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Regularisation of Temporary Employees:- A View Point of Judiciary

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Abstract

The Appointment on public post should be strictly in accordance with articles 14 (Equality before law) and 16 (Equality of opportunity in matters of public employment) of the constitution of India. Public employment i.e. jobs controlled by the government sector in a sovereign socialist secular democratic republic has to be as set down by the Constitution and the laws made there under. 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 unequal are not treated equals. Thus, any public employment has to be in terms of the constitutional scheme.[1]

Keywords: Public Employment, Constitutional Scheme, Equality of opportunity, Democratic Republic , Hallmark.

INTRODUCTION

The Supreme Court has repeatedly the deprecated regularization and absorption of persons working as part-time employees or on ad hoc basis[2] as it had become a common method of allowing back door entries.[3] It has been ruled that appointment made on contract basis or on daily wages or in violation of Rules, being void ab initio cannot be regularized. Deprecating the practice of making back door appointment to government jobs, the Apex Court has made a terse remark that "those who come by the back door should go through that door".[4] 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 recognised 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. Equality of opportunity is the hallmark, and the Constitution has provided also for affirmative

[1] *State of Karnataka v. Umadevi, AIR 2006 SC 1806.*

[2] *Karnataka State pvt. Colleges Stop-Gap Lecturers Association v. State of Karnataka, (1992) to SCC 29.*

[3] *Ashwani Kumar v. State of Bihar, AIR 1997 SC 1628.*

[4] Times of India, Dated 27-07-2007.

action to ensure that unequals are not treated as equals . Thus, any public employment has to be in terms of the constitutional scheme Central and State Governments have made Acts, rules and regulations for implementing the guarantees provided under Arts. 14, 16, 309, 315, 320 and 335 and any recruitment to service in the Union, States or their instrumentalities is governed by such Acts, regulations Due to the mandate of Art. 309, the entire process of rules and recruitment for services is controlled by detailed procedures which specify necessary qualifications, mode of appointment, etc. The Constitution does not envisage any employment outside this constitutional scheme and without following the requirements set down therein. The executive, or for that matter the court, in appropriate cases, would have only the right to regularise an appointment made after following the due procedure, even though a non-fundamental element of that process or procedure has not been followed. This right of the executive and that of the court would not extend to the executive or the court being in a position to direct that an appointment made in clear violation of the constitutional scheme, and the statutory rules made in that behalf, can be treated as permanent or can be directed to be treated as permanent.[5]

JudgmentsRelied:

Nihal Singh & others vs. State of Punjab & others.[6] In this case the supreme court was held that Uma Devi Judgment cannot became a licence for exploitation by the State and its instrumentalities and direct the State of Punjab to regularise the services of the appellants by creating necessary post within a period of three months from the date of Judgment . Upon Such regularisation, the appellants would be entitled to all the benefits of services attached to the post which are similar in nature already in the cadre of the Police services of the State.

In a recent case titled as **Amarkant Rai vs. State of Bihar and others[7]** the Supreme Court deviated from its own settled law in Uma Devi. The court in Amarkant Rai case (supra) while taking into account the fact the appellant has been working on daily wages for more than 29 years with the respondent-university, directed the respondents to regularize the services of the appellant.

Surinder Singh & others vs. Union of India and others.[8] In this case the Punjab and Haryana High Court held that all those petitioners who have served for a period of more than 8 years on contract basis they shall be deemed to have been confirmed on a regular basis and the remaining petitioners shall have the opportunity to participate in the regular selection process initiated by the society in future.

High Court of Tripura.[9] In this writ petitions the high court was disposed of with following directions The respondents shall form a committee to consider the cases of all the petitioners for regularization. Those petitioners who fulfill the following conditions shall be regularized:

Those petitioners who held necessary educational qualifications at the time of their initial engagement;

(ii) They had completed more than 10 years of engagement before the High Court for the first time granted them protection against termination;

(iii)The regularization shall be from the date of this judgment.

(iv) The exercise for regularization shell be completed within six months from today i.e. 9th March, 2021.

