

(2015) 07 JH CK 0093

In the Jharkhand High Court

Case No : Writ Petition (S) No. 4144 of 2010

Kailash Prasad Yadav

APPELLANT

Vs

The State of Jharkhand and Others

RESPONDENT

Date of Decision : 24-07-2015

Acts Referred:

Constitution of India, 1950 — Article 226, 311(2)

Citation : (2015) 07 JH CK 0093

Hon'ble Judges : Pramath Patnaik, J

Bench : Single Bench

Advocate : Navin Kumar Singh, for the Appellant; Pratiush Lala, JC to G.P. IV, Advocates for the Respondent

Final Decision : Disposed off

Judgement

Pramath Patnaik, J—The present writ application has been preferred for the following reliefs:

"A) Writ of and/or in the nature of certiorari quashing order memo No. 176 dt. 7.3.2010 issued by the Executive Engineer (respondent No. 5) retrenching the services of the petitioner, w.e.f. 9.3.2010 as also letter No. 46 dt. 8.3.2010 issued by Assistant Engineer (Respondent No. 6) communicating decision of retrenchment to the petitioner.

B) A writ of and/or in the nature of mandamus directing the respondents to reinstate the petitioner forthwith from the date of his retrenchment with all consequential benefit.

C) A Writ of and/or in the nature of mandamus directing the respondents to pay the arrear of salary to the petitioner due since August 2008.

D) A writ of and/or in the nature of mandamus directing the respondents to appoint the petitioner against a sanctioned and vacant Class-IV post in accordance with law and as per recommendation contained in letter No. 3664(s)

W E dt. 25.9.2004 contained in Annexure-4."

2. Sans details facts described in the writ application in a nutshell is that the petitioner was initially appointed on sanctioned post of Godown Chaukidar for four months by the competent authority, Executive Engineer as a daily wage employee by memo No. 1351 dt. 20.08.1983 at Annexure-1 to the writ application. The services of the petitioner was extended from time to time by the competent authority as evident from Annexure-2 & 3 to the writ application. The State Government's letter No. 3664 (S) WE dt. 25.9.2004, inter alia, stipulates that due recommendation of the State Government for giving preference in appointment on a sanctioned and vacant post to all those daily wage employees, who completed 240 days of continuous services prior to 1.8.1985 in Road Construction Department by enclosing the list of such 31 daily wage employees against sanctioned and vacant posts in accordance with law by advertising the post as evident from Annexure-4 to the writ application. The name of the petitioner appears at serial No. 8 in the enclosed list showing that the petitioner was appointed prior to 1.8.1985 and has completed 240 days as daily wage employee and therefore, the petitioner is entitled to be considered for appointment on preferential basis. Pursuant to letter No. 705 dated 19.8.2005 issued by Superintending Engineer, Executive Engineer duly submitted list of Class IV sanctioned and vacant posts available in regular establishment of Road Division Chaibasa to Superintending Engineer with copy to Deputy Secretary, Road Construction Department and Chief Engineer (Yatayat), Road Construction Department to give effect to recommendation of Annexure-4. The Chief Engineer have given effect to recommendation of Annexure -4 as indicated in Annexures-5 and 6 respectively to the writ petition. So far as 12 class IV posts vacant in Regular Establishment of Road Division Chaibasa, and out of 12 such posts 4 posts of chaukidar. By a letter dated 25.3.2006 Engineer-in-Chief-cum- Special Secretary Road Construction Department sought for report forthwith from Chief Engineers, Superintending Engineers and Executive Engineers of Road Construction Department as to how many daily wage employees have been appointed on regular basis pursuant to Annexure-4. It appears that aforesaid letter memo No. 1242 (S) dt. 25.3.2006 (Annexure-7) was issued in the light of the order passed in Contempt Case No. 977/2002, by the Hon'ble Court and in pursuance to Annexure-7 the Chief Engineers were directed to take steps forthwith in accordance with law for appointment of 31 aforesaid daily wage employees for compliance of the aforesaid order. By the letter dated 30.3.2006 the Engineer-in-Chief-cum-Additional Commissioner-cum-Special Secretary Road Construction Department again sought for report forthwith from Superintending Engineer & Executive Engineer as to how many out of aforesaid 31 daily wage Employees have been appointed by giving preference in appointment and how many are left vide Annexure- 8 to the writ application.

