

(2000) 08 GAU CK 0022

In the Gauhati High Court

Case No : Writ Petition (C) No's. 394, 395 of 1999 and 94, 102 and 103 of 2000

Mira Roy and Another

APPELLANT

Vs

State of Tripura and Others

RESPONDENT

Date of Decision : 03-08-2000

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 320, 41

Citation : (2000) 3 GLT 322

Hon'ble Judges : J.N. Sharma, J

Bench : Single Bench

Advocate : Mr. K.N. Bhattacharjee and Mr. S. Chakraborty, for the Appellant; Mr. B.R. Bhattacharjee, A.G., Mr. U.B. Saha, Mr. T.D. Majumdar and Mr. B. Dutta, for the Respondent

Final Decision : Dismissed

Judgement

1. All the writ applications raise the common question of law and almost similar facts. These writ applications have been filed by 19 petitioners in all with the prayer to set aside the Memorandum dated 31.3.1999. Annexure - 11 (wrongly typed out as Annexurc -12 in the writ petitions). Annexure - 11 reads as follows :-

"No. F.3(51) - DSWE /ESTT/97 GOVERNMENT OF TRIPURA DIRECTORATE OF SOCIAL WELFARE & SOCIAL EDUCATION

AGARTALA: TRIPURA

Dated, Agartala, the 31/3/1999

MEMO

Shri/Smt. Juthika Bhattacharjee. Supervisor, ICDS was appointed on adhoc basis and his/her adhoc appointment is continued from time to time. As he/she was appointed on adhoc basis without following the selection process through TPSC. His/her adhoc appointment could not be regularised. Because of this, his/her

adhoc appointment may discontinued at any time by the Government.

The TPSC has issued Advertisement vide No.3/99 dated 17.3.1999 for the post of Supervisor, ICDS. The last date for submission of application is 17.4.1999. Shri/ Smt. Juthika Bhattacharjee, Supervisor. ICDS is requested to apply for the post to the Secretary, TPSC through the proper channel.

Sd/- Illegible (S. SAILO) DIRECTOR SOCIAL WELFARE & SOCIAL EDUCATION TRIPURA "

Thereafter, these posts were advertised and already the selection has been made by the Tripura Public Service Commission, but result has not been announced. In W.P. (C) Nos. 94/2000, 102/2000 and 103/2000 the subsequent advertisement issued has been challenged.

2. There are basic differences in the facts of all the cases. In W.P.(C) No. 394/99 there are two petitioners namely, Smti Mira Roy and Smti Juthika Bhattacharjee. These two petitioners earlier filed a suit being Title Suit No. 34/87 before the learned Assistant District Judge, Kailashahar, North Tripura for certain reliefs. The suit was dismissed. Thereafter, there was an appeal being Title Appeal No. 15/92 before the learned District Judge, North Tripura, Kailashahar. The learned District Judge allowed the appeal and in Paragraphs 28 and 29 of the Judgment he held as follows :-

"(28) In the result, therefore, I find that the appellants were entitled to be duly considered for appointment as Social Education Workers or such other Identical posts under the Education Department, Govt. of Tripura at least on 13.7.1981 when their juniors were considered and offered such posts vide Exbt. 8 series. Accordingly, this is an immature stage for deciding the additional issue Nos. 1 and 2 finally either in favour or against the appellants because these issues would arise only after the appellants succeed in getting regular appointment or deemed appointment with effect from any date prior to their date of actual joining to the regular posts of Supervisor I.C.D.S. (In case of Smti. Mira Roy appellant in T.A. 15/92) and the post of Junior Social Education Organizor (In case of appellant in T.A. 16/92 and T.A. 17/92). Hence the additional issue Nos. 1 and 2 are accordingly disposed of.

(29) In view of the findings above, I find that all the appeals are to be allowed and accordingly the impugned judgment and decree of the LD. Lower Court are hereby set aside. And it is hereby ordered that the appeals are allowed on contest and it is further ordered that the respondents are hereby directed to reconsider the cases of these appellants for giving them regular appointments to the posts presently being held by them with reference to the date 13.7.1981 i.e. the date when their juniors were in fact appointed to the posts of Social Education Workers vide Exbt. 8 Series and Ext. 10 under the Directorate of Social Education. Govt. of Tripura and it is further ordered that in case their cases are so considered and their appointments are given with effect from 13.7.1981 or any other date as may be found reasonable then the respondents should

consider granting of all financial benefit to which they may be legally entitled by virtue of such regularisation with such retrospective effect."

