
(1995) 03 CAL CK 0002
In the Calcutta High Court
Case No : Civil Order No. 13280 (W) of 1993

Utpal Sikdar

APPELLANT

Vs

Assistant Commissioner, Kendriya Vidyalaya Sangathan

RESPONDENT

Date of Decision : 22-03-1995

Acts Referred:

Constitution of India, 1950 — Article 14, 142, 16, 16(1), 162
Kendriya Vidyalaya Sangathan Rules — Rule 14, 6, 7, 9

Citation : (1995) 2 ILR (Cal) 351

Hon'ble Judges : Satyabrata Sinha, J

Bench : Single Bench

Advocate : Ashoke Banerjee and Shukla Kabir Sinha, for the Appellant; Paresh Chandra Maity, for the Respondent

Final Decision : Dismissed

Judgement

Satyabrata Sinha, J.—Whether an Assistant Teacher working for some time in different schools belonging to Kendriya Vidyalaya Sangathan (hereinafter referred to for the sake of brevity as K.V. Sangathan) is entitled to be regularised in services is the central theme of this writ application.

2. The fact of the matter shortly stated is as follows: The writ Petitioner is a Commerce Graduate from the Calcutta University. He has also completed his B. Ed. She was appointed on ad hoc/part-time basis in different schools belonging to the K.V. Sangathan for different periods and on different salary as it would be evident from Annex. "A" to the writ application.

3. The contention of the Petitioner is that keeping in view the fact that she worked for more than 240 days in different schools of the said K.V. Sangathan, she is entitled to be regularised as a permanent teacher.

4. By order dated September 23. 1992, Susanta Chatterjee J. passed an interim order of status quo so far as the service of the Petitioner was concerned.

5. Two contempt applications have been filed by the Petitioner for alleged

violation of the interim orders passed in the writ application.

6. This writ application along with the aforementioned two contempt applications were taken up for hearing together and are being disposed of by a common judgment.

7. Mr. Ashok Banerjee, learned Counsel appearing on behalf of the Petitioner, submits that although the Petitioner was appointed on ad hoc/part time basis, she having been appointed in terms of Reg. 39 of the Kendriya Vidyalaya Sangathan Regulation and prior thereto her name having been sponsored by the Employment Exchange, it cannot be said that her appointment was illegal. The learned Counsel for the Petitioner submits that the Petitioner has been appointed on ad hoc/part time basis on a number of occasions in different schools belonging to K.V. Sangathan. Mr. Banerjee, learned Counsel, submitted on the basis of a decision of the Division Bench of Gauhati High Court in the case of K.V. Sangathan and Ors. v. Md. Shabnam Parween and Ors. Writ Appeal No. 100 of 1994 disposed of on March 13, 1994 that the K. V. Sangathan itself had framed a scheme in respect of Assam region and pursuant thereto teachers who are appointed on ad hoc/part time basis in the schools of the said Assam region, have been regularised and, thus, the Petitioner should also be regularised in terms thereof.

8. The learned Counsel for the Petitioner submits that the Petitioner having been appointed in a regular sanctioned post, there is absolutely no reason as to why such scheme should not be implemented by the Sangathan in other regions.

9. Mr. Prakash Chandra Maity, learned Counsel appearing on behalf of the Respondents, submits that a perusal of Reg. 39 of K.V. Sangathan would indicate that the selection for appointment in the permanent post was required to be done on all India basis. According to the learned Counsel, the Principals of the local schools do not possess any authority to appoint a teacher on permanent basis. It was stated that the Petitioner merely worked by way of stop-gap arrangement, in the affidavit-in-opposition it has been stated that the Petitioner is not qualified to hold the post of an Assistant Teacher in Social Studies. The learned Counsel has also referred to a recent decision of this Court in Jagat Kiran Sinha v. Asstt. Commissioner of K. V. Sangathan Disposal of on February 16, 1995 as well as a decision of the Division Bench of Allahabad High Court in Asstt. Commissioner of K. V. Sangathan and Anr. v. Km. Manisha Vermah Special Appeal No. 506 of 1995 by a Division Bench of Allahabad High Court on September 29, 1994.

