
(2012) 09 MP CK 0227

In the Madhya Pradesh High Court

Case No : Writ Petition No. 1017 of 2010

Rayees Khan

APPELLANT

Vs

State of M.P. and Others

RESPONDENT

Date of Decision : 06-09-2012

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 226

Citation : (2013) 1 LLJ 681

Hon'ble Judges : S.C. Sharma, J

Bench : Single Bench

Final Decision : Allowed

Judgement

S.C. Sharma, J.—Regard being had to the similitude in the controversy involved in the present cases," the writ petitions were analogously heard and by this common order, they are being disposed of by this Court. Facts of Writ Petition No. 1017 of 2010 are narrated hereunder. The petitioner before this Court has filed this present writ petition being aggrieved by the order dated 21.1.2010, terminating the petitioner's services from the post of Vehicle Driver.

2. The contention of the petitioner is that he was appointed w.e.f. 1.1.1996 on the post of Vehicle Driver on contractual basis under the District Hospital, Rajgarh in a scheme known as "District Blindness Control Society". Petitioner has further stated that he was permitted to continue uninterruptedly in service and he was regularised/absorbed on the post of Driver by an order dated 1.10.2003 passed by the Chief Medical & Health Officer, Rajgarh. The contention of the petitioner is that a show-cause notice was issued on 24.4.2006 informing the petitioner that his regularization is not proper and he was directed to file a reply. The petitioner did file a reply to the show-cause notice and thereafter the respondents did nothing in the matter. Petitioner has further stated that a similar show-cause notice was issued on 2.1.2010 and the petitioner again submitted a reply on 8.1.2010, however, the respondents after considering the reply of the petitioner, have passed the impugned order. Learned counsel for the petitioner

has raised various grounds before this Court and his contention is that in the year 2006 some enquiry was conducted by the Collector in respect of the absorptions of class 3 and 4 employees by the then Chief Medical & Health Officer and based upon the enquiry conducted by the Collector, show-cause notices were issued to large number of employees. Petitioner has further stated that services of some of the employees were put to an end and the petitioner has enclosed one such order passed in W.P. No. 3250 of 2006 (s) Ku. Priyanka Dixit v. State of Madhya Pradesh and his contention is that the order terminating the service of Priyanka Dixit was set aside by this Court and Priyanka Dixit, who was regularised along with the petitioner, is still continuing in service and, therefore, the petitioner is also entitled to continue in service as in his case also some enquiry was conducted by the Collector behind his back and as the same has been made the basis for discontinuing the petitioner from service. Learned counsel for the petitioner has also argued before this Court that at the relevant point of time when the petitioner's case for regularization was considered in the light of the policy of the State Government dated 5.6.2003, there were vacancies available in the Department. Petitioner has enclosed Annexure-F along with the additional rejoinder, a document obtained under the Right to Information Act and the same establishes that two vacancies had incurred in respect of the post of Driver. Another document which Annexure G also establishes that the vacancies of Driver were available at the relevant point of time when the petitioner was regularised on the post of Driver. Learned counsel for the petitioner has vehemently argued before this Court that absorption of the petitioner has attained finality could not have been re-opened in the manner and method as it has been done, as the Apex Court in the case of Secretary, State of Karnataka and Others Vs. Umadevi and Others, has held that the regularization if already done will not be open/re-opened based upon the aforesaid judgment. The contention of the petitioner is that he was regularised against a vacant post by a competent authority who is competent to appoint a Driver and as identically placed persons are continuing in service the impugned order deserves to be set aside.

3. Learned counsel for the respondent State has filed a reply and the stand of the State Government is that the petitioner was appointed under the "District Blindness Control Society" which was a programme financed by the Government of India and, therefore, as the petitioner was not a daily wager of the State Government or a contractual employee of the State Government, he could not have been regularised in the manner and method it was done by the then Chief Medical & Health Officer. Respondents have also stated that the petitioner's absorption was an illegal absorption and he has rightly been deregularised and discontinued from service keeping in view the judgment delivered by the Apex Court in SLP No. 3492 of 1996 State of Himachal Pradesh Vs. Suresh Kumar Verma and another, . It has also been stated in the reply that at the relevant point of time vacancies were not available in the department and therefore, regularization against a non-existing post was bad in law and, therefore, the

respondents were left with no other choice except to discontinue the petitioner from service. Respondents have also stated that initially a show-cause notice was issued in the year 2006 to the petitioner, however, nothing was done by them and again a show-cause notice was issued in the year 2010 and after hearing the petitioner they have discontinued the services of the petitioner. Respondents have prayed for dismissal of the writ petition.

