
(2014) 10 SHI CK 0113
In the High Court Of Himachal Pradesh
Case No : CWP No. 5068 of 2013

Anita Parihar

APPELLANT

Vs

State of H.P.

RESPONDENT

Date of Decision : 08-10-2014

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 226, 32

Citation : (2014) 10 SHI CK 0113

Hon'ble Judges : Tarlok Singh Chauhan, J

Bench : Single Bench

Advocate : Ranjana Parmar, Advocate for the Appellant; V.K. Verma, D.S. Nainta and Meenakshi Sharma, Additional Advocate Generals, Advocate for the Respondent

Final Decision : Allowed

Judgement

Tarlok Singh Chauhan, J.—The petitioners have prayed the following reliefs:-

"i) That the respondent may kindly be directed to the order dated 26.2.2013 may kindly be quashed and the case of the petitioners for regularization under Policy framed by the State of Himachal Pradesh from the date they completed eight years of service with all consequential benefits."

2. The petitioners claim to be employees of District Rural Development Agency (for short "DRDA"). Petitioner No. 1 claims to have joined as sales girl on 17.1.1994, petitioner No. 2 as class-IV employee in the year 1996 while petitioners No. 3 and 4 claim to have joined as driver and Enumerator in the year 2002, respectively.

3. Vide office order dated 19.3.2005 the services of the petitioners were placed at the disposal of the Milch Live Stock Improvement Society (for short "MLIS") by the Deputy Commission-cum-C.E.O., DRDA. Apart from the petitioners certain other employees were also sent to work with the society.

4. On 16th June, 2009 a letter was issued by the Secretary (Revenue Department) to all the Deputy Commissioners-cum-CEO, DRDA to adopt the instructions issued by the State Government regarding regularization of daily waged/contract basis employees in DRDA who had completed eight years of continuous service with the minimum of 240 days in a calendar year as on 31.3.2008. When the respondents failed to regularize the services of the petitioners, they filed CWP No. 5890 of 2010 before this Court, which come up for consideration on 9.10.2012 and the following order was passed:-

"In view of the above facts, the cases of the petitioners shall be considered by respondent No. 2, as a representation and a copy of the writ petition shall be submitted to respondent No. 2 and the allegations made in the petition shall be considered as a representation, which shall be considered by respondent No. 2, in view of the Policy vide Annexures P-2 and P-3 dated 16.6.2009 and 9.9.2008. The cases of the petitioners shall be considered for regularization accordingly and the said representation shall be decided by respondent No. 2 within a period of three months of the date, the copy of the writ petition with relevant Annexures and a certified copy of the order are produced before respondent No. 2 by the petitioners and in case, the petitioners are found eligible for regularization, they shall also be entitled to all the consequential benefits in view of the policy as applicable, in the case of the petitioners."

5. In compliance to the directions of this Court the petitioners filed representation which again came to be rejected constraining the petitioners to file the present petition.

6. The respondents have filed their reply, wherein it is claimed that the petitioners were engaged under a specific project titled as Milch Live Stock Improvement Project sanctioned by the Government of India. Their services were initially engaged purely on temporary basis to run the project till the cessation of the project, which was handed over to respondent No. 3 MLIS in the year 2005 by execution an memorandum of understanding on 11.1.2005 in which it was clearly mentioned that the staff engaged by the Society shall in no way be considered to be the employees of DRDA/government. It is further claimed that after closure of the project it has been handed over to the Society along with all assets and liabilities by executing an Exit Protocol Memorandum of Understanding dated 27.3.2012, wherein again it has been mentioned that the DRDA shall not be responsible for the staff engaged/to be engaged by the project. The staff available with the MLIS shall not be considered as DRDA employees for regularization and these employees of MLIS shall not be entitled to any service benefits from DRDA.

7. I have heard the learned counsel for the parties and gone through the records of the case. Office order dated 19.3.2005 shows that the services of the petitioner had been placed at the disposal of the MLIS. In case the petitioners were already the employees of MLIS, as is being claimed by the respondents, then where was the question of the petitioners along with the other staff

mentioned in the office order being placed at the disposal of the MLIS. This clearly belies the stand of the respondents. This fact has already been noticed by this Court while adjudicating the earlier petition i.e. CWP No. 5890 of 2010, wherein this Court observed as under:-

"The petitioners were working as Sales Girl, Class-IV employee, Driver and Enumerator, respectively, as alleged in Para-2 of the petition and they were appointed by the Deputy Commissioner-cum-CEO, respondent No. 2. The petitioners have allegedly completed 8 years of service and as alleged, as per the policy of the State Government, they are liable to be regularized on completion of 8 years service.

2. The plea taken by the respondent State in their reply is that the petitioners were appointed on contractual basis under a project and they were employees of the Milch Live Stock Improvement Society, respondent No. 3. However, a perusal of office order Annexure P-1, shows that services of these employees were placed at the disposal of Milch Live Stock Improvement Society on 17.3.2005 and prima facie, they cannot be said to be employees of the Milch Live Stock Improvement Society, respondent No. 3, keeping in view the initial appointment made by the Deputy Commissioner-cum-CEO, DRDA, respondent No. 2."

