
(2001) 03 AHC CK 0074

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 39455 of 1999

Rajendra Prasad and Ors.

APPELLANT

Vs

Engineer-in-Chief, Public Works Department, U.P. & Ors.

RESPONDENT

Date of Decision : 02-03-2001

Acts Referred:

Citation : (2001) 03 AHC CK 0074

Hon'ble Judges : Bharati Sapru, J

Final Decision : Allowed

Judgement

Bharati Sapru, J.—Heard learned Counsel for the petitioners Ms. Sunita Agarwal, learned Standing Counsel appearing on behalf of the respondents No. 2 to 7 and Sri V.K. Singh appearing on behalf of respondents No. 8 to 18.

2. There are five petitioners in the present petition who have challenged the orders dated 111998 and 861999 passed by the Chief Engineer, P.W.D. Lucknow and consequent order passed by the Superintending Engineer, Gorakhpur Circle, P.W.D. on 3181999 and the last order dated 892006 passed by the Superintending Engineer, Gorakhpur Circle, P.W.D. Gorakhpur.

3. By the orders dated 111998, 861999 and 3181999, respondents No. 8 to 18 who were work charged cleaners were promoted as work charged drivers. By the order dated 892006 respondents No. 8 to 18 who were working as work charged drivers have been regularized to the post of regular drivers.

4. The facts of the case are that the petitioners No. 1 to 5 were appointed as regular cleaners in the regular establishment of the Public Works Department, Gorakhpur. The date of the regular appointments are given below :

(1) Rajendra Prasad 131970

(2) Chanman 141990

(3) Shambhoo Sharan Pandey 131980

(4) Mattan 131971

(5) Madan Mohan Lal 131971

5. Other than the regular establishment, the Public Works Department, Gorakhpur also has a work charged establishment. The respondents No. 8 to 18 who were working as work charged cleaners and were being paid fixed salary in lump sum Rs. 1,800/per month. The status of respondents No. 8 to 18 was clearly that of work charged employees.

6. The petitioners who are working as cleaners contend that although they have been appointed as cleaners but all the petitioners No. 1 to 5 had requisite qualifications to hold the post of driver. They all had in their possession driving licences to drive heavy vehicles such as road roller and those licences had been issued to them by the competent Road Transport Authority.

7. Now the Public Works Department at any place including Gorakhpur where the present petitioners were situated, has a number of heavy vehicles to fulfil the work of the construction and repairs, which is line of the business of the Public Works Department. All these vehicles, which are being used by Public Works Department, are heavy vehicles and the post of driver are of permanent nature. When the work increases, the Public Works Department has at its disposal a work charged establishment also, which engages both work charged cleaners as well as work charged drivers. These work charged employees as has been stated earlier are used on project work i.e., if any, special or extra work, or exigency occurs then the work charged establishment is brought to aid.

8. The petitioners whose undisputed position is that of the regular cleaners contend that the petitioners have been used from time to time by the Department to drive heavy vehicles such as rollers and trucks in the regular establishment as well as work charged establishment and therefore, the petitioners contend that they are fully eligible for being promoted on the post of driver. The petitioners have given details in the writ petition of the various rollers, which have been driven by them. Having given the details of their experience in driving heavy vehicles such as road rollers, the petitioners contend that they have both experience and requisite educational qualifications to be appointed as regular drivers in the establishment and therefore, it is the prayer of the petitioners that they should be promoted as regular drivers.

9. Despite making representations from time to time, the petitioners have not been granted promotion as regular drivers.

10. It is the grievance of the petitioners that although the petitioners are not being given promotions from the post of regular cleaners to regular drivers in the establishment, the respondents No. 8 to 18 who are work charged cleaners were wrongly promoted by an order dated 111998 on the demand raised by the Government Transport Drivers Union, P.W.D. Lucknow.

11. The petitioners' grievance is that even though this could not have been done

by a further order dated 861999, the qualifications for promotion to the post of a driver were clarified and it was clarified that no educational qualification was required and only a three years old driving licence and experience for driving the vehicle would be sufficient.

12. The petitioners' other grievance is that in furtherance to the order dated 861999, another order was passed which is also impugned in the present writ petition i.e. the order dated 3181999 by which the Superintending Engineer, Gorakhpur Circle, Gorakhpur passed an order for promotion of 11 work charged cleaners i.e. respondents No. 8 to 18 as work charged drivers.

