
(2018) 04 OHC CK 0037
In the Orissa High Court
Case No : W.P.(C) No. 20518 of 2010

RANJEET KUMAR DAS

APPELLANT

Vs

STATE OF ORISSA AND ORS.

RESPONDENT

Date of Decision : 06-04-2018

Acts Referred:

Constitution of India, 1950 — Article 14, 16

Citation : (2018) 04 OHC CK 0037

Hon'ble Judges : VINEET SARAN, C.J;B.R. SARANGI

Bench : Division Bench

Advocate : Manoj Kumar Mohanty, Pradhan, T. Pradhan, R.K. Mohapatra

Final Decision : Allowed

Judgement

DR. B.R. SARANGI,J.

1. The petitioner, who is working as a driver in the office of the CDPO (Child Development Project Officer), ICDS (Integrated Child Development

Services) Project, Pattamundai under the Government of Odisha in Women and Child Development Department, has filed this application challenging

the order dated 04.10.2010 passed by the Orissa Administrative Tribunal, Bhubaneswar in O.A. No. 1335 of 2003, wherein it has been directed that

till a regular driver is appointed or till continuation of the project or till the vehicle exists in that office, whichever is earlier, the petitioner may be

allowed to continue in accordance with the existing terms and conditions of engagement. Though the petitioner had claimed for regularization of

service, but no such direction has been issued by the tribunal, while passing the order impugned.

2. The brief facts, which led to filing of the instant writ petition, are that a sanctioned post of driver was lying vacant in the office of the CDPO,

Pattamundai. In order to fill up the vacancy, applications were invited from the locality, pursuant to which the petitioner applied for, and by following

due process of selection he was selected and engaged in the said post, having valid driving licence. He was engaged for a period of 44 days w.e.f.

03.04.1999 to 16.05.1999, as per the Collector, Kendrapara office order dated 17.04.1999, on ad hoc basis in the scale of pay of Rs.3050/- to

Rs.4590/- with usual DA and other allowances admissible under rule from time to time. Such engagement of 44 days was extended from time to time.

But, after the order dated 07.02.2002, the District Office, Kendrapara did not issue any order of engagement on 44 days basis in favour of the

petitioner. However, the petitioner was given engagement on daily wage basis apprehending that he may claim regularization of service, if the order of

engagement is issued from time to time. At that point of time, the petitioner filed a representation before the authority concerned seeking regularization

of his services. But the Collector, Kendrapara, vide order dated 21.11.2003, deployed one B.K. Dhangada Majhi as driver in the ICDS Project Office,

Pattamundai. As he did not join in the said post, the petitioner was allowed to continue as driver, as usual, on daily wage basis and was issued with

necessary engagement certificates by the CDPO, Pattamundai on 26.08.2003 and 31.03.2010.

2.1 In view of the length of service rendered by the petitioner against the sanctioned post, the petitioner filed O.A. No. 1335 of 2003 before the Orissa

Administrative Tribunal, Bhubaneswar praying for regularization of service as driver in Pattamundai ICDS Project and to release his arrear and

current salaries with a further prayer to allow the petitioner to participate in regular selection made for the post of driver. The opposite parties filed

their counter affidavit stating that Kendrapara district was newly created on 01.04.1993 and the Collector of the district is the appointing and

disciplinary authority. During the year 1996-97, UNICEF vehicle was provided to Pattamundai ICDS Project and initially the vehicle was driven by the

driver of Pattamundai Block Office, due to non-posting of regular driver, in order to keep the vehicle in running condition. Subsequently, the CDPO,

Pattamundai engaged the petitioner as driver on daily wage basis. Thereafter, the petitioner has been engaged on temporary basis, vide order dated

17.02.1997 of the Women and Child Development Department, and on ad hoc basis for 44 days spell w.e.f. 03.04.1999 to 16.05.1999, as per the

Collector, Kendrapara office order dated 17.04.1999, and continued as such with one day break in different spells on the basis of exigency of work

required for such engagement. But due to imposition of ban, the post of driver of Pattamundai ICDS Project could not be filled up.

2.2 Considering the contention of the parties and having noted down the same in the order dated 04.10.2010, the tribunal disposed of the Original

Application directing that till a regular driver is appointed or till continuation of the project or till the vehicle exists in that office, whichever is earlier,

the petitioner may be allowed to continue in accordance with the existing terms and conditions of his engagement. It was also directed that if the

petitioner has any dues to get, i.e., salary or wages towards the duty rendered by him, that be drawn and paid to him within three months from the date

of communication of the order and that too in accordance with the terms and conditions of appointment. Though prayer was made by the petitioner for

regularization of his services, but no order has been passed by the tribunal to that extent, hence this application.

3. Mr. Manoj Kumar Mohanty, learned counsel appearing for the petitioner strenuously urged that a perusal of the pleadings made in the O.A. No.

