

(2022) 12 GUJ CK 0029

In the Gujarat High Court

Case No : R/Special Civil Application No. 12730 Of 2019

Khata Madhubhai Jivabhai

APPELLANT

Vs

State Of Gujarat

RESPONDENT

Date of Decision : 01-12-2022

Acts Referred:

Constitution Of India, 1950 — Article 14, 16, 226

Citation : (2022) 12 GUJ CK 0029

Hon'ble Judges : A.S. Supehia, J

Bench : Single Bench

Advocate : AV Prajapati, Ronak B. Raval

Final Decision : Partly Allowed

Judgement

A.S. Supehia, J

1. RULE. Learned Assistant Government Pleader waives service of notice of rule on behalf of the respondents.

2. The present petition has been filed by the petitioner seeking a direction to regularize him in service and also to pay him the minimum wages.

3. The petitioner has been appointed as a part-timer by the order dated 02.05.2008 purely on temporary basis as a Daily Wager on a fix pay of Rs.1,350/- for six hours. Thus, the petitioner has accepted the aforesaid conditions, which are made in the appointment order dated 02.05.2008. It appears that thereafter intermittently, his service has been continued.

4. Learned advocate Mr.Parjapati, has placed reliance on the judgment dated 15.11.2011 passed in Letters Patent Appeal No.321 of 2003 and allied matter in support of his submissions with regard to the regularization of the petitioner. He has submitted that since the petitioner has been continued as a part-time basis for so many years, he would be entitled for regularization.

4.1 Learned advocate Mr.Pajapati, has submitted that the petitioner would be

entitled to the minimum wages as per the latest policy of the State Government dated 16.07.2019, if the petitioner is not being paid the same. It is further contended by the learned advocate for the petitioner that though the order contains six hours working, in fact the respondents are taking the work of 12 hours.

4.2 Learned Assistant Government Pleader Mr.Raval, while pointing out the appointment order of the petitioner has submitted that the petitioner has no right to claim for regularization, as he was appointed on part-time basis for six hours, on a fixed pay and his appointment order specifically suggests that the said post, on which, he is working, would not be a Class-IV post.

5. I have heard the learned advocates for the respective parties.

6. With regard to the prayer for grant of minimum wages is concerned, the learned Assistant Government Pleader has submitted that the case of the petitioner is yet to be examined by the respondent authorities.

7. So far as the claim of the petitioner for regularization is concerned, the same cannot be accepted, as the petitioner having accepted all the terms and conditions of his appointment order cannot claim regularization merely on the basis that he has rendered so many years of service.

8. At his stage, it would be apposite to refer to the decision of the Supreme Court in the case of Secretary to the Government School Education Department Chennai vs. R.Govindaswamy and Ors., 2014 (4) S.S.C. 769, wherein the Supreme Court has held thus : -

"8. This Court in State of Rajasthan & Ors. v. Daya Lal & Ors., AIR 2011 SC 1193, has considered the scope of regularisation of irregular or part-time appointments in all possible eventualities and laid down well-settled principles relating to regularisation and parity in pay relevant in the context of the issues involved therein. The same are as under:

"8(i) The High Courts, in exercising power under Article 226 of the Constitution will not issue directions for regularisation, absorption or permanent continuance, unless the employees claiming regularisation had been appointed in pursuance of a regular recruitment in accordance with relevant rules in an open competitive process, against sanctioned vacant posts. The equality clause contained in Articles 14 and 16 should be scrupulously followed and Courts should not issue a direction for regularisation of services of an employee which would be violative of the constitutional scheme. While something that is irregular for want of compliance with one of the elements in the process of selection which does not go to the root of the process, can be regularised, back door entries, appointments contrary to the constitutional scheme and/or appointment of ineligible candidates cannot be regularised.

(ii) Mere continuation of service by a temporary or ad hoc or daily-wage employee, under cover of some interim orders of the court, would not confer

upon him any right to be absorbed into service, as such service would be "litigious employment". Even temporary, ad hoc or daily-wage service for a long number of years, let alone service for one or two years, will not entitle such employee to claim regularisation, if he is not working against a sanctioned post. Sympathy and sentiment cannot be grounds for passing any order of regularisation in the absence of a legal right.

(iii) Even where a scheme is formulated for regularisation with a cut-off date (that is a scheme providing that persons who had put in a specified number of years of service and continuing in employment as on the cut-off date), it is not possible to others who were appointed subsequent to the cut-off date, to claim or contend that the scheme should be applied to them by extending the cut-off date or seek a direction for framing of fresh schemes providing for successive cut-off dates.

(iv) Part-time employees are not entitled to seek regularisation as they are not working against any sanctioned posts. There cannot be a direction for absorption, regularisation or permanent continuance of part-time temporary employees.

(v) Part-time temporary employees in government-run institutions cannot claim parity in salary with regular employees of the Government on the principle of equal pay for equal work. Nor can employees in private employment, even if serving full time, seek parity in salary with government employees. The right to claim a particular salary against the State must arise under a contract or under a statute." (Emphasis added)

9. The present appeals are squarely covered by clauses (ii), (iv) and (v) of the aforesaid judgment. Therefore, the appeals are allowed. However, in light of the facts and circumstances of the case as Shri P.P. Rao, learned senior counsel has submitted that the appellant has already implemented the impugned judgments and does not want to disturb the services of the respondents, the services of the respondents which stood regularised should not be affected."

