

(2009) 09 AP CK 0014

In the Andhra Pradesh High Court

Case No : Writ Petition No. 102 of 2004

D. Poornachandra Rao and N. Giri Prasad

APPELLANT

Vs

Tirumala Tirupati Devasthanams

RESPONDENT

Date of Decision : 18-09-2009

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 226, 309
Industrial Disputes Act, 1947 — Section 2

Citation : (2010) 1 ALT 56

Hon'ble Judges : Sanjay Kumar, J

Bench : Single Bench

Advocate : P.B. Vijay Kumar, for the Appellant; A.K. Jayaprakash Rao, for the Respondent

Final Decision : Allowed

Judgement

Sanjay Kumar, J.—Another episode in the never-ending saga of the travails and traumas of job seekers in this country. Conversely, the spot light turns upon exploitative tendencies of employers, who ruthlessly seek their pound of flesh for every drop of sustenance extended to the hapless unemployed. Sustenance, which assumes the form of dubious or half measures of employment: on casual basis, contract basis, part-time basis and hourly wage basis.

2. The petitioners are Packers in the Saptagiri Journal Section of the Tirumala Tirupati Devasthanams (hereinafter referred to as "the Devasthanams"), the first respondent herein. They claim to have worked for 240 days and 180 days with breaks in service during the years 1992 and 1993 respectively. As their services were terminated thereafter, they filed Writ Petition No. 3983 of 1994 before this Court. The said writ petition was disposed of directing the respondent Devasthanams to consider their cases for absorption in service, in case work exists. While so, the Editor of the Devasthanams' Publications in his letter dated 27.09.1996, addressed to the Assistant Executive officer of the Devasthanams, sought sanction of at least five posts of Packers on regular basis, owing to the

workload caused by the termination of nine casual workers. In spite of the petitioners' entreaties to re-engage them and absorb them into service pursuant to the order in W.P. No. 3983 of 1994, the respondent Devasthanams turned a deaf ear; constraining them to approach this Court once again by way of W.P.No. 26883 of 1997, seeking a direction to the Devasthanams to re-engage and absorb them into service.

3. A learned Judge of this Court, by order dated 16.04.1998, allowed the writ petition directing the Devasthanams to maintain a seniority list of all temporary employees under whatever designation they were appointed, Unit-wise, Department-wise, Branch-wise, restricting their chances of absorption/regularization/retrenchment to that Unit/Department/Branch without bringing or appointing outsiders from elsewhere. The learned Judge directed that upon preparation of the seniority list, the Devasthanams should consider the cases of the petitioners in the Journal Section as per their turn. The learned Judge passed the above direction taking note of the letter dated 27.09.1996 addressed by the Editor to the Assistant Executive Officer of the Devasthanams with regard to the need for sanction of five regular posts of Packers. The observations of the learned Judge in this regard are relevant:

Time and again this Court pointed out that to deny the living wages and regular scales of pay to a worker, the Government and its organs have invented innumerable devices and designations and named these employees as N.M.Rs. etc., though they are working on par with regular employees. At any rate it cannot be said that without any work these persons are appointed. The very letter of the Editor makes it clear that there is absolute need for continuance of the petitioners as Packers.

4. The learned Judge also took note of the fact that Forest Mazdoors were brought on deputation to work in the Journal Section, clearly evidencing the existence of workload. Accordingly, the learned Judge passed the order as aforestated. Writ Appeal No. 1057 of 1998 filed by the Devasthanams questioning the above Order was dismissed as withdrawn on 10.04.2002.

5. Alleging violation of the order dated 16.04.1998 in W.P. No. 26883 of 1997, the petitioners filed Contempt Case No. 288 of 2003. The learned Judge, taking note of the fact that the Devasthanams had issued proceedings dated 18.03.2003 reengaging the services of the petitioners as NMR Packers, closed the contempt case.