The petitioner submitted his representation dated 27.4.2006 and 29.7.2006 requesting Deputy Commissioner, West Singhbhum Chaibasa and Superintending Engineer, Road Circle, Jamshedpur with a copy to Executive Engineer Road

Division, Chaibasa for consideration of his case for appointment against a sanctioned and vacant class IV employees by giving him preference in appointment pursuant to letter dated 25.9.2004 vide Annexure- 4 to the writ application and the said representation have been annexed at Annexure- 9 series. In pursuance to letter dated 26.10.2006, Sub Divisional Officer, Road Sub Division Hata submitted, service details of petitioner in check slip (Bibrani III) to Executive Engineer, Road Division, Chaibasa to be further submitted the same to the superintending Engineer Road Circle Jamshedpur for taking necessary action for regularization of service of petitioner as evident from Annexure-10 series.

3. But instead of regularising the services of the petitioner, the petitioner was shocked to receive order No. 176 dated 7.3.2010 issued by the Executive Engineer whereby the services of the petitioner has been retrenched w.e.f. 9.3.2010 on the ground of absence from duty and insubordination as evident from Annexure 12 & 12/1 to the writ application.

4. Being aggrieved by order of retrenchment, the petitioner requested the Executive Engineer for reinstatement in services by representation dated 28.5.2010 as per Annexures-13 and 14 to the writ application again submitted the representation to the Authorities vide Annexures-15, 15/1 & 15/2 to the writ application.

5. Since, the representation preferred by the petitioner did not evoke any response from the respondents, left with no efficacious alternative remedy the petitioner has approached this Court invoking the extraordinary jurisdiction under Article 226 of the Constitution of India for redressal of his grievances.

6. Per contra, counter-affidavit has been filed on behalf of the respondent Nos. 2 to 6 repelling the averments made in the writ application, it has been submitted in the counter-affidavit that the petitioner was the (Muster Roll) worker who worked as Godown Chaukidar. He was never appointed against a sanctioned post, rather his duty was need based. He was not guided by Public Works Departmental Code. Relevant clause of the code are as follows:

"As per the clause 226 of Public Works Accounts Code with the following exceptions, all persons engaged departmentally for the execution of works are considered as daily labourers and their wages should be drawn on Muster Rolls, Form 21 (T.C. Form 49) and charged to the estimate of the works on which they are employed:

(1) Permanent and temporary employees of the division whose pay is charged to the head "Establishment".

(2) Members of the work-charged establishment as defined in paragraph 57-62 of the Bihar Public Works Department Code.

Discrepancies between labour reports and muster rolls should be investigated as soon as the later are received. As per clause 227 for Public Works Account Code Muster Rolls should be prepared in Form 21 (T.C. Form 49), and dealt in

accordance with the provision mentioned therein. Photo copy of the Public Works Account Code and Public Works Departmental Code have been annexed at Annexure-A to the counter-affidavit."

7. It has further been submitted in the counter-affidavit that in consonance with the direction given by the Hon"ble Apex Court in the case of State of Bihar & Others v. Laghu Sichai Karmchari Sangh & Others, the Government of Jharkhand made a policy for work charged and Muster Roll Workers vide letter No. 1614 (s) W.E. Dated 21.05.2004. According to the said policy they were supposed to be given preference when ever regular appointment is made against vacancies. A photo copy of the judgment of the Hon"ble Apex Court and a photo copy of the letter dated 21.05.2004 has been annexed as Annexure-B and C to the counter-affidavit. It has further been submitted in the counter-affidavit that the petitioner does not remain present at his duty place Chaibasa nor the petitioner has been performing his duty. However, a reasoned order has been passed by the Superintending Engineer of the Road Construction Department of the Road Circle, Chaibasa whereby he allowed payment of his unpaid wages from September 2008 to 07.03.2010, excluding 78 days of his absence, and all admissible dues have been paid and cleared as evident from Annexure - D & E to the counter-affidavit. It has further been submitted in the counter-affidavit that since the petitioner is not holding any sanctioned post which is permanent in nature as his engagement was temporary on daily wage basis and was paid on daily wage. Hence, the removal of the petitioner cannot be termed as retrenchment.

