

IN THE HIGH COURT OF DELHI AT NEW DELHI

W. P. (C) 4875/2000 & CMs 9696/2000, 10626/2000, 28/2001 (u/S 151 CPC), 7724/2001 (u/O 6 R 17 CPC), 2343/2005 & 5277/2011 (u/S 151 CPC)

Reserved on: 7th July 2011
Decision on: 19th July 2011

N.K. ANAND & ANR. Petitioners
Through: Mr. Sanjay Sharawat, Advocate

versus

UNION OF INDIA & ORS Respondents
Through: Mr. Ravi Sikri with
Mr. Ayushya Kumar, Advocates for R- 2 & 3.
Mr. A.K. Bhardwaj with
Mr. M.K. Bhardwaj, Advocates for R-4.

CORAM: JUSTICE S. MURALIDHAR

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| 1. Whether Reporters of local papers may be allowed to see the judgment? | No |
| 2. To be referred to the Reporter or not? | No |
| 3. Whether the judgment should be reported in Digest? | No |

JUDGMENT
19.07.2011

1. Petitioner No. 1 Mr. N.K. Anand and Petitioner No. 2 Mrs. Usha Bhatia have filed this petition under Article 226 of the Constitution on 29th August 2000 praying for a direction to Respondent No. 3, National Physical Laboratory ('NPL'), and Respondent No. 4, National Accreditation Board for Testing and Calibration Laboratories ('NABL'), to consider absorbing the Petitioners against the posts of Junior Stenographer and Lower Division Clerk ('LDC'), respectively. Subsequently, the petition was amended to seek a direction to the NABL to regularize the services of the Petitioners with all consequential benefits and, in the alternative, for a direction to the NPL to regularize their services with all consequential benefits.

2. Petitioner No. 2 was appointed as an LDC by the NPL under the National Coordination of Testing and Calibration Facilities ('NCTCF') Project for a period of

six months by an Office Memorandum ('OM') dated 8th November 1988. The said OM indicated that her appointment was temporary and sanctioned up to 7th April 1989 in the first instance under the NCTCF Project. Clause 5 of the OM made it clear that the appointment was not a Council of Scientific and Industrial Research ('CSIR') appointment, temporary or otherwise and it did "not entitle the incumbent to any claim, implicit or explicit, on any CSIR post."

3. Petitioner No. 1 was appointed as a Junior Stenographer by the NPL by an OM dated 16th August 1989 under the NCTCF Project. Again the said OM made it explicit that the appointment was not under the CSIR and did not entitle Petitioner No. 1 to make any claim, implicit or explicit, on any CSIR post. The appointment was up to March 1990.

4. The admitted position is that both the Petitioners continued in the said posts beyond the date up to which each of them was initially appointed. An Office Order dated 15th May 1990 was issued by the Administrative Officer of the NPL stating that pursuant to letter dated 2nd May 1990 of the Ministry of Science and Technology ('MoST'), the Director NPL had been pleased to approve the carrying over of the unspent funds of 1989-90 to the current financial year 1990-91 for payment of salaries of the staff employed for the NCTCF Project which included both the Petitioners. By a letter dated 26th March 1991 the Department of Science and Technology ('DST'), under which the NPL functions, informed the NPL of the continuation of the NCTCF Project for the year 1991-92 and that they could continue paying the salaries of the staff.

5. The DST formed NABL as a society with the wider object of assessing the standards of various laboratories in the country and granting them accreditation. NABL was registered as a society with effect from 12th August 1998. It began functioning as an autonomous body fully funded by the DST. A decision was taken to shift the activities of NABL to the Qutab Hotel. This was communicated by the NABL to the NPL on 7th December 1999.

