
(2001) 03 AP CK 0078
In the Andhra Pradesh High Court
Case No : WA No. 9577 of 1999

Mohd. Ahmed Ali and others

APPELLANT

Vs

State of A.P. and others

RESPONDENT

Date of Decision : 28-03-2001

Acts Referred:

Andhra Pradesh (Regulation of Appointments to Public Services and Rationalisation of Staff Pattern and Pay Structure) Act, 1994 — Section 3, 7
Constitution of India, 1950 — Article 16, 162, 226, 309, 311
Industrial Disputes Act, 1947 — Section 25

Citation : (2001) 3 ALD 428 : (2001) 3 ALT 468

Hon'ble Judges : S.B. Sinha, C.J.; V.V.S. Rao, J

Bench : Division Bench

Advocate : Mr. P. Raghavender Reddy, for the Appellant; Advocate-General and Mr. P. Harinatha Gupta, for the Respondent

Judgement

S.B. Sinha, CJ

1. The petitioners in this application have inter alia prayed for the following reliefs:

".....this Hon''ble Court may be pleased to issue an order or direction more particularly one in the nature of writ of mandamus declaring the Act No.27/98 issued by the 1st respondent as illegal, arbitrary and contrary to the orders passed by the Hon''ble Supreme Court in Civil Appeal Nos.82 and 83 of 1999, dated 11-1-1999 and Civil Appeal No.1867 and 1868 of 1999, dated 26-3-1999 and further direct the respondents as Supervisors (Assistant Engineers)/ Tracer in the existing vacancies in terms of G.O. Ms. No.212, Finance and Planning dated 22-4-1994 and G.O. Ms. No.330, MA, dated 24-9-1994 and also as per the judgments of the Hon''ble Supreme Court in Civil Appeal Nos.82 and 83 of 1999 dated 11-1-1999 and civil appeal No.1867 and 1868 of 1999, dated 26-3-1999 without insisting the completion of 5 years of service as on 25-11-1993 by declaring that they are entitled for regularisation from the date of completion of

5 years of service and eligible to draw the scale of Supervisors/Assistant Engineers/Tracer from the date of completion of 5 years of service and pass such other order or orders as this Hon"ble Court may deem fit and proper in the circumstances of the case.

It is also just and necessary of justice that this Hon"ble Court may be pleased to direct the respondents to pay the minimum time scale to the petitioners corresponding to the regular supervisors (Assistant Engineers)/Tracer working in the authority from April, 1999 onwards and pass such other order or orders as this Hon"ble Court may deem fit and proper in the circumstances of the case."

2. However, at the time of hearing, the learned senior Counsel appearing on behalf of the petitioners submitted that he does not press the question as regards the vires of act Act No.27 of 1998. The only question which, therefore, remained for consideration is as to whether the petitioners have a legal right to be regularised in the services. The petitioners are four in number. The petitioners 1 to 3 were appointed on 15-9-1989, 1-12-1989 and 8-8-1989 respectively in the post of supervisor on daily wage basis and the petitioner No.4 was appointed on 1-2-1990 as tracer in the engineering department. The State Government issued a Government Order being G.O. Ms. No.212 on 22-4-1994. The relevant provisions whereof are:

".....Though the Act provides that no person who is daily wage employee and no person who is appointed on temporary basis shall have any right to claim for regularisation of services on any ground, it has been the endeavour of the Government to regularise as many as NMR/daily wage employees as possible who are otherwise qualified depending upon the requirement of the work load while keeping in mind the hardship that would be caused if their services are not regularised. The Hon"ble Supreme Court in its judgment dated 12-8-1992 in Civil Appeal No.2979 of 1992 and Batch have also observed to evolve an appropriate policy for regularisation. Accordingly, Government after careful examination of the whole issue and in suppression of all previous orders on the subject including G.O. Ms. No. 193, General Administration Department, dated 14-3-1990 and keeping in view the above judgments of the Supreme Court of India, have formulated a scheme for regularisation of services of the persons appointed on daily wage/ NMR or on consolidated pay and are continuing on the date of commencement of the Act. Government accordingly decided that the services of such persons who worked continuously for a minimum period of five years and are continuing on 25-11-1993 be regularised by the appointing authorities subject to fulfilment of the following conditions:

1. The persons appointed should possess the qualifications prescribed as per rules in force as on the date from which his/her services have been regularised.
2. They should be within the age limits as on the date of appointment as NMR/ daily wage employee.
3. The rule of reservation wherever applicable will be followed and back log will

be set-off against future vacancies.

