

Reserved
(On 28.09.2018)

CENTRAL ADMINISTRATIVE TRIBUNAL
ALLAHABAD BENCH
ALLAHABAD

Dated: This the **06th** day of **November** 2018

Original Application No. 331/01359 of 2012

Hon'ble Mr. Gokul Chandra Pati, Member – A

Sapan Kumar, S/o Roop Chandra Kanaujia, R/o 101/1, Ashok Nagar,
Allahabad.

. . .Applicant

By Adv: Shri Bhagirathi Tiwari

V E R S U S

1. Comptroller and Auditor General of India, 9, Deen Dayal Upadhy Marg, New Delhi.
2. Principal Accountant General, Office of the P.A.G. (Audit) I, Allahabad.
3. Senior Dy. Accountant General, Office of the P.A.G. (Audit) I, U.P. Allahabad.
4. Senior Audit Officer G.D. Branch O/o P.A.G. Civil Audit, U.P. Allahabad.
5. Mukesh Kumar Kushwaha (Casual Labour) S/o Ram Chandra Kushwaha, C/o Senior Audit Officer, G.D. Branch, Office of the P.A.G. (Civil Audit), U.P. Allahabad. Presently MTS O/o PAG (G&SSA).

. . . Respondents

By Adv: Shri R.K. Rai

ORDER

The applicant seeks the following relief through this OA:-

- “a. This Hon'ble Tribunal may be graciously pleased to quash the statement of Senior Dy. Accountant General office of the P.A.G. (Audit) as stated in her misleading reply dated 29.02.2011 to the extent it gives date of applicant's engagement in the office of P.A.G. (Admin) as Casual Labour w.e.f. 08.09.2011 inconsistent with Tribunal's order dated 11.10.2011.***
- b. The respondent No. 3 be directed to provide the applicant the order of competent authority who ordered the applicant's deployment as casual labour by outsourcing agency named Garuda Security***

Services w.e.f. 08.09.2011 instead of 09.08.2011 which is stated in Tribunal's order dated 11.10.2011.

- c. The applicant's name be included in the roster for Casual Labourer alongwith those currently working the office of respondent No. 4 as per direction in O.A. No. 104 of 2007 to given equal opportunity for work to the applicant who is still unemployed.*
- d. The applicant be granted notional seniority from the date of engagement of Mukesh Kumar Kushwaha in 2006 to date of his disengagement on May 5, 2010 and the applicant being senior on the date of the engagement of Avinash Kumar was not engaged although he was senior to him.*
- e. The arrear of wages w.e.f. 01.04.2012 has not been paid to the Applicant on the date of his disengagement on 17.04.2012. Previously also the wages from July 2006 to 14.02.2007 were not paid even after the direction on the Tribunal in O.A. No. 104 of 2007 which may be directed to be paid now.*
- f. The applicant be engaged forthwith in preference to 4 newly engaged Casual Labourers and his position in roster be disclosed for his engagement like other 43 regularly engaged Casual Labourer vide letter dated 17.07.2009 read with Seniority List effective from 01.11.2007.*
- g. The respondents be directed to decide Judiciously the issue raised in sub para (a) to (h) in amended OA No. 592 of 2009 as aforesaid not examined and decided by the respondents even after the Tribunal's order dated 11.10.2011."*

2. The applicant's grievance is that he was not being engaged as a casual labourer, for which his case for regularization has been overlooked, where as many new casual employees are being engaged by the respondents ignoring the case of the applicant. The applicant had filed a contempt petition for non-compliance of the order dated 11.10.2011 passed in the OA No. 592/2009. The contempt petition was disposed of by this Tribunal vide order dated 7.5.2012 (Annexure A-1) with the following directions:-

"1. While making his preliminary submission, in support of the contempt petition, proxy counsel for the applicant has stated that as per order of the Tribunal dated 11.10.2011 the respondents were supposed to reengage the applicant as per their own statement after notice of the Tribunal. He has referred to one order passed by Senior Deputy Accountant General on 29.02.2012, in which the situation has been explained by the respondents stating that the applicant has been re-engaged by an outsourcing namely Garuda Security Services w.e.f. 08.09.2011 and payment is being made accordingly. The proxy counsel has stated that this was not the intention of the order. The applicant was supposed to be re-engaged by the respondents directly.

2. In view of facts available before us, we observe that this order has been passed in compliance of the order dated 11.10.2011 passed in OA No. 592/09, for the alleged non compliance of which

instant contempt petition has been preferred. The respondents have complied with the order. It seems that the applicant is not satisfied with this order. In that situation the applicant has the option to agitate the matter by way of filing a fresh OA because this is a fresh cause of action. Accordingly, the contempt petition is found untenable at this stage. Hence the same is dismissed. However, liberty is allowed to the applicant to file a fresh OA if he is so advised."