6. On 4th February 2000, the Senior Director of NPL wrote to the Director, NABL

stating that while some of the NABL staff had moved to the new NABL Secretariat, as per the advice of the Director, NABL, three of the staff members, i.e., the two Petitioners and one Mr. R.K. Kaushik “are still operating from NPL as before and till further instructions from NABL will continue to draw their salary from NABL budget operated by NPL”. The NABL was asked to transfer the requisite budget to the NABL so that the salaries of the NABL staff could be paid in time. By a letter dated 8th February 2000 the NABL wrote to the NPL stating that “the Governing Body of NABL has not agreed to the continuity of the above three staff persons with the main NABL work.” It was also stated that “these staff members may be engaged with some R&D projects at NPL, where DST/NABL is funding.” The NABL also, by a letter dated 10th March 2000, sent a cheque in the sum of Rs. 65,000/- towards three months’ salaries of the two Petitioners and Mr. Kaushik. It was stated in this letter that “they had been working under NCTCF scheme and now going to be engaged for inter-laboratory Proficiency Testing and measurement related audit on behalf of NABL.” At this stage, on 13th March 2000 Petitioner No. 1 wrote to the Director NPL that there was some confusion about whether he was with NABL or was continuing with NPL. A similar letter was also written by Petitioner No. 2.

7. On 31st May 2000 the NPL again wrote to the NABL stating that in light of the Memorandum of Understanding (‘MOU’) signed on 29th May 2000 between NPL and NABL some permanent solution would be found for payment of salaries of the Petitioners and Mr. Kaushik. As an interim measure, the NABL was requested to send a sum of Rs. 70,000/- for payment of salaries to the said persons for the next three months. It appears that this was sent by way of a cheque dated 2nd June 2000 to the NPL by NABL. A similar request was sent on 17th July 2000 by NPL to NABL for further sum of Rs. 70,000/- for the salaries for the months of August-October 2000. It was in the above circumstances that sometime in August 2000, the present writ petition was filed.

8. Notice was directed to be issued in the writ petition on 31st August 2000. Thereafter on 31st January 2001 this Court passed the following order:-

“CM 9696/2000 and 28/2001 in CW 4875/2000

I have received a copy of the Letter dated March 10, 2000 issued by Respondent No.4 enclosing a cheque for Rs.65,000/- towards three

months' salary of three persons two of whom are Petitioners before the Court. In the Counter Affidavit the stand taken by Respondent No.4 is that the Petitioners were not working for Respondent No.4 and no details pertaining to them is available. The Letter dated March 10, 2000 has been handed over by Learned Counsel appearing for Respondents 2 and 3. The Counter Affidavit is not on the Record. The Learned Counsel appearing for Respondent No.4 states that it has been sworn by Mr. V.K. Jain, Registrar of Respondent No.4. In view of this apparently contradictory stand, it is necessary that Mr. V.K. Jain, Registrar is directed to be present in Court on the next date of hearing.

Learned Counsel for Respondents 2 and 3 states that the appropriate forum for redressal of grievances directed towards these Respondents is the Central Administrative Tribunal. He submits that either the Writ Petition be dismissed or these Respondents be struck off from the array of the parties. He has reiterated that the Petitioners, as per the Scheme formulated by Respondent No.1 are employees of Respondent No.4. In these circumstances, Learned Counsel for the Petitioner states that he will obtain instructions in this regard.

Renotify on 12th March, 2001.”

9. Thereafter, on 12th December 2001, the following order was passed:-

“CWP 4875/00 & CM 7724/01 (O.6 R.17 CPC)

From the oral submissions of learned counsel for respondents 3 & 4 it appears that both the said respondents are trying to take the stand that the petitioners are not their employees. To say the least, this is a strange stand. Let Directors of both the respondents have a meeting and take a final decision on the issue involved in this petition. The meeting of the Directors shall be held within three weeks from today and minutes of the deliberations shall be placed before the Court on the next date of hearing.

List on 28 January 2002.

It is pointed out by learned counsel for the petitioners that the petitioners have not been paid their salaries from September 2000. Without prejudice to the stand of respondents No. 3 & 4 and subject to final adjustment, let petitioners' salaries upto the month of November 2001 be paid by respondent No.3 on or before 21 December 2001. Let there be no default in that regard.

Copy of the order be issued dasti to counsel for respondent No.3 for due compliance.”

10. At this stage, it appears that the learned counsel for the NPL at the hearing on 28th January 2002 raised an objection that no relief could be granted against the NPL in

the present writ petition and that the Petitioners would have to approach the Central Administrative Tribunal ('CAT') against the CSIR which was subject to the jurisdiction of the CAT. However, this plea was negated by this Court on 6th May 2002. Interim orders were directed to continue by the subsequent order dated 17th September 2002.