4. Sponsoring of candidates from Employment Exchange is relaxed.

5. Absorption shall be against clear vacancies of posts considered necessary to be continued as per work load excluding the vacancies already notified to the APPSC/DSC.

6. In the case of workcharged establishment, where there will be no clear vacancies, because of the fact that the expenditure on workcharged is at a fixed percentage of PS charges and as soon as the work is over, the services of workcharged establishment will have to be terminated, they shall be adjusted in the other departments, District Officers provided there are clear vacancies as last grade service.

3. All the Departments of Secretariat/ Heads of Departments are requested to process the cases of absorption/ regularisation of services of NMRs/Daily wage employees, etc., in pursuance of above scheme and obtain the clearance of Government in Finance and Planning (FW.PC.III) Department before orders are issued for such regularisation or absorption."

4. A writ petition being No.30748 of 1997 was filed by the petitioners herein wherein a learned Judge of this Court held:

"A learned Judge of this Court while dealing with a similar matter considered the cut-off date i.e., 25-11-1993 according to G.O. Ms. No.212 and held that the above condition must be taken as disjunctive to the effect that the petitioners should only be in service as on the date of the G.O. In other words, it is not necessary that they should have a five years of continuous service prior to that date and it is sufficient if they are in service on that date. In the instant case, since the petitioners are stated to be in service for more than 5 years, the petitioners are entitled to be considered in accordance with G.O. Ms. No.212, dated 22-4-1994 for regularisation.

With the above observation the petition is disposed of."

5. A SLP allegedly was filed against the parent judgment which having been dismissed, the Principal Secretary to the Government, Municipal Administration, Government of Andhra Pradesh did not press the writ appeal filed by them questioning the said order. Allegedly for non-compliance of the said order passed by the learned single Judge a contempt application was filed which was marked as CC No.796 of 1998. A learned Judge of this Court by an order dated 16-4-1998 while holding that no contempt has been committed as the Government is not bound to create supernumerary posts although dismissed the contempt application but directed:

"However, since the petitioners contend that as per G.O. Ms. No.330 dated 24-9-1994 wherein it was made clear by the Government that where the services of the eligible candidates could not be regularised for want of clear vacancies,

they could be regularised in the lower rank than the one in which they are working, they are entitled to be regularised in the lower rank than the one in which they are working now. It is however open to the petitioners to make a representation to the Government in this regard. If such a representation is made, the Government is directed to consider the cases of the petitioners strictly in accordance with G.O. Ms. No.330, dated 24-9-1994 within one month from the date of receiving the application/representation."

6. Pursuant to or in furtherance thereof G.O. Rt. No.1020, dated 19-11-1998 was issued which reads thus:

1. G.O. RtNo.1628 MA, dated 19-8-1986.
2. Orders in High Court dated 20-11-1997 in WP 30748/97 in WA No.607/98, dated 16-4-1998.
3. From Administrator, Quli Qutub Shah Urban Development Authority, Hyderabad.
4. G.O. Ms. No. 212, Finance, dated 22-4-1994.
5. From the High Court of A.P. orders 17-9-1998 in CC No.796/ 1998.
6. Representation from the petitioners in WP No.30748/97 12-10-1998.

Order :

The Hon''ble High Court in the reference 2nd cited directed the second respondent to consider the case of the petitioners for regularisation under G.O. Ms. No.212, dated 22-4-1994 and take appropriate action seeking approval of the first respondent in accordance with law.

2. The Administrator, Quli Qutub Shah Urban Development Authority in the letter 3rd read above has reported that Sri Md. Ahmed Ali, D. Raghavachary, P. Venkoba and Sri Himayath Ali working as NMRs with effect from 15-9-1989, 1-12-1989, 8-8-1989 and 1-2-1990 respectively and the authority has not given any appointment orders to the petitioners. As they have also not completed 5 years of service as on 25-11-1993 and there are no clear vacancies so their services were not regularised. He has requested the Government to communicate suitable orders in the light of the orders of Hon''ble High Court.

