
(2008) 08 AHC CK 0303
In the Allahabad High Court

Radhey Shyam Nishad

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 20-08-2008

Acts Referred:

Constitution of India, 1950 — Article 14, 16

Citation : (2009) 1 AWC 686 : (2008) 3 UPLBEC 2550

Hon'ble Judges : Tarun Agarwala, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Tarun Agarwala, J.—Heard Shri R.P. Ram, the learned Counsel for the petitioner and the learned Standing Counsel appearing for the respondents.

2. The petitioner has filed the present writ petition for the quashing of the orders dated 19.10.1996, 16.12.2005, 26.08.2006 and 29.08.2006, and further has prayed for a writ of mandamus commanding the respondents to regularise the petitioner on the post of Operator Gr. I. The facts leading to the filing of the writ petition is, that the petitioner was appointed on work charge as a Motor Boat Driver/Operator in the Irrigation Department in the year 1971, and since then, is working on that post. The petitioner alleged that the services of 19 other employees in the Irrigation Department, who were junior to the petitioner, have been regularised, and that the petitioner has been discriminated and, has not been regularised in the service of the Department, for reasons best known to the respondents. The details of the persons, who were junior to the petitioner, and who have been regularised, has been mentioned in paragraph 3 of the writ petition. The petitioner further contended that he is working continuously without any break in service, and that, he made a representation in the year 1995 for the regularisation of his services, which remained pending, and consequently, Writ Petition No. 41 of 1996 was filed, which was disposed of by an order dated 8th of January, 1996, directing the Superintending Engineer to decide the representation. Even this direction was not complied with, and the petitioner had

to file a contempt application, as a result of which, the Executive Engineer issued an order dated 19th of October, 1996, appointing the petitioner as a temporary employee on the post of Mate in the pay-scale of Rs. 775-1025/-. Since the petitioner was working as an Operator and was getting a higher pay-scale, he refused, and made a representation dated 30th January, 1997, praying that he should be given the pay-scale of an Operator in the pay-scale of Rs. 1200-2040/-. This representation remained pending and the petitioner again approached the writ Court by filing Writ Petition No. 31403 of 1997. The writ Court, by an order dated 27th August, 2004, disposed of the writ petition directing the authorities to decide the representation. Even this direction of the Court was not complied with, and accordingly, the petitioner filed another contempt application, and on the fear of the contempt proceedings, the respondents, by an order dated 16th December, 2005, rejected the representation of the petitioner, refusing to regularise his services, on the short ground that there was no sanctioned post of an Operator. The petitioner, being aggrieved by the said order, has filed the present writ petition.

3. The petitioner contended that four posts of Operator was existing in the office of the Superintending Engineer in Obra in district Sonbhadra, and that, various Government Orders had been issued from time to time, with regard to the regularisation of work charge employees in the Irrigation Department, which has not been adhered to by the authorities.

4. The respondents, in their counter affidavit, have admitted in paragraph 4 that the petitioner was appointed on the post of Motor Boat Driver/Operator and that his services could not be regularised as there was no vacancy in the Division/ Circle of the Irrigation Department. The respondents further admitted that the services of the petitioner was regularised on the post of Mate, which the petitioner did not accept, as he was getting a higher salary, and that, the post of Operator Gr. I was not available, and therefore, the petitioner's services could not be regularised. In paragraph 12 of the counter affidavit, the respondents admitted that 4 posts of operator was available in Obra in district Sonbhadra, but it was not possible for the respondents to regularise the petitioner on that post, and that, the same could only be done by the Chief Engineer (Zonal) of Sonbhadra Division.

5. Based on the aforesaid averments, made in the counter affidavit, the Court issued an order dated 26th April, 2006, directing the Superintending Engineer to send his comments to the Chief Engineer, who, in turn, would issue the necessary directions to the Chief Engineer (Zonal), and who will decide the claim of the petitioner. It transpires that, based on the aforesaid direction, the Executive Engineer issued an order dated 26th August, 1986, appointing the petitioner on the post of Operator in the pay-scale of Rs. 2610-3540/-. It was contended that the order was passed by the Executive Engineer upon the directions of the Chief Engineer (Zonal) and the Superintending Engineer, and that, the petitioner was regularised off the post, which was vacant in Obra in

district Sonbhadra. The petitioner, being aggrieved by this order, filed an amendment application, which was allowed, and an additional prayer was made for quashing of this order dated 26th August, 2006 on the ground that the petitioner was receiving a higher pay-scale and was entitled to be regularised as an Operator Gr. I in the pay-scale of Rs. 4000-6000/-.

6. The Court has heard the parties at some length and has also perused the original record as well as the service book of the petitioner, which was produced by the respondents, as per the directions of the Court. From the counter affidavit, filed by the respondents, it is clear that the petitioner was appointed in the year 1971 on the post of Motor Boat Driver/Operator. The said appointment was made on a non-existing post. No effort was made by the Department to create a post of Operator, nor any effort was made by the respondents to dispense the services of the petitioner on account of non-existence of a post. The service record, on the other hand, discloses that from time to time the petitioner was given an increment, and as and when the pay-scale of Operator was revised, the petitioner was given the said pay-scale. Consequently, for all practical purposes, the respondents were treating the petitioner as a confirmed employee. The service book clearly indicates that all the benefits of a confirmed employee was being given to the petitioner.

