

(2014) 07 KL CK 0035

In the High Court Of Kerala

Case No : Writ Petition (Civil) No. 18340 of 2008

Kanakaveni, K.

APPELLANT

Vs

Kasargod Municipality

RESPONDENT

Date of Decision : 23-07-2014

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 16(4), 226

Citation : (2014) 4 ILR 487 : (2014) LabIC 4563

Hon'ble Judges : P.D. Rajan, J

Bench : Single Bench

Advocate : Kaleeswaram Raj, Advocate for the Appellant; T.R. Rajesh, Government Pleader, Advocate for the Respondent

Judgement

P.D. Rajan, J.—This writ petition is filed under Article 226 of the Constitution of India by the petitioners seeking to declare that the petitioners are entitled to regularise in service from the date shown in paragraph 6 of the writ petition and to issue a writ of mandamus directing the respondents to regularise them in service. The petitioners are the Sanitation Workers of Kasaragod Municipality, appointed by Ext. P-1 order dated 14-1-1991 on daily wages, on condition that when regular vacancies arise, they will be appointed in the Public Health Contingent Establishment Wing of Kasaragod Municipality. But after several years of their appointment, they were not regularised in the above post. On the other hand, Municipal Council has issued Ext. P-2 order dated 26-9-2000 and appointed the petitioners provisionally in that post in the scale of Rs. 975-1525, on condition that appointment is subjected to review and the retrenchment by the Secretary without further notice. In the circumstances, the petitioners approached this Court with this petition to regularise their service from the date on which vacancies arose.

2. Heard both sides. There was no counter-affidavit from the side of respondents 1 to 3 with regard to the above contention. But the learned Government Pleader Sri T.R. Rajesh, representing for respondents 2 and 3 raised all contentions

denying the arguments advanced by the petitioners.

3. In this context, I may observe that in public appointment, merit, fairness and transparency are the basic concept, which will be followed by the reservation policy ensured in the constitution. If this constitutional right is put in causality it will create improper method of public appointment. Therefore, I may refer the facts of the case where it is clearly pleaded about the nature of appointment made in this case. Petitioners pleaded and proved intentional omission and violation of the service rules from the side of respondents. It is the settled principles of law of pleading that an averment made by the petitioners is expected to be specifically denied by the replying party. If there is no specific denial, then such averment is deemed to have been admitted by the respondents. In the present petition, it is evident that pleadings are specific and material, in the absence of any denial I am of the view that petitioners made out a prima facie case for interference. Here, it will be useful to refer the decision of the Apex Court in which explained the principle in giving ad hoc or temporary appointments.

4. Apex Court in State of Haryana and others Vs. Piara Singh and others etc. etc., held as follows:

"25 *** **

The normal rule, of course, is regular recruitment through the prescribed agency but exigencies of administration may sometimes call for and ad hoc or temporary appointment to be made. In such a situation, effort should always be to replace such an ad hoc/temporary employees by a regularly selected employee as early as possible. Such a temporary employee may also compete along with others for such regular selection/appointment. If he gets selected, well and good, but if he does not, he must give way to the regularly selected candidate. The appointment of the regularly selected candidate cannot be withheld or kept in abeyance for the sake of such an ad hoc/temporary employee.

Secondly, an ad hoc or temporary employee should not be replaced by another ad hoc or temporary employee; he must be replaced only by a regularly selected employee. This is necessary to avoid arbitrary action on the part of the appointing authority.

Thirdly, even where an ad hoc or temporary employment is necessitated on account of the exigencies of administration, he should ordinarily be drawn from the employment exchange unless it cannot brook delay in which case the pressing cause must be stated on the file. If no candidate is available or is not sponsored by the employment exchange, some appropriate method consistent with the requirements of Article 16 should be followed. In other words there must be a notice published in the appropriate manner calling for applications and all those who apply in response thereto should be considered fairly."