3. Government have issued orders vide GO 4th read above for regularisation of services of daily wage/NMRs/ Consolidated pay persons who worked continuously for a minimum period of 5 years and those who are continuing on 25-11-1993 be regularised by the appointing authorities in consultation with Finance Department, subject to fulfilment of certain other conditions stipulated therein. This is also a statutory regulation now by virtue of amending Act 2 of 1994 in Act 3 of 1998 and Act 27 of 1998.

4. Government have issued orders vide GO 1st read above, while according sanction for the creation of the staff for the Engineering wing of the Quli Qutub

Shah Urban Development Authority Engineering posts shall be filled up by deputation only and also only from Public Health Department.

5. The individuals have filed a contempt petition vide CC No.706 of 1998 for not implementing the orders of High Court in WP No.30748/98, High Court have issued orders in CC as follows:

"However, since the petitioners contend that as per G.O. Ms. No.330, dated 24-9-1994 wherein it was made clear by the Government that where the services of the eligible candidates could not be regularised for want of clear vacancies, they could be regularised in the lower rank than the one in which are working, they are entitled to be regularised in the lower rank than the one in which they are working now. It is however open to the petitioners to make a representation to the Government in this regard. If such a representation is made, the Government is directed to consider the cases of the petitioners strictly in accordance with G.O. Ms. No.330, dated 24-9-1994 within one month from the date of receiving the application/ representation."

6. According to the above orders the individual will have to represent for considering their cases in the lower category in terms of G.O. Ms. No.330, Finance, dated 24-9-1994. However, the petitioners representation in the reference 6th read above and requested the Government for their regularisation in the present posts in which they are working.

7. After due examination of the representation and keeping in view of the orders of High Court in the CC No.796 of 1998 it is decided that it is not possible to regularise the services of the individuals as there are no clear vacancies and the representations made by the individuals are not in accordance with the orders of High Court in CC mentioned above. Hence the request of the individuals is hereby rejected."

7. The petitioners herein do not question the said order.

8. The learned Counsel for the petitioners inter alia submit that having regard to the fact that the order passed by this Court in earlier writ application has attained finality and there being several vacancies in existence, the petitioners are entitled to be regularised in services.

9. The learned Advocate-General appearing on behalf of the State on the other hand submitted that having regard to the fact that the G.O. Rt. No. 1020, dated 19-11-1998 having not been challenged, this writ petition is not maintainable.

10. The question as to whether there exists any vacancy or not cannot be decided by this Court in exercise of its jurisdiction under Article 226 of the Constitution of India. The learned Judge of this Court in judgment dated 20-11-1997 passed in Writ Petition No.30748 of 1997 merely held, the correctness whereof may be open to question, that it was not necessary for the petitioners to put in five years of continuous service prior to the cut-off date 25-11-1993 and it is sufficient if they are in service on that date. However, it was

held that as they were in service for more than five years, they were entitled to be considered for regularisation.

11. A bare perusal of the said judgment clearly goes to show that the apex Court has categorically directed that the question of regularisation would arise provided the concerned employees satisfy the conditions laid down in G.O. Ms. No.212, dated 22-4-1994.

12. The said G.O. Ms. No.212, as noticed hereinbefore, lays down various conditions, to be fulfilled before an "order of regularisation can be passed. Such conditions having regard to the decision of the apex Court must be fulfilled before the concerned employees can claim existence of a legal right in themselves and a corresponding legal duty in the respondents so as to enable the Court to issue a writ in the nature of mandamus in their favour. One of the conditions was that there must exist clear vacancies of posts which are considered necessary to be continued as per work load.

13. The State in its order dated 19-11-1998 inter alia rejected the prayer on the following grounds: (1) they have not completed five years of service as on 25-11-1993; (2) there are no clear vacancies; and (3) in view of the statutory regulation by reason of Act No.27 of 1998, such regularisation cannot be directed.

