
(1994) 04 OHC CK 0017

In the Orissa High Court

Case No : Original Jurisdiction Case No. 6322 of 1993

Miss Kalpanamayee Devi

APPELLANT

Vs

Indira Gandhi National Open University and Others

RESPONDENT

Date of Decision : 29-04-1994

Acts Referred:

Citation : (1994) 78 CLT 453 : (1994) 2 OLR 56

Hon'ble Judges : P.C. Naik, J; L. Rath, J

Bench : Division Bench

Advocate : S.P. Misra, J.K. Misra, S.K. Das and S.B. Jena, for the Appellant; R.K. Mohapatra, R.K. Dash, U.K. Samal and S.K. Swain, for the Respondent

Final Decision : Allowed

Judgement

P.C. Naik, J.—The petition under Arts. 226 and 227 of the Constitution of India has been filed for issuance of appropriate writ, direction or order commanding the opp. parties to regularise the services of the petitioner and absorb her permanently as a Professional Assistant or semi-Professional Assistant on the appropriate pay scale attached to the post with all consequential pecuniary benefits. The further prayer is for directing the opposite parties not to give effect to the order dated 18-6-1993 (Annexure-26) whereby the Regional Directors of the University have been asked not to engage any part time staff of any category without prior sanction and to dispense with the services of part-time staff already employed by them.

2. The facts giving rise to the petition are hereinafter stated :

Vide order dated 26-3-1987 the petitioner was initially appointed as a Librarian on ad hoc basis on a consolidated pay of Rs. 500/- per month for a period of 89 days or till regular appointment was made. The appointment order merely stated that the appointment was purely temporary and was liable to be terminated at any time without prior notice. The petitioner joined the post on 31-3-1987. On the expiry of the period vide order dated 27-8-1987 she was appointed as part-

time Library Assistant on the consolidated salary of Rs. 500/- per month with effect from 1st July 1987 until further orders. According to the petitioner, she continued to work as such and her name was shown in the list of staff, an extract whereof is annexed as Annexure-6. In the meanwhile her salary was raised from Rs. 500/- to 700/- per month with effect from 16-10-1989 in terms of order dated 28-10-1989.

3. On 9-5-1981 a circular was issued requiring the department/ university/ Government colleges to sponsor candidates for deputation to fill certain posts which were lying vacant. This list also showed a post of semi-professional Assistant who could be employed as a part-time staff on the consolidated salary of Rs. 1,100/-. In response to the above letter, the Regional Director, Bhubaneswar recommended the name of the petitioner for being appointed as a semi-Professional Assistant. It was mentioned that the petitioner was M. A. from Utkal University and also had first class degree in Library Science and that she was quite regular in duty and doing her job sincerely. It was further stated that she was also assisting in the administrative work and any other office work; whenever necessity arose.

4. In the meanwhile, a circular was issued inviting applications from graduates and Library Science for a post of semi-Professional Assistant at the Regional centre at Bhubaneswar. In response to the aforesaid advertisement, the petitioner applied for the post. She along with others appeared in an interview that was held on 16-9-1991. The selection committee which was constituted vide Annexure-13, interviewed all the candidates and prepared a merit list in which the petitioner's name was placed at serial No. 1. Accordingly, an order was issued to the petitioner appointing her as the semi Professional Assistant on a consolidated remuneration of Rs. 1, 100/- per month. It was, however, clarified that the post was purely temporary; did not carry any regular scale of pay and that the services could be terminated at any time without assigning any reason. It was also stated that she would not have any claim for regular absorption in the University. The petitioner re joined her duties as semi-Professional Assistant on 17-9-1991 as She appointment order did not contain all the conditions of service. a corrected order was issued on 2-11-1992. The order of appointment as part time semi-professional Assistant was renewed vide order dated 10-3-1992 for the period 18-3-1992 to 17-9-1992.

