POST MASTER GENERAL, KOLKATA AND ORS. A

v.

TUTU DAS (DUTTA)

MAY 2, 2007

[S.B. SINHA AND MARKANDEY KATJU, JJ.] B

Service Law:

Daily wager substitute to EDA—Claim for regularization—Held: Neither the Central Administrative Tribunal nor the High Court recorded a positive finding that the daily wager had completed 240 days in a year as substitute to EDA—No appointment should be made contrary to statutory provisions governing recruitment or the rules framed in that behalf under a statute by the proviso to Article 309 of the Constitution—Constitution of India—Arts. 14, 16, 77, 162 and 309—Industrial Disputes Act, 1947—25F. C D

Respondent, a daily rated substitute to a regular EDA, claimed to have completed 240 days in one year prior to 7.5.1985. She was disengaged on 10.9.1987. She approached the Central Administrative Tribunal claiming absorption on the basis of the circular dated 13.11.1987 of the PMG West Bengal, which provided for, as one time exception, appointment of daily rated substitutes as EDA on vacant posts. The respondent also contended that in the case of some other similarly situated daily rated substitutes, the CAT directed the Department to give benefit of the Circular to the petitioners. The Tribunal directed that in case the respondent was found to have completed 240 days of work, she should be regularized. The writ petition of the Department having been dismissed by the High Court, it filed the present appeal. E F

Allowing the appeal, the Court

HELD: 1.1. The respondent was asked to produce relevant documents showing the period during which she had worked as EDA substitute in different post offices from time to time prior to 7.5.1985. There is nothing on record to show that she brought such materials on record. The Tribunal also did not come to a definite finding that the respondent had completed 240 days in a year as a substituted EDA prior to issuance of the circular letter dated G

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A 12th 13th November, 1987. Besides, the concept of 240 days of continuous service in a year would be attracted only in case where retrenchment has been effected without complying with the provisions contained in Section 25F of the Industrial Disputes Act, but would not be relevant for regularization of service. [Paras 11 and 16] 1122-D-E; 1125-C-D]

B *Madhyamik Siksha Parishad, U.P.* v. *Anil Kumar Mishra and Ors. etc.*, AIR (1994) SC 1638, referred to.

1.2. Equality clause contained in Articles 14 and 16 of the Constitution of India must be given primacy. No policy decision can be taken in terms of Article 77 or Article 162 of the Constitution of India which would run contrary C to the constitutional or statutory schemes. [Para 13] [1122-G-H]

1.3 In the instant case, there are two distinctive features, namely, (i) equality is a positive concept, therefore, it cannot be invoked where any illegality has been committed or where no legal right is established; and (ii) D according to the appellant, the respondent having not completed 240 days, does not fulfill the requisite criteria. A disputed question of fact has been raised. The High Court did not come to a positive finding that the respondent had worked for more than 240 days in a year. Even otherwise this Court is bound by the Constitution Bench decision in *Uma Devi's* case*. The statement of law contained in para 53 of the said judgment cannot also be invoked in this E case. The question has been considered by this Court in a large number of decisions. [Para 18 and 20] [1125-D-G]

**Secretary State of Karnataka and Ors.* v. *Uma Devi and Ors.*, [2006] 3 SCR 953= [2006] 4 SCC 1; *Punjab Water Supply and Sewarage Board* v. *Ranjodh Singh & Ors.*, [2006] 13 SCALE 426; *Punjab State Warehousing* F *Corp., Chandigarh* v. *Manmohan Singh & Anr.*, [2007] 3 SCALE 401, relied on.

2. What was considered to be permissible at a given point of time, keeping in view the decisions of this Court which had then been operating in G the field, does no longer hold good. Indisputably, the situation has completely changed in view of a large number of decisions rendered by this Court in the last 15 years or so. It was felt that no appointment should be made contrary to the statutory provisions governing recruitment or the rules framed in that behalf under a statute or the proviso appended to Article 309 of the Constitution of India. [Para 12] [1122-F]

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Secretary, State of Karnataka and Ors **v.** *Umadevi (3) and Ors.*, **[2006] 3 SCR 953 [2006] 4 SCC 1, followed.** A

Union of India and Ors. **v.** *Debika Guha and Ors.*, **[2006] 9 SCC 416, overruled.**

A. Umarani **v.** *Registrar, Cooperative Societies and Ors.*, **[2004] 7 SCC 112, referred to.** B

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2319 of 2007.

