

# THE HIGH COURT OF SIKKIM : GANGTOK

(Civil Extraordinary Jurisdiction)

DATED : 14<sup>th</sup> November, 2022

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SINGLE BENCH : THE HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE

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WP(C) No.25 of 2020

**Petitioners** : Sonam Thendup Bhutia and Another

**versus**

**Respondents** : State of Sikkim and Another

Application under Articles 226/227 of the Constitution of India

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## Appearance

Mr. A. K. Upadhyaya, Senior Advocate with Ms. Rachhitta Rai, Advocate for the Petitioners.

Mr. Sudesh Joshi, Additional Advocate General with Mr. Yadev Sharma, Additional Government Advocate for the State-Respondents.

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## J U D G M E N T

Meenakshi Madan Rai, J.

**1(i)** The issue in this Writ Petition concerns the alleged indifference of the State-Respondents to the plea of the Petitioners appointed on *ad hoc* as Assistant Professors to regularise their services on parity with 28 (twenty eight) others, who were absorbed as regular employees in the post of Assistant Professors.

**(ii)** The Petitioner No.1 was appointed as Assistant Professor (Zoology) vide Office Order No.2063/DIR(HE)/HRDD, dated 02-02-2013, on *ad hoc* basis in the Namchi Government College, South Sikkim, while the Petitioner No.2 was appointed in the same College also on *ad hoc* as Assistant Professor (Botany) vide Office Order No.2380/DIR(HE)/HRDD, dated 13-09-2013. They both continue to serve in the Namchi Government College.

**2.** Learned Counsel for the Petitioner relying on Notification bearing No.F(85)/17/GEN/DOP, dated 27-04-2018,

canvassed that the contents of the Notification assured all eligible temporary employees serving in the State on Workcharge, Muster Roll, *ad hoc* and Consolidated pay, continuously for five years or more as on 31-12-2018, under various Departments, that they would be considered for regularisation. That, pursuant thereto, vide Office Order No.348/DIR(HE)/HRDD, dated 22-09-2018, 8 (eight) persons were appointed to the post of Assistant Professors in Bhutia, Limboo and Lepcha respectively, sans interview, in the Pay Band of Rs.15600-39100 with Academic Grade Pay of Rs.6,000/- per month, plus admissible allowances, with effect from the date of their joining. The Petitioners who were also equally eligible were excluded from such appointment. That, aggrieved by the exclusion, the Petitioner No.1 filed an application before the Respondent No.2 under the Right to Information Act seeking information on the number of *ad hoc* Assistant Professors whose services had been regularised. The concerned authority informed that 28 (twenty eight) *ad hoc* Assistant Professors in Humanities, Commerce and Language subject were regularised/absorbed as 'regular' to the post of Assistant Professors. It was contended that the inequity meted out to the Petitioners is apparent as the services of one Tshering Chopel Bhutia whose name appears at Serial No.22 in the response provided by the Respondent No.2 (Annexure P8 dated 13-01-2020) had also been regularised, although, he had been initially appointed on *ad hoc* along with the Petitioner No.1 vide Office Order dated 02-02-2013. That, a legal notice was issued to the Respondent Nos. 1 and 2 (Annexure P9) by the Petitioners requesting regularisation of their services and

thereby parity with the other Assistant Professors, to no avail.

Hence, the prayers *inter alia* in the Writ Petition;

- (i) To direct the official Respondents to regularised (sic) the services of the Petitioners as per the Notification dated 27-04-2018, since they are duly qualified and have the same qualification as of the regular Assistant Professors and after perusal of the records, causes shown, if any and upon hearing the parties, may be pleased to make the Rule absolute and/or pass any other order/orders/directions as Your Lordship deem fit and proper for the ends of justice.

