

Pranaba Kumar Panda Vs. State of Orissa and ors.

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Court : Orissa

Decided On : Jun-30-2009

Reported in : 108(2009)CLT276

Judge : B.P. Das and; Indrajit Mahanty, JJ.

Appellant : Pranaba Kumar Panda

Respondent : State of Orissa and ors.

Disposition : Application allowed

Judgement :

Indrajit Mahanty, J.

1. The Petitioner-Pranaba Kumar Panda has filed the present writ application seeking a direction to Opp.Parties 2 and 3, namely, the Vice Chairman and the Secretary of Bhubaneswar Development Authority (in short 'BDA') to allow him to join in the post of Junior Engineer (Mechanical) in which he had been continuously working and with a further prayer to direct regularization of his services with consequential service benefits.

2. In course of hearing of this writ application, by an Order Dated 6.3.2007, directions were issued by this Court permitting the Petitioner, to file a representation before the Vice Chairman, Bhubaneswar Development Authority-

Opp. Party No. 2, within a period of ten days and the Vice Chairman was directed to reconsider the case of the Petitioner sympathetically, keeping in view the fact that the Petitioner had served for a considerable length of time in the B.D.A. and to take a decision on the representation within a period of two months from the date of filing of such representation. Pursuant to the said direction, the Petitioner made a representation, but the same came to be rejected by Opp. Party No. 2 vide letter dated 8.6.2007 on the ground that 'the work load and present staff position in the mechanical wing, there is no further need of any Junior Engineer (Mechanical) in B.D.A.'

3. Shorn of unnecessary details, on perusal of the pleadings of the case, it appears that the Petitioner was a holder of a Diploma in 'Mechanical Engineering' and in the year 1987, applied to the State Government for a post of 'Mobile Unit Supervisor'. By an Order Dated 28.12.1987 (Annexure-1) the State Government appointed him on 'ad hoc basis' and posted him to Koraput P.H. Division against a post created vide the Government order No. 6866 dated 15.12.1986. The Petitioner joined at Koraput P.H. Sub-division on 4.1.1988 and thereafter was transferred from place to place. In course of his employment he was ultimately, transferred to Baliana under Bhubaneswar Sub-division and worked there till 27.10.1992.

While working at Baliana as a 'Mobile Unit Supervisor', a post of Junior Engineer (Mechanical) became vacant under the B.D.A. and since the Petitioner was interested in the same, he made representation/application to the Vice-Chairman of B.D.A. (through proper channel) under Annexure-2. It further reveals that on 17.11.1992, the Chief Engineer, P.H. Department forwarded the application of the Petitioner to the Deputy Secretary to Government in Housing & U.D. Department recommending the case of the Petitioner, and forwarded the same to the Vice-Chairman, B.D.A. vide Annexure-3. The said representation was forwarded to the Vice-chairman, B.D.A. by the Secretary, Housing & U.D. Department on 23.11.1992 under Annexure-4. The Secretary, B.D.A.-O.P. No. 2, under cover of his letter dated 4.2.1993 addressed to the Deputy Secretary, Housing & U.D. Department sought for 'requisition of service' of the Petitioner to be placed with B.D.A. under 'foreign service terms' and conditions as a post of Junior Engineer

(Mechanical) had been created by the B.D.A. at its 44th meeting (under Annexure-5).

4. The Government-in Housing & U.D. Department vide letter dated 11.3.1993 replied to the letter of the Secretary, B.D.A. (Annexure-5) stating that, while it was not permissible to place the services of the Petitioner at the disposal of a foreign body, since the Petitioner was working under a work-charged establishment, the Department had no objection if the Petitioner was absorbed in B.D.A. 'permanently' considering his qualification and suitability. The Government further requested that the representation of the Petitioner sent to the B.D.A. earlier vide Department letter dated 23.11.1992 may be considered for 'regular appointment' (under Annexure-6).

5. The B.D.A. issued an order of appointment dated 21.3.1994 in favour of the Petitioner under Annexure-7 to the following effect:

Sri P.K. Panda, J.E. (Mechanical) is appointed temporarily for one year in the scale of pay Rs. 1400-40-1600-50-2300-EB-60-2600 with effect from date of his joining in BDA, Bhubaneswar against a post of Junior Engineer (Civil).