10. It is not correct to contend that the name of the Petitioner on all occasions prior to her appointment in K.V.S. was sponsored by the Employment Exchange. The Petitioner in the affidavit-in-reply has annexed only two documents to show that her name had been sponsored by the Employment Exchange for appointment to the post of Primary Teacher in K.V. Command Hospital, A! ipore-27 as would be evident from the letter of interview dated July 7, 1987, and

for the post of a teacher in K.V. Sangathan, Cossipore, as is evident from the letter of interview dated June 8, 1987. The subject-matter of the said letter categorically states that the interview was to be held for the post of Primary Teacher on ad hoc basis.

11. It is pertinent to note that the Petitioner filed an application before the Principal, K.V.S. No. 2 Kan- charapara, which is contained in Annex. "X" to the affidavit-in-opposition stating therein that she is a trained graduate in Commerce with Geography and Economics and she had done B. Ed, from R.B. University. In the said application the Petitioner even did not refer to her past experience in other schools run by K.V.S. Sangathan. On the body of the said application the concerned Principal directed the office to issue offer of appointment on part-time basis as a stop-gap arrangement on a fixed salary of Rs. 1050. By memorandum dated August 3, 1983 addressed to the Petitioner it was stated as follows:

With reference to her application seeking employment on part-time basis in K.V. No. 2, Kancharapara Miss Utpala Sikdar is informed that on consideration of her qualification and the standard of performance shown by her during the course of interview she has not been found adequately suitable for appointment as applied for. However, keeping in view the academic needs of the Vidyalaya Children vis-a-vis till the availability of suitable teacher on promotion/ selection or on transfer from other KVS. The aforesaid Miss Utpala Sikdar is offered the post of Assistant Teacher as time-gap arrangement on the consolidated pay of Rs. 1050 (Rupees one thousand fifty only) for a limited period of days i.e. upto 31st Oct. 93 in the afternoon of which (date) her service will stand terminated automatically, without further notice. This offer will be subject to termination, without further notice also in the event of joining the regular incumbent either on transfer from other KVS or on promotion, on selection through the recruitment channel of K.V.S. or upto cited above. It was further stated in the said Memorandum as follows: The employment on part-time basis will not accrue any right or entitlement or claim of consideration for employment in any form (part-time ad hoc or regular) for the subsequent period.

If she accepts the offer on the terms and conditions stipulated in paras 01 and 04 above in writing to be submitted latest by 5.8.93. She may report for duty to the undersigned during working hours on any day latest by 5.8.93.

12. The Petitioner accepted the said offer of appointment by her" letter dated August 5, 1993. She also joined as a teacher on part-time basis on the said date. It is therefore clear that offer of appointment to the Petitioner as a part-time basis teacher was not. done in terms of Rule 39 of the Code. The mandatory provision of the said Code for recruitment of a teacher on a permanent basis or even on an ad hoc basis were not complied with nor there had been any compliance of Articles 14 and 16 of the Constitution of India. The appointment of the Petitioner was only for a limited period, that is, upto October 31, 1993, whereafter her services were to stand terminated automatically without any further notice. The said offer of appointment was also subject to termination

without further notice in the event of joining of a regular incumbent either on transfer from other K.V.S. or on promotion, on selection through the recruitment channel of K.V.S. etc.

13. The Petitioner, therefore, did not derive any legal right to continue to hold the said post after October 31, 1993, and her appointment having been made in violation of the mandatory provision of the Recruitment Rules as also Articles 14 and 16 of the Constitution of India was a nullity.

14. It is now well-settled that regularisation cannot be a mode of recruitment. When a Recruitment Rule is framed by a statutory authority the same has the force of law. Any appointment in violation of the mandatory provision of such Recruitment Rules would be nullity. This aspect of the matter has been considered by me in Jagat Kiran Sinha v. Asst. Commissioner, K.V.S. (Supra) disposed of on February 16, 1995. The Supreme Court in the case of State of Mysore and Another Vs. S.V. Narayanappa, ; B.N. Nagarjan v. State of Karnatrka and Ors. AIR 1079 S.C. 1676 and R.N. Nanjundappa Vs. T. Thimmiah and Another, clearly held that regularisation cannot be a mode of appointment. The Hon"ble Supreme Court, however, subsequently in various decisions directed regularisation of service, inter alia, on the ground that the concerned employee had worked for a number of years. In some cases the Supreme Court also directed the Respondent to frame the scheme for absorption of such employees who have been working for a long time.

