

(2001) 03 OHC CK 0051
In the Orissa High Court
Case No : O.J.C. No. 7083 of 1998

Rabinarayan Mohanty and others

APPELLANT

Vs

Bhubaneswar Development Authority and others

RESPONDENT

Date of Decision : 13-03-2001

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Citation : (2001) 92 CLT 395 : (2001) 91 CLT 573 : (2001) 1 OLR 493

Hon'ble Judges : L. Mohapatra, J

Bench : Single Bench

Advocate : Mr. S.N. Sahoo, for the Appellant; Mr. D. Mohapatra, for the Respondent

Final Decision : Dismissed

Judgement

L. Mohapatra, J.—The petitioners, who are nine in number, have filed this writ application challenging the order dated 4-5-1998 in Annexure-5 withdrawing the earlier order of regularisation of service passed in their favour.

2. The case of the petitioners is that they were engaged as D.L.R. Mates in the year 1989 through an agency under the Bhubaneswar Development Authority ("B.D.A.", for short). On 1-12-1991 all the petitioners, except petitioner No. 3, were directly engaged under the B.D.A. and with effect from 1-1-1992 petitioner No. 3 was directly engaged under the B.D.A. . On 13-12-1994 the B.D.A. regularised the services of 171 D. L. R, employees who had served for a minimum period of five years by 1-12-1994 and the petitioners were amongst the 171 D. L. R. employees. After the said decision was taken on 13-12-1994, on 9-6-1996 in the first phase, the B.D.A. regularised the services of the employees in Annexure-1, except 15 candidates. On 14-8-1996 the B.D.A. again regularised six such D.L.R. employees in the second phase and only the petitioners were left out. On 4-3-1997 the petitioners approached the B.D.A. for regularisation as all other D.L.R. employees in the list had already been regularised. The matter was examined at the end of the B.D.A. and the B.D.A. in its meeting dated 2-5-1997

decided to regularise the services of the petitioners with effect from 1-12-1994. By order dated 27-5-1997 the services of the petitioners were regularised with effect from 1-12-1994 and from June, 1997 the petitioners were allowed to draw their salary and allowances and the service books of the petitioners were opened from August, 1997. From August, 1997 also the petitioners were allowed house-rent allowance as paid to the regular employees of the B.D.A. . Increments were also allowed in favour of the petitioners. Suddenly by order dated 4-5-1998 the B. D. A. has withdrawn the order of regularisation on the ground that the petitioners had not completed 5 years of service directly under the B.D.A. as on 1-12-1994, The said order has been challenged before this Court.

3. Shri S. N. Sahoo, learned counsel appearing for the petitioners, has drawn the attention of the Court to Annexure-1, that is the decision of the B.D.A. dated 13th December, 1994 and submitted that the list of D.L.R. employees who had completed 5 years of service as on 1-12-1994 was prepared for the purpose of regularisation in service. The regularisation was made in two phases and the petitioners had been excluded. Therefore, when the matter was brought to the notice of the authorities a decision was taken by the B.D.A. to regularise the services of the petitioners taking into consideration the period served by them under an agency and accordingly decided that the petitioners having completed five years of service on 1-12-1994 are entitled for regularisation and therefore, subsequently by order dated 27-5-1997 the petitioners were regularised in service with effect from 1-12-1994. Shri Sahoo further submitted that since the B.D.A. in its meeting had decided to count the service rendered under the agency for the purpose of computing five years and the same had been approved by the Board, there was no power left with the B.D.A. to recall the same and therefore, the order withdrawing the order of regularisation under Annexure-5 is not sustainable. Shri Sahoo further submitted that before withdrawal of the order of regularisation, the petitioners were not given an opportunity of bearing and as such the impugned order is liable to be quashed.

4. A counter has been filed on behalf of the B.D.A. wherein it is stated that a decision had been taken by it to regularise the services of those D.L.R. employees who had completed five years of service directly under the B.D.A. as on 1-12-1994. Admittedly the petitioners were directly engaged by the B.D.A. with effect from 1-12-1991 except petitioner No. 3 who was directly engaged by B.D.A. with effect from 1-1-1992. Therefore, as on 1-12-1994 they had not completed five years of service directly under the B.D.A. and as such were not entitled for consideration for regularisation. The decision of the B.D.A. to regularise the services of the petitioners taking into consideration the service rendered under the agency was contrary to the earlier decision and the B.D.A. had the power to revoke the order of regularisation, if on verification it was found that the informations submitted by the employees are false and fabricated. It is further submitted on behalf of the B.D.A. that this fact came to the knowledge of the B.D.A. when another employee working on D.L.R. basis similarly placed as that of the petitioners approached the B.D.A. for regularisation on the ground

that he is also entitled for regularisation as he stands on the same footing as that of the petitioners. When the matter was examined, it was found that the petitioners had not completed five years of service directly under the B.D.A. by 1-12-1994 and therefore, the order of regularisation was withdrawn. Coming to the next question raised by the learned counsel for petitioner that no notice was served on the petitioners or opportunity was afforded to them it is submitted on behalf of the B.D.A. that when the facts are admitted, there is no necessity for giving an opportunity of hearing. In course of argument, apart from what had been submitted earlier, Shri Sahoo also pointed out that there are some other employees whose services under the agency were taken into account for the purpose of computing five years of services and their services were regularised. Learned counsel appearing for the B.D.A. submitted that when the B.D.A. came to know about such erroneous decision the orders of regularisation passed in favour of those employees had been withdrawn and the matter is subjudice before this Court.