5. It is pertinent to note that the petitioners were appointed as per Ext. P-1

order. The proceedings of the Municipal Commissioner, Kasaragod Municipality shows that altogether 25 candidates were enlisted to appoint as substituted daily wages workers from the list received from the Employment Exchange, Kasaragod and petitioners were appointed as Contingent Workers in the Health Section of Kasaragod Municipality and directed them to report before the Health Inspector. In Ext. P-1 also, it was assured that the selected candidates will be appointed on daily wages in the vacancies and they will be appointed into the regular vacancies in Public Health Contingent Establishment of Kasaragod Municipality when regular vacancies arise. They were directed to present before the Health Inspector at Health Inspectors Office and if they absent for continuous seven days without sufficient reason their name will not be considered for further appointment also.

6. Accordingly, the petitioners joined on duty and continued their work as Sanitation Workers in the Municipality. After that, 1st respondent issued Ext. P-2 in which five persons were appointed in the permanent vacancies of the Municipality on 26-9-2000. In Ext. P-2, it is mentioned that Smt. Patha retired from the post of Sanitation Worker on 31.1.1989 and in that vacancy, Smt. Kanakaveni, who is the 1st petitioner, was appointed. Smt. Mallu retired on 31-3-1990 and in that vacancy, the 2nd petitioner Sri K. Chathukutty Nair, Sanitation Worker was appointed. On 31-10-1991 Smt. Nettoni retired from service and in that vacancy, the 3rd petitioner, Sri Gangadharan, Sanitation Worker was appointed as Sanitation Worker. On 31.1.1998 Smt. Dettchu retired and in that vacancy the 4th petitioner, Sri K.K. Kunhikrishnan was appointed. On 1-9-1992, Smt. Kaliyani died and in that vacancy, Sri V. Balan, the 5th petitioner was appointed as Sanitation Worker. It is clear from the above appointments that the petitioners were appointed in the regular vacancies available in the Public Health Wing of Kasaragod Municipality. In Ext P-2, it is stated that the appointment is temporary and the Secretary has the right to retrench them without further notice. As per Ext. P-2, the petitioners appeared before the Municipal Health Supervisor with medical fitness certificate received from the Civil Surgeon within the time stipulated in Ext. P-2 order. Ext. P-2 was issued on 26-9-2000 and petitioners were appointed with effect from 1-10-2000 itself. Therefore, they are entitled to regularise in that vacancy from on 1-10-2000 onwards. When petitioners are appointed in the regular vacancy as per Ext. P-2, their service can be regularised from the date on which Ext. P-2 order came into force, i.e. 1-10-2000.

7. Considering the above facts, I am of the opinion that the decision of the Constitution Bench in Secretary, State of Karnataka and Others Vs. Umadevi and Others, is relevant, in which it is held as follows: (para 53)

"53. One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in S.V. Narayanappa v. R.N. Nanjundappa ((1972) 1 SCC 409) and referred to in para 15 above of duly qualified persons in duly sanctioned vacant posts might have been made and the

employees have continued to work for ten years or more but without the intervention of orders of the courts or of tribunals. The question of regularisation of the services of such employees may have to be considered on merits in the light of the principles settled by this Court in the cases above referred to and in the light of this judgment. In that context, the Union of India, the State Governments and their instrumentalities should take steps to regularise as a onetime measure, the services of such irregularly appointed, who have worked for ten years or more in duly sanctioned posts but not under cover of orders of the courts or of tribunals and should further ensure that regular recruitments are undertaken to fill those vacant sanctioned posts that require to be filled up, in cases where temporary employees or daily wages are being now employed. The process must be set in motion within six months from this date. We also clarify that regularisation, if any already made, but not sub judice, need not be reoperated based on this judgment, but there should be no further bypassing of the constitutional requirement and regularising or making permanent, those not duly appointed as per the constitutional scheme."

