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IN THE HIGH COURT OF ORISSA AT CUTTACK

WPC(OAC) Nos.1568 of 2018 & 4573 of 2016

In the matter of an application under Section 19 of the Administrative Tribunal Act, 1985.

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WPC(OAC) No.1568 of 2018

Sk. Saifur Raheman & Others .... **Petitioners**

-versus-

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

For Petitioners : M/s.S. K. Das, S.K. Mishra & P.K.Behera.

For Opp. Parties : Addl. Standing Counsel Mr.D.K.Mohanty.

WPC(OAC) No.4573 of 2016

Chittaranjan Biswal & Others .... **Petitioners**

-versus-

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

For Petitioners : M/s.S. B. Jena, S.Behera, A. Mishra, S.Soren, C.K.Sahoo & S.S. Mohanty.

For Opp. Parties : Addl. Standing Counsel Mr.D.K.Mohanty.

PRESENT:

THE HONBLE JUSTICE BIRAJA PRASANNA SATAPATHY

Date of Hearing:22.03.2023 and Date of Judgment:02.05.2023

Biraja Prasanna Satapathy, J.

1. Since issue involved in both the cases are identical and the challenge made in the writ petitions are also similar, both the matters are heard analogously and disposed of vide the present common order.

Both the Writ Petitions have been filed seeking a direction on the Opposite Parties to regularize the services of the Petitioners from the date of their initial appointment and with a further direction to pay all consequential service and financial benefits.

2. W.P.(C) No.1568 of 2018 has been filed by 8 numbers of Petitioners and W.P.(C) No.4523 of 2016 though was initially filed by 14 numbers of Petitioners but subsequently confined to all the Petitioners save and except Petitioner Nos.5, 6 and 14.

3. It is the case of the Petitioners that all of them though were engaged on DLR basis after 12.04.1993, but in view of their long continuance w.e.f. from their initial date of appointment till date they are eligible and entitled for their absorption in the regular establishment.

4. It is contended that though as per the Finance Department Resolution dated 15.05.1997, engagement of DLRs/NMRs after 12.04.1993 was held not permissible but the Petitioners were not only engaged after 12.04.1993 but also they were allowed to continue since their initial date of appointment.

4.1. It is also contended that similarly situated NMR employees engaged after 12.04.1993 in the Department of Water Resources as have been brought over to the work-charged establishment vide order dated 16.12.2008 under Annexure-4, the Petitioners are eligible and entitled to get similar benefits of regularization.

4.2 It is also contended that as per the decision of the Hon'ble Apex Court in the case of ***Secretary, State of Karnataka vs. Uma Devi (3)***, ***(2006) 4 SCC-1, State of Karnatak vs. M.L.Keshari***, ***(2010) 9 SCC 247, Nihal Singh & Others vs. State of Punjab & Others***, ***2013 (14) SCC 65*** and ***Amarkant Rai vs. State of Bihar & Others, 2015 (8) SCC 265,*** the petitioners are eligible and entitled for their absorption in their regular establishment. In view of such long continuance on DLR basis, it is also to be held that the Petitioners are continuing as against substantive vacant posts.

4.3. It is accordingly contented that non-consideration of the claim of the Petitioners for their absorption in the regular establishment only on the ground that they have been engaged after the cut-off date so fixed in resolution dated 15.05.1997 is not sustainable in the eye of law, in view of the decision of the Hon'ble Apex Court so cited (supra) and the benefit extended in favour of similarly situated NMRs vide order under Annexure-4 dated 16.12.2008. Hence necessary direction be issued to the Opposite Parties to absorb the Petitioners in the regular establishment in the light of the order passed under Annexure-4.

5. Mr. D.K. Mohanty, learned Addl. Standing Counsel for the State on the other hand made his submission basing on the stand taken in the counter affidavit. It is the main contention of the Opposite Parties that since the Petitioners are engaged as DLRs after 12.04.1993 in violation of the stipulation contained in the Finance Department Resolution dated 15.05.1997, the Petitioners in spite of their long continuance are not eligible and entitled for their absorption in the regular establishment.

5.1. It is contended that the Petitioners are all engaged after 12.04.1993 i.e. after the ban was imposed by the State for such engagement of DLR/NMR. It is accordingly

contended that in view of the nature of engagement of the Petitioner after the cut-off date, the Petitioners are not eligible and entitled to get the benefit of regularization.

6. Taking into account the stand taken by the learned counsel appearing for the Petitioners in both the cases that similarly situated NMRs engaged in Water Resources Department after 12.04.1993 have been absorbed in the regular establishment, this Court vide order dated 09.09.2022 directed the learned State Counsel to obtain instruction on the same and file an affidavit in that regard. Pursuant to the said order passed by this Court on 09.09.2022, an affidavit was filed by the Opposite Party No.4 on 27.02.2023. It is indicated in the said affidavit that in terms of the order issued under Annexure-4, 18 numbers of NMR employees working in the Water Resources Department were brought over to the work charged establishment and they have not yet been regularized in the regular establishment.

