NATIONAL FERTILIZERS LTD. & ORS. A

*v.*

SOMVIR SINGH

MAY 12, 2006

[S.B. SINHA AND P.P. NAOLEKAR, JJ.] B

*Service Law :*

*Appointment—By Government Company—In violation of Recruitment Rules—Regularisation thereof—Permissibility of—Held Appointments in violation of Recruitment Rules would render them as nullities—If appointment is without following the Rules, the question of regularization thereof would not arise.* C

**Appellant, a Government Company took a policy decision not to make further recruitment. Despite such ban 52 employees including respondents were appointed without any advertisement and without any intimation to employment exchange i.e. in violation of the Recruitment Rules made by the appellant. Writ Petitions were filed in various High Courts. Different views were expressed by different High Courts. Writ Petitions filed by the respondents were allowed directing the appellant to regularize the services of the respondents.** D E

**In appeal to this Court respondent contended that their appointments might be irregular but not illegal, that for Class IV employees, Employment Exchanges were not required to be notified.** F

**Allowing the appeals, the Court**

**HELD : 1.1. The appointments of the Respondents are illegal. They do not, thus, have any legal right to continue in service. [407-E-F]** G

**1.2. The Respondents herein were appointed only on applications made by them. Admittedly, no advertisement was issued in a newspaper nor the employment exchange was notified as regard existence of vacancies. It is now trite law that a 'State' within the meaning of Article 12 of the Constitution of India is bound to comply with the constitutional** H

A requirements as adumbrated in Articles 14 and 16 thereof. When Recruitment Rules are made, the employer would be bound to comply with the same. Any appointment in violation of such Rules would render them as nullities. It is also well-settled that no recruitment should be permitted to be made through backdoor. [402-E-G]

B *Secretary, State of Karnataka and Ors.* v. *Umadevi and Ors.*, [2006] 4 SCALE 197, followed.

*Union Public Service Commission* v. *Girish Jayanti Lal Vaghela and Ors.*, [2006] 2 SCALE 115; *State of Mysore* v. *S.V. Narayanappa*, [1967] C 1 SCR 799; *Nanjundapa* v. *T. Thimmiah and Anr.*, [1972] 2 SCR 799 and *B.N. Nagarajan and Ors.* v. *State of Karnataka and Ors.*, [1979] 3 SCR 937, relied on.

1.3. Regularisation is not a mode of appointment. If appointment is made without following the Rules, the same being a nullity the D question of confirmation of an employee upon the expiry of the purported period of probation would not arise. [404-A-B]

1.4. It cannot be said that the appointments were irregular and not illegal. Respondents were appointed only on the basis of their applications. The Recruitment Rules were not followed. Even the Selection Committee E had not been properly constituted. In view of the ban in employment, no recruitment was permissible in law. The reservation policy adopted by the appellant had not been maintained. Even cases of minorities had not been given due consideration. [407-A-C]

F 1.5. It is true that the Respondents had been working for a long time. It may also be true that they had not been paid wages on a regular scale of pay. But, they did not hold any post. They were, therefore, not entitled to be paid salary on a regular scale of pay. Furthermore, only because the Respondents have worked for some time, the same by itself would not be a ground for directing regularisation of their services. G [407-F-G]

2. The plea that for Class IV employees, the Employment Exchanges were not required to be notified in view of Section 3(1)(d) of the 1959 Act does not appear to have been raised before the High Court. No H material was placed by the employer to show as to whether the job of

**the respondents was within the purview of the aforementioned provision. [402-G-H, 403-C-D]**

**3. The respondents said to be working, may be relieved of their posts. However, their cases may be considered for future appointment and age bar, if any, in view of the policy decision of the appellant itself maybe relaxed to the extent they had worked. The salary or any remuneration paid to them, however, may not be recovered. This order, however, is being passed in exercise of jurisdiction under Article 142 of the Constitution of India keeping in view the principles embodied in Section 70 of the Contract Act. [408-A-B]**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6337 of 2003.

