
(2007) 01 GAU CK 0081
In the Gauhati High Court
Case No : Writ Appeal No. 64 of 2003

State of Manipur and Others

APPELLANT

Vs

Hidangmanym Brajamani Sharma

RESPONDENT

Date of Decision : 04-01-2007

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 162, 167, 226

Citation : (2009) 4 GLT 72

Hon'ble Judges : U.B. Saha, J; I.A. Ansari, J

Bench : Division Bench

Advocate : Asok Potsangbam, for the Appellant; N. Ibotombi, for the Respondent

Judgement

I.A. Ansari, J.—The writ Petitioner-Respondent herein, who holds a degree of Bachelor of Engineering in Electrical, was appointed, vide order, dated 18.11.80, as a Technical Assistant in the Public Works Department (hereinafter referred to as "the PWD") of the State Government, his appointment being as work-charged employee. As many as nine persons, who were appointed as Section Officers on work-charged basis, were regularized against existing vacancies. As the said 9 persons were, according to the Petitioner, junior to him and as the Petitioner considered non-regularization of his service as an act of discrimination by the State Government, the Petitioner came to this Court, with the help of an application made under Article 226 of the Constitution of India, seeking appropriate directions to the State Respondents commanding them to regularize the service of the Petitioner. This application gave rise to W.P(C) No. 1212 of 2000.

2. The Appellants herein, who were Respondents in the said writ petition, resisted the prayer for regularization made by the Petitioner contending, inter alia, that the regularization of the said nine work-charged employees was against posts of Section Officers, but in the case of the writ Petitioner, since there was no recruitment rule, his service could not be regularized. Though the State had earlier a policy for regularization of the services of work-charged employees on

completion of a period of 10 years, this policy was subsequently withdrawn. Withdrawal of this policy came to be challenged by way of various writ petitions. While these writ petitions were still pending, a learned Single Judge, who heard the present writ petition, took the view that on account of the fact that the service of persons, junior to the writ Petitioner, had already been regularized, the service of the Petitioner too ought to have been regularized. Having reached this conclusion, the learned Single Judge directed the State Respondents to regularize the service of the Petitioner within a period of 45 days. The direction, so given, is under challenge, in the present appeal, by the State Government.

3. We have heard Mr. Asok Potsangbam, learned Advocate General, Manipur, for the Appellants, and Mr. N. Ibotombi, learned Counsel, for the writ Petitioner-Respondent.

4. While considering the present appeal, what may be noted, at the very outset, is that the learned Single Judge has observed, in the impugned judgment, that in the light of the judicial pronouncements and as per the earlier policy of the Government, a period of 10 years is an adequate period for regularizing the service of a work-charged employee. Pointing out to the observations so made by the learned Single Judge, learned Advocate General has submitted that in the face of the clear and authoritative pronouncement of the Constitution Bench, in *Secretary, State of Karnataka and Others Vs. Umadevi and Others*, (hereinafter referred to as *Umadevi (4)*) regularization of service of a person is not constitutionally permissible unless appointment of such a person had been made following scrupulously the provisions of the relevant recruitment rules, if any, or following such a process of selection, which is consistent with the scheme of public employment as envisaged by our Constitution, particularly, in accordance with the mandates of Articles 14 and 16 thereof. In the case at hand, submits the learned Advocate General, apart from the fact that there is no recruitment rules in existence for recruitment to a post of technical assistant, the appointment of the writ Petitioner was as a work-charged employee and his appointment, as a work-charged employee, had been made without following any constitutionally required selection process. In a case of present nature, contends learned Advocate General, the Court ought not to have directed regularisation of service. The learned Advocate General has also taken us through various pronouncements of the Supreme Court culminating into the decision of the Constitution Bench, in *Umadevi (4)* (*supra*), to show that not only Articles 14, but even Article 16 has been held to form basic structure of the Constitution and, hence, in matters of public employment, no one can be made beneficiary of "pick and choose" system and that a public employment has to be made following a due process of selection, which throws open to all those, who are eligible, an effective opportunity to participate in the selection process. The learned Advocate General has pointed out that in the light of the decision of the Constitution Bench, in *Umadevi (4)* (*supra*), there can be no escape from the conclusion that no the State Government has the power or authority to make appointment by taking resort to the provisions of Article 167 and that a public

employment, in order to survive, must be made in terms of the rules, if any, framed under Article 309 or in terms of such a process, which would fulfill the mandatory requirements of, at least, Articles 14 and 16 of the Constitution.

