
(2007) 05 GAU CK 0073
In the Gauhati High Court
Case No : W.A. No. 12 (K) of 2007

State of Nagaland and Another	Vs	APPELLANT
Pushu Khiamungan and Others		RESPONDENT

Date of Decision : 25-05-2007

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 162, 226, 309
Nagaland Secretariat (Civil) Stenographers Service (Amendment) Rules, 2002 — Rule 7
Nagaland Secretariat (Civil) Stenographers Service Rules, 1973 — Rule 7

Citation : (2008) GLT 215 Supp

Hon'ble Judges : K. Meruno, J; I.A. Ansari, J

Bench : Division Bench

Advocate : L.S. Jamir, for the Appellant; I. Longjem, for the Respondent

Judgement

I.A. Ansari, J.—Whether a High Court can issue a writ, in the nature of mandamus, commanding the State or its instrumentality to regularize the service of a person even if he has been appointed on ad hoc or contractual basis without following the relevant recruitment rules and in denial of the State's constitutional obligation to hold every selection process enabling all eligible candidates to participate in the selection process? Whether the High Court, in such a case, must necessarily issue a writ, in the nature of mandamus, if the service of another person, who was similarly appointed had been directed earlier, in another case, to be regularized? These are the two important questions, which this writ appeal has raised.

2. Before we answer the questions posed above, we may take note of the material facts, which have given rise to this writ appeal. The respondents herein, who are 22 in number, instituted W.P. (C) No. 147 (K) 2001 seeking directions to be issued to the respondents therein (i.e., the Appellants in this appeal) to regularize the services of the writ Petitioners as Stenographer Grade-III in Nagaland (Civil) Secretariat from the date of their respective initial appointment with all consequential benefits, the case of the writ Petitioners being, in brief,

thus : The Petitioners were appointed on contract basis, for a fixed period, as a Stenographer Grade-HI in Nagaland (Civil) Secretariat. Their contractual appointments were kept on being extended from time to time with a break in service for day or so; but from the respective dates of their initial appointments, all the Petitioners have completed more than five years of service and are, therefore, in terms of the relevant policy of the Government, entitled to regularization of their services.

3. The present Appellants, appearing as respondents in the writ petition, resisted the writ petition by contending, inter alia, thus: The writ Petitioners were initially, appointed as substitutes against leave vacancies and on expiry of the leave periods, when the regular employees rejoined their services, the Petitioners appointment were brought to an end; but on the ground of mercy, the writ Petitioners were appointed on contractual basis. A contractual appointee is not entitled to be permanently absorbed and their appointments come to an end, when their contract period is terminated or expires. This apart, the writ Petitioners are required to satisfy their efficiency in terms of the requirements of their service as Stenographer Grade-in.

4. However, the learned Single Judge, in the Judgment and order, dated 27.11.2002, relying upon the directions, which had been rendered earlier in Civil Rule No. 54(K) 97, W.P. (C) No. 170 (K) 99 and W.P. (C) No. 105 (K) 2000, observed as follows:

10. Similar issues came before this Court for consideration in Civil Rule No. 54 (K) 1997, W.P. (C) No. 170 (K) 1999 and W.P. (C) No. 105 (K) 2000. In writ petition No. 170 (K) 1999, the learned Single Judge gave the following directions:

(a) The Department shall consider the cases of all the Petitioners who are holding and working in their respective post for more than 5 years on ad hoc or contract as the case may be for regularization of their services subject to their possessing requisite qualification at the time of their initial appointment.

(b) For those Petitioners who are not yet completed 5 years of service in their respective post as on today, they shall be allowed to appear in the written test as well as viva voce to be conducted in association with the Nagaland Public Service Commission by relaxing their age, if any.

(c) The advertisement No. 3/99-2000 dated 6th Oct. '99 in so far with regard to the posts held by the Petitioners for 5 years or more shall not be processed for selection either written test or viva voce. The rest of the posts advertised shall go ahead with the process of recruitment in terms of the recruitment rules.

(d) If the concerned Department after examining the cases of the Petitioners who have completed 5 years of services on ad hoc/contract basis ultimately found that they are not qualified to hold the post either on the ground of academic qualification or suitability or otherwise, their cases shall not be considered for regularization but they shall also be entitled to appear before the selection test

after relaxing their age, if any.

Till such process as in (a), (b), (c) and (d) are completed, the Advertisement No. 3/99-2000 dated 6th Oct. '99 notifying the posts shall be kept in abeyance in so far with regard to the posts held by the Petitioners for more than 5 years.