8. Moreover, the petitioner is not entitled to be reinstated to the post of godown chaukidar. However, the preference shall be given to the petitioner whenever the appointment will be made in due course, preference will be given to Muster Roll, daily wage Holder. It has further been submitted in the counter-affidavit that as per the decision of the Hon"ble Apex Court reported in Secretary, State of Karnataka and Others Vs. Umadevi and Others, AIR 2006 SC 1806 : (2006) 6 CompLJ 1 : (2006) 4 JT 420 : (2006) 2 LLJ 722 : (2006) 4 SCALE 197 : (2006) 4 SCC 1 : (2006) 3 SLJ 1 : (2006) AIRSCW 1991 : (2006) 3 Supreme 415 and reported case of R.S. Garg Vs. State of U.P. and Others, AIR 2006 SC 2912 : (2006) 111 FLR 616 : (2006) 7 JT 1 : (2006) 7 SCALE 405 : (2006) 6 SCC 430 : (2006) SCC(L&S) 1388 : (2006) 4 SCR 120 Supp : (2006) AIRSCW 4040 : (2006) 6 Supreme 324 , the Apex Court clearly stated that petitioner"s post cannot be regularized only on the ground that he was working for long period on daily wage.

Moreover, as per the decision of Hon"ble Apex Court reported in J and K. Public Service Commission, etc. Vs. Dr. Narinder Mohan and others etc. etc., AIR 1994 SC 1808 : (1994) 68 FLR 363 : (1993) 6 JT 593 : (1994) 1 LLJ 780 : (1993) 4 SCALE 597 : (1994) 2 SCC 630 : (1993) 3 SCR 900 Supp : (1994) 1 SLJ 218 that there can be no right to claim regularization particularly when the appointment had not been made on regular basis by way of advertisement. The

decision reported in PCJR 2001 (June) 729 stipulates that there must be clear sanctioned vacancies, but in the instant case there are no such vacancies. It has further been submitted that whenever advertisement for the post will be made preference will be given to the petitioner.

9. In response to the counter-affidavit filed by the respondent Nos. 2 to 6, the petitioner has filed a rejoinder reiterating the averments made in the writ application. In the rejoinder affidavit it has been submitted that 14 daily wages employees who completed 240 days regular services prior to 1.8.1985 have been appointed and posted on the post of Laboratory Attendant/Khalasi by office order memo No. 676 dt. 18.8.2005 out of list of 31 daily wages employees contained in State Government Letter No. 3664 (s) W.E. dt. 25.9.2004 wherein the petitioner is at serial No. 8 as evident from Annexure-4 to the writ application. Letter dated 18.8.2005 relating to regularization of daily wages employees has been annexed as Annexure 17 to the rejoinder affidavit. It has further been submitted that by the counsel appearing for the petitioner that out of 31 daily wages employees contained in letter dated 25.9.2004 at Annexure-4 to the writ application 14 daily wages employees have been appointed as evident from Annexure-17 to the rejoinder affidavit. However, out of 14 daily wages 10 daily wages employees are junior to the petitioner since they have joined the service after joining of the petitioner as evident from the table mentioned in the rejoinder.

10. The petitioner has also filed a supplementary rejoinder to the counter-affidavit filed by the respondent Nos. 2 to 6 incorporating certain facts for factual adjudication of the writ application. It has been submitted in the supplementary rejoinder that as per the statement of the respondent Nos. 2 to 6 made in the counter-affidavit in para 11 that as per the present policy of Government there is no need of godown choukidar in road construction department and he would not be regularized on that post, is totally a wrong statement as would be evident from the office order dated 28.2.2014, Sri Nirmal Kumar Singh has been regularized/absorbed on the post of Godown Chowkidar vide Annexure-18 to the supplementary rejoinder. It has further been submitted that the persons who are junior to the petitioner is working as daily wager in muster roll in the year 1984, has been regularized in the year 2005 itself (Annexure-17 to the rejoinder), but the petitioner has been deprived of the fruits of his hard work of 27 years of service and has been discriminated. It has further been submitted in the supplementary rejoinder that the petitioner has been continuously doing his duty, as would be evident from Annexures-3, 9, 10, 10/1, 10/2, and 10/3 of the writ application and also Annexure-E to the counter-affidavit filed by the respondents and at the time of the retrenchment, juniors to him are working on the permanent post till date. Therefore, the petitioner is entitled to parity of equal treatment as has been extended to the junior daily wage employees to the petitioner vide Annexure-17 to the rejoinder.

11. Learned counsel for the petitioner during course of arguments has referred to the decision rendered in W.P.(S) Nos. 2548 and 4297 of 2007 reported in

2009(2) JLJR 682. Learned counsel for the petitioner assiduously argued for quashing of the impugned order dated 07.3.2010 and letter dated 08.3.2010 as contained in Annexure-12 and 12/1 to the writ application on the ground that the same has been passed on violation of the provisions of article 311(2) of the Constitution of India. Since the impugned order of punishment has been passed as a measure of punishment casting stigma and inflicting Civil consequences of penal nature. Therefore, prayer of giving opportunity of hearing was mandatory being procedural requirement of law.