6. It appears that after re-inducting the petitioners into service vide proceedings dated 18.03.2003, the petitioners' names were reflected in the Attendance Register for a period of two months and thereafter, the Devasthanams resorted to the practice of maintaining a muster, after deleting their names from the Attendance Register. The petitioners stated in their affidavit that they were being paid at Rs.3/- per hour and were denied minimum wages/minimum time scale, though they were working in the place of repatriated Forest Mazdoors. The

petitioners further averred that there was sufficient workload in the Journal Section, as was evident from the fact that deputationists from the Forest and Postal Departments were being brought in to attend to the work. In spite of the same, the Devasthanams continued with the practice of treating the petitioners herein as NMRs. The petitioners therefore prayed for a direction to the respondents to continue them in service and regularize their service as Packers with all consequential and attendant benefits.

7. In it's counter, the Devasthanams denied that the petitioners worked as Packers on NMR basis. According to it, the services of the petitioners were engaged on hourly wage basis at Rs.2.50 ps. per hour during the period September, 1992 to January, 1994 and not at Rs. 3/- per hour! The Devasthanams however admitted that it had suffered the order dated 28.04.1995 in W.P. "No. 3983 of 1994 whereby it was directed to consider the cases of the petitioners for regularization in case work existed and if there was a need, to appoint them along with others in accordance with Rules. It is stated that pursuant to the above order, proceedings dated 18.08.1995 were issued by the Devasthanams informing the petitioners that they were not entitled for appointment as Packers in the Devasthanams.

8. With regard to the second writ petition, viz. W.P. No. 26883 of 1997, the Devasthanams admitted the facts averred by the petitioners. Pausing here for a moment, it is relevant to note that in paragraph 7 of the counter, the Devasthanams specifically stated that the petitioners were re-inducted by proceedings dated 18.03.2003 in the same status in which they were engaged prior to their termination. A reading of the proceedings dated 18.03.2003 would show that the petitioners were re-inducted in service as "NMR Packers". Thus, the earlier statement of the Devasthanams in the counter that the petitioners were not engaged on NMR basis is incorrect. The counter goes on to state that the petitioners' services were engaged on hourly wage basis at Rs.2.50 ps. per hour and that their names were not recorded in the Attendance Register, which is intended only for permanent employees. This submission is also equally unfounded in the light of the extracts of the Attendance Register filed by the petitioners, clearly evidencing the inclusion of their names therein for a period of two months. The Devasthanams denied that the, petitioners were paid Rs.3/- per hour and asserted instead that it was only paying Rs.2.50 ps. per hour! It is further stated that they are not entitled to minimum wages. The other averments made by the petitioners with regard to regularization of other casual labour was denied and the Devasthanams prayed for dismissal of the writ petition, stating that the petitioners were neither entitled to regularization of their services nor the minimum of the time scale.

9. By way of an interlocutory application in WPMP No. 28854 of 2004 filed in this writ petition, the petitioners sought a direction to the respondents to pay them minimum wages. No orders have been passed upon this application till date.

10. At first blush, the prayer in the writ petition seeking a direction to the

respondents to continue the petitioners in service and to regularize their services as Packers with all consequential and attendant benefits, appears to be untenable in the light of the authoritative pronouncement of a Constitution Bench of the Supreme Court in *Secretary, State of Karnataka and Others Vs. Umadevi and Others*, . However, a more pervasive and deeper examination of the issues on hand in the light of the Judgment aforesaid would reveal that the actual relief sought by the petitioners is not antithetical to the ratio in *Umadevi*.

11. It is apposite that this Court should understand the aforesaid Judgment in the proper perspective so as to cull out its true import and intent and thereafter deal with the present case in the light of the principles laid down therein.