6.1. It is further submitted in the affidavit that those 18 numbers of employees were brought over to the work charged establishment vide order under Annexure-4 and when they represented for their regularization on the ground that 6 persons have been regularized with creation of 6 numbers of posts on abolition of certain post of Khalasi

under the establishment of S.E., Central Irrigation Circle, Bhubaneswar. Those 6 numbers of persons have been regularized with concurrence of the Finance Department vide Letter No. 5603 dated 20.12.1983 in regular establishment.

6.2. It is also submitted that those 18 numbers of persons were brought over work to the work charged establishment vide order under Annexure-4 for a particular purpose and the Opposite Party No.4 had no instruction as to whether those 18 numbers of persons have been regularized in the meantime.

Those 6 persons who have been regularized as claimed, has been done with concurrence of the Finance Department. However, it is again submitted that since the Petitioners were appointed after 12.04.1993, they are not eligible for their absorption in the regular establishment.

7. I have heard Mr.S. K. Das, learned counsel for the Petitioners and Mr.D.K. Mohanty, learned Addl. Standing Counsel for the State-Opposite Parties. On their consent, these matters were taken up for final disposal at the stage of admission.

8. Having heard learned counsel for the Parties and after going through the materials available on record, it is found

that all the Petitioners though were engaged as DLR after 12.04.1993, but all most all of them in the meantime have completed more than 20 years of continuance service as a DLR.

8.1. Hon'ble Apex Court in the case of ***Uma Devi*** in Para-44 has held as follows:-

> *"**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 wages are being now employed. The process must be set in motion within six months from this date. We also clarify that regularisation, if any already made, but not subjudice, need not be reopened based on this judgement, 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."*

8.2. Similarly Hon'ble Apex Court in the case of **M.L. Keshari** in Para- 8 and 13 has held as follows:-

> ***"8.*** *Umadevi (3) casts a duty upon the Government or instrumentality concerned, to take steps to regularise 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 (3) 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).*
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> ***13****. The Division Bench of the High Court has directed that the cases of the respondents should be considered in accordance with law. The only further direction that needs to be given, in view of Umadevi (3), is that the Zila Panchayat, Gadag should not undertake an exercise within six months, as a general one-time regularisation exercise, to find out whether there are daily-wage/casual/adhoc employees serving the Zila Panchayat and if so whether such employees (including the respondents) fulfil the requirements mentioned in para-53 of Umadevi (3). If they fulfill them, their services have to be regularised. If such an exercise has already been undertaken by ignoring or omitting the cases of Respondents 1 to 3 because of the pendency of these cases, then their cases shall have to be considered in continuation of the said one-time exercise within three months. It is needless to say that if the respondents do not fulfill the requirements of para 53 of Umadevi (3), their services need not be regularised. If the employees who have completed ten years' service do not possess the educational qualifications prescribed for the post, at the time of their appointment, they may be considered for regularisation in suitable lower posts."*

8.3. In the case of **Nihal Singh** in Para-35 to 38, Apex Court has held as follows:-

> ***"35****. Therefore, it is clear that the existence of the need for creation of the posts is a relevant factor with reference to which the executive government is required to take rational decision based on relevant consideration. In our opinion, when the facts such as the ones obtaining tin the instant case demonstrate that there is need for the creation of posts, the failure of the executive government to apply its mind and take a decision to create posts or stop extracting work from persons such as the appellants*

herein for decades together itself would be arbitrary action (inaction) on the part of the State.

21. In the first instances, the petitioner and the other Election Commissioners were appointed when the work of the Commission did not warrant their appointment. The reason given by Respondent 1 (Union of India), that on account of the Constitution (61" Amendment) Act reducing the voting age and the Constitution (64th Amendment) and (65 Amendment) Bills relating to election to the Panchayats and Nagar Paliks, the work of the Commission was expected to increase and, therefore, there was need for more Election Commissioners, cuts notice. As has been pointed out by Respondent 2, the work relating to revision of electoral roll on account of the reduction of voting age was completed in all the States except Assam by the end of July 1989 itself, and at the Conference of the Chief Electoral Officers at Tirupati. Respondent 2 had declared that the entire preparatory work relating to the conduct of the then ensuing general elections to the Lok Sahba would be completed by August in the whole of the country except Assam. Further the Constitution (64th and 65th Amendment) Bills had already fallen in Parliament before the appointments. In fact, what was needed was more secretarial staff for which the Commission was pressing, and not more Election Commissioners. What instead was done was to appoint the petitioner and the other Election Commissioner on 16.01.1989. Admittedly, further the view of the Chief Election Commissioner were not ascertained before making the said appointments. In fact, he was presented with them for the first time in the afternoon of the same day i.e, 16-10-1989.