3. In terms of the aforesaid judgment, the two petitioners were appointed as Junior Social Education Organiser. Thereafter, all these matters took a curious turn. There were certain vacancies of Supervisor (ICDS) and many applications were received for the post, but the then Minister of State, Education, Health and Family Welfare and Women Welfare, Tripura by order dated 6.2.1991 without following any due procedure pass the following order :-

The following candidate may be appointed to the post of I.C.D.S. Supervisor (direct recruitment)."

That order was with regard to 19 persons and all these 19 persons are the petitioners in all the writ petitions. In terms of this order the letters of appointment were issued and one letter of appointment is quoted below :-

"Persons as per list, are hereby temporarily appointed as Supervisor (ICDS), Group -C (Non- Gazetted) on adhoc basis on pay Rs. 1300 per month in scale of Rs. 1300-50-1700-55-2140-60-3220 plus admissible allowances for a period of 12 (twelve) months with effect from the date of joining and posted to the places as shown against each at Col. No. 3 in list as per terms laid down in the offer of appointment.

They are to report for duties to the Officer concerned as shown against each at Col. No. 4 in list within 20.4.1991 failing which appointment issued in favour of them will automatically be treated as cancelled.

They are entertained against the vacant post of Supervisor (ICDS) under the Directorate.

The expenditure involved on this account will proceed against the Head of Account :- 2235 - Social Security & Welfare, 02 - Social Welfare (Centrally Sponsored Plan Scheme), 102 - Child Welfare. Integrated Child Development Services. 1 - Salaries.

Sd/- Illegible Additional Director Social Welfare & Social Education. Tripura."

4. It will show that the appointments were made temporarily and on adhoc basis on 24.3.1991. On the basis of these adhoc appointments made in the year 1991 these persons are continuing in service. Though their appointments were absolutely without authority of law, void ab initio and illegal yet the Government not to cause injustice to them referred the matter to the Tripura Public Service Commission for approval for regularisation. The Tripura Public Service Commission bluntly refused to do so vide letter dated August 29, 1998. That letter is quoted below :-

"No. F. 66(1)-TPSC/98 TRIPURA PUBLIC SERVICE COMMISSION AGARTALA

FROM : DEPUTY SECRETARY

AGARTALA

TRIPURA PUBLIC SERVICE COMMISSION

AGARTALA August 29, 1998 The Addl. Secretary to the Government of Tripura Department of Social Welfare and Social Education, AGARTALA. Subject: Requisition for filling up the post of Supervisor ICDS.

Sir,

I am directed to refer the Government of Tripura, Department of Social Welfare and Social Education letter No. F. 3(51)DSWE/ESTT/ 97 dated 7-1-1997 on the above subject and to state that the Commission do not agree to the regularisation of the services of 19 (nineteen) adhoc appointees in the post of Supervisor, I.C.D.S. The Commission are of the view that recruitment should be made following the provisions of the notified Recruitment Rules.

I am, therefore, directed to request you to kindly arrange to send the requisition afresh including the vacancies filled up on adhoc basis for taking direct recruitment action.

Yours faithfully. Sd/- 29.8.1998 (J. DEBBARMA) Deputy Secretary."

5. When the Public Service Commission refused to regularise the services of these petitioners the Government had no option but to give advertisement of the posts and the posts were duly advertised. When the posts were advertised it was found that some of the petitioners were over aged and not in a position to apply for the post. The Government again took a sympathetic stand and relaxed the age of these petitioners to enable them to apply for the post. The application for relaxation of age is dated 13th April, 1999 and that application is quoted below :-

"To The Director, Social Welfare and Social Education, Tripura, Agartala. Subject:- Submission of application for the post of Supervisor, I.C.D.S. in reference to adv. no. 3/99 dated 17.03.999.

Ref:- Your Memo No. F. 3(51)-DSWE/Estt./97 dt. 31.3.99

Sir,

With due respect and humble prayer, we beg to pray to your kind honour to state that you have issue us the above referred Memo dated 31.3.1999 to apply to the Secretary, T.P.S.C. for the post of Supervisor, I.C.D.S. through proper channel to regularise our adhoc appointment. Accordingly we are agreed to obey your order. But we are unfortunate to inform you that our age has exceed above 42 years which is a bar also for apply for the above post.

Under the circumstances we pray to your kind honour to take suitable action in this matter so that we may not deprived.

