

(1992) 03 GUJ CK 0042

In the Gujarat High Court

Case No : Spl. Civil Application No. 558 of 1988

Dinesh Shivubha Parmar

APPELLANT

Vs

State of Gujarat and Others

RESPONDENT

Date of Decision : 12-03-1992

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 19, 226, 32

Citation : (1992) 1 GLR 608 : (1992) 2 LLJ 841

Hon'ble Judges : C.K. Thakker, J

Bench : Single Bench

Judgement

1. This petition is filed by the petitioner for an appropriate writ, direction or order directing the respondent authorities to regularise his services by giving him permanent appointment in Class-IV post in the Civil Hospital, Limdi and for granting all consequential benefits flowing from the regularisation and permanent absorption on the set up of the Hospital.

2. To appreciate the contentions raised in the petition, relevant facts may now be stated. It is the case of the petitioner that he was appointed by an order dated April 15, 1981 on purely temporary basis for a period of 29 days as a peon, in the pay scale of Rs. 196/- and other admissible allowances in accordance with law. It was mentioned in the said order that since the said appointment was purely temporary, his services were liable to be terminated at any time without issuing any notice. The petitioner accepted said appointment and joined the service. It appears that thereafter, various orders came to be passed for 29 days on the same line on which the first order was passed. The petitioner came to know that in Limdi and Surendranagar Government Hospital, regular appointments were to be made and he, therefore, made an application to the Superintendent, Civil Hospital, Limdi on December 14, 1985 and requested that in view of the fact that he had served in the Hospital in past as peon, he should be appointed to the said post instead of appointing a new person. Said request was also made by the petitioner by making an application to the Hon'ble Minister

of Health. It is the case of the petitioner that since nothing was done by the respondent authorities and since he was not made permanent nor his services were regularised nor was he called for interview for appointment on regular basis and apprehended termination, he approached this Court by filing this petition.

3. Mrs. Dawawala for Mr. P. B. Majmudar, learned Counsel for the petitioner, raised a number of contentions. She submitted that the petitioner is working since 1981 and thus he has completed a number of years in service with the hospital. The break which is given can be said to be "artificial break" as held in various decisions of the Hon'ble the Supreme Court as also of this Court which cannot come in the way of the petitioner in getting permanency benefits and regularisation of services. She further submitted that services of a number of persons similarly situated to that of the petitioner have been regularised and they have been made permanent, by not making the petitioner permanent and not regularising his services, respondent authorities have acted arbitrarily, discriminately and unreasonably and the said action is thus violative of Arts. 14, 16 and 19 of the Constitution of India. She also submitted that even if it is assumed for the sake of arguments without admitting it that regular appointment can always be made to the post of peon, there was no earthly reason for the respondent authorities not to allow the petitioner to compete with other similarly situated candidates and therefore, in any case, to the extent, the action of the respondent authorities requires to be interfered with by this Court. Reliance was also placed on a number of decisions of the Hon'ble the Supreme Court as well as of this Court including the decisions in the case of *Olga Tellis and Others Vs. Bombay Municipal Corporation and Others*, *Sushilkumar Yadunath Jha v. Union of India & Anr.*, reported in (1987 I LLJ 7) *Mariamben Amirbhai and Others Vs. State of Gujarat and Others*, and the decision of *R. C. Mankad, J. in Spl. C.A. No. 711 of 1985* decided on July 3, 1985.

4. The petition was admitted by issuing Rule on April 7, 1986 by this Court (Coram : A. P. Ravani, J.). A counter-affidavit is filed by the Supdt., R.R. Hospital, Limdi wherein it is stated that the petitioner was appointed on purely temporary basis to work as a peon on "leave vacancy" and he cannot claim any right to get permanency benefits. It is further stated the petitioner was not appointed against any permanent vacancy nor was he given regular appointment. His name was neither received from the Employment Exchange nor from the Social Welfare Department when purely temporary appointment by way of the leave vacancy was given to him. In view of the fact that on certain occasions, either because of some additional work or leave vacancy, the petitioner was given work and therefore, there was no question of giving any artificial break as contended by him. Regular selection procedure for the purpose of making regular and permanent appointment was not followed in the case of the petitioner and, therefore, said appointment was not according to law. With regard to appointment for a period of 29 days, the deponent has stated thus at page 21 of the compilation of the petition :

"As a matter of fact, the practice of giving appointment for 29 days is being abandoned by the respondent authorities. Only in exceptional circumstances, temporary appointments are given to see that administration does not suffer because of non-availability of sufficient staff."