12. The Supreme Court in *Umadevi* recognized that our constitutional scheme envisages employment by the Government and its instrumentalities on the basis of the procedure established in that behalf. The Court stated that a regular process of recruitment or appointment has to be resorted to when regular vacancies and posts, at a particular point of time, are to be filled up and filling up of those vacancies cannot be done in a haphazard manner or based on patronage or other considerations. Regular appointment must be the rule. However, the Court found that sometimes this process was not adhered to and the constitutional scheme of public employment was bypassed, whereby persons who got employed, without following a regular procedure or even through the backdoor or on daily wages, had been approaching the Court seeking directions to make them permanent in their posts. In the course of its enquiry into these aspects, the Supreme Court also recognized that there may be occasions when the sovereign State or its instrumentalities would have to employ persons in posts which are temporary, on daily wages, as additional hands or taking them in without following the required procedure. However, the Court added the rider that such engagements could not be used to deviate the very scheme of public employment. Dealing with the issue of regularization, the Court emphasized that when rules framed under Article 309 of the Constitution were in force, no regularization was permissible in exercise of executive powers in contravention thereof. The Court also drew a distinction between "regularization", which it identified as a rectification of something that is irregular, for want of compliance with one of the elements in the process of selection which did not go to the root of the process, from the concept of granting "permanence" of employment. In this context, the Court held that an appointment made, in clear violation of the constitutional scheme and statutory rules made in that behalf, cannot be directed to be treated as permanent. The observations of the Court in Paragraph 43 are apposite:

43. Thus, it is clear that adherence to the rule of equality in public employment is a basic feature of our Constitution and since the rule of law is the core of our Constitution, a Court would certainly be disabled from passing an order upholding a violation of Article 14 or in ordering the overlooking of the need to comply with the requirements of Article 14 read with Article 16 of the

Constitution. Therefore, consistent with the scheme for public employment, this Court while laying down the law, has necessarily to hold that unless the appointment is in terms of the relevant rules and after a proper competition among qualified persons, the same would not confer any right on the appointee. If it is a contractual appointment, the appointment comes to an end at the end of the contract, if it were an engagement or appointment on daily wages or casual basis, the same would come to an end when it is discontinued. Similarly, a temporary employee could not claim to be made permanent on the expiry of his term of appointment. It has also to be clarified that merely because a temporary employee or a casual wage worker is continued for a time beyond the term of his appointment, he would not be entitled to be absorbed in regular service or made permanent, merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant rules. It is not open to the court to prevent regular recruitment at the instance of temporary employees whose period of employment has come to an end or of ad hoc employees who by the very nature of their appointment, do not acquire any right. High Courts acting under Article 226 of the Constitution of India, should not ordinarily issue directions for absorption, regularization, or permanent continuance unless the recruitment itself was made regularly and in terms of the constitutional scheme. Merely because, an employee had continued under cover of an order of Court, which we have described as "litigious employment" in the earlier part of the judgment, he would not be entitled to any right to be absorbed or made permanent in the service. In fact, in such cases, the High Court may not be justified in issuing interim directions, since, after all, if ultimately the employee approaching it is found entitled to relief, it may be possible for it to mould the relief in such a manner that ultimately no prejudice will be caused to him, whereas an interim direction to continue his employment would hold up the regular procedure for selection or impose on the State the burden of paying an employee who is really not required. The courts must be careful in ensuring that they do not interfere unduly with the economic arrangement of its affairs by the State or its instrumentalities or lend themselves the instruments to facilitate the bypassing of the constitutional and statutory mandates.

13. It is relevant to note that the Court upheld the right of the sovereign State or its instrumentalities to employ persons in temporary posts, on daily wages, as additional hands or by taking them in without following the regular procedure to discharge duties in respect of posts that were sanctioned and required to be filled in terms of the relevant procedure or for work in temporary posts or projects that are not needed permanently. Such engagement of persons temporarily or on daily wages to meet the needs of the situation was held to be within the right of the employer. But the Court was quick to point out that such engagements could not be used to defeat the very scheme of public employment.

