
(2012) 10 GAU CK 0056
In the Gauhati High Court
Case No : Writ Petition (C) No. 581 of 2001

Pradip Kumar Das

APPELLANT

Vs

State of Tripura and Others

RESPONDENT

Date of Decision : 08-10-2012

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 162, 309, 73
Government of India Act, 1935 — Section 49, 8

Citation : (2013) 1 GLD 613 : (2013) 2 GLT 665 : (2013) 1 GLT 1

Hon'ble Judges : T. Nandakumar Singh, J

Bench : Single Bench

Advocate : D. Bhattacharjee, for the Appellant; A. Ghosh, GA, for the Respondent

Final Decision : Allowed

Judgement

T. Nandakumar Singh, J.—Question arises for consideration, in this writ petition, is as to whether the petitioner, who was promoted to the post of Superintendent (KVI/RAP) on the recommendation of the DPC (duly constituted) on ad hoc basis for an indefinite period vide order of the Director of Industries & Commerce, Tripura dated 14.12.1993, is entitled to the reliefs sought for in the present writ petition for a direction to the respondents to regularize his ad hoc appointment to the said post w.e.f. the date of his initial ad hoc appointment at the time of regularization of ad hoc service vide order of the Director of Industries & Commerce, Tripura dated 2.3.2001. Heard Mr. D. Bhattacharjee, learned counsel appearing for the petitioner as well as Mr. A. Ghosh, learned G.A. appearing for the respondents.

2. For appreciating the submission of Mr. Bhattacharjee, learned counsel for the petitioner, a brief reference to the facts leading to the filing of the present writ petition would suffice:

The petitioner joined his service in the Department of Industries & Commerce as Inspector (Stenography), which was subsequently re-designated as Senior

Instructor (Stenography), on 19.9.1985. Thereafter, on the recommendation of the duly constituted Class III Promotion Committee in its meeting held on 12.10.1993 in the office Chamber of Director of Industries, Govt. of Tripura, promoted to the post of Superintendent (KVI/RAP), which is a post of non engineering group, from the date of issue of the order until further orders vide order of the Director of Industries, Tripura dated 14.12.1993. From the manner of ad hoc appointment of the petitioner by promotion to the post of Superintendent (KVI/RAP) 3(three) conditions are clear that-

(i) the ad hoc promotion of the petitioner to the post of Superintendent (KVI/RAP) was on the recommendation of the duly constituted D.P.C;

(ii) his ad hoc promotion to the post of Superintendent (KVI/RAP) was for an indefinite period; and

(iii) there was a substantive vacancy in the post of Superintendent (KVI/RAP).

3. Pursuant to the said order of the Director of Industries, Tripura dated 14.12.1993 which was effective from the date of issue of the order until further orders, the petitioner continued to serve as ad hoc Superintendent (KVI/RAP) without any break till the ad hoc service of the petitioner was regularized vide another order of the Director of Industries & Commerce, Govt. of Tripura dated 2.3.2001 w.e.f. the date of joining to his place of posting as mentioned against his name. At the time of appointment of the petitioner by promotion on ad hoc basis vide the said order dated 14.12.1993 on the recommendation of the regular DPC (duly constituted DPC) there was no Recruitment Rules (R.R. for short) for the post of Superintendent (KVI/RAP) framed under Art. 309 of the Constitution of India inasmuch as R.R. for the said post under Art. 309 of the Constitution of India was framed only on 30.4.1994.

4. The petitioner filed a number of representations to the Director of Industries & Commerce, Govt. of Tripura and the Commissioner cum-Secretary, Department of Industries & Commerce, Govt. Tripura for retrospective regularization of his ad hoc service as Superintendent (KVI/RAP) w.e.f. the date of his initial ad hoc appointment i.e. 14.12.1993. The said representations filed by the petitioner were not acceded to and accordingly the present writ petition.

