

(2015) 04 AHC CK 0186

In the Allahabad High Court

Case No : Civil Misc. Writ Petition No. 45926 of 2006

Badrul Hasan Alvi

APPELLANT

Vs

State of Uttar Pradesh and Others

RESPONDENT

Date of Decision : 10-04-2015

Acts Referred:

Constitution of India, 1950 — Article 14

Citation : (2015) 4 ADJ 791 : (2015) 6 ALJ 248 : (2015) 3 ESC 1499 : (2015) LabIC 4397 : (2015) 3 UPLBEC 2151

Hon'ble Judges : M.C. Tripathi, J

Bench : Single Bench

Advocate : S.F.A. Naqvi, for the Appellant

Final Decision : Allowed

Judgement

M.C. Tripathi, J—Heard Shri S.F.A. Naqvi, learned counsel for the petitioner and learned Standing Counsel for the respondents.

By this writ petition the petitioner has prayed for following reliefs:

"(i) issue a writ, order or direction in the nature of certiorari quashing the impugned order dt. 19.5.2006 passed by respondent No. 2 (Annexure No. 1).

(ii) issue a writ, order or direction in the nature of mandamus directing and commanding the respondents to regularize the services of the petitioner on the post of Junior Engineer as well as to grant super time pay-scale in the said cadre with effect from the date upon which the petitioner was promoted upon the post of Junior Engineer and all other consequential benefits, which in normal circumstance is payable to a confirmed Junior Engineer.

(iii) issue a writ, order or direction in the nature of mandamus directing and commanding the respondents to pay interest at the permissible rate, which this Hon"ble Court may deem fit and proper upon all the financial benefits which are liable to be paid by the respondent authorities in pursuance of grant of

consequential reliefs claimed in relief No. 2.

(iv) issue a writ, order or direction, which this Hon"ble Court may deem fit and proper in the circumstances of the case.

(v) award the cost of the petition in favour of the petitioner."

Brief facts giving rise to the writ petition are that the petitioner was appointed on the post of Civil Draftsman vide order dated 16th August, 1967. Thereafter, the petitioner was promoted on the post of Overseer by order dated 25.10.1972. The post of Overseer is now known as Junior Engineer. While promoting the petitioner on the post of Overseer it was mentioned in the promotion order dated 25.10.1972 that in case the work of the petitioner was not found satisfactory or a qualified Overseer is appointed, the petitioner will be reverted back to his original post of Draftsman. It is submitted by learned counsel for the petitioner that the petitioner was working on the post of Junior Engineer till he attained the age of superannuation in the year 2006. It is submitted that at the time of initial induction in service he had the requisite qualifications. No other person was appointed on the said post in which the petitioner was working. It is averred that the entire career of the petitioner was unblemished and the petitioner was never granted any adverse entry during his career. It is also submitted that under Rule 4 of the U.P. Government Servant Confirmation Rules, 1991 the petitioner is fully qualified to be confirmed on the said post.

2. It is also submitted that other similarly placed persons who were appointed simultaneously with the petitioner as Draftsman were promoted and confirmed on the post of Junior Engineer after 1972 and they were also awarded consequential benefits. This shows that the petitioner was discriminated by the respondents. In paragraphs 14, 15 and 16 of the writ petition the petitioner has given the examples of similarly situated persons, who have been promoted and confirmed on the post of Junior Engineer.

3. Learned counsel for the petitioner prayed that the petitioner should be promoted and confirmed on the post of Junior Engineer by the department and all consequential benefits should also be given to him. Petitioner's learned counsel further submits that it is well-settled that the person who had worked for a considerable long period on a particular post and had obtained practical experience he should not be denied regularisation on the said post. It was mentioned in the promotion order that the petitioner will be reverted back to his original post of Draftsman if his work will not be found satisfactory or a qualified Overseer (Junior Engineer) is appointed on the said post. Neither any complaint was ever lodged against the petitioner nor any qualified person was appointed on the said post, hence, the petitioner should be confirmed on the post of Junior Engineer.

4. The petitioner has made several representations to the respondents to promote him on the said post but the respondents had not paid any attention on the grievance of the petitioner. Aggrieved with this attitude of the respondents

the petitioner had earlier filed a writ petition bearing Writ Petition No. 889 of 2006 (Badrul Hasan Alvi v. State of U.P. and others) in which Hon''ble Court has passed the following order on 6.1.2006:

"Petitioner on the strength of his working as Junior Engineer since 1972 seeks regularisation as well as other monetary benefits which have become legally due to him as a consequence to the regularisation. Petitioners in that regard has already made a representation dated 13.4.2005 which is pending consideration before respondent No. 3. Hence the present writ petition.