Union of India and Others vs. Ilmo Devi & Another.[10] In this case the Supreme Court has held that, part-time employs are not entitled to seek regularisation as they are not working against and sanctioned post. The court said it was a settled proposition of law, that regularisation could be only as per the policy declared by the state /

[5] *State of Mysore v. S.V. Narayanappa, (1967) 1 SCR 128.*
[6] *Civil Appeal No. 6315 of 2013*
[7] *2015 (3) SLR, 658.*
[8] *CWP No. 20514 of 2015*
[9] *WP(C) No. 1162/2018*
[10] *civil Appeal no. 5689-5690 of 2021*

government and "nobody can claim the regularisation as a matter of right". Framing of any scheme is no function of the court and is the sole prerogative of the government even the creation and / or sanction of the posts is also the sole prerogative of the government and the High Court, in exercise of the power under Article 226 of the constitution cannot issue writ of mandamus and / or direct to create and sanction the posts.

Principal Mehar Chand Polytechnic and Another vs. Anu Lamba and others.[11] The question involved in this case was regarding the legal right of regularisation of the respondents in services although appointed for a fixed period in project. Public employment is a facet of right to equality envisaged under Article 16 of the constitution of India. The State although is a model employer, Its right to create posts and recruit people therefore emanates from the statutes or statutory rules and / or rules framed under the provision appended to Article 309 of the constitution of India. The recruitment ruled are framed with a view to give equal opportunity to all the citizens of India and entitled for being considered for recruitment to vacant posts.

State of Haryana Vs.Piara Singh and Others.[12]

"The normal rule, of course, is regular recruitment through the prescribed agency but exigencies of administration may sometimes call for an Adhoc or temporary appointment to be made. In such a situation, effort should always be to replace such an Adhoc/temporary employee by a regularly selected employee as early as possible. Such a temporary employee may also compete along with others for such regular selection/appointment. If he gets selected, well and good, but if he does not, he must give way to the regularly selected candidate. The appointment of the regularly selected candidate cannot be withheld or kept in abeyance for the sake of such an ad hoc/temporary employee.

Secondly, another ad hoc or temporary employee should not replace an ad hoc or temporary employee; only a regularly selected employee must replace him. This is necessary to avoid arbitrary action on the part of the appointing authority.

Thirdly, even where an ad hoc or temporary employment is necessitated on account of the exigencies of administration, he should ordinarily be drawn from the employment exchange unless it cannot brook delay in which case the pressing cause must be stated on the file. If no candidate is available or is not sponsored by the employment exchange, some appropriate method consistent with the requirements of Article 16 should be followed. In other words, there must be a notice published in the appropriate manner calling for applications and all those who apply in response thereto should be considered fairly. An unqualified person ought to be appointed only when qualified persons are not available through the above processes. If for any reason, an Adhoc or temporary employee is continued for a fairly long spell, the authorities must consider his case for regularization provided he is eligible and qualified according to the rules and his service record is satisfactory and his appointment does not run counter to the reservation policy of the State.

With respect, why should the State be allowed to depart from the normal rule and indulge in temporary employment in permanent posts? This Court, in our view, is bound to insist on the State making regular and proper recruitments and is bound not to encourage or shut its eyes to the persistent transgression of the rules of regular recruitment. The direction to make permanent — the distinction between regularisation and making permanent, was not emphasised here — can only encourage the State, the model employer, to flout its own rules and would confer undue benefits on a few at the cost of many waiting to compete. With respect, the direction made in paragraph 50 of **Piara Singh** (supra) is to some extent inconsistent with the conclusion in paragraph 45 therein. With great respect, it appears to us that the last of the directions clearly runs counter to the constitutional scheme of employment recognised in the earlier part of the decision. Really, it cannot be said that this decision has laid down the law that all Adhoc, temporary or casual employees engaged without

[11] (2006) 7SCC161

[12] *(1992)3SCR826*

following the regular recruitment procedure should be made permanent."

In **Director, Institute of Management Development, U.P. Vs. Pushpa Srivastava (Smt.),**[13] the apex Court held that since the appointment was on purely contractual and Adhoc basis on consolidated pay for a fixed period and terminable without notice, when the appointment came to an end by efflux of time, the appointee had no right to continue in the post and to claim regularization in service in the absence of any rule providing for regularization after the period of service. This Court noticed that when the appointment was purely on ad hoc and contractual basis for a limited period, on the expiry of the period, the right to remain in the post came to an end. This Court stated that the view they were taking was the only view possible and set aside the judgment of the High Court, which had given relief to the appointee.

