

(2013) 10 MAD CK 0151

In the Madras High Court

Case No : Writ Petition No. 14053 of 2008

N. Savithri

APPELLANT

Vs

The Regional Director, The Director General Employees' State
Insurance Corporation and The Central Administrative
Tribunal

RESPONDENT

Date of Decision : 03-10-2013

Acts Referred:

Citation : (2013) 10 MAD CK 0151

Hon'ble Judges : N. Paul Vasanthakumar, J;K. Ravichandrabaabu, J

Bench : Division Bench

Advocate : R. Singaravelan, for the Appellant; S. Silambanan Senior Counsel for S. Jothivani (R1 and R2), for the Respondent

Final Decision : Allowed

Judgement

K. Ravichandrabaabu, J.—The prayer in this writ petition is challenging the orders of the first respondent dated 25.2.2005 and the third respondent Tribunal in O.A. No. 534 of 2005 dated 18.4.2006 and consequently seeking for directions to the respondents to promote the petitioner to the post of Personal Assistant with effect from the date of promotion given to her junior i.e. 19.1.2001 with all monetary and service benefits. The case of the petitioner is as follows:--

She was appointed to the post of Lower Division Clerk, on compassionate grounds, with effect from 15.5.1986, when there were 11 clear regular vacancies to that post. The petitioner was appointed in a regular vacancy only. Therefore, her service should have been regularised with effect from 15.5.1986 in the post of LDC. However, it was not regularised. A departmental examination was conducted for filling up the vacancies to the post of Stenographer under 25% quota in the year 1992. The petitioner applied for taking the said examination. A clarification was sought for by the Regional Office from the Head Office regarding the petitioner's eligibility to appear for the said examination on the reason that she was not regularised in the post of LDC in the year 1992 and that the

condition for taking part in the examination was three years regular service in the post of LDC. The Head Office granted permission to the petitioner to appear for the examination and accordingly she appeared and however failed in the examination conducted in the year 1992. Again, she applied for taking part in the examination conducted in the year 1993. The Regional Office on the basis of the earlier permission granted by the Head Office, had permitted the petitioner to appear for the examination in the year 1993. Accordingly, the petitioner appeared and passed the examination and she was promoted to the post of Stenographer on merits on 6.1.1994. However, her service in the post of LDC was regularised only with effect from 14.8.1996 after a lapse of 10 years from the date of her original appointment on compassionate grounds and in the post of Stenographer with effect from 16.8.1999, after a lapse of nearly 4 years from the date of her promotion on merits.

2. The petitioner made several representations seeking for promotion from the date on which her juniors were promoted to the post of Personal Assistants by regularising her service from the date of her original appointment. The second respondent through his letters dated 28.3.2002 and 25.7.2003 informed the first respondent that the petitioner's contention with regard to her appointment in the post of Lower Division Clerk being regular that her promotion to the post of Stenographer also being regular. However, without considering the same, the first respondent through the impugned order dated 25.2.2005 directed the petitioner's regularisation in the cadre of Stenographer only with effect from 15.8.1999. Challenging the said order of the first respondent the petitioner preferred O.A. No. 534 of 2005 on the file of the third respondent Tribunal. By an order dated 18.4.2006, the Tribunal dismissed the O.A. thereby rejecting the claim of the petitioner seeking regularisation from the date of her original appointment. Thus, aggrieved by the order of the first respondent dated 25.2.2005 confirmed by the Tribunal by its order dated 18.4.2006 the petitioner has filed the above writ petition.

3. The respondents 1 and 2 filed the counter affidavit and contended as follows:--

The petitioner was appointed as Lower Division Clerk with effect from 15.5.1986 in the respondent Corporation on compassionate grounds. Her appointment was purely on temporary basis. The offer of appointment was in relaxation of the prescribed procedure contained in the Recruitment Regulation for the post of Lower Division Clerk. The contention of the petitioner that there were regular vacancies of Lower Division Clerk is not correct and regular appointment could not be made as 35 officials who were already appointed on ad hoc and purely temporary basis to the post of Lower Division Clerk on various dates prior to the petitioner's appointment have got priority over the petitioner for regularisation and therefore the petitioner's appointment on regular basis could be considered only after regularisation of all those officials. Immediately after her appointment, due to review of staff position in respect of Lower Division Clerk in all the Regions, sanctioned strength of Tamil Nadu Region was reduced to 175 posts.