5. Referring to the above observations, learned Single Judge further observed and directed, in the judgment and order dated 27.11.2002, aforementioned is as follows:

In my considered opinion the writ petition at hand should also be disposed of with similar relief as has been given vide Para (a) of the judgment. Hence, this petition is disposed of with the direction to the respondent authority to consider the cases of all the Petitioners who have been working as Stenographer Gr-III for more than 5 years on ad hoc or contract, as the case may be, for regularization of their services ignoring the short break in service subject to their possessing requisite qualification at the time of initial appointment in consultation with the Nagaland Public Service Commission as may be permissible under the rules. The regularization shall be against available sanctioned vacancies which the Petitioners claim to have been holding. Until exercise in this behalf is completed, the Petitioners shall be paid their salary as specified in the appointment letters and the interim direction given by this Court vide order dated 23.8.2001.

6. Aggrieved by the directions as quoted hereinabove, the State respondents have preferred this appeal.

7. From the observations made and the directions given in writ petition, what becomes transparent is that the learned Single Judge took the view that as the Petitioners had been working as Stenographer Grade-III for more than 5 years on ad hoc or contract basis, their services cannot be refused to be regularized either by contending that the writ Petitioners had not rendered continuous service for more than 5 years.

8. While considering the reasons assigned by the learned Single Judge for issuing the impugned directions, it needs to be noted that there had been several decisions of the Supreme Court and of various High Courts directing regularization of services of such persons, who had been rendering service in different establishments of the State or its instrumentalities. The question as to whether regularization of service of a person is possible or not has been dealt with, at length, by the Constitution Bench in the Secretary, State of Karnataka and Others Vs. Umadevi and Others,

9. We have heard Mr. L.S. Jamir, learned Government Advocate, appearing on behalf of the Appellants, and Mr. I. Longjem, learned Counsel appearing on behalf of the respondents.

10. In Uma Devi (supra), the Constitution Bench has made it clear that the term "temporary employee" is a general category, which has under it several sub-categories, e.g., casual employee, daily-rated employee, ad-hoc employee

contractual employee, etc. A daily-rated casual worker or contractual worker is only a temporary worker and it is well settled that a temporary employees has no right to the post, or to be continued in service, to get absorption, far less the right to be regularized or claim regular pay. No doubt, there can be occasions, when the State or its instrumentalities employ persons on temporary or daily-wage basis in a contingency as additional hands without following the required procedure, but this does not confer any right on such persons to continue in service or get regular pay. It has been further made clear in *Uma Devi* (supra) that unless an appointment is made by following a due selection process consistent with the rules, if any, or consistent with the concept of public employment as envisaged under the Constitution of India, such an ad hoc, casual or contractual appointee, would not have any right to claim permanent absorption in the establishment. In short, no court can, holds the Constitution Bench in *Uma Devi* (supra), direct continuation in service of a non-regular appointee.

11. In *Uma Devi* (supra), the Constitution Bench held:

Any public employment has to be in terms of the constitutional scheme.

It 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.

The Constitution does not envisage any employment outside this constitutional scheme and without following the requirements set down therein.

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.

Though the High Court is entitled to exercise its judicial discretion in deciding writ petition or civil revision applications coming before it, the discretion had to be confined in declining to entertain such petitions and refusing to grant reliefs asked for.

Adherence to rule of equality in public employment is a basic feature of the Constitution.

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.

When the Court is approached for itself by way of a writ, the Court has necessarily to ask itself whether the person before it had any legal right to be enforced.

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.

Those decisions which run counter to the principle settled in this decision, or in which directions running counter to what we have held herein, will stand denuded of their status as precedents.

12. From what have been observed and held by the Constitution Bench, in *Uma Devi* (supra), it becomes transparent that Articles 14, 16 and 309 form part of the 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 equal 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 *Uma Devi* (supra), making of public employment outside the Constitutional scheme and without fulfilling the requirements set forth hereinbefore. The High Court while acting under Article 226, should not, ordinarily, issue direction for absorption, regularization or permanent continuance unless the recruitment, so made, is not illegal, but merely irregular and provided further that the recruitment was not in violation 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.

13. For the purpose of this appeal, the observations made at paragraph 43 of the decision, rendered in *Uma Devi* (supra), are of material consequence and are, therefore, reproduced below:

43. Thus, it is clear that adherence to the rule of equity in public employment is the 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 and 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 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 appointments, do not acquire any right. The High Courts acting under Article 226 of the Constitution, should not ordinarily issue directions for absorption, regularization, 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 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 regular procedure for selection or impose on the State the burden of paying an employee who is really not required. The court 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 by passing of the constitutional and statutory mandates.

