

(2013) 03 AHC CK 0008

In the Allahabad High Court

Case No : Civil Misc. Writ Petition No. 51640 of 2012

Rajesh Kumar Sharma and Others

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 08-03-2013

Acts Referred:

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

Citation : (2013) 4 ALJ 714 : (2013) 5 AWC 5092 : (2013) 2 UPLBEC 1617

Hon'ble Judges : B. Amit Sthalekar, J

Bench : Single Bench

Advocate : Ashok Khare, Siddharth Khare and V.D. Shukla, for the Appellant;
Krishna Agarwal and Suyash Agarwal, for the Respondent

Final Decision : Dismissed

Judgement

B. Amit Sthalekar, J.—The petitioners are seeking a direction to the respondents to take work from them in their respective trade and pay them regular monthly emoluments and also to consider them for absorption in permanent capacity. The petitioners are also challenging the order dated 4.9.2012 by which the services of the petitioners have been extended from 28.7.2012 up to 20.9.2012. Briefly stated the facts are that an advertisement was issued on 5.4.2010 in the newspapers, wherein, applications were invited for appointment of 40 Cooks, 10 Barbers, 10 Dhobis and 15 Safai Karmchari for catering to the requirement of recruits undergoing training at the Central Reserve Police Force, Group Centre, Allahabad. As per the conditions of the advertisement, the petitioners were appointed on C-N Basis at the rate of Rs. 192/- per day to be paid to Cooks/ Barbers/Dhobis and Rs. 169/- per day to Safai Karmachari. The candidates applying under the advertisement were required to be registered with the Employment Exchange. A selection was held and the petitioner Nos. 1-13 were selected for the post of Cook, petitioner Nos. 31 - 43 were selected for appointment as Barber, Petitioner Nos. 44-54 were selected for appointment as Dhobis while petitioner Nos. 55-61 were selected for appointment as Safai

Karmachari. The appointment letters were issued between 10.5.2010 to 23.11.2010 and in pursuance thereof the petitioners were joined their respective posts.

2. It is further stated that from 21.9.2012, the respondents have stopped taking any work from the petitioners and the petitioners have been relieved from their duties without any written order of disengagement. Subsequently, an amended relief was added challenging the order dated 4.9.2012 by which the tenure of the petitioners was extended from 28.7.2012 to 20.9.2012. From a perusal of the appointment order dated 19.5.2010 filed as Annexure-3 to the counter-affidavit, the petitioners were appointed initially on 10.5.2010 up to 6.8.2010 and thereafter the period was extended from time to time.

3. I have heard Sri Siddharth Khare, learned counsel for the petitioners and Sri Krishna Agrawal, learned counsel for the respondents.

4. It has been contended by the learned counsel for the petitioners that the petitioners were appointed in service through a process of selection after advertising the posts in question and therefore, the services could not have been terminated by an oral order. In any case, the petitioners were entitled to continue in service and to be considered for absorption and for regular salary since they had worked from May/November, 2010 till 21.9.2012. It is also contended that the services of the petitioners were extended after 89 days and that prior to dispensing of their services, no opportunity of hearing had been given to the petitioners.

5. The contention of Sri Siddharth Khare further is that the petitioners have been replaced in service by temporary appointees which is wholly illegal inasmuch as one temporary employee cannot be replaced by another temporary employee.

6. Countering the submissions of Sri Siddharth Khare, the learned counsel for the respondents, Sri Krishna Agrawal submitted that the appointment of the petitioners was purely temporary and was confined only to those candidates who were registered with the Employment Exchange and therefore, the said advertisement was not an open advertisement inviting applications on an All India basis. Sri Krishna Agarwal further submitted that the petitioners were no doubt appointed through a process of selection in the ATC (now 214. Battalion) but the petitioners were only appointed to cater to the requirement of the training centre 214 B(n) and they have not discharged any duty pertaining to armed training or recruits.

7. The learned counsel for the respondents further submitted that after the disengagement of the petitioners, regular appointees from different Battalions have been appointed against the vacant posts of Cook, Barber, Dhobi and Safai Karmachari. Along with the counter-affidavit, a list of such candidates who were appointed by the order dated 1.10.2012 has been filed as Annexure-4. According to Sri Krishna Agrawal, these persons are all regular appointees who have been brought from different Battalions and transferred to the 214 Battalion and

therefore, it is not correct to say that the temporary appointees are being replaced by another set of temporary appointees.

8. It was further submitted by the learned counsel for the respondents that by the impugned order dated 4.6.2012, the services of the petitioners have been extended from 28.7.2012 up to 20.9.2012 and even earlier the appointment of the petitioners was only for a period of 89 days as per requirement and therefore, being a purely tenure appointment the services of the petitioners could be dispensed with by oral order and it was not necessary to pass any written order terminating the services of the petitioners or giving them any opportunity of hearing.

