

**L.MOHAPATRA, J & B.K.MISRA, J.**

W.P.(C) NO.11684 OF 2009 (Decided on 28.07.2011).

**DILLIP KUMAR SAMANTRAY & ORS.** .....Petitioners

.Vrs.

**STATE OF ORISSA & ORS.** .....Opp.Parties.

For Petitioners - M/s. Budhadev Routray, D.K.Mohapatra, D.Routray,  
S.Jena, D.Mohapatra, P.K.Sahoo & S.Das.  
For Opp.Parties - Addl. Standing Counsel

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**L.MOHAPATRA, J.** The petitioners in this Writ Petition pray for quashing the order dated 03.8.2009 under Annexure-11 passed by the Orissa Administrative Tribunal, Bhubaneswar in O.A No.754 of 2009 as well as the order dated 28.7.2009 under Annexure-9 passed by the Engineer-in-Chief, Department of Water Resources, Orissa, Bhubaneswar and the order dated 02.7.2009 under Annexure-10 passed by the State Government. The further prayer in the Writ Petition is for a direction to the opposite parties to regularize the services of the petitioners against the post of Junior Assistants in terms of the recommendation made by the Engineer-in-Chief under Annexures-4 and 7 and in terms of the direction given by the Tribunal in O.A Nos.604 of 2006 and 1083 (C) of 2007.

2. The case of the petitioners is that on 16.3.1991 the Government of Orissa in General Administration Department passed a resolution relating to new Job Policy of the Government in respect of the recruitment of Class-III, Non-Gazetted Posts and Special Gazetted Posts. It was further decided in the said resolution that pending establishment of Sub-ordinate Staff Selection Commission by the Government the respective Departments/Heads of the Departments will recruit candidates against all Non-Gazetted and Specially Declared Gazetted Posts, which forms State Cadre. As there was no recruitment agency, opposite party no.2 took a decision to fill up nine vacant sanctioned posts of Junior Assistants on ad hoc basis. The present petitioners were appointed as Junior Assistants against seven number of vacant posts in the office of the Engineer-in-Chief, Departments of Water Resources, Government of Orissa on ad hoc basis for a period of 44 days. The tenure of appointment of all the petitioners was extended from time to time and by office order dated 31.12.1992 the petitioners were regularized against the said posts. After regularization, Kalyani Mohanty and others filed Original Application No.2621 of 1992 before the Orissa Administrative Tribunal. The said Original Application along with another batch of cases were disposed of by the Tribunal with an observation that the regularization of services of the present petitioners was irregular but the petitioners were permitted to continue on ad hoc basis. Sub-ordinate Staff Selection Commission was constituted in the month of November, 1993 but no steps for recruitment against the seven vacant posts occupied by the petitioners on ad hoc basis

was undertaken. Therefore, the petitioners submitted representation to opposite party no.2 to regularize their services on the ground that they had been appointed at a time when there was no examining agency and in the meantime they have gained the experience and had also the requisite qualification to hold the posts. On 06.2.2006 the Engineer-in-Chief –opposite party no.2 recommended the case of the petitioners to the Commissioner-cum-Secretary to Government, Water Resources Department for regularization and it was clearly mentioned in the said recommendation that the petitioners should continue as Junior Assistants against regular sanctioned posts and disposal of official business by the petitioners have been found to be satisfactory. Despite such recommendation made by opposite party no.2 no action was taken, as a result of which the petitioners moved the Orissa Administrative Tribunal in O.A No.604 of 2006 for regularization of their services. The Tribunal disposed of the Original Application directing opposite party no.1 i.e. the Secretary, Water Resources Department to consider the case of the petitioners treating the Original Application as representation. There were several correspondences between the office of opposite party no.2 and the office of opposite party no.1 but no final decision could be taken. In June, 2006, opposite party no.2 again recommended the case of the petitioners for consideration by the Government for the purpose of regularization but no action was taken. The petitioners, therefore, again approached the Orissa Administrative Tribunal in O.A No.1085 (C) of 2007 praying for a direction to the State Government to accept the recommendation made by opposite party no.2 and regularize their services. The said Original Application was disposed of by the Tribunal on 22.4.2007 directing opposite party no.1 to consider the proposal submitted by opposite party no.2 and take a decision thereon within a specified time.