This appointment is purely temporary and terminable at any time without any prior notice and, assigning any reason thereof.

The Petitioner's joining report was accepted by the B.D.A. vide Order Dated 21.3.1994 w.e.f. 5.4.1994 under Annexure-8. From the said date till 1996, the Petitioner continued in service under the B.D.A., but since his appointment under the B.D.A. had not been regularized, he made a representation once again to the Vice-Chairman, B.D.A. on 2.12.1996 under Annexure-9 seeking regularization of his service.

The B.D.A. while considering the representation of the Petitioner on 23.10.1997, wrote a letter to the Chief Engineer, P.H. Department, Bhubaneswar to send a copy of the Petitioner's Last Pay Certificate (LPC) and relieve order which were required for consideration of the Petitioner's case for regularization. In response to the aforesaid request of the B.D.A., the Chief Engineer, P.H. Orissa, Bhubaneswar

vide letter dated 25.10.2001 under Annexure-18, intimated that 'the Petitioner is treated to have been relieved from the office of the Chief Engineer, Public Health, Orissa, Bhubaneswar w.e.f. 4.4.1994 since he had joined under BDA, Bhubaneswar on 5.4.1994'. It was further intimated that the original service book of the Petitioner as well as Last Pay Certificate be sent to the B.D.A.. It is stated that even though the Service Book and Last Pay Certificate of the Petitioner as required by the B.D.A. for the purpose of regularization of his services, had been received by the B.D.A., yet, since no action was taken 'thereon, the Petitioner continued as such from 1994 till 2001.

6. The Petitioner faced a criminal trial for the suicide of his wife and during the pendency of the same, he was neither placed under suspension nor there was any order to terminate his services and after 'acquittal from the criminal charges' by the Judgment dated 18.10.2001 (Annexure-14), the Petitioner submitted a copy of the Judgment to the B.D.A. on 2.11.2001 and requested the Secretary, B.D.A. to allow him to join in duty. It was alleged that there was complete inaction on the part of the B.D.A. and despite numerous representations to the Opposite Parties 2 and 3 for being allowed to resume duty, the Opposite Parties remained completely silent compelling the Petitioner to file the present writ application.

7. Sri Dayananda Mohapatra, Learned Counsel for the B.D.A. placed reliance upon the counter affidavit filed on behalf of the B.D.A. and while taking the stand that the B.D.A. is the statutory authority created under the Orissa Development Authorities Act, 1982, stated in paragraph-7 that although the Petitioner had submitted a representation to the B.D.A. in order to engage him under the B.D.A. as Junior Engineer on 27.10.1992, such representation was submitted through proper channel. Learned Counsel for the B.D.A. stated that the proposal for creation of a post of Junior Engineer (Mechanical) was placed before the Board on its 44th meeting and the resolution .came as follows:

Item No. 27/44 - Creation of Post of Junior Engineer Mechanical.

Approved

It was decided not to create any new post & to bring a Junior Engineer, Mechanical on deputation from Govt, against one post of existing Junior-Engineer(Civil).'

It is further stated that pursuant to the aforesaid decision of the authority, the Secretary requested the Government in Housing and Urban Development Department to place the service of Sri Panda (Petitioner), Junior Engineer (Mechanical) under 'Foreign service terms and conditions' against the existing post of Junior Engineer (Civil). However, since the State Government pleaded its inability to place the services of the Petitioner on 'foreign service terms and conditions' and suggested that the Petitioner may be absorbed by the B.D.A. 'permanently' considering his qualification. In spite of the aforesaid averments, in paragraph-10 of the counter affidavit, the following is stated:

10. That, however, In consideration of different aspects the Petitioner was appointed temporarily for a period of one year against a post of Junior Engineer (Civil) vide Annexure-7. The aforesaid temporary engagement was placed before the Authority for post facto approval. The Authority was pleased to resolve as follows: The services of Sri Pranab Kumar Panda, Junior Engineer (Mechanical) who is now adjusted in the post of Junior Engineer (Civil) would be extended for a period of 2 years till 4.4.96.

