

(2010) 06 GAU CK 0051

In the Gauhati High Court

Case No : Writ Petition (C) No. 171 (AP) of 2009

Tabla Chobin and Others

APPELLANT

Vs

State of Arunachal Pradesh and Others

RESPONDENT

Date of Decision : 03-06-2010

Acts Referred:

Constitution of India, 1950 — Article 162, 309

Department of Education Recruitment Rules, 1973 — Rule 29

Citation : (2010) 3 GLT 447

Hon'ble Judges : A.C. Upadhyay, J

Bench : Single Bench

Advocate : R.P. Sarmah, for the Appellant; G. Deka, N. Tagia and M. Pertin, for the Respondent

Judgement

A.C. Upadhyay, J.—Heard Mr. R.P. Sarmah, learned senior counsel appearing for the Petitioners. Also heard Ms. G. Deka, learned Additional Senior Government Advocate representing the State Respondents, Mr. M. Pertin, learned counsel appearing on behalf of Respondent Nos. 4 to 17, 19 and 21 to 29 as well Mr. N. Tagia, learned Counsel appearing on behalf of Respondent Nos. 18 and 20.

2. The Petitioners have challenged the orders issued by the Director of School Education (i.e. the Respondent No. 3), Govt. of Arunachal Pradesh, regularizing the contract service of the private Respondents.

3. The facts, leading to filling of the writ petition, may be summarized, as follows:

The Petitioners have been serving as Senior Teachers in various schools located in different parts of Arunachal Pradesh, after their promotion to the post of Senior Teachers with effect from 28.07.2005.

4. The Government of Arunachal Pradesh, by issuing a notification dated 29.12.1973 in the Department of Education, framed "Recruitment Rules 1973 to Class III (Non-Gazette) Teachers Post", under the proviso to Article 309 of the Constitution of India, to regulate the appointments and service conditions of

Teachers in Arunachal Pradesh.

5. The Petitioners stated that the State Respondents appointed the private Respondent Nos. 4 to 12 on contract basis, as Senior Teachers, without any interview for a stipulated period of two years from the date of their appointments. Subsequently, the contractual services of the above named Respondent Nos. 4 to 12 were regularized vide officer Order No. ED.2/APT/551/2001 dated 26.05.2004 by giving retrospective effect from the date of their joining in contract services i.e. from 08.03.2004 and the regularization was ordered without holding any DPC.

6. The Respondent No. 3 i.e. the Director of School Education, Govt. of Arunachal Pradesh, by publishing a Notification vide No. ED.2/613/APT/2002 dated 07.05.2003, invited applications for filling up of the post of Senior Teachers on different subjects on contract basis temporarily, for a period of two years. In the said advertisement dated 7.5.2003 the sentence i.e., "likely to be declared permanent", which appeared in it originally was delete/omitted vide office Corrigendum No. ED.2/613/APT/2002 dated 18.12.2003, which made it more distinct and clear that the Government never wanted to make such post permanent in near future.

7. Pursuant to the said advertisement dated 07.05.2003, the private Respondent Nos. 13 to 29 were selected and appointed purely on temporary basis as Senior Teachers on different subjects for a period of two years with effect from the date of their joining at fixed pay of Rs. 5,000/- (rupees five thousand) per month, vide office Order dated 03.02.2004, issued by the State Respondents, which categorically indicated that the contract appointees would have no right to claim any regular appointment or regularization of their contract services and they would not be entitled to subscribe GPF account or CCIS account or such other schemes of the Government, which usually were available for other regular appointees. The Government of Arunachal Pradesh also adopted mandatory guidelines in respect of appointment of contract service vide office Memo No. PERS- 34/94 dated 17.10.1994, wherein it was specifically indicated that the maximum period of contract service can be only for two years, which may be extended for one more year in exceptional cases.

8. It has been stated on behalf of the Petitioners that the Respondent Nos. 3, the Director of School Education, Govt. of Arunachal Pradesh, without following due process of law and in violation of service conditions as contained in office Order No. ED.2/148/APT/2003 dated 03.02.2004. also in violation of the Recruitment Rules 1973 and the standing guidelines No. PERS-34/94 dated 17.10.1994, regularized the contract services of the Respondent No. 13 to 29 vide the impugned office order No. ED.2/215/APT/2004 dated 05.02.2005 by giving retrospective effect from 27.12.2004.

9. The Petitioner further stated that after the regularization of the services, the private Respondents have been placed at SI. No. 453 to 478 of the seniority list

and other Senior Teachers, who have been promoted on regular basis have been placed in the seniority position ranking from 479 onwards. It is also alleged by the Petitioners that the aforesaid seniority list, maintained by the State Respondents, is arbitrary, illegal, irregular and bad in law.

