

(2018) 04 UK CK 0062

In the Uttarakhand High Court

Case No : Writ Petition (S/S) No. 154, 155 Of 2017

HIMANSHU JOSHI & OTHERS; CHARU BHATT & ANOTHER

APPELLANT

Vs

STATE OF UTTARAKHAND & OTHERS

RESPONDENT

Date of Decision : 17-04-2018

Acts Referred:

Constitution of India, — Article 14, 16, 226, 309

Citation : (2018) 04 UK CK 0062

Hon'ble Judges : SUDHANSHU DHULIA, J

Bench : Single Bench

Advocate : Vinay Kumar, Paresh Tripathi, Rajendra Singh Negi, Pankaj Purohit, Neeti Rana, Rakesh Thapliyal, Jintendra Chaudhary, Alok Mehra, Bhagwat Mehra, Chetan Joshi, Mamta Joshi

Final Decision : Allowed

Judgement

Sudhanshu Dhulia, J

1. Since the controversy involved in both the writ petitions is common, they are being decided together, by this judgment and order.

2. Heard learned Counsel for the petitioners, learned Counsels for the respondents and also the learned Counsels for all the interveners.

3. Petitioners before this Court in Writ Petition No. 154/2017 are educated-unemployed youths of Uttarakhand who are all graduates, and in some

cases even post-graduate. All of them are struggling to seek employment on public posts in the State. Having requisite qualifications for appointment

on different Group posts, they had applied against regular vacancies, at various points of time. A Reference has been made to the

advertisements issued in the year 2014 as well as in 2016, against which they had applied. Petitioners would argue that regular selection on many posts

has either not taken place, and in many cases even where selection process was initiated it could not reach its logical end. On the other hand, the

Government has regularized a number of illegal appointments. All these regularizations have been made on posts, which ought to have been filled by

way of regular selection and appointment. The reference here is to the impugned amendment carried out on 14.12.2016 in the Regularization Rules of

2013, whereby adhoc, temporary and contractual employees who were appointed on or before 31.12.2011 against the substantive vacancies and have

completed 5 years of continuous service have either been regularized, or will be regularized in very near future. This action on the part of the

Government is being challenged by the petitioners. The petitioners would argue that this is in violation of Article 14 of the Constitution of India and

more importantly in clear violation of the law laid down by the Honâ??ble Apex Court, in the seminal judgment of Umadevi (AIR 2006 SC 1806).Â

4. In the second writ petition being WPSS 155/2017, petitioners before this Court have a qualification known as â??Certificate of Training of

Instructorâ? (CTI) which is a necessary qualification for being appointed as an Instructor in Government ITIs i.e. Industrial Training Institutes. The

case of the petitioners in the second writ petition is that whereas advertisement was issued in the year 2014 itself for filling up vacancies in Industrial

Training Institutes and the petitioners who possess the required qualification had applied, in pursuance of the said advertisement, yet the Government is

not making regular selection, but on the other hand backdoor appointments are being made by way of outsourcing the same vacancies through

UPNAL (i.e. Uttarakhand Purva Sainik Kalyan Nigam). Thereby removing all chances of the petitioners or an opportunity to them to appear and

compete in the regular selection process.Â

5. In short, the matter is common in both the petitions. Both set of petitioners are aggrieved by the action of the State by which posts, which were

liable to be thrown open in the open market, but instead are being filled up by regularization of casual employees working on such posts, thus depriving

the petitioners of an opportunity to compete for these posts in â??open selectionâ??, as per the Rules.Â Â Â

6. The main thrust of the argument raised by the petitioners is that the action on the part of the State Government is illegal, violative of the Constitution

of India and in clear violation of the directions contained in Umadevi. The case of the petitioners is that in Umadevi, the Honâ??ble Apex Court has

held that apart from the regular appointment, which is made in accordance with the rules, Government resorts to two other kinds of appointments, one

is a totally illegal appointment and second is merely irregular. The practice of regularizing these appointments by the Court was held to be bad. Apex

