Dr. Anuradha Bodi & Ors. Etc. Etc vs Municipal Corporation Of Delhi And ... on 8 May, 1998

Equivalent citations: AIR 1998 SUPREME COURT 2093, 1998 AIR SCW 1971, 1998 LAB. I. C. 1911, (1999) 1 LABLJ 560, (1998) 3 SCT 322, 1998 (5) SCC 293, (1998) 3 SCR 269 (SC), (1998) 3 SCALE 453, (1998) 2 ESC 1366, (1998) 73 DLT 497, (1998) 4 SUPREME 555, 1998 SCC (L&S) 1351, 1998 ADSC 4 552, (1999) 1 SERVLJ 1, (1998) 3 JT 757 (SC)

Bench: S.C. Agrawal, M. Srinivasan

PETITIONER:
DR. ANURADHA BODI & ORS. ETC. ETC.

Vs.

RESPONDENT:
MUNICIPAL CORPORATION OF DELHI AND OTHERS

DATE OF JUDGMENT: 08/05/1998

BENCH:
S.C. AGRAWAL, M. SRINIVASAN

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T SRINIVASAN, J.

There are nine petitioners in the earlier writ petition and one petitioner in the later writ petition. They were appointed by the first respondent as General Duty Medical Officer Grade II between 1982 and 1985. The first petitioner in the Civil Writ Petition 60 of 1994 and petitioner in Writ Petition No. 8 of 1997 were appointed in 1982. Petitioners 2 and 3 in the earlier writ petition were appointed din 1083. Petitioners 4 and 5 were appointed in 1984 whereas petitioners 6 to 9 were appointed in 1985. It is not in dispute that all of them were appointed on purely ad hoc basis on the same terms and conditions. In the appointment orders, Clause 1 stated that the appointment would be purely on an

ad hoc basis as a stop gap arrangement for a period of six months or till such time the posts were filled up on regular basis through Union Public Service Commission (for short `UPSE') or till further orders whichever was earlier. Clause 2 provided that the ad hoc appointments could be terminated at any time by the competent authority without assigning any reason whatsoever and without giving any prior notice. According to Clause 3, the appointment will not confer any right whatever on the appointee for regular/permanent appointment. Under Clause 9 the appointees were advised for regular appointment to pass the U.P.S.C. examination in normal course in the direct competition.

2. There is a specific averment in the counter-affidavit filed by the first respondent that inspite of several opportunities available to the petitioners, they preferred not to apply to the UPSC for direct competition entitling them to be appointed on regular basis. The petitioners have not filed any rejoinder controverting the same.

3. The Recruitment Rules, called "The Delhi Municipal Corporation Health Service Recruitment Regulation, 1982"

> (herein after referred to as `the Rules') were made by the Municipal Corporation of Delhi under Section 98 of the Delhi Municipal Corporation Act, 1957 and notified under Notification No. R-9/38/82-LSG/5686 dated 6.8.82. As per the rules, the posts in question were to be filled up through the U.P.S.C. Admittedly, the petitioners were not selected through U.P.S.C. but according to the petitioners they were selected by a high-profile Selection Committee consisting of Deputy Commissioner and Director (Personnel) of M.C.D., Medical Superintendent of the hospital concerned and two specialists in Clinical Medicine from two renowned hospitals.

4. Though the appointments of the petitioners were initially for a period of six months, they were being continued periodically by subsequent orders issued by the first respondent. One such order has been filed as a sample by the petitioners bearing dated 15.2.90. The preamble to the order reads as follows :

"The Chief Secretary, Delhi Administration, exercising powers of the Corporation under Section 490 (2)(b) of the D.M.C. Act, 1957 vide Decision No. 211/CW/Corp.

dated 2.2.1990 has approved the continued ad hoc appointment of following GDMOs Grade II in the pay scale of Rs, 2200-4000 plus the usual allowances with effect from 13.7.1989 for a period of one year or till such time the posts are filled up on regular basis, whichever is earlier"

