

(2012) 11 DEL CK 0138

In the Delhi High Court

Case No : Writ Petition (C) No. 5175 of 1998 and CM No. 14513 of 2010

Gurdas Ram and Others

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 05-11-2012

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2012) 11 DEL CK 0138

Hon'ble Judges : Sunil Gaur, J

Bench : Single Bench

Advocate : M.K. Singh, for Petitioners No. 1, 3, 4 and 6, Mr. G.K. Sharma, for Petitioners no. 2 and 5 in W.P. C No. 5175/1998 and CM No. 14513/2010, Mr. K.C. Mittal and Ms. Anjali Nehra, in W.P. C No. 4566/2001, Mr. Manoj Saxena and Mr. Shwetank Sailakwal, in W.P. C No. 2502/2003 Mr. Samrat K. Nigam, Mr. Kartikey Mahajan, Ms. Praneeta Vir and Mr. M.R. Shamshad, in W.P. C No. 9603-14/2003 and W.P. C No. 6373/2006, Mr. Abhigya in W.P. C No. 1398/2010 Mr. M.K. Singh and Ms. Ratna Agarwal in W.P. C No. 7109/2010, for the Appellant; Joydeep Mazumdar, Rohit Dutta, Ms. Soumya Dutta and Ms. Samina Sheikh, Advocates for respondents No. 1 to 3. Mr. Saurav Aggarwal, Advocate for R-4/IRCTC in W.P. (C) No. 5175/1998 and CM No. 14513/2010, in W.P. (C) No. 2502/2003, in W.P. (C) No. 6373/2006, in W.P. (C) No. 1398/2010 and in W.P. (C) No. 7109/2010 Mr. Joydeep Mazumdar, Rohit Dutta, Ms. Soumya Dutta and Ms. Samina Sheikh, Advocates for respondent - Northern Railways, in W.P. (C) No. 4566/2001 and Mr. Joydeep Mazumdar, Rohit Dutta, Ms. Soumya Dutta and Ms. Samina Sheikh, Advocates, in W.P. (C) No. 9603-14/2003, for the Respondent

Judgement

Sunil Gaur

1. In the above captioned first writ petition, the relief sought is to regularize petitioners as commission vendors, whereas in other writ petitions a

mandamus sought by petitioners to respondents, is to absorb petitioners as commission vendors in Group "C" posts and to quash Circulars of 4th

February, 2003, 20th November, 2003 and 1st January, 2004 and tender notice

(Annexure P-3). A direction is also sought to respondents by petitioner-Gurdas Ram and others to strictly implement comprehensive departmental catering at Delhi/New Delhi in accordance with Railway Board's Policy Letter of 29th December, 1979 and to terminate the services of private contractors and their stalls be offered to existing commission vendors, according to seniority.

2. Since in the above captioned writ petitions, identical submissions were advanced by both the sides, therefore, these petitions are being disposed of by this common judgment.

3. In the year 1998, respondents had taken note of decreased sale of snacks on stalls/trolleys at New Delhi Station and had issued notices to some of the commission vendors as to why their service at the stalls/trolleys should not be terminated on account of decrease in sales and had simultaneously invited applications for deputing two commission vendors at one such stall/trolley to work at existing stalls on the Railway Platform on 12 hours basis and this had brought petitioner-Gurdas Ram and others to court. Respondent's Comprehensive Departmental Catering Policy of December, 1979 had mandated that no contract for sale of edibles should be awarded to private contractors.

4. Petitioners rely upon Apex Court decision in Daily Rated Casual Labour Employed under P and T Department Vs. Union of India (UOI) and Others, deprecating policy of employment of persons on ad-hoc or casual basis for number of years and has directed the authorities to formulate a scheme for absorption of employees who had put in one year or more of service.

5. Whereas respondents rely upon Apex Court decision in W.P.(C) No. 1670/1987 T.I. Madhavan vs. Union of India & ors., rendered on 8th September, 1987, clarifying that all commission bearers who were registered first and then the commission vendors be absorbed in Railway Catering Service and they would be entitled to salary etc. from the date of their absorption and not from 1st December, 1983. Respondents maintain that all the vendors of New Delhi Railway Station had refused to get absorbed in regular Class IV scale and it is so evident from communication of 18th September, 1989 by Chief Catering Inspector to Area Railway Manager, New Delhi. Thereafter in the year 1992,

respondent-Railways came up with a new catering policy for undertaking

privatization in phases in view of various staff problems and to issue licenses for catering/vending units. The existing commission bearers/vendors were to be redeployed/adjusted preferably in the commercial department in various categories including ticket checking etc. or they were to be considered for allotment of stalls/trolleys at roadside station.

