WP(C) 166/2005
BEFORE
THE HON'BLE MR. JUSTICE B. K. SHARMA
(1) The first three writ petitions have been filed by 104 numbers of petitioners making a grievance against the same set of action taken by the respondents against them towards termination of their services on the ground of their appointments being illegal and void ab initio. The remaining three writ petitions have been filed by the same very petitioners claiming payment of their salary stated to be payable from July, 2004 till termination of their services with effect from 15. 3. 2005. All the writ petitions were heard analogously and are being disposed of by this common judgment and order.

(2) W. P. (C) No. 166 (AP)/05 has been filed by four petitioners making a challenge to Annexure-11 series orders dated 15. 3. 2005 by which their services under the respondents have been terminated. They were appointed by Annexure-2 series orders dated 10. 11. 2003, 2. 2. 2000, 3. 12. 1999 and 15. 9. 2003 respectively. Their such appointments were in the capacity of Nursing/sanitary Assistant. All of them were appointed on compassionate ground. When the petitioners were continuing in their services, show-cause notice dated 17. 12. 2004 were issued to them individually alleging conspiracy on their part with the concerned officers/officials of the office of the District Medical Officer (DMO) under whom they were appointed and serving. It was alleged that all of them were appointed without any sanctioned post and their such appointments were in violation of existing rules and procedure. It was indicated that the DMO who had issued the appointment order in their favour was not competent to appoint the petitioners on behalf of the Government without there being any sanctioned post. The petitioners were directed to furnish their respective replies within 7 days.

(3) On receipt of the said notice individually served on the petitioners, they submitted their show cause replies on 22. 12. 2004 highlighting as to how they were appointed by the aforementioned appointment orders. In their show cause replies they had stated they had been serving under the respondents like any other regular appointee. They pleaded that they were not aware of the rules and regulations and as to whether there was any sanctioned post or not and also as to who was the authority to make appointment.

(4) Simultaneously, the petitioners also approached this Court by filing a writ petition being W. P. (C) No. 301/05 making a challenge to the show cause notice. The writ petition was disposed of by order dated 12. 1. 2005 refusing to interfere with the show cause notice and instead it was provided that the DMO, Tawang who had issued the show-cause notices would finalize the matter after affording opportunity to the petitioners of personal hearing. Liberty was granted to the petitioners to agitate their grievance, if they were aggrieved. As regards the payment of arrear salary etc. , it was provided that if the petitioners were entitled to such salary, the respondents would ensure payment of the same.

(5) After the aforesaid order of this Court, it appears that the petitioners made representations for release of their arrear salary with effect from July, 2004 upto date. The petitioners were afforded personal hearing vide office Memorandum dated 25. 2. 2005 fixing the dates for such hearing. Thereafter, the petitioners submitted further representations to the show cause notice on 22. 3. 2005 urging various grounds defending their appointments. Thereafter, by Annexure-11 series orders dated 15. 3. 2005, the services of the petitioners were terminated. The basic grounds for termination of the services of the petitioners are that they were appointed against non-existent post and that too in violation of the rules and procedure of appointment. It has also been stated in the impugned orders of termination that the petitioners were appointed without any advertisement, selection and recruitment process in violation of the rules and procedure. It was further indicated that in absence of any vacant post, the DMO was not competent to appoint the petitioners. Finally it has been stated in the impugned order th

at the very appointments of the petitioners being void ab initio, their services stand terminated. In the order of termination, as regards entitlement of the salary/arrear salary, it has been indicated that the same shall be decided separately.

(6) The second and the third writ petitions involving 13 and 87 petitioners respectively are also on the same set of facts except that they were not appointed on compassionate ground. All the petitioners were appointed in different capacities ranging from Chowkidar, Sanitary Assistant, Nursing Assistant, Peon, to Female Attendant etc. They were appointed by the DMO during the period of 2000-2001. Similarly show cause notices were issued to all the petitioners individually in response to which they submitted their individual replies. They also approached this Court by filing writ petitions being W. P. (C) No. 299/05 and W. P. (C) No. 300/05 which were disposed of by orders dated 12. 1. 2005 issuing similar directions as in respect of the petitioners in the first writ petition. Thereafter, following the same procedure, impugned orders dated 15. 3. 2005 were issued dispensing with the services of the petitioners on the same very grounds as in the case of the petitioners in the first writ petition.