5. The respondent Nos. 1 to 3 filed joint affidavit in-opposition; and in their joint affidavit in-opposition the State respondents are not denying or not disputing that the petitioner was appointed by promotion on ad hoc basis on the recommendation of the duly constituted DPC to the post of Superintendent (KVI/RAP) and that there was substantive vacancy in the post of Superintendent (KVI/RAP). Two grounds for denying the retrospective regularization of the ad hoc appointment of the petitioner to the post of Superintendent (KVI/RAP) from the date of his initial ad hoc promotion, i.e. 14.12.1993 are that (i) at the time of ad hoc appointment of the petitioner to the said post, there was no R.R. for the said post framed under Art. 309 of the Constitution of India and Recruitment Rules under Art. 309 of the Constitution of India cannot be framed with retrospective

effect and (2) when the petitioner was holding the post of Superintendent (KVI/RAP) on ad hoc basis w.e.f. 14.12.93 there were some eligible employees who were given ad hoc appointment and those were senior to the petitioner and had already retired on superannuation and in the case of retrospective regularization of the ad hoc service of the petitioner w.e.f. the date of his initial appointment, the case of the seniors who were holding the post on ad hoc basis are also to be considered and regularized with effect from their initial ad hoc appointment. Relevant portion of the joint affidavit-in-opposition (as it is) from the mouth of Shri Dibyendu Kumar Das Gupta who sworn the affidavit read as follows:

(Second DPC) for regularization of the ad hoc appointment of the petitioner as Superintendent (KVI/RAP):

.....The DPC has recommended the regularization of ad hoc promotion of the petitioner in the post of Superintendent (MCU) from the prospective date considering the following points:

(i) The petitioner had joined to the post of Superintendent (KVI/RAP) on ad hoc basis w.e.f. 14.12.1993 whereas Recruitment Rules for the said post framed as on 30.4.94 as such before framing Recruitment Rules, regularization(sic) cannot be done from(sic) retrospective effect.

(ii) The petitioner was holding the post of Superintendent (KVI/RAP) on ad hoc basis w.e.f. 14.12.93 but prior to (sic) the some eligible employees were given ad hoc appointment of those are senior to the petitioner has gone retirement. Even the regularization of the petitioner is considered from retrospective effect i.e. 14.12.93 then the question of regularization of the retired employees may also come for consideration which may create irregularity and inconvenience in administrative work and for this his representation was not considered. Being aggrieved the petitioner filed this writ petition and claimed relief as mentioned above.

6. It is the further case of the petitioner that in the case of one Shri Pankaj Gupta, Field Assistant, who was appointed on ad hoc basis to officiate in the post of Inspector in the Directorate of Industries, his ad-hoc service was regularized w.e.f. the date of his initial ad hoc appointment, i.e. 4.3.1981 vide order of the Director of Industries & Commerce, Tripura dated 8.12.1998 and also in the case of Shri PP Sinha Chowdhury, Geologist, who was appointed on ad hoc basis to the post of Additional Director of Industries vide order dated 26.4.1994, his ad hoc appointment as Addl. Director of Industries was regularized w.e.f. the date of his initial ad hoc appointment, i.e. 06.11.1992 vide order of the Government of Tripura dated 17.1.2001. These facts of retrospective regularization were not denied by the respondents in their joint affidavit in-opposition, but the explanation given by the respondents, in their joint affidavit, was that juniors were already appointed to the respective higher posts.

7. As such one of the grounds for denying retrospective regularization of the ad hoc service of the petitioner as Superintendent (KVI/RAP) was that at the time of

initial promotion of the petitioner to the post of Superintendent (KVI/RAP) on the recommendation of a regular DPC on ad hoc basis for an indefinite period against the substantive vacant post of Superintendent (KVI/RAP) there was no R.R. This ground for denying retrospective regularization of ad hoc service of the petitioner is not sustainable for the reasons that it is not obligatory under proviso to Art. 309 of the Constitution of India to make Rules/Recruitment etc. before a service can be constituted or a post created or filled up. A Constitution Bench of the Apex Court (C/B) in B.N. Nagarajan and Others Vs. State of Mysore and Others, clearly held:

(5) It would be convenient to deal with this argument at this stage. Mr. Nambiar contends that the words "shall be as set forth in the rules of recruitment of such service specially made in that behalf clearly show that till the rules are made in that behalf no recruitment can be made to any service. We are unable to accept this contention. First it is not obligatory under proviso to Art. 309 to make rules of recruitment, etc. before a service can be constituted or a post created or filled. This is not to say that it is not desirable that ordinarily rules should be made on all matters which are susceptible of being embodied in rules. Secondly, the State Government had executive power, in relation to all matters with respect to which the Legislature of the State has power, to make laws. It follows from this that the State Government will have executive power in respect of List II, Entry 41, State Public Services. It was settled by this Court in Rai Sahib Ram Jawaya Kapur and Others Vs. The State of Punjab, , that it is not necessary that there must be a law already in existence before the executive is enabled to function and that the powers of the executive are limited merely to the carrying out of these laws. We see nothing in the terms of Article 309 of the Constitution which abridges the power of the executive to act under Art. 162 of the Constitution without a law. It is hardly necessary to mention that if there is a statutory rule or an act on the matter, the executive must abide by that act or rule and it cannot in exercise of the executive power under Art. 162 of the Constitution ignore or act contrary to that rule.

8. Under Art. 162 of the Constitution of India, the executive powers of the State shall extend to the matters with respect to which the legislator of the State has the power to make law. The executive powers of the State shall be subjected to, and limited by, the executive power expressly conferred by the Constitution or by any law made by the Parliament upon the Union or authorities thereof. Therefore, the executive powers of the State shall extend to all the matters with respect to which the legislator of the State has power to make laws subject to, and limited by, the Constitution or by any law made by the Parliament upon the Union or authorities thereof and also subject to law made by the legislator of a State and Parliament. In the absence of Recruitment Rules for the post of Superintendent (KVI/RAP) under Art. 309 of the Constitution of India, the State Government in its executive side has all the powers to make regular appointment to the post of Superintendent (KVI/RAP) on the recommendation of the regular DPC and also that there is no law that there cannot be regular DPC for promotion to a post in

the absence of recruitment rules for that post framed under Art. 309 of the Constitution of India, but in case there is Recruitment Rules for a particular post framed under Art. 309 of the Constitution of India, the executive powers of the State for filling up of that post should be controlled by the Recruitment Rules framed under Art. 309 of the Constitution of India.

9. The Apex Court (Constitution Bench) about more than half a century ago had discussed the executive power of the State under Art. 162 of the Constitution of India in *Rai Sahib Ram Jawaya Kapur and Others Vs. The State of Punjab*, and held that:

7. Article 73 of the Constitution relates to the executive powers of the Union, while the corresponding provision in regard to the executive powers of a State is contained in article 162. The provisions of these articles are analogous to those of section 8 and 49 respectively of the Government of India Act, 1935 and lay down the rule of distribution of executive powers between the Union and the States, following the same analogy as is provided in regard to the distribution of legislative powers between them. Article 162, with which we are directly concerned in this case, lays down:

Subject to the provisions of this Constitution, the executive power of a State shall extend to the matters with respect to which the Legislature of the State has power to make laws:

Provided that in any matter with respect to which the Legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by this Constitution or by any law made by Parliament upon the Union or authorities thereof.

Thus under this article the executive authority of the State is executive in respect to matters enumerated in List II of Seventh Schedule. The authority also extends to the Concurrent List except as provided in the Constitution itself or in any law passed by the Parliament. Similarly, article 73 provides that the executive powers of the Union shall extend to matters with respect to which the Parliament has power to make laws and to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or any agreement. The proviso engrafted on clause (1) further lays down that although with regard to the matters in the Concurrent List the executive authority shall be ordinarily left to be State it would be open to the Parliament to provide that in exceptional cases the executive power of the Union shall extend to these matters also. Neither of these articles contain any definition as to what the executive function is and what activities would legitimately come within its scope. They are concerned primarily with the distribution of the executive power between the Union on the one hand and the States on the other. They do not mean, as Mr. Pathak seems to suggest, that it is only when the Parliament or the State Legislature has legislated on certain items appertaining to their respective lists,

that the Union or the State executive, as the case may be, can proceed to function in respect to them. On the other hand, the language of article 162 clearly indicates that the powers of the State executive do extend to matters upon which the state Legislature is competent to legislate and are not confined to matters over which legislation has been passed already. The same principle underlies article 73 of the Constitution. These provisions of the Constitution therefore do not lend any support to Mr. Pathak's contention.

