
(2011) 08 AHC CK 0192

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 38220 of 2011

Amar Nath Chaudhary and Others

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 18-08-2011

Acts Referred:

Constitution of India, 1950 — Article 14, 162, 309

Citation : (2011) 7 ADJ 883

Hon'ble Judges : Rajesh Kumar, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Rajesh Kumar, J.—Heard learned Counsel for the Petitioners and learned Standing Counsel.

2. The brief facts of the case are that the Petitioners were engaged as daily wagers in the office of Executive Engineer, Provincial Division, Gorakhpur as well as in Basti. Their services have been regularised under the Uttar Pradesh Regularization of Daily Wages Appointment on Group "C" Posts Rules, 2001 and they have been appointed as regular employees by various orders. The Petitioners are claiming that their period of service prior to regularization be added in the service and the consequential benefits like higher pay-scale be provided as per the Government Orders.

3. The question for consideration is whether the period of service, when they have worked as daily wagers, be added in the service after the regularization and the consequential benefits, like higher pay-scale, be provided as per the Government Orders.

4. Learned Counsel for the Petitioners submitted that since the Petitioners have regularly worked as daily wagers, the period during which they have worked as daily wagers, may be added in their service. Reliance has been placed on various decisions of the Lucknow Bench of this Court and the Division Bench decision of

this Court in the cases of Board of Revenue and Ors. v. Prasidh Narain Upadhyay, reported in 2006 (1) E.S.C. 611 (All) (DB) and Dr. Hari Shankar Ashopa v. State of U.P. and Ors. reported in 1989 A.C.J. 337.

5. Learned Standing Counsel submitted that the daily wagers services start in the morning and end in the end of the day. They are not appointed against any vacancy on a regular post. The Constitution Bench of the Apex Court in the case of Secretary, State of Karnataka and Others Vs. Umadevi and Others, has held that the daily wagers have No. right to claim regularization or any other benefits and further observed that it is open to the Government, as a matter of policy, to consider their regularization. He placed reliance on the Division Bench decisions of this Court in the case of Bansh Gopal v. State of U.P., reported in 2006 (3) E.S.C. 2248 (All) (DB) and the decision of the learned Single Judge in the case of Gambhir Singh v. State of U.P. and Ors. reported in 2007 (2) E.S.C. 890 (All) and the recent decision of the learned Single Judge in Kashi Prasad v. State of U.P. and Ors., Civil Misc. Writ Petition No. 43227 of 2009

6. In the case of Bansh Gopal v. State of U.P. (Supra) the Petitioner was engaged as muster roll employee as Beldar in the year 1983. The Petitioner was thereafter taken under work charge establishment in the year 1987 and subsequently in the year 1999 his services were regularised in regular employment as Class-IV employee. He completed 60 years age of superannuation on 31.5.2005. The Division Bench of this Court on the consideration of the decision of the Division Bench in the case of Board of Revenue v. Prasidh Narain Upadhyay and Anr. and Regulation 370 of Civil Services Regulation, held that the period of service in work charge establishment cannot be included since his services as a regular employee was less than 10 years he was not eligible for pension.

7. In the case of Gambhir Singh v. State of U.P. and Ors. (Supra) also the learned Single Judge of this Court has followed the Division Bench decision in the case of Bans Gopal v. State of U.P. and held that the period during which a person worked in work charge establishment cannot be included in the regular service for the purposes of pension if the service as regular employee on a substantive basis is less than 10 years and he is not entitled for pension or pensionary benefit.

8. The Division Bench decision in the case of Board of Revenue v. Prasidh Narayan Upadhyay (Supra) has been distinguished in the aforesaid decisions on the ground that the said case relates to the temporary employee appointed on a sanctioned post who worked continuously and uninterruptedly.

9. In Kashi Prasad v. State of U.P. and Ors. Civil Misc. Writ Petition No. 43227 of 2009, the learned Single Judge of this Court while dealing with the question that whether the Seasonal Collection Amin worked for a long period to be considered to be regular employee and entitled for the pension. The learned Single Judge has held that the Seasonal Collection Amin cannot be considered to be an employee in regular service and, therefore, not entitled for the pension.

10. Hon"ble Apex Court in the case of Secretary, State of Karnataka and Others Vs. Umadevi and Others, has dealt with in detail viz-a-viz the status of daily wagers, temporary employee and ad-hoc employees and has clearly ruled, that Courts must be careful in ensuring that they do not interfere unduly with the economic arrangement of its affairs by the State or its instrumentalities or lend themselves the instruments to facilitate by-passing of constitutional and statutory mandates. Said judgment has again been extensively dealt with in the case of *Uttranchal Jal Sansthan v. Laxmi Devi* 2009 (SCC) 7 205, by mentioning that before person claims status of government servant, not only his appointment may be made in terms of recruitment rules, he must otherwise fulfil criteria provided for. Appointment made in violation of constitutional scheme is nullity. Rendition of service for a long time, it is well known does not confer permanency, it is furthermore not a mode of appointment.

11. It would be relevant to refer some of the paragraphs of the Constitution Bench decision in the case of *Secretary, State of Karnataka Vs. Uma Devi* (Supra):

16. In *B.N. Nagarajan and Others Vs. State of Karnataka and Others*, , 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. This Court emphasized that when rules framed under Article 309 of the Constitution of India are in force, No. regularization is permissible in exercise of the executive powers of the Government under Article 162 of the Constitution in contravention of the rules. These decisions and the principles recognized therein have not been dissented to by this Court and on principle, we see No. reason not to accept the proposition as enunciated in the above decisions. We have, therefore, to keep this distinction in mind and proceed on the basis that only something that is irregular for want of compliance with one of the elements in the process of selection which does not go to the root of the process, can be regularized and that it alone can be regularized and granting permanence of employment is a totally different concept and cannot be equated with regularization.

