
(2002) 05 DEL CK 0260
In the Delhi High Court
Case No : C.W.P. No. 1409 of 2001

Dr. Raman Kumar Attrey

APPELLANT

Vs

Employees" State Insurance Corpn. and Another

RESPONDENT

Date of Decision : 16-05-2002

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 309
Employees State Insurance Act, 1948 — Section 17(3), 97

Citation : (2002) 99 DLT 68 : (2002) 3 LLJ 1050

Hon'ble Judges : S.B. Sinha, C.J.;A.K. Sikri, J

Bench : Division Bench

Advocate : D.C. Vohra, for the Appellant; Narender Kumar, for the Respondent

Final Decision : Dismissed

Judgement

S.B. Sinha, C.J.—The original applicant before the Central Administrative Tribunal, Principal Bench, New Delhi (hereinafter referred to as, "the Tribunal") is the writ petitioner herein. He was appointed as "IMO Gr. II Doctor" on a contractual basis for a period of six months on a fixed remuneration of Rs. 2,200/- per month plus usual allowances as admissible. He questioned the said Order by filing an original application before the Tribunal, which was marked as O.A. No. 230 of 1988. The said application was disposed of by an Order dated 03.06.1993 with a direction upon the respondents to allow the petitioners to appear before the Selection Board for consideration for regularization subject to their eligibility and in case they were found suitable, they should be regularized subject to availability of vacancies. The respondents were also directed to grant age relaxation to the petitioner to the extent he had rendered services in the respondent Corporation.

2. The petitioner was not regularized in his service having been found to be over age, as the age limit for appointment as Insurance Medical Officer Grade II (in short, "IMO Grade II") in terms of the recruitment regulations was 30 years as on 30.09.1997. He was found to be over age despite weightage given to his

contractual service in terms of the said Order dated 03.06.1993 passed by the Tribunal in O.A. No. 230 of 1988.

3. Thereafter, the said original application was filed.

4. The learned Tribunal although rejected the contention, although raised by the petitioner, that his services be regularized, but directed :-

"10. This OA is Therefore disposed of with a direction to respondent to grant applicant the same pay scale in which his counterparts, who were initially recruited on contract basis and were later regularized, are drawing their pay, and thereafter fix his pay and allowances in that pay scale on par with those who were appointed on contract basis immediately after him, but were subsequently regularized. Applicant will be entitled to arrears with effect from the date he filed this OA (22.2.99) rounded off to the nearest month i.e. 1.3.99 and shall be entitled to annual increments. These payments shall continue till applicant remains in the service of respondents. These directions should be implemented within 3 months from the date of receipt of a copy of this order. The prayer for interest is rejected, as there are no good grounds to grant the same."

5. Dr. Vohra, the learned counsel appearing on behalf of the petitioner, would submit that keeping in view the fact that the petitioner had been working for a period of 13 years, there was absolutely no reason as to why his services could not be regularized.

6. The learned counsel, drawing our attention to the provisions of Section 17(3) of the Employees' State Insurance Act, 1948 (in short, "the Act"), would contend that for appointment of the regular candidates, consultation with Union Public Service Commission (in short, "UPSC") is mandatory. It is not so in case of employees, who were appointed on contract basis and continued despite expiry of the contract period.

7. Our attention has been drawn to two judgments of this Court being C.W.P. No. 559 and 95 of 1981 in the case of Director General P. Sarabhai and Ors. v. Union of India and Ors. and C.W.P. No. 3743 of 1992 decided on 20.12.1984 in the case of Dr. (Mrs.) D. Marwah and Ors. v. Employees' State Insurance Corporation and Ors. 1983 L&S Cases 910

8. Mr. Narender Kumar, the learned counsel appearing on behalf of the respondent on the other hand, would contend that Section 17(3) of the Act cannot be said to have any application whatsoever.

9. Dr. Vohra submitted that the petitioner having rendered long service in equity was entitled to the reliefs prayed for by the petitioner.

10. Before advertng to the question raised in this writ petition, we may notice that it has not been disputed that the petitioner has continued in service owing to interim order of stay granted by the learned Tribunal.

11. Section 17(3) of the Act reads thus :-

"(3) Every appointment to posts (other than medical posts)] corresponding to [Group A and Group B] posts under Central Government] shall be made in consultation with the Union Public Service Commission :

Provided that this sub-section shall not apply to an officiating or temporary appointment for [a period] not exceeding one year.

