

CENTRAL ADMINISTRATIVE TRIBUNAL
MUMBAI BENCH, MUMBAI

ORIGINAL APPLICATION No.86/2016

DATED THIS Tuesday THE 18th SEPTEMBER, 2018

CORAM:HON'BLE SHRI R. VIJAYKUMAR, MEMBER (A)
HON'BLE SHRI R.N. SINGH, MEMBER (J)

Dinesh Kadu Pawar
 Working as Casual Civilian Driver
 Defence Estate Office
 Mumbai Circle,
 Colaba, Mumbai - 400 005.
 At & Post - Mokbhanghi,
 Tal. Kalwan,
 Dist-Nashik - 423 501. **... Applicant**

(By Advocate Ms. Priyanka Mehndiratta)

VERSUS

- 1) The Union of India, through
 The Director General Defence Estates,
 Ministry of Defence,
 Raksha Sampada Bhawan,
 Delhi Cantt - 110 010.
- 2) The Principal Director Defense Estates
 Ministry of Defense,
 Southern Command,
 Manekji Mehta Road,
 Pune - 411 001 (Maharashtra)
- 3) The Defense Estate officer,
 Mumbai Circle,
 Colaba, Mumbai - 400 005.
- 4) Sh. Ashishkumar Hiranman Kolhe
 Post - Virali (BUJ)
 Tehsil - Lakhandur
 Dist Bhandara - 441 910. **... Respondents**

**(By Advocate Shri V.S. Masurkar
 alongwith Shri D.A. Dube)**

ORDER**PER: SHRI R. VIJAYKUMAR, MEMBER (A)**

This application has been filed by the applicant on 15.02.2016 under Section 19 of the Administrative Tribunals Act, 1985 seeking the following reliefs:-

"8(i) This Hon'ble Tribunal may graciously be pleased to call for the records of the case from the respondents and after examining the same, hold and declare that the initial appointment of the applicant was regular and on permanent post that was advertised and filled after due selection process was followed by the respondents.

(ii) The Hon'ble Tribunal may further be pleased to direct the respondents to absorb and regularise the services of the applicant as Permanent Driver, from the date of his initial joining on 16.06.2006, against the vacant post on which he was initially appointed, with all consequential benefits.

(iii) Cost of the application be provided for.

(iv) Any other and further order as this Hon'ble Tribunal deems fit in the nature and circumstances of the case be passed."

2. The facts of the case are that the regular Civilian Driver employed by the respondents superannuated on 30.04.2006 and despite requests of respondent No.3, neither respondent No.2 nor respondent No.1 considered and appointed a regular Civilian Driver in place of the retired employee although such an indent had been sent to them three months prior to retirement. The respondent No.3, thereafter called for candidates from the

Employment Exchange and it appears that he also placed his requirements on the office notice board which came to the attention of the applicant. The candidates from the employment exchange and the applicant who had directly applied, were interviewed by a Committee that was constituted by respondent No.3 and as a result of its deliberations, the applicant was appointed for six months on contractual basis and this fact was intimated to respondent No.2 in letter No.BOM/ADM/2/EMP/III/221 dated 12.06.2006 and an office order was issued on 14.08.2006 employing the applicant as a casual Civilian Driver in temporary establishment. The applicant has, thereafter been employed from 18.06.2006 upto 04.03.2016 with break periods of 1 to 6 days totaling 152 days as admitted by respondents in their reply. After appointment, the applicant was also cleared by police verification and was issued an identity card. The applicant states that there were no complaints against him. It is also apparent that the applicant was appointed on casual basis against the regular post for which Recruitment Rules were already in position. These Recruitment Rules were modified and have been issued on 28.08.2009 by

which the Civilian Motor Driver (Ordinary Grade) is considered a Group 'C' post which is required to be filled in by promotion failing which by transfer or absorption and failing both, by direct recruitment. An advertisement was issued by respondents in February, 2015 notifying four posts of Civilian Motor Drivers (ordinary grade) with vacancies in General (2), SC (1) and OBC (1) with the age limit fixed as on 27.02.2015 as 27 years for general candidates, 32 years for SC candidates and 30 years for OBC candidates providing three years relaxation over the general candidates for OBC candidates to which category the applicant belongs. Age relaxation has been provided for departmental candidates as below in addition to the age relaxation for SC and OBC candidates mentioned in the Advertisement:-