From the Final Order dated 22.02.2002 of High Court of Chhatish Garh at Bilaspur in Writ Petition No. 4946/1998.

WITH

Civil Appeal No. 464 of 2004.

Civil Appeal No. 465 of 2004.

Civil Appeal No. 466 of 2004.

Civil Appeal No. 467 of 2004.

Civil Appeal No. 7575 of 2005.

Bhaskar P. Gupta, Sr. Adv., Ghanshyam Joshi, Sanjiv Kumar Saxena and Partha Sil, Advs. with him for the Appellants.

Dinesh Kumar Garg (NP), Ashok Mathur, Devendra Singh (NP), Advs. for the Respondent.

The Judgment of the Court was delivered by

**S.B. SINHA, J :** The Appellant is a Government Company. It is a public sector undertaking. It is a 'State' within the meaning of Article 12 of the Constitution of India. A policy decision was taken by the Appellant

not to make any further recruitment in Marketing Division in any category of post stating:

> "It has been decided that with immediate effect the strength of the Marketing Division be pagged to the number of individuals in position in the Marketing Division as on 31.03.1998. It has also been decided that no further recruitment be made in the Marketing Division in any category of post. However, as and when if any post is required to be filled up in any category due to exigencies of work, the approval of D(F)/MD be obtained and the paper routed through the Corporate Office Personnel Department."

Despite such ban the Respondents had been appointed. Before such appointment the employment exchange was not intimated about the vacancy in terms of the provisions of Employment Exchange (Compulsory Notification of Vacancies) Act, 1959 (for short "the 1959 Act"). Admittedly, no advertisement was also issued. According to the Respondent, he worked at the Shimla Office of the Appellant for a period of six months and, thus, he was entitled for recruitment in terms of Rule 1.5(g) of the Recruitment and Promotion Rules. Rule 1.5(g) of the Rules does not envisage regular recruitment but a recruitment on a contractual basis. The Respondent, thus, on his own showing was appointed on a contractual basis. It is trite that a person who obtained recruitment on contractual basis cannot claim regularisation in service. The Respondents herein filed applications for their recruitment without any vacancy having been notified. They were said to have been interviewed on 24.3.1991 by a purported Committee constituted by the General Manager. Appointment letters were issued on or about 9.4.1991. An advertisement was admittedly issued only on 30 11.1993 for the post of Peon-cum-Messenger.

The Appellant in the year 1994, however, took a decision to fill up the posts in the Marketing Division *inter alia* stating:

> "During the coordination committee meeting held in October 1994, at C.O. the recognized union of marketing division requested for removal of ban in filling up vacant posts in marketing division. It was agreed that action to fill up the vacant posts in marketing division will be taken by marketing division, keeping in view the recruitments within the overall manpower strength."

Actions were initiated to fill up the vacant posts on permanent status by following the recruitment procedure. The Respondents were also granted an opportunity to file applications thereagainst. Relaxation of age to the extent of their services as temporary employees had also been granted.

The Appellant has framed its own Recruitment and Promotion Rules. The recruitment of an employee is governed by the said Rules. The terms and conditions of services are also governed by the same Rules. In terms of Rule 1.5 of the said Rules, recruitment of various posts were to be made *inter alia* from the following sources:

(a) Employment Exchange as per the provisions of the 1959 Act.

(b) Zila Saink Boards Director General Resettlement.

(c) Direct Recruitment by advertisement.

Rule 1.6.1 provides for method and procedure for recruitment in terms whereof all posts in the scale of pay of Rs. 1560-2160 is required to be considered as 'corporate level'. Direct recruitment can be resorted to only when no suitable candidate for promotion was available in the appropriate rank. Rule 1.6.8 provides for the mode and manner in which the advertisement is to be issued. Rule 1.6.9 provides for reservation. The manner in which Selection Committee has to be constituted has been laid down in paragraph 1.11. Such Selection Committee *inter alia* must consist of two members from the discipline for which recruitment is to be made apart from an officer from the Personnel Department as Member Secretary. In the event, a selection is to be made for reserved category, an officer of appropriate status belonging to SC/ST will be included as a member. In a case of recruitment to Group C & D posts, a member representing minority community will also be associated in the selection committee. The matter relating to interview is provided for in paragraph 12.1. Appointments are to be made in terms of paragraph 1.13.

