

IN THE HIGH COURT OF ORISSA AT CUTTACK
WPC(OAC) No.3529 of 2001

Suresh Chandra Behera *Petitioner*

Mr. Jayant Kumar Rath, Sr. Adv.
Mr. D.N. Rath, Adv.

-versus-

Settlement Officer, Cuttack *Opposite Parties*
Major Settlement, Cuttack

Mr. H.K. Panigrahi, ASC

CORAM:
DR. JUSTICE S.K. PANIGRAHI

ORDER
23.12.2022

Order
No.
07.

1. This matter is taken up through hybrid mode.
2. The petitioner has filed this writ petition praying inter alia for regularization of his service as he has been continuing for quite a long period as Driver at the office of Opposite Party, having the requisite qualification and valid driving license to his credit. The Petitioner has further assailed the inaction of Opposite Party No.1 for not regularizing his post even though a regular post is available under the Opposite Party No.1 and, in spite of

positive orders passed by the learned Tribunal in the earlier application filed by him, the petitioner has not been made regular.

3. The petitioner was engaged as a driver by Opposite Party No.1 vide Office Order dated 05.03.1998 on Daily Rate Basis for a period of one month. The petitioner was having the valid driving license to his credit. The father of the petitioner was a regular driver working under the Opp. Party No.1. He was made to retire on attaining the age of superannuation on 30.06.1998. However, prior to that owing to his illness, since he took leave, the post of driver fell vacant. There were five regular sanctioned post of drivers under the Opposite Party No.1. Two posts of Driver fell vacant owing to the retirement of the father of the petitioner and one Kartika Samal. The petitioner was engaged against one of such vacant posts as a stopgap arrangement.

4. The petitioner was temporarily appointed by the Opposite Party No.1 as a driver on the leave vacancy post of the father of the petitioner on 44 days basis in the scale of 950-1500 with usual DA as admissible from time to time. Such appointment was allowed to continue on 44 days basis with an artificial break of one day, though

the petitioner was continuing in service without any break.

5. Since the regular post of driver was lying vacant and the Petitioner possessed a valid driving license and eligibility for appointment to the post of driver after having been appointed by the competent authority on 44 days basis, the Petitioner approached the learned State Administrative Tribunal in OA No.1316 (C) of 2000 seeking a direction for regularization of his service.
6. The Learned Tribunal vide order dated 19.05.2000 disposed of the Original Application by directing that if there would be necessity to engage a driver on ad-hoc basis, the services of the petitioner may not be substituted by another ad- hoc employees beyond 44 days. The Learned Tribunal observed, as there is one post of driver is lying vacant, the regular selection for such post is to be made and in that event, the petitioner be allowed to participate in the said selection process along with others. As regular process of selection was not held, the petitioner was allowed to continue as driver on ad-hoc basis by 44 days terms in the scale of pay 3050-4590 by order of Opposite Party No.1.
7. Since, no steps were taken for regularization of the service of the petitioner by taking the regular

recruitment process, as directed by the learned Tribunal in OA No.1316 (C) of 2000 vide order dated 19.05.2000, therefore, the petitioner approached the learned Tribunal in OA No.3529 (C) of 2001 for regularization of his service as the petitioner was continuing on ad-hoc basis against the vacant post of driver.

II. SUBMISSIONS ON BEHALF OF THE PETITIONER

8. It is submitted by Learned Counsel for the Petitioner that the Petitioner has the reason to believe that he is not going to get further extension though the work is available and, the petitioner is going to be substituted by another ad hoc person. The petitioner would not have any grievance had there been a regular process of selection by giving opportunity to the petitioner. However, when the performance of the petitioner is up to the satisfaction of the authorities and the petitioner has the requisite qualification and experience to continue as a driver without any allegation against him, another ad hoc appointment cannot be done by the authorities. The law is well settled that in absence of regular process of selection, an ad hoc employee cannot be replaced by another ad hoc employee unless there is any serious allegation or incompetencies are established. Therefore, the petitioner is entitled to continue in the

post until the post is filled up in regular process of selection and the petitioner is given an opportunity to participate in the process of selection.

