

(2003) 11 GUJ CK 0023

In the Gujarat High Court

Case No : Special Civil Application No's. 4596, 4627, 4692, 4809, 4810, 5242, 5551, 5753, 5754, 5755, 5756, 5955, 6039, 6311, 6312, 6314, 6315, 6441 and 12009 of 2003

Ukawala Mukeshkumar Hirabhai

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 25-11-2003

Acts Referred:

Civil Services (Classification, Control and Appeal) Rules — Rule 49
Constitution of India, 1950 — Article 14, 16, 16(1), 313, 313
Government of India Act, 1935 — Section 240
Junior Pharmacists Recruitment Rules, 1963 — Rule 2

Citation : (2004) 24 GLH 347

Hon'ble Judges : P.B. Majmudar, J

Bench : Single Bench

Advocate : Y.N. Oza and Nirzar S. Desai, in Spl.C.A.No.4596, 4627, 4809, 5753, 5754, 5755, 5756, 6311, 6312, 6314, 6315, 6441 and 12009 of 2003, Y.N. Oza and K.R. Dave, in Spl.C.A. 4692 of 2003, Y.N. Oza and S. Shukla, in Spl.C.A.4810, 5242, 5551 and 6039 of 2003 and Y.N. Oza and D.C. Raval, in Spl.C.A.5955 of 2003, for the Appellant; Kamal Trivedi, A.A.G. and Sangeeta Vishen, Assistant Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

P.B. Majmudar, J.—Since the points involved in these petitions are common, all these petitions are disposed of by this common judgment.

2. The petitioners are serving as ad hoc Junior Pharmacists in the State Government and are discharging para-medical duties. Regular appointment of the Junior Pharmacist is to be made by way of selection process, which is to be undertaken by the Gujarat Gaun Seva Pasandgi Mandal. Since the process of selection was likely to take some time, and in view of the urgency for the purpose of recruiting Junior Pharmacists, the State of Gujarat, in its Health and Family Welfare Department, passed a Resolution dated 13.3.2001, by which it

was resolved to fill up 433 posts in the para-medical cadre, as per the Recruitment Rules, and only by way of ad hoc appointment. The said Resolution, though not placed either in the petition nor even in the affidavit-in-reply, was made available by the learned Advocates at the time of hearing of these petitions and with the consent of the parties, the same is taken on record. Clause 4 of the said Resolution dated 13.3.2001 provides that the Department may also find out the viability whether the Scheme which is applicable in the Education Department for the purpose of recruiting teachers, can also be made applicable for the purpose of filling up posts in the para-medical cadre. In Clause 5 of the Resolution, it is also provided that in view of the urgent need of the Health Department, the sanction is given to fill up 433 posts in the para-medical cadre as per the Recruitment Rules and only on ad hoc basis. In Clause 6 of the said G.R., it is specifically provided that posts in question fall within the purview of the Subordinate Staff Selection Board. The said posts can be filled in for a period of one year on ad hoc basis or till the regularly selected candidates are available, whichever is earlier. In view of the aforesaid Resolution and in view of the permission granted by the Department for filling up the aforesaid posts, the public advertisement was given, inviting applications for the purpose of filling up of the said posts.

3. The petitioners, at the relevant time, applied for such appointment, and, ultimately, the petitioners were appointed for a period of one year on the post of Junior Pharmacists in the pay scale of Rs.4500-7000. As per the appointment order, the said appointment is given on ad hoc basis for a period of one year or till appropriate selected candidate is available, whichever is earlier. Copy of one of the appointment orders issued to the petitioner is annexed in Special Civil Application No.4596 of 2003 at page 15, Annexure "B". The petitioners also gave necessary undertaking to the Department, stating that since their appointment is only for a period of one year or till the selected candidate is available, whichever is earlier, if the services of the petitioners are to be terminated on the expiry of the said period, the petitioners will accept such termination of their services. Such undertaking is taken from all the petitioners and it is also annexed along with the petition. Since the tenure appointment of the petitioners was coming to an end, the Department passed an order dated 27th March, 2003, which is annexed at Annexure "A" to Special Civil Application No.4596 of 2003, by which the services of the petitioners were terminated with effect from the date mentioned in the said order. The period of one year is taken into consideration from the date on which the candidates joined their services. In view of the aforesaid order, at Annexure "A", the petitioners approached this Court, challenging the said termination order on the ground that the petitioners are entitled to serve till regularly selected candidates are available. It is submitted that the Department wants to replace the petitioners, by appointing another set of ad hoc employees by giving fresh appointment orders to them. By filing these petitions, it is prayed that the impugned termination order may be set aside and that their services may be regularised from the date of their appointment. It is

also prayed that the Department may be directed to continue them in the pay scale of Rs.4500-7000, in which they were initially appointed by the first order. There are 33 petitioners, in all, in this bunch of petitions and as per the particulars given by Mr.Kamal Trivedi, learned Additional Advocate General, out of the said 33 employees, three employees, viz., Vaghela Rajeshkumar Baldevbhai, who is the petitioner in Special Civil Application No.4809 of 2003, Jigar Natvarlal Joshi, petitioner in Special Civil Application No.12009 of 2003, and Ketan G. Pandya, petitioner No.1 in Special Civil Application No.5551 of 2003, have left their services on their own and that, they are not in service. Mr.Trivedi also further submitted that so far as the remaining 30 petitioners are concerned, 25 petitioners approached this Court before passing the termination order at Annexure "A" and accordingly, they have been continued in service by virtue of the status quo order, and they were continued in the pay scale in which they were initially appointed by their original appointment order. He submitted that so far as the remaining five employees are concerned, since they have not approached this Court earlier, i.e. at the time of passing the termination order, they have been reappointed, but they have been given fixed salary. Further, the learned Additional Advocate General pointed out that even though the requisition was for 433 posts, ultimately, 137 posts are filled in.

