
(2007) 01 GAU CK 0028
In the Gauhati High Court

Brahmacharimayum Ibeyaima

APPELLANT

Vs

State of Manipur and Others

RESPONDENT

Date of Decision : 01-01-2007

Acts Referred:

Constitution of India, 1950 — Article 14, 16

Citation : (2007) 2 GLT 130

Hon'ble Judges : U.B. Saha, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

U.B. Saha, J.—The petitioner by filing the present writ petition prayed, inter alia, for issuance of a writ in the nature of mandamus for directing the respondents to regularize the service of the petitioner.

2. I have heard Mr. R.K. Milan, learned Counsel for the petitioner and Mr. R.S. Reisang, learned Addl. G.A.

3. The facts, in a nutshell, require to be adjudicated upon, may be stated : the petitioner applied for the post of L.D.C. in the Forest Department as there were many posts lying vacant and as she was found suitable in the selection/screening test and having possessed the requisite qualifications, she was engaged/appointed as such on casual basis vide order dated 08.04.1987 (Annexure-A/1 to the writ petition). In the aforesaid order of appointment of the petitioner, it has been, among others, stated that the petitioner's engagement as L.D.C. w.e.f. the date she joined her duty till a regular L.D.C. is posted. Thereafter petitioner has been holding the said post till date in the Department of Forest. The petitioner, on being uninterruptedly completed 10 years of service in the post, approached the competent authority to regularize her service in view of the fact that she has been serving in the said post of L.D.C. which is a vacant one. The service of one of her contemporaries, namely, Asem Nabachandra Singh, who is serving as Peon on casual basis, has been regularized vide order dated 31.7.1997 (Annexure-A/4

to the writ petition) issued by the respondent No. 3, Principal Chief Conservator of Forest, Govt. of Manipur as per the order of this Court (Annexure-A/5). It is stated that non-consideration of the petitioner's case for regularization even after completion of more than 10 years of service is discriminatory and violative of fundamental rights of the petitioner under Arts. 14 and 16 of the Constitution. The Govt. of Manipur by an order dated 2nd May, 1995 (Annexure-A/6 to the writ petition) formulated a scheme for absorption of work charged/Muster Roll employees who have put in more than 10 years of service as on 1991. In spite of existence of such scheme, the case of the petitioner has not yet been considered or regularization, hence, this writ petition.

4. On perusal of the records, it appears that no counter has been filed by the respondents. However, this Court feels it necessary to take up the writ petition for disposal on merit.

5. The points for decision in this writ petition are mainly; whether the casual appointee engaged like the writ petitioner has any legal right to be regularized for mere continuance in the service for a period of about 11 years as per the alleged scheme and whether the Court has the power to direct the authority to regularize the service of the petitioner and whether mere non submission of counter affidavit entitled the petitioner to get the relief prayed for.

6. Mr. R.K. Milan, learned Counsel for the petitioner submits that as the State respondents have not denied the claim of the petitioner in the writ petition by filing counter affidavit, the petitioner is entitled to the relief prayed for. He also further submits that after utilizing the service of the petitioner for a long period of about 10 years as a casual employee, the authority has no power/right to deprive her for regularization as L.D.C. The entire action of the respondents, particularly, the Principal Chief Conservator of Forest, Govt. of Manipur, respondent No. 3, is wholly unwarranted by law, more so violative of the provisions of Articles 14 and 16 of the Constitution of India. He also submits that even if, for the argument sake, it is admitted that the petitioner has no vested right to be regularized as L.D.C. but being an employee of lower strata has some expectation from the Government being a model employer, particularly when right to life includes right to livelihood. Learned Counsel of the petitioner further contended that, due to wrong action of the authority, livelihood of the petitioner is affected, which is unwarranted and not permissible under law. He further, tried to convince this Court, submitting that the Govt. being a model employer, should not act like a private management and discontinue its employee/worker like the petitioner on all of a sudden when she is not able to be engaged herself in any other employment in near future and her family members will be served due to the wrong action of the State respondents. He also relies on a orders of this Court dated 26.01.1991 and 8.11.95 in Civil Rule No. 514 of 1991 and Civil Rule No. 422 of 1995 respectively, wherein this Court directed the respondents to regularize and accommodate the petitioners in the next available vacancy.