**3.** Learned Additional Advocate General, for the State-Respondents, repudiated the Petitioners' claim contending that regularisation of service in terms of Notification dated 27-04-2018 *supra* was in fact issued by the State-Respondent No.1 for the purpose of regularisation of services of temporary employees serving in the Grade Pay of ₹ 1400, ₹ 1800 and ₹ 2300 respectively, falling under Group 'C' and 'D' categories. That, undisputedly the pay scales prescribed for the post of Assistant Professors being higher than the scales prescribed in the Notification excluded the Petitioners from the ambit of the Notification. This has also been clarified by the Respondent No.1 on enquiry by the Respondent No.2 as to the applicability of the Notification for the post of Assistant Professors. Besides, regularisation for the Petitioners was not possible the reason being that there were and are no vacant substantive posts of Assistant Professors for the subjects taught by the Petitioners. That, in any event, neither the appointment of the persons with whom the Petitioners claim parity nor their subsequent regularisation have been assailed by the Petitioners. Drawing strength from ***R. Muthukumar and Others vs. Chairman and Managing Director***

**TANGEDCO and Others**<sup>1</sup> it was canvassed that no negative equality can be claimed. Hence, the Petition deserves a dismissal.

**4.** Having heard Learned Counsel for the parties and perused all documents, the question which presents itself to this Court is; Whether the Petitioners are entitled to regularisation of services on parity with the other Assistant Professors as claimed?

**5(i).** Notification dated 27-04-2018 bearing No.F(85)/17/GEN/DOP is extracted hereinbelow for convenient reference;

“.....

GOVERNMENT OF SIKKIM  
DEPARTMENT OF PERSONNEL, ADMINISTRATIVE REFORMS,  
TRAINING AND PUBLIC GRIEVANCES  
GANGTOK-737101

No. F(85)/17/GEN/DOP Dated: 27/04/2018

NOTIFICATION

The State Government is hereby pleased to decide the following:-

1. Services of all eligible temporary who are continuously serving in the State on Workcharged/ Muster Roll/ Adhoc and on Consolidated pay for 5 (five) years or more as on 31/12/2018 under various departments shall be considered for regularisation.
2. Male Home Guards who have rendered cumulative service of 15 (fifteen) years and above on 31/12/2018 shall be considered for regularisation as Security Guards under Health Care, Human Services and Family Welfare Department.
3. Women Home Guards who have rendered cumulative service of 15 (fifteen) years and above as on 31/12/2018 shall be considered for regularisation as Office Attendants under various departments.
4. The temporary employees whose services would be regularized as above shall be placed in the pay scale corresponding to the existing Grade Pay of ₹ 1400, ₹ 1800 and ₹ 2300 respectively as required.

By order.

Sd/-  
(Tenzing Gelek) IAS  
COMMISSIONER-CUM-SECRETARY  
DEPARTMENT OF PERSONNEL, ADMINISTRATIVE REFORMS,  
TRAINING AND PUBLIC GRIEVANCES

.....”

<sup>1</sup> 2022 SCC OnLine SC 151

**(ii)** A bare reading of the Notification, specifically Paragraph 4, reveals that it applies to employees in Group 'C' and 'D' of the Government of Sikkim in the pay scales indicated which surely does not include in its scheme the post of Assistant Professor, whose consolidated pay is apparently higher as seen in Annexure P3, the Order of *ad hoc* appointment of the Petitioner No.1 and Annexure P4 of the Petitioner No.2, than that reflected in the Notification *supra*. The Petitioners have contended that Tshering Chopel Bhutia whose name appears in Sl. No.3 of the Office Order dated 22-09-2018 and at Sl. No.22 of Annexure P-8) the list of *ad hoc* Assistant Professors whose services were regularised, was appointed along with the Petitioner No.1 as *ad hoc* Assistant Professor, vide Office Order No.2063/Dir(HE)/HRDD, dated 02-02-2013. In this context, the submissions of Learned Additional Advocate General that there were and are no vacant substantive posts of Assistant Professors for the subject of 'Zoology' and 'Botany' cannot be brushed aside. Besides, it is also worth noting that in ***State of Gujarat and Others vs. R. J. Pathan and Others***<sup>2</sup> the Supreme Court observed that the High Court cannot issue orders for creating supernumerary posts.

