

(2022) 10 BOM CK 0038
In the Bombay High Court
Case No : Writ Petition No. 5552 Of 2015

Vishal Bansi Tambe

APPELLANT

Vs

State Of Maharashtra And Others

RESPONDENT

Date of Decision : 07-10-2022

Acts Referred:

Constitution Of India, 1950 — Article 14, 16

Citation : (2022) 10 BOM CK 0038

Hon'ble Judges : Mangesh S. Patil, J;Sandeep V. Marne, J

Bench : Division Bench

Advocate : Vinod P. Patil, A.S.Shinde, A.D.Sonkawade, Ashvin V. Hon

Final Decision : Dismissed

Judgement

Sandeep V. Marne, J

1. Rule, made returnable forthwith. With the consent of the learned Advocates for the respective parties, heard finally at the stage of admission.

2. By the present petition, petitioner seeks permanency/regularization on the post of lecturer in respondent No. 4 College. This Court had passed order dated 26.10.2016 granting liberty to the respondent College to consider petitioner's case for absorption against the vacant open category post as per rules. In pursuance thereof, his case was considered and by communication dated 27.02.2020, the Joint Director of Technical Education, Nashik has rejected the same. The petitioner has amended the petition and setup a challenge to the communication dated 27.02.2020.

3. The short issue involved is about Petitioner's entitlement for regularization of his services. The issue arises in the following factual background. Government Resolution was issued on 25.07.2002 by the State of Maharashtra thereby permitting contractual engagements in Technical Education Department, particularly in view of financial constraints of the State Government and inability of Maharashtra Public Service Commission to undertake and finalize the

recruitment process. It is claimed by the Petitioner that by the Government Resolution dated 05.08.2011, one post of lecturer in Pharmacy was retrieved in respondent College for the academic year 2011-12. That in pursuance of the two Government Resolutions, the respondent College intended to fill up a post of Lecturer on contract basis and sought permission of the Joint Director of the Technical Education, who by letter dated 16.09.2011, granted such permission. Respondent college issued advertisement in the newspaper on 30.09.2011 for filling up the post of Lecturer in Pharmacy on contract basis. Applications were invited for walk-in interviews scheduled to be conducted on 03.10.2011. It is petitioner's case that he fulfilled all eligibility criteria required for the post and accordingly applied in pursuance of the advertisement. He was one amongst 10 candidates, who appeared for interviews, which were conducted by the Committee of 14 Members including the Joint Director of Technical Education. He was selected for appointment. The respondent College sought permission of Joint Director of Technical Education by letter dated 03.10.2011, for appointment on contract basis w.e.f. 04.10.2011. He came to be appointed on the post of lecturer on contract basis vide order dated 05.10.2011. The appointment was on contract basis upto 31.05.2012 or till the appointment on regular lecturer, whichever occurred earlier. The Joint Director of Technical Education issued approval for the petitioner's appointment vide letter dated 10.10.2011.

4. It is the petitioner's case that he was continued in service by issuing successive appointment orders on contractual basis, which were approved by the office of Joint Director of Technical Education. He has filed the present petition on 20.05.2015 seeking permanency/ regularization on the post of lecturer. As observed hereinabove, during pendency of the present petition, it was brought to the notice of this Court that one vacancy of lecturer in open category got created on account of retirement of one Mr. Inamdar in May, 2016. In the light of this position, this Court granted liberty to the respondent College to consider petitioner's case against that open category vacancy as per rule by its order dated 26.10.2016. Accordingly, the respondent College sent a proposal dated 13.06.2018 for his appointment as lecturer against that vacant open category post. Proposal was recommended by the Joint Director of Technical Education, however, by communication dated 22.07.2020 that proposal has been rejected.

