THE HONOURABLE SRI JUSTICE SUJOY PAUL
AND
THE HONOURABLE SRI JUSTICE NAMAVARAPU RAJESHWAR RAO

WRIT APPEAL No.1018 of 2024

JUDGMENT (Oral): *(Per Hon'ble Justice Sujoy Paul)*

This intra-Court appeal takes exception to the order passed by the learned Single Judge in W.P.No.27532 of 2023, dated 09.01.2024, whereby, the Writ Petition was allowed and the order impugned therein cancelling appointment of respondents herein was set aside.

Factual Background:-

2. The parties have fought a long drawn battle in the corridors of the Court. In one of the litigation i.e., W.P.No.31379 of 2021, the respondents herein prayed for a direction to regularize their services and assailed the advertisement No.1 of 2021 dated 16.08.2021, whereby an open advertisement was issued inviting the candidature from open market. This Court passed order on 03.12.2021 and directed the petitioners therein/respondents to submit their physical applications within seven days and in turn, the employer was directed to permit the respondents herein/petitioners therein to participate in the selection process.

Admittedly, the petitioners therein were directed to participate in the selection process, but none of them could be selected.

3. Pursuant to the vacancy circular No.1 of 2023, dated 07.02.2023, the respondents submitted their application for selection for the posts of office attendants/laboratory attendants. The respondents were selected and one such appointment order dated 20/21.06.2023 is filed for example. However, subsequently by order dated 26.09.2023, the services of the respondents were terminated for the single reason that the said internal circular No.1 of 2023 was not in consonance with the recruitment rules and was issued without issuing any advertisement and without calling the candidatures from outside candidates. This cancellation of appointment became subject matter of challenge in W.P.No.27532 of 2023. The Writ Court opined that petitioners before it participated in the recruitment process and pursuant to Notification No.1 of 2021, dated 16.08.2021 became successful in mock test and they were accordingly appointed. On the basis of this premises, the Writ Court opined that the appointment of respondents at best can be treated to be 'irregular' and cannot be treated as 'illegal'. The cancellation of appointment was accordingly interfered with. There was yet another reason for

interference in the cancellation of appointment orders i.e., non-observance of the principles of natural justice.

Submissions of the appellants:-

4. Sri B. Narasimha Sharma, learned Additional Solicitor General of India appearing for appellants submits that the Regional Engineering Colleges ('REC') of country were governed by **National Institutes of Technology, Science Education and Research Act, 2007** ('NIT Act'). Thus, REC Warangal also became NIT. Under the said Act, a provision was made for issuance of rules/statutes. In furtherance thereof, statutes namely the **First Statutes of NIT** ('Statute') came into being on its publication in the official gazette w.e.f. 23.04.2009. By taking this Court to Statute No. 23, the learned Senior Counsel for the appellants submits that the posts were required to be filled up by issuing advertisement. Admittedly, in the instant case, no advertisement was issued pursuant to which present respondents were appointed. Instead, an internal notice was issued which was restricted within the institution wherein the present respondents were working and they alone submitted their applications. This recruitment process runs contrary to the statute and for this reason, no fault can be found in the action of cancellation of

appointment. So far, the principles of natural justice are concern, the learned Senior Counsel argued in tune of *Doctrine of useless formality.* It is urged that even if the respondents would have been put to notice, they would not have been in a position to rebut the allegations and meet the reason of cancellation which is mentioned in the cancellation order itself. Putting it differently, it is urged that admittedly respondents have been appointed in pursuant to an 'internal notice' and not based on any open advertisement published in the newspaper. Thus, they would not have been in a position to improve their case, even if they would have been put to notice.

5. By placing reliance on the decision of the 58th meeting of Board of Governors, it is submitted that it was resolved to approve the proposal of 'internal release of advertisement', but no such advertisement was ever issued. Therefore, the appointment of the respondents pursuant to internal notice runs contrary to the decision of the Board also.

6. By placing reliance on the Constitution Bench judgment of Supreme Court in **Secretary, State of Karnataka** v. **Umadevi**[1],

[1] 2006 (4) SCC 1

which is consistently followed in subsequent eight judgments of the Supreme Court, it is canvassed that 'illegal' appointment cannot be regularized, whereas 'irregular' appointment can be regularized. However, it is pointed out that the learned Single Judge clearly opined that it is not a case of regularization. Instead, it is a case of cancellation of appointments. The cancellation orders were set aside by assigning an incorrect and perverse finding that respondents were already selected pursuant to selection of 2021 which is nobody's case.

