

(2023) 12 OHC CK 0093

In the Orissa High Court

Case No : Writ Petition Civil (OAC) Nos. 4832 Of 2016, 21917 & 21919 Of 2019,
4862 Of 2020

Prabira Kumar Pattanaik & Others

APPELLANT

Vs

State Of Orissa & Others

RESPONDENT

Date of Decision : 13-12-2023

Acts Referred:

Orissa Administrative Tribunal Act, 1985 — Section 19

Citation : (2023) 12 OHC CK 0093

Hon'ble Judges : Biraja Prasanna Satapathy, J

Bench : Single Bench

Advocate : G.R. Sethi, J.K. Digal, H. K. Panigrahi

Final Decision : Disposed Of

Judgement

Biraja Prasanna Satapathy, J.

1. This matter is taken up through Hybrid Arrangement (Virtual/Physical) Mode.
2. Since the issue involved in the present batch of Writ Petitions is identical, all the matters were heard analogously and disposed of by the present common order.
3. Heard learned counsel for the parties.
4. All these writ petitions have been filed inter alia with a prayer to direct the Opp. Parties to regularize the services of the Petitioners with quashing of the advertisement issued by the C.D.M.O, Puri on 15.12.2016.
5. Learned counsels appearing for the Petitioners in the present batch of writ petitions contended that Petitioners were all engaged as Attendant on daily wage basis and for a period of 44 days, in between the year 2006 to 2008, with due approval of their engagement by the Collector-cum-Chariman, Zilla Swasthya Samiti , Puri.

5.1. It is contended that on being so engaged on daily wage basis for a period of 44 days, petitioners were allowed to continue as such without any break in engagement. In spite of such long continuance on daily wage basis and without taking steps to absorb them in the regular establishment, when an advertisement was issued by the CDMO, Puri on 15.12.2006 to fill up 62 posts of Attendant on contractual basis in his office, W.P.C (OAC) No.4832 of 2016 was initially filed by some of the attendants. The Tribunal while issuing notice of the matter vide order dtd.29.12.2016, passed an interim order by directing that no coercive action shall be taken against the Petitioners therein and required number of posts of attendants pursuant to the advertisement may not be filled up till filing of the counter and its adjudication.

5.2. It is contended that on the face of the order passed by the Tribunal, when this Court disposed of WP(C) No.4301 of 2020 vide order dtd.10.02.2020 with a direction to fill up the post of contractual attendant and the same shall be subject to final outcome of W.P.C(OAC)) No.4832 of 2016, the matter was challenged before this Court in W.A. No.205 of 2020. This Court while disposing Writ Appeal No.205 of 2020 issued the following direction. Relevant portion of the order reflected in paragraph 6 & 7 are quoted hereunder.

"6. In view of the above, this Court while setting aside the impugned order remits the matter back to the Single Bench for fresh disposal along with pending Writ Petitions.

7. So far as the appellants are concerned, it is submitted that they are continuing in their service. Since the similarly situated persons are continuing in service, the present appellants shall continue in their service as such which shall be subject to result of W.P.(C) No.4301 of 2020. This Court further directs the opposite parties to go ahead with the selection process, if there is no other impediment for engagement of Attendants as per the advertisement but out of 61 posts, 20 posts shall be kept vacant keeping in mind the number of petitioners involved in the earlier described Writ Petitions as well as the present appeal."

5.3. Learned counsel for the Petitioners contended that even though this Court while disposing the Writ Appeal NO.205 of 2020 directed to keep 20 posts of Attendant reserve for the Petitioners who are continuing on daily wage basis since the year 2006 -2008, but in fact because of the interim order initially passed in WP(C) NO.4832 of 2016, the selection process in terms of advertisement dtd.15.12.2016 was not proceeded with by filling up the posts on contractual basis.

5.4. Learned counsel for the Petitioners also contended that since the Petitioners from the year 2006-2008 are all continuing as Attendant in the establishment of CDMO, Puri on daily wage basis in view of the decision of the Hon'ble Apex Court so reported in the case of Secretary, State of Karnataka vs. Uma Devi (3), (2006) 4 SCC-1, State of Karnatak vs. M.L.Keshari, (2010) 9 SCC 247, Nihal Singh & Others vs. State of Punjab & Others, 2013 (14) SCC 65 and Amarkant

Rai vs. State of Bihar & Others, 2015 (8) SCC 265 ,they have accrued a right of regularization in their favour.