7. Mr. R.S. Reisang, learned Addl. G.A. submits that the petitioner was engaged,

without following the prescribed procedures as required, ignoring the constitutional scheme, hence, her engagement itself is a wrong, illegal and nullity in the eye of law and on the basis of the said wrong and illegal engagement, she has no right to ask for regularization and more so, the casual appointment does not create any vested right to be regularized. He further contended that the nature of engagement or appointment cannot be changed due to long passage of time, and being illegally engaged, the petitioner is not entitled to be regularized when she entered into service without following the norms prescribed for public employment under Constitutional scheme. Mr. Reisang, further, submits that whether the Government will fill up the vacant post or not by way of regularizing the service of a casual employee like the petitioner engaged dehors of rules is the policy matter of the Govt. He also submits that though the Apex Court in *Secretary, State of Karnataka and Others Vs. Umadevi and Others*, it was clearly stated that as a one time measure, the State may regularize the service of those persons whose appointments are not illegal but merely irregular, but in the instant case, engagement of the writ petitioner is not irregular but wrong and illegal and, hence, she is not entitled to the benefit of one time regularization as observed by the Apex Court. The learned Addl. G.A. also submits that writ Court normally do not direct the Govt. to take a policy decision for filling up the vacant post of regularizing the service of the casual employee entered into service like the petitioner dehors the rule depriving the other employees and it is the prerogative of the Executives to decide whether they will keep the employee on contract basis or casual basis. He placed reliance on the decision of the Apex Court in *State of Haryana and others Vs. Piara Singh and others etc. etc.*, in support of his contention that the Court cannot direct the executives to frame any policy nor interfere with the policy decision of the Government unless it is violative of any provisions of the Constitution and or any statute. The learned G.A. has also relied on the decision of the Apex Court in *Tech. Executive (Anti Pollution) Welfare Association Vs. Commissioner of Transport Dept. and another, and State Fishery Officers' Association, W.B. and Another Vs. State of W.B. and Another*, apart from *State of A.P. v. V.C. Subbarayudu and Ors.* (1998) 2 SCC 216 wherein the Apex Court has held that:

It is a matter of policy for the State Government which in its wisdom decided to create a separate cadre in the State by absorbing the Divisional Accountants working on deputation in the State and who were under the administrative control of the Accountant General. The Supreme Court cannot give any direction to the State Government to have a different policy and also absorb the SAS Accountants in its newly constituted service. That the State Government will have the benefit of more experienced officers of SAS cadre is for the State to consider. Merely on that ground plea of discrimination cannot be advanced.

Relying on the aforesaid decision of the Apex Court, he further contended that not only Article 14 but Article 16 has been held to form basic structure of the Constitution and hence in matters of public employment, no one can be made beneficial of pick and choose theory and the public employment has to be made

following the due process of selection providing effective opportunity to the thousands of unemployed youths who are waiting for engagement in accordance with the due process of selection. It is not open for the petitioner to be regularized depriving those thousands of unemployed youths who are waiting to get their bread and butter by way of an employment, under due process of selection. Mr. Reisang, relying on the decision in *Secretary, State of Karnataka and Ors. v. Uma Devi and Ors.* (supra) has contended that there cannot be regularization of service of ad hoc employees who were appointed dehors the Rules like the writ petitioner, as the Apex Court in the aforesaid judgment observed that appointment dehors the due process of selection as envisaged by the constitutional scheme confers no right on the appointee and the said appointee cannot ask for regularization when their appointments itself were illegal and/or otherwise wrong. In support of his contention, he also relied upon the decision in *Surendra Prasad Tewari Vs. Uttar Pradesh Rajya Krishi Utpadan Mandi Parishad and Others*, , wherein the Apex Court dealt with the subject relating to regularization of ad hoc employees. Mr. Reisang, learned G.A. relied on a decision of this Court dated 11.01.04 in the writ Appeal No. 32 of 2005 and submitted that the order dated 2nd May, 1995 (Annexure-A/6) is not the scheme for regularization, by that order Govt. put some restriction on ad hoc/officiating, substitute and work charged/Muster Roll basis and also decided to take steps for accommodation of work charged and Muster Roll employees who had put more than 10 years in service, ultimately by the Govt. prepared a scheme on 16.04.99 for regularization of service, which had been withdrawn on 26.2.2002 said order of withdrawal is not challenged in this case and as such the petitioner is in no way entitled to the benefits of the said scheme. He also submits that mere non filing of counter does not create any right to the petitioner to get relief automatically, she is to make out a case as to what right of the petitioner is affected by the action of the Government and how she is entitled to the relief as prayed for, and in the instant case she fails to make out any case, for which writ petition is liable to be dismissed.

