THE HIGH COURT OF SIKKIM : GANGTOK

(Civil Extraordinary Jurisdiction)

DATED : 26th April, 2023

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

WP(C) No.35 of 2019

Petitioners : Dr. Dilli Ram Dahal and Another

versus

Respondents : State of Sikkim and Others

Application under Article 226 of the Constitution of India

Appearance

Mr. A. Moulik, Senior Advocate with Mr. Ranjit Prasad, Advocate for the Petitioners.

Dr. Doma T. Bhutia, Additional Advocate General with Mr. S. K. Chettri, Government Advocate for the Respondents No.1 and 3.

Mr. Zigmee Bhutia, Law Officer, Respondent No.1 Department.

Mr. J. B. Pradhan, Senior Advocate with Mr. Bhusan Nepal, Advocate for the Respondents No.2 and 4.

Mr. B. C. Tamang, Advocate for the Respondent No.5.

Mr. Thinlay Dorjee Bhutia, Advocate for the Respondent No.6.

Mr. J. B. Pradhan, Senior Advocate with Ms. Sabina Chettri, Advocate for the Respondents No.7 to 9.

J U D G M E N T

Meenakshi Madan Rai, J.

1. Whether Respondent No.1 can cancel the offer of appointment made to Petitioner No.1 and Petitioner No.2, on grounds of lack of Notification of vacancies, considering that the offer made was in pursuance to a policy decision of the Government, to regularise their services and whether this Court can exercise judicial review in the realm of policy, are the two questions requiring determination in this petition.

2. The State-Respondent No.1 issued Memoranda offering appointment to the Petitioners No.1 and 2 in a temporary capacity, in the posts of Assistant Professors, on 05-12-2018. Both

Petitioners had been working on *ad hoc* in the same posts since 2016 and 2014 respectively. The offer of appointment is said to be the fructification of a policy decision of the Government, to regularise the services of seventeen Assistant Professors, who had put in less than five years of *ad hoc* services, in different Government Colleges, which included the Petitioners. On 17-12-2018 the offer of appointment was revoked by the Respondent No.1, with the reasoning that, the new posts had not been notified.

(i) Petitioner No.1 who belongs to the OBC category (State List), was appointed as Assistant Professor in Eastern Himalayan Studies, on *ad hoc* on 18-07-2016 and was posted in the Sikkim Government College, Rhenock. Petitioner No.2 who belongs to the OBC category (Central List), was appointed as Assistant Professor, Tourism, at the Sikkim Government College, Gyalshing on 14-07-2014, also on *ad hoc*.

(ii) The Petitioners' case is that, on 13-10-2017, the Respondent No.2 published an advertisement in local Newspapers and uploaded it on its website, inviting applications from eligible local candidates, for filling up one hundred posts of Assistant Professors, through direct recruitment, in different Government Colleges, under the Human Resource Development Department, in the Pay Band 3 of Rs.15600-39100, with Grade Pay of Rs.6,000/- per month. The advertisement specified that no applications for review or RTI/correspondence would be entertained by Respondent No.2 until completion of the recruitment process. Both Petitioners having applied for the posts were required to appear in the Class Room demonstrations, on 09-02-2018 for Geography with viva-voce held on 25-04-2018 and on 10-02-2018 for Tourism, with

viva-voce held on 26-04-2018 (collectively referred to as "interview" hereinafter). Both Petitioners were not selected. Nineteen other candidates who appeared in the same interview and were also unsuccessful like the Petitioners, were however appointed as Assistant Professors on 03-08-2018, in order to regularise their *ad hoc* services of more than five years as on 11-05-2018, allegedly based on a policy decision of the Government.