10. The learned Counsel for the Petitioners submitted that in spite of submission of representations by the Petitioners, the State Respondents did not come forward to consider the said representations and did not take any step for cancellation of the order of regularization of the contractual employees.

11. The learned Counsel for the Petitioners has emphasized on the fact that the private Respondent No. 4 to 29 were all appointed on contract basis for a specified tenure, and therefore, their regularization as Senior Teachers de hors the Recruitment Rules, 1973. The Learned Counsel for the Petitioners further pointed out that the Respondent Nos. 4 to 12 were initially appointed by the State Respondents as Senior Teacher on contract basis, even without publishing any advertisement or without holding any interview and, thereafter, the contract services of the private Respondents Nos. 4 to 12 had been regularized vide order dated 26.05.2004, which was apparently arbitrary, illegal and unfair. Similarly, the Respondent Nos. 13 to 29 were also appointed on contract basis for a period of two years from the date of joining by specifically indicating in the appointment order that the contract appointees would not have any right to claim for regular appointment. Mr. R.P. Sarmah, learned senior counsel pointed out that since the recruitment process of the private Respondents No. 4 to 29 was not carried out in terms of the Recruitment Rules 1973, their subsequent regularization by the State Respondents beyond the provision of the Recruitment Rules 1973 was not legally tenable. It is also contended by the counsel for the Petitioners that the Respondents, who were illegally and irregularly regularized in the post of Senior Teachers, cannot be placed above the Petitioners, in the seniority list of Senior Teacher in the Department of Education.

12. Mr. N. Tagia, learned Counsel appearing on behalf of the Respondent Nos. 18 and 20 submitted that the Petitioners did not have locus standi to challenge the regularization of the private Respondent for not being "person aggrieved" to file the writ petition, since the Petitioners were promoted in the cadre of Senior Teachers and the private Respondents, on the other hand, were all recruited by a process of contract recruitment directly as Senior Teachers. In support of his contentions, the learned Counsel for the Respondent Nos. 18 and 20 has relied on a decision of this Court reported in *Baphindali Giri and Ors. v. State of Meghalaya and Ors.* : 2006 (4) GLT 503.

13. In the aforesaid decision, the Hon'ble Division Bench of this High Court, while deciding the seniority of the directly recruited and promoted Judicial officers held that the order of appointment of a person against a post can be challenged by a person who can claim appointment against the said post. A person, who is not qualified to be appointed and who did not apply for the post cannot challenge the appointment of any person against the said post. Such

person, who challenges an order of appointment of another person by filing a writ petition, must be a "person aggrieved" by such appointment. A person can be said to be a "person aggrieved" by the action of the Government, in appointing another person in a post, if that action deprives that other persons from his right to be considered for appointment against the said post. The relevant extract of the decision of the Hon'ble Division Bench reads as follows:

8. A person can be said to be a "person aggrieved" by the action of the Government in appointing another person in a post, if that action deprives that other person from his right to be considered for appointment against the said post. The Petitioners to maintain a writ petition challenging an appointment of another person must show what legal right of there has been violated by the action of the Respondent in making such appointment. A "person aggrieved" is a person who has a genuine grievance against an order, which has prejudicially affected his rights and interest. A person who is not directly and immediately affected by an order of appointment but remotely affected or his chances of promotion in future has been affected by such appointment cannot maintain a writ petition challenging the appointment of another person, as such person cannot be termed as "person aggrieved" to maintain such writ petition. The jurisdiction of the writ Court being equitable and discretionary it will not issue any writ quashing the appointment of a person on the basis of the writ petition filed by a person, in whose favour no relief can be granted.

14. Admittedly, the Petitioners have been placed before the private Respondents in the seniority list, and thus, lost their seniority due to the regularization of the private Respondents in the cadre of Senior Teachers. Therefore, in terms of the interpretation of the Hon'ble Division Bench of this Court in Baphindali Giri case (supra), apparently the Petitioners' right would be directly and immediately affected by the order of regularization of the private Respondents. Therefore, the Petitioners will have to be considered to be the "persons aggrieved" by such promotional order in terms of the decision in Baphindali Giri case (supra).

15. Mr. N. Tagia, learned Counsel further submitted that the Petitioners have not challenged the seniority list of the Senior Teachers and, therefore, no relief whatsoever, may be available to the Petitioners on that count. Mr. Tagia, learned Counsel for the Respondent Nos. 18 and 20 further submitted that even if it is considered that the seniority position of the Respondents are under challenge, even then, no relief can be given to the Petitioners since the Petitioners have failed to challenge specifically indicating as to how their seniority would be affected.