[Provided further that any such officiating or temporary appointment shall not confer any claim for regular appointment and the services rendered in that capacity shall not count towards seniority or minimum qualifying service specified in the regulations for promotion to next higher grade."

12. It is not in dispute that the words "other than medical posts" were inserted vide Section 7(iii)(a) by Act No. 29 of 1989 and the petitioner was appointed prior to the said date.

13. A bare perusal of the aforesaid provision would, Therefore, clearly show that even in the case of appointment of Doctor, consultation with UPSC was mandatory.

14. The submission of the learned counsel to the effect that by reason of the proviso appended to Sub-section (3) of Section 17 of the Act in the event of an officiating or temporary appointment for a period not exceeding one year, consultation with UPSC was not necessary, cannot be accepted. The said proviso curbs out an exception and the said exception has a limited role to play and must be interpreted in a restrictive manner.

15. If the submission of Dr. Vohra is accepted, the same would confer upon the concerned Authorities to make back door appointment inasmuch as employee could be appointed on an officiating or temporary appointment for one year without any consultation with the UPSC and thereafter regularized in service, if his services have been extended for one reason or the other thereafter.

16. The recruitment rules reflect the legislative policy.

17. Having regard to the provisions contained in Articles 14 and 16 of the Constitution of India (in short, "the Constitution"), the provisions relating to recruitment must strictly be complied with. Articles 14 and 16 of the Constitution were enacted so as to give equal opportunity to all citizens of India similarly situated in the matter of employment and thus any back door appointment has been ruled out.

18. We may notice that Section 97 of the Act empowers the Corporation to make Regulations, which would be in consistent with the Act or the Rules made there under. The Corporation has made such Regulations, which has been published in the Gazette on 24.05.1990. The said regulation provides "procedure and manner of selection" for in the following terms :-

"2. Procedure and manner of Selection :-

(a) Direct recruitment to the post of Insurance Medical Officer, Grade-II shall ordinarily be made on the basis of a written examination followed by an interview of eligible and successful candidates. In other cases, where direct recruitment is prescribed, recruitment shall ordinarily be made on the basis of an interview.

In case, it becomes necessary to adopt a different mode of Recruitment, the same may be adopted by the Inspector General after obtaining specific prior approval of the Chairman, Employees' State Insurance Corporation. However, once a mode of recruitment is notified in the advertisement, no range shall be made.

(b) That number of candidates to be invited for interview shall be decided by the Chairman, Selection Board, keeping in view the number of vacancies and the number of applicants who satisfy the prescribed requirement and/or who qualify in the written examination.

(c) Mere fulfillment of the prescribed requirement of age, qualification, experience etc. will not confer any right on the applicant to be called for interview or to any claim over the post advertised.

(d) All work relating to issue of advertisement in respect of applications and processing of applications for submission to the Chairman, Selection Board will be handled by the office of the Director General, Employees' State Insurance Corporation.

(e) The Selection Board will be provided necessary Secretariat assistance by the office of the Director General, Employees' State Insurance Corporation.

19. The provisions of relaxation of power as contained in Regulation 6, which is as under :-

"6. Power to relax :-

Where the Director General of the Corporation is of opinion that it is necessary or expedient to do so, he may, by order, for reasons to be recorded in writing and after obtaining specific prior approval of the Chairman, Employees' State Insurance Corporation relax any of the provisions of this Regulation with respect to any class or category of persons."

20. No appointment, Therefore, could be made in deviation or departure from the procedures laid down in the said Regulation. Although the said Regulation had come into force subsequent to the appointment of the petitioner, but as noticed hereinbefore, a similar procedure was required to be followed when the petitioner was initially appointed having regard the provisions contained in Articles 14 and 16 of the Constitution.

21. Regularization, as is well known, is not a mode of recruitment. Once regularization in absence of any statute or statutory rules is held to be one of the mode for appointment, the same would be ultra vires. The statute or the statutory rules provide for mode and manner as also the mechanisms for regular

appointment. A person, who had been appointed on ad hoc or temporary basis, he enjoys that status. If he is appointed on a contract service, he also enjoys a particular status. The status enjoyed by the employee having been appointed in terms of the offer of appointment cannot be changed in absence of any statute or statutory rules.

