
(2018) 02 CAT CK 0035

In the Central Administrative Tribunal

Case No : Original Application No. 4289 Of 2015, Miscellaneous Application No. 3596 Of 2017

Animesh Kumar And Ors

APPELLANT

Vs

Secretary, Urban Development And Director And Ors

RESPONDENT

Date of Decision : 16-02-2018

Acts Referred:

Administrative Tribunals Act, 1985 — Section 19
Constitution Of India, 1950 — Article 14, 16, 309

Citation : (2018) 02 CAT CK 0035

Hon'ble Judges : K.N. Shrivastava, Member (A)

Bench : Single Bench

Advocate : Pragnya Routray, Rashmi Chopra, K M Singh, Bal Kishan, Yashpal Rangi

Final Decision : Dismissed

Judgement

1. Through the medium of this O.A. filed under Section 19 of the Administrative Tribunals Act, 1985, the applicants have prayed for the following relief:-

"a. issue an order/direction to the respondents to grant the Applicants regularization of service on the post of APHI/Vaccinators from the date of their initial appointment and all consequential benefits thereof."

2. The factual matrix of the case, as noticed from the records, is as under:-

2.1 The applicant Nos. 1 to 18 are working under North Delhi Municipal Corporation (North DMC) and applicant Nos. 19 to 23 are working under East Delhi Municipal Corporation (East DMC). They are officiating on the posts of Assistant Public Health Inspector (APHI) / Vaccinator since September 2010. Apparently, the erstwhile Municipal Corporation of Delhi (MCD), vide its Annexure A-7 Employment Notice, invited applications for appointment to the posts of APHI / Vaccinator (126 posts) and Assistant Malaria Inspector (AMI) (280 posts). The initial contract period stipulated therein was one year. The applicants applied

for the posts and were selected. They were called for documents verification on 17.08.2010 and thereafter they were required to sign a contract agreement (p.49 of the paper book). After signing the contract agreement, they were issued individual appointment letters. One such appointment letter qua applicant No.1 dated 17.09.2010 is at Annexure A-8 (colly.) (pp. 51 & 52). The terms of service spelt out in the appointment letter were as under:-

"1. The engagement is purely on contract basis for a period of 06 months or till the time the post is filled up on regular basis, whichever is earlier. The engagement can be terminated at any time by giving one month's notice or by paying one month's salary by the incumbent. However, contractual engagement can be terminated at any time without assigning any reason.

2. The appointing Authority reserves right to assign any duty as and when required. No extra remuneration will be admissible in case of such assignment.

3. The incumbent will be entitled to any other benefit such as Provident Fund, Pension, Gratuity, Medical Attendance Treatment, Seniority, LTC or other Terminal Benefits which are available to the MCD employees appointed on regular basis.

4. The incumbent will be entitled for Earned Leave, H.P.L./Commuted Leave and Extra ordinary Leave (without pay) under CCS (Leave Rule-1972 as mentioned in O.M. No.120/16/190-Estt (L) dated 5th July, 1990 instead of one day casual leave per month as per O.O. No.UDC (M)/ADC (H)/ADC (H)/2004/2456 dt. 25.05.2004. The leave not availed during the engagement period will not be carried forward nor there will be any encashment in lieu of it.

5. This engagement will not bestow any claim or right with the incumbent for regular appointment to the post.

6. The engagement carries with it the liability to serve in any part within the Jurisdiction of Municipal Corporation of Delhi.

7. The engagement will be subject to furnishing of Medical Fitness Certificate from a Govt. Dispensary, Hospital or MBBS Doctor & Police Verification Report from concerned Police Station.

8. The incumbent will not be entitled to any TA/DA for joining the post.

9. Other conditions of contractual service will be governed by relevant rules notified from time to time.

10. In case the offer is acceptable to him/her on above mentioned terms and conditions, he/she should join the post on or before 30th September 2010 in the office of the undersigned, failing which the offer of engagement shall be cancelled without further notice and no further communication will be entertained.

11. A contract agreement on the format available in the office of Dy. MHO (Epid), on Rs.10/- Non-Judicial stamp paper duly attested by notary public will also be

required to be furnished by the incumbent.

12. The incumbent will not be allowed to join any other service during the period of engagement with MCD."

2.2 The applicants were appointed on contractual basis on a consolidated salary, which was initially `10,300/- per month but enhanced from time to time to `17,000/-. It was against the regular salary of about of `58,000/-. Their contractual engagement has been renewed from time to time. The last renewal of their contractual agreement was done vide Annexure A-9 (colly.) letter dated 14.11.2013.

