

IN THE HIGH COURT OF ORISSA AT CUTTACK

W.P.(C) No. 33108 of 2020

An application under Sections 226 and 227 of the Constitution of India)

Gadei Swain

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Petitioner

-Versus-

State of Odisha and others

.....

Opp. Parties

Advocate(s) appeared in this case :-

For Petitioner : M/s. K.K. Swain, K. Swain &
J.R. Khuntia, Advocates

For Opp. Parties : Mr. B.P. Tripathy,
Addl. Government Advocate

CORAM:

JUSTICE SASHIKANTA MISHRA

J U D G M E N T
12th October, 2022

SASHIKANTA MISHRA, J.

This is the third journey of the petitioner to this Court seeking the same relief.

2. The petitioner was engaged against the post of Junior Clerk-cum-Typist with effect from 16.08.1995 on daily wage basis in S.C.S. (Autonomous) College, Puri. Despite working for long his services have not been regularized. He, therefore, approached the authorities on

several occasions requesting for consideration of his case for regular appointment. By letter dated 31.07.2010, the Principal of the College (Opposite party No.4) sought permission from the Director, Higher Education, Odisha (opposite party no.3) regarding regular absorption of the daily wage workers in the College. The petitioner was employed on daily wage basis at the rate of Rs.80/- per day which was enhanced to Rs.100/- per day from July, 2008 and Rs.116/- per day since July, 2010. He was paid for all days except national/gazetted holidays. Since no action was taken the petitioner approached this Court in W.P.(C) No.21745 of 2010, the said writ petition was disposed of by order dated 25.08.2011 with the following direction:-

“Heard learned counsel for the petitioner.

The petitioner, who is working as a Junior Clerk-cum-Typist since 1995 on daily wage basis and getting Rs.110/- per day, brings to the notice of the Court regarding the inaction of the Director, Higher Education, Orissa, opposite party no.3, for not granting permission to fill up vacant posts. The request letter of the Principal S.C.S. (A) College, Puri, opposite party no.4, is annexed to the writ petition, as Annexure-2, wherein opposite party no.4 has moved opposite party no.3 for filling up the aforesaid posts, in which the name of the petitioner finds place at SI No.2.

Let opposite party no.3 take a decision on the request of opposite party no.4 in Annexure-2 within a period of two months from the date of communication of this order.

The writ petition is accordingly disposed of.

Sd/- B.P. Das,J.

Sd/-S.K. Mishra, J.”

Pursuant to such order, the Director considered the case of the petitioner and rejected the same on the ground that after promulgation of Orissa Government Colleges Ministerial Service (Method of Recruitment and Conditions of Service) Rules, 1999 (for short, 'Rules, 1999') recruitment to the post of Junior Clerk can only be made through direct recruitment by means of competitive examination and that Government in Finance Department Memorandum dated 14.03.2001 have imposed ban on filling up of base level vacant posts meant for direct recruitment. Challenging such order passed by the Director, the petitioner again approached this Court in W.P.(C) No.33365 of 2011. The said writ petition was disposed of by judgment dated 27.09.2019 by quashing the aforementioned order of the Director and by remitting the matter to him for reconsideration in accordance with

law. Pursuant to the aforesaid judgment, the Principal of the College was called upon by Deputy Director of Higher Education vide letter dated 20.01.2020 to furnish information regarding number of sanctioned posts of Junior Clerk-cum-Typist and number of vacancies as on 01.08.1995 etc. The Principal, in his letter dated 21.01.2020 informed that number of sanctioned posts of Junior Clerk-cum-Typist is 11 and number of vacancies in the said posts as on 01.08.1995 is 01. It was also stated that the petitioner and another employee are working on daily wage basis since long satisfactorily and therefore requested for their appointment in the existing vacancies, which was 08. Again, the Deputy Director in his letter dated 06.02.2020, requested the Principal to intimate the names of persons working against the post of Junior Clerk-cum-Typist as on 01.08.1995 and about the subsequent vacancies with reason thereof. The Principal, by letter dated 10.02.2020 furnished the names of 04 persons who were working in the College against the post of Junior Clerk-cum-Typist as on 01.08.1995. Basing on such information, the Director in his order dated

21.04.2020, again rejected the claim of the petitioner for regularization, a copy of which is enclosed as Annexure-10 to the writ petition. The said order is impugned in the present writ petition. According to the petitioner, the Director has simply reiterated his earlier order of rejection despite the fact that the grounds taken therein for rejection were rejected by this Court in the earlier writ petition.

