

(2005) 12 AHC CK 0018

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 11035 of 2004

Shekhar Shukla

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision : 06-12-2005

Acts Referred:

Constitution of India, 1950 — Article 14, 16

Citation : (2006) 5 AWC 4892 : (2006) 1 UPLBEC 580

Hon'ble Judges : Sudhir Agarwal, J

Bench : Single Bench

Advocate : Subhodh Kumar, for the Appellant; V.K. Dixit and S.C., for the Respondent

Final Decision : Dismissed

Judgement

Sudhir Agarwal, J.—Heard Sri Subhodh Kumar, learned counsel for the petitioner and Sri V. K. Dikshit, learned counsel for the respondents No. 2 and 3.

2. The petitioner has sought a mandamus directing the respondent to pay equal pay for equal work and other benefits as other permanent employees of the Nagar Palika Paishad, Pilibhit with all consequential benefits.

3. The case of the petitioner is that a quotation/notice dated 27th May, 2001 was issued by the Nagar Palika Parishad, Pilibhit inviting application for engagement of typist on contract basis. Last date for submission of the application was 27th May, 2001. The petitioner in pursuance to the aforesaid notice submitted his application and the Nagar Palika Parishad, Pilibhit allowed him to join as typist on 28th May, 2001. He was paid fixed pay of Rs. 2500/- per month. The aforesaid appointment of the petitioner was initially for a period of two months which was extended thereafter from time to time. The petitioner submits that Adhyaksh, Nagar Palika Parishad, Pilibhit sent a letter dated 3rd February, 2003 to the Commissioner for sanctioning the post of typist/computer clerk but till date no order has been passed by the competent authority sanctioning the aforesaid

post. However, the petitioner is continuously working and presently getting a fixed salary of Rs. 3050/- only while the persons who are regularly appointed in Nagar Palika Parishad, Pilibhit are getting salary in the prescribed pay scales and getting more than Rs. 8000/-.

4. A counter affidavit has been filed by the respondents wherein it is stated that there is no sanctioned post of computer clerk/typist. Although letter has been sent to the Commissioner but he has not passed any order. It is further stated that the appointment of the petitioner is purely temporary and he cannot claim salary/wages at par with the regular appointed employees.

5. The basic contention of the learned counsel for the petitioner is that since he is discharging duties similar to those which are being discharged by other regularly appointed incumbents, the principle of equal pay for equal work is applicable and he is entitled for the same salary which is payable to other regularly appointed permanent employee of Nagar Palika Parishad. The factum whether the post was sanctioned or not is irrelevant particularly when eight posts of clerks are lying vacant in Nagar Palika Parishad. He further submits that in view of the availability of the vacancies of clerk, the petitioner could be adjusted on the post of clerk and should have been paid salary accordingly.

6. I have considered the submissions of the learned counsel for the petitioner but do not find any force. The petitioner, admittedly, has been engaged as typist on a consolidated pay for a limited period which has been extended from time to time. No doubt, Annexure "1" to the writ petition is a copy of the quotation/information issued by the Nagar Palika Parishad, Pilibhit on 22nd May, 2001 but it is not the case of the petitioner that the aforesaid notice was given wide publicity and was published in the newspaper also. Even the time gap within which the entire appointment process has been completed i.e. six days shows that the appointment has not been made by advertising vacancy to the public at large inviting application from all eligible incumbents. If there is a regular and substantive vacancy in a public office, the same has to be filled in by wide publication so that all eligible persons at large may have opportunity to apply for the same since all persons have fundamental right to consideration in public services under Article 16 of the Constitution of India. No such procedure has been followed in the present case. It appears that only notice on the Notice Board has been affixed by Nagar Palika Parishad and thereafter the petitioner has been appointed. The said process does not answer the requirement of wide publicity and equivalent opportunity of consideration to all eligible persons as contemplated under Articles 14 and 16 of the Constitution of India.

7. Moreover, in the present case, there is no post of typist sanctioned or created in Nagar Palika Parishad till date. In the absence of any post question of payment of salary in a regular pay scale does not arise. In the absence of post, the question of regularization or treating the petitioner as permanent employee of Nagar Palika Parishad would also not arise. The petitioner having not been appointed on the post of clerk cannot claim adjustment or appointment on the

post of clerk and when Nagar Palika Parishad decides to fill up the vacancies of clerk, they would follow the procedure prescribed under the rules. No person by back door entry can be allowed to seek appointment on a post which was never advertised and against which recruitment never took place in accordance with the procedure prescribed under law.

8. So far as the applicability of equal pay for equal work is concerned, now it is settled that the said principle is not applicable as an abstract doctrine since multiple factors are applicable to apply the aforesaid principles which emanates from Article 14 of the Constitution of India. One of the relevant factor is the method of appointment/process of appointment. Non availability of sanctioned post is also another very germane issue.