Sl.No. Name of the employees Date of birth Date of joining in the service Name of post

1. Smti Mira Roy 13.4.1948 3.4.1991 Supervisor I.C.D.S.
2. Smti Juthika Bhattacharjee 1.1.1954 3.4.1991 -do-
3. Sri Ram Krlshna Bhattacharjee 19.12.1956 30.3.1991 -do-
4. Smti Mamata Chakraborty 10.6.1955 1991 -do-

Dated, Agartala

the 13th April, 1999. Yours faithfully,

1. Sd/- Smti. Mira Roy (Supervisor) ICDS

2. Sd/- Smti. Juthika Bhattacharjee

Supervisor, ICDS

3. Sd/- Sri Ram krishan Bhattacharjee

Sup. I.C.D.S.

4. Sd/- Smti. Mamta Chakraborty "

6. In terms of the aforesaid application, the authority on 13.12.1999 relaxed the age of these petitioners and that was also intimated to the Tripura Public Service Commission. A bare persual of the letter dated 13.4.1999 will show that these four petitioners named therein that is Smti Mira Roy, Smti Juthika Bhattacharjee, Shri Ram Krishna Bhattacharjee and Smti Mamata Chakraborty agreed to apply for relaxation to the Tripura Public Service Commission in terms of the advertisement. Be that as it may when the advertisement was issued and interview was held save and except one petitioner Shri Somen Chakraborty, others did not apply and took the written test. Thereafter, they approached this court with the prayer that in terms of the adhoc appointment their services should be regularised and the Memo dated 31.3.1999 (Annexure - 11) which has been quoted above should be quashed including the advertisement issued subsequently.

7. There is another aspect of the matter which is to be borne in mind that Shri Rajat Roy, petitioner No. 5 in W.P. (C) No. 395/99 claimed to be appointed under the die-in-harness scheme and in support of it he relies on Annexure-7 to the writ application (W.P. (C) No. 395/ 99). That was a letter written by the Additional Director of Social Welfare and Social Education, Tripura, Agartala to the Director of School Education, Government of Tripura stating therein that the case of this petitioner may be considered to the post of Assistant Teacher as his father late Birender Bijoy Roy died in harness, but a bare persual of the order of the Minister which is available in the file at Page 172 of the record will show that on 14.2.1992 the Minister passed the following order :-

"The vacant post of Supervisor, I.C.D.S. may be filled up by offer -of- appointment to the following candidate -

Smt. Mitra Dutta B.A. D/O Late S.C. Dutta Rajnagar, Teliamura, Tripura West.
Rajat Roy S/O Lt. Birender Bijay Roy Ramnagar."

It is submitted by the learned counsel for the petitioners that the name of this petitioner has been written by hand and this hand writing at the Govt. file is not that of the Minister. If this contention of the learned counsel for the petitioner is accepted then there is nothing to show that on what basis the appointment of this petitioner was made. I hold that the appointment of this petitioner also was not made on the basis of die-in-harness scheme but it was on the basis of the order of the Minister, That is the factual matrix.

8. The learned counsel for the petitioners made a strenuous contention that there was no necessity to make a consultation with the Tripura Public Service Commission and the regularisation can be made by the Government even if without such consultation. This contention of the learned counsel for the petitioner is to be rejected only on the ground that there is statutory rule which requires such a consultation. That rule cannot be thrown to the wind by the Government. The Government was always sympathetic to these petitioners. They wanted to regularise the services of the petitioners, but the Tripura Public Service Commission as quoted above did not agree to do so. The learned counsel for the petitioner placed reliance on the following decisions ; -

(1998) 7 SCC 767 (Food Corporation of India and others v. Om Prakash Sharma and others.)

He relies on Paragraphs 35 and 36 of the aforesaid judgment. This case is relied on by him for the purpose that when these petitioners were appointed in the year 1991-1992 there was no statutory rule requiring such consultation. The rule came into existence in the year 1997 and as such this rule cannot be deemed to be retrospective in nature. The learned counsel for the petitioners submits that by application of this rule the vested rights or accrued rights of the petitioners have been wiped out. I have already quoted the letter of appointment of these petitioners. That appointment letter itself will show that the petitioners did not have any vested right or any right accrued to them it was simply a stop gap arrangement. Paragraphs 35 and 36 of the decision are quoted below :-

"35. The last of the above cases has been decided by the Constitution Bench in which one of us (Justice Agrawal), was a Member and he spoke for the Bench. It will be advantageous to quote the following passage in that Judgment: (SCC p. 638. para 24)

"24. In many of these decisions the expressions "vested rights" or "accrued rights" have been used while striking down the impugned provisions which had been given retrospective operation so as to have an adverse effect in the matter of promotion, seniority, substantive appointment, etc.. of the employees. The said expressions have been used in the context of a right following under the relevant rule which was sought to be altered with effect from an anterior date and thereby taking away the benefits available under the rule in force at that

time. It has been held that such amendment having retrospective operation which has the effect of taking away a benefit already available to the employee under the existing rule is arbitrary, discriminatory and violative of the rights guaranteed under Articles 14 and 16 of the Constitution."