16. In support of his contentions, learned Counsel relied on a decision of this Court reported in 2006 1 GLT 379 : Loukrakpam Rupnarain Singh v. State of Manipur and Ors. The relevant extract of the above decision in reads as follows:

11. In the absence of proper relief this Court cannot grant the relief to the Petitioner in the present writ petition that the writ Petitioner is senior to the

Assistant Agriculture Officer/equivalent whose particulars are not spelt out and also without disclosing their respective positions in the existing final seniority list of the Assistant Agriculture Officer/equivalent of the Department of Agriculture dated 2.4.2002 in the pleading of the present writ petition by interpreting the judgment and order of this Court dated 22.1.2001 passed in WP(C) No. 786 of 2000 in the manner writ petitions had interpreted. The Apex Court in *Krishna Priya Ganguly and Others Vs. University of Lucknow and Others*, held that a relief should be confined to those specifically prayed for in the writ petition. In that case, i.e. *Krishna Priya Ganguly and Ors. v. University of Lucknow and Ors.* (supra) writ Petitioner merely prayed for a writ directing the State and medical college to consider his case for admission but without any proper relief the High Court issued a writ of mandamus directing the college to admit him (writ Petitioner) to the Post Graduate College. The Apex Court held that such direction to the college to admit him to the Post Graduate College would amount to granting a relief which the Plaintiff never prayed for inasmuch as the prayer of the writ Petitioner in the writ petition is only for a direction to consider his case for admission. The Apex Court in *State of Mysore v. G.N. Lingappa and Ors.* : 1969 SLR 709 (SC) held that the Court cannot grant the relief in the writ petition in the absence of proper plea and any prayer to that effect. The Apex Court, further, in *Hindustan Petroleum Corpn. Ltd. v. Sunita Mehta and Ors.*, (2001) 9 SCC 344 held that the order not even challenged in the writ petitions cannot be quashed by the High Court in writ jurisdiction.

17. In reply to this Mr. R.P. Sarmah, learned senior counsel contended that the Petitioners have specifically pleaded in paragraph 10 of the writ petition and have also challenged the process of regularization and the preparation of the seniority list, which have been annexed in the writ petition. Learned senior counsel for the Petitioners further submitted that the process of regularization has been challenged by the Petitioners by which all the private Respondents have been regularized by the order of the State Respondents as Senior Teachers and also became senior to the writ Petitioners, in the seniority list maintained and published by the State Respondents. As rightly pointed out by the learned Counsel for the Petitioner, since process of regularization of contract employees has affected the seniority of the writ Petitioners, which is under challenge in the writ petition. It has further been indicated in the writ petition as to how the Petitioners position in the seniority list has been effected. Therefore, the decision rendered by this Court in *Loukrakpam Rupnarain Singh* (supra) relied on by the learned Counsel for the Respondent may not have application in the present case.

18. Mr. M. Pertin, learned Counsel appearing for the Respondent Nos. 4 to 17, 19, 21 to 29 submitted that the Respondents were recruited on contractual basis due to financial constraints of the State Government at the relevant period of time with a clear understanding that as and when the financial condition of the State Government would recover, the Respondents would be regularized in service. The learned Counsel for the Respondents further pointed out that it was in view of the cabinet decision taken by the State Government, the Respondents

were all regularized in service as Senior Teachers.

19. By drawing attention of this Court to the extract of resolution of the State Cabinet, Mr. Sarmah, learned senior counsel submitted that the cabinet allowed the Education Department to fill up the vacancies wherever it exists on regular basis and also allowed the Department to fill up cent percent vacancies of Teachers after obtaining concurrence of the Finance Department. The learned Counsel for the Petitioners further pointed out that the cabinet decided to fill up the regular vacancies on regular basis and it did not approve regularization of contract employees.

20. The learned Counsel for the Petitioners, drawing the attention of this Court to the decision of the Apex Court in *Secretary, State of Karnataka and Others Vs. Umadevi and Others*, submitted that the State Government by taking a cabinet decision cannot sharpen the provision contained in the rules of recruitment framed in terms of proviso 2 of Article 309 of the Constitution of India.