3. Learned Senior Counsel for the Petitioners while reiterating the facts as delineated above, contended that the Petitioners having appeared in the same selection process as the nineteen candidates, requested the Government for similar treatment. That, pursuant thereto, vide Cabinet Memorandum bearing Memo No.71/ACS/HRDD, dated 24-11-2018, as per a policy decision of the Government, a proposal was put forth before the Cabinet for regularisation of the *ad hoc* services of seventeen Assistant Professors, to accommodate those who had put in even less than five years of *ad hoc* services, in different Government Colleges, which included the Petitioners. Eight new posts of Assistant Professors were also proposed to be created. The proposal was said to be concurred by the Finance, Revenue and Expenditure Department, with due relaxation of Roster Points. The Cabinet approved the proposals. On 05-12-2018, seventeen *ad hoc* Assistant Professors, including the Petitioners, were issued Memoranda offering appointment. However, on 17-12-2018, vide Office Order bearing No.453/DIR(HE)HRDD, the appointments were cancelled on the plea of being infructuous as the new posts had allegedly not been notified. Contrarily in the Counter-Affidavit, the State averred that the Petitioners had not completed five years of

service and there was a lack of sanctioned posts. It is the stand of the Petitioners that the State-Respondents No.1 and 3 (hereinafter, State-Respondents) cannot now take the plea of lack of Notification, to deny reliefs to the Petitioners after the policy decision and Cabinet approval. That, in fact the regularisation of the services of the other nineteen Assistant Professors was only upon the approval of the Hon'ble Chief Minister of Sikkim, sans Notification of vacancies, whereas the matter concerning the Petitioners bore the stamp of approval of the Cabinet. Despite these circumstances their appointments were cancelled, without affording them an opportunity of being heard, clearly violating the principles of natural justice. Besides, appointments based on a policy decision which did not prescribe a selection procedure, cannot be cancelled by an Additional Chief Secretary of the Respondent No.1 Department.

(i) That, out of the one hundred posts advertised, appointments were made against seventy-seven vacancies, leaving twenty-three clear vacancies, with an additional existing thirty vacancies, as reflected in Annexure P-43, the Department Note Sheet. That, the Petitioners could easily have been accommodated in these vacancies and their services regularised. That, ***State of Rajasthan and Others*** vs. ***Daya Lal and Others***[1] relied on by the State-Respondents is inapplicable to the present circumstances, the Learned Single Judge therein having directed the Government to frame a 'scheme' for regularisation which is not so in the instant matter. Hence, the prayers in the petition which are being pressed, be allowed, viz.,

[1] (2011) 2 SCC 429

> "…….
>
> (iv) A writ or order or direction or declaration that memorandum dated 5/12/18 (Annexure-P38) appointing the petitioner no.1 but cancelled later on vide Annexure-P41; be revived and confirmed as Assistant Professor (Geography) duly quashing Annexure-P41 relating to petitioner no.1 which has illegally cancelled appointment of petitioner no.1 vide memorandum no.432/DIR(HE)/HRDD dated 5/12/2018.
>
> (v) A writ or order or direction or declaration that memorandum no.433/DIR(HE)/HRDD dated 5/12/2018 issued to petitioner no.2 appointing him as Assistant Professor (Tourism) stand revived and confirmed as Assistant Professor (Tourism) duly quashing and cancelling Office Order dated 17/12/2018 (Annexure-P41) so far as the petitioner no.2 is concerned;
>
> (vi) A writ or order or direction or declaration that the employment of the petitioner nos.1 and 2 as Assistant Professor (Geography/EHS) and Assistant Professor (Tourism) on Adhoc basis stand regularized in the regular establishment with all benefits of employment including seniority in service;
>
> ……." **[emphasis supplied]**

It was submitted that the other prayers enumerated in the petition are not being pursued.

4. *Per contra*, Learned Additional Advocate General contended that it is a settled principle of service jurisprudence that the mode of recruitment is to be as per the statutory rules, accordingly, seventy-seven candidates were selected on merit and as per roster points against the one hundred advertised vacancies, in terms of the Sikkim Government College Lecturers Recruitment Rules, 1992 (SGCLR Rules, 1992). That, of the two posts for Assistant Professors in Geography, one post was reserved for OBC (State List) and the second post for Scheduled Tribe, both of which were filled by candidates more meritorious than the Petitioner No.1. For Tourism, the post being unreserved, was filled also on merit by a candidate ranking higher than Petitioner No.2. Inviting the attention of this Court to the ratio in ***State of Uttar Pradesh and***