**6(i).** This Court is alive to the constitutional scheme which envisages employment by the Government and its instrumentalities on the basis of a procedure established for the purpose. Any public employment must be in terms of the constitutional scheme exhibiting *inter alia* Justice, Equity and Fair Play. Article 16 of the Constitution of India emphasises that there shall be equality of opportunity for all citizens in matters relating to employment or

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<sup>2</sup> (2022) 5 SCC 394

appointment to any office under the State and there shall be no discrimination to any citizen on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them. Article 14 of the Constitution is a positive concept and cannot be invoked if by some error or illegality an appointment is issued and the employee has obtained a benefit. This concept has been elucidated in **R. Muthukumar** (*supra*) wherein the Supreme Court observed as follows;

**"28.** A principle, axiomatic in this country's constitutional lore is that there is no negative equality. In other words, if there has been a benefit or advantage conferred on one or a set of people, without legal basis or justification, that benefit cannot multiply, or be relied upon as a principle of parity or equality. In *Basawaraj v. Special Land Acquisition Officer* [(2013) 14 SCC 81], this court ruled that:

*"8. It is a settled legal proposition that Article 14 of the Constitution is not meant to perpetuate illegality or fraud, even by extending the wrong decisions made in other cases. The said provision does not envisage negative equality but has only a positive aspect. Thus, if some other similarly situated persons have been granted some relief/benefit inadvertently or by mistake, such an order does not confer any legal right on others to get the same relief as well. If a wrong is committed in an earlier case, it cannot be perpetuated."*

.....

**30.** In view of the foregoing, it is held that the aggrieved appellants, and the respondent applicants (in TANGEDCO's appeal) could not claim the benefit of parity; their writ petitions were founded on the compromise order, which cannot be justified in law. The appeals of the aggrieved appellants, against the judgment and order of the Division Bench of the Madras High Court dated 02.08.2018, has to fail; it is accordingly dismissed. ...."

**(ii)** It is a settled position that appointment to any post under the State can only be made after issuance of an advertisement inviting applications from eligible candidates and selecting such candidates on merit through written examination or interview. Having said that, it is essential to note that the

Petitioners have no grievance against the method of appointment and regularisation of the services of the persons with whom they claim parity. This is not the challenge in this Writ Petition. They are merely discontented that they have been left out of the process of regularisation by the State-Respondents. It is now no more *res integra* that regularisation in fact cannot be a mode of appointment. A post must be created or sanctioned before filling it up. Regularisation has to be done in accordance with Rules and not *dehors* the Rules. Therefore, any order for absorption and regularisation of a person not appointed in accordance with Rules would fly in the face of the mandate of law as it would result in denial of equal opportunity in the matter of employment to other eligible and competent candidates. It is appropriate to recapitulate that in ***University of Delhi vs. Delhi University Contract Employees Union and Others***<sup>3</sup> the Court made reference to the ratiocination in ***Secretary, State of Karnataka and Others vs. Uma Devi (3) and Others***<sup>4</sup> wherein it was observed as follows;

**"3.** .....  
E) .....

"2. All the issues which have been urged in the present petition stand settled against the petitioners by the Constitution Bench judgment of the Supreme Court in the case of *Secretary, State of Karnataka v. Umadevi*, (2006) 4 SCC 1. The Supreme Court in the case of *Umadevi* (supra) has laid down the following ratio:—

"(I) The questions to be asked before regularization are:—

(a)(i) Was there a sanctioned post (court cannot order creation of posts because finances of the state may go haywire), (ii) is there a vacancy, (iii) are the persons qualified persons and (iv) are the appointments through regular recruitment process of calling

<sup>3</sup> 2021 SCC OnLine SC 256

<sup>4</sup> (2006) 4 SCC 1

all possible persons and which process involves inter-se competition among the candidates.

(b) A court can condone an irregularity in the appointment procedure only if the irregularity does not go to the root of the matter.

(II) For sanctioned posts having vacancies, such posts have to be filled by regular recruitment process of prescribed procedure otherwise, the constitutional mandate flowing from Articles 14, 16, 309, 315, 320 etc. is violated.

(III) In case of existence of necessary circumstances the government has a right to appoint contract employees or casual labour or employees for a project, but, such persons form a class in themselves and they cannot claim equality (except possibly for equal pay for equal work) with regular employees who form a separate class. Such temporary employees cannot claim legitimate expectation of absorption/regularization as they knew when they were appointed that they were temporary inasmuch as the government did not give and nor could have given an assurance of regularization without the regular recruitment process being followed. Such irregularly appointed persons cannot claim to be regularized alleging violation of Article 21. Also the equity in favour of the millions who await public employment through the regular recruitment process outweighs the equity in favour of the limited number of irregularly appointed persons who claim regularization.