Regarding non-consideration of the claim of the petitioner for regular appointment, the deponent has stated that the procedure in accordance with law was followed by requisitioning the names from the Employment Exchange and Social Welfare Department. The petitioner was not called for interview in view of the fact that neither his name was sent by the Employment Exchange nor by the Social Welfare Department. It is, therefore, stated that it was not that action of not considering the case of the petitioner was arbitrary or capricious but that such a situation did not arise since the name of the petitioner was not forwarded by the agency. It is finally submitted that the action of the respondent cannot be said to be discriminatory, arbitrary or unreasonable and the petitioner cannot make any grievance against the selection in accordance with law. He also cannot make any grievance against the termination of his services in view of appointment of a regularly selected and appointed candidate.

5. Mr. Amit Panchal learned Assistant Government Pleader for the respondents placed reliance upon the two recent decisions of the Supreme Court. In *Delhi Development Horticulture Employees' Union Vs. Delhi Administration, Delhi and others*, the petitioners were employed on daily wage basis under the Jawahar Rojgar Yojna by the authority. The scheme was enacted for the purpose of tackling the problem of poverty and as soon as the object was fulfilled it came to an end. When the services of the petitioners were sought to be terminated, they approached the Supreme Court by filing a writ petition under Art. 32 of the Constitution of India and prayed for directions against the authority for regularisation of their services and absorption. Reliance was placed on some of the earlier decisions of the Supreme Court. Considering those decisions, the Supreme Court held that if the appointment of the petitioners were made under the scheme, the petitioners could claim benefits only under the scheme. To get an employment under the scheme, and to claim on the basis of said employment, a right to regularisation is to frustrate the scheme itself. No Court can be a party to such exercise. According to the Court, it was never the intention of the scheme to extend right of employment in favour of the petitioners. If such a right is to be ensured, in the opinion of the Court, it would do more harm than good. The Supreme Court, however, did not rest the matter there. The Court took into account the fact that there are certain statutes like Employment Exchange Act which requires recruitment on the basis of registration in the Employment Exchange and in pursuance of the provisions of the said Act, interested candidates should get their names registered for the purpose of getting regular employment/appointment through Employment Exchange only. The Court should not ignore the provisions of the statute. The Court, speaking through Sawant, J., then made the following pertinent observations (p. 459) :

"..... (W)e may take note of the pernicious consequences to which the direction for regularisation of workmen on the only ground that they have put in work for 240 or more days, has been leading. Although there is Employment Exchange Act which requires recruitment on the basis of registration in the Employment Exchanges, and persons registered in the Employment Exchanges, and to employ and get employed directly those who are either not registered with the Employment Exchange or who though registered are lower in the long waiting list in the Employment Register. The Courts can take judicial notice of the fact that such employment is sought and given directly for various illegal considerations including money. The employment is given first for temporary periods with technical breaks to circumvent the relevant rules, and is continued for 240 or more days with a view to give the benefit of regularisation, knowing the judicial trend that those who have completed 240 or more days are directed to be automatically regularised. A good deal of illegal employment market has developed resulting in a new source of corruption and frustration of those who are waiting at the Employment Exchanges for years. Not all those who gain such back door entry in the employment are in need of the particular jobs. Though already employed elsewhere, they join the jobs for better and secured prospects. That is why most of the cases which come to the Courts are of employment in Government Department, Public Undertakings or Agencies. Ultimately it is the people who bear the heavy burden of the surplus labour. The other equally injurious effect of indiscriminate regularisation has been that many of the agencies have stopped undertaking casual or temporary works though they are urgent and essential for fear that if those who are employed on such works are required to be continued for 240 or more days have to be absorbed as regular employees although the works are time-bound and there is no need for the workmen beyond the completion of the works undertaken. The public interests are thus jeopardised on both counts."

