

(2013) 06 SHI CK 0055

In the High Court Of Himachal Pradesh

Case No : COPC No. 203 of 2012 with C. Rev. No. 185 of 2011

Bimla Devi

APPELLANT

Vs

Arun Sharma
 State of H.P. and Others Vs Bimla Devi

RESPONDENT

Date of Decision : 17-06-2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 47 Rule 1
Constitution of India, 1950 — Article 14, 16, 162, 226, 309

Citation : (2013) 06 SHI CK 0055

Hon'ble Judges : Surinder Singh, J;R.B. Misra, J

Bench : Division Bench

Advocate : Dalip K. Sharma in COPC No. 203 of 2012, Mr. D.C. Pathik, Mr. M.A. Khan, A.A.G. s with Mr. P.M. Negi, Deputy A.G. in C.Rev. No. 185 of 2011, for the Appellant; Dalip K. Sharma, Advocate in C.Rev. No. 185 of 2011, Mr. D.C. Pathik, M.A. Khan, Additional Advocate Generals with Mr. P.M. Negi, D.A.G. in COPC No. 203 of 2012, for the Respondent

Final Decision : Dismissed

Judgement

1. Heard learned counsel for the parties. Initially the writ petition No. 8953 of 2011-F (Bimla Devi Versus State of H.P. & Others) was preferred before this Court with the following prayer:

a) That writ of mandamus be issued directing the respondent to realize the services of the petitioner with effect from March 2009 with all consequential benefits with interest.

2. In the said writ petition, reply of the State Government, could not be filed, however, vide judgment and order dated 15.11.2011, the said writ petition was disposed of by this Court (DB) with the following directions given in paragraph 4, which are as follows:--

4. There will be a direction to the second respondent/Deputy Commissioner, Shimla to pass orders in the matter of regularization of the petitioner, as

recommended by the third respondent, within a month from the date of production of a copy of this judgment by the petitioner before the second respondent. Consequential benefits shall be disbursed to the petitioner within another one month. In the event of any delay beyond the said period, the petitioner shall be entitled to interest at the rate of 10% for arrears and the officers responsible for the delay shall be personally liable for the same.

3. The present Civil Review Petition No. 185 of 2011 has been preferred by the State of H.P. for reviewing the judgment and order dated 15.11.2011 passed in CWP No. 8953 of 2011 with submissions that the factual aspects and material on record were not taken into consideration and the Civil Writ Petition No. 8953 of 2011 was disposed of with above directions, which requires review for the existence of the principles enunciated in Order 47 Rule 1 of CPC as well as in view of the inherent powers provided under Article 226 of the Constitution of India for non consideration of the records, material and facts, which could have been produced at the time of disposal of the writ petition above mentioned. After hearing the review petition, we find sufficient grounds to allow the review petition and to recall the judgment and order dated 15.11.2011 passed by this Court (DB) in CWP No. 8953 of 2011-F and the writ petition No. 8953 of 2011-F is taken for adjudication afresh now.

4. In CWP No. 8953 of 2011-F, above prayer has been made. It appears that the petitioner was initially appointed as Coordinator vide order dated 21.05.1999 (Annexure P-1) on fixed honorarium of Rs. 700/- w.e.f. 11.03.1999, for a period of 89 days in Sub-Division Theog, with a condition that the services of the petitioner can be terminated any time, without assigning further notice. The petitioner had continued in service for fixed honorarium. For that purpose, no renewal order has been placed by the petitioner. Subsequently, vide order dated 14.08.2008 (Annexure P-2) the salary of the petitioner was enhanced from Rs. 1000/- to Rs. 3000/- vide notification dated 01.01.2008. The said emoluments were to be released to the petitioner out of e-Governance funds. It appears that vide office order dated 13.12.2007 (Annexure P-3), the petitioner was assigned the work of distribution of election Material. In the office order dated 24.12.2007 (Annexure P-4) of Returning Officer (SDM), 07-Theog, the petitioner was shown as part time Peon. Vide letter dated 29.12.2009 (Annexure P-5) forwarded by Sub-Divisional Officer, Theog, District Shimla, H.P., to the Deputy Commissioner, Shimla, indicated that since the petitioner was working as Safai Karamchari in Sugam Branch (Computer) Licence Branch) in the office of Sub-Divisional Officer, Theog and has since been deployed for the last 10 years, on contract basis, as such, she may be regularized to the post of Sweepers. Subsequently, Smt. Bimla Devi had moved an application dated 03.09.2010 (Annexure P-6) to the Deputy Commissioner, Shimla, H.P., for regularization of her services. It appears that without taking into consideration the reply filed by the respondent(s), though available in the review petition, the writ petition was decided by this Court (DB) on 15.11.2011, directing the Deputy Commissioner to pass orders within a month from the production of the copy of the judgment by the petitioner