9. In the case of State of Haryana v. Jasmer Singh and Ors. 1997 SC 1788, the Apex Court held that the principle of equal pay for equal work is not always easy to apply. There are inherent difficulties in comparing and evaluating the work done by persons in different organization or in the same organization. After referring to the various earlier judgment of the Apex court, in paragraphs 8, 10 and 11 of the judgment, it held as follows :

It is, therefore, clear that the quality of work performed by different sets of persons holding different jobs will have to be evaluated. There may be differences in educational or technical qualifications which may have a bearing on the skills which the holders bring to their job although the designation of the job may be the same. There may also be other considerations which have relevance to efficiency in service which may justify differences in pay-scales on the basis of criteria such as experience and seniority, or a need to prevent stagnation in the cadre, so that good performance can be elicited from persons who have reached the top of the pay-scale. There may be various other similar considerations which may have a bearing on efficient performance in a job." (para 8).

The respondents, therefore, in the present appeals who are employed on daily wages cannot be treated as on a par with persons in regular service of the State of Haryana holding similar posts. Daily-rated workers are not required to possess the qualifications prescribed for regular workers, nor do they have to fulfill the requirement relating to age at the time of recruitment. They are not selected in the manner in which regular employees are selected. In other words the recruitments for selection are not as rigorous. There are also other provisions relating to regular service such as the liability of a member of the service to be transferred and his being subject to the disciplinary jurisdiction of the authorities as prescribed, which the daily-rated workmen are not subjected to. They cannot, therefore, be equated with regular workmen for the purposes for their wages. Nor can they claim the minimum of the regular pay-scale of the regularly employed. (Para 10).(emphasis added).

The High Court was, therefore, not right in directing that the respondents should be paid the same salary and allowances as are being paid to regular employees

holding similar posts with effect from the dates when the respondents were employed. If a minimum wage is prescribed for such workers, the respondents would be entitled to it if it is more than what they are being paid. (Para 11).

10. In the case of Ashwani Kumar and Ors. v. State of Bihar and Ors. 1997 SC 1628, the Apex Court while considering the question of regularization observed as under:

Question of confirmation or regularization of an irregularly appointed candidate would arise if the concerned candidate is appointed in an irregular manner or on ad hoc basis against an available vacancy which is already sanctioned. But if the initial entry itself is unauthorized and is not against any sanctioned vacancy, question of regularizing the incumbent on such a non-existing vacancy would never survive for consideration and even if such purported regularization or confirmation is given it would be an exercise in futility. It would amount to decorating a still-born baby. Under these circumstances there was no occasion to regularize them or to give them valid confirmation." (Para 12)(emphasis added).

In this connection it is pertinent to note that question of regularization in any service including any Government service may arise in two contingencies. Firstly, if on any available clear vacancies which are of a long duration appointments are made on ad hoc basis or daily wage basis by a competent authority and are continued from time to time and if it is found that the concerned incumbents have continued to be employed for a long period of time with or without any artificial breaks and their services are otherwise required by the institution which employs them, a time may come in the service career of such employees who are continued on ad hoc basis for a given substantial length of time to regularize them so that the concerned employees can give their best by being assured security of tenure. But this would require one pre-condition that the initial entry of such an employee must be made against an available sanctioned vacancy by following the rules and regulations governing such entry. The second type of situation in which the question of regularization may arise would be when the initial entry of the employee against an available vacancy is found to have suffered from some flaw in the procedural exercise though the person appointing is competent to effect such initial recruitment and has otherwise followed due procedure for such recruitment. A need may then arise in the light of the exigency of administrative requirement for waiving such irregularity in the initial appointment by competent authority and the irregular initial appointment may be regularized and security of tenure may be made available to the concerned incumbent. But even in such a case the initial entry must not be found to be totally illegal or in blatant disregard of all the established rules and regulations governing such recruitment. In any case back door entries for filling up such vacancies have got to be strictly avoided. However, there would never arise any occasion for regularizing the appointment of an employee whose initial entry itself is tainted and is in total breach of the requisite procedure of recruitment and especially when there is no vacancy on which such an initial entry of the

candidate could even be effected. Such an entry of an employee would remain tainted from the very beginning and no question of regularizing such an illegal entrant would ever survive for consideration, however competent the recruiting agency may be. The appellants fall in this latter class of cases. They had no case for regularization and whatever purported regularization was effected in their favour remained an exercise in futility. (Para 13).

11. In the case of State of Haryana and Another Vs. Tilak Raj and Others, the Apex Court following the judgment of Jasmer Singh's case held as follows :

A scale of pay is attached to a definite post and in case of a daily-wager, he holds no posts. The respondent workers cannot be held to hold any posts to claim even any comparison with the regular and permanent staff for any or all purposes including a claim for equal pay and allowances. To claim a relief on the basis of equality, it is for the claimants to substantiate a clear-cut basis of equivalence and a resultant hostile discrimination before becoming eligible to claim rights on a par with the other group vis-a-vis an alleged discrimination. No material was placed before the High Court as to the nature of the duties of either categories and it is not possible to hold that the principle of "equal pay for equal work" is an abstract one. (Para 11)(emphasis added).

