
(2013) 03 PAT CK 0016
In the Patna High Court
Case No : CWJC No. 2834 of 1998

Anjani Kumar Sinha and Others

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 05-03-2013

Acts Referred:

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

Citation : (2013) 3 PLJR 356

Hon'ble Judges : Chakradhari Sharan Singh, J

Bench : Single Bench

Advocate : Satish Chandra Jha and Krishna Narayan Jha, for the Appellant;
Rajeev Kumar Singh, for the Respondent

Judgement

Chakradhari Sharan Singh, J.—This writ application has been filed on behalf of three petitioners seeking a direction from this Court to the respondents to regularize their services, taking into account their long continuation in service as daily wagers by giving effect to the Circular issued by the Personnel and Administrative Reforms Department, Government of Bihar, Patna vide letter No. 5940 dated 18.6.1993 (Annexure-2). As per the petitioners, the said circular needs to be applied in their cases which lays down the guideline for regularization of those daily wage employees who were appointed prior to 1.8.1985 and were still working. Petitioners have also sought for a direction for grant of equal pay for equal work as also lowest time scale of pay from the very date of their engagement which according to them, have been granted to similarly situated persons pursuant to order passed by this Court in CWJC No. 10984 of 1993 (Minor Irrigation Employees Association, Godda and Others vs. The State of Bihar and Others) dated 13.2.1996. The case of the petitioners is that they were initially appointed as daily wages Correspondence Clerk/Pump Operator in the year 1981/1982 under the control of Executive Engineer, Minor Irrigation Division, Katihar and since then they have been working on the said post continuously. They have and they had the requisite qualification for the post against which they were appointed as daily wage Correspondence Clerk/Pump

Operator and are being paid their wages regularly for the same.

2. Petitioners have brought on record the circular as contained in letter No. 5940 dated 18.6.1993 issued by the Personnel and Administrative Reforms Department, Government of Bihar, Patna which laid down certain guidelines with respect to daily wage employees. The said circular provided, inter alia, that the persons appointed on daily wage basis after 1.8.1985 were required to be considered in accordance with law settled for regular appointment. A copy of the said circular dated 18.6.1993 has been annexed as Annexure-2 to the writ application. It has been pleaded in the writ application that the said circular was implemented and the persons appointed after the cut off date i.e. 1.8.1985 were sought to be retrenched. It has been pleaded in the writ application that a provisional State Level seniority list of the employees working in Minor Irrigation Department, Government of Bihar, Patna was prepared pursuant to the issuance of the circular dated 18.6.1993 containing names of Typists/Correspondence Clerks which was published in 1994. In the said list the names of petitioner Nos. 1 and 2 figured at serial Nos. 3 and 4. Similar provisional seniority list of Pump Operator/Mechanic was also prepared under letter dated 21.4.1995 but in the said letter the name of petitioner No. 3 was left out in spite of the recommendation made by the Executive Engineer, Minor Irrigation Division, Katihar. It has been averred as regards petitioner No. 3 that the Executive Engineer, Minor Irrigation Division, Katihar under his letter No. 278 dated 27.6.1995 informed the Minor Irrigation Department to include the name of petitioner No. 3 in the provisional seniority list on the basis of the list supplied earlier under letter No. 752 dated 12.10.1993 as in the said list the name of petitioner No. 3 was at serial No. 33. It has been pleaded that till date petitioner No. 3 had no knowledge whether his name was included in the seniority list or not. It has also been stated in the writ application that the petitioners are still in service and are getting only wages not scale.

3. Petitioners have stated that there are 42 sanctioned posts of Typist/Correspondence Clerk lying vacant in the Minor Irrigation Department and also that there are several sanctioned posts of Pump Operator/Mechanic lying vacant in the Department but the respondents are not taking any steps for filling up those posts. On the basis of this statement petitioners claim that they are working on sanctioned vacant posts and are well within the Roster Point. It has been reiterated that having requisite qualification as on the date of the filing of the writ application, they have continued as daily wage employees for more than 16 years. It has further been pleaded that by order dated 13.2.1996 passed in CWJC No. 10984 of 1993 (Minor Irrigation Employees Association, Godda vs. The State of Bihar and Others) in similar situation this Court directed the respondents for payment on the basis of same pay scale as available to the employees holding the corresponding posts in regular service from the date of filing of the writ application and further for consideration of regularization of their service.

