

(2014) 02 SHI CK 0016
In the High Court Of Himachal Pradesh
Case No : CWP No. 6451 of 2011

Rakesh Kumar

APPELLANT

Vs

State of H.P. and Others

RESPONDENT

Date of Decision : 26-02-2014

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 226, 32
Himachal Pradesh Police Act, 2007 — Section 17

Citation : (2014) 02 SHI CK 0016

Hon'ble Judges : Rajiv Sharma, J

Bench : Single Bench

Advocate : P.D. Nanda, Advocates for the Appellant; M.A. Khan, Additional Advocate Generals and Neeraj K. Sharma, Dy. Advocate General, Advocates for the Respondent

Judgement

Rajiv Sharma, J.—The Additional Deputy Commissioner-cum-Project Director, District Rural Development Agency, Shimla sent a communication to the Incharge, Employment Exchange, Rampur/Chopal, District Shimla on 23.1.2001, Annexure P-12 for sponsoring names of the candidates for six posts of Watershed Development Team Members for Development Block Chopal and Rampur on contract basis. The essential qualification was also mentioned in the communication dated 23.1.2001. The interview was to be held as per the communication dated 23.1.2001 on 15.2.2001. The Project Officer, District Rural Development Agency, Shimla addressed a letter dated 16.2.2001, Annexure P-13 to the Employment Officer, Employment Exchange Chopal, District Shimla to sponsor the names of the candidates for the interview to be held on 24.2.2001. The Employment Officer, Employment Exchange Chopal sponsored name of the petitioner, pursuant to which he appeared in the interview for the post of Junior Engineer (Watershed Development). He was found suitable. Appointment letter, dated 8.3.2001, Annexure P-1, was issued in favour of the petitioner by the Deputy Commissioner-cum-C.E.O., District Rural Development Agency, Shimla. The petitioner joined his duties on 13.3.2001. The consolidated monthly

emoluments of the petitioner were fixed at Rs. 2500/-. The appointment was on contractual basis for a period of one year from the date of joining of the post. He was required to produce antecedent verification certificate to the satisfaction of the District Rural Development Agency from the Executive Magistrate or two Gazetted Officers known to him for the last three years. The headquarters of the petitioner were fixed in the office of Block Development Officer, Chopal. Thereafter, the petitioner entered into agreements with the Block Development Officer, Chopal, on various dates. The copies of agreements have been placed on record vide Annexure R3/A collectively. The petitioner initially worked as Junior Engineer in Water Development Project and thereafter was shifted on 20.6.2011 to Integrated Watershed Management Programme. He joined his duties on 13.9.2011.

2. The case of the petitioner, in a nutshell, is that he has worked uninterruptedly w.e.f. 13.3.2001 till date, but his services have not been regularized. The petitioner has relied upon instructions/guidelines issued by the State Government from time to time for regularization of the contractual appointees in the Government Departments on 9.9.2008 and 28.8.2009. The petitioner has also placed strong reliance on Annexure P-4 dated 16.6.2009. The mandays" chart of the petitioner is Annexure P-6. It is evident from the mandays" chart that the petitioner has worked uninterruptedly w.e.f. 13.3.2001 and has completed 240 days without any break in all the calendar years. The muster roll has been issued by the Block Development Officer, Development Block Chopal. However, case of the respondent-State, in a nutshell, is that since the petitioner was initially appointed in the Water Development Project and thereafter, shifted to Integrated Watershed Management Programme, his services cannot be regularized. In other words, the stand of the respondent-State is that the petitioner has not been appointed by the District Rural Development Agency, Shimla. Petitioner has placed on record various communications whereby similar situated persons, who were appointed in Desert Development Project by the District Rural Development Agency, have been regularized against sanctioned post including one Suman Lata. Year-wise statement of salary paid to Suman Lata has been placed on record vide Ext.PW11/C. The petitioner, by way of CMP No. 12945 of 2012, has also placed on record details of the persons, namely, Leela Dutt, Surinder Kumar, Sanjiv Kumari and Rakesh Kumari, who were initially appointed on contract basis in District Rural Development Agency against Integrated Waste Land Development Project, and thereafter have been regularized.

3. The Court had directed the respondent-State to file supplementary affidavit how the services of these persons were regularized. The Deputy Secretary (Rural Development) has filed supplementary affidavit. According to the supplementary affidavit, these persons were initially appointed in Integrated Water Development Project in District Rural Development Agency on consolidated honorarium and thereafter they were appointed by the District Rural Development Agency, Solan and later on, they were regularized.