12. Learned counsel for the petitioner has further urged that junior employees of the daily wage to the petitioner has been regularized since 2005 as evident from Annexure-17 to the rejoinder, the petitioner ought to have been considered on the doctrine of parity. In order to buttress his submissions, the learned counsel for the petitioner has relied upon the decisions in W.P.(S) Nos. 2548 & 4297 of 2007 in Birendra Rajak (in 2548) and Ram Lagan Rajwar (in 4297) v. the State of Jharkhand & Ors. reported in 2009(2) JLJR 682 wherein this Court has been pleased to direct that "the petitioners are those who are engaged in daily wage thus as per their own policy/circular they were entitled to be regularized. Accordingly, the writ petition is disposed of." Learned counsel for the petitioner has also referred the case of Malathi Das (Retd.) Now P.B. Mahishy and Others Vs. Suresh and Others, (2014) AIRSCW 1653 : (2014) CriLJ 1753 : (2014) 2 LLJ 676 : (2014) 3 SCALE 476 wherein the Hon"ble Apex Court has been pleased:

13. "In the aforesaid undisputed facts it is wholly unnecessary for us to consider as to whether the cases of persons who were awaiting regularisation on the date of the decision in Umadevi (3)7 is required to be dealt with in accordance with the conditions stipulated in para 53 of Umadevi (3)7 inasmuch as the claims of the respondent employees can well be decided on principles of parity. Similarly placed employees having been regularised by the State and in case of some of them such regularisation being after the decision in Umadevi(3)7 we are of the view that the stand taken by the appellants in refusing regularisation to the respondents cannot be countenanced. However, as the said stand of the appellants stems from their perception and understanding of the decision in Umadevi (3)7 we do not hold them liable for contempt but make it clear that the appellants and all the other competent authorities of the State will now be obliged and duty-bound to regularise the services of the respondents (74 in number) which will now be done forthwith and in any case within a period of two months from the date of receipt of this order."

13. So far as the impugned order of removal/termination of the petitioner vide Annexures-12, 12/1 is concerned the learned counsel for the petitioner referred the decision reported in The Manager, Government Branch Press and Another Vs. D.B. Belliappa, AIR 1979 SC 429 : (1979) 38 FLR 337 : (1979) LabIC 146 : (1979) 1 LLJ 156 : (1979) 1 SCC 477 : (1979) 2 SCR 458 wherein in para 24 Hon"ble the Apex Court has been pleased:

"Conversely, if the services of a temporary Government servant are terminated

arbitrarily, and not on the ground of his unsuitability, unsatisfactory conduct or the like which would put him in a class apart from his juniors in the same service, a question of unfair discrimination may arise, notwithstanding the fact that in terminating his service, the appointing authority was purporting to act in accordance with the terms of employment...."

14. Heard learned counsels from both the sides at length and perused the relevant records, after giving my anxious consideration with the legal and factual aspects:

"(I) The impugned order vide Annexure- 12 and 12/1 dated 7.3.2010 and 8.3.2010 respectively to the writ application are not sustainable.

(ii) It appears that the petitioner continuously worked from the year 1983 to 2010 till the impugned order of termination dated 8.3.2010 was passed, from 1983 to 2010 by rendering almost 27 years of service. As per the Annexure-4 to the writ application, the petitioner has given a list of employees, wherein the name of the petitioner is at serial No. 8 and the date of initial appointment has been mentioned as 4.8.1983 prior to the cut off dated. i.e. 1.8.85. It appears from the Annexure-17 to the rejoinder affidavit that the 14 daily wages employees who are junior to the petitioner as evident from Annexure 4 to the writ application have been regularized vide Annexure-17 dated 18.8.2005 to the rejoinder affidavit. The juniors to the petitioner have been regularized, the petitioner ought to have been regularized.

(iii) However, when the junior daily wage employees to the petitioner have been regularized, the petitioner ought to have raised his grievance, but the petitioner has chosen not to challenge the same, so the petitioner is guilty of laches and acquiescence."

15. However, the petitioner has been working as a daily wage employee for 27 years, the interest of justice demands that the case of the petitioner ought to have been considered in the light of the aforesaid decisions.

16. Accordingly, as cumulative effects of facts, reasons and judicial pronouncements, the impugned order at Annexure-12 & 12/1 is not legally sustainable and are hereby quashed and the respondents are directed to consider the case of the petitioner, for regularization in view of the facts that the junior to the petitioners have been regularized vide Annexure-17 to the rejoinder affidavit, within a period of two months.

17. With the aforesaid direction the writ petition is disposed of.