(Emphasis is supplied)

14. From the observations made above, it becomes abundantly clear that a person, whose appointment is dehors the rules, is not entitled to seek regularization of his service, for regularization of service cannot be a mode of recruitment. It has also been made clear. In *Uma Devi* (supra) that the appointment of a person, who has been rendering service on ad hoc or contractual basis, would come to an end when such an appointment is terminated and no right remains vested, in such a person, to claim regularization of service. It has also been clearly laid down, in *Uma Devi* (supra) that a person, whose appointment is dehors relevant recruitment rules, cannot be held to have legitimate expectation of his service being regularized merely because of the fact that he had been rendering service for a long period of time. In fact, the Constitution Bench in *Uma Devi* (supra), has, in no uncertain words stated, in Para-47, that when a person enters in a temporary employment or gets engaged as a contractual or casual workers and when his engagement is not based on a proper selection as recognized by the relevant Recruitment Rules or procedure, he is aware of the consequences of his appointment being temporary, casual or contractual in nature. Such a person cannot, holds the Apex Court in *Uma Devi* (supra), invoke the theory of legitimate expectation for being confirmed in the post.

15. Referring to the above observations made in Uma Devi (supra), the Apex Court, in Indian Drugs and Pharmaceuticals Ltd. Vs. Workman, Indian Drugs and Pharmaceuticals Ltd., held thus:

26. The underlined observations above clearly indicated that the casual, daily-rated, ad hoc employees, like the respondents in the present appeal, have no right to be continued in service, far less of being regularized and getting regular pay.

16. In Para 4 and 5 of its judgment in Uma Devi (supra), the Constitution Bench observed thus:

This Court has also on occasions issued directions which could not be said to be consistent with the constitutional scheme of public employment. Such directions are issued presumably on the basis of equitable considerations or individualization of justice. The question arises, equity to whom? Equity for the handful of people who have approached the Court with a claim, or equity for the teeming millions of his country seeking employment and seeking a fair opportunity for competing for employment? When one side of the coin is considered, the other side of the coin has also to be considered and the way open to any court of law or justice, is to adhere to the law as laid down by the Constitution and not to make directions, which at times, even if do not run counter to the constitutional scheme, certainly tend to water down the constitutional requirements. It is this conflict that is reflected in these cases referred to the Constitution Bench.

17. Taking note of the above observations made in Uma Devi (supra), the Court, in Indian Drugs & Pharmaceuticals Ltd. (supra), observed:

23. We have underlined the observations made above to emphasize that the court cannot direct continuation in service of a non-regular appointee. The High Court's direction is hence contrary to the said decision.

18. What surfaces from the above discussion is that if an employee's appointment is a contractual appointment, the appointment comes to an end with the end of the contract or when it is discontinued. Merely because of the fact that the service of a contractual employee has been continued for a period beyond the term of his appointment, he would not be entitled to be absorbed in regular service or made permanent on the strength of such continuance if his original appointment was not made by following a due process of selection as envisaged under the scheme of the Constitution with regard to public employment.

19. Bearing in mind the position of law with regard to regularization, when we turn to the facts of the case at hand, what attracts our eyes is that Rule 7(d) of the Nagaland Secretariat (Civil) Stenographers Service Rules, 1973 (for short, "the Rules of 1973"), originally read as under:

(d) Grade III Posts:

Recruitment to Grade III posts shall be made by direct recruitment through qualifying competitive test of 80 words per minute conducted by the Commission.

20. The Rules of 1973 has been amended and the amended rules are called "The Nagaland Secretariat (Civil) Stenographers Service (Amendment) Rules, 2002, (for short, "the Rules of 2002"). Rule 7(g) of the Rules of 2002, which relates to recruitment of Stenographer Grade-III, reads as under:

(g) Stenographer Gr. III 100% by direct recruitment through NPSC. Minimum educational qualification shall be P.U. with 80 w.p.m. in shorthand and 30 w.p.m. in Typing.

21. In the present case, the writ Petitioners were appointed on contractual basis as indicated hereinabove in the year 1992, 1993, 1994 and 1995, when the Rules of 1973 were in force Rule 7(d) as quoted hereinabove, clearly shows that no recruitment to the posts of Stenographer Grade-III could have been made except by way of direct recruitment through qualifying competitive test of 80 words per minute conducted by the NPSC. The writ Petitioners had, admittedly, not been recruited in terms of the provisions of Rule 7(d) of the Rules of 1973. Their appointment on contractual basis was, thus, ex facie in violation of the relevant recruitment rules. Such appointments, which were dehors the recruitment rules, did not vest any right, in the writ Petitioners to seek regularization of their services. Viewed thus, it is clear that the directions given by the learned Single Judge to the present Appellants to regularize the services of the writ Petitioners are contrary to law and in view of the authoritative pronouncement by the Constitution Bench in Uma Devi (supra), the directions, so given, cannot be allowed to stand good on record.