3. While matter stood thus the petitioners received a communication that they have been permitted to compete in the forthcoming selection for appointment of Junior Assistants conducted by the Orissa Sub-ordinate Staff Selection Commission. The petitioners after receipt of such communication approached the Tribunal in O.A No.754 of 2009 challenging the said communication on the ground that as they have already rendered 18 years of service as Junior Assistants, they cannot be forced to compete with freshers and when the matter is pending consideration for regularization they should not be asked to take any test for appointment. The Tribunal dismissed the Original Application on 03.8.2009 without issuing notice to the opposite parties. The said order of the Tribunal annexed to the Writ Petition as Annexure-11 is assailed in this Writ Petition.

4. Sri Budhadev Routray, learned counsel appearing for the petitioners submitted that had opposite party no.1 taken a decision regarding regularization of the services of the petitioners in the post of Junior Assistants on the basis of recommendation made by opposite party no.2 in time, the petitioners could not have been asked to compete with freshers for the purpose of appointment to the post of Junior Assistants. It was further contended by learned counsel for the petitioners that having been appointed on ad hoc basis in the year 1992, the petitioners have completed more than eighteen years of service continuously on ad hoc basis and therefore, it is no more open for the State authorities to fill up the posts by open recruitment test and permitting the petitioners to compete with freshers.

5. Learned counsel for the State referring to the counter affidavit and also the order passed by the Tribunal on 19.6.1996 in a batch of Original Applications submitted that by virtue of the order of the Tribunal, the petitioners are continuing in service on ad hoc basis and therefore they cannot claim regularization in service having continued for more than fourteen years by order of the Court. According to learned counsel for the State, the vacancies are to be filled up in accordance with the Rules prescribed for the same and no departure can be made. Therefore, the State authorities considering the services rendered by the petitioners permitted them to appear in the test by condoning their overage.

6. Undisputedly petitioner nos.1 and 4 had filed O.A No.1628 of 1995, petitioner no.6 had filed O.A No.629 (C) of 1992, petitioner No.5 had filed O.A No.628 (C) of 1992 and petitioner nos.2, 3 and 7 had filed O.A No.262 of 1992 before the Tribunal claiming for regularization in service. All the Original Applications were disposed of in a common judgment dated 19<sup>th</sup> June, 1996. The operating portion of the said judgment is quoted in the impugned order but for convenience it is again quoted below:-

“In view of the fact that they have gathered experience by continuing in the Department for so many years, they may be given chances to apply for the posts and compete with others and if necessary, their upper age limit may be relaxed. We further direct that the concerned Department should take immediate steps for filling up the vacancies on regular basis and in case it is felt necessary to fill up any of the vacancies pending regular selection, the applicants who have already gained some experience by working in the Department should be taken on adhoc basis in accordance with their length of service. The aforesaid direction will also be applicable in respect of Srinibas Behera, Dilip Kumar Samantray and Lelin Kumar Lenka who had been regularized and subsequently terminated and are continuing on the strength of interim orders. They may be allowed to continue on adhoc basis until regular selection is made and they should be given chance to apply for the posts and compete with others and if necessary, their upper age limit be relaxed.”