5. Appearing for the petitioner Mr. Patil, learned Advocate has submitted that the petitioner's initial appointment on contract basis was against sanctioned vacant post, effected after following the due selection process. He possessed the required eligibility criteria for the appointment. Therefore, his initial appointment itself was regular for all practicable purposes. Relying on judgment of this Court in Sachin Ambadas Dawale and Others Vs. State of Maharashtra and another 2013 (0) BCI 1318, he would submit that the petitioner is entitled to be regularized in service on completion of three years' contract service. He would submit that the judgment of this court in Sachin Dawale (supra) has been confirmed by the Apex Court by dismissal of Special Leave Petition filed by the State Government. He places reliance on several orders passed by this Court in

similarly situated cases granting regularization to lecturers on completion of 3 years' contractual services. He relies upon several Government Resolutions by which services of contractual lecturers engaged in Government Polytechnics came to be regularized following the decision in Sachin Dawale (supra). Alternatively, Mr. Patil would submit that for some reason if his service cannot be regularized against the initial vacant post, there is admittedly a vacant post in open category from 01.06.2016 and he is required to be regularized at least against that post. Lastly, he submits that the petitioner has now become age barred and would not be in a position to compete in the fresh recruitment process, if allowed to be initiated for filling up that vacant post.

6. Mr. Shinde, learned Assistant Government Pleader appearing for the State Government, opposes the petition. He invites our attention to the affidavit-in-reply filed by the State Government and contends that the selection of the petitioner was not through the prescribed Selection Committee. The mandatory procedure for the appointment was not followed. The selection of the petitioner was done merely on the basis of walk-in interview that too on temporary basis and as a stop gap arrangement. He would further submit that his initial appointment was against the post reserved for ST category and thus the reservation roster was not followed. He would further submit that the judgment of this Court in Sachin Dawale (supra) has subsequently been clarified. Even otherwise, he would submit that in Sachin Dawale (supra), candidates were selected by duly constituted Committee and the issue of reservation was not involved. He prays for dismissal of the petition.

7. Mr. Sonkawade, learned Advocate appearing for respondent Nos. 4 and 5 (College-Management) would submit that there was no regular vacancy in the open category at the time of initial appointment of the petitioner. That there was one vacancy of Scheduled Caste and Scheduled Tribes category each. While Scheduled Caste Category vacancy was filled up, the Scheduled Tribe category vacancy remained to be filled, against which the petitioner, belonging to open category, was appointed on contract basis.

8. We have heard the learned counsels for the respective parties and have perused the records.

9. The petitioner is not able to demonstrate that there was a sanctioned vacant post in open category at the time of his initial contractual appointment. Both the State Government as well as respondent College have filed affidavits asserting that the available post was in the Scheduled Tribe category. The petitioner has not controverted this position. So far as the manner in which the selection was conducted, we have our own doubts about genuineness of the same. The advertisement for effecting contractual appointment appears to have been issued in local newspaper "Daily Gavkari" on 30.09.2011. The interviews were scheduled to be conducted within three days thereafter on 03.10.2011. The candidates were not supposed to apply but directly remain present for walk-in interviews. The reservation criteria was not specified in the advertisement. Even

though it is claimed that 10 candidates appeared for interviews, one 'Mr. Bansi Balu Tambe-Patil' was a part of interview committee. Petitioner's name is 'Vishal Bansi Tambe'. Therefore, the manner in which the selection is conducted does not inspire confidence.

10. In view of the above position emerging before us, it is difficult to arrive at conclusion that the petitioner's initial appointment had any semblance to a regular appointment. It was not on sanctioned vacant post and proper selection process was not followed. Therefore mere continuance on the post barely for about 4 years did not create any right in his favour to seek regularisation by filing this petition. He has thereafter continued in service on the strength of interim order granted by this Court on 29.05.2015.

11. Having held that the a petitioner was not entitled to seek regularisaion of his services at the time of filing of the petition, we now proceed to examine his claim for regularization against the post of lecturer in open category vacated on account of retirement of Mr. Inamdar in May, 2016. As observed here-in-above, in pursuance of liberty granted by this Court, his claim has been considered and rejected by communication dated 22-07-2020. The question that arises is whether the petitioner, who entered service merely on contract basis against a non-available post sans proper selection process, should now be permitted to usurp the vacancy created later, during continuance of his appointment on account of interim order of this court? The answer to this question is obviously in the negative. If any vacancy in open category has arisen on account of retirement of regular incumbent, the same is required to be advertised and filled by following regular selection process and not by absorption by contractual lecturer. Therefore, the case of the petitioner was rightly rejected vide communication dated 27.02.2020.