4. It is required to be noted that, during the pendency of these petitions, the Government decided to give fresh appointment orders to the Junior Pharmacists, as, it is an admitted fact that no regularly selected candidate through the Board is yet available and, therefore, in order to see that the work of the department, which is an important work, and which is in the para-medical cadre, does not suffer, ultimately, after the expiry of the initial period of one year, on which the employees were appointed on ad hoc basis, by subsequent orders, they have been continued. Fresh appointment orders were given to the concerned employees, appointing them in a fixed scale for a fixed period of 11 months or till the regularly selected candidates are available in the fixed scale of Rs.3,500/-. One of such appointment orders is produced at Annexure "C", page 23 of the compilation in Special Civil Application No.5551 of 2003. As stated earlier, since 25 employees have approached this Court before their services were terminated, the Department continued them in view of the status quo order granted by this Court and no fresh appointment orders have been given to them in view of the status quo order granted by this Court. Rest of the five petitioners, who have not approached the Court earlier, have been given fixed salary by the Department and, accordingly, out of 30 petitioners, 25 petitioners have not been given any fresh appointment orders, giving them tenure appointment in a fixed salary which has been given to rest of the five petitioners. So far as the other three employees are concerned, whose reference is given earlier, they are out of service, either by way of resignation or otherwise, to which I shall deal with, later on. This bunch of petitions is, therefore, required to be decided in connection with the 33 employees, who approached this Court and the factual aspect of their case is classified above.

5. The grievance of the petitioners is that when the post in question is a sanctioned post and when they have been appointed for discharging regular duty prescribed for the post of Junior Pharmacist, there is no reason to terminate their services and thereafter, giving them fresh appointment order for a fixed tenure. It is submitted that when it is an admitted fact that selected candidates through Gujarat Gaun Seva Pasandgi Mandal are not available till today, at least till such selected candidates are available, the petitioners are required to be continued on ad hoc basis. It is also submitted that the petitioners are even otherwise eligible and qualified as per the recruitment rules for getting regular appointment and even in the past, since the appointments on the said posts were made by the State Government itself, without taking help of the Gujarat Gaun Seva Pasandgi Mandal, it is a case in which the services of the petitioners are required to be regularized as even otherwise, the petitioners are qualified to be appointed and they are working on sanctioned posts. It is also submitted that, in any case, the action of the State Government in giving them fresh appointment in the fixed salary is bad in law and is discriminatory as the petitioners who have been initially appointed in the regular scale for a period of one year, cannot be given appointment on a fixed salary of Rs.3,500/-. It is also submitted that, assuming that the Government is justified in giving them fresh temporary orders, on ad hoc basis, till regularly selected candidates are available, yet, it is not open for the Government to take away the benefit of regular scale, which was given to them earlier at the time of initial appointment and subsequently, reducing them to the fixed salary at the time of giving subsequent temporary orders, and the said action is, therefore, highly arbitrary, discriminatory and unjust. Alternatively, it is prayed that, in any case, the petitioners are required to be continued in the regular scale till the regularly selected candidates are available or till the tenure of the new appointment comes to an end, which is given for a further period of 11 months or till the regularly selected candidates are available, whichever is earlier.

6. The petitions have been resisted by the State Government by filing affidavit-in-reply. Mr.Kamal Trivedi, learned Additional Advocate General, appearing for the State Government, has argued that the petitioners have got no right to continue on the posts in question as their original appointment is purely on ad hoc basis. Mr.Trivedi submitted that the petitioners have got no right to the post and since it is a tenure appointment, they have no right to continue further after the tenure of their appointment is over. Mr.Trivedi further submitted that the State Government is contemplating formation of a Scheme for recruitment of Junior Pharmacist and other Para-medical services by way of adopting similar type of Scheme, which is framed by the Education Department for the purpose of recruitment of teachers in the Primary Schools. It is also submitted by Mr.Trivedi that, at present, the State is facing financial crisis and it is not possible for the State Government to give regular pay scale to the petitioners or such other ad hoc employees and even though, initially, it was decided to appoint the candidates by regular process and through the Selection Board, the Government

may now come out with some Scheme at par with the Scheme framed by the Education Department. It is also submitted by the learned Additional Advocate General that there are so many candidates who are willing to join the employment as a Junior Pharmacist in the fixed salary and when the Government is able to get services by paying less amount, the petitioners cannot compel that they should be given regular salary.

Mr.Trivedi, however, conceded the fact that the petitioners are otherwise eligible for being appointed to the post in question as per the Recruitment Rules. He also conceded the fact that a request was sent by the Health Department for filling up the said posts in view of the emergency and need for the same. He also conceded that the Government had given sanction, as per its G.R. dated 13.3.2001, to fill up 433 posts in para-medical cadre and the same are sanctioned posts, on which, ultimately, these petitioners have been appointed. He, however, submitted that even though 433 posts were sanctioned earlier, the actual appointment is made only on 137 posts, and rest of the posts were never filled in even by way of ad hoc appointment. Mr.Trivedi also stated that the State Government has also informed the Selection Board that only 137 posts are to be filled in and not all the sanctioned posts, i.e. 433 posts. Mr.Trivedi also further submitted that the Government is contemplating reduction of the total sanctioned posts of Junior Pharmacists in order to meet the financial difficulties. Mr.Trivedi also further submitted that this being a tenure appointment and that too, on ad hoc basis, there is nothing wrong, ultimately if the Government decides to give appointment on a fixed tenure in a fixed salary as the petitioners have got no right to the post and, therefore, no relief can be given to the petitioners in any manner. Mr.Trivedi also further submitted that the petitioners, having accepted the tenure appointment, are now estopped from challenging the same and they have no right to continue on the post after the tenure is over. Mr.Trivedi further submitted that so far as 25 petitioners are concerned, since they have not been even given new tenure orders, on a fixed salary, they have got no right now to continue as the original period prescribed in their appointment order has already come to an end. He submitted that so far as the remaining five employees are concerned, since they have already accepted the new orders, in which fixed salary is given to them, they now cannot ask for regular pay scale.

