

(2010) 01 AP CK 0006

In the Andhra Pradesh High Court

Case No : Writ Petition No"s. 23029, 23296, 23297 and 23301 of 2009

Government of A.P. and Others

APPELLANT

Vs

P. Sulochanamma and Others

RESPONDENT

Date of Decision : 18-01-2010

Acts Referred:

Administrative Tribunals Act, 1985 — Section 15

Andhra Pradesh State and Subordinate Service Rules, 1996 — Rule 2, 2(15), 3, 4, 9

Specific Relief Act, 1963 — Section 14, 14(1)

Citation : (2010) 2 ALD 174 : (2010) 2 ALT 187 : (2010) 1 APLJ 108

Hon'ble Judges : Vilas V. Afzulpurkar, J;V. Eswaraiyah, J

Bench : Division Bench

Advocate : G.P. for Services I, for the Appellant; G.V.L. Murthy, for Respondents in W.P. Nos. 23296, 23029, 23301 of 2009 and N. Guru Gopal in W.P. No. 23297 of 09, for the Respondent

Judgement

Vilas V. Afzulpurkar, J.—This batch of writ petitions is directed against the final order of the Andhra Pradesh Administrative Tribunal dated 13.05.2009 allowing a batch of O.A."s. Questioning the said order, the State has preferred several writ petitions. The writ petitions involve a common question for adjudication arising out of a common order of the tribunal. Hence, heard and disposed of by this common order.

2. When the present batch of cases was heard by us on 27.10.2009, while admitting W.P. No. 23029 of 2009 we had passed the following reasoned order suspending the impugned order.

The respondent herein was appointed by the District & Medical Officer, Kurnool as Multi-Purpose Health Assistant (Female) vide order in Proceedings Rc. No. 176/E@/2007, dated 22.10.2008, at Mandal level, purely on contract basis for a period of one year from the date of her joining, and on monthly consolidated pay of Rs. 4,000/- (Pay at Rs. 3000/- + incentive Rs. 1000/- per month). The said appointment was purely temporarily, on contract basis depending upon the

necessity and the same is liable for termination at any time without assigning any reasons therefor.

The services of the respondent/applicant were terminated by order in Proceedings Rc. No. E2/I76/07 dated 19.01.2009 after completion of one year and she was relieved from the said post vide order dated 21.01.2009.

Questioning the said termination, the respondent filed O.A. No. 1366 of 2009 before the Andhra Pradesh Administrative Tribunal. The tribunal by order dated 20.05.2009 disposed of the said O.A. along with other O.A.'s, setting aside the termination order and directed the petitioners herein to continue the applicants in O.A.'s on contract basis on par with others for the year 2009-2010 and further directed that the applicants can be replaced and their services can be terminated, if the candidates under roster points are available for filling up the said posts.

Aggrieved by the said order of the tribunal, the Government filed the present writ petition.

The learned Government Pleader appearing for the petitioners submits that in fact the respondent and other applicants had been appointed against roster points due to non availability of the suitable reserved candidates and that now reserved candidates are available and they are entitled to be appointed in the posts reserved for them.

We have perused the order of the tribunal. Admittedly, the appointment of the respondent was purely on contract basis for a period of one year. It is to be seen that any appointment made by agreement or on contract basis under Rule 9 of the AP State and Subordinate Service Rules, 1996 shall be not regarded as member of the service in which posts she/he is appointed. If that be so, non-member of the service is not entitled to invoke the jurisdiction of the tribunal u/s 15 of the Administrative Tribunals Act, 1985. In that view of the matter, as the present matter cannot be said that it relates to service within the meaning of Rule 3 of the said Rules, we are inclined to suspend the operation of the order dated 13.05.2009 passed by the tribunal in O.A. No. 1366 of 2009.

Accordingly, there shall be interim suspension as prayed for.

Notice.

The respondent has, thereafter, been served and we have heard the learned Government Pleader and the learned Counsel appearing for the respondent and had reserved this matter for judgment on 29.12.2009.

