

CENTRAL ADMINISTRATIVE TRIBUNAL
MUMBAI BENCH, MUMBAI

ORIGINAL APPLICATION No. 55/2012

Date of Decision:- 25.11.2019

CORAM: R. VIJAYKUMAR, MEMBER(A)
RAVINDER KAUR, MEMBER (J)

- 1 Bandopant Balu Kamble
Date of Birth : 01.05.1966
Working as Casual Labour
(Sweepers)
Commissioner of Income Tax -I,
Kolhapur
Residing at
A/P. Gharpan Tal. Phanhala
Dist Kolhapur
- 2 Rajaram Dhondiba Chougule,
Date of Birth 01.01.1975
Working
as Casual Labour
(Sweeper)
Commissioner of Income Tax -I,
Kolhapur
Residing at
C/o. Bhupal Papu Patil,
Rajarampuri, Shivaji University
Kolhapur.
- 3 Bharat Pandurang Shinde
Date of Birth : 23.01.1982
Working
as Casual Labour
(Sweeper/Cleaner)
Commissioner of Income Tax -II,
Ward 2(2) Kolhapur
Residing at
A/P. Shiraoli (P), Tal.
Hatkanagale, Dist. Kolhapur
- 4 Lakhan Vishwanath Mane,
Date of Birth
27.02.1989
Working as Casual Labour
(Sweeper)

Commissioner of Income Tax -II,
Kolhapur
Residing at
765, "C" Ward Bhol Galli,
Raviwar Peth,
Kolhapur.

- 5 Kumar Vasant Rohile
Date of Birth : 28.05.1982
Working
as Casual Labour (Sweeper)
Commissioner of Income Tax-II,
Kolhapur,
Residing at A/P. Sangrul,
Tal. Karveer, Kolhapur.
6. Hitesh Laxman Walade,
Date of Birth : 26.10.1986
Working as Casual Labour
(Sweeper)
Commissioner of Income Tax-II,
Kolhapur
Residing at Kolhapur.
C/o. Rahul Walia
3, Sailor Bldg, D.N. Road,
Opp. Flora Fountain, Fort.
7. Mahamad Manikso Nadaf
Date of Birth : 17.12.1973
Working as Casual Labour
(Sweeper)
Commissioner of Income Tax-I,
Kolhapur
Residing at
A/P. Kaulage, Tal Kagal
Dist. Kolhapur.
8. Tukaram Mohan Zodage
Date of Birth : 10.04.1989
Working as Casual Labour
(Sweeper)
Commissioner of Income Tax-II,
Kolhapur
Residing at
Plot No.53/5, Rajendra Nagar,
Dist. Kolhapur.
- ... Applicants

(By Advocate Shri R.G. Walia)

VERSUS

- 1 Union of India through
Chief Commissioner
Aayakar Bhavan
12, Sadhu Vaswani Chowk
Pune - 411 001.
- 2 Commissioner of Income Tax-I
Kolhapur
"Aayakar Bhavan,
31/C-2,
E Ward,
Tarabai Park,
Kolhapur - 416 003.
3. Om Ganesh Typing
& Zerox Center
Through its Proprietor
Mr. Desai having address at
333, 'E' Prabhakar Plaza
Gala N. B.L.G.- 7, Station Road,
Kolhapur - 416 001. ... **Respondents**

(By Advocate Shri N.K. Rajpurohit)

Reserved on: 12.02.2019

Pronounced on: 25.11.2019

ORDER

PER: RAVINDER KAUR, MEMBER(J)

The applicants have filed the present OA under Section 19 of the Administrative Tribunals Act seeking the following reliefs:

"8(a) This Hon'ble Tribunal may be pleased to call for the records and proceedings of the case and after going through the same, be pleased to order and direct the Respondents to regularize the Applicants' services from their initial dates of appointment with all consequential benefits.

8(b) This Hon'ble Tribunal may be pleased to hold and declare that the Applicants are entitled to be placed in regular scale of pay w.e.f. their initial date of appointment or any other date as his Hon'ble Tribunal

may deem fit and necessary and that the Applicants are entitled to arrears of salary and fixation of pay, consequent thereto.

8(c) This Hon'ble Tribunal may be pleased to hold and declare that the Applicants are entitled to count their whole service w.e.f. their initial date of appointment as qualifying service for the purpose of pension and other retirement benefits.

8(d) This Hon'ble Tribunal be pleased to hold and declare that the granting of work of Sweeping to Respondent No. 3 is illegal and wrong and be pleased to direct the Respondent to discontinue the contract of Respondent No. 3 if any.

8(e) Any other and further orders as this Hon'ble Tribunal may deem fit, proper and necessary in the facts and circumstances of the case;

8(f) Cost of this Original Application be provided for."

