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AMARKANT RAI

v.

STATE OF BIHAR & ORS.

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(Civil Appeal No. 2835 of 2015)

MARCH 13, 2015

[V.GOPALA GOWDA AND R.BANUMATHI, JJ.]

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Labour laws: Regularisation of service – Post of Night Guard – Appointment of appellant temporarily on daily wages – University took a decision to regularize the persons who worked for more than 240 days – Principal requested the

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Registrar of University to regularise the services of appellant but Registrar passed order of termination – On writ petition preferred by few similarly placed daily wagers, High Court directed registrar to allow daily wagers to resume their jobs and appellant also joined his duties – Appellant was required

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to appear before the Three Members Committee for consideration of his claim for regularisation of services, but the same was rejected on the ground that it was a clear case of violation of BSU Act, 1976 – Held: Appellant served University for more than 29 years on the post of Night Guard

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on daily wages – For a considerable time, University never raised the issue that the appointment of the appellant was ultra vires the rules of BSU Act – Having regard to the various communications between the Principal and the University

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*and also the education authorities and the facts of the case, the appointment of the appellant cannot be termed to be illegal, but it can only be termed as irregular – In *Umadevi's case, it was provided that irregular appointment in duly sanctioned posts who have worked for 10 years or more can*

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be considered on merits and steps to be taken one time

measure to regularize them – The objective behind the exception carved out in that case was to permit regularization of such appointments which are irregular but not illegal and to ensure security of employment of those persons who served the State Government and their instrumentalities for more than 10 years – The said exception carved out in Umadevi is applicable to the facts of the present case – There is no material that the appellant has been lacking any qualification or bear any blemish record during his employment for over two decades – Considering the facts and circumstances of the case that the appellant has served the University for more than 29 years, in the interest of justice, the authorities directed to regularize the services of the appellant retrospectively – Bihar State Universities Act, 1976 – ss.10(6), 35.

Allowing the appeal, the Court

HELD: 1. The appointment of the appellant as Night Guard was done out of necessity and concern for the college. The Principal of the college had recommended the case of the appellant for regularization on the post of Night Guard and the University was thus well acquainted with the appointment of the appellant by the then Principal even though Principal was not a competent authority to make such appointments and thus the appointment of the appellant and other employees was brought to the notice of the University in 1988. For a considerable time, University never raised the issue that the appointment of the appellant by the Principal was *ultra vires* the rules of BSU Act. Having regard to the various communications between the Principal and the University and also the education authorities and the

A facts of the case, the appointment of the appellant cannot be termed to be illegal, but it can only be termed as irregular. [Para 9] [548-E-H; 549-A]

B 2. The State Government intimated to the Registrar of all the Colleges that as per the settlement held between Bihar State University and College Employees Federation and the Government it was agreed that the services of the employees working in the education institutions on the basis of prescribed staffing pattern are to be regularized. As per sanctioned staffing pattern, there were two vacant posts of Class IV employees and the appellant was appointed against the same. [Para 10] [549-B-D]

D 3. The objective behind the exception carved out in **Umadevi's* case was to permit regularization of such appointments, which are irregular but not illegal, and to ensure security of employment of those persons who served the State Government and their instrumentalities for more than ten years. The exception carved out in *Umadevi* is applicable to the facts of the present case. There is no material placed by the respondents that the appellant has been lacking any qualification or bear any blemish record during his employment for over two decades. Considering the fact that the appellant has served the University for more than 29 years on the post of Night Guard on daily wages, in the interest of justice, the authorities are directed to regularize the services of the appellant retrospectively. [Paras 11, 14, 16] [551-B-C; 553-D, G-H; 554-A]

Secretary, State of Karnataka & Ors. v. Umadevi (3) & Ors. (2006) 4 SCC 1 :2006 (3) SCR 953 – relied on.

State of Karnataka & Ors. v. M.L. Kesari & Ors. (2010) 9 SCC 247; 2010 (9) SCR 543; Nihal Singh & Ors. v. State of Punjab & Ors. (2013) 14 SCC: 2013 (11) SCR 1 – referred to. A

Case Law Reference B

2006 (3) SCR 953 relied on. Para 4

2010 (9) SCR 543 referred to. Para 12

2013 (11) SCR 1 referred to. Para 13 C

CIVILAPPELLATE JURISDICTION : Civil Appeal No. 2835 of 2015.

