
(1994) 08 GAU CK 0013
In the Gauhati High Court
Case No : Civil Rule No. 2320 of 1994

Prabin Hensua

APPELLANT

Vs

Assam State Electricity Board and Others

RESPONDENT

Date of Decision : 08-08-1994

Acts Referred:

Assam State Electricity Board Employees (General Services) Regulations, 1960 — Rule 9
Constitution of India, 1950 — Article 14, 16, 226
Electricity (Supply) Act, 1948 — Section 79

Citation : (1994) 2 GLR 416

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

Bench : Single Bench

Advocate : B.N. Sarma and M. Sarma, for the Appellant; N.N. Saikia and J. Chutia, for the Respondent

Final Decision : Allowed

Judgement

J.N. Sarma, J.—This application under Article 226 of the Constitution of India has been filed praying to quash the order dated 3.5.94 giving consequential benefits to the Petitioner with a further prayer to regularise the service of the Petitioner in terms of the Circular of April, 1987.

The brief facts are as follows:

2. That the Petitioner read upto Class IX and belongs to Ahom community which is recognised as Other Backward Classes by the Govt. of Assam. That the Petitioner joined the service of Respondent Board on 1.8.88, as Sahayak in the T & T Division North Lakhimpur. The initial appointment of the Petitioner was for 87 days but it as continued by a series of orders and the last order was made on 28.4.94. appointing him upto 14.7.94. It was stated in the orders that these are all officiating arrangements which is purely temporary and it can be terminated at any time Without assigning any reason thereof. Thereafter on 3.11.94 the following order was issued i.e. Office order No. 489:

In pursuance of the Project Manager T & T, Gauhati Memo No. ASEB/PM/TT/Estt-118/Pt. IV/154 (a) dated 26.4.94 received on 2.5.94 intimation that any officiating engagement (which has been banned by the Chairman, AHEB) will be considered, as an act of violation of the Chairman Order. Hence all officiating engagement made by this Division since July/87 in the interest of the Board's work against sanctioned but vacant post in anticipation of approval are hereby discontinued with effect from 3.5.94 (AN).

Hence, this writ application.

3. An affidavit-in-opposition has been filed on behalf of the Respondents where in it has been stated that the circular dated April/87 has already been superseded, and by holding officiating appointments the Petitioner does not acquire any right and, that the termination of the Petitioner is a termination simpliciter. One very important thing which must be considered in this case is that in paragraph 4 of the writ application it has been stated inter-alia as follows:

That, the Petitioner's continuous service as Sahayak runs to about 6 years from 1.8.88 to 3.5.94. The engagement was continuous although the orders show a break of 2/3 days between two spells of appointment. The services of the Petitioner were taken on those break days also but he was not paid for those days.

4. This part of the statement that the service of the Petitioner were taken on the break days also but he was not paid for those days have not been controverted in the affidavit-opposition. So relying on the case of Naseem Banu v. State Uttar Pradesh AIR 1993 SC page 2592, it must be held that part of the statement have been admitted by the Respondents. So let us proceed on the basis that the service of the Petitioner is continuous from 1.8.88 and it continued up to 3.5.94 and there was no break in service though the orders show break in service for 2 to 3 days.

5. Shri B.N. Sarma, Learned Advocate appearing for the Petitioner places reliance on the following decisions and in Rule 9 of the Assam State Electricity Board Employees' Service Regulations. This Regulation was made in pursuance of the power given to the Board to make the Regulation u/s 79(sic) of the Electricity (Supply) Act. 1948. Rule 9 of the Regulation is quoted below:

Regulation 9, Except as otherwise specified at the time of appointment in writing, the service of an employee may be terminated;

(a) Without any notice

(i) at any time, in the case of a casual employee;

(ii) in the case of probationer, during the period of probation or on its expiry;

(iii) in the case of a temporary employee, if the period of temporary employment does not extend beyond 12 calendar months, before the expiry of the said period;

(iv) In the case of all employees, if such termination is the result of disciplinary action or takes place under an agreement which specifies a date for the termination of service.