5. While resisting the submissions made on behalf of the Appellants, Mr. N. Ibotombi, learned Counsel for the writ Petitioner Respondent herein, does not dispute that regularization of service is constitutionally not permissible unless a process of selection, consistent with the scheme of public employment as envisaged by the Constitution, is adhered to in making such appointment. What, however, Mr. N. Ibotombi contends, is that when persons, similarly situated as the writ Petitioner is, made beneficiary of the policy of regularization, the State shall not refuse to regularize the service of the writ Petitioner, for, such a refusal, according to Mr. Ibotombi, would amount to discrimination and discriminatory treatment, on the anvil of Article 14, is impermissible. It is also contended by Mr. Ibotombi that in the case at hand, Petitioner's service has not been regularized on the ground that no recruitment rules have been framed for making appointment of technical assistants. Omission to make relevant recruitment rules, submit Mr. Ibotombi, is a lapse on the part of the State and for the lapses, which a State commits, a citizen, such as the writ Petitioner, cannot be made to pay. Yet another submission of Mr. Ibotombi is that Umadevi (4) (supra) permits one time relaxation and regularization of service and, hence, in the present case too, the State Government can and may be directed to regularize, as a one-time measure, the service of the writ Petitioner. Support for this submission is sought to be derived by Mr. Ibotombi from para 53 of decision of the Constitution Bench in Umadevi (4) (supra).

6. Before we deal with the question as to whether the direction to regularize the service of the Petitioner could have been passed in the writ petition, what is imperative to be ascertained, in the light of the rival submissions made before us on behalf of the parties, is as to whether the mere fact that an authority has passed a particular order, such as, an order of regularization of service in favour of another person, similarly situated, can be made a ground for issuing a writ in favour of the Petitioner on the plea of discrimination if the order, passed in favour of the other person, is found to be contrary to law or not warranted in the facts and circumstances of his case. Noticing that the High Courts, in exercise of their writ jurisdiction, have been passing orders, which are not, otherwise, legally permissible, in order to remove discrimination and thereby asking, in effect, the authorities concerned to repeat the illegality, the Apex Court has expressed its anxiety on such an approach and has laid down, in no uncertain words, the position of law, in this regard, in Chandigarh Administration and another Vs. Jagjit Singh and another, in the following words:

8. We are of the opinion that the basis or the principle, if it can be called one, on which the writ petition has been allowed by the High Court is unsustainable in law and indefensible in principle. Since we have come across many such instances, we think it necessary to deal with such pleas at a little length.

Generally speaking, the mere fact that the Respondent authority has passed a particular order in the case of another person similarly situated can never be the ground for issuing a writ in favour of the Petitioner on the plea of discrimination. The order in favour of the other person might be legal and valid or it might not be. That has to be investigated first before it can be directed to be followed in the case of the Petitioner. If the order in favour of the other person is found to be contrary to law or not warranted in the facts and circumstances of his case, it is obvious that such illegal or unwarranted order cannot be made the basis of issuing a writ compelling the Respondent-authority to repeat the illegality or to pass another unwarranted order. The extraordinary and discretionary power of the High Court cannot be exercised for such a purpose. Merely because the Respondent-authority has passed one illegal unwarranted order, it does not entitle the High Court to compel the authority to repeat that illegality over again and again. The illegal unwarranted action must be corrected, if it can be done according to law - indeed, wherever it is possible, the Court should direct the appropriate authority to correct such wrong orders in accordance with law - but even if it cannot be corrected, it is difficult to see how it can be made a basis for its repetition. By refusing to direct the Respondent-authority to repeat the illegality, the Court is not condoning the earlier illegal act/order nor can such illegal order constitute the basis for a legitimate complaint of discrimination. Giving effect to such pleas would be prejudicial to the interests of law and will do incalculable mischief to public interest. It will be a negation of law and the rule of law. Of course, if in case the order in favour of the other person is found to be a lawful and justified one it can be followed and a similar relief can be given to the Petitioner if it is found that the Petitioners' case is similar to the other persons' case. But then why examine another person's case in his absence rather than examining the case of the Petitioner who is present before the Court and seeking the relief. Is it not more appropriate and convenient to examine the entitlement of the Petitioner before the Court to the relief asked for in the facts and circumstances of his case than to enquire into the correctness of the order made or action taken in another person's case, which other person is not before the case nor is his case. In our considered opinion, such a course barring exceptional situations - would neither be advisable nor desirable. In other words, the High Court cannot ignore the law and the well-accepted norms governing the writ jurisdiction and say that because in one case a particular order has been passed or a particular action has been taken, the same must be repeated irrespective of the fact whether such an order or action is contrary to law or otherwise. Each case must be decided on its own merits, factual and legal, in accordance with relevant legal principles. The orders and actions of the authorities cannot be equated to the judgments of the Supreme Court and High Courts nor can they be elevated to the level of the precedents, as understood in the judicial, world. (What is the position in the case of orders passed by authorities in exercise of their quasi-judicial power, we express no opinion. That can be dealt with when a proper case arises).