Mr.Trivedi relied upon certain judgments, to which I will refer later on in this judgment.

Mr.Trivedi submitted that the petitioners have no right now to continue after the tenure of their appointment is over. He also further submitted that, in case, ultimately, it is decided to give fresh appointment orders after the end of the earlier tenure period, or at the time of terminating their services, then, at that time of giving fresh appointment, even on tenure basis, or at the time of terminating their services, the principle of "Last Come, First Go", is required to be followed by the Government. It is submitted by Mr.Trivedi that it is open for

the Government to consider whether it is necessary still to give fresh orders after the tenure in question is over or to keep the posts vacant. It is, however, submitted that, in case, ultimately, it is decided to give appointments again in view of the need, naturally, the question of continuing senior employees by giving them preference is required to be considered.

7. I have heard learned Advocates of both the sides, in detail, and I have also gone through the various G.Rs. and appointment orders produced on the record. As pointed out earlier, the factual aspect, as such, is not in dispute. Initially, as per the need of the Department and in view of the Government Resolution dated 13.3.2001, it was decided to fill up the vacant posts as per the Recruitment Rules. It is required to be noted that the posts in question are in relation to the para-medical services. It is also not in dispute that as per Clause 5 of the G.R. dated 13.3.2001, the Health Department was in need of filling up the said posts urgently and that is how 433 posts were sanctioned. The break-up of the aforesaid 433 posts is also given along with the said Government Resolution. It is under this background that, initially, appointment orders were given to the petitioners in April, 2002. As per the aforesaid appointment order dated 6th April, 2002, which is at page 15, at Annexure "B" in Special Civil Application No.4956 of 2003, the petitioners were appointed for a period of one year or till the regularly selected candidates through the Board are available, whichever is earlier, and at that time, the petitioners were recruited in the pay scale prescribed for the post in question, i.e. Rs.4500-7000.

8. At this stage, it will be fruitful to rely upon the recruitment Rules for the post of Junior Pharmacist. The Rules in question are known as "Junior Pharmacists Recruitment Rules, 1983". The aforesaid Rules provide as under :-

"

1. These rules may be called the Junior Pharmacists Recruitment Rules, 1963.
2. Appointment to the post of Junior Pharmacists shall be made by direct selection.
3. To be eligible for appointment by direct selection to the post mentioned in rule 2, a candidate shall -
 - (i) not be more than 28 years of age; (ii) possess a degree in Pharmacy or a diploma in Pharmacy of a recognised University, or an equivalent educational qualification and must have registered his name with the Gujarat Pharmacy Council; (iii) Possess adequate knowledge of Gujarati and Hindi.

Provided that preference shall be given to a candidate having experience in dispensing the medicine in hospitals or dispensaries.

4. The selected candidate shall be required to pass the Departmental Examination, if any, prescribed by the Government and an examination in Gujarati or Hindi or both in accordance with the rules prescribed by the

Government in that behalf from time to time.

5. The selected candidate shall be on probation for a period of one year.

... .."

9. It is argued by Mr.Y.N. Oza, learned Advocate for the petitioners, that, initially, the said post was filled in only by the State Government itself and as such, there is no statutory requirement that it must be filled in through the Gujarat Gaun Seva Pasandgi Mandal. He submitted that since the petitioners are qualified to be appointed as per the Recruitment Rules, and even otherwise, they are eligible for getting such appointment, and since they are appointed to the sanctioned posts, the Department should regularise their services. However, so far as the prayer of the petitioners regarding regularisation of their services is concerned, in my view, there is hardly any substance in the same. An ad hoc employee has no right to the post and since the petitioners have been appointed purely on ad hoc basis, naturally, they are required to make room for the regularly selected candidate as and when such candidate is available or till their tenure period is over. In view of the settled legal position, an ad hoc employee has no right to the post. Even otherwise, since the petitioners have not been recruited through the regular selection procedure, which is to be done through the Gujarat Gaun Seva Pasandgi Mandal, the petitioners cannot claim absorption on permanent basis or cannot pray for regularisation of their services, as the tenure of their appointment is for a fixed period or till the regularly selected candidate is available, whichever is earlier. Considering the facts of the case, in my view, there is no substance in the contention of Mr.Oza that the services of the petitioners are required to be regularised. I, therefore, do not find any substance in the prayer of the petitioners that their services may be regularised by the Department.

10. Mr.Kamal Trivedi, learned Additional Advocate General, has relied upon various judgments of the Apex Court to substantiate his say that a person, who has been appointed on ad hoc basis, has no right to the post and since it is a tenure appointment, he has no right to continue further after the tenure of the appointment is over. In Dr. Arundhati Ajit Pargaonkar Vs. State of Maharashtra and others, , it has been held by the Apex Court as under in paragraph 4 :-

"

4. The terms of appointment letter had been extracted earlier. It is not disputed that the post on which the appellant was appointed was a permanent post. A person appointed temporarily to a permanent post cannot be equated with a person appointed ad hoc. A temporary appointee to a permanent post has all the privileges of a regular employee except that the appointment becomes permanent only in the manner provided in the rules. Even the tenor of the appointment letter indicates that the appellant was not to be treated as a temporary employee in the sense in which it is, normally, understood. It was not a tenurial appointment or an appointment till further orders. Even this was not

said that the appellant was being appointed till the regular candidate was selected. However, that by itself could not confer any permanent status on the appellant nor she could claim regularization unless it is established that she became permanent under some rule or order or 1975 Resolution by satisfying the conditions mentioned therein.