14. Apart from the fact that the petitioners herein do not question the vires of the said Act No.27 of 1998, which clearly prohibits such regularisation, according to the respondents herein there does not exist any clear vacancy. The petitioners in the aforementioned situation, should have questioned the said order dated 19-11-1998 but they did not do so.

15. It is now a well settled principle of law that regularisation is not a mode of recruitment. It has not been shown that there exists any power of regularisation in the State. Having regard to the principles adumbrated in Article 16 of the Constitution of India, the State cannot take recourse to back door appointment nor the Court can encourage the same. In that view of the matter, all policy decisions as regards regularisation, assuming they are enforceable, must strictly be enforced. The Court can exercise its jurisdiction under Article 226 and can direct regularisation provided all the conditions laid down therefore are satisfied. As the petitioners have not satisfied the conditions laid down in the aforementioned G.O. Ms. No.212 no case has been made out to grant any relief to the petitioners.

16. In *Tarak Chowdhury v. State of West Bengal* (Cal) 2000 (2) SLR 445, it has been held:

"7. It has not been disputed that the petitioner was appointed on an ad hoc basis. At the time of his appointment recruitment rules framed in terms of the proviso appended to Article 309 of the Constitution of India had not been followed. The State while granting appointment to a person is not only bound to follow the recruitment rules made in terms of the proviso appended to Article

309 of the Constitution of India but is also bound to give effect to the provisions of Articles 14 and 16 of the Constitution of India. No right far less any enforceable right flows from such illegal appointments. The recruitment rules, inter alia, provide for grant of equal opportunity to be considered for appointment to all eligible candidates. A person who is appointed through back-door cannot claim permanence only because he had been working for sometime. Reference in this connection may be made to the case of Dr. Arundhati Ajit Pargaonkar Vs. State of Maharashtra and others, and several decisions of the Apex Court following the same. It is further well known in view of several decisions of the Apex Court that only in irregular appointment can be regularised and not an illegal appointment. It is further well settled that regularisation cannot be a mode of recruitment. (See R.N. Nanjundappa Vs. T. Thimmiah and Another, and B.N. Nagarajan and Others Vs. State of Karnataka and Others, which decisions have been considered by the Apex Court in V. Sreenivasa Reddy and others Vs. Govt. of Andhara Pradesh and others, . It is now also well settled in view of the recent decisions of the Apex Court in State of Madhya Pradesh and Another Vs. Dharam Bir, that the status of a person cannot be changed with the passage of time. A person who was appointed on temporary or ad hoc basis, thus cannot claim the status of a permanent servant only because he had worked for sometime. The said decision along with other decisions had been considered by this Court in a large number of cases. Reference in this connection, however, may be made to Biman Ch. Karmakar v. State of West Bengal, reported in 1999 (2) CHN 289 and West Bengal Essential Commodities Supply Corporation Limited v. Md. Sarif, reported in 2000 (1) CHN 210 : [2000 (2) SLR 229 (Cal)]. The aforementioned circular letter dated 3rd August, 1979 is not a statute. Even a policy decision cannot be adopted in derogation of a statutory rules. Even the said purported memorandum dated 3rd August, 1979 is not an executive instruction within the meaning of Article 162 of the Constitution of India."

17. In fairness to the learned Counsel we may notice that strong reliance has been placed upon Sri Hariharan Vs. Baji Shaheed Khan, , wherein a Division Bench has held that the said amendment is prospective in nature and would not apply to a case where the High Court had directed regularisation as the said orders have become final. In the instant case no such Direction has been issued and both in the writ petition as also the contempt petition this Court has merely directed consideration of their case in terms of the said Government Order. The said Division Bench decisions is not applicable to the facts of this case.