22. In *State of Madhya Pradesh and Another Vs. Dharam Bir*, the Apex Court laid down the law in the following terms :-

"27. Applying these principles to the instant case, since the respondent admittedly, was appointed in an ad hoc capacity, he would continue to hold the post in question in that capacity. On the promulgation of Rules, Therefore, the post of Principal which he was holding could not be treated to have been filled up on regular basis and had to be treated as vacant. In order to make regular appointment by promotion on that post, the eligible candidates were considered and the respondent not possessing the required educational qualification, was not found fit or suitable for the post of Principal and was consequently directed to be appointed on regular basis as Vice-Principal as he was found suitable only for that post principally for the reason that he did not possess a Degree or Diploma in Engineering."

23. The question as to whether an order of regularization can be directed in equity or otherwise by the Tribunal or by the High Court has been considered by different courts.

24. Recently a Division Bench of the Andhra Pradesh High Court (of which one of us was a Member) in *Superintending Engineer, HCC-I, CPWD, Hyd. Vs. Tekmalla Raja Sekhar and Others*, noticed various decisions of different High Courts, which are as under :-

"14. In *Sohan and Another Vs. State of Haryana and Another*, a Division Bench of this Court has clearly held that regularization is not a mode of appointment and in absence of any statutory rules the Part-time employees, ad hoc employees and NMRs did not derive any legal right whatsoever to continue in service and no such direction can be issued inasmuch as for the purpose of obtaining a writ of or in the nature of mandamus the petitioner must establish existence of a legal right in himself and a corresponding legal duty in the respondents.

15. It was further held in no uncertain terms that the Court cannot direct creation of more posts.

16. Recently in *State of West Bengal v. Krishna Kumar Majumdar*, it was held:

"... An appointment on regular post must be made in terms of the Recruitment Rules having regard to the principles adumbrated under Articles 14 and 16 of the Constitution of India. In the instant case, as indicated hereinbefore, neither any appointment has been made by the writ petitioner that such appointment has been made in accordance with the Recruitment Rules or in consonance with the principle laid down under Articles 14 and 16 of the Constitution of India. Such

appointment, Therefore, cannot be encouraged. Furthermore, a finding of fact has been arrived at by the competent authority that the writ petitioners were appointed on contractual basis and that too for a period of 2 years at one point of time."

17. Even in *State of Haryana v. Piara Singh* the apex Court has clearly held that when an employee is appointed on ad hoc basis the same itself is a pointer to the fact that no regular post is available. The said principle should be applied also in relation to NMR. It has been held in the said case thus :-

"... Ordinarily speaking, 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 Article 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 the 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 act fairly and gives a fair deal to its employees consistent with the requirements of Articles 14 and 16.

18. We may notice that it has clearly been held that even the definition of worker under the Factories Act can only be read for the said purposes only. It is for the appropriate Government to decide whether employment of contract labour should be prohibited or only regulated. The Court or the Tribunal has no say therein. [See *Sujan Benerjee v. Union of India*, *Ranjit Kumar Chanda v. State of West Bengal*] In *Union of India v. Shri Rajinder Singh* it has been held:

"An employee must be appointed upon compliance of the provisions of the Recruitment Rules. When a particular status is conferred upon an employee, the same cannot be changed unless there exists any statutory provision therefore.

"A regular appointment can only be made in terms of the Recruitment Rules and subject to the candidate's possessing the requisite qualification and also subject to existence of any sanctioned post.

"An employee is borne in the cadre only when he is appointed upon fulfilling the requirement Therefore in a sanctioned post."

25. The aspect of the matter has also been considered in a Full Bench decision by the Andhra Pradesh High Court in *Managing Director, Andhra Pradesh State Meat and Poultry Development Corporation Limited Vs. S. Yadaiah and Others*,

26. In *T. Zakraiah and Others Vs. A.P.S.C. Co-operative Finance Corporation Ltd., Hyd. and Others*, a Division Bench of the Andhra Pradesh High Court (of which one of us was a Member) following an earlier decision of the Apex Court in *District Collector v. M.L. Singh*, 1998 (2) ALT 5 (SC) held :-

"10. The matter relating to interpretation of G.O. Ms. No. 212 dated 22-4-1994 in the light of the various decisions of the Apex Court including the decision in M.L. Singh (Supra) came up for consideration before this Court in Secretary, A.P. Social Welfare Residential Educational Institutions Society, Hyd. and others Vs. P. Venkata Kumari, and in Managing Director, Andhra Pradesh Beverages Corp. Ltd. Vs. M. Peter and Others, . It was held that unless the conditions laid down in the Government orders are satisfied, the employees cannot seek for regularization of their services as a matter of right, even though they might have put in more than five years of service. In M.L. Singh (supra) the Supreme Court clearly held that all the conditions laid down in G.O.Ms. No. 212 must be strictly complied with."