12. We recently had an occasion to deal with a similar issue of regularization of contractual lecturers in Ganesh Digambar Jambhrunkar and Others Vs. State of Maharashtra and Others 2022 DGLS (Bom.) 2921 (Writ Petition No. 4546 of 2016 decided on 20.09.2022). We have decided the issue of entitlement of contractual lecturers for regularization of their services on the basis of judgment of this Court in Sachin Dawale. We have considered the entire case law on the subject including the landmark judgment of the Constitution Bench Secretary, State of Karnataka and Others Vs. Umadevi (3) and Others (2006) 4 SCC 1. In Ganesh Digambar Jambhrunkar (supra), in paragraph Nos. 22 to 28 it is held as under :

"22. Since we are dealing with the prayer for regularization of services, no discussion can be complete without reference to the landmark judgment of the Apex Court in the case of Secretary State of Karnataka and others Vs. Umadevi and others 2006(4) SCC 01 which marks a critical turning point on the issue of regularization of services of ad-hoc or temporary employees. The Constitution Bench of the Supreme Court considered the question whether State can frame a scheme for regularization of services of an ad hoc/temporary/daily wagers appointed in violation of doctrine of equality or those appointed with a clear

stipulation that such appointments would not confer any right on them to seek regularization. The Supreme Court also considered the issue whether Courts can issue mandamus for regularization or absorption of such appointees. While answering the questions in negative, the Constitution Bench has held as under :

"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 concerned cases, 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.

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 concerned department 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.

49. It is contended that the State action in not regularizing the employees was not fair within the framework of the rule of law. The rule of law compels the State to make appointments as envisaged by the Constitution and in the manner we have indicated earlier. In most of these cases, no doubt, the employees had worked for some length of time but this has also been brought about by the pendency of proceedings in Tribunals and courts initiated at the instance of the employees. Moreover, accepting an argument of this nature would mean that the State would be permitted to perpetuate an illegality in the matter of public employment and that would be a negation of the constitutional scheme adopted by us, the people of India. It is therefore not possible to accept the argument that there must be a direction to make permanent all the persons employed on daily wages. When the court is approached for relief by way of a writ, the court has necessarily to ask itself whether the person before it had any legal right to be enforced. Considered in the light of the very clear constitutional scheme, it cannot be said that the employees have been able to establish a legal right to be made permanent even though they have never been appointed in terms of the relevant rules or in adherence of Articles 14 and 16 of the Constitution.

23. Since Ms. Talekar has relied upon the decision of the Apex Court in the case of State of Haryana and others Vs. Piara Singh and others (supra), we must refer to para 26 of the judgment in the case of Umadevi in which it is held that the directions given in the case of Piara Singh were inconsistent and run counter to the constitutional scheme of employment. It is specifically clarified that the decision in the case of Piara Singh cannot be said to have held that all ad hoc/temporary/casual employees appointed without following recruitment procedure should be made permanent. In fact in para 54 of the judgment in Umadevi, the Constitution Bench has clarified that all the earlier decisions of the Apex Court which run counter to the principles settled by it in Umadevi would be denuded of their status as precedents.

24. Thus, it is the Constitution Bench judgment in Umadevi which would govern the field of regularization and all the earlier judgments rendered by the Apex Court have lost their presidential value. Despite of law on regularization having been authoritatively laid down by the Constitution Bench in Umadevi, an attempt was made by a two judges Bench of the Apex Court in the case of U. P. State Electricity Board Vs. Pooran Chandra Pandey reported in 2007 (11) SCC 92 to water down the binding effect of judgment in the case of Umadevi. A three judges Bench of the Apex Court was therefore required to examine permissibility of such watering down of the Constitution Bench decision in the case of Umadevi. In the case of Official Liquidator Vs. Dayanand (supra) in para Nos. 90, 91 and 92 the Apex Court has held as under :