Stand of respondents:-

7. Sri D. Linga Rao, learned counsel for the respondents also placed reliance on various provisions of the **NIT Act**. By placing reliance on Section 5 (d), it is submitted that it is a 'saving clause' which provides that all the employees, who were on the rolls of the Institutes, when **NIT Act** came into being were saved. Thus, the appellants cannot take adverse decision against respondents. The next submission is based on Section 10 of the **NIT Act**, which defines the 'authorities' of the institutes. It is submitted that the Board of Governors is a competent authority to decide the policy matters and run the administration smoothly.

8. For the same purpose, Section 13 of the **NIT Act** is referred which deals with 'Powers and Functions of Board'. It is argued that a conjoint reading of Sections 10 and 13 shows that the Board in the interest of administration can take policy decision, and if such policy decision was taken to appoint the petitioners pursuant to internal notice, no fault can be found in the said action.

9. It is submitted that after receiving the impugned order passed by the Writ Court, the respondents were continued by the department. After having implemented the order of learned single Judge, it is no more open to the appellants to challenge the order, and the Writ Appeal for all practical purpose has rendered infructuous.

10. Learned counsel for the respondents submits that the respondents are working with NIT since last 15 to 30 years. Although initially they worked pursuant to interim protections given by the Courts, the fact remains that they are not getting any increment, the pay scale which their counter-parts/regular employees are getting. They were subjected to exploitation and it's a kind of slavery.

11. Learned counsel for the respondents placed reliance on judgments of the Supreme Court in **State of Punjab v. Dhanjit Singh Sandhu**[2] and **Union of India v. N.Murugesan**[3] to bolster the submission that a party cannot approbate and reprobate the same thing. The respondents also placed reliance on an order of Gujrat High Court in **Adam Chaki v. Government of India**[4] to contend that the equality of opportunity cannot be denied and it is applicable to similarly situated persons.

12. Lastly, it is submitted that the Board has rightly taken a decision as per autonomy given to it under Section 5(d) of the NIT Act to issue internal notice pursuant to which present respondents were selected and appointed. They could not have been terminated without following principles of natural justice.

13. The parties confined their arguments to the extent indicated above. We have bestowed our anxious consideration on rival contentions and perused the record.

FINDINGS:

14. At the outset, we deem it proper to deal with the objection of maintainability of Writ Appeal after having implemented the order

[2] 2014 (15) SCC 144
[3] (2022) 2 SCC 25
[4] AIR 2013 Guj 66

of learned single Judge. The Departmental order whereby the order of learned single Judge is implemented shows that it has been implemented on temporary basis. Even otherwise, even if order is implemented, that does not preclude the employer to challenge its validity. Such situations are not unknown to service/industrial adjudication. For instance, when termination of an employee is set aside by Industrial Tribunal and same is called in question even after his reinstatement before the higher forum challenge is not repelled by treating it as infructuous. Thus, we are unable to persuade ourselves with the line of argument that the Writ Appeal has rendered infructuous. The Supreme Court in this regard in **Union of India v. Narender Singh**[5]opined as under:

> "4. In response, learned counsel for the respondent employee submitted that the Tribunal's order is without blemish and even on merits there is no scope for interference with the said order. Even otherwise as has been rightly held by the High Court after the order of reinstatement the writ petition had really become infructuous.
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> 5. The High Court's order is clearly indefensible. A writ petition questioning the Tribunal's order on merits does not become infructuous by giving effect to the Tribunal's order. Merely because the order of reinstatement had been implemented by the appellant, that did not render the writ petition infructuous as has been observed by the High Court. This position was clearly stated in *Union of India* v. *G.R. Prabhavalkar* [(1973) 4 SCC 183 : 1973 SCC (L&S) 374] . In para 23 of the decision it was observed as follows : (SCC p. 193)

[5] (2005) 6 SCC 106

> "*23.* Mr Singhvi, learned counsel, then referred us to the fact that after the judgment of the High Court the State Government has passed an order on 19-3-1971, the effect of which is to equate the Sales Tax Officers of the erstwhile Madhya Pradesh State with the Sales Tax Officers, Grade III, of Bombay. This order, in our opinion, has been passed by the State Government only to comply with the directions given by the High Court. It was made during a period when the appeal against the judgment was pending in this Court. The fact that the State Government took steps to comply with the directions of the High Court cannot lead to the inference that the appeal by the Union of India has become infructuous.""
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> (Emphasis Supplied)

15. Admittedly, in this matter the NIT Act and statute holds the field. Section 5(d) of the NIT Act on which heavy reliance is placed by learned counsel for the respondents makes it clear that it is an umbrella arrangement for those employees who were on the rolls of the institute when it was taken over as NIT. This umbrella provision will protect the employee to the extent of the nature of position they were holding. If an employee at that point of time was a permanent employee, his status will main as such. The same principle will apply for a daily rated employee and Section 5(d), by no stretch of imagination, will make him as regular/permanent employee. Thus, Section 5(d) is of no assistance to the respondents.