(IV) Once there are vacancies in sanctioned posts such vacancies cannot be filled in except without regular recruitment process, and thus neither the court nor the executive can frame a scheme to absorb or regularize persons appointed to such posts without following the regular recruitment process.

(V) At the instance of persons irregularly appointed the process of regular recruitment shall not be stopped. Courts should not pass interim orders to continue employment of such irregularly appointed persons because the same will result in

stoppage of recruitment through regular appointment procedure.

(VI) If there are sanctioned posts with vacancies, and qualified persons were appointed without a regular recruitment process, then, such persons who when the judgment of *Uma Devi* [(2006) 4 SCC 1] is passed have worked for over 10 years without court orders, such persons be regularized under schemes to be framed by the concerned organization.

(VII) The aforesaid law which applies to the Union and the States will also apply to all instrumentalities of the State governed by Article 12 of the Constitution.”

**(iii)** The ratio *supra* therefore lays down that wherever there are sanctioned posts with vacancies and qualified persons were appointed without a regular recruitment process then such persons who had worked for over 10 (ten) years when the Judgment of *Uma Devi* (*supra*) was pronounced, be regularised on the scheme to be framed by the concerned organisation, as a onetime measure. The Judgment further specifically directs that Courts should refrain from issuing orders preventing regular selection or recruitment at the instance of persons who have not secured regular appointments as per procedure established. Pertinently, in Paragraph 46 to Paragraph 48 (*ibid*) the Supreme Court observed that temporary, contractual, casual or daily wage *ad hoc* employees appointed *dehors* the constitutional scheme to public employment have no legitimate expectation to be absorbed or regularised or granted permanent continuation in service on the ground that they have continued for a long time in service.

**(iv)** On the same lines apposite reference may be made to *Union of India and Others vs. Ilmo Devi and Another*<sup>5</sup> where the

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<sup>5</sup> 2021 SCC OnLine SC 899

Supreme Court while referring to the decision of ***State of Rajasthan vs. Daya Lal***<sup>6</sup> held as follows;

**“12.** We may at the outset refer to the following well-settled principles relating to regularisation and parity in pay, relevant in the context of these appeals:

- (i) **The High Courts, in exercising power under Article 226 of the Constitution will not issue directions for regularisation, absorption or permanent continuance, unless the employees claiming regularisation had been appointed in pursuance of a regular recruitment in accordance with relevant rules in an open competitive process, against sanctioned vacant posts.** The equality clause contained in Articles 14 and 16 should be scrupulously followed and Courts should not issue a direction for regularisation of services of an employee which would be violative of the constitutional scheme. While 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, back door entries, appointments contrary to the constitutional scheme and/or appointment of ineligible candidates cannot be regularised.

.....” [emphasis supplied]

(v) In ***Union of India and Another vs. Kartick Chandra Mondal and Another***<sup>7</sup>, the Supreme Court observed that;

**“25.** Even assuming that the similarly placed persons were ordered to be absorbed, the same if done erroneously cannot become the foundation for perpetuating further illegality. If an appointment is made illegally or irregularly, the same cannot be the basis of further appointment. An erroneous decision cannot be permitted to perpetuate further error to the detriment of the general welfare of the public or a considerable section. This has been the consistent approach of this Court. However, we intend to refer to a latest decision of this Court on this point in *State of Bihar v. Upendra Narayan Singh* [(2009) 5 SCC 65], the relevant portion of which is extracted hereinbelow: (SCC p. 102, para 67)

“67. By now 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

<sup>6</sup> (2011) 2 SCC 429

<sup>7</sup> (2010) 2 SCC 422

committed in favour of any individual or a 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. ....”

.....” [emphasis supplied]

**7.** Thus, while examining the merits of the case and the contentions raised, evidently the Petitioners are not aggrieved with the method of appointment and regularisation of services of the Assistant Professors. They merely seek parity with them. The plethora of Judgments referred to hereinabove and the ensuing discussions reveal with clarity the position and the unequivocal conclusion that there can be no relief for the Petitioners on the anvil of negative equality.

**8.** As a consequence, the Petitioners are not entitled to the reliefs claimed.

**9.** Writ Petition stands dismissed and disposed of accordingly.

**10.** No order as to costs.

**( Meenakshi Madan Rai )**  
**Judge**

14-11-2022

Approved for reporting : **Yes**