

(2006) 05 DEL CK 0178

In the Delhi High Court

Case No : Writ Petition (C) 3898 and 6794 of 2001

Dinesh Kumar

APPELLANT

Vs

Netaji Subhash Institute of Tec. and Others
 Om
Prakash Vs Govt. of Nct of Delhi Ors.

RESPONDENT

Date of Decision : 19-05-2006

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 21, 226, 23

Citation : (2006) 132 DLT 357

Hon'ble Judges : S. Ravindra Bhat, J

Bench : Single Bench

Advocate : U. Srivastava, for W.P.C 3898/2001, 14327-29, 17360 and 17716-17/2005 and 2739-41/2006, M.R. Mohapatra, for W.P.C 6794/2001, Narsh Kaushik and Shilpa Chauhan, for W.P.C 19511-13, 19781-82, 19860-79, 19969-70 and 20252-54/200, for the Appellant; Avnish Ahlawat in W.P.(C) 3898/2001, 6794/2001, 14327-29/2005, 17716-17/2005, 19781-82/2005, 19969-70/2005, 20252-54/2005 and 2739-41/2006 Aditya Madan in W.P.(C) 17360/2005, H.K.Aditya and Reeta Kaul for Respondent No. 2, Zeba Tarannum Khan, for Respondent GNCT in WP(C)19860-79/05, Sujata Kashyap, for the Respondent

Final Decision : Disposed Off

Judgement

S. Ravindra Bhat, J.—Issue Rule. With consent of counsel for the parties, these petitions were heard finally.

2. All the Petitioners in these cases were appointed/engaged by the respondent Netaji Subhash Institute of Technology (hereafter "the Institute"). The initial appointment or engagement differ; in some cases, appointments were made in 1991-92, 1995-96 and subsequently in 1998-99. All the Petitioners continued to work either as contract employees or on ad hoc basis. In many cases the periods of employment were not continuous but on intermittent basis.

3. The Institute needed the services of the Petitioners, for putting up a building and most of the Petitioners were engaged in connection with the building project.

It is an undisputed fact that regular sanctioned vacancies in respect of these posts were not created by the Institute, which is an autonomous organization, but subject to the control of the Government of NCT.

4. The common case of all the Petitioners is that their periods of officiation, either on ad hoc or contract basis ought to fructify into permanent employment. It is contended by counsel that the practice adopted by the Institute initially engaging persons on muster roll basis or contract basis and thereafter treating them as ad hoc employees is arbitrary and contrary to Articles 14 and 16 of the Constitution of India.

5. The Petitioners have all claimed regularization or permanent employment and contended that the work for which they were initially appointed (which they continue to discharge) is perennial in nature. It is claimed that the Petitioners have been granted pay and salaries which are lower than what are admissible to those normally admissible in relation to sanctioned posts. The analogy drawn here is to the pay scales/grades in the Government of NCT and certain documents/proposals of the Institute, have been relied upon.

6. Learned counsel for the Petitioners have relied upon the several decisions of the Supreme Court for the proposition that the relief of regularization should be granted in the facts of this case. Counsel relied upon the judgment in Bhagwati Prasad Vs. Delhi State Mineral Development Corporation, , State of Haryana and others Vs. Piara Singh and others etc. etc., . Counsel relied upon the judgment of the Supreme Court in Randhir Singh Vs. Union of India (UOI) and Others, for the proposition that the Respondents were duty bound to extend the prescribed pay scales on a proper application of Article 14 of the Constitution of India, to the Petitioner in these Cases.

7. Counsel for the respondent relied upon the averments made in the counter affidavits and contended that the Petitioners were appointed without reference to the circulars/guidelines that had prescribed that the personnel for the project were to be taken on deputation basis. It is also contended that none of the Petitioners were appointed in accordance with any constitutionally recognized mechanism, or procedure.

8. Counsel contended that the services of the Petitioners were pre- dominantly engaged on contract basis for limited periods of time. They were continued by the Respondent having regard to the exigencies of the project. It was submitted that the project was partly completed and that the contractor had abandoned the work. In the light of these circumstances, it was contended that the Institute does not have sanctioned posts and the issue as to the organizational structure and the personnel policies have to be finalized by the Institute in consultation with the Government of NCT. The Government of NCT, it is stated, is the authority sanctioning the posts as also releasing the necessary grant and funds for the purpose.

