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Casual worker Legitimate Expectation of Regularisation and the policy of Neo-liberalism

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LEGITIMATE EXPECTATION OF REGULARISATION

Under a common law, the concept of hire and fire applicable at the pleasure of the employer. The employer could either fire for a good reason or for a bad one or for no reason at all. In other word, employer was not required to show good reason or follow procedure before termination. After the adoption of constitution, the concept of justiciable unfair labour practice was introduced in the branch of our law. The concept of liberty, rights and property are well defined, that of legitimate expectation is not. And on the facts of each case, where the doctrine applies and where not depend upon the courts, but Judiciary must protect the individual from the decision unfairly arrived at by public authority. In a democracy, the state is supposed to pursue such policies that benefit the people, according to the concept of welfare state.

Workers who are employed on a causal basis usually expect for the regularisation of their employment after the definite period of their continuous service in the department. The common law position in this regard, the workers could not have this expectation, as these are appointed for temporary basis and it is obvious to get terminated if there is no work in the department. Also, in various judgements by Indian supreme court held that no promise is given to the workers for the regularisation of their employment by the department while hiring them. But this position seems to be against the legitimate demand of the casual workers working in the department for 10 or more years as they are not getting benefits of gratuity provision and some benefited allowances against the permanent employees of the same post in the department. The scenario got worse when the government after taking benefits for 10 or more years from these casual workers, then dispend them due to the contention of economic burden. These casual employees have no legal right to enforce their employment against the policy of being dispend and without a representation. Therefore, it is required from the judiciary to consider the expectation of these casual workers who are not employed in illegal bases but irregular bases. In this project I try to put my contention as how administrative agencies by their policies violates the legitimate expectation of the temporary casual workers for permanent employee status under the vacancy of regular recruitment process due to outsourcing, these vacancy are not created because of third party (corporation) appoint the

workers on the contract basis and these temporary casual worker get dispensed without being given the opportunity of representation by such policies of administrators which is against the concept of natural justice.

CASUAL WORKERS WITH TEMPORARY STATUS

"Casual workers are engaged by various Ministries\Departments and their attached and subordinate offices for work of casual or seasonal nature. They are engaged according to the requirement of different Ministries\Department\subordinate offices. There is no legislation exclusively for regulating engagement of casual workers. However, the central government has issued guidelines in the matter of recruitment of casual workers on daily wage basis."[1]

The government had launched a scheme viz Casual Labourers (Grant of Temporary Status and Regularisation), 1993. Under this scheme Temporary status would be conferred on all casual labourers who rendered their service of at least one year's i.e., engaged in the employment for a period at least 240 days (206 days in case of offices observing 5 days week)[2]. But it shall not be applicable to casual workers in Railways, Department of Telecommunication and Department of Posts who already have their own schemes. Some provision of the scheme:

1. Casual labourer who acquires temporary status will be brought on the permanent establishment only if they are selected through regular selection process for Group D post.
2. 50% of the service rendered under temporary status would be counted for the purpose of retirement benefits after their regularisation.
3. Despite conferment of temporary status, the service of a casual labour may be dispensed with by giving a notice of one month. Also, the wages be paid to the worker for the days on which he engaged on work.
4. Two out of every three vacancies in Group `D' cadres in respective offices where the casual labourers have been working would be filled up as per extant recruitment rules and in accordance with the instructions issued by Department of Personnel and Training from amongst casual workers with temporary status.
5. After rendering three years' continuous service after conferment of temporary status, the casual labourers would be treated on par with temporary Group `D' employees for the

[1] Press Information Bureau Government of India Ministry of Labour & Employment 09-January-2012
[2] Ministry of Personnel, Public Grievances and Pensions (Dept. of Personnel and Training, Casual Labourers (Grant of Temporary Status and Regularisation) Scheme.

purpose of contribution to the General Provident Fund and would also further be eligible for the grant of Festival Advance/Flood Advance on the same conditions as are applicable to temporary Group `D' employees, provided they furnish two sureties from permanent Government servants of their Department.

The scheme provide status of temporary to casual worker contain a provision required three-year continuous service for regularisation was given. Also, only 50% of the duration they engaged in work be taken into consideration after regularisation for retirement benefit which means that if they engage in 12-year employment only 6 yr. benefit after retirement be given addition to the duration of regularised in the service. And no clause gives information regarding the reason for the dispensed of service, only notice be given before one month. One view also be considered as an expectation of the temporary casual worker as when the government regularised them, they considered as fresh in the employment and no benefit of their previous work be given.

