STATE OF ORISSA AND AND ORS. A

v.

PRASANA KUMAR SAHOO

APRIL 26, 2007

[S.B. SINHA AND MARKANDEY KATJU, JJ.] B

Constitution of India, 1950:

Arts. 162 & 309—Policy decision taken by State in exercise of its jurisdiction under Art. 162—Held: Would be subservient to the recruitment C *rules framed by the State either in terms of a legislative act or the proviso appended to Art.309—A purported policy decision issued by way of an executive instruction cannot override the statute or statutory rules far less the constitutional provisions—A policy decision to absorb a person who is not in employment of the State without following the recruitment rules, would* D *not confer any legal right on him.*

Art. 14—Scope of—Held: Art. 14 contains a positive concept—Only because an illegality has been committed, the same cannot be directed to be perpetuated by a Court of law—There cannot be equality in illegality.

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Art. 226—Writ of Mandamus—Held: Can be issued by the High Court only when there exists a legal right in the Writ Petitioner and corresponding legal obligation in the State.

Appellant State issued a circular relaxing upper age limit of the retrenched employee of Census Organisation for appointment under the State. F **No policy for regularization or for absorption of the employees working the Census Organisation was laid down.**

Disputes arose with regard to the entitlement of Respondent appointment/regularization in terms of the said circular. Respondent used to be appointed in the Census Organisation from time to time keeping in view G **of exigencies of work. His services had been allegedly terminated.**

It is contended by the appellant that the Tribunal and consequently the High Court committed a manifest error in treating the said purported circular

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A letters as a policy decision on the part of the State for regularization of the service of the Respondent. It was contended that the circular letter in question only provided for relaxation of age and the same was subject to the provisions of the recruitment rules.

Respondent, on the other hand, contended that it is not a case where the B prayer for regularization of services in the Census Department was made. According to him, the State adopted a policy decision pursuant whereto and in furtherance whereof a large number of census employees who had been retrenched, having been appointed, there was absolutely no reason as to why he should have been discriminated against. It was contended by the Respondent C that at no point of time, he was found to be unsuitable for appointment in a Class-III post.

Allowing the appeal, the Court

HELD: 1. A State is bound by the constitutional scheme to treat all D persons equally in the matter of grant of public employment as envisaged under Articles 14 and 16 of the Constitution of India. [Para 13] [703-F-G]

2. Even a policy decision taken by the State in exercise of its jurisdiction under Article 162 of the Constitution of India would be subservient to the recruitment rules framed by the State either in terms of a legislative act or E the proviso appended to Article 309 of the Constitution of India. A purported policy decision issued by way of an executive instruction cannot override the statute or statutory rules far less the constitutional provisions.

[Para 14] [703-G, H; 704-A]

A Umarani v. *Registrar, Cooperative Societies and Ors.*, [2004] 7 SCC F 112, relied on

3. The Circular letter dated 21.3.1995 even does not purport to lay a policy decision relating to regularization or absorption of the census employees. It only provided for relaxation of age. Such relaxation was also subject to strict compliance of the recruitment rules. If by reason of some G misconception or otherwise, the Tribunal had granted some relief in favour of some census employees, the same by itself, would not confer any legal right upon a person for being absorbed in State services without compliance of the mandatory provisions of the recruitment rules and the constitutional scheme adumberated under Article 16 of the Constitution of India.

H [Para 16] [704-B, C, D]

4. Regularisation is not a mode of recruitment. A policy decision to absorb a person who is not in employment of the State without following the recruitment rules, would not confer any legal right on him. Furthermore, a direction to grant relaxation in respect of the age must also receive strict compliance of other conditions specified therein.