3. The respondents have filed Counter Reply for the OA as well as for the MA dated 22.11.2012 filed by the applicant. The Counter filed for the OA stated that the applicant had earlier filed OA No. 592/2009 which was disposed of vide order dated 10.11.2011. The applicant's representation dated 19.10.2011 in pursuance to the order dated 10.11.2011 of this Tribunal was examined by the respondents and passed a detailed order dated 21.12.2011 (Annexure A-4), wherein, it was clarified that the applicant was engaged through an outsourcing agency M/S Garuna Security Services for the period from 08.09.2011 to 31.03.2012 due to requirement for additional manpower because of special assignment for audit review of NRHM. This was accepted as compliance and the Contempt Petition No. 71/12 in OA No. 592/09 filed by the applicant was dismissed by this Tribunal. It is stated that the applicant was disengaged from the month of April 2012, for which he has again filed this present OA.

4. It is further averred in the Counter Reply that the engagement of casual labour by the respondents is as per suitability and requirement. It is further mentioned that the seniority list of casual labours has been maintained in descending order of total number of days for which casual labours were engaged. The seniority list was prepared on 01.11.2007. The total number for which the applicant was engaged as casual labour was found to be 287 days and accordingly, he was placed at Sl. No. 66 in the seniority list. It was further stated that no pick and choose method was adopted for engaging the casual labours, who are engaged as per the seniority on roster basis from amongst the workers available at the time of requirement and are suitable to do the work. The applicant was not engaged since he was not available at the time of requirement. Therefore, he cannot complain for non-engagement.

5. It is stated in another Counter Reply in reply to a Miscellaneous Application filed by applicant, stating that the instructions of the DOPT for direct recruitment in MTS cadre with relaxation of age and relaxation of qualification for the casual labourers, have been complied by the respondents. Reference to the judgment of Hon'ble Apex Court in the case of State of Karnataka vs. Uma Devi (2006 4 SCC 1) has been made to state that if appointment is made as per the rules after competition among qualified persons, the appointee will not have any claim and a temporary employee cannot claim regularization if the original appointment was not made after following due process of selection as per the rules. Judgments of Hon'ble Apex Court in the case of Union of India vs. Kartik Chandra Mandal and others (2010 2 SCC 422) and Pinaki Chatterjee and others vs. Union of India and others (2009 5 SCC 593) have also been referred to in the Counter Reply. It is further stated that for recruitment of MTS cadre, advertisement was issued as per the policy vide circular dated 30.4.2010. As per the policy, a casual worker engaged earlier for at least two hundred days in any two years, may be eligible for relaxation in upper age limit. It is stated that the order of the Tribunal for age relaxation was quashed by Hon'ble High Court in the case of Union of India and others vs. Ajay Kumar and others, vide order dated 3.3.2006 (Annexure R-6 to the Counter Reply). It is further stated in the Counter Reply that fixing 200 days of engagement of the casual workers to be considered for the MTS post cannot be said to be arbitrary as the DOPT's Casual Labourers (Grant of Temporary Status and Regularization) Scheme w.e.f. 1.9.1993 (Annexure R-7 to the Counter) has fixed 240 days engagement in a year for grant of temporary status.

6. The applicant has filed Rejoinder affidavit on 21.02.2013 denying the contentions made in the counter reply. It was mentioned in the Rejoinder that the respondents did not comply with the order of this Tribunal dated 11.10.2011 properly and the applicant was not informed about the requirement of work. Hence it is incorrect to say that he was not available for engagement at the time of requirement. It is further mentioned that the respondents have not followed the order of this Tribunal passed in OA No. 104/07 for proper duty roster of engagement of casual labours including the applicant. It was further stated that one

Avinash Kumar, junior to him was engaged from 2006 to 2011 (Paragraph 31 of the RA). It was further stated that the applicant was not aware about his engagement through outsourcing agency and he was not aware of the proprietor of said agency i.e. M/s Garuna Security Services.

7. Heard learned counsel for the applicant as well as respondents, who reiterated the averments in the pleadings. Learned counsel for the applicant filed written submissions reiterating the averment in the OA and enclosing the following cases:-

- i. OA No. 1052/2008 – Mohd. Salimuddin and others vs. Union of India and others CAT, Allahabad Bench.***
- ii. Civil Misc. Writ – A No. 35395 of 2013 – Union of India and others vs. Central Administrative Tribunal, Allahabad Bench Allahabad & others alongwith Civil Misc. Writ – A No. 35398 of 2013 - Union of India and others vs. Central Administrative Tribunal, Allahabad Bench Allahabad & others.***
- iii. Special Leave to Appeal (Civil) CC 20566 – 20567 of 2013 – Union of India vs. Sant Lal & Ors etc.***

8. Learned counsel for the respondents also filed written submissions stating that the engagement of casual labours has been stopped and no casual labour has been engaged in the office since work of intermittent nature has been done through outsourcing agencies. It is also stated that the OA No. 326 of 2014, which was dismissed vide order dated 08.01.2016, due to which the applicant has no right for any relief claimed in this OA. The applicant could not participate in the recruitment test for MTS in which most of the casual labours had been appointed on regular post and the applicant could not be selected since he could not fulfil the criteria for selection.