27. Thus, there cannot be any doubt whatsoever that the provisions of the statute and the statutory rules must be complied with before an appointment on regular basis can be made.

28. In the aforementioned backdrop, the Division Bench decision of this Court in Director General P. Sarabhai's case (Supra) may be considered. In the said decision unfortunately the earlier decisions of the Apex Court in R.N. Nanjundappa Vs. T. Thimmiah and Another, and B.N. Nagarajan and Others Vs. State of Karnataka and Others, had not been considered.

29. The Apex Court in subsequent decisions also has laid down a different dicta as has been noticed by different High Courts in the aforementioned judgments. We, Therefore, are not in a position to accept the ratio of the said decision, as this Court having regard to Article 141 of the Constitution must follow the binding decision of the Apex Court.

30. In any event, in Director General P. Sarabhai's case (Supra), it was held :-

"We would, Therefore, hold that those petitioners who had served one year under their order of appointment and were then continued by the respondents beyond the period of one year were appointed in consultation with the Union Public Service Commission within the meaning of Section 17(3) of the Employees State Insurance Act, 1948, and Therefore, those petitioners do not have to be selected afresh and will have to be deemed to be regularly appointed to the service from the date of their initial appointments. However, if any of the petitioners were not continued beyond one year by the respondents themselves, but have served beyond one year as a result of the stay order passed by this Court, then those petitioners will not be deemed to have been appointed u/s 17(3) in the aforesaid manner because their continuation will be due to the effect of this Court's stay order. Secondly, we would hold that the action of the Union Public Service Commission in disregarding the petitioners' previous service and making appointments by interview only and thus equating the petitioners with newcomers was discriminatory and violative of the fundamental rights of the petitioners under Article 14 or 16. Those of the petitioners who have succeeded on the first point do not have to be selected afresh because their appointment

has already been held under the first point to have become effective on their continuation beyond the period of one year. However, those petitioners who were not continued beyond one year by the orders of the respondents, but on account of this Court's stay order will be entitled to be considered afresh in the light of their past experience on a temporary basis. In considering this set of petitioners afresh, the Union Public Service Commission will take into consideration their past record while serving the State Employees Insurance Corporation. The petitioners will get their costs."

31. In the Counter Affidavit, it has categorically been stated that the petitioner filed an application for regularization before expiry of his contract period. Furthermore, in the said original application, he was granted an interim relief. By the said Order dated 03.06.1993 passed in O.A. No. 230 of 1988, the learned Tribunal directed :-

"... If no opportunity has been given to the petitioner to appear before the Selection Board subject to their eligibility. They should be given such an opportunity and in case they are found suitable, their services should be regularized in accordance with rules and subject to availability of vacancies. The petitioner shall also be, for this purpose, provided age relaxation to the extent they have rendered service in the Respondent Corporation."

32. It is not in dispute that pursuant to the said Order, the petitioner continued to serve with the respondent No. 1. The respondents issued an advertisement for filling up 126 posts of IMO Grade II. The petitioner had also applied, but as despite relaxation in the maximum age limit to the extent of the period of service with the respondent No. 1, he was found to be over age and thus was not found eligible for the said post.

33. The Order of the Tribunal passed in O.A. No. 230 of 1988, thus, having been complied with and the petitioner having been found to be over age, he could not have been appointed on a regular basis. Realizing that the said Order would not give him any benefit, he changed his stand and moved the Tribunal afresh by way of O.A. No. 437 of 1999 claiming that he stands regularized as Insurance Medical Officer since the date of his initial appointment.

34. The petitioner did not question the earlier Order passed by the Tribunal dated 03.06.1993 in O.A. No. 230 of 1988 and accepted the same and, Therefore, he cannot be permitted to resile there from and raise a contention that he stood regularized from the date of his initial appointment.

35. Even having regard to the fact that the petitioner continued on the basis of an order of stay granted by the Tribunal, the decision of Director General P. Sarabhai's case (Supra) is not applicable in this case.

36. The petitioner was not even entitled to an equitable relief, as no order on equity can be passed, which would be contrary to the statutory provisions. (See Union of India (UOI) and Others Vs. Dhanwanti Devi and Others, .

37. For the reasons aforementioned, there is no merit in this writ petition, which is accordingly dismissed. However, in the facts and circumstances of the case, there shall be no orders as to costs.