(7) The 4th, 5th and 6th writ petitions have been filed claiming arrear salary from July, 2004 to 15. 3. 2005 on which date the services of the petitioners were terminated.

(8) The respondents have filed their counter-affidavit opposing the claim of the petitioner. According to them the petitioners were appointed in gross violation of the recruitment rules and that too against non-existent posts. In their counter-affidavit, they have highlighted as to how 117 number of Group-D employees were appointed by the then DMO beyond the sanctioned strength. Such illegal appointment were detected by the Treasury Officer, Tawang. Thereafter, following the aforesaid procedure, the services of the petitioners were terminated. As regards the compassionate appointment in W. P. (C) No. 167/05, it is the case of the respondents that such appointments could be made only against 5 per cent quota for such appointment and that too with the approval of the Government. Referring to the orders of appointment made in favour of the four petitioners, the respondents have stated in their counter-affidavit that on the face of it their such appointments were made without any approval of the Government and in the case of other appointees, it is the stand of the respondents that such appointments were made against non-existent post and without following the due procedure laid down in the recruitment rules. Further stand of the respondents is that the required clearance of the Finance Department etc. was also not obtained.

(9) Countering the assertion made by the petitioners that the DMO is the competent authority to make appointment and that the petitioners were appointed against the existing vacancies for which the DMO obtained prior approval from the Director of Health Services, the respondents have stated in their counter-affidavit that the Director of Health Services only indicated that the DMO being competent authority, he was within his competence and jurisdiction to make appointment against Grade-D vacancies. However, same did not mean that the DMO could resort to illegal appointments without any advertisement, selection, determination of eligibility etc. and that too against non-existent post. In paragraph 12 of the counter-affidavit, the respondents have given the details of the illegal appointments gist of which are as follows :

(i)The claim of the petitioner that they offered their candidature in response to an advertisement hung in the Notice Board is absolutely false and that no such advertisement was issued before appointing 117 persons against non-existent. (ii)There are 58 sanctioned Grade-D posts in the establishment of DMO out of which 12 posts are planned post and remaining 46 posts are non-planed or programmed posts. The petitioners were appointed beyond these sanctioned posts. (iii)One Dr. A. C. Saikia, the then DMO made the illegal appointments in connivance with one

Shri U. K. Nair, UDA of his office taking recourse to fraud. Such appointments were made in total violation of the recruitment rules and reservation policies. (iv)Only 22 joining reports are available in the office of the DMO and the joining reports of remaining 95 appointees were not insisted to avoid detection. (v)Although as per the recruitment rules the prescribed educational qualification for any Grade-D post is Middle School passed from a recognized school, no academic qualification was insisted upon. No medical certificate or fitness certificate were obtained from the appointees. (vi)Salary was paid through messenger without maintaining any acquaintance roll. In order to give colour of regular appointment, the appointees were given GPF Account and Group Insurance Account numbers coupled with granting annual increments without any records and indication in the personal file of the appointees. (vii)Till 20. 10. 2004, no personal file, service book, leave account etc. of the illegal appointees were obtained/maintained although they were appointed much before that. (viii) There are no corresponding file by which the appointments were made. According to the concerned UDA, Shri U. K. Nair, since the entire process was irregular and there was no vacancy, they (he and Dr. A. C. Saikia) did not maintain any file pertaining to appointments. Only 30 copies of the appointment orders are available in the office. (xi)The appointments were made without any advertisement, selection, recruitment process etc. in gross violation of the recruitment rules. (x)The Treasury Officer, Tawang detected the irregularity during July, 2004 and returned the pay bills with the objection and the pay and allowance of the appointees had been held up by the Director of Health Services. The fraud could be detected because the list of the Grade-D employees as per the acquaintance roll for the month of July, 2004 was 174 as against sanctioned strength of 56 posts. As per the expenditure submitted by the DMO, Tawang, a sum of Rs. 68,07,872/- has been spent on pay and allowances on the illegal appointees. In other words, the Government of Arunachal Pradesh has incurred loss of an amount of Rs. 68,07,872/- for such fraudulent appointments. (xi)The Government of A. P. has taken prompt action against the erring officials. A criminal case has been registered at the Crime Branch Police Station (PHQ) vide No. CB PS 1/2005, under Sections 468, 420 and 120-B, IPC. Disciplinary proceeding has also been initiated against Dr. A. C. Saikia, the then DMO, Tawang under Rule 9 of the CCS (Pension) Rules, 1970. Shri U. K. Nair has been placed under suspension. (xii)In view of the above anomalies, the services of the petitioners have been terminated after following due procedure by way of issuance of show cause notice and giving personal hearing to the petitioners.