In the facts and circumstances of the case writ petition is disposed of with a direction upon respondent No. 2 to consider and decide the representation by means of a reasoned speaking order strictly in accordance with law preferably within four weeks from the date a certified copy of this order is filed before him. Respondent No. 2 shall pass a reasoned speaking order."

In pursuance of the order passed by this Hon''ble Court the respondents considered the claim of the petitioner and rejected the same by the impugned order dated 19.5.2006 stating that as he is not holding the requisite qualifications for the said post, he cannot be regularised on the post.

5. Learned counsel for the petitioner, in support of his claim, has placed reliance on the judgment in Bhagwati Prasad Vs. Delhi State Mineral Development Corporation, AIR 1990 SC 371 : (1990) 60 FLR 157 : (1989) 4 JT 541 : (1990) 1 LLJ 320 : (1989) 2 SCALE 1337 : (1990) 1 SCC 361 : (1989) 2 SCR 513 Supp : (1990) 1 UJ 254 , in which it was held that the workers not possessing prescribed educational qualification at the time of appointment and they gained sufficient experience after service of several years, confirmation of such employees cannot be refused on the ground that at the time of appointment they did not possess requisite qualifications. If a worker is allowed to work for a considerable length of time, it would be hard and harsh to deny him the confirmation in the respective post on the ground that he lacks the prescribed qualifications.

6. Learned counsel for the petitioner has also placed reliance on a recent judgment of Hon''ble Supreme Court in Civil Appeal No. 2835 of 2015 (Amarkant Rai v. State of Bihar and others) decided on 13.3.2015. The relevant paragraph Nos. 11 to 17 of the judgment are reproduced hereinafter:

"11. As noticed earlier, the case of the appellant was referred to Three Members Committee and Three Members Committee rejected the claim of the appellant declaring that his appointment is not in consonance with the ratio of the decision laid down by this Court in Umadevi's case (supra). In Umadevi's case, even though this Court has held that the appointments made against temporary or ad-hoc are not to be regularized, in para 53 of the judgment, it provided that irregular appointment of duly qualified persons in duly sanctioned posts who have worked for 10 years or more can be considered on merits and steps to be taken one time measure to regularize them. In para 53, the Court observed as

under:

"53. One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in *S.V. Narayanappa, R.N. Nanjundappa and B.N. Nagarajan* and referred to in para 15 above, of duly qualified persons in duly sanctioned vacant posts might have been made and the employees have continued to work for ten years or more but without the intervention of orders of the Courts or of tribunals. The question of regularisation of the services of such employees may have to be considered on merits in the light of the principles settled by this Court in the cases above referred to and in the light of this judgment. In that context, the Union of India, the State Governments and their instrumentalities should take steps to regularise as a one-time measure, the services of such irregularly appointed, who have worked for ten years or more in duly sanctioned posts but not under cover of orders of the Courts or of tribunals and should further ensure that regular recruitments are undertaken to fill those vacant sanctioned posts that require to be filled up, in cases where temporary employees or daily wagers are being now employed. The process must be set in motion within six months from this date. We also clarify that regularisation, if any already made, but not sub judice, need not be reopened based on this judgment, but there should be no further bypassing of the constitutional requirement and regularising or making permanent, those not duly appointed as per the constitutional scheme."

The objective behind the exception carved out in this case was prohibiting regularization of such appointments, appointed persons whose appointments is irregular but not illegal, ensure security of employment of those persons who served the State Government and their instrumentalities for more than ten years.

12. Elaborating upon the principles laid down in *Umadevi's* case (supra) and explaining the difference between irregular and illegal appointments in *State of Karnataka and Others Vs. M.L. Kesari and Others*, AIR 2010 SC 2587 : (2011) 111 CLT 209 : (2010) 127 FLR 12 : (2010) 8 JT 96 : (2010) 4 LLJ 583 : (2010) 9 SCC 247 , this Court held as under:

"7. It is evident from the above that there is an exception to the general principles against "regularisation" enunciated in *Umadevi* (3), if the following conditions are fulfilled:

(i) The employee concerned should have worked for 10 years or more in duly sanctioned post without the benefit or protection of the interim order of any Court or tribunal. In other words, the State Government or its instrumentality should have employed the employee and continued him in service voluntarily and continuously for more than ten years.

