
(2008) 11 RAJ CK 0049
In the Rajasthan High Court

Narendra Kumar	Vs	APPELLANT
State and Others		RESPONDENT

Date of Decision : 19-11-2008

Acts Referred:

Rajasthan Educational Subordinate Service Rules, 1971 — Rule 27

Citation : (2009) 2 RLW 967 : (2009) 1 WLN 192

Hon'ble Judges : Vineet Kothari, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Vineet Kothari, J.—By this petition, petitioner has prayed for quashing his reversion order dated 2/9/1996 and has sought further direction to the respondents to treat him regularised on the post of Lecturer (School Education) in Mathematics, the post on which he has been working for last 16 years since 1980 when this writ petition was filed in the year 1996.

2. By the impugned order Annex. 1 dated 2/9/1996 the petitioner was reverted back to the post of Gr. II teacher. The petitioner was appointed under Rule 27 of the Rajasthan Education (Subordinate Service) Rules, 1971 (hereinafter referred to as the "Rules, 1971") on the post of Lecturer (School Education) vide order dated 24/9/1980, Annex.5 on record. The said appointment though initially made on ad hoc and temporary basis on the condition that same will continue for a period of one year or till the point of time when the regularly selected candidates from Departmental Promotion Committee or Public Service Commission are available to be appointed against the said post. The said appointment was extended from time to time vide Annex.7 dated 18/11/1982 and Annex.8 dated 9/1/1984. The petitioner has also submitted that vide order dated 20/5/2000 (Annex.9) though certain candidates like Mr. Bhramdutt Kurmi Mohan Lal Sharma and Bheru Lal Mall etc. were available either through PSC or DPC in the year 1984-85 and 1988-89, since petitioner was continuing on the post of Lecturer (School Education) throughout upto the year 1996, there was no good reason to

revert him back after a long lapse of 16 years to the post of Gr. II Teacher.

3. Mr. Hemant Dutt, learned Counsel for the petitioner also urged that original appointment of the petitioner was under Rule 27 of the Rules, 1971 and not under Rule 28 which applies only for urgent temporary appointments and, therefore, the appointment of petitioner was made against substantive vacancy available and he was fully qualified to be appointed as Lecturer (School Education) having obtained the degree of M.Sc. B.Ed., therefore, his Initial appointment also cannot be said to be irregular or illegal in any manner. Relying upon the Constitution Bench decision of Hon''ble Supreme Court in case of Secretary, State of Karnataka and Others Vs. Umadevi and Others, and decisions in cases of Rudra Kumar Sain and Others Vs. Union of India and Others, and M.A. Hameed v. State of A.P and Anr and other judgments from this Court also, Mr. Dutt submitted that there was no justification for reverting back the petitioner after a long lapse of 16 years in the year 1996 and further since petitioner has continued on the said post under the interim order granted by this Court on 1/10/1996 staying the effect and operation of reversion order upto now, there is hardly any justification now after a long lapse of time to revert him back to the post of Gr.II Teacher. He submitted that it is fault of the State Government to have not regularised the services of petitioner on the said post ever since the year 1980 and now after such a long lapse of period the respondents cannot be permitted to revert the petitioner back.

4. On the side opposite, Mr. B.L. Bhati, learned Addl. Government Counsel submits that the petitioner has no right to be regularised on the post of Lecturer (School Education) since his initial appointment itself was subject to condition that as soon as regularly selected candidates are available, he would be reverted back to the post of Gr.II Teacher and irrespective of extension granted to him from time to time, he has no right to be regularised on the said post. He too relied upon the decision of Hon''ble Supreme Court in the case of Uma Devi (Supra).

5. I have heard learned counsels at length and given my thoughtful consideration to the facts of present case and case laws cited at the bar.

