
(2015) 07 OHC CK 0059

In the Orissa High Court

Case No : Writ Petition (C) Nos. 8350, 8352, 8353, 8355, 8356, 8359, 8360 and 8361 of 2012

Suvendu Mohanty and Others

APPELLANT

Vs

State and Others

RESPONDENT

Date of Decision : 28-07-2015

Acts Referred:

Citation : (2015) 07 OHC CK 0059

Hon'ble Judges : B.R. Sarangi, J

Bench : Single Bench

Advocate : A.K. Mishra, J. Sengupta, D.K. Panda, G. Sinha, A. Mishra, S. Mishra and P.P. Behera, for the Appellant; B. Senapati, Learned Addl. Govt. Advocate, Advocates for the Respondent

Final Decision : Allowed

Judgement

Dr. B.R. Sarangi, J—The petitioners, who are at present working as Assistant Project Managers in the Orissa State Police Housing & Welfare Corporation Ltd., have filed these petitions seeking for a direction to the opposite parties, more particularly, opposite party No. 1 to regularize their services and to grant them consequential service benefits retrospectively as due and admissible to the post.

2. The short fact of the case, in hand, is that Orissa State Police Housing and Welfare Corporation Limited, in short, "Corporation", a Public Sector Undertaking of the Government of Odisha is committed to build Police Buildings innovatively to enhance police efficiency and thereby improve Police-Community relations. The main objective of the Corporation includes to undertake construction of buildings for housing of the employees of the Government of Odisha in the Police, Prisons, Home Guards, Fire Force Department and Judicial Department as well as other similarly situated institutions. Initially the Corporation was started by bringing the persons on deputation from the Government and other Corporations and thereafter certain posts were created for the Corporation by the Board of Directors, which were later on approved by the Government in Home

Department. One of those posts was Assistant Project Manager, which is equivalent to the post of Junior Engineer under the Government. On completion of the deputation period, the persons, who were borrowed, were sent back and consequently, the post of Junior Engineer fell vacant. In order to maintain the works already undertaken by the Corporation, the Corporation was required to recruit persons to fill up those posts. At the relevant point of time, method of recruitment prescribed by the Government for the post of Junior Engineer in the State was based on a resolution of the erstwhile Political and Services Department dated 6.8.1979, which provided that the Government have to constitute a Committee consisting of the Chief Engineers and other Heads of Departments concerned for the purpose of recruiting the Junior Engineers. The Committee will allocate Diploma Holders in Civil Engineering to different Departments according to their requirement from the list of candidates available with Technical Manpower Employment Exchange. All appointments are to be made from the list of candidates sponsored by the said Exchange and in case it fails to furnish candidates within a specified period of three weeks, recruitment may be made from the open market. Accordingly, the Corporation placed requisition to the Employment Exchange to sponsor the names of the eligible candidates for filling up of the post of Junior Engineer. The petitioners applied for the post and on being selected were issued with orders of appointment as Assistant Project Manager for a period of 44 days on ad hoc basis with a consolidated pay of Rs. 3,000/- per month vide Annexure-1. On expiry of 44 days with one day artificial break, the petitioners were allowed to continue again for another 44 days. The process continued for quite long time and ultimately even though the petitioners continued as Assistant Project Manager on ad hoc basis on 44 days basis with one day break, they have been paid the scale of pay of Rs. 9300-34,800/- with Grade Pay of Rs. 4200/- with usual allowances per month w.e.f. 23.3.2012. After rendering service for quite long period, when the petitioners were deprived of getting their promotional benefits, and were paid the pay in the minimum scale of pay attached to the post, they moved the opposite party No. 2 seeking for regularization of their services. The grievance of the petitioners was placed before the Committee of opposite party No. 2 and after thorough discussion on the subject, it was recommended for taking appropriate steps to regularize all ad hoc employees. Accordingly, opposite party No. 2 moved the Government in Home Department seeking for regularization of 101 ad hoc employees working under the Corporation in different grades such as Assistant Project Manager, Junior Steno-cum-Assistant, Senior Assistant, Driver, Asst. Supervisor, M.T. Helper, Concrete Mixture Driver, Electrical Wiremen/Helper, Plumber, Watchman and Orderly Peon and such move was made on 24.6.2005 vide Annexure-3 and by that time most of the employees had already rendered service for more than 10-20 years. The Corporation had specifically indicated that their services are absolutely essential during the leave period as well as when turnover was substantially increased from 3 crores to 35 crores per annum. Accordingly, the Corporation requested the Government to consider the proposal and accord approval in respect of regularization of the services of the ad hoc