13. The petitioners' further grievance is that the act of promotion completed by the respondents on 3181999 was illegal and arbitrary and could not have been done and in further perpetuation of the illegality, another order has been passed on 892006 issued by the Superintending Engineer, Gorakhpur Circle, Gorakhpur, by which the respondents No. 8 to 18 who were promoted on 3181999 had been working as work charged drivers in the work charged establishment, have been regularised in the regular establishment by the impugned order dated 892006.

14. The petitioners' grievance is that the order dated 892006 is wholly illegal and arbitrary and such regularization of the work charged cleaner/driver is wholly arbitrary and de hors the rules. Such regularization of the work charged cleaner/driver as regular driver in the establishment has prejudiced the case of the petitioners severely because they have been denied the opportunity of being considered as regular drivers because the vacancies, which occurred, were not advertised and made open to the public at large resulting in denial to all concerned.

15. Learned Counsel for the petitioners has argued that it is wellsettled that the work charged establishment and regular establishment are two separate and distinct establishments and the employees of the two establishments belong to two separate classes/cadres. The work charged employees cannot be treated at par with regular employees and all benefits available to regular employees cannot be given to them.

16. Learned Counsel for the petitioners has placed reliance on the decision of the Hon'ble Supreme Court in the case of Jaswant Singh v. Union of India, (1979) 4 SCC 440 and also the case of State of Rajasthan v. Kunjiraman, (1997) 2 SCC 517, in which the Hon'ble Supreme Court has held that a workcharged establishment differs from a regular establishment which is permanent in nature. Setting up and continuance of a workcharged establishment is dependent upon the Government undertaking a project or a scheme or a 'work' and availability of funds for executing it. So far as employees engaged in workcharged establishments are concerned, not only their recruitment and service conditions but the nature of work and duties to be performed by them are not the same as those of the employees of the regular establishment. As stated earlier, a regular establishment and a workcharged establishment are two separate types of

establishments and the persons employed in those establishments come from two separate and distinct streams.

17. Learned Counsel for the petitioners further submit that in the present case, respondent Nos. 8 to 18 who were work charged cleaners engaged in the work charged establishment, were in fact, placed on a better footing than the petitioners who are cleaners in the regular establishment. Even though the nature of work and duties performed by the work charged cleaners were not permanent in nature.

18. Learned Counsel for the petitioners submit that the respondents No. 8 to 18 have in fact entered through the back door and were firstly given the benefit of promotion as the work charged drivers on 3181999 and a further illegality was perpetuated by regularizing their illegal appointments by passing the order of regularization dated 892006.

19. Learned Counsel for the petitioners has argued that such regularization of respondents No. 8 to 18 as regular drivers could not have been done as the procedure for appointment of drivers in Government Department is governed by U.P. Government Departments Drivers Service Rules, 1993 and under these rules, direct recruitment is only the source of recruitment for the post of drivers in the Government Department and statutory rules have been framed for the appointment of drivers, which are exhaustive and the Service Rules, 1993 do not contemplate promotion of even regular cleaners as regular drivers, much less that of work charged cleaners to work charged drivers. There is no channel of promotion from cleaner to driver and therefore, since the rules are exhaustive on this point that the procedure is well established that is all direct recruitment through determination of vacancies, notification through the Employment Exchange and advertisement in leading newspapers. No other procedure could have been followed except the procedure as laid down in Rules 16 and 17 of the Service Rules, 1993, which are quoted hereinbelow :

?16. Determination of vacancies. The appointing authority shall determine the number of vacancies to be filled during the course of the year as also the number of vacancies to be reserved for candidates belonging to Scheduled Caste, Scheduled Tribes and other categories under Rule 8. The appointing authority shall, notify the vacancies to the Employment Exchange in accordance with the rules and orders of the Government for the time being in force, and he may also advertise the vacancies in the leading newspapers.

17. Procedure for direct recruitment. (1) For the purpose of direct recruitment there shall be constituted a Selection Committee comprising :

(i) Appointing authority

Chairman

(ii) An officer belonging to Scheduled Caste or Scheduled Tribes nominated by the appointing authority, if the appointing authority does not belong to Scheduled

Tribes. If the appointing authority belongs to Scheduled Castes or Scheduled Tribes an officer other than belonging to Scheduled Castes or Scheduled Tribes, to be nominated by the appointing authority.

Member

(iii) Two officers nominated by the appointing authority, one of whom shall be an officer belonging to Minority community and the other belonging to Backward Class. If such suitable officers are not available in his department or organization, such officers shall on the request of the appointing authority be nominated by the concerned District Magistrate.