13. The limits within which the executive Government can function under the Indian Constitution can be ascertained without much difficulty by reference to the form of the executive which our Constitution has set up. Our Constitution, though federal in its structure, is modelled on the British Parliamentary system where the executive is deemed to have the primary responsibility for the formulation of governmental policy and its transmission into law though the condition precedent to the exercise of this responsibility is its retaining the confidence of the legislative branch of the State. The executive function comprises both the determination of the policy as well as carrying it into execution. This evidently includes the initiation of legislation, the maintenance of order, the promotion of social and economic welfare, the direction of foreign policy, in fact the carrying on or supervision of the general administration of the State.

10. The Apex Court (C/B) in Sant Ram Sharma Vs. State of Rajasthan and Another, held that it cannot be said that till statutory rules governing promotion to selection grade post are framed, Govt. cannot issue administrative instructions proposed to be followed and also that if cases for all the eligible candidates are considered before appointment to such posts there is no violation of Articles 14 and 16. Para 7 and 8 of the AIR in Sant Ram Sharma's case(supra) read as follows:

7. We proceed to consider the next contention of Mr. N.C. Chatterjee that in the absence of any statutory rules governing promotions to selection grade posts the Government cannot issue administrative instructions and such administrative instructions cannot impose any restrictions not found in the Rules already framed. We are unable to accept this argument as correct. It is true that there is no specific provision in the Rules laying down the principle of promotion of junior or senior grade officers to selection grade posts. But that does not mean that till statutory rules are framed in this behalf the Government cannot issue administrative instructions regarding the principle to be followed in promotions of the officers concerned to selection grade posts. It is true that Government cannot amend or supersede statutory rules by administrative instructions, but if the rules are silent on any particular point Government can fill up the gaps and supplement the rules and issue instructions not inconsistent with the rules already framed.

8. In B.N. Nagarajan and Others Vs. State of Mysore and Others, , it was pointed out by this Court that it is not obligatory under the proviso to Art, 309 of the

Constitution to make rules of recruitment, etc., before a service can be constituted or a post created or filled, and, secondly, the State Government has executive power, in relation to all matters with respect to which the Legislature of the State has power, to make laws. It follows from this that the State Government will have executive power in respect of Sch. 7, List II. Entry 41, State Public Services, and there is nothing in the terms of Art. 309 of the Constitution which abridges the power of the executive to act under Art. 162 of the Constitution without a law. A similar view was taken by this Court in *T. Cajee Vs. U. Jormanik Siem and Another*, .

11. The Apex Court in *Rajbir Singh and others Vs. Union of India and others*, held that-

2. It is well settled by several decisions of this Court that an appointment against a purely temporary ad hoc or fortuitous post does not entitle the holder of the post to be a member of the service and as such, such fortuitous or ad hoc appointment does not entitle the holder of the post to get the benefit of the period of such ad hoc or fortuitous service. Nevertheless, if a person is appointed against a substantive vacancy and is subsequently promoted to continue on ad hoc basis to hold such posts for a number of years, then, in that case the appointment though made on ad hoc basis has to be taken into consideration in reckoning the seniority of the holder on that basis. In the instant case, there is no whisper on the part of the Railway Authorities that the appellants who are already member of the service by being appointed in class IV posts since 1971 and subsequently promoted in 1975 on ad hoc basis after holding regular tests and finding them qualified to be promoted and has actually been regularized and promoted in class III service and their services were subsequently regularized in the said posts in 1986. In such circumstances, it cannot be said that such ad hoc service for a period of about 11 years will not be taken into account in determining the seniority of the holders of the class III post, i.e., the appellants.

