
(2006) 08 UK CK 0065

In the Uttarakhand High Court

Case No : Writ Petition No. 2309 (SS) of 2001

Naresh Kumar and Others

APPELLANT

Vs

State of Uttaranchal and Others

RESPONDENT

Date of Decision : 14-08-2006

Acts Referred:

Citation : (2007) 1 UC 641

Hon'ble Judges : Rajesh Tandon, J

Bench : Single Bench

Advocate : Sri Pankaj Miglani, for the Appellant; Standing Counsel for Respondents No. 1 to 3, for the Respondent

Final Decision : Dismissed

Judgement

Hon'ble Rajesh Tandon, J.—Heard Sri Pankaj Miglani, Advocate for the Petitioners and Standing Counsel for the Respondents No. 1 to 3.

2. By the present writ petition, the Petitioner has prayed for a writ of mandamus directing the Respondents to regularize the services of the Petitioners as Class-IV employees in Kanhaiya Lal Polytechnic, Roorkee, District-Haridwar and to pay them the regular pay-scale, bonus and other requisite benefits and arrears admissible to them as a Class-IV employee.

3. Briefly stated, the institution known as Kanhaiya Lal Polytechnic, Roorkee has been established by the State Government. According to the Petitioners Hostel is a part of the Institution, which has been established by the State Fund and the Petitioners were appointed as a Class-IV employees in the aforesaid institution in accordance with the date of appointment mentioned against their names by opposite party No. 5, who is the head of the institution and is the appointing authority of the Petitioners. The name along with the date of appointment is as follows:

Name of the employee Date of Appointment

1. Naresh Kumar 19-04-1986
2. Hari Singh 05-10-1986
3. Ram Hirday 01-06-1985
4. Satya Pal 01-04-1984"

4. The Petitioners have submitted that from the date of appointment, they are working in the institution as Class-IV employees and some times they have been shifted at Hostel and some time to the College and therefore, they are entitled for all the benefits on the ground of equal pay for equal work.

5. A counter affidavit has been filed by the State, where it has been stated in paragraph 4 that Kanhaiya Lal Polytechnic, Roorkee has been established by the Government of U.P. and is aided by the State Government under the control of Director Technical Education and the Hostel where the Petitioners are working is a separate and independent entity and neither there is any regular substantive post for Class-IV category and nor the same is aided by the State Government, but the same is being maintained from the income of rent received from the students. It has further been stated in the counter affidavit that there was no regular vacancy and there is no permanent requirement of any Class-IV staff.

6. Another counter affidavit has been filed by the Standing Counsel, where in paragraph (B), it has been stated that Kanhaiya Lal Polytechnic Roorkee was earlier functioning as an aided Polytechnic by the erstwhile State of U.P. Now it is functioning under the State of Uttaranchal and is un-aided Polytechnic and the financial aid is given to the College against the post sanctioned by the Government from time to time and the Petitioners were never appointed against the sanctioned posts and therefore, there is no occasion for regularization in the services. The management of Kanhaiya Lal Polytechnic Roorkee has employed them as temporary on work charge basis and they are paid for their work out of the rent received from the students. The Hostel is neither a part of the Polytechnic nor is being aided by the State of Uttaranchal, therefore, the grievance of the Petitioner to regularize them does not arise at all.

7. In paragraph 6 of the Rejoinder Affidavit, the Petitioner has pointed out certain grants, which has been given to the Institution. Relevant paragraph 6 to that effect is quoted below:

6. That the contents of paragraph No. 3 D is totally wrong, misconceived, false, misleading and hence is emphatically denied. It is pertinent to mention here that Ishwar Dayal Memorial Hostel is not an independent identity, initially the said IDM Hostel was constructed out of Government Funds and until now the Government use to fund the same from time to time manage the building and other assets pertaining to the aforesaid hostel in the same manner as it do for the upkeep of K.L. Polytechnic. It is pertinent to mention here that on 23-3-2005 Rs. 2.1 Lacs were sanctioned for the upkeep of K.L. Polytechnic and thereafter letter dated 25-11-2005 was issued by the Chief Development Officer, Haridwar

had asked for the details of the expenditure in respect of the aforesaid grant. In reply of the aforesaid letter dated 25-11-2005 was issued by the Chief Development Officer, Haridwar had asked for the details of the expenditure in respect of the aforesaid grant. In reply of the aforesaid letter dated 25-11-2005 Respondent No. 5 had got the report prepared, the bare perusal of which would reveal that the 2/3rd part of the aforesaid grant was utilized by the institution for the IDM hostel. Had the said IDM Hostel being the independent identity and not getting the grant of any kind, no part of the aforesaid grant would have been utilized for its purposes.

8. However, taking into account the entire facts, it has not where given that the Petitioners was appointed on the sanctioned post and also according to the rules after the advertisement of the vacancy.