7. In the light of the observations made in Chandigarh Administration (supra), there can be no escape from the conclusion that the present writ Petitioner's service cannot be directed to be regularized merely on the ground that the services of other persons, similarly situated as the Petitioner is, have been regularized unless this Court can hold that the regularization of the services of those persons was in accordance with law. If services of those (who have been made beneficiary of a process of regularisation of service) could not have been regularised in law or ought not to have regularised in law, the service of the Petitioner cannot be directed to be regularised, for, such a direction would be a direction to perpetuate an illegality, which the State might have committed in the past. A direction to commit an illegality cannot be issued to the State, in the name of removing discrimination, unless one is able to confidently hold that what had been done by the State, in favour of others, was legally permissible. If the Court finds that the direction, sought for by a Petitioner, would, if granted, require the State to perpetuate wrong earlier done, then, the Court must refuse to grant such a relief even if not granting of such a relief would amount to denying to the Petitioner a benefit, which others, similarly situated, may have been enjoying. In short, a Court cannot permit repetition of an illegality in the name of removing discrimination and before granting a relief, in order to remove a discrimination, the Court must be satisfied that the relief, sought for, is legally permissible. The test, therefore, in a case of present nature, is as to whether regularization of service is permissible in law, particularly, in the context of the facts of the present case.

8. Our quest for an answer to the question as to whether regularisation of service is possible and, if so, under what circumstances, takes us to the decision in Secretary, State of Karnataka and Ors. v. Umadevi and Ors., (2004) 7 SCC 132 [which was decided on 15.10.03 and is hereinafter referred to as Umadevi (1)]. In this case, the Supreme Court had before it a bunch of appeals against various judgments of High Court of Karnataka, whereunder directions for regularization of service of ad hoc employees or directions for considering the cases of the employees for regularisation had been issued. On noticing that different views, on the subject of regularisation, had been expressed in the decided cases, a two Judge Bench of the Supreme Court, in Umadevi (1) (supra), referred the matter to a Bench 3-Judges for decision. While referring the matter to a Judges Bench, the Court observed thus,

3. Looking to the position as it stands under the law regarding regularization, namely, different views expressed in different decisions of this Court, we feel that it would be appropriate that the matter may be heard by a 3 Judge Bench, so as to appropriately appreciate the legal position and decide the matter accordingly

4. Let the papers be placed before Hon"ble the Chief Justice of India for constituting a 3 Judge Bench for the purpose.

9. In terms of the above observations, a 3-Judge Bench was constituted. The 3-Judge Bench, so constituted, in Secretary, State of Karnataka and Ors. v.

Umadevi and Ors., reported in (2006) 4 SCC 44, [which was decided on 18.11.2003 and is hereinafter referred to as "Umadevi's (2)"], noticed that there was conflict of opinion, on the subject of regularization of service, between two decisions of 3-Judge Bench of the Supreme Court. Having so noted, the three-Judge Bench, in Umadevi (2)(supra), therefore, referred the matter to a Constitution Bench.

10. In Secretary, State of Karnataka and Ors. v. Umadevi and Ors. reported in 2006(1) Scale 313 [hereinafter referred to as Umadevi (3)], the Constitution Bench, on 28.10.05, framed four issues. The issues so framed and the directions given read as under.

1. There are questions relating to service jurisprudence calling for a more detailed hearing in view of the far reaching implications and ramifications. Some of the issues are as under:

1. Under the constitutional scheme should not proper selection and appointment be insisted upon and is it proper to recognize employments outside it as valid for the purpose of making them permanent subverting the constitutional scheme? Will it not amount to introducing a mode of appointment not recognized by the said scheme?

2. What is the distinction between regularization and confirmation or permanence in service jurisdiction?

3. Can the Court in exercise of its writ jurisdiction direct regularization or absorption in service though there are no posts or vacancies available for being filled up?

4. To what extent the appointments made dehors the service rules or in breach of statutory provisions contained in the Act or Rules can be recognized by the Courts and accorded judicial approval?

2. Let these matters be posted for hearing afresh on the above issue and such other related issues as may arise for consideration during the course of hearing.