5.5. Hon'ble Apex Court in the case of Uma Devi in Para- 44 has held as follows:-

"44. One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in S.V. Narayanappa (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 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 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 wages are being now employed. The process must be set in motion within six months from this date. We also clarify that regularisation, if any already made, but not subjudice, need not be reopened based on this judgement, but there should be no further by passing of the constitutional requirement and regularizing or making permanent, those not duly appointed as per the constitutional scheme."

5.6. Similarly Hon'ble Apex Court in the case of M.L. Keshari in Para- 8 and 13 has held as follows:-

"8. Umadevi (3) casts a duty upon the Government or instrumentality concerned, to take steps to regularise the services of those irregularly appointed employees who had served for more than ten years without the benefit or protection of any interim orders of courts or tribunals, as a one-time measure. Umadevi (3) directed that such one-time measure must be set in motion within six months from the date of its decision (rendered on 10-4-2006).

13. The Division Bench of the High Court has directed that the cases of the respondents should be considered in accordance with law. The only further direction that needs to be given, in view of Umadevi (3), is that the Zila Panchayat, Gadag should not undertake an exercise within six months, as a general one-time regularisation exercise, to find out whether there are daily-wage/casual/adhoc employees serving the Zila Panchayat and if so whether such employees (including the respondents) fulfil the requirements mentioned in para-53 of Umadevi (3). If they fulfill them, their services have to be regularised. If such an exercise has already been undertaken by ignoring or omitting the cases of Respondents 1 to 3 because of the pendency of these cases, then their cases shall have to be considered in continuation of the said one-time exercise

within three months. It is needless to say that if the respondents do not fulfill the requirements of para 53 of Umadevi (3), their services need not be regularised. If the employees who have completed ten years' service do not possess the educational qualifications prescribed for the post, at the time of their appointment, they may be considered for regularisation in suitable lower posts."

5.7. In the case of Nihal Singh in Para-35 to 38, Apex Court has held as follows:-

"35. Therefore, it is clear that the existence of the need for creation of the posts is a relevant factor with reference to which the executive government is required to take rational decision based on relevant consideration. In our opinion, when the facts such as the ones obtaining in the instant case demonstrate that there is need for the creation of posts, the failure of the executive government to apply its mind and take a decision to create posts or stop extracting work from persons such as the appellants herein for decades together itself would be arbitrary action (inaction) on the part of the State.

21. In the first instances, the petitioner and the other Election Commissioners were appointed when the work of the Commission did not warrant their appointment. The reason given by Respondent 1 (Union of India), that on account of the Constitution (61st Amendment) Act reducing the voting age and the Constitution (64th Amendment) and (65 Amendment) Bills relating to election to the Panchayats and Nagar Paliks, the work of the Commission was expected to increase and, therefore, there was need for more Election Commissioners, cuts no ice. As has been pointed out by Respondent 2, the work relating to revision of electoral roll on account of the reduction of voting age was completed in all the States except Assam by the end of July 1989 itself, and at the Conference of the Chief Electoral Officers at Tirupati. Respondent 2 had declared that the entire preparatory work relating to the conduct of the then ensuing general elections to the Lok Sabha would be completed by August in the whole of the country except Assam. Further the Constitution (64th and 65th Amendment) Bills had already fallen in Parliament before the appointments. In fact, what was needed was more secretarial staff for which the Commission was pressing, and not more Election Commissioners. What instead was done was to appoint the petitioner and the other Election Commissioner on 16.01.1989. Admittedly, further the view of the Chief Election Commissioner were not ascertained before making the said appointments. In fact, he was presented with them for the first time in the afternoon of the same day i.e, 16-10-1989.