“(2) Age Relaxation:

- (i) Upper age limit is relaxable by 05 years for SC and 03 years for OBC candidate as indicated above.
- (ii) Departmental Candidates with 03 years continuous service can apply up to age of 40 years. Additional relaxation as per (i) above will be available to candidates belonging to SC/OBC.
- (iii) Age relaxation for any other category of persons will be governed as per the orders issued by the Govt. from time to time.”

3. The applicant, an OBC candidate, submitted his application for which he has enclosed a

photocopy of the postal envelope (Annexure A-13) but did not receive any response from respondent No.2 for a long time. He states that he visited the office of respondent No.2 at Pune and was informed that he was overaged and that the process to appoint a permanent driver in his place was in progress in the office of respondent No.3. He also states that when he joined the department, he was 24 years old and now he had become 33 years and 9 months old at the time of filing his application. The applicant claims that he was appointed after a lawful process and therefore, he has claimed a right to regularisation. He submits that he has been working without complaints for more than 10 years and should have been appointed on permanent basis and absorbed but respondents have taken steps illegally to displace him. He submits that when departmental candidates with three years service can apply upto the age of 43 years for OBC, his application was ignored despite his 10 years of service and when he was less than 33 years by February, 2015. He refers to the decision of the Hon'ble High Court of Madras in **R. Lakshmi Vs. The Chief Engineer (Personnel) & Another in Writ Petition No.5980/2004 dated 03.08.2012** by which it was held that after an

employee has put in continued service for 480 days in two calendar years then his service would automatically become permanent. Now the respondents have appointed another driver now impleaded as respondent No.4 to his position on a regular basis while applicant was denied an opportunity to compete in the selection process held in reference to the Advertisement of February, 2015.

4. The respondents have stated that the applicant was not regularly appointed despite the requirement in the Recruitment Rules and they refer to the decision of the Hon'ble Apex Court in case of Secretary, State of Karnataka Vs. Uma Devi in Appeal (Civil) 3595-3612 of 1999 with Civil Appeal No.1861-2063/2001, 3849/2001, 3520-3524/2002 and Civil Appeal No.1968 of 2006 which emphasises the need for public employment to be made based on open competition and proper selection in accordance with the Recruitment Rules. The Court has also held that the Government is not precluded from making temporary appointments on daily wages but such persons cannot claim regularisation or permanency on this basis. They also emphasise that not only was the applicant not appointed in terms of the Recruitment Rules but he was not even sponsored by

the Employment Exchange. In particular, they reproduce the views of the Hon'ble Apex Court in the Uma Devi case as below:-

“In view of our conclusion on the questions referred to, no relief can be granted, that too to an indeterminate number of members of the association. These appointments or engagements were also made in the teeth of directions of the Governments not to make such appointments and it is impermissible to recognize such appointments made in the teeth of directions issued by the Government in that regard. We have also held that they are not legally entitled to any such relief. Granting of the relief claimed would mean paying a premium for defiance and insubordinate by those concerned who engaged these persons against the interdict in that behalf. Thus, on the whole, the appellants in these appeals are found to be not entitled to any relief. These appeals have, therefore, to be dismissed.”

5. They also assert that the orders employing the applicant affirm his temporary status and that they had also obtained such certificate from the applicant while extending his temporary appointments.

6. In his rejoinder, the applicant argues that the respondent No.2 could not and should not have converted the permanent post of car driver which fell vacant on 30.04.2006 into a temporary post and appointed the applicant on that post. They had also attempted in April to December, 2015 to appoint a driver on outsourcing basis. However, he does not explain the relevance of the outsourcing advertisement issued on 03.12.2015 to the

appointment given to respondent No.4. He rebuts the certificate and undertaking obtained from him stating that they were obtained on threat of denial of wages.