Once the period as mentioned above expired, the Petitioner continued to be engaged by the B.D.A. on 44 days basis and extended from time to time. More importantly, in paragraph-11 of the counter affidavit, it is stated that a 'Mechanical Sub-Division' was constituted by the B.D.A. and the Petitioner was transferred, and posted to Division No. 2 w.e.f. 6.2.1999 but it is alleged that the Petitioner did not comply with the said order and did not join in the said Division (Annexure-C). Thereafter, a Letter was addressed by the Establishment Officer by the B.D.A. to the Executive Engineer, Division No. 3, intimating him that Sri Panda had not joined in the Establishment Section, despite the orders and since the period of 44 days of engagement which expired by 17.11.1999, the Vice-Chairman had been pleased to pass orders to dispense with the services of the Petitioner and no further extension of his Adhoc appointment could be given beyond 17.11.1999.

Therefore, in essence, the stand of the B.D.A. is that although the B.D.A. has taken a decision on its 44th meeting approving the posting of a Junior Engineer (Mechanical) in a vacant post of Jr. Engineer (Civil) and even though the State Government had refused to send Sri Panda (Petitioner) to the B.D.A. on 'foreign service terms and, conditions', yet, no reason has at all been stated in the counter affidavit as to why, only temporary appointment was granted to the Petitioner since his application had been forwarded through the proper channel and even though the Petitioner satisfied the eligibility criteria for appointment to such post. It is the further stand of the B.D.A. that the Petitioner's appointment was disposed of by not renewing his services beyond 17.11.1999 on account of purported non-compliance of the orders of transfer passed by the Vice-Chairman. It is pertinent to mention herein that it is neither averred in the counter affidavit nor indicated in the said Annexure-D as to whether such order was communicated to the Petitioner at any point of time.

8. A rejoinder affidavit which has been filed by the Petitioner, in which the Petitioner has stated that, whereas the Petitioner was posted as Junior Engineer (Mechanical) under Division No. 2 on 44 days basis from 5.1.1999 to 17.2.1999, yet, since he was posted against regular vacancy under Division No. 2, there was no reason for being appointed on 44 days basis. Apart from it, he asserts that the Executive Engineer No. 3 under whom the Petitioner was posted from 3.4.1998 to 5.1.1999 did not relieve him from the said post and, therefore, he was unable to join in the post to which he was directed to be transferred. The Petitioner asserts that the non-compliance of the order of transfer was not willful since the Petitioner's superior authority, i.e., the Executive Engineer No. 3, did not relieve him, he could obviously not comply with the order of transfer for no fault of his. It is further contended by the Learned Counsel appearing for the Petitioner that the action of the B.D.A., in deciding not to renew his appointment, amounted to an order of termination of service itself and no such termination of service could have in law been permissible, without initiating an appropriate disciplinary proceeding against the Petitioner. Learned Counsel asserts that the stand of the B.D.A. that they had dispensed the Petitioner's services by not renewing his appointment beyond 17.11.1999, is nothing else other than a cloak to try and overcome the mandatory requirement of law, i.e. to hold a departmental enquiry against the

Petitioner. He asserts that non-compliance of this very fundamental principles of law, renders the alleged direction of nonrenewal of employment under Annexure-D dated 19.11.1999 as invalid in the eyes of law. Apart from the above, he asserts that the said letter was never communicated to the Petitioner.

9. The Petitioner has further asserted in the rejoinder affidavit that while working under the Executive Engineer, Division No. 3, he has availed leave on the health ground from 8.11.1999 to 17.11.1999. The Executive Engineer of Division No. 3 did not allow him to continue under that Division after his posting of transfer to Division No. 2 and had only allowed the Petitioner to avail leave from 8.11.1999.

On such a point of time, the wife of the Petitioner committed suicide on 26.11.1999 and' under suspicion of the said death being homicidal in nature, the Petitioner was arrested and granted bail on 16.1.2000. The Petitioner faced trial in the said criminal case and upon acquittal by the Trial Court, submitted an application to Opposite Party No. 3 on 2.11.2001 for his reinstatement in the services under the B.D.A.