... .."

In my view, in view of the settled legal position that an ad hoc employee has no right to the post and since the petitioners were appointed purely as tenure appointees on ad hoc basis and regular appointment is to be made only through the Gujarat Gaun Seva Pasandgi Mandal, the claim of the petitioners for regular absorption cannot be accepted. So far as the aforesaid prayer of the petitioners for direction in this behalf, asking the Department to regularise their services, is concerned, the same cannot be granted. The said prayer of the petitioners is accordingly rejected.

11. The next question which is required to be considered is whether the petitioners are entitled to continue on ad hoc basis till regularly selected candidates through the Gujarat Gaun Seva Pasandgi Mandal are available. Mr.Oza submitted that since the posts in question are sanctioned posts and since after inviting applications for the posts in question through advertisement, the petitioners had applied, in fairness, they are required to be continued till regularly selected candidates are available. He submitted that the petitioners are not required to be replaced by other ad hoc employees, as, ultimately, the Government is in need of getting services from the employees for the purpose of discharging the important work of para-medical services. Reliance is placed by Mr.Y.N. Oza, learned Advocate for the petitioners, on the decision of the Apex Court in State of Haryana and others Vs. Piara Singh and others etc. etc., , which deals with the case of ad hoc employees. In paragraph 25, the Honourable Supreme Court has held as under :-

" 25. Before parting with this case, we think it appropriate to say a few words concerning the issue of regularisation of ad hoc/temporary employees in government service.

The normal rule, of course, is regular recruitment through the prescribed agency but exigencies of administration may sometimes call for an ad hoc or temporary appointment to be made. In such a situation, effort should always be to replace such an ad hoc/temporary employee by a regularly selected employee as early as possible. Such a temporary employee may also compete along with others for such regular selection/appointment. If he gets selected, well and good, but if he does not, he must give way to the regularly selected candidate. The appointment of the regularly selected candidate cannot be withheld or kept in abeyance for the sake of such an ad hoc/temporary employee.

Secondly, an ad hoc or temporary employee should not be replaced by another ad hoc or temporary employee; he must be replaced only by a regularly selected

employee. This is necessary to avoid arbitrary action on the part of the appointing authority.

Thirdly, even where an ad hoc or temporary employment is necessitated on account of the exigencies of administration, he should ordinarily be drawn from the employment exchange unless it cannot brook delay in which case the pressing cause must be stated on the file. If no candidate is available or is not sponsored by the employment exchange, some appropriate method consistent with the requirements of Article 16 should be followed. In other words, there must be a notice published in the appropriate manner calling for applications and all those who apply in response thereto should be considered fairly.

An unqualified person ought to be appointed only when qualified persons are not available through the above processes.

If for any reason, an ad hoc or temporary employee is continued for a fairly long spell, the authorities must consider his case for regularisation provided he is eligible and qualified according to rules and his service record is satisfactory and his appointment does not run counter to the reservation policy of the State.

The proper course would be that each State prepares a scheme, if one is not already in vogue, for regularisation of such employees consistent with its reservation policy and if a scheme is already framed, the same way be made consistent with our observations herein so as to reduce avoidable litigation in this behalf. If and when such person is regularised he should be placed immediately below the last regularly appointed employee in that category, class or service, as the case may be.

So far as the work-charged employees and casual labour are concerned, the effort must be to regularise them as far as possible and as early as possible subject to their fulfilling the qualifications, if any, prescribed for the post and subject also to availability of work. If a casual labourer is continued for a fairly long spell say two or three years - a presumption may arise that there is regular need for his services. In such a situation, it becomes obligatory for the concerned authority to examine the feasibility of his regularisation. While doing so, the authorities ought to adopt a positive approach coupled with an empathy for the person. As has been repeatedly stressed by this court, security of tenure is necessary for an employee to give his best to the job. In this behalf, we do commend the orders of the Government of Haryana (contained in its letter dated 6.4.90 referred to hereinbefore) both in relation to work-charged employees as well as casual labour.

We must also say that the orders issued by the Governments of Punjab and Haryana providing for regularisation of ad hoc/temporary employees who have put in two years/one year of service are quite generous and leave no room for any legitimate grievance by any one. These are but a few observations which we thought it necessary to make, impelled by the facts of this case, and the spate of litigation by such employees. They are not exhaustive nor can they be

understood as immutable. Each Government or authority has to devise its own criteria or principles for regularisation having regard to all the relevant circumstances, but while doing so, it should bear in mind the observations made herein.

... .."

12. Mr.Trivedi, learned Additional Advocate General, however, submitted that it is not a case where, after terminating the services of the petitioners, the Government is going to appoint fresh recruits. In such eventuality, the claim of the petitioners is required to be considered on the basis of the earlier services rendered by them even on ad hoc basis. He, however, submitted that it is always open for the Government to consider whether it is necessary to continue same number of employees even after their tenure appointment comes to an end.