4. Heard learned counsel for the parties at length and perused the record.

5. In the present case, it is an admitted fact that the petitioner was appointed on the post of vehicle driver on contractual basis under the "District Blindness Control Society" and he was posted under the administrative control of Chief Medical & Health Officer w.e.f. 1.1.1996. The State Government has issued a circular dated 5.6.2003 which provides for regularization of contractual staff receiving aid from Central Government/World Bank and persons were required to be regularised/absorbed working under other programmes on contractual basis. The case of the petitioner was considered in the light of various circulars issued by the State Government and the documents filed along with the additional rejoinder which have not been controverted by the respondent State, obtained by the petitioner under the Right to Information Act establishes that there were vacant posts available at the time of absorption/regularization of the petitioner on 1.10.2003. Thus the petitioner was regularised against a vacant post by the respondents. It is noteworthy to mention that a complaint was made in respect of regularization orders passed in case of 11 persons and then Collector Rajgarh has conducted some enquiry. The enquiry report was submitted by the then Collector on 21.2.2006 and based upon the enquiry report submitted by the Collector, the Addl. Collector vide letter dated 12.4.2006 has directed the Chief Medical & Health Officer, Rajgarh to deregularise the petitioner and to discontinue petitioner from service. It is an admitted fact that the enquiry was conducted by the Collector behind the back of the petitioner. No opportunity of any kind was granted by the Collector. It is an admitted fact that the respondents have not furnished a copy of the enquiry report to the petitioner either in the year 2006 while issuing the first show-cause notice or in 2010 while issuing the second show-cause notice. It is really strange that on 24.4.2006 the show-cause notice was issued for deregulating the petitioner and for discontinuing him from service and the mighty State did nothing in the matter till 2010 and again the authorities woke up from slumber and issued a similar show-cause notice on 2.1.2010 seeking explanation from the petitioner as to why his services should not be put to an end. The show-cause notice dated 2.1.2010 again reflects to some enquiry conducted by the Collector in the year 2006 however, again copy of the enquiry report was not furnished to the petitioner at any point of time. The petitioner did submit a reply to the show-cause notice and informed the authorities that he was appointed against a vacant post and keeping in view the policy of the State Government dated 5.6.2003, he has rightly been regularised, however, the respondents have discontinued the petitioner from service. It is pertinent to note that show-cause notices were issued to identically placed persons in 2006,

service of 4 those persons were put to an end in the year 2006 itself and those 4 persons came up before this Court by filing writ petitions, the following writ petitions were filed:

- (1) Shri Kanhaiyalal Verma W.P. No. 3244 of 2006 (s)
- (2) Shri Lalit Kumar Verma W.P. No. 3245 of 2006 (s)
- (3) Shri Biramlal Mewade W.P. No. 3249 of 2006 (s) and
- (4) Ms. Priyanka Dixit W.P. No. 3250 of 2006 (s)

6. All the four writ petitions were allowed by this Court on the ground that the report of the Collector was not furnished to the petitioner therein. The order passed by the respondents were set aside and the respondents did not pass any further orders in other cases and in case of the petitioner, now all of a sudden the same show-cause notice which was issued in the year 2006, was issued by the respondents on 2.1.2010 and thereafter the services of the petitioner have been put to an end. This Court is of the considered opinion that once the report of the Collector which was the basis of discontinuing the service of the petitioner was not furnished to the petitioner, the action of the respondents especially in the light of the earlier pronouncements of this Court in identical cases is bad in law.

7. Resultantly, the impugned order discontinuing the petitioner from service dated 21.1.2010 is hereby quashed.

8. This Court has carefully gone through the other aspect of the case. In the present case, the petitioner was working on contractual basis since 1.1.1996. He was regularised against a vacant post as established from the documents filed by the petitioner and once he was regularised against a vacant post he should not have been, terminated on the basis of report submitted by the Collector. Not only this, the petitioner was regularised/absorbed by competent authority, competent to appoint the petitioner. The recruitment Rules governing the field known as MP Public Health & Family Welfare Department (Non Ministerial Relating to the Directorate of Health Service, Class 3 Service) Recruitment Rules, 1989 provides that the appointing authority in case of a driver is Chief Medical & Health Officer. In the present case, the petitioner is also holding the qualification required for the post of driver. He was absorbed/regularised on the post of driver by the authority competent to do so that too in the light of the fact that posts were available with the department and therefore, this Court is of the considered opinion that on the basis of some vintage report of the year 2006 the services of the petitioner could not have been put to an end in the manner and method it has been done by the respondents.