10. In the light of the aforesaid assertions made by the Learned Counsel for both the sides, the following issues arise for consideration in the present writ application:

i) Whether the order of the B.D.A. under Annexure-D to its counter affidavit dated 19.11.1999 deciding not to grant any further extension of the Petitioner's ad-hoc appointment beyond 17:11,1999 is valid in law?

ii) Whether prayer of the Petitioner for direction to regularize his service under the B.D.A. can be granted to the Petitioner in the facts and circumstances of the present case.

The facts that clearly emanate from the pleadings as well as the documents appended to the writ application, counter affidavit as well as the rejoinder affidavit, clearly establishes that the Petitioner had made an application through proper channel for being considered to be appointed to the post of Junior Engineer (Mechanical). Pursuant to such a representation, the Board of the B.D.A. at its

44th Meeting took a decision approving the posting of a Junior Engineer (Mechanical) in a vacant post of Junior Engineer (Civil) and while doing so, the Board decided that no new post was required to be created since there was an existing vacant post of Junior Engineer (Civil), against which a Junior Engineer (Mechanical) could be posted.

Therefore, clearly upon the Board's approval for posting of Junior Engineer (Mechanical) the B.D.A. sought to fill up the said post by bringing a Junior Engineer (Mechanical) on 'deputation' under the 'foreign service terms and conditions'. The State Government turned down this request of the B.D.A. and instead directed that the Petitioner may be absorbed by the B.D.A. permanently considering his qualification and suitability. Thereafter, no justification exists on the part of the B.D.A. not to have acted in terms of the recommendations made by the State Government or to have absorbed the Petitioner into the services of the B.D.A. on a permanent basis and instead to appoint the Petitioner on a temporary basis for a period of one year initially, thereafter extending the said appointment for a further period of one year and thereafter on 44 days basis, has no justification.

11. We are of the considered view that a regular vacancy of Junior Engineer existed in the B.D.A. and the Board decided not to create a new post of Junior Engineer (Mechanical) since a Junior Engineer (Mechanical) could be posted against the existing vacancy. There is no justification stated in the counter affidavit as to why temporary appointment was offered to the Petitioner. Apart from this, even assuming that the Petitioner continued as temporary employee from the year 1994, there is no reason has been stated by the B.D.A. as to why they have dispensed with the requirement of a departmental proceeding prior to deciding not to extend the period of appointment granted to the Petitioner. We do not find from record any evidence even of communication of the letter dated 19.11.1999 to the Petitioner. We are of the view that in a case of the present nature, irrespective of whether the Petitioner had been appointed either on a 'permanent or temporary basis' prior to the employer taking a decision not to extend the period of service of the Petitioner, which effectively amounts to termination of service, it was incumbent upon them, not only to issue a notice to the Petitioner but also to carry

out the departmental proceeding before giving effect to any order of termination. We find that no order of termination has ever been communicated to the Petitioner and no departmental proceeding whatsoever was ever initiated against the Petitioner. Therefore, we are of the considered view that Annexure-D to the counter affidavit dated 19.11.1999 holding that no further extension of the Petitioner's ad-hoc appointment would be given beyond 17.11.1999, is wholly erroneous in law and violative of the principles of natural justice.

12. In view of the findings arrived at, in so far as first issue is concerned, we find that in the facts and circumstances of the case the Petitioner was granted temporary appointment initially for a period of one year w.e.f. 5.4.1994 and, thereafter continued, on temporary basis till 17.11.1999. In the present case as noted hereinabove, once the Board has given its approval for the posting of Junior Engineer (Mechanical) in the existing vacancy of Junior Engineer (Civil), it is to be accepted that such a vacant post existed in the B.D.A. with effect from the date of Board's decision. Further, since the request of the B.D.A. to the State Government to place the Petitioner on deputation on 'foreign service terms and conditions', was turned down by the State Government, who instead recommended for his absorption in the B.D.A. permanently. In consideration of the qualification and suitability, the Petitioner should have been appointed on regular basis to the post he held. No reason has been stated in the counter affidavit to indicate as to why instead of offering a permanent post to the Petitioner, why a temporary/ad-hoc appointment was issued. Apart from the above, it is clear that the Petitioner has served the State Government from the year 1988 till 1994, whereafter he was appointed by the B.D.A. and continued to work for the B.D.A. till the date of his arrest on account of the suicide of the Petitioner's wife. The Petitioner admittedly faced trial in the matter and has been acquitted on 18.10.2001. More importantly, it may be mentioned herein, that no order of suspension or any departmental action was initiated against the Petitioner relating to his arrest at any point of time. Further, since no response has been given to the representation made by the Petitioner under which he forwarded copies of the Judgment of the Trial Court and his prayer for being issued orders for joining remained unanswered, the Petitioner filed the present Writ Petition.