6. Hon''ble Supreme Court in the constitution bench decision in the case of Uma Devi (supra) itself noted in para No. 44 as under:

One aspect needs to be clarified. There may be cases of irregular appointments (not illegal appointments) as explained in S.V. Narayanappa, R.N. Nanjundappa (supra), R.N. Nanjundappa (supra) and B.N. Nagarajan (supra) and referred to in paragraph 15 above, of duly qualified persons in duly sanctioned vacant posts might have been made and the employees have continued to work for ten years or more but without the intervention of orders of the courts or of tribunals. The question of regularization of the services of such employees may have to be considered on merits in the light of the principles settled by this Court in the cases above referred to and in the light of this judgment. In that context, the

Union of India, the State Governments and their instrumentalities should take steps to regularize as a one-time measure, the services of such irregularly appointed, who have worked for ten years or more in duly sanctioned posts but not under cover of orders of the courts or of tribunals and should further ensure that regular recruitments are undertaken to fill those vacant sanctioned posts that require to be filled up, in cases where temporary employees or daily wagers are being now employed. The process must be set in motion within a six months from this date. We also clarify that regularization, if any already made, but not sub judice, need not be reopened based on this judgment, but there should be no further bypassing of the constitutional requirement and regularizing or making permanent, those not duly appointed as per the constitutional scheme.

7. In Rudra Kumar Sain's case (supra) while dealing with the case of Judicial Officers, the Hon'ble Apex Court in a Constitution Bench decision held as under:

The High Court of Delhi, in drawing up the seniority list, though proceeded to allocate seniority according to the length of continuous officiation, regardless of whether an appointee held a temporary post or a permanent post or whether he was a promotee or a direct recruit, as directed by the Supreme Court in O.P. Singla case, but committed error by excluding persons on the ground that they held posts on ad hoc basis or for fortuitous reasons or by way of stopgap arrangement, even though appointments had been made under Rules 16 and 17 after due consultation with and/or approval of the High Court and the appointees satisfied the qualification required under Rule 7 of the Recruitment Rules. It is on this score, the ultimate seniority list, drawn up. Stands vitiated. The conclusion of the Committee that a person, promoted to the Higher Judicial Service under Rule 16 or 17 of the rules to a post against which some other person has a lien, would ipso facto make such appointment ad hoc/fortuitous/stopgap, is contrary to the conclusion of this Court in O.P. Singla case. The Supreme Court having categorically directed in that case that if appointments were made under Rule 16 or 17, after due consultation and/or approval of the High Court, and the appointee did qualify to hold the promotional post, as required under Rule 7 of the Recruitment Rules, then such appointment will not be ignored for the purpose of determining the inter se seniority in the cadre and on the other hand, continuous length of service should be the basis, though Rule 8(2) of the Recruitment Rules provides otherwise. Yet, the High Court took shelter under the expression "ad hoc/fortuitous/stopgap" and ignored the continuous length of service of such appointees, while determining the inter se seniority. The High Court appears to have stuck to the idea of the principles engrafted in Rule 8(2) of the Rules and then decided the question of seniority on the basis of number of posts, available in the service.

8. In M.A. Hameed's case (supra) the Hon'ble Supreme Court struck a note of caution that where appointment is temporary or irregular in any manner, reversion should be carried out within a reasonable period and on the facts of the case obtaining before their Lordships, it was held that reversion from the post of

Junior District Inspector of Local Funds (Accounts) after 11 years was not justified. Following the decision of Hon"ble Apex Court in Rudra Kumar Sain's case, the Division Bench of this Court in State and Others Vs. Anil Kumar and Others, laid down as under:

21 Thus, it becomes clear, that as at the time when the petitioners were appointed vide Annex. 1, 2 and 3, the substantive vacancies of Junior Engineers (degree holders) were available, and obviously vide these three orders, appointments had been made, purportedly on an ad-hoc basis, but then, the orders do further show, that these appointments had been made by the Chief Engineer himself, who was the appointing authority, even for making regular appointment by direct recruitment, under Rule 6(4). With this, it is also clear from these three documents, that the procedure employed for appointing the petitioners, may not be the regular selection process, but then some selection process was employed, which was in keeping with the letter and spirit of Article 14 and 16 of the Constitution, inasmuch as, the list of unemployed graduates civil engineers is maintained by the Planning (Man Power) Department of the Government, and from the pleadings it is clear, that the list is maintained on the basis of the marks obtained by the candidate, coupled with the experience acquired, and the list is revised annually i.e. the list can be said to be a list, based on merit, and from out of that list, the names were sent, and they were appointed. Thus, it cannot be said, that the appointment was in utter violation of the letter and spirit of Article 14 and 16 of the Constitution of India.

22. Then the difficulty is, that the word used in the appointment order is "ad-hoc". However the Constitutional Bench of Hon"ble the Supreme Court, in Rudra Kumar Sain and Others Vs. Union of India and Others, has drawn a thorough distinction between the terms "ad-hoc", "fortuitous" and "stop gap". And if the appointment of the petitioners, in the present case, were to be considered on those parameters, the appointment cannot be said to be "adhoc", rather It was nothing except temporary, inasmuch as, in the present case appointment was made to meet the contingency, arising out of the delay in completing the process of regular recruitment to the post, due to any reason, and It was not possible to keep the post vacant till then, and to meet this contingency, if an appointment is made, then it can appropriately be called as a stop gap arrangement. It has further been held by Hon"ble the Supreme Court in the above case, that in service jurisprudence, a person who possesses the requisite qualification for being appointed to a particular post, and then he is appointed with the approval, and consultation, of the appropriate authority, and continues in the post for a fairly long period, then such an appointment cannot be held to be stopgap, or fortuitous, or purely ad-hoc. With these findings, the order of the High Court, excluding the length of service from seniority, rendered as such, was found to be erroneous. Then a look at the provisions of Rule 27 shows, that it does provide for a contingency, where vacancy in service cannot be filled in immediately, the authority competent to make appointment can appoint temporarily thereto, a person eligible for direct recruitment, in the service. The proviso prohibits

continuance of such temporary appointment beyond one year without referring to case to the Commission, where such concurrence is necessary. In the present case, it is not shown, that such occurrence of the Commission was necessary. Thus, the proviso has no applicability. Thus, it cannot be said, that the appointment was made altogether de-hors the rules, rather it was made by competent authority, and can legitimately be said to have been made in the contingency, contemplated by Rule 27, which continued uptill the year 1988, when the regular selection exercise was undertaken, and the petitioners were appointed.

9. It would also be appropriate to reproduce Rule 27 and 28 of the Rules of 1971, as it appears from the initial appointment order of the petitioner (Annex.5) that same was made under Rule 27, whereas, in the reversion order (Annex. 1) the respondents have stated that the petitioner was appointed under Rule 28 of the said Rules.

Part VI -Appointments, Probation and Confirmation

27. Appointment to the Service - Appointments to posts in the service by direct recruitment or by promotion, as the case may be, shall be made by the Appointing Authority on occurrence of substantive vacancies by selection of persons in the manner indicated in rule 22 or in rule 26 and 26.

27-A. Appointment of screened persons - Appointment to the posts in the service shall be made by the Appointing Authority from amongst the persons adjudged suitable under rule 6 of these Rules.

28. Urgent Temporary Appointment - (1) A vacancy in the Service which cannot be filled in immediately either by direct recruitment or by promotion under the rules may be filled in by the Government or by the Competent Authority to make appointments, as the case may be, by appointing in an officiating capacity thereto an officer eligible for appointment to the post by promotion or by appointing temporarily thereto a person eligible for direct recruitment to the Service, where such direct recruitment has been provided under the provisions of these rules:

Provided that such an appointment will not be continued beyond a period of one year without referring the case to the Commission for concurrence, where such concurrence is necessary, and shall be terminated immediately on its refusal to concur.