11. While Umadevi (3) (supra) was still pending for decision by the Constitution Bench, a two-Judge Bench, in State of Karnataka and Others Vs. KGSD Canteen Employees Welfare Association and Others, decided, on 03.10.2006, held that a High Court in exercise of its discretion, under Article 26 of the Constitution of India, cannot either frame a scheme or directed the State to frame a scheme for regularizing the services of ad-hoc employees or daily wage employees, who had not been appointed in terms of the extent service rules framed either under a statute or under the proviso to the Article 309 of the Constitution. The Apex Court further held, in KGSD Canteen Employees Welfare Association (supra), that such a scheme, even if framed by the State, would not meet the requirements of law as the executive order, made under Article 162 of the Constitution, can not prevail over a statute or statutory rules framed under the proviso to Article 309. The relevants observations, made in KGSD Canteen Employees Welfare

Association (supra) read, thus,

It is not open to a High Court to exercise its discretion under Article 226 of the Constitution of India either to frame a scheme by itself or to direct the State to frame scheme for regularizing the services of ad-hoc employees or daily wage employees who had not been appointed in terms of the extent of service rules framed either under a statute or under the proviso to the Article 309 of the Constitution. Such a scheme, even if framed by the State would not meet the requirements of law as the executive order made under Article 162 of the Constitution can not prevail over a Statute or Statutory Rules framed under the proviso to Article 309.

12. Closely following the decision in KGSD Canteen Employees Welfare Association (supra), the Constitution Bench, in Secretary, State of Karnataka and Others Vs. Umadevi and Others, [hereinafter referred to as Umadevi (4)], decided on 10.4.06, held that every public employment has to be in terms of the Constitutional scheme of public employment and the High Courts, under their wide powers under Article 226 of the Constitution, cannot issue directions for the purpose of regularisation of service and thereby perpetuating illegalities, irregularities or improprieties and scuttle thereby the whole scheme of public employment. The Apex Court further held that the Constitution does not envisage any employment outside the constitutional scheme and without following the requirements set down therein. The Constitution Bench clarified that when rules, framed under Article 309 of the Constitution, are in force, no regularization is permissible, in exercise of the executive powers of the Government, under Article 162 of the Constitution, in contravention of the rules, for, adherence to rule of equality in public employment is a basic feature of the Constitution. The Constitution Bench further clarified that the High Court, acting under Article 226 of the Constitution, should not, ordinarily, issue direction for absorption unless the recruitment itself was made regularly and in terms of the Constitutional scheme and 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 enforced. Made it clear that Constitution Bench, in Umadevi (4) (supra), 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. Authoritatively laid down the Constitution Bench, in no uncertain words, in Umadevi (4) (supra), that those decisions, which run counter to the principles settled in the Constitution Bench decision, or in which directions run counter to what had been observed by the Constitution Bench, shall stand denuded of their status as precedents.

13. From what have been observed and held by the Constitution Bench, in Umadevi (4) (supra), it becomes, now, transparent that Articles 14, 16 and 309 form basic structure of the Constitution inasmuch as these constitutional provisions aim at ensuring that public employment is given only in a fair and

equitable manner by giving all those, who are eligible, an opportunity to seek employment. Adherence to the rule of equality of opportunity in public employment is, thus, a basic feature of the Constitution. When rules framed under Article 309 are in force, no regularization of service is permissible in exercise of the State's executive powers under Article 162, particularly, when the exercise of such executive power by the State contravenes the rules framed under Article 309. Even when no rules have been framed under Article 309, the public employment must be made following a fair and equitable selection process in terms of Articles 14 and 16 so as to enable every eligible person the liberty to seek employment. Our Constitution does not permit, in the light of the decision of the Constitution Bench, in *Umadevi (4)* (supra), making of public employment outside the Constitutional scheme and without following the requirements set forth hereinbefore. The High Court, while acting under Article 326, should not, ordinarily, issue direction for absorption, regularization or permanent continuance unless the recruitment, so made, is regular and in terms of the constitutional scheme. The fact that a person has been working, on the basis of an illegal appointment, for fairly long period of time cannot be made a ground for directing regularization of his service. The limitations, on the part of the State, to regularise the services of persons were, however, made subject to a one time exception by the Constitution Bench and this exception has been engrafted by the Constitution Bench, in para 53 of its decision in *Umadevi (4)* (supra). Para 53, therefore, which Mr. Ibotombi heavily relies upon, is reproduced hereinbelow:

53. One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in *State of Mysore and Another Vs. S.V. Narayanappa, R.N. Nanjundappa Vs. T. Thimmiah and Another*, and *B.N. Nagarajan and Others Vs. State of Karnataka and Others*, and referred to in para 15 above, of duly qualified persons in duly sanctioned vacant post 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 or regularization 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 above referred 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 regularize as a onetime measure, the services of such irregularly appointed, who have worked for ten years or more in duly sanctioned posts but no 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 regularization, if any already made, but not subjudice, need not be reopened based on this judgment, but there should be no further bypassing of the constitutional requirement and regularizing or making permanent, those not duly appointed as per the constitutional scheme.