3. Counter affidavit has been filed on behalf of opposite party nos. 1 and 3. The claim of the petitioner is sought to be refuted by stating that the petitioner was not appointed against any sanctioned post or any vacant post of Junior Clerk-cum-Typist but on daily wage basis in the year, 1995 to manage the day-to-day official work due to shortage of staff for which he has been paid from available fund of the College with discontinuity. It is also stated that the petitioner does not stand on the same footing as the other employees who have been regularized. It is also stated that as per report of the Principal, four persons were working against four sanctioned posts of Junior Clerk-cum-Typist and there was no vacant sanctioned

post of Junior Clerk-cum-Typist against which the petitioner was engaged on daily wage basis in the year, 1995. The first vacancy occurred on 15.07.2004 and as such the petitioner has not completed ten years of service against a sanctioned post on 10.04.2006. It is also stated that the engagement of the petitioner was in violation of the complete ban imposed by the Government in Finance Department vide letter dated 12.04.1993.

4. The petitioner filed a rejoinder to the counter stating that in the earlier order of rejection dated 25.08.2011, the Director had taken a stand regarding the imposition of ban on filling up of base level vacant posts as per Finance Department Memorandum dated 14.03.2001 and that the petitioner was appointed in violation of the Rules, 1999. Therefore, the Director could not have taken another ground when the earlier ground was disapproved by this Court. It is further stated that as per the decision of this Court in ***Prafulla Kumar Sahoo vs. State of Orissa and others***, reported in 2003 (I) OLR 91, the Finance Department has no jurisdiction/authority to issue any ban order with regard to appointment under

the Higher Education Department. It is further stated that from the various correspondences, it is clear that at the time of appointment a sanctioned post of Junior Clerk-cum-Typist was available and at present also, several vacancies are available. Even otherwise, the petitioner having continued admittedly for more than 26 years, it presupposes that a sanctioned/created post exists. The petitioner's appointment/engagement may at best be treated as irregular but not illegal under any circumstances. The State Government has in the meantime framed the Orissa Group-C and Group-D posts (Contractual Appointment) Rules, 2013, which provides for automatic regularization of services after six years of contractual engagement. The petitioner having been engaged for more than 26 years cannot be deprived of such benefit.

5. Heard Mr. K.K. Swain, learned counsel for the petitioner and Mr. B.P. Tripathy, learned Additional Government Advocate for the State.

6. Mr. K.K. Swain would argue that none of the grounds taken by the Director to reject the petitioner's

case for regularization are legally tenable. This Court having rejected the grounds taken earlier, it is not open to the Director to take fresh grounds not taken earlier with the intent of somehow rejecting the claim of the petitioner. The Director being a public functionary cannot be allowed to take different grounds at different times. According to Mr. Swain, it is clear that such grounds were taken only to reject the claim of the petitioner by any means. Mr. Swain further argues that even otherwise the grounds taken in the impugned order are not tenable inasmuch as 1985 Rules applies to Junior Clerks in a district office, but not in Government/Autonomous Colleges. The Rules, 1999 have been framed to govern the recruitment and service conditions of Ministerial staff for Government Colleges but the same also has no application since the petitioner was engaged prior to coming into force of the said Rules. As regards the ground that there was no vacancy of Junior Clerk-cum-Typist at the relevant time, it is argued by Mr. Swain that as per the letter dated 21.01.2020 of the petitioner one post was available as on 01.08.1995