The said Rules, therefore, lay down in great details as to how and in what manner the selection process was to be initiated, the minimum qualification therefor, the constitution of Selection Committee and other relevant factors.

A It is not in dispute that the Respondents herein were appointed without any advertisements and without any intimation to the employment exchange. Appointments are said to be made at the instance of two officers. Only after retirement of the said officers, writ petitions were filed before several High Courts including Chhattisgarh, Punjab and Haryana, Himachal Pradesh, Delhi, Madhya Pradesh and Rajasthan.
B

The writ petitions involved 52 employees. Different views were expressed by different High Courts.

The writ petitions filed by the Respondents were allowed directing the C Appellant to regularise the services of the Respondents to pay them all monetary benefits in terms of the appointment letters.

Mr. Bhaskar P. Gupta, learned senior counsel appearing on behalf of the Appellant submitted that the matter relating to regularisation of services D recruited on *ad hoc* basis is no longer *res integra* in view of the recent Constitution Bench decision of this Court in Secretary, *State of Karnataka and Others* v. *Umadevi and Others,* [2006] 4 SCALE 197.

Mr. Ashok Mathur, learned counsel appearing on behalf of the Respondents, on the other hand, submitted that the appointments of the E Respondents may be irregular but not illegal and in that view of the matter, the impugned judgments need not be interfered with.

The Respondents herein were appointed only on applications made by them. Admittedly, no advertisement was issued in a newspaper nor the F employment exchange was notified as regard existence of vacancies. It is now trite law that a 'State' within the meaning of Article 12 of the Constitution of India is bound to comply with the constitutional requirements as adumbrated in Articles 14 and 16 thereof. When Recruitment Rules are made, the employer would be bound to comply with the same. Any appointment in violation of such Rules would render them as nullities. It G is also well-settled that no recruitment should be permitted to be made through backdoor.

It was contended that for Class IV employees, the Employment Exchanges were not required to be notified in view of Section 3(1)(d) of the H 1959 Act. Section 3(1)(d) of the 1959 Act reads as under:

"3. Act not to apply in relation to certain vacancies — (1) This Act shall not apply in relation to vacancies

(a) ***

(b) ***

(c) ***

(d) in any employment to do unskilled office work;"

Such a plea does not appear to have been raised before the High Court. The question as regards the nature of duties required to be performed by the Respondents having not been raised. No material was placed by the employer to show as to whether the job of the Respondents was within the purview of the aforementioned provision. The Respondents themselves stated that they raised the question of applicability of the said provision of the Act in a suit filed at Jagadhri when another person was appointed as Peon-cum-Messenger. It, therefore, cannot be said that they were not aware of the statutory provisions contained in the said suit.

The order of ban suggests that if any appointment was to be made due to exigencies of work, the approval of the Director (Finance) or Managing Director was to be obtained and the paper routed in respect thereof should be through the corporate office. The Respondents contend that as at the point of time the Managing Director, Shri S.S. Jain had been placed under suspension, the file was placed before the General Manager (Marketing). The said plea cannot be accepted for more than one reason. If the regular incumbent or the Managing Director was placed under suspension, somebody else must be incharge of the said post. Furthermore, the file could be placed before the Director (Finance). The General Manager by no stretch of imagination could accord approval for appointment.

Submission of the learned counsel appearing on behalf of the Respondents to the effect that the ban was only on paper is not a matter which would fall for consideration of this Court inasmuch as it is not in dispute that the ban was lifted only on 16.12.1994. On what premise, an advertisement was issued on 30.11.1993 is not known. It is not the case of the Respondent that despite existence of ban some other workman was appointed prior to

A the lifting thereof. Even if, recruitments have been made illegally, the Respondents cannot claim any legal right on the basis thereof.