7. The applicant has referred to a judgment of the Hon'ble High Court of Himachal Pradesh in CWP No.6637 of 2012 decided on 28.02.2013 in **Seema Sharma Vs. Lokayukta Himachal Pradesh through its Secretary and 2 Others**. That case related to an advertisement for filling up posts of Junior Scale stenographers on a regular basis against which the petitioner had participated and had been selected but was appointed on temporary basis and the matter had therefore come to the Court. The facts of that case are totally different from the present one and have no application.

8. Learned Advocate for the applicant also referred to the case of **State of UP and Anr. Versus Dr M.J. Siddiqui** reported in **1980 (1) SLR 868** which decided a dispute that arose between appellants who were recruited in a regular manner against temporary posts of a cadre superior to petitioners who were appointed in an inferior cadre but whose seniority was affected in merger of cadres because of their temporary status. The Hon'ble Apex Court

held that substantive appointment can also be made against a purely temporary post by looking into surrounding circumstances, the mode, the manner, and terms of appointment, the fact that appellants were appointed after consulting the Public Service Commission and their appointment was otherwise regular except for having been placed in a temporary vacancy. That citation is also clearly not the case with the present applicant and quite irrelevant.

9. The respondents have stated that the temporary arrangement was made by respondent No.3 because of their emergent need and the contention of the applicant that this was for a permanent position is wrong. Moreover, the applicant was not sponsored by the employment exchange and had applied privately.

10. In a further affidavit, the respondents have also stated that while requesting withdrawal of the order granting interim relief, the applicant's substitute, Respondent No.4, was appointed in consequence of the advertisement and joined duty on 17.02.2016 and that two drivers have been paid against one sanctioned post. They have also enclosed the details of the written test and

Selection Committee proceedings relating to selection of respondent No.4 which, they assert, is in accordance with the Recruitment Rules of 2009.

11. Heard Ms. Priyanka M., learned Advocate for the applicant and Shri V.S. Masurkar, learned Advocate for the respondents at length and perused the case record.

12. It is apparent at the outset that the appointment of the applicant on temporary basis was clearly irregular and not even based on the list of candidates sent by the employment exchange but rather, only a private application. Even if he had been a part of a list sent by the employment exchange, the post of driver had become a Group 'C' post after the merger of categories by the 6th Pay Commission. Such posts were required to be advertised and selection made after applications were received on All-India basis. Moreover, the Recruitment Rules of 2009 do not comprehend a selection made by respondent No.3 or by a Selection Committee constituted at his behest. Therefore, the appointment of the applicant cannot by any means be considered to have been regular and he is a clear backdoor entry. Under these circumstances, the applicant attracts the ban placed on regularisation

of such appointees by the decision of the Hon'ble Apex Court in Uma Devi (***supra***) .

13. The applicant has made a plea that his application made in response to the advertisement was not considered although he had put in more than 10 years of service with about 155 days of break between the 2006 and 2016 which has also been categorically admitted by the respondents in their reply. Although this period of employment was clearly temporary yet, in terms of the ruling of the Hon'ble Apex Court in **State of Himachal Pradesh Vs. Suresh Kumar & Anr., 1996 AIR 1565 dated 24.01.1996**, relaxation of age to the extent of the period of service of the applicant should have been extended to him for enabling him to participate in the selection process especially considering that he was so eligible at the time when he was initially engaged and then continued in casual employment.

