
(2015) 11 P&H CK 0063
In the Punjab And Haryana At Chandigarh
Case No : CWP No. 11236 of 2015(OandM)

Amit Kumar Sidhu and Others

APPELLANT

Vs

State of Punjab and Others

RESPONDENT

Date of Decision : 05-11-2015

Acts Referred:

Constitution of India, 1950 — Article 14, 142, 16, 226

Citation : (2016) 1 SCT 205

Hon'ble Judges : Rajiv Narain Raina, J.

Bench : Single Bench

Advocate : Sunil K. Nehra, Advocate, for the Appellant; Kamal Sehgal, Addl. A.G., for the Respondent

Final Decision : Dismissed

Judgement

Rajiv Narain Raina, J.—The Punjab Public Service Commission issued a public notice in the print media on May 7, 2015 advertising several posts of Ayurvedic Medical Officer to be filled by direct recruitment. The post is governed by the provisions contained in the Punjab Ayurvedic (Group-A) Service Rules, 2008, which came into force vide notification dated March 25, 2008. In addition to the said rules of service, the provisions of the Punjab Civil Service (General and Common Condition of Service) Rules, 1994 are also applicable in direct recruitment where service rules are silent. The posts were advertised in terms of prescriptions in service rules regarding qualifications etc. There are 31 candidates before this Court in the present joint petition raising a common cause claiming similar relief seeking directions in relaxation of rules.

2. The petitioners are serving as Ayurvedic Medical Officers in the National Rural Health Mission (NRHM), Punjab in the Directorate of Ayurveda Punjab. They were appointed on different dates during the years 2008 to 2010. They have been working from the last 4 to 7 years. They were inducted into service of the Mission through identical assignment letters to work on contract basis on a consolidated pay of Rs. 20,000/- per month. The assignment letter to the first

petitioner has been placed on record at Annexure P-1 by way of sample. To condition in the assignment letter warns them that they have no claim to any service benefits whatsoever such as regularization of service, increment benefits, dearness allowance, travelling allowance or any other allowance. They are not eligible to subscribe to the General Provident Fund or GIS Scheme etc. During the period of contract, their services were liable for termination on grounds of absenteeism, misconduct or if the work or conduct was not found satisfactory at any time during the currency of the contract period. The contractual assignment continues on the strength of the first letter offering jobs. The assignment was made dependent on the outcome of CWP No. 18397 of 2008, titled as "Gagandeep Kaur v. State of Punjab & ors." and CWP No. 17892 of 2008 titled as "Dr. Kamalpreet Kaur & ors. v. State of Punjab".

3. The petitioners have approached this Court aggrieved by the advertisement and the recruitment process initiated for direct recruitment to the post of Ayurvedic Medical Officer lying vacant in the Department of Health and Family Welfare in the Department of Ayush. They pray that weightage of past service deserves to be given to them and as many as there are petitioners, the advertised vacancies should be deducted to accommodate their claim by giving weightage to their experience earned while serving the Mission. In addition, they claim age relaxation to those as may be over age in terms of the advertisement. The principal prayer at (a) in the prayer clause is for issuance of writ in the nature of mandamus directing the respondents to regularize the service of the petitioners against vacant posts of Ayurvedic Medical Officers. It is the further prayer at (c) that they should be given minimum pay scales of the post of Ayurvedic Medical Officer citing judicial precedent in the Full Bench decision of this Court handed down in Avtar Singh v. State of Punjab & Others, 2012 (1) SLR 832 : 2011 (4) RSJ 522, where contractual employees who have served for long periods have been held to be entitled to the minimum pay scale of pay of the post without any allowances.