36. The other factor which the State is required to keep in mind while creating or abolishing posts is the financial implications involved in such a decision. The creation of posts necessarily means additional financial burden on the exchequer of the State. Depending upon the priorities of the State, the allocation of the finance is no doubt exclusively within the domain of the legislature. However in the instant case creation of new posts would not create any additional financial burden to the State as the various banks at whose disposal the services of each of the appellants is made available have agreed to bear the burden. If absorbing

the appellants into the services of the State and providing benefits on a par with the police officers of similar rank employed by the State results in further financial commitment it is always open for the State to demand the banks to meet such additional burden. Apparently no such demand has ever been made by the State. The result is the various banks which avail the services of these appellants enjoy the supply of cheap labour over a period of decades. It is also pertinent to notice that these banks are public sector banks.

37. We are of the opinion that neither the Government of Punjab nor these public sector banks can continue such a practice consistent with their obligations to function in accordance with the Constitution. Umadevi (3) judgement cannot become a licence for exploitation by the State and its instrumentalities.

38. For all the abovementioned reasons, we are of the opinion that the appellants are entitled to be absorbed in the services of the State. The appeal are accordingly allowed. The judgements under appeal are set aside."

5.8. In the case of Amarkanti Rai, Hon'ble Apex Court in Para-8, 9, 11 to 14 has held as follows:-

"8. Insofar as contention of the respondent that the appointment of the appellant was made by the Principal who is not a competent authority to make such appointment and is in violation of the Bihar State Universities Act and hence the appointment is illegal appointment, it is pertinent to note that the appointment of the appellant as night guard was done out of necessity and concern for the College. As noticed earlier, the Principal of the College vide letters dated 11-3-1988, 7-1-1993, 8-1-2002 and 12-7-2004 recommended the case of the appellant for regularisation on the post of night guard and the University was thus well acquainted with the appointment of the appellant by the then Principal even though the Principal was not a competent authority to make such appointments and thus the appointment of the appellant and other employees was brought to the notice of the University in 1988. In spite of that, the process for termination was initiated only in the year 2001 and the appellant was reinstated w.e.f. 3-1-2002 and was removed from services finally in the year 2007. As rightly contended by the learned counsel for the appellant, for a considerable time, the University never raised the issue that the appointment of the appellant by the Principal is ultra vires the rules of the BSU Act. Having regard to the various communications between the Principal and the University and also the educational authorities and the facts of the case, in our view, the appointment of the appellant cannot be termed to be illegal, but it can only be termed as irregular.

9. The Human Resources Development, Department of Bihar Government, vide its Letter dated 11-7-1989 intimated to the Registrar of all the Colleges that as per the settlement dated 26-4-1989 held between Bihar State University and College Employees' Federation and the Government it was agreed that the services of the employees working in the educational institutions on the basis of

prescribed staffing pattern are to be regularised. As per sanctioned staffing pattern, in Ramashray Baleshwar College, there were two vacant posts of Class IV employees and the appellant was appointed against the same. Further, Resolution No. 989 dated 10-5-1991 issued by the Human Resources Development Department provides that employee working up to 10-5-1986 shall be adjusted against the vacancies arising in future. Although, the appellant was appointed in 1983 temporarily on the post that was not sanctioned by the State Government, as per the above communication of the Human Resources Development Department, it is evident that the State Government issued orders to regularise the services of the employees who worked up to 10-5-1986. In our considered view, the High Court ought to have examined the case of the appellant in the light of the various communications issued by the State Government and in the light of the circular, the appellant is eligible for consideration for regularisation.

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11. Elaboration upon the principles laid down in Umadevi (3) Case and explaining the difference between irregular and illegal appointments in State of Karnataka Vs. M.L Kesari, this Court held as under (ML Kesari case SSC p 250, para 7) 7. It is evident from the above that there is an exception to the general principles against 'regularisation enunciated in Umadevi (3). if the following conditions are fulfilled:

(i) The employee concerned should have worked for 10 years or more in duly sanctioned post without the benefit or protection of the interim order of any court or tribunal. In other words, the State Government or its instrumentality should have employed the employee and continued him in service voluntarily and continuously for more than ten years.

(ii) The appointment of such employee should not be illegal, even if irregular Where the appointments are not made or continued against sanctioned posts or where the persons appointed do not possess the prescribed minimum qualifications, the appointments will be considered to be illegal., But where the persons employed possessed the prescribed qualifications and was working against sanctioned posts, but had been selected without undergoing the process of open competitive selection, such appointments are considered to be irregular."