"90. We are distressed to note that despite several pronouncements on the subject, there is substantial increase in the number of cases involving violation of the basics of judicial discipline. The learned Single Judges and Benches of the High Courts refuse to follow and accept the verdict and law laid down by

coordinate and even larger Benches by citing minor difference in the facts as the ground for doing so. Therefore, it has become necessary to reiterate that disrespect to constitutional ethos and breach of discipline have grave impact on the credibility of judicial institution and encourages chance litigation. It must be remembered that predictability and certainty is an important hallmark of judicial jurisprudence developed in this country in last six decades and increase in the frequency of conflicting judgments of the superior judiciary will do incalculable harm to the system inasmuch as the courts at the grass root will not be able to decide as to which of the judgment lay down the correct law and which one should be followed.

91 We may add that in our constitutional set up every citizen is under a duty to abide by the Constitution and respect its ideals and institutions. Those who have been entrusted with the task of administering the system and operating various constituents of the State and who take oath to act in accordance with the Constitution and uphold the same, have to set an example by exhibiting total commitment to the Constitutional ideals. This principle is required to be observed with greater rigour by the members of judicial fraternity who have been bestowed with the power to adjudicate upon important constitutional and legal issues and protect and preserve rights of the individuals and society as a whole. Discipline is sine qua non for effective and efficient functioning of the judicial system. If the Courts command others to act in accordance with the provisions of the Constitution and rule of law, it is not possible to countenance violation of the constitutional principle by those who are required to lay down the law.

92. In the light of what has been stated above, we deem it proper to clarify that the comments and observations made by the two-Judges Bench in UP State Electricity Board vs. Pooran Chandra Pandey (supra) should be read as obiter and the same should neither be treated as binding by the High Courts, Tribunals and other judicial for as nor they should be relied upon or made basis for bypassing the principles laid down by the Constitution Bench.

25. Thus, the settled position of law now is that no person appointed on temporary/casual/adhoc/contractual basis can claim regularization or permanency in service. A one time exception has been carved out by the Apex Court in para No. 53 of the judgment in the case of Umadevi, wherein irregular appointments of duly qualified persons in duly sanctioned vacant posts where employees have worked for 10 years or more without intervention of Court orders have been permitted to be regularized. This Court at its Principal Seat in the case of Union of India and others Vs. Smt. Lalita V. Mertia in Writ Petition No. 1338 of 2015 decided on 08 October 2021 has held that the said exception made in the case of Umadevi is a one time exception and applicable only in respect of employees who have completed ten years as on 10th April 2006. It is held that it was never the intention of the Apex Court to permit regularization of those who had not completed 10 years of service as on the date of rendering of the judgment.

ISSUE OF REGULARISATION OF PETITIONERS

26. Having considered the law on the subject of regularization, we now advert to the issue of entitlement of the petitioners to seek the relief of regularization. At the outset, it must be noted that the petitioners are not covered by the one time exception carved out in para 53 of the judgment in the case of Umadevi as the very entry of the petitioners in service is after the cut-off date of 10th April 2006. Thus, applying the law enunciated by the Constitution Bench in the case of Umadevi as interpreted by this Court in Lalita Mertia, there is no right in favour of the petitioners to seek regularization of their services.

27. Now we proceed to examine the entitlement of the Petitioner for regularization as per the judgment of this Court in the case of Sachin Ambadas Dawale (supra), which has been the sheet anchor of Ms. Talekar's submissions for extension of similar treatment to the petitioners. In the case of Sachin Ambadas Dawale (supra) the petitioners therein were lecturers appointed in various departments of Government Polytechnic in the State of Maharashtra as per the policy incorporated in the G. R. dated 25 July 2002, 02 August 2003 and 03 August 2003. Since there was a ban on recruitment in the State of Maharashtra since 1998, contract appointments were effected on vacant sanctioned posts of lecturer in Government Polytechnic till nomination of candidates by the Maharashtra Public Service Commission. In these peculiar facts of the case, this Court directed regularization of services of the petitioners therein on completion of three years' service. However, since the judgment in Sachin Ambadas Dawale (supra) resulted in raising of numerous claims for regularization by persons dissimilarly situated, this Court was required to clarify its judgment by its order dated 27.04.2017. In the clarificatory order, it is held as under :

