
(2003) 10 AHC CK 0103

In the Allahabad High Court

Case No : Writ Petition No.5269 of 1999(S/S) (with W.P.No.7061 (S/S) of 2002)

Rishi Kesh Singh

APPELLANT

Vs

State of U.P.and Others

RESPONDENT

Date of Decision : 20-10-2003

Acts Referred:

Citation : (2003) 10 AHC CK 0103

Hon'ble Judges : N.K.Mehrotra, J

Final Decision : Disposed Of

Judgement

N.K Mehrotra, J.—In both the writ petitions S/Sri Bhagwat Yadav, Nagendra Singh, Joga Singh, Ram Kalyan Diwedi, Dilip Kumar Kashyap, Ram Phere are petitioners and in Writ Petition No.5269 (S/S) of 1999, Rishi Kesh Singh is also one of the petitioner besides the aforesaid 6 petitioners. All the petitioners in both the writ petitions are working on different posts of Mechanic, operator, peon, welder and Gardner etc. in Nonconventional Energy Development Agency (hereinafter referred to as NEDA), which is an instrumentality of the State. In the first writ petition No.5269 (S/S) of 1999 petitioners prayed for a writ of mandamus commanding the opposite parties to regularize the petitioners' services against the vacant posts in class III and class IV and not to terminate the services of the petition till then. In subsequent writ petition No.7061 (S/S) of 2002 the petitioners have sought the relief by way of a writ of mandamus commanding the opposite parties to consider the case of the petitioner for grant of regular pay scale of their respective class III and class IV post.

2. Heard the learned counsel for the petitioner. Opposite party NEDA and its Officers are represented by Madhuri Singh, Advocate and she did not appear. In Writ Petition No.5269 (S/S) of 1999, counter affidavit has been filed but in Writ Petition No.7601 of 2002, it appears that counter affidavit is decorating the file of the counsel because after receiving the copy of the counter affidavit the petitioners have filed rejoinder affidavit. According to the petitioners, the petitioners No.1, 2 and 3 of the earlier writ petition are working on class III Posts

and others are working on class IV post since 1993. They were appointed on contract basis for six months but they continued to work even after expiry of period of six months in the contract. Except petitioners No.5 and 6 of the earlier petition all the aforesaid petitioners have worked as daily wagers from 1990 but from 1993 they entered into a contract of service for a period of six months. According to the petitioners, petitioner No.5 came in employment in October, 1996 and petitioner No.6 came in employment in September, 1995. According to the petitioners, even after the signing of the contract, the nature of duties is the same like other workers who are employees on daily wages. It is also alleged that similarly situated employees have got the minimum of the regular pay scale on the basis of the interim orders of this court in various writ petitions, the copies of which have been enclosed. The petitioners are given break in service on the basis of the resolution of the Board as contained in Annexure No. 13. In the counter affidavit in the earlier writ petition the case of the opposite party is that the petitioners were engaged purely on contractual basis as per need and payment of their wages had been made at the prevalent rate approved by the NEDA. The government issued an order dated 17.1.1998 as contained in Annexure No.CA.1 restraining the appointment on contract basis in the absence of sanctioned post and it was directed that the services of such employees be discontinued. It is averred that as and when the work is available the services of the petitioners are hired on contract and they were never engaged as daily wage employees. There is no regular post of fitter, welder, pump operator and gardner available in Research and Training Centre, NEDA. The engagement of the petitioner was subject to the availability of the work and fund. Since there is no regular post of class III and class IV available with the respondent, regularization can not be made and the creation of the post is subject matter of the government. It is also contended that the writ petition does not lie because the alternative remedy is available by filing petition in the Labour Court.

3. In the subsequent writ petition the petitioners are claiming the minimum of the regular payscale prescribed for class 111 and class IV post and they claimed parity on the basis of Article 39 (d) of the Constitution of India. They claimed that they are working under the opposite parties for more than 10 years and they are discharging the same duties which are being discharged and performed by the other persons. According to the petitioners, other similarly situated employees namely, Ramesh Kumar Mishra, Heera Lal, Ajay Kumar, Shri Ram Vishkarma and Bhanu Kishore are getting the payment of minimum of the regular pay scale of the respective post on the strength of the interim order of this Court in the various writ petition stated in this petition and NEDA has sanctioned minimum of the regular payscale of consolidated basis to similarly situated 5 employees as per Annexure No.7. Petitioners alleged that they are being discriminated arbitrarily while they are working for long period. In earlier writ petition the petitioners have filed a copy of the resolution of the Executive Committee of NEDA which is Annexure No.13. It has been decided by the Executive Committee that the employees working on contract basis shall

continue to work, as such with a service break time to time till the creation of regular post. The opposite party has not denied that such decision was taken by the Executive Committee of the NEDA.