7. However, when the time came to regularise the services of the petitioner, a strange stand was adopted by the respondents, namely, that the services of the petitioner could not be regularised because there is no vacant post. If there was no vacant post, the respondents should have dispensed with his services, but, they chose not to do so, because the respondents required the services of the petitioner to operate the motor boat on the rivers of Allahabad to take the officials up and down the river. The respondents, in their counter affidavit, have admitted that juniors to the petitioner have been regularised, and that the services of the petitioner could not be regularised as there was no vacant post.

8. For the sake of repetition, the petitioner was appointed in 1971, and till date, the stand taken by the respondents after 38 years is, that there is no vacant post of Operator in the Circle/Division at Allahabad, and eventually, when the Court directed by an order dated 26th August, 2006, the respondents regularised the services of the petitioner on the post of Operator on a vacant post existing in Sonbhadra, and that too, on a lower pay-scale. The respondents in their supplementary counter affidavit dated 29th March, 2007, admitted that the regularisation of the petitioner on the post of Operator is on a lower pay-scale than what the petitioner is drawing as on date, and that, the question of protection of his last pay-scale can only be considered by the Department only when the petitioner joins the post.

9. In the light of the aforesaid, the admitted position is, that the petitioner was appointed on the post of Motor Boat Driver/Operator in 1971 on a non-existing post, and that, no sanctioned post of Motor Boat Driver/Operator is existing as on date in the Circle/Division of the Irrigation Department. These admitted facts

indicates the unfair labour practice adopted by the Irrigation Department. The Irrigation Department, which is part and parcel of the State machinery, is required to act as a model employer, and is not required to adopt an unfair labour practice. No effort has been made by the Department to create a post or ask the Government for sanctioning of a post. Further, juniors to the petitioner have been regularised. The petitioner has clearly been discriminated. The Court further finds that different stand has been taken by the respondents at different moment of time. Initially, the respondents took a stand that the services of the petitioner could not be regularised because there was no vacancy existing on the post of Operator Gr. I in the Circle/Division, and now, after the respondents have regularised the services of the petitioner on the post of Operator, a stand has been taken that the said regularisation is on account of the educational qualification which the petitioner possesses, and, on that basis, the petitioner could only be regularised on the post of Operator and not on the post of Operator Gr.I. The respondents have not considered the length of service, which the petitioner has put in on the post in which he was working. Thirty seven long years gives a sufficient experience to a person for being considered on a post, irrespective of the fact, whether he has the requisite qualification or not. Further, requisite qualification is a necessary ingredient when an appointment is made through direct recruitment, but is not the only essential factor when regularisation is to be considered. Length of service experience becomes an essential ingredient also for consideration for regularisation of the service. The respondents are totally adopting an unfair labour practice. If the petitioner was not qualified, then how has the respondents allowed the petitioner to function as a Motor Boat Driver/Operator for 37 long years, and when the question of regularisation comes into play, the respondents have the audacity and the cheek to suggest that the petitioner did not have the requisite education qualification, and therefore, could not be regularised on the post of Operator Gr. I.

10. In my opinion, the stand taken by the respondents is a clear indication of the unfair labour practice adopted by the respondents. A feeble attempt was also made by the respondents to take refuge to a decision in Secretary, State of Karnataka and Others Vs. Umadevi and Others, wherein, the Supreme Court has held that a back door entry cannot be permitted for such employees, who have been appointed illegally. Further, reliance was made on another Division Bench of this Court in Amit Kumar Sharma and Ors. v. State of U.P. and Ors. 2008 All CJ 493, wherein, it was held that a daily wager cannot claim that he was holding a post and cannot claim parity with regular employees of the establishment. In my opinion, the judgment cited by the respondents are clearly distinguishable. There is nothing to indicate that the appointment of the petitioner was ex facie illegal or de hors the rules. The only error was that the petitioner was appointed on a non-existing post. But then, the petitioner was not at fault and the respondents are totally responsible for allowing the petitioner to continue in service for 37 years, on a non-existing post. The illegalities committed by the respondents would have been cured by the creation of a post.

11. As I have held that for 37 long years the petitioner has been functioning on a non-existing post, and the Department made no effort to dispense his services or to create a post for his absorption. Further, admittedly, juniors to the petitioner have been regularised and the petitioner has been discriminated. Consequently, the policy adopted by the respondents is clearly arbitrary and violative of Articles 14 and 16 of the Constitution. In matters of public employment, the respondents cannot choose a policy of "pick and choose" by absorbing juniors to the detriment of the petitioner. This Court further finds that the order of regularisation has been made on a post lower than what the petitioner has claimed. Further, no effort has been made to give the petitioner the pay protection, which he is entitled to, under law, since he was receiving a higher pay-scale.

12. In view of the aforesaid, the writ petition is allowed. The impugned orders dated 19.10.1996, appointing the petitioner on the post of Mate, and the order dated 26th August, 2006, appointing the petitioner on the post of Operator, are quashed. The order dated 16.12.2005, rejecting the representation of the petitioner, is also quashed. A writ of mandamus is issued, commanding the respondents to regularise the services of the petitioner on the post of Operator Gr. I w.e.f. one day before the date juniors to the petitioner were regularised in the services of the Department. Consequential benefits that will flow from the regularisation will follow and the petitioner's pay would be recalculated accordingly. In the event the pay of the petitioner works out to be less than what he was being paid at the relevant moment of time, the difference will not be recovered from the petitioner, and that, the petitioner would be granted the pay protection. In the event, the petitioner is entitled for a higher pay after recalculation, the arrears, if any, would be paid to the petitioner within six weeks from the date of the production of a certified copy of this order.