7. As is evident from the above operating part of the judgment the Tribunal directed the concerned Department to take immediate steps for filling up the vacancies on regular basis and in case it is felt necessary to fill up the vacancies pending regular selection by appointing the petitioners on ad hoc basis considering the experience they had gained earlier while working on ad hoc basis. It was further directed that the petitioners shall be allowed to continue on ad hoc basis until regular selection is made and they should be given a chance to apply for the posts and compete with others and if necessary their upper age limit shall be relaxed. This judgment of the Tribunal attained finality having not been challenged by anyone of the parties. It is, therefore, clear that since the date of judgment i.e. 19.6.1996 the petitioners are continuing on ad hoc basis by virtue of the order of the Tribunal. In the said order the Tribunal clearly directed that till regular selection is made, the petitioners shall continue on ad hoc basis and as and when steps are taken for selection, the petitioners shall be permitted to apply for the post and compete with others, however, age relaxation shall be extended to them. Considering these facts it is now clear that the petitioners have worked from 1992 to 1996 on ad hoc basis without intervention of the Court and since 1996 they have been

continuing on ad hoc basis because of the order passed by the Tribunal in the aforesaid four Original Applications.

8. In the case of **Secretary, State of Karnataka and others Vs. Umadevi and others** reported in **(2006) 4 SCC 1** an exception was made to the extent that those who have been appointed irregularly and not illegally against a vacant post and have completed at least 10 years of service without intervention of the Court may be considered for regularization.

9. As admitted in the Writ Petition at the time of initial entry into service in the year 1992, the petitioners did not face any kind of test for being recruited against the vacant posts of Junior Assistants on ad hoc basis. Even if the Court accepts the contention of Sri Budhadev Routray, learned counsel appearing for the petitioners that such appointment was irregular, the petitioners have not completed ten years of service without intervention of Court. As stated earlier the petitioners were recruited in the year 1992 and their continuance is because of the order passed by the Tribunal in the aforesaid Original Applications dated 19.6.1996. Therefore, the petitioners continued on ad hoc basis without intervention of the Court only for a period of four years. Accordingly the petitioners cannot take advantage of the said exception made in the aforesaid judgment and claim for regularization. Reliance was placed by Sri Budhadev Routray, learned counsel appearing for the petitioners on another decision of the Hon'ble Apex Court in the case of **State of Karnataka and others Vs. M.L.Kesari and others** in Civil Appeal No.6208 of 2010 arising out of SLP (C) No.15774 of 2006. In the said judgment the Hon'ble Apex Court directed that if the respondents therein do not fulfill the requirements of paragraph-53 of the judgment in the case of **Secretary, State of Karnataka and others Vs. Umadevi and others**, their services need not be regularized. If the employees who have completed ten years of service do not possess the educational qualification prescribed for the post at the time of their appointment, they may be considered for regularization in suitable lower posts. This decision was cited by Sri Budhadev Routray, learned counsel appearing for the petitioners to explain what is an irregular appointment. In paragraph-5 of the judgment in the case of **State of Karnataka and others Vs. M.L.Kesari and others**, it was held by the Hon'ble Apex Court held that where the appointments are not made or continued against sanctioned posts or where the persons appointed do not possess the prescribed minimum qualifications, the appointments will be considered to be illegal. But where the person employed possessed the prescribed qualifications and was working against sanctioned posts, but had been selected without undergoing the process of open competitive selection, such appointment is considered to be irregular. As stated earlier even if we accept the contention of learned counsel for the petitioners that the appointment of all the petitioners in the year 1992 on ad hoc basis was irregular still then they do not come within the exception made in the case of **Secretary, State of Karnataka and others Vs. Umadevi and others** having not completed ten years of service without intervention of the Court.

10. We have not referred to other decisions cited by learned counsel for the parties as these two decisions are enough to answer the issues raised in the case. Sri Budhadev Routray, learned senior counsel appearing for the petitioners referring to certain annexures filed to the rejoinder and additional affidavit submitted that in some other Departments employees had been regularized in service on completion of less

than ten years of service. If we go by the judgment **Secretary, State of Karnataka and others Vs. Umadevi and others** no such regularization could be made by any Department ignoring the law laid down by the Hon'ble Apex Court, therefore, merely because one Department has committed a mistake the Water Resources Department cannot be directed to commit the same mistake specially on the face of the judgment of the Hon'ble Apex Court in the case of **Secretary, State of Karnataka and others Vs. Umadevi and others**.

For the reasons stated above, we find no merit in the Writ Petition and accordingly dismiss the same.

Writ petition dismissed.