Court came to the conclusion that appointments which have not been made as per the rules and are temporary, adhoc, casual or contractual cannot be

regularized.Â

7. What is the ratio laid down by the Honâ??ble Apex Court in the seminal decision of Umadevi? In the above case, the Apex Court was examining

the validity of regularizations done by orders of the Court on appointments which were initially either irregular or even illegal. The entire emphasis of

the Apex Court was that appointments on public posts must be made under the prescribed Rules, and substantive vacancies should never be filled

dehors the Rules. The first three paragraphs of the judgment are extremely important which are reproduced below:

â??2.Â Public employment in a sovereign socialist secular democratic republic, has to be as set down by the Constitution and the laws made

thereunder. Our constitutional scheme envisages employment by the Government and its instrumentalities on the basis of a procedure established in

that behalf. Equality of opportunity is the hallmark, and the Constitution has provided also for affirmative action to ensure that unequals are not treated

equals. Thus, any public employment has to be in terms of the constitutional scheme.Â

3. A sovereign government, considering the economic situation in the country and the work to be got done, is not precluded from making temporary

appointments or engaging workers on daily wages. Going by a law newly enacted, The National Rural Employment Guarantee Act, 2005, the object is

to give employment to at least one member of a family for hundred days in an year, on paying wages as fixed under that Act. But, a regular process

of recruitment or appointment has to be resorted to, when regular vacancies in posts, at a particular point of time, are to be filled up and the 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.Â

4. But, sometimes this process is not adhered to and the Constitutional scheme of public employment is bypassed. The Union, the States, their departments and instrumentalities have resorted to irregular appointments, especially in the lower rungs of the service, without reference to the duty to ensure a proper appointment procedure through the Public Service Commission or otherwise as per the rules adopted and to permit these irregular appointees or those appointed on contract or on daily wages, to continue year after year, thus, keeping out those who are qualified to apply for the post concerned and depriving them of an opportunity to compete for the post. It has also led to persons who get employed, without the following of a regular procedure or even through the backdoor or on daily wages, approaching the Courts, seeking directions to make them permanent in their posts and to prevent regular recruitment to the posts concerned. The courts have not always kept the legal aspects in mind and have occasionally even stayed the regular process of employment being set in motion and in some cases, even directed that these illegal, irregular or improper entrants be absorbed into service. A class of employment which can only be called 'litigious employment', has risen like a phoenix seriously impairing the constitutional scheme. Such orders are passed apparently in exercise of the wide powers under Article 226 of the Constitution. Whether the wide powers under Article 226 of the Constitution are intended to be used for a purpose certain to defeat the concept of social justice and equal opportunity for all, subject to affirmative action in the matter of public employment as recognized by our Constitution, has to be seriously pondered over. It is time, that Courts desist from issuing orders preventing regular selection or recruitment at the instance of such persons and from issuing directions for continuance of those who have not secured regular appointments as per procedure established. The passing of orders for continuance tends to defeat the very Constitutional scheme of public employment. It has to be emphasized that this is not the role envisaged for the High Courts in the scheme of things and their wide powers under Article 226 of the Constitution are not intended to be used for the purpose of perpetuating illegalities, irregularities or improprieties or for scuttling the whole scheme of public employment. Its role as the sentinel and as the guardian of equal rights protection should not be forgotten. (Emphasis provided)

8. The Apex Court held that the State while giving employment, does so within the limitations imposed by the Constitution of India. Governments, more often than not, instead of making appointments as per the Rules it resorts to temporary or casual appointments where later invariably such persons seek regularization from Courts. This practice was held to be bad by the Honâ??ble Apex Court. It was noted as follows:

â??47. When a person enters a temporary employment or gets engagement as a contractual or casual worker and the engagement is not based on a proper selection as recognized by the relevant rules or procedure, he is aware of the consequences of the appointment being temporary, casual or contractual in nature. Such a person cannot invoke the theory of legitimate expectation for being confirmed in the post when an appointment to the post could be made only by following a proper procedure for selection and in cases concerned, in consultation with the Public Service Commission.