2. The applicants are seeking regularization of their services from the initial dates of their appointment i.e. 18.01.2012 with all consequential benefits. It is claimed by the applicants that after clearing interview they had joined the office of Commissioner of Income tax - I and II at Kolapur as Sweepers on daily wages/contract basis and have been engaged continually till filing of present OA as on 18.01.2012. They have relied upon Annex A-1, the chart showing their service particulars i.e. the date of joining etc. Annex A-2 is the character certificate dated 26.05.2011 issued by Administrative Officer, Income Tax Office - I Kolapur in favour of one of the applicants i.e. Rajaram Dhondiba Chougule. It is claimed that

similar certificates are also issued to the other applicants. Further the applicants have been working as Sweepers, Night Watchmen and Cleaners. The applicants claim that the respondents are exploiting and forcing them to work through some contract agency i.e. Respondent no. 3, who has been awarded contract without any advertisement or circular. Further, that the work of sweeping and to maintain cleanliness is a permanent job thus the applicants must be absorbed in the service by the respondents. The applicants further claim that Respondent no. 3 i.e. OM Ganesh typing and Xerox Centre, who is stated to be sister concern of one Venkatesh Agencies made an application dated 25.10.2011 Annex A-4 to the Commissioner, Income Tax -I, Kolapur with an offer for providing Sweeper and Watchman on contract basis. It is claimed that Respondent no. 3 along with Venkatesh Agency is involved in supply of workers to the Respondent no. 1 and 2 and that they are supplying only those persons who are already working on daily wages which is illegal. It is further stated that since the respondents are in continuous need of workers, now they are

engaging the applicants through the agency Respondent no. 3. The applicants claim that they have already put in more than 240 days under the Dept of Commissioner of Income Tax - I Kolhapur and are engaged against regular posts or otherwise. The posts against which they are working are deemed to be substantive and permanent posts, therefore, they are entitled for regularization of their service from the original date of their engagement. It is further the claim of the applicants that a temporary employee/worker cannot be replaced by another temporary employee or agency as done in the present case. The action of the respondents in not regularizing the services of the applicants inspite of 240 days in service has been challenged on the ground that non-regularization of the applicants is illegal and unfair and violative of Article 14, 16 and 21 of the constitution of India, arbitrary and malicious as well as contrary to the law.

3. The respondents No. 1 and 2 have filed Affidavit in reply whereby they have denied the claim of the applicants that the posts against which they are working are deemed to be

substantive and permanent posts. The applicants were never taken against any regular posts. Further, after the cadre restructuring came into effect from 01.07.2001, the regular posts of Sweepers, Cleaning, Farrash, Watchman(Post of Group 'D') etc. have been abolished permanently in view of the recommendations of 6th CPC and the work of cleaning has thus been done through service contracts. The persons serving as Group 'D' employees have been merged into the cadre of Multi Taking Staff(MTS). The cadre of MTS has 100% direct recruitment through Staff Selection Commission. The present Group 'D' staff merged into MTS will either retire or get promoted and as such there is no Group 'D' in existence. It is denied that the applicants are entitled to claim regularization against the regular post. The applicants have been working only intermittently in the Department as and when their services were required. Further, the services of the applicants have been hired on contract and non permanent basis as per requirement for a specific period and they were not on this office establishment at any point of time.

4. It is claimed that the outsourcing of work has been done in terms of policy decisions taken by the Govt of India which is binding upon the Respondents. And the contract has been laid down under GFR 2005 so the same cannot be termed as irregular or illegal. The claim of the applicants that they are being forced to work under the agency has been denied.

5. Further that the appointments of the applicants were made on contract basis and the procedure followed was different from the laid down procedure for regular recruitment of employees for which the powers are not vested in the CIT. None of the applicants were hired on regular basis but on daily basis as and when required. It is specifically denied that the applicants were working as Sweepers on daily wage/contract basis continuously till the filing of the present OA. The applicants have claimed that they had to undergo police verification and submitted their documents such as proof of identity etc. The respondents have admitted that these documents were taken before allotting contract of cleaning/sweeping work and the police verification was done as the applicants

would have access to the entire office premises, therefore, it was necessary to check their background before allotting the contract.

6. The allegations that the respondents forced the applicants to work through respondent no. 3 or that Respondent no. 3 was appointed as a contractor without issuing any advertisement or circular have been denied.

7. It is stated that applicants were not given contract against any vacant post and as such cannot claim regularization of service as a matter of right. An offer has been made by the respondent no. 2 to protect the interest of the applicants by entering into a contract with the respondent no. 3 which gives all the benefits available to the applicants and further provides for benefits which were not available to them hitherto.

8. The contentions of the applicants vide para 4.8 that they have put in 240 days of service and their non-regularization is contrary to the rules, is denied by the respondents. The applicants were aware of the fact that the arrangement between them and respondents was contractual and they were given the benefits

available under the contract. Further that it is required to be noticed that services of the applicants are required only intermittently as per the requirement of Income Tax Department. The applicants have always chosen to enter into fresh contract knowing fully well that they cannot be given regular appointment. Further, that the applicants do not come under the purview of the scheme noted by the department in compliance of Supreme Court's Judgment in the case of Secretary State of Karnataka vs Umadevi & Ors. The respondents have relied upon the following judgments:

a) B. N. Nagrajan & Ors. V State of Karnataka & Ors. (1979) 3

SCR 937

b) State of Mysore v S. V. Narayanappa 1967 (1) SCR 128

c) R. N. Nanjundapa Vs. T. Thimmiah & Anr. (1972) 2 SCR

799

9. It is stated by the respondents that the facts and circumstances of the case, the applicants do not deserve any relief and OA deserves to be dismissed.

10. The applicants filed rejoinder and reaffirmed their assertions in terms of OA.

11. We have heard arguments addressed by Shri R.G. Walia, learned counsel for the applicants and Shri N. K. Rajpurohit, learned counsel for the respondents.