3. For the sake of convenience, We refer to the facts in W.P. No. 23029 of 2009 relating to O.A. No. 1366 of 2009 as follows:

(a) The Government created posts of Multi-Purpose Health Assistants (Female)/Auxiliary Nurses and Mid-Wives, hereinafter referred to as MPHA (F)/ANM, in certain districts and so far as Kurnool District is concerned (which is subject

matter of this batch) 517 posts were sanctioned vide G.O.Rt. No. 152 Health Medical And Family Welfare (D1) Department dated 05.02.2007. Accordingly, Notification No. 1/2007 dated 06.02.2007 and further notification dated 04.04.2007 were issued to fill up these posts on "contract basis" for a period of one year. The relevant portion of the said notification No. 1/2007 dated 06.02.2007 is as follows:

1. As part of the "National Rural Health Mission" the Government of India has agreed to fill up the post of 2nd ANM in all the Primary Health Centres in the State of Andhra Pradesh (in three phases: 2006-2009) as part of this the applications are hereby invited from all the eligible candidates to work as MPHA (F)/ANM on contract basis in the 3756 rural Primary Health Centres of Srikakulam, Vijayanagaram, Prakasam, Kadapa, Kurnool, Adilabad, Nizamabad and Mahaboob Nagar District (In other districts the appointments will be done in 2009-08 and 2008-09).

2. Mandal Level Selection: As per the orders of the Government of India, the selection of candidates will be done on Mandal basis. Each Mandal will be considered as one unit. To apply for the vacancies in one mandal the candidate of that particular mandal are only eligible. Local candidates will be decided as per the norms of the Government rules.

3. Existing vacancies (Provisional) : Srikakulam - 446, Vijayanagaram -404, Prakasham - 517, Kadapa - 415, Kurnool - 517, Adilabad - 424, Nizamabad - 397, Mahaboob Nagar -636. The particulars of mandal wise reservation and vacancies of each district is available in the application form.

4. Reservations: The rule of reservation is applicable for the ANM vacancies in each mandal.

5. Qualifications: A pass certification in (i) S.S.C. (ii) 18 months MPHWS (F) training course, approved by the AP nursing and Midwifery council (or) Intermediate (vocational) MPHWS (F) for 2 years issued by the Board of Intermediate, Andhra Pradesh, Hyderabad, (a) one year clinical training completed in any of the Government Hospitals recognized by the Government (or) (b) apprenticeship training completion certificate from any recognized hospital sponsored by the Board of Apprenticeship training, Chennai, Government of India, (iii) Physical fitness certificate for field training.

6. Process of selection: Marks obtained in qualifying examination i.e. ANM/MPHA (F) or Intermediate (Vocational) examination (vocational papers marks only) is considered for selection.

7. Age: The individual should have 18 to 35 years of age as on 01.07.2007 (relaxation is applicable as per rules in force).

8. Salary: 4000/- pm (3000/- pay and 1000/- honorarium).

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(b) As against the said 517 posts sanctioned in the district, 468 candidates were selected, except 45, they have been appointed by following roster points at Mandal level by giving due consideration to SC, ST and BCs and the said balance of 45 candidates were appointed due to non availability of candidates to fulfill and satisfy the roster points as above. The applicants herein are among those 45 candidates, who were appointed against the roster points due to non-availability of suitable reserved candidates. After working for one year and after expiry of initial contract period of one year the services of the applicant was terminated after 21.01.2009 vide impugned order of the District Medical and Health Officer dated 19.01.2009. Questioning the aforesaid termination, the applicant approached the tribunal in O.A. No. 1366 of 2009. It was contended before the tribunal that even though the appointment order indicated that appointment is on contract basis for one year, the posts were created on permanent basis and that the similarly engaged other candidates appointed along with the applicants are continuing and their services are not terminated. Grievance, therefore, in the O.A's was termination with respect to 45 candidates while continuing the other candidates appointed along with the applicants.

