
(2007) 07 JH CK 0002
In the Jharkhand High Court

Manglu Prasad Yadav

APPELLANT

Vs

State of Jharkhand and Others

RESPONDENT

Date of Decision : 30-07-2007

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 226, 309

Citation : (2007) 4 JCR 301

Hon'ble Judges : M.Y. Eqbal, J;D.G.R. Patnaik, J

Bench : Division Bench

Final Decision : Allowed

Judgement

M.Y. Eqbal, J.—This Letters Patent Appeal is directed against the judgment and order dated 9.8.2006 whereby the writ petition being W.P. (S) No. 1877 of 2002 filed by the petitioner for regularization and/or absorption of his service has been dismissed by the learned single Judge holding that the petitioner was not appointed against any post after following the procedure of appointment. The impugned judgment/order reads as under:

Admittedly the petitioner was engaged on daily wage and thereby he had no right to hold any post. He was not appointed against any post after following the procedure as such advertisement, interview and recommendation of the Selection Commission. In this background no direction can be given to regularize his services.

This writ petition is accordingly dismissed.

2. The case of the petitioner-appellant is that in the year 1983, the petitioner, having come to know about the vacancy in Class-IV post in Public Health Engineering Department, applied for the said post. The respondent No. 4--the Deputy Commissioner, Godda allowed the petitioner to work on muster roll in the said department and a letter dated 12.4.1983 was issued. Pursuant to that order of the Deputy Commissioner, the petitioner joined on muster roll in 1983 in Public Health Engineering Department and worked with full satisfaction of the

respondents-authorities. In 1987, since some Class-IV post was lying vacant in the Public Health Engineering Department, Godda (in short "PHED"), the Executive Engineer recommended the case of the petitioner for appointment in Class-IV post vide letter dated 23.12.1987. The petitioner's case is that his case was again recommended by the Superintending Engineer, PHED to the Chief Engineer for appointment on Class-IV post vide letter dated 11.1.1988. The Chief Engineer vide letter dated 31.8.1990 asked the Superintending Engineer, PHED, to take decision himself for adjustment of the services of the petitioner. The petitioner's case is that his services has not been regularized till date and he has been continuously working since 1.7.1983. In the year 2000, the services of the petitioner were converted from Muster Roll to Hand Receipt and he has been presently working as khalasi in Pathargama Water Supply Scheme.

3. Respondents in their counter affidavit have stated that Drinking Water and Sanitation Department consists of two establishments. One is regular establishment which includes office staff i.e. peon, clerk and engineering staff. Another establishment is called work-charged establishment. This includes junior staff who are directly engaged with the Water Supply works i.e. khalasi, pump operator, mistri, filter operator, etc. The post in the regular establishment is duly sanctioned by the Government, whereas work-charged posts are temporary and not duly sanctioned by the Government. It is further admitted that the petitioner has been working in the Water Supply Scheme in the work-charged establishment under Drinking Water and Sanitation Division, Godda on the post of Muster Roll khalasi since 1983. In paragraph 6 of the counter affidavit, it is stated that for the regularization/regular appointment of the daily wage/muster roll employees, provisions have been laid down in the Personnel and Administrative Department resolution dated 18.6.1993, according to which those daily wages employees who have been working for 240 days before 1.8.1985 have to be given preference over outsiders in regular appointment. However, it is stated that in absence of regular post, no regular appointment can be made. The respondents' further case is that there is a vacant post in regular establishment and name of the petitioner was recommended for regularization of services, but his services were not regularized for the reason that there was ban on appointment of Class-IV employees. The respondents have also stated that Chief Engineer, PHED, Bhagalpur issued instruction for regularization of the services of the petitioner, but in view of the Government decision, the department is unable to regularize the services of the petitioner.

4. The only question, therefore, that falls for consideration is as to whether in the facts and circumstances of the case, the petitioner is entitled for regularization or absorption of his services in Class-IV post.

5. We are fully conscious of the law laid down by the Supreme Court in the case of Secretary, State of Karnataka and Others Vs. Umadevi and Others, . In the Constitution Bench judgment, the law relating to public employment and right of absorption, regularization or permanent continuance of temporary, contractual,

casual, daily wage or ad hoc employees have been settled. It was held that the Court should not issue direction for regularization, absorption or continuance in service unless the recruitment itself was made regularly and in terms of constitutional scheme. Their Lordships have made observations in paragraph 43 of the judgment which is quoted herein below:

43. Thus, it is clear that adherence to the rule of equality in public employment is a basic feature of our Constitution and since the rule of law is the core of our Constitution, a Court would certainly be disabled from passing an order upholding a violation of Article 14 or in ordering the overlooking of the need to comply with the requirements of Article 14 read with Article 16 of the Constitution. Therefore, consistent with the scheme for public employment, this Court while laying down the law, has necessarily to hold that unless the appointment is in terms of the relevant rules and after a proper competition among qualified persons, the same would not confer any right on the appointee. If it is a contractual appointment, the appointment comes to an end at the contract, if it were an engagement or appointment on daily wages or casual basis, the same would come to an end when it is discontinued. Similarly, a temporary employee could not claim to be made permanent on the expiry of his term of appointment. It has also to be clarified that merely because a temporary employee or a casual wage worker is continued for a time beyond the term of his appointment, he would be entitled to be absorbed in regular service or made permanent, merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant rules. It is not open to the Court to prevent regular recruitment at the instance of temporary employees whose period of employment has come to an end or of ad hoc employees who by the very nature of their appointment, do not acquire any right. The High Courts acting under Article 226 of the Constitution, should not ordinarily issue directions for absorption, regularisation, 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 the 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 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.

6. However, their Lordships have given some relaxation to the irregularly

appointed persons who have worked for 10 years or more in paragraph 53 which is quoted herein below:

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. Nagarajan 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 bye-passing of the constitutional requirement and regularizing or making permanent, those not duly appointed as per the constitutional scheme.

7. Applying the principle laid down by the Supreme Court in the instant case, I would first like to discuss some of the relevant facts. In 1982-83, the appellant approached the Deputy Commissioner, Godda by filing an application for appointment in Class-IV post in the PHED. The said application was entertained by the Deputy Commissioner who was the appointing authority and allowed the petitioner to work on muster roll. Since the work of the petitioner was very satisfactory, the Executive Engineer, PHED, Godda in the year 1987 recommended the case of the petitioner for appointment in Class-IV post which was lying vacant. In the year 1988, the Superintending Engineer, PHED also recommended the case of the petitioner to the Chief Engineer, PHED for his appointment in Class-IV post. The Chief Engineer, in his turn, vide letter dated 31.8.1990 directed the Superintending Engineer, PHED to take a decision himself for adjustment of services of the petitioner since he was competent to do so. The recommendation for adjustment/regularization of the petitioner's services remained pending and the petitioner continued in service for more than 23 years and still he has been working on the said post. It is not the case of the respondents that the petitioner was illegally appointed, rather it has been admitted that the petitioner has been working for more than 24 years. The only case of the respondents is that since the petitioner has been in the work-charged establishment where there is no sanctioned post, appointment of the petitioner on regular post is not possible.

8. As noticed above, the respondents' case in the counter affidavit is that the petitioner was engaged in the year 1983 in work-charged establishment. In the united Bihar, now successor States of Bihar and Jharkhand, there were establishments of different nature such as, permanent establishment, known as regular establishment, temporary establishment and work-charged establishment. The work-charged establishment are found only in Works Departments, such as, Public Works Department (PWD) now known as Road Construction* Department and Building Department, Public Health Engineering Department (PHED) now known as Drinking Water and Sanitation Department, Irrigation and Minor Irrigation Department, etc.

9. For the purpose of execution of work in these departments and also for the purpose of establishment and classification of the Departments, the State of Bihar framed a Code known as Bihar Public Works Department Code (PWD Code). Rule 59 of the PWD Code deals with work-charged establishment which reads as under:

59. Works establishment will include such establishment as is employed, upon the actual execution, as distinct from the general supervision of a specific work or of sub-works of a specific project, or upon the subordinate supervision of departmental labour, stores and machinery in connection with such work or sub-work. When employees borne on the temporary establishment are employed on work of this nature, their pay should, for the time being, be charged direct to works.

Note 3.--Below Rule 59 being also relevant is quoted hereunder:

Note 3.--Posts borne on work-charged establishments which are required throughout the year for maintenance works, etc., or for a long and indefinite period should be made permanent and included in the. Permanent establishment with the approval of Government.

10. From bare reading of the aforesaid provisions, it is manifestly clear that persons are engaged in the work-charged establishment as per the need and requirement for the purpose of execution of works in the aforementioned departments like Water and Sanitation Department, Irrigation Department, Road Construction Department, etc. It is made clear in Note-3 that the post borne on work-charged establishment which are required throughout the year for maintenance works, etc. or for a long and. indefinite period, should be made permanent and included in the permanent establishment with the approval of the Government. The State of Bihar laid down conditions of services of the work-charged employees which was circulated vide Finance Department memo No. 1344 dated 4th February, 1949 which is quoted herein under:

Subject.--Revised conditions of service of work-charged establishment.