12. Learned counsel for applicant has argued that Group 'D' posts have not been abolished vide 6th CPC, but converted into Multi Tasking Staff (MTS). It is submitted that earlier the applicants (Group 'D' employees), were working under the Respondents and at present they are working under the contractor, Respondent No. 3, hired by the official respondents outsourcing the services of sweeping and cleaning. He has argued that the Respondents are taking the same services of the applicants even at present but now through the Agency, Respondent No. 3 and as such ad-hoc status of the applicants has been replaced with the ad-hoc status under the Respondent no. 3 though they are still rendering the same services **to the official respondents** which they were doing prior to outsourcing of these services to Respondent no. 3. It is stated that the scheme introduced in the year 1988 for granting temporary status to ad-hoc employees who have completed service of 240 days, is still

in operation and as such the applicants who have worked for a period of more than 240 days under the Respondents are entitled to be regularized along with wages in proper pay scales which are being paid to the regular employees. In support of his contention, learned counsel for the applicant has relied upon the judgment of Hon'ble Apex Court in the case of State of Haryana & Ors vs Piara Singh & Ors. (1992) 4 SCC 118 whereby on the issue of regularization of ad-hoc/temporary Government Employees, it was held that *"those eligible and qualifying and continuing in service satisfactory for long period have a right to be considered for regularization. Long continuance in service gives rise to a presumption about need for a regular post. In case of long continuance in service, presumption for regular need of service would oblige appointing authority concerned to consider with positive mind feasibility of regularization"*.

13. It is submitted that the applicants who have worked for a substantial period with the respondents cannot be thrown out of the public service and Union of India needs to act as a model employer and to grant the temporary status and thereafter to regularize their services in

view of the judgment of Hon'ble Apex Court in the case of Piara Singh(supra). The applicants have further agitated that the engagement of Respondent no. 3 is illegal as the Respondents had not issued any advertisement nor invited tenders to this effect.

14. On the other hand, learned counsel for the respondents has argued that after cadre restructuring in July, 2001, the post of Group 'D' have been abolished by a conscious decision for the Government and now vide 6th Pay Commission report, the Group 'D' employees were absorbed in Group 'C' cadre. Group 'D' posts are no more surviving. Further that in September, 2011, directions were received from CBDT, New Delhi to discontinue individual contracts for cleaning and sweeping and to outsource these services through contractor and it is under these circumstances, the services were outsourced to Respondent no. 3. Further, that since there is no Group 'D' post available, the applicants cannot be regularized. It is further argued that the similarly situated employees had approached this Tribunal vide OA NO. 622/2011 seeking regularization, however, in view of the

law laid down by the Hon'ble Apex Court in the case of Secretary, State Of Karnataka and Others vs Umadevi and Others, (2006) 4 SCC 1 and Official Liquidator vs Dayanand reported in (2008) 10 SCC 1 dismissed the OA vide order dated 10.09.2013. It is further submitted that the judgment of Hon'ble Apex Court in the case of **Piara Singh**(supra) has been discussed by the Hon'ble Apex Court in its later judgment passed by constitutional in the case of **Umadevi**(supra) and held that for the regularization there needs to be sanctioned posts available whereas in the present case, since the Group 'D' posts itself have been abolished, there is no question of availability of the sanctioned posts. It is further argued that the services of the applicants were hired on contract basis from time to time and they were well aware of the fact that their services were temporary and were only for a particular duration as mentioned in the contract and also that at no point of time any assurance had been given to the applicants that their services will be regularized at any point of time in future.

15. Learned counsel for the applicant has submitted that the judgment of Hon'ble Apex Court in the case of **Piara Singh**(supra) still holds good and the same has not been overruled by the Hon'ble Apex Court in the case of **Umadevi**(supra). It is claimed that Group 'D' posts have not abolished but have been redesignated as Multi Tasking Staff. It is further argued that as held by the Hon'ble Apex Court in the case of **Piara Singh**(supra) in para 46 that an ad-hoc or temporary employee should not be replaced by another ad-hoc or temporary employee, he must be replaced only by a regularly selected employee so as to avoid the arbitrary selection on the part of the appointing authority. On this aspect, learned counsel for the respondents has argued that the Hon'ble Apex Court in the case of Umadevi(supra) has discussed its judgment in the case of Piara Singh(supra) in para 20 and has drawn our attention to certain relevant observations made therein in respect of its own judgment in the case of Piara Singh (supra). He has further submitted that in view of the circumstances referred above, the OA is lacking in merit and

is liable to be dismissed.

16. After hearing the submissions of both the parties, we have carefully perused the record.

17. At the outset it is observed that the applicant has claimed multiple reliefs in non-compliance of Rule 10 of Central Administrative Tribunal (Procedure Rules). The reliefs claimed at 8(d) in the OA is different from the other reliefs claimed and has no bearing upon them as the same challenges the validity of contract awarded to Respondent no. 3 for the work of sweeping. Hence, the OA to this effect is not maintainable and the relief claimed vide para 8(d) is declined, however, with liberty to the applicant, if required, to challenge the same vide a separate OA.

18. It is the argument of learned counsel for the applicant that Group 'D' posts have not been abolished as claimed by the respondents and instead, they have been converted into MTS. Further the applicants are doing same task which

they were doing earlier. The only difference is that earlier they were doing under the respondents and now though with the respondents but through outsource agency i.e. Respondent No. 3. However, it has nowhere been denied by the applicants that they had been on contractual appointment with the Official Respondents from time to time. The applicants have relied upon Annex A-1 containing the dates of joining of each of the applicant with the respondents, however, this is not an authenticated document. No official document to this effect has been placed on record. The applicant have also not placed on record any document that they were given temporary employment as claimed by them. They have only placed on record Annexure A-2 i.e. the Character Certificate dated 26.05.2011 of applicant No. 2 , Rajarm Dhondiba Chougale which is reproduced as under :

"CHARACTER CERTIFICATE"

This is to certify that I personally know Shri Rajaram Dhondiba Chougale, resident of 128-EG, Ramarampuri, Shivaji University Road, Kolhapur from last 4 years. He is working in the office of Commissioner of Income-Tax-I, Kolhapur as Daily Wage Worker. He is found to be sincere & hard worker. He bears Good Moral Character.