4. In compliance of the said order of this Court, it is stated in the writ application

that the petitioners of that case are getting lowest time scale of pay regularly for the posts which they are hewing. In such view of the matter, the petitioners also represented for getting the same time scale of pay and also claimed for regularization of their services.

5. The respondents have filed counter affidavit opposing the prayer made in the writ application, paragraph 7 of which reads as follows:--

That the petitioners are not working against any sanctioned vacant post and they are only engaged to look after the scheme where they are posted. In their initial appointment, due procedure of an appointment of a regular employee was not followed, hence the question to pay them a regular pay scale does not arise. In view of a series of Judgments of the Hon"ble Court minimum scale of pay can be granted to employees who were appointed against the sanctioned post.

6. A reply to the counter affidavit has also been filed but there is no denial to the specific statement made in paragraph 7 of the counter affidavit, which goes to the root of the matter.

7. Learned counsel for the petitioners Mr. Satish Chandra Jha has submitted that the petitioners deserve to be considered for regularization of their service as they have continued as daily wage employees from 1981/1982, Mr. Jha has submitted that the petitioners were entitled for regularization in terms of the direction issued by the Supreme Court in case of Secretary, State of Karnataka and Others Vs. Umadevi and Others, .

8. In view of the pleadings and counter pleading on behalf of the parties, there cannot be any dispute over the fact that initial appointment of the petitioners was not preceded by any advertisement or selection on the basis of merit. Whether such appointment can be held to be irregular or illegal to bring such case within the purview of paragraph 53 Para 44 of PLJR of the judgment in case of Uma Devi (supra) came to be considered recently by a Full Bench of this Court in CWJC No. 267 of 2010 Reported in Ram Sevak Yadav Vs. The State of Bihar and Others, and CWJC No. 472 of 2010 Para 16 of PLJR (Umesh Ram vs. State of Bihar and Others). The said Full Bench of this Court considered the effect of an appointment on daily wage basis without complying with the requirements of Article 14 of the Constitution of India. This Court in its judgment dated 1.2.2013 passed in case of Ram Sevak Yadav (supra) has held as follows:--

Para 18 and 19 of PLJR Learned Counsel for the petitioners acknowledged that their initial appointment was not preceded by any advertisement or competitive merit selection. It is not their case that they were registered with the Employment Exchange. There is nothing to suggest that it was made against a sanctioned vacant post. On the contrary the language of the appointment letter more than sufficiently and inevitable manifests that it was a backdoor appointment doted out to them as an individual favour, treating them as blue eyed boys, reminiscent of the spoils system noticed in State of Bihar Vs. Upendra Narayan Singh and Others, . The opening of a Service Book and enhancement of

salary cannot confer the camouflage of legality on such an illegal appointment. Considering such illegal appointments it was observed In. Delhi Development Horticulture Employees" Union Vs. Delhi Administration, Delhi and others, :--

23.....The courts can take judicial notice of the fact that such employment is sought and given directly for various illegal considerations including money.

9. Referring to the judgment of Uma Devi (supra) held as follows:--

Para 44 of PLJR Employment under the State constitutes a national wealth. Every person eligible has a right to apply and be considered under Article 14 of the Constitution. The selection therefore has to be by open advertisement, equal opportunity for participation to the eligible and competitive merit selection. To dilute the requirement in any manner, shall not only be subverting the entire Constitutional scheme but shall also open the flood gates of favouritism, nepotism and corruption reducing public employment to pocket boroughs.