(10) Mr. P. D. Nair, learned counsel for the petitioners strongly argued that mere issuance of show-cause notices to the petitioners asking for their reply was not sufficient. According to him the services of the petitioner could not have been terminated in the manner and method in which the same has been done. Referring to the documents annexed to the counter-affidavit justifying the stand of the respondents that the petitioners were given personal hearing, Mr. Nair submitted that in fact, no such hearing was given to the petitioners. On being asked about the particulars as to the claim of the petitioners that they had offered their candidatures on the basis of the employment notice hung in the notice board of the office and their subsequent interview etc. as has been stated in the writ petition, Mr. Nair expressed his helplessness.

(11) Mr. B. L. Singh, learned senior State counsel, A. P. , referring to the aforementioned stand of the respondents in their counter-affidavit submitted that the very appointments of the petitioners being void ab initio, there was no illegality in terminating their services. As regards the claim of the petitioners for their salary from July, 2004 till termination of their services, Mr. Singh submitted that since the petitioners were appointed against non-sanctioned post, there is no question of payment of any salary to them. He submitted that because of the fraud committed by the then DMO in connivance with the concerned UDA of the office, the State cannot be burdened with payment of salary to the petitioners. As regards the payment of salary for the earlier period, Mr. Singh submitted that payment of salary to the petitioners was stopped on detection of the fraud

committed by the then DMO in appointing the petitioners against non-existent pos t. He submitted that if the appointments of the petitioners were void ab initio, same would naturally entail consequence of non-payment of salary to the petitio ners.

(12) I have given my anxious consideration to the materials on record includin g the submissions made by the learned counsel for the parties. There is no denia l of the fact that the petitioners were appointed without any advertisement, ini tiation of any selection process and completion thereof following the recruitmen t rules. In fact, the respondents in the counter-affidavit have annexed a copy o f the recruitment rules called Arunachal Pradesh Government (Establishment) Clas s-IV Recruitment Rules, 1977. The said rules provide for direct recruitment earm arking the quota of 80 per cent for Arunachal Pradesh Scheduled Tribes candidate s. The required qualification for such appointment has also been laid down. Comp osition of selection board/dpc has also been indicated.

(13) The direct recruitment by any public employment necessarily involves open competition giving equal opportunity to all eligible candidates. In the instant case, no advertisement was issued before appointing the petitioners. No selecti on was conducted and the petitioners were appointed on pick and choose basis and that too against non-existent post. The gist of the illegalities committed by t he then DMO in collaboration with the concerned UDA as reflected in paragraph-12 of the counter-affidavit has been noticed above to which there is no denial on the part of the petitioners. The only plea as could be noticed from the show cau se reply furnished by the petitioners is that they were not aware of the rules a nd regulation and as to who was the competent authority to appoint them. Such pl ea on the part of the petitioners can hardly be said to be tenable. The petition ers having been appointed against non-existent posts without following the proce dure so intrinsically connected with direct recruitment in any public employment , their appointment at the very inception was void ab initio. If that be so, no enforceable legal right accrued to the petitioners on the basis of such illegal appointments. Consequently, they cannot claim observance of the same procedure t owards termination of the service of the regularly appointed person.