6. As per additional affidavit of 12th July, 2001 of General Manager, Northern Railways, in view of the orders of the Apex Court, Delhi Division

of Railways had decided to regularize the service of 245 commission bearers working in Northern Railways and out of them, 225 could be

absorbed in Railways whereas remaining 20 commission bearers were found to be not suitable and on the basis of recommendations of a

Committee, 42 commission bearers of Delhi Division were found to be suitable for absorption. In compliance, to the policy decision of Railway

Board and orders of Hon"ble the Supreme Court, 327 commission bearers/vendors had so far been absorbed in Northern Railway and out of

them 12 commission vendors had not resumed their duty.

7. Since catering services of respondent-Railways was transferred to IRCTC, so an option was given to petitioners to get absorbed in "Group D"

posts and vide letters of March, 1999 and June, 2000, applications were called for absorption of commission vendors/bearers working in

Northern Railways in "Group D" posts, but only three applicants had appeared for screening test and they were found to be not suitable. Again in

March, 2004, another chance was given to such commission bearers/vendors to appear before the Screening Committee for absorption against the

existing vacancies in "Group D" but as per letter of 30th July, 2004 of IRCTC, Delhi Division, only two persons from Delhi Railway Station had

given their willingness to get absorbed, whereas 35 commission vendors of Northern Railways had given their willingness to get absorbed.

8. As per Railway Board's Policy decision of 1st December, 2005 all commission bearers/vendors should retire at an age of 60 years. In the

screening of Commission bearers/vendors for absorption held on 6th February, 2006, none of the commission bearers/vendors had appeared for

getting absorbed in the Railways" "Group D" posts. Respondents rely upon order of 17th March, 2004 in WP No. 2089 of 2004 passed by High

Court of Andhra Pradesh, wherein it was observed that the Railways have taken

all possible steps to absorb the Commission Bearers and

Vendors but they have not given their willingness to get absorbed in "Group D" posts and therefore the Commission Bearers and Vendors cannot

complain that they are deprived of their livelihood. It was further observed that the persons who were medically unfit for absorption could not be

allowed to continue the business.

9. Respondents also rely upon an interim order of 25th August, 2005, passed in W.P.(C) No. 4566/2001, W.P.(C) No. 9603/2003 and W.P.(C)

No. 2502/2003, wherein it was observed as under:-

If they apply absorption in "Group D" their request may be accepted to and they may be given duty corresponding to that of a commission vendor.

All these persons, if they apply, may be absorbed in the Delhi Region itself, subject to their being not more than 59 years of age on the date of filing

the application.

10. In view of the aforesaid, respondents maintain that the question of absorbing petitioners in "Group C" does not arise, as per the existing

recruitment rules, Group "C" posts are selection posts, which are filled up by direct recruitment as well as promotion from "Group D" to "Group

C" after having acquired sufficient experience.

11. According to learned counsel for the petitioners, issue of absorption of commission bearers/vendors is lingering on since the year 1996, when

respondent-Railways had promised absorption of such commission bearers/vendors having qualification of passing 8th class in "Group C" and of

other vendors in "Group D". It is urged that age of retirement was never contemplated as over the years, job of commission bearers/vendors upon

their demise had devolved upon their legal heirs and their employment as khalasis or safai karamchari, i.e., in "Group D" is contrary to their job

profile of preparing snacks upon raw material being supplied by Railways to them and to sell the snacks at a commission. As per learned counsel

for petitioners, despite interim directions, respondents have not disclosed the job profile of "Group C" and "Group D" posts.

12. On behalf of the petitioners, it is asserted that the job profile of petitioners is of cook/salesman and they should be absorbed against identical

job profile in Railways and not against "Group D" posts which are meant for khalasis, safai karamchari, etc.. It is further urged that since

petitioners have been working as commission vendors for a long period of time, therefore their claim for absorption cannot be scuttled by

introducing age of retirement by way of a policy decision of the year 2005, as to do so would be per se arbitrary and discriminatory as Railway

Catering was handed over to IRCTC in the year 2003 and it now stands reverted back to Indian Railways in the year 2010. So, it is urged that

most of the petitioners now confine the relief sought to regularization as commission vendors and not to be absorbed in Railways against "Group

C" posts.