against 11 sanctioned posts. Even otherwise as per the subsequent letter of the Principal, it is evident that only four persons were working against 11 sanctioned posts and presently there are 08 vacancies and therefore the petitioner can be easily absorbed. Mr. Swain has relied upon the decision of the Apex Court in the case of **Nihal Singh and others vs. State of Punjab and others**, reported in AIR 2013 SC 3547 wherein the Apex Court did not accept the plea of the State Government regarding non-availability of sanctioned posts when they have utilized the services of persons for decades. Mr. Swain has also relied upon the decision of this Court **Sri Prafulla Kumar Sahoo (supra)** wherein it was held that Finance Department has no jurisdiction to impose ban order in respect of educational institutions. Besides, Mr. Swain has also relied upon the decision of the Apex Court in the case of **Secretary, State of Karnataka and others vs. Uma Devi (3) and others**, reported in 2006 (4) SCC 1 and **State of Karnataka and others vs. M.L. Keshari and others**, reported in 2010 (II) OLR (SC) 982. Summing up his arguments Mr. Swain would

contend that the petitioner having admittedly discharged his duties for more than 26 years continuously his claim for regularization cannot be thrown away, more so on the grounds cited by the Director.

7. Per contra, Mr. B.P. Tripathy has argued that mere long period of engagement does not confer any right on an appointee to claim regularization of his services, particularly when such appointment was not made by following due recruitment procedure. Referring to a document titled "Details of payment to Sri Gadei Swain, working as Junior Clerk-cum-Typist on daily wage basis and source from which paid" furnished by the Principal of the College and enclosed as Annexure-A/1 to the counter, Mr. Tripathy submits that the petitioner was not engaged on all days of the month as would be evident from the said document. His engagement ranged between 12 to 20 days on an average. In fact, he was engaged for only 08 days in the month of February, 2004. This clearly shows that the petitioner's engagement was not on all days but on some days presumably due to shortage of staff. It is also argued by Mr. Tripathy that as

per information furnished by the Principal there was no vacant sanctioned posts of Junior Clerk-cum-Typist as on 01.08.1995 and that the first vacancy occurred only in 2004. Therefore, the petitioner's engagement, if at all can only be reckoned from 2004 onwards but not prior to it. That apart, the petitioner's engagement was contrary to 1985 Rules as also the ban order imposed by the Finance Department in 1993. Therefore, according to Mr. Tripathy, the petitioner's claim for regularization has no legs to stand and was hence, rightly rejected.

8. There seems to be no dispute with the fact that the petitioner was engaged as Junior Clerk-cum-Typist on 16.08.1995 on daily wage basis and has been continuing as such. The question is, whether such engagement was against any sanctioned post. In the communication dated 21.01.2020 (Annexure-7), the Principal has clearly mentioned that there were 11 sanctioned posts of Junior Clerk-cum-Typists and the number of vacancies as on 01.08.1995 was 01. In the said communication the Principal categorically stated that the petitioner and another employee (Md. Abu

Kasur) are working on daily wage basis since long in the College. In the communication dated 10.02.2020 (Annexure-9), the Principal stated that 04 (four) persons were working against the post of Junior Clerk-cum-Typist as on 01.08.1995. It is also apparent from Annexure-9 that the vacancy arose on 15.07.2004 due to transfer of one Nanda Kishore Das. This communication was in response to the query of the Deputy Director, Higher Education Department vide letter dated 06.02.2020 (Annexure-8). In the said letter it was stated that 11 sanctioned posts in the cadre of Junior Clerks were available in the College as per records available in the department. Thus, from a conjoint reading of Annexures -7, 8 and 9 it would be evident that the number of sanctioned posts in the cadre of Junior Clerk was 11 and secondly, the nomenclature Junior Clerk-cum-Typist was used loosely. The Government has laid much emphasis on the letter of the Principal at Annexure-9 to contend that all the four posts of Junior Clerk-cum-Typist were filled up as on 01.08.1995. This is apparent from a reading of the letter under Annexure-9.

However, fact remains that the letter under Annexure-7, wherein the number of vacancies as on 01.08.1995 was mentioned as 01 cannot be altogether ignored. This is more so because the number of sanctioned posts of Junior Clerk-cum-Typist is mentioned as 11 which actually is the figure relatable to the cadre of Junior Clerk as a whole which comprised the posts of Junior Clerk, Junior Clerk-cum-Typist and Cashier. Under such circumstances there is no reason to disbelieve the letter of the Principal under Annexure-7, rather it must be construed to be referring to the vacancies in the cadre of Junior Clerk but mentioned as Junior Clerk-cum-Typist. Therefore, it cannot straightaway be said that there was no sanctioned post or any vacancy in the cadre of Junior Clerk as on 01.08.1995.