(ii) The appointment of such employee should not be illegal, even if irregular. Where the appointments are not made or continued against sanctioned posts or where the persons appointed do not possess the prescribed minimum qualifications, the appointments will be considered to be illegal. But where the

person employed possessed the prescribed qualifications and was working against sanctioned posts, but had been selected without undergoing the process of open competitive selection, such appointments are considered to be irregular."

13. Applying the ratio of Umadevi's case, this Court in Nihal Singh and Others Vs. State of Punjab and Others, (2013) 8 AD 689 : AIR 2013 SC 3547 : (2013) 139 FLR 309 : (2013) 11 JT 289 : (2013) LabIC 3859 : (2013) 5 LLN 109 : (2013) 10 SCALE 162 : (2013) 14 SCC 65 : (2013) 4 SCT 469 : (2013) 114 SLJ 315 : (2013) AIRSCW 4919 : (2013) 5 Supreme 718 , directed the absorption of the Special Police Officers in the services of the State of Punjab holding as under:

"35. Therefore, it is clear that the existence of the need for creation of the posts is a relevant factor with reference to which the executive Government is required to take rational decision based on relevant consideration. In our opinion, when the facts such as the ones obtaining in the instant case demonstrate that there is need for the creation of posts, the failure of the executive Government to apply its mind and take a decision to create posts or stop extracting work from persons such as the appellants herein for decades together itself would be arbitrary action (inaction) on the part of the State.

36. The other factor which the State is required to keep in mind while creating or abolishing posts is the financial implications involved in such a decision. The creation of posts necessarily means additional financial burden on the exchequer of the State. Depending upon the priorities of the State, the allocation of the finances is no doubt exclusively within the domain of the legislature. However in the instant case creation of new posts would not create any additional financial burden to the State as the various banks at whose disposal the services of each of the appellants is made available have agreed to bear the burden. If absorbing the appellants into the services of the State and providing benefits on a par with the police officers of similar rank employed by the State results in further financial commitment it is always open for the State to demand the banks to meet such additional burden. Apparently no such demand has ever been made by the State. The result is-the various banks which avail the services of these appellants enjoy the supply of cheap labour over a period of decades. It is also pertinent to notice that these banks are public sector banks."

14. In our view, the exception carved out in para 53 of Umadevi is applicable to the facts of the present case. There is no material placed on record by the respondents that the appellant has been lacking any qualification or bear any blemish record during his employment for over two decades. It is pertinent to note that services of similarly situated persons on daily wages for regularization viz. one Yatindra Kumar Mishra who was appointed on daily wages on the post of Clerk was regularized w.e.f. 1987. The appellant although initially working against unsanctioned post, the appellant was working continuously since 3.1.2002 against sanctioned post. Since there is no material placed on record regarding the details whether any other night guard was appointed against the sanctioned post, in the facts and circumstances of the case, we are inclined to

award monetary benefits be paid from 1.1.2010.

15. Considering the facts and circumstances of the case that the appellant has served the University for more than 29 years on the post of Night Guard and that he has served the College on daily wages, in the interest of justice, the authorities are directed to regularize the services of the appellant retrospectively w.e.f. 3.1.2002 (the date on which he rejoined the post as per direction of Registrar).

16. The impugned order of the High Court in LPA No. 1312 of 2012 dated 20.2.2013 is set aside and this appeal is allowed. The authorities are directed to notionally regularize the services of the appellant retrospectively w.e.f. 3.1.2002, or the date on which the post became vacant whichever is later and without monetary benefit for the above period. However, the appellant shall be entitled to monetary benefits from 1.1.2010. The period from 3.1.2002 shall be taken for continuity of service and pensionary benefits.