Therefore, the Department taking benefit from these provisions and take maximum benefit of manpower from the temporary casual worker, dispensed them without holding and liability. The government come up with the new concept of outsourcing the government function. All this make the situation worse as the casual labour expect for their regularisation of employment after continuing working in the department for 10 or more years and the government by making such policy violates the legitimate expectation of the temporary casual labour.

CASUAL WORKERS OF AIR INDIA MANAGEMENT DEMANDING FOR REGULARISATION

Indian Airlines, over 2,500 workers have been working as a casual worker for many decades. These workers who are class 4 employees work as Commercial helper and drivers. They work with permanent workers, perform loading and unloading luggage of passengers, cargo handling, cleaning the aircrafts in day and night shifts. The casual workers of Air India follow various strict safety and security rules and regulations to ensure the Air India flight are safe. Air India management have been keeping these workers who play such responsible function as casual worker for the last 20-30 years. To avoid them making permanent, management does not permit any one to work over 6 months in a year. Once workers complete 6 months of work in a year, they are sent out on a compulsory break and they allowed to resume their work only after 6 months. They don't receive any DA, no additional night times or early morning allowances, no provident fund, no medical facilities or medical insurance. By retaining them as casual workers and by cutting

down the work to outsource the services by private contract corporations as done at Bangalore and Hyderabad by outsourcing the work to Singapore Airline Terminal Services Company. This effect the condition of the workers, as management engaged them to work for only 6 months so to cut down their temporary status and no requirement for their regularisation. Casual worker of Air India and Indian Airlines have been fighting for their legitimate expectation with hinders by the policy of outsourcing and without considering their interest in the employment. As there always a hope to get regularise when one serving half span of their life in the department with full sincerity.

SUPREME COURT ON REGULARISATION

There is no fundamental right in those who are temporary casual worker to claim that they have a right to be absorbed in the service. But doctrine of legitimate expectation has been recognised by the judiciary in its various judgment which fall between claim and no claim. Though their appointment was irregular but not illegal[3], service ought to have been regularise in the view of the judgement of the Hon'ble Supreme Court of India.

Uma Devi v. state of Karnataka[4]

Para 53 - The term "one time measure" held in this case which meant each department or each instrumentality should undertake a one-time exercise and prepare a list of all casual, daily-wage or ad hoc employees who have been working for more than ten years without the intervention of courts and tribunals and subject them to a process verification as to whether they are working against vacant posts and possess the requisite qualification for the post and if so, regularise their services on the cut-off date of 10th April, 2006.[5]

But several department and instrumentality did not commence the one-time regularisation process. On the other hand, some department or instrumentalities excludes several employees from consideration either on the ground that their case were pending in courts or due to absolute error.

Also, government of Uttarakhand has brought a regulation policy to regularise all the contractual employees working and complete 5 years of service which has been quashed by High Court of Uttarakhand because of Uma Devi Judgment para 53 as "one-time measure" cut off date 2006.

[3]Mahalingam vs The Engineer in Chief W.P.Nos.28633
[4] Appeal (civil) 3595-3612 of 1999
[5] Uma Devi v. state of Karnataka

Narendra Kumar Tiwari vs The State of Jharkhand[6]

The High Court as well as the State of Jharkhand ought to have considered the entire issue in a contextual perspective and not only from the point of view of the interest of the State, financial or otherwise – the interest of the employees is also required to be kept in mind. Under the circumstances, we are of the view that the Regularisation Rules must be given a pragmatic interpretation and the appellants, if they have completed 10 years of service on the date of promulgation of the Regularisation Rules, ought to be given the benefit of the service rendered by them. If they have completed 10 years of service they should be regularised unless there is some valid objection to their regularisation like misconduct etc

As it is stated by the supreme court, these irregular procedures have to be curbed and state has to concern more on regular recruitment process and regularised the service of temporary casual worker who complete their service term of 10 years on the cut-off date of 10th April 2006.[7]

Mahalingam vs The Engineer in Chief[8]

The claim of the writ petitioners for regularisation were rejected in proceedings dated 17.9.2014 on the ground that the employees who were appointed on casual basis and on daily wages, are not entitled for regularisation in accordance with the Government Orders In this regard, a direction is also sought for in this writ petition to regularise the services of the writ petitioners in the existing vacancy by taking note of the fact that the petitioners have completed 10 years of their continuous service.[9]

The writ petitioners, though admit the fact that their appointment was irregular, contended that their appointments are not illegal and therefore their services ought to have been regularised in view of the judgment of the Hon'ble Supreme Court of India.[10]

