

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 154/2012**

Gopalkrishna Shantaram Borkar,
resident of House No.116, Ward No.2,
Bori Village, Gramastha, Khajorda,
Borim, Goa.

..... Petitioner.

V/s.

1) State of Goa,
through its Chief Secretary,
having Office at the Secretariat,
Porvorim, Bardez, Goa.

2) The Director,
Directorate of Craftmen & Training,
having Office at Shrama Shakti Bhavan,
Third Floor, Patto Plaza,
Panaji, Goa.

3) The Principal,
Cacora Government I.T.I.,
Cacora, Curchorem, Goa.

..... Respondents.

Shri D. Zaveri, Advocate appointed under the Legal Aid Scheme for the petitioner.

Shri V. Rodrigues, Additional Government Advocate for the respondents.

Shri D. Pangam, Advocate - Amicus Cuiae.

**CORAM :- F.M. REIS &
K.L. WADANE, JJ.**

Judgment reserved on : 28/01/2015

Judgment dictated on : 25/03/2015.

ORAL JUDGMENT : (PER F.M. REIS, J.)

Heard Shri D. Zaveri, learned Counsel appearing for the petitioner, Shri V. Rodrigues, learned Additional Government Advocate appearing for the respondents and Advocate Shri D. Pangam, learned Amicus Curiae.

2. The above petition, *inter alia*, seeks for regularisation of the services rendered by the petitioner, on the ground that he was in the select list of the duly conducted selection process. It is the case of the petitioner that pursuant to an advertisement published in a local newspaper on 7th/8th March, 2006, the petitioner applied for the post of Watchman in the establishment of the respondents. The Departmental Selection Committee met to fill up the said vacant post on 2/8/2006 and the petitioner, upon assessment by such a Committee, apparently was recommended for the said post of Watchman. The petitioner was first in the merit list. An offer of appointment came to

be issued to the petitioner on 11th December, 2006 on contractual basis. Thereafter, an order came to be issued on or about 5th February, 2006, appointing the petitioner on contractual basis and was posted at the I.T.I. Margao initially for a period of six months. The said period of six months was, thereafter, extended from 25/8/2007 to 24/8/2008, and subsequently from 1/9/2008 to 31/8/2009. The contractual agreement was subsequently renewed from time to time and the last such appointment was with effect from 1/9/2010.

In the meanwhile, on 23rd August, 2010, the petitioner made a representation to the respondent No.2, calling upon the said respondent to regularise the services of the petitioner. Thereafter, another representation was sent by the petitioner on 19th January, 2011 and ultimately, on 16th May, 2011, the petitioner made a representation to the Hon'ble Chief Minister of Goa to look into his grievances. A Memo was, thereafter, issued to the petitioner on 25th May, 2011 and ultimately, on 29th August, 2011, the respondent No.2 informed the petitioner that he should stop coming to work from 1st September, 2011.

Being aggrieved by the action taken by the respondents, the petitioner has filed the above petition, *inter alia*, seeking for the aforesaid reliefs.

3. Shri D. Zaveri, learned Counsel who was appointed under the Legal Aid Scheme to appear on behalf of the petitioner, was not present on some occasions and hence, Advocate Shri D. Pangam was appointed as an Amicus Curiae.

4. Shri D. Zaveri, learned Counsel appearing for the petitioner has pointed out that there were vacancies for posts as watchman with the respondent No.2, for which the petitioner went through a regular selection process and, as such, the action of the respondents not to give a regular appointment to the petitioner is arbitrary and cannot be justified. The learned Counsel has further pointed out that the petitioner had made various representations for his regularisation which the respondents did not act upon. The learned Counsel further points out that the only ground on which the petitioner has been refused appointment letter is the change in the policy as the services of a watchman were to be outsourced. The learned Counsel further points out that in fact, the said policy cannot be made applicable in case of the petitioner as, according to him, the petitioner had in fact been given a contractual appointment. The learned Counsel has, thereafter, taken us through the Office Memorandum dated 20/11/2006

to point out that even in case of appointment of the petitioner the norms referred to therein have not been complied with. The learned Counsel further points out that once the recruitment process has started on the basis of an advertisement and the terms and conditions stipulated therein, it is not open to the respondents to change the norms and refuse appointment to the petitioner. The learned Counsel further points out that the petitioner, as such, is entitled to be given the regular appointment as, admittedly, the vacancy still subsists. The learned Counsel has, thereafter, taken us through the reply filed on behalf of the respondents to point out that the said reply can, in no way, justify the action of the respondents.