The existing distinction between work-charged establishment temporary and permanent establishment and daily labour as given in the PW Code and PWD

Accounts Code will be maintained but the conditions of service of work-charged establishment will henceforth be identical with those of temporary Government servants.

The posts in work-charged establishment which are of permanent nature, that is required for 12 months in the year and for long and indefinite period will be made permanent and included in permanent establishment and the men employed on these posts, having one year's approved service will be included amongst permanent Government employees. Details in this connection are being worked out and till this is done the conditions of service applicable to temporary Government servants will apply to all work-charged posts. [Vide F.D. Memo No. 1344 dated 4.2.1949].

11. In the year 1950 the Government of Bihar framed a rule under proviso to Article 309 of the Constitution of India, whereby, all Enactments, Rules and orders, regulating recruitment and condition of services of persons, appointed under the State, which were in force immediately before 26th January, 1950, were declared to be rule, as if made under proviso to Article 309 of the Constitution of India. This was Gazetted on 26th April, 1950 and is quoted hereunder:

Bihar Gazette

P.T. 2(11) No. 17, dated 26th April, 1950

Political and Appointment Department, Government of Bihar

Notification No. 3555-3L/27/50-A, dated 15th April, 1950

In exercise of power conferred by the proviso to Article 309 of the Constitution of India, the Governor of Bihar is pleased to make the following rules, namely:

All enactments, rules and orders, which are made under any enactment or otherwise, which regulated the recruitment and condition of services of persons appointed through public services and posts in connection with the affairs which are now the affairs of the State of Bihar and which are enforced immediately before the 26th January, 1950, shall until provision is made by or under any act of the State Legislature to regulate such recruitment and conditions of service, be enforced as if they had been made by virtue of the power under the said proviso.

By the Order of Governor, Bihar

Sd/- L.P. Singh Chief Secretary

12. Note-3 appended with Rule 59 as quoted hereinabove cast an obligation on the officers to see that the posts borne on work-charged establishment which are required throughout the year for the maintenance of work for along and indefinite period are to be made permanent and included in the permanent establishment with the approval of the Government. The members of the work-

charged establishment had no separate conditions of services till the statutory rules framed under the proviso of Article 309 of the Constitution. Following the said rule, the State of Bihar from its different work departments regularized the services of work-charged employees by taking over their services in the permanent establishment. Generally their cases were used to be considered on completion of 10 years of service in the work-charged establishment. However, recently, the State of Bihar vide Government decision dated 15.5.2005 deleted paragraphs 59, 60, 61 and 62 of the Code by inserting paragraphs 15-A, 103-A, 158-A, 169-A and 180(2)(a). The State of Jharkhand, however, has not deleted the rule till date.

13. Be that as it may, the admitted facts are that the petitioner was engaged in 1983 in the work-charged establishment and for the last 25 years, he has been working in the work-charged establishment without any break which itself shows that the post in which the petitioner was engaged has been continuing for the last 25 years. It is worth to be noted here that there was or is no rule for engaging daily wages or temporary employee in the work-charged establishment for reason that persons are engaged to execute the work as per requirement. At this juncture, I would again like to quoted para 19 of the Constitution Bench judgment in Uma Devi's case (supra) which reads as under:

19. One aspect arises. Obviously, the State is also controlled by economic considerations and financial implications of any public employment. The viability of the department or the instrumentality of the project is also of equal concern for the State. The State works out the scheme taking into consideration the financial implications and the economic aspects. Can the Court impose on the State a financial burden of this nature by insisting on regularisation or permanence in employment, when those employed temporarily are not needed permanently or regularly? As an example, we can envisage a direction to give permanent employment to all those who are being temporarily or casually employed in a public sector undertaking. The burden may become so heavy by such a direction that the undertaking itself may collapse under its own weight. It is not as if this had not happened. So, the Court ought not to impose a financial burden on the State by such directions as such directions may turn counterproductive.

14. In the light of the observation made by the Supreme Case, I am of the opinion that if the petitioner is absorbed in the regular establishment, then it will not create any financial implications and there shall not be financial burden on the State for the reason that the post in which the petitioner has been working for the last 25 years is permanently and regularly needed by the department.

15. After giving my anxious consideration, I am of the definite view that absorption of the petitioner in the regular establishment will not be against the principle laid down by the Supreme Court in Uma Devi's case (supra).

16. For the reasons aforesaid, this appeal is allowed and the judgment and order

passed by the learned single Judge is set aside. Accordingly, the respondents are directed to absorb the petitioner in regular establishment as expeditiously as possible.

D.G.R. Patnaik, J.

17. I agree.