12. Applying the ratio of Umadevi (3) case, this Court in Nihal Singh v. State of Punjab directed the absorption of the Special Police Officers in the services of the State of holding as under: (Nihal Singh Case, SCC pp. 79-80, paras- 35-36)

"35. Therefore, it is clear that the existence of the need for creation of the posts is a relevant factor with reference to which the executive government is required to take rational decision based on relevant consideration. In our opinion, when the facts such as the ones obtaining in the instant case demonstrate that there is need for the creation of posts, the failure extracting work from persons such as the appellants herein for decades together itself would be arbitrary action

(inaction) on the part of the State.

36. The other factor which the State is required to keep in mind while creating or abolishing posts is the financial implications involved in such a decision. The creation of posts necessarily means additional financial burden on the exchequer of the State. Depending upon the priorities of the State, the allocation of the finances is no doubt exclusively within the domain of the legislature. However in the instant case creation of new posts would not create any additional financial burden to the State as the Various banks at whose disposal the services of each of the appellants is made available have agreed to bear the burden. If absorbing the appellants into the services of the State and providing benefits on a par with the police officers of similar rank employed by the State results in the banks to meet such additional burden Apparently no such demand has ever been made by the State. The result is the various banks which avail the services of these appellants enjoy the supply of cheap labour over a period of decades. It is also pertinent to notice that these banks are public sector banks

13. In our view, the exception carved out in para 53 of Umadevi (3)3 is applicable to the facts of the present case. There is no material placed on record by the respondents that the appellant has been lacking any qualification or bore any blemish record during his employment for over two decades. It is pertinent to note that services of similarly situated persons on daily wages for regularisation viz. one Yatindra Kumar Mishra who was appointed on daily wages on the post of Clerk was regularised w.e.f. 1987. The appellant although initially working against unsanctioned post, the appellant was working continuously since 3-1-2002 against sanctioned post. Since there is no material placed on record regarding the details whether any other night guard was appointed against the sanctioned post, in the facts and circumstances of the case, we are inclined to award monetary benefits to be paid from 1.-1-2010.

14. Considering the facts and circumstances of the case that the appellant has served the University for more than 29. years of the post of night guard and that he has served the College on daily wages, in the interest of justice, the authorities are directed to regularise the services of the appellant retrospectively w.ef. 3-1- 2002 (the date on which he rejoined the post as per the direction of the Registrar)."

5.9. Learned counsel for the petitioners also relied on another decisions of this Court so passed on 02.05.2023 in WPC (OAC) NOs.1568 of 2018 and 4573 of 2016. It is contended that the judgment of this Court so passed on 02.05.2023 in the aforesaid two Writ Petitions has been confirmed by the Writ Appellate Court vide order dtd.07.11.2023 in Writ Appeal No.2427 of 2023. This Court in Paragraph-8.7 of the judgment has held as follows:-

" 8.7. In view of the materials available on record and in view of such long continuance for more than 20 years, it is to be held that the Petitioners are continuing as against substantive vacancies and the Opposite Parties are

required to absorb the Petitioners in the regular establishment and/or in the work charged establishment. Therefore, this Court placing reliance on the decisions as cited (supra) directs the Opposite Parties to absorb the Petitioners in the regular establishment and/or in the work charged establishment within a period of three (3) months from the date of receipt of this order.”

6. It is also contended that initially this Court vide order dt.03.08.2021 when disposed of WPC (OAC) NO.4832 of 2016 with a direction on the Opp. Parties to consider the case of the Petitioners for their regularization keeping in view the decision of the Hon’ble Apex Court in the case of Uma Devi and M.L. Keshari vide order dtd.03.08.2021, the same was challenged by the State machineries in Writ Appeal No.748 of 2022. Vide Order dtd.04.04.2023, WPC (OAC) No.4832 of 2016 was remanded for fresh disposal by the Writ Appellate Court while setting aside the order dtd.03.08.2021. It is accordingly contended that since the petitioners in the present batch of Writ Petitions are continuing on daily wage basis since w.e.f the year 2006-2008 as Attendant in the establishment of CDMO, Puri without any break in engagement, in view of the decisions of the Hon’ble Apex Court as cited (supra) and the decisions rendered by this Court in its judgment dated 02.05.2023, so confirmed in Writ Appeal No.2427 of 2023, Petitioners are eligible and entitled to get the benefit of regularization of their services. It is however contended that Petitioners in the present batch of Writ Petitions though are continuing and discharging their duties as attendants, but they are not getting their wages.