17. The appeal is allowed in terms of the above. No order as to costs."

7. Learned counsel for the petitioner has also placed reliance on the judgment of Hon"ble Supreme Court in Bhaskar Gajanan Kajrekar Vs. Administrator, Dadra and Nagar Haveli and Others, (1993) JT 43 Supp : (1994) 1 LLJ 114 : (1993) 1 SCALE 683 : (1993) 3 SCC 237 : (1993) 2 SCR 60 , in which in paragraphs 3 to 7 it is observed as under:

"3. Kajrekar was not given pension on the ground that throughout his service he worked on officiating basis and was never appointed substantively to any of the posts held by him. Kajrekar challenged the action of the respondents, denying pension to him, before the Central Administrative Tribunal, Bombay. The Tribunal rejected his application on the ground that he retired from service without holding lien on any substantive post and as such was not entitled to pension under Rule 13 of the Central Civil Services (Pension) Rules, 1972 (the Rules). The application of Kajrekar was disposed of ex parte by the Tribunal and his prayer for restoration and hearing was also rejected. These appeals by way of special leave petitions are against the orders of the Central Administrative Tribunal.

4. It is not disputed that the post of Chief of Police under Dadra and Nagar Haveli Administration was declared permanent with effect from June 14, 1967. On that date the appellant had already put in about thirteen years of service but his case for confirmation was not considered on the ground that there were no Recruitment Rules for the post in existence. The Recruitment Rules for the post of Chief of Police under the Administration of Dadra and Nagar Haveli came into force on January 19, 1980. The said Rules provided "by transfer on deputation" as the method of recruitment to the post of Chief of Police. The Recruitment Rules have no relevance to the question of confirmation of the appellant as he had retired from service on January 31, 1977 much before the coming into force of the Recruitment Rules. It was incumbent on the respondents to have

considered the question of confirmation of the appellant before his retirement, specially when he was being retired after serving the respondents for twenty three years. It was wholly arbitrary on the part of the respondents to have kept the appellant as an unconfirmed employee for a period of twenty three years on the ground that there were no Recruitment Rules for the post he was holding.

5. The Union Territory of Dadra and Nagar Haveli in its counter filed in this Court has stated that after the publication of the Recruitment Rules 63 a Departmental Promotion Committee was convened on July 4, 1981 for considering the question of confirmation of the appellant as Chief of Policy. The Departmental Promotion Committee did not recommend the appellant for confirmation on the ground that during the course of his service, two departmental enquiries were instituted against the appellant. The enquiries could not be completed before the appellant's retirement and the findings were made available thereafter. The proceedings of the Departmental Promotion Committee further show that as a result of the enquiries Rs. 4,000 was to be deducted from the gratuity amount of the appellant as a measure of punishment. The Departmental Promotion Committee found that the confidential reports of the appellant for the last three years were good but the Committee declined to recommend confirmation because of the two enquiries.

6. It is not disputed that the findings in the two enquiries were never communicated to the appellant during the period of his service. Those were served on him only after retirement. The question of his confirmation which was due in the year 1967 could not have been linked with the enquiries which were initiated at a much later stage. The Departmental Promotion Committee should have considered the appellant for confirmation on the basis of the record of the appellant as existed in the year 1967/1968. There is no material before us to show that the service record of the appellant prior to 1970 was adverse in any manner rather the averments made by the appellant in the rejoinder to the effect that there was nothing adverse against him on the record prior to 1971, have not been controverted. Even the Departmental Promotion Committee found the confidential reports of the appellant for the last three years as good. We are of the view that on the availability of a permanent post of Chief of Police on June 14, 1967 the appellant was entitled to be confirmed against the said post. It was wholly arbitrary for the respondents to have deferred the question of confirmation of the appellant on the ground that there were no Recruitment Rules. We, therefore, hold that the appellant having served the respondents for about thirteen years on June 14, 1967 when the post of Chief of Police was made permanent and there being nothing adverse against him at that point of time, he was entitled to be confirmed in the said post. In that view of the matter the appellant was a confirmed employee when he retired from service on July 31, 1977.

7. We, therefore, direct the respondents to treat the appellant as having 64 been retired as a confirmed employee and fix his pension and other post-retiral

benefits on that basis. We further direct the respondents to complete the pension case of the appellant within three months from today and pay him all the arrears of the pension within two months thereafter alongwith 12% interest on the said arrears. We allow the appeals with costs which we quantify as Rs. 10,000."