(c) A detailed counter was filed by the respondent/State before the tribunal and the batch of O.A's was considered by the tribunal taking note of the fact that even as per the counter affidavit other than the 45 candidates whose services have been terminated, the remaining candidates are continuing and converted into contract basis for the further period of one year for 2009-2010. The tribunal, therefore, felt that the applicant as well as others, who have been continuing, having been appointed on contract basis for 2008-2009, the services of the applicant can be terminated only if the candidates in the reserved category against the roster points are available for filling up these posts. Since the counter affidavit does not state about the availability of reserved candidates to fill up and satisfy the roster points the impugned order of termination was set aside and the respondent/State was directed to continue the applicant by extending the benefit along with the others for the year 2009-2010 and that they can be replaced/terminated only as and when the roster point candidates are available. The aforesaid order is under challenge at the instance of the respondent/State in this batch of writ petitions.

4. Learned Government Pleader for the petitioners contend that the applicant cannot claim parity with the other candidates, who are continuing, in view of admitted position that while the other candidates were appointed by following the roster point reservation at Mandal level, the applicant, who admittedly, do not satisfy the said roster and appointed only on account of non-availability of candidates satisfying the roster points. Learned Government Pleader also states that the impugned direction given by the tribunal is to treat the applicant on par with others notwithstanding that all of them do not form a class and the tribunal

has issued further direction that the applicant can be replaced only when a candidate to fulfill the roster point is available.

5. Learned Counsel for the respondent, however, supports the impugned order by contending that existence of work and the posts being not in dispute, there is no reason as to why the services of the applicant are terminated while continuing others. He also submits that non-availability of reserved candidates was taken into consideration while appointment was offered to the applicant and as long as such candidates are not available, in view of necessity of extending health services being in public interest, the impugned order of the tribunal is justified and does not warrant interference.

6. We have considered the aforesaid submissions in the light of the material available on record. The very advertisement under which the recruitment was made and the relevant portion of which is extracted above show that the recruitment itself was being made by following the rule of reservation on contract basis. Accordingly, the applicant has been appointed on contract basis and has worked as such for initial one year. Only when her services were terminated under the impugned order, she approached the tribunal with the present O.A. In order to appreciate the contentions on either side, a sample appointment order with respect to the applicant in O.A. No. 1366 of 2009 is extracted as hereunder:

ORDER:

The Commissioner of Family Welfare, AP, Hyderabad vide reference 1st and 4th cited, have issued notification for the recruitment of posts of MPHA (F)/ANM on Contract Basis at Mandal level in the districts.

Accordingly, the following candidate mentioned in the Annexure is provisionally selected for the post of MPHA (F)/ANM on contract basis at mandal level on the basis of percentage of marks obtained in MPHFW (F) Training 18 months course on contract basis for a period of one year during the counseling held on -01-2008 and posted to the place noted against her name on consolidated pay of Rs. 4,000/- (Rupees Four thousand only) (pay at Rs. 3,000/- + incentive Rs. 1,000/- per month) subject to the following conditions.

(1) The appointment is purely on contract basis for a period of one year from the date of joining of the individual.

(2) Her appointment is purely temporarily on contract basis depending up to the necessity and liable for termination at any time without assigning any reasons therefore.

(3) She should report for duty before the officer noted in Col. No. 4 within 15 days from the date of receipt of these orders.

(4) The candidate should produce the Physical Fitness Certificate issued by the Civil Surgeon only at the time of joining.

(5) The candidate should invariably stay at her bonafide head quarters only, in

case, if she fails, she will be terminated from service without assigning any reasons therefor.

The Medical Officer concerned is requested to intimate the date of joining of the individual to this office without fail.

Note: If any eligible candidate claims for selection under the reserved category their request will be considered duly canceling your selection as you are selected against the roster point. Hence you are requested to give your consent letter (to lose the job) to this effect.

It would be evident from the above that the recruitment itself is on contract basis for a period of one year from the date of joining and the note below the annexure specifically states that the candidate must give a consent letter that in the event of an eligible reserved category candidate is available the selection of the candidate would be cancelled.

7. During the hearing of this batch, we had entertained a doubt as to whether a contract appointee can claim to hold a civil post under the State Civil Services? Both the learned Counsel made their submission on the above aspect as well.

