paramedical staffs had filed W.P. NO. 13001 of 2008 and in view of the interim order granted, the appellant was allowed to continue in service and when the final orders were passed dismissing the writ petition, the appellant's services also



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came to be terminated. It is pertinent to note that even after the dismissal of W.P. No. 13001 of 2008 by order dated 17.08.2011, the appellant was permitted to continue to work in the respondent Institute till 26.07.2012 and the same has been admitted by one of the management witnesses examined as M.W.1 in her evidence. The Labour Court, after analysing the evidence on record, while deciding the issue whether the agency agreement dated 27.04.2005 was sham and nominal, had elaborately considered the rival submissions and held as hereunder:

“13.The petitioner has been appointed as a Grade II Lab Technician in the respondent industry. From the nature of the activities of the respondent institute, it is very much evident that, the service of a Lab technician is a essential one which is required constantly in all the day to day research activities of the institute and is absolutely perennial in nature. It is seen from the Ex.W13 notification of the Government dated 31.01.2016 that, again the Government has called for applications for the post of Lab Technician Grade II which goes to show that, the post of a Lab Technician Grade II is constantly required in the institutions like the respondents. These kind of perennial nature of services ought to be made available in the institute, not by filling the posts by outsourcing agencies, but by appointing permanent employees. Under these circumstances, when a perennial nature of service has been outsourced by the Government, under the guise of policy decision,



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it would only defeat the statutory rights of the Lab technicians by keeping them as employees of the so called outsourcing agencies. Whatever stand taken by the Government, which affects the statutory rights of the employees, cannot be shielded as policy decision of the Government. In this case, by the conduct of the Government in filling the perennial service of Lab Technician by outsourcing and after exploiting their service for a considerable period on consolidated basis and terminating their service, would certainly amount to the unfair labour practice, even if adopted by the Government.”

14. On that score, this Court is inclined to conclude that the outsourcing agreement Ex.W4 dated 27.04.2005 is nothing but a sham and nominal one and this point is answered accordingly.”

The Labour Court further observed that the services of the appellant have been utilised by the respondent for nearly 7 years from the date of her appointment on 27.05.2005 till July, 2008 and thereafter till 26.07.2012 and that she has been terminated without complying with any of the statutory provisions of Section 25F of the Industrial Disputes Act, 1947 and therefore, held that the termination of the appellant was arbitrary and unsustainable and directed the Institute to reinstate the appellant as Lab Technician Grade II or any equivalent service with backwages and continuity of service.



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7. Admittedly, there was an agreement dated 27.04.2005 between the Director of Medical Education and METC marked as Ex.W4. The Industrial Regulations, in particular, The Contract Labour (Regulation and Abolition) Act, 1970 empowers any employer to engage a contract labour. The only aspect required is that the employer has to follow the norms prescribed under the said legislation. Even if the norms are followed, it is open to the employee to raise an industrial dispute questioning the act of the Management in engaging a contract labour for jobs of perennial nature and contend that the contract entered into between the two parties, namely, the principal employer and the contractor is sham and nominal. It is open to the industrial forum or the Labour Court to delve into the issue and decide whether the contract is sham and nominal. In case, the Labour Court or the Tribunal holds that the contract is sham and nominal, it can direct regularisation of the employee under the principal employer. If the contract is held as genuine, it can direct the employee to approach the authority under the Contract Labour (Regulation and Abolition) Act, 1970. In the present case, the Labour Court, after analysing the evidence on record, came to the conclusion that the agreement between the Director of Medical



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Education and METC dated 27.04.2005 was sham and nominal.

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8. As far as the decision in *Uma Devi's case* relied on by the learned Special Government Pleader for the respondent is concerned, the same is not applicable to the facts of this case. Admittedly, *Umadevi's case* was not adjudicated before the industrial forum. It was a case where the writ petition was filed directly before the High Court and the Court had prescribed certain guidelines and categorically held that backdoor entry should be avoided. The legal principles laid down in the said judgment with regard to the issue of regularisation have been extracted in the order of the learned Single Judge and the relevant portions are re-produced hereunder for useful reference:

(i) the words "regular" or "regularization" do not connote permanence and cannot be construed so as to convey an idea of the nature of tenure of appointments. They are terms calculated to condone any procedural irregularities and are meant to cure only such defects as are attributable to methodology followed in making the appointments. This court emphasized that when rules framed under Article 309 of the Constitution of India are in force, no regularization is permissible in exercise of the executive powers of the Government under Article 162 of the Constitution in



contravention of the rules. These decisions and the principles recognized therein have not been dissented to by this Court and on principle, we see no reason not to accept the proposition as enunciated in the above decisions. We have, therefore, to keep this distinction in mind and proceed on the basis that only something that is irregular for want of compliance with one of the elements in the process of selection which does not go to the root of the process, can be regularized and that it alone can be regularized and granting permanence of employment is a totally different concept and cannot be equated with regularisation.