employees. When the matter was pending with the Government, there was restructuring of the staffing pattern of the Corporation. Under clause (vi) of the letter dated 16.6.2007 vide Annexure-4, it was indicated that creation of 9 posts of Assistant Manager in the rank of Junior Engineer for regular appointment of ad hoc Assistant Project Manager is not agreed to on the ground that regularization of irregular recruits is not permissible under the Government Rules. Since the State Government rules are applicable to the Government owned Corporation, the Corporation also cannot take a decision to regularize the irregular recruits without following due process of law. Under Clause-C of the said restructuring letter, it was clearly indicated that restructuring pattern will however be subject to fulfilling certain conditions, mentioned therein that the posts created/and upgraded may be filled up by annual contractual appointment or on promotion from amongst the eligible regular employees of the Corporation in the lower grade. Under sub-clause (e) of Clause-C, it is stated that no post may be created/upgraded for the ad hoc and irregular employees. Under sub-clause (f) of Clause-C, it is stated that the work of the Assistant Project Manager (JE-Civil) continuing on contractual basis shall be reviewed and if necessary, their number may be limited. Opposite party No. 2 vide its letter dated 28.5.2011 also sought permission to regularize the services of 9 Assistant Project Managers in the rank of Junior Manager. While seeking such permission, it was specifically mentioned that at present there are three categories of employees in the Corporation, namely, regular, ad hoc and contractual. All the employees recruited after 1998 are in the contractual category. At present there are 307 employees in the Corporation, which includes 98 regular, 88 ad hoc and 121 contractual. The ad hoc employees receive salary at the minimum of basic of the pay scale and the contractual employees receive salary at contractual rate fixed by the Government in Finance Department. Out of 88 ad hoc employees, it was proposed to regularize the services of 9 Assistant Project Managers (Junior Engineers) in the first phase reason being they have been recruited against permanent vacancies, which were sanctioned/created by the Board of Directors from time to time in their meetings held on 2.2.1982, 21.9.1988 and 31.12.1993. While appointing these 9 Assistant Project Managers, the provisions of the ORV Act has been complied with and all these 9 Assistant Project Managers have been interviewed by the Engineering Head of the Corporation after due scrutinisation of their academic records and past experience etc. They are in the pay roll of the Corporation for more than 12 years and their regularization will not involve any additional financial burden immediately and the Corporation is in a position to meet the future financial burden in terms of increments from its own resources and therefore, the Government should take a long term and generous view in the matter and agree to the proposal for regularization of services of all these nine ad hoc Junior Engineers of the Corporation. Similarly, correspondences were also made on 20.7.2011 and 19.4.2012 vide Annexures-10 and 11 respectively, but no final communication has been received from the Government. Hence, these petitions.

3. Mr. A.K. Mishra, learned Senior Counsel appearing for the petitioners strenuously urged that since the petitioners have been appointed by following a due procedure of selection on ad hoc basis initially for 44 days with one day break and subsequently, they have been paid regular scale of pay and such appointments having been made against regular vacancies, their services have to be regularized by the authority. As such, the opposite party No. 2 has already recommended the case of the petitioners to the State Government for its approval, but the State Government is sitting tight over the matter without taking any decision thereon on the plea that under restructuring programme, the petitioners being irregular recruits, their services cannot be regularized. It is further urged that the conditions stipulated in the restructuring programme of the State Government are not applicable to the petitioners in view of the fact that the petitioners have already rendered service for more than 10-20 years and as such, the law laid down by the apex Court in *Secretary, State of Karnataka and Others Vs. Umadevi and Others*, AIR 2006 SC 1806 : (2006) 6 CompLJ 1 : (2006) 4 JT 420 : (2006) 2 LLJ 722 : (2006) 4 SCALE 197 : (2006) 4 SCC 1 : (2006) 3 SLJ 1 : (2006) AIRSCW 1991 : (2006) 3 Supreme 415, is squarely applicable to the present case. Therefore, the State Government cannot and could not have sat tight over the matter instead of approving the proposal submitted by the opposite party No. 2 for regularization of the services of these 9 ad hoc Assistant Project Managers, who have been appointed against regular vacancies.

4. Though several opportunities have been given to the opposite party No. 1, till date no counter affidavit is forthcoming from the side of the State Government. Mr. B. Senapati, learned Addl. Govt. Advocate for the State argued with vehemence that since the petitioners have been appointed irregularly even though they have rendered service for more than 10 years, their services cannot be regularized in terms of the restructuring policy of the State Government pursuant to Annexure-4. The restructuring of the staffing pattern of the opposite party No. 2-Corporation has been done by the State Government as a matter of policy pursuant to which the letter under Annexure-4 has been issued on 16.6.2002. As regularization of the irregular recruits are not permissible under the State Government rules, the petitioners services cannot be regularized as claimed in the writ petitions.