5. While working as a part time semi-Professional Assistant, the petitioner on 5-5-1992 through the Regional Director, submitted a representation to the Registrar for absorbing her in service in regular basis. This representation was forwarded by the Regional Director to the Registrar of the University with a recommendation that it be favourably considered as the petitioner had worked on part-time basis for five years and was M. A. and also had a first class degree in Library Science. The representation remained pending and in the meantime the petitioner's period of part-time appointment came to an end on 17-9-1992. However, vide order dated 20-11-1992 (Annexure 22) she was given a further

appointment of six months with effect from 21-9-1992 on terms similar to her previous appointment. On the expiry of the period, a similar appointment was again Issued to her vide order dated 23-3-1993 as is clear from Annexura-23. In the meanwhile, the petitioner submitted another application on (3-4-1993) drawing the attention of the Registrar for favourable consideration of her representation dated 5-5-1992 wherein prayer for absorption in the Service of the University Was made. This was followed by another reminder on 17-6-1993. The representation remained pending and in the mean- time on 18-6-1393, an office order was issued intimating the Regional Director not to engage any part-time staff without prior sanction and to dispense with the services of the existing part-time staff. It is alter issuance of this order that the present petition has been filed on the facts which have been stated above.

6 The contention of Sri S K. Das, learned counsel for the petitioner is that the petitioner having worked for a period of nearly six years on a part-time past was entitled to be regularised against a regular post which exists in the University. Amongst others, reference and reliance have been placed in the case of Savitri Rawat Vs. Govind Singh Rawat, , Daily v. Union, reported in AIR 1937 SC 2342, Bhagawati v. Delhi State, reported in AIR 1990 SC 31 Dharwad v. State of Karnataka, reported in AIR 1990 SC 803 and Sri Dhiraj Ghosh Vs. Union of India and another, . He contends that though initially the appointment orders were issued for a period of 89 days, she continued to work on the basis of fresh orders which were issued after a break of a day or two. He contends that though there was a break, the petitioner continued to attend the office and do her assigned job. There was thus continuity of service as a part-time employee..

7. The petition is being resisted by the opp parties who have filed a counter in support of their stand. Sri R. K, Mohapatra, learned counsel for the opp. parties contends that the petitioner is not entitled to regularisation because her appointment was not on a regular basis but was for fixed periods with breaks. He further contends that the appointment itself stated that it was purely temporary and that the petitioner would have no right to regular appointment. For this reason, the petitioner cannot, having accepted the appointment subjected to the conditions, turn around and make a prayer for regularisation. The learned counsel further contends that the post of a semi- professional assistant was duly advertised and that the petitioner also applied for the said post. In response to the call, she appeared in a written examination which was held at Calcutta. She, however, failed. Having failed, she cannot now claim regularisation on the basis of her part-time services with the University, Sri Mohapatra, learned counsel lor the opp. parties contends that regularisation is an equitable relief and as the petitioner bad tampered with the Attendance Register, by marking her presence during.the break period, she was not entitled to the relief of regularisation. It is also submitted that the petitioner cannot be regularisation as she is no longer in service as the last part-time engagement of the petitioner cams to an end on 22-9-1993.

8. Having considered the rival contentions and advanced by the parties and on a consideration of the material on record and the authorities cited, we are of the opinion that the petition deserves to be allowed

It is not disputed that from 31-8-1987 to 22-9-1993, the petitioner has been working in the University on a part-time basis though with some break between appointments. It is also not disputed that the petitioner has the requisite qualification and her work has been found to be satisfactory by the Regional Director, who also, in his recommendations to the Registrar, stated that the petitioner was discharging the duties like a regular Librarian and was also assisting in the office and other work assigned to her from time to time. Thus, the petitioner neither lacks qualification nor the experience. There is a dispute as to whether or not she was working continuously or with breaks between two appointment orders. The fact that she has been working from 31-10-1987 to 22-9-1993 itself indicates that she was more or less a regular part-time employee. We cannot lose sight of the fact that employers do issue appointment orders for a short period and renew the appointment with break of a day or two in order to circumvent certain provisions of law and to avoid regular appointment or regularisation of service in view of this, we are inclined to accept the contention of the petitioner that though there was a break of a day or two in between fresh appointments who was regularly attending office to do her duties on the days on which break in service was shown.