Therefore, the theory of legitimate expectation cannot be successfully advanced by temporary, contractual or casual employees. It cannot also be held that the State has held out any promise while engaging these persons either to continue them where they are or to make them permanent. The State cannot constitutionally make such a promise. It is also obvious that the theory cannot be invoked to seek a positive relief of being made permanent in the post.Â

48. It was then contended that the rights of the employees thus appointed, under Articles 14 and 16 of the Constitution, are violated. It is stated that the State has treated the employees unfairly by employing them on less than minimum wages and extracting work from them for a pretty long period in comparison with those directly recruited who are getting more wages or salaries for doing similar work. The employees before us were engaged on daily wages in the department concerned on a wage that was made known to them. There is no case that the wage agreed upon was not being paid.

Those who are working on daily wages formed a class by themselves, they cannot claim that they are discriminated as against those who have been regularly recruited on the basis of the relevant rules. No right can be founded on an employment on daily wages to claim that such employee should be treated on a par with a regularly recruited candidate, and made permanent in employment, even assuming that the principle could be invoked for

claiming equal wages for equal work. There is no fundamental right in those who have been employed on daily wages or temporarily or on contractual basis, to claim that they have a right to be absorbed in service. As has been held by this Court, they cannot be said to be holders of a post, since, a regular appointment could be made only by making appointments consistent with the requirements of Articles 14 and 16 of the Constitution. The right to be treated equally with the other employees employed on daily wages, cannot be extended to a claim for equal treatment with those who were regularly employed. That would be treating unequals as equals. It cannot also be relied on to claim a right to be absorbed in service even though they have never been selected in terms of the relevant recruitment rules. The arguments based on Articles 14 and 16 of the Constitution are therefore overruled. (Emphasis supplied)

9. Having held regularization to be bad, even unconstitutional, an exception was created in paragraph 53 of the said judgment for a limited category

and more importantly as a one-time measure, which reads as under:

53. One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in *State of Mysore*

v. S.V. Narayanappa, R.N. Nanjundappa v. T. Thimmiah and B.N. Nagarajan v. State of Karnataka 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

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 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 bypassing of the constitutional requirement and regularising or making permanent, those not duly appointed as per the constitutional scheme.Â (Emphasis supplied)

10. The above exception was created by the Honâble Apex Court only in the cases of âirregularâ appointments, where those seeking regularization fulfilled certain conditions. It had two important elements, firstly an employee must be continuing for 10 years or more but not on the strength of an interim order of the Court, and second was that such an appointment, in the first instance, was on a substantive vacancy and the candidate had all the requisite qualifications for the post at the time of his appointment. In such cases, directions were given to the Union of India, State Governments and their instrumentalities to make a one-time measure for regularization by framing Rules.Â

11. The State of Uttarakhand subsequently framed its regularization rules in 2011 wherein for regularization one mandatory condition was that an employee must have put in 10 years of continuous service and, secondly, he must be working on the substantive post and, thirdly, such an employee must be having the qualifications required for the post. Later, the said rules were repealed and another rules were enforced which is known the regularization rules of 2013, in which the mandatory qualification of 10 years continuous service was reduced to 5 years continuous service.Â

12. Whether the State Government could have done this is a question which is still open in law, but presently since it has not been challenged by the petitioners, and further this Court has been informed that this aspect is under challenge in another writ petition pending before a coordinate Bench of this Court, this Court is not examining this aspect.Â Â

13. In any case a regularization scheme was framed in the 2013 Rules and the date of notification of the Rules was 30.12.2013. Hence, an employee who was working on a substantive vacancy for the last 5 years was liable to be regularized on that post provided he fulfilled the qualifications contained under the rules. In other words, no person who was engaged after 30.12.2008 could be regularized as on the date of notification (i.e. 30.12.2013), he would not be completing 5 years of service.Â

14. What is under challenge is the subsequent amendment made in the rules in the year 2016 by which the 5 years mandatory period has been

ingenuously reduced, as now all employees who were appointed on or before 31.12.2011 and who have the qualifications, and were working on a substantive vacancy having completed 5 years continuous service on the post are liable to be regularized on that post. In other words, all such persons who were engaged between 30.12.2008 to 31.12.2011, who were not eligible for regularization in the original Rules are now eligible by way of the amendment.Â Â Â