Another vs. ***Ram Adhar***[2] it was contended that special skills are required to teach such subjects and merit would only be the consideration for selection. That, as the Memoranda of appointment, dated 05-12-2018, were issued illegally, sans Notification, they were cancelled. The Department Note Sheet clarified that appointment orders of eight new posts of Assistant Professors were issued without Notification. While referring to Section 36 of the Sikkim Interpretation and General Clauses Act, 1977, it was contended that the provision mandatorily requires publication of Notification. Relying on ***B. K. Srinivasan and Others*** vs. ***State of Karnataka and Others***[3] it was next urged that the Supreme Court has explained therein the necessity for publication of subordinate legislation in the Gazette. That, in any event, the Memoranda of appointment dated 05-12-2018, specified that the appointment was to be of a purely temporary nature and could be terminated at any time, with 30 days' notice on either side. The termination of service could be effected immediately or before the expiry of the stipulated period of notice, by paying the appointee a sum equivalent to the pay band, academic grade pay and allowances, for the period of notice or the unexpired portion thereof.

(i) That, the prayer of the Petitioners for regularisation are illegal as the services of the nineteen *ad hoc* Assistant Professors were in fact not regularised, but appointments were made, as they had appeared for the interview, conducted by the Respondent No.2, SPSC. That, no joining reports were submitted by the Petitioners pursuant to the offer of appointment and prior to its

---

[2] (2008) 12 SCC 136

[3] (1987) 1 SCC 658

cancellation and they continue to serve on *ad hoc*, hence no rights accrued to them vide the Memoranda. That, in any event selection to a post does not confer an indefeasible right to be appointed, succour on this point was garnered from ***Renu Ahuja*** vs. ***State of Punjab and Others***[4]. It was further urged that the Court cannot issue a Mandamus to the Government for enforcement of a Cabinet decision, relying on the ratio in ***Vivek Krishna*** vs. ***Union of India and Others***[5].

(ii) That, the Cabinet Memorandum is nothing but an Executive proposal and Article 14 of the Constitution of India is not meant to perpetuate illegality neither does it envisage negative equality. Thus, even if some other similarly situated persons have been granted some benefit, such orders do not confer any legal right on the Petitioners to get the same relief. Reliance on this aspect was placed on the ratio in ***Union of India and Another*** vs. ***Kartick Chandra Mondal and Another***[6]. That, Articles 14 and 16 of the Constitution 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, this argument was buttressed by the ratio in ***Daya Lal*** *(supra)*[7]. That, the Supreme Court in ***Balco Employees' Union (Regd.)*** vs. ***Union of India and Others***[8] observed that when a policy is changed by the State or a new policy is notified, this would prevail over the previous policies. Urging that the State is best suited to frame a policy or a decision,

---

[4] (1992) 4 SLR 263 (P&H)
[5] 2022 SCC OnLine SC 1040
[6] (2010) 2 SCC 422
[7] (2011) 2 SCC 429
[8] (2002) 2 SCC 333

reliance was placed on ***State of Himachal Pradesh and Others*** vs. ***Himachal Pradesh Nizi Vyavsayik Prishikshan Kendra Sangh***[9].

(iii) That, the principle of intelligible differentia would not apply in the instant case as the Petitioners were not equal to the meritorious candidates recommended for appointment by the Respondent No.2. That, in fact the Petitioners to fill up the lacuna in their case have filed additional documents in their Additional Affidavit which is legally untenable and cannot be considered by the Court. Hence, the Petition lacking merit ought to be dismissed.

5. Learned Counsel for Respondent No.6 had no submissions to put forth, on grounds that no reliefs were claimed from him and he relies on the averments in his pleadings. Learned Senior Counsel for Respondent Nos.2, 4, 7, 8 and 9 submitted that he too had no arguments to advance as no reliefs were sought from Respondent Nos.2 and 4, their action being unassailed and the Petitioners expressing no aggrievement on the selection of Respondent Nos.7, 8 and 9. Learned Counsel for Respondent No.5 submitted that he is the affiliating University and as its role is not impugned, he has no submissions to place.

6. Rival contentions of Learned Counsel for the parties were heard extensively, the pleadings perused and documents examined.