4. What emerges from the facts, enumerated herein-above, is that the process for filling up the posts was initiated by the Additional Deputy Commissioner-cum-Project Director, District Rural Development Agency, Shimla vide Annexure P-12. The petitioner was found suitable, which led to issuance of appointment letter, Annexure P-1. The appointment letter has been issued by the Deputy Commissioner-cum-C.E.O., District Rural Development Agency, Shimla. The headquarters of the petitioner were fixed as per Annexure P-1 in the office of Block Development Officer, Chopal. It is specifically stated in opening portion of the appointment letter that with reference to the interview in the District Rural Development Agency, the petitioner was offered appointment as Junior Engineer (Watershed Development). It is clear that initially the petitioner was appointed in the District Rural Development Agency, thereafter was deployed in Watershed Development Project. It will also be pertinent at this stage to take into consideration the agreements entered into between the petitioner and the Block Development Officer, Chopal. According to condition No. 1 of the agreement, petitioner was to remain as Watershed Development Team Member, Junior Engineer (Civil) in the office of Block Development Officer initially for a period of one year on contractual basis. According to condition No. 2, he was to submit himself to the orders of the Block Development Officer and of the officers and authorities under whom he may from time to time be placed by the Block Development Officer. The services of the petitioner were to be terminated automatically at the end of contractual period or the date mentioned in the contract whichever was earlier and was to be terminated on a notice of one month by the Block Development Officer or in lieu of it, he was entitled to one month's pay. The decision whether the petitioner was fit or not for the discharge of his duties was to be taken by the Block Development Officer. The services of the petitioner could also be terminated by the Block Development Officer if the petitioner was found to be prima facie guilty of any insubordination or moral turpitude or other misconduct etc.. Further, the services of the petitioner could be terminated by giving one month's notice in writing at any time during service under the agreement by the Block Development Officer on behalf of the District Rural Development Agency without assigning any reason whatsoever.

5. What emerges from the conditions, enumerated in the appointment letter and agreements, is that the petitioner is an employee of District Rural Development Agency, Shimla. The District Rural Development Agency is appointing/disciplinary authority.

6. There is no merit in the contention of Mr. Virender K. Verma, learned Additional Advocate General that since the petitioner is appointed on honourarium basis, he cannot be regularized. The fact of the matter is that the petitioner has been appointed on contract basis on consolidated salary under the overall supervision of the Block Development Officer. The State Government has issued instructions/guidelines for regularization of the contractual appointees on 9.9.2008. The Secretary (Rural Development) to the Government of Himachal Pradesh had sent a communication to all the Deputy Commissioners-cum-CEO,

District Rural Development Agency on 16.6.2009. Text of the letter dated 16.6.2009 reads as under:-

"I am directed to say that the matter of adoption of instructions issued by the Govt. of H.P. on the subject cited above was under the active consideration of the Government. It has now been decided in consultation with the Finance Department that all the DRDA may adopt the Govt. of Himachal Pradesh policy on regularization of daily wages/contract basis employees as approved norms of the Govt. of India and the recurring expenditure is sustainable, without any additional financial demand from the State Government. The DRDAs Societies MDA/Article of Asson must have a provision for such recruitment/regularization of staff and the DRDAs should complete all codal formalities before the regularization process is started. You are therefore requested to take further necessary action in accordance with above decision and also keeping in view the instructions issued by the Govt. of HP in its letter No. PER(AP)C-II(2)-1/2008-Vol. V dated 9th September, 2008.

An early action in the matter will be highly appreciated."

7. Thereafter, the Secretary (Personnel) to the Government of Himachal Pradesh issued fresh instructions on 29.8.2009 for regularization of contract appointees in the Government Departments. According to the instructions issued on 29.8.2009, the incumbents, who had completed eight years" service on contract basis, were to be considered for regularization against the available vacancies. As noticed hereinabove, one Suman Lata was appointed as Clerk in the Desert Development Project, DRDA Cell, Pooh on 29.10.1999 against sanctioned post. She has been paid salary from Administrative Head of Watershed Development Project from 29.10.1999 to 28.6.2010 and thereafter, w.e.f. 29.06.2010 from the Administrative Head of the District Rural Development Agency. Her services were regularized against a sanctioned post of Clerk on 29.6.2010. The petitioner was to be treated similarly. It is evident from Annexure P11/C that Suman Lata has been paid salary from 1999 till 2011 from the Administrative Head of Watershed Development Project.

8. Seven vacancies were available with the respondents and despite that he has not been regularized. This fact has not been denied by the respondents in their reply. The petitioner has produced sufficient material on record to establish that similarly situated persons, who were earlier working in the Integrated Water Development Project and thereafter appointed by the District Rural Development Agency, have been regularized by the respondent-State. The petitioner has also placed on record their regularization orders.