This certificate is issued on the request of Shri Rajaram

Dhondiba Chougule.”

19. The above character certificate only reflects that applicant no. 2 was working with the respondents on daily basis. This certificate was issued on 26.05.2011, however, it does not find mention since when the applicant No.2 is working with the respondents in daily wages. Even assuming that he is working there since 2007, there is nothing on record that the applicant No. 2 or any other applicant were appointed on contract basis against the sanctioned post. The respondents have categorically denied that the applicants were working continuously with them as sweepers on daily wages/contract basis. It is stated in para 8 of their reply that Annex A-1 is only showing the date of joining i.e. in fact the date of beginning of contract. Applicant No. 2 was not in contract with the Commissioner of Income Tax, Kohlapur during the period 19.11.2008 to 30.01.2010. The effective date of hiring his services is 01.02.2010. Regarding Annex A-2, the character certificate of Applicant No. 2, it is submitted that it only shows that he was working on daily wages and

nothing more can be inferred from the same. The respondents have also during the course of arguments drawn out attention to Annex A-3, the memorandum dated 02.12.1998 whereby the services of applicant No. 2 for the work of sweeping and maintaining cleanliness were hired w.e.f 03.12.1998 for a period of 6 months to be renewed in case his work was found satisfactory. As per Annex A-3, the services of the applicant were hired on contract on temporary basis. The contract for work of sweeping and cleaning was given to applicant No. 1 for a period of 6 months which could be renewed if his performance was found satisfactory. Clause 5 of the memorandum clearly finds mention that he was hired on contractual basis and he is neither entitled for any Govt service nor for any benefits that a govt servant entails. These terms and conditions of the contract were accepted by the applicant/s voluntarily.

20. The contention of the applicants that Group 'D' posts have not been abolished but instead converted to Multi Tasking Staff has been repelled by the respondents as it is brought to our notice that the Govt of India had

taken a conscious decision to abolish the post of Group 'D' after the finalization of recommendations of 6th CPC and there is no fresh recruitment in Group 'D'. Since then the persons serving as Group 'D' employees in view of this decision of Government have been merged in the cadre of Multi Tasking Staff. The cadre of MTS has 100% direct recruitment through Staff Selection Commission. As stated by respondents, the Group 'D' staff already working on the post merged into MTS will either retire or get promoted. In these circumstances, there is no Group 'D' cadre in existence after the finalization of the recommendations of 6th CPC. Therefore, the services such as sweeping cleaning, security etc. are required to be hired through service contracts only. The respondents themselves cannot hire the services of such persons directly anymore.

21. Learned counsel for the applicants claims that contention of Respondents regarding abolition of Group 'D' post is irrelevant as the applicants are still working as Sweepers and Night Watchmen. In other words, the applicants have not disputed that Group 'D' posts are

abolished but they are harping on the fact that applicants are working as Sweeper and Watchman continuously either with the official respondents or with the outsourced Agency. Though the respondents have brought on record vide memo Annex A-3 that the services of the applicants were engaged temporarily on contract basis, the applicants are relying upon the judgment of Hon'ble Apex Court in the case of Piara Singh wherein it is observed that an ad-hoc or temporary employee should not be replaced by another ad-hoc or temporary employee; he must be replaced only by a regularly selected employee. We have carefully gone through the aforesaid judgment however though we fully agree with the said judgment and the observations made in para 46, however, the same are not applicable to the facts and circumstances of the present case, as when the aforesaid judgment was delivered the Group 'D' posts were still existing whereas when the present OA has been filed in June, 2012, in view of the recommendations of 6th CPC report, the Group 'D' posts are no more in existence and therefore, despite the fact that the applicants were

appointed ad-hoc for a period stipulated under contract and on the abolition of these posts and as per the directions from CBDT, New Delhi in September 2011, the individual contracts of cleaning and sweeping were discontinued and are being outsourced through a contractor. We have carefully gone through para 20 of the judgment referred above which reads as under:-

" 20. We may now consider, State of Haryana Vs. Piara Singh and Others [1992] 3 SCR 826]. There, the court was considering the sustainability of certain directions issued by the High Court in the light of various orders passed by the State for the absorption of its ad hoc or temporary employees and daily wagers or casual labour. This Court started by saying:

"Ordinarily speaking, the creation and abolition of a post is the prerogative of the Executive. It is the Executive again that lays down the conditions of service subject, of course, to a law made by the appropriate legislature. This power to prescribe the conditions of service can be exercised either by making rules under the proviso to Article 309 of the Constitution or (in the absence of such rules) by issued rules/instructions in exercise of its executive power. The court comes into the picture only to ensure observance of fundamental rights, statutory provisions, rules and other instructions, if any governing the conditions of service"

This Court then referred to some of the earlier decisions of this Court while stating:

"The main concern of the court in such matters is to ensure the rule of law and to see that the Executive acts fairly and gives a fair deal to its employees consistent with the requirements of Articles 14 and 16. It also means that the State should not exploit its employees nor should it seek to take advantage of the helplessness and misery of either the unemployed persons or the employees, as the case may be. As is often said, the State must be a model employer. It is for this reason, it is held that equal pay must be given for equal work, which is indeed one of the directive principles of the Constitution. It is for this very reason it is held that a person should not be kept in a temporary or ad hoc status for long. Where a temporary or ad hoc appointment is continued

for long the court presumes that there is need and warrant for a regular post and accordingly directs regularization. While all the situations in which the court may act to ensure fairness cannot be detailed here, it is sufficient to indicate that the guiding principles are the ones stated above."