From the Judgment and Order dated 20.02.2013 of the High Court of judicature at Patna in L.P.A. No. 1312 of 2012. D

Pradeep Gupta, Parinav Gupta, Mansi Gupta, Dr. Vipin Gupta for the Appellant. E

Abhinav Mukerji, Bihu Sharma, Purnima Krishna, Rohit K. Singh for the Respondents.

The Judgment of the Court was delivered by F

R. BANUMATHI, J. 1. Leave granted.

2. This appeal by special leave arises out of the order dated 20.02.2013 passed by the High Court of Judicature at Patna in LPA No.1312 of 2012 which was dismissed in *limine* by the High Court, whereby the order of the learned Single Judge was confirmed observing that the appointment of the appellant as daily wages was not by the competent authority and that he is not entitled for regularization. G

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A 3. Brief facts which led to the filing of this appeal are as follows:- The appellant was appointed temporarily in Class IV post of Night Guard, on daily wages vide Office Order dated 04.06.1983 issued by Principal, Ramashray Baleshwar College (for short "College"), Dalsang Sarai, affiliated to Lalit Narayan Mithila University (for short "University"), Bihar. The University vide letter dated 04.07.1985 took a decision to regularize the persons who worked for more than 240 days, and as per the letter dated 30.03.1987, as per which employees who have been working for a period for more than one year need to be regularized. Thereafter, the Additional Commissioner-cum- Secretary, Bihar passed a settlement dated 11.07.1989 and forwarded a copy of the same to the Vice Chancellors of the Universities, wherein it was stated that the services of employees working in educational institutions as per the staff pattern, can be regularized, further imposing a condition that new appointments against the vacancies present and in future should not at all be done. Principal, Ramashray Baleshwar College requested the Registrar of the University to regularize the services of appellant vide letter dated 07.10.1993; but the Registrar passed an Order of termination dated 01.03.2001. A Writ Petition No.9809/1998 was preferred by few similarly placed daily wagers in the High Court. As per the directions issued by the High Court, the Registrar of the University vide letter dated 22.12.2001 allowed all the daily wagers to resume their jobs from 03.01.2002 and the appellant also joined his duties.

G 4. The Principal of the College again vide letters dated 08.01.2002 and 12.07.2004 recommended for absorption of the appellant against the two vacant posts. In pursuance of the High Court Order in CWJC No. 5774/2000, he was given opportunity to appear before the Three Members Committee constituted by the Vice-Chancellor for consideration of his claim

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for regularization of services, but the same was rejected as it was not in consonance with the Recruitment Rules laid down by the Constitution Bench judgment in *Secretary, State of Karnataka & Ors. v. Umadevi (3) & Ors.*, (2006) 4 SCC 1 and the same was informed to the appellant by the Registrar vide letter dated 25.11.2007. Appellant approached the High Court by way of Writ Petition (civil) No. 545/2009 and the same was dismissed vide Order dated 26.8.2011 observing that it is a clear case of violation of Section 10(6) and Section 35 of the Bihar State Universities Act, 1976 and there is no illegality in the order passed by the Three Members Committee. Aggrieved by it, the appellant preferred LPA No. 1312/2012 which was dismissed *in limine* confirming the order dated 26.08.2011. In this appeal, the appellant seeks to assail the above order.

5. Learned counsel for the appellant contended that the appellant served on the post for 29 years on daily wages and even as per the decision in para 53 in *Umadevi's* case (*supra*), irregular appointment of employees who have worked for more than 10 years should be considered on merits. It was contended that the appellant has been working in a sanctioned post and his appointment was not illegal but in the facts and circumstances of the case, his appointment could only be irregular appointment entitling him for regularization. It was submitted that Three Members Committee as well as the High Court did not keep in view that the case of the appellant was recommended for regularization.