8. Learned counsel for the petitioner submits that in the similar circumstances the department had promoted one Shri Ram Dutt Sharma son of Shri Asha Ram Sharma, who had passed only High School and was working as Civil Draftsman, was confirmed in the cadre of Junior Engineer. He had been placed at Sl. No. 14-A in the seniority list between Shri Vakil Ahmad (Sl. No. 14) and Shri Hari Mohan Yadav (Sl. No. 15) vide order dated 27.6.1992, whereas in the case of the petitioner, the respondents had denied the right on the ground that the petitioner did not have the requisite qualification. It had also been reiterated that Shri Ram Dutt Sharma had also not obtained any such degree or diploma from the Rural Engineering College and had been placed in the cadre of Junior Engineer and as such discrimination has been made, which is also violative of Art. 14 of the Constitution of India.

9. Controverting the petitioner's stand, learned counsel for the respondents states that the petitioner was initially appointed on the post of Civil Draft Man. He did not have the requisite qualifications for the post of Junior Engineer/Overseer as provided under the Rules. By the promotion order dated 25.10.1972 it was clearly stated that the petitioner is temporarily posted on the post of Overseer/Junior Engineer in a stop gap arrangement subject to qualified Overseer is appointed or his work and conduct is found satisfactory. The sole contention of the respondents is that the petitioner did not have the requisite qualifications for the post of Junior Engineer and the impugned order has been passed reasonably.

10. Having heard the rival contentions of learned counsel for the parties, perusing the record and considering the judgments cited at the bar, I find that the petitioner was appointed on the post of Civil Draft Man on 16th August, 1967. He was promoted on the post of Overseer (now known as Junior Engineer) by order dated 25.10.1972. After serving on the promoted post for about 34 years, he retired after attaining the age of superannuation. The department slept over the matter of the petitioner for about 34 years and the petitioner had been regularly working on the post of Junior Engineer without being confirmed. When after making repeated representations nothing has been done by the respondents, he had taken the shelter of writ jurisdiction. When writ Court has given some relief of deciding representation, the department awakened and passed the impugned order at the fag end of the retirement of the petitioner. The department has overlooked the service of the petitioner for about 34 years and passed the impugned order merely on the ground that he did not have requisite qualification for the post. The promotion order was passed with the condition that the petitioner will work on the post until the regularly selected candidate joins or his work and conduct was found unsatisfactory. The petitioner's work and

conduct was never questioned by the respondents at any point of time in 34 years of service on promoted post and no qualified Overseer was appointed on the said post.

11. In the present matter while denying the claim of the petitioner the respondents have set out their case that although the petitioner was appointed on the post of Civil Draftsman but did not have the requisite qualifications for the post of Junior Engineer/Overseer as per the U.P. Engineering Service (Irrigation Department) (Group-B) Service Regulations, 1993, governing the recruitments, and terms and conditions of the appointment. Even in the order dated 25.10.1972 it was clearly provided that the petitioner was temporarily promoted to the post of Overseer in a stop gap arrangement with condition that in case qualified Overseer is appointed by the Director, Agriculture, the petitioner will be reverted.

12. It is not disputed that the petitioner had been given charge vide order dated 25.10.1972 as Overseer in a stop gap arrangement with condition that in case qualified Overseer is appointed by the Director, Agricultural, the petitioner would be reverted. Nowhere the respondents had denied the fact that since 25.10.1972 the petitioner had not worked over the said post or he was not fit for the said assignment and as such he could not perform the technical work. Therefore, at this belated stage, the respondents cannot take this plea that at the initial stage in the year 1972 the petitioner did not have the requisite qualification and as such he is not entitled for the Super Time Pay-scale and other benefits of Junior Engineer. It is admitted case that the petitioner continued to discharge the duty on the post of Junior Engineer/Overseer. Therefore, at such belated stage after lapse of more than 34 years of his career the department is precluded from taking technical view that at the initial stage while assigning the work the petitioner did not have requisite qualifications. Admittedly the petitioner discharged his duties with utmost sincerity and no adverse material has been placed before this Court to indicate that the petitioner failed to do substantial justice with the said post. The judgments cited by learned counsel for the petitioner are fully applicable to the petitioner's case. If a worker gains sufficient experience after serving several years in the department, he cannot be refused confirmation on the ground that he did not possess requisite qualifications. The petitioner worked on the promoted post for a substantial period of time without being questioned by the respondents and at the fag end of his retirement he cannot be denied confirmation.

With the aforesaid observations, the writ petition is allowed. The impugned order dated 19.5.2006 is hereby set aside. The petitioner is entitled to get all the benefits, which have been given to similarly situated persons, from the same date. The said exercise shall be completed by the respondents within a period of two months from the date of production of certified copy of this order.

There shall be no order as to costs.