

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 1142 OF 2018

Kalpana B. Upase

...

Petitioner.

V/s.

The Commissioner/Director
(Administration) and ors.

... Respondents.

Mr. Prasad P. Kulkarni for the Petitioner.

Mr. P.G. Sawant, AGP for the State / Respondent No.3.

CORAM : A.S. OKA AND M.S. SONAK, JJ.

DATE : 27th AUGUST 2018.

P.C.:

1] Heard learned counsel for the parties.

2] The challenge in this petition is to the judgment and order dated 24.4.2015 made by the Maharashtra Administrative Tribunal (MAT), Mumbai dismissing O.A. No 468 of 2012 instituted by the petitioner questioning the order dated 29.7.2010. The order dated 29.7.2010 had cancelled the order dated 27.1.2010 made by the Director (Administration) purporting to regularise the services of the petitioner as a Staff Nurse.

3] Mr. Kulkarni, learned counsel for the petitioner, submits that the petitioner continues in employment as Staff Nurse since 20.3.1992 and therefore, the order dated 27.1.2010 regularising her services ought not have been cancelled after such a length of time. Mr. Kulkarni submits that by order dated 27.1.2010 the services of two other Staff Nurses apart from the petitioner came to be regularised. However, by order dated 29.7.2010, the order of regularisation only insofar as the petitioner is concerned came to be cancelled. Mr. Kulkarni submits that this is a clear case of practice of hostile discrimination against the petitioner and consequently, there is violation of Article 14 of the Constitution of India. On these two grounds, Mr. Kulkarni submits that the impugned judgment and order made by the MAT as also the order dated 29.7.2010 made by the respondents deserves to be set aside.

4] Mr. Sawant, learned AGP for the State, points out that the petitioner was never appointed on regular basis. He points out that in terms of the orders made by the MAT in O.A. No. 854 of 1991 instituted by the petitioner herself, the MAT, had merely

directed the continuance of the petitioner's services by giving fresh appointments until other candidates from surplus staff or persons who are on leave vacancy join the post. Mr. Sawant points out that this order had attained finality in the absence of any challenge to the same. Mr. Sawant also points out that the order dated 27.1.2010 was erroneously issued by the Director (Administration), who in fact, lacked authority for the issuance of the same. On the aspect of alleged discrimination, Mr. Sawant submits that the facts as regards the other two Staff Nurses are not quite clear and in any case, the MAT has already directed the respondents to take action against the other Staff Nurses. For all these reasons, Mr. Sawant submits that the present petition may be dismissed.

5] The rival contentions now fall for our determination

6] The record indicates that the petitioner was initially appointed as a Staff Nurse on temporary basis in a leave vacancy some time in August 1991. The petitioner then instituted O.A. No. 854 of 1991, possibly seeking regular

appointment. In O.A No. 854 of 1991, the MAT, vide its order dated 17.12.1991, directed that the petitioner be continued in service by giving fresh appointment, until other candidates from surplus staff or persons who are on leave vacancy join posts. The petitioner suppressed this order whilst instituting O.A. No. 468 of 2012, in which, the impugned judgement and order came to be made. The petitioner has also failed to disclose the fate of O.A. No. 854 of 1991 instituted by her, both before the MAT as well as before this Court.

7] Since the material on record establishes that initial appointment of the petitioner was on temporary basis and against leave vacancies and thereafter, the services of the petitioner were continued by issuing fresh appointments until other candidates from the surplus staff or persons who were on leave vacancies resumed duties, in law it cannot be said that the petitioner had made out any case for grant of regularisation. This is particularly so in the light of ruling of the Hon'ble Supreme Court in case of **Secretary, State of Karnataka and ors vs. Umadevi and ors. - (2006) 4 SCC 1 (para 53)**.

8] This is also not a case where the benefit of so called regularisation granted to the petitioner was cancelled after lapse of considerable time, as was sought to be portrayed by the learned counsel for the petitioner. It is only by order dated 27.1.2010 that the Director (Administration) purported to regularise the services of the petitioner. There is no challenge to the statement made on behalf of the respondents that the Director (Administration) issued the order dated 27.1.2010 without having authority to issue such order or without approval of the competent authority, which could have issued such order. No sooner this was realised by order dated 29.7.2010, the order dated 27.1.2010 came to be cancelled.

9] This means that the order of so called regularisation came to be cancelled within a period of hardly six months from the date of its issue, no sooner, the competent authorities realised that the Director (Administration) had made an order, which he was not authorised to make. Apart from law, therefore, this is not a case where the petitioner can really claim equities on the basis of lapse of some considerable period.

10] There is no proper foundation, both in the original application as well as in the present petition, in order to examine the ground of discrimination. In absence of proper pleadings, it is difficult to compare the case of the petitioner with other two Staff Nurses, whose orders of regularisation, according to the petitioner, have not been cancelled. In any case, the MAT, in paragraph 6 of the impugned judgment and order, has already directed its Registrar to send a copy of this order to the Principal Secretary, Medical Education and Drugs/Public Health Department to take necessary action in the light of observations relating to other two Staff Nurses.

11] Since, the petitioner has not been able to establish any violation of her right or entitlement, obviously the petitioner, cannot complain of discrimination, assuming that her case was similar to the case of the two Staff Nurses whose regularisation orders have not been cancelled. It is settled position in law that the right guaranteed by Article 14 of the Constitution is a positive right. Article 14 of the Constitution is not intended to perpetuate illegality and it does not envisage negative

equalities.

12] In ***State of U.P. Vs. Rajmukar Sharma - 2006 (3) SCC 330***, the Apex Court has held that even if some appointments have been made by mistake or wrongly, that does not confer any right on other persons to seek any appointment by alleging discrimination. Article 14 of the Constitution does not envisage negative equality, and if the State commits any mistake, it cannot be forced to perpetuate the same mistake.

13] Again, in the context of the regularisation of services of employees who had secured initial appointments by the back door methods or without compliance with the mandates of Articles 14 and 16 of the Constitution of India, the Apex Court in ***State of Bihar vs. Upendra Narayan Singh - (2009) 5 SCC 65***, has held that it is settled that the guarantee of equality before law enshrined in Article 14 is a positive concept and it cannot be enforced by a citizen or court in a negative manner. If an illegality or irregularity has been committed in favour of any individual or group of individuals or a wrong order has been passed by a judicial forum, others cannot invoke the jurisdiction

of the higher or superior court for repeating or multiplying the same irregularity or illegality or for passing wrong order.

14] Since, the MAT has applied the aforesaid principles in making the impugned judgment and order, we see no good ground to interfere with the same.

15] Accordingly, the petition is rejected. There shall, however, be no order as to costs.

(M. S. SONAK, J.)

(A.S.OKA, J.)

Dinesh
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Sherla

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