8. Constitutionality of regularisation of service was considered by Three Judge Bench in State of Haryana and others Vs. Piara Singh and others etc. etc., , in which it is held as follows: (para 12 & 17)

"12. As would be evident from the observations made and directions given in the above two cases, the court must, while giving such directions, act with due care and caution. It must first ascertain the relevant facts, and must be cognizant of the several situations and eventualities that may arise on account of such directions. A practical and pragmatic view has to be taken, inasmuch as every such direction not only tells upon the public exchequer but also has the effect of increasing the cadre strength of a particular service, class or category. Now, take the directions given in the judgment under appeal. Apart from the fact the High Court was not right--as we shall presently demonstrate in holding that the several conditions imposed by the two Governments in their respective orders relating to regularisation are arbitrary not valid and justified--the High Court acted rather hastily in directing wholesome regularisation of all such persons who have put in one year's service, and that too unconditionally. We may venture to point out the several problems that will arise if such directions become the norm:

(a) Take a case where certain vacancies are existing or expected and steps are taken for regular recruitment either through Public Service Commission or other such body, as the case may be, A large number of persons apply. Inevitably there is bound to be some delay in finalising the selections and making the appointments. Very often the process of selection is stayed or has to be re-done for one or the other reason. Meanwhile the exigencies of administration may require appointment of temporary hands. It may happen that these temporary hands are continued for more than one year because the regular selection has not yet been finalised. Now according to the impugned direction the temporary hands completing one year's service will have to be regularised in those posts

which means frustrating the regular selection. There would be no post left for regularly selected persons even if they are selected. Such cases have indeed come to this court from these very two States.

(b) In some situations, the permanent incumbent of a post may be absent for more than a year. Examples of this are not wanting. He may go on deputation, he may go on Faculty Improvement Programme (F.I.P.), or he may be suspended pending enquiry into charges against him and so on. There may be any number of such situations. If a person is appointed temporarily in his place and after one year he is made permanent where will the permanent incumbent be placed on his return? Two persons cannot hold the same post on a regular or permanent basis.

(c) It may also happen that for a particular post a qualified person is not available at a given point of time. Pending another attempt at selection later on an unqualified person is appointed temporarily. He may continue for more than one year. If he is to be regularised, it would not only mean foreclosing of appointment of a regular qualified person, it would also mean appointment of an unqualified person.

(d) Such directions have also the effect of disregarding and violating the rule relating to reservation in favour of backward class of citizens made under Article 16(4). What cannot be done directly cannot be allowed to be done in such indirect manner.

(e) Many appointments may have been made irregularly--as in this case--in the sense that the candidates were neither sponsored by the Employment Exchange nor were they appointed after issuing a proper advertisement calling for applications. In short, it may be a back door entry. A direction to regularise such appointments would only result in encouragement to such unhealthy practices.

These are but a few problems that may arise, if such directions become the norm. There may be many such and other problems that may arise. All this only emphasises the need for a fuller consideration and due circumspection while giving such directions.

17. Now coming to the direction that all those ad hoc, temporary employees who have continued for more than an year should be regularised, we find it difficult to sustain it. The direction has been given without reference to the existence of a vacancy. The direction in effect means that every ad hoc/temporary employee who has been continued for one year should be regularised even though (a) no vacancy is available for him--which means creation of a vacancy (b) he was not sponsored by the Employment Exchange nor was he appointed in pursuance of a notification calling for applications which means he had entered by a back-door (c) he was not eligible and or qualified for the post at the time of his appointment (d) his record of service since his appointment is not satisfactory. These are in addition to some of the problems indicated by us in para 12, which would arise from giving of such blanket orders. None of the decisions relied upon

by the High Court justify such wholesale unconditional orders. Moreover, from the mere continuation of an ad hoc employee or one year, it cannot be presumed that there is need for a regular post. Such a presumption may be justified only when such continuance extends to several years. Further, there can be no rule of thumb" in such matters. Conditions and circumstances of one unit may not be the same as of the other. Just because in one case, a direction was given to regularise employees who have put in one year's service as far as possible and subject to fulfilling the qualifications, it cannot be held that in each and every case such a direction must follow irrespective of and without taking into account the other relevant circumstances and considerations. The relief must be moulded in each case having regard to all the relevant facts and circumstances of that case. It cannot be a mechanical act but a judicious one. Judged from this standpoint, the impugned directions must be held to be totally untenable and unsustainable.