15. The arguments of the petitioners would be that since regularization could be made only as a one-time measure, it was done by way of regularization rules framed in the year 2013 and all such persons who were appointed on temporary, adhoc or on casual basis on or before 30.12.2008 were liable to be regularized. Now, vide the amendment of 2016, this benefit has been extended to all such persons who were employed between 30.12.2008 to 31.12.2011 as well. By doing so, it is argued that regularization itself is becoming â??a mode of recruitmentâ?, something which has been held to be illegal and violation of the Constitution of India in no uncertain words by the Constitution Bench in *Umadevi*.Â

16. Learned Chief Standing Counsel while rebutting the arguments of the petitioners has firstly objected to the very maintainability of the writ petitions itself at the hands of the petitioners and it has been argued that the petitioners, in fact, have no locus standi to challenge the amendment brought in 2016 for the reason that from the averments of the writ petition, it is clear that the petitioners are only seeking employment against regular vacancies which have already been advertised by the State Government and against some of the vacancies, appointments have already been made. It is the categorical statement of the State Government that no regularization is being made on the vacancies which have been advertised and, therefore, the petitioners have no claim on the posts on which regularization is presently being done.

17. Moreover, it has been further argued by the State Counsel as well as by the Counsel for the interveners that the petitioners do not have the required qualifications for many of the posts on which regularization is being made such as the posts of Medical Officer, Staff Nurse, Lab Technician as well as Ayurvedic Doctors.

18. Having heard both the sides on the issue of locus standi, this Court is of a

considered view that the present writ petitions cannot be rejected on the ground of locus standi of the petitioners. This is so because the petitioners are challenging an amendment carried out in the year 2016, which seeks to make irregular, even illegal appointments, as regular, which adversely affects the petitioners, because if this is not done all these posts would be open for the general public by way of "open selection", as per the Rules, which is how it ought to be. The argument of the petitioners is that this is in violation of Article 14 of the Constitution of India and the seminal decision of the Hon'ble Apex Court in the case of Umadevi, and many other subsequent judgments of the Apex Court.

19. It is of little relevance whether the petitioners have or should have applied for the vacancies which are advertised by the state from time to time (although it is the case of the petitioners that they did). What is relevant here is the fact that had the regularisation not being made, as it is presently being done, and had the Government, followed the mandate of law as laid down in Uma Devi, all existing vacancies, irrespective of the fact that it was temporarily occupied by an irregular occupant, were liable to be advertised and filled as per the process given in the rules.

20. It is also of no relevance whether the petitioners are eligible for A, B or C category of post on which regularization is being made. Petitioners are challenging the amendment itself, which is applicable for the posts on which they are candidates or could have been candidates in case, instead of regularizing the adhoc, temporary and casual employees, the State would have invited applications from eligible candidates by way of open advertisement, by making regular selection as per the rules. Since this has not been done, the petitioners have a legitimate ground to challenge the amendment itself and, therefore, the objection as to the locus standi of the petitioners is concerned, it is clearly misconceived and is hereby rejected.

21. It has also been argued by the learned Chief Standing Counsel Sri Paresh Tripathi that Umadevi is not an authority for the proposition that the executive or the legislature cannot frame a scheme for regularization. The State is within its power under proviso to Article 309 of the Constitution of India in framing rules for services where there is no statute. The rules for regularization have been framed under the statutory exercise of this power under Article 309 of the Constitution of India. Moreover, even in Umadevi case,

the Honâ??ble Apex Court has not totally debarred the State

Governments from regularization, but said that â??ordinarilyâ? regularization cannot be done. Meaning thereby that in a given contingency

regularization can be resorted to.Â

22. Having heard learned Counsel for all the parties, this Court is of the considered view that the ratio laid down in the Constitution Bench is absolutely

clear, which was that appointment has to be made only as per the existing service Rules and in case the appointments have been made dehors the

rules, such employees are not liable to be regularized in service. An exception was created only for a limited class of employees such as the one who

are working on substantive vacancies since 10 years or more, where their initial appointment was not illegal, but only irregular.Â Meaning thereby

that before the recruitment against the duly sanctioned and vacant post, vacancies were duly advertised and applicants had all the qualifications

required for the said posts. Moreover, it was to be only as a one-time measure. It was never supposed to be a mode of recruitment.Â

23. Regularization could be done only as a one-time measure. Here it is being resorted repeatedly, and this would be in clear violation of Umadevi.

