

**CENTRAL ADMINISTRATIVE TRIBUNAL
CUTTACK BENCH**

OA No. 347 of 1997

Present: Hon'ble Mr. Gokul Chandra Pati, Member (A)
Hon'ble Mr. Swarup Kumar Mishra, Member (J)

Madhan Mallick, aged 28 years, S/o Dhada Mallick, Vill. – Bentapur – Diwanpada, PO – Brahmanasarangi, PS – Baliantha, Dist. – Khurda. At present working as Driver in the office of the Director, Telecom (M) ETC, Micorwave Campus, Unit-VIII, Bhubaneswar-12, Dist. – Khurda.

.....Applicant

VERSUS

1. Union of India represented by the Commissioner-cum-Secretary to the Government of India, Ministry of Telecommunication, Central Secretariat, New Delhi.
2. The Chief General Manager, Eastern Telecom Region, 7, Kshetra Das Lane, Calcutta – 12.
3. The Director, Telecom (Mtce), Eastern Telecom Region, Microwave Campus, Unit-VIII, Bhubaneswar-12, Dist. – Khurda.

.....Respondents.

For the applicant : Mr.D.P.Dhalsamant, counsel

For the respondents: Mr.D.K.Mallick, counsel

Heard & reserved on : 5.7.2019 Order on : 18.7.2019

O R D E R

Per Mr. Gokul Chandra Pati, Member (A)

The applicant has filed this Original Application under Section 19 of the Administrative Tribunals Act, 1985 seeking the following reliefs :

"That the Hon'ble Tribunal be pleased to declare that the applicant is employed with the respondent No.3 as a Driver on casual basis ever since 1990:

AND he is entitled to wages in such capacity besides other perquisites e.g. increment, overtime allowance etc. less permissible deductions;

AND he is also entitled to regularisation/naturalisation of his services as per Rules;

AND the respondent No.3 be called upon to produce before the Hon'ble Tribunal, the accounts of payments made to the applicant and differential amount as may be found due upon the respondent No.3 be ordered to be paid with such interest, as under the circumstances this Hon'ble Tribunal considered appropriate;

AND such other relief or reliefs to which the applicant is found to be entitled to may be allowed;

AND the costs of the application be allowed.

AND for such kind act the applicant shall ever pray."

2. The facts in brief are that the applicant claims that he was working under the respondent no. 3 as a casual driver since 1990 and that he is not being paid his wages and overtime allowances as per the rules and that from February, 1997 he is being shown by the respondent no. 3 to be engaged through one M/s Oriental Security Service (in short OSS) although he had never opted to work under the said agency. He also claimed for regularization of his services. When the matter was heard for the first time on 12.6.1997, this Tribunal considered the prayer for interim relief and directed the respondents not to alter the terms of engagement of the applicant till filing of Counter by the respondents. After filing of the Counter, the question of continuation of the interim order was considered and vide order dated 18.9.1997 of this Tribunal, further continuation of the interim order was not extended with the observation that the applicant was being engaged through the private agency OSS for which no direction can be given to the respondents about terms of engagement of the applicant. Thereafter, after hearing the parties, this Tribunal dismissed the OA vide order dated 26.5.2000, which was challenged before Hon'ble High Court in O.J.C. No. 12752/2001. Hon'ble High Court, vide order dated 29.11.2018, the matter was remitted to this Tribunal for fresh adjudication. Accordingly, the matter was adjudicated afresh after hearing both the parties.

3. The facts in this case have been examined by this Tribunal vide order dated 18.9.1997 while considering the question of extending the interim protection. This order was not challenged by the applicant. The paragraphs 3 and 4 of the order are extracted as under:-

"3. The applicant's case is that in 1990 he was engaged as a casual Driver on daily wage basis in the office of respondent No.3 and he has been working as such throughout since 1990. During this period, however, he has not got the prescribed wages, or increments, or over time allowance. In 1993 a vacancy of Driver was notified and the applicant was called to the interview, but the interview was cancelled. Prior to February, 1997, the applicant was getting his wages regularly from the establishment of respondent No.3. But from February, 1997 onwards he is being paid by M/S Oriental Security Service. The applicant has never offered to work under M/s Oriental Security Service. According to the applicant, respondent No.3 has shown him as being in the pay roll of M/s Oriental Security Service.

4. Respondents in their counter have alleged that the applicant was working sometimes under respondent No.3 as casual Motor Driver on daily payment basis,. Such engagement was with breaks as the applicant was being engaged depending upon requirement for his service. Subsequently, respondent No.3 has disengaged him and the applicant has been engaged by M/s Oriental Security Service who have been offering his service to respondent No.3 as and when required. The applicant is being paid by M/s Oriental Security Service. He has never worked against any specific Colas III or Class IV post in the establishment of respondent No.3 and there is no relationship of master and servant between respondent No.3 and the applicant. Therefore, according to the respondents, the question of respondent No.3 altering the terms of engagement of the applicant does not arise as the applicant is not under the engagement of respondent No.3."