14. It is relevant to remember that in *State of Haryana v. Piara Singh* (1922) 4 SCC 118, the Supreme Court observed:

The main concern of the court in such matters is to ensure the rule of law and to see that the Executive acts fairly and gives a fair deal to its employees consistent with the requirements of Articles 14 and 16. It also means that the State should not exploit its employees nor should it seek to take advantage of the helplessness and misery of either the unemployed persons or the employees, as the case may be. As is often said, the State must be a model employer. It is for this reason, it is held that equal pay must be given for equal work, which is indeed one of the directive principles of the Constitution. It is for this very reason it is held that a person should not be kept in a temporary or ad hoc status for long. Where a temporary or ad hoc appointment is continued for long the court presumes that there is need and warrant for a regular post and accordingly directs regularization. While all the situations in which the court may act to ensure fairness cannot be detailed here, it is sufficient to indicate that the guiding principles are the ones stated above.

[Emphasis is mine]

15. In *Umadevi*, the Supreme Court only disagreed with one direction in *Piara Singh* (1922) 4 SCC 118, which was with regard to regularization of an ad-hoc or temporary employee who is continued for a fairly long spell and who was otherwise eligible and qualified according to the rules whose appointment did not run counter to the reservation policy of the State.

16. Reference may also be made to the observation of the Court in *Umadevi* that regular recruitment should be insisted upon by and large and only in a contingency, can an ad hoc appointment be made in a permanent vacancy. Even in such case, the same should soon be followed by a regular recruitment. The Court also upheld the right of the employer to terminate an employee of a time bound project upon the completion of the project.

17. What emerges from a conspectus of the discussion and principles laid down in *Umadevi* is that the Apex Court decried the practice of validating irregular or backdoor entry into service merely because of the continuance of such employees for a period of time. *Umadevi* turned upon appointments being made in violation of the applicable rules or by way of backdoor methods, whereby regular recruitment as per procedure was scuttled; and such methods were held to be a violation of the constitutional scheme of public employment. It is in this background that the Court held that such employees should not be made permanent or be directed to be regularized in contravention of the applicable rules and procedure.

18. In the present case, there is no material on record to show that the engagement of the petitioners was in violation of any prescribed rule or procedure. The approach on the part of the Devasthanams, all through, appears to have been that there is no workload warranting appointment of regular Packers in the Journal Section and that is the sheet anchor of their argument to deny the petitioners' entitlement.

19. Umadevi cannot be understood or utilized by employers to scuttle the very scheme of public employment and the guarantees enshrined in Articles 14 and 16 of the Constitution, by treating as impermanent or temporary, a service which is essentially of a permanent and enduring nature. By adopting such a practice, an employer having appointed temporary/ad-hoc/daily wage employees on the ground that there were no permanent posts in a particular service, cannot take recourse to Umadevi to say that such persons have no rights. Umadevi does not lay down the proposition that an employer can treat as temporary a post which ought to be permanent. Such a practice would, in fact, be an unfair labour practice under Clause-I(10) of the Fifth Schedule to the Industrial Disputes Act, 1947, relatable to Section 2(ra) thereof, which defines "unfair labour, practice".

20. In effect, though the petitioners' prayer is with regard to regularization of their services, the same is a misnomer in as much as it is not "their" services that they are seeking regularization of, but the regularization of the "posts" that they have been working in. The Devasthanams conveniently treated these posts as impermanent and temporary for nearly two decades, notwithstanding the fact that its own Editor had voiced the need for five regular posts in this cadre as long back as in the year 1996. Thus, the petitioners are neither seeking "regularization" nor "permanence" of their own services. What they are, in effect, seeking is that the posts in which they are working should be made "permanent and regular".