12. The Apex Court had discussed the ratio decidendi of the case *The Direct Recruit Class-II Engineering Officers' Association and others Vs. State of Maharashtra and others*, in *State of W.B. and Others Vs. Aghore Nath Dey and Others*, and held that:

23. This being the obvious inference from conclusion (A), the question is whether the present case can also fall within conclusion (B) which deals with cases in which period of officiating service will be counted for seniority. We have no doubt that conclusion (B) cannot include, within its ambit, those cases which are expressly covered by the corollary in conclusion (A), since the two conclusions cannot be read in conflict with each other.

24. The question, therefore, is of the category which would be covered by conclusion (B) excluding therefrom the cases covered by the corollary in conclusion (A).

25. In our opinion the conclusion (B) was added to cover a different kind of

situation, wherein the appointments are otherwise regular, except for the deficiency of certain procedural requirements laid down by the rules. This is clear from the opening words of the conclusion (B), namely, "if the initial appointment is not made by following the procedure laid down by the rules" and the later expression "till the regularisation of his service in accordance with the rules". We read conclusion (B), and it must be so read to reconcile with conclusion (A), to cover the cases where the initial appointment is made against an existing vacancy, not limited to a fixed period of time or purpose by the appointment order itself, and is made subject to the deficiency in the procedural requirements prescribed by the rules for adjudging suitability of the appointee for the post being cured at the time of regularisation, the appointee being eligible and qualified in every manner for a regular appointment on the date of initial appointment in such cases, Decision about the nature of the appointment, for determining whether it falls in this category, has to be made on the basis of the terms of the initial appointment itself and the provisions in the rules. In such cases, the deficiency in the procedural requirements laid down by the rules has to be cured at the first available opportunity, without any default of the employee, and the appointee must continue in the post uninterruptedly till the regularisation of his service, in accordance with the rules. In such cases, the appointee is not to blame for the deficiency in the procedural requirements under the rules at the time of his initial appointment and the appointment not-being limited to a fixed period of time is intended to be a regular appointment, subject to the remaining procedural requirements of the rules being fulfilled at the earliest. In such cases also, if there be any delay in curing the defects on account of any fault of the appointee, the appointee would not get the full benefit of the earlier period on account of his default, the benefit being confined only to the period for which he is not to blame. This category of cases is different from those covered by the corollary in conclusion (A) which relates to appointment only on ad hoc basis as a stopgap arrangement and not according to rules. It is, therefore, not correct to say, that the present cases can fall within the ambit of conclusion (B), even though they are squarely covered by the corollary in conclusion (A).

13. As the appointment of the petitioner, as discussed and stated above, on ad hoc basis to the substantive vacant post of Superintendent (KVI/RAP), was on the recommendation of the duly constituted DPC for an indefinite period and continued to serve without any break till regularization vide the said order dated 2.3.2001, that too on the recommendation of the duly constituted DPC; petitioner's ad hoc service as done in other cases should also be regularized with effect from the date of his initial ad hoc appointment and such retrospective regularization cannot be denied only on the lame excuse that other ad hoc employees who were senior to the petitioner had already retired on superannuation and their cases (seniors) were also to be considered. This little administrative inconvenience cannot be the ground for denying the legitimate right of the petitioner for retrospective regularization of his ad hoc service in the

given case w.e.f. the date of his initial ad hoc appointment.

14. For the foregoing discussions, the respondents are directed to regularize the ad hoc service of the petitioner as Superintendent (KVI/RAP) w.e.f. the date of his initial ad hoc appointment, i.e. 14.12.93 and his seniority should be counted with effect from the date of his initial appointment, i.e. 14.12.1993. Necessary compliance order should be issued within a period of three months from the date of receipt of the certified copy of this judgment and order. Writ petition is allowed and in the result the said letter of the Government denying the retrospective regularization of the petitioner with effect from the date of his initial ad hoc appointment is quashed.