Regularisation, furthermore, is not a mode of appointment. If appointment is made without following the Rules, the same being a nullity the question of confirmation of an employee upon the expiry of the purported B period of probation would not arise. The Constitution Bench in *Umadevi* (supra) made a detailed survey of the case laws operating in the field.

The referral order to the Constitution Bench was made by a 3-Judge Bench of this Court stating:

C

> "1. Apart from the conflicting opinions between the three Judges' Bench decisions in *Ashwani Kumar and Ors.* v. *State of Bihar and Ors.*, reported in [1997] 2 SCC 1, *State of Haryana and Ors.* v., *Piara Singh and Ors.* Reported in [1992] 4 SCC 118 and *Dharwad* D *Distt. P.W.D. Literate Daily Wage Employees Association and Ors.* v. *State of Karnataka and Ors.* Reported in [1990] 2 SCC 396, on the one hand and *State of Himachal Pradesh* v. *Suresh Kumar Verma and Anr.*, reported in AIR 1996 SC 1565, *State of Punjab* v. *Surinder Kumar and Ors.* Reported in AIR (1992) SC 1593, and *B.N. Nagarajan and Ors.* v. *State of Karnataka and Ors.*, reported E in [1979] 4 SCC 507 on the other, which has been brought out in one of the judgments under appeal of *Karnataka High Court in State of Karnataka* v. *H. Ganesh Rao,* decided on 1.6.2000, reported in 2001 (4) Karnataka Law Journal 466, learned Additional Solicitor General urged that the scheme for regularization is repugnant to F Articles 16(4), 309, 320 and 335 of the Constitution of India and, therefore, these cases are required to be heard by a Bench of Five learned Judges (Constitution Bench).
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> 2. On the other hand, Mr. M.C. Bhandare, learned senior counsel, appearing for the employees urged that such a scheme for G regularization is consistent with the provision of Articles 14 and 21 of the Constitution.
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> 3. Mr. V. Lakshmi Narayan, learned counsel, appearing in CC Nos.109-498 of 2003, has filed the G.O. dated 19.7.2002 and H submitted that orders have already been implemented.

4. After having found that there is conflict of opinion between three Judges Bench decisions of this Court, we are of the view that these cases are required to be heard by a Bench of five learned Judges. A

5. Let these matters be placed before Hon'ble the Chief Justice for appropriate orders." B

The Constitution Bench opined that any appointment made in violation of the Recruitment Rules as also in violation of Articles 14 and 16 of the Constitution would be nullity. The contention raised on behalf of the employees that those temporary or *ad hoc* employees who had continued for a fairly long spell, the authorities must consider their cases for regularisation was answered, thus: C

"With respect, why should the State be allowed to depart from the normal rule and indulge in temporary employment in permanent posts? This Court, in our view, is bound to insist on the State making regular and proper recruitments and is bound not to encourage or shut its eyes to the persistent transgression of the rules of regular recruitment. The direction to make permanent — the distinction between regularization and making permanent, was not emphasized here — can only encourage the State, the model employer, to flout its own rules and would confer undue benefits on a few at the cost of many waiting to compete. With respect, the direction made in paragraph 50 of Piara Singh (supra) are to some extent inconsistent with the conclusion in paragraph 45 therein. With great respect, it appears to us that the last of the directions clearly runs counter to the constitutional scheme of employment recognized in the earlier part of the decision. Really, it cannot be said that this decision has laid down the law that all *ad hoc*, temporary or casual employees engaged without following the regular recruitment procedure should be made permanent." D E F G

It was furthermore opined:

"26. It is not necessary to notice all the decisions of this Court on this aspect. By and large what emerges is that regular recruitment H

A should be insisted upon, only in a contingency an *ad hoc* appointment can be made in a permanent vacancy, but the same should soon be followed by a regular recruitment and that appointments to non-available posts should not be taken note of for regularization. The cases directing regularization have mainly proceeded on the basis
B that having permitted the employee to work for some period, he should be absorbed, without really laying down any law to that effect, after discussing the constitutional scheme for public employment."