21. The services under the Devasthanams consist of the posts specified under various branches in Annexure-I to the Tirumala Tirupathi Devasthanams Employees Service Rules, 1989 (G.O.Ms. No. 1060, Revenue (Endowments-I) dated 24th October, 1989). Annexure-I broadly categorizes the various posts under departmental/service headings and under the heading "Last Grade Service", provision is made for the post of Packer at Serial No. 49. Annexure-II to the Tirupathi Devasthanams Employees Service Rules, 1989 specifies the method of recruitment for appointment, qualifications and the age prescribed for the various posts. For the post of Packer categorized under the "Last Grade Service", it is provided in Annexure-II that the method of recruitment and qualification to the said post will be shown under the respective departments in the said. Annexure. However, the post of Packer is only shown in the Temple Administration Service" Department; the appointment to the said post is to be made by direct recruitment and the qualifications prescribed are that the candidate should have passed VIII Class and must have skill in packing and bundling. Relevant to note, neither in the Printing Press Department nor in the Editor Department is the post of Packer shown. It is therefore evident that though the relevant rules provide for the regular post of Packer in the cadre of Last Grade Services, allowing discretion to the Devasthanams to provide the posts as required in various departments, the Devasthanams only chose to show this post as a regular post in the Temple Administration Service" Department, overlooking the Printing Press and Editor Departments which would be concerned with the Journal Section. The facts on record clearly establish that the posts of

Packers are required on a regular basis in the Journal Section of the Devasthanams as is evident from the facts on record supported by the letter of the Editor dated 27.09.1996.

22. No material has been brought on record to rebut or dilute the letter dated 27.09.1996 addressed by the Editor to the Assistant Executive Officer of the Devasthanams asserting the need for five regular posts of Packers in the Journal Section. It is not denied even now that deputationists were brought in from the Forest and Postal Departments to work in the Journal Section of the Devasthanams. Further, the continuance of the petitioners as Packers all these years was neither denied nor called in question at any time by the Devasthanams citing deficit in the workload. That being so, the approach of the Devasthanams in deliberately ignoring the need for "permanent Packers" in the Journal Section to undertake the duties discharged by the petitioners and other deputationists, needs to be deprecated.

23. It is not as if the petitioners gained entry into these jobs through backdoor methods. There is no whisper of an allegation from the Devasthanams that there was anything illegal in the manner of their appointment to these posts. On the other hand, the treatment meted out to the petitioners clearly demonstrates their blatant exploitation by the Devasthanams.

24. All the more so, as the Devasthanams, with its overflowing coffers, cannot complain of dearth of funds. It is also to be noted that the Devasthanams does not explain as what it has done pursuant to the order of this Court dated 16.04.1998 in W.P. No. 26883 of 1997. The said order required the Devasthanams to draw up seniority lists and consider the cases of the petitioners for absorption into regular service as per their rankings therein. There is no whisper of such an exercise being undertaken by the Devasthanams. The effect and import of a judgment inter partes, which has attained finality, cannot be denuded or obliterated by mere passage of time.

25. Such being the circumstances, the prayer in the writ petition, moulded to read as if it is for a direction to regularize the "services" of the petitioners, is strictly speaking incorrect. As the respondent Devasthanams is not even treating the posts of Packers in the Journal Section as regular and permanent posts, there is no question of regularizing the "services" of the petitioners in such posts. All the more so, when "regularization" means rectification of 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 such process. That is not the situation in this case. What is in issue presently, is the action of the Devasthanams in treating patently permanent and regular posts as something transient and temporary and thereby adopting the means of engaging persons, such as, the petitioners on NMR and hourly wage basis or by bringing deputationists from other services. Such a practice is clearly detrimental to the interests of the workmen and also the institution and is opposed to the constitutional scheme of public employment.

26. This Court in exercise of its plenary jurisdiction under Article 226 is concerned with furtherance of justice and would not be bound by the exact prayer as projected in the writ petition. The facts exposed and the points involved and resolved can certainly guide this Court to give appropriate reliefs to the parties, as pointed out by a learned Division Bench of the Madras High Court in Director of School Education, Madras and others Vs. V. Gnanaraj and another, .

27. In the light of the facts and circumstances obtaining in this case, Umadevi cannot be pressed into service to deny the entitlement of the petitioners to claim that their posts be continued and be made part of the permanent establishment of the Devasthanams. The Devasthanams cannot be permitted to continue with this temporary arrangement indefinitely, thereby perpetuating this unfair labour practice. The service of Packers in the Journal Section cannot be perpetually treated as "on casual basis". More so, in the light of the service Rules which provide for posts of "Packers" in the regular service of the Devasthanams and in the light of the letter of the Editor issued as long back as in the light of year 1996, seeking sanction of 5 regular posts of Packers in the Journal Section.