In **Madhyamik Shiksha Parishad, U.P. Vs. Anil Kumar Mishra and Others**, a three-judge bench of this Court held that ad hoc appointees/temporary employees engaged on ad hoc basis and paid on piece-rate basis for certain clerical work and discontinued on completion of their task, were not entitled to reinstatement or regularization of their services even if their working period ranged from one to two years. This decision indicates that if the engagement was made in a particular work or in connection with particular project, on completion of that work or of that project, those who were temporarily engaged or employed in that work or project could not claim any right to continue in service and the High Court cannot direct that they be continued or absorbed elsewhere. In **State of Himachal Pradesh Vs. Suresh Kumar Verma**,[14] a three- Judge Bench of this Court held that a person appointed on daily wage basis was not an appointee to a post according to Rules. On his termination, on the project employing him coming to an end, the Court could not issue a direction to re-engage him in any other work or appoint him against existing vacancies. This Court said: "It is settled law that having made rules of recruitment to various services under the State or to a class of posts under the State, the State is bound to follow the same and to have the selection of the candidates made as per recruitment rules and appointments shall be made accordingly. From the date of discharging the duties attached to the post, the incumbent becomes a member of the services. Appointment on daily wage basis is not an appointment to a post according to the Rules." Their Lordships cautioned that if directions are given to re-engage such persons in any other work or appoint them against existing vacancies, "the judicial process would become another mode of recruitment dehors the rules."

In Umarani vs. Registrar, Cooperative Societies and Others,[15] A three- judge bench held that the State could not invoke its power under Article 162 of the Constitution to regularise such appointments. This Court also held that regularisation is not and cannot be a mode of recruitment by any State within the meaning of Article 12 of the Constitution of India or any body or authority governed by a statutory Act or the Rules framed there under. Regularisation furthermore cannot give permanence to an employee whose services are ad hoc in nature. It was also held that the fact that some person shad been working for a long time would not mean that they had acquired aright for regularization.

This decision kept in mind the distinction between 'regularisation' and 'permanency' and laid down that regularisation is not and cannot be the mode of recruitment by any State. It also held that regularization couldn't give permanence an employee whose services are adhoc in nature.

This Court in **State of Rajasthan & Ors. v. Daya Lal & Ors** .,[16] has considered the scope of regularisation of irregular or part-time appointments in all possible eventualities and laid down well-settled principles relating to regularisation and parity in pay relevant in the context of the issues involved therein. "The High Courts, in exercising power under Article 226 of the Constitution will not issue directions for regularisation, absorption or permanent continuance, unless the employees claiming regularisation had been appointed in pursuance of a regular recruitment in accordance with relevant rules in an open competitive process, against sanctioned vacant posts. The equality clause contained in Articles 14 and 16 should be

[13] ***(1992 (3) SCR 712)***
[14] *(1996 (1) SCR 972)*
[15] *(2004 (7) SCC 112)*
[16] AIR 2011 SC 1193

scrupulously followed and Courts should not issue a direction for regularisation of services of an employee, which would be violative of the constitutional scheme. While something that is irregular for want of compliance with one of the elements in the process of selection which do not go to the root of the process, can be regularised, back door entries, appointments contrary to the constitutional scheme and/or appointment of ineligible candidates cannot be regularised.

Mere continuation of service by a temporary or ad hoc or daily-wage employee, under cover of some interim orders of the court, would not confer upon him any right to be absorbed into service, as such service would be "litigious employment". Even temporary, ad hoc or daily-wage service for a long number of years, let alone service for one or two years, will not entitle such employee to claim regularisation if he is not working against a sanctioned post. Sympathy and sentiment cannot be grounds for passing any order of regularisation in the absence of a legal right.

"Even where a scheme is formulated for regularisation with a cut-off date (that is a scheme providing that persons who had put in a specified number of years of service and continuing in employment as on the cut-off date), it is not possible to others who were appointed subsequent to the cut-off date, to claim or contend that the scheme should be applied to them by extending the cut-off date or seek a direction for framing of fresh schemes providing for successive cut-off dates.

Part-time employees are not entitled to seek regularisation, as they are not working against any sanctioned posts. There cannot be a direction for absorption,regularisation
or permanent continuance of part-time temporary employees.

