

## Brief Note

Against illegal enactment of "Validation Act" for validating the services of 403 nos. of irregular Non-PSC appointees (though physically 104 of them are available at present in Secretariat) in the post of L.D. Asst./Jr. Asst. and also in post of Sr. Asst. retrospectively, in contravention of provisions of OMS Rules, 1951 and also in violation of the law recently settled by the Hon'ble Supreme Court in Medical Doctors' Validation case.

### Brief History:

Recruitment of L.D. Assts./ Jr. Asst. in Secretariat through Public Service Commission (OPSC) is guided by provisions of OMS Rules, 1951. Hence there was/ is no other mode of recruitment to Asst. Cadre in Secretariat other than through OPSC.

Basing on the requisition made by Home Department to fill up the vacancies for the year 1974-75 for appointment of L.D. Asst. (now Jr. Asst.) in different departments of Secretariat, OPSC conducted recruitment and forwarded list of 714 nos. (including 19 nos. of SC and 2 nos. of ST) of successful candidates to Home Department on 28.10.1977. On receipt of the panel of 714 nos. of candidates from OPSC, Home Department terminated all the adhoc recruits appointed earlier on temporary basis as per the condition laid down in their appointment letters under Rule 11 of OMS Rule. On written prayer from some of those SC&ST candidates for accommodation/ regularization of their services in Secretariat, the Law Department had turned down their prayer since it was not in accordance with the provisions of OMS Rules, 1951. After termination, they were adjusted in different subordinate offices as direct recruits but were not accommodated in Asst. Cadre of Secretariat.

A decision for making direct recruitment of 403 nos. of SC/ST candidates through Employment Exchanges by Home Department in the post of L.D. Asst. was taken on 04.03.78 in All Secretaries' Meeting in contravention to the provisions of OMS Rules, 1951. The reason being, adequate number of candidates from reserved category (SC/ST) could not come out successful in the recruitment examination conducted by OPSC for the year 1974-75. Determining 403 nos. for SC/ST candidates as carried forward vacancies is misleading/wrong on the basis of T&RW Department Circular in letter No. 17545/TRW dt. 29.05.76 para-3 reads as :-

"Fresh roster of vacancies in respect of initial recruitment and promotion will be started from 01.07.76 by appointing authorities. In other words, previous vacancies should be treated as lapsed and should not be brought forward in the rosters to be opened w.e.f. 01.07.1976."

When PSC have been conducting recruitment examinations for all categories of posts (General/SC/ST) of L. D. Assts. In Secretariat, regularly i.e., for 1973, 1974-75 and 1977-78 onwards. It is strange, as to where from such 403 nos. of ST/SC vacancies in the cadre was arrived at in the Secretaries' meeting dt. 04.03.78 *against strength of 665 L.D. Asst. posts in the common cadre of the Secretariat.*

ORV Act came into force w.e.f. 1<sup>st</sup> July 1976, much after publication of advertisement by OPSC for filling up vacancies of L.D. Assts. In Secretariat meant for 1974-75. Hence neither Section-9(4) of ORV Act, 1975 nor OMS Rules, 1951 confers any authority on Home Department to make any direct regular recruitment in the Asst. Cadre of Secretariat other than through OPSC. When OPSC panel of 714 nos. of successful candidates

was in force, Home Department during 1978-79, irregularly appointed 403 nos. of L. D. Assts. From SC/ST Categories into Asst. Cadre in Secretariat by deliberately ignoring the recruitment provisions of OMS Rules. The stipulations in their respective appointment orders were that they would be replaced through regular PSC candidates.

Though regular PSC candidates were available yet those irregularly recruited appointees without being terminated as per their terms of appointment, were illegally allowed to continue. Unfortunately, Home Department regularized their services through Resolution and promoted them to the post of Sr. Asst. like other OPSC regular L.D. Assts. Regularisation of services of those irregular recruits were challenged before Hon'ble Tribunal in TA No. 224/86 and 805/87 which were allowed vide a common judgment 23<sup>rd</sup> November, 96, the relevant observations and directions in the said judgment are to the following effect:-

“The services cannot be regularized by Resolution. It must be by a statutory provision.”

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“A candidate who has been irregularly appointed contrary to the provisions of 1951 Rules, cannot have seniority over a regularly recruited and appointed candidate.”

With the aforesaid observation and direction the Secretary to Govt. Home Department was directed to re-examine the issue and to take a final decision in this regard. Unfortunately the judgments were never acted upon and complied with for years together solely with a view to showing undue favour to those aforesaid irregular appointees.

Prior to the aforesaid judgment the Hon'ble Tribunal had also in an identical case in O.A. No. 399/86 decided on 16.08.1989 had held their (those irregular appointees) initial appointments as L.D. Asst. and their further promotion as Sr. Asst. as illegal and contrary to law. In all the aforesaid cases the Hon'ble Tribunal had also categorically held the Govt. Resolution regularizing their services as illegal. All the aforesaid judgments were reached their finality and as such binding on the State Govt. as those judgments were never appealed against.