This Court then concluded in paragraphs 45 to 50:

"The normal rule, of course, is regular recruitment through the prescribed agency but exigencies of administration may sometimes call for an ad hoc 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, an ad hoc or temporary employee should not be replaced by another ad hoc or temporary employee; he must be replaced only by a regularlyselected employee. This is necessary to avoid arbitrary action on the part of the appointing authority.

Thirdly, even where an ad hoc or temporaryemployment is necessitated on account of the exigencies of administration, he should ordinarily be drawnfrom the employment exchange unless it cannot brook delay inwhich 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 methodconsistent with the requirements of Article 16 should be followed. In other words, there must be a noticepublished in the appropriate manner calling forapplications and all those who apply in response thereto should be considered fairly.

An unqualified person ought to be appointed onlywhen qualified persons are not available through the above processes.

If for any reason, an ad hoc or temporary employeeis continued for a fairly long spell, the authorities must consider his case for regularization provided he iseligible and qualified according to the rules and his service record is satisfactory and his appointment does notrun 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 regularization and making permanent, was not emphasized 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) are 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 recognized in the earlier part of the decision. Really, it cannot be said that this decision has laid down the law that all ad hoc, temporary or casual employees engaged without following the regular recruitment procedure should be made permanent.

In view of the above referred observations made by Hon'ble Apex Court in the case of Uma Devi (supra), the contention of the applicants that ad-hoc cannot be replaced by ad-hoc and the applicants who were employed/hired on contract basis are required to be regularised is of no consequence. Even otherwise since the applicants belong to Group 'C' which is no longer in existence and stand abolished after the 6th CPC. Therefore, the applicants who are/worked admittedly ad-hoc/contractual employees cannot be replaced by regularly selected employees as on date in view of the development which took place subsequent to the judgment in the case of Piara Singh (supra).

22. The Hon'ble Apex Court in the case of

National Fertilizers Ltd. & Ors vs Somvir

Singh (2006) 5 SCC 493 has made the following observations in para 18:

"Regularisation, furthermore, is not a mode of appointment. If appointment is made without following the Rules, the same being a nullity the question of confirmation of an employee upon the expiry of the purported period of probation would not arise. The Constitution Bench in Umadevi (supra) made a detailed survey of the case laws operating in the field."

23. The Hon'ble High Court at MUMBAI in WP NO. 2149/2012 also dealt with the identical issue and relying upon the judgment of Hon'ble Apex Court in the case of Umadevi (supra) had set aside the order of this Bench of the Tribunal in OA NO.320/2006 and OA No. 569/2008 to 572/2008 while making the following observations in para 18 respectively:-

"18. It may be that the respondents were recommended by the Employment Exchange upon requisitions made by the petitioners. In fact the requisition itself indicates that the vacancies for which the requisitions are called are temporary but are likely to be continued beyond one year. The respondents were thus appointed and continued to work in vacancies which are temporary in nature. The vacancies continued to be temporary for years together in which vacancy the respondents worked. Later on, as indicated earlier, the employees were engaged through a contractor. The respondents in effect seek a direction that these temporary vacancies which have continued as such for so long number of years may be treated as permanent posts thereby regularising their services in these posts. We are afraid that it is not possible for us to direct the respondents to treat these temporary vacancies as permanent sanctioned posts. The respondents contended that there is an employer-employee relationship between the petitioners and the respondents and that the contractor is appointed only to deprive the respondents the benefits of regularization. In view of the law

laid down by the Apex Court in the case of Umadevi, once we come to the conclusion that the appointment of the respondents are not against vacant sanctioned posts, the question of regularization of their services in accordance with the directions contained in para 53 of Umadevi's case does not arise."

24. The Hon'ble Apex Court in the case of **Umadevi** (supra) has also made the following observations:

"2. 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.

3. But, sometimes this process is not adhered to and the Constitutional scheme of public employment is by-passed. 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 Courts, seeking directions to make them permanent in their posts and to prevent regular recruitment to the concerned posts. 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 of India. Whether the wide powers under Article 226 of the Constitution is 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 High Courts in the scheme of things and their wide powers under Article 226 of the Constitution of India 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.

4. This Court has also on occasions issued directions which could not be said to be consistent with the Constitutional scheme of public employment. Such directions are issued presumably on the basis of equitable considerations or individualization of justice. The question arises, equity to whom? Equity for the handful of people who have approached the Court with a claim, or equity for the teeming millions of this country seeking employment and seeking a fair opportunity for competing for employment? When one side of the coin is considered, the other side of the coin, has also to be considered and the way open to any court of law or justice, is to adhere to the law as laid down by the Constitution and not to make directions, which at times, even if do not run counter to the Constitutional scheme, certainly tend to water down the Constitutional requirements. It is this conflict that is reflected in these cases referred to the Constitution Bench.

