
(2008) 02 GAU CK 0024
In the Gauhati High Court

Hussain Ali Khandakar

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 15-02-2008

Acts Referred:

Constitution of India, 1950 — Article 14, 16

Citation : (2008) 2 GLT 415

Hon'ble Judges : M.B.K. Singh, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

M.B.K. Singh, J.—Heard Mrs. B.R.A. Sultana, learned Counsel appearing on behalf of the petitioner and Ms. V.L. Sinta, learned Counsel appearing on behalf of the respondents.

2. Brief facts leading to the filing of this case are as follows:

The petitioner was appointed as a casual Grade-in employee in the office of Chamaria Revenue Circle on fixed pay of Rs. 900/- vide appointment order dated 4.8.92, issued by the Additional Deputy Commissioner, Kamrup and he joined his service on 7.8.92. The petitioner was released from his service, vide order passed by the Deputy Commissioner, Kamrup on 31.5.93 and he challenged the said order by filing a writ petition being Civil Rule No. 2288/93. This Court, vide order dated 27.9.94, allowed the said Civil Rule and directed the respondents to accommodate the petitioner subject to availability of vacancy. A copy of the order of this Court passed in Civil Rule No. 2288/93 is at Annexure-D of the writ petition. In view of the said order dated 27.9.94 of this Court and on getting Government instruction vide letter No. GAG (B) 167/93/38 dated 28.6.95, the petitioner was again appointed as a casual employee on monthly fixed pay of Rs. 900/- by the Deputy Commissioner, Kamrup. A copy of the said appointment order is at Annexure-E of the writ petition. The petitioner submitted representations on 18.7.96, 27.4.98, 17.11.98 and 15.10.99 to the concerned

authorities praying in effect for regularization of his service as done in the case of similarly situated persons.

3. Being aggrieved by the failure on the part of the respondents to consider his prayer made in the said representations favourably and alleging discrimination and lack of fair play on the part of the respondents, this writ petition has been filed praying for an appropriate writ or order directing the respondents to regularize his service as LDA-cum-Typist and also to allow him to get service benefits with effect from the date of his joining service as casual Grade-III employee. According to the petitioner, he has served as a casual employee for the last more than 6 (six) years and he has been trying to get confirmation of his service by approaching the respondents many times. Further, according to the petitioner, some of his colleagues who were similarly situated with him, approached this Court vide Civil Rule 4412/95 and obtained favourable order dated 10.7.96 leading to regularization of their services by the office of the Deputy Commissioner, Kamrup under Government of Assam vide memo No. KPE 53/93/330 dated 18.3.98.

4. In the Affidavit-in-Opposition filed by the Deputy Commissioner, Kamrup (respondent No. 3), there is no denial in respect of most of the facts alleged by the petitioner. According to respondent No. 3, due to imposition of ban in recruitment by the Government of Assam, vide letters ABP/74/96/26 dated 9.9.96 and ABP 58/99/129 dated 30.6.01, the authority is unable to take up any recruitment process as well as any step to regularize the service of the petitioner. From the stand taken by respondent No. 3, it appears that in case of removal of the said ban, he has no objection in taking up action for regularization of the service of the petitioner.

5. Despite the apparent readiness on the part of respondent No. 3 to proceed for regularization of the service of the petitioner in the case of removal of the said ban, since the petitioner is praying for an appropriate writ or order from this Court directing the respondents to regularize his service as well as to allow him to get service benefits with effect from the date of his joining service as a casual Grade-III employee, it is necessary to ascertain if the petitioner has any legal right to be enforced or the State has a legal duty to regularize him. From the nature of his prayer, it is apparent that in effect he is praying to this Court for directing the respondents for making his casual service into one to be continued permanently with all the benefits entitled by a regularly appointed employee. It is not stated anywhere that he is entitled to the said regularization under any provision of law. The basis of the petitioner's prayer is that he has been serving as a casual Grade-III employee for some years and that services of some of his colleagues similarly situated with him had been regularized on direction of the Court.

6. The petitioner was appointed on casual basis on a fixed pay. His appointment was not according to any relevant recruitment rules. The said casual appointment made without following the required procedure cannot be considered as an

appointment to a post in the real sense of the term. The said appointment was not also one made in consonance with the provision of Articles 14 and 16 of the Constitution of India after giving equal opportunity to all eligible candidates and after holding a proper selection, where all eligible candidates got chance to compete. Accordingly, the said appointment of the petitioner was not as per the constitutional scheme for public employment.