9. The Supreme Court has held that part-time employees are not entitled to seek regularization as they are not working against any sanctioned posts. There cannot be a direction for absorption, regularization or permanent continuance of part-time temporary employees. It is also held that even temporary, ad hoc or daily-wage service for a long number of years, let alone service for one or two years, will not entitle such employee to claim regularization, if he is not working against a sanctioned post. Sympathy and sentiment cannot be grounds for passing any order of regularization in the absence of a legal right. The Supreme Court has considered the judgment of the Constitution Bench in the case of the State of Karnataka & Ors. v. Umadevi & Ors., (2006) 4 S.C.C. 1.

10. It would also be apposite to refer the decision of the Supreme Court in the case of Union of India Vs. Elmo Devi and Anr., (2021) SCC Online S.C. 899, wherein the Supreme Court has reiterated the proposition of law thus :-

"8.6 Applying the law laid down by this court in the aforesaid decisions, the directions issued by the High Court in the impugned judgment and order, more particularly, directions in paragraphs 22 and 23 are unsustainable and beyond the power of the judicial review of the High Court in exercise of the power under Article 226 of the Constitution. Even otherwise, it is required to be noted that in the present case, the Union of India/Department subsequently came out with a regularization policy dated 30.06.2014, which is absolutely in consonance with the law laid down by this Court in the case of Umadevi (supra), which does not apply to the part-time workers who do not work on the sanctioned post. As per the settled preposition of law, the regularization can be only as per the regularization policy declared by the State/Government and nobody can claim the regularization as a matter of right dehors the regularization policy. Therefore, in absence of any sanctioned post and considering the fact that the respondents were serving as a contingent paid part-time Safai Karamcharies, even otherwise, they were not entitled for the benefit of regularization under the regularization policy dated 30.06.2014.

8.7 Though, we are of the opinion that even the direction contained in paragraph 23 for granting minimum basic pay of Group 'D' posts from a particular date to those, who have completed 20 years of part-time daily wage service also is unsustainable as the part-time wagers, who are working for four to five hours a day and cannot claim the parity with other Group 'D' posts. However, in view of the order passed by this Court dated 22.07.2016 while issuing notice in the present appeals, we are not quashing and setting aside the directions contained in paragraph 23 in the impugned judgment and order so far as the respondents' employees are concerned."

11. In the case of Raj Balram Prasad Vs. State of Bihar, (2018) 12 S.C.C. 50, wherein the Supreme Court has held thus:

"20. One cannot dispute that the State has the power to appoint persons for a temporary period under the Act and Rules framed thereunder and once such power was exercised by the State, the status of such appointee continued to be that of temporary employee notwithstanding grant of some extensions to them for some more period.

21 In other words, the grant of extension to work for some more period to the writ petitioners could never result in conferring on them the status of a permanent employee or/and nor could enable them to seek regularization in the services unless some Rule had recognized any such right in their favour."

12. Recently, the Division Bench of this Court in case of Babasaheb Ambedkar Open University vs. Dipesh Yashwantbhai Jani, in the judgment dated 25.07.2022 passed in Letters Patent Appeal No.1092 of 2021 has held thus:

"14 The decisions of the Hon'ble Supreme Court in the case of Secretary, State of Karnataka and others v. Umadevi and another and in the case of State of Karnataka and others v. M. L. Kesari and others (Supra), would not be applicable

to the facts of the present case. Therefore, we are of the opinion that the appellant University had committed no error in terminating the services of the original petitioner in terms of the contract of appointment and, therefore, we also hereby held that the employee who is appointed on a particular post for a fixed period with fixed salary cannot claim regularization of his services on the ground that he continued on the said post for long duration as after the original petitioner was terminated from service, respondent No.4 who was appointed in his place was also appointed on fixed period of five years with fixed salary and upon completion of five years period, respondent No.4 has been appointed on regular basis. Therefore, it cannot be said that the Government Resolutions dated 15.5.2012 and 28.2.2013 are arbitrary and therefore the same cannot be quashed and set aside by directing University to reinstate the original petitioner and directing the University to take appropriate action for appointing the original petitioner on regular basis, as was done by learned Single Judge, contrary to the ratio laid down by the Hon'ble Supreme Court in the aforesaid decisions."

13. In the present case, the appointment order of the petitioner specifically stipulates a condition that the appointment of the petitioner will not be considered on a Class-IV post. In wake of the fact that there is no sanctioned post of Class-IV and his appointment is not to be considered as Class-IV, the petitioner merely, who has rendered his services as a part-timer, cannot claim regularization.

14. Thus, the petitioner having accepted the terms and conditions of his appointment cannot claim regularization on a post. The contention raised by learned advocate Mr.Prajapati that the working hours of the petitioner which has been taken by the respondent instead of six hours, 12 hours cannot be examined in the writ proceedings and such aspect can only be examined before the appropriate forum. Hence, the prayer for seeking regularization is rejected.

15. Reliance placed on the order passed by the Division Bench will not apply to the facts of the case and in wake of the specific conditions incorporated in the appointment order.

Hence, the writ petition with regard to claim of regularization is rejected. So far the prayer made for paying him, the minimum wages, the respondent authorities are directed to examine the case of the petitioner, as per the policy and in case the petitioner is not being paid the minimum wages, as per the policy dated 16.07.2019, the respondent authorities may pay the same, after examining the case of the petitioner.

16. With these observations, the writ petition is partly allowed. RULE is made absolute accordingly.