

(2008) 06 AHC CK 0010
In the Allahabad High Court

Smt. Janki Devi

APPELLANT

Vs

Nagar Nigam and Mukhya Nagar Adhikari, Nagar Nigam

RESPONDENT

Date of Decision : 30-06-2008

Acts Referred:

Citation : (2008) 4 AWC 3613 : (2008) 119 FLR 5

Hon'ble Judges : Tarun Agarwala, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Tarun Agarwala, J.—Heard Sri A.P. Tewari, the learned Counsel for the petitioner. List has been revised. The learned Counsel for the respondents is not present.

2. It transpires that the petitioner's husband was appointed as a "DOM" on 4.12.1987 to work in the electric crematorium managed by the respondents in Daragranj at Allahabad. It is alleged that the petitioner's husband worked continuously on that post at that crematorium and died in harness on 13.9.2000.

3. Upon the death of the husband, the petitioner applied for an appointment under the Dying in Harness Rules, 1974. The Mukhya Nagar, Adhikari issued a letter dated 18.10.2000 recommending the appointment of the petitioner to work as a "DOM". It is alleged that based on the aforesaid recommendation, the petitioner was appointed and started working w.e.f 22.12.2001. No formal appointment letter was issued but was paid the salary through cheques and that her name finds place in the muster roll of the employees of the Nagar Nigam, Allahabad.

4. The petitioner alleges that even though she is still working as a DOM, in the electric crematorium, she is being treated by the authority as a daily rated employee and is not being treated as a regular employee. The petitioner contends that an appointment under the Dying in Harness Rules is made in a substantive capacity on a permanent basis and that the petitioner cannot be treated as a daily rated employee. The petitioner, consequently filed the present

writ petition praying that a writ of mandamus be issued to the respondents to treat the petitioner as having been appointed under the Dying in Harness Rules and that the respondents should treat the petitioner as a regular employee and pay salary of a regular employee month by month.

5. The respondents have filed a counter affidavit alleging that the petitioner's husband was working on a "temporary daily wage basis" and that the petitioner's husband was not appointed in a permanent capacity nor was working on a vacancy in view of the fact that no post of DOM was created or sanctioned by the State Government and therefore, engagement were made by the Nagar Nigam on a daily rated basis. The respondents contends that the Dying in Harness Rules, 1974 contemplates appointment of a dependent of the deceased on compassionate ground only where an employee was appointed in a permanent capacity as defined under Rule 2(a) of the Rules of 1974. The respondents contended that since the petitioner's husband was not appointed in accordance with the provision of Rule 2(a) of the Rules of 1974, the benefit of appointment on compassionate ground under the said Rules cannot be given.

6. Having hearing the learned Counsels" for the parties and having perused the writ petition and the counter affidavit, this Court finds that the writ petition is liable to be allowed and a writ of mandamus is liable to be issued.

7. From the counter affidavit, it is clear that upon the construction of the electric crematorium at Daraganj in the city of Allahabad, no post of DOM was created by the Nagar Nigam, Allahabad and that the work of a DOM was taken by the engagement of persons on daily rated basis. The affidavits reveals that the petitioner's husband was appointed in the year 1987 as a DOM and that he worked continuously till he died in the year 2000. The Nagar Nigam, which is an instrumentality of the State, was required to create a post. No such effort was made by the respondents to create a post and the respondents allowed the petitioner to work continuously on a daily rated basis. The affidavits reveals that the work which the petitioner's husband was performing, was a work which was of a permanent nature and which is still continuing as on date. Therefore it cannot be alleged that the employment of the petitioner's husband was on a temporary basis on account of exigency of service. The appointment of the petitioner's husband was of a permanent character and that the appointment of the petitioner on a daily rated basis was made for the simple reason that there was no sanctioned post of DOM, for which the petitioner's husband was not at fault and that the Nagar Nigam, Allahabad alone was at fault. Consequently, the mere fact that the petitioner's husband was working on a daily rated basis becomes immaterial since the work, which he was performing, was permanent in character.

8. The U.P. Recruitment of Dependents of Government Servants Dying-in-Harness Rules, 1974 provides rules regulating the recruitment of dependent of government servants dying in harness Rule 2(a) defines a Government Servant as under:

(a) "Government Servant" means a Government Servant employed in connection with the affairs of Uttar Pradesh who-

(i) was permanent in such employment; or

(ii) though temporary had been regularly appointed in such employment; or

(iii) though not regularly appointed, had put in three years" continuous service in regular vacancy in such employment.

The said rule has been explained through various judgments.

In *Sunil Kumar v. State of U.P. and Ors.* 2003 (1) S A C 122 it was held that a daily rated employee having worked for more than thirteen years, was deemed to be government servant, as defined under Rule 2(a) of the Rules of 1974. Similar view was again held in the decision of *Santosh Kumar Mishra Vs. State of U.P. and Others*,

In writ petition No. 51469 of 2005, *Vijay Kumar Yadav v. State of U.P. and Ors.* decided on 25.7.2005, this Court held, that where a person had worked for more than three years as a part time Tube-well Operator on a temporary post, he was deemed to work on a regular vacancy and was therefore entitled to be treated as Government servant.

9. In view of the aforesaid, this Court is of the opinion that the petitioner's husband having worked continuously for more than thirteen years which was permanent in character, was a Government servant as defined under Rule 2(a) of the Rules of 1974. Consequently, upon his death, the petitioner, being a widow and dependent on her husband, was entitled for an appointment on compassionate ground. The recommendation of the Nagar Nigam as disclosed in Annexure No. 4 to the writ petition reveals that the petitioner was appointed under the Dying in Harness Rules. This Court is of the opinion that an appointment made under the Dying in Harness Rules is permanent in character, that is to say, a substantive appointment and that the appointment cannot be treated as a temporary appointment or an appointment on a daily rated basis as held by a division bench of this Court in 1999 (3) UPLBEC 2263 *Ravi Karan Singh v. State of U.P. and Ors.* and 2002 (3) ESC 454 *Sanjai Kumar v. Dy. Director General (NCC) Directorate, U.P., Lucknow and Ors.*

10. In view of the aforesaid, the writ petition is allowed. A writ of mandamus is issued directing the respondents to treat the petitioner as having been appointed in a substantive capacity under the Dying in Harness Rules. The petitioner is consequently entitled to be treated as a regular employee of the Nagar Nigam and is entitled to the pay given to a regular employee from the initial date of her appointment. The arrears of salary would be calculated by the respondents and shall be paid to the petitioner within three months from the date of the production of a certified copy of this order.

11. It is made clear that even if the post has not been sanctioned. the

respondents are still required to pay the salary to the petitioner as payable to a regular employee and take immediate steps with the State Government for the creation of the post of DOM which is of a permanent character.