17. We have already indicated the constitutional scheme of public employment in this country, and the executive, or for that matter the Court, in appropriate cases, would have only the right to regularize an appointment made after following the due procedure, even though a non-fundamental element of that process or procedure has not been followed. This right of the executive and that of the court, would not extend to the executive or the court being in a position to direct that an appointment made in clear violation of the constitutional scheme, and the statutory rules made in that behalf, can be treated as permanent or can be directed to be treated as permanent.

12. In paragraph-45 of the above judgment, it has been held by the Constitution

Bench that the engagement of the temporary or casual or daily wager is not an appointment to a post in the real sense of the term. Paragraphs-45, 46 and 47 of the judgment are referred herein below:

45. While directing that appointments, temporary or casual, be regularised or made permanent, the courts are swayed by the fact that the person concerned has worked for some time and in some cases for a considerable length of time. It is not as if the person who accepts an engagement either temporary or casual in nature, is not aware of the nature of his employment. He accepts the employment with open eyes. It may be true that he is not in a position to bargain-not at arm's length-since he might have been searching for some employment so as to eke out his livelihood and accepts whatever he gets. But on that ground alone, it would not be appropriate to jettison the constitutional scheme of appointment and to take the view that a person who has temporarily or casually got employed should be directed to be continued permanently. By doing so, it will be creating another mode of public appointment which is not permissible. If the court were to avoid a contractual employment of this nature on the ground that the parties were not having equal bargaining power, that too would not enable the court to grant any relief to that employee. A total embargo on such casual or temporary employment is not possible, given the exigencies of administration and if imposed, would only mean that some people who at least get employment temporarily, contractually or casually, would not be getting even that employment when securing of such employment brings at least some succour to them. After all, innumerable citizens of our vast country are in search of employment and one is not compelled to accept a casual or temporary employment if one is not inclined to go in for such an employment. It is in that context that one has to proceed on the basis that the employment was accepted fully knowing the nature of it and the consequences flowing from it. In other words, even while accepting the employment, the person concerned knows the nature of his employment. It is not an appointment to a post in the real sense of term. The claim acquired by him in the post in which he is temporarily employed or the interest in that post cannot be considered to be of such a magnitude as to enable the giving up of the procedure established, for making regular appointments to available posts in the services of the State. The argument that since one has been working for some time in the post, it will not be just to discontinue him, even though he was aware of the nature of the employment when he first took it up, is not (sic) one that would enable the jettisoning of the procedure established by law for public employment and would have to fail when tested on the touchstone of constitutionality and equality of opportunity enshrined in Article 14 of the Constitution.

Emphasis provided

46. Learned Senior Counsel for some of the Respondents argued that on the basis of the doctrine of legitimate expectation, the employees, especially of the Commercial Taxes Department, should be directed to be regularised since the

decisions in Dharwad, Piara Singh, Jacob and Gujarat Agricultural University and the like, have given rise to an expectation in them that their services would also be regularised. The doctrine can be invoked if the decisions of the administrative authority affect the person by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there have been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he was received assurance from the decision-maker they will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn. See Lord Diplock in *Council for Civil Services Union v. Minister of Civil Service*, *National Buildings Construction Corpn. v. S. Raghunathan and Chanchal Goyal (Dr.) v. State of Rajasthan*. There is No. case that any assurance was given by the Government or the department concerned while making the appointment on daily wages that the status conferred on him will not be withdrawn until some rational reason comes into existence for withdrawing it. The very engagement was against the constitutional scheme. Though, the Commissioner of the Commercial Taxes Department sought to get the appointments made permanent, there is No. case that at the time of appointment any promise was held out. No. such promise could also have been held out in view of the circulars and directives issued by the Government after Dharwad decision. Though, there is a case that the State had made regularisations in the past of similarly situated employees, the fact remains that such regularisations were done only pursuant to judicial directions, either of the Administrative Tribunal or of the High Court and in some case by this Court. Moreover, the invocation of the doctrine of legitimate expectation cannot enable the employees to claim that they must be made permanent or they must be regularised in the service though they had not been selected in terms of the rules for appointment. The fact that in certain cases the court had directed regularisation of the employees involved in those cases cannot be made use of to found a claim based on legitimate expectation. The argument if accepted would also run counter to the constitutional mandate. The argument in that behalf has therefore to be rejected.

47. When a person enters a temporary employment or gets engagement as a contractual or casual worker and the engagement is not based on a proper selection as recognized by the relevant rules or procedure, he is aware of the consequences of the appointment being temporary, casual or contractual in nature. Such a person cannot invoke the theory of legitimate expectation for being confirmed in the post when an appointment to the post could be made only by following a proper procedure for selection and in cases concerned, in consultation with the Public Service Commission. Therefore, the theory of legitimate expectation cannot be successfully advanced by temporary, contractual or casual employees. It cannot also be held that the State has held out any promise while engaging these persons either to continue them where they are or to make them permanent. The State cannot constitutionally make

such a promise. It is also obvious that the theory cannot be invoked to seek a positive relief of being made permanent in the post.

13. In view of the above, I am of the view that the period of engagement as a daily wager prior to regularisation cannot fall within the meaning of regular service and, therefore, such period cannot be added / considered for consequential benefit available to regular employee.

14. The writ petition fails and is dismissed.