AFFECTS OF OUTSOURCING

Supporters of outsourcing and privatisation argues that private sector can perform many functions more efficiently and cost-effectively than government because of government face budget constraint. Also, private sector can do a better job at providing same service that government

[6] S.L.P. (Civil) Nos. 19832-19838 OF 2017)
[7] Uma Devi v. state of Karnataka
[8] WP No.28633 of 2014
[9] Mahalingam vs The Engineer in Chief
[10] Ibid.

provides. Some argues against it as if government outsource certain functions, private sector develops and then fully privatise the function and work according to its pleasure. Recently, Government in its various department outsourcing the recruitment process and privatised its function. This will be affecting the employment in government sectors, as by outsourcing the corporation hire the worker according to their terms and no regulation of the government apply to them.

With the advent of privatisation, most of the government function are being given to private sector to serve the public due to the workload in the administration the department. Previously, there is a relationship between the individual employee and government in the department and workers are govern by the government scheme. But now scenario changing as individual worker work under the corporation and not govern by the government scheme but by the corporation contract where they get exploited.

Government by coming with this policy of outsourcing[11] the recruitment process in the government department to the third part (corporation) affect the worker who are working in the department before the outsourcing policy and many of them have engaged in the service for more than 10 years. Now they get dispensed or transfer to the corporation as workers who comply with their terms. The casual labours who were working with the government department for more than years now have to face the corporation exploitation and no provision of regularisation is given Under the Contract Labour (Regulation & Abolition) Act, 1970. As this policy violates the legitimate expectation of the worker to get regularise after serving a definite period of time and continue the employment

LABOUR RIGHTS AND NEOLIBERALISM

"Neo" means we are concerning about a new kind of liberalism. With the rapid privatisation of various public sectors, we are seeing neo-liberalism state. Neoliberal policies and laws in its feature are meant to weaken labour and strengthen capitalisation. The state itself encourages and rely on the casual and contracting of labour in the name of employment generation. We are in a scenario where the ideology of the state is meeting the interest of capital and reflected in the policies and legislation. Workers collectively fighting against these neo-liberal policies. Most of the workers in the employment sector do not have a status of employees.

[11] General Financial Rules 2017" (GFR 2017) Press Information Bureau Government of India Ministry of Personnel, Public Grievances & Pensions, Outsourcing of jobs in Government Departments

Neoliberalism is generally associated with a set of policies implemented in the 1980s by the International Monetary Fund, the World Bank, and the United States of America Treasury Department, in an effort to help crisis-stricken developing countries by prescribing a series of reforms, the so-called 'Washington Consensus' policies, such policies aimed at achieving macroeconomic stabilisation, reducing governments' role in the economy, privatising public assets, and reducing public expenditure[12]

> No regulation on private enterprises imposed by government, no matter how much social damage this causes. Reduce wages by de-unionizing workers and reject workers rights. To convince us they say, it is good for all as "an unregulated market is the best way to increase economic growth, which is ultimately benefit everyone".

Around the world, neoliberalism concept initiated by powerful financial institutions like IMF, World Bank. We firstly see, the effect in Mexico where wages decline 40-50% in the first year of NAFTA while the cost of living rose by 80%. Also, more than 1,000 state owned enterprises have been privatised in Mexico. It is more be considered as neo-colonisation of Latin America. This destroying the welfare programs, violating the rights of labour and deny to protect the children, youth, women and vast majority suffer, where employers have freedom to hire contract labour and to dispense with labour service and shut down business in accordance with the market forces and not controlled by administrative intervention.

UTTARAKHAND – SAMVIDHA EMPLOYEES

At the time of formation of the Uttarakhand, government needs urgent worker in the government department. This urgency was satisfied by the appointment of samvidha employees (contract base) for a fixed period but government despite of creating vacancy renew the contract and now there are more the thousand employees working since 2000 without getting the benefit as the permanent employee get. Now the demand has risen for the regularisation of the employee who has completed 10 years or more in the sate government department.

The government of Uttarakhand has made the first Regularization in the 2011 Rules, where eligibility was fixed as 10 years of service on the post. Later in 2013 new Rules came up, which reduced this eligibility to 5 years, and finally the 2016 amendment, where the period has been

[12] Undurraga T. Neoliberalism in Argentina and Chile: common antecedents, divergent paths

further reduced. But the high court made a stay on the regularisation of the employees' rule, 2013 and 2016[13] as against the judgment in Uma Devi case.

