

IN THE HIGH COURT OF ORISSA AT CUTTACK

WPC(OAC) No. 171 of 2013

An application under Articles 226 & 227 of Constitution of India.

AFR **Satya Narayan Panda** **Petitioner**

-Versus-

State of Odisha & Others **Opp. Parties**

Advocate(s) appeared in this case:-

For Petitioner : M/s. K.K. Swain, P.N. Mohanty,
U. Chhotray, P.K. Mohapatra,
Advocates.

For Opp. Parties : Mr. N.K. Praharaj,
Addl. Govt. Advocate

CORAM:

JUSTICE SASHIKANTA MISHRA

JUDGMENT

29th September, 2022

SASHIKANTA MISHRA, J.

Pursuant to an advertisement dated 03.11.2007 for filling up the post of Pharmacist in respect of Singhapur PHC in the district of Jajpur under the Rogi Kalyan Samiti (RKS), the petitioner applied for the same,

attended a selection test, was selected for appointment and joined in the post on 21.11.2007. The petitioner has a Diploma in Pharmacy and is duly registered under the Odisha State Board of Pharmacy. Such appointment was contractual in nature initially for a period of one year with consolidated salary of Rs.1000 per month. The said contract was renewed from time to time. An advertisement was issued by the Chief District Medical Officer (CDMO) on 14.12.2009 to fill up 12 posts of Pharmacists on contractual basis. The petitioner challenged the said advertisement before the Odisha Administrative Tribunal in O.A. No. 3077 (C) of 2009 on the ground that he, being appointed as a contractual Pharmacist, cannot be replaced by another contractual employee. The O.A. was disposed of by order dated 01.10.2010 and 30.11.2010 by granting liberty to the petitioner to submit a representation to the CDMO. The petitioner submitted representation accordingly but no action was taken for which he filed a contempt application being CP No. 434(c) of 2010. During pendency of the said contempt

application, the government, vide letter dated 28.12.2010 directed the CDMO to implement the order of the tribunal by considering the representation of the petitioner for his engagement on contractual basis as Pharmacist against vacancy if available under his control to avoid legal complication. Such letter was followed by another letter dated 04.1.2011 of the State Government reminding the CDMO to implement the order of the Tribunal. Again, the State Government wrote to the CDMO on 01.02.2011 directing him to implement the order. Accordingly an order was issued on 15.02.2011 by the CDMO for appointing the petitioner as a contractual Pharmacist. Pursuant to such order, the petitioner has been continuing as a Contractual Pharmacist with his contractual period being renewed from time to time. While continuing as such, the State Government passed an order on 09.01.2013 to terminate the services of the petitioner on the ground that no advertisement was issued for the five posts of Contractual Pharmacist against which the petitioner and four others were appointed and

therefore such appointments are *ab initio* void. Such order of the Government was passed pursuant to the order passed by the Tribunal in O.A. No.1819 (C) of 2012 and batch, wherein the petitioner nor the other four contractual Pharmacist were parties. It is stated that the Tribunal in the said case had simply directed the Government to consider the representation of the applicants but the Government issued the impugned order directing termination of the services of the petitioner and four others. It is further stated that as the petitioner has already rendered six years of service as a contractual employee, as per the scheme of the State Government he is entitled to be regularized in service. On such facts and grounds, the petitioner approached the erstwhile Odisha Administrative Tribunal in O.A. No. 171 (C) of 2013 seeking the following relief:

“Under the above circumstances, it is humbly prays that the Original Application be allowed:-

And

(a) the impugned order dated 09.01.2013 passed by the State Government under Annexure-16 may be quashed/set aside and the applicant may be allowed to continue in the post of Contractual Pharmacist with all service benefits;

And

(b) any other order/orders or direction/directions be issued so as to give complete relief to the applicant.”

The said OA has since been transferred to this Court and registered as the instant writ application.