1335 of 2003 would go to show that the petitioner had made a specific prayer for regularization of his services, but the tribunal, instead of issuing

direction for regularization, has disposed of the Original Application directing that till regular driver is appointed or till continuation of the project or till

the vehicle exists in the office, whichever is earlier, the petitioner may be allowed to continue in accordance with the existing terms and conditions of

his engagement, which was not the relief sought before the tribunal by the petitioner. It is further contended that if there is existing vacancy, against

which the petitioner is being allowed to continue in service for a quite long period, his services should be regularized, even if his engagement is an

irregular one, keeping in view the exception carved out in State of Karnatak v. Umadevi (3), (2006) 4 SCC 1.

4. Mr. R.K. Mohapatra, learned Government Advocate appearing for the State opposite parties argued with vehemence justifying the order passed by

the tribunal and contended that regularization in service cannot be claimed as a matter of right and, as such, the appointment of the petitioner, being

illegal one, cannot be regularized, and thereby the tribunal has not committed any illegality or irregularity in passing the order impugned. It is further

contended that the petitioner, by virtue of the order passed by the tribunal, is still continuing in service with the same terms and conditions of his

engagement and thereby the order passed by the tribunal has been given due respect by the opposite parties. To substantiate his contention, he has

relied upon the judgment of the apex Court in *State of Jammu and Kashmir v. District Bar Association, Bandipora*, (2017) 3 SCC 410.

5. We have heard Mr. Manoj Kumar Mohanty, learned counsel for the petitioner and Mr. R.K. Mohapatra, learned Government Advocate appearing

for the State opposite parties and perused the record including order dated 04.10.2010 passed by Orissa Administrative Tribunal, Bhubaneswar in

O.A. No. 1335 of 2003. Pleadings between the parties have been exchanged and with consent of learned counsel for the parties, the writ petition is

being disposed of finally at the stage of admission.

6. The undisputed fact being that the petitioner had been engaged as a driver in the office of the CDPO, ICDS Project, Pattamundai under Women

and Child Development Department and was allowed to continue, initially for a period of 44 days basis, but subsequently on a temporary basis, and

continued till today as such by virtue of the order passed by the tribunal. For last 19 years, the petitioner has been continuing on temporary basis. He

had approached the tribunal seeking for regularization of service, but the tribunal, instead of passing an order regularizing the services of the petitioner,

disposed of the Original Application directing that till a regular driver is appointed or till continuance of the project or till the vehicle exists in that office,

whichever is earlier, the petitioner may be allowed to continue in accordance with existing terms and conditions of his engagement. Paragraphs 6 and

7 of the counter affidavit, wherein it has been admitted that the petitioner is still continuing in service, are extracted hereunder:

â??6. That in reply to the averments made in Paragraph-3 of the writ application, it is humbly submitted that petitioner temporarily was engaged as

Driver for a period of 44 days w.e.f. 3.4.1999 to 16.05.1999 as per order of Collector, Kendrapara by Office Order No. 6989, dtd.17.04.1999. Copy

of order No.6989 dtd.17.04.1999 is enclosed herewith and marked as Annexure-A/2 for kind perusal of the Honâ??ble Court. Subsequently the

engagement was continued in spells from 18.05.1999 â?" 30.06.1999, 02.07.1999 â?" 14.08.1999, 16.08.1999 â?" 28.09.1999, 30.09.1999-

121.11.1999, 15.11.1999 â?" 28.12.1999, 30.12.1999 â?" 11.02.2000, 19.12.2000 â?" 31.01.2001, 02.02.2001 â?" 17.03.2001, 19.03.2001 â?"

01.05.2001, 03.05.2001 â?" 15.06.2001, 18.06.2001, 31.07.2001, 02.08.2001 â?" 14.01.2001, 18.01.2001 â?" 31.10.2001. Â

7. That in reply to the averments made in paragraph-4 of the writ application, it is humbly submitted that as per the order of the district office vide letter

no. 1843, dtd. 30.06.2008 the applicant has been continuing as Driver till date in daily wages basis.â??

So far as payment of salary is concerned, in terms of the direction given by the tribunal since no decision has been taken at the level of District Office,

Kendrapara, pursuant to letter dated 05.05.2014, the said salary has not been paid, but he has been continuing in service till date. Needless to say that

the petitioner having approached the tribunal for regularization of services, the tribunal ought to have passed an order to that extent. Instead of giving

any other reasons, the tribunal should have decided the Original Application on the basis of the relief sought by the petitioner.