The first Regularization was made in the 2011 Rules, where eligibility was fixed as 10 years of service on the post. Later in 2013 new Rules came up,

which reduced this eligibility to 5 years, and finally the 2016 amendment, where the period has been further reduced. This cannot go on forever. It is a

settled law that regularization cannot be a mode of recruitment, but it is being made so by way of the amendment carried out in the year 2016. If this

amendment is to be held good then it would, not only amount to an approval of the Court to the present amendment, but to any subsequent amendment

as well, as this ingenious method of enlarging the scope of eligibility, has great potential for abuse in the future. If this method continues then the

irregular will become regular and regular will be irregular. Consequently, this impugned amendment is not only violative of Article 14 of the

Constitution but also it is in clear violation of the directions given in Umadevi case. The amendment notified on 14.12.2016 is hereby quashed and set

aside.Â

24. However, it is made clear that for all such posts on which the regularization was being made pursuant to the amendment of 2016 though the

Government cannot regularize the ad hoc, temporary or contractual employees on these posts but these posts cannot remain vacant as well, therefore,

Government shall take immediate steps for filling up these vacancies in accordance with law and as per the prescribed selection procedure, but since

some of the candidates might be working on these sanctioned posts for the last many years, the Government would always be at liberty to grant a

reasonable "weightage point" and "age relaxation" to such candidates, in making regular selection on those posts by making these posts

available by way of an open competition.

25. During the course of hearing, in this case many intervention applications have been filed on behalf of persons, who were liable to be regularized as

per the 2016 amendment but that did not happen due to an interim order of a coordinate Bench of this Court dated 24.1.2017. Most of these

intervention applications have been allowed, the remaining also stand allowed as in any case the Counsels representing the interveners i.e. Mr.

Jitendra Chaudhary, Mr. Alok Mahra, Mr. Bhagwat Mehra, Mr. Chetan Joshi and Ms. Mamta Joshi have been heard.Â Â

26. A reference here of three intervention applications filed on behalf of those who were appointed as Staff Nurse and Lab Technician in a newly

constituted State medical college in District Pauri Garhwal known as "Veer Chandra Singh Garhwali Government Medical Science and Research

Institute, Srinagar", needs mention (In Application CLMA Nos. 8448 of 2017, 2273 of 2017 & 4713 of 2018). Their case is somewhat different.

Admittedly, the college itself was constituted in the year 2008 and on 25.2.2009 the posts of Lab Technician and Staff Nurse were created by the

State Government in the said newly constituted college and thereafter on 28.2.2009, an advertisement was issued by the State Government inviting

applications from eligible candidates for filling up these posts against which the interveners applied and were appointed. Yet their appointment was not

a regular appointment and it was called a "contractual appointment", for the reason that till that time (and even now), no rules were framed for

recruitment of Staff Nurse and Lab Technician in the said medical college. Therefore, in these peculiar facts and circumstances where there was an

urgent need for manning the medical college by Staff Nurses and Lab Technicians, and there being no other option, such a measure was adopted. As

there was no service rules, and in any case, the Government could have resorted later a one-time measure for regularization, this case is distinguished from the rest.Â Â Â

27. Therefore as regarding the interveners who are Staff Nurses and Lab Technicians in â??Veer Chandra Singh Garhwali Government Medical

Science and Research Institute, Srinagarâ?, although their regularization still cannot be made in terms of the amendment made in the year 2016, for

the simple reason that the amendment itself has been quashed and set aside, but this itself will not restrict the State Government from regularizing their

services independently as a one-time measure as that would be in terms of the exception created by the Honâ??ble Apex Court in Umadevi.

28. Both the writ petitions are hereby allowed in above terms.