9. Learned counsel for the Respondent submitted that neither can the Court

issue a direction to regularize the Petitioners nor can it enter into the factual arena to determine what should be the ideal organizational cadre structure etc, in view of the judgment of the Constitution Bench of the Supreme Court in *Secretary, State of Karnataka and Others Vs. Umadevi and Others*, . Counsel also submitted that the relief of parity in pay scales or even the benefit of age relaxation cannot be granted by the Court and the question of age relaxation has to be determined by the employer itself, in accordance with rules and conditions of services.

10. In the case of *Secretary of Karnataka and Ors. v. Uma Devi's case* (supra) the Supreme Court reviewed all the judgments on the question as to whether the contract or ad hoc employees appointed to sanctioned posts either through some process, or irregularity, or without following any procedure can seek direction to regularize their services. The Court indicated that the power under Article 226 cannot be construed as extending to defeat the provisions of law or the mandate of Articles 14 and 16 which require that public appointments have to be proceeded with some publicity consistent with the obligation to provide equal opportunity and that some process of recruitment in accordance with the provisions and policies, have to be resorted to. The Court had indicated in paras 48 to 53, as follows:

48. It has been contended that the rights of the employees thus appointed, under Articles 14 and 16 of the Constitution, are violated. It is stated that the State has treated the employees unfairly by employing them on less than minimum wages and extracting work from them for a pretty long period in comparison with those directly recruited who are getting more wages or salaries for doing similar work. The employees before us were engaged on daily wages in the department concerned on a wage that was made known to them. There is no case that the wage agreed upon was not being paid. Those who are working on daily wages formed a class by themselves, they cannot claim that they are discriminated as against those who have been regularly recruited on the basis of the relevant rules. No right can be founded on an employment on daily wages to claim that such employee should be treated on a par with a regularly recruited candidate, and made permanent in employment, even assuming that the principle could be invoked for claiming equal wages for equal work. There is no fundamental right in those who have been employed on daily wages or temporarily or on contractual basis, to claim that they have a right to be absorbed in service. As has been held by this Court, they cannot be said to be holders of a post, since, a regular appointment could be made only by making appointments consistent with the requirements of Articles 14 and 16 of the Constitution. The right to be treated equally with the other employees employed on daily wages, cannot be extended to a claim for equal treatment with those who were regularly employed. That would be treating unequals as equals. It cannot also be relied on to claim a right to be absorbed in service even though they have never been selected in terms of the relevant requirement rules. The arguments based on Articles 14 and 16 of the Constitution are Therefore

overruled.

49. It is contended that the State action in not regularising the employees was not fair within the framework of the rule of law. The rule of law compels the State to make appointments as envisaged by the Constitution and in the manner we have indicated earlier. In most of these cases, no doubt, the manner we have indicated earlier. In most of these cases, no doubt the employees had worked for some length of time but this has also been brought about by the pendency of proceedings in tribunals and courts initiated at the instance of the employees. Moreover, accepting an argument of this nature would mean that the State would be permitted to perpetuate an illegality in the matter of public employment and that would be a negation of the constitutional scheme adopted by us, the people of India. It is Therefore not possible to accept the argument that there must be a direction to make permanent all the persons employed on daily wages. When the court is approached for relief by way of a writ, the court has necessarily to ask itself whether the person before it had any legal right to be enforced. Considered in the light of the very clear constitutional scheme, it cannot be said that the employees have been able to establish a legal right to be made permanent even though they have never been appointed in terms of the relevant rules or in adherence of Articles 14 and 16 of the Constitution.