Thus some officials who were already holding the post of Lower Division Clerk on regular basis were rendered surplus. The officials so rendered surplus were required to be adjusted against future vacancies due to retirements, death, promotion etc., Accordingly, as soon as regular vacancy arose in the cadre of Lower Division Clerk as per the turn of the petitioner for regularisation, she was considered for regular appointment with effect from 14.8.1996. The petitioner applied for the Limited Departmental Competitive Examination for Stenographers held on 25.9.1993. As per the Recruitment Regulations and instructions, the officials who have completed 3 years of regular service as Lower Division Clerk alone are eligible for applying for the departmental examination for the post of stenographers. The petitioner was not holding the post of Lower Division Clerk on regular basis as on 25.9.1993. However, she was allowed to take the examination on liberal interpretation of the Rules. Thus, the petitioner was accommodated as a special case though she was not actually entitled to write the examination. The petitioner though qualified in the examination she could be accommodated as Stenographer on adhoc basis only as she did not fulfill the eligibility condition of 3 years of regular service as Lower Division Clerk. The petitioner was regularised as Lower Division Clerk with effect from 14.8.1996 when regular vacancy arose and thereafter on completion of the requisite three years regular service as Lower Division Clerk, she was given regular status in the post of Stenographer with effect from 15.8.1999.

4. The Tribunal rejected the case of the petitioner on the reason that the petitioner was appointed on a temporary vacancy and her case could be considered for regularisation only after the availability of regular vacancies after 32 of her seniors, who were given appointment before her were regularised in substantive vacancies.

5. Mr. R. Singaravelan, learned counsel appearing for the petitioner submitted as follows:--

The initial appointment of the petitioner was made in a regular vacancy on compassionate grounds. Therefore, the surplus cannot be stated as a reason. The scheme for compassionate appointment contemplates that the applicant for compassionate appointment should be eligible and suitable for the posts in all respects under the provisions of the relevant Recruitment Rules. Instruction No. 6(A) of the said Scheme contemplates that compassionate appointments are exempted from the observance of the requirements of clearance from the Surplus Cell of the Department of Personnel and Training/Directorate General of Employment and Training. If really the petitioner's appointment was found to be surplus they should have sent the petitioner to the reserve pool. But the respondents have not done so because the petitioner's appointment was on compassionate ground where exemption is granted against the requirement of clearance from the Surplus cell. He further contended that even though the initial appointment order refers the same as a temporary one, the petitioner was permitted to appear for the examination for stenographer post through the

proceedings dated 8.10.1992 by the Deputy Regional Director. While granting such permission, the authority has specifically observed that the petitioner's appointment was against a regular vacancy. The method of recruitment to the post of stenographer contemplated 50% by direct recruitment and 50% by transfer on the basis of a qualifying Departmental test from amongst the Lower Division Clerk possessing the qualification prescribed for direct recruits. The recruitment regulations in respect of Personal Assistant indicates two methods one by 50% by way of promotion from amongst the stenographers on the basis of seniority and 50% by promotion from amongst the stenographers having rendered one year regular service. Thus, the method of recruitment of stenographer and the personal assistant is distinguishable. While prescribing the method of recruitment to the stenographer, the word "regular service" is not contemplated and on the other hand, it is only stated that a qualifying departmental test from amongst the Lower Division Clerk possessing the qualification prescribed for direct recruits. Thus, the respondents are not justified in denying the regularisation from the date of her initial appointment. In support of his contentions, the learned counsel relied on the following decisions.