2.3 Respondent No.4 brought out Annexure A-11 Advertisement No.01/14 dated 20.05.2014 to fill up various posts. Post Code 22/2014 was in respect of APhi/Vaccinator - 108 posts under MCD.

2.4 Some of these applicants approached this Tribunal in O.A. No.701/2014 praying therein that in the proposed recruitment vide Annexure A-11 Advertisement No.01/14, they should be given due weightage for the services they have already rendered in the MCD and they should be granted appropriate age relaxation. An interim order was issued by the Tribunal on 25.02.2014, which reads as under:-

"The applicants, 17 in number, submit that they are working as Assistant Public Health Inspectors/Vaccinators on contract basis since September, 2010. It is the grievance of the applicants that though there are directions from this Tribunal that while filling up the vacancies on regular basis, the cases of the applicant have to be considered by giving weightage to service and appropriate age relaxation, the respondents have issued advertisement No.01/14 (post code 22/14) and are proceeding to fill up 108 posts of APhi/Vaccinator without considering the cases of the applicants by providing relaxations, as aforesaid. It is also further submitted that in similar circumstances, in respect of certain other posts the Tribunal has interfered in the said advertisement and issued appropriate directions.

In the circumstances, and in view of the prima facie case made out, we direct that the respondents shall reserve equal number of the vacancies for the applicants for a period of 14 days."

2.5 Some similarly placed contractual employees of MCD had approached this Tribunal in O.A. No.1179/2011 seeking grant of regular pay scale and for engaging them as Public Health Inspectors (PHIs). The said O.A. was disallowed vide order dated 23.11.2011, against which Writ Petition (C) No.2259/2012 was filed before the Hon'ble High Court of Delhi (Sh. Narendra & others v. Municipal Corporation of Delhi), which was disposed of vide order dated 31.10.2014 with the following directions:-

"32. Consequently, the CAT's impugned order cannot be sustained and petitioners/applicants as PHIs, with the pay-scale of Rs.5000-8000, with all

benefits of arrears of pay and allowances, on parity with that enjoyed by the other Vaccinators who have that benefit. The MCD is directed to issue consequential directions within eight weeks from today. The writ petition is allowed in the above terms along with the pending application without order as to costs."

2.6 The applicants apprehend that after the selection for the posts of APHI/ Vaccinator pursuant to Annexure A-11 Advertisement No.01/2014 is done, their services would be terminated. As a result of this apprehension, the applicants have approached this Tribunal in the instant O.A. praying for the relief, as indicated in paragraph (1) above.

3. The applicants have pleaded the following grounds in the O.A. in support of the relief claimed for:

3.1 The applicants have the requisite qualifications for the posts of APHI/ Vaccinator and have been officiating against such posts since 2010.

3.2 For engaging the applicants, regular recruitment process was adopted, which also included interview.

3.3 The applicants are performing perennial nature of job and their performance has been satisfactory, as a result of which their services have been extended from time to time for more than 5 years.

3.4 The respondents have unfairly resorted to recruitment against the post of APHI and the applicants' case for regularization of the services has not been considered by the respondents despite Annexure A-10 Resolution of respondent No.2 dated 09.01.2014.

3.5 The act of the respondents in issuing the Annexure A-11 Advertisement No.01/2014 is illegal and arbitrary, as the conditions issued therein by the respondents do not provide for any relaxation / consideration to the applicants.

4. Pursuant to the notices issued, the respondents entered appearance and filed their respective replies. In the reply filed on behalf of respondent No. 2, following important averments have been made:-

4.1 The applicants were engaged as APHI/Vaccinator in the year 2010 on contract basis. The terms of engagement clearly indicated that the initial engagement would be for a period of six months or till the time the posts are filled up on regular basis. The contract was terminable at any time by giving one month's notice or by paying one month's salary in lieu thereof to the incumbent at any time without assigning any reason. The condition No.(5) clearly specified that the engagement will not bestow any claim or right with the incumbent for regular appointment.

4.2 The applicants were well aware that their engagement was purely on contract basis. The present O.A. has been filed by the applicants in utter violation of the terms and conditions of the contractual agreement.

4.3 There are 108 posts of APhi/Vaccinator lying vacant with three Municipal Corporations, namely, South, North and East DMCs. These Corporations had sent a requisition to respondent No.1 for getting the vacant posts of APhi/Vaccinator filled up, and accordingly respondent No.4 has been tasked to carry out recruitments.