16. Sections 10 and 13 of the NIT Act deals with the authorities of the Institute and powers given to them. As noticed above, the

argument of learned counsel for the respondents was that the full autonomy is given to the Board by the NIT Act to take policy decision and implement it in the interest of the administration. If impugned action is tested on the anvil of this argument, it will be clear like cloudless sky that no decision was taken by the Board to issue limited internal notice.

17. On the contrary, decision was taken for releasing advertisement. The relevant portion of the decision of the Board is reproduced thus:

58.2	Recruitment of Non-Faculty Personnel against Vacancies:	The Board **resolved** to **approve** the proposal of the Institute for releasing the **advertisement for** 07 Officers (including the anticipated vacancy of Registrar) and 22 other Non-Teaching posts for direct recruitment. The Board has also approved the proposal for filling 25 posts of Office Attendant/Laboratory Assistant by internal circulation among the Daily Wage workers subject to the condition that they meet the eligibility criteria as per Recruitment Rules 2019 and may be given relaxation in age only, as approved by BoG in its 48th meeting held on 13.06.2019 as a onetime measure.

18. Admittedly, the respondents were selected pursuant to vacancy circular No.1/23, dated 07.02.2023. This circular cannot be equated with an advertisement, which was required to be

published. Since their appointment was made without issuing the advertisement, the Board in its subsequent meeting dated 26.09.2023 decided to cancel their appointment orders.

19. The relevant portion of **Statute No. 23**, which deals with **Appointments** reads thus:

> " (1) **The posts at the Institute shall be filled by advertisement on all India basis.**
>
> Provided that the ratio between the Direct Recruitment and Promotion posts for posts other than that of the Director or the Deputy Director shall be as per the recruitment rules."
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> (Emphasis Supplied)

20. A plain reading of this provision makes it clear that to fill-up the posts at the level of institution, advertisement has to be published on all India basis. Thus, it is crystal clear that the NIT, Warangal has committed an error in issuing the internal notice through vacancy Circular No.1 of 2023, pursuant to which only the present respondents could submit their candidature and not the other eligible candidates. This Circular runs contrary to Board's decision reproduced hereinabove as well as Statute No. 23.

21. The relevant portion of the order of learned Single Judge reads as under:

> "15. It is therefore to be examined as to whether by cancelling of the impugned order, will an illegal order be revived. Before examining to this issue, it has to be examined if the order of appointment is an illegal order. It is noticed that in the WP.No.31379 of 2021, the stand of the respondents No.3 and 4 was that recruitment notification No.1/21, dated 16.08.2021 was issued in accordance with Recruitment Rules and that the writ petitioners therein also can respond to the said Notification and can be regularly recruited in the posts which were notified. It was also stated that the Board of Governors have relaxed the age and educational requirements to enable the petitioners to apply pursuant to the Recruitment Notification. Thus, taking the above into consideration only, this Court had directed the respondent to permit the petitioners to apply and participate in the recruitment process if they come within the zone of consideration. **It is also noticed that the petitioners participated and were successful in the mock test and were accordingly appointed. Therefore, this Court does not find any illegality in this whole process.** It may have been irregular in not inviting the applications from the open market as well. The irregularity can be cured by the respondents by taking necessary corrective steps, but cannot terminate the services in this process, particularly when there was no role of the petitioners in this irregularity in appointments. The respondents have not cancelled the Notification, but have only cancelled the appointments of the writ petitioners herein. Therefore, the impugned order of the respondents is clearly illegal and cannot be sustained. All the decisions relied upon by the learned standing counsel for the respondent University are where the initial order which is cancelled is illegal and not where the initial order is irregular. Therefore, they are distinguished on facts."
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> (Emphasis Supplied)

22. During the course of arguments, it became an admitted position that the present respondents were not selected pursuant to recruitment Notification No.1 of 2021, dated 16.08.2021. If they would have been so selected pursuant to that notification as regular employees, there was no occasion for the Institute to issue another vacancy Circular i.e., Circular No.1 of 2023, dated

07.02.2023 and issuance of appointment order like order dated 20/21.06.2023.

23. The Constitution Bench in **Umadevi's** case supra, which is consistently followed in various judgments, made it clear that only 'irregular' appointments can be regularized and not 'illegal' appointments. Such liberty of regularization was given as "*One time measure"* only for such employees, who were in employment for 10 years on the cut-off date, without there being any interim protection from the Courts. In the instant case, the respondents remained in employment because of interim protection granted by the Court. Learned single Judge rightly held that question before the Writ Court is not about regularization, instead question is relating to validity of action in cancelling the appointment order. As noticed above, we are unable to hold that cancellation of appointment is arbitrary or illegal in nature. Since appointments could have been made only as per the procedure prescribed in the Statute, any appointment made *dehors* the Statute cannot get stamp of approval.