9. I have considered the submissions of the learned counsel for the parties and perused the papers on record.

10. A perusal of the advertisement filed as Annexure-1 to the writ petition, clearly demonstrates that the appointment of the petitioners on the post of Cook, Barbar and Dhobi was made temporary basis on daily wages at Rs. 192/- per day and that of Safai Karmachari was made at Rs. 169/- per day on the same conditions. There was a further rider that the candidate should have been registered with the Employment Exchange. The appointment letters of one of the petitioners which has been filed as Annexure-3 to the writ petition clearly mentions that the;

1. Appointment would be on day-to-day basis for a duty of 89 days.

2. Appointment would be temporary and on day-to-day basis and the appointment would be for work of 8 hours per day.

3. Appointment would be purely temporary and the services would be liable to be terminated without any notice.

11. The facts are not disputed that the petitioners were appointed on the above terms and conditions and that even as per advertisement, it was purely temporary and on daily wage basis. The appointment was also restricted to candidates from who were registered with the Employment Exchange and it was not an advertisement open to all eligible candidates.

12. The Supreme Court in the case, reported in Excise Superintendent Malkapatnam, Krishna District, A.P. Vs. K.B.N. Visweshwara Rao and Others, has held that the recruitment for a public post cannot be restricted only to candidates from the Employment Exchange but rather the post must be advertised and open to the public to apply. Para 6 of the said judgment reads as follows:

6. Having regard to the respective contentions, we are of the view that contention-of the respondents is more acceptable which would be consistent with the principles of fair play, justice and equal opportunity. It is common knowledge that many a candidate is unable to have the names sponsored, though their names are either registered or are waiting to be registered in the employment

exchange, with the result that the choice of selection is restricted to only such of the candidates whose names come to be sponsored by the employment exchange. Under these circumstances, many a deserving candidate is deprived of the right to be considered for appointment to a post under the State. Better view appears to be that it should be mandatory for the requisitioning authority/establishment to intimate the employment exchange, and employment exchange should sponsor the names of the candidates to the requisitioning departments for selection strictly according to seniority and reservation, as per requisition. In addition, the appropriate department or undertaking or establishment should call for the names by publication in the newspapers having wider circulation and also display on their office notice boards or announce on radio television and employment new bulletins; and then consider the cases of all the candidates who have applied. If this procedure is adopted, fair play would be sub-served. The equality of opportunity in the matter of employment would be available to all eligible candidates.

13. Therefore, in view of the judgment of the Supreme Court *Excise Superintendent Malkapatnam, Krishna District, A.P. Vs. K.B.N. Visweshwara Rao and Others*, the advertisement dated 5.4.2010, Annexure-1 to the writ petition cannot be said to be a public advertisement but rather it was reserved only for candidates registered with the Employment Exchange and therefore, the appointment of the petitioners in pursuance of the such a restricted advertisement was violative of the provisions of the Articles 14 and 16 of the Constitution of India and would not confer on them any valid right to claim regularisation or payment of regular salary or continuity in service.

14. Even otherwise, the Supreme Court in the case reported in *State of Rajasthan and Others Vs. Daya Lal and Others*, has held as follows:

20. The part time cooks and chowkidars were employed on temporary basis in the government hostels in the year 1995,1996,1997 and 1998. They approached the High Court in the year 1999 (except Madan Lal Yogi who approached in the year 1997). The services of some of them had been terminated within one or two years from the date of temporary appointment. Though the State had taken a decision to terminate all those who were appointed on consolidated wage basis, the other respondents continued because of the interim orders by the courts. Service for a period of one or two years or continuation for some more years by virtue of final orders under challenge, or interim orders, will not entitle them to any kind of relief either with reference to regularisation nor for payment of salary on a par with regular employees of the Department.

15. In the case before the Supreme Court also the employees were part time Cooks and Chawkidars engaged on temporary basis as in the present case. In para 12 of the said judgment the Supreme Court has propounded the well settled principles relating to regularisation and parity in pay. Para 12 of the said judgment reads as follows:

12. We may at the outset refer to the following well settled principles relating to regularization and parity in pay, relevant in the context of these appeals:

(i) High Courts, in exercising power under Article 226 of the Constitution will not issue directions for regularization, absorption or permanent continuance, unless the employees claiming regularization had been appointed in pursuance of a regular recruitment in accordance with relevant rules in an open competitive process, against sanctioned vacant posts. The equality clause contained in Articles 14 and 16 should be scrupulously followed and courts should not issue a direction for regularization of services of an employee which would be violative of the constitutional scheme. While 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, back door entries, appointments contrary to the constitutional scheme and/or appointment of ineligible candidates cannot be regularized.