(b) With notice

of not less than one calendar month on either side as may be specified in the case of a permanent employee or a temporary employee not covered under (a)(i) above, provided that pay in lieu of notice may be ordered by a competent authority in any specific case.

6. Rule 9(a)(i) provides that the service of an employee may be terminated without any notice at any time in the case of casual employee. So, the question which calls for determination in this case is that whether the Petitioner was a casual employee. Because holding that he is the casual employee, this power has been exercised to pass the impugned order.

Shri Sarma, Learned Advocate for the petitioner relies on the following decisions;

(i) Karnataka State Private College Stop-Gap Lecturers Association Vs. State of Karnataka and Others, wherein paragraph 4 the Supreme Court pointed out as follows:

Distinction between appointment against temporary and permanent vacancies are well known in service law. It was unnecessary to make it appear crude. If the purpose was to avoid any possible claim for regularisation by the temporary teachers then it was acting more like a private business house of narrow outlook than government of a welfare State. Such provisions cannot withstand the test of arbitrariness.

(ii) Sri Rabinarayan Mohapartra Vs. State of Orissa and others, wherein relying on Rattan Lal and Others Vs. State of Haryana and Others, the Supreme Court pointed out as follows:

(a) The policy of "ad hocism" followed by the State Government for a long period has led to the breach of Article 14 of the Constitution. Such a situation cannot be permitted to last, any longer. It is needless to say that the State Government is expected to function as a model employer.

(b) An appointment on 89 days basis with one day break which deprives a teacher of his salary for the period of summer vacation and other service benefits is wholly arbitrary and suffers from the vice of discrimination.

(iii) Dr. Mrs. Sumati P. Shere Vs. Union of India (UOI) and Others, wherein the Supreme Court in paragraph 4 pointed out as follows:

We must emphasize that in the relationship of master and servant there is a moral obligation to act fairly.

On the other hand, Shri N.N. Saikia, Learned Advocate for the Respondents places reliance on the following decisions:

(i) AIR 1992 (2) SC 2070 Director Institute of Management Development U.P. v. Smti. Pushpa Srivastava There the Supreme Court laid down as follows:

Where the appointment is purely on ad hoc basis and is contractual and by efflux of time the appointment comes to an end, the person holding such post can have no right to continue in the post. This is so even if the person is continued from time to time on "ad hoc" basis for more than a year. He cannot claim regularisation in service on basis that he was appointed on ad hoc basis for more than a year. (The management was directed to consider sympathetically if regularisation in service is possible.)

(ii) Delhi Development Horticulture Employees' Union Vs. Delhi Administration, Delhi and others, wherein the Supreme Court pointed out as follows:

Those employed under the scheme, therefore, could not ask for more than what the scheme intend to give them. To get an employment under such scheme and to claim on the basis of the said employment, a right to regularisation is to frustrate the scheme itself. No Court can be a party to such exercise.

(iii) State of U.P. and others Vs. Sheo Nandan and others, wherein the Supreme Court pointed out as follows:

(a) The Division Bench, however, was absolutely clear in its mind that seasonal posts created up to the end of August, 1984 to meet the requirement of the procurement season were not intended to be continued by the said direction. The learned single Judge, however, took the view that since the seasonal posts were discontinued at the end of August, 1984 on the ground of want of sanction for continuance of the posts and no other ground, the Petitioners were entitled to be considered for permanent appointment on regular basis by absorbing them in service in accordance with law.

(b) The possibility of others who had not approached the Court being senior to the Petitioners cannot be ruled out.

(iv) AIR 1994 (2) SCC 718 L.I.C. of India v. Asha Ramchandra Ambekar (Mrs.) wherein the Supreme Court pointed out as follows:

(a) It is true that there may be pitiable situations but on that score, the statutory provisions cannot be put aside.

(b) The courts should endeavour to find out whether a particular case in which sympathetic considerations are to be weighed falls within the scope of law. Disregardful of law, however, hard the case may be, it should never be done. In the very case itself, there are regulations and instructions which we have extracted above.