4. The applicant, during pendency of the OA, had filed the MA No. 736/1998 on 1.12.1998, stating that after vacation of the interim order on 18.9.1997, the respondents have posted one driver on transfer from another office and have informed the agency OSS to discontinue the engagement of the applicant w.e.f. 1.12.1998. The applicant therefore, prayed for a direction not to implement the order dated 17.11.1998. Thereafter, the OA and the MA were listed for peremptory hearing to 15.12.1998, when the applicant's counsel was absent and on his request the matter was listed to 17.12.1998. Finally, the matter was heard on 22.5.2000 and order dated 26.5.2000 was pronounced dismissing the OA which was set aside by Hon'ble High Court vide order dated 29.11.2018. This implies that the applicant's engagement as casual driver has been discontinued since 1.12.1998.

5. We heard learned counsel for the applicant. He reiterated the averments made in the OA, stating that the applicant was engaged by the respondents as casual driver and subsequently, without knowledge of the applicant, he was being paid wages through another agency. It was also submitted that the applicant is not being engaged by the respondents after vacation of interim order by the Tribunal vide order dated 18.9.1997. At the time of hearing, learned counsel submitted copy of some documents in which, the name of the applicant was listed as one of the part time employee.

6. Learned counsel for the respondents submitted that as stated in the Counter, the applicant does not hold any civil post and hence, the OA is not maintainable. It was further submitted that the applicant was being engaged as casual driver on daily wage basis depending on the necessity of work and after the respondents dispensed with the service of the applicant, he was engaged by OSS and he had no relationship of master and servant with the respondents.

7. From the pleadings as well as the submissions of the parties, the undisputed facts are that the applicant on part time casual basis since 1990 by the respondent no.3 till January, 1997. From February, 1997, the applicant was being engaged through an agency, M/s Oriental Security Service for which the applicant had not given any consent as stated in the OA. Although the decision of the respondents to disengage the applicant from service directly under the respondents with effect from February, 1997 and to engage him through M/s Oriental Security Service has not been specifically challenged in the OA, but it is noted that one of the prayer of the applicant is to treat him to be employed directly by the respondent no.3 as casual driver since 1990. By the time the OA was filed, the applicant was already under the employment under M/s Oriental Security Service. Thereafter, the respondents decided to disengage the applicant w.e.f. 1.12.1998 after transfer of one regular driver

from another office and although it was objected by the applicant by filing the MA No. 736/1998, there was no order of the Tribunal to stay the operation of the order to transfer another driver in place of the applicant.

8. It was submitted by the applicant's counsel at the time of hearing that the applicant is not being given any work after vacation of the interim order on 18.9.1997. It was open for the applicant to approach Hon'ble High Court against order dated 18.9.1997 of this Tribunal by which the interim relief granted by the Tribunal was vacated so that during pendency of this dispute, status quo of his engagement on the date of filing the OA could have been maintained.

9. The law regarding the issue of regularization of the service of casual/temporary employees like the applicant has been settled by Hon'ble Apex Court in the case of State of Karnataka vs. Uma Devi reported in 2006 SCC (L&S) 753. It has been laid down in the above judgment that an employee who has been appointed in violation of service rules, will not be entitled for any benefit. It was further held in the case of Uma Devi (supra) as under:-

"45. 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.

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47. When a person enters a temporary employment or gets engagement as a contractual or casual worker and the engagement is not based on a proper selection as recognized by the relevant rules or procedure, he is aware of the consequences of the appointment being temporary, casual or contractual in nature. Such a person cannot invoke the theory of legitimate expectation for being confirmed in the post when an appointment to the post could be made only by following a proper procedure for selection and in concerned cases, in consultation with the Public Service Commission. Therefore, the theory of legitimate expectation cannot be successfully advanced by temporary, contractual or casual employees. It cannot also be held that the State has held out any promise while engaging these persons either to continue them where they are or to make them permanent. The State cannot constitutionally make such a promise. It is also obvious that the theory cannot be invoked to seek a positive relief of being made permanent in the post.

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53. One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in S.V. NARAYANAPPA (*supra*), R.N. Nanjundappa (*supra*), and B.N. Nagarajan (*supra*), and referred to in paragraph 15 above, of duly qualified persons in duly sanctioned vacant posts might have been made and the employees have continued to work for ten years or more but without the intervention of orders of 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 *sub judice*, 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.

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

10. Applying the ratio of the above judgment in the case of the applicant, it is seen that he had not completed 10 years of continuous service as on 1.12.1998 when the respondents discontinued his engagement through OSS. The applicant has not produced any rules or scheme of Government of India which was prevalent during the time he was under engagement to justify the prayers made in this OA. As per the judgment in the case of *Uma Devi* (*supra*), the employees who had worked for more than 10 years continuously can be considered for regularization as a part of one time exercise, if they fulfil certain criteria as laid down in that judgment. We do not find the applicant to have fulfilled these criteria to justify his prayer for regularization. Even if the applicant would have got the benefit of the interim order to continue being engaged from 1.12.1998 till 2006, still also he would not have fulfilled the criteria as laid down by Hon'ble Apex Court in *Uma Devi* judgment since

minimum 10 year of engagement laid down as one criteria, excludes the period the employee continued because of the stay order from Court.

11. In view of the facts and circumstances as discussed above, we do not find any merit in the OA, which is accordingly dismissed. There will be no order as to cost.

(SWARUP KUMAR MISHRA)
MEMBER (J)

(GOKUL CHANDRA PATI)
MEMBER (A)

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