11. It appears that up to this stage the Court was not informed that the two Petitioners had in fact filed OA No. 2429 of 1992 before the CAT way back in 1992 alongwith four other persons challenging the OM's issued by the NPL dated 23rd August 1992 and 31st August 1992 granting them a consolidated salary instead of a regular pay scale. In the said application, apart from seeking the relief of absorption in the NPL, the applicants including the Petitioners also sought the payment of regular pay scales.

12. By its order dated 23rd February 1999 the CAT held that the applicants before it including the Petitioners herein were appointed to temporary posts and that too in a project. In the circumstances, the prayer of the Petitioners for regularisation of their services was rejected by the CAT.

13. However, as regards the prayer for placement in a regular pay scale, the CAT relied on the decision of the Supreme Court in *Karnataka State Private College Stop-gap Lecturers Association v. State of Karnataka (1992) 2 SCC 72* and held that the Petitioners will be entitled to parity with regularly appointed persons as far as their pay was concerned. Consequently, the application was partly allowed and the Respondents, i.e., the DST and the NPL were directed to place the Petitioners in a regular pay scale from 23rd June 1992 onwards and grant them all consequential benefits accruing therefrom including the payment of arrears of the difference of salary.

14. The above judgment of the CAT was accepted by the Respondents and also implemented. For some strange reason, however, the above fact of the Petitioners having approached the CAT and their plea for regularisation having been rejected by the CAT by its order dated 23rd February 1999, was not mentioned in this writ petition.

15. At this juncture, it may also be noted that the Petitioners had also filed Writ Petition (Civil) No. 3848 of 2000 in this Court on 17th July 2000 seeking identical reliefs. The said writ petition was dismissed as withdrawn granting the Petitioners liberty to make a representation through the Respondents. Even in the said writ petition, a copy of which has been perused by this Court, there was no mention whatsoever of the Petitioners having approached the CAT unsuccessfully in OA No. 2429 of 1992 with the prayer for regularisation.

16. The fact of the CAT having been approached by the Petitioners for the relief of regularisation of their services was first brought on record in the present proceedings by Respondents 2 and 3 when they filed a reply on 18th March 2002 to the amended writ petition. In para 4 of the reply it was specifically stated that in view of the above order dated 23rd February 1999 “no relief of regularisation can be claimed against the answering Respondents”, i.e., the CSIR and the NPL. CSIR and NPL also filed CM No. 13893 of 2002 seeking an early hearing of the case on the ground that there was no provision made in the budget of NPL to continue making payment of salaries to the Petitioners. Again a reference was made to the order of the CAT dated 23rd February 1999. Another application (CM No. 544 of 2003) was filed seeking an identical relief.

17. It may be mentioned that on 16th September 2002 Petitioner No. 1 filed an additional affidavit claiming that the Petitioners have been appointed against sanctioned posts in the NCTCF project which was subsequently reconstituted as the NABL. It was claimed that there were vacancies for the posts of Senior Stenographer in the NABL. Even in this affidavit no mention was made of the fact that the Petitioners had earlier approached the CAT which had, by its order dated 23rd February 1999, rejected their plea for regularisation of their services in the NPL. This is significant since this additional affidavit was filed much after the affidavit pointing out the above fact was filed by the NPL on 18th March 2002.

18. Periodically the NPL kept making applications either seeking advancement of the hearing of the writ petition or vacation of the interim order dated 12th December 2001 passed by this Court in terms of which NPL was required to pay salaries to the

Petitioners. Reference can be made to CM No. 10591 of 2004 filed by NPL in which it was pointed out that from September 2000 till the date of the filing of the said application, i.e., 2nd September 2004 sum of Rs. 6,69,923/- had been paid to the Petitioners as salary in terms of this Court's order dated 12th December 2001. CM No. 2343 of 2005 was filed on 14th February 2005 seeking a similar relief. The Petitioner filed an additional affidavit on 24th January 2006, this time stating that some of the employees of the NCTCF had been transferred to the NABL when it shifted to a separate office. In this affidavit it was contended by the Petitioners that the jurisdiction of the CAT extended only to NPL and not NABL.

19. This Court has heard in detail the submissions of Mr. Sanjay Sharawat, learned counsel appearing for the Petitioners, Mr. Ravi Sikri, learned counsel appearing for Respondents 2 to 3, CSIR and NPL respectively, and Mr. A.K. Bhardwaj, learned counsel appearing for Respondent No. 4 NABL.