8. In response to the submission made by Mr. R.S. Reisang, learned Counsel for the respondents, learned Counsel for the writ petitioner, Mr. R.K. Milan submits that after utilization of the service of petitioners for a long period of 10 years, the respondents have no power to raise the question regarding the manner of appointment of the writ petitioner. He also submits that if the appointment was wrong and dehors the Rules, then also it was done by the appointing authority for which the writ petitioner cannot be blamed, and for the wrong committed by the authority, petitioner should not suffer. The learned Counsel of the petitioner placed reliance on the decision of the Apex Court in *Jacob M. Puthuparambil and others Vs. Kerala Water Authority and others*, for the proposition that even if the statutory rules do not operate in the field, direction for regularization is permissible under the law by the Court. He further contended that the instant case is covered by the decision of the Apex Court in the case of *All Manipur Regular Posts Vacancies Substitute Teachers' Association Vs. State of Manipur*, ,

wherein the Apex Court directed the State Govt. to consider the case for regularization of ad hoc appointees like the petitioner before making direct recruitment to the post in question and also directed to appoint direct recruits if there is any additional vacancies.

9. In *Piara Singh (supra)*, it is held by the Apex Court that "the creation and abolition of a post is the prerogative of the Executive. It is the Executive again that lays down the conditions of service subject, of course, to a law made by the appropriate legislature. This power to prescribe the conditions of service can be exercised either by making Rules under the proviso to Art. 309 of the Constitution or (in the absence of such Rules) by issuing Rules/instructions in exercise of its executive power. The Court comes into picture only to ensure observance of fundamental rights, statutory provisions, Rules and other instructions, if any, governing the conditions of service. The main concern of the Court in such matters is to ensure the Rule of law and to see that the executive acts fairly and gives a fair deal to its employees consistent with the requirements of Articles 14 and 16."

10. In the case of *M. Ramanatha Pillai Vs. The State of Kerala and Another*, also, the Apex Court held that "the power to create or abolish a post is not related to the doctrine of pleasure. It is a matter of governmental policy. Every sovereign Government has this power in the interest and necessity of internal administration. The creation or abolition of post is dictated by policy decision, exigencies of circumstances and administrative necessity. The creation, the continuance and the abolition of post are all decided by the Government in the interest of administration and general public."

Following the aforesaid decisions in *N. Ramanatha Pillai (supra)*, the Apex Court again reiterated the same views in the case of *State of Haryana Vs. Shri Des Raj Sangar and Another*, stating that "Whether a post should be retained or abolished is essentially a matter for the Government to decide. As long as such decision of the Government is taken in good faith, the same cannot be set aside by the Court. It is not open to the Court to go behind the wisdom of the decision and substitute its own opinion for that of the Government on the point as to whether a post should or should not be abolished. The decision to abolish the post should, however, as already mentioned, be taken in good faith and be not used as a cloak or pretence to terminate the service of a person holding that post. In case it is found, on consideration of the facts of a case that the abolition of the post was only a device to terminate the services of an employee, the abolition of the post would be liable to be set aside."

11. On going through the aforesaid decisions, I am of the considered opinion that now a days the power of the Court is so limited that unless a specific case is made out for arbitrary and discriminatory action on the part of the employer against the employee for his order of regularization, it is very difficult to interfere with the action of the Govt. as regularization of an employee depends upon the policy decision of the said Govt. In the instant case the petitioner counsel relies

on the orders of this Court dated 26.01.1991 and 08.11.95 in Civil Rule No. 514 of 1991 and Civil Rule No. 422 of 1995, which cannot be treated as a precedent after the judgment of the Apex Court in the case of Uma Devi (supra) and Surinder Prasad (supra). After the case of Uma Devi (supra) and Surinder Prasad (supra) Court can direct for regularization only in case of irregular appointment not illegal or wrong appointment. In the instant case, it is admitted that there was no advertisement and/or open competition for filling up the post which was holding by the petitioner. Hence, the petitioner cannot be treated as irregular, rather same is illegal.