15. The Supreme Court in view of the provisions, contained in Article 142 of the Constitution has a wide discretionary jurisdiction to pass any order while it thinks proper for doing complete justice to the parties. The High Court does not have such power. This Court can administer justice only in accordance with law and thus cannot act contrary to law. As regularisation cannot be said to be, mode of recruitment, direction for appointment of the Petitioner on a permanent basis by way of regularisation cannot be given. To accede to such a proposition would be to introduce a new head an appointment in defiance of rules or it may have the effect of setting at naught the rules.

16. This aspect of the matter has been considered by me not only in the case of Jagat Kiran Sinha(Supra) but also in the case of Md. Saigal Alam v. State of West Bengal CO. No. 618 (W) of 1993 disposed of on February 16, 1995 Similar view has been taken by me In Re.: Chittaranjan Mondial v. State of West Bengal and Ors. Disposed of on November 30, 1994 disposed of an November 30, 1994. Suffice, therefore, would be to consider the latest pronouncements of the Supreme Court of India.

17. In the case of State of Orissa and others Vs. Smt. Sukanti Mohapatra and others, . The Supreme Court held as follows:

If compassionate ground is the public interest for regularisation it is difficult to understand how such a factual aspect can form the basis for public interest.

18. In that case it was also held that the essential requirement, i.e. the condition precedent for the exercise of power under Rule 14, namely, public interest, is not shown to have been satisfied.

19. Similar view has been taken by the Supreme Court in Smt. Ravinder Sharma and Another Vs. State of Punjab and Others,

20. In the J and K. Public Service Commission, etc. Vs. Dr. Narinder Mohan and others etc. etc., the Supreme Court held as follows:

The next question is whether the direction given by the High Court to regularise the service of the Respondents is valid in law. It is true that the ad hoc appointees have been continuing from 1986 onwards but their appointments are de hors the Rules. Rules prescribe only two modes of recruitment, namely, direct recruitment or promotion or selection. As regards the lecturers are concerned, it is only by direct recruitment. The mode of recruitment suggested by the High Court, namely, regularisation by placing the service record of the Respondents before the PSC and consideration thereof and PSC's recommendation in that behalf is only a hybrid procedure not contemplated by the Rules. Moreover when the Rules prescribe direct recruitment and recruitment by open advertisement which is one of the well accepted modes of recruitment, Inviting applications for recruitment to fill in notified vacancies is consistent with the right to apply for by qualified and eligible persons and consideration of their claim to an office or post under the State is a guaranteed right given under Articles 14 and 16 of the Constitution. The direction, therefore, issued by the Division Bench is in negation of Articles 14 & 16 and in violation to the statutory rules. The PSC cannot be directed to devise a third mode or selection, as directed by the High Court nor be mandated to disobey the Constitution and the law.

21. In the case of V. Sreenivasa Reddy and others Vs. Govt. of Andhra Pradesh and others, the Apex Court: deprecated the practice of the Government giving a go-by to the Statutory Rules or regulations framed under the proviso to Article 309 of the Constitution of India by making large-scale departure. The Court also noticed on B.N. Nagarajan and Others Vs. State of Karnataka and Others, in the following terms:

In R.N. Nanjundappa Vs. T. Thimmiah and Another, platinum C & D, dealing with the contention that Article 309 " speak of rules for appointment and general condition of service, held that regularisation or appointment in exercise of executive power process notwithstanding any rule, cannot be a form or kind of appointment and if it has effect of the violation of the Rules or the Constitution, illegality cannot be regularised. If it does not violate the law, it would be permissible, otherwise the rule itself gets citizen on the ground that it is in violation of Articles 14 and 16(1).