In the light of these circumstances, the Supreme Court did not grant the relief to the petitioners and dismissed the petition.

Almost in similar circumstances, a question arose before the Supreme Court in the case of State of Punjab and others Vs. Surinder Kumar and others, . In that case, some part-timers approached the High Court of Punjab and Haryana for getting full-time work. The High Court allowed the petition by a "cryptic" order and continued the petitioners in service. State of Punjab approached the Supreme Court. The Supreme Court took into account the fact that pursuant to the instructions issued by the Education Department, appointment of the petitioners were made as part-time lecturers. The petitioners accepted the terms and conditions mentioned in the appointment orders and joined the service. The Court did not find any valid reason as to why specific terms on which the appointments were made could not be enforced against the petitioners. The Supreme Court also observed that there were no sufficient grounds on the basis of which absorption and permanency was granted by the High Court in favour of the petitioners. The Court, therefore, set aside the order passed by the High

Court of Punjab and Haryana.

In view of the above latest decisions of the Hon"ble the Supreme Court, it appears that the Court considered a number of circumstances, particularly, a circumstance that, on one hand certain statutes are being enacted for the purpose of regular recruitment of staff in Government and Semi-Government agencies and; if, on the other hand, such back door irregular entry is permitted and legalised, it would open flood gates of irregularity, illegality and even corruption

6. Mr. Amit Panchal learned Assistant Government Pleader for the respondents also submitted that the names of all candidates registered either with the Employment Exchange or with the Social Welfare Department are sent on the basis of the date of registration of candidates with the said agency. If irregular appointment is regularised and a back door entry is approved by judicial decisions, not only those persons who were the beneficiaries of irregular appointment would get undue advantage over the appointments from regular market, but would frustrate and defeat object of enacting such statutes. It would be causing great prejudice and injustice to those who have no influence or sufficient funds to extend monetary benefits or who want to get employment in accordance with law and purely on the basis of merits. I find considerable force in the argument of Mr. Panchal.

7. In my judgment, whenever an irregularly appointed applicant or petitioner approaches a High Court, by invoking extra-ordinary jurisdiction under Art. 226 of the Constitution of India, the Court should always remember that his initial appointment was irregular and his entry was a back door entry. In dealing with such a situation, the Court must keep in mind, inter alia, the following considerations :

1. Articles 14 and 16 of the Constitution of India guarantee fundamental rights of equality before the law and equal protection of the laws for all citizens in all matters relating to employment to any office under the State.

2. Courts should insist upon the observance of the statutes, rules and regulations. If it is the duty of the executive to follow and implement statutory rules and regulations in making appointments, it is equally the duty of Courts to give effect to such rules and regulations, if they are intra vires and constitutional.

3. Appointments of candidates made on regular basis in accordance with rules and regulations and appointments made on irregular basis other than in conformity with the rules and regulations can never be said to be at par with and they cannot be said to be similarly situated. Neither Art. 14 nor Art. 16 can be invoked, applied or pressed into service in such cases.

4. If the Government wants to follow the provisions of the rules and regulations for making regular appointments, the said action can never be said to be arbitrary, capricious or unreasonable, requiring interference in extra-ordinary and

prerogative jurisdiction of the High Court under Art. 226 of the Constitution of India. A Court should not prevent or obstruct such legal, proper and reasonable course being followed by the executive.

5. While considering the cases of irregular appointments, Court should not ignore the fact that initial entry was a back door entry and appointment was not in consonance with the rules and regulations.

6. Court should also bear in mind an important aspect that at the time when irregular appointments were made, eligible, qualified, deserving and otherwise fit candidates though available, in open market, were not considered and were not afforded opportunity to compete with the back door entrants without there being any fault on their part.

7. The persons who came to be appointed were aware of the fact that their appointments were irregular such as ad hoc, temporary, officiating, part-time, etc. In spite of that, they accepted the service and terms and conditions of such appointment.

8. If, with an open eye, irregularly appointed candidates accepted services and if their services came to be terminated in accordance with terms and conditions of appointment, they have no right to make grievance.