(v) AIR 1994 (2) SCC 630 J & K Public Service Commission and Ors. v. Dr. Narinder Mohan and Ors. wherein the Supreme Court pointed out in paragraph 10 as follows:

The next question is whether the direction given by the High Court to regularise the services of the Respondents is valid in law. It is true that the ad hoc appointees have been continuing from 1986 onwards but their appointments are de hors the Rules. Rules prescribe only two modes of recruitment, namely direct recruitment or promotion by selection. As regards the lecturers are concerned, it is only by direct recruitment. The mode of recruitment suggested by the High Court, namely, regularisation by placing the service record of the Respondents before the PSC and consideration thereof and PSC's recommendation in that behalf is only a hybrid procedure not contemplated by the Rules. Moreover, when the Rules prescribe direct recruitment, every eligible candidate is entitled to be considered and recruitment by open advertisement which is one of the well accepted modes of recruitment. Inviting applications for recruitment to fill in notified vacancies is consistent with the right to apply for, by qualified and eligible persons and consideration of their claim to an office or post under the State is a guaranteed right given under Articles 14 and 16 of the Constitution. The direction, therefore, issued by the Division Bench is in negation of Articles 14 and 16 and in violation to the statutory rules. The PSC cannot be directed to devise a third mode of selection, as directed by the High Court, nor be mandated to disobey the Constitution and the law.

7. The case of Dr. Nurinder Mohan and the law laid down by that court does not apply to the facts of the case in as much as in that case the initial appointment was found to be bad in law as Rules prescribed only two modes of recruitment namely, direct recruitment or promotion by selection, But the Supreme Court found that the regularisation suggested by the High Court will be only a hybrid procedure not contemplated by the Rules. In the instant case, the initial appointment of the Petitioner was by the competent authority. They worked from 1988 without any break.

8. The next case i.e. case of L.I.C. also does not apply to the facts of the present case inasmuch as in that case also Ramachandra Ambekar was an employee of L.I.C He died on September, 1987 and upon his demise his widow submitted an application seeking employment on compassionate ground with the Corporation. That was rejected by the Corporation on the ground that the wife had exceeded the upper age limit of 45 years. Therefore, her request could not be complied with.

9. The next case is 1994 SC 1183 (Supra). It also does not help the Petitioner in deciding the present case. The facts of that case are absolutely different from the facts of the present case.

10. The next case is 1992 SC 789 (Supra). This case also does not help the Petitioner because in that case the persons were employed on daily wages basis but that is not the case here, The Petitioner in this case is working continuously from 1988.

11. The other case that the Director, Institute of Management Development 1992

SC 2070 (Supra) can be distinguished on the facts of the present case.

12. So, the cases which are sought to be relieved by Mr. Saikia do not apply to the facts of the present case.

13. From a bare perusal of the facts of the present case as given in paragraph 4 of the writ petition, it is clear that the Petitioner was in continuous service for a period of 6 years from 1.8.88 to 3.5.94 and On 28.4.94 there was an order to continue the service of the Petitioner upto 14.7.94. But on 3.5.94 the impugned order as quoted above was passed and in that impugned order itself, it is stated that these were sanctioned and vacant posts and only the approval of the Board was anticipated, So, it can never be said that these posts are casual in nature. The termination order dated 3.5.94 Annexure 4(c) itself clearly shows that these posts are not casual in nature but are sanctioned and vacant posts. This being the position it cannot be said that the Petitioner is a casual employee. The Petitioner is a regular employee as he was working against a sanctioned and vacant post and as such, it was the obligation/duty and liability of the Corporation to regularise the Petitioner by the Board and I allow this Writ application with a direction that the service of the Petitioner shall be regularised as the termination order itself shows that these are sanctioned and vacant post.

14. This shall be done within a period of 3 (three) months from the date of receipt of the order.

15. The Petitioner may obtain the certified copy of the order and produce the same before the authority to do the needful in terms of the order. It shall be the duty of the Respondents No. 2 and 3 to comply with this order within 3 (three) months from the date of receipt of this order.