From the Final Judgment and Order dated 19.11.2004 of the High Court of Judicature at Calcutta in COCT No. 17 of 2004. C

R. Mohan, ASG., Rajiv Dutta, M.F. Humayunisa, Rashmi Malhotra and V.K. Verma for the Appellants.

Piyush K. Roy and G. Ramakrishna Prasad for the Respondent.

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The Judgment of the Court was delivered by

S.B. SINHA, J. 1. Leave granted.

2. Respondent had been working as a substitute to a regular EDA as and when he would remain on leave. She allegedly had completed a period E of 240 days in one year prior to 7.5.1985. Respondent joined her services on 1.10.1980. She was disengaged on 10.9.1987.

3. On or about 12th / 13th November, 1987, a circular was issued stating that although the substitutes of EDA were being engaged on an *ad-hoc* basis who were required to perform their duties only for few hours a day, despite F absorption of the regular incumbents, they had been continued as daily rated mazdoor and thus, irregular substitutes who had been working as such prior to 7.5.1985 may be considered for appointment as EDAs in vacant posts, even if they had not been recruited through Employment Exchanges provided they were found eligible therefor in all respects statin:-

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> "....It has been decided as one time exception, that such daily rated mazdoors irregular substitutes, who have been working as such from a date prior to 7th May, 1985, the date of issue of C.M. No. 49014/ 18/84-Estt.(C) dtd. 07.5.85 from the Govt. of India (Department of Personnel & training) to tally banning appointment of casual workers H

A otherwise than through employment Exchanges may be considered for appointment as EDAs in vacant posts even if they were not recruited through Employment Exchanges provided they are eligible for such appointment in all respects. It is reiterated that this concession has not been and cannot be given to the daily rated/casual workers from 07.5.1985 from which date the nominees of the Employment Exchange B are only to be considered for such appointment....."

4. Respondent filed an original application before the Central Administrative Tribunal claiming absorption in the post of EDA relying on or on the basis of the said circular as also claiming parity in terms of an order C passed by the Central Administrative Tribunal, Calcutta Bench in O.A. No. 731 of 1998, *Niva Ghosh and Ors.* v. *Union of India and Ors.*, which although was initially dismissed but a direction was issued in a review proceedings in terms of an order dated 30.9.1997 directing;

"This review petitioners shall be given an opportunity by the D respondents to produce documents in their possession in support of their period of service claimed to have been rendered by them within 12 weeks from the date of communication of this order and if such documents are produced, the same shall be checked and verified by the respondent authorities with reference to documents in their office and upon such verification, if it is found that the petitioners or any E of them had rendered 240 days of service as substitute ED prior to 7.5.1985, the benefit of the letter dated 13.11.1987 of the PMG, West Bengal Circle, shall be extended to them. In case it is found by the respondent authorities after verification of documents, if any, produced by the petitioner, they or any of them did not work for 240 days as F substitute ED prior to 7.5.1985, a reasoned order shall be passed and communicated to the petitioners as soon as such an order is passed."

5. Whereas pursuant to the said direction, although the case of Niva Ghosh was allegedly considered, her case was not, whereupon a contempt petition was filed. In the said contempt proceedings, a stand was taken by G the appellant that she had not completed a period of 240 days in a year before the said cut off date. The said contempt petition was dismissed with liberty to the respondent to file a fresh original application. Pursuant to the said observations, respondent filed an application before the Central Administrative Tribunal, Calcutta Bench, Calcutta which was marked as O.A. No. 484/2002.

H 6. By a judgment and Order dated 18.12.2003, the Central Administrative

Tribunal directed;

> "Therefore, in the aforesaid fact situation, we direct the respondent no. 2 to examine the available records along with certificate granted to the applicant as regards the number of days she had purported to have worked, in consultation with the notification and orders passed by the department from time to time and to ascertain whether she had completed the requisite number of days/ of work for regularisation in service. In case she is found to have completed 240 days of work, it is needless to mention that she should also be regularized."

7. Appellant herein filed a writ petition thereagainst which has been dismissed by reason of the impugned judgment by a Division Bench of the Calcutta High Court; proceeding on the premise that the respondent had been working since 1987. Relying or on the basis of a purported observations made by this Court in *Union of India and Ors.* v. *Debika Guha and Ors.*, [2000] 9 SCC 416 as also the said purported circular dated 12th /13th November, 1987, the High Court directed as under:-

> "Considering the aforementioned we find that admittedly law is settled by the apex Court holding that even in such case of the petitioner, on admitted facts the long period of service entitles the employee to get regularisation. We also found that circular issued by the authorities long back in the year 1987 recognised right of regularisation of an employee in case of a continuous working inspite of irregularities in particular factual circumstances. It is admitted that the case of the present private Respondent is also governed by the said circular. In such circumstances, we find that the direction given by the learned tribunal for consideration of the case of the private Respondent here to be considered for ascertaining whether she had rendered service for a long period, does not require any interference. The complaint of the authorities as petitioners here on the ground that the period of 240 days has no relevance through mentioned in the order of the learned Tribunal, also does not require any interference as we find that the said period is also a substantial long period in the facts and circumstances of the case."