13. To assert that petitioners have no fundamental right to be absorbed in Railway Catering Service and the scheme to absorb them is out of

benevolence shown by the Apex Court in W.P. No. 6804 of 1982, Sital Singh & Ors. Vs. Union of India, rendered on 13th December, 1983 and

T.I. Madhawan vs. Union of India & Ors., 1987 (5) SLR 572 and on absorption, an employee does not have right to a particular grade or post,

reliance is placed by respondents' counsel upon decisions in P.B. Roy Vs. Union of India (UOI), ; State of Madhya Pradesh and others Vs.

Ramesh Kumar Sharma, ; Fertilizer Corporation Kamgar Union (Regd.), Sindri and Others Vs. Union of India (UOI) and Others, ; Avas Vikas

Sansthan and Anr. Vs. Avas Vikas Sansthan Engineers Association and Ors., (2004) 4 SCC 132 ; and Secretary, State of Karnataka and Others

Vs. Umadevi and Others, .

14. On behalf of the respondents, the stand taken can be summed up as under:-

In the compliance affidavit of 14th January, 2005, respondents had disclosed the job profile of vendors as equivalent to waiters and it was

disclosed that the Railway Administration is willing to absorb the members of All India Vendors Association in the post of waiters. However, in the

subsequent affidavit of 23rd August, 2005, respondents maintained that entire catering work had been transferred to IRCTC and only those

commission bearers/vendors can be absorbed who fulfil the conditions imposed in terms of the applicable rules and regulations. In the counter

affidavit of 9th September, 2005, respondents had disclosed that Catering Policy-2000 reveals that there were several loss causing units in the

departmentally managed Catering/Vending Service in Railways.

15. Infact, respondents had maintained silence in respect of impugned Tender

Notice inviting applications from caterers for allotment of

catering/vending license at Lucknow Station. In any case, no worthwhile submissions were advanced by either side at the hearing in respect of

tender notice, as the entire catering work was handed over by the Railways to IRCTC in the year 2003, though it reverted back in the year 2010.

16. The prayer made in one of the writ petitions is to restrain the respondents from introducing multinational companies in the line of commission

bearers/vendors but at the hearing, much emphasis on behalf of petitioner was on their regularization as commission vendors instead of seeking

absorption due to the introduction of retirement age.

17. Respondents resolutely maintain that initial appointment of vendors is in Group "D" as khalasis etc. and later on they are promoted to Group

"C" posts like waiters/cook, etc. The precise stand taken by respondents is that the commission vendors should have first opted for their

absorption in Railways only then they can be promoted to "Group C"; and "Group B" is a gazetted post and on one hand vendors are not coming

forward for absorption and on the other hand, it is alleged that Respondent-Railways is not complying with the directions issued by the Court and

the vendors who are seeking absorption are in the age group of 40 to 70 years.

18. The categoric stand of respondents in their counter affidavit of 21st July, 2011 in the above captioned writ petition of Madan Singh and others,

is based upon its circulars of 1st December, 2005 and 7th June, 2007, i.e., all commission bearers/vendors would be regularized with complete

relaxation of educational qualification in "Group D" staff and the widow/ward of such vendors/bearers would be provided compassionate

appointment as per the rules, in case of their death or medical incapacitation before their retirement and that commission bearers/vendors have to

retire at the age of 60 years.

19. The respective stand taken by both the sides, the material on record and the decisions cited have to be considered while keeping in view that

there is no challenge to the policy decision of 1st December, 2005 providing for age of retirement as 60 years for those commission vendors who

opt for absorption in the Railway Catering Service, as retirement age of Indian Railways staff is 60 years. The consistent stand of respondents right

from the beginning is that in view of the directions issued by Apex Court in Sital

Singh (Supra), respondents are willing to absorb commission bearers/vendors but as per the applicable Rules and Regulations.

20. The controversy raised is not regarding absorption but about category of post in which absorption is to be done. Respondents had offered to

absorb commission bearers/vendors in "Group D" posts whereas petitioners assert that they are entitled to be absorbed in "Group C" posts, as

their job profile is equivalent of that of waiters/cook, etc. and they cannot be put at par with khalasis and safai karamcharis. This court is conscious

of the legal position regarding absorption or regularization in service, as redefined by the Apex Court in Secretary, State of Karnataka and Others

Vs. Umadevi and Others, , which is as under:-

High Courts acting under Article 226 of the Constitution of India, should not ordinarily issue directions for absorption, regularization, or permanent

continuance unless the recruitment itself was made regularly and in terms of the constitutional scheme. Merely because, an employee had continued

under cover of an order of Court, which we have described as "litigious employment" in the earlier part of the judgment, he would not be entitled

to any right to be absorbed or made permanent in the service. In fact, in such cases, the High Court may not be justified in issuing interim

directions, since, after all, if ultimately the employee approaching it is found entitled to relief, it may be possible for it to mould the relief in such a

manner that ultimately no prejudice will be caused to him, whereas an interim direction to continue his employment would hold up the regular

procedure for selection or impose on the State the burden of paying an employee who is really not required. 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 or lend themselves the instruments

to facilitate the bypassing of the constitutional and statutory mandates.