2. Counter affidavit has been filed by the CDMO. After referring to the undisputed facts averred in the writ application, it has been stated in the counter that challenging the order of appointment issued by the CDMO in favour of the petitioner and four other persons, three candidates namely, Bikash Kumar Mishra, Kaibalya Tripathy and Susant Kumar Panda approached the erstwhile Odisha Administrative Tribunal in O.A. No. 1395 (C) of 2011 with a prayer to quash the same. The said applicants also filed O.A. Nos. 1819 (C) of 2012, 1820 (C) of 2012 and 855 (C) of 2012 with prayer for their engagement on similar footing. As per order passed by the Tribunal on 22.03.2012, the appointing authority after going through the Government guidelines was unable to appoint the said applicants within the procedure and disposed of the same within the timeframe. The

Principal Secretary to Government in H & FW Department after necessary enquiry passed order to terminate the services of the petitioner and the other employees but allowed them to continue with their earlier engagement under the RKS.

3. The petitioner has filed rejoinder to the counter filed by the opposite party No.3. It is basically stated that the petitioner has put in more than eight years of service in the capacity of Contractual Pharmacist under the RKS and Contractual Pharmacist under the Government. Therefore, under the scheme of the Government he is entitled to be regularized in service.

4. The petitioner also filed an additional affidavit. It is stated that the Original Applications, being O.A. Nos. 1304(C) of 2013, 1303 (C) of 2013 and 1305 (C) of 2013 filed by the three persons before the Tribunal claiming parity with the petitioner for appointment as Contractual Pharmacist and the State Government, were transferred to this Court after abolition of the Tribunal. By order dated 03.03.2022, all the said cases were disposed of.

5. Heard Mr.K.K.Swain, learned counsel appearing for the petitioner and Mr.N.K. Praharaj, learned Additional Government Advocate for the State.

6. It is argued by Mr. Swain that the petitioner was appointed by the authorities in compliance of the order of the Tribunal in O.A. No. 3077 (C) of 2009 without any misrepresentation or forgery committed by him. Only when he was threatened to be replaced by another contractual employee that he approached the Tribunal. It is well settled that one contractual employee cannot be replaced by another set of contractual employee. Mr. Swain has relied upon the decision of the Apex Court in the case of **State of Haryana and others vs. Piara Singh and others** reported in AIR 1992 SC 2130 and of this Court in the case of **Dillip Kumar Baral vs. Biju Patnaik University of Technology and others** reported in 2013(II) OLR 210. It is further argued that once the authorities have appointed the petitioner pursuant to order passed by the Tribunal, they are estopped from terminating him on the ground that his appointment was

not valid. Even assuming that the petitioner was wrongly appointed then also he cannot be terminated after having rendered more than 15 years of service. The decision of this Court in the case of the ***Pratima Sahoo vs. State of Odisha*** reported in 2021(I) ILR-CUT-150 is relied on by Mr. Swain in this regard. Alternatively, it is contended by Mr. Swain that even otherwise, as per Rule-4 of Odisha Pharmacist Service (Method of Recruitment and Conditions of Service) Rules, 2019 all Contractual Pharmacists, who have been duly recruited by the concerned Societies/Schemes and have completed six years of satisfactory contractual service, shall be deemed to be regular government employees as one-time measure subject to fulfillment of eligibility criteria as prescribed under Rule-5. The petitioner was engaged as Contractual Pharmacist under the RKS Scheme in the year 2007 and therefore, as on the date of coming into force of the 2019 Rules he is eligible to be regularized in service as per Rule 4 and 5 thereof.

7. Mr. Praharaj, on the other hand, has argued that having been wrongly appointed to a post, it is not open to a person to claim any vested right thereon. There can be no estoppel against law. Since the petitioner was wrongly appointed, the authority rightly held the same to be invalid and considered the cases of the eligible persons who had been wrongly left out. In any case, the petitioner has been allowed to continue as per his earlier status as a Contractual Pharmacist under the RKS Scheme and therefore, he cannot be said to have any legitimate grievance to raise before this Court.