7. What can be culled out *inter alia* from the pleadings and submissions forwarded is that the Petitioners No.1 and 2 continue to serve in their posts of Assistant Professors on *ad hoc*, despite non-selection in the interview and cancellation on 17-12-2018 of the offer of appointment dated 05-12-2018.

---

[9] (2011) 6 SCC 597

(i) To comprehend the matter in its entirety, it is essential to advert to the Cabinet Memorandum, dated 24-11-2018, (Annexure P-49) about which much has been discussed and is extracted hereinbelow for clarity;

"……

GOVERNMENT OF SIKKIM
HUMAN RESOURCE DEVELOPMENT DEPARTMENT
GANGTOK

Memo No. 71 /ACS/HRDD Date: 24/11 /2018

CABINET MEMORANDUM

Minister-in-charge: ***SHRI R.B. SUBBA***

Secretary-in-charge: ***SHRI G.P. UPADHYAYA***

Department: ***HUMAN RESOURCE DEVELOPMENT DEPARTMENT***

Subject: ***REGULARIZATION OF ADHOC SERVICES OF SEVENTEEN (17) ASSISTANT PROFESSORS IN DIFFERENT SUBJECTS IN VARIOUS GOVERNMENT COLLEGES OF THE STATE ALONGWITH CREATION OF EIGHT (8) NEW POSTS OF ASSISTANT PROFESSORS.***

The Proposal pertains to regularization of Adhoc services of Seventeen (17) Assistant Professors in different subjects in various Government Colleges of the State along with creation of eight (8) new posts to accommodate these Seventeen (17) Assistant Professors, who have put in less than 5 years of Adhoc service in different Government Colleges as per the Policy decision of the State Government.

2. The proposal has been concurred in by Finance Revenue and Expenditure Department and the Roster Points have been relaxed by DOPART vide Notification No: 128/GEN/DOP dated 14.11.2018 in the following subjects as mentioned below:-

Sl. No.	*Subject*	*Number of post(s)*
1.	*Political Science*	*4*
2.	*English*	*4*
3.	*Commerce*	*3*
4.	*Economics*	*2*
5.	*Sociology*	*1*
6.	*Geography*	*1*
7.	*Tourism*	*1*
8.	*Law*	*1*
	TOTAL	*17 posts*

3. The eight new posts shall be created as under to accommodate these 17 Assistant Professors:-

Sl. No.	*Subject*	*Number of post(s) to be created*
1.	*Political Science*	*3*
2.	*English*	*1*
3.	*Commerce*	*2*
4.	*Tourism*	*1*
5.	*Law*	*1*

> *4. The Minister for Human Resource Development Department has seen and approved the proposal for placing in the Cabinet.*
>
> *5. The proposal is now placed before the Council of Ministers for post factor confirmation of the approval accorded by the Chief Minister earlier.*
>
> *(G.P. Upadhyaya)*
> *Additional Chief Secretary*
> *Human Resource Development Department*
> ……**"**
> **[emphasis supplied]**

(ii) From the Cabinet Memorandum, it transpires that the services of seventeen Assistant Professors appointed on *ad hoc*, who had put in less than five years of such service, were sought to be regularised. Evidently, for accommodating all seventeen of them eight new posts had to be created, undisputedly, as per the policy decision of the Government.

(iii) The contents of the Cabinet Memorandum (Annexure P-50) recorded as follows;

> **"**…….
>
> ***251.53*** *The proposal seeks post facto approval for regularization of seventeen (17) Assistant Professors in different subjects in various Government Colleges of the State alongwith creation of eight (8) new post of Assistant Professors, as detailed in the Cabinet Memo No.71/ACS/HRDD Dated 24-11-2018.*
>
> ***CABINET DECISION : The Cabinet approved the above proposal.***
>
> …….**"**

The contents are therefore self-explanatory.

