

(2013) 11 DEL CK 0221

In the Delhi High Court

Case No : Writ Petition (C) No. 1613 of 2012 and CM 3535 of 2012

Budhi Singh Rawat

APPELLANT

Vs

National Commission for Women and Others

RESPONDENT

Date of Decision : 11-11-2013

Acts Referred:

Constitution of India, 1950 — Article 12, 14, 16, 21, 309
National Commission For Women Act, 1990 — Section 5, 5(1)

Citation : (2013) 11 DEL CK 0221

Hon'ble Judges : Valmiki J Mehta, J

Bench : Single Bench

Advocate : R.V. Sinha, for the Appellant; Monika Garg, for R-1, Ms. Sweety Manchanda, CGSC and Mr. Deboashish Mukherjee, for R-2 and 3, for the Respondent

Final Decision : Dismissed

Judgement

Valmiki J Mehta, J.—By this writ petition, the petitioner prays for relief for regularizing him in the post of a Driver (Grade-II) with the respondent no. 1/ National Commission for Women. Admittedly, the petitioner was appointed in terms of the office memorandum dated 28.10.1998 on a temporary post of a Grade I Staff Car Driver. Petitioner subsequently was appointed to the post of Grade-II Staff Car Driver on his passing the Trade Test in February 2004 w.e.f. 4.1.2002. Petitioner has accordingly continued in this post and prays that he should be regularized with respondent no. 1 at the post of Staff Car Driver (Grade II) and be given all consequential benefits. There is also a prayer made in the writ petition for quashing of the letter dated 9.12.2011 issued by the respondent no. 2/Govt. of India, Ministry of Women and Child Development which opines that appointment of the petitioner to the post of Staff Car Driver with the respondent no. 1 was illegal being in violation of Section 5 of the National Commission for Women Act, 1990 (in short "the Act"), as per which Section, respondent no. 1 cannot appoint regular employees on its own and the employees of the Commission can only be those employees who are provided by

the Central Government. The stand of the respondent no. 1/employer/National Commission for Women and that of the Ministry/respondent no. 2 is the same, and which is placing reliance upon Section 5(1) of the Act, as per which, Commission has no power to create sanctioned/permanent/regular posts and which regular posts can only be created/sanctioned by the Central Government. Both the counsel for respondent nos. 1 and 2 therefore argue that petitioner cannot be given the benefit of regular appointment in the absence of any power existing in the respondent no. 1 to create sanctioned posts, and the fact that petitioner was never appointed against any sanctioned post as a regular employee.

2. In my opinion, there are two aspects which have to be looked into in the present case. First is assuming that respondent no. 1 has power to create sanctioned post then whether there existed a sanctioned post in which petitioner was employed in the post of a Staff Car Driver. The second aspect is that whether at all respondent no. 1 can create a regular post or a sanctioned post for a regular employee for being appointed on a permanent basis and not on a temporary or adhoc or casual basis.

3. Let me take the second aspect first as to whether there exists power in the respondent no. 1 to create sanctioned post without any consent or approval being given by the respondent no. 2/Ministry. Section 5 of the National Commission for Women Act, 1990 in this regard is relevant and the same reads as under:-

5. Officers and other employees of the Commission.-(1) The Central Government shall provide the Commission with a Secretary and such other officers and employees as may be necessary for the efficient performance of the functions of the Commission under this Act.

(2) The salaries and allowances payable to, and the other terms and conditions of service of, the officers and other employees appointed for the purpose of the Commission shall be such as may be prescribed.

4. A reference to sub-Section 1 of Section 5 shows that it is the Central Government which shall provide the National Commission for Women with its officers and employees. Possibly, therefore, appointments with National Commission for Women would be by deputation from the government department. In any case, even if sub-Section-1 of Section 5 is read liberally, it would mean that there can be appointment by National Commission for Women/respondent no. 1 on regular basis provided the consent or approval of the Ministry is taken for creation of the sanctioned post. In the light of the categorical language of sub-Section 1 of Section 5, sanctioned posts themselves for employees being appointed on regular basis cannot be created by respondent no. 1 for employees being appointed on a regular basis. In the facts of the present case therefore, one will have to examine as to whether Central Government did create sanctioned posts for Drivers in the respondent no. 1.

In this regard, petitioner himself has filed with the writ petition the letter dated 29.3.1994 of the Member Secretary of the respondent no. 1 and which shows that 3 temporary posts were sanctioned for Staff Car Drivers by the Ministry's order dated 3.7.1992 and 2 further temporary posts of drivers were sanctioned as per the Ministry's order dated 5.1.1993. Though, counsel for the petitioner sought to contend by placing reliance upon para 5(iv) of the writ petition, that there were sanctioned post, however, this para which refers to creation of 3 posts on 3.7.1992 and two posts on 5.1.1993 has to be necessarily read in terms of the letter of the Member Secretary dated 29.3.1994 and which shows that the posts of drivers were only temporary posts and they were not sanctioned as regular posts. Therefore, respondent no. 1 had no power to create regular posts and nor were regular posts of drivers created by respondent no. 1.