8. Mr. Rajiv Dutta, learned senior counsel appearing on behalf of the appellant would submit that the impugned judgment cannot be sustained as question of regularisation of the services of the respondent did not arise in view of the decisions of this Court.

A 9. Mr. Pijush K. Roy, learned counsel appearing on behalf of the respondent, on the other hand, submitted that having regard to the decisions of this Court in *Debika Guha* (supra) as also the fact that she had been discriminated against *vis-a-vis* the aforementioned *Niva Ghosh*, the impugned judgment should not be interfered with by this Court.

B 10. It was furthermore submitted that a Constitution Bench of this Court in its decision in *Secretary, State of Karnataka and Ors.* v. *Umadevi 3 and Ors.*, [2006] 4 SCC 1 have opined that a case of this nature, the general ratio laid down therein would not be attracted, the exception was made in paragraph 53 thereof is squarely attracted in the instant case.

C 11. We have noticed hereinbefore that when the services of the respondent had not been regularized, she filed a contempt application. An extension was sought for by the appellant to comply with the said direction, which having been rejected, the respondent was asked to produce relevant documents showing the period during which she had worked as EDA D substitute in different post offices under South Calcutta Division from time to time prior to 7.5.1985. There is nothing on record to show that she brought such materials on records. The Tribunal also did not come to a definite finding that the respondent had completed 240 days in an year as a substituted EDA prior to issuance of the said circular letter dated 12th /13th November, 1987. It, however, proceeded to issue the directions which we have noticed E hereinbefore.

12. What was considered to be permissible at a given point of time keeping in view the decisions of this Court which had then been operating in the field, does no longer hold good. Indisputably the situation has completely F changed in view of a large number of decisions rendered by this Court in last 15 years or so. It was felt that no appointment should be made contrary to the statutory provisions governing recruitment or the rules framed in that behalf under a statute or the proviso appended to Article 309 of the Constitution of India.

G 13. Equality clause contained in Article 14 and 16 of the Constitution of India must be given primacy. No policy decision can be taken in terms of Article 77 or Article 162 of the Constitution of India which would run contrary to the constitutional or statutory schemes.

14. The question involved herein came to be considered by a H Constitution Bench of this Court in *Umadevi* (supra) wherein noticing a long

line of recent decisions and upon consideration of the question as to whether the right to life protected by Article 21 of the Constitution of India would include the right of employment as well, vis-a-vis application of principles of equality, it was inter alia held; A

> "Even at the threshold, it is necessary to keep in mind the distinction between regularisation and conferment of permanence in service jurisprudence. In *State of Mysore v. S.V. Narayanappa* this Court stated that it was a misconception to consider that regularisation meant permanence. In *R.N. Nanjundappa* v. *T. Thimmiah,* this Court dealt with an argument that regularisation would mean conferring the quality of permanence on the appointment. This Court stated: (SCC pp. 416-17, para 26) B C
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> "Counsel on behalf of the respondent contended that regularisation would mean conferring the quality of permanence on the appointment whereas counsel on behalf of the State contended that regularisation did not mean permanence but that it was a case of regularisation of the rules under Article 309. Both the contentions are fallacious. If the appointment itself is in infraction of the rules or if it is in violation of the provisions of the Constitution illegality cannot be regularised. Ratification or regularisation is possible of an act which is within the power and province of the authority but there has been some non-compliance with procedure or manner which does not go to the root of the appointment. Regularisation cannot be said to be a mode of recruitment. To accede to such a proposition would be to introduce a new head of appointment in defiance of rules or it may have the effect of setting at naught the rules." D E
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> In *B.N. Nagarajan* v. *State of Karnataka,* this Court clearly held that the words "regular" or "regularisation" 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 emphasised that when rules framed under Article 309 of the Constitution are in force, no regularisation 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 recognised therein have not been dissented to by this Court and on principle, we see no reason not to accept the proposition F G H

A 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 regularised and that it alone can be regularised and granting permanence of employment is a totally different concept and cannot be equated with regularisation.