9. Mr. Virender K. Verma, learned Additional Advocate General, has also argued that the petitioner has now been shifted to Integrated Watershed Management Programme and he has joined his duties on 13.9.2011. Since the petitioner has been working as Junior Engineer since 8.3.2001 uninterruptedly, he had no alternative but to join his duties on 13.9.2011. The action of the respondent not

to regularize the petitioner, who has put in more than twelve years" service uninterruptedly, is arbitrary. It is violative of articles 14 and 16 of the Constitution of India. The action of the respondent-State not to regularize the petitioner amounts to unfair labour practice as well. The respondent-State cannot be permitted to exploit the petitioner and similar situated persons by keeping them on contract basis for more than a decade. The respondents have also not complied with the letter dated 16.6.2009, Annexure P-4. It has clearly been spelt out in the letter that after consultation from the Finance Department, it was agreed that all the District Rural Development Agencies may adopt the Government of Himachal Pradesh policy for regularization of daily wages/contract basis employees as per approved norms of the Government of India. The petitioner was entitled to be regularized as per instructions issued by the State Government since he has completed now more than eight years" uninterrupted service. There is master and servant relationship between the petitioner and District Rural Development Agency, Shimla. The Disciplinary and Appointing authority of the petitioner, as noticed hereinabove, is District Rural Development Agency, Shimla.

10. Their Lordships of Hon"ble Supreme Court in Nihal Singh and ors. vs. State of Punjab and ors., have held as under:-

"17. It is obvious both from the said section and also the appointment orders, the appellants are appointed by the State in exercise of the statutory power under section 17 of the Act. The appellants are amenable to the disciplinary control of the State as in the case of any other regular police officers. The only distinction is that they are to be paid daily wages of Rs. 35 (which came to be revised from time to time). Further, such payment was to be made by the bank to whom the services of each one of the appellants is made available.

18. From the mere fact that the payment of wages came from the bank at whose disposal the services of each of the appellants was kept did not render the appellants employees of those banks. The appointment is made by the State. The disciplinary control vests with the State. The two factors which conclusively establish that the relationship of master and servant exists between the State and the appellants. A fact which is clearly recognized by the division bench of the High Court in LPA No. 209 of 1992. It may be worthwhile mentioning here that under the law of contracts in this country the consideration for a contract need not always necessarily flow from the parties to a contract. The decision of the SSP to reject the claim of the appellants only on the basis that the payment of wages to the appellants herein was being made by the concerned banks rendering them disentitled to seek regularization of their services from the State is clearly untenable.

21. But we do not see any justification for the State to take a defence that after permitting the utilisation of the services of large number of people like the appellants for decades to say that there are no sanctioned posts to absorb the appellants. Sanctioned posts do not fall from heaven. State has to create them

by a conscious choice on the basis of some rational assessment of the need.

22. The question is whether this court can compel the State of Punjab to create posts and absorb the appellants into the services of the State on a permanent basis consistent with the Constitution Bench decision of this court in Umadevi's case. To answer this question, the ratio decidendi of the Umadevi's case is required to be examined. In that case, this Court was considering the legality of the action of the State in resorting to irregular appointments without reference to the duty to comply with the proper appointment procedure contemplated by the Constitution. "4. ... The Union, the States, their departments and instrumentalities have resorted to irregular appointments, especially in the lower rungs of the service, without reference to the duty to ensure a proper appointment procedure through the Public Service Commissions or otherwise as per the rules adopted and to permit these irregular appointees or those appointed on contract or on daily wages, to continue year after year, thus, keeping out those who are qualified to apply for the post concerned and depriving them of an opportunity to compete for the post. It has also led to persons who get employed, without the following of a regular procedure or even through the backdoor or on daily wages, approaching the courts, seeking directions to make them permanent in their posts and to prevent regular recruitment to the posts concerned. The courts have not always kept the legal aspects in mind and have occasionally even stayed the regular process of employment being set in motion and in some cases, even directed that these illegal, irregular or improper entrants be absorbed into service. A class of employment which can only be called "litigious employment", has risen like a phoenix seriously impairing the constitutional scheme. Such orders are passed apparently in exercise of the wide powers under Article 226 of the Constitution. Whether the wide powers under Article 226 of the Constitution are intended to be used for a purpose certain to defeat the concept of social justice and equal opportunity for all, subject to affirmative action in the matter of public employment as recognised by our Constitution, has to be seriously pondered over."