8. So far as the impugned order of the tribunal below is concerned, as rightly pointed out by the learned Government Pleader, the candidates appointed in accordance with the roster points by applying rule of reservation and the present applicant appointed against the roster point on account of non-availability of reserved candidates against the roster points form a separate class and both cannot be treated as one class as has been done by the tribunal. The very basis of the order of the tribunal being the continuation of the remaining candidates, who were properly appointed against roster points, is, therefore, erroneous. While the services of the applicant was terminable as soon as a reserved candidate against the roster point is available, the same was not the case with respect to other appointees, obviously, as they were appointed in accordance with the roster points. Thus, treating the applicant on par with others, as has been done by the tribunal, is clearly erroneous.

9. Secondly, the applicant, admittedly, was appointed on contract basis for one year. Under the Andhra Pradesh State and Subordinate Service Rules, Rule 4 provides method of appointment. Relevant portion of Rule 4 states as follows:

4. Method of Appointment: (a) Appointment to any service, class or category shall be by one or more of the methods indicated below as may be specified in the Special Rules applicable to the relevant post:

1. Direct recruitment,
2. Recruitment/appointment by transfer,
3. Promotion, or
4. Contract/Agreement/Re-employment,.

(b)...

Rule 9 of the Rules deals with appointment by agreement or contract, which is as follows:

9. Appointment by agreement or contract:

(a)(i) Notwithstanding anything contained in these rules or special rules it shall be open to the State Government to make appointment to any post in a service, class or category, otherwise than in accordance with these rules or special rules and to provide by agreement or contract with the person (s) so appointed, for any of the matters in respect of which, in the opinion of the State Government, special provisions are required to be made and to the extent to which such provisions are made in the agreement or contract, nothing in these rules or the special rules shall apply to any person so appointed in respect of any matter for which provision is made in the agreement or contract:

Provided that in every agreement or contract made in exercise of the powers conferred by these rules, it shall further be provided that in respect of any matter in which no provision has been made in the agreement or contract, provisions of these rules or special rules relating to the post shall apply.

(ii) The agreement or contract may inter alia include provisions in respect of conditions of service, pay and allowances, discipline, contract period of appointment, notice period for termination of appointment by either party and other relevant matters.

(iii) The Government may, by order, prescribe the form of such agreement or contract.

(b) A person appointed under Sub-rule (a) shall not be regarded as a member of the service, in which the post to which he is appointed, is included and shall not be entitled by reason only of such appointment, to any preferential right to any other appointment in that or in any other service.

Sub-rule (b) above specifically mandates that a person appointed under Sub-rule (a) shall not be regarded as a member of the service, in the post to which he is appointed.

Under the definitions under Rule 2 the word "Direct Recruitment" is defined in Sub-rule (15) as follows:

(15) Direct recruitment: - A candidate is said to be recruited direct to a post, class or category in a service, in case his first appointment thereto is made otherwise than by the following methods:

(i) by promotion from a lower post, category or class in that service or from a lower grade of any such post, category or class, or

(ii) by transfer from any other class of that service, or

- (iii) by appointment by transfer from any other service, or
- (iv) by re-employment of a person in case he had retired from service of Government prior to such appointment, or
- (v) by appointment by agreement or contract.

From (v) above it would be evident that an appointment by agreement or contract cannot be considered to be a direct recruitment as none of the Clauses (i) to (v) in Sub-rule (15) qualify as direct recruitment.

10. Under the Administrative Tribunals Act, 1985, Section 15 provides jurisdiction, powers and authority of State Administrative Tribunals. Section 15 is similar to Section 14, which deals with Central Administrative Tribunal. Section 15 is extracted as under.