> 5. By a similar order dated 24.7.1990 the services of the petitioners were extended for a period of one year with effect from 13.7.1990. The petitioners were making representations to regularise their services even without appearing before the U.P.S.C. but in vain.
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> 6. They filled a writ petition in this Court under Article 32 of the Constitution in Writ Petition (Civil) No. 47 of 1991 praying that their services should be treated as regular

from the respective dates of their induction into the service and to consider them for promotion to Grade I, that their initial appointment be treated as regular appointment with effect from the date of their induction of their service and to grant them consequential seniority, to declare that the Corporation should absorb them first before offering the existing vacancies to the new recruits who might be selected in pursuance of the combined Medical Service Examination 1991 and to restrain the respondents from terminating the services of the petitioners pending the disposal of the petition. The said petition was disposed of vide order dated 29.7.1991 in the following terms :

"We are informed that all the petitioners have been called for interview by Union Public Service Commission. In view of this no further relief requires to be granted in the petition. The petitioners certainly can not claim that they are entitled to be regularised even though they are not selected. The Writ Petition is dismissed as infructuous. If the petitioners have not been selected and they have any grievance in that connection with the selection the remedy for them is to file separate proceedings"

7. Thereafter, the petitioners appeared before the U.P.S.C. and were selected. Consequently, the first respondent passed an order on 17.8.1992 appointing the petitioners on regular basis to the grade of G.D.M.O. II with effect from 27.6.91, the date when the U.P.S.C. recommended the appointment of the petitioners.

8. The petitioners are aggrieved by the date from which they are appointed on regular basis namely, 27.6.91. According to the petitioners they should have been appointed on regular basis with effect from the initial dates of appointment respectively. Hence they have filed the present writ petition with prayers for declaration that the respondents should treat them as holding their respective posts regularly from the respective dates of their initial appointments which stand now regularised by U.P.S.C. and grant them their due seniority with consequential benefits such as promotion to higher grade notwithstanding the order dated 17.8.92 which may be suitably amended, declaration that the action of the respondents in not treating them as regular employees of the Corporation since the date of their initial appointment is unwarranted, arbitrary and violative of Articles 14 and 16 of the Constitution and for declaration that the petitioners are entitled to be treated as having been appointed on regular basis as G.D.M.Os from the date of respective initial appointment as has been done in the case of other employees vide order dated 31.12.86.

9. A preliminary objection was raised by the learned counsel for first the respondent that the writ petition is not maintainable in as much as the claim for regularisation has been negatived by this Court in Writ Petition (Civil) No. 47 of 1991 the order in which has already been extracted by us. Though the prayers in the two writ petitions are almost the same and the petitioners are seeking once again to claim that their initial appointments should be considered to be on regular basis. This writ petition has to be considered in so far as it relates to question of seniority. In view of the order dated 27.9.91 in Writ Petition 47 of 1991 the petitioners cannot claim that they are entitled to be treated as having been regularly appointed with effect from the date of their initial appointment. But

the petitioners are placing reliance on the judgment of the Constitution Bench of this Court in Direct Recruit Class II Engineering Officers' Association Versus State of Maharashtra & Ors . (1990) 2 S.C.C. 715 and are contending that their services from the dates of initial appointment till the date of regularisation have to be taken into consideration for purposes of fixing their seniority. In fact on an earlier occasion when this case was heard on 27.10.94 the Court took note of the said contention and directed the impleadment of persons who were regularly appointed after selection by the U.P.S.C. and were in service during the period 1982 to 1991. Thus the regular appointees have been impleaded as respondents in the present case. Hence, the question which has to be considered is whether the petitioners are entitled to get any benefit on the basis of the decision rendered by the Constitution Bench in the Direct Recruit case (supra).

10. The propositions laid down by the Constitution Bench in the aforesaid case are set out in Paragraph 47 of the judgment. We are concerned with only Conclusions (A) and (B) which read as follows :