21. Ms. G. Deka, learned Addl. Senior Govt. Advocate appearing on behalf of the State Respondents submitted that the State Government Department regularized the service of the private Respondents by observing all formalities even by conducting interview for selection of the candidates and such appointments of the private Respondents were made with due recommendations, made by the selection board constituted for the purpose. And subsequently, thereafter, the services of the private Respondents were formally regularized by the Government by holding Departmental Promotion Committee (DPC) duly constituted for the purpose. However, in doing so, the contractual service period of the Respondents was not counted for the purpose of regularization of their service and further submitted that there is not discrepancy in the seniority list of the private Respondent Nos. 12 to 29. However, fact remains that the Petitioners were appointed on contract service and their subsequent regularization prosulated by the State Respondent was not in terms of the Recruitment Rules.

22. On careful analysis of the rival contentions made by the learned Counsel appearing on behalf of the Petitioners, the State Respondents as well as private Respondents, it appears that the Petitioners, who were promoted to the post of Senior Teachers, became junior to the private Respondents, who were regularized from their contract service. In this context the Hon'ble Supreme Court in *Secretary, State of Karnataka and Others Vs. Umadevi and Others*, analyzing the legal implication in regularizing the service of contractual employees held that the constitutional scheme of public employment in this country envisaged regularization of appointment after following the due procedure. Hon'ble Supreme Court further held that the right of the executive and that of the Court would not extend to the power to direct regularization of the contract appointment as permanent, which has been made in clear violation of the constitutional scheme and the statutory rules made in that behalf. The relevant observation made by the Hon'ble Supreme Court in *Uma Devi (supra)* is reproduced below:

15. Even at the threshold, it is necessary to keep in mind the distinction between regularization and conferment of permanence in service jurisprudence. In *State of Mysore and Another Vs. S.V. Narayanappa*, this Court stated that it was a misconception to consider that regularization meant permanence. In *R.N. Nanjundappa Vs. T. Thimmiah and Another*, this Court dealt with an argument that regularization would mean conferring the quality of permanence on the appointment. This Court stated: (SCC pp. 416-17, para 26).

Counsel on behalf of the Respondent contended that regularization would mean conferring the quality of performance on the appointment whereas counsel on behalf of the State contended that regularization did not mean permanence but that it was a case of regularization of the Rules under Article 309. Both the contentions are fallacious. If the appointment itself is in inflection of the rules or if it is in violation of the provisions of the Constitution illegality cannot be regularized. Ratification or regularization is possible of an act which is within the power and province of the authority but there has been some noncompliance with procedure or manner which does not go to the root of the appointment. Regularization cannot be said to be a mode of recruitment. To accede to such a proposition would be to introduce a new head of appointment in defiance of rules or it may have the effect of setting at naught the rules.

16. In *B.N. Nagarajan and Others Vs. State of Karnataka and Others*, this Court clearly held that the words "regular" or "regularization" do not connote permanence and cannot be construed so as to convey an idea of the nature of tenure of appointments. They are terms calculated to condone any procedural irregularities and are meant to cure only such defects as are attributable to methodology followed in making the appointments. This Court emphasized that when rules framed under Article 309 of the Constitution are in force, no regularisation is permissible in exercise of the executive powers of the Government under Article 162 of the Constitution in contravention of the rules. These decisions and the principles recognized therein have not been dissented to by this Court and on principle, we see no reason not to accept the proposition as enunciated in the above decisions. We have, therefore, to keep this distinction in mind and proceed on the basis that only something that is irregular for want of compliance with one of the elements in the process of selection which does not go to the root of the process, can be regularized and that it alone can be regularized and granting permanence of employment is a totally different concept and cannot be equated with regularization.

17. We have already indicated the constitutional scheme of public employment in this country, and the executive, or for that matter the Court, in appropriate case, would have only the right to regularize an appointment made after following the due procedure, even though a non-fundamental element of that process or procedure has not been followed. This right of the executive and that of the Court would not extend to the executive or the Court being in a position to direct that an appointment made in clear violation of the constitutional scheme, and

the statutory rules made in that behalf, can be treated as permanent or can be directed to be treated as permanent.

23. Therefore, in view of the decision of the Hon"ble Supreme Court in Uma Devi (supra), the process adopted by the State Government in regularizing the private Respondents, who were contract employees, in the post of Senior Teachers, is not in terms of the Recruitment Rules. The entire process which has been adopted by the State Respondents apparently de hors the Recruitment Rules and is against the principle of law laid by the Hon"ble Supreme Court in Umadevi case (supra). Therefore, there is no scope to interpret the decision of the Cabinet as an approval for regularization of the contractual employees of the Education Department.