12. In Uma Devi (supra), the Apex Court laid down the law regarding the rights of the employees appointed on temporary, contractual, casual, daily wage or ad hoc basis, wherein the Apex Court observed that Articles-14, 16 and 309 of the Constitution aim at ensuring public appointment should be given only in a fair and equal manner by providing opportunities, to those who are eligible and waiting for employment. When the rules framed under Article 309 is in force and/or government instructions/policies cover the field, no regularization of service is permissible in exercise of the executive power of the State Government and even the Court has also no power to give a direction to regularize the service of those employees who are appointed contrary to the provisions of the rules framed under Art. 309 and/or Government instructions and/or policy as the same would close the door of opportunity to the thousands of unemployed youths who are waiting for employment following the procedures as prescribed by law. The case of Uma Devi (supra) has also subsequently been considered and followed by the Apex Court in Surinder Prasad Tiwari (supra), wherein the Apex Court reiterated the principles laid down in the case of Uma Devi (supra) stating, inter alia, that equal opportunity is the basic feature of our constitution and public employment is repository of the State power. The observation of the Apex Court in para 43 of Uma Devi (supra) is quoted hereunder:

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 Orin 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. It is a contract, if it were an engagement or appointment on daily wages or casual basis, the same would come to an end when it is discontinued. Similarly, a temporary employee could not claim to be made permanent on the expiry of his term of appointment. It has also to be clarified that merely because a temporary employee or a casual wage worker is continued for a time beyond the term of his appointment, he would not be entitled to be absorbed in regular service or made permanent, merely on the strength of such continuance, if the original

appointment was not made by following a due process of selection as envisaged by the relevant rules. It is not open to the Court to prevent regular recruitment at the instance of temporary employee whose period of employment has come to an end or of ad hoc employees who by the very nature of their appointment do not acquire any right. The High Court acting under Art. 226 of the Constitution, should not ordinarily issue directions for absorption, regularization, or permanent continuance unless the recruitment itself was made regularly and in terms of the constitutional scheme. Merely because an employee had continued under cover of an order of the Court, which we have described as "litigious employment" in the earlier part of the judgment, he would not be entitled to any right to be absorbed or made permanent in the service. In fact, in such case, the High Court may not be justified in issuing interim directions, since, after all, if ultimately the employee approaching it is found entitled to relief, it may be possible for it to mould the relief in such a manner that ultimately no prejudice will be caused to him, whereas an interim direction to continue his employment would hold up the regular procedure for selection or impose on the State the burden of payment an employee who is really not required. The Courts must be careful in ensuring that they do not interfere unduly with the economic arrangement of its affairs by the state or its instrumentalities or lend themselves the instruments to facilitate the by passing of constitutional and statutory mandates.

13. Regarding the effect of non submission of the counter affidavit by the respondents, this Court is of opinion that Court cannot pass blindly an order, in favour of the petitioner, in absence of counter affidavit though the petitioner fails to make out a definite case in accordance with law, for getting such relief/or reliefs as prayed for, as it is the bounden duty of the Court to consider the averments made in the writ petition on its true merit before granting any relief to the petitioner. Accordingly, this Court, considers the petition on its true merit and found that the petitioner was engaged as a casual employee and, as such she does not have any right to be continued in service, contrary to the terms and conditions made in the appointment/engagement order, more so, for regularization, even on the ground of non submission of counter also does not ipso facto create any right to the petitioner to get the relief automatically in writ proceeding even she fails to make out a definite case.

14. Upon consideration of the aforementioned decisions of the Apex Court and arguments of the learned Counsel for the parties and on perusal of the records available before this Court, I am of the considered opinion that mere non submission of counter affidavit does not create any right to the petitioner for regularization of her service on casual basis, as her initial appointment was made without following Constitutional scheme prescribed for public employment and in her appointment/engagement letter some specific terms were mentioned, which she was aware of at the time of her entry into service, now she has no right to claim more benefit than the terms of her appointment, as the service of an employee is firstly guided by the terms of appointment and thereafter by the Service Rules, if any, for the said post. In this case as the scheme prepared by

the Government has already been withdrawn on 26.2.2002, petitioner is also not entitled to be considered under the said non existing scheme. This Court has no power to direct the respondents to regularize the service of the petitioner as her initial appointment was against the public employment scheme particularly, Articles 14, 16 and 309 of the Constitution. It is within the domain of the Government whether it will keep the vacancy unfilled as long as it chooses or fills up the same on regular basis or casual basis considering the ground reality. An employee has no right to compel the authority to fill up the vacancy and/or vacancies, within a specific time or in the year in which vacancy occurred to regularize the service of an individual like the petitioner or any other employee, as the same depends on Govt. policy and Court has no power to ask the Govt. to frame a particular policy for the interest of an individual like the petitioner. In the light of the discussion and observation made herein above, this Court is not in a position to direct the respondents for regularizing the service of the petitioner.

In the result this writ petition is dismissed. No order as to costs.