In B.N. Nagarajan and Others Vs. State of Karnataka and Others, a Bench of three Judges, held that regularisation in violation of the Statutory Rules is not permissible, in exercise of the executive power of the State which have the effect

of overriding the rules framed under proviso to Article 309 of the Constitution and that, therefore, no regularisation in exercise of the executive power under Article 162 in contravention of the statutory rules, is permissible.

22. There is no rule that on completion of 240 days, an employee would automatically be absorbed in the permanent service of the State. The Supreme Court even in the cases falling under Industrial Disputes Act, in *Madhyamik Siksha Parishad, U.P. Vs. Anil Kumar Mishra and others etc.*, categorically held that no such right of absorption is? deprived by workmen under the Industrial Disputes Act.

23. In *P.V. Anitha v. Assistant Director of Tea Development 1995 Lab. I.C. 37*, a Division Bench of the Kerala High Court held that regularisation in service cannot be claimed when the appointment was made on an ad hoc basis and on daily wages.

24. The Supreme Court in no uncertain terms has also held that those who come by back door must go by that door: see *State of U.P. and others Vs. U.P. State Law Officers Association and others*,

25. The Supreme Court in the latest decisions, thus, categorically held that the Court cannot direct regularisation of service unless there exists any rule.

26. The Supreme Court in the case of *Mukesh Dhari v. Joint Agriculture and Marketing Adviser AIR 1905 S.C.413* has taken the same view. Recently, a Full Bench of Patna High Court in the case reported in *Bishandeo Choudhary and Others Vs. State of Bihar and Others* has also taken a similar view.

27. In the case of *State of Orissa and Another Vs. Dr. Pyari Mohan Misra*, the Apex Court held that "In other words, mere prolonged or continuous ad hoc service does not ripen into a regular service to claim permanent or substantive status."

28. The Division Bench of Allahabad High Court also in the case of *Assistant Commissioner, Kendriya Vidyalaya Sangathan v. Km. Manisha Verma Special Appeal No. 506 of 1903* disposed of on September 29, 1994 held as follows:

Once a regularly selected candidate was available the management had a right to terminate the services of the ad hoc appointee, Principally when she had worked for less than one year.

29. In that case also the appointment letter of the Petitioner showed that her service was purely temporary and ad hoc basis and the same could be terminated at any time.

30. The learned Judges in the aforementioned case observed:

It is settled law that a temporary employee has no right to the post, and hence Km. Manish Varma could not claim to be continued in service since she was not a regularly selected candidate.

31. It appears from the unreported judgment of Km. Manish (Supra) that certain rules have been made by the K.V. Sangathan. Rule 6 provides for method of regular selection to the various teaching and other posts in the Central School. Rule 7 states that for the post? to be filled up by direct recruitment the selection authority after test or interview or both, as the case may be, prepare a select panel only on merits. Rule 9 deals with ad hoc appointment and states that notwithstanding anything contained in Rule 6 & 7 when an employee included in the select penal is not available or where such a select panel has not yet been prepared and the appointing authority considers it necessary and expedient to do so, a vacancy in any grade of the service may be filled on ad hoc and temporary basis by the appointment thereto. In this case admittedly the requirement of the said rules were not complied with.

32. In Surinder Kumar v. State of Punjab 1902 (1) S.C.C. 489 it has been clearly held:

There is still another reason way the High Court cannot be equated with this Court. The Constitution has, by Article 142, empowered the Supreme Court to make such orders as may be necessary "for doing complete justice in any case or matter pending before it", which authority the High Court does not enjoy. The jurisdiction of the High Court, while dealing with a writ petition, is circumscribed by the limitations discussed and declared by the judicial decisions, and it cannot, transgress the limits on the basis of whims or subjective sense or justice varying from Judge to Judge.

33. The same view has been expressed by the Supreme Court in the case of Dr. Narinder Mohan (Supra).

34. The Gauhati High Court might have directed formulation of Scheme in terms of the decision of the Supreme Court of India.