4.4 The Hon'ble Supreme Court in *Secretary, State of Karnataka & others v. Umadevi & others*, AIR 2006 SC 1806 has issued the following directions:

"44. 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 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 subjudice, 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."

In view of the law laid down by the Hon'ble Apex Court in *Umadevi's case* (supra), the services of the applicants cannot be regularized.

5. The rejoinder has been filed on behalf of the applicants, in which, rebutting the reply filed on behalf of respondent No.2, it is broadly stated as under:-

5.1 The respondents have admitted that the applicants have been continuously working for more than 6 years. There are 108 vacant posts of Vaccinators. In such circumstances, appointing persons on contractual basis for years against regular and vacant posts amounts to exploitation of labour. Such unfair labour practices are prohibited in law.

5.2 Respondent Nos. 1, 2 & 3, on one hand, sought help of DSSSB (respondent No.4) to fill up the vacant posts but, on the other hand, completely ignored the recommendations of the House Committee on Municipal Corporations for regularization of all contractual employees, including the APHIs (applicants).

5.3 Hon'ble Apex Court in the case of *Umadevi* (supra) has dealt with issues of

persons appointed illegally / irregularly. However, the appointments of the applicants are neither irregular nor illegal. Hence, the said judgment would not apply in the case of the applicants.

6. A separate reply has been filed on behalf of respondent No.1, in which, by and large, the points raised in the reply filed on behalf of respondent No.2 have been supported.

7. On completion of pleadings, the case was taken up for hearing the arguments of learned counsel for the parties on 05.12.2018. Arguments of Mrs. Pragnya Routray, learned counsel for applicants, Mrs. Neetu Mishra for Mrs. Rashmi Chopra, learned counsel for respondent No.1, Mr. K M Singh, learned counsel for respondent Nos. 2 & 4 and Mr. Bal Kishan, learned counsel for respondent No.3 were heard.

8. Mrs. Pragnya Routray, learned counsel argued that the applicants have all the requisite qualifications for the posts of APHI/Vaccinator, as prescribed in the Recruitment Rules. Their engagement against the said posts has been through a regular selection process. The contention of the respondents that such engagement was purely for an urgent work is absolutely false, as the applicants have continued in the posts for more than 6 years. She further contended that the engagement of the applicants is against regular posts but they are being paid a consolidated monthly salary of ` 17,000/-. Thus, the respondents have indulged into unfair labour practice. She placed reliance on the following judgments of Hon'ble Supreme Court and Hon'ble High Court of Delhi:-

Hon'ble Supreme Court

i) Nihal Singh & others v. State of Punjab & others, (2013) 14 SCC 65 wherein it has been held as follows:-

"24. Even going by the principles laid down in Umadevi's case, we are of the opinion that the State of Punjab cannot be heard to say that the appellants are not entitled to be absorbed into the services of the State on permanent basis as their appointments were purely temporary and not against any sanctioned posts created by the State.

25. In our opinion, the initial appointment of the appellants can never be categorized as an irregular appointment. The initial appointment of the appellants is made in accordance with the statutory procedure contemplated under the Act. The decision to resort to such a procedure was taken at the highest level of the State by conscious choice as already noticed by us...."

ii) U.P. Electricity Board v. Pooran Chandra Pandey & others, (2007) 11 SCC 92, in which it has been held as under:-

"17... We have to read Uma Devi's case (supra) in conformity with Article 14 of the Constitution, and we cannot read it in a manner which will make it in conflict with Article 14. The Constitution is the supreme law of the land, and any

judgment, not even of the Supreme Court, can violate the Constitution..."

Hon'ble High Court of Delhi

iii) S.K. Chowdhury & others v. Govt. of NCT of Delhi & another, 2013 I AD (DELHI) 779,

25. Now, making petitioners compete with fresh graduate Engineers whose theoretical knowledge, being immediately out of college, would be most unfair.

26. Noting that neither in Umadevi's case nor in M.K.Kesari's case the Supreme Court rendered an opinion as to what process of regularization should be adopted in cases where initial appointment was irregular and not illegal, we expand upon this subject by opining that the process through which irregular appointments need to be subjected to convert the same into regular appointments has to be a selection process devised where only the irregularly appointed employees are uniformly tested with respect to the minimum theory; keeping in view the experience gained by them. In other words, the test has not to be theoretical but an application based selection process

28. Since appointment of the petitioners was irregular and not illegal, in that, their existed vacant posts of Engineers in DSIDC when petitioners were inducted as Engineers and the petitioners were qualified, we dispose of the writ petition confirming the impugned decision pronounced by the Tribunal but modify the same with reference to direction issued to advertise the posts and effect selection through DSSSB : by substituting the direction that the respondents would devise a suitable methodology to subject the writ petitioners to an induction test which would be designed with reference to application and not theory. Age relaxation benefit would be granted to the petitioners. As noted by us the fact not in dispute is that the petitioners possess the necessary educational qualifications.