8. Before proceeding to examine the merits of the rival contentions, it would be relevant to note that the petitioner has been continuing as Contractual Pharmacist under the State Government till date by virtue of order dated 04.02.2013 and 22.03.2022 passed by this Court in W.P.(C) No.2166 of 2013. Admittedly, the petitioner was engaged as Contractual Pharmacist under the RKS Scheme and joined as such on 21.11.2007. Since there was a move to engage Pharmacists on contractual basis

the petitioner approached the Tribunal in O.A. No. 3077 (C) of 2013. It can only be said that the petitioner had a valid point to raise before the Tribunal. Be that as it may, the Tribunal, without entering into the merits of the case, disposed of the O.A. by granting liberty to the petitioner to submit a representation to the CDMO highlighting his grievance. The CDMO, being repeatedly instructed/reminded by the State Government issued appointment order in his favor. It must be kept in mind that the Tribunal never directed the CDMO to appoint the petitioner as a Contractual Pharmacist but had only granted liberty to the petitioner to submit a representation which would be considered in accordance with law within a stipulated time. What prompted the State Government to straightaway appoint the petitioner against the post of Contractual Pharmacist, which incidentally was advertised, without undertaking even a semblance of selection process is unable to be comprehended by this Court. It goes without saying that all public appointments are required to be made in an open and transparent

manner in consonance with the extant rules. Viewed in light of the above position, it can hardly be said that the appointment of the petitioner by the CDMO in 2011 was valid in the eye of law. To such extent therefore the opposite party No. 1 cannot be faulted with for passing the impugned order in arriving at the same conclusion as referred above.

9. The opposite party No.1 has however observed in the impugned order that the petitioner can continue in his earlier status as Contractual Pharmacist under the RKS Scheme. The petitioner has been continuing on the strength of an interim order passed by this Court. However as has been held hereinbefore, the very appointment of the petitioner to the post of Contractual Pharmacist in the year 2011 was illegal. Of course, no fault can be attributed to the petitioner for such appointment as he had simply raised a valid legal point questioning the advertisement on the ground that one contractual employee cannot be replaced by another contractual employee. The Tribunal, as already stated,

never directed the authorities to appoint the petitioner in the post in question. Therefore, the appointment made by the CDMO on the direction of the State Government has to be treated as a wrong committed by them and not the petitioner. That apart, the petitioner's earlier appointment as Contractual Pharmacist with effect from 21.11.2007 under RKS scheme has not been interfered with by opposite party No. 1, rather he has endorsed the same in the impugned order by holding that the petitioner was continuing under the RKS prior to the contractual appointment and is allowed to continue under the said status. This Court finds nothing wrong in such observation. This observation/order however helps the petitioner when viewed in the background of the 2019 Rules. Rule 4 of the 2019 Rules is quoted hereinbelow for reference:

“4. Conditions of taking over of existing contractual Pharmacists.- (A) (1) On the date of commencement of these rules, all the contractual Pharmacists who have been recruited by concerned societies/Schemes and have completed 6 (six) years of satisfactory contractual service shall be deemed to be regular government employees as one time measure subject to fulfillment of eligibility criteria as prescribed under rule-5,

Provided that all the contractual Pharmacists who are yet to complete six years of contractual service and having eligibility criteria as prescribed under rule-5 shall be deemed to be contractual government employees as one time measure and shall be regularized as and when they complete six years of satisfactory contractual service, including the service that has already been rendered in concerned scheme/society.

Provided further that those contractual Pharmacists, who do not meet the eligibility criteria, as mentioned under rule-5 & shall continue as such under the OSH & FW Society till closure of the project retirement or disengagement, whichever is earlier.