***36**. The other factor which the State is required to keep in mind while creating or abolishing posts is the financial implications involved in such a decision. The creation of posts necessarily means additional financial burden on the exchequer of the State. Depending upon the priorities of the State, the allocation of the finance is no doubt exclusively within the domain of the legislature. However in the instant case creation of new posts would not create any additional financial burden to the State as the various banks at whose disposal the services of each of the appellants is made available have agreed to bear the burden. If absorbing the appellants into the services of the State and providing benefits on a par with the police officers of similar rank employed by the State results in*

further financial commitment it is always open for the State to demand the banks to meet such additional burden. Apparently no such demand has ever been made by the State. The result is the various banks which avail the services of these appellants enjoy the supply of cheap labour over a period of decades. It is also pertinent to notice that these banks are public sector banks.

37. *We are of the opinion that neither the Governmnet of Punjab nor these public sector banks can continue such a practice consistent with their obligations to function in accordance with the Constitution. Umadevi (3) judgement cannot became a licence for exploitation by the State and its instrumentalities.*

38. *For all the abovementioned reasons, we are of the opinion that the appellants are entitled to be absorbed in the services of the State. The appeal are accordingly allowed. The judgements under appeal are set aside."*

8.4. In the case of **Amarkanti Rai,** Hon'ble Apex Court in Para-8, 9, 11 to 14 has held as follows:-

*"**8**. Insofar as contention of the respondent that the appointment of the appellant was made by the Principal who is not a competent authority to make such appointment and is in violation of the Bihar State Universities Act and hence the appointment is illegal appointment, it is pertinent to note that the appointment of the appellant as night guard was done out of necessity and concern for the College. As noticed earlier, the Principal of the College vide letters dated 11-3-1988, 7-1-1993, 8-1-2002 and 12-7-2004 recommended the case of the appellant for regularisation on the post of night guard and the University was thus well acquainted with the appointment of the appellant by the then Principal even though the Principal was not a competent authority to make such appointments and thus the appointment of the appellant and other employees was brought to the notice of the University in 1988. In spite of that, the process for termination was initiated only in the year 2001 and the*

appellant was reinstated w.ef. 3-1-2002 and was removed from services finally in the year 2007. As rightly contended by the learned counsel for the appellant, for a considerable time, the University never raised the issue that the appointment of the appellant by the Principal is ultra vires the rules of the BSU Act. Having regard to the various communications between the Principal and the University and also the educational authorities and the facts of the case, in our view, the appointment of the appellant cannot be termed to be illegal, but it can only be termed as irregular.

***9**. The Human Resources Development, Department of Bihar Government, vide its Letter dated 11-7-1989 intimated to the Registrar of all the Colleges that as per the settlement dated 26-4-1989 held between Bihar State University and College Employees' Federation and the Government it was agreed that the services of the employees working in the educational institutions on the basis of prescribed staffing pattern are to be regularised. As per sanctioned staffing partien, in Ramashray Baleshwar College, there were two vacant posts of Class IV employees and the appellant was appointed against the same. Further, Resolution No. 989 dated 10-5-1991 issued by the Human Resources Development Department provides that employee working up to 10-5-1986 shall be adjusted against the vacancies arising in future. Although, the appellant was appointed in 1983 temporarily on the post that was not sanctioned by the State Government, as per the above communication of the Human Resources Development Department, it is evident that the State Government issued orders to regularise the services of the employees who worked up to 10-5-1986. In our considered view, the High Court ought to have examined the case of the appellant in the light of the various communications issued by the State Government and in the light of the*

circular, the appellant is eligible for consideration for regularisation.

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***11**. Elaboration upon the principles laid down in Umadevi (3) Case and explaining the difference between irregular and illegal appointments in State of Karnataka Vs. M.L Kesari, this Court held as under (ML Kesari case SSC p 250, para 7) 7. It is evident from the above that there is an exception to the general principles against 'regularisation enunciated in Umadevi (3). 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 possesses the prescribed minimum qualifications, the appointments will be considered to be illegal., But where the persons 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."