Part-time temporary employees in government-run institutions cannot claim parity in salary with regular employees of the Government on the principle of equal pay for equal work. Nor can employees in private employment, even if serving full time, seek parity in salary with government employees. The right to claim a particular salary against the State must arise under a contract or under a statute." (Emphasis added)

In B.N. Nagarajan & Ors. Vs. State of Karnataka & Ors.[17] the apex 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 of India 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 the apex Court and on principle and there is no reason not to accept the proposition as enunciated in the above decisions.

State of Karnataka vs. M.L.Kesari :[18] The one-time exercise should consider all daily-wage/ad-hoc/those employees who had put in 10 years of continuous service as on 10.4.2006 without availing the protection of any interim orders of courts or tribunals. If any employer had held the one-time exercise in terms of para 53 of Umadevi but did not consider the cases of some employees who were entitled to the benefit of para 53 of Umadevi, the employer concerned should consider their cases also, as a continuation of the one-time exercise. The one time exercise will be concluded only when all the employees who are entitled to be considered in terms of Para 53 of Umadevi, are so considered. The object behind the said direction in para 53 of Umadevi is two- fold. First is to ensure that those who have put in more than ten years of continuous service without the protection of any interim orders of courts or tribunals, before the date of decisionin Umadevi was rendered, are considered for regularization in view of their long service. Second is to ensure that the departments/instrumentalities do not perpetuate the practice of employing persons on daily-wage/ad-hoc/casual for long periods and then periodically regularise them on the ground that they have served for more than ten years, thereby defeating the constitutional or statutory provisions relating to recruitment and appointment. The true effect of the direction is that all persons who have worked for more than

[17] (1979) 3 SCR 937)
[18] SLP (C) No. 15774 of 2006

ten years as on 10.4.2006 (the date of decision in Umadevi) without the protection of any interim order of any court or tribunal, in vacant posts, possessing the requisite qualification, are entitled to be considered for regularisation. The fact that the employer has not undertaken such exercise of regularisation within six months of the decision in Umadevi or that such exercise was undertaken only in regard to a limited few, will not disentitle such employees, the right to be considered for regularisation in terms of the above directions in Umadevi as a one-time measure.

Conclusion:

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 Umadevi judgment. In that context, the Union of India, the State Government sand their instrumentalities should take steps to regularize 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 courts or of tribunals and should further ensure that regular recruitments are undertaken to fill those vacant sanctioned posts that require being 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. Weal so 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. The guidelines laid down in various judgments are:

- Regularisation cannot be a mode of recruitment.
- The concept of regularisation and permanent employment is different. The Supreme Court held 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 can be regularised but a grant of the permanence of employment is a totally different concept and cannot be equated with regularisation.
- Right of Regularization vests with Court and Executive.
- Where a temporary or ad-hoc appointment is continued for long period, the court presumes that there are a need and warrant for regular post.
- If a temporary employee gets selected, well and good, but if he does not, he must give way to the regularly selected candidate. The appointment of the regularly selected candidate cannot be withheld or kept in abeyance for the sake of such an ad hoc/temporary employee.
- Another ad hoc or temporary employee should not replace an ad hoc or temporary employee;
- If for any reason, an ad hoc or temporary employee is continued for a fairly long spell, the authorities must consider his case for regularisation provided he is eligible and qualified according to the rules and his service record is satisfactory and his appointment does not run counter to the reservation policy of the State.
- Since the appointment was on purely contractual and ad hoc basis on consolidated pay for a fixed period and terminable without notice, when the appointment came to an end by efflux of time, the appointee had no right to continue in the post and to claim regularization in service in the absence of any rule providing for regularization after the period of service.
- If the engagement was made in a particular work or in connection with particular project, on completion of that work or of that project, those who were temporarily engaged or employed in that work or project could not claim any right to continue in service and the High Court cannot direct that they be continued or absorbed elsewhere.
- Rules of recruitment to various services under the State or to a class of posts under the State, the State is bound to follow the same and to have the selection of the candidates made as per recruitment rules and appointments shall be made accordingly.
- 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.

- High Courts acting under article 226 of the Constitution of India, should not ordinarily issue directions for absorption, regularisation, or permanent continuance unless the recruitment itself was made regularly and in terms of the constitutional scheme.
- Illegal appointments are a nullity in law only irregular appointments can be regularised.

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