4. Feeling aggrieved by direct recruitment initiative of the State Government/PPSC they approached this Court on May 26, 2015 for relief to protect them from being dislodged to make way for regular recruits likely to be recommended for appointment. The action is brought promptly after the advertisement was published on May 7, 2015. By an interim order, petitioners' No. 8, 10, 19, 23 & 28 were allowed to participate in the selection process subject to the outcome of the writ petition. It was directed that the result of the petitioners be not declared and be kept in a sealed cover. Similar interim orders were passed in CWP No. 12161 of 2015 claiming the same reliefs. The interim order was passed on May 28, 2015. The Punjab Public Service Commission, Patiala has obeyed the directions and in terms of the interim orders, permitted the petitioners to appear in the written examination held on September 6, 2015. The result of the written examination has been put in public domain on September 29, 2015. The result of the permitted petitioners has been kept in sealed cover. A total of 200 candidates, which is three times of number of posts, have been shortlisted for

interview. The interviews were scheduled to be held from October 12, 2015 to October 16, 2015. Two of the candidates amongst the petitioners have qualified the written examination as is now disclosed, namely, Dr. Maninder Thakur and Dr. Rakhee Tangri. This position has been explained in a short reply by way of affidavit filed by the Secretary, Punjab Public Service Commission, Patiala, dated October 7, 2015.

5. By consent arguments were heard for final disposal on October 7, 2015 and the judgment was reserved, which is being pronounced today. Mr. Sunil K. Nehra appearing for the petitioners has made the following submissions in his impassioned address to the Court.

6. He submits on the strength of decision of the Supreme Court in Secretary, State of Karnataka and Others Vs. Umadevi and Others, , that the petitioners have served for considerable period of time in the NRHM as Ayurvedic Medical Officers and they have developed in the meantime a right to regularization of their services. Mr. Nehra relies inter alia on the Punjab Government circular dated March 18, 2011, which deals specifically with the mandate of the Constitution Bench of the Supreme Court in Umadevi (3) (supra) to regularize the employment of employees working on contract basis in different departments. The circular has been issued by the Punjab Government, Personnel Department (P.P.3 Branch) in Civil Secretariat, Punjab. The policy circular has approval of Cabinet Ministers in the Government of Punjab in the meeting held on March 9, 2011. In continuance of the policy circular dated December 15, 2006 formulated after the decision was rendered in Umadevi (3) on April 10, 2006 and the conditions in the circular stipulates that the policy covers employees who are working on contract basis against permanent posts and whose appointment was made by adopting proper procedure in a transparent manner keeping in view the prescribed qualifications and eligibility criteria of those of who fall within the ambit of the circular should be regularized from April 1, 2011 or on completion of 3 years of service on contract basis whichever is later but no new pay scales will be fixed further. Mr. Nehra has placed numerous circulars on the subject matter of the petition including those issued by the Punjab Government in the Department of Health and Family Welfare, Chandigarh of which one of them dated July 12, 2013 has been issued in the National Rural Health Mission addressed to all the Civil Surgeons, Punjab, for sending cases regarding Ayush and Homeopathy Department to the Directorate concerned. The Mission programme as administered through the office of the Department of Health (NRHM), Punjab. The policy in Umadevi-3, in para. 53 has been extended to employees working on contract and daily wages or on the acquittance roll of work-charge employees of Board, Commissions, Corporations, societies etc. administered by different departments of the Government of Punjab. This circular is dated November 17, 2011 (Annexure P-5).

7. It is the lament and the complaint of the petitioners that they have been discriminated against only for the reason that they worked in the National Rural

Health Mission, Punjab, which is a Central Government programme managed at the State level by the different State Governments as have adopted the Mission. The petitioners deserve to be treated on equal footing with present and prospective counterparts especially having regard the fact that they have already served for the last 4 to 7 years and their work and conduct is satisfactory and nothing adverse has been reported on them.

8. In the alternative, Mr. Nehra submits that even if the petitioners are to compete with the open merit candidates who have applied for the said posts they should be given weightage of experience earned by them while serving the Mission. It is not only the weightage of experience that they must have while serving the Government and shouldering its needs but also relaxation in age for those who have become overage while serving the Mission as they have become unemployable for Government service in the meanwhile. To this end, a mandamus is sought from Court commanding the State to create weightage of experience as part of criterion and to also tide over the age bar so that they can, if called upon, to compete on equal footing with the applicants but with weightage they will be put at par in the race of securing regular employment as AMOs. Otherwise, they would be disadvantaged or handicapped in seeking employment under the State in the future.