(14) The petitioners have pressed into service the correspondence made by the then DMO with the Director of Health Services seeking his approval for appointme nt of Grade-D employees and the approval accorded by the Director of Health Serv ices. In those correspondences the then DMO sought for approval of the Director of Health Services for appointment of Grade-D employees for which the reply of t he Director of Health Services was that the DMO being the competent authority, i t would be open for him to make appointment as per the rules. Such communication made by the Director of Health Services cannot be said to be an approval for re sorting to illegal appointments. The respondents in their counter-affidavit have highlighted as to how there are only 56 sanctioned posts and how altogether 117 illegal appointments were made beyond such sanctioned strength. Such appointmen ts de hors the rules cannot confer any right on the petitioners.

(15) Mr. Nair, learned counsel for the petitioners strongly contended that the petitioners were not given personal hearing in terms of the aforesaid orders pa ssed by this Court by which the earlier batch of writ petitions was disposed of about which a mention has been made above. From the records, it appears that all the petitioners were given reasonable opportunity of being heard in addition to an opportunity of submitting show cause reply. After the disposal of the first batch of writ petitions, the petitioners also submitted their further representa tions. The competent authority after considering the show-cause notices and the replies thereto and also the stand of the petitioners during the personal hearin g, passed the impugned orders terminating their services. The revelation made by the respondents in paragraph-12 of the counter-affidavit are really shocking. I t was in those circumstances, the respondents had no option than to terminate th e services of the petitioners.

(16) As regards the plea of the petitioners that there has been gross violation of the principles of natural justice, learned counsel for the petitioner was asking during the course of hearing as to what the petitioners would have submitted had they been provided with further opportunity. The learned counsel for the petitioners could not elaborate anything except reiterating that there has been violation of the principles of natural justice. Time and again, the Apex Court has reiterated the well settled principle of law that the principles of natural justice should not be stretched too far and the same cannot be put in a straight-jacket. In the case of Vice-Chairman, Kendriya Vidyalaya Sangathan and Anr. Vs. Girdharilal Yadav, as reported in (2004) 6 SCC 325, the Apex Court reiterating the said principles held that the admitted facts need not be proved. In the instant case also when the facts are admitted, the contention of the petitioners even if held to be correct, is of no consequence.

(17) In the case of A. Umarani v. Registrar, Co-operative Societies and Ors. , as reported in (2004) 7 SCC 112, the Apex Court held that when the appointments were made in contravention of mandatory provision of the Act in question and statutory rules framed thereunder and in ignorance of essential qualification, the same would be illegal and cannot be regularized by the State invoking the power under Article of 162 of the Constitution of India. Same view has been expressed in Pankaj Gupta and Ors. Vs. State of Jandk and Ors. , reported in (2004) 8 SCC 353, in the following words :

\no person illegally appointed or appointed without following the procedure prescribed under the law, is entitled to claim that he should be continued in service. In this situation, we see no reason to interfere with the impugned order. The appointees have no right to regularization in the service because of the erroneous procedure adopted by the authority concerned in appointing such persons. \

(18) In the case of Sanjay K. Sinha II and Ors. Vs. State of Bihar and Ors. , reported in AIR 2004 SC 3460, the Apex Court pointed out that in absence of any post there could not have been any appointment to the service. Similarly, in the case of R. Vishwanatha Pillai Vs. State of Kerala and Ors. , reported in (2004) 2 SCC 105, the Apex Court held that when an appointment is not an appointment in the eye of law, the appointee cannot claim right to the post and also cannot claim the constitutional guarantee provided under Article 311 of the Constitution of India. Similar view has been expressed in the case reported in (1995) 1 SCC 638 (Madhya Pradesh Hasta Shilpa Vikash Nigam Ltd. Vs. Devendra Kumar Jain), when the appointment was made in high haste and in violation of the rules.

(19) Mr. Nair, learned counsel for the petitioners during the course of hearing also submitted that the authority which has issued the orders of termination was responsible in making at least two appointments out of 171 appointments. Thus, he contended that the same very authority which was responsible for making illegal appointments, could not have taken the impugned action. This argument of Mr. Nair is hardly of any force in law. The two appointments against which the present DMO has issued termination orders, pertains to four writ petitioners in W. P. (C) No. 166 (AP)/05. In that case all the four writ petitioners were appointed on compassionate ground. Two of such appointments were made by the same very DMO who has issued the orders of termination. If the present DMO also resorted to any illegal appointments, the consequence will fall on him also. However, merely because he was responsible towards issuance of two appointment orders, that by itself cannot nullify the illegal action resorted to by the former DMO. The petitioners cannot base their claim on a negative equality.