6.1. Learned Addl. Standing Counsel on the other hand made his submission basing on the stand taken by Opp. Party No.3 in his counter.

Even though in the counter, a stand has been taken that the Petitioners are working in different wings of District Headquarter Hospital, Puri since last 17 years sincerely and honesty and with utmost satisfaction of the authority and several communications have been made to the higher authorities on behalf of Opp. Party NO.3 to consider the claim of the Petitioners for their regularization, but no decision has yet been received. It is further contended that, in absence of appropriate order from the higher authority, Opp. Party NO.3 is not in a position to consider the grievance of the Petitioners for their regularization in service. This stand as has been taken in Paragraph-4 of the counter so filed by Opp. Party NO.3 is reproduced hereunder:

4. That in reply to the averments made in Para 6.6 of the Original application, it is humbly submitted that the Petitioner have been working in different wings of DHH,Puri since 17 years and above. They are doing their duty very sincerely and honestly with utmost satisfaction of the competent authorities. Several letters had also been communicated to Higher Authorities on behalf of the Opp. party No.3 to consider their case for regularization of their service, but, no reply in this regard has received by the O.P. NO.3 till date. As per Health & FW Department Letter NO.25987 dt.08.12.2016, advertisement was made vide NO.10683 dt.15.12.2016 to fill up 62 (sixty two) NOs. of Attendant Posts, for which it does

not come under jurisdiction of the O.P. NO.3 i.e. Chief District Medical & Public Health Officer, Puri to take any steps for absorption/regularization of existing daily wages/NHM/ZSS or any project against the regular post until any communication received from the Govt.

7. Considering the rival submissions made by the learned counsel appearing for the parties, this Court when directed the State counsel to obtain instruction with regard to the status of the recruitment process so initiated in terms of the advertisement dtd.15.12.2016, instruction provided by the CDMO, Puri vide his letter dtd.31.10.2023 was produced before this Court. This Court after going through the instruction found that the selection process initiated to fill up 62 posts of contractual attendants in terms of advertisement dtd.15.12.2016 was stopped because of the interim order passed by the Tribunal in WPC (OAC) NO.4832 of 2016 and in some other similar matters. It has also been indicated that all the Petitioners are continuing as Attendant on daily wage basis since their initial date of engagement from the year 2006-2008.

8. Having heard learned counsel for the parties and after going through the materials available on record, this Court finds that all the Petitioners were engaged as Attendant on daily wage basis with due approval of the Collector-cum-Chairman, Zilla Swasthya Samiti, Puri vide orders issued starting from 15.11.2006 onwards. As admitted by Opp. Party No.3, all the petitioners are continuing as Attendant on daily wage basis since their initial date of engagement with effect from the year 2006-2008. It is also found from the instruction provided by the CDMO that the selection process initiated to fill up 62 number of posts of attendant on contractual basis in terms of advertisement issued on 15.12.2016 has not been undertaken and all the petitioners are continuing as such till date.

8.1. In view of such position and placing reliance on the decisions of the Hon'ble Apex Court as cited (supra) and so also the decisions of this Court passed on 02.05.2023 in WPC (OAC) NO.1568 of 2018 and another, this Court while disposing the Writ Petition directs Opp. Party No.1 to 3 to take effective steps for regularization of the services of the Petitioners as against those 62 posts so sanctioned by the Government to fill up on contractual basis. Such a decision be taken by Opp. Party Nos.1 to 3 within a period of three (3) months from the date of receipt of this order. Till such a decision is taken, the Petitioners in the present batch of Writ Petitions be allowed to continue. It is also observed that Petitioners be paid with their wages as due and admissible if it has not been paid, as contended by the learned counsel appearing for the Petitioners.

All the Writ Petitions are accordingly disposed of.

Photocopy of the order be placed in the connected cases.

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