(i) R. Thirunavukkarasu, M. Sundarajan and C.P. Chitrarasu Vs. The State of Tamil Nadu and Others,

(ii) Indian Council of Medical Research and Others Vs. K. Rajalakshmi and Another,

(iii) V. Perumal Vs. The Commissioner and Secretary to the Government, Health and Family Welfare Department, The Director of Medical Education and The Dean,

6. Mr. R. Silambanan, learned Senior Counsel appearing for the respondents supported the impugned orders by contending that the petitioner's initial appointment was only on temporary vacancy and therefore the regularisation was rightly granted only from the date of her absorption in the regular vacancy.

7. We have heard the learned counsels appearing on either side and given our careful consideration to the facts and circumstances of the case.

8. The point for consideration in this case is as to whether the petitioner is entitled to get her service regularised from the date of her initial appointment or not?

9. It is not disputed by the respondents 1 and 2 with regard to the date of initial appointment of the petitioner as well as the mode of such appointment as claimed by the petitioner. Thus, admittedly the petitioner was appointed as lower division clerk on 15.5.1986 on compassionate grounds. A perusal of the scheme for compassionate appointment would show that the applicant for compassionate appointment should be eligible and suitable for the post in all respects under the provisions of the relevant Recruitment Rules and such appointment on compassionate grounds should be made only on regular basis and that too only, if regular vacancies meant for that purpose are available. Further, the scheme

also contemplates that such compassionate appointments are exempted from observance of the following requirements:--

(a) Recruitment procedure i.e. without the agency of the Staff Selection Commission or the Employment Exchange.

(b) Clearance from the Surplus Cell of the Department of Personnel and Training/ Directorate General of Employment and Training.

(c) The ban orders on filling up of posts issued by the Ministry of Finance (Department of Expenditure)

10. Considering the above exemption clause provided under the said scheme, it could be seen that clearance from the surplus cell of the Department of Personnel and Training/Directorate General of Employment and Training is not required while making compassionate appointments. Keeping these aspects of the scheme in our mind, we perused the order of appointment dated 30.4.1986 of the petitioner as Lower Division Clerk. No doubt, the order of appointment refers the same as on temporary basis. But, it is to be noted that the appointment was not made on a temporary vacancy. An appointment made temporarily or as a probation in the regular vacancy is totally different and distinguishable from the appointment made against temporary vacancy. Moreover, when the scheme itself contemplates that the appointment has to be made only on regular basis and that too only if regular vacancies meant for that purpose are available and when the appointment was made by following the said scheme, the respondents 1 and 2 are not justified in contending that it was not on regular basis.

11. Further, the petitioner after such appointment and after nearly six years was permitted to attend the departmental test for promotion to the post of Stenographers. Though originally such request was rejected, by a proceeding dated 8.10.1992, the first respondent had permitted the petitioner to appear for the examination to be conducted in the year 1992. A perusal of the said proceedings would go to show that the respondents have in fact admitted the petitioner's appointment made on compassionate ground as the one against a regular vacancy in the month of May 1986. In another proceedings dated 12.8.1993 issued by the Head Office, it is clearly stated that only those LDCs who have completed 3 years regular service as on 25.9.1993 and possessing the requisite qualifications as laid down in the Recruitment Regulations are eligible for appearing in the departmental Stenographers' test. Thus, it is manifest that only by considering that the petitioner was appointed in a regular vacancy in the year 1986 and that she was possessing the requisite qualifications as laid down in the Recruitment Regulations, the respondents 1 and 2 had permitted the petitioner to take part in the examination. Accordingly, she wrote the examination and became successful. This fact is also not disputed. Thereafter, the petitioner was promoted as stenographer through proceedings dated 6.1.1994. A perusal of the said proceedings of the Deputy Regional Director

would show that such promotion was made not by reserving any right of the respondents to review or reconsider the promotion based on the on the petitioner's conferment and regularisation of service in the LDC. Therefore, all these actions taken by the respondents 1 and 2 would amply prove that the petitioner's appointment was made only as against regular vacancy, even though the appointment order reads as if it was on temporary basis.