9. The question now arises as to the effect of the petitioner in not clearing the written test. This gives rise to another question, if there was no test or had the petitioner made a prayer for regularisation without having appeared in the test, could she lay a claim for regularisation or not? The answer is simple. She would not be denied regularisation. Therefore, the fact that she appeared in the examination and could not clear the same would not debar the petitioner from claiming regularisation—a claim to which she had become entitled to prior to the said examination. Had there been no examination, the petitioner could have still claimed regularisation if she was entitled to claim it. Therefore, her failure to clear the examination can have no adverse effect on her claim. Indeed, if an authority is needed, reference can be made to the case of *Smt. Urmila Senapati Vs. State of Orissa and Others*, wherein a Division Bench has held ;

"xx xx xx

that the opposite parties having allowed the petitioner to continue for more than five years as a Tracer on daily wages basis have acted with discrimination by requiring her to appear at a test along with other fresh candidates who had been sponsored from the Employment Exchange and adjudicated their relative merit and suitability. It is not the case of the opp. parties that the petitioner does not possess the minimum qualification and, as has been stated earlier, the very fact of her continuance for more than five years was sufficient to adjudge her suitability for regular absorption.

The ratio of Smt. Urmila's case (supra) can be applied to the facts of this case also. The learned counsel for the opp. parties Sri R. K. Mohapatra relying on certain observations contended in para-8 of the aforesaid judgment tried to distinguish the present petition from Smt. Urmila's case. We, however do not agree with the submission that the ratio of Smt. Urmila's case cannot be applied to the facts of this petition.

10. Sri Mohapatra, learned counsel for the opp. parties has also drawn our attention to Section 24 of the Indira Gandhi National Open University Act, 1985 (No. 50 of 1963) and Statute 10 of the Statutes of the University contained in the second schedule of Act 50 of 1985. However, statute 18 provides that all employees of the University, other than the teachers and other academic staff of the University, shall, in the absence of any contract to the contrary, be governed by the terms and conditions of service and code of conduct as are specified in the statutes and the Ordinances. At this stage, it may be mentioned that the matter was heard on 26-4-1994. Neither any statute nor any Ordinance was placed before us to show the mode of selection/appointment of the employees of the University. Indeed, neither any reference to any statute nor Ordinance dealing with the mode of appointment/selection of the employees has been made in the counter filed by the opposite parties. However, after the case was closed, we were informed that some rules known as "Indira Gandhi National Open University (Non-academic Employment) Recruitment and Promotion Rules, 1991" were approved and framed by the Board of Management at their 24th meeting on 11-7-1991. In view of this, the matter was re-listed for hearing and additional arguments were advanced by the counsel for the petitioner as also the counsel for the opposite parties.

11. Sri R. K. Mohapatra, learned counsel for the opposite parties draw our attention to Statute 7(?) under which in exercise of powers, the 1991 Rules have been framed by the Board of Management. He drew our attention to Rule 11. 1 the relevant extract whereof reads as under ;

"11-1 (a) Direct Recruitment mentioned in Annexure-C to Rule 5 means open Recruitment and selection on the basis of a written test, were considered necessary (except in the case of recruitment to Group and Posts), and/or Skill test, (were prescribed) and interview.

(b) For the purpose of open recruitment mentioned in Clause (a) above.

(i) Applications may be invited for Group "D" posts by notification within the University and notifying with the employment Exchange wherever necessary.

(ii) For all other posts by advertisement on all India basis/deputation/contract/ fixed terms and by notifying with the Employment Exchange wherever necessary."

Placing reliance the above Rules, it is contended that posts would be filled in by advertising them in All India Newspaper and through a selection on the basis of a written test". It is pointed out that in view of the above Rule, the petitioner can

only be appointed according to the procedure prescribed in Rule 11 -t and in view of this. she cannot claim to be regularised merely because she was working for fixed periods from time to time.