9. Mr. Nehra relies on the following observations of the Supreme court in *Umadevi*(3) where the Supreme Court directed that if sanctioned posts are vacant, the State will take immediate steps for filling those posts by a regular process of selection. But when the regular employment is undertaken, the respondents in civil appeals No. 3595/3612 of 1999 and those in the Commercial Taxes Departments (CTD), who are similarly situated, will be allowed to compete waiving the age restriction imposed for the recruitment and should give some weightage for their having been engaged for the work in the department for a significant period of time. These directions have been issued statedly under Article 142 of the Constitution of India to do justice to them. The reference is to para. 46 in *Umadevi* (3) which reads as under:--

"46. In cases relating to service in the commercial taxes department, the High Court has directed that those engaged on daily wages, be paid wages equal to the salary and allowances that are being paid to the regular employees of their cadre in government service, with effect from the dates from which they were respectively appointed. The objection taken was to the direction for payment from the dates of engagement. We find that the High Court had clearly gone wrong in directing that these employees be paid salary equal to the salary and allowances that are being paid to the regular employees of their cadre in government service, with effect from the dates from which they were respectively engaged or appointed. It was not open to the High Court to impose such an obligation on the State when the very question before the High Court in the case was whether these employees were entitled to have equal pay for equal work so called and were entitled to any other benefit. They had also been

engaged in the teeth of directions not to do so. We are, therefore, of the view that, at best, the Division Bench of the High Court should have directed that wages equal to the salary that are being paid to regular employees be paid to these daily wage employees with effect from the date of its judgment. Hence, that part of the direction of the Division Bench is modified and it is directed that these daily wage earners be paid wages equal to the salary at the lowest grade of employees of their cadre in the Commercial Taxes Department in government service, from the date of the judgment of the Division Bench of the High Court. Since, they are only daily wage earners, there would be no question of other allowances being paid to them. In view of our conclusion, that Courts are not expected to issue directions for making such persons permanent in service, we set aside that part of the direction of the High Court directing the Government to consider their cases for regularization. We also notice that the High Court has not adverted to the aspect as to whether it was regularization or it was giving permanency that was being directed by the High Court. In such a situation, the direction in that regard will stand deleted and the appeals filed by the State would stand allowed to that extent. If sanctioned posts are vacant (they are said to be vacant) the State will take immediate steps for filling those posts by a regular process of selection. But when regular recruitment is undertaken, the respondents in C.A. No. 3595-3612 and those in the Commercial Taxes Department similarly situated, will be allowed to compete, waiving the age restriction imposed for the recruitment and giving some weightage for their having been engaged for work in the Department for a significant period of time. That would be the extent of the exercise of power by this Court under Article 142 of the Constitution to do justice to them."

10. Mr. Nehra cites another authority of the Supreme Court in *Satya Parkash v. State of Bihar & Ors.*, 2010 (2) SCT 243, where the Supreme Court has observed, that persons who are working with department on ad hoc/contract basis for a considerable period of time are entitled to participate in the selection process and rather entitled for age relaxation and weightage for having been engaged or worked in the department for a considerable period of time.

11. However, in the resent case the respondent-Commission in the advertisement has neither made any provision for age relaxation nor weightage has been given to the employees who are working as Ayurvedic Medical Officers with the State Government for the last many years on contract basis. The Court is informed that all the petitioners have applied in pursuance to the advertisement. The age restriction in the advertisement is from 18 years to 37 years as on January 1, 2015. It is mentioned in para. 11 of the petition that petitioners" No. 8, 10, 19, 23 & 28 have become overage. Meanwhile, it is these petitioners, who have the benefit of the interim orders on the strength of which they have appeared for the written examination. In case, their claims are thrown out on the age bar grave injustice would be done to them and especially to Dr. Ravneet Kaur, petitioner No. 10, who has qualified the written examination and has made it in the final result of the selection process on merit. Undue hardship and heartburn would be

caused to the successful candidates amongst the petitioners in case she is shown the exit door. Mr. Nehra's contention for grant of minimum pay scales of the post of Ayurvedic Medical Officer by applying the law laid down in Avtar Singh's case(supra) is a stand-alone prayer which has nothing to do with the impugned selection process and is severable from main prayers a & b and can be separately agitated with the Central/State Government. For these reasons Mr. Nehra submits that the petitioners have a case for directions and deserve not to be treated as outsiders serving on the fringes of the government and that too having been exploited for years together. They should be treated with fairness-in-action by the Government on principles of justice, equity and good conscience.