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One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in *S.V. Narayanappa , R.N. Nanjundappa* and *B.N. Nagarajan* and referred to in para 15 above, of duly qualified persons in duly sanctioned vacant posts might have been made and the employees have continued to work for ten years or more but without the intervention of orders of the courts or of tribunals. The question of regularisation of the services of such employees may have to be considered on merits in the light of the principles settled by this Court in the cases abovereferred 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.

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G It is also clarified that those decisions which run counter to the principle settled in this decision, or in which directions running counter to what we have held herein, will stand denuded of their status as precedents.

15. Before considering the submission of Mr. Roy based upon paragraph H 53 of *Umadevi* (supra), we may notice that in *A. Umarani* v *Registrar,*

Cooperative Societies and Ors., [2004] 7 SCC 112, this Court held; A

> "No regularisation is, thus, permissible in exercise of the statutory power conferred under Article 162 of the Constitution if the appointments have been made in contravention of the statutory rules."

16. The short order which was the subject matter of decision of this B Court in *Debika Guha* (supra) also stood overruled in *Umadevi* (supra). We may at this stage also notice that the concept of 240 days to be the cut off mark for the purpose of regularisation of services came up for consideration of this Court in *Madhyamik Siksha Parishad, U.P.* v *Anil Kumar Mishra and Ors. etc.*, AIR (1994) SC 1638, wherein it was clearly laid down that the completion of 240 days of continuous service in a year would be attracted C only in a case where retrenchment has been effected without complying with the provisions contained in Section 25F of the Industrial Disputes Act , but would not be relevant for regularisation of service.

17. Submission of Mr. Roy is that the respondent has been discriminated D against inasmuch as although the services of Niva Ghosh were regularised, she had not been, may now be noticed.

18. There are two distinctive features in the present case, which are:-

(i) Equality is a positive concept. Therefore, it cannot be invoked E where any illegality has been committed or where no legal right is established.

(ii) According to the appellant the respondent having completed 240 days, does not fulfil the requisite criteria. A disputed question of fact has been raised. The High Court did not come to a positive finding F that she had worked for more than 240 days in a year.

19. Even otherwise this Court is bound by the Constitution Bench decision. Attention of the High Court unfortunately was not drawn to a large number of recent decisions which had been rendered by this Court.

20. The statement of law contained in para 53 of *Uma Devi* (supra) G cannot also be invoked in this case. The question has been considered by this Court in a large number of decisions. We would, however, refer to only a few of them.

21. In *Punjab Water Supply and Sewerage Board* v *Ranjodh Singh &* H

A *Ors.*, [2006] 13 SCALE 426 referring to paragraphs 15, 16 and 53 of Uma Devi (supra), this Court;

> "A combined reading of the aforementioned paragraphs would clearly indicate that what the Constitution Bench had in mind in directing regularisation was in relation to such appointments, which were
B irregular in nature and not illegal ones.

Distinction between irregularity and illegality is explicit. It has been so pointed out in *National Fetilizers Ltd. & Ors.* v. *Somvir Singh,* [2006] 5 SCC 493 in the following terms:

C "The contention of the learned counsel appearing on behalf of the respondents that the appointments were irregular and not illegal, cannot be accepted for more than one reason. They were appointed only on the basis of their applications. The Recruitment Rules were not followed. Even the Selection Committee had not been properly constituted. In view of the ban on employment, no recruitment was
D permissible in law. The reservation policy adopted by the appellant had not been maintained. Even cases of minorities had not been given due consideration.

The Constitution Bench thought of directing regularisation of the services only of those employees whose appointments were irregular
E as explained in *State of Mysore* v *S.V. Narayanappa, R.N. Nanjundappa* v. *T. Thimmiah and B.N. Nagarajan* v *State of Karnataka,* wherein this court observed: [Umadevi (3) case 1, SCC p. 24, para 16]

> "16. In *B.N. Nagarajan* v. *State of Karnataka* this Court clearly
F held that the words 'regular' or 'regularisation' 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."

G Judged by the standards laid down by this Court in the aforementioned decisions, the appointments of the respondents are illegal. They do not, thus, have any legal right to continue in service."

H {See also *State of Madhya Pradesh & Ors.* v. *Yogesh Chandra Dubey*

& Ors., [2006] 8 SCC 67 and *State of M.P. & Ors.* v. *Lalit Kumar Verma,* [2006] 12 SCALE 642.} A

22. The same principle has been reiterated recently in *Punjab State Warehousing Corp., Chandigarh* v. *Manmohan Singh & Anr.,* [2007] 3 SCALE 401.

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23. For the reasons aforementioned, the impugned judgment cannot be sustained. It is set aside accordingly. The appeal is allowed. In the facts and circumstances of this case, however, there shall be no order as to costs.

R.P. Appeal allowed.