50. It is argued that in a country like India where there is so much poverty and unemployment and there is no equality of bargaining power, the action of the State in not making the employees permanent, would be vocative of Article 21 of the Constitution. But the very argument indicates that there are so many waiting for employment and an equal opportunity for competing for employment and it is in that context that the Constitution as one of its basic features, has indicated Articles 14, 16 and 309 so as to ensure that public employment is given only in a fair and equitable manner by giving all those who are qualified, an opportunity to seek employment. In the guise of upholding rights under Article 21 of the Constitution, a set of persons cannot be preferred over a vast majority of people waiting for an opportunity to compete for state employment. The acceptance of the argument on behalf of the respondents would really negate the rights of the others conferred by Article 21 of the Constitution, assuming that we are in a position to hold that the right to employment is also a right coming within the purview of Article 21 of the Constitution. The argument that Article 23 of the Constitution is breached because the employment on daily wages amounts to forced labour, cannot be accepted. After all, the employees accepted the employment at their own volition and with eyes open as to the nature of their employment. The Governments also revised the minimum wages payable from time to time in the light of all relevant circumstances. It also appears to us that importing of these theories to defeat the basic requirement of public employment would defeat the constitutional scheme and the constitutional goal of equality.

51. The argument that the right to life protected by Article 21 of the Constitution would include the right to employment cannot also be accepted at this juncture.

The law is dynamic and our Constitution is a living document. May be at some future point of time, the right to employment can also be brought in under the concept of right to life or even included as a fundamental right. The new statute is perhaps a beginning. As things now stand, the acceptance of such a plea at the instance of the employees before us would lead to the consequence of depriving a large number of other aspirants of an opportunity to compete for the post or employment. Their right to employment, if it is a part of right to life, would stand denuded by the preferring of those who have got in casually or those who have come through the backdoor. The obligation cast on the State under Article 39(a) of the Constitution is to ensure that all citizens equally have the right to adequate means of livelihood. It will be more consistent with that policy if the courts recognise that an appointment to a post in government service or in the service of its instrumentalities, can only be by way of a proper selection in the manner recognised by the relevant legislation in the context of the relevant provisions of the Constitution. In the name of individualising justice, it is also not possible to shut our eyes to the constitutional scheme and the right of the numerous as against the few who are before the court. The directive principles of State policy have also to be reconciled with the rights available to the citizen under Part III of the Constitution and the obligation of the state to one and all and not to a particular group of citizens. We, Therefore, overrule the argument based on Article 21 of the Constitution.

52. Normally, what is sought for by such temporary employees when they approach the court, is the issue of a writ of mandamus directing the employer, the State or its instrumentalities, to absorb them in permanent service or to allow them to continue. In this context, the question arises whether a mandamus could be issued in favor of such persons. At this juncture, it will be proper to refer to the decision of the Constitution Bench of this Court in *Rai Shivendra Bahadur (Dr.) v. Governing Body of the Nalanda College*. That case arose out of a refusal to promote the writ petitioner therein as the Principal of a college. This Court held that in order that a mandamus may issue to compel the authorities to do something, it must be shown that the statute imposes a legal duty on the authority and the aggrieved party had a legal right under the statute or rule to enforce it. This classical position continues and a mandamus could not be issued in favor of the employees directing the Government to make them permanent since the employees cannot show that they have an enforceable legal right to be permanently absorbed or that the State has a legal duty to make them permanent.

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.Nagarjan* 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.

54. It is also clarified that those decisions which run counter to the principle settled in this decision, or in which directions running counter to what we have held herein, will stand denuded of their status as precedents.

11. Having considered the contentions of the parties as well as the materials on record, I am of the opinion that the reliefs claimed in these writ proceedings cannot be granted by the Court. Without going into the merits of the controversy raised in each of the writ petitions, the Respondents in my opinion ought to undertake the review exercise indicated in the guidelines laid down by the Supreme Court. The Respondents shall also complete the process of putting in place the recruitment policies and publish the same. In respect of posts for which sanction is yet to be obtained, the Respondents shall complete the process and take a final decision within four months from today. The Respondent shall undertake the review indicated above by Constituting a suitable committee which shall examine all the cases individually, and make specific recommendations, within four months.

12. Learned counsel for the Respondent states that in the event of Respondent having to engage personnel on contract/ad hoc basis the cases of the Petitioners would be considered in accordance with a rational policy having regard to the seniority of all such identically situated persons.

13. The writ petition is disposed off in the above terms. Interim orders stand vacated. No. costs.