12. Recently, the Apex Court in the case of State of Haryana and Others Vs. Charanjit Singh and Others, etc. etc., after referring to large number of earlier judgments of the apex court, it held as under:

Having considered the authorities and the submissions we are of the view that the authorities in the cases of Jasmer Singh, Tilak Raj, Orissa University of Agriculture & Technology and Tarun K. Roy lay down the correct law. Undoubtedly, the doctrine of "equal pay for equal work" is not an abstract doctrine and is capable of being enforced in a Court of law. But equal pay must be for equal work of equal value. The principle of "equal pay for equal work" has no mechanical application in every case. Article 14 permits reasonable classification based on qualities or characteristics of persons recruited and grouped together, as against those who were left out. Of course, the qualities or characteristics must have a reasonable relation to the object sought to be achieved. In service matters, merit or experience can be a proper basis for classification for the purposes of pay in order to promote efficiency in administration. A higher pay scale to avoid stagnation or resultant frustration for lack of promotional avenues is also an acceptable reason for pay differentiation. The very fact that the person has not gone through the process of recruitment may itself, in certain cases, make a difference. If the educational qualifications are different, then also the doctrine may have no application. Even though persons may do the same work, their quality of work may differ. Where persons are selected by a Selection Committee on the basis of merit with due regard to seniority a higher pay scale granted to such persons who are evaluated by competent authority cannot be challenged. A classification based on difference in educational qualifications justifies a difference in pay scales. A mere

nomenclature designating a person as say a carpenter or a craftsman is not enough to come to the conclusion that he is doing the same work as another carpenter or craftsman in regular service. The quality of work which is produced may be different and even the nature of work assigned may be different. It is not just a comparison of physical activity. The application of the principle of "equal pay for equal work" requires consideration of various dimensions of a given job. The accuracy required and the dexterity that the job may entail may differ from job to job. It cannot be judged by the mere volume of work. There may be qualitative difference as regards reliability and responsibility. Functions may be the same but the responsibilities made a difference. Thus normally the applicability of this principle must be left to be evaluated and determined by an expert body. These are not matters where a writ court can lightly interfere. Normally a party claiming equal pay for equal work should be required to raise a dispute in this regards." (Para 17)(emphasis added).

13. An Hon"ble single judge of this Court after following the apex Court judgment in Tilak Raj and a Division Bench of this Court in the case of State of U.P. v. U.P. Madhyamik Shiksha Shramik Sangh 2004 (1) UPLBEC 77 has also taken a similar view in the case of Lakhan Lal Uttam Vs. State of U.P. and Others, held as under:

It is well settled that daily wage employees or persons engaged on contract basis would not be entitled to the payment of minimum pay scale of regular employees. The scale of pay is attached to a definite post and a daily wagger or a contract employee holds no post and thus cannot be compared with the regular and permanent staff for any or all purposes including a claim for pay parity vide State of Haryana and Another Vs. Tilak Raj and Others, and State of Orissa and Others Vs. Balaram Sahu and Others, etc. etc., . A Division Bench of this Court in the case of State of U.P. and Others Vs. U.P. Madhyamik Shiksha Parishad Shramik Sangh and Others, has also held that principles of equal pay for equal work cannot be applied to daily wage employees and they cannot be regularized in service merely because they have worked for a reasonably long period nor can they be given the same pay scale as the regular employees.

In the case in hand, the admitted position is born out from the record is

- (1) There is no sanctioned post of typist available in Nagar Palika Parishad, Pilibhit against which the petitioner could have been appointed.
- (2) The petitioner employed on contract basis with tenure appointment of limited period on fixed salary.
- (3) The appointment of the petitioner was not made after advertising the vacancy inviting applications from public at large and after undergoing a regular process of selection in accordance with rules since there was no sanctioned post of typist available in Nagar Palika Parishad, Pilibhit.
- (4) The petitioner is neither appointed on the post of Clerk nor the vacancies of

clerk have been advertised till date and, therefore, adjustment against the post of clerk is out of question.

14. In the aforesaid circumstances, since the sanctioned post is still not available, there is no question of directing the respondents to pay equal pay for equal work to the petitioner. Even as typist, it cannot be said that the petitioner is discharging the duties similar to that of a clerk appointed on regular basis.

15. In view of the aforesaid admitted facts as well as law discussed above, it is evident that the petitioner is not entitled for the relief as prayed for in the writ petition since the principle of equal pay for equal work is not applicable in the present case. Accordingly, the writ petition fails and is dismissed.