10. In addition to the equality clause represented by Article 14 of the Constitution, Article 16 has specifically provided for equality of opportunity in matters of public employment. Buttressing these fundamental rights, Article 309 provides that subject to the provisions of the Constitution, Acts of the legislature may regulate the recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of a State. In view of the interpretation placed on Article 12 of the Constitution by this Court, obviously, these principles also govern the instrumentalities that come within the purview of Article 12 of the Constitution. With a view to make the procedure for selection fair, the Constitution by Article 315 has also created a Public Service Commission for the Union and Public Service Commissions for the States. Article 320 deals with the functions of Public Service Commissions and mandates consultation with the Commission on all matters relating to methods of recruitment to civil services and for civil posts and other related matters. As a part of the affirmative action recognized by Article 16 of the Constitution, Article 335 provides for special consideration in the matter of claims of the members of the scheduled castes and scheduled tribes for employment. The States have made Acts, Rules or Regulations for implementing the above constitutional guarantees and any recruitment to the service in the State or in the Union is governed by such Acts, Rules and Regulations. The Constitution does not envisage any employment outside this constitutional scheme and without following the requirements set down therein.

14.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 regularized.

“Ratification or regularization 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. Regularization 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."

In *B.N. Nagarajan & Ors. Vs. State of Karnataka & Ors.* [(1979) 3 SCR 937], this court clearly held that the words "regular" or "regularization" 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 emphasized that when rules framed under Article 309 of the Constitution of India are in force, no regularization 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 recognized therein have not been dissented to by this Court and on principle, we see no reason not to accept the proposition 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 regularized and that it alone can be regularized and granting permanence of employment is a totally different concept and cannot be equated with regularization.

20.

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 regularization and making permanent, was not emphasized 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)* are 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 recognized in the earlier part of the decision. Really, it cannot be said that this decision has laid down the law that all ad hoc, temporary or casual employees engaged without following the regular recruitment procedure should be made permanent.

22. In *Director, Institute of Management Development, U.P. Vs. Pushpa Srivastava (Smt.)* (1992 (3) SCR 712), this Court held that 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. A limited relief of directing that the appointee be permitted on sympathetic consideration to be continued in service till the end of the concerned calendar year was issued. 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.

25.

" In this connection it is pertinent to note that question of regularization in any service including any government service may arise in two contingencies. Firstly, if on any available clear vacancies which are of a long duration appointments are made on ad hoc basis or daily-wage basis by a competent authority and are continued from time to time and if it is found that the incumbents concerned have continued to be employed for a long period of time with or without any artificial breaks, and their services are otherwise required by the institution which employs them, a time may come in the service career of such employees who are continued on ad hoc basis for a given substantial length of time to regularize them so that the employees concerned can give their best by being assured security of tenure. But this would require one precondition that the initial entry of such an employee must be made against an available sanctioned vacancy by following the rules and regulations governing such entry. The second type of situation in which the question of regularization may arise would be when the initial entry of the employee against an available vacancy is found to have suffered from some flaw in the procedural exercise though the person appointing is competent to effect such initial recruitment and has otherwise followed due procedure for such recruitment. A need may then arise in the light of the exigency of administrative requirement for waiving such irregularity in the initial appointment by a competent authority and the irregular initial appointment may be regularized and security of tenure may be made available to the incumbent concerned. But even in such a case the initial entry must not be found to be totally illegal or in blatant disregard of all the established rules and regulations governing such recruitment."

26. It is not necessary to notice all the decisions of this Court on this aspect. By and large what emerges is that regular recruitment should be insisted upon, only in a contingency an ad hoc appointment can be made in a permanent vacancy, but the same should soon be followed by a regular recruitment and that appointments to non-available posts should not be taken note of for regularization. The cases directing regularization have mainly proceeded on the basis that having permitted the employee to work for some period, he should be absorbed, without really laying down any law to that effect, after discussing the constitutional scheme for public employment.

34.

Thus, it is clear that adherence to the rule of equality in public employment is a basic feature of our Constitution and since the rule of

law is the core of our Constitution, a Court would certainly be disabled from passing an order upholding a violation of Article 14 or in ordering the overlooking of the need to comply with the requirements of Article 14 read with Article 16 of the Constitution. Therefore, consistent with the scheme for public employment, this Court while laying down the law, has necessarily to hold that unless the appointment is in terms of the relevant rules and after a proper competition among qualified persons, the same would not confer any right on the appointee. If it is a contractual appointment, the appointment comes to an end at the end of the contract, if it were an engagement or appointment on daily wages or casual basis, the same would come to an end when it is discontinued. Similarly, a temporary employee could not claim to be made permanent on the expiry of his term of appointment. It has also to be clarified that merely because a temporary employee or a casual wage worker is continued for a time beyond the term of his appointment, he would not be entitled to be absorbed in regular service or made permanent, merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant rules. It is not open to the court to prevent regular recruitment at the instance of temporary employees whose period of employment has come to an end or of ad hoc employees who by the very nature of their appointment, do not acquire any right. High Courts acting under Article 226 of the Constitution of India, should not ordinarily issue directions for absorption, regularization, or permanent continuance unless the recruitment itself was made regularly and in terms of the constitutional scheme. Merely because, an employee had continued under cover of an order of Court, which we have described as 'litigious employment' in the earlier part of the judgment, he would not be entitled to any right to be absorbed or made permanent in the service. In fact, in such cases, the High Court may not be justified in issuing interim directions, since, after all, if ultimately the employee approaching it is found entitled to relief, it may be possible for it to mould the relief in such a manner that ultimately no prejudice will be caused to him, whereas an interim direction to continue his employment would hold up the regular procedure for selection or impose on the State the burden of paying an employee who is really not required. The courts must be careful in ensuring that they do not interfere unduly with the economic arrangement of its affairs by the State or its instrumentalities or lend themselves the instruments to facilitate the bypassing of the constitutional and statutory mandates.