6. Per contra, learned counsel for respondents No. 1 to 3 contended that Principal of the College has no authority to make any appointment on any post on daily wages as per the legislative scheme under Section 10(6) of Bihar State Universities Act, 1976. It was submitted that Three Members

A Committee scrutinized the documents available on record and rejected claim of the appellant for regularization and the High Court rightly dismissed the claim of the appellant for regularization.

B 7. Reiterating the submission, learned counsel for respondent Nos. 4 to 6 submitted that a principal of the college was not empowered under the Universities Laws to make appointment to Class III or Class IV and that the appellant was not appointed against any sanctioned post and therefore he cannot seek for regularization.

8. We have carefully considered the rival contentions and also perused the impugned order and material on record.

D 9. Insofar as contention of the respondent that the appointment of the appellant was made by the principal who is not a competent authority to make such appointment and is in violation of the Bihar State Universities Act and hence the appointment is illegal appointment, it is pertinent to note that the appointment of the appellant as Night Guard was done out of necessity and concern for the college. As noticed earlier, the Principal of the college vide letters dated 11.03.1988, 07.10.1993, 08.01.2002 and 12.07.2004 recommended the case of the appellant for regularization on the post of Night Guard and the University was thus well acquainted with the appointment of the appellant by the then principal even though Principal was not a competent authority to make such appointments and thus the appointment of the appellant and other employees was brought to the notice of the University in 1988. In spite of that, the process for termination was initiated only in the year 2001 and the appellant was reinstated w.e.f. 3.01.2002 and was removed from services finally in the year 2007. As rightly contended by the learned counsel for the appellant, for a considerable time, University never raised the

issue that the appointment of the appellant by the Principal is *ultra vires* the rules of BSU Act. Having regard to the various communications between the Principal and the University and also the education authorities and the facts of the case, in our view, the appointment of the appellant cannot be termed to be illegal, but it can only be termed as irregular.

10. Human Resources Development, Department of Bihar Government, vide its letter dated 11.07.1989 intimated to the Registrar of all the Colleges that as per the settlement dated 26.04.1989 held between Bihar State University and College Employees Federation and the Government it was agreed that the services of the employees working in the education institutions on the basis of prescribed staffing pattern are to be regularized. As per sanctioned staffing pattern, in Ramashray Baleshwar College, there were two vacant posts of Class IV employees and the appellant was appointed against the same. Further, Resolution No. 989 dated 10.05.1991 issued by the Human Resources Development Department provides that employees working upto 10.5.1986 shall be adjusted against the vacancies arising in future. Although, the appellant was appointed in 1983 temporarily on the post that was not sanctioned by the State Government, as per the above communication of Human Resources Development Department, it is evident that the State Government issued orders to regularise the services of the employees who worked upto 10.5.1986. In our considered view, the High Court ought to have examined the case of the appellant in the light of the various communications issued by the State Government and in the light of the circular, the appellant is eligible for consideration for regularization.

11. As noticed earlier, the case of the appellant was referred to Three Members Committee and Three Members

- A Committee rejected the claim of the appellant declaring that his appointment is not in consonance with the ratio of the decision laid down by this Court in *Umadevi's* case (supra). In *Umadevi's* case, even though this Court has held that the appointments made against temporary or ad-hoc are not to be regularized, in para 53 of the judgment, it provided that irregular appointment of duly qualified persons in duly sanctioned posts who have worked for 10 years or more can be considered on merits and steps to be taken one time measure to regularize them. In para 53, the Court observed as under:-

- D “53. One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in *S.V. Narayanappa*, *R.N. Nanjundappa* and *B.N. Nagarajan* and referred to in para 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 the courts or of tribunals. The question of regularisation 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 abovereferred 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 regularise 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 the 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 regularisation, if any already made, but not sub judice, need not be reopened based on this judgment, but there should be no further bypassing of the constitutional requirement and regularising or making permanent, those not duly appointed as per the constitutional scheme.”

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The objective behind the exception carved out in this case was to permit regularization of such appointments, which are irregular but not illegal, and to ensure security of employment of those persons who served the State Government and their instrumentalities for more than ten years.