to the second respondent and consequently benefits were also ordered to be disbursed to the petitioner within another one month.

5. We have gone through the reply-affidavit dated 13.03.2012 of Sh. Manoj Kumar, applicant No. 3, Sub-Divisional Officer (Civil) Theog, District Shimla, H.P. filed in Civil Review Petition No. 185 of 2011. In paragraph 5 of the said affidavit, it appears that the respondent was working in the office of Sub-Divisional Officer (Civil) Thong, on the following period:--

(I) W.e.f. 11-3.1999 to 25-09-2004 on the basis of 89 days on the fixed honorarium of Rs. 700/- as coordinator in Saksharta Abhiyan i.e. around Total period 5 years & 6 months.

(ii) W.e.f. April, 2007 to date as Safai Karamchari in computer Sugam Branch in the office of Sub-Divisional Officer (Civil) Theog on contract basis i.e. for the period around 4 years & 10 months on fixed honorarium being enhanced from time to time.

As such, the writ petitioner was working under the E-Governance Society of District Shimla and the employees of that Society do not come within the definition of the Govt. servant.

6. Paragraph 3 of the said affidavit further reveals that the writ petitioner was found to have worked in the office of the Sub-Divisional Officer (Civil) Theog w.e.f. 25.09.2004 to 14.03.2007 as Safai Karamchari at her own accord without any order of the competent authority. No record of her engagement for the above period is available in the office of Sub-Divisional Officer (Civil) Theog. Moreover, no salary/wages was paid to her for that period and there is no record of her attendance is available in the office of Sub-Divisional Officer (Civil) Theog. Therefore, it is difficult to ascertain that the petitioner had actually worked in the office or not. The record further reveals that the writ petitioner did not work w.e.f. 25.09.2004 to 14.03.2007. The writ petitioner has been shown to be deployed under E-Governance Society on contract basis. It has also been noticed in view of affidavit dated 18.03.2013 of the Deputy commissioner, Shimla, filed pursuant to this Court's order dated 11.01.2013 in review petition, that the writ petitioner was initially engaged as Safai Karamchari at Sugam Center Theog on 18.04.2007 on monthly wages of Rs. 1000/-. Thereafter, her wages were enhanced from Rs. 1000/- to Rs. 3000/- vide letter dated 14.08.2008 and vide letter dated 27.04.2011 the wages were further enhanced from Rs. 3000/- to Rs. 3500/-. The wages of the petitioner were further enhanced from Rs. 3500/- to Rs. 4500/- w.e.f. 01.11.2011 and Rs. 4500/- to Rs. 5000/- w.e.f. 12.09.2012. The wages were being paid to her from the user charges collected under e-Governance.

7. We have heard the counsel for the parties and have also perused the record. Nothing has been brought to the notice of this Court that the petitioner was initially appointed in consonance to the advertisement issued in the News Paper or the petitioner appeared in the selection process along with others. It has also

not brought by the writ petitioner that her selection was made in consonance to the rules framed under Article 309 of the Constitution of India in observance of policy of reservation and nothing has been brought that the petitioner was holding a civil post. It has also not been shown to us that the petitioner was working as daily wager or was on contract basis under any scheme against any post. It has also not been brought before us that the petitioner under which provision is entitled to regularize.