C Taking note of some recent decisions of this Court, it was held that the State does not enjoy a power to make appointments in terms of Article 162 of the Constitution of India. It further quoted with approval a decision of this Court in *Union Public Service Commission* v. *Girish Jayanti Lal Vaghela & Others,* [2006] 2 SCALE 115 in the following terms:

D "...The appointment to any post under the State can only be made after a proper advertisement has been made inviting applications from eligible candidates and holding of selection by a body of experts or a specially constituted committee whose members are fair and impartial through a written examination or interview or some
E other rational criteria for judging the *inter se* merit of candidates who have applied in response to the advertisement made. A regular appointment to a post under the State or Union cannot be made without issuing advertisement in the prescribed manner which may in some cases include inviting applications from the employment exchange where eligible candidates get their names registered. Any
F regular appointment made on a post under the State or Union without issuing advertisement inviting applications from eligible candidates and without holding a proper selection where all eligible candidates get a fair chance to compete would violate the guarantee enshrined under Article 16 of the Constitution.."

G

It was clearly held:

"These binding decisions are clear imperatives that adherence to Articles 14 and 16 of the Constitution is a must in the process of
H public employment."

The contention of the learned counsel appearing on behalf of the Respondents that the appointments were irregular and not illegal, cannot be accepted for more than one reason. They were appointed only on the basis of their applications. The Recruitment Rules were not followed. Even the Selection Committee had not been properly constituted. In view of the ban in employment, no recruitment was permissible in law. The reservation policy adopted by the Appellant had not been maintained. Even cases of minorities had not been given due consideration.

The Constitution Bench thought of directing regularisation of the services only of those employees whose appointments were irregular as explained in *State of Mysore* v. *S.V. Narayanappa,* [1967] 1 SCR 799, *Nanjundappa* v. *T. Thimmiah & Anr.,* [1972] 2 SCR 799 and *B.N. Nagarajan & Ors.* v. *State of Karnataka & Ors.,* [1979] 3 SCR 937, wherein this Court observed:

> "In *B.N. Nagarajan & Ors.* v. *State of Karnataka & Ors.,* [1979] 3 SCR 937, this court clearly held that the words "regular" or "regularization" do not connote permanence and cannot be construed so as to convey an idea of the nature of tenure of appointments. They are terms calculated to condone any procedural irregularities and are meant to cure only such defects as are attributable to methodology followed in making the appointments..."

Judged by the standards laid down by this Court in the aforementioned decisions, the appointments of the Respondents are illegal. They do not, thus, have any legal right to continue in service.

It is true that the Respondents had been working for a long time. It may also be true that they had not been paid wages on a regular scale of pay. But, they did not hold any post. They were, therefore, not entitled to be paid salary on a regular scale of pay. Furthermore, only because the Respondents have worked for some time, the same by itself would not be a ground for directing regularisation of their services in view of the decision of this Court in *Uma Devi* (supra).

In view of the authoritative pronouncement of the Constitution Bench, in our opinion, the impugned judgments cannot be sustained. They are set aside accordingly.

A S/Shri Somvir Singh, Hansraj Benewal, Malkiat Singh, Ranjit Singh are said to be working. They may be relieved of their posts. We may, however, observe that their cases may be considered for future appointment and age bar, if any, in view of the policy decision of the Appellant itself may be relaxed to the extent they had worked. The salary or any remuneration paid to them, however, may not be recovered. This order, however, is being B passed in exercise of our jurisdiction under Article 142 of the Constitution of India keeping in view the principles embodied in Section 70 of the Contract Act. The appeals are allowed. No costs.

K.K.T. Appeals allowed.