***12.** Applying the ratio of Umadevi (3) case, this Court in Nihal Singh v. State of Punjab directed the absorption of the Special Police Officers in the services of the State of holding as under: (Nihal Singh Case, SCC pp. 79-80, paras- 35-36)*

"35. Therefore, it is clear that the existence of the need for creation of the posts is a relevant factor with reference to which the executive government is required to take

rational decision based on relevant consideration. In our opinion, when the facts such as the ones obtaining in the instant case demonstrate that there is need for the creation of posts, the failure extracting work from persons such as the appellants herein for decades together itself would he arbitrary action (inaction) on the part of the State. 36. The other factor which the State is required to keep in mind while creating or abolishing posts is the financial implications involved in such a decision. The creation of posts necessarily means additional financial burden on the exchequer of the State. Depending upon the priorities of the State, the allocation of the finances is no doubt exclusively within the domain of the legislature. However in the instant case creation of new posts would not create any additional financial burden to the State as the Various banks at whose disposal the services of each of the appellants is made available have agreed to bear the burden. If absorbing the appellants into the services of the State and providing benefits on a par with the police officers of similar rank employed by the State results in the banks to meet such additional burden Apparently no such demand has ever been made by the State. The result is the various banks which avail the services of these appellants enjoy the supply of cheap labour over a period of decades. It is also pertinent to notice that these banks are public sector banks

13. *In our view, the exception carved out in para 53 of Umadevi (3)3 is applicable to the facts of the present case. There is no material placed on record by the respondents that the appellant has been lacking any qualification or bore any blemish record during his employment for over two decades. It is pertinent to note that services of similarly situated persons on daily wages for regularisation viz. one Yatindra Kumar Mishra who was appointed on daily wages on the post of Clerk was regularised w.e.f. 1987. The appellant although initially*

working against unsanctioned post, the appellant was working continuously since 3-1-2002 against sanctioned post. Since there is no material placed on record regarding the details whether any other night guard was appointed against the sanctioned post, in the facts and circumstances of the case, we are inclined to award monetary benefits to be paid from 1.-1-2010.

14. *Considering the facts and circumstances of the case that the appellant has served the University for more than 29. years of the post of night guard and that he has served the College on daily wages, in the interest of justice, the authorities are directed to regularise the services of the appellant retrospectively w.ef. 3-1-2002 (the date on which he rejoined the post as per the direction of the Registrar).”*

8.5. Similarly, this Court in the case of ***Dr. Prasanna Kumar Mishra vs. State of Odisha & Others*** reported in ***2016(1) ILR (CUT)-373*** in Para-22 has held as follows:-

“22. *In that view of the matter, this Court is of the considered view that the opposite parties should absorb the petitioner on regular basis against sanctioned vacant post taking into account the length of service rendered by him as a Lecturer in Mathematics in which he is continuing without insisting him to undergo the rigors of the selection procedure laid down under the BPUT Act and Rules framed thereunder reason being in the meantime the petitioner has become over aged and he has also been exploited for 20 years for no reasons though he has qualified in all the interviews conducted by the authority for his engagement on contractual basis. The petitioner being not a backdoor entrant to the service, the opposite party-University should extend all consequential benefits as due and admissible in accordance with law as expeditiously as possible preferably within a period of four months. The writ petition is allowed. No order to cost.”*

8.6. Placing reliance on the aforesaid decisions, this Court vide its judgment dated 17.02.2023 in WPC(OAC) Nos.373, 374 and 375 of 2019, while allowing similar claim directed the Opposite Parties to absorb the Petitioners therein in the regular establishment. This Court in Para-6.8 of the judgment dated 17.02.2023 has held as follows:-

> ***"6.8.*** *Therefore, placing reliance on the decisions of the Hon'ble Apex Court as well as of this Court as cited (supra) and taking into account the fact that the Petitioners who possess similar qualification as like Gram Panchayat Technical Assistants and the only difference being that the Petitioners were engaged as Technical Consultants and the other Diploma Engineers as Gram Panchayat Technical Assistants on being sponsored from out of the Panel, this Court is inclined to hold that the Petitioners are eligible and entitled for their absorption in the regular establishment. While holding so, this Court directs the Opp. Parties to absorb the Petitioners in the regular establishment within a period of three (3) months from the date of receipt of this order".*

8.7. In view of the materials available on record and in view of such long continuance for more than 20 years, it is to be held that the Petitioners are continuing as against substantive vacancies and the Opposite Parties are required to absorb the Petitioners in the regular establishment and / or in the work charged establishment. Therefore, this Court placing reliance on the decisions as cited (supra) directs the Opposite Parties to absorb the Petitioners in the regular establishment and/or in the work charged establishment within a period of three (3) months from the date of receipt of this order.

9. With the aforesaid observations and directions, both the Writ Petitions are disposed of.

SUBRAT KUMAR BARIK

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Date: 2023.05.04 17:39:59 +05'30'

(Biraja Prasanna Satapathy)
Judge

Orissa High Court, Cuttack
Dated the 2nd of May, 2023/Subrat