

(2017) 08 DEL CK 0052

In the Delhi High Court

Case No : 9503 of 2016

MAMTA DHASMANA & ORS

APPELLANT

Vs

UNION OF INDIA AND ANR

RESPONDENT

Date of Decision : 21-08-2017

Acts Referred:

Constitution of India, Article 14, Article 16 - Appointment of Commission to inquire into and report on the administration of autonomous districts and autonomous regions - Dissolution of a Distr

Citation : (2017) 08 DEL CK 0052

Hon'ble Judges : Sanjiv Khanna, Navin Chawla

Bench : DIVISION BENCH

Advocate : Ambar Qamaruddin, Syed Sarfaraz Karim, Rakesh Kumar, S.A.Haseeb

Judgement

1. The petitioners, who are working as Stenographers, Lower Division Clerk and Peons in The National Commission for Minority Educational Institutions (hereinafter referred to as "NCMEI"), New Delhi have filed the present petition, inter alia, praying for the following reliefs:- "(a) Quash the impugned Recruitment Rules, 2016; and/or

(b) Issue a writ of mandamus or any other appropriate writ directing the respondents to frame fresh Recruitment Rules for employees (except Secretary of the Commission) providing promotional avenues and further grant promotions to the eligible petitioners"

2. The basic grievance of the petitioners is that they have been working with NCMEI since around 2005 and the Recruitment Rules now framed provide that their posts shall be filled by deputationists. They, therefore, claim that, on the ground of their working for a long period of time, they should be treated as regular employees and be granted all service benefits.

3. This Court in its order dated 17th October, 2016 directed the petitioners to file affidavit enclosing therewith copy of the letters of appointment, if any, and also

state whether they were appointed after issuance and publication of a proper advertisement and following a fair method of selection.

4. In compliance with the above order, the petitioners have filed additional affidavits. They are, *mutatis mutandis*, almost verbatim in nature and, therefore, the contents of the additional affidavit filed by the petitioner no.1, so far as are relevant, are reproduced hereunder:- "2) That in the month of February 2005, I came to know from a reliable source about the vacancy of Stenographer in the National Commission for Minority Educational Institution.

3) That I approached the then Secretary Shri R.Renganath and I offered my service for the said post. That Shri R.Renganath asked me to appear in the test to be conducted next week and also asked me to bring all the testimonials in original. That on the day fixed, when I visited the commission I found that 5 to 6 candidates were present. I and the aforesaid candidates were asked to appear in the test for stenography. Shri Renganath gave us dictation and tested our stenographic skills, he also verified our testimonials which showed that I was duly qualified and experienced, we had also undergone medical test and thereafter I was asked to come on next day. That on the next day I was given an office order and was asked to join duty immediately as there was acute shortage of Stenographers in the Commission.

4) That after joining my duty Shri R.Renganath told me that this is an emergency appointment and after finalising of Service Rules by the Ministry of Human Resource Development all the posts will be advertised and I will be given an opportunity to appear in the competitive examination. Since then I have been serving uninterrupted. I was appointed vide order dated 30.03.2005 on contract, true copy of the office order is filed as Annexure A-1. Thereafter, I was appointed on temporary basis vide office order dated 29.07.2005. True copy of the office order is filed as Annexure A-2. Thereafter, I was appointed on probation period for 2 years vide order dated 10.03.2006, true copy of the office order is filed as Annexure A-3. Finally the appointment was made on 21.04.2008, which is already on record."

5. A bare reading of the affidavit would show that even the petitioners do not claim that they had applied to the post with NCMEI pursuant to any advertisement. They further admit that at the time of appointment, they were clearly told that their appointments were of an emergency nature due to an acute shortage of staff. Furthermore they were informed that after the service rules were finalized, the posts would be advertised and the petitioners would be granted an opportunity to appear in the competitive examinations for such posts. Even the appointment letters dated 10th March, 2006 (to petitioner Nos. 1 to 4), 8th August, 2007 (to petitioner No. 5), 11th July, 2007 (to petitioner Nos. 6 to 8) and 22nd August, 2008 (to petitioner No. 9) state that they were being appointed in a temporary capacity. The letter of appointment dated 7th September, 2010 issued to petitioner No. 10 does not state that his appointment was in a temporary capacity, perhaps since the clarification received from the

HRD Ministry dated 7th June, 2010 stated that the "posts were permanent and created specifically for NCMEI."