(emphasis supplied)

23. It can be seen from the above that the entire issue pivoted around the fact that the State initially made appointments without following any rational procedure envisaged under the Scheme of the Constitution in the matters of public appointments. This court while recognising the authority of the State to make temporary appointments engaging workers on daily wages declared that the regularisation of the employment of such persons which was made without following the procedure conforming to the requirement of the Scheme of the Constitution in the matter of public appointments cannot become an alternate mode of recruitment to public appointment. It was further declared that the jurisdiction of the Constitutional Courts under Article 226 or Article 32 cannot be exercised to compel the State or to enable the State to perpetuate an illegality.

This court held that compelling the State to absorb persons who were employed by the State as casual workers or daily-wage workers for a long period on the ground that such a practice would be an arbitrary practice and violative of Article 14 and would itself offend another aspect of Article 14 i.e. the State chose initially to appoint such persons without any rational procedure recognized by law thereby depriving vast number of other eligible candidates who were similarly situated to compete for such employment.

24. Even going by the principles laid down in Umadevi's case, we are of the opinion that the State of Punjab cannot be heard to say that the appellants are not entitled to be absorbed into the services of the State on permanent basis as their appointments were purely temporary and not against any sanctioned posts created by the State.

25. In our opinion, the initial appointment of the appellants can never be categorized as an irregular appointment. The initial appointment of the appellants is made in accordance with the statutory procedure contemplated under the Act. The decision to resort to such a procedure was taken at the highest level of the State by conscious choice as already noticed by us. The High Court in its decision in LPA No. 209 of 1992 recorded that the decision to resort to the procedure under section 17 of the Act was taken in a meeting dated 24.3.1984 between the Advisor to the Government of Punjab and senior officers of the various Banks in the public sector. Such a decision was taken as there was a need to provide necessary security to the public sector banks. As the State was not in a position to provide requisite police guards to the banks, it was decided by the State to resort to section 17 of the Act. As the employment of such additional force would create a further financial burden on the State, various public sector banks undertook to take over the financial burden arising out of such employment. In this regard, the written statement filed before the High Court in the instant case by respondent Nos. 1 to 3 through the Assistant Inspector General of Police (Welfare & Litigation) is necessary to be noticed. It is stated in the said affidavit:

"2. That in meeting of higher officers held on 27.3.1984 in Governor House Chandigarh with Shri Surinder Nath, IPS, Advisor to Governor of Punjab, in which following decisions were taken:-

i) That it will not be possible to provide police guard to banks unless the Banks were willing to pay for the same and additional force could be arranged on that basis, it was decided that police guards should be requisitioned by the Banks for their biggest branches located at the Distt. and Sub Divisional towns. They should place the requisition with the Distt. SSPs endorsing a copy of IG CID. In the requisition, they should clearly state that the costs of guard would be met by them. It will then be for the police department to get additional force sanctioned. This task should be done on a top priority. In the meantime depending upon the urgency of the need of any particular branch, police Deptt. may provide from police strength for its protection.

ii) For all other branches guards will be provided by Distt. SSP after selecting suitable ex-servicemen or other able bodied persons who will be appointed as Special Police Officer in terms of Section 17 of the Police Act. Preference may be given to persons who may already be in possession of licence weapons. All persons appointed as SPO for this purpose will be given a brief training for about 7 days in the Police Lines in the handling of weapons taking suitable position for protection of branches. These SPOs will work under the discipline and control and as per Police Act, they will have the same powers, privileges and protection and shall be amenable to same penalty as an ordinary police personnel."

26. It can be seen from the above that a selection process was designed under which the District Senior Superintendent of Police is required to choose suitable ex-servicemen or other able bodied persons for being appointed as Special Police Officers in terms of section 17 of the Act. It is indicated that the persons who are already in possession of a licensed weapon are to be given priority.

28. Such a procedure making recruitments through the employment exchanges was held to be consistent with the requirement of Articles 14 and 16 of the Constitution by this Court in Union of India (UOI) and Others Vs. N. Hargopal and Others, .

29. The abovementioned process clearly indicates it is not a case where persons like the appellants were arbitrarily chosen to the exclusion of other eligible candidates. It required all able bodied persons to be considered by the SSP who was charged with the responsibility of selecting suitable candidates.

30. Such a process of selection is sanctioned by law under section 17 of the Act. Viewed in the context of the situation prevailing at that point of time in the State of Punjab, such a process cannot be said to be irrational. The need was to obtain the services of persons who had some experience and training in handling an extraordinary situation of dealing with armed miscreants."

11. Accordingly, in view of the observations and analysis made hereinabove, the writ petition is allowed and the respondents are directed to regularize the services of the petitioner as Junior Engineer in District Rural Development Agency, Shimla, from the date he has completed eight years of service with all consequential benefits within a period of three months from today. Pending application(s), if any, also stands disposed of. No order as to costs.