[Para 19 and 21] [704-F; 705-B]

Secretary, State of Karnataka and Ors. **v.** *Umadevi (3) Ors.,* **[2006] 4 SCC 1, followed.**

Gurbachan Lal **v.** *Regional Engineering College, Kurukshetra & Ors.,* **(2007) 4 SCALE 1** *State of U.P. & Ors.* **v.** *Desh Raj,* **(2006) 13 SCALE 382;** *Punjab Water Supply & Sewerage Board* **v.** *Ranjod Singh & Ors.,* **(2006) 13 SCALE 426;** *National Institute of Technology & Ors.* **v.** *Niraj kumar Singh,* **(2007) 2 SCALE 525;** *Punjab State Warehousing Corp., Chandigarh* **v.** *Manmohan Singh & Anr.,* **(2007) 3 SCALE 401 and** *Kendriya Vidyalaya Sangathan and Ors.* **v.** *Sajal Kumar Roy and Ors.,* **[2006] 8 SCC 671, relied on.**

5. It may be that some other persons similarly situated have been appointed. But Article 14 as is well known contains a positive concept. A Writ of *Mandamus* can be issued by the High Court only when there exists a legal right in the Writ Petitioner and corresponding legal obligation in the State. Only because an illegality has been committed, the same cannot be directed to be perpetuated by a court of law. It is also well settled that there cannot be equality in illegality. [Paras 22 and 23] [705-C, D]

Sushanta Tagore & Ors. **v.** *Union of India and Ors.,* **[2005] 3 SCC 16;** *State, CBI* **v.** *Shashi Balasubramanian and Anr.,* **(2006) 10 SCALE 541 and** *U.P. Sugar Corp. Ltd. & Anr.* **v.** *Sant Raj Singh & Ors.,* **(2006) 6 SCALE 205, relied on.**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2167 of 2007.

From the Final Judgment and Order dated 10.04.2006 of the High Court of Orissa, Cuttack in W.P. (C) 564 of 2006.

Janaranjan Das and Sweta Ketu Mishra for the Appellants.

Bharat Sangal, R.R. Kumar, Samyadip Chatterji and Suchitra Sharma for the Respondents.

The Judgment of the Court was delivered by

A **S.B. SINHA, J.** 1. Leave granted.

2. Respondent herein was appointed by the Union of India in the Census Organisation. His appointment was temporary in nature. He used to be appointed from time to time keeping in view exigencies of work. The State of Orissa issued a circular letter on or about 21.3.1995 relaxing upper age limit B of the retrenched census employees for appointment under the State. The said circular letter related to 147 retrenched employees of the census organization. Principally relaxation of age for appointment in the State Service was contemplated thereby stating;

> C "Now after careful consideration in pursuance of Rule 52 of OSC Government have been pleased to decide that in relaxation of upper age limit prescribed u/r 52A ibid shall be applicable to these 147 retrenched Census Employees of Census Organisations in Orissa as indicated below:
>
> > D (i) The age limit for entry into any post under any rule relating recruitment may be relaxed in the above cases. Relaxation in age may be granted equal to the period of service rendered in the Census Organisation of Orissa prior to retrenchment.
>
> All Departments of Government, all Heads of department and all Collectors are requested to entertain the cases of these retrenched E employees *when they apply for any post under them suit to their qualification provided they are otherwise eligible for post under the relevant recruitment rules.* Necessary detail seeking particulars of these 147 retrenched employees may be obtained from Director of Census Operation, Orissa, Bhubaneswar when necessary."
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> F (Emphasis Supplied)

3. By the said circular letter, no policy for regularization or for absorption of the employees working in the census organization was laid down.

G 4. Another circular letter was issued on or about 2.7.1999. The question as to whether in terms of the said purported circular letters, the employees working in the census organization were entitled to recruitment came up for consideration before the Orissa Administrative Tribunal and by reason of judgment and order dated 17.12.1998, it was directed;

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"6. Be that as it may, the fact remains that these applicants and others who were left out were not given any opportunity to compete with the Respondents while being selected to be posts to which they have been appointed. There is nothing on record to show that these applicants were intimated by any office at any time about the existence of any vacancy nor were they called to any selection test by any governmental authority for recruitment to the post after they were retrenched. In the absence of any such intimation, it was not possible for the applicants and others to know about the vacancy position and to make any application for appointment. As it appears from the resolution that it was the duty of various departments of the State Government to take *suo moto* initiative to appoint such retrenched candidates. No obligation was cast on these retrenched candidates. No obligation was cast on these retrenched candidates to apply for the posts. It is submitted that in the meantime hundred of posts fell vacant in the Government departments including in the District Offices and Sub-Divisional Offices. If that is so we are of the view that the present attitude taken by the authorities in not considering the retrenched employees like the applicants in preference to others in terms of the aforesaid resolution of the Government is not proper and we may further say that they have committed acts of injustice to the applicants as well as other retrenched candidates. However, it is submitted by the learned counsel for Respondents that about 90 such retrenched candidates have already been appointed in different offices and only about 50 candidates are left for appointment.