6. The NCMEI has filed an affidavit in answer to the petition. However, the affidavit does not make any reference to the nature of employment of the petitioners or any procedure known to law having been followed while appointing the petitioners.

7. Faced with this situation, the petitioners contend that not only have they being working for a long period of time but also various correspondence has been exchanged between the NCMEI and the Ministry of Human Resource Development, Government of India which would show that the Government of India was aware of their appointment and have never objected to the same. They, therefore, claim legitimate expectation to continue in the said post.

8. Respondent No. 1- Union of India on the other hand, in its affidavit before us, has stated that various posts were created in the Secretariat of NCMEI vide office orders dated 10th December, 2004, 16th March, 2006 and 22nd August, 2006. In the order dated 22nd August, 2006, it was clearly stated that the posts will be filled up through deputation and in case of non- availability of suitable candidates, through contractual appointment only. It has further been contended that except for the posts of Private Secretary, Personal Assistant and Peon/MTS, all other posts are isolated posts with sanction strength of between 1 to 3 only with no promotional avenues. Hence, to avoid the holders of theses posts from getting frustrated due to lack of any opportunity for promotion, the Minority Division of the of the Ministry of Human Resource Development, in its draft recruitment rules, proposed that all 17 posts in NCMEI would be filled only through deputation as direct recruitment to these posts would leave the holders of these isolated posts with no promotional avenues.

9. Having carefully considered the submissions of the parties, we feel, no relief can be granted in favour of the petitioners in the present case. Though it is correct that the petitioners have been working for the NCMEI for a long period of time; that the Government of India, having created such posts should have considered the framing of recruitment rules expeditiously; that the Government of India was fully aware that the Commission was working after making ad hoc appointments to the various posts, however, at the same time, it cannot be lost sight of that no advertisement, transparent and fair selection process calling for applications from other eligible candidates was issued before appointing the petitioners. Though the petitioners claim that certain "tests" and even medical examinations were conducted, what was the nature of these tests is unknown. Certainly, objectivity and probity had laid low and suffered.

10. Supreme Court in the case of Secretary, State of Karnataka & Ors. vs. Uma Devi & Ors. (2006) 4 SCC 1 has clearly held that adherence to the rule of equality in public employment is a basic feature of our Constitution and a Court would certainly be disabled from passing an order upholding violation of Article

14 or in ordering the over-looking of the need to comply with the requirements of Article 14 read with Article 16 of the Constitution of India.