7. Before delving into the niceties of the order passed by the tribunal, this Court deems it proper to examine the claims of the petitioner on the basis of

the factual matrix available on record itself. On the basis of the pleadings available before this Court, no doubt the petitioner had approached the

tribunal seeking regularization of his services. Regularization in service law connotes official formalisation of an appointment, which was made on

temporary or ad hoc or stop gap or casual basis or the like, in deviation from the normal rules of applicable norms of appointment. Such formalisation

makes the appointment regular. The ordinary meaning of regularisation is â??to make regularâ? according to The Shorter Oxford English Dictionary,

3rd Edition, and according to Blackâ??s Law Dictionary, 6th Edition, the word â??regularâ?? means:

â??Conformable to law. Steady or uniform in course, practice, or occurrence; not subject to unexplained or irrational variation. Usual, customary,

normal or general. *Gerald v. American Cas. Co of Reading, Pa., D.C.N.C., 249 F, Supp. 355, 357.* Made according to rule, duly authorised, formed

after uniform type; built or arranged according to established plan, law, or principle. Antonym of â??casualâ? or â??occasional,â? *Palle v. Industrial*

*Commission, 79 Utah 47, 7 P. 2d. 248, 290.*â??

8. The above being the meaning of 'regular', as per the common parlance given in dictionary, in *B.N. Nagarajan, v. State of Karnataka*, AIR

1979 SC 1676 : (1979) 4 SCC 507, the apex Court held that the effect of such regularization would depend on the object or purpose for which the

regularization is made or the stage at which it is made. Once regularized, the procedural infirmities which attended the appointment are cured.

Regularization, however, does not necessarily connote permanence.

9. The word 'regular' or 'regularisation' do not connote permanence and cannot be construed so as to convey an idea of the nature of

tenure of appointments. They are terms calculated to condone any procedural irregularities and are meant to cure only such defects as are attributable

to methodology followed in making the appointments. Relying on the judgments of the apex Court in *B.N. Nagarajan v. State of Karnataka*, AIR 1979

SC 1676 : (1979) 4 SCC 507, the Constitution Bench of the apex Court in *State of Karnataka v. Umadevi* (3), (2006) 4 SCC 1 has also taken the same

view, which has also been followed by the apex Court in *Hindustan Petroleum Corpn. Ltd. v. Ashok Ranghba Ambre*, (2008) 2 SCC 717 and also in

Hindustan Aeronautics Ltd. v. Dan Bahadur Singh, (2007) 6 SCC 207.

10. Temporary or ad hoc or stop gap or casual basis or the like appointments are made for various reasons. An emergent situation might make it

necessary to make such appointments. Since the adoption of the normal method of regular recruitment might involve considerable delay regulating in

failure to tackle the emergency. Sometimes such appointments were to be made because although extra hands are required to meet the workload,

there are no sanctioned posts against which any regular recruitment could be made. In fact in the case of ad hoc or casual appointees, the

appointments, are in the majority of cases, not against sanctioned posts and the appointments are made because of the necessity of workload and the

constraints of sanctioning such post (mainly on financial consideration) on permanent basis. Needless to say that filling up vacancies against

sanctioned posts by regularisation is against the constitutional provisions of equality of opportunity in the matter of public employment violating Articles

14 and 16 of the Constitution by not making the offer of employment to the world at large and allowing all eligible candidates equality of opportunity to

be considered on merits. If that be so, considering the emergent necessity of

filling up of vacancies and allowing the petitioner to continue for a quite long period, even if with one day break in service, cannot be stated to be a reasonable one, rather, this is an unfair and unreasonable action of the authority concerned.

11. Keeping this backdrop of the case in view, it is to be examined whether this Court has been able to obtain the benefit of constitutional philosophy of social and economic justice or not. Have the lofty ideals which the founding fathers placed before us any effect in our daily life-the answer cannot however but be in the negative- what happens to the constitutional philosophy as is available in the Constitution itself, which we ourselves have so fondly conferred on to ourselves. The socialistic pattern of society as envisaged in the Constitution has to be attributed its full meaning.

12. In view of above constitutional philosophy, whether courts can remain as mute spectator, is a matter to be considered to achieve the constitutional goal in proper perspective. But all these questions had come up for consideration and decided by the Constitution Bench of the apex Court in *Umadevi*

(3) mentioned supra. The factual matrix of the case in *Umadevi* (3) arose for consideration from a judgment of Karnataka High Court. In some of the

cases, the Karnataka High Court rejected the claims of persons, who had been temporarily engaged as daily wagers but were continued for more than

10 years in the Commercial Taxes Department of the State of Karnataka for regularization as permanent employees and their entitlement to all the

benefits of regular employees. Another set of civil appeals arose from the order passed by the same High Court on a writ petition challenging the

order of the government directing cancellation of appointments of all casual workers/daily rated workers and seeking a further direction for the

regularization of all such daily wage earners engaged by the State or local bodies. These claims were rejected by the Division Bench of the Karnataka

High Court on appeal from the judgment of the learned Single Judge. The reason for the matter being considered by the Constitution Bench arose

because of two earlier orders of reference made by a Bench of two-Judge and subsequently by a Bench of three-Judge- *Secretary, State of Karnatak*

v. Uma Devi (1) (2004) 7 SCC 132, and *Secretary, State of Karnataka v. Uma Devi* (2) (2006) 4 SCC 44, respectively, as they noticed the conflicting

opinions expressed by the earlier 3 Bench judgments in relation to regularization.