Member

(iv) Regional Transport Officer of the concerned region or his nominee not below the rank of Assistant Regional Transport Officer.

Member

(2) The applications received directly or through the Employment Exchange shall be scrutinized by the appointing authority, who shall call for an interview and driving test to such persons as appear qualified under these rules.

(3) The Selection Committee shall, after the interview and driving test prepare a list of candidates in order of their proficiency as disclosed by the aggregate of marks obtained by them in interview and driving test. If two or more candidates obtain equal marks, the Selection Committee shall arrange their names in order of merit on the basis of their general suitability for the post. The number of names in the list shall be large (but not large by more than 25 per cent) than the number of the vacancies. The Selection Committee shall forward the list to the appointing authority.?

20. Therefore, the learned Counsel for the petitioners has submitted that there are no regularization rules, which contemplate the regularization of work charged drivers and their appointments against the vacancies of the regular drivers in the regular establishment. Admittedly the two establishments are completely separate, not interchangeable and cannot thus be treated at par.

21. Learned Counsel for the petitioners has further submitted that the regularization cannot be adopted as a mode of the recruitment nor it can grant permanence to ad hoc employees. Learned Counsel for the petitioners argued that no Government order or notification or any circular can supplant statutory rules framed for their specific purpose and no appointment can, therefore, be made in deviation of or departure of the procedures as laid down in the Statute. In support of this argument, learned Counsel for the petitioners placed reliance on the decision of the Hon'ble Apex Court in the case of A. Umarani v. Registrar, Cooperative Societies & Ors., (2004) 7 SCC 112 and the decision in the case of Secretary, State of Karnataka v. Uma Devi, 2006(3) LBESR 260 (SC) : (2006) 4 SCC 1 (para 6, 34 and 37).

22. Learned Counsel for the petitioners has further argued that prejudice has been caused to the petitioners because by passing of the order dated 892006, the respondents No. 8 to 18 have been appointed as regular drivers and this has been done de hors the statutory rules i.e., the procedure as set out in the U.P. Government Departments Drivers Service Rules, 1993 has not been followed. Thus the appointments made on 892006 are de hors the above rules and has resulted in the denial of the fair opportunity to all including the petitioners, who might have applied. In support whereof, the learned Counsel for the petitioners has relied decision rendered in the case of Binod Kumar Gupta v. Ram Ashray Mahoto, (2005) 4 SCC 209 and has argued that because the appointments vide order dated 892006, has been made de hors the rules and without any advertisement or without following any selection procedure, it is liable to be set aside.

23. Learned Counsel for the petitioners has argued that the very existence of the respondents No. 8 to 18 from very inception of their entry is in the nature of an unauthorized entry, since they were never appointed against any sanctioned vacancy but were engaged only as work charged cleaners on a temporary basis, the question of their regularization against the vacancies in the regular establishment does not arise.

24. Learned Counsel for the petitioners has relied on a decision of the Hon''ble Supreme Court in the case of Secretary, State of Karnataka v. Uma Devi (supra) that for regularization, it is one of the preconditions that the initial entry of the employees must be made against an available sanctioned vacancy by following the rules and regulations governing such entry.

25. Learned Counsel for the petitioners further argued that initial entry of the respondents No. 8 to 18 as work charged cleaners and their subsequent promotions as work charged drivers were done without their being any rules and regulations for the same and they were never appointed against a duly sanctioned vacancy in the regular establishment.

26. Learned Counsel for the petitioners further argued that even assuming without admitting that the respondents No. 8 to 18 had any claim for regularization against the vacancies in the regular establishment then only those appointments could have been saved as per the judgment in the case of Secretary, State of Karnataka v. Uma Devi (supra) i.e., the employees who had worked more than ten years in the duly sanctioned post and had continued without any intervention of any order of the Courts or Tribunal. Only irregular appointments have been permitted to be regularized not the illegal appointments.

27. Learned Counsel for the petitioners has argued that the respondents No. 8 to 18 have not worked for a period of ten years for the work charged establishment as work charged drivers. They have been illegally promoted as work charged drivers on 3181999 and have been illegally regularized against regular vacancies of the drivers by the order dated 892006. The period intervening is less than ten

years and therefore, it cannot be said that they are entitled to the benefit granted in the case of Secretary, State of Karnataka v. Uma Devi (supra).

28. In fact, the learned Counsel for the petitioners has argued that the order of promotion dated 892006 was passed after the decision in Secretary, State of Karnataka v. Uma Devi (supra), which was delivered on 1042006 and therefore, an order of promotion was made in total disregard of the said decision.