28. Such petitioners who clear the selection process, which would be limited to the writ petitioners, would be inducted permanently against the posts they are currently holding."

iv) Govt. School Teachers Association (Migrants) Regd. & others v. Union of India & others, 2015 VIII AD (DELHI) 602, wherein it has been held that "The State being a model employer cannot ignore the principles of socialism which, intrinsically form part of our Constitution".

v) Sonia Gandhi & others v. Govt. of NCT of Delhi & others (W.P. (C) No.6798/2002 with connected petition) decided on 6.11.2013.

"22. Accordingly, we issue another direction and simultaneously dispose of the two writ petitions. The direction would be that the Government of NCT Delhi would carry out a manpower requirement assessment in all its departments keeping in view the fact that the population in Delhi has crossed 1.7 crore persons. Such number of posts shall be sanctioned as are necessary to provide

services to the citizens of Delhi. A one time policy of regularization shall be framed and existing rules pertaining to service in different departments shall be amended. Existing contractual employees shall be considered for appointment to these new posts as per a policy framed."

9. Per contra, Mr. K M Singh, learned counsel for respondent Nos. 2 & 4 submitted that the applicants have participated in the selection process undertaken by respondent No.4 for selecting APHIs/Vaccinators/AMIs. Having rendered unsuccessful, they cannot challenge the selection as per law laid down by the Hon'ble Apex Court in Chandra Prakash Tiwari & others v. Shakuntala Shukla & others (2002) 6 SCC 127. The applicants' engagement as APHI/Vaccinator, on contract basis, was on the basis of Annexure A-11 Advertisement No.01/2014, which is not under challenge in this O.A. It is clearly stated in the said Advertisement that the selected candidates would be paid consolidated salary and that the engagement will not bestow any claim or right with the incumbent for regular appointment to the posts. The appointments of the applicants on contract basis was not illegal but was definitely irregular. On this issue, the Hon'ble Apex Court in the case of State of Jammu & Kashmir & others v. District Bar Association, Bandipora (Civil Appeal No.36084/2016) decided on 08.12.2016 has held as under:-

"17. The difference between irregular and illegal appointments as also the scope of paragraph 53 of Uma Devi has fallen for consideration in various subsequent judgments of this Court . These decisions have been adverted to in State of Karnataka v. G.V. Chandrashekar[7]. In Employees' Union v. Mineral Exploration Corpn. Ltd[8]. this Court observed as follows :

"39. We, therefore, direct the Tribunal to decide the claim of the workmen of the Union strictly in accordance with and in compliance with all the directions given in the judgment by the Constitution Bench in State of Karnataka v. Umadevi (3) and in particular, paras 53 and 12 relied on by the learned Senior Counsel appearing for the Union. The Tribunal is directed to dispose of the matter afresh within 9 months from the date of receipt of this judgment without being influenced by any of the observations made by us in this judgment. Both the parties are at liberty to submit and furnish the details in regard to the names of the workmen, nature of the work, pay scales and the wages drawn by them from time to time and the transfers of the workmen made from time to time, from place to place and other necessary and requisite details. The above details shall be submitted within two months from the date of the receipt of this judgment before the Tribunal."

10. In Surinder Prasad Tiwari v. U.P. Rajya Krishi Utpadan Mandi Parishad (2006) 7 SCC 684, the Hon'ble Apex Court has held as under:-

"25. The appellant submitted that he has been continued in service for 14 years and is entitled for regularization. This aspect of the matter has also been specifically dealt with by the said Constitution Bench in para 45 of the judgment

and it was observed as under:

"45. While directing that appointments, temporary or casual, be regularized 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 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..."

26. An argument was made before the Constitution Bench that the State action in not regularizing the employees was not fair within the framework of the rule of law. The Court observed that if the appointments, which have not been made according to the constitutional scheme, are regularized, that would amount to perpetuate an illegality in the matter of public employment and that would be a negation of the constitutional scheme adopted by the people of this country.