12. On the other hand, Mr. Kamal Sehgal, learned Additional Advocate General, Punjab appearing for both the State of Punjab and the Commission submits that the petitioners are not employees of the Punjab Government *stricto sensu* and do not hold posts under the State. They have been engaged by assignment to work on contract basis on fixed salary with the National Rural Health Mission, which is a Central Government sponsored scheme managed and run by the Punjab Government to give effect to the Mission to bolster the health programme of the State Government in the field of Ayurveda. He draws attention of this Court to the assignment data to contend that contractual appointments were offered to the petitioners by a Committee constituted for recruitment under the National Rural Health Mission. The contractual employment does not satisfy the test of public employment within the meaning of Articles 14 & 16 of the Constitution of India and the contractual employment is not in terms of the constitutional scheme of appointments to public service as explained in *Umadevi* (3) itself. Their assignment cannot be read as an open competition for public posts to secure for them berths on public posts. The quality of the assignment is not one and the same thing as service under the State gained through open competition on equal opportunity law in scheme of appointments. The petitioners cannot be seen as exploited lot as they picked up the assignment with open eyes and in the face of Clause 4 of the appointment letter referred to above. No hopes or legitimate expectations were promised. The assignment letters are clear enough. Long service due to delays in regular recruitment will confer hardly any rights on the petitioners. They can make no claim for regularization of service since the policy circulars do not come in aid of their cases as they are not employees of the State Government. They form a separate class. There is a reasonable classification between regular employment in terms of the rules of service and the appointments on contract basis in the NRHM.

13. On the moot issue of weightage of experience, if given, it is manifest that it would put the open candidates who have applied for the post of Ayurvedic Medical Officer to disadvantage as the petitioners would get a head start with such weightage which would destroy the claims of the general candidates as have applied to the Commission to compete for those posts on regular basis within the advertised boundaries of open merit competition. It is seriously argued that the race for posts from the starting gun to the tape and the merit finally

determined among the eligible competitors would get totally distorted in case a direction is issued by the Court to the State Government to give weightage towards experience to the petitioners. If such a course is adopted it would violate the equality clause in Article 14 of the Constitution of India and disturb the equal opportunity law in Article 16 the result of which would be to put unequals on equal footing, which the Constitution abhors.

14. There is another angle from where Mr. Sehgal canvasses before the Court insofar as the claim for weightage is concerned, urging that in case weightage is given, if directed, when the Commission has all but done its work, it would inevitably result in nullification of the advertisement and the entire recruitment process itself re-setting the clock for the Commission to make a fresh recruitment by fresh advertisement all over again for the same posts/vacancies which have been advertised for direct recruitment. This would lead to administrative chaos and would be against public interest preventing regular recruitment or in any event postponing it to an unpredictable future date which is not what regular recruitment is about. The scope of mandamus jurisdiction in Article 226 of the Constitution of India is not meant for such a purpose as would inevitably prejudice the interest of the State and the public at large. A mandamus would never lie to the Government to redesign a rule or rewrite it on grounds of sympathy or compassion. If this were allowed we can forget about making direct recruitment of Ayurvedic Medical Officers for a long time. Besides, apart from the two persons mentioned in the affidavit the rest have not made the mark on merits in the written examination and therefore, they have no case for appointment whatsoever or towards weightage of experience and to overcome the age bar to enable them to be interviewed.

15. In response to Satya Parkash's case (supra) Mr. Sehgal submits on the facts of that case that the appellants before the Supreme Court were daily wage Clerks and Peons who claimed regularization on the passing of the Bihar Education Council (Repeal) Act, 2007. They had served for more than 10 years on daily rated basis in the Bihar Intermediate Education Council and approached the Patna High Court for regularization of their services. The learned Single Judge considered their request for regularization and directed the Council to treat them as a separate class after relaxing their age. No positive direction was given to the Council for regularization of their services. The Division Bench in appeal held that merely because they worked as daily wage employees with the Council that would not confer any right for regularization as no public appointment was permissible de hors the recruitment rules. The Letters Patent Appeal was dismissed in limine. Aggrieved by the same, the petitioners approached the Supreme Court by special leave to appeal. It was argued on their behalf that paragraph 53 in Umadevi(3) case came to their rescue since they have served for 10 years or more against the duly sanctioned posts. They deserve equal treatment. The Council countered the claim stating that they were never appointed on the sanctioned posts and therefore, they could not avail the benefit of the directions in Umadevi's case which ruling was applicable to only to those