8. Another fact which cannot be lost sight is that as per the case set up by the respondents themselves, the services of the petitioners were handed over to the Society in 2005 by executing a Memorandum of Understanding on 11.1.2005. In case the services of the petitioners had already been handed over to the Society on 11.1.2005 in terms of Memorandum of Understanding, then where was the requirement of having subsequently issued office order dated 19.3.2005, whereby the services of the petitioners along with certain other persons were again placed at the disposal of MLIS, respondent No. 3 herein. This action falsifies the defence put forth by the respondents. It is not the case of the respondents that in case the petitioners are their employees, then they are not entitled to the regularization of their services in terms of the instructions issued by the Government on 9.9.2008, but the only case is that the petitioners are the employees of respondent No. 3, Society and not of the DRDA. The petitioners have produced sufficient material on record to establish that persons who were similarly situated like that of the petitioners have in fact been regularized, which averments have not been specifically denied by the respondents and thus are deemed to be admitted.

9. The petitioners have rendered more than 12 to 20 years of services and the action of the respondents in not regularizing their services is arbitrary. It is violative of Articles 14 and 16 of the Constitution of India. It also amounts of unfair labour practice. The respondents-State cannot be permitted to exploit the petitioners and similarly situate persons by keeping them on contract basis for more than a decade.

10. Not only this, the respondents have also not complied with the letter dated

16.6.2009 circulated vide letter dated 9.9.2008, wherein it is clearly spelt out that after consultation with the Finance Department it had been agreed that all the District Rural Development Agencies may adopt the Government of Himachal Pradesh Policy for regularization of daily waged/contact basis employees, as per the approved norms of Government of India. The petitioners in terms of these instructions were required to be regularized since they had admittedly completed more than eight years of uninterrupted service.

11. It is amply proved on record that there was a master and servant relationship between the respondents and petitioners. The Hon'ble Supreme Court in Nihal Singh and Ors. Vs. State of Punjab and Ors. has held as under:-

"17. It is obvious both from the said section and also the appointment orders, the appellants are appointed by the State in exercise of the statutory power u/s 17 of the Act. The appellants are amenable to the disciplinary control of the State as in the case of any other regular police officers. The only distinction is that they are to be paid daily wages of Rs. 35 (which came to be revised from time to time). Further, such payment was to be made by the bank to whom the services of each one of the appellants is made available.

18. From the mere fact that the payment of wages came from the bank at whose disposal the services of each of the appellants was kept did not render the appellants employees of those banks. The appointment is made by the State. The disciplinary control vests with the State. The two factors which conclusively establish that the relationship of master and servant exists between the State and the appellants. A fact which is clearly recognized by the division bench of the High Court in LPA No. 209 of 1992. It may be worthwhile mentioning here that under the law of contracts in this country the consideration for a contract need not always necessarily flow from the parties to a contract. The decision of the SSP to reject the claim of the appellants only on the basis that the payment of wages to the appellants herein was being made by the concerned banks rendering them disentitled to seek regularization of their services from the State is clearly untenable.

21. But we do not see any justification for the State to take a defence that after permitting the utilisation of the services of large number of people like the appellants for decades to say that there are no sanctioned posts to absorb the appellants. Sanctioned posts do not fall from heaven. State has to create them by a conscious choice on the basis of some rational assessment of the need.

22. The question is whether this court can compel the State of Punjab to create posts and absorb the appellants into the services of the State on a permanent basis consistent with the Constitution Bench decision of this court in Umadevi's case. To answer this question, the ratio decidendi of the Umadevi's case is required to be examined. In that case, this Court was considering the legality of the action of the State in resorting to irregular appointments without reference to the duty to comply with the proper appointment procedure contemplated by the

Constitution. "4. ... The Union, the States, their departments and instrumentalities have resorted to irregular appointments, especially in the lower rungs of the service, without reference to the duty to ensure a proper appointment procedure through the Public Service Commissions or otherwise as per the rules adopted and to permit these irregular appointees or those appointed on contract or on daily wages, to continue year after year, thus, keeping out those who are qualified to apply for the post concerned and depriving them of an opportunity to compete for the post. It has also led to persons who get employed, without the following of a regular procedure or even through the backdoor or on daily wages, approaching the courts, seeking directions to make them permanent in their posts and to prevent regular recruitment to the posts concerned. The courts have not always kept the legal aspects in mind and have occasionally even stayed the regular process of employment being set in motion and in some cases, even directed that these illegal, irregular or improper entrants be absorbed into service. A class of employment which can only be called "litigious employment", has risen like a phoenix seriously impairing the constitutional scheme. Such orders are passed apparently in exercise of the wide powers under Article 226 of the Constitution. Whether the wide powers under Article 226 of the Constitution are intended to be used for a purpose certain to defeat the concept of social justice and equal opportunity for all, subject to affirmative action in the matter of public employment as recognised by our Constitution, has to be seriously pondered over."