24. So far, the question of violation of principles of natural justice is concerned, we find substantial force in the argument of learned Assistant Solicitor General appearing for the appellants

that doctrine of useless formality can be pressed into service in a case of this nature. The principle of natural justice is not an unruly horse. Its application depends on the facts and circumstances of each case. The Supreme Court dealt with 'useless formality doctrine' in **Viveka Nand Sethi v. Chairman, J & K Bank Ltds.,**[6]and held as under:

> "22. The principle of natural justice, it is trite, is no unruly horse. When facts are admitted, an enquiry would be an empty formality. Even the principle of estoppel will apply. [See *Gurjeewan Garewal (Dr.)* v. *Dr. Sumitra Dash* [(2004) 5 SCC 263 : 2004 SCC (L&S) 747] .] The principles of natural justice are required to be complied with having regard to the fact situation obtaining therein. It cannot be put in a straitjacket formula. It cannot be applied in a vacuum without reference to the relevant facts and circumstances of the case. (See *State of Punjab* v. *Jagir Singh* [(2004) 8 SCC 129 : 2004 SCC (L&S) 1109] and *Karnataka SRTC* v. *S.G. Kotturappa* [(2005) 3 SCC 409 : (2005) 2 Scale 493] .)"

25. Even if respondents would have been put to notice, they would not have been in a position to wriggle out of Statute No.23 and the decision of the Board in utter violation of which they were appointed through restricted institutional notice and without issuing any advertisement. The Apex Court in **Veer Kunwar Singh University Ad Hoc Teachers Association v. Bihar State University (C.C.) Service Commission**[7], held thus:

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[6] (2005) 5 SCC 337
[7] (2009) 17 SCC 184

> "19. It is now a well-settled principle of law that any appointment made in violation of the constitutional scheme of equality as adumbrated under Article 14 of the Constitution of India as also in violation of the provisions of the Act and the subordinate legislations framed thereunder would be wholly illegal and without jurisdiction. It has been so held by a Constitution Bench of this Court in State of Karnataka v. Umadevi (3) [(2006) 4 SCC 1 : 2006 SCC (L&S) 753] . The ratio of the said decision has since been followed in a large number of cases e.g. R.S. Garg v. State of U.P. [(2006) 6 SCC 430 : 2006 SCC (L&S) 1388] , Surinder Prasad Tiwari v. U.P. Rajya Krishi Utpadan Mandi Parishad [(2006) 7 SCC 684 : 2006 SCC (L&S) 1745] , State of M.P. v. Lalit Kumar Verma [(2007) 1 SCC 575 : (2007) 1 SCC (L&S) 405] , Indian Drugs & Pharmaceuticals Ltd. v. Workmen [(2007) 1 SCC 408 : (2007) 1 SCC (L&S) 270] , Municipal Corpn., Jabalpur v. Om Prakash Dubey [(2007) 1 SCC 373 : (2007) 1 SCC (L&S) 256] , A.P. SRTC v. K.V. Ramana [(2007) 2 SCC 324 : (2007) 1 SCC (L&S) 641] , Punjab Water Supply & Sewerage Board v. Ranjodh Singh [(2007) 2 SCC 491 : (2007) 1 SCC (L&S) 713] , State of Punjab v. Lakhwinder Singh [(2007) 2 SCC 502 : (2007) 1 SCC (L&S) 723] , Yamuna Shankar Sharma v. State of Rajasthan [(2007) 2 SCC 611 : (2007) 1 SCC (L&S) 709] and Post Master General, Kolkata v. Tutu Das (Dutta) [(2007) 5 SCC 317 : (2007) 2 SCC (L&S) 179] ."

In the light of this judgment, the appointment of respondents must be termed as 'illegal' and not 'irregular'.

26. The judgments cited by learned counsel for the respondents have no application in the facts and circumstances of this case. The action of the employer by no stretch of imagination can be called as 'approbate' and 'reprobate'. The Gujarat High Court decision in **Adam Chaki** (supra) cannot be pressed into service because the daily rated employees cannot be equated with their

counterparts appointed on substantive basis for the purpose of grant of remuneration and other service conditions.

27. In view of foregoing discussion, we are unable to countenance the order passed by learned Single Judge.

28. Accordingly, order passed in Writ Petition is set aside and the Writ Appeal is **allowed**. This judgment will not come in the way of the appellants to continue the respondents as daily wages employees and consider them in future selections for regular employment depending upon their eligibility. No order as to costs. Miscellaneous petitions pending, if any, shall stand closed.

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JUSTICE SUJOY PAUL

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JUSTICE NAMAVARAPU RAJESHWAR RAO

Date: 18.11.2024
GVR/TJMR/NVL