IN THE PUNJAB AND HARYANA HIGH COURT AT CHANDIGARH

C.W.P. No. 6605 of 2004

Date of Decision: January 31, 2011

The Mansa Central Cooperative Bank Ltd. Mansa

...Petitioner

Versus

The Presiding Officer, Industrial Tribunal, Punjab, Sector 22, Chandigarh & others

...Respondents

CORAM: HON'BLE MR. JUSTICE M.M. KUMAR

HON'BLE MS. JUSTICE RITU BAHRI

Present: Mr. D.V. Sharma, Sr. Advocate with
Mr. Deepak Bhardwaj, Advocate,
for the petitioner.

Ms. Anjali Khosla, Advocate, for
Mr. Vikas Singh, Advocate,
for respondent No. 1.

1. To be referred to the Reporters or not? Yes

2. Whether the judgment should be reported in the Digest? Yes

M.M. KUMAR & RITU BAHRI, JJ.

1. This petition filed under Article 226 of the Constitution challenges award dated 20.2.2003 (P-7) passed by the Industrial Tribunal, Punjab, Chandigarh (for brevity, 'the Tribunal') directing the petitioner-Bank to frame Rules for regularising the services of the workmen within a period of nine months from the date of passing of the award.

2. Brief facts of the case are that various workmen who were working as Gunmen in the petitioner-Bank submitted a demand notice dated 5.12.1995 (P-1) through Trade Union Council,

Patiala. Eventually, on 26.10.1999, the Labour Commissioner, Punjab, made a reference to the Tribunal constituted under Section 7-A of the Industrial Disputes Act, 1947 (for brevity, 'the Act') for giving award on the following issues:

"1. Whether the daily wage gunmen are entitled to be regularised from the date of their appointment? If yes, then what benefits are to be paid to the workmen?

2. Whether the Gunmen are entitled to get arrears as per the scales of Nationalised Banks from 1988? If yes, then what benefits are to be paid to the workmen?

3. Whether the gunmen are entitled to get their uniforms according to the seasons? If yes, what are benefits they are entitled for?

4. Whether the Gunmen are entitled to get Gunman allowance @ Rs. 100/- per month? If yes, what are benefits they are entitled to?"

3. On 11.2.2000, the workmen filed their statement of claim before the Tribunal (P-3). The case of the workmen was that during the period of terrorism in Punjab, the Banks were prone to robbery and dacoity. Accordingly, the Inspector General of Police, Punjab, allowed the Banks to engage security guards on daily wage basis until threat ceases. The workmen-gunmen were engaged by the Banks on daily wage basis and they continued to work as such since 1988. They claimed regularisation of their services as also grant of regular pay scales equivalent to the scales of pay drawn by their counterparts working in the nationalised banks w.e.f. 1988 along

with arrears. Other than this, they also raised demand of providing seasonal uniforms according to the Government instructions issued from time to time for its employees. Their last demand was with regard to Gun allowance @ ₹ 100/- per month as is given by other Banks.

4. The petitioner-Bank contested the reference by filing reply on 19.7.2000 (P-4). It was urged that no appointment letters were issued to the workmen-gunmen because the job of security personnel is not of permanent nature. Moreover, no advertisement was issued in the newspapers and their appointments were made as per the resolution of the Bank. The petitioner-Bank also denied other demands raised by the workmen.

5. On 20.3.2003, the Tribunal passed an award giving its findings on the above mentioned four issues. The findings recorded by the Tribunal read thus:

> "12. No evidence has been produced by the workman to show that they were appointed on regular posts as per requirement of the service Rules. In fact the sole witness Shri Darshan Singh, examined by the workman in this first line of his cross examination stated that he was not given any appointment letter. He further stated that his presence was marked separately and not on the staff register and he was paid salary after a week on daily wages basis. The perusal of the statement of this witness clearly indicates that the workman were not working on permanent posts but on daily wage basis. It is the case of respondent that the workmen were appointed on daily wage basis in view of the threat perception during the

terrorism days, but it is in evidence that they are still working as a Gunmen, which shows permanent nature of their job. It is not the case f the Bank that there is no need of Security Guards at present. The claim of the workmen for regular appointment cannot be ignored. The contention of the authorised representative of the management is that they were appointed on the directions of Inspector General of Police is of little consequence. In fact the Bank should have at their initial appointments created posts of Bank Guards by framing proper Rules for their appointments and since it has not been done and it is now directed that the respondent Bank shall frame the Rules for regularizing their services as indicated above within a period of nine months from the date of the award. The first issue in the order of reference is accordingly decided.

13. ISSUE NO. 2

The workman have not placed on record any document showing what is the scale of pay of the security guard of Nationalised Banks. It is hoped that the management will take into consideration while framing the Rules for fixing the salary taking note of scales of pay made by other Banks. The issue is decided accordingly.

14. ISSUE NO. 3

Regarding providing of Uniforms according to season it is desirable that Bank Guards for their distinct identity be provided with the Uniforms according to season and it is directed that necessary Rules be framed

in this regard. The issue is decided accordingly.