29. Learned Counsel for the petitioners has further argued that even otherwise the respondents No. 8 to 18 were much junior to the petitioners No. 1 to 5 and has placed on record a chart to show their inter se vacancy position of the seniority.

30. Learned Counsel for the petitioners has also argued that in fact the respondents have admitted the order of promotion passed promoting work charged cleaners to work charged drivers was wrong, therefore, cancelled the process of promotion of work charged cleaners to work charged drivers made with effect from 3152000 but have saved the promotion order of respondents No. 8 to 18 by subsequent order dated 1262000.

31. Learned Counsel for the petitioners further argued that by the order dated 861999 the educational qualification for promotion was also dropped as well minimum required qualification for the post of driver under the Rules, 1993 and therefore, this also renders initial entry of respondents No. 8 to 18 illegal.

32. Learned Counsel for the petitioners further argues that the petitioners have been seriously prejudiced as even though they are appointed as regular cleaner in the regular establishment after following the due procedure as per rules and even though they have been doing the work of regular drivers and have been driving heavy vehicles like road rollers and trucks, no benefit of promotion has been given to the petitioners.

33. Learned Counsel for the petitioners further argues that no regular appointment of driver has been made by the respondent authorities from a very long time; no vacancy of the driver has been advertised for direct recruitment as per the Service Rules, 1993, as a result of which, the petitioners have been deprived of their legal claim for being appointed against the regular post of drivers and on the other hand, the persons such as the respondents No. 8 to 18 who have not been legally selected, have been given priority by the respondent authorities and have been adjusted against the regular post in a wholly arbitrary and illegal manner. Learned Counsel for the petitioners has, therefore, argued that the respondents should not be allowed to perpetuate the illegality.

34. Learned Counsel for the respondents No. 8 to 18 has made submissions as well as has filed his written submissions. Out of the several contentions as raised by the learned Counsel for the respondents No. 8 to 18, his main contention is that the respondents No. 8 to 18 are working in the work charged establishment and the post of driver in work charged division is ad hoc and the respondents No.

8 to 18 were getting his salary on contract basis. His argument is that the petitioners were holding regular posts of cleaners in the regular establishment, therefore, they could not have been promoted on the post of drivers in a work charged establishment.

35. Learned Counsel for the respondents has also argued that right to promotion in a service is a fundamental right and if a vacancy arises on the post of driver in the work charged establishment, then there could be no illegality in promoting such cleaner on the post of drivers.

36. Learned Counsel for the respondents No. 8 to 18 has however made no submissions with regard to the order dated 892006 by which the respondents No. 8 to 18 who have been absorbed as regular drivers in the regular establishment.

37. State has filed counteraffidavit as well as made its written submissions. In reply to the first contentions as made by the petitioners that the respondents No. 8 to 18 were wrongly promoted from work charged cleaners to work charged drivers, the State has filed response saying that it is not open to the petitioners to raise such contention because under the Rules framed for the appointment of the drivers working in Government department and including their service conditions, there is no provision for appointment of regular drivers by way of promotion from any cadre below noted. The State submits that under Rule 7 of the aforesaid Service Rules, 1993 there was only provision for direct recruitment of drivers.

38. The State has also stated on record that the order of promotion dated 111998 was issued by the respondents permitting the promotion of the work charged cleaners to the post of work charged drivers. The basis in the order of promotion made on 111998 was a demand raised by the employees union. After passing the impugned order of promotion on 111998, the State has clarified vide clarification issued by EngineerinChief on 2481999 indicating that the regular cleaners cannot be promoted to the post of regular drivers as there is no provision in the Service Rules for any such promotion but only work charged cleaners can be promoted to the post of work charged drivers.

39. The State has again clarified that this power too was withdrawn by way of the circular dated 3152000. The system of promoting a work charged cleaner to a work charge driver was withdrawn and finally by the Government order dated 13122000 which contemplates promotion of the work charged cleaner to the post of work charged driver was finally stopped.

40. The State admits that the work charged cleaners were wrongly promoted as work charged drivers but because some promotions such as that of respondents No. 8 to 18 were made prior to the circular dated 3152000, the same were saved.

41. In response to the other submissions as made by the petitioners, the State has submitted that there is no channel of promotion in the Service Rules, 1993,

which are applicable to the petitioners who are work charged regular cleaners, could have been promoted as regular drivers. The only source of recruitment to the post of a regular driver in the regular establishment is by way of regular selection, as contemplated in Rules 16 and 17 of the Rules, 1993.