9. A Division Bench of this Court in *Laila Vs. State of Kerala*, , held as follows: (para 14, 15 & 16)

"14. The appointment of persons, including the appellants, following such decision, though was ordered to be purely on temporary basis observing PSC Rules, the quality of service that they rendered were as trained hands for a specific purpose and on continuous officiation and discharge of duties and responsibilities as such temporary hands. They are not back door recruits. They were taken as needed, to achieve the national and human right health and welfare relevant goals of eradication of leprosy. They were taken in on temporary appointment because there was no live list with the PSC.

15. With passage of time, PSC came out with list and many of them were brought in even displacing temporary hands.

16. Writ petitioners and others who were temporarily appointed as Leprosy Inspectors have worked for nearly two decades discharging such duties and responsibilities after being put to six months' training for such purpose. Though they would have executed bonds as dictated by the executive hierarchy in Government and governance, we cannot ignore their then abysmal bargaining power in that regard. Having extracted labour, they cannot be left high and dry. The need based recruitment and the training conferred on the temporary appointees were with the specific purpose of getting them trained and making themselves available to discharge duties and functions in connection with the implementation of a cardinal and crucial project of national importance, namely, leprosy management. In this land of India, much need not be stated to recall the necessity of such programmes and the requirement of people to man those projects. Efforts taken by national icons of yesteryears, including the Father of the Nation, Mahatma Gandhiji, should provide constitutional pulsation in such a situation. The refusal to count past services of the writ appellants for any service benefits, including pension is irrational, inhuman, illogical, unreasonable and arbitrary. It amounts to negation of the Fundamental Rights enshrined in Articles

14 and 16 of the Constitution of India. It is unreasonable and arbitrary to exclude the appellants from the benefits of counting their past services for all service benefits including pension."

10. The normal rule of appointment is that recruitment should be made through prescribed agency, but during urgency in administration there may sometimes make temporary appointments in public service. In such a situation, temporary employees should always be replaced by a regularly selected employee as early as possible. The appointment of the regularly selected candidate cannot be withheld for the sake of such temporary employee. Moreover, temporary employee should not be replaced by another temporary employee, but he must be replaced only by a regularly selected candidate. This is only to avoid arbitrary action on the part of the appointing authority. When temporary employment is necessitated on account of the urgency of administration, he should ordinarily be appoint from the employment exchange unless it cannot suffer delay in which the pressing cause must be stated on the file. If no candidate is available from the employment exchange, some appropriate method consistent with the requirements of employment opportunity ensured to all by publishing a notice in the appropriate manner calling for applications and all those who apply in response thereto should be considered fairly and ensured the fundamental right guaranteed under Arts. 14 and 16 of the Constitution of India.

11. Here, petitioners were appointed in duly sanctioned vacancies through employment exchange on production of fitness certificate and have worked for more than twenty years without any interruption. The question of regularisation of the service of these petitioners can be considered by the appointing authority in the light of the above principles, since they were appointed in the permanent retirement vacancies. The refusal to consider their petition is inhuman, unreasonable and arbitrary. The 1st respondent has not considered the G.O. (Ms.) No. 91/2001 issued by the Secretary, Local Self Government dated 29-3-2001 and as per that order, the daily wages employees who were appointed through employment exchange, were to be appointed in the regular vacancy according to their seniority. There is sufficient ground to interfere against the negative approach taken by the 1st respondent with regard to regularisation. Hence, the date of regularisation of services of the petitioners would be operated from 1-10-2000, the date on which Ext. P-2 order came into force and the 1st respondent shall issue fresh proceeding set the law in motion with in six months from the date of receipt of copy of this judgment. Since the petitioners were appointed in the regular vacancy, I am of the opinion that their provisional service can be counted for service benefits and pensionary benefits including the pension.

Accordingly, I declare that the petitioners are entitled to regularise in service with effect from the dates shown in paragraph 6 of the writ petition and direct the 1st respondent to regularise the petitioners in service with effect from the date on which the respective vacancies arose.

The writ petition is allowed as above.

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