"In these peculiar facts and circumstances, we had observed that the appointment of petitioners could not be said to be a backdoor entry and as such, we had distinguished the Judgment of the Apex Court in the case of Secretary, State of Karnataka and Ors. vs. Umadevi and Others reported in AIR 2006 SC 1806 (1). We had also considered that the State Government itself in the category of various other employees had regularised the services of various employees. We had further observed that, for a long period during which the petitioners were in employment, the Maharashtra Public Services Commission had also not conducted the interviews and as such, during the intervening period when the petitioners were continued in the employment, after having undergone due selection process, they had attained upper age limit and as such, when the State itself had not conducted the selection process through MPSC for more than 10 years, the petitioners who were selected through due selection process could not be penalised. We had observed that, on account of inaction on the part of the State, selection process for a period of more than 10 years was not held and hence, the petitioners, who had by efflux of time, 20 wp_4546.16.odt become age bar, cannot be penalised and thrown out of their job. We had specifically

observed that, insofar as the case of Umadevi is concerned, the appointments therein were made clandestinely and without advertisement and the persons were appointed without following the due process of law.

It could thus be seen that, in the peculiar facts and circumstances of the case, the petitioners in the present petition were selected in pursuance of the Government Resolution dt.25.7.2002 after following the due selection process by the Selection Committee duly constituted under the said Government Resolution and on account of inaction on the part of the State Government in not holding the selection process through the MPSC for a period of more than 10 years, many of the petitioners had become age bar and as such, they were deprived of opportunity of undergoing selection process through MPSC, we had found that a special case was made out for regularisation of services of the petitioners therein. We may specify that we had restricted the claim of the petitioners who were already in service when they had approached the Court. By no stretch of imagination, the said Judgment could be applicable to the persons who had already left the job and taken chances.

We may also observe that, citing the said Judgment, some of the employees who are appointed on temporary or contractual basis and who are removed after putting in a year's or two years service are also seeking regularisation. We may clarify that the said Judgment would not lay the ratio that, the persons who are appointed on purely contractual or temporary basis without following the due selection process as laid down by the Apex Court in the case of Umadevi, would also be entitled to regularisation of their services.

28. Thus, this Court has specifically clarified that the judgment in Sachin Ambadas Dawale (supra) does not lay down a ratio that persons appointed on purely contractual or temporary basis without following due selection process as laid down by the Apex Court in the case of Umadevi would also be entitled to regularization of their services. The present petitions have been filed on 18.04.2016 before issuance of the clarification by this Court on 27.04.2017. Thus, in view of the specific clarification issued by this Court by order dated 27.04.2017, the petitioners are not entitled to the relief of regularization by relying on the judgment in the case of Sachin Ambadas Dawale (supra)."

13. The law on regularization of services is now crystallized by the Constitutional Bench decision in Umadevi (supra). One time exception was made by the Apex Court in para. 53 in Umadavi for those appointed irregularly against sanctioned posts, by following due process of selection and who continued on that post for 10 years without any interim order of any court. The petitioner is not covered by such exception for variety of reasons. His appointment was not against regularly sanctioned vacant post in open category. The selection process does not inspire our confidence. He has not completed 10 years of service without protection of interim order. Therefore, he is not entitled to the benefit of regularization in accordance with paragraph No. 53 of the judgment in Umadavi.

14. The entire thrust of the petitioner is on the decision of this Court in Sachin Dawale(supra). In Ganesh Digambar Jambhrunkar (supra) we have recorded detailed reasons, as to why the decision in Sachin Dawale cannot be used for seeking regularization by every lecturer on completion of three years of service. Therefore, reliance of the petitioner in Sachin Dawale is completely misplaced.

15. Consequently, we are of the considered view that no case is made out by the petitioner for regularization of his services. The petition is devoid of merits and is dismissed without any orders as to the costs.

16. Rule is discharged.

17. Interim order stands vacated.