4. It appears that the petitioners are working from different dates as shown in the chart annexed to Annexure No.1 to the writ petition and it indicates that all the petitioners are working since 1992 to 1996 and thus they have put in their service from 7 years to 11 years as the case may be. There is a policy decision of the Executive Committee of NEDA that they will continue to work as such till the new posts are created. It also appears from the evidence on record that a number of employees are working in the same condition but they are getting consolidated salary at the minimum of the regular payscale. Further few employees have been granted consolidated salary at the minimum of the regular payscale by the order of NEDA itself which is evident from Annexure No.7 of the writ petition No.7061 (S/S) of 2002.

5. The petitioners claimed firstly, that they should be regularized and they should be permitted to continue till their regularization; secondly they claimed minimum consolidated salary of the regular payscale of class III and class IV post as the case may be. So far as the regularization of the petitioners is concerned no mandate can be issued for the regularization till the regular sanctioned posts are there because the regularization is made against a particular post. The opposite parties have clearly averred in the counter affidavit that there are no sanctioned post and it is evident also from the document Annexure No.13 filed by the petitioners also in subsequent writ petition. Annexure No. 13 contains a resolution of the executive committee of the NEDA in which it has been clearly mentioned that such employees shall continue to work till the regular posts are created. Therefore it is established that there are no posts of class III or class IV in the establishment of NEDA. In the absence of the posts the opposite parties can not be directed to regularize the petitioners but at the same time I feel that the petitioners are working for long. Requirement of their services is still subsisting. The NEDA Executive has decided to take work from them but with a rider that there will be an artificial break in the service. The artificial break can not be permitted and as the NEDA Executive has already decided that the petitioners shall be permitted to continue till the creation of the new posts, for which the NEDA Executive can recommend to the government for creation of the post after showing the exigency of the work. Therefore, earlier writ petition can be disposed of with the direction to the opposite parties to take steps for creation of the posts if the requirement of the work subsists and if the posts are created by the State Government the petitioners shall be considered for regularization of such post and in the meantime they will be permitted to continue on their posts. So far as the second Petition is concerned I find that the petitioners are entitled for equal pay for equal work as the other similarly situated employees are getting the consolidated salary equal to the minimum of the regular payscale in some oases on the strength of the different orders of this Court and in other cases according to its own decision of the NEDA. The factor that some employees who

are working in daily wages have been given minimum of the payscale and the employees who were working on contract basis have not been given the consolidated salary will not be an obstruction in treating the petitioners for equal pay for equal work. It appears that the petitioners are also doing the same work for the same working hours as the other similarly situated regular employees are working. They are working in the same Government Institution. In *Jaipal and others v. State of Haryana and others*. (1998) 3 SCC 354, the Supreme Court has held that if two categories of employees are performing similar nature of work the facts that employees of one category were appointed temporarily but the other appointed regularly or that services of one category of employees was transferable but that of the other was non transferable or that mode of selection of two was different, it is immaterial for the applicability of the doctrine as enshrined under Article 39 (d) of the Constitution of India. Since NEDA is giving consolidated salary equal to the minimum of the regular payscale to a number of employees the petitioners can also be awarded the same salary and for which a mandate can be issued to the opposite party to consider the cases of the petitioners for award of consolidated salary equal to the minimum of the regular payscale at par with other employees as mentioned in the petition.

6. In view of the above, both the writ petitions are disposed of with the direction to opposite parties namely NEDA, the Secretary and Chief Project Officer NEDA and the Chairman NEDA to consider the regularization of the petitioners on their respective posts if the sanctioned posts are available within a period of two months and in case the posts are not available they will refer the matter to the government for the sanction of the posts and after the sanction of the post the petitioners shall be considered for regularization and till then need of their services exists they will continue to work as such without any break. The aforesaid opposite parties are further directed to consider for making payment of the consolidated salary equal to the minimum of the regular payscale to the petitioners at par with other employees named in the petition and pass a reasoned order within a period of two months.

(Ordered accordingly)