9. The issues to be decided in this OA are: (i) whether the applicant's case was considered when need arose for engagement of additional manpower and (ii) whether the respondents have complied with the order dated 10.11.2011 of the Tribunal in earlier OA filed by the applicant.

10. It is stated by the respondents that the applicant was engaged through the outsourcing agency from 8.9.2011. But at the same time, his name has been included in the seniority list for casual labourers at serial number 66 as stated in the Counter Reply. Hence, it is undisputed that the applicant was engaged as a casual labourer under the respondents and he was included in the seniority list maintained by the respondents for the purpose. The respondents' contention is that the casual labourers are being engaged as and when the need arises depending on the availability and suitability. There is nothing in the pleadings of the respondent to show that the applicant was asked anytime to report for casual nature of work, or an open notice was issued for the casual workers in the seniority list to appear for consideration for engagement. How the availability of the casual labourers for engagement was assessed by the respondents has not been specified in the Counter Reply. Hence, it cannot be said that the applicant was not available for engagement as and when the need for work arises and the applicant's contention that he was never informed about engagement is correct. Further, the contentions of the respondents that the applicant has no right for engagement as he was engaged through an outsourcing agency have no force, since the applicant was included in the seniority list of casual workers under the respondents as admitted in the Counter Reply. Therefore, the applicant, subject to his seniority, has a right to be considered for engagement as when the need for such casual engagement arises. The issue at (i) of para 9 is therefore, decided in favour of the applicant.

11. Regarding compliance of the order dated 10.11.2011 of this Tribunal, it is seen that the copy of the said order dated 10.11.2011 order has not been placed on record by the parties. However, the order passed by the Tribunal in the Contempt Petition filed by the applicant for non-compliance of the order dated 10.11.2011, as extracted in para 2 above shows that the Contempt proceeding was dropped on the basis of the averment of the respondents that the applicant was engaged through the outsourcing agency w.e.f. 8.9.2011 was considered to be complied by this Tribunal. Hence, the issue of compliance of the said order cannot be raised against in this OA. Accordingly, the order dated 10.11.2011 is

settled and cannot be raised again. Hence, the issue (ii) of para 9 is decided in favour of the respondents.

12. Learned counsel for the applicant has submitted a copy of the judgment in the case of Mohd. Salimuddin and others (supra), which was allowed by this Tribunal vide order dated 02.04.2013. The Writ Petition filed by the respondents against this order was dismissed by the Hon'ble Allahabad High Court in Civil Misc. Writ Petition No. 35395 of 2013 vide order dated 19.07.2013. In the case of Mohd. Salimuddin, there was an earlier order of the Tribunal to regularize the services of the applicant which was challenged before Hon'ble High Court without success. Subsequently, the services of the applicant were not regularized for which fresh OA was filed, which was allowed. The Hon'ble High Court while disposing of the case had observed as under:-

“.....It is no more open for the petitioners to say that there is no provision for regularizing their service as order of Tribunal confirmed by this Court was not challenged and it had attained finality. Therefore, the only option available to the petitioners now is to regularize service of the private respondents in terms of the earlier direction passed by the Tribunal confirmed by this Court in Writ Petition No. 15825 of 8 2006.

We therefore, find no reason to interfere with the impugned order of the Tribunal.”

In the instant OA there is nothing on record to show that there was an order of this Tribunal to regularize the services of the applicant. Hence, cited case is factually distinguishable and the ratio of the decision in the cited case of Mohd. Salimuddin and others (supra) regarding regularization of the services of the applicant is not applicable in the present OA.

13. As discussed above the applicant's case for fresh engagement as and whether need arose, was not considered properly by the respondents and although they had complied with the order dated 10.11.2011, but for subsequent engagement, the applicant was not given any opportunity as per his seniority list as casual labourer for making himself available for being engaged.

14. In view of the above discussions, the OA is allowed partly to the extent that the case of the applicant shall be considered by the respondents in future in case there is need for engagement for additional personnel on casual basis arises, subject to the seniority position of the applicant in the list of casual labours maintained by the respondents, as stated by the respondents in the counter affidavit. The case of the applicant shall also be considered if there is any policy decision or any scheme for such regularization. It is made clear that even if the engagement for future requirement of additional personnel is intended through outsourcing agency, the case of the applicant shall also be considered on merit.

15. The OA is partly allowed as above. There will be no order as to costs.

(Gokul Chandra Pati)
Member – A

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