14. A microscopic analysis of what has been observed, in para 53 hereinabove,

makes it clear that as a one time measure, the State may regularise the services of those persons, whose appointment are not illegal but merely irregular. There is a firm, though subtle, difference between an illegal appointment and an irregular appointment. An illegal appointment is one, which is contrary to, or in violation of, the constitutional guarantees and scheme of public employment. An irregular appointment is one, where there may have been recruitment in accordance with law, but while making the recruitment, there may have been some omission, which may not go to the root of the entire selection process and thereby vitiate the selection process. When this distinction between an illegal appointment and irregular appointment is borne in mind, there remains no difficulty in holding that the decision of the Constitution Bench, in *Umadevi (4)* (supra), permits, as a one time measure, regularization of service of those appointees, whose appointments may have been irregular, but not illegal.

15. In the backdrop of what have been indicated above, when the case of the present writ Petitioner is examined, it clearly transpires that the Petitioner came to be appointed as a work-charged employee without any selection process. Thus; the process of selection of the Petitioner was wholly arbitrary and in violation of the requirements of appointments, in public employment, as envisaged under Articles 14 and 16 of the Constitution. True it is that there are no recruitment rules for making appointment to a post of technical assistant in the P.W.D. of the State Government. But the appointment to such a post cannot be made on the basis of "pick and choose" method, for, in Public Works Department, every appointment has to be consistent with the constitutional scheme of public employment.

16. In the case at hand, it is not the case of the writ Petitioner that his appointment, as a work-charged employee, was following a due, fair and just selection process, which had permitted other eligible persons to participate in the selection process. In a situation, such as the present one, there can be no escape from the conclusion that the Petitioner's appointment as a work-charged employee, was wholly illegal and not merely irregular. When the appointment of the writ Petitioner, as work-charged employee, was wholly illegal, no direction could have been given by the High Court, under Article 226, to either appoint or regularize the service of such a person.

17. Because of what have been discussed and pointed out above, we find that the direction for regularization of the service of the writ Petitioner as given by the learned Single Judge, cannot be maintained in law.

18. We may also point out that following the decision of Constitution Bench, in *Umadevi (4)* (supra), a two-Judge Bench, in *National Fertilizers Ltd. and Others Vs. Somvir Singh*, set aside the direction given by the High Court to regularize the service of writ Petitioner and to pay all monetary benefits to him in terms of his appointment letter. (See also *Accounts Officer, (A and I) A.P. SRTC and Ors. v. P. Chandra Sekhara Rao and Ors.* reported in (2006) 7 SCC 488, *Principal, Mehar Chand Polytechnic, Jalandhar City and Another Vs. Anu Lumba and Others*, and

Surendra Prasad Tewari Vs. Uttar Pradesh Rajya Krishi Utpadan Mandi Parishad and Others,

19. We may also hasten to point out that the service of the writ Petitioner cannot, contrary to what Mr. Ibotombi has submitted, be directed to be regularized, for, his appointment, being wholly illegal as a work-charged employee, cannot be regularized on the ground that the services of persons, similarly situated, have been regularized, for, it is not open to the High Court, in the light of the decision, in Chandigarh Administration (supra), to direct a State Government to perpetuate an illegality in the name of removing discrimination. When the writ Petitioner has no legal right to seek regularization of his service, regularization of his service cannot be directed on the ground that persons, similarly situated as the Petitioner is, have been given the benefit of regularization.

20. In the result and for the reasons discussed above, this appeal succeeds. The impugned judgment and order, dated 27.08.2002, shall accordingly stand set aside.

21. Before parting with this appeal, we, however, make it clear that the writ Petitioner shall remain at liberty to participate in any selection process, which may be held by the State Government in accordance with law for making appointments to the posts of Technical Assistant in the P.W.D. of the State Government and if the Petitioner's case suffers from disqualification on account of the factum of his age, the State Respondents shall remain at liberty to condone the bar, in age, in accordance with law.

22. With the above observations and directions, this appeal shall stand disposed of.

23. No order as to costs.