13. In the case of Umadevi (3), even though this Court has held that the appointments made against temporary or adhoc are not to be regularized, in

para 53 of the judgment, it is provided that irregular appointment of duly qualified persons in duly sanctioned posts, who have worked for 10 years or

more, can be considered on merits and steps to be taken as a one- time measure to regularize them. In para 53, the Court observed as under:-

“53. One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in S.V.

Narayanappa, R.N. Nanjundappa and B.N. Nagarajan and referred to in para 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 regularisation 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 aboveresferred 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 regularise 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 six months from this date. We also clarify that regularisation, 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 regularising or

making permanent, those not duly appointed as per the constitutional scheme.”

The objective behind the exception carved out in this case was prohibiting regularization of such appointments, appointed persons whose appointments

is irregular but not illegal, ensure security of employment of those persons who served the State Government and their instrumentalities for more than

ten years.

14. Elaborating upon the principles laid down in the case of Umadevi (3) (supra) and explaining the difference between irregular and illegal

appointments in *State of Karnataka v. M.L. Kesari*, (2010) 9 SCC 247, this Court held as under:

¶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 person 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.¶

15. Applying the ratio of *Umadevi* (3) case, this Court in *Nihal Singh v. State of Punjab*, (2013) 14 SCC 65 directed the absorption of the Special

Police Officers in the services of the State of Punjab holding as under:

¶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.

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 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.â??

16. As it appears from the record itself, the case of the petitioner is covered under the exception carved out in paragraph 53 of Umadevi (3) (supra), which is applicable to the present case. Meaning thereby, against an existing vacancy the petitioner having been engaged by following due procedure of selection and continued for a quite long period and, as admitted by Mr. R.K. Mohapatra, learned Government Advocate appearing for the State opposite parties and as is evident from the pleadings in the counter affidavit, the petitioner is still continuing, the same cannot be treated as an â??illegalâ?? appointment rather it may be nomenclature as an â??irregularâ?? appointment.

17. Coming to the judgment of the apex Court in State of Jammu and Kashmir v. District Bar Association, Bandipora, (2017) 3 SCC 410, on which reliance has been placed by Mr. R.K. Mohapatra, learned Government Advocate appearing for the State opposite parties, wherein a distinction has been made with regard to â??irregularâ? and â??illegalâ? appointment referring to the exception carved out in Umadevi (3) (supra), in paragraph 12 of the said judgment it has been stated as follows:

â??12. The third aspect of Umadevi (3) which bears notice is the distinction between an â??irregularâ? and â??illegalâ? appointment. While answering the question of whether an appointment is irregular or illegal, the Court would have to enquire as to whether the appointment process adopted was tainted by the vice of non-adherence to an essential prerequisite or is liable to be faulted on account of the lack of a fair process of recruitment. There may be varied circumstances in which an ad hoc or temporary

appointment may be made. The power of the employer to make a temporary appointment, if the exigencies of the situation so demand, cannot be disputed. The exercise of power however stands vitiated if it is found that the exercise undertaken (a) was not in the exigencies of administration; or (b) where the procedure adopted was violative of Articles 14 and 16 of the Constitution; and/or (c) where the recruitment process was overridden by the vice of nepotism, bias or mala fides. The above noted principle is squarely applicable to the case of the petitioner than opposite parties. If the petitioner has been engaged against an existing vacancy, by following due process of selection, and continued for a quite long period and his engagement is due to the emergent situation, the appointment being irregular one, his services are to be regularized in accordance with law.

18. The tribunal having failed to give any direction so far as relief claimed in the Original Application for regularization of services of the petitioner, we are of the view that the impugned order, having not been passed in conformity with the relief sought, cannot sustain in the eye of law and the same is liable to be quashed. Accordingly, the order dated 04.10.2010 passed by the Orissa Administrative Tribunal, Bhubaneswar in O.A. No.1335 of 2003 is hereby quashed. The opposite parties are directed to take necessary steps in accordance with law for regularization of services of the petitioner treating the same as an irregular appointment as per the exception carved out in the case of Umadevi (3) mentioned supra as expeditiously as possible, preferably within a period of four months from the date of communication of this judgment, and also release the legitimate dues as admissible to the petitioner forthwith.

19. The writ petition is thus allowed. No order as to costs.