15. ISSUE NO. 4

Gun allowance is regarding maintenance of the Gun. The workman demanded Rs. 100/- per month as Gun Allowance and at present they are being paid Rs. 25/- per month as Gun Allowance as per statement of MW1 Gian Chand Gandhi. It is not proved on record how this amount of Rs. 25/- per month as gun allowance is inadequate. It my opinion, an amount of Rs. 25/- is sufficient to maintain the Gun. Therefore, I hold that the workmen are not entitled to Rs. 100/- per month as gun allowance but only Rs. 25/- per month.

In view of my above findings, the reference stands answered accordingly."

6. It is obvious that reference has been allowed by the Tribunal on Issue Nos. 1 and 2 by directing the petitioner-Bank to frame the Rules for regularising the services of the workmen within a period of nine months from the date of award, primarily on the ground that the workmen have been working continuously for a very long time since 1988, which shows the permanent nature of their job. It is not the case of the petitioner-Bank that there is no need of security guards at present.

7. Mr. D.V. Sharma, learned senior counsel for the petitioner-Bank has raised two arguments before us. Firstly, it has been submitted that the Tribunal has no jurisdiction to entertain the reference under Section 10 of the Act and secondly the claim for regularisation is not sustainable in view of the Constitution Bench judgment of Hon'ble the Supreme Court rendered in the case of

Secretary, State of Karnataka v. Umadevi, (2006) 4 SCC 1, wherein their Lordships' of Hon'ble the Supreme Court has deprecated regularisation of services of daily wagers who had made a back door entry and continued for a long period. Learned counsel has emphasised that in the present case the workmen were engaged on daily wage basis without following the procedure prescribed in the statutory rules applicable to the petitioner-Bank, namely, the Punjab State Cooperative Financing Institutions Service Rules, 1958. Therefore, the workmen do not acquire any right for regularisation of their services and the Tribunal has gravely erred in issuing direction to the petitioner-Bank to frame rules for regularising their services. Learned counsel then submitted that there is no direction given by Hon'ble the Supreme Court in Umadevi's case (supra) that persons who have completed ten years must be regularised. The said judgment came in the year 2006 and a number of workmen-Gunmen have already attained the age of superannuation before 2006 and they have not completed ten years service with the Bank.

8. Ms. Anjali Khosla, learned counsel for respondent No. 1 on the other hand referred to Annexure R-1 filed along with their written statement, which depicts the dates of joining of workmen with the petitioner-Bank. A bare perusal of Annexure R-1 shows that out of 14 gunmen, 11 had joined way back in the year 1988; 2 joined in the year 1993; and 1 in the year 1996 and they all have completed more than 15 years of service with the Bank as daily wagers. Learned counsel further argued that before the Tribunal the petitioner-Bank has not taken the plea that the particulars of the workmen were not known to it and that the demand notice was not proper. The petitioner can not raise this plea now. Therefore, the

award passed by the Tribunal deserves to be upheld.

9. Having heard learned counsel for the parties and perusing the record with their able assistance we are of the view that the fundamental issue which is required to be answered in this case is whether the Tribunal was within its jurisdiction to issue directions to frame rules for regularisation for the post of Bank Guards and also create posts for them. The Constitution Bench in Umadevi's case (supra) has answered the aforesaid issue and matter is no longer res integra. A plethora of judgments, for and against, regarding framing of scheme of regularisation have been analyised. The basic distinction between the illegality and irregularity has also been highlighted and in para 43 the rule of equality in public employment has been reiterated holding that it is a basic feature of our Constitution. Para 43 of the judgment is extracted below, which highlight the aforesaid concept:-

> "43. Thus, it is clear that adherence to the rule of equality in public employment is a basic feature of our Constitution and since the rule of law is the core of our Constitution, a Court would certainly be disabled from passing an order upholding a violation of Article 14 or in ordering the overlooking of the need to comply with the requirements of Article 14 read with Article 16 of the Constitution. Therefore, consistent with the scheme for public employment, this Court while laying down the law, has necessarily to hold that unless the appointment is in terms of the relevant rules and after a proper competition among qualified persons, the same would not confer any right on the appointee.....".

10. Once it is concluded that the rule of equality in public employment is a basic feature of our Constitution then no mandamus can be issued by the Courts to violate the rule of equality or the basic structure of the Constitution. Therefore, by issuing directions to the State, the Courts cannot legalise what was not permissible by the Constitution or the rules of service regulating the recruitment. In other words, the employees who have entered the service on ad hoc basis for a period of 89 days or as a daily wager or on contract basis or by any other mode not supported by the basic feature of the Constitution as enshrined under Articles 14 and 16(1) would not then become entitled to seek equitable relief of regularisation because it would amount to condoning the violation of the basic feature of the Constitution.

11. The Constitution Bench has also exhorted the Courts to refrain from issuing directions in favour of a 'litigious employee' by issuing interim directions or otherwise because it would hold up regular procedure for selection or impose on the State the burden of paying an employee who is really not required. The Courts are not to interfere unduly with the economic arrangement of its affairs by the State or its instrumentalities or lend themselves the instruments to facilitate the bypassing of the constitutional and statutory mandates.

