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Court : Kerala

Decided On : Mar-02-2016

Judge : Dama Seshadri Naidu

Appeal No. : WP(C).No. 576 of 2010

Appellant : Yousaf and Others

Respondent : The Kerala Co-operative Milk Marketing Federation Ltd. Represented by the Managing, Director and Others

Judgement :

1. The petitioners in all the four writ petitions are similarly situated, having a common grievance as regards the security of their service in the Kerala Co-operative Milk Marketing Federation ('the Federation'). This Court, therefore, decides to dispose of all the writ petitions through a common judgment.
2. Originally, 9 petitioners filed the writ petition; pending the writ petition, petitioners 5 and 6 have left the Organisation. Now, all the remaining seven petitioners are working as technicians.
3. Out of four petitioners, pending the writ petition, petitioners 1 and 4 left. The remaining two petitioners are working as technicians.

4. Out of nine petitioners, petitioners 1, 6 and 9 left the service pending the writ petition. All the remaining six petitioners are working as technicians.

5. It is pertinent to observe that the petitioners in these three writ petitions possessed the qualification required to hold the post of technician: ITI Certificate with a basic qualification of SSLC and three years' experience.

6. Both the petitioners joined the respondent Federation as Junior Assistants and are continuing as such. 7. As seen from the record, in or around 2007, all the petitioners were appointed temporarily for a period of one year on a consolidated pay. The orders of appointment also made it clear that the appointments would not confer on the petitioners any preferential claim in the federation. Earlier, the federation sought to replace the petitioners with another set of temporary employees on the premise that the petitioners initial tenure had come to an end. All of them approached this Court, which, through different interim orders, allowed them to continue in service.

8. The learned counsel for the petitioners have submitted that in 2007 and 2008, when the petitioners were appointed, the method of recruitment through the Kerala Public Service Commission was not invoked. According to them, the rules were framed and the recruitment in the federation through the Public Service Commission commenced only in 2011.

9. Until 2011, the mode of recruitment, contend the learned counsel for the petitioners, was through the sponsorship by the Employment Exchange. And the competent authority to appoint the staff was the Board of the Federation.

10. The learned counsel, in elaboration of their submissions, have submitted that the federation appointed the petitioners in identified vacancies after following the due procedure. No procedural infraction, much less statutory violation, had been committed in the petitioners appointment.

11. Drawing my attention to State of Karnataka v. Umadevi JT 2006 (4) SC 420 a Constitution Bench decision of the Apex Court, the learned counsel stress that the petitioners' appointment could not be termed illegal. According to them, it is not

even irregular. In elaboration, the learned counsel have contended that until 2011, the recruitment being only through the process of sponsorship by the Employment Exchange, the petitioners 1 JT 2006 (4) SC 420 appointment is unexceptionable.

12. The learned counsel would further contend that the Courts have held through a profusion of precedents that replacement of one set of temporary employees with another set is impermissible. Further, in the light of Rules framed by the Government prospectively from 2011, the appointments made much earlier could not be disturbed, according to the learned counsel for the petitioners.

13. The learned Standing Counsel for the respondent federation, with equal vehemence, has submitted that the Government issued G.O. (P) No. 41/98/Co-op. dated 09.03.1998, making it mandatory that all appointments in the respondent federation should be through the PSC. He has further drawn my attention to Section 80(3A) of the Kerala Co-operative Societies Act, 1969, to hammer home that the said provision read with Schedule I appended thereto clarifies that no other mode of recruitment than through PSC is permissible.

14. The learned Standing Counsel has also drawn my attention to Exhibit P8 Rules framed in 2011 by the Government empowering the PSC to recruit employees for various Co-operative Societies in the respondent federation. In elaboration, the learned counsel would contend that the federation adopted the process of temporary appointments by way of sponsorship from the Employment Exchange in the interim, only in anticipation of the Rules to be framed by the Government entrusting the recruitment to the PSC. The learned Standing Counsel stresses that there was no occasion for the petitioners to entertain any hope that their position would be made permanent, for the appointment orders were specific that the tenure was one year.

15. Finally, referring to the judicial dictum in *Umadevi* (supra), the learned Standing Counsel would contend that the petitioners, seeking regularization at least as a one-time measure, ought to have been covered by the exceptions provide in the said decision. He has, in elaboration, submitted that those employees ought to have continued for a minimum period of ten years with no judicial intervention. In the present instance, the petitioners were appointed in

2008, and immediately thereafter their services were sought to be terminated. Their services could have been terminated but for the interim direction of this Court in 2010.

16. The learned Standing Counsel for the Public Service Commission, on his part, has submitted that as and when the federation makes the request, it undertakes the process of recruitment strictly in statutory terms.

17. Heard the learned counsel for the petitioners, the learned Standing Counsel for the respondent federation and the learned Standing Counsel for the Public Service Commission, as well as the learned Government Pleader, apart from perusing the record.