5. Shri D. Pangam, learned Amicus Curiae, has pointed out that once the petitioner has been selected in a regular selection process against a regular vacancy, it is not open to the respondents to change the norms and refuse regular appointment to the petitioner. The learned Amicus Curiae further points out that in the case of *Secretary, State of Karnataka and others vs. Umadevi (3) and others*, (2006) 4 SCC 1, the Apex Court has held that in cases in which the initial appointments are made without following the due process, the question of regularisation would not arise. He submits that regular

appointment must be the rule. The learned Amicus Curiae, however, points out that in the present case, the petitioner has undergone a regular selection process for a regular vacancy and, as such, it would not stop this Court from directing the appointment of the petitioner on regular basis. The learned Amicus Curiae further points out that it is now well settled that the respondents cannot change the norms of selection after the selection process has commenced. He further submits that even in case there is a change in the policy of appointments, such decision can only have a prospective effect and would not affect selection process which is almost complete. He further points out that the petitioner has become age-barred for any Government service and as such, he would be deprived of getting any Government employment.

The learned Amicus Curiae, in support of his submissions, has relied upon the judgment of the Apex Court in the case of *State of Bihar and others vs. Mithilesh Kumar*, (2010) 13 SCC 467.

6. On the other hand, Shri V. Rodrigues, learned Additional Govt. Advocate appearing for the respondents points out that it is well settled that a person has no indefeasible right of appointment unless and until he gets an appointment letter from the employer. Shri

Rodrigues further points out that admittedly, in the present case, no appointment letter has been issued to the petitioner and, the offer of appointment was on contractual basis and as such, according to him, the petitioner cannot file the above writ petition. The learned Additional Govt. Advocate further points out that on account of austerity reasons, the State Government had changed the selection norms and found it appropriate to outsource such services. The learned Additional Govt. Advocate further points out that the Judgment of the Apex Court in *Umadevi (3)* and others (*supra*), clearly suggests that Government cannot regularise appointments of casual labourers. He further points out that the very fact that the petitioner had accepted the contractual appointment which was renewed from time to time, by itself would not entitle the petitioner to claim regularisation. The learned Counsel further points out that the Policy of the Government has not been challenged and, as such, according to him, the question of considering the validity of such policy, does not arise at all. The learned Counsel further points out that the petitioner had, initially signed the contract in the year 2006 and the present petition is filed in the year 2012 and, as such, according to him, the petition itself is barred by laches.

Shri Rodrigues, learned Additional Govt. Advocate, in

support of his submissions, has relied upon the judgments of the Apex Court in *Jai Singh Dalal and others, vs. State of Haryana and another*, 1993 Supp (2) SCC 600 and in *State of A.P. and others vs. D. Dastagiri and others*, (2003) 5 SCC 373.

7. We have duly considered the submissions of the learned Counsel and we have gone through the record.

8. Admitted facts of the case are that the petitioner applied for the post of Watchman pursuant to an advertisement published in the year 2006; the fact that he had undergone a regular selection process and was first in the merit list, has not been disputed nor that there was a vacant post of Watchman. The fact that the petitioner was given an offer letter for contractual appointment instead has also not been disputed. It appears that in the meantime, by virtue Office Memorandum dated 20/11/2006, the petitioner was refused the letter of appointment, as the policy of the Government to appoint Watchman had apparently changed. In fact that normally any change of the policy cannot affect a regular selection process which had already been completed, cannot be disputed.

9. In the present case, the selection process had already completed and the petitioner was selected for the post of Watchman. Apart from that, on perusal of the said Memorandum, the policy of the Government appears to be to outsource such services. However, in the present case, the respondents did not outsource the services, but proceeded to appoint the petitioner on contractual basis. In this connection, the Judgment of the Apex Court in *Mithilesh Kumar* (supra), relied upon by the learned Amicus Curiae would be relevant, as it observes at paras 18 to 24 thus :

“ 18. We have carefully considered the submissions made on behalf of the parties and we are not impressed with the stand taken by the petitioner State of Bihar, that the Bihar Public Service Commission ought not to have recommended the name of the respondent for appointment after the Assistant Director, Social Welfare had requested the Commission not to recommend any further names in view of the decision taken by the State to have disabled persons trained through professionally established NGOs/institutions in place of Instructors/Assistant Instructors for which advertisements had already been issued by the Commission.