5. The Constitution Bench judgment in the case of Secretary, State of Karnataka and Others Vs. Umadevi and Others, has held that merely by length of service in the government or an instrumentality of State, there is no entitlement to regularization. For an employee to be a regular employee, it is necessary that such employee is a duly qualified employee who is appointed in a vacancy in a sanctioned post in accordance with the regular recruitment process whereby candidates are called through advertisement and/or employment exchange. Therefore, existence of a sanctioned post is a sine qua non before there can be regularization. Even the exception which is carved out as per para 53 in Umadevi's case (supra) is with respect to those employees who were duly qualified employees and appointed against vacancies in a sanctioned posts, however these persons were appointed without going through the process of competition where candidates were called through advertisement in newspapers and/or employment exchange. It is only for such limited class of persons an exception was created by para 53 of the Supreme Court judgment in Umadevi's case (supra) and direction was issued to the State to regularize such employees as per scheme to be floated, and such employees being duly qualified employees have been appointed against vacancies in a sanctioned post and have worked for 10 years in such posts without taking benefit of an interim order of the court. Following is the ratio of Umadevi's case (supra):-

(I) The questions to be asked before regularization are:-

(a)(i) Was there a sanctioned post (court cannot order creation of posts because finances of the state may go haywire), (ii) is there a vacancy, (iii) are the persons qualified persons and (iv) are the appointments through regular recruitment process of calling all possible persons and which process involves inter-se competition among the candidates

(b) A court can condone an irregularity in the appointment procedure only if the irregularity does not go to the root of the matter.

(II) For sanctioned posts having vacancies, such posts have to be filled by regular recruitment process of prescribed procedure otherwise, the constitutional

mandate flowing from Articles 14, 16, 309, 315, 320 etc is violated.

(III) In case of existence of necessary circumstances the government has a right to appoint contract employees or casual labour or employees for a project, but, such persons form a class in themselves and they cannot claim equality (except possibly for equal pay for equal work) with regular employees who form a separate class. Such temporary employees cannot claim legitimate expectation of absorption/regularization as they knew when they were appointed that they were temporary inasmuch as the government did not give and nor could have given an assurance of regularization without the regular recruitment process being followed. Such irregularly appointed persons cannot claim to be regularized alleging violation of Article 21. Also the equity in favour of the millions who await public employment through the regular recruitment process outweighs the equity in favour of the limited number of irregularly appointed persons who claim regularization.

(IV) Once there are vacancies in sanctioned posts such vacancies cannot be filled in except without regular recruitment process, and thus neither the court nor the executive can frame a scheme to absorb or regularize persons appointed to such posts without following the regular recruitment process.

(V) At the instance of persons irregularly appointed the process of regular recruitment shall not be stopped. Courts should not pass interim orders to continue employment of such irregularly appointed persons because the same will result in stoppage of recruitment through regular appointment procedure.

(VI) If there are sanctioned posts with vacancies, and qualified persons were appointed without a regular recruitment process, then, such persons who when the judgment of Uma Devi is passed have worked for over 10 years without court orders, such persons be regularized under schemes to be framed by the concerned organization.

(VII) The aforesaid law which applies to the Union and the States will also apply to all instrumentalities of the State governed by Article 12 of the Constitution.

6. In view of the admitted fact that appointment of the petitioner was only to a temporary post and which was because in fact respondent no. 1 did not have the power to create a sanctioned post for a regular employee, petitioner cannot be said to be a regular employee of the respondent no. 1. Also, a conjoint reading of Section 5(1) of the Act read with the ratio of Umadevi's case (supra) shows that petitioner cannot claim regularization of his services with the respondent no. 1.

7. For the sake of completion of narration, I must mention that there is a correspondence filed by the petitioner himself whereby respondent no. 1 had sought benefits of regularization for the petitioner and for giving the petitioner pensionary benefits and other service benefits, however, the respondent no. 2/ Ministry had specifically rejected this request, and the last of such order being the order dated 9.12.2011, and which has been impugned by the petitioner in

the present case.

8. In view of the above, petitioner was never appointed against a sanctioned post of a regular employee. Also, there is nothing on record that respondent no. 2 took consent or approval for creation of a sanctioned post of a driver on regular basis. As already stated above, the letter of the Member Secretary dated 29.3.1994 shows that all the five posts of drivers were temporary posts and in one of such post petitioner was appointed. Petitioner therefore cannot claim regularization as prayed for in the writ petition and the consequential reliefs or regularization. In view of the above, there is no merit in the petition, and the same is therefore dismissed, leaving the parties to bear their own costs.