36. While directing that appointments, temporary or casual, be regularized or made permanent, courts are swayed by the fact that the concerned person has worked for some time and in some cases for a considerable length of time. It is not as if the person who accepts an engagement either temporary or casual in nature, is not aware of the nature of his employment. He accepts the employment with eyes open. It may be true that he is not in a position to bargain -- not at arms length -- since he might have been searching for some employment so as to eke out his livelihood and accepts whatever he gets. But on that ground alone, it would not be appropriate to jettison the constitutional scheme of appointment and to take the view that a person who has temporarily or casually got employed should be directed to be

continued permanently. By doing so, it will be creating another mode of public appointment which is not permissible. If the court were to void a contractual employment of this nature on the ground that the parties were not having equal bargaining power, that too would not enable the court to grant any relief to that employee. A total embargo on such casual or temporary employment is not possible, given the exigencies of administration and if imposed, would only mean that some people who at least get employment temporarily, contractually or casually, would not be getting even that employment when securing of such employment brings at least some succor to them. After all, innumerable citizens of our vast country are in search of employment and one is not compelled to accept a casual or temporary employment if one is not inclined to go in for such an employment. It is in that context that one has to proceed on the basis that the employment was accepted fully knowing the nature of it and the consequences flowing from it. In other words, even while accepting the employment, the person concerned knows the nature of his employment. It is not an appointment to a post in the real sense of the term. The claim acquired by him in the post in which he is temporarily employed or the interest in that post cannot be considered to be of such a magnitude as to enable the giving up of the procedure established, for making regular appointments to available posts in the services of the State. The argument that since one has been working for some time in the post, it will not be just to discontinue him, even though he was aware of the nature of the employment when he first took it up, is not one that would enable the jettisoning of the procedure established by law for public employment and would have to fail when tested on the touchstone of constitutionality and equality of opportunity enshrined in Article 14 of the Constitution of India.

44. One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in *STATE OF MYSORE Vs. S.V. NARAYANAPPA* [1967 (1) S.C.R. 128], *R.N. NANJUNDAPPA Vs T. THIMMIAH & ANR.* [(1972) 2 S.C.R. 799] , and *B.N. NAGARAJAN* (supra), and referred to in paragraph 14 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 courts or of tribunals. The question of regularization 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 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 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 regularization, if any already made, but not subjudice, need not be reopened based on this judgment, but there should be no further by-passing of the constitutional requirement and regularizing or making permanent, those not duly appointed as per the constitutional scheme."

25. The issue in the present case is whether the post to which the applicants were appointed were advertised and whether these were regular posts for regular appointment/permanent appointment. If the posts were regular and the applicants were selected as per due process only then they would have a valid claim for regularization. If to the contrary the advertisement was only for short term contract/ad-hoc/temporary post, then the applicants cannot seek regularization of their service. There is no material available on record that the appointment of the applicants on contract basis was through any advertisement. They have admitted in the petition that they were given appointments of cleaners and sweepers after an interview and also that there were no specific recruitment rules for the posts of sweepers and watchman. Annex A-3 the memorandum issued to applicant no. 1 has been placed on record by the applicants to prove that they had been appointed on the terms and conditions mentioned therein and the perusal of this memorandum clearly shows that they were appointed on contract for a period of 6 months

which was renewable if their work was found satisfactory. It also finds mention that the contract was purely on temporary basis and could be terminated at any point of time without assigning any reason. It was also made clear in the memorandum that the hired person was not entitled to any Government service in the concerned department nor he was entitled to any benefit that a Government servant avails. From the record, it is clear that all the applicants were appointed only on short term contract which was renewable subject to the satisfaction of the employer and there was no assurance for any future prospects.

26. Before the applicants can get the benefit of the ratio of the various judgments of the Hon'ble Apex Court that they worked continuously for seeking regularization, it is necessary that the post should have been advertised for regular appointment/permanent appointment ie. existing vacancy in a regular/permanent post. In the present case, there is no evidence of advertising of the post nor the applicants were appointed on permanent and regular basis, in our opinion they cannot

seek regularization of their contractual appointments. The persons who are not appointed to regular posts but are appointed to temporary/ad-hoc posts without following proper procedure cannot get regularization.

27. The Hon'ble Apex Court in the case of Umadevi (supra) had made it abundantly clear that before appointing of persons on a regular/permanent basis there have to exist recruitment rules or specific eligibility criteria laid down for the appointments, there must be sanctioned posts, there must be vacancies of the sanctioned posts and finally there must be issued advertisements for filling up the posts; not as temporary/contractual posts but as permanent posts; so that there should be a level playing field of competition with respect to prospective appointees.

28. The Hon'ble Apex Court in the case of Umadevi (supra) has laid down the following ratios:-

"(I) The questions to be asked before regularization are:-

(a)(i) Was there a sanctioned post (court cannot order creation of posts because finances of the state may go haywire), (ii) is there

a vacancy, (iii) are the persons qualified persons and (iv) are the appointments through regular recruitment process of

(b) A court can condone an irregularity in the appointment procedure only if the irregularity does not go to the root of the matter.