13. As noted hereinabove, during hearing of the writ application, the Petitioner had made a representation (pursuant to the direction of this Court) and the same came to be rejected by the Opposite Party vide its letter dated 8.6.2007 on the ground that, 'the work load and the present staff position in the mechanical wing, there, is no further need of any Junior Engineer (Mechanical) in B.D.A'.

We are afraid the aforesaid reason given by the authority is wholly unjustified. In so far as issue No. 2 is concerned that there was need for the service of a Junior Engineer (Mechanical), can no longer be in doubt since the Board at its 44th Meeting had itself approved for posting of a Junior Engineer (Mechanical) and other persons, such as, Sri P.K. Behura, who is admittedly junior to the Petitioner continue to be in the services of the B.D.A. Therefore, we find no justifiable reason for supporting the plea raised by the Opposite Party to reject the Petitioner's representation.

14. Sri Mohapatra, Learned Counsel for the B.D.A. placed reliance on the Judgment of the Hon'ble Supreme Court in the case of Secretary, State of Karnatak and Ors. v. Uma Devi : A.I.R. 2006 SC 1806 wherein it is stated that no direction can be issued for regularization of the Petitioner. In this respect, it becomes essential to take note of paragraph-44 thereof which is quoted hereunder:

One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as, explained in S.V. Narayanappa (supra), R.N. Nanjundappa (supra) and B.N. Nagrajan (supra), and referred to in paragraph 15 above, of duly qualified persons in duly sanctioned vacant posts might have been made and the employees have continued to work for ten years or more but without the intervention of orders of Courts or of tribunals. The question of regularization of the services of such employees may have to be considered on merits in the light of the principles settled by this Court in the cases above referred to and in the light of this Judgment. In that context, the Union of India, the State Governments and their instrumentalities should take steps to regularize as a one time measure, the services of such irregularly appointed, who have worked for ten years or more in duly sanctioned posts but not under cover of orders of Courts or

of tribunals and should further ensure that regular recruitments are undertaken to fill those vacant sanctioned posts that require to be filled up, in cases where temporary employees or daily wagers are being now employed, the process must be set in motion within six months from this date. We also clarify that regularization, if any already made, but not subjudice, need not be reopened based on this Judgment, but there should be no further by-passing of the constitutional requirement and regularizing or making permanent, those not duly appointed as per the constitutional scheme.

15. In the light of the aforesaid Judgment of the Hon'ble Supreme Court, we are of the considered view that the Petitioner is entitled for consideration for regularization, inasmuch as, he worked for the B.D.A. since 1994 and his application had been sent to the authorities through proper channel and since, his appointment was made only after the Board took a decision to post a Junior Engineer (Mechanical) in the existing vacancy of a Junior Engineer (Civil). Therefore, the employment of the Petitioner cannot be treated as 'back-door entry'. Hence, the Petitioner is entitled to the benefit of the aforesaid Judgment of the Hon'ble Supreme Court.

Accordingly, we quash the letter dated 19th November 1999 under Annexure-D to the counter affidavit and direct that the B.D.A. shall take steps in terms of the Judgment of the Hon'ble Supreme -Court as noted hereinabove and consider the case of the Petitioner for regularization within a period of three months from the date of receipt of a certified copy of this Judgment.

In so far as the period from 17.11.1999 to 2.11.2001 is concerned, the Petitioner shall not be entitled to claim any salary on the principle of 'No work no pay', but the same shall not be treated as any break in service and shall be counted both for seniority/promotion as well as retiral benefits.

The writ application is allowed in terms of the aforesaid directions.

B.P. Das, J.

I agree.

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