> (A) Once an incumbent is appointed to a post according to rule, his seniority has to be counted from the date of his appointment and not according to the date of his confirmation. The corollary of the above rule is that where the initial appointment is only ad hoc and not according to rules and made as a stop gap arrangement, the officiation in such posts cannot be taken into account for considering the seniority.
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> (B) If the initial appointment is not made by following the procedure laid down by the rules but appointed continues in the post uninterruptedly till the regularisation of his service in accordance with the rules, the period of officiating service will be counted".
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> 11. These two clauses have been explained in a subsequent judgment in State of West Bengal and others etc. etc. versus Aghore Nath Dey and others etc. etc. (1993) 3 S.C.C. 371 The relevant passages in the said judgment read as follows :
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> "21. We shall now deal with conclusions (A) and (B) of the constitution bench in the Maharashtra Engineers case quoted above.
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> 22. There can be no doubt that these two conclusions have to be read harmoniously, and conclusion (B) cannot cover cases which are expressly excluded by conclusion (A). We may, therefore, first refer to conclusion from the date of initial appointment and not according to the date of confirmation, the incumbent of the post has to be initially appointed `according to rules'. The corollary set out in conclusion (A), then is, that `where the initial appointment is only ad hoc and not according to rules and made as a stopgap arrangement, the officiation in such posts cannot betaken into account for considering the seniority'. Thus, the corollary in conclusion (A) expressly excludes the category of cases where the initial appointment is only ad hoc and not according to rules, being made only as a stopgap arrangement.

The case of the writ petitioners squarely falls within this corollary in conclusion (A), which says that the officiation in such posts cannot be taken into account for counting the seniority.

23. This being the obvious inference from conclusion (A), the question is whether the present case can also fall within conclusion (B) which deals with cases in which period of officiating service will be counted for seniority. We have no doubt that conclusion (B) cannot include, within its ambit, those cases which are expressly covered by the corollary in conclusion (A), since the two conclusions cannot be read in conflict with each other.

24. The question, therefore, is of the category which would be covered by conclusion (B) excluding therefrom the cases covered by the corollary in conclusion (A).

25. In out opinion, the conclusion (B) was added to cover a different kind of situation, wherein the appointments are otherwise regular, except for the deficiency of certain procedural requirements laid down by the rules. This is clear from the opening words of the conclusion (B), namely, `if the initial appointment is not made by following the procedure laid down by the `rules' and the latter expression `till the regularisation of his service in accordance with the rules'. We read conclusion (BH), and it must be so read to reconcile with conclusion (A), to cover the cases where the initial appointment is made against an existing vacancy, not limited to a fixed period of time or purpose by the appointment order itself, and is made subject to the deficiency in the procedural requirements prescribed by the rules for adjudging suitability of the appointment on the date of initial appointment in such cases. Decision about the nature of the appointment, for determining whether it falls in this category, has to be made on the basis of the terms of the initial appointment itself and the provisions in the rules. In such cases, the deficiency in the procedural requirements laid down by the rules has to be cured at the first available opportunity, without any default of the employee, and the appointee must continue in the post uninterruptedly till the regularisation of his service, in accordance with the rules. In such cases, the appointee is not to blame for the deficiency in the procedural requirements under the rules at the time of his initial appointment, and the appointment not being limited to a fixed remaining procedural requirements of the rules being fulfilled at the earliest. In such cases all appointee is not to blame for the initial appointment, and the appointment not being limited to a fixed period of time is intended to be regular appointment, subject to the remaining procedural requirements of the rules being fulfilled at the earliest. In such cases also, if there be any delay in curing the defects on account of any fault of the appointee, the appointee would not get the full benefit of the earlier period on account of his default, the benefit being confined only to the period for which he is not to blame. This category of cases is different from those covered by the corollary in conclusion (A) which relates to appointment only on ad hoc basis as a stopgap arrangement and not according to rules".

12. If the facts of these two cases are analysed in the light of the aforesaid decisions, there can be no doubt whatever that the petitioners fall within the corollary in Conclusion (A). The orders of appointment issued to the petitioners are very specific in their terms. Though the Recruitment Rules came into force on 6.8.82, the appointments were not made in accordance therewith. They were ad hoc and made as a stop gap arrangement. The orders themselves indicated that for the purpose of regular appointment the petitioners were bound to pass the U.P.S.C. examination in normal course

in the direct competition. Hence the petitioners will not fail under the main part of Conclusion (A) or Conclusion (B) as contended by the learned counsel for the petitioners.