13. At this stage, reference is required to be made to the decisions cited by the learned Additional Advocate General.

In Satish Chandra Anand Vs. The Union of India (UOI), , a civil servant, who had been engaged on the basis of special contract for a certain term, was, on the expiry of the term, reappointed by a further contract on a temporary basis. In accordance with the Rules, which form part of the contract, he was discharged from services, after notice. The petitioner filed a petition under Article 32 of the Constitution, seeking redress for breach of his fundamental rights under Articles 14 and 16(1) of the Constitution of India. It was argued that the rules infringed were those conferred by Article 311 of the Constitution. Negating the said contention, it was held by the Apex Court in paragraphs 7, 8 and 9 as under :-

"

(7) Taking article 14 first, it must be shown that the petitioner has been discriminated against in the exercise or enjoyment of some legal right which is open to others who are similarly situated. The rights which he says have been infringed are those conferred by article 311. He says he has either been dismissed or removed from service without the safeguards which that article confers. In our opinion, article 311 has no application because this is neither a dismissal nor a removal from service, nor is it a reduction in rank. It is an ordinary case of a contract being terminated by notice under one of its clauses. (8) The services in India have long been afforded certain statutory guarantees and safeguards against arbitrary dismissal or reduction in rank u/s 240 of the Government of India Act, 1935, the safeguards were limited to those two cases. Under the present Constitution, a third was added, namely removal from service. In order to understand the difference between "dismissal" and "removal" from service, it will be necessary to turn to the Rule, which governed, and with modifications still govern, the "services" in India because of article 313 of the Constitution. (9) Part XII of the Civil Services (Classification, Control and Appeal) Rules relating to Conduct and Discipline includes rule 49 which sets out the various penalties to which a member of the services can be subjected for

indiscipline and misconduct. They are seven in number and include censure, suspension, reduction in rank, removal from service and dismissal from service. The Act of 1935 selected only two of these possible penalties as serious enough to merit statutory safeguards, namely reduction in rank and dismissal from service. The Constitution has added a third to the list. The distinction which is drawn between the two is explained in rule 49. There is first removal from service "which does not disqualify from future employment " and there is next dismissal from service "which ordinarily disqualifies from future employment." Then follows an Explanation: The discharge--

.. . . .

(c) of a person engaged under contract, in accordance with the terms of his contract, does not amount to removal or dismissal within the meaning of this rule." These terms are used in the same sense in article 311. It follows that the article has no application here and so no question of discrimination arises, for the "law" whose protection the petitioner seeks has no application to him. There was no compulsion on the petitioner to enter into the contract he did. He was as free under the law as any other person to accept or to reject the offer which was made to him. Having accepted, he still has open to him all the right and remedies available to other persons similarly situated to enforce any rights under his contract which have been denied to him, assuming there are any, and to pursue in the ordinary courts of the land such remedies for a breach as are open to him to exactly the same extent as other persons similarly situated. He has not been discriminated against and he has not been denied the protection of any laws which others similarly situated could claim. The remedy of a writ is misconceived.

... .."

In the said decision, negating the plea based on Article 16(1) of the Constitution, the Apex Court held as under in paragraph 11 :-

"

(11) Article 16(1) is equally inapplicable. The whole matter rests in contract. When the petitioner's first contract (the five year one) came to an end, he was not a permanent Government servant and Government was not bound either to reemploy him or to continue him in service. On the other hand, it was open to Government to make him the offer it did of a continuation of his employment on a temporary and contractual basis. Though the employment was continued, it was in point of fact, and in the eyes of the law, under a new and fresh contract which was quite separate and distinct from the old even though many of its terms were the same. Article 16(1) deals with equality of opportunity in all matters relating to employment or appointment to any office under the State. The petitioner has not been denied any opportunity of employment or of appointment. He has been treated just like any other person to whom an offer of temporary employment under these conditions was made. His grievance, when

analysed, is not one of personal differentiation but is against an offer of temporary employment on special terms as opposed to permanent employment. But of course the State can enter into contracts of temporary employment and impose special terms in each case, provided they are not inconsistent with the Constitution, and those who choose to accept those terms and enter into the contract are bound by them, even as the State is bound. When the employment is permanent there are certain statutory guarantees but in the absence of any such limitations government is, subject to the qualification mentioned above, as free to make special contracts of service with temporary employees, engaged in works of a temporary nature, as any other employer.

... .."

In *State of Punjab and ors. v. Surinder Kumar and ors.* 1992(1) SLR 335, the Apex Court held as under :- "

It is not contended that an Instruction by the Education Department was issued in pursuance of which the appointments of the respondents in question were made as part-time lecturers. It is also not suggested that the respondents accepted the terms set out in annexures P/1 and P/2 under mistake. We, therefore, do not find any reason as to why the specific terms on which the appointments were made could not be enforced. We have gone through the special leave petition, the respondents' counter affidavit and the other affidavits filed by the parties, and do not find any relevant material or tenable plea in support of the claim in the writ petition filed in the High Court. The learned counsel for the respondents also could not suggest any ground for sustaining the impugned order except contending that this Court has issued directions for absorption of temporary or ad hoc Government servants on permanent basis in several cases. It has been argued that if this could be done by this Court without assigning any reason, it should be open to the High Courts as well to allow writ petitions in similar terms. We are not in a position to agree."

In *Bhanmati Tapubhai Muliya v. State of Gujarat* 1995(2) GLH 228, a Division Bench of this Court held that in the case of appointment for a fixed term and on ad hoc basis, an employee has no right to continue on the post on the expiry of the term and the appointment automatically comes to an end.

In *E. Ramakrishnan and Others Vs. State of Kerala and Others*, , the Apex Court has held as under :- "

2. It is sought to be contended by Mr.M.M. Paikeday, the learned Senior Counsel for the petitioners, that in the light of the law laid down by this Court in *Piara Singh* case and in view of the fact that the petitioners have been continuing for more than 14 years, they are required to be regularised. We find no force in the contention. Admittedly, the posts are to be filled up through selection by PSC recruitment norms. Necessarily, therefore, the requisition was sent for selection through the PSC and candidates came to be selected. Under those circumstances, the candidates who were found eligible and selected and

recommended for appointment by the PSC, were required to be appointed. The Court rightly had exercised the power in declining to regularize the services of the petitioners.