9. It is contended by Learned Counsel for the Petitioner that the post of Driver is available and the Petitioner is continuing in the said post. According to the direction of Hon'ble Tribunal, the regular process of selection for appointment of the Driver was to be made at the earliest possible time but no such selection was made and the petitioner was allowed to continue in the past. But, due to the break in service on each 44 days interval, the Petitioner is being deprived of other benefits which are available even to a temporary or to an ad hoc employee of the State Government. It would be seen that the petitioner has worked more than 4 years by now but the petitioner is paid only the basic pay as fixed by the State Government and all other benefits have not been extended to the petitioner on the plea that the petitioner is an employee having been appointed for a fixed term of 44 days. As a result of which, the petitioner is put to unnecessary mental harassment and so also financial sufferings without his fault.

III. SUBMISSIONS ON BEHALF OF OPPOSITE PARTY

10. Per Contra, it is contended by Learned Counsel for the Opposite Party that on 04.07.2002, one post of driver was lying vacant in the office of the Charge Officer, Puri which is the wing office of Cuttack Major Settlement. However, the said post of driver was not filled up on regular process as the post, according to roster point, was to be filled up by Schedule Tribe candidate.

11. Furthermore, it is submitted by Learned Counsel for the Opposite Party that as per the letter of the Government dated 17.02.2000, 50% of the base level post was to be abolished as existing on 01.07.1999 and as there was only one vacant post for driver, hence, the same was abolished. There is no post of driver available to be filled up to assuage the grievance of the petitioner.

IV. COURT'S ANALYSIS AND REASONS

12. Heard learned Counsel for the parties. The Petitioner being an outsider, was initially appointed in place of his father who was a regular driver, on ad hoc basis for a period of 44 days with one day gap between two spells of appointments. The appointment of the Petitioner was done without resorting to the prescribed norms and guidelines for such appointment. The authority has given appointment to the Petitioner without making any

advertisement inviting applications from the general public for their participation for engagement and filling of the post of peon of the school. Hence, it appears from the record that the appointment of the Petitioner is illegal. The appointment of the Petitioner and continuance in the service in non-sanctioned post is beyond the rules and no procedures have been followed to appoint in order to fill up the Group-D post. The Petitioner was appointed on 44 days basis and it was extended from time to time with one day break and received salary meant for the ad hoc peon post. The position in law has been reaffirmed in a catena of judgments after *State of Karnataka Vs. Uma Devi and others*¹, hence, the continuance of service of the Petitioner is beyond the rules. Thus, the Petitioner's service cannot be regularized. If the appointment is illegal, the principles laid down in Uma Devi (supra) cannot come to the aid of the Petitioner. This Court has, however, no doubt in its mind that the Constitution Bench deprecated appointment through side door/back door being contrary to the Constitutional Scheme of equality.

¹ (2006) 4 SCC 1

13. In the case of *State of Karnataka v. Umadevi and other*(supra), the Supreme Court held asunder:

“In B.N. Nagarajan v. State of Karnataka² this Court clearly held that the words “regular” or “regularisation” do not connote permanence and cannot be construed so as to convey an idea of the nature of tenure of appointments. They are terms calculated to condone any procedural irregularities and are meant to cure only such defects as are attributable to methodology followed in making the appointments. This Court emphasised that when rules framed under Article 309 of the Constitution are in force, no regularisation is permissible in exercise of the executive powers of the Government under Article 162 of the Constitution in contravention of the rules. These decisions and the principles recognised therein have not been dissented to by this Court and on principle, we see no reason not to accept the proposition as enunciated in the above decisions. We have, therefore, to keep this distinction in mind and proceed on the basis that only something that is irregular for want of compliance with one of the elements in the process of selection which does not go to the root of the process, can be regularised and that it alone can be regularised and granting permanence of employment is a totally different concept and cannot be equated with regularisation.