7. The Apex Court noticed that in matter of regularization of ad hoc employees, there were conflicting decisions by Three Judge Bench of the Court and by Two Judge Bench and as such, the question was required to be considered by a Larger Bench. When the matters came up before a Three Judge Bench, the Bench in turn felt that the matters required consideration by a Constitution Bench in view of the conflict and in the light of the arguments raised by the Additional Solicitor General. The order of reference is reported in *Secretary, State of Karnataka v. Uma Devi* (2006) 4 SCC 44 . The Constitution Bench in *Secretary, State of Karnataka and Others Vs. Umadevi and Others*, , opined that any appointment made in violation of the recruitment rules as also in violation of the Articles 14 and 16 of the Constitution would be a nullity. In the opinion of the Constitution Bench, adherence to Articles 14 and 16 of the Constitution is a must in the process of public employment. The contention raised on behalf of the employees that those temporary or ad hoc employees who had continued for fairly long spell, the authorities must consider their cases for regularization was answered thus:

(Uma Devi's (3) Case SCC 29 para 26)

26. With respect, why should the State be allowed to depart from the normal rule and indulge in temporary employment in permanent posts? This Court, in our view, is bound to insist on the State making regular and proper recruitments and is bound not to encourage or shut its eyes to the persistent transgression of the rules of regular recruitment. The direction to make permanent the distinction between regularization and making permanent, was not emphasized here can only encourage the State, the model employer, to flout its own rules and would confer undue benefits on a few at the cost of many waiting to complete. With respect, the direction made in para 50 (of SCC) of *Piara Singh* is to some extent inconsistent with the conclusion in para 45 (of SCC) therein. With great respect, it appears to us that the last of the directions clearly runs counter to the constitutional scheme of employment recognized in the earlier part of the decision. Really, it cannot be said that this decision has laid down the law that all ad hoc, temporary or casual employees engaged without following the regular recruitment procedure should be made permanent.

The same Constitution Bench further opined at para 33 as follows:

33. It is not necessary to notice all the decisions of this Court on this aspect. By an large what emerges is that regular recruitment should be insisted upon, only in a contingency can an ad hoc appointment be made in a permanent vacancy,

but the same should soon be followed by a regular recruitment and that appointments to non-available posts should not be taken note of for regularization. The cases directing regularization have mainly proceeded on the basis that having permitted the employee to work for some period, he should be absorbed, without really laying down any law to that effect, after discussing the constitutional scheme for public employment.

It was also held that there is a vital distinction between regularization and conferment of permanent in service jurisprudence and that it is misconception to quote regularization with permanence. In the opinion of the Constitution Bench, the word "regular" or "regularization" do not connote permanence and as such they cannot be construed to convey an idea of the nature of tenure of appointment. Further in the opinion of the Constitution Bench, they are terms calculated to condone any procedural irregularities and are meant to cure the defects in the method of appointment and as such not illegality in the appointments. The Constitution Bench thought of directing regularization of the service only of those employees whose appointments were irregular and not illegal as explained in the State of Mysore and Another Vs. S.V. Narayanappa, ; R.N. Nanjundappa Vs. T. Thimmiah and Another, and B. N. Nagarajan v. State of Karnataka (1979) 4 SCC 509.

8. At paragraphs 45 and 54 of the same Judgment (Uma Devi's (3) Case) the Constitution Bench held:

45. While directing that appointments, temporary or casual, be regularized or made permanent, the courts are swayed by the fact that the person concerned has worked for some time and in some cases for a considerable length of time. It is not as if the person who accepts an engagement either temporary or casual in nature, is not aware of the nature of his employment. He accepts the employment with open eyes. It may be true that he is not in a position to bargain--not at arm's length--since he might have been searching for some employment so as to eke out his livelihood and accepts whatever he gets. But on that ground alone, it would not be appropriate to jettison the constitutional scheme of appointment and to take a view that a person who has temporarily or casually got employed should be directed to be continued permanently. By doing so, it will be creating another mode of public appointment which is not permissible. If the court were to void a contractual employment of this nature on the ground that the parties were not having equal bargaining power, that too would not enable the court to grant any relief to that employee. A total embargo on such casual or temporary employment is not possible, given the exigencies of administration and if imposed, would only mean that some people who at least get employment temporarily, contractually or casually, would not be getting even that employment when securing of such employment brings at least some succour to them. After all, innumerable citizens of our vast country are in search of employment and one is not compelled to accept a casual or temporary employment if one is not inclined to go in for such an employment. It is in that

context that one has to proceed on the basis that the employment was accepted fully knowing the nature of it and the consequences flowing from it. In other words, even while accepting the employment, the person concerned knows the nature of his employment. It is not an appointment to a post in the real sense of the term. The claim acquired by him in the post in which he is temporarily employed or the interest in that post cannot be considered to be of such a magnitude as to enable the giving up of the procedure established, for making regular appointments to available posts in the services of the State. The argument that since one has been working for some time in the post, it will not be just to discontinue him, even though he was aware of the nature of the employment when he first took it up, is not (sic) one that would enable the jettisoning of the procedure established by law. for public employment and would have to fail when tested on the touchstone of constitutionality and equality of opportunity enshrined in Article 14 of the Constitution.

54. It is also clarified that those decisions which run counter to the principle settled in this decision, or in which directions running counter to what we have held herein, will stand denuded of their status as precedents.

9. In the light of the above position of law, the petitioner, who was appointed on casual basis without following the relevant recruitment rules as well as without complying with the constitutional scheme for public employment is not entitled to the relief claimed by him. On the basis of the decision which run counter to the above principle of law settled by the Constitution Bench, the petitioner cannot be held entitled to the relief claimed by him. Those decisions contrary to the above said principle of law have already been denuded of their status as precedents. In the result, this writ petition is dismissed with an observation that the petitioner's case may be considered for future appointment on regular basis following the relevant rules and age bar, if any, may be relaxed to the extent he had work with the State respondents. No order as to costs.