27. Admittedly, the appellant has not been appointed in terms of the relevant rules or in adherence to Articles 14 and 16 of the Constitution.

28. In Umadevi's case (supra), this Court has also dealt with another aspect of the matter and observed as under:

"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 cases concerned, in consultation with the Public Service Commission.

xx xx xx xx

38. In view of the clear and unambiguous constitutional scheme, the courts cannot countenance appointments to public office which have been made against the constitutional scheme. In the backdrop of constitutional philosophy, it would be improper for the courts to give directions for regularization of services of the person who is working either as daily-wager, ad hoc employee, probationer, temporary or contractual employee, not appointed following the procedure laid down under Articles 14, 16 and 309 of the Constitution. In our constitutional scheme, there is no room for back door entry in the matter of public

employment."

11. In the case of State of Maharashtra & others v. Anita & another etc. 2016 (5) SLR 136, the Hon'ble Apex Court has observed as follows:-

"15. It is relevant to note that the respondents at the time of appointment have accepted an agreement in accordance with Appendix 'B' attached to Government Resolution dated 15.09.2006. The terms of the agreement specifically lay down that the appointment is purely contractual and that the respondents will not be entitled to claim any rights, interest and benefits whatsoever of the permanent service in the government....

16.... the agreement further reiterate the stand of the State that the appointments were purely contractual and that the respondents shall not be entitled to claim any right or interest of permanent service in the government. The appointments of respondents were made initially for eleven months but were renewed twice and after serving the maximum contractual period, the services of the respondents came to an end and the Government initiated a fresh process of selection. Conditions of respondents' engagement is governed by the terms of agreement. After having accepted contractual appointment, the respondents are estopped from challenging the terms of their appointment. Furthermore, respondents are not precluded from applying for the said posts afresh subject to the satisfaction of other eligibility criteria."

12. I have considered the arguments of learned counsel for the parties and have also perused the pleadings and documents annexed thereto. It is not in dispute that the applicants have been engaged as APMI/Vaccinator on contract basis through a selection process undertaken pursuant to Annexure A-17 Employment Notice. The terms of the contractual engagements were spelt out to the applicants at the time of their engagement, which, inter alia, included consolidated monthly salary payable to them, period of engagement as well as other conditions. The terms also envisaged that their engagement would end in case the regular appointments are made against the posts. For their internal reasons, the respondents could not take up regular recruitments to fill up the posts against which these applicants were engaged on contract basis; as a result of which, the applicants were given extension from time to time with some breaks in service and have thus continued for over 6 years. It is also not in dispute that these applicants had participated in the selection process initiated by respondent No.4 for filling up 226 posts of APMI/Vaccinator and 280 posts of AMI pursuant to Annexure A-11 Advertisement. After having participated and having failed in the said selection, they have come before the Tribunal in the instant O.A. As per law laid down by the Hon'ble Apex Court in Chandra Prakash Tiwari's case (supra), these applicants are prohibited from questioning the said selection.

13. In matter of contract between two parties, in the event of any breach of contract, the adversely affected party can seek enforcement of the contract and nothing beyond that. The Hon'ble Apex Court in the case of Nandganj Sihori

Sugar Co. Ltd. V. Badri Nath Dixit, (1991) 3 SCC 54 has laid down the clear law:-

"11..... Even if there was a contract in terms of which the plaintiff was entitled to seek relief, the only relief which was available in law was damages and not specific performance. Breach of contract must ordinarily sound in damages, and particularly so in the case of personal contracts..."

14. In the instant case, there has not been any breach of the terms of the contract. As a matter of fact, the engagement of the applicants on contract basis has been continued even beyond the initial period of engagement by way of entering into new contractual agreements. The action initiated by the respondents in terms of Annexure A-11 Advertisement No.01/2014 does not intend to replace one set of contractual employees with a new set of such employees. This Advertisement is, in fact, intending to fill up the posts on regular basis.

15. The judgments relied upon by the learned counsel for applicants would not apply to the facts of the present case. Undoubtedly, the contractual engagement of the applicants in the year 2010 was done in an irregular manner but not in an illegal manner. Attempts have been made through this O.A. to thwart filling up of the posts of APMI/Vaccinator/AMI occupied by these applicants, on regular basis, since they have failed to compete in the said selection process. Such an attempt cannot be allowed to sustain.

16. In the conspectus of the discussion of the foregoing paragraphs, I do not find any merit in this O.A. It is accordingly dismissed.

17. In view of aforesaid, M.A. No.3596/2017 has become infructuous. It is also dismissed.