

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 8393 OF 2016

The Administrator,
Union Territory of Daman
and Diu & Anr.

...Petitioners

Versus

Dr. Pravinkumar Ramji Anjani

...Respondent

Mr. S. S. Deshmukh for Petitioners.
Mr. S. R. Atre for Respondent.

**CORAM : SMT. V. K. TAHILRAMANI, Acting C.J. &
M. S. SONAK, J.**

DATE : 14th MARCH 2018

ORAL JUDGMENT :

1] Heard the learned counsel for the parties.

2] Rule. With the consent of and at the request of the learned counsel for the parties, Rule is made returnable forthwith.

3] The petitioner - Administrator, Union Territory of Daman and Diu challenges judgment and order dated 14th August 2015 made by the Central Administrative Tribunal

(CAT) allowing Original Application No. 458 of 2011 instituted by the respondent, a medical officer, in continuous service with the petitioners since the year 1989. By the impugned judgment and order, the CAT has directed regularization of the services of the respondent. The learned counsel for the parties state that by now, the respondent have already attained the age of superannuation after having received the benefits, otherwise available to a regularly employed medical officer with the petitioners. The relief of regularization, if now upset by this court, will only mean that the respondent will be deprived of retiral benefits like pension etc.

4] Mr. Deshmukh, the learned counsel for the petitioners submits that the respondent was appointed as a medical officer in the year 1989 only on *ad hoc* basis. At that stage, there were no recruitment rules in existence for appointment to the post of medical officer. However, in the year 1993, recruitment rules came to be framed and in terms thereof, the post of medical officer was to be filled in on the basis of recommendations of the Union Public Service Commission (UPSC). Mr. Deshmukh submits that

since the respondent failed to clear the UPSC process, despite availing opportunities, the CAT, was not at all justified in ordering regularization of services of the respondent. Mr. Deshmukh submits that the impugned judgment and order, if not upset, will constitute an erroneous precedent and therefore, it is only appropriate that this Court sets aside the impugned judgment and order made by the CAT

5] Mr. Deshmukh submits that the case of the respondent did not fall within the exception carved out in the case of ***Secretary, State of Karnataka & Ors. vs. Umadevi (3) & Ors.***¹ (paragraph 53 SCC citation). Mr. Deshmukh submits that the appointment of the respondent was not merely irregular but the same was in fact illegal since, at the stage of the respondent's initial appointment in the year 1989 there were no recruitment rules in respect of the post of medical officer. Mr. Deshmukh submits that the CAT has failed to appreciate that there was a difference in the facts and circumstances prevalent in other matters decided by the CAT or the High Court and the case of the present respondent. Mr. Deshmukh submits that the CAT, has

¹ (2006) 4 SCC 1

followed its earlier decisions without failing to notice the distinction of facts. For all these reasons, Mr. Deshmukh submits that the impugned judgment and order made by the CAT is liable to be set aside.

6] Mr. Atre, the learned counsel for the respondent submits that the respondent was appointed in the year 1989 in pursuance of public advertisement and after the respondent went through the prescribed selection procedures. He submits that there was nothing illegal about the appointment of the respondent. The appointment of the respondent could never have been styled as some sort of back-door entry. Mr. Atre submits that the existence of recruitment rules is not an essential prerequisite for making a valid appointment. He refers to several decisions in support of this proposition.

7] Mr. Atre submits that the case of the respondent was clearly covered under paragraph 53 of *Umadevi* (supra) and the petitioners were duty bound to regularize the services of the respondent. Besides, Mr. Atre submits that the respondent, by now, has already retired and at this stage, it

will not be appropriate to deprive the respondent of the retiral benefits, as a consequence of denial of regularization after discharge of continuous and meritorious service from the year 1989 onwards. Mr. Atre submits that the view taken by the CAT is consistent with the view taken by the CAT itself in similar cases, which view, has been affirmed by this court as well. Mr. Atre submits that in any case the view taken by the CAT promotes substantial justice and therefore, the same may not be interfered with in exercise of extra ordinary and discretionary jurisdiction under Articles 226 and 227 of the Constitution of India. For all these reasons, Mr. Atre submits that this petition may be dismissed.

8] Rival contentions now fall for our determination.

9] The respondent was appointed as a medical officer on *ad hoc* basis in the year 1989 on the basis of recommendation of a local selection committee nominated by the Administrator of Daman and Diu. The recommendation of the selection committee was specifically accepted and approved by the Administrator. In

the initial appointment letter, it was stated that appointment will be for a period of one year. However, later on, yet another appointment letter dated 13th March 1990 was issued to the respondent, in which, again, the respondent's *ad hoc* appointment was continued on same terms and conditions, however, without specifying any duration of appointment. In pursuance of such appointment, there is no dispute whatsoever that the respondent continued to work and has continued to receive all the benefits like pay scale etc., which would ordinarily go with a regular appointment to the post of medical officer.