(2) On their regularization, such posts of contractual Pharmacists of the OSH & FW Society in sub-clause (1) shall be deemed to have been abolished from the date of such induction of contractual Pharmacists into the Cadre. As these posts shall cease to exist, no further recruitment to fill up these posts shall be made by the OSH & FW Society other than by the Commission:

10. Admittedly, the 2019 Rules came into force on 08.03.2019. On the said date, the petitioner was continuing as Contractual Pharmacist with reference to his appointment made in the year 2011. The opposite party No.1, while holding that the petitioner's appointment as such is ab initio void, has also held that he is allowed to continue in his earlier status. Though technically the petitioner's appointment from the year 2011 can be treated as illegal, notwithstanding the interim order passed by this Court, yet his earlier spell of

engagement that is, from the year 2007 under the RKS Scheme not having been interfered with, the question is, can it be said that he has completed six years of service as on the date of commencement of the Rules. It is the settled position of law that where a person has been appointed bonafide without any fault on his part and has continued in the concerned position for a long time, notwithstanding the fact that his appointment is subsequently found to be invalid, it is not always necessary to remove him from service or to treat the said period of engagement as non-est. In the case of **Tridip Kumar Dingal v. State of W.B.**, reported in **(2009) 1 SCC 768 : (2009) 2 SCC (L&S) 119**, the Apex Court observed as follows:

“52. *In M.S. Mudhol (Dr.) v. S.D. Halegkar [(1993) 3 SCC 591 : 1993 SCC (L&S) 986 : (1993) 25 ATC 91] the petitioner sought a writ of quo warranto and prayed for removal of a Principal of a school on the ground that he did not possess the requisite qualification and was wrongly selected by the Selection Committee. Keeping in view the fact, however, that the incumbent was occupying the office of Principal since more than ten years, this Court refused to disturb him at that stage.*

53. *In our considered opinion, the law laid down by this Court in aforesaid and other cases applies*

to the present situation also. We are of the considered view that it would be inequitable if we set aside appointments of candidates selected, appointed and are working since 1998-1999. We, therefore, hold that the Tribunal and the High Court were right in not setting aside their appointments.”

11. This is a case where the petitioner has been continuously discharging the duties of Contractual Pharmacist, admittedly without any blemish for as long as 15 years. This Court has already held that the petitioner's subsequent appointment as Contractual Pharmacist, though invalid, was not on account of any fault on his part but on the part of the authorities. It can be reasonably supposed that had he not been engaged as a Contractual Pharmacist in the year 2011 he would have continued as a Contractual Pharmacist under the RKS Scheme. There is a Rule in place being the 2019 Rules which provides for regularization of such employees who have completed six years of service as on the date of coming into force of the said rules. For the reasons indicated hereinbefore, this Court finds no reason as to why the beneficial provisions of Rule 4 and 5 of the 2019

Rules shall not be extended to the petitioner. These Rules, it must be remembered, require that the employee must have rendered six years continuous service under any Scheme as on the date of commencement of the Rules. The petitioner was engaged under the RKS Scheme from 20.11.2007 and his subsequent appointment as Contractual Pharmacist under the State Government was from 2011. This Court has already held that such subsequent appointment was illegal. However taking note of the fact that the petitioner had no fault in being so appointed and he having continued in service, even till date, on the strength of interim order passed by this Court, it would be iniquitous to ignore such spell of engagement (from 2011 till the Rules came into place in 2019). Had he not been so appointed, he would have continued under the RKS and thereby, been eligible for being considered for regularization as per the 2019 Rules. Therefore, the aforementioned period of engagement (2011 to 2019) must also be notionally counted only for the

purpose of considering his case for regularization as per Rules 4 and 5 of the 2019 Rules.

12. For the foregoing reasons, therefore, this Court is of the view that the impugned order insofar as it relates to terminating the services of the petitioner as Contractual Pharmacist under the Government is not liable to be interfered with. However, the writ application is disposed of by directing the opposite party authorities to consider the case of the petitioner for regularization of his services having regard to the relevant provisions of the 2019 rules by treating him as having completed six years of service as Contractual Pharmacist under the RKS Scheme continuously as on the date of commencement of the said Rules. The above exercise shall be completed within a period of three months 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 29th September, 2022/A.K. Rana