

(2021) 06 DEL CK 0087

In the Delhi High Court

Case No : Civil Writ Petition No. 5453 Of 2020, Civil Miscellaneous No. 19659 Of 2020, 340 Of 2021

Saroj Kumar Nayak & Ors.

APPELLANT

Vs

Tribal Cooperative Marketing Development Federation On
India Limited

RESPONDENT

Date of Decision : 21-06-2021

Acts Referred:

Constitution Of India, 1950 — Article 14, 15, 16, 21, 23, 226, 309

Citation : (2021) 06 DEL CK 0087

Hon'ble Judges : V. Kameswar Rao, J

Bench : Single Bench

Advocate : Sudarshan Rajan, Hitain Bajaj, Rajesh Gogna

Final Decision : Dismissed

Judgement

V. Kameswar Rao, J

1. The present petition has been filed by eight persons with the following prayers:

â??In view of the facts narrated and grounds set out in this writ petition, it is most respectfully prayed that this Honâ??ble Court may be

graciously pleased to

(a) call for the relevant records relating to the contractual employment of the petitioners herein as also relevant records leading to the issue

of the notification dated 09-11-2019 (Annexure P-6) and other kindred records leading to the issue of order dated 23-07-2020 (annexure

P-9) and examine the extent of injustice meted to the petitioners in;

(b) issue a writ in the nature mandamus or any other suitable writ or direction or order directing the respondents to consider the case for

regularization from the very date of initial engagement and afford the petitioners the consequential reliefs, such as pay and allowances,

annual increments, leave and leave encashment and other benefits which may be granted in accordance the provisions of the VII Pay

Commission recommendations as admissible to the regular employees of the TRIFED, of corresponding post.

This Honâ??ble Court may be pleased to pass such other order or orders as this Honâ??ble Court deem fit to meet the ends of justice.â??

2. It is the case of the petitioners that their initial engagement on contract basis was in the years 2010 / 2011 on the post of Assistant Grade-I (now

Senior Assistant) and Clerk (now called as Junior Assistant) through a selection process which is undertaken for making regular appointment. Their

engagement was renewed from time to time with artificial breaks. Some of the petitioners were also given appointment on higher post s. Though, the

appointments were with the nomenclature â??on contract basisâ? but for all purposes it was a regular appointment except the fact that the

remuneration that is being paid, is not that of a regular appointee.

3. The cause of action for them to approach this Court by way of this petition was triggered on the issuance of notification dated November 09, 2019

by the respondent whereby the respondent advertised the filling up various posts on direct recruitment basis. These posts include that of Deputy

Manger, Sales Executive, Senior Accountant, etc. It is their case that as they are eligible and have been performing their duties sincerely / diligently

hence are entitled to be regularized on the posts on which they are working. According to them, they now being overage for any job outside the

respondent organization, the respondent should regularize their services. They have referred to the various representations made by them requesting

the authorities in the respondent organization, for regularization of their services. Unfortunately, the same have not been replied to. It is averred in the

petition that legal advice was sought on the aspect of regularizing the services of the petitioners, wherein it is opined, that the petitioners past

contractual services could well be reckoned for purposes of seniority and age limit shall not be a bar and precedents are available when in 2012

individuals who had temporary status were regularized.

4. A counter affidavit has been filed by the respondent wherein it is stated that

the respondent is a Multi State Cooperative Society under the administrative control of the Ministry of Tribal Affairs and is an organization engaged in marketing development of tribal products including tribal art & craft under the brand name "TRIBES INDIA".

5. The main mandate of the respondent is to enhance the capability of the tribal community; promotion of tribal products and creation of marketing opportunities for them with a view to ensure fair prices for their products and augmenting their income on a sustainable basis.

6. It is stated that an advertisement was published in the Employment News dated 20 to 26 February, 2010 and in the Tribune, Himachal Pradesh dated April 23, 2011 whereby applications were invited from the eligible candidates for filling up the posts of Assistant Grade-I and Clerk on contract basis.

7. In furtherance of the said advertisement and receipt of applications, a Selection Committee was constituted by the respondent to conduct interviews to shortlist the applicants against the advertised posts. Pursuant thereto, interviews were held and selection was made of the petitioners. The petitioners being contractual employees are being paid salary / remuneration consisting of minimum basic wage of the grade / post with Dearness Allowance, HRA and Transport Allowance in terms of the norms fixed by the Central Government.