9. The apex Court in the case of State of Karnataka v. Umadevi and Others (supra) has held as under:

4. But, sometimes this process is not adhered to and the constitutional scheme

of public employment is bypassed. The Union, the States, their departments and instrumentalities have resorted to irregular appointments, especially in the lower rungs of the service, without reference to the duty to ensure a proper appointment procedure through the Public Service Commissions or otherwise as per the rules adopted and to permit these irregular appointees or those appointed on contract or on daily wages, to continue year after year, thus, keeping out those who are qualified to apply for the post concerned and depriving them of an opportunity to compete for the post. It has also led to persons who get employed, without the following of a regular procedure or even through the backdoor or on daily wages, approaching the Courts, seeking directions to make them permanent in their posts and to prevent regular recruitment to the posts concerned. The Courts have not always kept the legal aspects in mind and have occasionally even stayed the regular process of employment being set in motion and in some cases, even directed that these illegal, irregular or improper entrants be absorbed into service. A class of employment which can only be called "litigious employment", has risen like a phoenix seriously impairing the constitutional scheme. Such orders are passed apparently in exercise of the wide powers under Article 226 of the Constitution. Whether the wide powers under Article 226 of the Constitution are intended to be used for a purpose certain to defeat the concept of social justice and equal opportunity for all, subject to affirmative action in the matter of public employment as recognised by our Constitution, has to be seriously pondered over. It is time, that the Courts desist from issuing orders preventing regular selection or recruitment at the instance of such persons and from issuing directions for continuance of those who have not secured regular appointments as per procedure established. The passing of orders for continuance tends to defeat the very constitutional scheme of public employment. It has to be emphasised that this is not the role envisaged for the High Courts in the scheme of things and their wide powers under Article 226 of the Constitution are not intended to be used for the purpose of perpetuating illegalities, irregularities or improprieties or for scuttling the whole scheme of public employment. Its role as the sentinel and as the guardian of equal rights protection should not be forgotten.

13. What is sought to be pitted against this approach, is the so-called equity arising out of giving of temporary employment or engagement on daily wages and the continuance of such persons in the engaged work for a certain length of time. Such considerations can have only a limited role to play, when every qualified citizen has a right to apply for appointment, the adoption of the concept of rule of law and the scheme of the Constitution for appointment to posts. It cannot also be forgotten that it is not the role of the Courts to ignore, encourage or approve appointments made or engagements given outside the constitutional scheme. In effect, orders based on such sentiments or approach would result in perpetuating illegalities and in the jettisoning of the scheme of public employment adopted by us while adopting the Constitution. The approving of

such acts also results in depriving many of their opportunity to compete for public employment. We have, therefore, to consider the question objectively and based on the constitutional and statutory provisions. In this context, we have also to bear in mind the exposition of law by a Constitution Bench in *State of Punjab v. Jagdip Singh*. It was held therein:

In our opinion where a Government servant has no right to a post or to a particular status, though an authority under the Government acting beyond its competence had purported to give that person a status which it was not entitled to give he will not in law be deemed to have been validly appointed to the post or given the particular status.

43. Thus, it is clear that adherence to the rule of equality in public employment is a basic feature of our Constitution and since the rule of law is the core of our Constitution, a Court would certainly be disabled from passing an order upholding a violation of Article 14 or in ordering the overlooking of the need to comply with the requirements of Article 14 read with Article 16 of the Constitution. Therefore, consistent with the scheme for public employment, this Court while laying down the law, has necessarily to hold that unless the appointment is in terms of the relevant rules and after a proper competition among qualified persons, the same would not confer any right on the appointee. If it is a contractual appointment, the appointment comes to an end at the end of the contract, if it were an engagement or appointment on daily wages or casual basis, the same would come to an end when it is discontinued. Similarly, a temporary employee could not claim to be made permanent on the expiry of his term of appointment. It has also to be clarified that merely because a temporary employee or a casual wage worker is continued for a time beyond the term of his appointment, he would not be entitled to be absorbed in regular service or made permanent, merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant rules, it is not open to the Court to prevent regular recruitment at the instance of temporary employees whose period of employment has come to an end or of ad hoc employees who by the very nature of their appointment, do not acquire any right. The High Courts acting under Article 226 of the Constitution, should not ordinarily issue directions for absorption, regularisation, or permanent continuance unless the recruitment itself was made regularly and in terms of the constitutional scheme. Merely because an employee had continued under cover of an order of the Court, which we have described as "litigious employment" in the earlier part of the judgment, he would not be entitled to any right to be absorbed or made permanent in the service. In fact, in such cases, the High Court may not be justified in issuing interim directions, since, after all, if ultimately the employee approaching it is found entitled to relief, it may be possible for it to mould the relief in such a manner that ultimately no prejudice will be caused to him, whereas an interim direction to continue his employment would hold up the regular procedure for selection or impose on the State the burden of paying an employee who is really not

required. The Courts must be careful in ensuring that they do not interfere unduly with the economic arrangement of its affairs by the State or its instrumentalities or lend themselves the instruments to facilitate the bypassing of the constitutional and statutory mandates.