(iv) A policy is the reasoning and object that guides the decision of the Authority [*See*, ***State of Tamil Nadu and Another*** vs. ***National South Indian River Interlinking Agriculturist Association***[10]]. Admittedly, the policy decision, as discussed in the foregoing paragraphs, was made by the Government for the aforestated purpose. It is pertinent to notice that the said policy decision has not been modified or withdrawn at any point in time, nor has the Cabinet approval (*supra*) been withdrawn. Hence, both are

[10] 2021 SCC OnLine SC 1114

subsisting. In this backdrop, while considering the arguments advanced by the State-Respondents it is indeed incomprehensible as to how the observation of the Supreme Court in the ratio of ***Balco Employees' Union*** (*supra*) pertaining to new policy and its prevalence over previous policy is applicable. The argument of the State-Respondents that appointments cannot be made *de hors* the SGCLR Rules, 1992, flies in the face of the policy decision of the Government itself and is revelatory of the fact that the State-Respondents were aware of the recruitment process prescribed in the SGCLR Rules, 1992. Arguments on Articles 14 and 16 of the Constitution were advanced to impress upon this Court that these provisions cannot be trampled upon and merit is the only criteria for selection, when the facts bear out the admitted position of the "policy decision" being that of the Government itself, *de hors* the constitutional provisions cited. Surely when the policy was being framed the policy makers were well aware of Article 14, Article 16 and their scope and ambit. The arguments on this count, advanced by the State-Respondents are in disconsonance with the policy decision. Indeed the concept of equality and equal protection of laws is guaranteed under Article 14 and in its proper spectrum encompasses social and economic justice and is a positive concept. Article 16 of the Constitution for its part is concerned with equality of opportunity in matters of public appointment and guarantees equal opportunity to all citizens to apply for employment under the State. The non-discrimination principle and affirmative action of the State obliging it to provide a level playing field under this provision, warrants notice. The arguments urged by the State-Respondents invoking these Articles reflects a discontentment with

their own policy decision and an admission that it was erroneous as reflected in the written arguments viz; " …….. *Thus, it is the solemn duty of the Courts not to perpetuate the same mistake ……..*".

(v) The Additional Advocate General urged that publication of a Notification was mandatory and had sought to draw strength from Rule 36 of the Sikkim Interpretation and General Clauses Act, 1977. This provision deals with publication of "Rules" and provides as follows;

> **"***Publication of rules, etc. in the Official Gazette to be deemed to be due publication*
>
> 36. Where in any Sikkim law or any rule, regulation or by-law made thereunder, it is directed that any rule, regulation, by-law, notification, order, scheme, form or order matter shall be notified or published, then, such notification or publication shall, unless such law, rule, regulation or by-law otherwise provides, be deemed to be duly made if it is published in the official Gazette.**"**

This is clearly a misplaced reliance as in the first instance it is inapplicable to the present circumstance, further, no purpose would have been achieved or served by publication of a Notification. The act of notifying would have been superfluous and contrived as no new candidate would have been eligible for consideration in these posts, which was for a predetermined purpose viz., regularisation of the services of persons, as explained *supra*. This argument thus cuts no ice.

(vi) Reliance on the ratio in ***Himachal Pradesh Nizi Vyavsayik Prishikshan Kendra Sangh*** (*supra*) by the State-Respondents is evidently erroneous as the policy making power of the State has not been questioned by any authority, much less this Court. This Court is acutely conscious and aware that there cannot be interference from a Court into the soundness and wisdom of a policy. However, at the same time it may be noted that a policy is

subject to judicial review on the limited grounds of non-compliance with the fundamental rights and other provisions of the Constitution [*See*, ***National South Indian River Interlinking Agriculturist Association*** (*supra*)]. In fact, in ***Balco Employees' Union*** (*supra*), the Supreme Court at Paragraph 92 held as follows;

> **"92. In a democracy, it is the prerogative of each elected Government to follow its own policy. Often a change in Government may result in the shift in focus or change in economic policies. Any such change may result in adversely affecting some vested interests. Unless any illegality is committed in the execution of the policy or the same is contrary to law or mala fide, a decision bringing about change cannot *per se* be interfered with by the court."**
>
> [emphasis supplied]

Nevertheless, when the Government is dissatisfied with its own policy as appears apparent from arguments advanced herein, the situation could best have been salvaged probably by withdrawing or modifying the policy, to preempt the external consequences of dissatisfaction.