11. Treating appointments made without following the due procedure established by law as permanent would be negation of the principle of equality of opportunity. Where a person accepts the employment, temporary or casual in nature, with the open eyes direction to continue with his employment permanently cannot be issued. We can do no better but to quote from the judgment of Uma Devi (supra) as under:- "43) Thus, it is clear that adherence to the rule of equality in public employment is a basic feature of our Constitution and since the rule of law is the core of our Constitution, a Court would certainly be disabled from passing an order upholding a violation of Article 14 or in ordering the overlooking of the need to comply with the requirements of Article 14 read with Article 16 of the Constitution. Therefore, consistent with the scheme for public employment, this Court while laying down the law, has necessarily to hold that unless the appointment is in terms of the relevant rules and after a proper competition among qualified persons, the same would not confer any right on the appointee. If it is a contractual appointment, the appointment comes to an end at the end of the contract, if it were an engagement or appointment on daily wages or casual basis, the same would come to an end when it is discontinued. Similarly, a temporary employee could not claim to be made permanent on the expiry of his term of appointment. It has also to be clarified that merely because a temporary employee or a casual wage worker is continued for a time beyond the term of his appointment, he would not be entitled to be absorbed in regular service or made permanent, merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant rules. It is not open to the court to prevent regular recruitment at the instance of temporary employees whose period of employment has come to an end or of ad hoc employees who by the very nature of their appointment, do not acquire any right. High Courts acting under Article 226 of the Constitution of India, should not ordinarily issue directions for absorption, regularization, or permanent continuance unless the recruitment itself was made regularly and in terms of the constitutional scheme. Merely because, an employee had continued under cover of an order of Court, which we have described as "litigious employment" in the earlier part of the judgment, he would not be entitled to any right to be absorbed or made permanent in the service. In fact, in such cases, the High Court may not be justified in issuing interim directions, since, after all, if ultimately the employee approaching it is found entitled to relief, it may be possible for it to mould the relief in such a manner that ultimately no prejudice will be caused to him, whereas an interim direction to continue his employment would hold up the regular procedure for selection or impose on the State the burden of paying an employee who is really not required. The courts must be careful in ensuring that they do not interfere unduly with the economic arrangement of its affairs by the State or its instrumentalities or lend themselves the instruments to facilitate the

bypassing of the constitutional and statutory mandates.

44) The concept of "equal pay for equal work" is different from the concept of conferring permanency on those who have been appointed on ad hoc basis, temporary basis, or based on no process of selection as envisaged by the Rules. This Court has in various decisions applied the principle of equal pay for equal work and has laid down the parameters for the application of that principle. The decisions are rested on the concept of equality enshrined in our Constitution in the light of the directive principles in that behalf. But the acceptance of that principle cannot lead to a position where the court could direct that appointments made without following the due procedure established by law, be deemed permanent or issue directions to treat them as permanent. Doing so, would be negation of the principle of equality of opportunity. The power to make an order as is necessary for doing complete justice in any cause or matter pending before this Court, would not normally be used for giving the go-by to the procedure established by law in the matter of public employment. Take the situation arising in the cases before us from the State of Karnataka. Therein, after the Dharwad decision, the Government had issued repeated directions and mandatory orders that no temporary or ad hoc employment or engagement be given. Some of the authorities and departments had ignored those directions or defied those directions and had continued to give employment, specifically interdicted by the orders issued by the executive. Some of the appointing officers have even been punished for their defiance. It would not be just or proper to pass an order in exercise of jurisdiction under Article 226 or 32 of the Constitution or in exercise of power under Article 142 of the Constitution of India permitting those persons engaged, to be absorbed or to be made permanent, based on their appointments or engagements. Complete justice would be justice according to law and though it would be open to this Court to mould the relief, this Court would not grant a relief which would amount to perpetuating an illegality.

45) While directing that appointments, temporary or casual, be regularized or made permanent, courts are swayed by the fact that the concerned person 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 eyes open. It may be true that he is not in a position to bargain -- not at arms 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 the 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 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 of India.

47) When a person enters a temporary employment or gets engagement as a contractual or casual worker and the engagement is not based on a proper selection as recognized by the relevant rules or procedure, he is aware of the consequences of the appointment being temporary, casual or contractual in nature. Such a person cannot invoke the theory of legitimate expectation for being confirmed in the post when an appointment to the post could be made only by following a proper procedure for selection and in concerned cases, in consultation with the Public Service Commission. Therefore, the theory of legitimate expectation cannot be successfully advanced by temporary, contractual or casual employees. It cannot also be held that the State has held out any promise while engaging these persons either to continue them where they are or to make them permanent. The State cannot constitutionally make such a promise. It is also obvious that the theory cannot be invoked to seek a positive relief of being made permanent in the post.