3. The learned counsel sought to rely upon an order of the Government where the Government had decided to regularize the services of the ad hoc employees. Obviously, since the decision runs into the teeth of statutory requirements under Article 320 of the Constitution the Government cannot take any decision contrary to the Constitution to regularise the services of the candidates dehors the recruitment rules and the statutory process for selection through the PSC. The High Court, therefore, has rightly given direction to the Government to notify 30 vacancies and odd or whatever may be the vacancies existing to fill up from amongst the candidates selected by the PSC."

In *H.P. State Cement Corporation Ltd. and Others Vs. B.K. Tiwari*, , the respondent-employee before the Supreme Court was offered appointment and he accepted the offer on the terms and conditions contained in the offer. Allowing the appeal of the appellant-employer, it was held by the Apex Court that the employee could not claim better terms.

In *State of U.P. and Others Vs. Raj Karan Singh*, , the Honourable Supreme Court held as under :- ""

2. Heard counsel on both sides. It appears that a Division Bench of the High Court comprising V.N. Khare and S.K. Mookerji, JJ. had by their order dated 27.4.1989 directed that the ad hoc appointment of the respondents may continue till a regularly selected candidate becomes available for appointment or till his services are terminated in accordance with law or the post is abolished. Under the said interim order, the respondent is continuing to function as an Assistant Lecturer (Civil Engineering) on ad hoc basis. By the impugned order dated 26.10.1994, another Division Bench of the High Court has directed that since the respondent was retained in service beyond one year, he should be treated as on "regular service" and his services cannot be terminated without issuing any formal order. Thus the respondent was directed to be treated on regular service by the impugned order merely because by the earlier order of 27.4.1989, he was permitted to continue till a regularly selected candidate was available. The original prayer of the respondent was for the issuance of a writ to allow him to continue till regular selection through the UPSC is made. The impugned order of 26.10.1994, therefore, goes beyond the relief claimed by the respondent in the writ petition itself. Besides, merely because a person continues under the interim orders of the Court, such continuance on the post cannot and, in this case, does not confer on him any right for continuance, it does not enhance his case for regularization. It is only an interim arrangement pending decision by the Court and cannot disturb the position in law or equities, as on the date of the petition."

In *State of Haryana and Another Vs. Haryana Civil Secretariat Personal Staff*

Association, , the Honourable Supreme Court held that courts should interfere with administrative decisions pertaining to pay fixation and pay parity only when they find such decision to be patently irrational, unjust and prejudicial, and it was further held that where the order, fixing pay scale, is found to be unsustainable, instead of granting a particular pay scale, ordinarily, the Court should direct the Authority concerned to reconsider the matter.

In Utkal University and Another Vs. Jyotirmayee Nayak and Others, , the respondents before the Honourable Supreme Court were appointed on a consolidated salary. Allowing the appeal of the appellant-Utkal University, it is held by the Apex Court that in absence of any appointment orders, appointing them on regular pay scale, the respondents cannot claim pay scales or regular salary as was admissible to the similarly placed employees and the question of regularization of services of the respondents also does not survive in the circumstances.

Lastly, the learned Additional Advocate General also placed reliance on my decision dated 23.7.2003, passed in Special Civil Application No.10018 of 2002. The petitioners in the said decision, who were serving as Shikshan Sahayak / Vahivati Sahayak / Sathi Sahayak, sought parity in pay scale with employees, like Assistant Teacher, Administration Employee and Peon. So far as the aforesaid decision is concerned, it was in connection with a Scheme framed by the State Government and initially, Government decided to give fixed salary to the selected candidates and, thereafter, to permanently absorb them on the regular post. The facts of the aforesaid decision cannot be made applicable, as it was in connection with a special Scheme framed by the Government and the said Scheme was upheld by this Court. In the instant case, till today, the Government has not come out with any such type of scheme, though, as argued by the learned Additional Advocate General, such Scheme is under the contemplation for recruiting Junior Pharmacists.

14. Considering the various case law on the subject and considering the facts of this case, in my view, if, on the expiry of the tenure period, it is decided by the Government not to fill up the posts at all, naturally, the petitioners cannot insist that in view of their original appointment on tenure basis, the Government must continue them by giving fresh temporary orders. On the expiry of the contractual period, if it is decided not to continue the said period further and not to fill up the posts even by other ad hoc employees, it is not open for the petitioners to insist that they must be continued till regularly selected candidates are available. It would be a different matter, if, after the end of the tenure period, the Department decides to fill up the posts by replacing the existing set of employees by other fresh ad hoc employees. Accordingly, it is held that the petitioners have no right to claim fresh appointments even on tenure basis in case the Government decides not to fill up the said posts again after their tenure comes to an end. It is, however, held that in case, at that stage, the Government decides to appoint another set of employees on the very posts on which the petitioners

and such type of employees were appointed initially, the Government is required to give preference to those who are already in service by following the principle of "Last Come, First Go". The learned Additional Advocate General has also fairly conceded that the said principle will be followed at the time of either terminating the services or at the time of giving fresh appointment orders. While considering this question, it is required to be kept in mind that the State is supposed to act as a model employer and when ad hoc employee, who has put in particular years of service, is available, normally, he is not required to be replaced by another ad hoc employee.

As pointed out earlier, it would be a different thing, if, ultimately, it is decided not to fill up the posts at all for financial reason or for any administrative reason. In that case, the petitioners or such other employees have absolutely no right to continue on the posts in question and it is open for the Government to keep these posts vacant even without awaiting the arrival of the regularly selected candidates through the Gujarat Gaun Seva Pasandgi Mandal. However, if it is decided to continue the employees who are employed on the aforesaid post, then, naturally, those who are already in service, should be given first preference and as per the seniority, they are required to be retained in the employment. However, in such cases also, as and when regularly selected candidates are available, those employees who are continuing on ad hoc basis, will have no right to the posts in any manner.