(emphasis supplied)

23. It can be seen from the above that the entire issue pivoted around the fact that the State initially made appointments without following any rational procedure envisaged under the Scheme of the Constitution in the matters of public appointments. This court while recognising the authority of the State to make temporary appointments engaging workers on daily wages declared that the regularisation of the employment of such persons which was made without following the procedure conforming to the requirement of the Scheme of the Constitution in the matter of public appointments cannot become an alternate mode of recruitment to public appointment. It was further declared that the jurisdiction of the Constitutional Courts under Article 226 or Article 32 cannot be exercised to compel the State or to enable the State to perpetuate an illegality. This court held that compelling the State to absorb persons who were employed by the State as casual workers or daily-wage workers for a long period on the ground that such a practice would be an arbitrary practice and violative of Article 14 and would itself offend another aspect of Article 14 i.e. the State chose initially to appoint such persons without any rational procedure recognized by law thereby depriving vast number of other eligible candidates who were similarly situated to compete for such employment.

24. Even going by the principles laid down in Umadevi's case, we are of the

opinion that the State of Punjab cannot be heard to say that the appellants are not entitled to be absorbed into the services of the State on permanent basis as their appointments were purely temporary and not against any sanctioned posts created by the State.

25. In our opinion, the initial appointment of the appellants can never be categorized as an irregular appointment. The initial appointment of the appellants is made in accordance with the statutory procedure contemplated under the Act. The decision to resort to such a procedure was taken at the highest level of the State by conscious choice as already noticed by us. The High Court in its decision in LPA No. 209 of 1992 recorded that the decision to resort to the procedure u/s 17 of the Act was taken in a meeting dated 24.3.1984 between the Advisor to the Government of Punjab and senior officers of the various Banks in the public sector. Such a decision was taken as there was a need to provide necessary security to the public sector banks. As the State was not in a position to provide requisite police guards to the banks, it was decided by the State to resort to section 17 of the Act. As the employment of such additional force would create a further financial burden on the State, various public sector banks undertook to take over the financial burden arising out of such employment. In this regard, the written statement filed before the High Court in the instant case by respondent Nos. 1 to 3 through the Assistant Inspector General of Police (Welfare & Litigation) is necessary to be noticed. It is stated in the said affidavit:

"2. That in meeting of higher officers held on 27.3.1984 in Governor House Chandigarh with Shri Surinder Nath, IPS, Advisor to Governor of Punjab, in which following decisions were taken:-

i) That it will not be possible to provide police guard to banks unless the Banks were willing to pay for the same and additional force could be arranged on that basis, it was decided that police guards should be requisitioned by the Banks for their biggest branches located at the Distt. and Sub Divisional towns. They should place the requisition with the Distt. SSPs endorsing a copy of IG CID. In the requisition, they should clearly state that the costs of guard would be met by them. It will then be for the police department to get additional force sanctioned. This task should be done on a top priority. In the meantime depending upon the urgency of the need of any particular branch, police Deptt. may provide from police strength for its protection.

ii) For all other branches guards will be provided by Distt. SSP after selecting suitable ex-servicemen or other able bodied persons who will be appointed as Special Police Officer in terms of Section 17 of the Police Act. Preference may be given to persons who may already be in possession of licence weapons. All persons appointed as SPO for this purpose will be given a brief training for about 7 days in the Police Lines in the handling of weapons taking suitable position for protection of branches. These SPOs will work under the discipline and control and as per Police Act, they will have the same powers, privileges and protection and

shall be amenable to same penalty as an ordinary police personnel."

26. It can be seen from the above that a selection process was designed under which the District Senior Superintendent of Police is required to choose suitable ex-servicemen or other able bodied persons for being appointed as Special Police Officers in terms of section 17 of the Act. It is indicated that the persons who are already in possession of a licensed weapon are to be given priority.

28. Such a procedure making recruitments through the employment exchanges was held to be consistent with the requirement of Articles 14 and 16 of the Constitution by this Court in *Union of India (UOI) and Others Vs. N. Hargopal and Others*,

29. The abovementioned process clearly indicates it is not a case where persons like the appellants were arbitrarily chosen to the exclusion of other eligible candidates. It required all able bodied persons to be considered by the SSP who was charged with the responsibility of selecting suitable candidates.

30. Such a process of selection is sanctioned by law u/s 17 of the Act. Viewed in the context of the situation prevailing at that point of time in the State of Punjab, such a process cannot be said to be irrational. The need was to obtain the services of persons who had some experience and training in handling an extraordinary situation of dealing with armed miscreants."

12. Accordingly, in view of the observations and analysis made herein above, the writ petition is allowed and the respondents are directed to regularize the services of the petitioners from the date when they have completed eight years of service with all consequential benefits within a period of three months from today. Pending application(s), if any, also stand disposed of. No orders as to costs.