10] From the record, it does appear that the appointment of respondent, though styled as on *ad hoc* basis, was, not some sort of an illegal appointment or a back-door entry to the post of medical officer with the petitioners. The only reason which may have prompted the petitioners to style the appointment on *ad hoc* basis was perhaps, the lack of recruitment rules to the post of medical officer. In fact, the record indicates that this was also the case of the petitioners in the course of several proceedings initiated by the respondent before the CAT in the matter of

regularization of his services.

11] Now it is settled position in law that existence of recruitment rules is not a *sine qua non* for making a valid recruitment. The CAT, in the impugned judgment and order, has referred to several rulings of the Hon'ble Supreme Court, in which, this position has been clarified.

12] In ***B. N. Nagarajan & Ors. vs. State of Mysore & Ors.***² it is held that the proviso to Article 309 of the Constitution does not abridge executive power of the State to act without framing any rules or legislation and by resort to its executive power under Article 162 of the Constitution of India. In ***Sant Ram Sharma vs. State of Rajasthan & Ors.***³ it is held that administrative instructions can be issued and acted upon until the statutory rules are framed and implemented. In ***Ramesh Prasad Singh vs. State of Bihar & Ors.***⁴, it is held that there is no obligation to make recruitment rules before a service is constituted or a post is created or filled up. In ***Rajendra Narain Singh vs. State of Bihar***⁵, it is held that in absence of any legislation on the

2 AIR 1966 SC 1942

3 AIR 1967 SC 1910

4 AIR 1978 SC 327

5 AIR 1980 SC 1246

subject, the Government can always regulate its public services under the executive power of the State.

13] Thus, it is quite clear that merely because there existed no recruitment rules for the post of medical officer in the year 1989, when the respondent was appointed to such a post after following the prescribed selection procedures, it cannot be said that the appointment of the respondent was '*illegal*' or some sort of back-door entry into public service.

14] There is no dispute that from 1989 onwards and till the date the respondent instituted OA 458 of 2011, in the year 2011 and even thereafter until he attained the age of superannuation, the respondent has been in continuous and uninterrupted service as medical officer availing all benefits like pay-scale etc., in so far as the post of medical officer is concerned. The petitioners were therefore required to consider the case of the respondent for regularization keeping in mind the twin aspects that the respondent's initial appointment was neither illegal nor some back-door entry and further, the respondent, has been in continuous

and uninterrupted service as medical officer for almost 17 years as on the date the Hon'ble Supreme Court delivered its decision in the case of *Umadevi* (supra).

15] At paragraph 53 of *Umadevi* (supra), this is what the Hon'ble Supreme Court has clarified:

“53. One aspect needs to be clarified. There may be cases there irregular appointments (not illegal appointments) as explained in S.V. Narayanappa (1967(1) SCR 128 128) : (AIR 1967 SC 10671); R.N. Nanjundappa [1972 (1) SCC 409] : (AIR 1972 SC 1767) and B.N. Nagarajan (1979(4) SCC 507] : (AIR 1979 SC 1676) and referred to in para 15 above, of duly qualified persons in duly sanctioned vacant posts might have been made and the employees have continued to work for ten years or more but without the intervention of orders of the courts or of tribunals. The question of regularization of the service of such employees may have to be considered on merits in the light of the principles settled by this Court in the case above-referred to and in the light of this judgment. In that context, the Union of India, the State Governments and their instrumentalities should take steps to regularize as a one-time measure, the services of such irregularly appointed, who have worked for ten years or more in duly sanctioned posts but not under cover of orders of the courts or of Tribunals and should further ensure that regular recruitments are undertaken to fill those vacant sanctioned posts that required to be filled up, in cases where temporary employees or daily wagers are being now employed. The process must be set in motion within six months from this date.....”

16] Later on, in the case of ***State of Karnataka & Ors. vs. M. L. Kesari & Ors.***⁶, the Hon'ble Supreme Court has held that if the employer / authority has failed to undertake the exercise as contemplated by paragraph 53 of *Umadevi* (supra) within a period of six months, that does not mean that the employees thereby lose their right of consideration for regularization.

17] The CAT, has referred to its own decisions in similar cases as also the decisions of the High Court in similar cases where relief of regularization was granted to employees who were placed in position similar to the respondent herein. It is true that in the present case, after the 1993 Rules came into force, the respondent, did make efforts for selection through the involvement of the UPSC and perhaps, did not succeed in its efforts. However, the fact remains that despite the respondent's failure, the petitioners continued him in service on the same terms and conditions. As a result, there is no dispute that the respondent, has continued in service right from the year 1989 until his age of superannuation as a medical officer, technically on *ad hoc* basis but enjoying the benefits

6 2010 AIR SCW 4577

otherwise available to the regularly employed medical officers.