(20) Under Article 14 of the Constitution of India the guarantee of equality before law is a positive concept and it cannot be conferred by a citizen or Court in a negative manner. Even if illegality or irregularity has been committed in favour of any individual or a group of individuals, others cannot invoke the jur

isdiction of the High Court urging that the same irregularity or illegality by committed by the State or an authority. As has been held by the Apex Court in the case of Gursharan Singh and Ors. Vs. New Delhi Municipal Committee and Ors. , reported in (1996) 2 SCC 459, neither Article 14 of the Constitution conceives within the equality clause this concept nor Article 226 empowers the High Court to enforce such claim of equality before law. If such claims are enforced, it shall amount to directing to continue and perpetuate an illegal procedure or an illegal order for extending similar benefits to others. Before a claim based or equality clause is upheld, it must be established by the petitioner that his claim being just and legal, has been denied to him while it has been extended to others and in this process there has been a discrimination.

(21) Same view has been expressed in the case of CSIR and Ors. Vs. Dr. Ajay Kumar Jain, reported in (2000) 4 SCC 186, while holding that illegality once committed cannot be claimed to be perpetuated. Equality being a positive concept cannot be enforced in a negative manner. Benefits extended to such person illegally or irregular manner cannot be claimed by others on the plea of equality. Wrong order or judgment passed in favour of one person would not entitle others to claim the similar benefits.

(22) A similar question arose before the Apex Court in the case of Nazira Begum Lashkar and Ors. Vs. State of Assam and Ors. , reported in AIR 2001 SC 102. In that case, a good number of appointments were made in violation of the statutory rules without any advertisement calling for application and without any constitution of selection committee and without any interview. Such appointments were cancelled by giving notice to the appointees. The Apex Court held that such appointees could not claim even any equitable relief from any Court.

(23) In view of the aforesaid factual and legal position involved in the matter, I am of the considered opinion that no interference is called for to the impugned orders. The petitioners having been appointed illegally without any sanctioned post and in gross violation of the recruitment rules by way of discrimination keeping at bay the eligible contenders, the respondents were within its competence and jurisdiction to take recourse to the impugned action which eventually culminated to the impugned orders of termination.

(24) This now leads us to the question as to whether the petitioners are entitled to receive their salary from July, 2004 onwards. In the impugned order of termination, the authority which have issued the orders indicated that the question relating to arrear salary etc. would be dealt with separately. However, till date no orders had been issued regarding entitlement of salary by the petitioners or otherwise. However, Mr. Nair, learned counsel for the petitioners during the course of hearing drew my attention to the stand of the respondents in the contempt proceeding being COP No. 17 (AP)/05 which the petitioners had initiated claiming violation of the earlier orders of this Court by which the respondents were directed to examine the case of the petitioners as regards the entitlement of arrear salary. In the said proceeding the respondents took the stand that the appointments being de hors the rules and that too without any sanctioned post, the petitioners were not entitled to receive any salary. Thus although no order has been issued disentitling the petitioners from receiving salary from July, 2004 onwards, it is the stand of the respondents that the petitioners are not entitled to receive any salary from July, 2004 onwards, their appointments being illegal and de hors the rules without there being any sanctioned post.

(25) Once having held that the petitioners were appointed against non-sanctioned post and without following due procedure of recruitment and consequently there such appointments were void ab initio at the very inception, there cannot be any mandamus to the respondents to pay salary to the petitioners. It is the definite case of the respondents that fraudulent appointments resorted to by the then DMO was detected in July, 2004. In such a situation, the State not being a part

y to such illegal appointments, it cannot be burdened with payment of salary to the petitioners. The respondents in their counter-affidavit have indicated as to how the State has already incurred loss to the tune of Rs. 68,07,872/- on account of payment of salary to the petitioners although they were appointed against non-sanctioned post. I am of the considered opinion that the State cannot be burdened any further. Consequently, the petitioners are held to be not entitled to receive any salary from July, 2004 to 15. 3. 2005 on which date their services were terminated. It will be open for the petitioners to stake their claim for salary by resorting to civil action against the DMO who was responsible for their fraudulent appointments.