36. If the principle laid down in the above Judgment is applied here, there is no doubt that the impugned amendments in the present case cannot operate retrospectively."

This case does not help the petitioner inasmuch as the validity of the rule has not been challenged in these writ petitions. So, there is no necessity for me to go to that aspect of the matter.

The next case relied on by the learned counsel for the petitioners is Nagpur Improvement Trust Vs. Yadaorao Jagannath Kumbhare and Others, That case is of no help to the petitioner. The simply laid down that in the absence of any rule the State Govt. may fill up a post through executive instruction.

Regarding consultation with the Public Service Commission, the learned counsel for the petitioners relies on M. C. Bindal Vs. R.C. Singh and others, wherein in paragraph 12 the Supreme Court has pointed out as follows :-

"The Commission, therefore, revised its earlier decision and withdrew the candidature of the appellant and also cancelled its recommendation earlier given in favour of the appellant. This decision of the Public Service Commission, in our considered opinion cannot be faulted; it is the constitutional requirement envisaged in Art. 320 that the Commission will have to perform the duty of recommending the candidate fulfilling all the requisite qualifications for the post to the Government for being considered for appointment to the post concerned. It is, of course, a well settled legal position that the duty to consult the Commission in the matter of appointment to civil posts by the Government is not mandatory but directory and as such the absence of consultation with the State Public Service Commission does not render any appointment made by the Government in Civil posts invalid or illegal. It cannot also be contended that since the duty to consult the Public Service Commission in the matter of making appointments to Civil Services of the State is directory and not mandatory, the appointment of Dr. Bindal as Food and Drug Controller, U.P. by the Government of Uttar Pradesh cannot be questioned or interfered in by the Court inasmuch as the candidature of the appellant, Dr. Bindal for the post in question has already been withdrawn by the Public Service Commission and as such the question of validity or invalidity of the appointment of the appellant, Dr. Bindal to the said post is no longer open to be considered by the Court."

That case instead of helping the petitioners helps the respondents as the question before this court is that whether the initial appointments of the petitioners are valid or not and the Supreme Court in that particular decision as quoted above pointed out that the appointment so made can be scrutinised by the court to find out whether it is a valid appointment in the eye of law or not.

9. The learned counsel for the petitioner submits that these petitioners have put up service for more than 8 to 9 years and if they are now thrown out from their service they will face hardship and difficulty and as such in delivering justice it should be tempered with mercy and human consideration and in support of this contention the learned counsel for the petitioner relies on 1987 SCC 497 (Dr. A.K. Jain and others, petitioners v. Union of India and others, respondents). Para-4 of that decision is quoted below :-

"4. The Combined Medical Services Examination was introduced by the UPSC in the 1977, and from 1977 to 1983 maximum age relaxation up to 40 years or even 50 years was granted from time to time to enable the said "ad hoc" doctors on the Zonal Railways to avail themselves of the opportunity of appearing in the Combined Medical Services Examination. In addition, the UPSC held two Special Selection based on interview only with sufficient relaxation in the years 1982 and 1985. In these two special selections held in 1982 and 1985, 100 and 67 "ad hoc" doctors respectively of the Railways were selected and absorbed in the regular cadre. The petitioners who were still "ad hoc" doctors on the Zonal Railways, were, thus, those doctors who either failed to appear in the Combined Medical Services Examination held by the UPSC or after appearing had failed. Having failed to get regularised in accordance with the prescribed rules and regulations for regular appointments, the petitioners' services had to be terminated and as such there had been neither any arbitrary nor illegal action on the part of the respondents, nor any violation of the Fundamental Rights guaranteed under Articles 14 and 16."

So that case instead of helping the petitioners goes against them. The learned counsel relies on the order portion of that judgment. That order was passed by the Supreme Court by moulding the relief on the facts of that particular case and that cannot be a precedent to bind a court.