28. Umadevi cannot be understood to mean that in circumstances obtaining as in this case, an employer can take recourse to it and deny the claim of a workman, who is, in effect, seeking not regularization or permanence of his own service, but regularization or permanence of the post that he is made to work in by treating the same as temporary, though in reality it is otherwise. Therefore, keeping in mind the earlier binding directions of this Court in W.P. No. 26883 of 1997 and the fact that the services of the petitioners and other deputationists have been utilized as Packers in the Journal Section of the Devasthanams for nearly two decades, it is no longer open to the Devasthanams to plead that the posts in question are not necessary or permanent. It is therefore incumbent upon the Devasthanams to consider making these posts permanent by regularizing the said posts in the services of the Devasthanams.

29. I am conscious of the fact that Courts would normally be chary of entering into the realm of "creation" of posts. In State of Himachal Pradesh, through the Secretary, Agriculture to the Govt. of Himachal Pradesh Vs. Nodha Ram and others, , the Supreme Court observed that directions cannot be given to the State to create posts in a non-existent establishment. It was further observed that the Court would adopt a pragmatic approach in giving directions; and that directions to create posts and continue them despite non-availability of work would be illegal.

30. It is however to be seen that Nodha Ram dealt with creation of posts in a "non-existent" establishment. Such is not the situation in the present case, where the Devasthanams obdurately continues to treat the posts of Packers in the Journal Section as unnecessary and impermanent, notwithstanding the facts on record belying the said stand. The continuance of Packers in this status with the object of depriving them the privileges of permanent workmen clearly

constitutes an "unfair labour practice". Having provided for regular posts of Packers in its service cadre, the action of the Devasthanams in continuing to treat the posts of Packers in the Journal Section as temporary and unnecessary posts needs to be deprecated in the strongest terms. This practice is being perpetuated by the Devasthanams for the past several years and clearly offends the constitutional scheme of public employment.

31. In *Divisional Manager, Aravali Golf Club v. Chandar Hass* (2008) 1 SCC 683, the Supreme Court reiterated that creation of a post is an executive or legislative function involving economic factors and therefore the Courts cannot take upon themselves the power of creation of posts.

32. Thus, no positive direction can ensue for creation of the posts of Packers, notwithstanding the aforesaid facts and circumstances, which clearly demonstrate the injustice being meted out to the petitioners by the Devasthanams. The Devasthanams shall accordingly consider making the posts of Packers in the Journal Section permanent duly taking note of the recommendation of its Editor made as long back as on 27.09.1996 and in the light of the Service Rules, 1989. It is for the Devasthanams to decide whether it would choose to adopt the same qualifications prescribed for Packers in the Temple Administration Service" Department or devise new qualifications. In the event the Devasthanams takes a positive decision to make the posts permanent, it shall thereafter undertake appointment to the regular posts of Packers in accordance with the procedure that may be prescribed therefor. The services of the petitioners shall be continued till such time a decision is taken and in the event a positive decision is taken as aforesaid, they shall be continued in service till the recruitment process is completed.

33. The petitioners having rendered service for all these years and having gained valuable experience would necessarily have to be considered in accordance with these rules, giving due weightage to their experience and length of service and granting age relaxation, if necessary.

34. With regard to the issue of payment of wages on par with regular employees of equivalent cadre, while dealing with the case of daily wagers in the Commercial Tax Department, the Supreme Court in *Umadevi* held that such persons were entitled to be paid wages equal to the salary of the last grade of employees of their cadre. Accordingly, the petitioners shall be paid the minimum time scale applicable to regular Class-IV employees in the Devasthanams, during the period of their continuance in service, pending the decision of the Devasthanams.

35. The Writ Petition is accordingly allowed in terms of the directions aforesaid. In the light of this final order, no further orders are required to be passed in WPMP No. 28854 of 2004, which is consequently closed. In the circumstances of the case, there shall be no order as to costs.