The word "illegal and irregular" have different connotations. The former denotes an action contrary to law from the very inception making it void ab-initio. The latter denotes rudimentary compliance with some procedures but with infractions which could be remedied. Reiterating the same in (Uma Devi) (supra) It was held:--

15. Even at the threshold, it is necessary to keep in mind the distinction between regularization and conferment of permanence in service jurisprudence in State of Mysore vs. S.V. Narayanappa this Court stated that it was a misconception to consider that regularization meant permanence. In R.N. Nanjundappa vs. T. Thimmiah this Court dealt with an argument that regularization would mean conferring the quality of permanence on the appointment. This Court stated:--

Counsel on behalf of the respondent contended that regularization would mean conferring the quality of permanence on the appointment whereas counsel on behalf of the State contended that regularization did not mean permanence but that it was a case of regularization of the rules under Article 309. Both the contentions are fallacious. If the violation of the provisions of the Constitution illegality cannot be regularized. Ratification or regularization is possible of an act which is within the power and province of the authority but there has been some non-compliance with procedure or manner which does not go to the root of the appointment. Regularization cannot be said to be a mode of recruitment. To accede to such a proposition would be to introduce a new head of appointment in defiance of rules or it may have the effect of setting at naught the rules.

16. In B.N. Nagarajan vs. State of Karnataka 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 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.

10. This Court held in case of Ram Sevak Yadav (supra) noting the ratio of Supreme Court judgment in case of Uma Devi that the person obtaining such precarious appointment does so consciously aware of the peril and that he may have had no option in the matter, in view of his need for employment or poor bargaining position are inconsequential issues.

11. This Court further held in case of Ram Sevak Yadav as follows:--

Para 28 of FB (PLJR) A claim for regularization by daily wagers simplicitor on completion of ten years" service was denied in State of Karnataka and Others Vs. Ganapathi Chaya Nayak and Others, , in Satya Prakash and Others Vs. State of Bihar and Others, the claim for regularization by a daily wager on completion of ten years" service without court intervention under paragraph 53 Para 44 of PLJR (Uma Devi) (supra) was denied on the ground that the appointment itself was not in consonance with Article 14 and upon a sanctioned vacant post. That (Uma Devi) (supra) has been the subject of diverse interpretations has been noticed in Govt. of A.P. and Others Vs. K. Brahmanandam and Others, also holding that claims originated in litigation before the Constitution Bench decision (as is the case presently also) could not be given the benefit of paragraph 53 Para 44 of PLJR observing as follows:--

20. In the light of the decision of this Court in Umadevi (3), para 53 Para 44 of PLJR thereof would be applicable subject to the condition that the matter had not been pending before any Court or tribunal. Indisputable, the litigation between the parties was pending since January, 2000. The Institution's application for approval of the said appointments had been rejected. Therefore, para 53 Para 44 of PLJR of Umadevi (3) has no application.

12. The Full Bench of this Court in Ram Sevak Yadav (supra) after taking note of precedents on the issue of regularization of service in public employment laid down the law as follows:--

Para 43 of FB (PLJR) A) Uma Devi (supra) prohibits regularization of daily wage, casual, ad-hoc and temporary appointments, the period of service being irrelevant.

B) An illegal appointment void ab-initio made contrary to the mandate of Article 14 without open competitive selection cannot be regularized under any circumstances.

C) Irregular appointments can be regularized if the appointment was made by an authority competent to do so, it was made on a vacant sanctioned post, in accordance with Article 14 of the Constitution with equal opportunity for participation to others eligible by competitive selection and the candidate possessed the eligibility qualifications for regular appointment to the post.

D) The appointment must not have been an individual favour doled out to the appointee alone and the person must have continued in service for over ten years without intervention of any court orders.

13. In view of the law laid down by the Full Bench and the admitted position that no procedure was followed for appointment of the petitioners on daily wage basis in compliance of Article 14 of the Constitution of India, this Court cannot issue any direction as sought for by the petitioners. This is to be noted that in paragraph 7 of the counter affidavit the State/Respondents have taken specific plea that the petitioners were not appointed on any sanctioned post and they were only engaged to look after the scheme where they were posted. There is no denial to such assertion. The initial engagement of the petitioners of the present case was thus not "irregular" rather "illegal".

14. There is another fact which also deserves to be noted. A second supplementary counter affidavit has been filed on behalf of the State/Respondents, stating therein that petitioner No. 3 was removed from service by letter No. 786 dated 14.12.2001 being surplus daily wage worker. It has further been stated that claim of petitioner No. 3 was considered by a three men Committee on 24.6.2008 and his case has been rejected by the said Committee. In view of the above, I do not find any merit in the writ application and the same is, accordingly, dismissed.