(vii) The ratio in ***Daya Lal*** (*supra*) relied on by Learned Additional Advocate General is distinguishable from the case at hand. Two questions that fell for consideration therein were;

(i) *Whether persons appointed as Superintendents in aided non-governmental hostels are entitled to claim absorption by way of regularisation in government service or salary on a par with the Superintendents in government hostels?*

(ii) *Whether part-time cooks and chowkidar appointed temporarily by Mess Committees of Government Hostels, with two or three years' service, are entitled to regularisation by framing a special scheme?*

The present petition seeks enforcement of the policy decision of the Government as reflected in Annexure P-49 and Annexure P-50 *supra* extracted, which was not arrived at upon the direction of any Court nor was there a direction from this Court to frame any special scheme to facilitate regularisation of the services of any

individual thereby distinguishing this matter from the ratio in ***Daya Lal*** (*supra*).

(viii) It is imperative to also notice that an erroneous interpretation of the principles of intelligible differentia was sought to be made by the arguments advanced. Intelligible differentia means difference capable of being understood. Article 14 does not forbid classification or differentiation but this must rest on reasonable grounds of distinction. The principle is applicable to the Petitioners vis-à-vis the nineteen Assistant Professors, who failed to make the Grade in the interview, along with the Petitioners, but whose services were yet regularised on the anvil of a policy decision of the Government. It is clear that the Petitioners' case stands on the same footing as the nineteen unsuccessful candidates whose only advantage vis-à-vis the Petitioners were the number of years of *ad hoc* service, the disadvantage faced by the Petitioners was sought to be addressed by the subsequent policy decision. It is reiterated here that classification is to be rational and based upon an intelligible differentia, which distinguishes persons that are grouped together with others that are left out of the group and whether the basis of differentiation has any rational nexus or relation to its avowed policy and objects [*See*, ***K. R. Lakshman and Others*** vs. ***Karnataka Electricity Board and Others***[11]].

(ix) The argument of Learned Additional Advocate General resting on the ratio of ***Ram Adhar*** (*supra*) cannot be countenanced, as the Government had overlooked all procedural requirements of selection when the policy was framed for regularisation of the services of the seventeen Assistant Professors. The Petitioners did

[11] (2001) 1 SCC 442

not "*fail*" in the selection process, as was the case in the said ratiocination. Admittedly the Petitioner No.1 secured 60.8 marks at the interview, while Petitioner No.2 secured 42 marks, the qualifying marks being '40', unfortunately, their ranking in order of merit was below the successful meritorious candidates. The Government then sought to regularise their services by a policy decision, which went awry and is being contested by the State-Respondents itself.

(x) The further argument of Learned Additional Advocate General that the appointment could be terminated at any time within 30 days appears to be a little far-fetched, considering that it was the policy decision to regularise their services. Besides, the Memoranda of appointment provides that termination of the offer of appointment is contingent upon payment to the appointee of a sum equivalent to the pay band and other pay and allowances, for the period of notice or the unexpired portion. Although the State terminated the services, this obligation of the State remained unfulfilled and unaddressed in the arguments advanced.

(xi) The ratio in ***Renu Ahuja*** (*supra*) and arguments based thereon is inapplicable as the observation therein deals with "*selection to a post*". The Petitioners have not been "*selected*" by any stretch of the imagination, the entire exercise revolves around the regularisation of their services, based on a public policy, which is a completely different concept from "selection" by an open competition. The argument of Learned Additional Advocate General that for teaching subjects like Geography and Tourism special skills are to be considered, evidently assails the public policy of regularisation. It is relevantly noticed that the State-

Respondents failed to put forth any clarification with regard to the alleged existing vacancies referred to by the Petitioners in their contentions. It can thus safely be presumed that such vacancies were subsisting at the time of issuance of Memoranda.

(xii) While addressing the contention of the State-Respondents that the additional documents filed with the Additional Affidavit is against legal tenets, it is apposite to point out that the Additional Affidavit with the documents were filed on 24-07-2022. In the interim, despite the lapse of time, no objection was raised from any quarter till the date of arguments, when the State-Respondents suddenly woke up from a prolonged slumber to assert their rights belatedly. The settled proposition of law is *vigilantibus non dormientibus jura subveniunt*, i.e., the law assists only those who are vigilant and not those who sleep over their rights.