(26) In view of the above findings based on the materials on record, the decisions on which Mr. Nair placed reliance are of no help to the case of the petitioners. The said decisions are as reported in (1998) 9 SCC 71 (Arun Kumar Rout and Ors. Vs. State of Bihar and Ors.), (2000) 2 GLR 382 (Ratan Dutta Vs. State of Tripura and Ors.), (2000) 3 GLR 237 (Susama Acharjee Vs. State of Tripura and Ors.) and (2005) 1 GLR 140 (Jubair Ahmed Barbhuiya Vs. State of Assam and Ors.). However, I have considered the same.

(27) In the case of Aruna Rout (supra) the Apex Court even after noticing that the appointments were made illegally adopted a humanitarian approach and sympathetic consideration, but cautioned that the decisions should not be cited as a precedent and that the relief granted to the appellants were in view of the special facts. In this connection, the observation made by the Apex Court in Satchidananda Misra v. State of Orissa and others, reported in (2004) 8 SCC 599, is quoted below :

\drawing support from the observation made in H. C. Puttaswamy v. Hon'ble Chief Justice of Karnataka High Court, it was contended that the illegal appointees can also be treated to be regularly appointed. In the relied upon decision, this Court, after having reached the conclusion about the invalidity of the impugned appointments made by the Chief Justice, but, having regard to the circumstances of the case, since the consequence would have been to support the employees, adopted a humanitarian approach and held on facts that the appointees deserved mercy. True, this Court has ample powers in a given case to direct regularization of illegal and unsupportable appointments, if the justice of any particular case so demands, but it cannot be taken as a rule of general application to perpetuate illegalities. Such a course is to be resorted to in exceptional circumstances. We do not think that the present case falls in that category. \

(28) The cases of Rattan Dutta and Jubair Ahmed (supra) were pressed into service to bring home the point of argument that there was gross violation of the principles of natural justice. In both these cases, the petitioners were removed from service without giving any opportunity of being heard. However, the same is not the case in hand. As discussed above, the petitioners were given full opportunity. In the case of Susama Acharjee (supra) this Court allowed the petitioner's salary during the period in which he was allowed to work and his services were taken by the respondents.

(29) In the instant case the State was never party to the fraudulent appointments resorted to by the then DMO and in that view of the matter as has been held above, the State cannot be burdened with payment of salary to the petitioners. If a mandamus is issued in this regard, same will lead to absurd situation in which even after holding that the petitioners were appointed illegally de hors the rules and against non-sanctioned post, they will be entitled to receive their salary, which cannot be allowed. In the case of Dr. Ajay Kumar Jain (supra) the Apex Court interfering with the direction of the Tribunal for payment of salary to the respondent even for the period during which there was no valid order of appointment/extension, held such direction to be irregular. It was held that the respondent could not be awarded emoluments for that period, although he continued

as Pool Officer.

(30) In view of the above, neither the impugned orders of termination of service of the petitioners nor the decision of the respondents not to pay the salary to the petitioners from July, 2004 till termination of their service can be said to be arbitrary and illegal warranting any interference of this Court in exercise of its power of judicial review under Article 226 of the Constitution of India. Consequently all the writ petitions fail.

(31) The writ petitions are dismissed. However, having regard to the facts and circumstances involved in the case, there shall be no order as to costs.

(32) Before parting with the case records, I make it clear that the dismissal of the writ petitions will not be a bar for their future appointment under the respondents, if they participate in the regular process of selection subject to their eligibility and if such process is initiated by the respondents. The petitioners in W. P. (C) No. 166 (AP)/05 being seekers of compassionate appointments, their cases may be considered as per the prevalent scheme against the prescribed quota, subject to approval by the State Government and if they are considered to be eligible for such appointments.