8. The Hon'ble Supreme Court in the judgment of Secretary, State of Karnataka and Others Vs. Umadevi and Others, , has given the guidelines for dealing all the aspects of regularization of daily wagers, work charge, ad hoc employees and contractual employees. The relevant following paragraphs are extracted as below:--

7. After considering the verdict of Constitution Bench in Uma Devi (supra), the Hon'ble Supreme Court in State of Karnataka and Others Vs. M.L. Kesari and Others, has observed as below:--

5. The decision in Secretary, State of Karnataka and Others Vs. Umadevi and Others,). In that case, a Constitution Bench of this Court held that appointments made without following the due process or the rules relating to appointment did not confer any right on the appointees and courts cannot direct their absorption, regularization or re-engagement nor make their service permanent, and the High Court in exercise of jurisdiction under Article 226 of the Constitution should not ordinarily issue directions for absorption, regularization, or permanent continuance unless the recruitment had been done in a regular manner, in terms of the constitutional scheme; and that the courts must be careful in ensuring that they do not interfere unduly with the economic arrangement of its affairs by the State or its instrumentalities, nor lend themselves to be instruments to facilitate the bypassing of the constitutional and statutory mandates.

6. This Court further held that a temporary, contractual, casual or a daily-wage employee does not have a legal right to be made permanent unless he had been appointed in terms of the relevant rules or in adherence of Articles 14 and 16 of the Constitution. This Court, however, made one exception to the above position and the same is extracted below (Para 44 of AIR):

53. One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in State of Mysore and Another Vs. S.V. Narayanappa, R.N. Nanjundappa Vs. T. Thimmiah and Another, and B.N. Nagarajan and Others Vs. State of Karnataka and Others, 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 regularization 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 regularize 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....

7. It is evident from the above that there is an exception to the general principles against "regularization" enunciated in *Secretary, State of Karnataka and Others Vs. Umadevi and Others*, , 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.

9. The term "one-time measure" has to be understood in its proper perspective. This would normally mean that after the decision in *Secretary, State of Karnataka and Others Vs. Umadevi and Others*, , each department or each instrumentality should undertake a onetime exercise and prepare a list of all casual, daily-wage or ad hoc employees who have been working for more than ten years without the intervention of courts and tribunals and subject them to a process verification as to whether they are working against vacant posts and possess the requisite qualification for the post and if so, regularize their services.

10. At the end of six months from the date of decision in *Umadevi*, cases of several daily-wage/ad hoc/casual employees were still pending before Courts. Consequently, several departments and instrumentalities did not commence the onetime regularization process. On the other hand, some Government departments or instrumentalities undertook the one-time exercise excluding several employees from consideration either on the ground that their cases were pending in courts or due to sheer oversight. In such circumstances, the employees who were entitled to be considered in terms of Para 53 of the decision in *Secretary, State of Karnataka and Others Vs. Umadevi and Others*, will not lose their right to be considered for regularization, merely because the one-time exercise was completed without considering their cases, or because the six

months" period mentioned in para 53 (Para 44 of AIR) of Umadevi has expired. The one-time exercise should consider all daily-wage/ad hoc/those employees who had put in 10 years of continuous service as on 10.4.2006 without availing the protection of any interim orders of courts or tribunals. If any employer had held the one-time exercise in terms of para 53 (Para 44 of AIR) of Umadevi, but did not consider the cases of some employees who were entitled to the benefit of para 53 (Para 44 of AIR) of Umadevi, the employer concerned should consider their cases also, as a continuation of the one-time exercise. The one time exercise will be concluded only when all the employees who are entitled to be considered in terms of Para 53 (Para 44 of AIR) of Umadevi, are so considered.