48) It was then contended that the rights of the employees thus appointed, under Articles 14 and 16 of the Constitution, are violated. It is stated that the State has treated the employees unfairly by employing them on less than minimum wages and extracting work from them for a pretty long period in comparison with those directly recruited who are getting more wages or salaries for doing similar work. The employees before us were engaged on daily wages in the concerned department on a wage that was made known to them. There is no case that the wage agreed upon was not being paid. Those who are working on daily wages formed a class by themselves, they cannot claim that they are discriminated as against those who have been regularly recruited on the basis of

the relevant rules. No right can be founded on an employment on daily wages to claim that such employee should be treated on a par with a regularly recruited candidate, and made permanent in employment, even assuming that the principle could be invoked for claiming equal wages for equal work. There is no fundamental right in those who have been employed on daily wages or temporarily or on contractual basis, to claim that they have a right to be absorbed in service. As has been held by this Court, they cannot be said to be holders of a post, since, a regular appointment could be made only by making appointments consistent with the requirements of Articles 14 and 16 of the Constitution. The right to be treated equally with the other employees employed on daily wages, cannot be extended to a claim for equal treatment with those who were regularly employed. That would be treating unequals as equals. It cannot also be relied on to claim a right to be absorbed in service even though they have never been selected in terms of the relevant recruitment rules. The arguments based on Articles 14 and 16 of the Constitution are therefore overruled.

49) It is contended that the State action in not regularizing the employees was not fair within the framework of the rule of law. The rule of law compels the State to make appointments as envisaged by the Constitution and in the manner we have indicated earlier. In most of these cases, no doubt, the employees had worked for some length of time but this has also been brought about by the pendency of proceedings in Tribunals and courts initiated at the instance of the employees. Moreover, accepting an argument of this nature would mean that the State would be permitted to perpetuate an illegality in the matter of public employment and that would be a negation of the constitutional scheme adopted by us, the people of India. It is therefore not possible to accept the argument that there must be a direction to make permanent all the persons employed on daily wages. When the court is approached for relief by way of a writ, the court has necessarily to ask itself whether the person before it had any legal right to be enforced. Considered in the light of the very clear constitutional scheme, it cannot be said that the employees have been able to establish a legal right to be made permanent even though they have never been appointed in terms of the relevant rules or in adherence of Articles 14 and 16 of the Constitution."

12. The petitioners on the other hand, placed heavy reliance on paragraph 53 of the judgment of the Supreme Court in *Uma Devi (supra)* and also the judgment of the Supreme Court in the case of *State of Karnataka & Ors. vs. M.L.Kesari & Ors.* AIR 2010 SC 2587 to contend that their appointments cannot be considered to be illegal and, therefore, having worked for more than ten years, without the benefit or protection of any interim orders of Courts or Tribunals, they should be regularized.

13. In the present case, however, we are of the opinion that in the absence of even a semblance of compliance with the mandate of Article 14 of the Constitution of India at the time of making appointment, the appointment of

petitioners was illegal and not irregular in nature. As stated above, no advertisement was issued calling for candidates to apply for the posts in NCMEI; no criteria for judging their liability was laid down; it is not known what kind of tests or selection process was followed while making the initial or the later appointment; in any case, the petitioners were fully aware of the nature of their appointments being contractual/temporary.

14. This issue was addressed and dealt with in *Renu & Ors. vs. District and Sessions Judge, Tis Hazri & Anr.* (2014) 15 SCC 731 wherein the Supreme Court held that the petitioners' appointments being *ex facie* illegal, the issuance of an appointment letter conferred no right upon them. An aggrieved party must have an enforceable right under a statute or rule for a mandamus to be issued. The Supreme Court held:- 7. Tested on the touchstone of constitutionality and equality of opportunity enshrined in Article 14 read with Article 16 of the Constitution, we have no hesitation in holding that the aforesaid selection/appointments cannot be sustained. Adherence to the rule of equality in public employment is a basic feature of our Constitution and we shall be failing in our duty, if we overlook admitted irregularities in the selections/appointments brought to our notice, merely on the ground that selections in questions are only for Group "D" posts. We are unable to persuade ourselves to agree with the learned counsel for the petitioners that the petitioner may be permitted to join and work for at least 89 days, the period for which they were appointed. It is trite law that unless an aggrieved party has enforceable legal right under a statute or rule, a mandamus cannot be issued to an authority to do something. It is hard to believe that the petitioners were not aware of the manner in which they were selected and appointed within a span of a few days (without any advertisement or interview). Their appointments being *ex facie* illegal, issuance of appointment letters did not confer any right on them. In our opinion therefore, the learned Single Judge was fully justified in dismissing the petitioners' writ petition."