8. It is also stated that an advertisement had been issued on November 15, 2019 against which petitioner Nos.1, 4, 5, 6 and 7 had applied for the posts of Deputy Manager, Senior Accountant and Sales Executive. Consequent upon completion of all the procedure, the final result of the direct recruitment process and Computer Based Tests ("CBT" for short) were announced on March 23, 2021, wherein it was found except Deepak Kumar who has been shortlisted in the waiting list category for the post of Sales Executive, none of the other petitioners are successful in the selection process.

9. It is stated that the petitioners who have applied for the posts and having participated in the selection process, now cannot make a claim for regularization of their services. It is stated, the petition be dismissed.

10. A rejoinder is also filed by the petitioners controverting the stand of the respondent in its counter affidavit.

SUBMISSIONS:

11. At the outset, Mr. Sudarshan Rajan, learned counsel appearing for the petitioners submitted that out of eight petitioners, the petitioner Nos.2 and 3

have since resigned and the lis qua them no longer survives. The statement is taken on record. It is the submission of Mr. Rajan that the prayer in the

writ petition is for regularization of the petitioners from the date of their initial appointment with consequential benefits. According to him, the petitioner

Nos.1 to 5 were appointed as Assistant Grade-I (now called as Senior Assistant) and petitioner Nos.6 to 8 were appointed as Clerk (now called as

Junior Assistant) with the respondent organization in the years 2010 and 2011. The appointment of the petitioners was on regular basis, inasmuch as

the post on which the petitioners were appointed are sanctioned posts and through the process followed for regular appointment. That apart, some of

the petitioners i.e. petitioner Nos.1 to 5 have also been given promotion for all practical purposes to the post of Senior Assistant in the year 2019.

Similarly, the petitioner Nos. 6 to 8 were practically promoted from the post of Clerk to the post of Junior Assistant in the year 2019. He lays stress on

the fact that the ACRs of the petitioners were also drawn which is akin to the case of a regular appointee. The contract of the petitioners has been

extended after evaluating their performance which was found to be good. He also stated that the petitioners' service was with Pan India Service

liability which otherwise does not exist in the case of contractual employment. Even the respondent was making deductions against Provident Fund

which is also an attribute showing their regular appointment. The functions are being discharged by the petitioners as regular appointees.

12. Mr. Rajan stated that the appointments were made after following the due process, inasmuch as notification, calling applications for appointment,

was issued. The petitioners have requisite qualifications except petitioner No.3 who was appointed after giving age relaxation for which provision

exists. In fact, it is his submission that the respondent themselves wanted to regularize the petitioners and in that regard they had also taken a legal

opinion. Even as per DOPT circular of 2013 a person who has rendered continuous service of three years is entitled to regularization.

13. Mr. Rajan stated that the plea of the respondent that the petitioners having applied for various posts under the direct recruitment category and

being unsuccessful cannot seek regularization is untenable. In this regard, it was his submission that the petitioners who had applied against notification for direct recruitment, did not apply for the same post on which they were appointed on contract basis. Hence, their participation in the selection for different posts and not being successful is inconsequential and they cannot be non-suited in this petition on that ground. According to Mr. Rajan, continued service for nearly a decade without intervention of the Court on the basis of selection under the constitutional scheme and against regular vacancies has resulted in a vested right having accrued in favour of the petitioners for regularization.

14. Mr. Rajan had also stated that provision exists even to absorb temporary status employee. Casual labourers who were appointed even without the due process of selection and have served for 240 days resulting in grant of temporary status have been regularized. The case of the petitioners is on stronger footing as they have been appointed by a due process and against regular vacancies and have put in more than ten years of service. In support of his submissions Mr. Rajan had relied upon the following judgments:

- (i) B. Nagarajan & Ors. v. State of Mysore (1966) 3 SCR 682;
- (ii) Dhirendra Chamoli v. State of U.P. (1986) 1 SCC 637;
- (iii) Direct Recruit Class II Engineering Officers Association v. State of Maharashtra (1990) 2 SCC 715;
- (iv) N. Suresh Nathan & Anr. v. UOI, (1992) Supp (1) SCC 584;
- (v) K.C. Gupta v. Lt. Governor of Delhi, 1994 Supp (3) SCC 408;
- (vi) U.P.S.C. v. Alpana (1994) 2 SCC 723;
- (vii) Bimlesh Tanwar v. State of Haryana (2003) 5 SCC 604;
- (viii) State of West Bengal v. Manas Kumar Chakraborty, (2003) 2 SCC 604;
- (ix) U.P.S.C. v. Girish Jayanthi Lal Vaghela & Ors. (2006) 2 SCC 482;
- (x) Secretary, State of Karnataka & Ors. v. Uma Devi & Ors.; (2006) 4 SCC 1;
- (xi) Shailendra Dania v. S.P. Dubey & Ors. (2007) 5 SCC 535;
- (xii) State of Orissa v. Mamata Mohanty (2011) 3 SCC 436;
- (xiii) Sheo Narayan Nagar v. State of U.P. (2018) 13 SCC 432;
- (xiv) Chander Mohan Negi v. State of H.P. (2020) 5 SCC 732;
- (xv) Randhir Singh v. Union of India & Ors. (1982) 1 SCC 618 ; and

(xvi) Anuj Garg & Ors. v. Hotel Association of India & Ors. (2008) 3 SCC 1.