5. For the purpose of deciding this case now two points arise for consideration:

(i) The B.D.A. having decided once to regularise the services of those D.L.R. employees who had served the B.D.A. for a period of five years as on 1-12-1994, whether a different standard can be adopted for some of the D.L.R. employee; and

(ii) Whether a notice was required for the purpose of giving an opportunity to the petitioners prior to withdrawal of the order of regularisation.

6. So far as the first question is concerned, there is no dispute that the B.D.A. had taken a decision to regularise the services of those D L.R. employees who had completed five years of service directly under the B.D.A. as on 1-12-1994. In the first phase the services of 171 D.L.R. employees who had completed five years of service directly under the B.D.A. as on 1-12-1994 were regularised. In the second phase the services of six more employees were regularised. Only after regularisation of all these employees the petitioners approached the B.D.A. for regularisation of their services and their cases were considered. It is evident from Annexure-2 that while computing the period of service of the petitioners for the purpose of finding as to whether they had served for five years as on 1-12-1994 or not, the period served by them under the agency had been taken into consideration which was contrary to the earlier decision of the B.D.A. If this decision is allowed to stand, then those who were regularised in the first and the second phases shall be entitled for regularisation from a prior date. Admittedly the petitioners had not completed five years of service directly under the B.D.A. as on 1-12-1994. Only because of the decision contained in Annexure-2, the services of the petitioners were regularised. There is no dispute that some other employees who were also regularised in the same manner have also been treated with the same does and the orders of regularisation passed in their favour have been withdrawn. Therefore, it cannot be said that the petitioners have been discriminated in any manner. I do not think that if a wrong decision is

taken by the B.D.A. it has to be sustained in contravention of the earlier decision of the B.D.A. A mistake committed by an authority can be rectified by the same authority and in this case the B.D.A. has only corrected the mistake that was committed by taking a decision to regularise the services of the petitioners who as such were not entitled for regularisation they having not completed five years of service directly under the B.D.A. as on 1-12-1994.

7. Learned counsel for petitioners has relied upon a decision of the Apex Court reported in Arun Kumar Rout and Others Vs. State of Bihar and Others, and submitted that even if the initial appointment of a daily wager is illegal, his case cannot be thrown out and he should be considered for regularisation. In the aforesaid case some daily wagers were regularised in service and subsequently their services were terminated on the ground that their initial appointments were irregular. Under such circumstances, the Apex Court held that such daily wagers had served the Department initially even without getting any salary for a long time and they are not guilty of any fraud or sharp practice and did not lack in requisite qualification. They were in continuous service of the Department for more than five years and therefore, deserved sympathetic consideration, even if they could not claim regularisation as a matter of course. The ratio of this decision is not in dispute, but is of no help to the petitioners in the present case.

The learned counsel has also relied upon another decision of the Apex Court reported in Basudeo Tiwary Vs. Sido Kanhu University and Others, . In that case the Apex Court held that in order to arrive at a conclusion that appointment is contrary to the provisions of the Acts, Statutes, Rules or Regulations, etc. a finding has to be recorded and unless such a finding is recorded termination cannot be made. But to arrive at such a conclusion necessarily an enquiry has to be made as to whether such appointment was contrary to the provisions of the Act, etc.. If in a given case such exercise is absent, the condition precedent stands unfulfilled. To arrive at such a finding necessarily an enquiry will have to be held and in holding such enquiry the person whose appointment is under enquiry will have to be issued with notice. If notice is not given to him, then it is like playing Hamlet without the Prince of Denmark. that is, if the employee concerned whose rights are affected, is not given notice of such proceeding and a conclusion is drawn in his absence, such conclusion would not be just, fair or reasonable. In my view, the ratio of this decision cited by the learned counsel for petitioners is not applicable to the facts of the present case as the ground on which the order of regularisation has been withdrawn can be verified from the record itself. The admitted case of both the parties is that the petitioners were initially appointed through an agency under the B.D.A. in the year 1989. The further admitted case is that except petitioner No. 3 all other petitioners were directly engaged under the B.D.A. for the first time on 1-12-1991 and petitioner No. 3 was directly engaged under the B.D.A. on 1-1-1992. The decision of the B.D.A. was to regularise those employees who had completed five years of service directly under the B.D.A. as on 1-12-1994. None of the petitioners had completed five years of service directly under the B.D.A. as on 1-12-1994. Even

if the petitioners had been given notice or opportunity of hearing, they could not have improved their case In any manner, as their appointments under the B.D.A. directly are matters of record and admittedly by the petitioners themselves. I am, therefore, of the view that by not affording an opportunity to the petitioners to show-cause prior to withdrawal of the order of regularisation no prejudice has been caused to the petitioners. Apart from the said fact, the petitioners have been allowed to continue directly under the B.D.A. as casual employees and they have not been thrown out of service.

8. While declining to interfere with the impugned order, I direct that since the petitioners have completed five years of service directly under the B.D.A. in the meantime, their cases may be considered for regularisation at an early date.

9. Writ petition dismissed.