35. It is true as has been contended by Mr. Banerjee, learned Counsel, that such scheme has been framed and appears to have been implemented in the case of such candidates who come within the purview thereof but in the order passed by the Division Bench of Gauhati High Court in the case of Kcndriya Vidyalayn Snngathan v. Sm. Latifa Khatun 1944 G.L.R. 187 which has been referred to in Ms. Shabnam Parween (Supra), it was clearly stated that such a scheme was formulated for the region in question. In the case Ms. Shabnam Parweem the only question arose before the Hon"ble C.J. and the Hon"ble S. N. Phukan J. (as His Lordship then was) was with regard to the interpretation of the said Scheme. The learned Judges did not lay down any law. The questions raised and the decisions cited herein were neither considered nor discussed. The said decision was rendered without considering the binding precedent. of the law of land. The said judgment, thus, is not binding on this Court.

36. In A. Antulay v. R.S. Nayak and Anr. 1938 (1) S.C.C. 602 a Constitution Bench of tine Supreme Court held that if a judgment which has been rendered per incuriam is not binding upon another Bench.

37. The principle of equitability of law has been considered by the Supreme Court in the case of *Municipal Corporation of Delhi v. Gurnam Kaur* 1988 (1) S.C.C. 101. In the said decision the Supreme Court had elaborately discussed the concept of doctrine of sub silentio and referred to from Prof. P. J. Fitzgerald, Editor of the *Salmond on Jurisprudence* (12th Ed. p. 153). This aspect of the matter has also been considered by me recently in the case of *Mridul Chandra Das and Ors. v. State of West Bengal and Ors.*

38. The learned Counsel for the Respondent has submitted that the Principals of Kendriya Vidyalaya are not competent to appoint any teacher on regular basis except that for the interest of running the Vidyalayas, part-time teachers are appointed on stop-gap basis for a particular session. It is further stated that so long regular suitable selected persons are not available through the Kendriya Vidyalaya Sangathan on all India open competitive selection, the Principal exercises a limited power to run the classes of the Vidyalaya by engaging a part-time teacher on stop-gap basis to derive at least a minimum workable teaching even to a lesser qualified person.

39. The Petitioner was appointed by the Principal of Kanchrapara K.V. No. 2 locally as a stop gap measure by way of purely local arrangement to run the Vidyalaya. It appears from the letter dated November 8, 1993, as contained in Annex. "A" to the affidavit-in-opposition that the Petitioner applied for leave for her absence on November 6, 1992, which was granted on the condition "no work no pay".

40. The Petitioner herself in response to the advertisement dated July 22, 1992, applied, but evidently she was not selected. From a perusal of the said advertisement it appears that the K. V. Sangathan intended to fill up 2833 Primary Graduate Teachers and Librarians throughout India. Such vacancies, it is expected, have been filled up. It is evident that steps have been taken and are being taken for filling up the vacant posts on a regular basis as is evident from the affidavit-in-opposition.

41. It appears from the affidavit-in-opposition that the advertisement were issued on May 28, 1994 and April 22, 1994 for selection of teachers amongst the eligible candidates on all-India basis and seen the regular incumbents will join in the posts. No part-time teacher could be kept beyond the academic session ended on April 30, 1994.

42. It has categorically been stated in the affidavit-in-opposition that a teacher has been selected for the post to which the Petitioner is the claimant but owing to the interim order passed by this Court, regular incumbent has not been able to join. It has also been stated that the Petitioner was appointed as part-time trained graduate teacher (Social Study), but as she was not able to teach the students of higher classes having no requisite qualification thereof, she was instructed to take classes of lower standard as she is merely a Commerce Graduate. The fact stated in the affidavit-in-opposition clearly shows that the

Petitioner is not suitable to hold the post.

43. The question as to whether a person is suitable to hold a particular post or not should be left to the expert opinion of the Selection Committee/Employers.

44. The High Court in exercise of its writ jurisdiction under Article 226 of the Constitution of India cannot embark upon a question as to whether the Petitioner who was appointed as a part-time teacher in Social Studies has the requisite qualification and experience to teach the students on the said subject or not. As indicated hereinbefore, the Petitioner has not been selected by the Selection Committee for appointment on a regular basis.

45. For the foregoing reasons it has to be hold that the Petitioner has no legal right to continue in service and thus she is not entitled to any relief, as prayed for.

46. This writ application is, therefore, dismissed but without any order as to costs.

47. In view of the dismissal of the writ application, no further order is required to be passed on the contempt application.