19. Both the learned Single Judge as also the

Division Bench rightly held that the change in the norms of recruitment could be applied prospectively and could not affect those who had been selected for being recommended for appointment after following the norms as were in place at the time when the selection process was commenced. The respondent had been selected for recommendation to be appointed as Assistant Instructor in accordance with the existing norms. Before he could be appointed or even considered for appointment, the norms of recruitment were altered to the prejudice of the respondent. The question is whether those altered norms will apply to the respondent.

20. The decisions which have been cited on behalf of the respondent have clearly explained the law with regard to the applicability of the rules which are amended and/or altered during the selection process. They all say in one voice that the norms or rules as existing on the date when the process of selection begins will control such selection and any alteration to such norms would not affect the continuing process, unless specifically the same were given retrospective effect.

21. As far as the decision in *Umadevi (3)* (*supra*) case is concerned, we share the sentiments as set out in para 35 of the judgment but we are only considering a situation where amendments are

introduced to a recruitment process after the same has begun. The question of allowing sympathy to affect our judgment does not, therefore, arise in this case. Our focus is not on any individual, but on a legal principle which has been settled by this Court in various decisions, as referred to hereinbefore.

22. There is no reason for us to have any disagreement with the decision of this Court in *All India Railway Recruitment Board case* (2010) 6 SCC 614 regarding the right to appointment even of selected candidates, but this is not a case of the respondent having acquired any indefeasible right which has to be cancelled on account of certain exigencies. On the other hand, this is a case where although selected for the purpose of appointment by BPSC, Patna, the case of the respondent was not even considered as there was a change in policy regarding recruitment in the meantime.

23. While a person may not acquire an indefeasible right to appointment merely on the basis of selection, in the instant case the fact situation is different since the claim of the respondent to be appointed had been negated by a change in policy after the selection process had begun.

24. In these circumstances, we do not see any reason to interfere with the impugned judgment of the Division Bench of the High Court dated 18-7-2008,

in LPA No. 844 of 2007, affirming the judgment of the learned Single Judge dated 31-7-2007, in CWJC No. 447 of 2006. The special leave petition is, therefore, dismissed, without any order as to cost .”

10. The judgment of the Apex Court relied upon by Shri Rodrigues, learned Additional Govt. Advocate appearing for the respondents in the case of *Umadevi (3) and others* (Supra), has observed that the Court must be careful not to allow sympathy to affect the judgment. But, however, the Apex Court has also recognized that when the norms and rules framed are exhaustive, the only fair means to adopt is to make appointments based on such norms and rules. The Apex Court has further noted that the main concern of the Court in such matters is to see that the executive acts fairly and gives fair deal to its employees, consistent with the requirements of Articles 14 and 16 of the Constitution. It also means that the State should not exploit its employees, nor should it seek to take advantage of the helplessness and misery of either the unemployed persons or the employees, as the case may be. It is further noted that the State must be a model employer and that whenever temporary or ad hoc appointment is continued for long, the Court presumes that there is need and warrant for a regular post and

accordingly directs regularisation. Taking note of the said observations of the Apex Court, the petitioner herein was selected based on the selection process, following the norms, and complying with the terms and conditions in the advertisement. The action of the respondents not to give regular appointment to the petitioner, but only the contractual appointment, cannot be sustained. Even the judgments relied upon by the learned Additional Govt. Advocate have also been considered by the Apex Court in ***Mithilesh Kumar*** (supra) whilst coming to such conclusion.

11. In the present case, considering that the norms of appointments have been changed only after the selection process had already completed, we find that applying such norms to the petitioner is not at all justifiable. The petitioner was, as such, entitled for a regular appointment as on the date when his initial contract was signed by the petitioner way back in the year 2006. But, however, it is not disputed that from the year 2007 till the year 2011, the petitioner was given contractual appointments. Apart from that, the petitioner did not approach this Court immediately after he was refused regular appointment in the year 2012. It is reported that the petitioner has crossed the age for any Government employment. In such

circumstances, we find, in the interest of justice, that the petitioner is to be appointed on regular basis notionally from the date of his initial contractual appointment on 5/2/2007, for the purpose of seniority and pensionary benefits. For the purpose of monetary benefits, if any, the regular appointment would be effective from 3rd May, 2012, the date on which an interim relief was granted by this Court.

12. In view of the above, we pass the following order :

The respondents are directed to regularise the appointment of the petitioner notionally with effect from 5/2/2007 for the purpose of seniority and pensionary benefits and from 3rd May, 2012 for the purpose of monetary benefits.

13. Rule is made absolute in the above terms. There shall be no order as to costs.

K.L. WADANE, J.

F.M. REIS, J.

ssm.