42. Learned standing Counsel has produced before this Court rules in respect of the work charged establishment in the Government, which are followed, which are known as 'Work Charged Establishment Rules, 1978', which have been laid down in the Uttar Pradesh Irrigation Department Work Charged Establishment and thus is applicable for the PWD also. Under this Work Charged Establishment Rules, 1978 only provisions have been made for appointment and conditions of the employment in the work charged establishment. There is no provision in these Rules for promotion from one cadre to other.

43. The Financial Hand Book Chapter XXI has been produced and clause 667 provides conditions of employment in Work Charged Establishments, which is quoted hereinbelow:

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

44. This simply provides for the manner in which payments to be made.

45. I have heard learned Counsel for the parties at length. The position which emerges from the facts and materials on record is thus :

(i) There are two kinds of establishments in the P.W.D. departments one is the regular establishment and the second is the Work Charged Establishment. The petitioners No. 1 to 5 were appointed as regular cleaners in the regular establishment.

(ii) Respondents No. 8 to 18 were initially appointed as work charged cleaners in the work charged establishment.

(iii) There is no channel of promotion under the Rules, 1993 by which the regular cleaners may be promoted as regular drivers.

(iv) A regular driver in the regular establishment can only be appointed as per the procedure set out in the Rules, 1993.

(v) In the rules for work charged establishment also, there is no channel of promotion provided by which a work charged cleaner can be promoted to a work charged driver.

(vi) In fact by the circular dated 3152000, it is clear that a work charged cleaner

could not have been promoted as work charged driver.

(vii) The order of regularization dated 892006 regularizing the respondents No. 8 to 18 as regular drivers is de hors the rules.

In view of the above, the impugned orders dated 111998 and 3181999 deserve to be set aside.

46. If there is a vacant post in the regular department concerned, the same should be advertised in accordance with the Rules of 1993.

47. If any regularization is to be made, it may now be done in accordance with the dictum as laid down by the Hon''ble Supreme Court in the case of Secretary, State of Karnataka v. Uma Devi (supra).

48. From the position, which has emerged above, I come to the conclusion that the respondents have acted completely arbitrary and illegally. They have contrived to do indirectly what they could not have directly i.e., to say that the order of promotion given to the respondents No. 8 to 18 on 111998 and the consequent order dated 3181999 is wholly illegal and is not supported by the observance of any kind of rules or procedure even for the work charged establishment.

49. It is a trite law that what cannot be done directly, cannot be done indirectly. For this purpose, I rely on the decision of the Hon''ble Apex Court rendered in the case of N. Birendra Singh v. L. Priyokumar Singh & Ors., (2006) 9 SCC 650. Therefore, if there was no channel of promotion from the cadre of regular cleaner to a regular driver and from a work charged cleaner to a work charged driver, then it could not have been done in the case of both the regular cleaner i.e., the petitioners and the work charged cleaners the respondents. The only possible way for appointment of regular driver was by way of procedures as set out in the Rules 16 and 17 of Rules, 1993, other than that promotions could not have been made.

50. Consequently the order of regularization passed on 892006 by which the respondents No. 8 to 18 were regularized as regular drivers in the regular establishment is also de hors the rules and is, therefore, illegal and is liable to be set aside.

51. Learned Counsel for the petitioners has argued that in the last the petitioners No. 1 to 5 amongst whom the petitioner No. 1 is dead have worked in the P.W.D. department as regular cleaner for more than 25 years and in fact for even substituted on many occasions as drivers who have driven the road rollers and trucks. In fact the petitioner No. 5 has received some increments and although the regular cleaners are being given in pay scale of Rs. 2750 to 14000. The petitioner No. 5 received pay scale of Rs. 40006000. The other petitioners have received pay scale, which was fixed for them.

52. Learned Counsel for the petitioners prays that equity be done and the salary

of the petitioners be protected and no money be recovered from them in case they have paid in excess, particularly in view of the fact that even though the petitioners were fully qualified for being considered as drivers, they have not been considered for regular establishment of the drivers nor being promoted but instead the entire process had been circumvented and the work charged employees such as the respondents No. 8 to 18 have been unfairly benefited.

53. The last submission of the learned Counsel for the petitioners is accepted by this Court that their salary may be protected and no recovery may be made from them.

54. The conclusions drawn by this Court are that the submissions as made by the learned Counsel for the petitioners are fully justified. The order of promotion dated 111998 and the consequent order dated 3181999 are quashed. The order of promotion dated 892006 is also quashed.

55. The writ petition is allowed as above.