20. As regards the status of the Petitioners, Mr. Sharawat submitted that they ought to be treated as employees of the NPL as right from the issuance of the appointment orders it was the NPL that was dealing with them. Their salaries have also been paid by the NPL from time to time pursuant to the interim orders passed by this Court. It is submitted that both the NPL and NABL are under the DST. Not having terminated the services of the Petitioners for over two decades, it would be unfair and unreasonable not to regularise their services in the NPL. In any event, pursuant to the order dated 23rd February 1999 of the CAT which had not been challenged by the NPL, it was bound to pay them their regular pay scales. Mr. Sharawat placed considerable reliance upon the Merit and Normal Assessment Scheme ('MNA Scheme') issued by the CSIR on 13th January 1981 and in particular Clauses 5 and 8 and submitted that the services of the Petitioners ought to be regularised in terms thereof. As regards the order dated 23rd February 1999 of the CAT, it is submitted that inasmuch as the said order did not take note of the aforementioned clauses of the MNA Scheme, it should be considered to be *per incuriam* and in any event not constituting *res judicata*. Reliance was placed on the decisions of the Supreme Court in *Manohar v. Sanjay Education Society (1999) 9 SCC 118*; *Allahabad Development Authority v. Nasiruzzaman (1996) 6 SCC 424* and *Shakuntla Devi v.*

21. Mr. Ravi Sikri, learned counsel appearing for Respondents 2 to 3, on the other hand submitted that there was no reasonable explanation offered by the Petitioners for suppressing material facts concerning the OA filed by them way back in 1992 before the CAT and the fact that on 23rd February 1999 the CAT had rejected the prayer for regularisation of their services in the NPL. It was only when the NPL filed its counter affidavit that the above fact was brought on record in these proceedings. It was clear that the Petitioners were appointed only to a Project and once the Project came to an end, their services could not be continued indefinitely. Initially it appears that the NABL considered their absorption but later NABL also washed its hands off by stating that it had no sanctioned posts against which the Petitioners could be absorbed. He submitted that the Petitioners could not claim a right to continue in the NPL and to be paid salaries without there being any work for them. He pointed out that that they continued to receive salaries throughout the pendency of the writ petition under the interim order of this Court but this did not create any equity in their favour. In fact, the NPL had filed numerous applications seeking vacation of the said interim order. Therefore, the NPL could not be presented with the *fait accompli* that since the Petitioners are continuing in service for a long time, their services should be regularised.

22. Appearing on behalf of the NABL, Mr. A.K. Bhardwaj pointed out that as of today all appointments in the NABL were only contractual. He refers to an additional affidavit filed on behalf of the NABL on 9th December 2010 in which it was clearly stated that Ms. Sarita Choudhary, Ms. Kavita Choudhary, Ms. Babita Sharma, Mr. Xavier and Mr. Anil Kumar have never worked in the NABL. When NABL became an autonomous body on 12th August 1998 they were granted fresh appointments therein on contract basis. They were also continuing as on date on contract basis and, therefore, the contention of the Petitioners that they should be treated on par with the aforementioned employees of NABL is misconceived. It is submitted that there are no posts against which the Petitioners can be absorbed in the NABL.

23. As regards the plea for regularisation of their services, it does appear that the

Petitioners sought this very relief in OA No. 2429 of 1992 filed before the CAT. The appointment letters of the Petitioners were examined by the CAT. It was noticed that the Petitioners had made representations against the communications dated 23rd August 1992 and 31st August 1992 issued by the NPL granting extension of their appointments under the DST Sponsored Project only on a contractual basis and on a consolidated salary. Those representations were rejected and they were informed that their extension in service could be given only on the revised terms and conditions as contained in the OM dated 11th May 1992. In paras 12 and 13 of the order of the CAT it was therefore observed as under:-

“12. It is true that when the applicants were initially appointed they were granted pay at the minimum of the relevant pay scales applicable to them and were further granted the usual allowances admissible from time to time. This becomes evident when one goes through the contents of the appointment orders issued to the applicants. But it is equally true that the posts were temporary and has been created only for a short duration. It is not disputed that the appointments were initially against the Project, though the learned counsel for the applicants has vainly urged that it was a Scheme and not a Project which contention, in our considered view does not make the Scheme or the Project a permanent one. It is also clear from a perusal of the documents annexed by the applicants themselves to the OA that the posts had been sanctioned only for a particular period of time and that the sanction was to lapse initially on 7.4.1989 as mentioned in Annexure A-12 but the duration was later extended from time to time. It is also not disputed by the applicants that extension was later granted till the end of Eighth Five Year Plan.