9. Even assuming for the sake of argument that there was no sanctioned post against which the petitioner could have been engaged the same would be of no consequence in view of the fact that continuance of the petitioner in a post belonging to the cadre of Junior Clerk for as long as 26 years implies that there is

requirement of the work rendered by the petitioner. Further, it is for the authorities concerned to create/sanction posts and the employee cannot be blamed for non-creation of the post after extracting work from him for more than two decades. This tantamounts to gross exploitation which the State as a model employer is not expected to do. In the case of **Nihal Singh (supra)** , the Apex Court observed as follows:-

“19. Coming to the judgment of the Division Bench of the High Court of Punjab & Haryana in LPA No.209 of 1992 where the claims for regularization of the similarly situated persons were rejected on the ground that no regular cadre or sanctioned posts are available for regularization of their services, the High Court may be factually right in recording that there is no regularly constituted cadre and sanctioned posts against which recruitments of persons like the appellants herein were made. However, that does not conclusively decide the issue on hand. The creation of a cadre or sanctioning of posts for a cadre is a matter exclusively within the authority of the State. That the State did not choose to create a cadre but chose to make appointments of persons creating contractual relationship only demonstrates the arbitrary nature of the exercise of the power available under section 17 of the Act. The appointments made have never been terminated thereby enabling various banks to utilize the services of employees of the State for a long period on nominal wages and without making available any other service benefits which are available to the other employees of the State, who are discharging functions similar to the functions that are being discharged by the appellants.

20. No doubt that the powers under [section 17](#) are meant for meeting the exigencies contemplated under

it, such as, riot or disturbance which are normally expected to be of a short duration. Therefore, the State might not have initially thought of creating either a cadre or permanent posts.

21. But we do not see any justification for the State to take a defence that after permitting the utilisation of the services of large number of people like the appellants for decades to say that there are no sanctioned posts to absorb the appellants. Sanctioned posts do not fall from heaven. State has to create them by a conscious choice on the basis of some rational assessment of the need.”

10. The correctness of the impugned order may now be examined in the backdrop of the facts and law narrated above.

As has been stated in detailed hereinbefore, the Director initially rejected the claim of the petitioner on two grounds, namely, the Principal has no authority to recruit/appoint candidates as Junior Clerk-cum-Typist without adhering to the procedure laid down in the 1999 Rules and the Government in Finance Department vide memorandum dated 14.03.2001 have imposed selective ban on filling up of the base level vacant posts. Both these grounds were rejected as invalid by this Court as per judgment passed on 27.09.2019 in W.P.(C) No. 33365 of 2011. The matter being remitted to the Director for fresh consideration, the Director has again rejected the claim on

two grounds, namely, there was no vacancy of Junior Clerk-cum-Typist against which the petitioner was engaged in the year 1995 as the first vacancy arose on 15.07.2004 and the petitioner was engaged in violation of the ban imposed by the Government in Finance Department letter dated 12.04.1993. It is also stated that at the relevant time 1985 Rules was in force. It is implicit that according to the Director, the said Rules was not followed while engaging the petitioner.

11. Reading of the impugned order would suggest that firstly, the grounds taken for rejection of the petitioner's claim are entirely different from the grounds originally taken while rejecting the claim earlier, which were disapproved by this Court. Both the grounds taken in the impugned order are new, being taken for the first time. Thus, the stand of the Government vis-à-vis the claim of the petitioner seems to be changing and improving from time to time. Such conduct can hardly be expected from the Government or accepted in law. Since the grounds originally taken were held to be invalid by this Court and the matter was remitted for fresh consideration it did not

mean that the authority concerned would re-invent further grounds to somehow vindicate its decision of not allowing the claim of the petitioner. Unfortunately, this is what the Director appears to have done by passing the impugned order. The Director has also referred to the judgment of the Apex Court in the case of **Uma Devi (supra)** to hold that the appointment of the petitioner is both illegal and irregular. The observation of the Apex Court in **Uma Devi (supra)** under paragraph-44 is significant.