9. It has held been in Secretary, State of Karnataka and Others Vs. Umadevi and Others, that there may be circumstances where temporary on daily wages additional employees have to kept without following the required procedure to discharge the duties in respect of the posts that are sanctioned and that are required to be filled up in terms of the relevant procedure for the temporary posts or project. The Apex Court has observed as under:

12. In spite of this scheme, there may be occasions, when the sovereign State or its instrumentalities will have to employ persons, in posts which are temporary, on daily wages, as additional hands or taking them in without following the required procedure, to discharge the duties in respect of the posts that are sanctioned and that are required to be filled in terms of the relevant procedure established by the Constitution or for work in temporary posts or projects that are not needed permanently. This right of the Union or of the State Government cannot but be recognized and there is nothing in the Constitution which prohibits such engaging of persons temporarily or on daily wages, to meet the need of the situation. But the fact that such engagements are resorted to, cannot be used to defeat the very scheme of public employment. Nor can a court stay that the Union or the State Governments do not have the right to engage persons in various capacities for a duration or until the work in a particular project is completed. Once this right of the Government is recognized and the mandate of the constitutional requirement for public employment is respected, there cannot be much difficulty in coming to the conclusion that it is ordinary not proper for the Courts whether acting under Article 226 of the Constitution or under Article 32 of the Constitution, to direct absorption in permanent employment of those who have engaged without following a due process of selection as envisaged by the constitutional scheme.

14. During the course of the arguments, various orders of the courts either interim or final were brought to our notice. The purport of those orders more or les was the issue of directions for continuation or absorption without referring to the legal position obtaining. Learned Counsel for the State of Karnataka submitted that chaos has been created by such orders without reference to the

legal principles and it is time that this Court settled the law once and for all so that in case the Court finds that such orders should not be made, the courts, especially, the High Courts would be precluded from issuing such directions or passing such orders. The submission of Learned Counsel for the Respondents based on the various orders passed by the High Court or by the Government pursuant to the directions of the Court also highlights the need for settling the law by this Court. The bypassing of the constitutional scheme cannot be perpetuated by the passing of orders without dealing with and deciding the validity of such orders on the touchstone of constitutionality. While approaching the questions falling for our decision, it is necessary to bear this in mind and to bring about certainty in the matter of public employment. The argument on behalf of some of the Respondents is that this Court having once directed regularization in Dharwad case all those appointed temporarily at any point of time would be entitled to be regularized since otherwise it would be discrimination between those similarly situated and in that view, all appointments made on daily wages, temporarily or contractually, must be directed to be regularized. Acceptance of this argument would mean that appointments made otherwise than by a regular process of selection would become the order of the day completely jettisoning the constitutional scheme of appointment. This argument also highlights the need for this Court to formally lay down the law on the question and ensure certainty in dealings relating to public employment. The very divergence in approach in this Court, the so-called equitable made in some, as against those decisions which have insisted on the rules being followed, also justifies a firm decision by this Court one way or the other. It is necessary to put an end to uncertainty and clarify the legal position emerging from the constitutional scheme, leaving the High Courts to follow necessarily, the law thus laid down.

9. The Apex Court has also interpreted the between regularization confirmed and permanent in services. Their Lordships have held as under:

15. Even at the threshold, it is necessary to keep in mind the distinction between regularization and conferment of permanence in service jurisprudence. In *State of Mysore and Another Vs. S.V. Narayanappa*, this Court stated that it was a misconception to consider that regularization meant permanence. In *R.N. Nanjundappa Vs. T. Thimmiah and Another*, this Court dealt with an argument that regularization would mean conferring the quality of permanence on the appointment. This Court stated: (26 SCC 416 17)

Counsel on behalf of the Respondent contended that regularization would mean conferring the quality of permanence on the appointment whereas counsel on behalf of the State contended that regularization did not mean permanence but that it was a case of regularisation of the rules under Article 309. Both the contentions are fallacious, If the appointment itself is in infraction of the rules or if it is in violation of the provisions of the Constitution illegality cannot be regularized. Ratification or regularization is possible of an act which is within the

power and province of the authority but there has been some non-compliance with procedure or manner which does not go to the root of the appointment. Regularisation cannot be said to be a mode of recruitment. To accede to such a proposition would be to introduce a new head of appointment in defiance of rules or it may have the effect of setting at naught the rules.

16. In *B.N. Nagarajan and Others Vs. State of Karnataka and Others*, this Court clearly held that the words "regular or "regularization" do not connote permanence and cannot be construed so as to convey an idea of the nature of tenure of appointments. They are terms calculated to condone any procedural irregularities and are meant to cure only such defects as are attributable to methodology followed in making the appointments. This Court emphasized that when rules framed under Article 309 of the Constitution are in force, no regularization is permissible in exercise of the executive powers of the Government under Article 162 of the Constitution in contravention of the rules. These decisions and the principles recognized therein have not been dissented to by this Court and on principle, we see no reason not to accept the proposition as enunciated in the above decisions. We have, therefore, to keep this distinction in mind and proceed on the basis that only something that is irregular for want of compliance with one of the elements in the process of selection which does not go to the root of the process, can be regularized and that it alone can be regularized and granting permanence of employment is a totally different concept and cannot be equated with regularization.

17. We have already indicated the constitutional scheme of public employment in this country, and the executive, or for that matter the court, in appropriate cases, would have only the right to regularize an appointment made after following the due procedure, even though a non-fundamental element of that process or procedure has not been followed. This right of the executive and that of the court would not extend to the executive or the court being in a position to direct that an appointment made in clear violation of the constitutional scheme, and the statutory rules made in that behalf, can be treated as permanent or can be directed to be treated as permanent.

10. In view of the aforesaid, the Petitioners cannot have a legal right for regularization and no relief can be granted in favour of the Petitioners.

11. However, it is made clear that in case the posts are sanctioned and Respondents require their duties at any point of time, liberty is given to the Petitioners to apply afresh and the same shall be considered in accordance with law.

12. Consequently, subject to above, writ petition lacks merit and is dismissed. No order as to costs.