(II) For sanctioned posts having vacancies, such posts have to be filled by regular recruitment process of prescribed procedure otherwise, the constitutional mandate flowing from Articles 14, 16, 309, 315, 320 etc is violated.

(III) In case of existence of necessary circumstances the government has a right to appoint contract employees or casual labour or employees for a project, but, such persons form a class in themselves and they cannot claim equality(except possibly for equal pay for equal work) with regular employees who form a separate class. Such temporary employees cannot claim legitimate expectation of absorption/regularization as they knew when they were appointed that they were temporary inasmuch as the government did not give and nor could have given an assurance of regularization without the regular recruitment process being followed. Such irregularly appointed persons cannot claim to be regularized alleging violation of Article 21. Also the equity in favour of the millions who await public employment through the regular recruitment process outweighs the equity in favour of the limited number of irregularly appointed persons who claim regularization.

(IV) Once there are vacancies in sanctioned posts such vacancies cannot be filled in except without regular recruitment process, and thus neither the court nor the executive can frame a scheme to absorb or regularize persons appointed to such posts without following the regular recruitment process.

(V) At the instance of persons irregularly appointed the process of regular recruitment shall not be stopped. Courts should not pass interim orders to continue employment of such irregularly appointed persons because the same will result in stoppage of recruitment through regular appointment procedure.

(VI) If there are sanctioned posts with vacancies, and qualified persons were appointed without a regular recruitment process, then, such persons who when the judgment of Uma Devi is passed have worked for over 10 years without court orders, such persons be regularized under schemes to be framed by the concerned organization.

(VII)The aforesaid law which applies to the Union and the States will also apply to all instrumentalities of the State governed by Article 12 of the Constitution".

29. In the present cases, it is observed that it is only on account of exigencies that

the applicants were appointed as short-term contract employees and they were well aware of their such status at the time of their appointments which is crystal clear from the Memorandum(Annex A-3).

30. The applicants thus formed a class in themselves and cannot claim regularization merely for the reason that many of the applicants have worked on such short-term contract basis for more than 240 days. They were well aware at the time of their appointment that they were temporary and no assurance was given to them by the respondents for regularisation without regular recruitment process being followed.

31. As held by the Hon'ble Apex Court in the case of Umadevi(supra) if the appointment is a contractual appointment, the appointment comes to an end at the end of the contract. It is also clarified that merely because a temporary employee or a casual wage worker is continued for a time beyond the term of his appointment, he would not be entitled to be absorbed in regular service or made permanent, merely on the strength of such continuance, if the original

appointment was not made by following a due process of selection as envisaged by the relevant rules.

32. In the present cases also, the applicants' appointments on short-term contract basis cannot be termed to have been made by a due process of selection as envisaged by the relevant rules and thus they cannot claim the right for regularisation. To seek regularisation of appointment, the recruitment itself should have been done regularly and in terms of constitutional scheme. The applicants at the time of their appointment on contractual basis were aware of the nature of their employment and had accepted the same with open eyes. As observed by the Hon'ble Apex Court in the case of Umadevi (supra), it may be true that the applicants were not in a position to bargain as they might have been searching for employment so as to earn their livelihood and accepted the appointment on contractual basis but merely for this reason the respondents cannot be directed to regularise their services. Once the applicants have accepted the employment on contractual basis fully knowing the nature of

it, they have to bear the consequences of the same.

33. As referred above, the respondents had not given any assurance to the applicants while making their appointments on contract basis that the status conferred on them will not be withdrawn until some rational reason comes into existence for withdrawing it.

34. It is observed that when a person enters a temporary employment or gets engagement as a contractual or casual worker and the engagement is not based on proper selection as recognised by the relevant rules and procedure, he is aware of the consequences of the appointment being temporary, casual or contractual in nature and he 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.

35. As held by the Hon'ble Apex Court in the case of Umadevi (supra), the applicants who were appointed on contractual basis have no fundamental right to claim that they have to be regularised in service, as they cannot be said to be holders of posts, since a regular

appointment could be made only by making appointments consistent with the requirements of Articles 14 and 16 of the Constitution. The applicants have not been able to establish a legal right to be regularised to the posts to which they are appointed on contract basis as they have never been appointed in terms of the relevant rules or in adherence to Articles 14 and 16 of the Constitution.

36. The appointment to a post in Government service can only be by way of a proper selection in the manner recognised by the relevant legislation in the context of the relevant provisions of the Constitution.

37. The contention of learned counsel for the applicants that many of the present applicants are working continuously on contract basis for a period of more than 240 days and they need to be regularized is of no consequence as at the time they were appointed to do the work of sweeping and maintaining cleanliness, a Group 'D' post on contractual basis, there were no sanctioned posts and they were not appointed as per relevant rules prevalent at that time. The initial entry of all the applicants in the present case was not

against the sanctioned posts and thus it was not following the rules and regulations governing such entry, hence once the initial entry itself was unauthorized and not against any sanctioned post, question of regularization of applicants against such non existing vacancies would not survive for consideration. In the present case we cannot lose sight of the fact that the post to which the services of the applicants were hired on contractual basis belonged to Group 'D' which have already been abolished vide 6th CPC report.

38. In view of above discussion, the Original Application is without merits, hence dismissed. No order as to costs.

(Ravinder Kaur)
Member (J)

(R. Vijaykumar)
Member (A)

gm

JD
19/12/19