(xiii) The appointment is said to be *coterminous* as per the arguments advanced. This is indeed a nebulous submission of the State-Respondents, lacking elucidation as to with what circumstance or with whose services the appointment was *coterminous*. *Coterminous* as per ***Black's Law Dictionary – Bryan A. Garner – Tenth Edition – 2014*** **means** *(Of ideas or events)* **coextensive in time or meaning**. In ***K. Panudass and Others*** vs. ***Puduchery Power Corporation Limited (A Government of Puduchery Undertaking) represented by the Executive Engineer (Mech) and Another***[12] it was explained as follows;

> **"2.** ……. The concept of appointing employees in the Co-terminus basis is to ensure that the Authorities can efficiently deliver their official functions in the interest of the public at large. **<u>However, the terms of appointment is unambiguous that on the date of retirement of the person who issued an appointment order the tenure of the Co-terminus also expires.</u>"** [emphasis supplied]

[12] 2019 SCC OnLine Mad 25592

The State-Respondents having failed to explain as to who the appointment of the Petitioners was *coterminous* with, the argument lacks coherence and deserves to be and is consequently disregarded.

(xiv) There is no quarrel with the settled principle that recruitment is to be as per statutory rules. This was in fact the constant refrain in the arguments of Learned Additional Advocate General, even in the teeth of the fact that the State-Respondents chose to overlook the statutory method of recruitment and in its stead took a policy decision for recruitment by way of regularisation of services of the Assistant Professors who had completed specific years of *ad hoc* service. The contention put forth by the State-Respondents that the services of the nineteen *ad hoc* Assistant Professors were not regularised but that they were appointed having appeared for the interview, is totally bereft of logic and cannot be countenanced as indubitably they were unsuccessful in the interview in which they appeared for, along with the Petitioners and thereby were in the exact same position as the seventeen Assistant Professors, which included the Petitioners.

(xv) It thus concludes non-publication of Notification of vacancies is no ground for cancellation of the offer of appointment, in view of the fact that a policy decision sought to regularise the services of the Petitioners. In such a circumstance, publication of Notification would have served no genuine purpose, as no fresh applicants would have been eligible to apply for the posts which were set aside for a predetermined purpose as discussed above.

8. That having been said, while proceeding to address and determine the second question formulated, we may now relevantly

refer to the decision of the Supreme Court in ***Brij Mohan Lal*** vs. ***Union of India and Others***[13] which laid down certain tests on whether the Supreme Court should or not interfere in the policy decision of the State. This is to be the guiding light for this Court as well. The same are extracted below for ready reference;

> **"100.** Certain tests, whether this Court should or not interfere in the policy decisions of the State, as stated in other judgments, can be summed up as:
>
> (*I*) If the policy fails to satisfy the test of reasonableness, it would be unconstitutional.
>
> **(*II*) The change in policy must be made fairly and should not give the impression that it was so done arbitrarily on any ulterior intention.**
>
> **(*III*) The policy can be faulted on grounds of mala fides, unreasonableness, arbitrariness or unfairness, etc.**
>
> **(*IV*) If the policy is found to be against any statute or the Constitution or runs counter to the philosophy behind these provisions.**
>
> **(*V*) It is dehors the provisions of the Act or legislations.**
>
> (*VI*) If the delegate has acted beyond its power of delegation.**"**
>
> **101. Cases of this nature can be classified into two main classes: one class being the matters relating to general policy decisions of the State and the second relating to fiscal policies of the State. In the former class of cases, the courts have expanded the scope of judicial review when the actions are arbitrary, mala fide or contrary to the law of the land; while in the latter class of cases, the scope of such judicial review is far narrower. Nevertheless, unreasonableness, arbitrariness, unfair actions or policies contrary to the letter, intent and philosophy of law and policies expanding beyond the permissible limits of delegated power will be instances where the courts will step in to interfere with government policy.**
>
> **102.** In *Mohd. Abdul Kadir* v. *DG of Police* [(2009) 6 SCC 611] this Court, while declining regularisation of the persons employed in a particular project under a temporary scheme, though the same had been continued for a long time, commented upon the scope of interference in the policy relating to the Prevention of Infiltration of Foreigners Additional Scheme, 1987 and considered it appropriate to draw the attention of the authorities to the issues involved in the case by directing as under: (SCC p. 618, para 22)
>
> **"*22*. We are conscious of the fact that the issue is a matter of policy having financial and other implications. But where an issue involving public interest has not engaged the**