7. For the reasons stated above, we hold that the grievance of the applicants is genuine. In view of the fact that the Respondents have been duly selected and they appointed as retrenched candidates, we are not inclined to interfere with the orders of their appointment after regularization. Hence, the Respondents No. 4 to 13 wherever already in service shall continue to work in their posts according to rules.

8. We direct the State Government and Respondent no. 1 & 2 in particular to take immediate steps for absorption of the remaining retrenched candidates within a period of six months from the date of receipt of a copy of this order in any Government office located anywhere in the State or if no such immediate vacancies are available in the Government Offices, in any of the public Sector Undertaking located anywhere in the State in the post for which they are eligible

A but not below the rank of Class III. This exercise should be completed within a period of 6 months from the date of receipt of a copy of this order irrespective of their present age subject to the condition that none of them is aged more than 50 years."

5. Although a large number of employees were said to have been B appointed pursuant to the said policy decision, respondent herein was again appointed in the census organization on or about 7.2.2001. Apprehending that his services may be terminated, he approached the Orissa Administrative Tribunal and by an interim order dated 17.4.2001, a direction was issued that his services should not be terminated without the leave of the Tribunal.

C 6. As despite the said interim order, his services were allegedly terminated on 1.6.2001, he filed an application for contempt, whereupon a contempt proceedings was initiated. By reason of an Order dated 28.1.2002, the State Government was directed to appoint the respondent to any unfilled vacancy of Junior Clerks on a temporary basis and subject to the final order of the D Tribunal.

7. A Writ Petition was filed by the State before the Orissa High Court questioning the validity of the said order and by an Order dated 19.1.2005, although the High Court opined that the Tribunal was not justified in issuing the said direction, observed;

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"Before parting with the matter, we feel that the State Government is duty bound to comply with its policy and circulars when there is a direction to appoint retrenched employees of the Census organization, we see no reason as to why the Government is not complying with those directions. Therefore, we feel that the petitioners should take F steps to appoint the retrenched employees of Census organization in accordance with the Government circulars including the Government memo dated 21.3.1995 and in case the case of the opposite party is also covered with the same, it goes without saying that his case is also liable to be considered for permanent absorption against any of G the vacancies of Junior Clerk."

8. The Tribunal thereafter allowed the original application filed by the respondent directing;

"In view of the said observations on the Hon. High Court coupled with the policy decision and order of the Govt. as at Annexure-2 & H

5, we dispose of the Original Application with a direction to the respondents to consider the case of the applicant for his permanent absorption against any of the vacancies of junior clerk under the respondent no. 3 if his case is covered with the conditions mentioned in Annexure-2 & 5 and this exercise shall be completed within six months from the date of receipt of a copy of this order and communicate the order to the applicant with the said period." A B

9. A Writ Petition filed before the High Court by the appellant against the said Order of the Tribunal has been dismissed by the High Court by reason of the impugned judgment.

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10. Submission of Mr. Janaranjan Das, learned counsel appearing on behalf of the appellant in support of the appeal, is that the Tribunal and consequently the High Court committed a manifest error in treating the said purported circular letters as a policy decision on the part of the State for regularization of the services of the respondents.

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11. Circular letters, the learned counsel would contend, only provided for relaxation of age and a bare perusal thereof would clearly show that the same was subject to the provisions of the recruitment rules.

12. Mr. Bharat Sanghal, learned counsel appearing on behalf of the respondent, on the other hand, would submit that it is not a case where the E respondent prayed for regularisation of services in the Census Department. According to the learned counsel, the State adopted a policy decision pursuant whereto and in furtherance whereof a large number of census employees who had been retrenched, having been appointed, there was absolutely no reason as to why the respondent should have been discriminated against. It was F contended that at no point of time, the respondent was found to be unsuitable for appointment in a Class-III post.