15. On the other hand, Mr. Rajesh Gogna, learned CGSC appearing for the respondent would contend that the petitioners were engaged by the

respondent on various dates relating back to 2010-11 and their contract was extended from time to time. Mr.Gogna has taken an objection that the

shortlisted candidates for appointment pursuant to notification of 2019 are necessary parties to the petition as they are going to be adversely affected.

He submitted that the petitioners having participated in the selection process pursuant to the advertisement dated November 09, 2019 and being

unsuccessful cannot seek regularization. He stated, the petitioners were aware that, on regular selection, their engagement shall be terminated. On the

submission, the selected candidates need to be party as their rights shall be affected, he has relied on the following judgments:

(i) Prabodh Verma & Ors. v. State of U.P., (1984) 4 SCC 251;

(ii) Avtar Singh Hit v. Delhi Gurudwara (2006) 8 SCC 487; and

(iii) Public Service Commission v. Mamta Bisht, (2010) 12 SCC 204.

16. Mr.Gogna would submit that in view of the terms of the advertisement and the letter of appointment issued to the petitioners in the year 2010 /

2011 which stipulates the appointment as contractual till regular appointments are made, they are not entitled to regularization. In this regard, he has

relied upon the judgment in the case of Anil Lamba and Ors. v. Govt. of NCT and Ors., 2017 SCC OnLine Del 7382.

17. According to Mr. Gogna, the claim of the petitioners that they had legitimate expectation that their contractual appointment may crystallize in

regular appointment is against settled position of law and also on facts. In this regard, he has relied upon the judgment in the case of Radhey Shyam

& Ors. v. GNCT of Delhi and Ors. 2015 SCC Online Del 6774 and Kumar Mayank v. Delhi Technological University & Anr., 2016 (160) DRJ 211.

18. Insofar as the submission of Mr. Rajan that persons with temporary status have been regularized and similar benefit must be given to the

petitioners is contested by Mr.Gogna as misconceived. According to him, the petitioners who were appointed on contractual basis cannot be compared

with temporary status employee. According to him, the regularization of the temporary status employee is governed by Casual Labourer, (grant of

temporary status and regularization) Scheme, 1993 which stipulates

regularization of Casual Labourers in service who were in place as on September 10, 1993. He also contests the plea of Mr. Rajan that the grant of pay scale with DA, HRA and filling up of ACR form would depict regular nature of appointment as untenable. He stated, no comparison can be made between the contractual employees and the regular employees. He concluded his submissions by reiterating his stance that some of the petitioners having availed opportunity of seeking regular appointment in the respondent organization and being unsuccessful cannot not seek regularization which shall be a back door entry in view of the judgment of the Supreme Court in the case of Secretary, State of Karnataka & Ors. (supra). Hence he seeks the dismissal of the writ petition.

19. Having heard the learned counsel for the parties, the issue which arises for consideration in this petition is whether the petitioner Nos. 1, 4, 5, 6, 7 and 8 are entitled to regularization of their services on the posts on which they are working on contract basis.

20. It is a conceded position that the said petitioners were appointed as Assistant Grade-I (Senior Assistant) and Clerk (Junior Assistant) on contract basis. The advertisement, pursuant to which they were appointed, clearly stated that the appointment is for a period of two years or till regular appointments are made, whichever is earlier. The advertisement also stated that the candidates applying against the advertisement shall be appointed on a contract basis and have no right of absorption or permanent employment. Similar are the provisions in the appointment letters issued to the petitioners.

21. Admittedly, the petitioners have not challenged the nature / terms of the appointment since their initial appointment and also in this petition. They continued to work on contractual basis for the last ten years.

22. I note similar terms of appointment with regard to the very same respondent had come up for consideration in a case titled as Jagdish Kumar v.