13. In the conspectus of the above facts we must accept the contention of the respondents that the appointments offered to the applicants were not against any posts under the Govt. of India but that on the other hand the posts were temporary and that too in a Project though the project was sponsored by the DST the respondent no. here in these circumstances the prayer of the applicants for their regularisation cannot be acceded to.”

24. The Petitioners have not challenged the above order. The other part of the above order concerns the grant of regular pay scale to the Petitioners which is allowed by the CAT from 26th March 1992 onwards. This part of the order was not challenged by the NPL either. The resultant position is that the Petitioners have accepted the order of the CAT rejecting their prayer for regularisation. The Petitioners, therefore, cannot be permitted to agitate that issue again before this Court by way of the present writ petition.

25. The plea that the CAT did not consider the applicability of the MNA Scheme and the clauses thereunder and, therefore, its order should be treated as being *per incuriam*, is without merit. The MNA Scheme had been in operation since 1981. For the reasons best known to them, the Petitioners never advanced any submission before the CAT on the basis of the said Scheme. To permit the Petitioners to seek the relief of regularisation of their services in this petition on a different ground would be to condone an abuse of the process of law. This is apart from the fact that the Petitioners have no explanation to offer as to why they suppressed the fact of their having approached the CAT way back in 1992 and having failed in their attempt to seek a direction for regularisation of their services. By the time the present writ petition was filed or even the earlier Writ Petition No. 3848 of 2000 was filed in this Court, the order of the CAT dated 23rd February 1999 was available. There can be no excuse therefore for the Petitioners to not have disclosed this fact in the present writ petition. Significantly, in para 18 of the writ petition, it is stated that there is no other petition either pending or filed in any court on the subject and the petition is also supported by the affidavit of Petitioner No. 1. The said statement was obviously false and false to the knowledge of Petitioner No. 1. This is yet another reason why the Petitioners would be disentitled to any relief as regards the regularisation of their services in the NPL.

26. The letters of appointment of each of the Petitioners make it clear that it is purely a temporary appointment for a limited duration. Due to exigencies the appointments were continued till the Project came to an end sometime in 1999. The correspondence between the NABL and NPL shows that there was doubt as to whether the Petitioners' services could continue with the NABL. However, on 18th February 2000 itself, the NABL made it clear that it was not agreeable to their continuing to work with the NABL. Although the amount for salaries of the Petitioners till August 2000 was continued to be paid by the NABL, at least from September 2000 NABL was not involved in paying the salaries as well. The counsel for Respondents 2 and 3 is right in his contention that the appointment of the Petitioners, as long as it continued with the NCTCF Project and later for a brief period with the NPL was only on contractual basis. The mere fact that they are being paid salaries without doing any work under interim orders of this Court does not create any equities in favor of the Petitioners to

seek regularisation in the NPL. It is not as if NPL did not take steps to get the interim order, under which salaries have been paid to the Petitioners, vacated. As regards the NABL, all posts have been filled up on a contractual basis, a position that continues till date. No other person working in the NCTCF Project has in fact been absorbed by NABL. The additional affidavit of the NABL makes it clear that the four persons named thereunder were appointed on a contractual basis afresh with the NABL and they have not worked under the NCTCF Project. All the present posts in the NABL are purely contractual. Consequently, there is no legal justification for a mandamus to be issued to the Respondents to regularise the services of the Petitioners in the NABL. Consequently, the prayer of the Petitioners for regularisation of their services either in the NPL or in the NABL cannot be entertained.

27. For the aforementioned reasons, neither of the prayers made in the writ petition can be granted. The petition is accordingly dismissed but in the circumstances with no order as to costs. The interim order dated 12th December 2001 and subsequent orders continuing it are vacated. All pending applications are disposed of.

S. MURALIDHAR, J

JULY 19, 2011

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