Without complying the directions in the aforesaid judgments steps were taken by the Home Department clandestinely to allow those irregular appointees for further promotion to the post of Section Officer Level-II. When CCRs were called for from respective departments, some regularly recruited Sr. Assts. Filed O.A. No.1785/02 (Pratap Kishore Panda & others Vrs. State of Orissa & Others) which was decided recently on 21.10.02. The Hon'ble Tribunal relying on its earlier decisions in the aforesaid T.A. cases and of the Hon'ble Supreme Court and of the Hon'ble High Court of Orissa (particularly in Dr. Mrs. Juthika Mohanty's case) held that those irregular appointees are ineligible to any benefit namely any further promotion to the post of S.O. Level-II. With the aforesaid holding the Home Department was directed expressly to exclude names of those irregularly recruited L.D. Assts./ Sr. Assts. From the common gradation list and to hold fresh DPC with the names of regularly recruited candidates only, as per rules.

The State Govt. in Home Department without complying the said recent judgment of Hon'ble Tribunal in Pratap Kishore Panda & others Vrs. State of Orissa & Others, have illegally tried to have a Validation Legislation to validate the appointments of 403 nos. of irregular appointees in a manner grossly contrary to the direction in Pratap Panda's case as well as contrary to the law settled by the Hon'ble Supreme Court in the recent Medical

Doctor's Validation case, in which the State Govt. was put itself in a most humiliating situation.

While making a move to have a Validation Act through Cabinet for retrospective validation of the appointments of the irregular appointees, a deliberate fraud is to be committed on the State Govt. by the Home Department which would be evident from the fact that validation has been suggested for 403 nos., of irregular appointees whereas 104 nos. of them are physically available in the Secretariat. The fact remains that the Home Department has suggested for validation of 299 nos. of non-existent irregular appointees.

So far as validation of 403 nos. of irregular appointees are concerned, the law is well settled that their services cannot be validated. In this context the various pronouncements are as under :-

**AIR 1972 SC 1767 (A. N. Nanjundappa Vrs. T. Themnaiah) :**

“If appointment itself is in infraction of Rules, or if it is in violation of provisions of Constitution, illegality cannot be regularized “

“Regularisation cannot be said to be mode of recruitment.”

**AIR 1990 SC 1607 – Direct Recruitment Class-II (Engineering Association Vrs. State of Maharashtra):**

“If the initial appointment is not made according to the rule, subsequent regularization of service does not entitle an employee to the benefit of intervening service for seniority.”

**AIR 1991 SC 284 – (K. C. Joshi Vrs. Union of India):**

“Seniority is to be counted from the date on which appointment is made to the post in accordance with the rules. Ad-hoc appointment having been made not according to rules, period of officiation in such post cannot be considered for computing seniority.”

**1993(3) SCC 371 (State of West Bengal Vrs. A.N. Dey) :**

“It was held by Supreme Court that the benefit of ad-hoc service is not admissible if appointment was in violation of the Rules”

**AIR 1993 SC 1808 (J&K PSC Vrs. Narinder Mohan) :**

“Back door ad-hoc appointment at behest of power source or other-wise and recruitment according to rules are mutually antagonistic and strange bed partners. They cannot co-exist in same sheath. The former is a negation of fair play. The later are the products of order and regularity.”

AIR 1994 SC 55 (K. Narayanan Vrs. State of Karnataka) and Mrs. Juthika Mohanty Vrs. State of Orissa in O.H.C. – para-9:

“Rules operate prospectively. Retrospectively is exception. Even where statutes permit framing of rules with retrospective effect, the exercise of power must not operate discriminately or in violation of any Constitution right so as to affect vested right.....”

AIR 1996 SC 2755

“Ad-hoc appointments would be only temporary appointments de-horse the rules pending regular appointment without conferring any right to regularization of service.”

AIR 1997 SC 3127 (S. S. Bhola Vrs. B. D. Sardena & others):

“The benefits acquired under the existing rules cannot be taken away by an amendment with retrospective effect.....”

OLR (II) 2001 – 342-57 decided on 6<sup>th</sup> Aug’01 (Dr. Mrs. Juthika Mohanty Vrs. State of Orissa):

“It is clear that Regularisation cannot be said to be the mode of appointment. If appointment is in violation of Recruitment Rules, 1979, illegal appointment cannot be regularized.”

Order dt. 19.07.2002 of Hon’ble Supreme Court on Contempt Petition (Dr. Sachidananda Mishra Vrs. State of Orissa & others):

“After striking down the provisions of Regularisation Act, any appointee who had not joined through the regular process of selection under Recruitment Rules, will be held illegally usurping a public office and would not be borne in the Cadre”

“No Court can permit an irregularly recruited candidate within a cadre to continue even on equitable consideration.”

**SUGGESTION :**

- (i) Those irregular appointees can be adjusted in sub-ordinate offices as done in case of irregular adhoc recruits in Secretariat during 1977-78 Or, in the alternate,
- (ii) Those irregular appointees can be adjusted in the same manner as done in the case of the Medical Doctors as per the direction of the Hon’ble Supreme Court in the recent decision in the case of Dr. Sachidananda Mishra & others.

**But for adhering to the aforesaid suggestion, the Govt. would be put into avoidable harassment and humiliation and embarrassing situation before the Court of law.**

Pratap Kishore Panda & others,  
Regular OPSC Recruits of 1974-75 Batch,  
Orissa Secretariat, Bhubaneswar.  
Applicants in O.A. No. 1785/2002.