9. Ordinarily, in cases of appointments on daily wages basis, (eg. appointment for 29 days), whether a break in service can be said to be artificial or not, depends upon the facts and circumstances of each individual case and requires to be decided on the basis of evidence adduced and materials placed on record by the parties. Such questions of fact are not usually decided by the High Court in exercise of its extra-ordinary jurisdiction under Art. 226 of the Constitution of India.

10. By issuing a writ, making an order of giving a direction of regularisation of services of an employee who is irregularly recruited, the Court not only regularises such appointment but also deprives several eligible, qualified and deserving candidates from competing for that post. Such a step not only offends and violates sacrosanct provisions of Arts. 14, 16 and 19 of the Constitution but makes those provisions nugatory and otiose by frustrating the laudable object and purpose for which they have been included in Part III of the Constitution of India.

11. There may be certain projects of a temporary nature or vacancies may arise due to work of an urgent nature, such as election, scarcity, drought, flood, Census operations, etc. State cannot be forced to continue such projects or schemes even after they are over by indiscriminate exercise of prerogative powers under Art. 226 of the Constitution of India. A High Court also cannot direct the authority to make persons appointed for such scheme or project as permanent and regular.

12. Arbitrariness is writ large in such appointments. Irregular appointments are

made on various irrelevant, extraneous and even on illegal considerations including corruption. It is, therefore, not only the power and authority but the duty of the Court to curb such evils or to minimise them to the maximum extent. In any case, the judicial Institution should not become an instrument in even indirectly approving such acts.

13. These principles apply to writ petitions filed under Art. 226 of the Constitution of India which are normally decided on the basis of pleadings and affidavits of parties and not on the basis of oral evidence and examination and cross-examination of witnesses.

The above list is merely illustrative and by no means should be treated as exhaustive. Whenever a case of this nature comes before a High Court, it would consider the above factors in the light of decided cases and facts and circumstances of the case before it and decide the point raised by the petitioner.

8. Having given anxious consideration to various decisions of the Hon'ble Supreme Court and applying the above principles to the facts of the case, in my considered opinion, the prayer of the petitioner cannot be granted.

In the instant case, as mentioned hereinabove, the petitioner was not appointed on a permanent post and his appointment was made only by way of ad hoc arrangement either cause the incumbent was not available or there was some more work. The petitioner was specifically informed even when the initial appointment was made in clear and unequivocal terms that his appointment was purely on temporary basis for a period of 29 days and was liable to be terminated without giving notice. This position was accepted by the petitioner. It is not even the case of the petitioner that he did not understand the meaning of terms and conditions of the said appointment. Having taken advantage and derived benefit under the said appointment it does not now lie in the mouth of the petitioner to contend that the action of termination of his services is not legal and valid. If the services of the petitioner are terminated in accordance with the terms and conditions of his appointment, in my opinion, he cannot make any grievance about the said Act. Mr. Panchal is also right in submitting that the names were received from the Employment Exchange or from the Social Welfare Department on the basis of registration of dates and since the petitioner's name was not sent either by the Employment Exchange or by the Social Welfare Department, the petitioner cannot make any grievance against the respondents as to why his case was not considered. The argument about artificial break is misconceived in the light of the above facts and circumstances. The submission with regard to the doctrine of equity also cannot apply to the facts of the present case inasmuch as the persons whose names were registered either with the Employment Exchange or with the Social Welfare Department and whose names were sent in accordance with law cannot be said to be a class similarly situated to that of the petitioner since the petitioner can be said to be a person belonging to a different class. In the circumstances, provisions of Arts. 14, 16 and 19 cannot be pressed into service by the petitioner.

9. The learned Counsel for the petitioner submitted that the petitioner has worked for sufficiently long time and he can be said to be "an experienced hand". His cannot be denied. However, in view of the decision of the Supreme Court, I cannot issue a writ of mandamus directing the respondent authorities to consider the case of the petitioner straightway. If the petitioner is otherwise fit and his case is required to be considered in accordance with law, the authorities will take into account the fact that the petitioner has worked for long time and he is an "experienced person", and taking into account that fact the authorities shall decide his case.

10. In view of the above circumstances, and the law laid down by the Supreme Court, I do not find any substance in the case of the petitioner and the petition requires to be dismissed. Rule is accordingly discharged, however, with no order as to costs.