12. Explaining that an employee, who has been engaged either on temporary basis or casual basis or on contract basis, is fully aware what he has accepted and, therefore, he has no legitimate expectation to continue in service the way a regularly recruited employee would expect, the Constitution Bench has also refused to impose a permanent ban on the State to employ daily

wager, temporary and contractual employees and has held that such an employee should not be considered as a substitute for the regular recruitment. The aforementioned view has been expressed in para 45, which is extracted below for facility of reference:-

> "45. While directing that appointments, temporary or casual, be regularised or made permanent, the courts are swayed by the fact that the person concerned 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 open eyes. It may be true that he is not in a position to bargain – not at arm's 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 succour to them. ……”

13. The Constitution Bench has also explained the legal connotation of expression ‘illegality’ and ‘irregularity’. It has been laid down that it is mandatory that the posts are advertised by the competent authority/the State or authorized selection body. After considering all the competing claims in accordance with the criteria which answers the requirement of Articles 14 and 16(1) of the Constitution, the candidates are required to be selected and then appointed to the post. Any entry into service by a method contrary to the provisions of Articles 14 and 16(1) of the Constitution have been considered to be illegal as is evident from the perusal of para 15 and 53 of the judgment. The Constitution Bench has made distinction between ‘illegality’ and ‘irregularity’. In order to cull out the aforementioned distinction, their Lordships’ made a reference to the arguments raised in the case of R.N. Nanjundappa v. T. Thimmiah, (1972) 1 SCC 409, wherein it was observed that if the appointment made itself is in infraction of the rules or if it is in violation of the provisions of the Constitution, such an illegality cannot be regularised. It has been further observed that ratification and regularisation is possible of an act which could be within the power and province of the authority but there has been some non-compliance of the procedure or manner which did not go to the root of the appointment and that regularisation cannot be a mode of recruitment. If such a proposition was to be accepted then a new head of appointment would be introduced in defiance of rules, which

would have the effect of setting at naught the rules. The Constitution Bench has also made a reference to another judgment of the Supreme Court rendered in the case of B.N. Nagarajan v. State of Karnataka, (1979) 4 SCC 507. Therefore, a clear distinction between those who have entered into service in violation of the rules and basic structure of the Constitution as envisaged by Articles 14 and 16(1) of the Constitution are class apart from those whose appointments have come to be irregular. It is in these circumstances that their Lordships' of the Supreme Court in Umadevi's case (supra) has observed in para 53 as under:-

> "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 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 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 regularizing or making permanent, those not duly appointed as per the constitutional scheme."

14. When the aforesaid principles are applied to the facts of the present case, it becomes patently clear that the view taken by the Tribunal suffers from apparent legal malady. The workmen-Gunmen in the present case were engaged on daily wage basis in the year 1988 on account of deteriorated law and order situation in the State of Punjab. The Inspector General of Police, C.I.D., Punjab, had issued directions to the Banks to recruit the Security Guards for the safety of the Bank property. There is no material on record to show that the Banks took any steps to create a post of Security Guard and made recruitment in accordance with the principles enshrined under Articles 14 and 16(1) of the Constitution. In order to fall within the four-corners of para 53 of the judgment rendered in Umadevi's case (supra) it is presumed that a sanctioned post is in existence and that their initial appointment on daily wage basis was made by following the procedure consistent with the provisions of Articles 14 and 16(1) of the Constitution. As a first step in that direction the Bank was required to advertise the post with

qualification inviting applications from all eligible persons. On due consideration of all competing claims, the best available candidates were to be selected and appointed. Such a procedure would have answered the provisions of articles 14 and 16 of the Constitution. Any lapse in following the aforesaid procedure would not result in treating the same as irregularity but it would be a patent illegality and violation of the basic feature of the Constitution. However, an irregularity like consideration of a candidate who has applied after the last date or any such thing might be considered as a mere irregularity. Therefore, those who have crossed the initial hurdle of satisfying the basic requirement of Articles 14 and 16 of the Constitution and who have worked for 10 years on ad hoc/ temporary basis could alone be considered for absorption on permanent basis. Moreover, in the present case there is no post of Gunman available and it is well settled that Courts cannot issue any direction for creation of posts.

15. The argument of Ms. Anjali Khosla that the workmen-respondents have completed long years of service would not cut any ice because a daily wage workman would not be entitled to regularisation. In case the Tribunal has found that there is violation of Section 25-F of the Industrial Disputes Act, 1947, then appropriate relief could have been granted to them. We find no merit in the contention raised by Ms. Khosla and, therefore, have no hesitation to reject the same.

16. As a sequel to the above discussion, this petition succeeds and the impugned award of the Tribunal, dated 20.2.2003 (P-7) is set aside to the extent directions have been issued for creation of posts and framing of rules for regularisation of the

services of the workmen. There was no serious challenge to the findings recorded under Issue Nos. 3 and 4, therefore, the same are upheld.

17. The writ petition stands disposed of in the above terms.

(M.M. KUMAR)
JUDGE

(RITU BAHRI)
JUDGE

January 31, 2011
'sp'/Pkapoor