12. The respondents, no doubt, contended that the permission to write the examination was granted to the petitioner on liberal interpretation of the Rules. When they admitted that the petitioner was permitted to write the examination by liberal interpretation of the Rules, we wonder as to how the respondents 1 and 2 can now turn around and say that the petitioner is not entitled to get regularisation of her services with effect from the date of her initial appointment. Having allowed her to write the examination to the next promotional post by treating her as having three years of regular service and having given promotion as stenographer in the year 1994 without any reservation, the respondents are not justified in denying the benefit of regularisation of her service from the date of her initial appointment.

13. It is further to be noted, as rightly contended by the learned counsel for the petitioner, that the respondents have not kept the petitioner's appointment in the surplus pool. In fact, as per the scheme for compassionate appointment, no such requirement is also contemplated, viz., clearance from the surplus cell at the time of making the appointment. Therefore, the respondents are not justified in stating that the petitioner's appointment could not be regularised as several other LDCs were declared surplus that too in a review took place in the year 1989.

14. Learned counsel for the petitioner in support of his submissions relied on the decisions, which we referred to supra. They are as follows:--

(i). In Indian Council of Medical Research and Others Vs. K. Rajalakshmi and Another, , the Hon''ble Division Bench of this Court has held at paragraph as follows:--

28. In service jurisprudence, no post can be treated permanently as temporary. Temporary means only for a certain limited period. When a post being held by a person continues to be held for more than a certain limited period, it cannot be said that it is a temporary post. Such continuance, in a certain post, automatically takes away the character of temporary and takes the character of permanent.

The Hon''ble Division Bench has in fact referred to the decision of the Apex Court reported in State of Haryana and others Vs. Piara Singh and others etc. etc., in support of its conclusion.

(ii). In another decision reported in V. Perumal Vs. The Commissioner and Secretary to the Government, Health and Family Welfare Department, The

Director of Medical Education and The Dean, one of us (N. Paul Vasanthakumar, J.) while allowing a writ petition has held at paragraph 4 as follows:--

4. The grievance of the petitioner is that there is no justification to restrict the relaxation applicable prospectively and not from the date of petitioner's passing the Nursing Assistant test from 30.8.1975. The Government have relaxed the qualification in favour of the petitioner and having regard to the appointment of the petitioner as Hospital Servant on regular basis with effect from 19.3.1965 and having appointed the petitioner as Nursing Assistant Grade II temporarily and the petitioner having completed training on 30.8.1975, there is no justification on the part of the Government to restrict the relaxation only from the date of the order. The relaxation is granted by the Government for the purpose of regularisation of petitioner's service. The regularisation of service cannot be made after 20 years of the petitioner's service. If the impugned Government Order is applied strictly, the petitioner's valuable service of 20 years will get obliterated and the petitioner will not be in a position to get annual increments and other benefits. Hence, the action of the first respondent in restricting the relaxation only from 27.6.1995 is unreasonable and arbitrary in exercise of power.

In the said decision, it was held that the Government having relaxed the qualification in favour of the petitioner therein and having appointed him in a particular post, there was no justification on the part of the Government to restrict relaxation only from the date of the order and by doing so the petitioner's valuable service of 20 years will get obliterated. Here also, the respondents 1 and 2 have admittedly construed the rules liberally and permitted the petitioner to take part in the examination. Thereafter, they cannot turn around and say that the petitioner is not entitled to get the regularisation with effect from the date of her initial appointment.

(iii). In another unreported decision made in W.P. No. 24868 of 2008 dated 18.12.2009, a learned single Judge of this Court by following the above decision of the Hon'ble Division Bench as well as the decision of the learned single Judge reported in Indian Council of Medical Research and Others Vs. K. Rajalakshmi and Another, and V. Perumal Vs. The Commissioner and Secretary to the Government, Health and Family Welfare Department, The Director of Medical Education and The Dean, allowed the writ petition and directed regularisation of the service of the petitioner therein from the original date of appointment.