15. Jurisdiction, powers and authority of State Administrative Tribunals.:

(1) Save as otherwise expressly provided in this Act, the Administrative Tribunal for a State shall exercise, on and from the appointed day, all the jurisdiction, powers and authority exercisable immediately before that day by all courts (except the Supreme Court [***]) in relation to:

(a) recruitment, and matters concerning recruitment, to any civil service of the State or to any civil post under the State;

(b) all service matters concerning a person [not being a person referred to in Clause (c) of this sub-section or a member, person or civilian referred to in Clause (b) of Sub-section (1) of Section 14] appointed to any civil service of the State or any civil post under the State and pertaining to the service of such person in connection with the affairs of the State or of any local or other authority under the control of the State Government or of any corporation [or society] owned or controlled by the State Government;

(c) all service matters pertaining to service in connection with the affairs of the State concerning a person appointed to any service or post referred to in Clause (b), being a person whose services have been placed by any such local or other authority or corporation [or society] or other body as is controlled or owned by the State Government, at the disposal of the State Government for such appointment.

(2) The State Government may, by notification, apply with effect from such date as may be specified in the notification the provisions of Sub-section (3) to local or other authorities and corporations [or societies] controlled or owned by the State Government:

Provided that if the State Government considers it expedient so to do for the purpose of facilitating transition to the scheme as envisaged by this Act, different dates may be so specified under this sub-section in respect of different classes of, or different categories under any class of, local or other authorities or

corporations [or societies].

(3) Save as otherwise expressly provided in this Act, the Administrative Tribunal for a State shall also exercise, on and from the date with effect from which the provisions of this subsection apply to any local or other authority or corporation [or society], all the jurisdiction, powers and authority exercisable immediately before that date by all courts (except the Supreme Court [***]) in relation to:

(a) recruitment, and matters concerning recruitment, to any service or post in connection with the affairs of such local or other authority or corporation [or society]; and

(b) all service matters concerning a person [other than a person referred to in Clause (b) of Sub-section (1) of this section or a member, person or civilian referred to in Clause (b) of Sub-section (1) of Section 14] appointed to any service or post in connection with the affairs of such local or other authority or corporation [or society] and pertaining to the service of such person in connection with such affairs.

(4) For the removal of doubts, it is hereby declared that the jurisdiction, powers and authority of the Administrative Tribunal for a State shall not extend to, or be exercisable in relation to, any matter in relation to which the jurisdiction, powers and authority of the Central Administrative Tribunal extends or is exercisable.

11. Clauses (a), (b) and (c) above clearly refer to civil services or a civil post under the State, which is a sine qua non for approaching the State Administrative Tribunal for reliefs relating to recruitment, matters connecting to recruitment to any civil service of the State or any civil post under the State. Rule 9(b) of Andhra Pradesh State and Subordinate Service Rules referred to above clearly excludes a contract appointee from being regarded as a member of the service and thereby a contract appointee cannot be said to hold any post under any service of the State nor he can be said to hold a civil post. Therefore, the applicant could not have approached the tribunal for any relief, as the O.A itself is not maintainable for the reasons aforesaid.

12. The said aspect can also be examined from a slightly different angle as well. The relief sought for in the O.A is to set aside the order of termination and to continue the applicant with all consequential benefits. In other words, therefore, the relief sought for is to set aside the order terminating the contract. The said contract, admittedly, was for one year and by efflux of time, automatically, the appointment comes to an end on expiry of one year period and as such even without the order of termination, which is impugned herein also, when the contract is not renewed for further period, no legitimate right can be claimed by the applicant to continue in service. The order of termination of the applicant, merely amounts to putting an end to the said contract in terms of the contract. The further relief sought for by the applicant relating to the continuation, therefore, amounts to enforcing a contract beyond the period stipulated. The applicant, therefore, was clearly seeking specific performance of a contract apart

from the fact that a contract of personal service being not specifically enforceable u/s 14 of the Specific Relief Act, 1963 and the tribunal had no jurisdiction to compel and force the State to indefinitely extend the contract in favour of the applicant. Thus, even if it is assumed that the O.A was maintainable before the tribunal, no relief as sought for could have been granted by the tribunal.

For the aforesaid reasons, W.P. No. 23029 of 2009 deserves to be allowed and is accordingly allowed and O.A. No. 1366 of is liable to be dismissed and is accordingly dismissed.

Since the issue involved in all other writ petitions is identical, W.P. Nos. 23296, 23297 and 23301 of 2009 are also allowed and the corresponding O.A's stand dismissed. However, there shall be no order as to costs.