18] In the aforesaid circumstances, we are not persuaded to hold that the view taken by the CAT, is in excess of jurisdiction or vitiated by perversity. The CAT, has held that the circumstance that the respondent did make attempts at selection through UPSC but failed in such attempts, is not a circumstance sufficient to deny such respondent the benefit of regularization in terms of directions in paragraph 53 of *Umadevi (supra)*. The CAT, has also taken note of the circumstance that from 1989 onwards, the respondent is in continuous and uninterrupted service as medical officer and further, entry of the respondent was neither illegal nor through the back door. We also find that *de facto*, the respondent, has been treated as a regularly appointed medical officer right from the year 1989 and the impugned order made by the CAT, only grants the *de jure* status to such arrangement, which was in force since the year 1989 and until superannuation of the respondent.

19] There is no merit in the apprehension expressed by Mr.Deshmukh that the impugned judgment and order made by the CAT may be treated as a precedent because, it is quite obvious, that the facts and circumstances of the present case are peculiar and the impugned judgment and order has been made in the light of such peculiar facts and circumstances of the case of the respondent. We are also not inclined to interfere with the impugned judgment and order by taking into consideration the aforesaid peculiar facts and circumstances of the case of the respondent. In particular, we may emphasize that right from the year 1989, the respondent has not only continued as a medical officer, but, has also secured most of the benefits which go along with such regular appointment. Further, we have noted that there were no recruitment rules in existence at the stage when the respondent was appointed as a medical officer and the selection of the respondent was not undertaken in a illegal manner so as to suggest any back door entry. We also agree with the view taken by the CAT that existence of the recruitment rules is not a *sine qua non* for valid appointment. Valid appointment or recruitment can be undertaken on the basis of executive instructions, in the

absence of any statutory recruitment rules or statute. In these circumstance, there is no necessity to interfere with the impugned judgment and order made by the CAT on the apprehension expressed by Mr. Deshmukh.

20] Again, there is substance in the contention of Mr. Atre that the view taken by the CAT in the peculiar facts and circumstances of the respondent's case promotes substantial justice and therefore, this Court, ought not to interfere with such decision. Admittedly, the respondent, has been in continuous service as medical officer right since the year 1989. The entry of the respondent in service, as noted earlier, was not some back-door entry in public service. The petitioners have themselves treated the respondent as regular right since the year 1989, by awarding him all benefits available to a regularly employed medical officer. At this point of time, if the limited relief granted by the CAT is interfered with, all that will happen is that the respondent will be deprived of his retiral benefits like pension etc. after having discharged continuous service as medical officer right from the year 1989 onwards. Taking into consideration all these aspects, we do not deem

it appropriate to interfere with the impugned judgment and order in the exercise of our extra ordinary and discretionary jurisdiction under Articles 226 and 227 of the Constitution of India.

21] In ***Roshan Deen vs. Preeti Lal***⁷, the Hon'ble Supreme Court has held that the purpose of powers conferred on High Court under Articles 226 and 227 of the Constitution of India is to advance justice and not to thwart it. Even where the justice is the by-product of an erroneous interpretation of law, High Court ought not to wipe out such justice in the name of correcting the error of law.

22] In ***Municipal Board, Pratabgarh & Anr. vs. Mahendra Singh Chawla & Ors.***⁸, the Hon'ble Supreme Court held that legal formulations cannot be enforced *de hors* from the realities of the fact situation of the case and the effect of the laws on the human beings for whom the laws are meant. In the context of exercise of discretionary jurisdiction under Article 136, the Hon'ble

7 (2002) 1 SCC 100

8 (1982) 3 SCC 331

Supreme Court has held that the law is to be tempered with equity and if the equitable situation demands after setting right the legal formulations not to take it to the logical end, the Supreme Court would be failing in its duty if it does not notice equitable considerations and mould the final order. In exercise of the extra ordinary jurisdiction under Article 136 the discretion should be so exercised by the court that justice may be rendered to both the parties. Similar considerations apply in the matter of exercise of extra ordinary and discretionary jurisdiction under Articles 226 and 227 of the Constitution of India.

23] For all the aforesaid reasons, we do not deem it appropriate to interfere with the impugned judgment and order made by the CAT. Rule is, therefore, discharged. There shall be no order as to costs.

(M.S. SONAK, J.)

(ACTING CHIEF JUSTICE)

CHANDKA