Tribal Cooperative Marketing Development Federation of India Ltd., W.P.(C) 1647/2014, decided on November 10, 2014, wherein a Coordinate

Bench of this Court has in para 14 held as under:

14. This Court is of the opinion that having accepted the aforesaid terms and conditions of appointment of his own free will, joined the services of the respondent and worked for a year and a half, it does not lie in the

mouth of the petitioner to challenge the same and that too

after the respondent has terminated his services. The terms and conditions of the petitioner's appointment letter bears out the submission

made by learned counsel for the respondent that his appointment was contractual in nature and he was aware of the fact that the said

appointment would not confer any right on him for regular appointment to the said post and further, that his services could be terminated in

case of non-compliance of any of the conditions stipulated in the letter.

(Emphasis supplied)

23. It is not known, as to why the respondent had resorted to contractual appointment despite the Supreme Court in the case of Secretary, State of

Karnataka & Ors. (supra), has held that public appointment has to be in terms of the constitutional scheme, on regular basis and also following the

recruitment rules. The appointments made were in violation of the judgment of the Supreme Court in Secretary, State of Karnataka & Ors. (supra).

24. Having said that, in the case in hand, I find the selection of the petitioners was only through the process of interview, unlike now, pursuant to the

notification of 2019, when the selection has been made through CBT and Interview. Further, the fact, the advertisement itself contemplated the

appointment on a contract basis, not many people would have applied for the same because of its temporary nature. It is clear that the process that

was followed at the time of the appointment of the petitioners on contractual basis was not as per the required procedure to be followed for regular

appointment.

25. In this regard, I may refer to the following observation of the Supreme Court in the case of Official Liquidator v. Dayanand (2008) 10 SCC 1 as

relied on by a Coordinate Bench of this Court in the judgment of Anil Lamba (supra), wherein in paragraph 52 has held as under:

52. In this context, we may also mention that though the Official Liquidators appear to have issued advertisements for appointing

the company-paid staff and made some sort of selection, more qualified and meritorious persons must have shunned from applying because

they knew that the employment will be for a fixed term on fixed salary and their engagement will come to an end with the conclusion of

liquidation proceedings. As a result of this, only mediocres must have responded

to the advertisements and joined as company-paid staff. In

this scenario, a direction for absorption of all the company-paid staff has to be treated as violative of the doctrine of equality enshrined in

Articles 14 and 16 of the Constitution.â??

(Emphasis supplied)

26. Having said that Mr. Gogna is also right in contending at least petitioner Nos.1, 4, 5, 6 and 7 having applied pursuant to notification of 2019 for

getting a regular appointment and being unsuccessful (except Deepak Kumar, who is in waiting list) cannot now seek regularization. This I say so,

because regularization is not a mode of appointment. [Ref: Nagar Mahapalika, Kanpur v. Vibha Shukla, 2007 (15) SCC 161]. Regular appointment has

to be in the manner contemplated under the Recruitment Rules. The said petitioners being unsuccessful cannot now seek a regular appointment under

the garb of regularization. The Supreme Court in the case of Hindustan Shipyard Ltd. and Ors. v. Dr. P. Sambasiva Rao and Ors . (and connected

appeal) 1996 (7) SCC 499, held that regularization has to be as per Recruitment Rules for direct recruitment.

27. The Supreme Court in Secretary, State of Karnataka & Ors. (supra), held that public employment has to be in terms of constitutional scheme

which is as per the Recruitment Rules framed by the employer and has to be by giving wide publicity and considering every person who applies for the

post and fulfills the eligibility conditions.

28. Insofar as the plea of Mr. Rajan that there is a precedent available in the respondent organization, regularizing the services of the Casual

Labourers having attained temporary status, hence the petitioners need to be regularized is not appealing. Firstly, Casual Labourers are Group-D

employees whose regularization was effected under the scheme evolved by the Government of India known as Casual Labourers (grant of temporary

status and regularization) Scheme, 1993. From the perusal of the said scheme, it is clear that the same is applicable to Group-D employees only,

whereas the petitioners herein are working on Group-C posts, hence the said scheme has no applicability. Even I find the prayer of the petitioners in

this petition is for their regularization w.e.f. their initial date of engagement. From the above discussion, it is clear that the petitioners are not entitled to

their regularization, hence, the plea of Mr. Rajan that the same must relate back

the date of initial appointment cannot be granted. The Supreme Court in the case of *Union of India and Ors. v. Sheela Rani*, (2007) 15 SCC 230 has rejected a similar plea of regularization from a retrospective date. I may also at this stage, reproduce paras 43 and 50 of the judgment of the Supreme Court in the case of *Secretary, State of Karnataka & Ors. (supra)* as under:

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.