[13] (2012) 6 SCC 502

> **attention of those concerned with policy, or where the failure to take prompt decision on a pending issue is likely to be detrimental to public interest, courts will be failing in their duty if they do not draw attention of the authorities concerned to the issue involved in appropriate cases. While courts cannot be and should not be makers of policy, they can certainly be catalysts, when there is a need for a policy or a change in policy."** [emphasis supplied]

(i) The observation of the Supreme Court in ***Kartick Chandra Mondal*** (*supra*) which lays down that Article 14 of the Constitution is a positive concept and cannot be enforced by a citizen or Court in a negative manner is of equal relevance if not more. At paragraph 25, it was held as follows;

> **"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 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…."**
>
> [A reference in this regard may also be made to the earlier decisions of this Court. See also (*1*) *Faridabad CT Scan Centre* v. *D.G. Health Services* [(1997) 7 SCC 752]; (*2*) *South Eastern Coalfields Ltd.* v. *State of M.P.* [(2003) 8 SCC 648]; and (*3*) *Maharaj Krishan Bhatt* v. *State of J&K* [(2008) 9 SCC 24].] **[emphasis supplied]**

(ii) Later in time, while reiterating the same principle the Supreme Court in ***Basawaraj and Another*** vs. ***Special Land Acquisition Officer***[14] held as follows;

[14] (2013) 14 SCC 81

> **"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. Equality is a trite, which cannot be claimed in illegality and therefore, cannot be enforced by a citizen or court in a negative manner. If an illegality and irregularity has been committed in favour of an 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 a similarly wrong order. A wrong order/decision in favour of any particular party does not entitle any other party to claim benefits on the basis of the wrong decision. Even otherwise, Article 14 cannot be stretched too far for otherwise it would make functioning of administration impossible. ……."

(iii) Reference to this ratio *supra* and paragraph 8 was made by the Hon'ble Supreme Court recently in ***R. Muthukumar and Others*** vs. ***Chairman and Managing Director TANGEDCO and Others***[15] wherein at paragraph 28 it was 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:
> ……."

In the observations *supra* the concept of equality enshrined in Article 14 of the Constitution and that of it being a positive concept is succinctly elucidated.

(iv) That apart, it is apposite to recapitulate that in ***University of Delhi*** vs. ***Delhi University Contract Employees Union and Others***[16] the Court made reference to the ratiocination in ***Secretary,***

---

[15] 2022 SCC OnLine SC 151
[16] 2021 SCC OnLine SC 256

State of Karnataka and Others vs. ***Umadevi (3) and Others***[17] wherein it was *inter alia* held that sanctioned posts having vacancies 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. Pertinently, in Paragraph 46 to Paragraph 48 (*ibid*) it was unequivocally observed that temporary, contractual, casual or daily wage, *ad hoc* employees, appointed *de hors* 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.

(v) On the bedrock of the principles referred to and extracted hereinabove, it cannot but be concluded that the Courts can interfere in the realm of policy when the policy is found to be clouded with unreasonableness, arbitrariness, unfair actions and in violation of the constitutional provisions.

9. Thus, in the facts and circumstances obtaining in the instant petition, the Court cannot overlook the fact that the regularisation of services, discussed threadbare above, sought to bypass the regular and legitimate process of recruitment. The method adopted by the Government excluded scores of eligible candidates from the ambit of State employment in direct violation of the constitutional provisions, thereby depriving qualified and eligible candidates from Government employment. The Court cannot perpetuate the illegality of granting employment sans fair methods of recruitment. A benefit or advantage conferred on a

[17] (2006) 4 SCC 1

person or persons without legal basis or justification cannot be relied upon as a principle of parity or equality.

10. In light of the foregoing discussions, in the end result, the petition lacking merit deserves to be and is accordingly dismissed.

(Meenakshi Madan Rai)
Judge
26-04-2023

Approved for reporting : **Yes**

ds