qualified employees, who are appointed irregularly in the sanctioned posts. Resultantly, the Council in 1995 had decided to fill up the posts of Assistant/Routine Clerks and Peons on regular basis by an advertisement published on 25.2.1995. The appellants and several other persons applied but no panel no merit list was prepared by the Council. Accordingly, no appointments were effected. The matter was reviewed in 1999 to complete the earlier selection process and accordingly to prepare a merit list by 15.1.2000. Even that did not materialize due to the creation of new State of Jharkhand by the Bihar Reorganisation Act 2007. Further the Council itself was dissolved by the Bihar Intermediate Council (Repeal) Act, 2007. Hence, there was no question of regularization of any employee in the Council. The functions of the erstwhile Intermediate Council were transferred to the Bihar School Examination Board which followed its own recruitment rules. The Supreme Court held the view that benefit of regularization of their services could not be granted since they were never appointed against any sanctioned posts but were engaged on daily wages. However, in the concluding para. 14 in Satya Parkash's case (supra) the Supreme Court made a small allowance by giving age relaxation to those who had become overage and directed that when the Board proposes to undertake a regular selection process to fill up the posts age be relaxed. The following observations were made in para. 14:--

"14. Appellants stated that they had undergone a selection process held fourteen years back, following an advertisement published in the year 1995 but the merit list was neither prepared nor published. Selection process, though had undertaken by the Council was not completed and now the Council is no more in existence. However, if Board proposes to undertake any regular selection process to fill up the posts, the applications, if any, submitted by the appellants may also be considered after giving age relaxation. In Umadevi's case in paragraph 55 of the judgment, the Constitution Bench has also permitted such persons to participate in selection process waiving the age relaxation and giving the weightage for having been engaged or worked in the department for a significant period of time."

16. In making these observations, the Court relied on para. 55 in Umadevi(3) case.

17. Continuing with his submissions on the age bar, Mr. Sehgal cites a decision prior in point of time to Satya Parkash's case and refers to another ruling of the Supreme Court in Nagendra Chandra etc. v. State of Jharkhand & ors., where the Supreme Court after noticing Umadevi (3) made an allowance in a case involving illegal appointments of Constables in Jharkhand who were recruited against the vacancies which were neither advertised through an employment exchange nor in a newspaper and were made in violation of Rule 663 of the Bihar Police Manual and whose services were later terminated by the competent authority. The termination was upheld since an appointment which is made in violation of recruitment rules is non est as the same is violative of Articles 14 & 16 of the

Constitution and renders the appointment illegal and void. However, in the concluding paras 9 & 10, the Supreme Court made observations similar to the ones in 2010 in Satya Parkash's case ruling as follows:--

"9. In view of the foregoing discussion, we have no option but to hold that if an appointment is made in infraction of the recruitment rules, the same would be violative of Articles 14 and 16 of the Constitution and being nullity would be liable to be cancelled. In the present case, as the vacancies were not advertised in the newspapers, the appointments made were not only in infraction of Rule 663(d) of the Bihar Police Manual but also violative of Articles 14 and 16 of the Constitution, which rendered the appointments of the appellants as illegal; as such the competent authority was quite justified in terminating their services and the High Court, by the impugned order, was quite justified in upholding the same.

10. In the result, the appeals fail and the same are accordingly dismissed, but in view of the fact that the appellants have continued in service for a period of fourteen years, we may, however, observe that their cases may be considered for future appointment and age bar, if any, may be relaxed in relation to them. There shall be no order as to costs."