13. It is now well-settled that a State is bound by the constitutional scheme to treat all persons equally in the matter of grant of public employment as envisaged under Articles 14 and 16 of the Constitution of India. G

14. Even a policy decision taken by the State in exercise of its jurisdiction under Article 162 of the Constitution of India would be subservient to the recruitment rules framed by the State either in terms of a legislative act or the proviso appended to Article 309 of the Constitution of India. A purported policy decision issued by way of an executive instruction cannot override the H

A statute or statutory rules far less the constitutional provisions.

15. In *A. Umarani* v. *Registrar, Cooperative Societies and Ors.*, [2004] 7 SCC 112, this Court has held;

> "45. No regularisation is, thus, permissible in exercise of the statutory
> B power conferred under Article 162 of the Constitution if the appointments have been made in contravention of the statutory rules."

16. The circular letter dated 21.3.1995 even does not purport to lay a policy decision relating to regularisation or absorption of the census employees. It only provided for relaxation of age. Such relaxation was also subject to
C strict compliance of the recruitment rules. If by reason of some misconception or otherwise, the Tribunal had granted some relief in favour of some census employees, the same by itself, in our opinion, would not confer any legal right upon a person for being absorbed in State services without compliance of the mandatory provisions of the recruitment rules and the constitutional scheme
D adumberated under Article 16 of the Constitution of India.

17. Submission of Mr. Bharat Sanghal, learned counsel is that the High Court had made certain observations in regard to the recruitment of the respondent while disposing of the Writ Petition from an Order dated 28.1.2002 passed by the Tribunal in the contempt proceeding.

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18. We have noticed hereinbefore that the High Court had set aside the Order of the Tribunal directing the petitioner to re-instate the respondent in service. Observations made therein did not constitute a binding direction. The Tribunal passed an order to that effect, but the same had been in question before the High Court.

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19. Regularisation as is well known is not a mode of recruitment. A policy decision to absorb a person who is not in employment of the State without following the recruitment rules, would not confer any legal right on him. A Constitution Bench of this Court in *Secretary, State of Karnataka and*
G *Ors.* v. *Umadevi (3) and Ors.*, [2006] 4 SCC 1, categorically held that any appointment made in violation of the constitutional provisions would be a nullity.

See also *Gurbachan Lal* v. *Regional Engineering College, Kurukshetra & Ors.*, (2007) 4 SCALE 1]

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20. We may notice that in a large number of decisions, *Umadevi* (supra)

has been followed by this Court. A

e.g. *State of U.P. & Ors.* v. *Desh Raj,* (2006) 13 SCALE 382, *Punjab Water Supply & Sewerage Board* v. *Ranjodh Singh & Ors.,* (2006) 13 SCALE 426 and *National Institute of Technology & Ors.* v *Niraj Kumar Singh,* (2007) 2 SCALE 525, *Punjab State Warehousing Corp., Chandigarh* v. *Manmohan Singh & Anr.,* (2007) 3 SCALE 401]. B

21. Furthermore, a direction to grant relaxation in respect of the age must also receive strict compliance of other conditions specified therein.

See *Kendriya Vidyalaya Sangathan and Ors.* v. *Sajal Kumar Roy and Ors.,* [2006] 8 SCC 671]. C

22. It may be that some other persons similarly situated have been appointed. But Article 14 as is well known contains a positive concept. A Writ of Mandamus can be issued by the High Court only when there exists a legal right in the Writ Petitioner and corresponding legal obligation in the State. D Only because an illegality has been committed, the same cannot be directed to be perpetuated by a court of law.

23. It is also well settled that there cannot be equality in illegality.

See *Sushanta Tagore & Ors.* v. *Union of India and Ors.,* [2005] 3 SCC 16, *State, CBI* v. *Sashi Balasubramanian and Anr.,* (2006) 10 SCALE 541 and *U.P. State Sugar Corp. Ltd. & Anr.* v. *Sant Raj Singh & Ors.,* (2006) 6 SCALE 205].

24. For the reasons aforementioned, the impugned judgment cannot be sustained. It is set aside accordingly. The Appeal is allowed. However, in the facts and circumstances of this case, there shall be no order as to costs.

B.B.B. Appeal allowed.