11. The object behind the said direction in para 53 of Secretary, State of Karnataka and Others Vs. Umadevi and Others,) is two- fold. First is to ensure that those who have put in more than ten years of continuous service without the protection of any interim orders of courts or tribunals, before the date of decision in Umadevi (2006 AIR SCW 1991) was rendered, are considered for regularization in view of their long service. Second is to ensure that the departments/instrumentalities do not perpetuate the practice of employing persons on daily-wage/ad hoc/casual for long periods and then periodically regularize them on the ground that they have served for more than ten years, thereby defeating the constitutional or statutory provisions relating to recruitment and appointment. The true effect of the direction is that all persons who have worked for more than ten years as on 10.4.2006 (the date of decision in Umadevi) without the protection of any interim order of any court or tribunal, in vacant posts, possessing the requisite qualification, are entitled to be considered for regularization. The fact that the employer has not undertaken such exercise of regularization within six months of the decision in Umadevi or that such exercise was undertaken only in regard to a limited few, will not disentitle such employees, the right to be considered for regularization in terms of the above directions in Umadevi as a one-time measure.

8. It is well settled that when rules, framed under Article 309 of the Constitution of India, are available then no regularization is permissible under the instructions or circulars issued under Article 162 of the Constitution. The Constitutional Bench of the Supreme Court in Umadevi's case (supra), has observed that there is no fundamental right in favour of persons employed on daily wages or temporarily or on contractual basis to claim that they have any right to be absorbed in service as they cannot be said to be holders of a post. A regular appointment can be made only by making appointments in consonance to the requirements of Articles 14 and 16 of the Constitution. The claim by persons, employed on daily wages, to treat them equally and extend the claim for equal treatment with those who were regularly employed, cannot be granted. Subsequently, in M.L. Kesari's case (supra), after following the verdict of Umadevi's case (supra), Hon'ble Supreme Court has observed that appointments made without following due process or the rules relating to appointment did not confer any right on the appointees and Courts can neither direct their absorption, regularization or re-

engagement nor make their service permanent and the High Court, in exercise of jurisdiction under Article 226 of the Constitution, should not issue directions for absorption, regularization or permanent continuance unless the recruitment has been done in a regular manner. The Hon''ble Supreme Court has very categorically observed in Paragraph-53 of Umadevi's case (supra), that Union of India, the State Governments and their instrumentalities may take steps to regularize as one time measure, the services of irregularly appointed incumbents, who have worked for ten years or more against duly sanctioned posts but not under cover of orders of Courts or Tribunals. Taking of such step of one time measure of regularization have been mentioned in Paragraph-6 of M.L. Kesari & Others (supra), however, such exercise was to be made within six months from the passing of the judgment of Supreme Court in Umadevi's case (supra). In light of the observations made in Paragraph-9 of M.L. Kesari (supra), in order to undertake a one time measure, a list of all casual, daily wage or ad-hoc or contractual employees was to be prepared who have worked for more than ten years without the intervention of Courts or Tribunals provided that such employees were working against vacant posts and then their cases were to be considered for regularization, in view of Paragraph-13 of M.L. Kesari (supra). The case of the employees who have completed ten years'' service, however, were not having educational qualifications prescribed for the post, at the time of their appointment, were to be considered for regularization in suitable lower posts.

9. Hon''ble Supreme Court in State of Bihar Vs. Upendra Narayan Singh and Others, has not appreciated in giving directions to the State and its instrumentalities to frame scheme for regularization/absorption.

9. In almost similar circumstances, this Court (DB) vide judgment dated 26.04.2013 passed in CWP No. 835 of 2013-D (Smt. Roopan Devi Versus State of H.P. & Another), has taken a similar view, wherein the writ petitioner was working as Safai Karamchari and had prayed for regularization of her services with all consequential benefits, which prayer was rejected by this Court in its judgment dated 26.04.2013. In view of the aforesaid analysis, the petitioner cannot be regularized and the writ petition No. 8953 of 2011 is without merit, hence the same is dismissed and the review petition No. 185 of 2011 is allowed as indicated above. After dismissal of the writ petition in question, no contempt is made out and accordingly COPC No. 203 of 2012 is also dismissed. Notice of contempt is discharged.