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50. It is argued that in a country like India where there is so much poverty and unemployment and there is no equality of bargaining power,

the action of the State in not making the employees permanent, would be violative of Article 21 of the Constitution. But the very argument

indicates that there are so many waiting for employment and an equal opportunity for competing for employment and it is in that context that

the Constitution as one of its basic features, has included Articles 14, 16 and 309 so as to ensure that public employment is given only in a

fair and equitable manner by giving all those who are qualified, an opportunity to seek employment. In the guise of upholding rights under

Article 21 of the Constitution, a set of persons cannot be preferred over a vast majority of people waiting for an opportunity to compete for

State employment. The acceptance of the argument on behalf of the respondents would really negate the rights of the others conferred by

Article 21 of the Constitution, assuming that we are in a position to hold that the right to employment is also a right coming within the

purview of Article 21 of the Constitution. The argument that Article 23 of the Constitution is breached because the employment on daily

wages amounts to forced labour, cannot be accepted. After all, the employees accepted the employment at their own volition and with eyes

open as to the nature of their employment. The Governments also revised the minimum wages payable from time to time in the light of all

relevant circumstances. It also appears to us that importing of these theories to defeat the basic requirement of public employment would

defeat the constitutional scheme and the constitutional goal of equality.â??

29. One of the plea of Mr. Rajan was also that the petitioners who have applied pursuant to the notification of 2019 was for different posts and hence

they need to be considered for regularization on the posts on which they are working as of now, is also without merit. The respondent had in 2019

issued notification for making appointments on the posts on which the petitioners are working on contract basis. The petitioners instead of applying for

the posts they are working, applied for higher posts and were unsuccessful; they cannot now contend that they should be considered for regularization

on the posts on which they are currently working. This argument of Mr. Rajan is an afterthought only realizing that the petitioners are unsuccessful in

getting regular appointment pursuant to notification of 2019.

30. Now coming to the judgments referred to by Mr. Rajan are concerned, he has relied upon in B. Nagarajan & Ors. (supra) in support of his

contention that, if the government advertises appointments and the conditions of service of the appointment and makes a selection after advertisement,

there would be no breach of Articles 15 and 16 of the Constitution of India because everybody who is eligible in view of the conditions of service

would be entitled to be considered by the State. The said judgment has no applicability in the facts of this case. I have already held that the process

followed by the respondent was not similar to the process followed in making regular appointments.

31. For similar reasons the judgment in the case of U. P.S. C. v. Girish Jayanthi Lal Vaghela (supra) has no applicability.

32. On similar proposition, Mr. Rajan had relied upon the judgment in the case of State of Orissa (supra). For similar reasoning as in the case of B.

Nagarajan (supra), the judgment has no applicability to the facts of this case. He has relied upon the judgments in the case of N. Suresh Nathan &

Anr. (supra), K.C. Gupta (supra), U.P.S.C. v. Alpana (supra), Bimlesh Tanwar (supra), State of West Bengal (supra), Shailendra Dania (supra) and

Sheo Narayan Nagar (supra), to contend that if there exists past practice, the

same has become a rule and the petitioners are entitled to regularization.

Suffice to state, the plea is contrary to the ratio of the Supreme Court in Secretary, State of Karnataka & Ors. (supra), wherein it is held that

appointments have to be in terms of Constitutional Scheme; Recruitment Rules; by giving wide publicity and on regular basis.

33. Mr. Rajan has also relied on the judgments in the cases of Randhir Singh (Supra) and Anuj Garg (supra) to argue that equal work should translate

to equal pay. Suffice would it be to state that in light of my conclusions above and the fact that present petition seeks the regularization of t h e

petitioners, the abovementioned judgments are not relevant in terms of the issue at hand.

34. He has also relied upon the judgment in the case of Dharendra Chamoli (supra), Direct Recruit Class II Engineering Officers (supra) and Chander

Mohan Negi (supra) in support of his submission that the petitioners are entitled to regularization. I am afraid that such a submission cannot be

accepted in view of my discussion above based on the judgment of the Supreme Court in Secretary, State of Karnataka & Ors. (supra) and also the

fact that the petitioners 1, 4, 5, 6 and 7 having applied for appointment to various posts pursuant to a notification of 2019 and being unsuccessful

(except one petitioner who is in waiting list), the reliefs as prayed can n ot be granted. Suffice to state, the Judgments relied upon are distinguishable

on facts.

35. In view of my discussion above, I find the contesting petitioners are not entitled to any relief. There is no merit in the petition, the same is

dismissed.

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In view of my decision in the writ petition these applications stand dismissed.