5. Mr. N.K. Mishra, learned Sr. Counsel appearing for the Corporation supported the stand of the petitioners and referring to the counter filed by opposite party No. 2 has categorically stated that the petitioners are continuing as Assistant Project Manager (C) on ad hoc basis from time to time on tenure engagement basis. He further submits that the regularization of services of the petitioners along with some other similarly situated ad hoc Assistant Project Managers have been contemplated by the opposite party-Corporation with the approval of such proposal being sought for from the Government in its Administrative Department since 2005. Although the queries made by the Govt. from time to time have been adequately answered by the opposite party-Corporation, neither any final

decision has been taken nor the required approval/sanction for the purpose of regularization of the ad hoc Assistant Project Managers including the petitioners has been made and that in the absence of specific approval of the Administrative Department for the Corporation in the State Government, the opposite party-Corporation is unable to regularize the services of the petitioners. Since approval of the administrative department is mandatory, in absence of any decision taken by the administrative department approving the proposal for regularization of the services of the petitioners, the opposite party No. 2 could not be able to regularize the services of the petitioners. The issue of regularization of the services of the petitioners and similarly situated Assistant Project Managers has been referred to the Government in Home Department several times to consider their case, but no action has yet been taken by the Government, consequently, the opposite party-Corporation could not effectively attend the grievances of the petitioners. Though regularization of the services of the petitioners and other similarly situated Assistant Project Managers will not involve any financial burden on the Corporation immediately since they are drawing salary as per their respective grades, due to the inaction of opposite party No. 1, the services of the petitioners could not have been regularized.

6. Mr. J. Das, learned Senior Advocate appearing for the intervenor-petitioners, who also claim for regularization of their services.

7. In view of fact that, the source of recruitment of the intervenor-petitioners is totally different from that of the present petitioners and as such, those intervenors have filed separate writ petitions ventilating their grievances and their case will be separately dealt with by this Court in a separate judgment. In view of the same, these intervenors have no nexus with the claim made by the present petitioners though the petitioners and the intervenors have been working as Assistant Project Managers under the Corporation, their source of recruitment, appointment and scale of pay are different from each other and therefore, this Court thought it proper to consider the case of these intervenor-petitioners independently.

8. On the basis of the facts pleaded above, there is no dispute that the petitioners are working as Assistant Project Managers under the opposite party No. 2. Though they were appointed on ad hoc basis initially on basis of 44 days with one day break, subsequently, they have been allowed to continue with minimum scale of pay admissible to the post against regular vacancies and in the meantime all of them have completed more than 10 years of service and their cases have also been considered by opposite party No. 2 for regularization. Though recommendation was made time and again, no decision is forthcoming from the administrative department on the plea that in view of restructuring of staffing pattern of the Corporation, the petitioners having been appointed irregularly, their case cannot be considered for regularization. More so, no communication has been made on the basis of the recommendation made by opposite party No. 2 to opposite party No. 1 with regard to the regularization of

their services, but as per the provisions of law unless approval is received from the administrative department, the opposite party No. 2 cannot regularize the services of the petitioners. Due to the inaction of the administrative department in taking and communicating the decision on the recommendation with regard to the regularization of the services of the petitioners, the opposite party No. 2 has been kept in dark till date.

9. With regard to the regularization of the services of the petitioners, a mention has been made in Annexure-4 that the petitioners being irregular recruits, their regularization is not permissible under the State Govt. rules. But this condition made in the restructuring order in Annexure-4 so far as it relates to the petitioners cannot be applicable in view of the fact that the petitioners have been appointed against regular vacancies available in the regular scale of pay admissible to the post. But in view of their continued service for more than 10 years, their cases are covered by the ratio of the judgment of the apex Court in *Secretary, State of Karnatak v. Umadevi (supra)*, wherein the apex Court has held that the appointments made against temporary or ad-hoc basis are not to be regularized. In paragraph 53 of the said judgment, it is provided that irregular appointment of duly qualified persons against sanctioned posts, who have worked for 10 years or more can be considered on merits and steps to be taken as one time measure to regularize them. In Paragraph 53 of the said judgment, the apex Court has held as follows:

"53. One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in *S.V. Narayanappa, R.N. Nanjundappa and B.N. Nagarajan* and referred to in para 15 above, of duly qualified persons in duly sanctioned vacant posts might have been made and the employees have continued to work for ten years or more but without the intervention of orders of the courts or of tribunals. The question of regularisation of the services of such employees may have to be considered on merits in the light of the principles settled by this Court in the cases 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 regularise as a non-time measure, the services of such irregularly appointed, who have worked for ten years or more in duly sanctioned posts but not under cover of orders of the courts or of tribunals and should further ensure that regular recruitments are undertaken to fill those vacant sanctioned posts that require to be filled up, in cases where temporary employees or daily wagers are being now employed. The process must be set in motion within six months from this date. We also clarify that regularisation, if any already made, but not sub judice, need not be reopened based on this judgment, but there should be no further bypassing of the constitutional requirement and regularising or making permanent, those not duly appointed as per the constitutional scheme."