We have already indicated the constitutional scheme of public employment in this country,

² (1979) 4 SCC 507 : 1980 SCC (L&S) 4 : (1979) 3 SCR 937

and the executive, or for that matter the court, in appropriate cases, would have only the right to regularise an appointment made after following the due procedure, even though a non-fundamental element of that process or procedure has not been followed. This right of the executive and that of the court would not extend to the executive or the court being in a position to direct that an appointment made in clear violation of the constitutional scheme, and the statutory rules made in that behalf, can be treated as permanent or can be directed to be treated as permanent.

One aspect arises. Obviously, the State is also controlled by economic considerations and financial implications of any public employment. The viability of the department or the instrumentality of the project is also of equal concern for the State. The State works out the scheme taking into consideration the financial implications and the economic aspects. Can the court impose on the State a financial burden of this nature by insisting on regularisation or permanence in employment, when those employed temporarily are not needed permanently or regularly? As an example, we can envisage a direction to give permanent employment to all those who are being temporarily or casually employed in a public sector undertaking. The burden may become so heavy by such a direction that the undertaking itself may collapse under its own weight. It is not as if this had not happened. So, the court ought not to impose a financial

burden on the State by such directions, as such directions may turn counterproductive.”

14. In the present case, the Petitioner was appointed on ad-hoc basis to the post of Driver which fell vacant after the superannuation of his father on 30.06.1998. Merely because, the Petitioner's father was continuing in the said post as regular driver, it cannot be said that the appointment of Petitioner on ad-hoc basis to the post of driver is adequate to extend him the benefits of regularisation. The Petitioner's engagement as Driver could have been regularized, had he been appointed after following due procedure. However, the Petitioner's appointment as Driver was made on the basis of executive decision/direction on that relevant point of time and due procedure was not followed i.e., inviting applications, conducting screening test etc.

15. The very concept of public employment is elaborately adjudicated and the principles are laid down in Umadevi case. This Court is of the considered opinion that all appointments are to be made strictly in accordance with the Service Rules in force. Equal opportunity in public employment is the constitutional mandate. All eligible persons, who are all aspiring to secure public employment, must be provided with an

opportunity to participate in the open competitive process under the Constitutional scheme and any violation would result in denial of equal opportunity enunciated under the Constitution of India. In the event of large scale back door appointments undoubtedly, the efficiency level in the public administration would be diluted. One can easily visualize that in the absence of any merit selection, the efficiency level cannot be ensured or maintained. Beyond the deprivation of opportunity of public employment to the meritorious candidates, the efficiency in the public administration is also contemplated under the Constitutional Principles. Efficient public administration is the avowed mandate. In order to maintain the efficiency in Public Administration, the appointments are to be made by selecting meritorious candidates for public services. Dilution on the Constitutional Principles would result in disaster consequences.

16. All these aspects are to be borne in mind. It is not as if Courts can decide certain issues on sympathy or by taking a lenient view. Such misplaced sympathy or lenient view may result in denial of social justice to all the citizen of this great nation. If the implication of such misplaced sympathy would result in adverse

consequences, the Courts should not prefer to grant relief in such cases merely based on the length of services or the manner in which the irregular or illegal appointments are made.

17. Further, the decision of this Court in *Moti Dei v. State of Odisha*³ and *Pramod Kumar Das v. State of Odisha*⁴ are squarely applicable to the facts of the present case as it delved on similar subject-matter. The decision of regularization of service is a policy decision of the Government. The prayer of the Petitioner is beyond the purview/ jurisdiction of the present Opposite Party who has already considered his case in pursuance to the order passed by the Tribunal. Therefore, the present Writ Petition is liable to be dismissed being devoid of merits.
18. Accordingly, this Writ Petition is dismissed. No order as to cost.

(Dr. S.K. Panigrahi)
Judge

B.Jhankar

³ W.P.(C). No.39394 of 2021

⁴ W.P.(C) No. 17928 of 2021