24. In Ananda Ram Borah and Ors. v. State of Assam and Ors.: 2003 (2) GLT 78, a Division Bench of this Court categorically held that any appointee not recruited in terms of the Recruitment Rules cannot get seniority over the person who was regularly recruited. The Hon"ble Division Bench of this Court, upon analyzing the decision of the Hon"ble Supreme Court in Suraj Prakash Gupta v. State of Jammu and Kashmir: (2000) 7 SCC 56, observed that exercise of power of relaxation of the conditions of service and recruitment rules is strictly prohibited. The relevant observation of the Hon"ble Division of this Court reads as follows:

The power to relax a particular rule could be exercised by the appointing authority on its satisfaction that a particular case requires special treatment to provide just and equitable relief to a person or persons concerned. The question, which call for determination by this Court is, whether the power to relax the Rule would go to the extent of relaxing conditions of recruitment also or it can be only to the extent of relaxing the conditions of service? Can a direct recruit for recruitment to the post of LDA avoid competitive examination? Can the Government exercise power of relaxation of Rule of recruitment requiring a direct recruit to appear in the competitive examination and such relaxation of the recruitment Rules is permissible in Keshav Chandra Joshi and others etc. Vs. Union of India and others, the Apex Court has emphasised the need of strict compliance of the recruitment Rules for both direct recruits and promotees. It is held that there cannot be any relaxation of the basic or fundamental Rules of recruitment. That was a case where the Rule permitting relaxation of conditions of service came for consideration and it was held by a three judges Bench that the Rule did not permit relaxation of the recruitment Rules. In Syed Khalid Rizvi and Others and Ramesh Prasad Singh and Others Vs. Union of India (UOI) and Others, the Apex Court observed". The condition precedent, therefore, is that there should be an appointment to the service in accordance with Rules and by operation of the Rule, undue hardship has been caused,.... it is already held that the condition of recruitment and conditions of service are distinct and the latter is preceded by an appointment according to Rules. The former cannot be relaxed." Thus, according to the Apex Court there is distinction between the conditions of recruitment and conditions of service. Appointment has to be made

in accordance with the recruitment Rules and thereafter, there may be a relaxation in the service condition. Similarly, in *State of Orissa and others Vs. Smt. Sukanti Mohapatra and others*, it was held that though the power of relaxation stated in the Rule was in regard to "any of the provisions of the Rules," this did not permit relaxation of the Rule of direct recruitment without consulting the Commission and the entire ad-hoc service of a direct recruit could not be treated as regular service. In *Dr M.A. Haque and Others Vs. Union of India (UOI) and Others*, and in *J and K. Public Service Commission, etc. Vs. Dr. Narinder Mohan and others etc. etc.*, it has been emphatically laid down that the Rule relating to recruitment could not be relaxed. The judgment in the matter of *Suraj Prakash Gupta (supra)* has also reiterated the principle laid down by the Apex Court that there cannot be any relaxation of the conditions of recruitment. The conditions of recruitment and conditions of service are distinct. The Government has the power to relax conditions of service, whereas the conditions of recruitment cannot be relaxed even though the Rule intends to do so. In the present case, admittedly the Appellants were not appointed on the post of LDA after competitive examination. Their appointments were made relaxing the Rule of appointment exercising the powers under Rule 29. The power to relax cannot accede to the conditions of recruitment, which is competitive examination. As no competitive examination was held, appointment of the Appellants cannot be said to be in conformity with the 1963 rules. The appointment order itself indicates the nature of appointment, which says that the appointments may be terminated at any time without notice and without assigning any reason. The appointment itself appears to be temporary in nature. Such an appointee cannot be placed senior over the persons who have been recruited in the service in accordance with the service Rules. The Appellants having not been appointed in accordance with the Rules cannot claim seniority over the persons who have been regularly recruited in accordance with the service rules. The claim made by the Appellants for assigning seniority from the date of their appointment cannot be entertained.

25. Therefore, the power and authority exercised by the State Government in regularizing the service of the private Respondents being clearly beyond the provisions of the rules was illegal, arbitrary and not tenable in law.

26. In view of the above discussion, upon careful consideration of the entire gamut of facts discussed above. I am of the considered view that the process of regularization adopted by the State Government in respect of the private Respondents as Senior Teachers is beyond the Recruitment Rules and the principle of law laid by the Hon'ble Supreme Court in *Umadevi (supra)*. Accordingly, the impugned order of regularization of the private Respondents issued by the Respondent No. 3, Director, School Education, Govt. of Arunachal Pradesh, is hereby set aside and quashed. As a corollary to the above, the Respondent State Government is directed also to carry out the exercise of fixing seniority of the Petitioners in terms of the provisions of the recruitment Rules and in accordance with law.

27. With the above observations, this writ petition is disposed of.