10. The object behind the exception carved out in this case was to permit regularization of such appointments, which are irregular but not illegal, and to

ensure security of employment of those persons who served the State Government and their instrumentalities for more than ten years. Similar question came up for consideration before the apex Court in Civil Appeal No. 2835 of 2015 (arising out of SLP (Civil) No. 20169 of 2013 disposed of on 13.3.2015. In paragraphs 12 and 13, the apex Court has held as follows:

"12. Elaborating upon the principles laid down in Umadevi's case (supra) and explaining the difference between irregular and illegal appointments in State of Karnataka and Others Vs. M.L. Kesari and Others, AIR 2010 SC 2587 : (2011) 111 CLT 209 : (2010) 127 FLR 12 : (2010) 8 JT 96 : (2010) 4 LLJ 583 : (2010) 9 SCC 247 , this Court held as under:

"7. It is evident from the above that there is an exception to the general principles against "regularisation" enunciated in Umadevi (3), if the following conditions are fulfilled:

(i) The employee concerned should have worked for 10 years or more in duly sanctioned post without the benefit or protection of the interim order of any court or tribunal. In other words, the State Government or its instrumentality should have employed the employee and continued him in service voluntarily and continuously for more than ten years.

(ii) The appointment of such employee should not be illegal, even if irregular. Where the appointments are not made or continued against sanctioned posts or where the persons appointed do not possess the prescribed minimum qualifications, the appointments will be considered to be illegal. But where the person employed possessed the prescribed qualifications and was working against sanctioned posts, but had been selected without undergoing the process of open competitive selection, such appointments are considered to be irregular."

13. Applying the ratio of Umadevi's case, this Court in Nihal Singh and Others Vs. State of Punjab and Others, (2013) 8 AD 689 : AIR 2013 SC 3547 : (2013) 139 FLR 309 : (2013) 11 JT 289 : (2013) LabIC 3859 : (2013) 5 LLN 109 : (2013) 10 SCALE 162 : (2013) 14 SCC 65 : (2013) 4 SCT 469 : (2013) 114 SLJ 315 : (2013) AIRSCW 4919 : (2013) 5 Supreme 718 directed the absorption of the Special Police Officers in the services of the State of Punjab holding as under:

"35. Therefore, it is clear that the existence of the need for creation of the posts is a relevant factor with reference to which the executive government is required to take rational decision based on relevant consideration. In our opinion, when the facts such as the ones obtaining in the instant case demonstrate that there is need for the creation of posts, the failure of the executive government to apply its mind and take a decision to create posts or stop extracting work from persons such as the appellants herein for decades together itself would be arbitrary action (inaction) on the part of the State.

36. The other factor which the State is required to keep in mind while creating or abolishing posts is the financial implications involved in such a decision. The

creation of posts necessarily means additional financial burden on the exchequer of the State. Depending upon the priorities of the State, the allocation of the finances is no doubt exclusively within the domain of the legislature. However in the instant case creation of new posts would not create any additional financial burden to the State as the various banks at whose disposal the services of each of the appellants is made available have agreed to bear the burden. If absorbing the appellants into the services of the State and providing benefits on a par with the police officers of similar rank employed by the State results in further financial commitment it is always open for the State to demand the banks to meet such additional burden. Apparently no such demand has ever been made by the State. The result is-the various banks which avail the services of these appellants enjoy the supply of cheap labour over a period of decades. It is also pertinent to notice that these banks are public sector banks."

11. Taking into consideration the law laid down by the apex Court, which has been considered in the subsequent case as mentioned supra, the principle so laid down by the apex Court is squarely applicable to the present case. Since all the petitioners have already rendered service for more than 10 years and they have been appointed against regular and sanctioned vacancies and also getting regular scale of pay and there will be no financial burden on the State exchequer, their cases should be regularized keeping in view the law laid down by the apex Court, as discussed above. Therefore, the State Government is directed to make necessary administrative approval for these petitioners on the basis of the recommendation made by opposite party No. 2 pursuant to Annexures-9, 10 and 11 and extend all the consequential service benefits as due and admissible to them in accordance with law as expeditiously as possible preferably within a period of three months from the date of communication of this judgment.

12. With the aforesaid observation and direction, the writ petitions are allowed. No cost.