(ii) appointments were made in contravention of mandatory provisions of the Act and statutory rules framed thereunder and by ignoring essential qualifications, the appointments would be illegal and cannot be regularized by the State. The State could not invoke its power under Article 162 of the Constitution to regularize such appointments. This Court also held that regularization is not and cannot be a mode of recruitment by any State within the meaning of Article 12 of the Constitution of India or any body or authority governed by a statutory Act or the Rules framed thereunder. Regularization furthermore cannot give permanence to an employee whose services are ad hoc in nature. It was also held that the fact that some persons had been working for a long time would not mean that they had acquired a right for regularization. “



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The judgment in the said case is dated 10.04.2006. After the orders of the Apex Court, in all fairness, the employer should have stopped giving work quoting the judgment in *Uma devi's case*. But the appellant was allowed to continue even after the agreement came to an end and the writ petition was filed only in 2008. The Hon'ble Apex Court in ***Maharashtra State Road Transport Corporation and another V. Casteribe Rajya Parivahan Karmchari Sanghatan*** reported in **2009 8 SCC 556** has held that *Umadevi's case* cannot have precedent over industrial adjudication. The relevant portion of the said judgment reads thus:

“.....Umadevi is an authoritative pronouncement for the proposition that Supreme Court (Article 32) and High Courts (Article 226) should not issue directions of absorption, regularization or permanent continuance of temporary, contractual, casual, daily wage or ad-hoc employees unless the recruitment itself was made regularly in terms of constitutional scheme. Umadevi does not denude the Industrial and Labour Courts of their statutory power under Section 30 read with Section 32 of MRTU & PULP Act to order permanency of the workers who have been victim of unfair labour practice on the part of the employer under item 6 of Schedule IV where the posts on which they have been working exists. Umadevi cannot be held to have overridden the powers of Industrial and Labour Courts in passing



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appropriate order under Section 30 of MRTU & PULP Act, once unfair labour practice on the part of the employer under item 6 of Schedule IV is established.”

9. In the present case, the methodology followed with regard to appointment was irregular. It cannot be said as illegal. The Labour Court is empowered to create a new contract between the employer and the employee and in the instant case, the Labour Court, while considering the issue as to whether the contract between the principal employer and the contractor is sham and nominal, has rightly held it as sham and nominal. This is a finding of fact. When there is procedural irregularity with regard to appointment of a person and when there is no illegality, the employee must be given the benefit of employment and absorption under the principal employer. That apart, the learned Single Judge has referred to the appellant's subsequent recruitment in Thiruvannamalai Health Unit District vide order dated 24.12.2021. This makes it very clear that the appellant is qualified to be appointed as Lab Technician and her services have been utilised by the respondent Institute for nearly 7 years. Of course, she was employed earlier as a Noon Meal Organizer at St. Thomas Block from



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12.09.2017 to 13.07.2020 as could be seen from the counter of the respondent Institute dated 13.02.2023 and the relevant paragraph is extracted hereunder:

“12. The appellant had been working earlier in the Government job as Noon Meal Organizer at St. Thomas Block from 12.09.2017 to 13.07.2020 and currently she has been working as Lab Technician Grade III under the control of Director of Public Health and Preventive Medicine, Chennai as per the Medical Services Recruitment Board, Chennai letter reference No. 18/MRB/2019 dated 22.02.2020 Selection List (S.No.821/MRB Application No.805985)....”

Therefore, the order of the learned Single Judge in non-suiting the appellant holding that she would not be entitled to the benefit and setting aside the award needs to be interfered with as the award of the Labour Court is based on finding of fact. That apart, *Umadevi's case*, as stated supra, may not be applicable to the facts of this case in the light of the judgment of the Hon'ble Apex Court in *Maharashtra State Road Transport Corporation case*.



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10. Since the appellant was employed as Noon Meal Organizer from 12.09.2017 to 13.07.2020, she would not be entitled to any wages for the period during which she was employed as a Noon Meal Organizer. Since the present employment as Lab Technician Grade III is pursuant to selection and the respondent Institute has stated that she would not be disturbed, we are of the view that the employee would be entitled to continuity of service from the date of expiry of the contract period between the Director of Medical Education and METC and the entire period will be taken into account for the purpose of granting terminal benefits. However, for the purpose of seniority, wages, etc., the date of entry vide order dated 22.02.2020 alone will be taken into account.

11. Though it has been contended by Mrs. Sangamithirai, learned Special Government Pleader that the employee did not possess the qualification to be appointed in the post of Grade II Lab Technician and that she has only a Diploma in Lab Technician Course, the very fact that ignoring the qualification, the Management had allowed her to continue clearly shows that the appellant has a technical background and that was



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the reason, she was allowed to continue. In any event, we are not directing the Institute to pay any backwages or grant seniority in the post of Grade II as she has joined the post of Lab Technician Grade III in 2020 and we reiterate that she will be entitled to continuity of service for the purpose of terminal benefits like gratuity, pension, if any and other retirement benefits. The writ appeal stands allowed with the above directions. No costs.

nv

(S.V.N.J.) (R.K.M.J.)
07.03.2023

To

The Director,
King Institute of Preventive Medicine,
Guindy, Chennai 600 032.

S. VAIDYANATHAN,J

AND

R. KALAIMATHI,J.



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