18. In Nagendra Chandra's case (supra) age relaxation was whittled down by the Supreme Court in the judgment dated 6.7.2011 rendered in Union of India (UOI) and Another Vs. Arulmozhi Iniarasu and Others, . The Supreme Court in the said case explained away the directions issued in Nagendra Chandra's case were made in exercise of powers under Article 142 of the Constitution of India, which is neither possessed by the High Courts nor the Tribunals. The argument arose when the Additional Solicitor General of India appearing for the Central Government strenuously urged that High Court had committed a manifest error in directing relaxation of age bar by treating the decision in the case of Nagendra Chandra as a binding precedent on the point. The Supreme Court agreed and held in para 13 as follows:--

"13. Bearing in mind the aforementioned principle of law, we may now refer to the decision in Nagendra Chandra (supra). It is plain from a bare reading of the said decision that the question which fell for consideration before a bench of three learned Judges of this Court was as to whether the appointments of the appellants in that case were illegal or irregular. This Court opined that since the appointments made were not only in infraction of the recruitment rules but also violative of Articles 14 and 16 of the Constitution of India, these were illegal. It was thus, held that the appellants would not be entitled to get the benefit of the directions contained in Umadevi(3) case (supra), which are applicable only to those qualified employees who were appointed irregularly in a sanctioned post. Having come to the conclusion that the subject appointments being illegal, the competent authority was justified in terminating the services of the employees concerned and the High Court was also justified in upholding the same, in our view, they relied upon observation in the penultimate paragraph of the judgment in Nagendra Chandra (supra) does not appear to be consistent with the ratio of

the decision of the Constitution Bench in Umadevi (3) case (supra). In the said decision it has clearly been held that the courts are not expected to issue any direction for absorption/regularisation or permanent continuance of temporary, contractual, casual, daily wagers or ad-hoc employees merely because such an employee is continued for a long time beyond the term of his appointment. It has also been held that such an employee would not be entitled to be absorbed in regular service or made permanent, merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant rules. Therefore, in our opinion, the said observation cannot be said to be an exposition of general principle of law on the point that a long length of service, dehors the relevant recruitment rules for the post, is a relevant factor for waiver or relaxation of any eligibility criterion, including age limit, for future regular selections for the post. Obviously, the observation, general in nature, was made by this Court in exercise of its jurisdiction under Article 142 of the Constitution of India and, therefore, cannot be treated as a binding precedent. It has to be confined to the peculiar facts of that case."

19. In the said ruling the Supreme Court held that the observations in Umadevi(3) were not applied in Nagendra Chandra's case and the observations in Nagendra Chandra's case cannot be said to be an exposition on a general principle of law on the point that a long length of service de hors the relevant factors for waiver or relaxation of any eligibility criterion including age limit for future regular selection for the post to be followed as binding dicta on principles of stare decisis. From this, Mr. Sehgal contends that neither the directions in Nagendra Chandra's case nor in Satya Parkash's case can be applied by this Court to consider relaxation in age contrary to rules of service governing the posts of Ayurvedic Medical Officers. There can be no doubt on this point as to which way it should go and Mr. Sehgal appears on sound footing when he urges this Court not to interfere in the age bar by making any direction or approving relaxation on this count irrespective of the length of service, while arguing that his opposing counsel cannot succeed on this point and because he cannot succeed on the issue of age bar, he cannot succeed on the question of weightage of experience as well since it is not prescribed in the rules of service nor obviously in the advertisement and the stand of the State in the considered view of this Court deserves to be upheld as it is valid and commendable view of the law on the facts of this case which are peculiar in nature.

20. Mere sympathy or compassion alone cannot come to the rescue of the petitioners nor would any equity flow from the interim orders passed by this Court to consider the cases on merits as the arrangement to allow the over age candidates to compete for the post was interim and no equities flow therefrom. Even if one or two of the candidates have been successful on merits in the selection even then equitable principles cannot be invoked in favour of any of the present candidates praying that weightage of experience is to be given to them alone then why should it not be given to all the candidates who have applied

under the advertisement. Any direction of the kind, I dare say, would upset the entire apple cart and jeopardize the recruitment process itself throwing it off gear and in a tizzy impairing third party rights to such a degree as would restrain the hands of this Court from passing any orders favourable to the petitioners despite long service in a scheme where the entry process was qualitatively different from the one presently being pursued by the PPSC, Patiala, on a requisition of the State Government in the Department of Health (Ayush).

21. For these reasons, this Court would be loath to interfere with the recruitment process where it stands and which must now be taken to its logical conclusion without the burdens of this petition carried any further. If both or either of the two concessions are given as claimed it would amount to reverse discrimination and betray Articles 14 and 16 of the Constitution of India.

22. Consequently, no ground is made out warranting interference in writ jurisdiction and the petition is found without substance and is thus dismissed.