(iv). In a recent decision made in the case of R. Thirunavukkarasu, M. Sundarajan and C.P. Chitrarasu Vs. The State of Tamil Nadu and Others, , a Division Bench of this Court, wherein one of us (K. Ravichandrababu, J.) was a party, has considered the question of estoppel and observed that a Government cannot approbate and reprobate and the same cannot be permitted by applying the doctrine of estoppel as well. At paragraphs 130 and 131 of the said decision, the Division Bench relied on the decision of the Apex Court reported in Cauvery Coffee Traders, Mangalore Vs. Hornor Resources (Intern.) Company Ltd., , as well

as the subsequent decision of the Apex Court reported in The Rajasthan State Industrial Development and Investment Corporation and Another Vs. Diamond and Gem Development Corporation Ltd. and Another, . The relevant paragraphs 130 and 131 are extracted hereunder:--

130. The conduct of the Government in passing the impugned G.O. is also bad by applying the Rule of estoppel. The stand, which is now taken before us by the Government, is totally contra to the stand taken before the learned single Judge. Thus, it is crystal clear that the Government approbates and reprobates. This cannot be permitted by applying the doctrine of estoppel as well. It is useful to refer, at this juncture, the recent decision of the Apex Court reported in Cauvery Coffee Traders, Mangalore Vs. Hornor Resources (Intern.) Company Ltd., wherein the Apex Court at paragraphs 33 to 35 held as follows:--

33. In R.N. Gosain Vs. Yashpal Dhir, , this Court has observed as under:

Law does not permit a person to both approbate and reprobate. This principle is based on the doctrine of election which postulates that no party can accept and reject the same instrument and that a person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage.

34. A party cannot be permitted to blow hot and cold, fast and loose or approbate and reprobate. Where one knowingly accepts the benefits of a contract or conveyance or an order, is estopped to deny the validity or binding effect on him of such contract or conveyance or order. This rule is applied to do equity, however, it must not be applied in a manner as to violate the principles of right and good conscience. (Vide: Nagubai Ammal and Others Vs. B. Shama Rao and Others, ; Commissioner of Income Tax, Madras Vs. V. Mr. P. Firm, Muar, ; Maharashtra State Road Transport Corporation Vs. Balwant Regular Motor Service, Amravati and Others, ; P.R. Deshpande Vs. Maruti Balaram Haibatti, ; Sri Babu Ram Alias Durga Prasad Vs. Sri Indra Pal Singh (Dead) by Lrs., ; Chairman and M.D., N.T.P.C. Ltd. Vs. Reshmi Constructions, Builders and Contractors, ; Ramesh Chandra Sankla Etc. Vs. Vikram Cement Etc., ; and Pradeep Oil Corporation Vs. Municipal Corporation of Delhi and Another,).

35. Thus, it is evident that the doctrine of election is based on the rule of estoppel- the principle that one cannot approbate and reprobate inheres in it. The doctrine of estoppel by election is one of the species of estoppels in pais (or equitable estoppel), which is a rule in equity. By that law, a person may be precluded by his actions or conduct or silence when it is his duty to speak, from asserting a right which he otherwise would have had.

131. The same view was reiterated once again by the Apex Court in the latest decision reported in The Rajasthan State Industrial Development and Investment Corporation and Another Vs. Diamond and Gem Development Corporation Ltd. and Another, .

Considering all these facts and circumstances and considering the above case laws, we are of the view that the petitioner is entitled to succeed in this writ petition and the order of the Tribunal in rejecting the petitioner's claim for regularisation is not sustainable. Accordingly, the writ petition is allowed and the respondents 1 and 2 are directed to regularise the services of the petitioner with effect from the date of her initial appointment and consequently promote the petitioner to the post of Personal Assistant with effect from the date of promotion given to her junior notionally with all service benefits within a period of four weeks from the date of receipt of copy of this order. No costs.