22. At the time of hearing of this appeal, it has been submitted on behalf the writ Petitioners-respondents, that when the High Court has, in some cases, already ordered regularization of services of some persons, who had been appointed on contractual basis as Stenographer Grade-HI in Nagaland Civil Secretariat, refusal by the High Court to direct the State Government to regularize the services of the writ Petitioners, who are also contractual employees, would be a serious discrimination and, hence, the directions, which the learned Single Judge has given, for regularizing the services of the writ Petitioners must not be interfered with.

23. In effect, the submissions made on behalf of the writ Petitioners-respondents is that when the services of some contractual employees have already been directed to be regularized by the High Court, it would be serious discrimination to the Petitioners if similar directions, given in the present case, are, now, interfered with.

24. While considering the above submission, what is of paramount importance to note is that before a writ Court commands the State or any of its instrumentalities to pass similar order as has been passed in the case of another person in order to remove discrimination, the Court must be satisfied that the

order, which had been passed in favour of the other person, was in accordance with the law and sustainable, if an order has been illegally passed to give benefit to a person or an illegal benefit has been extended to a person, the writ Court, in the name of removing discrimination, cannot command the person, who has passed the illegal order, to repeat the illegality for the purpose of removing discrimination. The test of discrimination is, thus, not satisfied merely because of the fact that unequal treatment has been given to two persons. The test of discrimination really lies in the fact as to whether a benefit rightfully and legally given to one has been denied, without lawful reasons and justification to the other person, who alleges discrimination. If the benefit given to anyone is illegal, such a benefit cannot be directed by the Court to be extended to another person in the name of removing discrimination.

25. What emerges from the above discussion is that the mere fact that an authority has passed a particular order in the case of another person, similarly situated, cannot be made a ground for issuing a Writ in favour of a Petitioner on the plea of removing discrimination 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. Noticing that the High Courts, in exercise of their writ jurisdiction have been passing orders to remove discrimination and thereby asking the authorities concerned to repeat the illegality, the Apex Court has expressed its anxiety on such incorrect approach and has laid down the position of law, 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 and over 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.)

26. In the light of the observations made in Chandigarh Administration (supra), there can be no escape from the conclusion that the services of the present writ Petitioners could not have been directed to be regularized merely on the ground that the services of some other persons, similarly situated as the Petitioners, had been regularized unless the learned Single Judge could have held that the regularization of the services of those persons " was in accordance with law. If the services of those, who have been made beneficiary of a process of regularization of service, could not have made in law, or ought not to have been made in law, the services of the Petitioners cannot be directed to be regularized, 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 the wrong done earlier, then, the Court must refuse to grant such a relief even if not granting of such a relief would amount to denying to the writ Petitioner a benefit, which others, similarly situated, may have been enjoying. In short, a writ 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.

27. In the backdrop of law discussed above, when we revert to the facts of the present case, we notice that the present writ Petitioners were contractual employees and their appointments having been made dehors the relevant Recruitment Rules and contrary to State's constitutional obligation to make public appointment in a fair and equitable manner, their services could not have been directed to be regularized. In such circumstances, merely because of the fact that the services of some persons, similarly situated, had been directed, in the past, to be regularized, similar directions cannot be issued in the name of removing discrimination, when the earlier directions for regularization were against law. In fact, in Para-54 of *Uma Devi (supra)*, the Constitution Bench has clarified that the decisions, which run counter to the principles, now, settled in *Uma Devi (supra)*, shall stand denuded of their status as precedent. In the face of the position of law so clearly pronounced by the Constitution Bench in *Uma Devi (supra)*, the fact that some of the similarly situated persons or contractual employees have been given, in the past, the benefit of regularization, this fact cannot be made a ground for issuing a writ commanding the present Appellants to regularize the services of the writ Petitioner.

28. In view of what has been discussed above and in the interest of justice, this writ appeal is allowed and the directions for regularization, given in favour of the writ Petitioners/respondents herein, are hereby set aside. It is, however, made clear that the writ Petitioners/respondents, if otherwise eligible, shall be at liberty to participate in the selection process, if and when such a selection procedure is held by the State for making recruitment to the posts of Stenographer Grade-III in Nagaland (Civil) Secretariat, and in order to enable the writ Petitioners to participate in such selection process, the Appellants shall, if need be, condone the age of those writ Petitioners, who may have already become or may, in course of time, become over-aged.

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