According to the researcher, the judgement given in Uma Devi case against the regularisation of the employees who are appointed by violation constitutional scheme of appointment, but the employees appointed under samvidha are against the duly sanctioned and vacant post, vacancies were duly advertised and applicants had all the qualification required for the post, so how it is against the constitutional scheme if all have a proper opportunity for employment. Also, state has a power to make rules for services under Art 309.

In this regard, the judiciary must comply with the interest of the public and emphasis on the legitimate expectation of the worker to get the same benefit as a regular employee getting.

EXPECTATION OF PERMANENT EMPLOYEMENT UNDER SOUTH AFRICA LABOUR RELATION ACT

In the University of Pretoria vs. commission for conciliation, mediation and arbitration and others, the applicant contended an unfair dismissal in terms of sect 186(b) of labour relation act. she also claimed that she expected to be appointed permanently.

"an employee reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms, but the employer offered to renew it on less favourable terms, or did not renew it;"[14]

The court noted that legislature opted to specifically limit this right of expectation to fixed term contracts and that the expectation of permanent employment cannot be dealt with under the current section 186(1)(b) unless the Act is amended.

In 2013 Labour Relations Amendment Act 2014. Section 186(1)(b) amended to read as follows:

"b) an *employee* employed in terms of a fixed term contract of employment reasonably expected the employer—
(i) to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it; or

[13]Himanshu Joshi And Others vs State of Uttarakhand And Others
[14] section 186(1)(b) of the Labour Relations Act

(ii) to retain the *employee* in employment on an indefinite basis but otherwise on the same or similar terms as the fixed term contract, but the employer offered to retain the *employee* on less favourable terms, or did not offer to retain the *employee*;"[15]

The practical consequence of this amendment is that employees appointed for the fixed term contracts will be able to claim that they reasonably expected to be appointed indefinitely as a result of the behaviour. Under such circumstances the onus will be on the employee prove that the employer created the expectation.

CONCLUSION AND SUGGESTION

Here, researcher try to focus on some points-

Firstly, what happens to those temporary casual workers do not complete the service of 10 year up to the specified date as mention in Uma Devi case. Secondly, by the policy of outsourcing is government try to restrict the regularisation of casual worker. According to the researcher when the vacancy created for the regular recruitment process, the temporary casual worker be given adequate opportunity to take part in the process and get regularised status (here adequate representation means preferential treatment must be given to the worker over other who completed 10 or more years in the same service which is justified as a intelligible differentia) by this way this irregularity be curbed. But when government privatised its function to any corporation now which is appointing the employees in their terms and no question for the regularisation[16] will occur. This will hinder the expectation of the temporary casual labour to get regularised as prescribed under the government rule of 1993, because of either they get dispensed or transferred to work under the corporation where the rules and regulation be according to that corporation. Recently, NITI Aayog CEO emphasis on the privatisation of Railway considering the experience of privatisation of airport.

Therefore, the courts have to recognise the legitimate expectation of the temporary casual worker[17] who now working under the corporation due to the outsourcing as considered that corporation itself a state instrumentality and covered under the Art. 12 of the Indian constitution in the same way to get enforced the fundamental right against the corporation.

[15] Amendment of section 186 of Act 66 of 1995, GOVERNMENT GAZETTE, 18 August 2014
[16] Anil Lamba & Ors. vs Govt. Of Nct & Ors
[17] Worker not covered under the regularisation scheme of 2006 Uma Devi case

On the other hand, it was argued that anybody who worked in the premises of or under the control or authority of the principal employer should be treated as workmen of the principal employer." It was contended that the contractor merely acted as an agent of the principal employer and that his actions bind the principal employer. Therefore, it was a logical conclusion, that on abolition of the relationship between the contract labour and contractor the relationship between the principal employer and the labour get matured.[18]

It was urged that the Court should take an interpretation that would further the goals set forth in Part IV of the Constitution rather than one which would defeat the same by rendering the workers without any means of livelihood. [19]

Reference: https://lexforti.com/legal-news/

[18] Opinion of Justice Majumdar in Air India, wherein he opined that the entire purpose of abolition was to improve the condition of the contract labour and not to render them workless. It was his considered opinion that, no express provision is required for the absorption of contract labour because it is implicit in the nature of relationship of a principal employer and the contract labour.

[19]Here again the approach of Justice Ramaswamy in Air India was relied upon, wherein the learned judge does invoke constitutional principles and pointed out to the fact that the right to livelihood enshrined in Article 21 of the Constitution would stand violated if absorption were not provided.