12. In reply, Sri S. K. Das, learned counsel for the petitioner invites our attention in Rule 7 which provides for constitution of an open Recruitment Committee for direct recruitment to Group "D.L.D.C posts. Ha also cites a reference to Rule 11-1 (a) and contends that a more reading of the rule would disclose that though the rule provides for direct recruitment and selection on the basis of the written test, the would "words considered necessary" after the words" selection on the basis of a written tests "clearly indicates the holding of a written test can be dispensed with. This, the contention of the opposite parties, submitted by Sri Das, that recruit- ment can only be on the basis of a written test is not correct. Drawing our attention to Annexure-13, ha contends that a selection committee was, in fact, constituted for the purpose of selecting a suitable candidate for appointing a semi-professional Assistant for the Regional Library Centro, Bhubaneswar and that this committee had selected the petitioner. However, instead of a regular appointment, she was given a temporary appointment vide order dated 8-10-1991 (Annexure- 1) to the petition. " The learned counsel for the opposite parties; however, contents that the appointment was on a temporary basis till the selection of a regular candidate.

13. In the advertisement (Annexre-2). in all 12 posts of semi- Professional Assistants was advertised. The qualification and experience required was graduation with two years Library experience or in the alternative Matriculate/ Higher Secondary plus certificate in Library Science with four years Library experience. The age was not to exceed 20 years on 1-8-1990.. Admittedly, the petitioner is a Post-Graduate from Utkal University, has a First Class Bachelor degree with Library Science and has worked as a part-time Librarian/semi-Professional Assistant for a period over five years. Therefore, it cannot be denied that the petitioner has the qualification and experience for the post. But as she is ever 30 years of age, she has crossed the age limit. Under the circumstances as she has worked for more than five years as a part-time Librarian/sem Professional Assistant, we are of the opinion that refusal to regularise her would be unfair to her as, having worked for so long, on part-time basis she has now become over age to seek employment also where.

14. As regards the 1991 Rules, it may be mentioned that they came into force sometime in August, 1991. Admittedly, the petitioner has been working on the basis of short appointment orders with artificial breaks from 31-3 1987 onwards. Therefore, at the time she was given the appointments, the 1991 Rules were not in force. There is nothing on record, to indicate that the authority which gave the initial appointment had no authority to do so. There is also nothing on record to indicate that at any point of time the actions of the Regional Director in giving the petitioner short term of appointment on a more or lest regular basis was disapproved or objected to by the University authorities. As found above, the

petitioner has the requisite qualification and was also selected by a selection committee which was constituted for selecting a semi-Professional Assistant. Though she was appointed for a temporary basis till the post was filled up on regular basis, it cannot be disputed that her appointment was against a regular post. The fact that she has now crossed the age limit and will lose an opportunity of obtaining service either under the University or else where is also a factor which has to be kept in mind. Under the circumstances, we are of the opinion that the petition deserves to be allowed. We may, however, add that authorities should refrain from making such short term appointment over long periods when regular posts are available. All available posts must be filled up promptly and strictly in accordance with the procedure prescribed so that all eligible candidates are able to compete. Making appointment for a short period and continuing such appointments over a long spell of time with artificial breaks is neither proper nor desirable as it gives rise to many difficulties like that involved in the present petition.

15. In view of the above, the writ petition is allowed, The opposite parties are hereby directed to regularise the petitioner on the post of semi-Professional Assistant and to pay her salary and other consequential service/pecuniary benefits to which a semi-professional Assistant is entitled to. In the facts and circumstance of the case, it is clarified that the semi-Professional Assistants have been selected the basis of written test in terms of Rule 1 1-2 of the 1991 Rules, the petitioner's name will be placed immediately below the names of the selected candidates. However, as her services came to an end on 22-9-1993, it is directed that she will be entitled to claim salary as a semi-Professional Assistant from the date other joining the said post for which, it is directed that appropriate orders will be issued by the opp. party preferably within a period of three weeks from the date of the receipt of this order. In view of the fact that the petitioner had suppressed the fact of her having appeared at the examination at Calcutta and failed, and in the circumstances of the case, we remain from awarding any cost to her. Parties to bear their on costs.

L. Rath, J.

I agree.