*“44. One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in **S.V. Narayanappa (supra)**, **R.N. Nanjundappa (supra)**, and **B.N. Nagarajan (supra)**, and referred to in paragraph 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 courts or of tribunals. The question of regularization of the services of such employees may have to be considered on merits in the light of the principles settled by this Court in the cases 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 courts or of tribunals and should further ensure that regular recruitments are undertaken to fill those vacant sanctioned posts that require 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. We also clarify that regularization, if any already made, but not sub judice, need not be reopened based on this judgment, but there should be no further by-passing of the constitutional requirement and regularizing or making permanent, those not duly appointed as per the constitutional scheme.”

Thus what emerges is, there is distinction between irregular appointment and illegal appointment. The cases of irregular appointment can be considered favourably by the authorities, if such appointments have continued for ten years or more but without intervention of the orders of Courts or Tribunal. The aforesaid position was further clarified in the case of **M.L. Keshari (supra)** under paragraphs-7 and 8 as follows:-

“7. It is evident from the above that there is an exception to the general principles against ‘regularization’ enunciated in Umadevi, if the following conditions are fulfilled :

- (i) The employee concerned should have worked for 10 years or more in duly sanctioned post without the benefit or protection of the interim order of any court or tribunal. In other words, the State Government or its instrumentality should have employed the employee and continued him in service voluntarily and continuously for more than ten years.*
- (ii) The appointment of such employee should not be illegal, even if irregular. Where the appointments are not made or continued against sanctioned posts or where the*

persons appointed do not possess the prescribed minimum qualifications, the appointments will be considered to be illegal. But where the person employed possessed the prescribed qualifications and was working against sanctioned posts, but had been selected without undergoing the process of open competitive selection, such appointments are considered to be irregular.

8. Umadevi casts a duty upon the concerned Government or instrumentality, to take steps to regularize the services of those irregularly appointed employees who had served for more than ten years without the benefit or protection of any interim orders of courts or tribunals, as a one-time measure. Umadevi, directed that such one-time measure must be set in motion within six months from the date of its decision (rendered on 10.4.2006)."

12. It has already been held by this Court that there was a sanctioned post available as on 01.08.1995 in the cadre of Junior Clerk. The petitioner was engaged on 16.08.1995. The petitioner has continued in service till date without intervention of order of any Court or Tribunal. Thus, he also fulfils the condition of rendering service for 10 years continuously as on 10.04.2006. There is no material to show that any recruitment procedure was adopted. In such view of the matter, the petitioner's appointment can only be treated as irregular but not illegal by any means.

13. The question that now arises is, what relief can be granted to the petitioner. This Court has already held that the impugned order cannot be sustained in the eye of law for the reasons indicated in detail hereinbefore. It has been brought on record that the petitioner is suffering from cancer and undergoing treatment for the same. The relevant medical documents including prescription etc. have been enclosed as Annexure-11 series to the rejoinder filed by the petitioner. Having regard to the narration in the preceding paragraph, this Court is satisfied that the petitioner fulfills all the conditions required for regularization of his services as laid in ***Uma Devi (supra)*** and ***M.L. Keshari (supra)***. The petitioner being a low paid employee has been forced to approach this Court thrice. Therefore, taking a larger view of the matter, this Court is of the considered view that ends of justice would be best served, if the authorities are directed to regularize the services of the petitioner against the available vacant post without any further delay.

14. In the result, the writ petition succeeds and is, therefore, allowed. The impugned order under Annexure-

10 is hereby quashed. The opposite party nos. 1, 2 and 3 are directed to take necessary steps to regularize the services of the petitioner against the available vacant post in the cadre of Junior Clerk within a period of four weeks from the date of communication of this order or on production of certified copy thereof by the petitioner.

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Sashikanta Mishra,
Judge

Orissa High Court, Cuttack,
The 12th October, 2022/ B.C. Tudu