18. Hard cases make bad law this Court reminds itself of the Speluncean dilemma, a hypothesis by Lon L. Fuller. The Case of the Speluncean Explorers is an article by legal philosopher Lon L. Fuller. (Published in Harvard Law Review, 1949).

19. By the time the petitioners were appointed, the PSC was not in picture. Though the Government issued G.O. (P) No. 41/98/Co-op. dated 09.03.1998 and amended Section 80 on 05.08.1995, till 2011 it did not frame the Rules enabling the PSC to recruit staff for the respondent federation. Nor had the PSC recruited any employees for the federation in any category or cadre until 2011, when it recruited the first batch of employees.² The Case of the Speluncean Explorers is an article by legal philosopher Lon L. Fuller. (Published in Harvard Law Review, 1949)

20. As has been rightly contended by Sri. K.M. Unnithan, one of the learned counsel for the petitioners, the petitioners appointment was in identified, sanctioned vacancies and also through due process. The federation, rightly, sought sponsorship from the Employment Exchange, which in terms of Section 4 of the Employment Exchanges (compulsory notification of vacancies) Act, 1959, and the Rules made there under, sponsored certain candidates who included the petitioners as well.

21. Indisputably, the petitioners' appointment orders plainly stated that the term was one year. The orders did not hold out any hope, as has been contended by the learned Standing Counsel, that their services would be either extended or regularised. The fact, nevertheless, remains that the petitioners services were not terminated strictly tenurially; it appears, periodically at least initially their terms were extended.

22. As seen from the record, only when the federation sought to replace the petitioners with another set of temporary employees, said to have been sponsored by the Employment Exchange, the petitioners rushed to this Court. The Court, through interim directions, protected their continuation.

23. The issue must be viewed in twin perspective: (1) that as per the appointment order, the petitioners service was tenureal, i.e. temporary, and did not hold out any promise of extension, much less permanency; (2) that the petitioners appointment was neither irregular nor illegal, for the appointment through PSC, then, was unavailable, due to the absence of recruitment rules.

24. At any rate, since the Government issued the G.O. in 1998 and Section 80 stood amended by 1995, the federation, perhaps, in anticipation of the Rules to be framed and the recruitment to be effected through PSC sought appointments by way of sponsorship by Employment Exchange only on a tenureal basis. The action of the respondent federation, therefore, cannot be found fault with.

25. I, however, hasten to add that, having possessed the qualification and having been sponsored by the Employment Exchange, the petitioners secured their employment through a legitimate process. They continued initially on the voluntary extension by the federation, and later under the protective cover of the judicial orders.

26. In *Umadevi* (supra) a learned constitution bench of the Honourable Supreme Court has discussed threadbare the ubiquitous issue of temporary appointments and the subsequent, mostly inevitable, regularizations under one pretext or another. Their Lordships in this definitive pronouncement have decried the adhoc approach of the employers in having recruitments through backdoor methods.

27. Very elaborately Umadevi laid down the principles concerning the recruitment and regularisation. However, conscious of the ramifications of the judgment on countless number of employees who may have been continuing temporarily for decades, Umadevi has observed in paragraph 44 of the judgment thus:

44. One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) . . . 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. . .

(italics supplied)

28. Viewed from the above perspective, I am constrained to observe that though the petitioners were not appointed by any illegal process, their tenure was fixed for one year. They did not complete ten years to be qualified as per the exception carved out in Umadevi. At the same time, I shall observe that until 2011 there was nothing contradictory, either in the statute or recruitment regulations, to interdict the petitioners appointments. Now, they have completed close to a decade service albeit under a judicial directive.

29. It cannot be said that the petitioners lack the qualification. At this juncture, taking a strictly technical view as regards their continuation may inflict extreme agony on the petitioners, most of whom have crossed the employable age. However, compassion in judicial dispensation cannot, at all times, be a noble virtue unless it conforms to the rule of law. Temper justice with compassion, we

must; tamper with justice in the name of compassion, we shall not.

30. Efficacious as the public law remedy under Article 226 of Constitution is, the Constitutional Courts have, nevertheless, acknowledged the limitations concerning, for example, the service matters where the employer enjoys unbridled discretion, which cannot be interfered with so long as it has not fallen foul of any statutory or constitutional mandate.

31. Under these circumstances, this Court declines to hold definitively that the petitioners should be regularized; however, it relegates the issue to the Government, which, as a matter of policy, may take a decision as regards the petitioners' regularisation.

32. It is hoped that the Government will take into account all attendant circumstances, including the statutory compulsions and the misery that may be wrought on the petitioners if permanent employment is denied to them. It is, however, clarified that until the Government takes a decision after hearing all parties concerned and communicates the same, the petitioners shall continue in their present position.

33. The above arrangement does not, however, mean that the Court has shown any proclivity for the petitioners continuation, much less a judicial imprimatur in any manner. The decision making lies entirely in the discretion of the Government.

With the above observations, the Court disposes of the writ petitions. No order on costs.

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