15. The last point which is required to be considered in these petitions is whether it is open for the State Government to continue the present set of employees by substituting their regular scale into a fixed salary. In this behalf, the factual aspect of the case is also required to be taken into consideration. The following points, as such, are not in dispute :-

- (i) In view of the urgent need for filling up the posts in question, 433 posts were sanctioned by the Government;
- (ii) As per the Government Resolution dated 13.3.2001, the recruitment on ad hoc basis can be made till regularly selected candidate is available or till the period of one year is over, whichever is earlier;
- (iii) The recruitment is to be made as per the Recruitment Rules;
- (iv) In view of the said Resolution, appointment orders were given to the petitioners in the regular pay scale, which is prescribed for the post in question, in the year 2002;

And

- (v) After the completion of the earlier tenure period, the Government decided to give fresh orders, for these very posts and in the same manner, i.e. as per the Recruitment Rules with the only alteration by way of giving fixed salary, instead of continuing the benefit of regular scale, which was given to them earlier at the time of appointing them initially. In this behalf, reference is required to be made

to the Government Resolution dated 6th February, 2003, which is annexed with the affidavit-in-reply filed by the State Government. The same is at page 30 of Special Civil Application No.4596 of 2003. As per the aforesaid G.R., the Government gave sanction for filling up 433 posts of Para-medical Service Class III for a period of one year, which was also continued for a further period of six months, later on. By the said Resolution dated 6.2.2003, it was decided to continue the said ad hoc appointment for a further period of 11 months on contractual basis as no selected candidate is yet made available by the Gujarat Gaun Seva Pasandgi Mandal. Accordingly, it was decided to give tenure appointment now for 11 months on contractual basis and as per Clause 2 of the said G.R., after giving necessary break, the new appointment orders are to be given. As per Clause 4 of the said G.R., the appointment is to be made in the fixed scale, as prescribed in the said G.R. In view of the aforesaid G.R. dated 6.2.2003, the services of the petitioners were terminated in order to give necessary break and new orders are given for a fixed term and on fixed salary. The learned Additional Advocate General also could not point out the justification of the expression "necessary break", which is used in the said G.R. It is required to be noted that the State Government is bound to follow the mandate of Article 16 of the Constitution of India. It is not in dispute that the work in question is still in existence and the Government is badly in need of employees for getting the said work done and it has also been pointed out during the course of the hearing that the concerned Department, i.e. the Health Department, has given requisition for making regular appointment on the posts in question. This G.R. is passed only with a view to seeing that the employees, who are already appointed or who are likely to be appointed in view of the fact that the Government is badly in need of their services, they are to be given so-called breaks, so that fresh appointment orders can be given in the fixed salary. By the said G.R., mandate is given to the concerned Department to give necessary break by way of terminating their services for a short period and, thereafter, to give fresh appointment orders on a fixed salary. In my view, such action of the State Government, on the face of it, is arbitrary and this G.R. is passed only with the object of depriving the employees the regular scale, which was given to them at the time of their original appointment. When the petitioners have been appointed by inviting applications and even otherwise, they are qualified as per the recruitment rules, and when they have already performed their duties by getting the scale, which is already prescribed for the posts in question, it is not proper to subsequently give fresh appointment orders only with a view to giving them fixed salary. It is not proper for the State Government to treat the contract of service as a contract of slavery. Simply under compulsion and without any alternative, if the employees are required to give necessary undertaking, that, ipso facto, cannot take away their rights to claim the salary which is prescribed for the posts in question and which is required to be given to them. As pointed out earlier, the Government itself decided to give the said scale to the petitioners and other such employees, who have been appointed on the posts in question, on ad hoc basis. On the one hand, even though the posts in question, which are important posts,

and which are in the para-medical cadre, are not filled in by way of regular selection and, on the other hand, the services of the employees, who are already serving on the posts, have been terminated in order to give so-called necessary break with an object to depriving them the regular pay scale, which was earlier given to them at the time of their appointment.

16. On behalf of the State Government, it is also pointed out that it is not known as to when the Gujarat Gaun Seva Pasandgi Mandal will send the necessary selected candidates and it may take long time. If regularly selected candidates are available, naturally, the Government has no option but to give them regular scale, but, the Government cannot take undue advantage of the situation, by delaying the recruitment process, with a view to seeing that the said work can be taken from such type of ad hoc employees on a fixed salary with the benefit that the Government is not required to pay the regular prescribed salary. For the posts in question, the pay scales are already prescribed, which is also reflected at page 31 in the compilation of Spl.C.A.No.4596 of 2003.

The action of the State Government, therefore, in depriving the scale, which was already given to the ad hoc employees at the time of their first appointment is absolutely arbitrary. It is not a case wherein, from initial stage, the employees have been appointed in a fixed salary for doing some ad hoc work. It is also not a case in which the initial appointment is made under any special scheme prescribing particular fixed salary etc. Initial appointment orders were made as per the Recruitment Rules, and the pay scale prescribed for the posts was given. As stated earlier, here, the petitioners and such other employees were already given regular scale, and, subsequently, the G.R., as referred above, is passed, asking the Department for giving necessary break, by terminating their services and thereafter, to give fixed salary. This type of device adopted by the Government is not just and proper and, on the face of it, only with an object to deprive the petitioners the very scale which was already given to them, the said G.R. dated 6.2.2003 is passed, and, now, naturally, when the Government is able to get its work done by giving the minimum amount, naturally, no efforts are being made to fill up the regular posts, as, at that time, the regular scale is required to be paid. It is, no doubt, true, as argued by the learned Additional Advocate General that the ad hoc employee has absolutely no right to the post, but, in any case, it is not equally open for the Government to take undue advantage of the situation, as, on the one hand, no serious attempts have been made to make regular appointment to the post, and, on the other hand, it is decided to take the work of a permanent nature from ad hoc employees by continuing them on a fixed salary for a long period. When the petitioners are even otherwise eligible as per the Recruitment Rules for getting appointment, there is no reason why any change or deviation was required to be made from the first ad hoc appointment order, by which they have been given regular scale. The learned Additional Advocate General, however, argued that if the Government is able to get the services at cheaper rate, and when people are willing to join services even by getting nominal fixed amount, the Government is

entitled to take the benefit of cheaper services available from the market. However, mandate of Article 16 and other provisions of the Constitution cannot be lost sight of. The Government cannot act as an ordinary businessman. The Government is required to follow certain principles such as equity and fair play. Maybe, in view of the difficulty in getting public employment, some may be compelled to join services by accepting a nominal fixed amount, but the Government should not resort to such acts by taking undue advantage of the situation in such a manner.