14. The respondents have not denied his contention that they set aside his application but have provided no details whatsoever on the nature of its rejection nor on the timely receipt of the application from the applicant in response to the advertisement. Another aspect noted in this case is

that, considering the provisions for providing 10 years for departmental candidates besides three years more for OBC candidates, the reasons why such a relaxation was not extended to the case of the applicant are not explained nor is it denied that he sought such a relaxation in his application to the respondents following the advertisement. In this connection, the Recruitment Rules provide age relaxation upto 40 years for candidates who have rendered at least three years continuous service under the Central Government. The Advertisement adds three years for OBC candidates raising the limit to 43 years. No specific definition of departmental candidates is given except the specification of three years of continuous service. The present applicant has admittedly served for more than 10 years with only 152 days of breaks ranging from 1-6 days. The Courts have frowned upon this practice of giving breaks to continue the appearance that the appointee is temporary. In this present case, the relevance is only to the extent that the applicant had more than three years of continuous service overlooking the device adopted by respondents of giving breaks.

15. The judgment of the Hon'ble Apex Court in **Union Public Service Commission Vs. Dr. Jamuna Kurup and Ors.**, reported in **2008 (11) SCC 10** was followed by the Hon'ble High Court of Delhi in its judgment dated 15.11.2011 in WP(C) No.1641/2011 - Delhi Subordinate Services Selection Board and Anr. Vs. Mrs. Preeti Rathi & Ors. arising out of the order of the Principal Bench of this Tribunal in OA 714/2009 (supra) decided on 20.08.2010. The relevant part of the said judgment reads as under:-

"13. In the rules, nowhere the expression departmental candidates has been defined. It has to be, in these circumstances, assigned natural connotation. A departmental candidate would be the candidate who is not an outsider but is already working in the concerned department namely MCD in the instant case. Admittedly the respondents are working in MCD as Primary Teachers on contract basis and one has to assign practical meaning to the aforesaid terminology and we are of the considered opinion that the respondents shall be treated as departmental candidates for the purpose of appointment to the post of Primary Teachers on regular basis when they are already working in the same post on ad-hoc basis for the last ten years. Reference may be made to UPSC Vs. Dr. Jamuna Kurup (2008) 11SCC 10 where the expression employees of MCD in the advertisement granting age relaxation with respect to recruitment to the post of Ayurvedic Vaid was held to include both permanent or temporary, regular or short term contractual or ad hoc employees of the MCD. Accordingly those appointed on contract basis were held to be employees of MCD and entitled

to age relaxation. The earlier judgment in *UPSC Vs. Girish Jayanati Lal Vaghela* (2006) 2 SCC 482 relating to Government employees was held to be not applicable to the expression employees of MCD. We see no reason why the said dicta of the Supreme Court be not applied to the present situation also.

14. Even in those matters whether cases of ad-hoc/causal/contract employees come up for consideration for regular appointment, there has always been a practice of giving age relaxation. In many judgments rendered by the Apex Court as well as this Court such relaxation is provided and the relevant aspect which is to be kept in mind is that at the time of initial appointment on contract/causal basis the incumbent was within the age limit and was not overage. If that is so, to the extent of service rendered by such an employee, the benefit thereof has to be given. If the relaxation of almost 10 years is to be given to the respondents for having worked for this period, in that case also they would fall within the prescribed age limit.

Therefore, we draw upon this binding precedent to hold that the applicant should have been treated as a departmental candidate and considered as falling within the age limits prescribed. Therefore, the rejection of his application was not as per settled law on both aspects set out in para 13 and as above.

16. The learned Advocate for the applicant has stated during arguments that respondent No.4 who had been selected, joined the post and subsequently

resigned. Therefore, it is apparent that this post is now vacant and the balance of convenience not only lies with the applicant but so also does the application of settled law discussed above in this matter. Therefore, it is appropriate to quash the impugned Advertisement and consequent selection in respect of OBC candidate (one post) and to direct the respondents to recommence the selection process through a duly constituted Committee by inviting applications in accordance with the rules and after extending age relaxation to the applicant in conformity with the law.

17. In the circumstances, this OA is allowed with the directions above. No costs. Further, until this process is completed, the respondents are directed not to disturb the continuance in service of the applicant until a regularly selected candidate takes his place.

(R.N. Singh)
Member (J)

(R. Vijaykumar)
Member (A)

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