18. Sections 7 and 7-A of the Andhra Pradesh (Regulation of Appointments to Public Services and Rationalisation of Staff Pattern and Pay Structure) Act, 1994 as amended by Act No.27 of 1998 read thus:

"7. Bar for regularisation of services :--No person who is a daily wage employee and no person who is appointed on a temporary basis u/s 3 and no person who is continuing as such at the commencement of this Act shall have or shall be deemed ever to have a right to claim for regularisation of services on any ground

whatsoever and the services of such person shall be liable to be terminated at any time without any notice and without assigning any reasons :

Provided that the services of those persons continuing as on 25th November, 1993 having completed a continuous minimum period of five years of service on or before 25th November, 1993 either on daily wage, or nominal muster roll, or consolidated pay or as a contingent worker on full time basis, shall be regularised in substantive vacancies, if they were otherwise qualified fulfilling the other conditions stipulated in the scheme formulated in G.O. Ms. No.212, Finance and Planning (FW.PC.III) Department, dated the 22nd April, 1994;

Provided further that the services of a person who worked on part-time basis continuously for a minimum period of ten years and is continuing as such on the date of the commencement of this Act shall be regularised in accordance with the scheme formulated in G.O. (P). 112, Finance and Planning (FW.PC.III) Department, dated the 23rd July, 1997;

Provided also that in the case of workmen falling within the scope of Section 25F of the Industrial Disputes Act, 1947, one month's wages and such compensation as would be payable under the said section shall be paid in case of termination of services;

Provided also that nothing in this section shall apply to the Workmen governed by Chapter V-B of the Industrial Disputes Act, 1947.

Explanation :--For the removal of doubts it is hereby declared that the termination of services under this section shall not be deemed to be dismissal or removal from service within the meaning of Article 311 of the Constitution or of any other relevant law providing for the dismissal or removal of employees but shall only amount to termination simpliciter, not amounting to any punishment.

7-A. Abatement of claims :--(1) Notwithstanding any Government Order, judgment, Decree or Order of any Court, Tribunal or other authority, no person shall claim for regularisation of service under the first proviso to Section 7 as it was incorporated by the Andhra Pradesh (Regulation of Appointments to Public Services and Rationalisation of Staff Pattern and Pay Structure) (Amendment Act), 1998.

(2) No suit or other proceedings shall be maintained or continued in any Court, Tribunal or other authority against the Government or any person or other authority whatsoever for regularisation of services and all such pending proceedings shall abate forthwith.

(3) No Court shall enforce any decree or order directing the Government or any person or other authority whatsoever for regularisation of services."

19. In Chunduri Balaji Vs. Union of India and others, , it is held as follows:

"22. It is required to notice that the post of Scientific Assistant advertised by NRSA is a purely temporary post. The duration of the said post and the

appointment into the said post itself is for a period of six months. The said post itself was later converted into a contract. The petitioner entered into a contract subject to the terms and conditions mentioned therein. In the circumstances, there is absolutely no difficulty whatsoever to hold that the petitioner herein has no right for regularisation in that post.

"23.....The post itself is for not a permanent one. The notification, pursuant to which the petitioner has been appointed, itself would reveal the temporary nature of the post and its duration. Admittedly, after the project work was over, the petitioner herein was awarded appointment on contract basis subject to certain terms and conditions mentioned there. The duration of the contract was fixed at one year. It is thus clear that at no point of time the petitioner has been selected and appointed into any regular post as such on any regular pay scales. Therefore, no directions could be issued compelling the respondents to absorb and regularise the services of the petitioner."

20. In *Texmace Limited v. State of West Bengal* (Cal) 2001 (1) SLR 387, it was observed:

"31.....Thus, illegal appointments even in that case had not been and could not be set aside evidently in view of the decision of the Apex Court in various decisions as for example in *Ashwani Kumar and Others Vs. State of Bihar and Others*, , *Dr. Arundhati Ajit Pargaonkar Vs. State of Maharashtra and others*, , *State of West Bengal and others v. Tapan Kumar Saha* reported in 1999 (2) CHN 519, J and K. *Public Service Commission, etc. Vs. Dr. Narinder Mohan and others etc. etc.*, , *State of Madhya Pradesh and Another Vs. Dharam Bir, and Dr. Surinder Singh Jamwal and another Vs. State of Jammu and Kashmir and others*, ."

21. As indicated hereinbefore, the petitioners did not question the validity of the said Act and in that view of the matter no regularisation can be directed in terms thereof.

22. For the aforementioned reasons, we are of the opinion that there is no merit in this writ petition which is accordingly dismissed. There shall be no order as to costs.