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12. Elaborating upon the principles laid down in *Umadevi's* case (supra) and explaining the difference between irregular and illegal appointments in *State of Karnataka & Ors. v. M.L. Kesari & Ors.*, (2010) 9 SCC 247, this Court held as under:

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“7. It is evident from the above that there is an exception to the general principles against “regularisation” enunciated in *Umadevi* (3) , if the following conditions are fulfilled:

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(i) The employee concerned should have worked for 10 years or more in duly sanctioned post without the benefit or protection of the interim order of any court or tribunal. In other words, the State Government or its instrumentality should have employed the employee and continued him in service voluntarily and continuously for more than ten years.

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(ii) The appointment of such employee should not be illegal, even if irregular. Where the appointments are not made or continued against sanctioned posts or

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- A where the persons appointed do not possess the prescribed minimum qualifications, the appointments will be considered to be illegal. But where the person employed possessed the prescribed qualifications and was working against sanctioned posts, but had
- B been selected without undergoing the process of open competitive selection, such appointments are considered to be irregular.”

- C 13. Applying the ratio of *Umadevi's* case, this Court in *Nihal Singh & Ors. v. State of Punjab & Ors.*, (2013) 14 SCC 65 directed the absorption of the Special Police Officers in the services of the State of Punjab holding as under:

- D “35. Therefore, it is clear that the existence of the need for creation of the posts is a relevant factor with reference to which the executive government is required to take rational decision based on relevant consideration. In our opinion, when the facts such as the ones obtaining in the instant case demonstrate that there is need for the
- E creation of posts, the failure of the executive government to apply its mind and take a decision to create posts or stop extracting work from persons such as the appellants herein for decades together itself would be arbitrary
- F action (inaction) on the part of the State.

- G 36. The other factor which the State is required to keep in mind while creating or abolishing posts is the financial implications involved in such a decision. The creation of posts necessarily means additional financial burden on the exchequer of the State. Depending upon the priorities of the State, the allocation of the finances is no doubt exclusively within the domain of the legislature. However in the instant case creation of new posts would not create
- H any additional financial burden to the State as the various

banks at whose disposal the services of each of the appellants is made available have agreed to bear the burden. If absorbing the appellants into the services of the State and providing benefits on a par with the police officers of similar rank employed by the State results in further financial commitment it is always open for the State to demand the banks to meet such additional burden. Apparently no such demand has ever been made by the State. The result is—the various banks which avail the services of these appellants enjoy the supply of cheap labour over a period of decades. It is also pertinent to notice that these banks are public sector banks."

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14. In our view, the exception carved out in para 53 of *Umadevi* is applicable to the facts of the present case. There is no material placed on record by the respondents that the appellant has been lacking any qualification or bear any blemish record during his employment for over two decades. It is pertinent to note that services of similarly situated persons on daily wages for regularization viz. one Yatindra Kumar Mishra who was appointed on daily wages on the post of Clerk was regularized w.e.f. 1987. The appellant although initially working against unsanctioned post, the appellant was working continuously since 03.1.2002 against sanctioned post. Since there is no material placed on record regarding the details whether any other night guard was appointed against the sanctioned post, in the facts and circumstances of the case, we are inclined to award monetary benefits be paid from 01.01.2010.

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15. Considering the facts and circumstances of the case that the appellant has served the University for more than 29 years on the post of Night Guard and that he has served the

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- A College on daily wages, in the interest of justice, the authorities are directed to regularize the services of the appellant retrospectively w.e.f. 03.01.2002 (the date on which he rejoined the post as per direction of Registrar).
- B 16. The impugned order of the High Court in LPA No.1312 of 2012 dated 20.02.2013 is set aside and this appeal is allowed. The authorities are directed to notionally regularize the services of the appellant retrospectively w.e.f. 03.01.2002, or the date on which the post became vacant
- C whichever is later and without monetary benefit for the above period. However, the appellant shall be entitled to monetary benefits from 01.01.2010. The period from 03.01.2002 shall be taken for continuity of service and pensionary benefits.
- D 17. The appeal is allowed in terms of the above. No order as to costs.

Devika Gujral

Appeal allowed.

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