15. Supreme Court in the case of *State of Rajasthan vs. Daya Lal & Ors.* (2011) 2 SCC 429 reiterated that 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. In the present case, the appointment of the petitioners smack of the back door entry.

16. Full Bench of Patna High Court in the case of *Ram Sevak Yadav vs. The State of Bihar through the Chief Secretary Govt. of Bihar, Old Secretariat, Patna & Ors.*, after referring to various judgments of Supreme Court, including the judgment in *M.L.Kesari* (supra) summed up the law on regularisation as under:- "42) We therefore sum up our conclusions and answer the reference as follows:-

A) Uma Devi (supra) prohibits regularisation of daily wage, casual, ad-hoc and temporary appointments, the period of service being irrelevant;

B) An illegal appointment void ab-initio made contrary to the mandate of Article 14 without open competitive selection cannot be regularised under any circumstances.

C) Irregular appointments can be regularised if the appointment was made by an authority competent to do so, it was made on a vacant sanctioned post, in accordance with Article 14 of the Constitution with equal opportunity for participation to others eligible by competitive selection and the candidate possessed the eligibility qualifications for a regular appointment to the post.

D) The appointment must not have been an individual favour doled out to the appointee alone and the person must have continued in service for over ten years without intervention of any court orders."

17. In view of the above, no relief of regularisation can be granted in favour of the petitioners.

18. The petitioners have relied upon Section 6 of the National Commission of Minority Educational Institutions Act, 2004 and the National Commission for Minority Educational Institutions for financial and administrative powers Rules, 2005 to contend that not only was the Central Government under an obligation to provide officers and employees, as may be necessary for the efficient performance of the functions of the Commission under the Act but also that the Chairperson had been delegated the financial powers subject to any procedure or other instructions or rules issued by the Central Government, from time to time including appointments and promotions against vacancies in respect of Sanctioned posts. It is, therefore, contended that as the petitioners had been appointed by the Chairperson of the Commission, their appointment is legal.

19. On the other hand, the respondent No. 1 Union of India has relied upon its office order dated 22nd August, 2006, wherein it is stated that the post have to be filled up through deputation and in case of non-availability of suitable candidates, through contractual appointments only. However, as has been observed above, once the appointment of the petitioners has been found to be illegal and in violation of the mandate of Article 14 and in view of their appointment letters proclaiming itself to be contractual/temporary, we need not go into the powers of the Chairperson any further.

20. In addition to the above, the petitioners have challenged the rules on the ground that, though at the initial stage, NCMEI was duly consulted, the final recruitment rules have been notified without consulting the National Commission.

21. We have been shown no rule/statutory provision which mandates such consultation. In any case, the respondent No 1.- Union of India in its affidavit has explained the reasons for mandating filling of the posts through deputation only and we find no arbitrariness in the same. Reasons and grounds stated have merit.

22. Though, we find no merit in the petition, we cannot shut our eyes to the fact that though NCMEI was established under the National Commission for Minority

Educational Institutions Act, 2004 and even the posts were created under Office Order dated 10.12.2004, 16.03.2006 and 22.08.2006, Recruitment Rules were not prepared till 12.07.2016 (i.e. for period of almost 14 years). It is such enormous delay that has resulted in the present situation with NCMEI making ad-hoc appointments. We, therefore, direct that the petitioner shall not be removed from their present posts till recruitment is done in accordance with the Recruitment Rules notified on 12.07.2016. We further direct that such regular recruitment should be done expeditiously. With the above directions, the petition is dismissed with no order as to costs.