Provided further that in respect of the service or a post in the service for which both the above methods of recruitment have been prescribed, the Government or the authority competent to make appointment, as the case may be, shall not, save with the specific permission of the Government in the Department of Personnel in case of State Service and Government in the Administrative Department concerned in respect of other services, fill the temporary vacancy against the direct recruitment quota by a whole time appointment for a period

exceeding three months, otherwise than out of persons eligible for direct recruitment and after a short term advertisement.

(2) In the event of non-availability of suitable persons, fulfilling the requirement of eligibility for promotion, Government may, notwithstanding the condition of eligibility for promotion required under Sub-rule (1) above, lay down general instructions for grant of permission to fill the vacancies on urgent temporary basis subject to such conditions and restrictions regarding pay and other allowances as it may direct. Such appointments shall, however, be subject to concurrence of the Commission as required under the said sub-rule.

Provided further that if the Government is satisfied in a year that eligible persons are not available for appointment as Teachers persons who have passed Matriculation Examination/or its equivalent examination and have successfully completed either the emergency short term BSTC Course started by the Government in January/February, 1973 or first year of the regular BSTC Course may be appointment during the year 1974-75, 1975-76, 1976-77 and 1977-78 and there will be no urgent temporary appointment on the posts Teacher from the year 1978-79. Such persons shall be treated as "Untrained" for purpose of pay till they acquire necessary certificate of training or an equivalent qualification.

10. From the above contentions and perusal of Rules and case laws it is clear that the petitioner was appointed as Lecturer (School Education) being fully qualified for the said post under Rule 27 of the Rules way back on 24/9/1980. It is also not disputed that the said appointment was continued and extended from time to time upto the year 1996 i.e. for about 16 years. It also cannot be disputed that though in the meanwhile some selected candidates also became available in the year 1984-85 and 1988-89 but at that point of time also petitioner was not reverted back but was kept in the same position of Lecturer (School Education) upto the year 1996. Keeping a man on ad hoc and temporary basis on a particular post for such a long period cannot be appreciated. The Courts time and again have expressed their concern and anguish at such lethargy and inaction on the part of State functionaries. When persons fully qualified and eligible to be appointed on a particular post are held in such position for long periods and thereafter are reverted back to the original post, it causes serious prejudice to them as in the meanwhile they not only lose their opportunities to get selected through regular selection process but also in most of the cases get age barred. The Hon'ble Supreme Court in Uma Devi's Case (supra) and Rudra Kumar Sain's case (supra) have clearly laid down that where the appointment is made against substantive vacancy even though not following the regular selection process, such appointments even though may be called irregular but not illegal and such employees have continued to work for ten years or more without intervention of the order of Court or Tribunal, their cases for regularization will have to be considered on merits in the light of principles settled by Apex Court.

11. The initial appointment order in the present case made on 24/9/1980 under

Rule 27 of the Rules of 1971 clearly shows that the said appointment was made against the substantive vacancy available with the respondent Department. The condition that the same would be extended for a period of one year or till regularly selected candidates were available lost its significance as not only the petitioner's said ad hoc or temporary appointment continued for a long period of 16 years but it was continued notwithstanding the availability of regularly selected candidates in the meanwhile. Therefore, said condition could not be made the basis for his reversion in the year 1996 when nothing new had happened. A right came to be vested in the petitioner on account of his being continued on the post of Lecturer (School Education) for a long period of 16 years and respondents were bound to regularise him on the said post. The reversion order Annex. 1 dated 2/9/1996, therefore, cannot be justified and is liable to be quashed.

12. Accordingly, this writ petition is allowed and the impugned reversion order dated 2/9/1996 (Annex. 1) is quashed and respondents are directed to consider the case of petitioner for regularization on the post of Lecturer (School Education) in terms of para 44 of the judgment of Hon'ble Supreme Court in case of Umadevi (supra) and give him all consequential benefits due to him. In the facts and circumstances of the case, the respondents shall also pay cost of Rs. 5000/- to the petitioner.