13. A strange contention has been urged by the learned counsel for the petitioners by referring to Section 96 of the Delhi Municipal Corporation Act. Under that Section no appointment to any category A post shall be made except after consultation with the U.P.S.C. but under the proviso no such consultation shall be necessary in regard to the selection for appointment to any acting or temporary posts for a period not exceeding one year. According to learned counsel for the petitioners, the appointment of the petitioners was for a period of six months only and there was no necessity to consult the Commission. Consequently, according to her the appointments were in accordance with the statutory provisions. There is no merit in this contention. If this contention is accepted the main provision contained in Section 96 prohibiting any appointment without consulting the Commission can be easily defeated. Appointments can be made for periods lesser than one year and after continuing such appointments for some years, the appointees could be made permanent. That will only lead to nepotism and anarchy. The Statute has not provided for any such situation. In fact a note of warning has been issued by this Court in Dr. M.A. Haque and others Versus Union of India & Ors. (1993) 2 S.C.C. 213 in the following words :

> "As against this, however, we cannot lose sight of the fact that the recruitment rules made under Article 309 of the Constitution have to be followed strictly and not in breach. If a disregard of the rules and the by-passing of the Public Service Commission's are permitted, it will open a back door for illegal recruitment without limit."

With respect, we adopt that reasoning and reject the contention of the learned counsel for the petitioners.

14. Learned counsel attempted to contend that the posts of GDMOs Grade II were in category B within the meaning of Section 90 of the Delhi Municipal Corporation Act and they did not fall within the ambit of U.P.S.C. There is no such plea in the writ petition. In the absence of any specific pleading in that regard we cannot permit the petitioner's counsel to raise such a contention at the stage of arguments. However, it must be pointed out that in the writ petition there is an averment by the petitioners in Paragraph 12 that since the petitioners have been in service for periods ranging between 5 to 9 years, it is to be presumed that consultation with the approval of U.P.S.C. was obtained for their continued appointment. That averment is on the footing that the posts fell within the ambit of U.P.S.C.. Hence, it is not open to the petitioners to contend to the contrary.

15. The next contention of the petitioners' counsel is that they have been in service for such a long time enjoying the benefits of revised pay scales as well as allowances periodically and have been prevented from carrying on private practice of any kind whatsoever and therefore they should be treated as regular appointees from the inception. Support is sought from the judgment of this Court in Jacob M. Puthuparambil and others etc. etc. versus Kerala Water Authority and others (1991) 1 S.C.C. 28 in which this Court on an interpretation of the relevant rules held that long continuous service of temporary appointees should not be terminated but should be regularised by the authority

concerned. The ruling has no application in the present case. Our attention is also drawn to the judgment in I.K. Sukhija and others versus Union of India and others (1997) 6 S.C.C. 406. The contention put forward by the counsel in that case was that the appellants were governed by the corollary of Conclusion A in the Direct Recruit case (supra). The Court found on the facts that the appellants' promotions were not contrary to any statutory recruitment rules, they were duly considered by the D.P.C. and promotions were made according to their placement in t he merit list. It was also found that the only reason for ad hoc promotion instead of regular promotion was that the draft rules had not been finalised. In that situation, the Court held that the appellants fell within the scope of Conclusion B in Direct Recruit case (supra) and were entitled to the benefit of the period of officiating service. That ruling will not apply in the present case.

16. The next contention of the learned counsel is that by an order dated 31.12.86 the Corporation regularised the services of several appointees on the recommendation of the Union Public Service Commission with effect from 27th December 1980 or the date of appointment whichever was later. According to the learned counsel hostile discrimination is made against the petitioners who were in a similar situation. There is no merit in this contention. In the counter-affidavit it has been clearly stated by the respondents that those persons were appointed prior to 20.6.78 during the period of strike of Municipal doctors and non-availability of the recommended doctors from the U.P.S.C. and there was an agreement between the representatives of those doctors pursuant to which they were regularised and such regularisation was with effect from 27.12.80 i.e. the date of recommendation by the U.P.S.C. It should be noted that those appointments were long prior to the passing of the recruitment rules and the petitioners cannot claim that they are on the same platform as those appointees.

17. The petitioners have been regularised with effect from 27.6.91 the date on which the U.P.S.C. recommended their appointments. Hence there is nothing illegal or arbitrary in the office order dated 17.8.92 appointing the petitioners on regular basis with effect from 27.6.91. The said regularisation is in accordance with the rules.

18. We hold that the order of regularisation made by the first respondent on 17.8.92 with reference to petitioners is valid and not arbitrary. The petitioners cannot have any grievance against the same. Consequently the writ petitions have to fail and they are hereby dismissed. There will be no order as to costs.