45. While directing that appointments, temporary or casual, be regularised or made permanent, the Courts are swayed by the fact that the person concerned has worked for some time and in some cases for a considerable length of time. It is not as if the person who accepts an engagement either temporary or casual in nature, is not aware of the nature of his employment. He accepts the employment with open eyes. It may be true that he is not in a position to bargain-not at arm's length-since he might have been searching for some employment so as to eke out his livelihood and accepts whatever he gets. But on that ground alone, it would not be appropriate to jettison the constitutional scheme of appointment and to take the view that a person who has temporarily or casually got employed should be directed to be continued permanently. By doing so, it will be creating another mode of public appointment which is not permissible. If the Court were to void a contractual employment of this nature on the ground that the parties were not having equal bargaining power, that too would not enable the Court to grant any relief to that employee. A total embargo on such casual or temporary employment is not possible, given the exigencies of administration and if imposed, would only mean that some people who at least get employment temporarily, contractually or casually, would not be getting even that employment when securing of such employment brings at least some succour to them. After all, innumerable citizens of our vast country are in search of employment and one is not compelled to accept a casual or temporary employment if one is not inclined to go in for such an employment. It is in that context that one has to proceed on the basis that the employment was accepted fully knowing the nature of it and the consequences flowing from it. In other words, even while accepting the employment, the person concerned knows the nature of his employment. It is not an appointment to a post in the real sense of the term. The claim acquired by him in the post in which he is temporarily employed or the interest in that post cannot be considered to be of such a magnitude as to enable the giving up of the procedure established, for making regular appointments to available posts in the services of the State. The argument that since one has been working for some time in the post, it will not be just to discontinue him, even though he was aware of the nature of the employment when he first took it up, is not one that would enable the jettisoning of the procedure established by law for public employment and would have to fail when tested on the touchstone of constitutionality and equality of Opportunity enshrined in Article 14 of the Constitution.

49. It is contended that the State action in not regularising the employees was not fair within the framework of the rule of law. The rule of law compels the State to make appointments as envisaged by the Constitution and in the manner we have indicated earlier. In most of these cases, no doubt, the employees had

worked for some length of time but this has also been brought about by the pendency of proceedings in tribunals and Courts initiate at the instance of the employees. Moreover, accepting an argument of this nature would mean that the State would be permitted to perpetuate an illegality in the matter of public employment and that would be a negation of the constitutional scheme adopted by us, the people of India. It is therefore not possible to accept the argument that there must be a direction to make permanent all the person employed on daily wages. When the Court is approached for relief by way of a writ, the Court has necessarily to ask itself whether the person before it had any legal right to be en forced. Considered in the light of the very clear constitutional scheme, it cannot be said that the employees have been able to establish legal right to be made permanent even though they have never been appointed in terms of the relevant rules or in adherence of Articles 14 and 16 of the Constitution.

9A. Keeping in view the judgment delivered by the apex Court, the regularization done by the respondent State need not be touched or reopened based on the judgment as held by the apex Court and therefore this Court is of the considered opinion that the subsequent action of the respondents in the light of the subsequent circulars issued by the State Government pursuant to the judgment delivered in the case of *State of Karnataka v. Umadevi and Others* (supra), is bad in law.

10. Resultantly the impugned order passed by the respondents dated 21.1.2010 is hereby set aside. Respondents are directed to reinstate the petitioner forthwith. It is needless to mention that the petitioner shall not be entitled for any back-wages, however, the petitioner shall be entitled for notional fixation of seniority and other consequential benefits. Petition is allowed. No order as to costs.

11. In the light of the aforesaid, other connected writ petitions are also allowed. The impugned order dated 21.1.2010 is hereby quashed. The petitioners shall be entitled for reinstatement in service forthwith with all consequential benefits except back-wages. In other writ petitions i.e., W.P. Nos. 1018 of 2010, 1019 of 2010 and 1020 of 2010, again the regularization has been done on a class 4 post by the Chief Medical & Health Officer, Rajgarh and though the petitioners in the aforesaid cases were working on the post of driver, they were regularised against the post of ward boy which is again a Class IV post. For the reasons detailed in the preceding paragraphs, the order terminating their service i.e., order dated 21.1.2010 is hereby set aside. The respondents are directed to reinstate the petitioners in the peculiar facts and circumstances of the case also forthwith. The petitioners shall be entitled for all consequential benefits including notional fixation of seniority, however, they shall not be entitled for back-wages. It is further made clear that in one of the writ petitions i.e., W.P. No. 1020 of 2010, the petitioner therein namely; Sunil was deregularised by the impugned order dated 21.1.2010 and as this Court has arrived at a conclusion that the deregularisation/termination is bad in law the petitioner Sunil shall be entitled for

all consequential benefits except back-wages and the order deregularising his service is set aside.