(ii) Mere continuation of service by a temporary or ad hoc or daily-wage employee, under cover of some interim orders of the court, would not confer upon him any right to be absorbed into service, as such service would be "litigious employment". Even temporary, ad hoc or daily-wage service for a long number of years, let alone service for one or two years, will not entitle such employee to claim regularization, if he is not working against a sanctioned post. Sympathy and sentiment cannot be grounds for passing any order of regularization in the absence of a legal right.

(iii) Even where a scheme is formulated for regularization with a cut-off date (that is a scheme providing that persons who had put in a specified number of years of service and continuing in employment as on the cut-off date), it is not possible to others who were appointed subsequent to the cut-off date, to claim or contend that the scheme should be applied to them by extending the cut-off date or seek a direction for framing of fresh schemes providing for successive cut-off dates.

(iv) Part-time employees are not entitled to seek regularization as they are not working against any sanctioned posts. There cannot be a direction for absorption, regularization or permanent continuance of part time temporary employees.

(v) Part time employees in government run institutions cannot claim parity in salary with regular employees of the government on the principle of equal pay for equal work. Nor can employees in private employment, even if serving full time, seek parity in salary with government employees. The right to claim a particular salary against the State must arise under a contract or under a statute.

16. In Union of India (UOI) and Another Vs. Arulmozhi Iniarasu and Others, the respondents employees were engaged on purely temporary basis and the terms and conditions of their appointments have been outlined by the Supreme Court in para 22 of the judgment which are quite similar to the conditions mentioned in the case of the appointment of the present petitioners. Para 22 reads as follows:

22. Bearing in mind the aforesaid legal position, we may now advert to the facts at hand. For the sake of ready reference, the relevant portions of offer of appointment issued by Commissioner of Central Excise, Chennai, to the respondents on 6.8.1999 are extracted below:

The undermentioned candidates who have been applied in response to the advertisement given by this Department in the "Daily Thanthi" and who appeared in Interview conducted by this office on 10.04.99 are offered appointment provisionally in "part time contingent casual labourers" Purely on temporary basis on the basis of payment for the number of hours actually worked in a month. They will be paid Rs. 10/- for every working hour.

3. The candidates should note that they will be asked to work on the basis of the need of the office and there is no guarantee as regards minimum number in a month.

6. The offer of appointment is purely on temporary basis only. In case the work and conduct of the candidates is not found to be satisfactory. Their services will be terminated without any intimation/notice.

7. This appointment letter does not confer any right to claim any permanent post in this Department and does not also vest any automatic right to be considered for selection to any permanent post in the Department.

17. Interpreting the term "temporary" appointments the Supreme Court further in para 23 has held as follows:

23. It is plain from the terms of the letter of appointment that the respondents were told in unambiguous terms that their appointments were temporary and would not confer any right to claim any permanent post in the Department. It is not the case of the respondents that at any point of time, during their engagements with the appellants, a promise was held out to them by the appellants that they would be absorbed as regular employees of the Department. In fact, no such promise could be held out in view of the Government O.M. dated 7.6.1988 banning the employment of persons in regular posts.

18. The Supreme Court in the case of Secretary, State of Karnataka and Others Vs. Umadevi and Others, held in paragraph 43 (Para 14 of AIR) as under:

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 end of 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 not 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. High Courts acting under Article 226 of the Constitution of India, should not ordinarily issue directions for absorption, regularization, 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 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 a 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.

19. The learned counsel for the respondents further submitted that there was no illegality in the disengagement of the services of the petitioners by oral order inasmuch as the petitioners were engaged on a purely temporary basis for a period of 89 days which was extended from time to time and the last extension was granted from 28.7.2012 to 20.9.2012. Thus, the petitioners, even otherwise apart from the conditions mentioned in their appointment letter were aware that their appointment was for a particular tenure and was liable to be terminated at the end of the tenure and therefore, it was not necessary to terminate their services by any written order.

20. A similar matter came up before this Court in the case, reported in Udai Pratap Singh Vs. State of Uttar Pradesh, Basic Shiksha Adhikari and Regional Deputy Director of Education, , wherein, the Court has held that the petitioner therein was appointed on tenure basis and his services automatically came to an

end by efflux of time and therefore, there was no question of any termination. The oral termination is nothing but at best may be said to the information of the petitioners that by efflux of time he stands disengaged.

21. So far as the submissions of Sri Khare is concerned, that the petitioners who are temporary employees are being replaced by another set of temporary employees, the sub-1 mission is contrary to the documents on record inasmuch as the order filed as Annexure-4 to the counter-affidavit clearly shows that the persons mentioned therein were regular appointees of various other battalions who have been transferred and attached to the 224 battalion at Group Centre, Allahabad.

22. Thus, on a conspectus of the facts and the case law referred to above, the writ petition is devoid merit and is, accordingly, dismissed. The interim order stands vacated. There shall be no order as to cost.