10. The learned counsel for the petitioners next relied on Jacob M. Puthuparambil and others Vs. Kerala Water Authority and others, That was a case on a different footing inasmuch as in that case the appointments were not made without following the due process of law. The appointments were made by following due process of law, but that appointments were not regularised as they were temporary employees. In para - 15 of that judgment the Supreme Court has laid down the law as follows :-

"It is unfair and unreasonable to remove people who have been rendering service since sometime as such removal has serious consequences. The family of the employee which has settled down and accommodated its needs to the emoluments received by the bread winner will face economic ruination if the job is suddenly taken away. Besides, the precious period of early life devoted in the service of the establishment will be wholly wasted and the incumbent may be rendered "age barred" for securing a job elsewhere. It is indeed unfair to use him, generate hope and a feeling of security in him, attune his family to live within his earnings and then suddenly to throw him out of job. Such behaviour

would be an affront to the concept of job security and would run counter to the constitutional philosophy, particularly the concept of right to work in Art. 41 of the Constitution. Therefore, if we interpret Rule 9(1)(i) consistently with the spirit and philosophy of the Constitution, which it is permissible to do without doing violence to the said rule, it follows that employees who are serving on the establishment for long spells and have the requisite qualifications for the job should not be thrown out but their services should be regularised as far as possible. Since workers belonging to this batch have worked on their posts for reasonably long spells they are entitled to regularisation in services."

11. Lastly, the learned counsel for the petitioners relies on H.C. Puttaswamy and others Vs. The Hon"ble Chief Justice of Karnataka High Court, Bangalore and others, In paragraphs 12 and 16 of that judgment, the Supreme Court observed as follows :-

"12. Having reached the conclusion about the invalidity of the impugned appointments made by the Chief Justice, we cannot, however, refuse to recognise the consequences that involves on up-rooting the appellants. Mr. Gopala Subramanayam, counsel for the appellants while highlighting the human problems involved in the case pleaded for sympathetic approach and made an impassioned appeal for allowing the appellants to continue in their respective posts. He has also referred to us several decisions of this Court where equitable directions were issued in the interests of justice even though the selection and appointments of candidates were held to be illegal and unsupportable.

16. The precedents apart, the circumstances of this case justify an humanitarian approach and indeed, the appellants seem to deserve justice ruled by mercy. We also take note of the fact that the writ petitioners also would be appointed in the High Court as stated by learned Advocate General of the State."

12. On the other hand, the learned Advocate General places reliance on P. Ravindran and Others Vs. Union Territory of Pondicherry and Others, wherein the Supreme Court has pointed out that adhoc appointees cannot be regularised by passing the process of recruitment through open competition to be held by the Public Service Commission. The Supreme Court, inter alia, has pointed out as follows :-

"The Commission having been entrusted with the constitutional duty to select suitable candidate by inviting applications from the open market, every candidate has a fundamental right to seek consideration and for selection through open competition. The petitioners also have that right. Therefore, the process of recruitment through the Commission, as envisaged under the Constitution, cannot be bypassed by issuing direction for regularisation of the services of the ad hoc persons who had come to the service through back-door entry."

13. The learned Advocate General also relies on Dr. Arundhati Ajit Pargaonkar Vs. State of Maharashtra and others, That was a case where the appellant before the Supreme Court was appointed temporarily against the permanent post and

claimed regularisation under resolution. In para - 7 of that judgment the Supreme Court pointed out as follows :-

"7. Nor the claim of the appellant, that she having worked as Lecturer without break for nine years on the date the advertisement was issued she should be deemed to have been regularised appears to be well founded. Eligibility and continuous working for howsoever long period should not be permitted to over-reach the law. Requirement of rules of selection through Commission cannot be substituted by humane considerations. Law must take its course. Consequently the appellant was not entitled to claim that she should have been deemed to have been regularised as she had been working without break for nine years."

There also the appointment to the post of lecturer was governed by set of rules: The Supreme Court pointed out that the appellant was appointed in disregard to the recruitment rules. She cannot claim to be regularised under resolution or on equitable consideration.

14. That being the position of law, all these writ applications are devoid of merit and they are rejected. However, I make it clear that if there are vacancies save and except for which the advertisement has been made these petitioners may be allowed to continue against those vacancies and they may be further given a chance to appear before the Tripura Public Service Commission as and when those posts shall be advertised by relaxing their age. After all these petitioners behaved in a foolish manner but that does not mean that the Government should not approach the matter with magnanimity. I also make it clear that Smti. Mira Roy and Smti. Juthika Bhattacharjee who were appointed on the basis of the judgment quoted above shall be allowed to continue against that posts mentioned in the judgment. If there is no posts, the petitioners cannot be allowed to continue on basis of their ad hoc appointment blocking the appointments of regularly selected persons by Public Service Commission.

15. No Costs.