17. Considering the fact that the present petitioners were already given regular scale at the time of initial appointment and it is only at a subsequent stage the Resolution dated 6.2.2003, was passed by the Government, by giving a break in service, with an object to give them fixed salary and considering the fact that the petitioners are performing regular work prescribed for the posts in question, in my view, it would not be just and proper on the part of the State Government to continue them subsequently in the fixed salary and by taking regular work from them. It is not the case of the State Government that the Government does not require the services of these employees at all. In fact, the Government is badly in need of the services of Junior Pharmacists and considering the fact that the regular selection process is likely to take long time, it is just and proper to direct the State Government to give benefit of regular scale to the petitioners till they complete their tenure or till regularly selected candidates are available, whichever is earlier.

During their tenure, if the work of a particular employee is not satisfactory, it is always open for the State Government to put an end to his service within the contractual period itself.

18. Considering the matter from the aforesaid angle, it is held as under :-

(i) The petitioners have got no right to ask for regularisation of their services, as they have been appointed only on ad hoc basis and by way of tenure appointment;

(ii) In case the Government decides to continue ad hoc appointment for the posts in question in view of the administrative exigencies, preference is to be given to those employees, who are already in service, and if services of any one of them are required to be terminated, the principle of "Last Come, First Go" is required to be followed; AND

(iii) It will be open for the Government not to give fresh appointment orders on the expiry of the tenure orders. However, if the Government decides to give fresh appointment orders, the claim of one who is already in service is required to be considered, and preference is required to be given to one who is already in service, instead of replacing the present petitioners by other new ad hoc employees. 19. So far as petitioners of Special Civil Application Nos. 4809 and 12009 of 2003, viz., Vaghela Rajeshkumar Baldevbhai, and Jigar Natvarlal Joshi, respectively, are concerned, it is submitted that the said petitioners have not

been given any fresh appointment orders and, it is submitted that, therefore, there is no question of reinstating them in service. So far as the 25 other employees, whose reference is already made earlier, are concerned, in view of the fact that they have approached the Court earlier, no fresh appointment orders are given to them.

So far as the aforesaid two petitioners, viz., Vaghela Rajeshkumar Baldevbhai, and Jigar Natvarlal Joshi, and the 25 aforesaid employees, who have not been given any fresh appointment orders, are concerned, the respondents shall reconsider their cases for giving them fresh appointment if they are forming part of the original 137 posts, for which recruitment is made and if any of their juniors is continued, on the basis of the principle of "Last Come, First Go", appropriate orders may be passed as regards the aforesaid set of employees. The Government shall consider the aforesaid question appropriately for the purpose of giving fresh orders to this set of employees. The Government is accordingly directed to consider their claim and pass appropriate orders within a period of one month from today. Till the Government takes appropriate decision in connection with the above employees, status quo granted earlier shall continue. Simply because these petitioners have approached this Court and status quo order is granted, that itself should not be made the basis for not giving even tenure orders which are given to other employees. Ultimately, if these petitioners are continued, they will be entitled to regular scale prescribed for the post till their tenure is over. It is, however, clarified that it will be for the Government to review the situation at the time of the expiry of a tenure appointment whether to continue such employee by giving fresh appointment orders, but, at that time, as stated earlier, the principle of "Last Come, First Go", is required to be followed, as the one who is already in service is required to be preferred, instead of replacing such employee by way of another ad hoc employee.

So far as Ketan G. Pandya, petitioner No.1 of Special Civil Application No.5551 of 2003, is concerned, his claim is negated and no relief is given to him and the Government is not obliged to consider his case for the purpose of giving fresh appointment order.

It is held that so far as the rest of the five petitioners, who have already been given contractual appointment on a fixed period and fixed salary are concerned, they are required to be placed in the regular scale, which they were already getting at the time of their initial appointment and, they will be entitled to have such benefit of regular scale, which was given in the first appointment order till their tenure comes to an end or till their services are continued by the Government, as per the exigencies of the Administration. So far as rest of the 25 petitioners are concerned, ultimately, if they are given fresh appointment orders, as indicated in the earlier part of this order, they are also required to be given regular pay scale, which was given to them at the time of their initial appointment and their cases are also required to be treated at par with the set of

other five employees, who are already serving at present in the fixed salary.

It is once again pointed out that, even at the time when the tenure appointment comes to an end, it shall not be obligatory on the part of the State Government to continue the services of these ad hoc employees. However, in case the Government decides to make appointment of other ad hoc employees, naturally, at that time, the claims of these employees are required to be considered and the principle of "Last Come, First Go", is required to be followed so that it may not result in arbitrariness or heartburn to the employees. However, it is clarified that in case the tenure appointment of the petitioners is over, they shall have no right to hold the posts or to claim fresh orders unless the eventuality pointed out earlier exists or they are replaced by other junior employees.

20. The petitions are accordingly partly allowed. Rule is made absolute accordingly, with no order as to costs. However, claim of petitioner No.1 of Special Civil Application No.5551 of 2003 is negatived.