21. Pertinently, in the compliance affidavit of 14th January, 2005, respondents had disclosed the job profile of vendors as equivalent to waiters and

it was disclosed that the Railway Administration is willing to absorb the members of All India Vendors Association in the post of waiters. Having

taken aforementioned stand, respondents cannot be allowed to back track to assert in their later counter affidavit of 21st July, 2011 that absorption of

commission vendors would be in "Group D" posts. Once having conceded that

the job profile of petitioners, i.e., commission vendors is equivalent that of waiters, respondents cannot be allowed to wriggle out of it, because the stand taken in compliance affidavit of 14th January, 2005, regarding job equivalence appears to be correct. Respondents do not offer any worthwhile justification to treat commission vendors as khalasis etc.. So, the decisions relied upon on behalf of Respondents do not advance their case.

22. At the hearing, attention of this Court was not drawn to any rule or regulation to show as to why commission vendors cannot be treated at par with the waiters in catering wing of Respondents. So, absorption of petitioners in "Group C" posts would depend upon their qualifying minimum eligibility conditions while relaxing age bar, if any. The real question is not of petitioners having any right to seek absorption in particular cadre but is whether respondents can violate the concept of equality to treat petitioners differently, when their job profile entitles them to be treated at par with waiters of the catering wing of respondents. The measure of economy and the need for streamlining its staffing pattern or administration is the domain of the respondents, wherein this Court would not tread but it is the bounden duty of this Court to ensure that concept of equality is not violated by respondents, by deliberately ignoring the job equivalence in providing absorption in service.

23. In the considered opinion of this Court, there is no rationale or justification to permit respondents to wriggle out of its stand taken in compliance affidavit of 14th January, 2005 conceding that job profile of commission vendors is equivalent to that of waiters in the Railway Administration. Therefore, a mandamus is issued to the respondents to absorb eligible petitioners who have not crossed age of 59 years in "Group C" posts against vacant posts of this category after such eligible petitioners formally make an application to seek absorption in "Group C" posts.

24. However, so far as claim of petitioners to seek regularization as commission vendors is concerned, the same cannot be acceded to, as a Constitutional Bench of Apex Court in Secretary, State of Karnataka and Others Vs. Umadevi and Others, has declared that High Courts acting under Article 226 of the Constitution of India should not, ordinarily issue direction for regularization of service unless the recruitment itself was

made in terms of the Constitutional Scheme. The predominant view is that appointments made without following the due process or the rules for

appointment do not confer any right on the appointees and that the Court cannot direct their regularization or make them permanent. So, in the

instant matter, absorption of eligible petitioners ought to be considered by respondents subject to availability of vacant "Group C" posts and in

view of respondents aptly conceding in their compliance affidavit of 14th January, 2005 that job profile of commission vendors i.e., petitioners

herein is equivalent to that of waiters, who indisputably hold "Group C" posts.

25. In the final analysis, prayer of petitioners seeking quashing of circulars of 4th February, 2003, 20th November, 2003 and 1st January, 2004

and the tender notice is found to be infructuous as from the year 2010 the catering service of respondents stands reverted back to Indian Railways.

The prayer of petitioners for regularizing them as commission vendors stands declined in view of the afore-noted dictum of the Apex Court in Uma

Devi (Supra). However, these petitions succeed only to the extent of directing Respondents to consider the case of eligible petitioners for being

absorbed against vacant posts in "Group C", provided such eligible petitioners, i.e., who have not crossed the age of 59 years, seek absorption

within two weeks from today and the respondents are directed to consider the case of such petitioners with expedition, i.e., within twelve weeks or

so. Needless to say, if absorption on compassionate basis is sought by any of the eligible petitioners in terms of Respondents' Circulars of 1st

December, 2005 and 7th June, 2007, the same would be considered in terms of aforesaid Circulars. These petitions are disposed of in the

aforesaid terms, while leaving the parties to bear their own costs. Pending applications are disposed of as infructuous.